

THE NONDELEGATION DOCTRINE AFTER *LOPER BRIGHT*

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In *Loper Bright*, the Supreme Court uprooted the judiciary's approach to resolving statutory ambiguity. Now, the courts determine the "best" meaning of ambiguous statutory language without deferring to the agency's view. But *Loper Bright* left room for courts to interpret statutory ambiguity as Congress's delegation to the agency in certain cases. Statutory language can be ambiguous in at least two ways. The literal words themselves might be susceptible to multiple plausible meanings, in which case courts, not agencies, get the final word. But as *Loper Bright* concedes, statutes can also be ambiguous about who gets to define various statutory terms. Proponents of agency deference will use this form of statutory ambiguity to argue that the statute's "best" meaning is that Congress delegated the authority to define statutory terms to the agency. After *Loper Bright*, statutory ambiguity alone cannot be read as an "implicit delegation," but where a statute directs agencies—explicitly or implicitly—to define ambiguous terms, *Loper Bright* orders courts to "respect" that delegation. While proponents of agency deference will advance this reading of *Loper Bright*, a renewed and faithful understanding of the nondelegation doctrine will hem in "prodelegation" readings of ambiguous statutes. This Note first supports the revival of a strong nondelegation doctrine by contrasting the "intelligible principle" test used by the current Court in nondelegation cases with the precedents that created the nondelegation doctrine. Then, it explains how "prodelegation" readings of ambiguous statutes are largely incompatible with a strong nondelegation doctrine. Finally,

this Note concludes that courts would impermissibly perform a legislative act by curing a statute's violation of the nondelegation doctrine by employing the nondelegation canon. When courts detect that a statute violates the nondelegation doctrine, therefore, they are compelled to strike down the statute.

INTRODUCTION

Despite *Chevron*'s¹ demise, agency deference is far from dead. To be sure, after *Loper Bright*,² courts need no longer defer to an agency's interpretation of a statute after exhausting the tools of statutory interpretation. Nevertheless, there remains plenty of slack in the line between courts' compulsory deference to agency interpretations and courts' broad freedom to reject those interpretations. Indeed, even after *Loper Bright*, courts might read ambiguous terms as Congress's implicit delegation of interpretive power to the agency.³ In other words, courts might apply a prodelegation canon to ambiguous statutes.⁴

This approach violates the nondelegation doctrine in most cases. To prove this thesis, this Note offers three arguments. First, it argues that the Court should abandon its current understanding of the nondelegation doctrine. Instead, it should apply a more robust nondelegation doctrine. Second, it anticipates potential attempts to recast the *Chevron* doctrine from a generous reading of *Loper Bright* that permits courts and litigants to apply a "prodelegation" canon

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

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

3. *Id.* at 2267 (explaining that courts can still interpret statutory ambiguity "with due respect for the views of the Executive Branch").

4. See Adrian Vermeule, *Implied Delegations After Loper*, YALE J. REG.: NOTICE & COMMENT (July 9, 2024), <https://www.yalejreg.com/nc/implied-delegations-after-loper-by-adrian-vermeule/> [<https://perma.cc/6CAV-MSXU>]. *Loper Bright* approved of statutory delegations whether they were explicit or implicit. This is because "the whole thrust of the Court's approach in *Loper* is that the best reading [of a statute] is the best reading, and that applies whether the relevant delegation is express or implied." *Id.* Where a statute is unclear about whether Congress gave the agency the power to define statutory terms, a "pro-delegation" canon would argue that the "best" reading of the ambiguity is naturally whatever the agency says the ambiguity means because, for example, the agency has expertise and the most direct knowledge of the issue before the court.

of construing ambiguous terms in statutes. Such a prodelegation canon would often unlawfully conflict with the nondelegation doctrine by violating Article I's vesting of legislative power in Congress. Third, therefore, this Note concludes that courts must strike down statutes that do not literally and obviously satisfy the nondelegation doctrine.

I. THE NONDELEGATION DOCTRINE SHOULD BE RECAST AS A MORE RESTRICTIVE SUBSTANTIVE RULE

The nondelegation doctrine upholds the separation of powers by preventing Congress from transferring legislative power to another branch. Part I begins by explaining why the current Court's understanding of the nondelegation doctrine fails to uphold the precedents that gave rise to the nondelegation doctrine nearly a century ago. According to the current Court, Congress satisfies the nondelegation doctrine if the statutory delegation states an "'intelligible principle' to guide the delegee's exercise of authority."⁵ Part I argues that the "intelligible principle" test has substantially loosened—if not entirely evaporated—the substantive requirements of the nondelegation doctrine that the Court's precedents enforce. Next, Part I argues that the current Court has allowed Congress to get away with increasingly broad delegations, not just by relaxing the substantive requirements of the nondelegation doctrine, but also by using the nondelegation canon of construction to cure possible violations of the nondelegation doctrine in statutory text. Finally, Part I argues that the Court should change its approach to cases involving nondelegation challenges. In contrast to its current approach, the Court should strengthen the nondelegation doctrine's substantive requirements and straightforwardly construct statutory text using its literal meaning, rather than by using the nondelegation canon.

5. *Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019) (plurality opinion) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

A. *The current Court's understanding of the nondelegation doctrine conflicts with the precedent that created the nondelegation doctrine*

Congress cannot delegate legislative power to the Executive because Article I vests all legislative power in Congress.⁶ The nondelegation doctrine captures this constitutional rule: when Congress gives away its legislative power to the Executive, it violates the Constitution, and courts uphold the Constitution by striking down that impermissible delegation. Using the “intelligible principle” test to enforce the nondelegation doctrine, the Court has “almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.”⁷ This is in part because the intelligible principle’s “standards . . . are not demanding,” for “a delegation is permissible if Congress has made clear to the delegee ‘the general policy’ he must pursue and the ‘boundaries of [his] authority.’”⁸ Examples of sufficiently circumscribed delegations, according to the current Court, include Congressional commands that agencies “regulate in the ‘public interest,’”⁹ or that they “set ‘fair and equitable’ prices.”¹⁰

It is true that the Court has formally used the nondelegation doctrine to invalidate congressional delegations only twice in this nation’s history.¹¹ These cases were *A.L.A. Schechter Poultry Corporation v. United States*¹² and *Panama Refining Company v. Ryan*.¹³ Both cases were decided in 1935 and concerned sweeping powers Congress granted President Roosevelt under the National

6. U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States . . .”).

7. *Gundy*, 139 S. Ct. at 2129 (quoting *Whitman v. Am. Trucking Ass’ns., Inc.*, 531 U.S. 457, 474–75 (2001)).

8. *Id.* (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)).

9. *Id.* (quoting *N.Y. Cent. Sec. Corp. v. United States*, 287 U.S. 12, 24 (1932)).

10. *Id.* (quoting *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591 (1944)).

11. *Id.*

12. 295 U.S. 495 (1935).

13. 293 U.S. 388 (1935).

Industrial Recovery Act (Recovery Act).¹⁴ In both cases, the Court invalidated the President's economic regulations because they were derived from provisions of the Recovery Act that were "unconstitutional delegation[s] of legislative power."¹⁵

In *Schechter*, the petitioners were slaughterhouse operators convicted under the "Live Poultry Code," an extensive program designed to regulate New York City poultry products, employees, business practices and poultry transport.¹⁶ This code was created and enforced by a presidential executive order, as authorized by the Recovery Act.¹⁷ The Recovery Act gave the President authority to issue "codes of fair competition" upon request of private industrial associations or groups.¹⁸ This broad power was circumscribed by two necessary requirements before the President could issue a code. First, the code could "not permit monopolies or monopolistic practices."¹⁹ Second, the code could not "eliminate or oppress small enterprises [nor] operate to discriminate against them."²⁰ Placing context and structure aside, this statutory text alone would be enough to pass the current Court's intelligible principle test.

In addition to "furthering the public interest," which the current Court cites as a sufficiently intelligible principle standing alone, the Recovery Act further restricted codes to those practices that were not monopolistic.²¹ But even with this additional proscription, the power to create codes of fair competition was an unconstitutional delegation of legislative power to the President. The Court anchored its view that these statutory delegations were unconstitutional by looking to the text of the Constitution, which governs delegations of legislative power to the executive branch. Article I, Section I states that "[a]ll legislative [p]owers granted

14. *See id.* at 405–10.

15. *Schechter*, 295 U.S. at 542.

16. *Id.* at 521–22.

17. *Id.*

18. *Id.*

19. *Id.* at 538.

20. *Id.*

21. *Id.*

herein shall be vested in a Congress of the United States.”²² While “[e]xtraordinary conditions,” like the Great Depression, “may call for extraordinary remedies[,] . . . [e]xtraordinary conditions do not create or enlarge constitutional power.”²³ Congress can “‘make all laws which shall be necessary and proper for carrying into execution’ its general powers,” but it cannot “abdicate or . . . transfer to others the essential legislative functions with which it is thus vested.”²⁴

The *Schechter* Court explained that a statutory delegation is a permissible exercise of the legislative function if that delegation “itself established the standards of legal obligation.”²⁵ When the *Schechter* Court determined that the Recovery Act’s delegation to the President fell short of establishing a “standard[] of legal obligation,” it rejected statutory language that was notably more specific than the “public interest” or “‘fair and equitable’ pricing” principles which the current Court touts as sufficiently intelligible.²⁶ The Recovery Act “supplie[d] no standards for any trade, industry, or activity,” and failed to “prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure.”²⁷

Contra the current Court’s explanation of the intelligible principle test, therefore, Congress must do more than just state “the general policy” the regulator “must pursue and the boundaries of [the regulator’s] authority.”²⁸ Anti-monopolistic regulations that also advance the interests of business are certainly “general policies” and “regulatory boundaries.” Yet neither the general policy nor the regulatory boundary outlined by the Recovery Act in *Schechter* were permissible delegations. The intelligible principle test does not capture the strictures of *Schechter*, but the Court

22. U.S. CONST. art. I, § 1.

23. *Schechter*, 295 U.S. at 528.

24. *Id.* at 529.

25. *Id.* at 530.

26. See *Gundy*, 139 S. Ct. at 2129.

27. *Schechter*, 295 U.S. at 541.

28. *Gundy*, 139 S. Ct. at 2129 (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)).

dodges *Schechter's* holding not just by watering down the nondelegation doctrine's substantive requirements.²⁹

B. *The Court also avoids subjecting statutory delegations to the requirements of the nondelegation doctrine by using the nondelegation canon*

The nondelegation canon is distinct from the nondelegation doctrine. This Note argues that the Court deploys the nondelegation canon where a statutory delegation is ambiguous and susceptible to multiple plausible meanings. The canon instructs that the Court should select the interpretation that does not violate the nondelegation doctrine. Often, this interpretive move involves altering the most straightforward reading of ambiguous statutory delegations, so that the Court's new reading

29. See, e.g., *id.* Justice Kagan argues that *Schechter* and *Panama Refining* are distinguished from the Court's other nondelegation doctrine precedents because the statutes at issue in *Schechter* and *Panama Refining* "'failed to articulate any policy or standard' to confine discretion." *Id.* (quoting *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989)). As previously discussed, the statute at issue in *Schechter* not only cabined the President's discretion to regulate "in the public interest," but also further restricted the scope of the "codes of fair competition" by preventing the codes from advancing various monopolistic business practices. But in addition to mischaracterizing the statute at issue in *Schechter*, Justice Kagan also asserts that cases like *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), upheld statutory delegations that simply "approved delegations to various agencies to regulate in the 'public interest.'" *Gundy*, 139 S. Ct. at 2129. Those cases, however, implicitly acknowledge that a blanket statutory delegation to regulate in the public interest would not be sufficiently circumscribed. In *National Broadcasting*, the statute at issue, for example, allowed the agency to regulate in the public interest, but this statutory language was directly followed up with clear, succinct principles that limited the scope of that regulation in the statutory text. See 319 U.S. at 214–15. There, the statute only permitted the agency to regulate in the public interest for limited reasons like "prevent[ing] interference between [radio] stations." *Id.* at 215. The difference between cases like *Schechter* and *National Broadcasting*, therefore, is not whether the statutes at issue articulated "any" policy to guide the agency, but the extent to which those policies granted the agency discretion. This difference is one of degree, not kind. Both cases involved statutes that contained some policy to guide the agency's decisionmaking, so both cases stand for the principle that a statutory delegation must guide the agency's discretion with a policy more specific than the "public interest." After that, there is room for academic debate about how much more specific the policy must be.

of the text corrects the statute's potential violation of the nondelegation doctrine. In *Gundy v. United States*,³⁰ the Court does just this.

There, the Court confronted a challenge to the Sex Offender Registration and Notification Act (SORNA) on nondelegation grounds.³¹ The provision at issue dealt with the Attorney General's power to apply new registration requirements to past offenders.³² That provision gave the Attorney General express "authority to specify the applicability of the requirements of [SORNA] to sex offenders convicted before the enactment of this [statute]."³³ If the Attorney General chose to exercise that authority, the same section of SORNA also conferred the Attorney General with the authority "to prescribe rules for the registration of any such sex offenders . . . who are unable to comply with [the statute's new requirements]."³⁴

Gundy required, as the Court itself admits, a decision whether this provision of SORNA violated the nondelegation doctrine.³⁵ The Court asked its usual question: whether SORNA "supplied an intelligible principle to guide the delegatee's use of discretion."³⁶ The "nondelegation inquiry always begins . . . with statutory interpretation."³⁷ The Court characterizes the preliminary stage of its nondelegation framework as a straightforward, simple act of cut-and-dry textualism. But when Justice Kagan, writing for the *Gundy* plurality, transitions from explaining her framework to applying it, she just as quickly trades in the standard tools of textualism for an extra-textual canon of construction.

30. 139 S. Ct. 2116 (2019).

31. *Id.* at 2121.

32. *Id.* at 2122 (quoting 34 U.S.C. § 20913(d)).

33. 34 U.S.C. § 20913(d).

34. *Id.*

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

36. *Id.* at 2123.

37. *Id.*

Instead of interpreting the statute by “[s]tarting, as [the Court] always do[es], with the statutory language,”³⁸ Justice Kagan proffers a different starting point in *Gundy*. There, the answer to the textualist inquiry “require[d] construing the challenged statute to figure out what task it delegates and what instructions it provides.”³⁹ In other words, this inquiry begins by applying the nondelegation canon which is not designed to produce the most objective reading of the text, regardless of that reading’s constitutional consequences. Rather, the inquiry is designed with a motive to construe “the text of a delegation to place constitutionally adequate limits on [it].”⁴⁰ By assuming that the statute delegates any task or instruction that is properly bounded by constitutional limits in the first place, Justice Kagan nullifies the nondelegation inquiry before it even begins. If Congress has to satisfy the intelligible principle test before a statute is deemed constitutional—because that is the bare minimum equivalent of “legislating”—the Court cannot assist Congress in creating that principle without performing a legislative act. By putting its thumb on the scale in favor of a statute’s constitutionality, the Court places the rabbit in the hat and demands our shock when it proceeds to pull it out.

38. *Advoc. Health Care Network v. Stapleton*, 581 U.S. 468, 475 (2017) (opinion of Kagan, J.) (stating the oft-repeated textualist tenant that statutory interpretation begins with some objective account of the text).

39. *Gundy*, 139 S. Ct. at 2123.

40. *Id.* Justice Kagan describes the Court’s textualist inquiry in *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 473 (2001), in a manner that reveals the Court’s *a priori* motivation to avoid reading a statute to violate the Constitution. As this Note later explains, this motivation reveals, first, that the Court has some good reason to assume that the statute might violate the Constitution on its face if the text is not first contorted to avoid that violation. Second, this Note will show that the Court cannot apply interpretive methods like this (i.e. a constitutional avoidance canon) where a statute might violate the nondelegation doctrine because the Court would be effectively legislating.

C. *In cases involving nondelegation challenges to ambiguous delegations, courts should apply a nondelegation doctrine with substantive rules, not the nondelegation canon.*

To be sure, the “principle” Justice Kagan draws out of SORNA in *Gundy* is “intelligible” enough to pass muster under the current Court’s nondelegation precedents.⁴¹ The Court decided that SORNA’s delegation of authority to the Attorney General to “specify the applicability of the requirements of [SORNA] to sex offenders convicted before the enactment of this [statute],” actually demanded that the Attorney General “apply SORNA to pre-Act offenders as soon as he thought it feasible to do so.”⁴² But Justice Kagan implicitly concedes that this is neither the only nor most intuitive reading of SORNA. If it had been, Justice Kagan might have been confident enough to give the text its most natural meaning independent of that reading’s constitutional implications. Rather, Justice Kagan justifies her reading of the statute by supplementing its language with SORNA’s “basic statutory purpose,” and “the Act’s history.”⁴³ SORNA demanded that sex offenders in every state register before their prison sentences terminated, but many pre-Act offenders were out of prison when SORNA was enacted.⁴⁴ Because SORNA’s text contained a “purpose” clause stating that SORNA was designed to “include[] offenders who committed their offenses before the Act became law,” Justice Kagan reasoned that the only plausible reading of the Attorney’s General authority to register pre-Act offenders was to do so as soon as feasible.⁴⁵

True to form, Justice Kagan performs a compelling textualist analysis. It is not the point of this Note, however, to rebut Justice Kagan’s textual argument after granting her interpretive premises. It is to identify that Justice Kagan had to load the dice with a

41. *See id.* at 2130.

42. *Id.* at 2128.

43. *Id.* at 2124.

44. *See id.* at 2122.

45. *Id.* at 2124.

presumption of the text's constitutionality in the first place. And herein lies the problem with the nondelegation canon of construction—where a statute is not necessarily read literally, but towards the aim of finding any plausible intelligible principle: the compelling textualist analysis the Court performs may not be the only compelling textualist analysis of the statute available.

Indeed, Justice Gorsuch's dissent provides a similarly compelling textual reading of the provision at issue. Justice Gorsuch explains that "[t]he only provision addressing pre-Act offenders . . . says *nothing* about feasibility."⁴⁶ Congress could not have meant "as soon as feasible," when it enacted the phrase "authority to specify the applicability of [SORNA's requirements]," because "Congress knows exactly how to write a feasibility standard."⁴⁷ Even the Attorney General, Justice Gorsuch observed, understood this statutory provision to "afford[] him the authority to 'balance' the burdens on sex offenders with 'public safety interests' as and how he s[aw] fit," which is more authority than a pure feasibility standard.⁴⁸ Finally, Justice Gorsuch notes that clear text always outweighs what Congress "hoped and wished for" because "the fact remains that the law they actually adopted for pre-Act offenders leaves everything to the Attorney General. Hopes and dreams are not laws."⁴⁹ Justices Kagan and Gorsuch's disagreement demonstrates that "specify the applicability" can be reasonably construed to mean "as soon as feasible," when "public safety concerns permit," or any other publicly palatable standard.

This contradiction indicates why the nondelegation canon conflicts with the nondelegation doctrine. The nondelegation doctrine is simply another way of expressing what the Constitution implies: Congress cannot delegate its legislative power to the Executive, and Congress satisfies this requirement if its delegations

46. *Id.* at 2146 (Gorsuch, J., dissenting).

47. *Id.*

48. *Id.* (quoting Office of the Attorney General; Applicability of the Sex Offender Registration and Notification Act, 75 Fed. Reg. 81849, 81851–52 (Dec. 29, 2010) (codified at 28 C.F.R. pt. 72)).

49. *Id.*

contain a clear intelligible principle. *Black's Law Dictionary* defines "intelligibility" as the "statement of matters of fact directly (excluding the necessity of inference or argument to arrive at the meaning) and in such appropriate terms, so arranged, as to be comprehensible by a person of common or ordinary understanding."⁵⁰ Courts use the nondelegation canon, however, where a statutory delegation has not stated an intelligible principle directly. Indeed, the nondelegation canon—like all canons of statutory construction—are devices through which courts draw inferences and make arguments about a text's meaning. Where a court is forced to apply the nondelegation canon, in other words, the court has implicitly admitted that Congress has failed to create a clear intelligible principle itself, and therefore, failed to satisfy the nondelegation doctrine. If the court is asked to determine whether a statute violates the nondelegation doctrine, it should not apply the nondelegation canon. Instead, it should determine whether the text's clear and most natural meaning satisfies a substantive rule that reflects the requirements of the nondelegation doctrine.

In his *Gundy* dissent, Justice Gorsuch defines what a substantive rule reflecting the nondelegation doctrine's requirements might look like. First, a court must ask whether "the statute assign[s] to the executive only the responsibility to make factual findings."⁵¹ Second, it must ask whether the statute "set[s] forth the facts that the executive must consider and the criteria against which to measure them."⁵² Third, "[a]nd most importantly," the court must ask whether "Congress, and not the Executive Branch, make the policy judgments."⁵³ Justice Gorsuch argues that "[o]nly then can [the Court] fairly say that a statute contains the kind of intelligible principle the Constitution demands."⁵⁴ In *Schechter*, the Court affirmed that Congress must "establish[] the standards of legal obligation" whenever it delegates decision-making power to the

50. *Intelligibility*, BLACK'S LAW DICTIONARY (12th ed. 2024).

51. *Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting).

52. *Id.*

53. *Id.*

54. *Id.*

Executive Branch.⁵⁵ Compared with Justice Kagan's application of the nondelegation canon, Justice Gorsuch's view of the nondelegation doctrine as enforcing substantive rules better conforms to the constitutional limits on statutory delegations that this Court recognized in *Schechter* for two reasons.

First, Justice Gorsuch's view aligns with the Court's understanding of the nondelegation doctrine as it was originally understood in *Schechter*. Justice Kagan's view does not. Justice Kagan notes that the Court has found "a delegation excessive . . . [o]nly twice in this country's history,"⁵⁶ but the "intelligible principle" is never mentioned in *Schechter*,⁵⁷ and is mentioned only once in *Panama Refining*.⁵⁸ And in *Panama Refining*, the Court certainly did not apply a canon of construction to the statutory text in order to create an intelligible principle that the text did not make immediately obvious. Rather, the Court invalidated the statute on its face because it had "no requirement, no definition of circumstances and [no definition] of conditions in which [the regulated activity was] to be allowed or prohibited."⁵⁹ This conclusion is not a textual inference or an argument about what the Recovery Act could plausibly mean after applying the nondelegation canon. It is instead an indication that the Court is examining the statute's text in a straightforward manner without a presumption that the text can or will provide a policy judgment to guide the agency. By applying the nondelegation canon and searching only for an "intelligible principle," Justice Kagan strays from *Schechter* and *Panama Refining*'s straightforward examination of the statutory delegation, and the substantive requirements to which those statutes were subjected.

Justice Gorsuch's dissent in *Gundy* lays forth requirements that map neatly onto *Schechter* and *Panama Refining*. Like *Schechter*'s command to lay out a standard more specific than "in the public

55. *A.L.A. Shechter Poultry Corp. v. United States*, 295 U.S. 495, 530 (1935).

56. *Gundy*, 139 S. Ct. at 2129 (plurality opinion).

57. *See Schechter*, 295 U.S. at 520–55.

58. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935).

59. *Id.*

interest” and identify relevant facts, Justice Gorsuch would require that “Congress, and not the Executive Branch, make the policy judgments,” and that the statute “set forth facts that the executive must consider and the criteria against which to measure them.”⁶⁰ Any discretion Congress is allowed to delegate, according to Justice Gorsuch, must remain limited “only [to] the responsibility to make factual findings.”⁶¹ This requirement is supported by *Schechter’s* holding that permissible delegations must include some “administrative procedure.”⁶²

In *Panama Refining*, the Court affirmed Congress’s “historic practice” of delegating power by statutes including “declarations of policy . . . made by the Congress.”⁶³ The Court added that permissible delegations must include “facts and conditions to be found and stated by the President.”⁶⁴ In accordance with *Panama Refining*, Justice Gorsuch would require that “Congress, and not the Executive Branch, make the policy judgment” and that the statute specify the relevant facts and criteria against which to judge them.⁶⁵ *Panama Refining* and *Schechter* should be understood as establishing the absolute minimum detail that Congress, not the Court, is constitutionally required to include in statutory delegations because they provide the only instances where statutes violated the nondelegation doctrine. According to Justice Gorsuch’s *Gundy* dissent informed by *Schechter*, the nondelegation doctrine can be distilled into three substantive requirements. To satisfy the nondelegation doctrine by establishing the “standard of legal obligation,” Congress must at least define (1) a standard more specific than “in the public interest” to cabin the scope of permissible regulations, (2) to what particular facts that standard would apply, and (3) some administrative procedure outlining rules for the application of standards to facts.⁶⁶

60. *Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting).

61. *Id.*

62. 295 U.S. at 541.

63. 293 U.S. at 431.

64. *Id.*

65. *Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting).

66. *See id.*; *Schechter*, 295 U.S. at 530, 541.

Second, Justice Gorsuch's view of the nondelegation doctrine is more analytically consistent with *Schechter* and *Panama Refining* than Justice Kagan's view because those cases establish a substantive rule. In *Panama Refining*, the Court sets out an objective test:

Accordingly, [the Court] look[s] to the statute to see whether the Congress has declared a policy with respect to that subject; whether the Congress has set up a standard for the President's action; whether Congress has required any finding by the President in the exercise of the authority to enact the prohibition.⁶⁷

"[T]o see whether the Congress has declared a policy," might involve debate over what "a policy" actually is, but not whether the task at hand is simply to determine whether Congress has in fact declared one.⁶⁸ On a plain reading of a statute, either Congress exceeded its authority under the Constitution, or it did not. *Panama Refining's* test describes the Court's role in textual interpretation as that role has been understood since *Marbury*: to state the law and respond to Congress's command accordingly.⁶⁹ The Court's role is not to sketch out an intelligible principle Congress did not provide to push an unconstitutional delegation back within permissible limits. As Justice Kagan reminds the parties in *Gundy*, "Congress may 'obtain the assistance of its coordinate Branches' [by] confer[ring] substantial discretion on executive agencies."⁷⁰ But even Justice Kagan concedes that Congress is not entitled to seek assistance from coordinate Branches through delegation unless it first "lay[s] down by legislative act an intelligible principle."⁷¹ And if the Constitution truly vests "[a]ll legislative [p]owers . . . in a Congress of the United States," then Congress alone is responsible

67. 293 U.S. at 415.

68. *Id.*

69. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

70. 139 S. Ct. at 2123 (plurality opinion) (quoting *Mistretta v. United States*, 488 U.S. 361, 372 (1989)).

71. *Id.* (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

for enunciating at least that principle without assistance.⁷² Any aid from the Court is an unconstitutional intrusion into express Article I power.⁷³ *Schechter* and *Panama Refining* demand that Congress, not some blend of Congress and the courts, perform the “essential legislative function,” so the nondelegation doctrine should enforce a substantive rule.

Justice Kagan used judicial power in *Gundy* not only to overstep a federal agency⁷⁴ but also to rewrite a command of Congress. If Congress’s statutory delegations are liable to be rewritten by courts, then federal agencies might find themselves at sea trying to guess how the Court will construe statutory provisions that present nondelegation questions in the future. Justice Kagan’s commitments to both textualism and broad delegations to the administrative state⁷⁵ face an impasse when statutes raise clear nondelegation problems—one commitment must give way. In *Gundy*, the best reading of the text gave way to a “construction” designed to rescue an unconstitutional delegation of legislative power from judicial invalidation. In future cases involving nondelegation challenges to statutes, the Court should abandon Justice Kagan’s approach in *Gundy*. Instead, the Court should recast the nondelegation doctrine as a substantive rule that requires statutory delegations to define (1) a standard more specific than “in the public interest” to cabin the scope of permissible regulations,

72. U.S. CONST. art. I, § 1 (emphasis added).

73. See *A.L.A. Shechter Poultry Corp. v. United States*, 295 U.S. 495, 530 (1935) (“[T]he Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality But we said that the constant recognition of the necessity and validity of such provisions . . . cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained.”).

74. See *Gundy*, 139 S. Ct. at 2132 (Gorsuch, J., dissenting) (outlining the various distinct interpretations of SORNA different Attorneys General had implemented since its enactment). Because the plurality narrowed the provision of SORNA at issue in this case to mean “as soon as feasible,” *id.* at 2121 (plurality opinion), the Court effectively eliminated the discretion that SORNA had conferred on Attorneys General up to this point.

75. See, e.g., *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2294 (2024) (Kagan, J., dissenting) (defending broad delegations because of the scope of the federal bureaucracy).

(2) the particular facts to which that standard would apply, and (3) some administrative procedure outlining rules for the application of standards to facts. The Court should determine whether statutory delegations satisfy this rule by giving the text its most natural meaning, not by applying the nondelegation canon. Having proposed an alternative formulation of the nondelegation doctrine, this Note will apply that formulation to an important class of cases involving ambiguous statutory delegations.

II. A PRO-DELEGATION CANON OF CONSTRUCTION WOULD BE
LARGELY UNLAWFUL UNDER A FAITHFUL APPLICATION OF THE
NONDELEGATION DOCTRINE

A faithful application of the nondelegation doctrine cannot permit a prodelegation canon. A prodelegation canon would run afoul of what this Note suggests should be the nondelegation doctrine's substantive requirements. The prodelegation canon and nondelegation doctrine become incompatible in cases where the "best" alleged reading of ambiguous statutory delegations is that Congress meant for the agency to give the statute whatever meaning the agency thinks best. These will be the post-*Loper Bright* cases where the best meaning of a statute is that Congress delegated definitional power to the agency within alleged "constitutional limits."⁷⁶

Loper Bright largely foreclosed the "presumption that Congress, when it left ambiguity in a statute[,] . . . understood that the ambiguity would be resolved, first and foremost, by the agency."⁷⁷ But Chief Justice Roberts' allowance of agency deference when "a particular statute delegates authority to an agency consistent with constitutional limits," left ample room for that presumption of deference to be applied as a prodelegation canon.⁷⁸ A faithful application of the nondelegation doctrine to many if not mainly all of those "particular statutes delegat[ing] authority to an agency,"

76. See *Loper Bright*, 144 S. Ct. at 2268.

77. *Id.* at 2265 (quoting *Smiley v. Citibank (S.D.)*, N.A., 517 U.S. 735, 740–41 (1996)).

78. *Id.* at 2273.

however, will further limit the application of this presumption.⁷⁹ It will do so by redefining the “constitutional limits” to which those statutes are subject. Article I, Section I of the Constitution cannot be squared with many of those statutes where “Congress delegated authority to the agency generally to make rules carrying the force of law,” or those statutes where even *Loper Bright* may still allow for agency deference.⁸⁰

Resolving these cases first requires determining that statutory delegations are themselves ambiguous. In doing so, “a reviewing court should not confine itself to examining a particular provision in isolation.”⁸¹ The meaning of ambiguous terms “may be affected by other Acts,” and the court “must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of [major] economic and political magnitude to an administrative agency.”⁸² After a court deploys these tools, and finds that ambiguity does exist, it must decide how to interpret that ambiguity, if at all. Where the resulting ambiguity is a delegation to an agency within “constitutional limits,” the court might apply a prodelegation canon to the ambiguity and defer to the agency’s view.⁸³ In many of these cases, however, a faithful application of the nondelegation doctrine prevents the court from deferring to an agency. A recent example helps demonstrate this proposition.

A. *Example: Biden v. Missouri*⁸⁴

Here, the Court confronted a challenge to a regulation promulgated by the Secretary of Health and Human Services in

79. *Id.*

80. *Id.*

81. *FDA. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000).

82. *Id.* at 133.

83. *See Loper Bright*, 144 S. Ct. at 2268 (explaining that Congress may “confer discretionary authority on agencies,” and that courts “fulfill their obligations under the APA to independently identify and respect such delegations of authority”—i.e., in such circumstances courts may mandatorily defer to the agency view as long as that view is within the “outer statutory boundaries of th[e] delegation[.]”).

84. 142 S. Ct. 647 (2022) (per curiam).

response to the COVID-19 pandemic.⁸⁵ The regulation was an “omnibus rule mandating that medical facilities nationwide order their employees, volunteers, [etc.] . . . to receive a COVID-19 vaccine” if the facility received funds from Medicare or Medicaid.⁸⁶ All told, the regulation “effectively mandated vaccination for 10 million healthcare workers” under pain of “fines and termination” if they chose to remain noncompliant.⁸⁷ The Court upheld the regulation because there were “no grounds for limiting the exercise of authorities the agency ha[d] long been recognized to have.”⁸⁸

The Court examined a variety of statutes that the government claimed gave the Secretary authority to promulgate this rule. This rule was designed to apply to virtually all facilities⁸⁹ that received funds from Medicare or Medicaid, so no single statutory provision alone was enough to support the rule.⁹⁰ The majority found the strongest support for the Secretary’s vaccine mandate in statutory language permitting the Secretary to establish “requirements as he finds necessary in the interest of the health and safety of individuals who are furnished services in the institution” receiving Medicare or Medicaid funds.⁹¹ In its briefing, the Government cited eight other statutes that connected the Secretary’s authority to regulate the “health and safety” of Medicare or Medicaid patients with the

85. *See id.* at 650.

86. *Id.* at 655 (Thomas, J., dissenting); *see also* COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61555, 61561 (Nov. 5, 2021) (codified at 29 C.F.R. pts. 1910, 1915, 1917, 1918, 1926 & 1928).

87. *Biden v. Missouri*, 142 S. Ct. at 655 (Thomas, J., dissenting).

88. *Id.* at 654 (majority opinion).

89. *See id.* at 650 (identifying how various types of “facilities” receiving Medicare or Medicaid funds tend to have their own background statutory provisions). The majority cites separate provisions that apply distinctly to hospitals, outpatient rehabilitation facilities, skilled nursing facilities, ambulatory surgical centers etc. What is clear is that the Secretary’s regulation was designed to apply to all of these facilities and that the Secretary drew statutory authority from multiple sources.

90. *See id.* at 652 (concluding “that the Secretary’s rule f[ell] within the *authorities* that Congress has conferred upon him” (emphasis added) and thus conceding that multiple statutes were necessary to justify the regulation).

91. *Id.* at 650.

broad range of facilities the vaccine mandate was designed to cover.⁹²

Justice Thomas in dissent had responses to both sets of statutes. On the first set of statutes cited by the majority, “5 of the 15 [statutes] d[id] not authorize [the Secretary] to impose ‘health and safety’ regulations at all.”⁹³ On the statutes cited by the Government, Justice Thomas argued that authority to promulgate a vaccine mandate for ten million healthcare workers would not logically be found in “these ancillary provisions to house what can only be characterized as a ‘fundamental detail’ of the statutory scheme.”⁹⁴ Congress elsewhere “specifically authorize[s]” vaccine mandates.⁹⁵ The statutes at issue “admit of two or more reasonable ordinary usages,” so they are ambiguous.⁹⁶

Had the Court confronted this case after *Loper Bright*, it would not have necessarily mattered that there was a “longstanding litany of health-related participation conditions” the agency required qualified facilities to meet before receiving funding.⁹⁷ The majority would have been bound under *Loper Bright* to show that the “best meaning” of *all* of these ambiguous provisions was that they “delegate[d] authority to an agency consistent with constitutional limits,” and that the agency’s vaccine mandate was “within” the delegation.⁹⁸ The prodelegation canon is permissible to help resolve statutory ambiguity under *Loper Bright* as long as the statute (1) does not pertain to judicial review, (2) is part of a statutory scheme administered by that agency, (3) is not a major question, and (4) is part of scheme that “delegated authority to the agency generally to

92. *See id.* at 656 (Thomas, J., dissenting).

93. *Id.* (citing 42 U.S.C. §§ 1396d(d)(1), (h)(1)(B)(i); 1395rr(b)(1)(A); 1395x(iii)(3)(D)(i)(IV); 1395i-4(e)).

94. *Id.*

95. *Id.* at 656–57 (referencing 22 U.S.C. § 2504(e), a statute authorizing an agency to mandate necessary and appropriate immunizations for Peace Corps volunteers).

96. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 989 (2005).

97. *Biden v. Missouri*, 142 S. Ct. at 653.

98. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024).

make rules carrying the force of law.”⁹⁹ The statutes at issue here (1) do not pertain to judicial review,¹⁰⁰ (2) are part of a statutory scheme administered by the Secretary,¹⁰¹ (3) do not involve a major question,¹⁰² and (4) are part of a scheme that delegated typical agency rulemaking power to the Secretary.¹⁰³ The prodelegation canon, therefore, is a viable basis for the Secretary’s vaccine mandate and is permissible as long as the statutory delegation is within “constitutional limits.” After faithfully applying this Note’s formulation of the nondelegation doctrine, however, multiple statutory provisions cited in defense of the vaccine mandate break constitutional limits on delegations to the executive branch.

Taking the majority’s and the government’s arguments in their best light, this Note will assume *arguendo* that the strongest statutory provisions in favor of a vaccine mandate explicitly apply to each facility covered by the mandate. Then, the statute permitting the Secretary to establish “requirements as he finds necessary in the interest of the health and safety of individuals who are furnished services in the institution” receiving Medicare or Medicaid funds (“health and safety statute”) must satisfy the nondelegation doctrine’s substantive rule.¹⁰⁴ The nondelegation doctrine’s substantive rule requires that that a delegation to an agency at least include: (1) a standard more specific than “in the public interest,” (2) the types of facts to which that standard would apply, and (3) some administrative procedure outlining rules for

99. *Id.*

100. See generally *Biden v. Missouri*, 142 S. Ct. at 654 (quoting *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021)).

101. See, e.g., *id.* at 652 (citing in support of the vaccine mandate 42 U.S.C. § 1395x(e)(9), which “authorized the Secretary to impose conditions on the receipt of Medicaid and Medicare funds”).

102. Compare *Biden v. Missouri*, 142 S. Ct. 647 (2022) (upholding a vaccine mandate), with *Nat’l Fed’n of Indep. Bus. v. Dep’t of Labor*, 142 S. Ct. 661, 662 (2022) (per curiam) (striking down a nationwide vaccine mandate that applied to “84 million workers” because this issue presented a major question and the Secretary did not have clear authority under the statute to regulate this major question in this manner).

103. See, e.g., *Biden v. Missouri*, 142 S. Ct. at 654.

104. *Id.* at 650.

the application of standards to facts.¹⁰⁵ To satisfy the nondelegation doctrine, a statute must pass all three requirements, but this statute fails at least the first requirement.

The health and safety statute is not clearly more specific than “in the public interest.” The only terms or phrases in the statutory language indicating some type of value judgment are “necessary,” and “in the interest of . . . health and safety.”¹⁰⁶ Notably, “a reviewing court should not confine itself to examining a particular provision in isolation,” and the meaning of ambiguous terms “may be affected by other Acts.”¹⁰⁷ Here, though, the majority read the provision at issue—that only extended to select facilities, all with caveats—to apply generally to any of the ten million healthcare workers employed at facilities receiving funds from Medicare or Medicaid.¹⁰⁸ At this point, in other words, this “particular provision” is getting as much help from its sister provisions and “other Acts” as would be possible because the health and safety statute alone does not clearly apply to each facility covered by the mandate. But even still, the nondelegation doctrine demands that “Congress, and not the Executive Branch, make the policy judgments.”¹⁰⁹ Whether the statute alone has made “the policy judgment” should ultimately govern whether the standard enunciated is specific enough to satisfy Article I, Section I of the Constitution.

In *Biden v. Missouri*, the statute empowered the Secretary to issue any “requirement . . . he f[ound] necessary in the interest of the health and safety” of Medicare and Medicaid enrollees.¹¹⁰ The Secretary stated that that vaccine mandate was “necessary to promote and protect patient health and safety” because “vaccine mandates are vastly more effective than other measures at

105. *Supra* note 27 and accompanying text.

106. *Biden v. Missouri*, 142 S. Ct. at 650.

107. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000).

108. *Biden v. Missouri*, 142 S. Ct. at 656 (Thomas, J., dissenting).

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

110. *Biden v. Missouri*, 142 S. Ct. at 650.

achieving ideal vaccination rates.”¹¹¹ The Secretary defined neither the “health” nor the “safety” of enrollees by reference to specific standards elsewhere available in any related statutes. Instead, the vaccine mandate was in the “interest of the health and safety” of enrollees because, according to the Secretary, it achieved “the resulting patient protections from morbidity and mortality.”¹¹² “Mortality” means death and “morbidity” means “leaving physical or psychological wellbeing as a state.”¹¹³ If reducing the likelihood of death or improving someone’s physical or psychological state is the only requirement for creating a regulation, it cannot be the case that Congress is truly making the policy judgment. Banning tobacco products, for example, would reduce the likelihood of death, but the Court has forbidden the FDA from banning tobacco outright without clear statutory authorization.¹¹⁴ Reducing the likelihood of death or physical illness, therefore, is not a sufficiently specific standard to guide the agency without more.

Moreover, the Secretary does not use “necessary” as the word is typically understood. Rather, he defines “necessary” requirements as those that “are vastly more effective than other measures.”¹¹⁵ The Secretary’s usage, perhaps, falls within a permissible use of the term “necessary” to mean “calculated to produce the end” (the “end” is the amorphous phrase “health and safety” in this case) rather than to mean “unable to exist without that other.”¹¹⁶ The key takeaway, though, is that the phrase “necessary in the interest of health and safety” is arguably as ambiguous as “in the public interest” where (1) “necessary” means “anything the Secretary thinks is calculated to achieve the end of “health and safety,” and (2) the phrase “health and safety” is not a legal term of art, nor

111. COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61555, 61613 (Nov. 5, 2021) (codified at 29 C.F.R. pts. 1910, 1915, 1917, 1918, 1926 & 1928).

112. *Id.*

113. *Morbidity*, BLACK’S LAW DICTIONARY (2d ed. 1910).

114. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

115. COVID-19 Vaccination and Testing, 86 Fed. Reg. at 61613.

116. *See Necessary*, BLACK’S LAW DICTIONARY (2d ed. 1910).

defined in reference to other statutory standards, but means anything that is not death or non-wellbeing.¹¹⁷

At last, the standard Congress instructed the agency to apply in *Biden v. Missouri* is brought into focus. The Secretary can require that ten million healthcare workers do anything that is calculated to prevent death or ill health (physical or psychological) for the 130 million people covered by Medicare and Medicaid. Congress can delegate substantial power of this magnitude to the Executive Branch, but these delegations tend to include clear parameters that further restrict when that power can be used.¹¹⁸ *Schechter* and

117. *Schechter* provides helpful guidance by describing the types of standards that are so broad as to impermissibly delegate policy choices to the executive branch which are fundamentally legislative. There, the statute enabled the President to institute a “code of fair competition” if it was generally within the public interest. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 534 (1935). While the Court had previously upheld statutes that delegated power to an agency to regulate “in the public interest,” the Court found that the National Recovery Act’s direction to regulate “in the public interest” was “[s]uch a sweeping delegation of legislative power [that found] no support in the [Court’s prior] decisions.” *Id.* at 539. The Court contrasted the Recovery Act with a permissible delegation in the Interstate Commerce Act (ICA), where the ICA also directed the agency to regulate “in the public interest.” *Id.* at 540. But the ICA’s text also created specific “standards prescribed for the service of common carriers” that applied “with respect to particular conditions of transportation.” *Id.* The ICA required, therefore, that the agency’s definition of “public interest” possess “direct relation” to the more specific standards (e.g. preventing unjust market discrimination) that were specified by the Act. *Id.* at 539–40. Using this contrast, *Schechter* struck down the Recovery Act’s direction to regulate “in the public interest” because it had no relation to more specific standards which applied to the same subject matter.

118. *Panama Refining* declared that a standard is insufficiently specific to constitute a valid delegation from Congress to the executive branch when the statute “contains . . . nothing as to the policy or prohibiting or not prohibiting the [regulated activity].” *Panama Refining Co. v. Ryan*, 293 U.S. 388, 417 (1935). If a standard is overly broad when the executive branch does not know when it can *prohibit* behavior that already exists, it must also be overly broad when the executive branch does not know when it can *compel* behavior that does not currently take place—the latter being more coercive than the former. *See, e.g., Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 552 (2012) (rejecting the government’s view of the Commerce Clause as enabling Congress to “compel[] individuals to *become* active” in commerce, instead limiting Congress’s commerce power to only that behavior that is “existing commercial activity”). *Sebelius* demonstrates the proposition that government power is more oppressive and less respectful of liberty when it compels behavior, rather than prohibits behavior that already exists.

Panama Refining at least establish that an exceedingly general power like regulating “in the public interest” or advancing “health and safety” must be cabined by some lever like a legal term of art, statutory context, or complementary statutory provisions that the executive branch can lean on to discern when they cannot act within this exceedingly broad space.¹¹⁹ “Congress, and not the Executive Branch, [must] make the policy judgments,” and this principle is the core of the nondelegation doctrine, and Article I, Section I of the Constitution by extension.¹²⁰ The statute at issue in *Biden v. Missouri* transfers legislative power to write policy to the executive branch because it does not provide a standard more specific than “in the public interest.”¹²¹ This alone establishes a violation of the nondelegation doctrine, so the delegation is unconstitutional.

It is no defense to say that Congress satisfied the nondelegation doctrine here because the agency was only directed “to fill up the details” after the legislature had “establish[ed] primary standards.”¹²² Just because Congress has made *a* policy judgment (by specifying an overly broad standard like “in the interest of health and safety”) does not mean that Congress has met its obligation to make *all* of the policy judgments that are necessarily legislative.¹²³ So whether the agency is simply “fill[ing] up the details,” in other words, depends on whether Congress has first “establish[ed] the primary standards” that require details in the

119. See *e.g.*, *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (explaining that a statute is ambiguous when the “the statute is fairly capable of two interpretations” (internal quotation marks omitted)). An “exceedingly general power” would correspond to a statutory term that is capable of—rather than just two meanings—multiple, if not an uncountable number of meanings. Such a term necessitates that Congress direct the agency how to decide from various potential meanings.

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

121. See *Schechter*, 295 U.S. at 541 (distilling at least three requirements for a statute to constitute a valid delegation of discretionary power to the Executive Branch while remaining within constitutional limits).

122. *Panama Refining*, 293 U.S. at 426 (quoting *Wayman v. Southard*, 10 Wheat. 1, 43 (1825)).

123. See *Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting).

first place. In *Biden v. Missouri*, the standard is insufficiently specific, so while part of the agency's regulation may involve "details," part of it will also necessarily involve the agency "fill[ing] up" the rest of the "primary standard" that Congress failed to provide.¹²⁴

While the statute at issue in *Biden v. Missouri* fails the nondelegation doctrine's requirement that the standard supplied be more specific than "in the public interest," it might satisfy the other two requirements. One of those requirements mandates that statutory delegations identify the types of facts to which that standard would apply.¹²⁵ The facts to which that standard applies are clearly covered facilities treating enrollees in Medicare or Medicaid. The last requirement of the nondelegation doctrine mandates that statutory delegations specify the administrative procedure outlining rules for the application of standards to facts.¹²⁶ Generally, all rulemaking statutes are read against the backdrop of the APA and judicial precedent that elaborate clear procedures for factfinding, public notice, adequate consultation with stakeholders, and adequate consideration of stakeholder interests.¹²⁷ As a result, the statute adequately specifies the facts to which the standard applies and procedures for applying the standard to facts. But ultimately, the statute violates the nondelegation doctrine because its standard is not more specific than "in the public interest."

The example of *Biden v. Missouri* does not categorically demonstrate that a prodelegation canon is unlawful, or that ambiguous statutory delegations always violate the nondelegation doctrine's substantive requirements. But as Justice Kagan stated in *Gundy*, the Court has "over and over upheld even *very* broad delegations," including "delegations to various agencies to regulate in the *public interest*."¹²⁸ All of these statutory delegations are

124. *Panama Refining*, 293 U.S. at 426.

125. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 534 (1935).

126. See *id.*

127. See *Biden v. Missouri*, 142 S. Ct. 647, 659 (2022) (Alito, J., dissenting) (per curiam).

128. *Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019) (emphasis added) (internal quotation marks omitted).

vulnerable under a faithful application of the nondelegation doctrine if the standards they supply are similarly ambiguous to one that directs an agency to regulate “in the interest of . . . health and safety.”¹²⁹ At bottom, *Loper Bright* left room for agency deference that “courts must respect” when “a particular statute delegates authority to an agency consistent with constitutional limits.”¹³⁰ A faithful application of the nondelegation doctrine, however, constricts those “constitutional limits” and truncates whatever room agency deference has left.

While this essay recasts the nondelegation doctrine as a legal rule, much of the nondelegation analysis involves analogical reasoning, as the example of *Biden v. Missouri* demonstrates.¹³¹ This is especially true when the Court assesses whether the delegation’s “policy” or “standard” is sufficiently narrow to prevent Congress from transplanting legislative power to the executive branch. But once a court identifies that a statute violates the nondelegation doctrine, that court must find a resolution. Many courts might adopt the canon of constitutional avoidance, narrowing the statute’s scope until it fits within constitutional boundaries.¹³² But that is not a viable option.

III. IF A STATUTE VIOLATES THE NONDELEGATION DOCTRINE, COURTS MUST STRIKE DOWN THE STATUTE

The Court must end its practice of cleaning up Congress’s constitutional errors when its statutes violate the nondelegation doctrine. Nearly a century has passed since the Court struck down an Act of Congress using the nondelegation doctrine.¹³³ But that is

129. *Biden v. Missouri*, 142 S. Ct. at 650.

130. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024).

131. See *supra* notes 121–22. This is likely because Article I, Section I of the Constitution provides little guidance as to the meaning of “legislative power,” distinct from executive or judicial power.

132. See, e.g., *Gundy*, 139 S. Ct. at 2121 (construing the nondelegation canon, which can be understood as a subset of the constitutional avoidance canon, to require that impermissible delegations violate the Constitution).

133. 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).

not because it has been a century since Congress passed a law that probably violated the nondelegation doctrine. It is because statutes that present nondelegation problems are “constru[ed] . . . to place constitutionally adequate ‘limits on the [agency’s] discretion.’”¹³⁴ Congress, in other words, always benefits from a presumption that it does not violate the constitutional boundary on its power to delegate, so a statute’s “purpose[,] factual background[,] and context” will often suffice to hem in a statute’s meaning where Congress might appear to have delegated too broadly.¹³⁵

The nondelegation canon reflects a cornerstone virtue of constitutional law that there is no “hermetic sealing-off of the three branches of government from one another.”¹³⁶ The alternative risks “frustrat[ing] the establishment of a National Government capable of effectively exercising [its] substantive powers.”¹³⁷ Justice Kagan’s intuition that the Court should redraw the bounds of SORNA in *Gundy*, therefore, is not without merit. But while the Court may interpret and ascertain statutory meaning, there must be some point where “interpreting” a statute effectively creates a new one. In the very opinion that created the “intelligible principle” test, Chief Justice Taft articulated just where that point is located: “[I]t is a breach of the national fundamental law if Congress gives up its legislative power and transfers it to the President, or to the judicial branch.”¹³⁸ And the nondelegation doctrine encapsulates this constitutional constraint by permitting Congressional delegations up to the point where the decision that is delegated is a legislative decision.

Where a judge must apply the nondelegation canon, one thing is clear to him, even if only implicitly: the statute creates an objective nondelegation problem, or less euphemistically, the statute’s

134. *Gundy*, 139 S. Ct. at 2123 (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 104–05 (1946)).

135. *Id.*

136. *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 673 (1980) (Rehnquist, J., concurring in the judgment).

137. *Id.* at 673–74.

138. *Id.* at 674 (emphasis added) (quoting *J.W. Hampton & Co. v. United States*, 276 U.S. 394, 406 (1928)).

obvious meaning does not supply an “intelligible principle.”¹³⁹ Justice Barrett has helped explain how both purposivist and textualist judges get away with dodging a statute’s most literal meaning.¹⁴⁰ They deploy substantive canons, or “strong-form canons.” According to Justice Barrett, “strong-form canon[s],” like the nondelegation canon, are made to prevail over “the better interpretation of a statute . . . [where] the better reading leads to a disfavored result,” or “end protected by a strong-form canon.”¹⁴¹ These ends might include “a presumption of *mens rea* in criminal statutes” or “a presumption of equitable tolling to statutes of limitations.”¹⁴² Noting that “strong-form canon[s] . . . pose a lot of trouble for the honest textualist,” Justice Barrett has anticipated criticism of the nondelegation canon as an atextual “strain [on] statutory text to advance a particular value.”¹⁴³ Seeking to preserve the nondelegation canon as a legitimate textualist tool, Justice Barrett has argued that the canon does not strain statutory text in cases involving the major questions doctrine.¹⁴⁴

In cases involving major questions, Justice Barrett argues, the nondelegation canon just “situates text in context, which is how textualists, like all interpreters, approach the task [of statutory interpretation].”¹⁴⁵ And whenever a statute must be interpreted by a court, “the Constitution’s structure [is] part of the context in which a delegation occurs.”¹⁴⁶ The Constitution’s structure reveals “the basic premise that Congress normally ‘intends to make major

139. See *Gundy*, 139 S. Ct. at 2121. For the purposes of Part III, this essay will presume that the nondelegation doctrine only requires that a statutory delegation supply an “intelligible principle.”

140. *Biden v. Nebraska*, 143 S. Ct. 2355, 2376–77 (2023) (Barrett, J., concurring).

141. *Id.* at 2377–78.

142. *Id.* at 2378 (citing *Xiulu Ruan v. United States*, 142 S. Ct. 2370, 2376–77 (2022); *Irwin v. Dep’t of Veterans Affs.*, 498 U.S. 89, 95–96 (1990)).

143. *Id.* at 2376–77. (internal quotations omitted).

144. See *id.* at 2377 (citing Cass Sunstein, *There Are Two “Major Questions” Doctrines*, 73 ADMIN. L. REV. 475, 483–84 (2021)).

145. *Id.* at 2378 (citing Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 348 (2005)).

146. *Id.* at 2380.

policy decisions itself, not leave those decisions to agencies.”¹⁴⁷ Finally, therefore, absent “text directly authorizing the agency action or context demonstrating that the agency’s interpretation is convincing,” an interpretation that asserts Congress has delegated authority over a major question is likely “not the best.”¹⁴⁸ This is a compelling justification that the nondelegation canon need not be viewed as a substantive canon or “strong-form canon,” at least in cases involving the major questions doctrine. But Justice Barrett’s reasoning does not rescue Justice Kagan’s application of the nondelegation canon in *Gundy*.

In cases involving the major questions doctrine, courts are not debating whether a statutory delegation’s plain text *is* constitutional. They are debating *how* statutory delegations to regulate over “major questions” *become* constitutional. In *Biden v. Nebraska*,¹⁴⁹ the issue was not whether Congress could empower the Secretary of Education to implement vast loan forgiveness, but whether the HEROES Act had already done so.¹⁵⁰ And at its most powerful, the major questions doctrine does not prevent Congress from delegating policy choices of “vast ‘economic and political significance’” to agencies as long as those delegations are made clearly.¹⁵¹ It simply governs *how* those delegations must be made. The nondelegation doctrine, however, does contemplate delegations that Congress is never allowed to make, no matter how clearly Congress makes them. Congress could clearly delegate power to the President to regulate petroleum reserves¹⁵² or to create “codes of fair competition.”¹⁵³ But without stating (1) a standard more specific than “in the public interest,” (2) the types of facts to which that standard would apply, and (3) some administrative

147. *Id.* (quoting *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc)).

148. *Id.* at 2381.

149. 143 S. Ct. 2355 (2023).

150. *See id.* at 2384 (Barrett, J., concurring).

151. *Id.* at 2384 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302 (2014)).

152. *See Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

153. *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

procedure outlining rules for the application of standards to facts, those delegations would be unconstitutional, and in fact were.¹⁵⁴

When a court refuses to enlarge a statute that is ambiguous about a major question, it is emphatically not making a legislative judgment. The resolution of a case involving the major questions doctrine only dictates that agencies cannot do something Congress never clearly told them they could do in the first place. In cases involving the nondelegation canon, like *Gundy*, the court dictates that agencies must do something Congress never clearly told them to do. And because the nondelegation canon is only deployed to ensure that a statute contains an adequately specific legislative judgment, the court—not Congress—is defining the actual legislative judgment that agencies must follow. Textualism that prizes literalism is most essential in cases involving nondelegation questions because courts are at the absolute closest to infringing the sphere of legislative power.¹⁵⁵ Justice Barrett never concedes that the major questions doctrine compels judges to abandon the “literal” or “most natural” reading of the text.¹⁵⁶ Justice Barrett does imply, however, that the Constitution’s context can be a stronger indication of Congress’s expression than the literal meaning of Congress’s words when the statute is ambiguous and a major question is at hand.¹⁵⁷ Constitutional context, however, cannot trump the literal meaning of Congress’s words when that literal meaning fails any of the nondelegation doctrine’s substantive requirements.

In *Gundy*, Congress gave the Attorney General “authority to specify the applicability of [SORNA’s requirements]” to pre-Act offenders.¹⁵⁸ Justice Kagan never argues that the literal meaning of these words is that Congress “require[d] the Attorney General to

154. See *supra* note 27 and accompanying text.

155. See, e.g., *Gundy v. United States*, 139 S. Ct. 2116, 2139 (2019) (Gorsuch, J., dissenting) (describing how nondelegation cases present close questions on the line between “lawmaking and fact-finding”).

156. See *Biden v. Nebraska*, 143 S. Ct. at 2376 (Barrett, J., concurring).

157. See *id.* at 2380.

158. *Gundy*, 139 S. Ct. at 2122.

apply SORNA to all pre-Act offenders as soon as feasible.”¹⁵⁹ Justice Kagan only arrives at that interpretation after the text was “considered alongside its context, purpose, and history.”¹⁶⁰ In *Gundy*, Congress at least failed to provide an intelligible principle “clearly.” The difference between a clear command and an ambiguous command does not disappear when the Court searches the “context, purpose, and history” of the Act.¹⁶¹ Justices and judges will plausibly disagree about how “context, purpose, and history” color the statute,¹⁶² like Justice Kagan and Justice Gorsuch disagreed on this precise question in *Gundy*.¹⁶³

The less clear the intelligible principle is in the statute, the less likely the Court is to accurately pinpoint the intelligible principle that Congress meant to include, if at all. Most importantly, any mistake by the Court would constitute a deviation from Congress’s legislative judgment. If the Court has to construe the statutory delegation and create an intelligible principle that is not itself in the text, then the Court is deviating from Congress’s original legislative judgment even if that judgment was constitutionally defective. The Constitution allows Congress to delegate power, but only if Congress, and Congress alone, supplies at least an intelligible principle first.¹⁶⁴ Else, even minor modifications of the standard by a body that is not Congress would mean not *all* legislative power has been vested in Congress. The Supreme Court cannot alter the Constitution’s commands.¹⁶⁵ The Court illegally trespasses into the exclusive sphere of Congress wherever it confronts a nondelegation problem and uses the nondelegation canon to depart from

159. *Id.* at 2123.

160. *Id.*

161. *Id.*

162. *Id.*

163. Compare *id.* (Kagan, J.), with *Gundy*, 139 S. Ct. at 2143–44 (Gorsuch, J., dissenting).

164. *Id.* at 2123. (The nondelegation doctrine is framed here as only requiring an intelligible principle rather than substantive rules to demonstrate that the nondelegation canon is unconstitutional even under the current Court’s understanding of the nondelegation doctrine. It is, therefore, unconstitutional under a more restrictive nondelegation framework).

165. See U.S. CONST. art. V.

Congress's literal words. Wherever Congress does not complete its responsibility of supplying an intelligible principle by making it literally and naturally obvious, the statutory delegation violates Article I, Section I of the Constitution, and courts would multiply that violation by legislating an intelligible principle themselves. With one option left, courts must invalidate the statute.

CONCLUSION

Out of its desire to uphold a nondelegation precedent that has only rebuffed Congress "twice in this country's history," the current Court drops the ball it has tried to keep in the air. *Schechter* and *Panama Refining* do not instruct courts to apply a nondelegation canon. They enforce a nondelegation doctrine with substantive rules. That doctrine cannot be squared with a prodelegation canon left over from *Loper Bright's* restoration. In those cases, the court cannot usurp legislative power by curing a statute's constitutional defect. Courts must strike down those statutes, and Congress must try again.