

The German Doctrine of Normative Authorisation as an Inspiration for US Administrative Law after *Loper Bright*

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Abstract

In the summer of 2024, the United States (US) Supreme Court overruled the decades-old *Chevron* doctrine in *Loper Bright*. In doing so, it redefined judicial review of discretionary decisions by administrative agencies. This is particularly relevant in the area of executive rulemaking. For some, the decision was considered as the beginning of the long-awaited decline of the administrative state. Others mourn the end of *Chevron*. For some, the decision marks a disruption in administrative law. Others see continuity rather than a shift in the allocation of powers. Further developments remain unclear. This

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article describes the developments and possible consequences of the landmark decision. It contributes to the growing literature by putting it in the context with German administrative law, namely the doctrine of normative authorisation. The German doctrine can be an inspiration for navigating the unclear developments in this area of US administrative law after *Loper Bright*.

Keywords

comparative administrative law – judicial review of discretionary agency decisions – doctrine of normative authorisation – *Chevron* deference – *Loper Bright*- German and US administrative law

I. Introduction

US administrative law and the administrative state are in stormy waters. Big waves have capsized conventional doctrine and are perceived as a threat to the flagship, i. e. the rule of law¹. A rough sea is also already visible on the horizon, but it is not yet clear how things will develop.² This article focuses

¹ See the various opinions by Aziz Huq et al., ‘The “Recklessness Itself Sends a Message”: 35 Legal Experts Assess Trump’s Return’, The New York Times, 28 April 2025, <www.nytimes.com/2025/04/28/opinion/trump-constitution-rule-of-law.html>, last access 9 April 2026; see also Lorenz Dopplinger, ‘Die Transformation des amerikanischen Administrative State’, Staat 64 (2025) 441-471 (471).

² This concerns at least two areas. Firstly, it relates to the reintroduction of the nondelegation doctrine in a dissent written by Justice Gorsuch (US Supreme Court, *Gundy v. United States*, judgment of 20 June 2019, 588 U. S. 128, 149), according to which rulemaking would be largely reserved for Congress, which could only authorise the executive branch to ‘fill up the details’, to carry out fact-finding and to conduct non-legislative tasks. On the relation between our topic and the nondelegation doctrine Kristin E. Hickman and Amy J. Wildermuth, ‘Harmonizing Delegation and Deference After *Loper Bright*’, N. Y. U. L. Rev. 100 (2025), 1924-1983 (1950-1958, 1974-1983); Mila Sohoni, ‘*Chevron*’s Legacy’, Harv. L. Rev. Forum 138 (2025), 66-88 (72-76). Secondly, this concerns the debate surrounding the unitary executive theory and the for-cause removal protection of heads of independent agencies. The Trump administration has announced its intention to push the Supreme Court to overrule the relevant precedent (US Supreme Court, *Humphrey’s Executor v. United States*, judgment of 27 May 1935, 295 U. S. 602) if it is in the way of firing principal officers, see a letter from Sarah M. Harris (Acting Solicitor General), ‘Restrictions on the Removal of Certain Principal Officers of the United States’, 12. February 2025, <<https://www.fingfx.thomsonreuters.com/gfx/legaldocs/movawxboava/2025.02.12-OUT-Durbin-530D.pdf>>, last access 9 April 2026. In US Supreme Court, *Seila Law LLC v. Consumer Fin. Prot. Bureau*, judgment of 29 June 2020, 591 U. S., the court has already shown a tendency towards the unitary executive theory; in US Supreme Court, *Trump v. Slaughter*, judgment of 29 June 2026, 609 U. S., the court finally overruled *Humphrey’s Executor*.

on the disruption that has taken place in June 2024 through the overturned doctrine. It is the end of *Chevron* deference that had granted administrative agencies judicial deference in interpreting statutes.³ This is a landmark event, as the *Chevron* doctrine had been considered as a ‘cornerstone’ of US administrative law.⁴ The article argues that, for what lies ahead for the US administrative law, the German doctrine could offer orientation from across the Atlantic. The end of *Chevron* will require courts in the United States to deal more explicitly with an issue that German administrative law has addressed for quite some time: the issue concerning the question of when an administrative agency is authorised to decide at its own discretion and when, accordingly, only limited judicial review exists. This article proposes that the German doctrine of normative authorisation (*normative Ermächtigungslehre*) can serve as an inspiration for the US approach on judicial review of discretionary agency decisions after the end of *Chevron*. The main message of the German doctrine is that administrative agencies are authorised to decide at their own discretion with corresponding judicial deference if this is provided for by parliamentary statute.

To substantiate this, Part II outlines the end of *Chevron* deference in US administrative law and considers the legal movement that had contributed to it. In addition, the article considers the possible consequences of the overturning of the doctrine. Part III summarises and builds on the corresponding doctrine of normative authorisation in German administrative law. Part IV examines whether the German doctrine is a worthwhile inspiration for the US, and does so by contextualising and focusing on the potential downsides and advantages of its application in the US system. Part V concludes in the affirmative.

Two small caveats: Since the end of *Chevron* was decided at and is discussed with regard to the US federal level, this article does not take the sub-federal levels into consideration.⁵ Furthermore, it does not claim to deductively solve any specific challenges that US administrative law faces. Rather, the article aims to offer a general orientation by comparing the administrative law doctrines.

³ US Supreme Court, *Chevron U. S. A., Inc. v. Natural Resources Defense Council*, judgment of 25 June 1984, Inc., 467 U.S. 837.

⁴ US Supreme Court, *Loper Bright Enterprises v. Raimondo*, judgment of 28 June 2024, 603 U.S., (Kagan, J., dissenting), 1.

⁵ Accordingly and with a brief comparison of the federal systems in relation to administrative law Jonas Plebuch and Simon Pielhoff, ‘Verwaltungsstaat als Demokratieideal – Administrative State als Demokratiegefahr?’, Staat 61 (2022), 167–203 (169–172).

II. The End of *Chevron* Deference

The forty years old US doctrine of *Chevron* deference regarding judicial review of discretionary agency decisions (1.) was overturned by the US Supreme Court in *Loper Bright Enterprises v. Raimondo, Secretary of Commerce*⁶ (2.). The consequences of the end of *Chevron* are contentious and difficult to predict (3.).

1. *Chevron* Deference

Chevron deference was introduced by the US Supreme Court in 1984.⁷ In two steps, the doctrine considered whether federal courts must defer to a federal administrative agency's interpretation of a statute. Deference depended, first, on whether Congress had directly spoken to the precise question at issue, that is, whether the term was unambiguous; and second, on whether the agency's interpretation was reasonable.⁸ If Congress had directly addressed the issue, agencies had to follow Congress' view. If Congress had not directly spoken and if the interpretation of an ambiguous statutory term was reasonable, the courts had to defer to the agency's interpretation. An unreasonable interpretation of an ambiguous statute was impermissible. If Congress had created an administrative program and left some gaps, either explicitly or implicitly, this was regarded as an authorisation of the agency to discretionarily concretise the ambiguous provisions.⁹

Chevron deference was a core doctrine of US administrative law.¹⁰ While the doctrine was initially celebrated by conservatives,¹¹ it was later supported primarily by progressives and fell into discredit among conservatives.¹² *Chevron* deference was a fundamental doctrine for the formation of the administrative state, which has increasingly become the scapegoat of the conservative side.¹³ Accordingly, the doctrine was met with strong headwinds

⁶ US Supreme Court, *Loper Bright* (n. 4).

⁷ US Supreme Court, *Chevron* (n. 3).

⁸ US Supreme Court, *Chevron* (n. 3), 842-843.

⁹ US Supreme Court, *Chevron* (n. 3), 843-844. On ambiguity as implicit delegation in the *Chevron* doctrine Thomas W. Merrill, 'The Demise of Deference – And the Rise of Delegation to Interpret?' Harv. L. Rev. 138 (2024), 227-272 (252-254).

¹⁰ Cary Coglianese and Daniel E. Walters, 'The Great Unsettling: Administrative Governance After *Loper Bright*', Admin. L. Rev. 77 (2025), 1-64 (39).

¹¹ See Merrill (n. 9), 248-250.

¹² See at n. 32.

¹³ See Plebush and Pielhoff (n. 5), 183-184; Cass R. Sunstein and Adrian Vermeule, *Law & Leviathan* (Belknap Press of Harvard University Press 2020), 132.

and its scope was narrowed by quite a few Supreme Court decisions, lastly by invoking the major question doctrine.¹⁴

2. *Loper Bright*: *Chevron*'s End

On June 28, 2024, the US Supreme Court overruled *Chevron* in *Loper Bright*.¹⁵ The majority opinion, written by Chief Justice Roberts draws upon § 706 of the Administrative Procedure Act (APA)¹⁶, which states that a 'reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions'.¹⁷ Courts now have to determine the 'single, best meaning' of a statute and decide independently the questions of law.¹⁸ Since the best meaning of a statute can still be that it delegates discretionary power to an agency, discretionary decisions of agencies are still possible after *Loper Bright*.¹⁹ However, neither an ambiguity alone nor the authorisation to promulgate rules inherently implies a discretionary

¹⁴ US Supreme Court, *West Virginia v. EPA*, judgment of 30 June 2022, 597 U.S.; the major question doctrine says that 'in certain extraordinary cases, [...] a merely plausible textual basis for the agency action' is not enough but rather 'clear congressional authorization' is needed (*West Virginia* (n. 14), 19); see also US Supreme Court, *Biden v. Nebraska*, judgment of 30 June 2023, 600 U.S. After the end of *Chevron*, some no longer consider the doctrine to be relevant, see Richard J. Pierce, 'Two Neglected Effects of *Loper Bright*', *The Regulatory Review*, 1 July 2024, <<https://www.theregreview.org/2024/07/01/pierce-two-neglected-effects-of-loper-brigh>>, last access 9 April 2026; differing view by Blake Emerson, 'The Existential Challenge to the Administrative State', *Geo. L.J.* 113 (2025) 1263-1337 (1297-1301); Eric R. Bolinder, 'Litigating *Loper Bright*: Interpretive Challenges and Solutions for the Post-*Chevron* Era', *W. Va. L. Rev.* 128 (2025), 219-264 (254-260). On further limitations of *Chevron* deference, see US Supreme Court, *Loper Bright* (n. 4), (Kagan, J., dissenting), 11-12.

¹⁵ US Supreme Court, *Loper Bright* (n. 4). On the same day, the Supreme Court also decided a companion case: US Supreme Court, *Relentless, Inc. v. Department of Commerce*, argued on 17 January 2024, 603 U.S. In these cases, the Supreme Court did not overrule the *Auer* deference, given to an agency's interpretation of its own regulation, see Robin Kundis Craig, 'The Impact of *Loper Bright v. Raimondo*: An Empirical Review of the First Six Months', *Minn. L. Rev.* 109 (2025), 2671-2748 (2710-2711). This deference has been narrowed by US Supreme Court, *Kisor v. Wilkie*, judgment of 26 June 2019, 588 U.S. 558. On the relation between *Loper Bright* and *Auer* deference Adrian Vermeule, 'The Old Regime and the *Loper Bright* "Revolution"', *Sup. Ct. Rev.* 2024, 235-270 (260-261). On the relation between *Loper Bright* and further deregulatory phenomena Renee Farmer and Daniel G. Aaron, '*Loper Bright*'s Deregulatory Synergies', *Seton Hall Law Review* 55 (2025), 1697-1719.

¹⁶ 5 U.S. Code § 706.

¹⁷ US Supreme Court, *Loper Bright* (n. 4), 13-14; against the majority's reasoning, drawing upon APA § 706, see US Supreme Court, *Loper Bright* (n. 4), (Kagan, J., dissenting), 15-19, 23-24; Merrill (n. 9), 236-241.

¹⁸ US Supreme Court, *Loper Bright* (n. 4), 22.

¹⁹ US Supreme Court, *Loper Bright* (n. 4), 16-18; see Cass R. Sunstein, 'Our *Marbury*: *Loper Bright* and the Administrative State', *Duke Law Journal* 74 (2025), 1893-1916 (1902).

authority.²⁰ In general, judges must now consider the question of whether the agency's interpretation is consistent with the law. *Chevron's* two-step approach is outdated.

In the Supreme Court's view, the APA 'incorporates the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of a statutory provision'.²¹ The Court rejects the argument that the interpretation of ambiguous statutes constitutes a political judgment and therefore falls within the sphere of political institutions rather than the judicial branch.²² Interpreting ambiguous statutory provisions is considered as a matter of conventional tools, not of individual preferences.²³ In this sense, the *Loper Bright* Court refers to a traditional and rather strict²⁴ understanding of the separation of powers: 'Indeed, the Framers crafted the Constitution to ensure that federal judges could exercise judgment free from the influence of the political branches.'²⁵

With this view of the role of the judiciary in relation to the administrative state, the *Loper Bright* Court attempts to resolve not only the separation of powers issue, but also the practical problems associated with *Chevron* deference. Two problems should briefly be mentioned.²⁶ First, when is a statutory provision sufficiently ambiguous under *Chevron's* step one?²⁷ Here, the Court considered *Chevron* as 'unworkable'.²⁸ Second, in the Court's view, the uncertainty surrounding *Chevron* undermined reliance interests in the applicability of the doctrine and the results of its application by allowing agencies within a hard to define scope of ambiguity to replace an interpretation with another as often as they liked; it 'foster[ed] unwarranted instability in the law'.²⁹

²⁰ On ambiguity US Supreme Court, *Loper Bright* (n. 4), 22-23. The fact that the delegation to issue rules does not imply a discretionary authority in US administrative law is implicit in US Supreme Court, *Loper Bright* (n. 4), 27 et passim. This differs from the German approach, see at n. 121.

²¹ US Supreme Court, *Loper Bright* (n. 4), 16.

²² US Supreme Court, *Loper Bright* (n. 4), 26.

²³ US Supreme Court, *Loper Bright* (n. 4), 26.

²⁴ The Court is in favour of a strict or formalistic understanding of the separation of powers rather than mutual dependence and interaction between institutions, see Cary Coglianese and David B. Froomkin, 'Loper Bright's Disingenuity', U. Pa. L. Rev. 174 (2025), 91-156 (103-104); this is consistent with the arguments against the administrative state in general, see Plebuch and Pielhoff (n. 5), 170.

²⁵ US Supreme Court, *Loper Bright* (n. 4), 26.

²⁶ The discussion about the flaws and merits of *Chevron* cannot be replicated in detail here. The literature on that is vast, and *Loper Bright* marks a caesura. Therefore, this article focuses on a forward-looking perspective.

²⁷ See Brett M. Kavanaugh, 'Fixing Statutory Interpretation', Harv. L. Rev. 129 (2016), 2118-2163 (2121, 2136-2144).

²⁸ US Supreme Court, *Loper Bright* (n. 4), 30.

²⁹ US Supreme Court, *Loper Bright* (n. 4), 33.

Besides those important practicalities, the central argument in *Loper Bright* addresses the proper role of the judiciary in relation to administrative agencies. While the majority opinion by Chief Justice Roberts bases this argument on § 706 APA,³⁰ Justice Thomas' concurrence is more far-reaching: In his view, *Chevron* also violated the Constitution's principle of separation of powers by forcing judges to waive their judicial power and by allowing agencies to exercise powers not conferred upon the executive branch.³¹

Loper Bright marks a milestone that the conservative legal movement in the United States has been working towards for some time. This movement and its opposition to the administrative state can be understood as a reaction to the growth of the latter.³² The administrative state grew at the federal level in the United States particularly with Franklin D. Roosevelt's New Deal in the 1930s, which marked the establishment of powerful agencies such as the Federal Communications Commission (FCC), the Securities and Exchange Commission (SEC), and the National Labor Relations Board (NLRB). This was followed in the 1960s and 1970s by the creation of environmental, consumer, and labour protection agencies. Eventually in the course of history, the Obama administration was very active in terms of progressive regulation.

This process was accompanied by a number of fundamental Supreme Court rulings that – though certainly not one-sided – significantly supported the growth of the administrative state as a whole. For example, in *Humphrey's Executor* in 1935,³³ the Court established the basis for independent agencies that are not directly subordinate to the President and whose leaders are protected against at will removals, so that the President cannot fire officers at will at any time for any reason. Also important in this context is the 1997 case of *Auer v. Robbins*,³⁴ in which the Supreme Court recognised the binding effect of interpretations by agencies when interpreting the regulations they had issued themselves, so that the courts had to defer to those

³⁰ US Supreme Court, *Loper Bright* (n. 4), 14: 'The APA [...] codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment.'

³¹ US Supreme Court, *Loper Bright* (n. 4), (Thomas, J, concurring), 2-3; see also US Court of Appeals for the 10th Circuit, *Gutiérrez-Brizuela v. Lynch*, judgment of 23 August 2016, no. 14-9585 (Gorsuch, concurring).

³² Overview by Plebuch and Pielhoff (n. 5), 181-183; Dopplinger (n. 1), 448-454; Gillian E. Metzger, 'Foreword: 1930s Redux: The Administrative State Under Siege', Harv. L. Rev. 131 (2017), 1-95 (51-71), focusing on anti-administrative approaches.

³³ US Supreme Court, *Humphrey's Executor* (n. 2).

³⁴ US Supreme Court, *Auer v. Robbins*, judgment of 19 February 1997, 519 U.S. 452.

interpretations. Undoubtedly, *Chevron*, the famous case from 1984, is one of the most landmark decisions for expanding the magnitude of the administrative state.³⁵

In the recent past, these important cases have been judicially curtailed,³⁶ or as in the case of *Chevron*, explicitly overruled. Such a development should not be traced back to a single cause. Nevertheless, such downgrading of administrative power can also be attributed to the influence of the conservative legal movement, which continues to push for a limitation or even capsizing of the doctrines that enable the administrative state.³⁷ Conservatives are considered to fear the abuse of administrative power.³⁸ They believe that the Constitution, which they often interpret in an originalist manner, is on their side.³⁹ Conservatives have seen Roosevelt's New Deal as a moment of and, in general terms, the growth of the administrative state as an erosion of the US democracy, whereby a constitutionally limited legislative power in the hands of Congress was undemocratically substituted by an unaccountable far-reaching regulatory bureaucracy.⁴⁰ In particular, a broad delegation of law-making powers is deemed unconstitutional.⁴¹ Some are calling for the revival of the nondelegation doctrine, which, for constitutional reasons, restricts the delegation of rulemaking powers from Congress to administrative agencies.⁴² We are not there (yet). However, since *Chevron* was considered an important reason for the shift of public policy-making

³⁵ However, during the time of Justice Scalia on the Supreme Court, *Chevron* deference was initially considered a conservative doctrine by enabling deregulation, see Merrill (n. 9), 230.

³⁶ Cutting back *Humphrey's Executor*: US Supreme Court, *Seila Law* (n. 2): a single head of the Consumer Financial Protection Bureau with a 'for cause' removal protection violates the separation of powers; US Supreme Court, *Free Enterprise Fund v. PCAOB*, judgment of 28 June 2010, 561 U.S. 477, invalidating a two-stage 'for cause' removal protection; finally overruling *Humphrey's Executor*: US Supreme Court, *Trump v. Slaughter* (n. 2). *Auer* deference was limited by US Supreme Court, *Kisor* (n. 15).

³⁷ See, e.g., Steven G. Calabresi and Gary S. Lawson, 'The Depravity of the 1930s and the Modern Administrative State', *Notre Dame L. Rev.* 94 (2019), 821-866 (859-861 et passim); overview by Emerson (n. 14), 1274-1306, particularly 1280-1283, considering that liberal Supreme Court Justices have also contributed to this trend, Emerson (n. 14), at 1270-1271, 1286-1294, 1299-1300, 1304-1306. The conservative legal movement often supports specific litigations through conservative advocacy organisations, see Ann Southworth, 'Conservative Legal Advocacy Organizations and Constitutional Change in the Roberts Court', *Fordham L. Rev.* 93 (2025), 1239-1256.

³⁸ Sunstein and Vermeule (n. 13), 30.

³⁹ See Metzger (n. 32), 42-46.

⁴⁰ See, e.g., Calabresi and Lawson (n. 37), 853-859 et passim; Gary S. Lawson, 'The Rise and Rise of the Administrative State', *Harv. L. Rev.* 107 (1994), 1231-1254; overview of the diverse motives by Sunstein and Vermeule (n. 13), 1-3, 20-37.

⁴¹ Calabresi and Lawson (n. 37), 853-859.

⁴² US Supreme Court, *Gundy* (n. 2).

power away from Congress,⁴³ its overruling also appears to significantly limit the regulatory powers of agencies.⁴⁴

The conservative legal movement opposes the administrative state, but not greater presidential power.⁴⁵ The administrative state is seen in conflict with the separation of powers, since the three functions of government are partly combined in administrative agencies.⁴⁶ In addition, a powerful administrative state raises concerns that it is outside the executive control and therefore unaccountable and undemocratic.⁴⁷ Against this backdrop, courts have strengthened presidential control over agencies.⁴⁸ The unitary executive theory, which claims that all executive power lies in the hands of the President and is subject to his control, seems to be becoming an institutional reality.⁴⁹ Therefore, it would be undifferentiated to solely claim that the conservative legal movement aims at a libertarian state: The motivations are complex.⁵⁰ *Loper Bright*, however, can be seen as part of the traditional line of the conservative legal movement, which seeks to downsize the administrative state.

3. Possible Consequences

Although *Loper Bright*'s key message is that legal issues ought to be resolved through an independent judicial review, *Loper Bright* accepts that the judiciary should give attention to the interpretations by agencies: The judicial approach in reviewing agencies' interpretation of law falls back to *Skidmore*

⁴³ Ted Cruz, Mike Johnson and Others, Amicus Brief in Support of Petitioners, *Loper Bright*, No. 22-451, 8-9.

⁴⁴ See in part II. 3.

⁴⁵ Metzger (n. 32), 3.

⁴⁶ See Lawson (n. 40), 1248-1249; prominent and detailed Philip Hamburger, *Is Administrative Law Unlawful?* (Chicago University Press 2014), 1, 26-29, 347-354; descriptive Metzger (n. 32), 7, 17-24.

⁴⁷ US Supreme Court, *Free Enterprise Fund* (n. 36), 499.

⁴⁸ See at n. 36; Emily R. Chertoff and Jessica Bulman-Pozen, 'The Administrative State's Second Face', N. Y. U. L. Rev. 100 (2025), 727-784 (748).

⁴⁹ Chertoff and Bulman-Pozen (n. 48), 754-758, though excluding a 'second face' of the administrative state, consisting primarily of security and intelligence agencies.

⁵⁰ Chertoff and Bulman-Pozen (n. 48) describe the conservative idea of the administrative state as a paradox with two faces: While conservatives fear and fight the first face, e.g. far-reaching influence by the Environmental Protection Agency (EPA), the Department of Health and Human Services (HHS) or the Consumer Financial Protection Board (CFPB), they consider intrusions into individual liberties with few legal checks necessary to ensure security and public order – the second face of the administrative state. The second face is neither libertarian-minimal nor limited to safeguarding physical security, see Chertoff and Bulman-Pozen (n. 48), 777-779 et passim.

deference,⁵¹ which means that courts give weight to an agency's interpretation if it is persuasive: '[T]he rulings, interpretations, and opinions of the Administrator [...], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgement to which courts and litigants may properly resort for guidance'; in order to assess the weight of the agency's judgment, courts have to look at 'the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade'.⁵²

While it is generally accepted that *Skidmore* deference applies after *Loper Bright*, scholars now debate upon the consequences of *Loper Bright* beyond that.⁵³ Further developments appear to be quite uncertain.⁵⁴ There are a variety of different expectations regarding the consequences of the end of *Chevron*.

Some see *Loper Bright* as a dramatic shift in US administrative law.⁵⁵ This assessment comes from very different directions. For House-Speaker Mike Johnson, *Loper Bright* is the awaited 'beginning of the end of the administrative state'.⁵⁶ From a different perspective, but also indicating a disruption, Justice Kagan noted in her dissent in *Loper Bright* that it is a 'massive shock to the legal system, "cast[ing] doubt on many settled constructions" of statutes and threatening the interests of many parties who have relied on them for years'.⁵⁷

In contrast, some expect continuity rather than disruption.⁵⁸ *Skidmore* and the remaining possibility of delegations of rulemaking authority, which the

⁵¹ The Court explicitly refers to *Skidmore*, US Supreme Court, *Loper Bright* (n. 4), 16, 21, 25. Detailed on the *Skidmore* doctrine before and after *Loper Bright* Kristin E. Hickman, 'Anticipating a New Modern *Skidmore* Standard', Duke Law Journal Online 74 (2025), 111-138; see also Bolinder, 'Litigating *Loper Bright*' (n. 14), 229-238; Merrill (n. 9), 266-267.

⁵² US Supreme Court, *Skidmore v. Swift & Co.*, judgment of 4 December 1944, 323 U. S. 134, 140.

⁵³ A collection of various early reactions to *Loper Bright* is provided by Coglianese and Walters (n. 10), 15-23 et passim.

⁵⁴ Coglianese and Walters (n. 10), passim.

⁵⁵ Coglianese and Walters (n. 10), 2: '*Loper Bright* has shaken up the legal landscape', 4: 'great unsettling', 19-20 with further statements that see a substantial disruption, 38-39, 43-45; Bolinder, 'Litigating *Loper Bright*' (n. 14), 226-229, 263-264; Dopplinger (n. 1), 459; Sapna Kumar, 'Scientific and Technical Expertise after *Loper Bright*', Duke Law Journal 74 (2025), 1749-1789 (1766-1773).

⁵⁶ Mike Johnson, @SpeakerJohnson, 'My joint statement with @SteveScalise and @GOP-MajorityWhip on *Loper Bright v. Raimondo*', X (28 June 2024, 11:19 AM), <<https://x.com/SpeakerJohnson/status/1806724236616065364>>, last access 9 April 2026.

⁵⁷ US Supreme Court, *Loper Bright* (n. 4), (Kagan, J., dissenting), 24.

⁵⁸ Vermeule, 'Old Regime' (n. 15), 243-245 et passim; see also David A. Strauss, 'University of Chicago Law School, Supreme Court Preview: 2024 Term', Youtube (17 September 2024), <www.youtube.com/watch?v=S-dA5ULmDpE>, last access 9 April 2026, at 45:00: *Loper Bright* rather as a mood than a substantial difference; on further corresponding comments Coglianese and Walters (n. 10), 21-22.

Loper Bright court explicitly acknowledges,⁵⁹ could also lead to the result that many agency rulings will be upheld.⁶⁰ Accordingly, *Loper Bright* is understood as being in large part merely a relabelling of *Chevron* deference and not the perceived dramatic disruption.⁶¹ What was formerly *Chevron* deference could have become the '*Loper Bright* delegation'.⁶² Now, courts could simply interpret the statute independently and, in doing so, say that the statute is best understood as delegating a question of law to be decided by agencies.⁶³ In that sense, conceding 'conservative-libertarians' a 'headline victory' and upholding most of the substance of the *Chevron* regime is seen as a 'pseudo-revolution'.⁶⁴

There are several assessments between the poles of disruption and continuity. For some, US administrative law is moving towards libertarianism.⁶⁵ Regarding the question of whether an agency's interpretation will be invalidated, it might be particularly important whether the judges ruling on the case were appointed by a Republican or a Democrat, and whether the agency's interpretation is rather left or right.⁶⁶ *Loper Bright* is likely to cause disagreement among federal judges and thus legal inconsistency and uncer-

⁵⁹ US Supreme Court, *Loper Bright* (n. 4), 17; see in part IV. 1.

⁶⁰ Sunstein (n. 19), 1904.

⁶¹ Adrian Vermeule, 'Chevron By Any Other Name', The New Digest (28 June 2024), <<https://thenewdigest.substack.com/p/chevron-by-any-other-name>>, last access 9 April 2026; Vermeule, 'Old Regime' (n. 15), 236, 248-249 et passim. See also Lisa Schultz Bressman, 'Lower Courts After *Loper Bright*', Geo. Mason L. Rev. 31 (2024), 499-513 (504-505, 510, 513); Coglianese and Froomkin (n. 24), 121-132; Richard Pierce, '*Loper Bright Enterprises v. Raimondo*: *Chevron* is Dead; Long Live *Skidmore*', Geo. Wash. L. Rev. On the Docket, 8 July 2024; Anuj C. Desai, '*Loper Bright* as Jurisprudence: Institutional Choice and the Expressive Value of Law', Ari. L. Rev. 67 (2025), 585-628 (608-612 et passim). Arguments against the relabelling approach provided by Bolinder, 'Litigating *Loper Bright*' (n. 14), 226-229; Eric R. Bolinder, 'Fishing for Justice: The Legal and Moral Case for *Loper Bright*', Liberty University Law Review 19 (2024), 357-402 (385-389).

⁶² Vermeule, 'Chevron' (n. 61); Vermeule, 'Old Regime' (n. 15), 236, 248-249 et passim.

⁶³ Vermeule, 'Old Regime' (n. 15), 248-249.

⁶⁴ Vermeule, 'Old Regime' (n. 15), 264-265.

⁶⁵ See Sunstein (n. 19), 1913-1914; Michele Benedetto Neitz, 'Ready or Not: How Congressional Dysfunction and *Loper Bright v. Raimondo* Will Shift U.S. Regulation of Emerging Technologies to the Federal Bench', SMU L. Rev. 78 (2025), 119-156 (137-138): 'large gap in technology regulation'.

⁶⁶ Sunstein (n. 19), 1906-1907, 1912, 1916; Nicholas R. Bednar, '*Chevron* on the Eve of *Loper Bright*', Widener Commonwealth Law Review 34 (2024), 1-42 (39-41); see also Kent Barnett, Christina L. Boyd and Christopher J. Walker, 'Administrative Law's Political Dynamics', Vand. L. Rev. 71 (2019), 1463-1526 (1470); Merrill (n. 9), 231, 246; US Supreme Court, *Loper Bright* (n. 4), (Kagan, J., dissenting), 28; Nicholas R. Bednar, 'What to Do About *Chevron* – Nothing', Vand. L. Rev. 72 (2019), 151-176 (160-161): '*Chevron* successfully curtail [ed] the influence of judges' own political preferences'.

tainty.⁶⁷ This poses a threat to the political legitimacy of the legal framework.⁶⁸ Furthermore and broadly speaking, the end of *Chevron* and judicial pessimism towards the administrative state could lead to an increase of the number of invalidations of agency regulations.⁶⁹ *Loper Bright* expresses the notion that the judiciary should engage in statutory interpretation more extensively.⁷⁰

Time will tell which expectations will be realised.⁷¹ However, despite all the uncertainties, one trend seems quite clear: The decision is directed against a broad agency authority and could therefore encourage courts to interpret legal issues creatively rather than deferring to the agency's view. *Loper Bright* will probably increase the number of challenges against administrative rulemaking. Consequently, many regulations are at risk.⁷² Furthermore, the decision could have a chilling effect on agencies which may be hesitant to adopt far-reaching regulations due to the (perceived) increased likelihood of the regulations being invalidated.⁷³ Accordingly, whether from a conservative or progressive perspective, one can disagree with the mentioned view that rather sees continuity than disruption. Against this background and despite the uncertainty concerning further developments, the trend is moving towards less discretion and more judicial control. In this respect, US administrative law comes closer to the general German approach to the relationship between judicial review and administrative discretion,⁷⁴ which we now turn to.

III. Doctrine of Normative Authorisation in German Administrative Law

The following section first discusses the concept and development of the doctrine of normative authorisation (1.) and subsequently, its constitutional and conception foundations (2.).

⁶⁷ Merrill (n. 9), 246; Neitz (n. 65), 140-141; see also Bednar, 'What to Do' (n. 66), 160; Sohoni, (n. 2), 86; Daniel E. Walters, 'A New Era of Deference: From *Chevron* to *Loper Bright*', CPI Antitrust Chronicle, October 2024, 1-10 (7-8); Coglianese and Walters (n. 10), 29-30, 34; *Loper Bright* could make judicial review less predictable.

⁶⁸ Sohoni, (n. 2), 87.

⁶⁹ Sunstein (n. 19), 1893, 1915-1916; see also Coglianese and Walters (n. 10), 47-48.

⁷⁰ Sunstein (n. 19), 1903.

⁷¹ An empirical study covering the first six months after *Chevron* was overturned shows that lower federal and state courts are dealing with the new legal situation differently, Craig, (n. 15).

⁷² See the data provided by Craig, (n. 15), 2724, 2732-2745; see also Emerson (n. 14), 1294.

⁷³ Bolinder, 'Fishing' (n. 61), 390-391; Mark Buse, 'The Supreme Court v. the Administrative State II', Verfassungsblog, 3 July 2024, <<https://verfassungsblog.de/chevron-supreme-court-loper-bright/>>, last access 9 April 2026; Coglianese and Walters (n. 10), 31; Pierce (n. 61); Sunstein (n. 19), 1910.

⁷⁴ Referring to the time before *Loper Bright* Plebuch and Pielhoff (n. 5), 196-197.

1. Concept and Development of the Doctrine of Normative Authorisation

In Germany, based on the right to effective judicial protection in Art. 19 para. 4 of the Basic Law, courts, in general, exercise full control over agency decisions.⁷⁵ It is broadly accepted practice that it is the courts that resolve questions of law.⁷⁶ In general, this also applies to administrative actions based on ambiguous legal terms. However, early on under the Basic Law, scholars developed approaches that give administrative agencies a greater leeway in decision-making and reduce the degree of judicial control.⁷⁷ According to Otto Bachof's doctrine – in general terms –, the use of ambiguous legal terms can be interpreted as granting administrative agencies discretionary powers, a scope for assessment that cannot be reviewed by courts. Only the limits of this scope should be reviewable, namely whether the agency could indeed reach its conclusion on the basis of the facts asserted; courts should review whether those facts were true.⁷⁸ Another approach deemed an agency decision lawful in cases where several decisions were within the limits of reasonableness.⁷⁹ These and other early approaches in Germany showed similarities:⁸⁰ By using ambiguous legal terms, the legislature was seen as authorising agencies to decide with discretion, subject to only limited judicial review. Since various decisions are possible and fall within the limits of the law, it was not assumed that agencies have to find a single right answer. Administrative agencies have expertise and are closer to the problems and therefore need their own sphere of non-reviewable deci-

⁷⁵ BVerfGE 15, 275 (282); BVerfGE 129, 1 (para. 68); BVerwGE 167, 33 (para. 12); Markus Ludwigs, 'Kontrolllichte der Verwaltungsgerichte', DÖV 73 (2020), 405-415 (409-410); Thorsten Siegel, 'Verwaltung' in: Klaus Stern, Helge Sodan and Markus Möstl (eds), *Das Staatsrecht der Bundesrepublik Deutschland im europäischen Staatenverbund*, Vol. II (C. H. Beck 2022), § 46, para. 60.

⁷⁶ Eberhard Schmidt-Aßmann, 'Art. 19 Abs. 4' in: Roman Herzog, Rupert Scholz, Matthias Herdegen and Hans H. Klein (eds), *Grundgesetz-Kommentar* (108th update, C. H. Beck 2025), para. 184c.

⁷⁷ Fundamental Otto Bachof, 'Beurteilungsspielraum, Ermessen und unbestimmter Rechtsbegriff im Verwaltungsrecht', JZ 10 (1955), 97-102; Carl Hermann Ule, 'Zur Anwendung unbestimmter Rechtsbegriffe im Verwaltungsrecht', in: Otto Bachof, Martin Drath, Otto Gönnenwein and Ernst Walz (eds), *Gedächtnisschrift für Walter Jellinek* (Günter Olzog 1955), 309-330; see also Carl Hermann Ule, 'Rechtsstaat und Verwaltung', VerwArch 76 (1985), 1-23 (15-19). Overview of early approaches by Mattias Wendel, *Verwaltungsermessen als Mehrebenenproblem* (Mohr Siebeck 2019), 11-21.

⁷⁸ Bachof (n. 77), 100-101 et passim.

⁷⁹ Ule, 'Zur Anwendung' (n. 77), 325-328.

⁸⁰ To the following Hartmut Maurer and Christian Waldhoff, *Allgemeines Verwaltungsrecht* (21st edn, C. H. Beck 2024), § 7, para. 32.

sion-making. The proposed doctrines show some parallels to the *Chevron* doctrine.⁸¹

The early approaches have received a lot of approval, and based on them, a path dependency has become apparent. The German discussion still deals with the critical question of when a final decision-making power of agencies that is not fully reviewable by the courts should be recognised. The prevalent opinion emerged that a margin of discretion with limited judicial review is justified if the relevant statute authorises such an independent and final assessment.⁸² This is the core of the doctrine of normative authorisation: It focuses on the question of whether the statute allows for a margin of discretion. The doctrine's main message is that the final administrative decision-making power must be traceable to a parliamentary statute.⁸³

In the case of individual adjudications, an explicit authorisation is not considered necessary. However, the ambiguity of the legal term alone is not sufficient to assume a final administrative decision-making power.⁸⁴ At least an implicit authorisation is required, which must be determined by interpreting the statutory provision.⁸⁵ Attempts are made to overcome the difficulties in finding a clear answer to the question of the existence of implicit authorisations by focusing on functional considerations.⁸⁶ Based on this, statutory authorisations of final decision-making powers to agencies are deemed to exist if the essential questions cannot be resolved by courts. If the judge is unable to assess the case using judicial tools, then no judicial review should take place.⁸⁷ This represents a synthesis of the doctrine of normative authorisation and a functional approach, which rejects the former and seeks to rely on function-related considerations.⁸⁸

⁸¹ See in part II. 1.

⁸² Maurer and Waldhoff (n. 80), § 7, paras 33–34.

⁸³ Matthias Jestaedt, 'Maßstäbe des Verwaltungshandelns' in: Dirk Ehlers and Hermann Pünder (eds), *Allgemeines Verwaltungsrecht* (16th edn, C. F. Müller 2022), § 11, para. 39.

⁸⁴ Jestaedt (n. 83), para. 29; Schmidt-Aßmann, 'Art. 19 Abs. 4' (n. 76), para. 191; Jan Ziekow, 'Verwaltungsrecht und Verwaltungsprozessrecht' in: Wolfgang Kahl and Markus Ludwigs (eds), *Handbuch des Verwaltungsrechts*, Vol. I (C. F. Müller 2021), § 14, para. 65.

⁸⁵ BVerfGE 129, 1 (para. 74); Eberhard Schmidt-Aßmann, 'Einleitung', in: Friedrich Schoch and Jens-Peter Schneider (eds), *Verwaltungsrecht-VwGO* (46th update, C. H. Beck 2024), para. 189.

⁸⁶ See Eckhard Pache, *Tatbestandliche Abwägung und Beurteilungsspielraum* (Mohr Siebeck 2001), 76–80; Markus Ludwigs, 'Dogmatische Grundlagen und Typologie behördlicher Entscheidungsspielräume' in: Wolfgang Kahl and Markus Ludwigs (eds), *Handbuch des Verwaltungsrechts* Vol. V (C. F. Müller 2023), para. 34.

⁸⁷ Maurer and Waldhoff (n. 80), § 7, para. 34.

⁸⁸ Ralf Poscher, 'Geteilte Missverständnisse', in: Ivo Appel, Georg Hermes and Christoph Schönberger (eds), *Festschrift für Rainer Wahl* (Duncker & Humblot 2011), 527–551 (539, 549–551 et passim); see also Maurer and Waldhoff (n. 80), § 7, paras 33–34. Against this approach Jestaedt (n. 83), para. 40. In favour of a synthesis Ludwigs 'Kontrolldichte' (n. 75), 410–411; see also BVerwGE 167, 33 (para. 15).

Judicial practice has taken up the doctrine of normative authorisation.⁸⁹ Due to the requirement for effective legal protection under Art. 19 para. 4 of the Basic Law, courts generally assume that ambiguous legal terms are subject to full judicial review, but in exceptional cases, they consider a reduced level of judicial control to be appropriate if the statute provides for this. In this respect, there is no difference between a margin of discretion on the part of the statutory requirements and facts⁹⁰ and on the part of the legal consequences when the facts of a provision are present.⁹¹ The doctrine of normative authorisation applies to both parts of an authorising provision with a conditional norm structure.⁹² However, the differentiation between the two parts has often been emphasised. Both in terms of statutory requirements and factual findings, as well as in terms of legal consequences, judicial review depends on whether the statute grants the agency a final discretionary power. Regarding statutory requirements and facts an implicit authorisation must often be derived from the provision, whereas in terms of legal consequences there is generally an explicit statutory authorisation. The latter can be seen when the statute provides that the agency ‘may’ or ‘can’ act in a certain way or in several ways.

The development and discussion of the doctrine of normative authorisation have so far been predominantly based on the perspective of individual case scenarios. However, this path dependency should be left behind and the view broadened. Other spheres of discretionary decisions by agencies should be included in our thinking about the doctrine of normative authorisation.⁹³ Conventional German doctrine of discretionary agency decisions shows idiosyncrasies, particularly with regard to the path-dependent differentiation between the statutory requirements and the legal consequences within the framework of

⁸⁹ BVerfGE 61, 82 (111); BVerfGE 129, 1 (paras 68-76); BVerfGE 140, 197 (para. 93); BVerfGE 149, 407 (para. 34); BVerfGE 152, 345 (para. 73); BVerwGE 62, 86 (98); BVerwGE 129, 27 (para. 26); BVerwGE 153, 36 (para. 17); BVerwGE 170, 273 (para. 14).

⁹⁰ This has been recognised by courts namely in the following categories: examinations and evaluations (BVerfGE 84, 34 (52)), personal assessments in the public sector (BVerwGE 128, 329 (para. 44)), judgmental decisions by pluralistic bodies (BVerwGE 91, 211 (215-216), but constrained by BVerwGE 167, 33 (para. 19)), and science-based and prognostic decisions (BVerwGE 72, 300 (316-317)). See on further (counter-)examples Schmidt-Aßmann, ‘Art. 19 Abs. 4’ (n. 76), para. 197.

⁹¹ For abandoning the distinction, which goes back to Bachof (n. 77), between discretionary powers on the part of legal requirements and on the part of legal consequences Jestaedt (n. 83), paras 14-26, 31; Ludwigs, ‘Kontrolldichte’ (n. 75), 407-409; Ludwigs, ‘Dogmatische Grundlagen’ (n. 86), para. 65; Wendel (n. 77), 26-28.

⁹² The doctrine also applies to provisions with a final structure, see Jestaedt (n. 83), paras 18, 22.

⁹³ This enables to identify general structures of a decision-making power with limited judicial review, see Jestaedt (n. 83), para. 21.

a conditional norm structure.⁹⁴ For the purpose of opening up German doctrine to comparison, attention should be shifted away from this hardened dichotomy and from the perspective limited to individual case scenarios – the perspective needs to be widened to include other areas, in particular discretionary rulemaking powers.⁹⁵ Accordingly, some scholars include this power within the domain of the doctrine,⁹⁶ even though this is clearly not (yet) its main focus. In order to link the doctrine of normative authorisation to discretionary rulemaking and to open it up for the comparative analysis pursued here, the doctrine's constitutional foundations should be addressed. Since the literature on the topic of judicial review on agency decisions is vast – a never-ending topic, also in Germany⁹⁷ –, the constitutional and conceptional foundations can only be discussed in sufficient depth to provide a useful frame of reference.

2. Constitutional and Conceptional Foundations of the Doctrine of Normative Authorisation

Institutionally, the doctrine of normative authorisation is based on the German constitutional understanding of a parliament that politically, and in terms of democratic legitimacy, occupies an elevated position in the power structure.⁹⁸ The doctrine operates within the framework of a variety of constitutional principles, which are specified by the doctrine, but which in turn also guide and justify the doctrine.

⁹⁴ Shu-Peng Hwang, 'Allgemeines Verwaltungsermessen' in: Wolfgang Kahl and Markus Ludwigs (eds), *Handbuch des Verwaltungsrechts*, Vol. V (C. F. Müller 2023), § 128, para. 7.

⁹⁵ Ludwigs, 'Kontrolldichte' (n. 75), 409; Ludwigs 'Dogmatische Grundlagen' (n. 86), paras 64-66; see also Jestaedt (n. 83), paras 21, 31-33.

⁹⁶ Christian Bickenbach, 'Exekutives Normsetzungsermessen' in: Wolfgang Kahl and Markus Ludwigs (eds), *Handbuch des Verwaltungsrechts*, Vol. V (C. F. Müller 2023), § 132, paras 32-37; Matthias Herdegen, 'Gestaltungsspielräume bei administrativer Normgebung – Ein Beitrag zu rechtsformabhängigen Standards für die gerichtliche Kontrolle von Verwaltungshandeln', AöR 114 (1989), 607-643 (613, 620-623); see also Peter Badura, 'Das normative Ermessen beim Erlass von Rechtsverordnungen und Satzungen' in: Peter Selmer and Ingo von Münch (eds), *Gedächtnisschrift für Wolfgang Martens* (Walter de Gruyter 1987), 25-37; Armin von Bogdandy, *Gubernative Rechtsetzung* (Mohr Siebeck 2000), 368-369; Markus Möstl, 'Normative Handlungsformen, Allgemeiner Teil' in: Dirk Ehlers and Hermann Pünder (eds), *Allgemeines Verwaltungsrecht* (16th edn, C. F. Müller 2022), § 19, paras 6, 28; Christian Weitzel, *Justitiabilität des Rechtsetzungsermessens* (Duncker & Humblot 1998), 110-111; Johanna Wolff, 'Rechtsverordnung' in: Wolfgang Kahl and Markus Ludwigs (eds), *Handbuch des Verwaltungsrechts*, Vol. V (C. F. Müller 2023), § 153, paras 12, 14.

⁹⁷ Christoph Külpmann, 'Anmerkungen zum gegenwärtigen Stand des Umweltrechtsschutzes', DVBl 134 (2019), 140-145 (143).

⁹⁸ See Ludwigs, 'Dogmatische Grundlagen' (n. 86), para. 29; Schmidt-Aßmann, 'Art. 19 Abs. 4' (n. 76), para. 187.

a) In Germany, the principle of *separation of powers* is understood as an intertwining of powers in which the functions are not strictly separated between different organs, but are often interrelated, with a system of mutual checks and balances.⁹⁹ Furthermore, the principle requires a functional allocation of powers, so that government tasks should be assigned to the body that has the best organisational, material, and functional resources to carry out the tasks appropriately.¹⁰⁰

The doctrine of normative authorisation concretises the postulate of checks and balances by placing the degree of judicial control of discretionary agency decisions in the hands of the legislature: checks and balances as determined by the parliament which cannot decide entirely freely on the authorisation of agencies, but is subject to the constitutional requirement for a sufficiently substantial reason.¹⁰¹ In principle, judicial review must not be undermined.¹⁰² A further check is provided by the parliamentary procedure and its publicity.¹⁰³ The fact that the parliament is not entirely free to normatively authorise the executive branch is particularly apparent in the delegation of rulemaking power, for which Art. 80 of the Basic Law provides specific requirements.¹⁰⁴

Furthermore, the doctrine of normative authorisation enables an allocation of powers that is appropriate to the organisational, material, and functional resources of institutions. By assigning final decision-making authority to agencies, the legislature can take into account the functional limits of the judiciary and place the decision in the hands of agencies, which have expertise in the relevant area and may have the appropriate problem-solving skills.¹⁰⁵ The same is true when the parliament delegates rulemaking power to the executive branch. In doing so, it can make use of the executive's proximity to the subject matter and its expertise and relieve itself of some workload. Regardless of whether a statute authorises agencies to decide at their own discretion in individual cases or to issue rules, the doctrine of normative authorisation concretises the principle of the separation of powers in the German understanding by enabling control and an allocation of powers suitable to institutional functions and capacities.

⁹⁹ BVerfGE 3, 225 (247); BVerfGE 96, 375 (394); BVerfGE 126, 78 (120); BVerfGE 143, 101 (para. 118).

¹⁰⁰ BVerfGE 150, 1 (para. 197); BVerfGE 157, 30 (para. 60).

¹⁰¹ BVerfGE 129, 1 (22-23); BVerwGE 170, 273 (para. 14).

¹⁰² Ludwigs, 'Dogmatische Grundlagen' (n. 86), para. 28.

¹⁰³ Bernd Grzeszick, 'Vorrang und Vorbehalt des Gesetzes' in: Wolfgang Kahl and Markus Ludwigs (eds), *Handbuch des Verwaltungsrechts*, Vol. III (C. F. Müller 2022), § 72, para. 5.

¹⁰⁴ According to Art. 80 para. 1 of the Basic Law, the authorising statute must be sufficiently determined with regard to content, purpose and scope of the authorisation.

¹⁰⁵ See Maurer and Waldhoff (n. 80), § 7, para. 32.

b) The doctrine of normative authorisation is also subject to the influence of the *principle of democracy* and its German idiosyncrasies.¹⁰⁶ Former Judge of the Federal Constitutional Court, Ernst-Wolfgang Böckenförde, introduced the theory of the chain of legitimacy, according to which all exercise of state power must be derived from, as well as determined and controlled by, the people.¹⁰⁷ Firstly, this traceability can be achieved through personal legitimacy, i.e. through the appointment and dismissal of civil servants; secondly, it can be achieved through institutional legitimacy, i.e. through the recognition of institutions and their functions by the constitutional order; thirdly, the traceability of state power to the people is achieved through legitimacy in terms of content and substance.¹⁰⁸ The latter can be attained both by the statute to which the government agency is bound and by institutional control.¹⁰⁹ It is not necessary for all three elements of legitimacy to be fully satisfied in every exercise of state power; rather, it is necessary that a sufficient level of legitimacy is always achieved.¹¹⁰ In this context, a compensation can come into play.¹¹¹ If there is less institutional control, e.g. by the courts, this can be compensated for by substantive instructions by the statute: less legitimacy through less control, but at the same time more legitimacy through stricter statutory instructions.¹¹² This applies to the topic discussed here: Limited judicial review of agency decisions results in a legitimacy deficit. This deficit, however, is compensated for by the legitimacy-creating statutory provision that judicial review should be limited. A sufficient traceability to the will of the people and thus sufficient democratic legitimacy is not present if the agencies' discretionary power is not based on a statutory authorisation. In this case, agency decisions are indeed personally and institutionally legitimised, but not in terms of content and substance.

The doctrine of normative authorisation places the parliamentary legislator at the centre. Its authorisation is required in order to justify limited judicial

¹⁰⁶ See Ludwigs, 'Kontrolldichte' (n. 75), 410.

¹⁰⁷ Ernst-Wolfgang Böckenförde, 'Demokratie als Verfassungsprinzip' in: Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Vol. II (3rd edn, C. F. Müller 2004), § 24, para. 12.

¹⁰⁸ Böckenförde (n. 107), paras 14-22.

¹⁰⁹ Böckenförde (n. 107), paras 21-22.

¹¹⁰ Böckenförde (n. 107), paras 22-23.

¹¹¹ Böckenförde (n. 107), para. 23.

¹¹² However, this idea of compensation must take into account that Böckenförde considered subject-matter legitimacy primarily in *intrainstitutional* control, rather than in *interinstitutional* control, as applied in judicial review of agency decisions, see Böckenförde (n. 107), paras 21-22. Nevertheless, when it comes to the question of whether agency decisions are lawful (in contrast to expedient), they are also legitimised by *interinstitutional* control.

review and executive discretionary decisions. The parliament is also the main political decision-making body according to the theory of the chain of legitimacy: It is directly elected by the people and acts through statutes that shape the executive and judicial branches.¹¹³ The parliament is the operational centre which, within constitutional limits and with its elevated democratic legitimacy¹¹⁴, decides on limited judicial control and agency discretion. The doctrine of normative authorisation ensures that agencies' final discretion and the associated judicial deference can effectively be traced back to the will of the people.

c) Furthermore, in German constitutional law, the principles of democracy and the rule of law give rise to the idea that *decisions on major questions by the executive must be based on a parliamentary act* that has, as mentioned, a prominent democratic function.¹¹⁵ Significant issues must be decided in parliament, which increases publicity and legitimacy.¹¹⁶ The statutory guidance of agency actions is in the sense of this concept realised through the doctrine of normative authorisation: The question of agencies' final discretionary powers, which is a significant issue, must be decided by the parliament and cannot be left to other bodies. This is bolstered by the prevailing German understanding of what is a major question and therefore requires a parliamentary decision. An act of parliament is particularly indispensable when fundamental rights are affected,¹¹⁷ such as in the issue of agencies' final discretionary powers: the fundamental right to effective legal protection under Art. 19 para. 4 of the Basic Law.¹¹⁸

In Germany, the requirement for a parliamentary act on significant issues is particularly clear when it comes to rulemaking by the executive branch. In this respect, the doctrine of normative authorisation is explicitly prescribed in constitutional law. Under Art. 80 para. 1 of the Basic Law, executive rulemaking requires an authorisation in the form of a parliamentary statute.¹¹⁹ A popular interpretation of Art. 80 of the Basic Law is that this

¹¹³ Horst Dreier and David Kuch, 'Demokratische Legitimation der Verwaltung' in: Wolfgang Kahl and Markus Ludwigs (eds), *Handbuch des Verwaltungsrechts*, Vol. III (C.F. Müller 2022), § 124, para. 28.

¹¹⁴ BVerfGE 147, 50 (para. 198); Böckenförde (n. 107), para. 16.

¹¹⁵ BVerfGE 41, 251 (259 f.); BVerfGE 141, 143 (para. 59); BVerfGE 166, 93 (para. 182); see Grzeszick (n. 103), paras 24-25.

¹¹⁶ Grzeszick (n. 103), para. 5.

¹¹⁷ BVerfGE 47, 46 (79); BVerfGE 141, 143 (para. 59); BVerfGE 143, 38 (para. 38).

¹¹⁸ This also applies to the rulemaking power of the executive branch, which falls under Art. 19 para. 4 of the Basic Law, see BVerfGE 115, 81 (92); Andreas Funke, 'Art. 19 IV' in: Frauke Brosius-Gersdorf (ed.), *Dreier Grundgesetz-Kommentar*, Vol. II (4th edn, Mohr Siebeck 2023), para. 13.

¹¹⁹ See Michael Brenner, 'Art. 80' in: Peter M. Huber and Andreas Voßkuhle (eds), *Grundgesetz-Kommentar*, Vol. II (8th edn, C. H. Beck 2024), para. 28.

provision has a blocking effect on executive rulemaking that has not been expressly delegated.¹²⁰ The authorisation to issue rules inherently implies discretionary powers on the part of the issuing body, within the limits of the statutory authorisation.¹²¹ The only matters that can be judicially reviewed are a) whether the delegation itself is lawful, b) whether the legal limits, in particular those set by the delegating law, are observed, c) whether the decision is sufficiently informed and d) whether the relevant circumstances and interests are sufficiently considered.¹²²

IV. German-Style Doctrine of Normative Authorisation in US Administrative Law

After considering whether the *Loper Bright* Court recognises something like a doctrine of normative authorisation as a limit of judicial review of discretionary agency decisions (1.), this section presents the proposal that US administrative law could focus on the authorising provision in order to determine discretionary powers and the corresponding judicial deference, thereby converging with the German doctrine (2.). It contextualises and elaborates on potential counterarguments (3.) before introducing arguments in favour of the proposal (4.).

1. Notion of a Doctrine of Normative Authorisation in *Loper Bright*

The *Loper Bright* Court acknowledges normative authorisations: ‘In a case involving an agency, of course, the statute’s meaning may well be that the

¹²⁰ Hartmut Bauer, ‘Art. 80’ in: Horst Dreier (ed.), *Grundgesetz-Kommentar*, Vol. II (3rd edn, Mohr Siebeck 2015), para. 13; Kathrin Groh, ‘Verwaltungsvorschrift’ in: Wolfgang Kahl and Markus Ludwigs (eds), *Handbuch des Verwaltungsrechts*, Vol. V (C.F. Müller 2023), § 155, para. 8; Möstl (n. 96), paras 8-10; Johannes Saurer, *Die Funktionen der Rechtsverordnung* (Duncker & Humblot 2005), 341; see also BVerwGE 121, 103 (110); Grzeszick (n. 103), paras 38-46 (within the realm of major questions that are relevant for fundamental rights). Differing view von Bogdandy (n. 96), 482-483. With respect to executive law-making in the form of ordinances within the framework of administrative self-government, e.g. at the municipal level, an authorisation by law is also required for the acceptance of regulatory discretion, see Bickenbach (n. 96), para. 18.

¹²¹ Bickenbach (n. 96), para. 7-8, 18; Schmidt-Aßmann, ‘Art. 19 Abs. 4’ (n. 76), paras 217-217a; see also von Bogdandy (n. 96), 347-354, 366; Saurer, (n. 120), 260-265; detailed Thomas von Danwitz, *Die Gestaltungsfreiheit des Ordnungsgebers* (Duncker & Humblot 1989).

¹²² See Schmidt-Aßmann, ‘Art. 19 Abs. 4’ (n. 76), para. 217a.

agency is authorised to exercise a degree of discretion. [The U.S.] Congress has often enacted such statutes. For example, some statutes “expressly delegate” to an agency the authority to give meaning to a particular statutory term. [...] Others empower an agency to prescribe rules to “fill up the details” of a statutory scheme, [...] or to regulate subject to the limits imposed by a term or phrase that “leaves agencies with flexibility,” [...] such as “appropriate” or “reasonable.”¹²³

This section of *Loper Bright* shows that US administrative law also knows normative authorisations as a limit of judicial control of agency decisions. At least before *Loper Bright*, US administrative law acknowledged both explicit and implicit authorisations.¹²⁴ But the same is true after *Loper Bright*.¹²⁵ These delegations refer to both the authorisation of rule-making power and of adjudicatory decisions in individual cases. The formulation that statutes ‘empower an agency to prescribe rules to “fill up the details”’ should not be understood as excluding adjudicatory agency decisions from a doctrine of normative authorisation. The *Chevron* doctrine already referred to decisions in individual case scenarios,¹²⁶ and there is no reason why, after *Loper Bright*, normative authorisation should now be treated more strictly in individual case decisions than in rulemaking. Rather, it can be argued that if authorisation for discretionary rulemaking is expressly recognised, as the cited section shows, this must also apply to individual decisions that have less far-reaching social implications than rulemaking. The specific wording chosen by the *Loper Bright* court reflects the special significance of rulemaking in US administrative law¹²⁷ and does not exclude the delegation of discretionary powers with regard to individual cases.

2. Proposal: Focus on Authorising Provision to Determine Discretionary Powers in US Administrative Law

German doctrine of normative authorisation recognises both explicit and implicit authorisations. With regard to the delegation of rulemaking power,

¹²³ US Supreme Court, *Loper Bright* (n. 4), 17.

¹²⁴ On further typology Hickman and Wildermuth (n. 2), 7-19.

¹²⁵ It is critical now to find those implicit delegations see Matthew C. Stephenson, ‘The Gray Area: Finding Implicit Delegations to Agencies after *Loper Bright*’, Admin L. Rev. 78 (2026), 99-199.

¹²⁶ US Supreme Court, *United States v. Mead Corp.*, judgment of 18 June 2001, 533 U.S. 218.

¹²⁷ See in part IV. 3.

according to Art. 80 of the Basic Law, an explicit and narrowly defined delegation is required.¹²⁸ The delegation of rulemaking power, however, does include a scope for discretionary decisions, a sphere for self-programming. Applying this approach to US administrative law, an explicit, narrowly defined delegation would be required for executive rulemaking. And a delegation to the agency to issue rules could, depending on the interpretation of the delegating parliamentary act, also mean an authorisation to decide discretionarily. The judiciary has to review whether the delegation itself is lawful, whether the limits of the delegation have been complied with and whether the delegation also contains the authorisation for the agency to decide discretionarily. An implicit authorisation of discretionary powers without the need for an explicit delegation would suffice for adjudicatory decisions in individual case scenarios. In all circumstances, whether individual case scenarios or rulemaking, normative authorisation in a parliamentary act is crucial in order to assume final discretionary powers on part of agencies, which cannot be fully reviewed by courts. In line with the German doctrine, the question of discretionary decisions and, correspondingly, judicial deference would be closely linked to the parliamentary act.

Although this is not claimed here, one might think about going beyond the German doctrine and requiring not only explicit delegation of rulemaking power, but also an explicit authorisation for discretionary agency decisions and corresponding judicial deference. In Germany, implicit statutory authorisations for discretionary decisions are sufficient.¹²⁹

The proposal presented here is not a result that can be deduced from US law, whether from the Constitution, statutes, or case law. In the section cited above, the *Loper Bright* court seems to acknowledge explicit and also implicit delegations of discretionary rulemaking authority.¹³⁰ However, this is contested and it remains unclear to what extent implicit delegations are to be accepted.¹³¹ That US administrative law could be oriented towards

¹²⁸ See at n. 104.

¹²⁹ Art. 80 of the Basic Law establishes the requirement for an explicit delegation of rulemaking power, but does not require explicit authorisation for discretionary decisions, see at n. 121.

¹³⁰ See US Supreme Court, *Loper Bright* (n. 4), 17.

¹³¹ Coglianese and Walters (n. 10), 42-43; Merrill (n. 9), 264-265; considering implicit delegations to be sufficient Adrian Vermeule, 'Implied Delegations After *Loper*', *Yale Journal on Regulation*, Notice & Comment, 9 July 2024; Vermeule, 'Old Regime' (n. 15), 249-251; reading *Loper Bright* as if it required an explicit ('clear') granting of authority Bolinder, 'Litigating *Loper Bright*' (n. 14), 240-245; Hickman and Wildermuth (n. 2), 16-18, treating 'general authority/housekeeping delegations' differently from specific delegations, Hickman and Wildermuth (n. 2), 36.

the German doctrine of normative authorisation regarding the requirement for a statutory authorisation of discretionary powers is rather a proposal that could be taken up by Congress¹³² or courts. The basic orientation towards German doctrine cannot be seen as the only correct solution to deal with the uncertainty left behind by *Loper Bright*. However, Congress could be encouraged to either pass a law providing that explicit delegations are required to authorise agencies to issue rules at their own final discretion. Alternatively, informed by the German approach, Congress could be aware that it is especially reasonable to explicitly authorise the agency. US Courts could use the German doctrine as a point of reference to clarify the question of when there is a statutory authorisation for agency discretion.

No suggestion based on the German doctrine is made here as to when implicit authorisation for discretionary powers in individual case scenarios should be assumed in US administrative law. In this regard, the article must confine itself to a few comments on convergences and divergences: In German administrative law, the mere ambiguity of the statutory norm does not suffice to justify discretionary powers in individual cases.¹³³ In light of the doctrine of normative authorisation, it depends on whether the norm, taking precedents into account, can be interpreted in such a way that it recognises discretionary power. In the US, the ambiguity of the norm was decisive in the first step of the *Chevron* doctrine. The vagueness could be seen as an implicit authorisation. It remains to be seen whether the ambiguity of the norm plays a similar critical role after *Loper Bright*.¹³⁴ If one follows the relabelling approach,¹³⁵ ambiguity could continue to be decisive in the sense that courts now understand implicit delegation as the only correct interpretation of an ambiguous provision. Ambiguity seems to be a necessary condition – without it, an implicit authorisation can hardly be assumed. However, it must be doubted whether ambiguity is also a sufficient condition.¹³⁶ Following *Loper Bright*'s reasoning – given that the case expressly overrules *Chevron* –, it is hardly possible to assume that ambiguity is a sufficient condition for proceeding to a second step and conducting a reasonableness test.¹³⁷ If so, *Chevron* would have survived its

¹³² On the role of Congress in building a new administrative state Emerson (n. 14), 1325-1331.

¹³³ See at n. 84.

¹³⁴ It is critical now to find implicit delegations, see Stephenson (n. 125).

¹³⁵ See at n. 61.

¹³⁶ Hickman and Wildermuth (n. 2), 16; Merrill (n. 9), 257, 259-260.

¹³⁷ Additionally, the Supreme Court (*Loper Bright* (n. 4), 21) explicitly states, that '*Chevron* cannot be reconciled with the APA [...] by presuming that statutory ambiguities are implicit delegations to agencies'.

overruling. Therefore, the critical question is: What needs to be added to the unclear statutory provision in order for an implicit authorisation to be assumed? This question also arises in Germany. However, the starting points diverge: While cases with precedential value exist in Germany that help to determine whether discretionary authority has been granted by statute,¹³⁸ *Loper Bright* has somewhat reset the situation in the US back to zero.¹³⁹ Case law must be established to serve as a guide for assessing whether the statute contains an implicit authorisation of agency discretion. So ironically, due to its precedents, German administrative law is currently better suited to determining statutorily authorised discretionary powers of agencies than the US common law system, which heavily relies on precedents and case law.

The proposal presented here concerns the basic principle that, as in Germany, in US administrative law it should depend on the statute and its interpretation whether an authorisation to decide discretionarily exists and, correspondingly, whether the judiciary must defer to the agency decision. In addition, this article suggests, that detailed explicit parliamentary authorisation should be required when delegating rulemaking power and that this can imply a power on part of the agencies to decide discretionarily. A discussion of whether other features of the German doctrine of normative authorisation, such as the case categories in which an implicit authorisation for discretionary powers in individual case scenarios can be assumed,¹⁴⁰ could or even should be transferred to US administrative law would require detailed further considerations. Such an extensive transfer of the doctrine of normative authorisation runs a particular risk of failing to take relevant contexts into account.

3. Contextualisation and Counterarguments

In order to be acceptable, the proposal made here must be contextualised¹⁴¹ and counterarguments must be considered. The following takes into account divergences between the legislative bodies' capabilities to pass laws

¹³⁸ See in n. 90.

¹³⁹ The remaining *Skidmore* deference (see at n. 51) does not change that, because it does not refer to an implicit delegation, but rather recognises that the agencies' interpretations can help the courts in their task of determining the law.

¹⁴⁰ See in n. 90.

¹⁴¹ On the need for a contextual comparative approach, see Uwe Kischel, *Rechtsvergleich* (C. H. Beck 2015), 187-188 et passim; Eberhard Schmidt-Aßmann, 'Zum Standort der Rechtsvergleichung im Verwaltungsrecht', *ZaöRV* 78 (2018), 807-862 (824-836).

(a), between a parliamentary and a presidential system of government (b), and the conventional differences in the significance of statutory instructions for agency actions (c).

a) One can perceive an important difference in the institutional set up in the capability of the legislative bodies to act. This could be invoked as an argument against the requirement for an explicit delegation for discretionary rulemaking authority and against the general idea that judicial deference should depend on a statutory authorisation. Executive rulemaking could be necessary on a large scale if Congress itself were unable to regulate.

Indeed, many observers have concluded that the US Congress often has difficulties enacting legislation due to dysfunctions; these include strict bicameralism, party polarisation, and filibuster.¹⁴² In contrast, no parliamentary gridlock can be observed at the federal level in Germany.¹⁴³ This has a significant impact on the importance of executive rulemaking. If parliamentary statutes are completely lacking or cannot be enacted with sufficient detail, the government can either use executive regulations to steer policies, provided this is legally permissible, or it must refrain from doing so in a libertarian manner, diminishing its capacity to operate on a general level. Against this background, executive rulemaking has a different status in the US than it has in Germany.¹⁴⁴

Congressional paralysis puts pressure on US courts to give more leeway to agencies, because the rulemaking by agency can, to a certain extent, replace congressional law-making. In order to serve as a substitute, administrative rulemaking must be efficient. The efficiency hinges on the agencies' independent ability to interpret their empowering statutes. Without this ability, the validity of agency rules is threatened. Executive rulemaking was therefore easier under the *Chevron* doctrine and has been downgraded

¹⁴² In detail Sara A. Binder, *Stalemate: Causes and Consequences of Legislative Gridlock* (Brookings Institution Press 2003); Sarah A. Binder, 'The Dysfunctional Congress', *Annual Review of Political Science* 18 (2015), 85-101; Marc S. Jacob, Barton E. Lee and Gabriele Gratton, 'From Gridlock to Polarization', *UNSW Economics Working Paper* 2023-11, 8 February 2024, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4521276>, last access 9 April 2026; Thomas E. Mann and Norman J. Ornstein, *It's Even Worse Than It Looks* (Basic Books 2012); Andrew Reeves and Jon C. Rogowski, 'Unilateral Inaction: Congressional Gridlock, Interbranch Conflict, and Public Evaluations of Executive Power', *Legislative Studies Quarterly* 47 (2022), 427-457; Michael J. Teter, 'Gridlock, Legislative Supremacy, and the Problem of Arbitrary Inaction', *Notre Dame L. Rev.* 88 (2013), 2217-2232; see also Buse (n. 73); Neitz (n. 65), 124-131; Plebuch and Pielhoff (n. 5), 194-195.

¹⁴³ Plebuch and Pielhoff (n. 5), 194-195, 199.

¹⁴⁴ Nevertheless, in Germany, the necessity of executive rulemaking is also generally recognised, see Maurer and Waldhoff (n. 80), § 4, para. 22; Brenner (n. 119), para. 22.

under *Loper Bright* – particularly if one understands this case as a disruption.¹⁴⁵

There is an expectation that a lowering of the government's ability to act due to the restriction of executive rulemaking powers will not occur because the willingness to compromise in Congress increases with this restriction.¹⁴⁶ However, such an expectation depends on the degree of polarisation and the strength of libertarian forces.¹⁴⁷ Deregulation is booming under the Trump administration,¹⁴⁸ so such an expectation will likely remain an unfulfilled hope for the time being.¹⁴⁹ Therefore, the loss of executive regulatory powers as a result of *Loper Bright* is unlikely to be compensated for by increased congressional activity. With a parliament that is active in steering policies, as in Germany, the possibility of executive rulemaking is less important. The state apparatus is able and willing to exercise power, even if administrative agencies do not predominantly take on the rulemaking task.

However, the argument about congressional gridlock against the requirement for explicit, narrowly defined delegations of rulemaking authority does not carry too much weight, because Congress is not required to agree on details and decide on them, but simply to provide delegations. Congress must

¹⁴⁵ See at n. 55.

¹⁴⁶ Yuval Levin, 'The Supreme Court Thinks That by Arguing More, We Can Be Less Divided', *The New York Times*, 28 June 2024, <www.nytimes.com/2024/06/28/opinion/supreme-court-chevron-congress.html>, last access 9 April 2026; Adam White, 'Constitutional Government After *Chevron*?', *Law & Liberty*, 1 May 2024, <<https://lawliberty.org/forum/constitutional-government-after-chevron/>>, last access 9 April 2026; see also Bolinder, 'Fishing' (n. 61), 391-392; Bolinder, 'Litigating *Loper Bright*' (n. 14), 263; Eberhard Schmidt-Aßmann, *Das Verwaltungsrecht der Vereinigten Staaten von Amerika* (Nomos 2021), 356; corresponding statements collected by Daniel E. Walters, 'Will *Loper Bright* Spur a Congressional Renaissance?', *Texas A&M University School of Law Legal Studies Research Paper*, 16 April 2024, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4792884>, last access 9 April 2026, 5-9.

¹⁴⁷ It is not surprising that libertarian commentators welcome governmental gridlock, see Marcus E. Ethridge, 'The Case for Gridlock', *Cato Institute Policy Analysis* No. 672, 27 January 2011, <<https://www.cato.org/sites/cato.org/files/pubs/pdf/PA672.pdf>>, last access 9 April 2026; see also Bolinder, 'Fishing' (n. 61), 391.

¹⁴⁸ See, e.g., Executive Order No. 14192 (6 February 2025), prescribing that, in general, whenever an agency promulgates a new regulation, it shall identify at least 10 regulations to be repealed (Sec. 3 (a)); overview provided by Coral Davenport, 'Inside Trump's Plan to Halt Hundreds of Regulations', *The New York Times*, 15 April 2025, <<https://www.nytimes.com/2025/04/15/us/politics/trump-doge-regulations.html>>, last access 9 April 2026.

¹⁴⁹ This is bolstered by an empirical study, referring to the state level, on the question of whether *Loper Bright* will positively effect Congress activity; it does not find a significant empirical basis for the assumption that Congress will become more active, Walters (n. 146), 9-33.

decide whether agencies should be authorised to issue regulations at their own discretion and whether they, correspondingly, should enjoy judicial deference. Congress can transfer decisions that it does not want or is unable to make itself in the hands of the executive branch,¹⁵⁰ which has the necessary expertise.¹⁵¹

b) The difference between a presidential and a parliamentary system of government¹⁵² does not preclude the US from being inspired by the German doctrine. A criticism, however, could be formulated as follows: The persuasiveness of the doctrine of normative authorisation is based on the primacy of the democratically legitimated parliament.¹⁵³ As described, in the German parliamentary system the Bundestag occupies a prominent position within the political structure.¹⁵⁴ In the case of a presidential system, in contrast, democratic legitimacy is also established through a chain of legitimacy leading to the elected president, so that there seems to be no need for the same connection to a parliamentary authorisation as in a parliamentary system of government, for example in Germany.

It is true that this divergence could stand in the way of an approach that requires agencies to be more closely bound by a parliamentary act. Democratic legitimacy of discretionary agency decisions, ensured through oversight by a directly elected president, can be achieved without the need for a legally certain parliamentary statute,¹⁵⁵ which is required in a parliamentary system of government such as that in Germany. However, in the consequence of *Loper Bright*, it is not the agencies that have the final say, but rather judges that have to deal with the question of whether agencies are authorised to decide at their own final discretion.¹⁵⁶ The courts seem to have *de facto*

¹⁵⁰ Skeptical about Congress' efforts to amend regulatory regimes accordingly Craig (n. 15), 2747.

¹⁵¹ In Germany this is also a common reason for the delegation of legislative powers, see Bickenbach (n. 96), para. 27; Brenner (n. 119), paras 12, 17. On the discussion about expertise in and after *Loper Bright* Kumar (n. 55).

¹⁵² Overview by Schmidt-Aßmann, *Verwaltungsrecht der Vereinigten Staaten* (n. 146), 21-22.

¹⁵³ See in part III. 2.

¹⁵⁴ See Ludwigs, 'Dogmatische Grundlagen' (n. 86), para. 29; Schmidt-Aßmann, 'Art. 19 Abs. 4' (n. 76), para. 187.

¹⁵⁵ However, personal democratic legitimacy is also considered to be weak in the US, see Hermann Pünder, *Exekutive Normsetzung in den Vereinigten Staaten von Amerika und der Bundesrepublik Deutschland* (Duncker & Humblot 1995), 98-99. This supports the point made here. The issue is not mitigated by participatory elements, as is basically the case with executive rulemaking in the US (see p. 248), since there is a shift in power towards the courts and away from executive power, where participatory elements of legitimacy are relevant.

¹⁵⁶ See at n. 66.

discretionary power in deciding that. If courts have the final say, it is an issue that is independent of the differences between a parliamentary and a presidential system of government. If we think about applying the doctrine of normative authorisation to the US presidential system, the persuasiveness of the doctrine remains intact.

c) Compared to Germany, US administrative law provides weaker instructions of executive actions, particularly rulemaking, by parliamentary statutes.¹⁵⁷ This can also be attributed to the difference between a presidential and a parliamentary system of government: The stand-alone democratic legitimacy of the executive branch strengthens its position and can justify less statutory guidance.¹⁵⁸ Furthermore, the legitimising effect of parliamentary statutes is not given such high priority in the US system because administrative decisions are also legitimised to a considerable extent through participation and communication.¹⁵⁹ In this sense, unlike its German counterpart, US administrative law allows for extensive public participation through the notice-and-comment rulemaking procedure under § 553 APA. In Germany, however, in line with the theory of the chain of legitimacy,¹⁶⁰ parliamentary statutes are particularly important instruments for establishing democratic legitimacy.¹⁶¹ The principle that requires a statutory provision on major questions¹⁶² therefore does not play a role in US administrative law comparable to the German system.¹⁶³

As described earlier, the doctrine of normative authorisation is based on the German focus on parliamentary acts. The proposal to adopt a stronger orientation towards parliamentary authorisations in US administrative law in accordance with the German doctrine is moving in a new direction. This offers the opportunity to distribute power in the spirit of the separation of powers at a time when the President is considered unassailably powerful.

¹⁵⁷ See Schmidt-Aßmann, *Verwaltungsrecht der Vereinigten Staaten* (n. 146), 187.

¹⁵⁸ See Schmidt-Aßmann, *Verwaltungsrecht der Vereinigten Staaten* (n. 146), 21.

¹⁵⁹ Hermann Pünder, 'Democratic Legitimation of Delegated Legislation', ICLQ 58 (2009), 353-378 (369-371); Schmidt-Aßmann, *Verwaltungsrecht der Vereinigten Staaten* (n. 146), 384-385.

¹⁶⁰ See Böckenförde (n. 107).

¹⁶¹ See Dreier and Kuch (n. 113).

¹⁶² See at n. 115.

¹⁶³ Schmidt-Aßmann, *Verwaltungsrecht der Vereinigten Staaten* (n. 146), 21, 92-93; see also Oliver Lepsius, *Verwaltungsrecht unter dem Common Law* (Mohr Siebeck 1997), 207-208. This principle should not be confused with the US major question doctrine (see at n. 14), as the latter concerns the requirement for clear legal authorisation for major questions, whereas the German principle concerns the prior question of which issues must be decided by parliamentary act. The German principle is rather comparable to the nondelegation doctrine (see at n. 2).

However, it is not primarily the executive branch that is being removed from power by the proposal for a stronger focus on parliamentary authorisation. This power had already been curtailed by *Loper Bright*. Rather, in the consequence of *Loper Bright*, it is primarily up to the judiciary to decide whether agencies have been authorised to exercise discretionary powers to which the courts defer.¹⁶⁴ The proposal for a focus on the parliamentary authorisation clarifies the crucial criterium for courts to decide that. The idea does not ignore the legitimising effect of participation in executive rulemaking. It does not shift power from the executive branch, which is to some extent legitimised through participation, to parliamentary statutes, but rather clarifies the criterion for courts and thus shifts power to some extent from them to Congress.

The proposal calls for statutory authorisations and, thereby, for a stronger orientation towards Congress. Thus, the proposal also addresses, to a certain extent, the criticism from a conservative perspective that the limited legislative power in the hands of Congress was undemocratically substituted by an unaccountable bureaucracy.¹⁶⁵ Legislative power is primarily assigned to Congress, which, however, may delegate and thus cope with its difficulties in acting and make use of administrative expertise.

4. Arguments in Favour of the Proposal

In order to reason for an orientation of the US administrative law towards the German doctrine, this paper considers a general convergence between both systems regarding judicial review of discretionary decisions after *Loper Bright* (a), and the transferability of the rationale behind Art. 80 para. 1 of the Basic Law to the US level, particularly in light of the expected consequences of the end of *Chevron* (b).

a) The tendency to downgrade executive rulemaking in the US by *Loper Bright* brings the legal systems closer together, so that the abovementioned difference in the significance of executive rulemaking¹⁶⁶ has been diminished. This convergence is in addition to the similarity that both (and other) legal systems have generalist courts and specialised administrative agencies with their own expertise, which raises comparable issues about the allocation of power.

¹⁶⁴ See at n. 66.

¹⁶⁵ See at n. 40.

¹⁶⁶ See in part IV. 3.

If one sees the end of *Chevron* as a disruption,¹⁶⁷ there is a strong shift from executive discretion to stricter judicial review. If one sees *Loper Bright* more as a relabelling,¹⁶⁸ then the starting point of *Chevron* is confirmed: After *Loper Bright*, the delegation of discretionary power is still crucial. In both assessments, there is an alignment with the traditional German understanding. The disruption version gets closer to the German ‘full control’ variant. The relabelling version is comparable to the doctrine of normative authorisation, according to which the construction of the statute is decisive.¹⁶⁹ In this respect, especially after *Loper Bright*, one can conclude that American administrative law is becoming more German.¹⁷⁰ It depends on further developments whether this will also lead to a convergence of the characteristics of the administrative states or whether the basic tendency will persist that the US system is relatively proactive,¹⁷¹ while its German counterpart is more executive in nature.

To illustrate how the approaches of the US and Germany to judicial review have converged with *Loper Bright*, it is worth looking at the facts underlying the *Chevron* case.¹⁷² The case concerned the interpretation of ‘source’ of air pollution in the Clean Air Act. Because the Act itself did not contain a definition of the term, the Environmental Protection Agency (EPA) defined it on its own. Initially, the EPA understood the term as including any considerable change to a factory. Later, in a regulation, EPA changed the definition of ‘source’ so that the term meant only the entire plant, the so called ‘bubble concept’. As a result, a company could now add new air-polluting buildings, as long as it made changes elsewhere in the plant to reduce emissions, so that overall there was no increase in pollution. If that was the case, the company did not have to go through the complex and time-consuming EPA review process. Since Congress had not directly addressed the issue and the EPA’s construction was not unreasonable,¹⁷³ the Supreme

¹⁶⁷ See at n. 55.

¹⁶⁸ See at n. 61.

¹⁶⁹ Observing a convergence between *Chevron* deference and the German doctrine Schmidt-Aßmann, *Verwaltungsrecht der Vereinigten Staaten* (n. 146), 293.

¹⁷⁰ Dopplinger (n. 1), 458-459; see also Plebuch and Pielhoff (n. 5), 196-197. On the differences in earlier times Uwe Kischel, ‘Delegation of Legislative Power to Agencies: A Comparative Analysis of United States and German Law’, *Admin. L. Rev.* 46 (1994), 213-256.

¹⁷¹ This observation stems from progressive and libertarian perspectives, of course with differing assessments, see Schmidt-Aßmann, *Verwaltungsrecht der Vereinigten Staaten* (n. 146), 348, with further proof.

¹⁷² US Supreme Court, *Chevron* (n. 3).

¹⁷³ On *Chevron*’s two-step-test see part II. 1.

Court ruled in *Chevron* that courts had to defer to the agency's interpretation of the ambiguous term such as 'source'. In contrast, in the German system, a statutory authorisation to exercise discretionary powers would be required and, since the regulation involves rulemaking, the rulemaking powers would have to be explicitly provided for in accordance with Art. 80 of the Basic Law. In Germany, without a specific delegation of rulemaking power, it is up to the courts to determine the correct interpretation of a legal term such as 'source' of air pollution. Courts cannot simply defer to an agency's interpretation, even if it is reasonable.¹⁷⁴ Likewise, after *Loper Bright*, US courts cannot defer to the agency's interpretation of 'source', although agency opinions have weight in accordance with the *Skidmore* standard; they still 'constitute a body of experience and informed judgement to which courts [...] may properly resort for guidance'.¹⁷⁵ Despite this standard, the agency's interpretation of an ambiguous term is no longer controlling upon the courts. As in Germany, US courts would have to determine the meaning of the term 'source' of air pollution, unless they interpret the relevant parliamentary act as authorising the agency to define the word within a scope of discretion.¹⁷⁶

However, observing convergence in some respects – stricter judicial review – cannot in itself indicate the accuracy of a convergence of the doctrines in other respects – requirement for narrowly defined explicit delegations of rulemaking powers. Otherwise, describing legal systems would become a normative assessment that goes beyond the description. Rather, the observation of general convergence reduces concerns that one compares apples with oranges.

b) In Germany, the requirement for narrowly defined, explicit delegation is rooted in Art. 80 para. 1 of the Basic Law. If the rationale behind that provision also applies to the US system, it could be seen as bolstering the proposal made here.

The requirement for explicit delegations of agency rulemaking powers in Art. 80 of the Basic Law specifies the constitutional principles of separation of powers, legal certainty and democracy.¹⁷⁷ The limitation to explicit and

¹⁷⁴ Given the technical nature of the subject, German environmental law involves extensive delegations of rulemaking powers to the executive branch (see, e.g., §§ 4, 7, 48a BImSchG) and knows other regulations that specify the law, such as the TA-Luft (Technical Instructions on Air Quality Control).

¹⁷⁵ US Supreme Court, *Skidmore* (n. 52), 134, 140.

¹⁷⁶ See Coglianese and Froomkin (n. 24), 113-121: regarding the facts of *Chevron*, Congress delegated the authority to specify the meaning of the statutory term.

¹⁷⁷ Bauer (n. 120), paras 3-4; Brenner (n. 119), para. 15.

narrowly defined delegations shapes the relationship between the executive and legislative branches by binding executive rulemaking to the express will of the legislature, thereby ensuring that executive rulemaking also has its origin in the parliament. The requirement for an explicit delegation therefore puts the principle of separation of powers into effect.

The restriction of executive rulemaking to explicit and not too broad delegations ensures legal certainty because it is no longer necessary for the courts to derive an implicit delegation of rulemaking powers from ambiguous legal terms (and other circumstances¹⁷⁸), which depends on the often difficult-to-determine will of the legislature.¹⁷⁹ The above mentioned expectation that the invalidation of executive regulation depends on whether Republican or Democratic-appointed judges decide and whether the regulation tends to be right or left of centre¹⁸⁰ would less likely become reality if the US were to follow the German approach. An unreasonable dependence of the validity of executive regulations on political circumstances, namely possibly subjective views within a politicised judiciary,¹⁸¹ would be prevented in the interest of legal certainty. This is also in line with the principle of separation of powers because making validity dependent on political sympathies makes the question of validity appear to be a political one itself. The judiciary is not the right body to decide such cases.¹⁸² A demand for a narrowly defined explicit delegation based on the model of Art. 80 of the Basic Law would place this political question more clearly in the hands of Congress as a political body.

Furthermore, the claim for an explicit and not too broad delegation strengthens the principle of democracy. Democratic accountability is ensured because this requirement places the fundamental decision on whether the executive branch can issue abstract rules in the hands of elected members of Congress. Under such a concept, executive rulemaking is implemented by accountable agencies under the supervision of an elected President. It is not dependent on the judiciary to the same extent as would be the case if an implicit but difficult (or impossible?¹⁸³) to determine delegation were considered sufficient. Both Congress and administrative agencies are more

¹⁷⁸ See above part IV. 2.

¹⁷⁹ Kenneth A. Shepsle, 'Congress Is a "They," Not an "It": Legislative Intent as Oxymoron', *International Review of Law and Economics* 12 (1992), 239-256.

¹⁸⁰ See at n. 66.

¹⁸¹ On such a risk after *Loper Bright* Dopplinger (n. 1), 461-463, 466-471.

¹⁸² See US Supreme Court, *Loper Bright* (n. 4), (Kagan, J., dissenting), 10-14, referring to policy trade-offs that should be decided by agencies, judges are unsuited.

¹⁸³ See Shepsle (n. 179).

accountable than the judiciary.¹⁸⁴ Without the requirement for an explicit and narrowly defined delegation, the judiciary would have significant influence over the possibility and validity of executive rulemaking because it would *de facto* have greater discretion in assessing whether implicit delegations exist.

The demand for an explicit, more narrowly defined delegation of rulemaking powers enables precise instructions through parliamentary acts in the sense of the German doctrine of normative authorisation. This makes it easier to identify authorisations for discretionary decisions with corresponding judicial deference. The proposal made here is supported by the rationales behind Art. 80 of the Basic Law, which are also relevant in the US – of course, subject to the need for contextualisation.¹⁸⁵

The need for a narrowly defined, explicit delegation of powers does not exist with regard to decisions in individual case scenarios, but only with regard to the delegation of rulemaking powers. This is because, broadly speaking, abstract general rules are socially more important and affect more people than decisions in individual cases. In the case of far-reaching decisions, there should be a legally certain connection to the legislature, accountability should be guaranteed and the validity of the decision should depend less on courts. *De facto*, courts have greater discretion in determining implicit authorisations, but they are not as democratically accountable as the other branches of government. This distinction ensures that the enactment of abstract rules – the central function of the legislature – is closely linked to the parliament. The separation of powers is guaranteed. Therefore, the German-style doctrine of normative authorisation can also be seen as inspiration for how, after *Loper Bright*, the principle of separation of powers can be upheld without abandoning the role of administrative agencies.

V. Conclusion

The dependence of executive rulemaking powers on explicit and narrowly defined delegations by Congress would correspond to the German approach. This is one part of the proposed idea that US administrative law after *Loper Bright* could be inspired by the German doctrine of normative authorisation.

¹⁸⁴ See US Supreme Court, *Loper Bright* (n. 4), (Kagan, J., dissenting), 2, with respect to agencies; Merrill (n. 9), 257-258: Congress is the most accountable institution.

¹⁸⁵ See in part IV. 3.

The doctrine's general notion is that the question of whether the executive branch is authorised to decide discretionarily with corresponding judicial deference depends on the authorising parliamentary act. With regard to the US, this is not a stringent conclusion deduced from supreme law or compelling interpretation, but rather a proposal informed by comparative law to address a relevant problem facing US administrative law after *Loper Bright*. This proposal takes relevant contexts into account, in particular conventional differences in the statutory guidance of administrative agencies, differences in a parliamentary and presidential system of government, and differences in the capacities of legislative bodies to act. With *Loper Bright*, US administrative law is moving closer to its German counterpart with regard to discretionary decisions by administrative agencies and corresponding judicial deference. This applies both to the assumption of a disruption and to the assumption of a relabelling as a consequence of *Loper Bright*. As far as the proposal presented here goes, the German doctrine of normative authorisation can be an inspiration for the US approach to clearing up the murky waters left behind by the end of *Chevron*.

It remains open when agencies are authorised by statutes to decide individual cases with final discretion. Future projects could examine whether the rationales behind cases in which authorisations of discretionary powers in individual cases are recognised in Germany could also inform US administrative law. It also remains to be seen how, in general, the relationship between the discretionary powers of administrative agencies and the functional limits of the judiciary will develop.¹⁸⁶ This issue is relevant in both systems. The proposal made here to harmonise the legal systems with regard to the requirement of statutory authorisation for discretionary decisions by administrative agencies contributes to one aspect of this discussion. Furthermore, it remains a crucial question as to where the limits of delegation lie. However, examining this goes beyond the scope of this article. The question is whether and to what extent the nondelegation doctrine is experiencing a revival and whether the limits for delegating rulemaking power go beyond an 'intelligible principle'¹⁸⁷. Of course, this issue could also be examined through the lenses of comparative law. From a German perspective, both the constitutional principle that major questions must be addressed in a parliamentary act and Art. 80 of the Basic Law would be relevant and would have

¹⁸⁶ See BVerfGE 149, 407 (paras 17-24) – *Rotmilan*; Ludwigs, 'Kontrolldichte' (n. 75), 411-412; Laura Münkler, 'Der Beurteilungsspielraum als dogmatischer Knotenpunkt', DÖV 74 (2021), 615-623.

¹⁸⁷ See US Supreme Court, *Gundy* (n. 2), 4-6.

to be contextualised in relation to US law. Regardless of this, and at this point in time, it can be assumed with the *Loper Bright* Court that authorisations for discretionary decisions with corresponding judicial deference are legally possible.¹⁸⁸

¹⁸⁸ US Supreme Court, *Loper Bright* (n. 4), 17-18; Stephenson (n. 125); Sunstein (n. 19), 1902: ‘most fundamental point’.

