JUDICIAL HUMILITY & RETICENCE IN ADMINISTRATIVE LAW

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Humility has been top of mind for Justice Elena Kagan, a concern surfacing often in her questions and opinions across several terms whenever the case involves a federal agency. The Supreme Court, in her view, lacks humility. And it demonstrates this lack whenever it questions agency priorities.

In January, the Court heard two cases challenging the *Chevron* doctrine, which requires courts to defer to an agency's "reasonable" interpretation of gaps or ambiguities in statutes.[1] Justice Kagan answered that challenge by calling Chevron a "doctrine of humility."[2] "We know in our heart of hearts," she explained, "that agencies know things that courts do not. And that's the basis of *Chevron*."[3] Justice Kagan, and likeminded thinkers, rely on the agency-specific ability to "know things" as the primary justification for assuming that Congress prefers for agencies, not courts, to resolve ambiguities in statutes. Convinced of the agencies' epistemic superiority, Justice Kagan reminded her colleagues in *West Virginia v. EPA* that "this Court has historically known enough not to get in the way."[4] Many scholars defend judicial deference in similar terms.[5]

The types of determinations for which agencies demand judicial deference vary. The determination may be factual, whether pertaining to the agency's area of expertise or not; it may be a determination of the law's application to certain facts; or it may be a pure question of law, an assertion of what a provision in the agency's organic statute means or what that law's metes and bounds are. Regardless of the type of decision for which deference is sought, there are good

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[1] Loper Bright Enters. v. Raimondo, No. 22–451 (U.S. argued Jan. 17, 2024); Relentless, Inc. v. Dep't of Com., No. 22–1219 (U.S. argued Jan. 17, 2024).

[2] Transcript of Oral Argument at 34–35, Loper Bright Enters. v. Raimondo (2024) (No. 22–451).

[3] *Id.* at 34.

[4] West Virginia v. EPA, 597 U.S. 697, 782 (2022) (Kagan, J., dissenting).

[5] *See, e.g.*, ADRIAN VERMEULE, LAW'S ABNEGATION: FROM LAW'S EMPIRE TO THE ADMINISTRATIVE STATE 8 (2016) (arguing that the judiciary's surrender of power to the administrative state was done for "valid lawyerly reasons" and that "good Dworkinians" should support it); Cass R. Sunstein, *Chevron As Law*, 107 GEO. L.J. 1613, 1666 (2019) (acknowledging the possibility that *Chevron* "unleashes political officials from law" but taking the position that it nonetheless is a doctrine of judicial humility); Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 43–44 (2019) ("Moreover, the arguments for deference to agencies on fact and policy matters—such as agencies' greater political accountability, expertise, or congressional authorization—also push toward deference in law application, which easily spills over into law interpretation."); Stephen Breyer, *The Executive Branch, Administrative Action, and Comparative Expertise*, 32 CARDOZO L. REV. 2189, 2193 (2011) ("Courts find the notion of comparative expertise useful, indeed necessary, when reviewing administrative decisions."); Mark Seidenfeld, *Chevron's Foundation*, 86 NOTRE DAME L. REV. 273, 275 (2011) (arguing that *Chevron* "encourages courts to refrain from dictating outcomes in policy-laden decisions"); David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 223 (2001) ("[*Chevron*] stressed more heavily the virtues of placing interpretive decisions in the hands of accountable and knowledgeable administrators.").

reasons to think that the epistemic gap between agencies and courts is neither so deep nor so wide as to merit deference and that the insistence on deference as a form of humility is premised less on a judicial incapacity to address borderline cases and more on a preference for shifting policymaking towards the executive branch.[6] This conclusion has implications for other deference rationales.

As for the epistemic gap rationale, it fails because the gap can be closed.[7] As Paul Ray explains in a forthcoming paper, there are "good reasons" to conclude "that the expertise underlying the most important interpretations could be communicated to reviewing courts at quite manageable costs."[8] This is so because, at several junctures in the internal processes by which an agency crafts a final rule, regulation, or decision, agency experts have "*already* successfully communicate[d] their expertise to non-experts."[9]

As Ray points out, judicial deference to agencies on the basis of agencies' expertise is justified only if four things are true: (1) that the agency has expertise in the subject at hand; (2) that the expertise helps the agency make a better interpretive decision; (3) that the agency uses its expertise to make decisions; and (4) that a reviewing court does not have the expertise and cannot reasonably learn it.[10] The Supreme Court regularly denies deference when any of the first three conditions is violated, but neither the Supreme Court nor other courts have paid much attention to the fourth requirement.[11] They tend to assume that judges simply cannot come to know what agency experts know.[12]

This assumption is wrong.[13] First, all agency expertise is communicable. It is gained through instruction or experience.[14] In the early days of the administrative experiment, experience was more important; today, instruction.[15] In most present instances, someone taught the agency's experts most of what they know, and they, in turn, can teach it to others.[16] Indeed, agency experts teach what they know to others all the time.[17] That is why agencies publish guidance documents and the like: to pass on to regulated parties, the public, and the agency officials' successors what the agency believes is lawful, necessary, and proper to resolve a public policy problem.[18]

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[6] *See* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 994, 994 n.370 (2017).
[7] *See* Paul J. Ray, *Lover, Mystic, Bureaucrat, Judge: The Communication of Expertise and the Deference Doctrines* (C. Boyden Gray Ctr., Ctr. for Study of Admin. State, Working Paper 23–32, 2023), https://administrativestate.gmu.edu/paper/lover-mystic-bureaucrat-judge-the-communication-of-expertise-and-the-deference-doctrines/ [https://perma.cc/C5TQ-PZS8].
[8] *Id.* at 1.
[9] *Id.* at 3.
[10] *Id.* at 6–7.
[11] *Id.* at 9.
[12] *Id.*
[13] *See id.* at 10–12.
[14] *Id.* at 10–11.
[15] *Id.* at 9–14.
[16] *Id.* at 11.
[17] *Id.* at 13–14.
[18] *See*, *e.g.*, FDA, CTR. FOR DRUG EVALUATION & RSCH., PSYCHEDELIC DRUGS: CONSIDERATIONS FOR CLINICAL INVESTIGATIONS (2023).

The process of creating regulations "is thick with demands for justification."[19] Throughout the process, subject matter experts within agencies must teach their expertise to "a host of interlocutors both within their own agency and throughout the broader executive branch."[20] Many political appointees to whom the regulatory choices must be explained have only limited training or expertise of their own to rely on. Yet they, as much as anyone in the agency or the administration more broadly, must be convinced of the soundness and feasibility of the proposed approach. Thus, by the time any case challenging a finalized regulation arrives before a judge, the experts will have communicated their knowledge to many non-experts; there is no reason they could not do the same to judges.[21] Judges *can*, therefore, come to know what agency experts know.

That conclusion has implications for an array of contexts in which the question of deference may arise. Not only can agencies provide judges with the explanations for their legal interpretations—which judges are expert in assessing—agencies also can effectively communicate to judges their thinking on factual determinations, even determinations of matters that seem, at first glance, impenetrably abstruse to a generalist. The point is not to provide judges with license to supplant the agency's choice where that determination is purely factual. But the most confounding questions in agency cases arise when the determination at issue could plausibly be characterized as factual or legal, with the choice between the two dictating much about whether the judge will examine the question in search of the best answer or merely defer to a facially plausible one.[22] Expertise does not birth fully formed policy solutions absent the inclusion of other ingredients, often normative or even nakedly political in nature. Being better informed about the types of judgments comprising the arc of a policy's development can assist judges in sifting through those decisions to distinguish between matters that are truly factual and those that entail additional value judgments. Value judgments may be inevitable, but where the kernel of controversy is the agency's authority to act, there courts will be better positioned to assess the extent to which agencies' value judgments are a faithful execution of Congress's purposes, and whether those ends are being pursued within proper statutory bounds.

This conclusion has implications for the subsidiary justification for preferring agencies as interpreters of statutory ambiguity: that agencies are more democratically accountable than judges. Although no agency employee is elected, and though most are career civil servants, by dint of presidential control and a few presidential appointees, agency personnel are relatively more accountable than federal judges.[23] But congressional representatives are still more

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[19] Ray, *supra* note 7, at 13.
[20] *Id.* at 13–14.
[21] *Id.* at 14.
[22] *See* Bamzai, *supra* note 6, at 994 (quoting John Dickinson, *Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review*, 33 ABA J. 434, 517 (1947)) ("Dickinson noted that, far from being a sign of judicial quiescence, the Court's ability to redraw the line between questions of law and fact—and, hence, to 'draw the line between what is "general" and what is "technical"'—necessarily lodged great power in the Justices by 'leaving to the Court's discretion the determination of whether it would or would not review a legal question.'").
[23] *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331 (2001) ("Presidential administration promotes accountability in two principal and related ways."); Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 312 (1986) ("*Chevron* shifts power from the courts to the agencies, shifting with it the site of the real battle over regulatory decisions. In numerous ways, the decision returns the power to set policy to

accountable than either agency personnel or judges. Should not the accountability rationale favor more decisions being made by the *most* accountable body and not merely a relatively more accountable one?

The reason for not following the accountability rationale to this conclusion is the countervailing effect of the expertise rationale. Sure, Congress is more accountable, but, much like judges, congressmen do not know much of anything. Justice Kagan again:

> Members of Congress often can't know enough—and again, know they can't—to keep regulatory schemes working across time. Congress usually can't predict the future—can't anticipate changing circumstances and the way they will affect varied regulatory techniques. Nor can Congress (realistically) keep track of and respond to fast-flowing developments as they occur.[24]

Fair enough. But there is more than a little here to debate. Let us assume, maybe unkindly, that members of Congress know even less than judges. Should we conclude that representatives are fundamentally unteachable in some way that judges are not? There is no sound basis for that. If secret, incommunicable knowledge is no more valid in justifying regulations to legislators than to judges, then what fundamental obstacle prevents agencies from educating legislators on the relevant points of expertise? And what then should prevent the truly, not merely relatively, accountable body from legislating based on the agencies' best proposals? Greater input from agencies on the front-end of the legislative process seems likely to result in fewer back-end interpretive difficulties because Congress would have a better opportunity to understand and legislate on the appropriate means of implementing its designs based on a fuller understanding of the technical aspects of the problem it seeks to address.

The rejoinder, as in the case of judges, is that the costs are too high, a premise implicit in the assertion that Congress cannot "realistically" keep pace with modernity's multifarious policy demands.[25] Congress oversees priorities so numerous and diverse that its members cannot possibly attain an adequate understanding of more than a few matters. Perhaps. But perhaps both Congress and the federal government writ large have arrogated too many responsibilities to themselves, taking too many away from state or local authorities sometimes with the cooperation of the federal courts. Perhaps, to the extent Congress feels overwhelmed, that is a symptom of an unnecessary problem of their own making. If so, it seems that decentralizing some of this work to non-federal authorities is as plausible a solution as choosing to concentrate it further still within the executive branch.

Putting that aside, the unmanageable-workload argument still only gets one so far. Congress consists of 535 members, somewhat less than the total number of federal judges.[26] But with the assistance of considerably larger staffs and committees with investigatory power, they

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democratically accountable officials, not least by making it easier for a new administration to oust an old regulatory order.").

[24] West Virginia v. EPA, 597 U.S. 697, 781 (2022) (Kagan, J., dissenting).

[25] *Id.*

[26] The are currently 860 federal judges who hold appointments under Article III of the Constitution. See U.S. Courts, Authorized Judgeships, https://www.uscourts.gov/sites/default/files/allauth.pdf.

possess even greater practical ability to assimilate and implement the relevant agency expertise than does any single federal judge.

As a deliberative institution of equals, though, Congress fails to embody the features of idealized agencies. Maybe new, unforeseen challenges ought to occasion deliberative evaluation in Congress? But no, there is no time—not when every new policy challenge from climate change to student loans is its own emergency, or so we are told.[27] Agencies behave not like agents but like a policy vanguard overcoming novel challenges, applying expertise synthesized within their hierarchical chain of command. There is no lag waiting for Congress to gather up its fragmented collective mind, just expert solutions ready to salve the collective angst of a nation perpetually in need. Or so the argument goes.[28] One suspects that those who defend deference on these grounds are only one or two rhetorical moves away from invoking the right of self-preservation to justify agency action.[29] But one consequence of the insistence that agencies must have latitude to innovate is to ensure that deliberative reconsideration of policy becomes an intramural affair within agencies, where they revise and repurpose outmoded congressional programs like they are running software updates. Congress need not trouble or be troubled. Its members need never face the political risks of making hard policy compromises.

Congress may enjoy at least one comparative advantage: "Congress knows about how government works in ways courts don't. More specifically, Congress knows what mix of legislative and administrative action conduces to good policy."[30] That may be true, but the statement assumes away another plausible explanation for the "mix" Congress chooses: the mix may have little to do with good policy and much to do with shielding Congress from political accountability.[31] Why courts should defer to arrangements made on that basis is unclear. But the statement also sets a baseline presumption that is not self-evidently true, namely, that Congress prefers agencies not only as executors of the law but as the law's primary interpreters as well. Of

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[27] *See generally* GianCarlo Canaparo & Paul J. Larkin, *The Constitution and Emergencies: Regulating Presidential Emergency Declarations*, HERITAGE FOUND., Legal Memo. No. 335 (June 20, 2023), https://www.heritage.org/sites/default/files/2023-06/LM335_0.pdf [https://perma.cc/X2ZU-QZGP] (examining the prolific use of emergency powers for non-emergencies).

[28] *But cf.* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2151 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) ("We must recognize how much *Chevron* invites an extremely aggressive executive branch philosophy of pushing the legal envelope (a philosophy that, I should note, seems present in the administrations of both political parties)."); *see also* RACHEL AUGUSTINE POTTER, BENDING THE RULES: PROCEDURAL POLITICKING IN THE BUREAUCRACY 5 (2019) (acknowledging that the view of bureaucrats as neutral experts is incorrect—they are "inherently political"—while also urging bureaucrats to "use administrative tools to strategically and systematically insulate their rule-making proposals from political scrutiny and interference."). *But cf.* Sunstein, *supra* note 5, at 1667 (deriding the view that agencies push political priorities through statutory mouseholes as "a cartoon").

[29] *See, e.g.*, VERMEULE, *supra* note 5 at 67 ("Legislative institutions are structurally incapable of supplying policy change at the necessary rates," and so we must give power to the administrative state, even if we must sacrifice "the quality of policy," "impartiality," and the "very goal of minimizing abuses of power.").

[30] West Virginia v. EPA, 597 U.S. 697, 783 (2022) (Kagan, J., dissenting).

[31] *See* DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 17 (1993) (arguing that Congressional delegations undermine the accountability that the Article I lawmaking procedures provide); Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463 (2015) (arguing that congressional deference "destroys the Madisonian checks and balances."); *see generally* Peter H. Aranson, Ernest Gellhorn, & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 Cornell L. Rev. 1 (1982) (applying a public choice lens to congressional delegation).

course, only the executive branch can execute the laws, but when it comes to interpretation, it is just as reasonable to think, as Professor Tom Merrill does, that "Congress undoubtedly perceives the independent judiciary as a more plausible faithful agent than the executive branch agencies" because the latter "are more likely to interpret statutes to further transitory political objectives of the incumbent President."[32]

Finally, it is all well to talk about honoring Congress's intended division of labor between itself and agencies. But when Congress prescribed what it deemed the proper mix of agency discretion and judicial review in the 1946 Administrative Procedure Act (APA), courts paid little attention and continued building, in an ad hoc fashion, a jurisprudence of deference.[33] The current Supreme Court, until recently, paid little attention to what the APA's judicial review provision, Section 706, might mean for deference. In that section, Congress instructed courts to "decide all relevant questions of law" and "hold unlawful and set aside agency action" that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."[34]

Although there is some room for disagreement about the precise interpretive rules that Congress intended to codify in the APA, the law makes no mention of deferential review, and the overwhelming weight of prior jurisprudence supported judicial deference only where the agency's interpretation of law had been a longstanding construction developed contemporaneously with the law's enactment.[35] The departure from those norms towards deference doctrines that privilege even novel and inconsistent agency interpretations seems to have been more a matter of preference (in both the federal judiciary and the Department of Justice) than a principled adherence to Congress's wishes in the APA.[36] The Supreme Court has gone so far as to declare that *Chevron* deference is owed to an agency's determination of its own jurisdiction, despite that holding's tendency to render nugatory the judicial duty to set aside agency action in excess of statutory jurisdiction.[37] Despite the administrative state's tendency to strain the traditional tripartite division of government, the judiciary has, in many instances, declared itself unwilling to say when agencies have pushed too far. For defenders of this judicial reticence, the judiciary does its best when it is as small an impediment as possible to policymaking;[38] when it does not, as Justice Kagan puts it, "get in the way."[39]

But this vision of restraint is backwards.[40] Although judicial freewheeling is a legitimate concern, the restraint that ought to concern judges at least as much is restraining the *other*

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[32] THOMAS W. MERRILL, THE CHEVRON DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE 231 (2022).
[33] *See* Bamzai, *supra* note 6, at 995.
[34] Administrative Procedure Act (APA), 5 U.S.C. § 706.
[35] *See* Bamzai, *supra* note 6, 962–65.
[36] MERRILL, *supra* note 32, 94–96; *see also* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) ("Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the Chevron framework.").
[37] *See* City of Arlington v. FCC, 569 U.S. 290, 301 (2013).
[38] *See* VERMEULE, *supra* note 5, at 58–60.
[39] West Virginia v. EPA, 597 U.S. 697, 782 (2022) (Kagan, J., dissenting).
[40] *See* MERRILL, *supra* note 32, at 231 (arguing that the "better baseline assumption is" not that courts should defer to agency determinations but "that questions of law must be resolved by courts unless Congress has actually delegated authority to the agency to act as the primary interpreter with respect to the provision in question").

branches.[41] After all, the voluntary contraction of the judicial power vested by Article III is not a costless enterprise. The judiciary is intended to be an obstacle, a mighty "bulwark" in Alexander Hamilton's words, defending the "limited constitution" against the encroachments of executive and legislative branches.[42] Through interpretation, courts "expound and define the [law's] true meaning and operation," without which the laws themselves would be but "a dead letter."[43] By exercising their "peculiar" expertise in "interpretation of the laws," the courts both interpose themselves as the protective "intermediate body between the people and the legislature" and keep the rival powers "within the limits assigned to their authority."[44] Much of that constitutional role ends up obscured in agency cases by the distinctly modern form of judicial humility that says that courts ought to defer for expediency's sake.

During the oral arguments challenging *Chevron*, Justice Kagan observed that when courts read a statute, "sometimes law runs out," meaning that at some point in the legislative process, Congress stopped making decisions.[45] The question is whether that point marks the beginning of a frontier open for the agency's policymaking authority or whether it marks the end of delegated authority to act. Deference broadly, and *Chevron* Deference specifically, conditions the way that judges approach and answer that question. Undoubtedly, there are questions integral to a statutory scheme that Congress has not answered with the degree of detail necessary for implementation. Here, agencies must bring their expertise to bear, devising a means for bringing Congress's design to fruition.

But it is not always the case that Congress is inviting the agency to pick up where the drafters left off. Take the two cases challenging *Chevron*.[46] Congress gave the National Marine Fisheries Service authority to fund its at-sea monitor program through fee collection in limited circumstances and subject to strict constraints.[47] Small herring vessels are not among those covered by Congress's specific delegation of fee-collecting authority.[48] Nevertheless, the agency took that specific delegation as indicative of a much broader authority that Congress had supposedly transferred to it to extract fee funding from fishermen whenever their monitor programs wanted for resources. Implausible and self-serving though this sounds, the D.C. Circuit gave the agency's interpretation Chevron deference.[49] Deference, as Justice Samuel Alito put it in another context, allows the executive branch to "acquire authority forbidden by law through a process akin to adverse possession."[50]

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[41] *See City of Arlington*, 569 U.S. at 327 (2013) (Roberts, C.J., dissenting) (stating that the judiciary is constitutionally obligated "not only to confine itself to its proper role, but to ensure that the other branches do so as well.").
[42] THE FEDERALIST No. 78 (Alexander Hamilton).
[43] THE FEDERALIST No. 22 (Alexander Hamilton).
[44] THE FEDERALIST No. 78 (Alexander Hamilton).
[45] Transcript of Oral Argument at 12, Relentless, Inc. v. Dep't of Com., (2024) (No. 22–1219).
[46] Loper Bright Enters. v. Raimondo (No. 22–451) (U.S. argued Jan. 17, 2024); Relentless, Inc. v. Dep't of Commerce (No. 22–1219) (U.S. argued Jan. 17, 2024).
[47] Loper Bright Enters., Inc. v. Raimondo, 45 F.4th 359, 367 (D.C. Cir. 2022), *cert. granted in part sub nom.* Loper Bright Enters. v. Raimondo, 143 S. Ct. 2429 (2023).
[48] *Id.* at 375 (Walker, J. dissenting).
[49] *Id.* at 370.
[50] Biden v. Texas, 597 U.S. 785, 830 (2022) (Alito, J., dissenting).

Judges weaned on doctrines requiring deference to agencies have a blind spot for the possibility that the power to act should be strictly construed even, perhaps especially, where an agency is involved. A part of the explanation is a legitimate hesitancy to approach questions that in their most extreme presentations verge on intractable. Because there are limits to the answers law can provide, neither the law nor its most discerning practitioners are able to settle all questions pertaining to government, at least not in terms of law alone.[51] Even where the law's domain has not run out entirely, an inability to formulate those answers in terms of clear consistent divisions or clean syllogistic tests can make lawyers cautious to the point of paralysis. What, for instance, is the dividing line between a question of law and fact? Between policy questions and legal questions? When Congress has legislated, which matters in the bill count as "important subjects, which must be entirely regulated by the legislature itself," and which mere "details" which agencies may address?[52] What is the *sine qua non* of an intelligible principle? Is the distinction between jurisdictional and non-jurisdictional determinations real or imagined when the actor is an agency?[53] The answers to these questions bear directly on when and how agencies have authority to act. No less a lawyer and jurist than the late Justice Antonin Scalia quailed at the prospect of answering many such questions while on the bench.[54]

But where the maintenance of the separation of powers is at stake, it is no answer to say that the judiciary is equipped to adjudicate only questions with clear answers.[55] As Merrill says, "[i]f courts can apply the jurisdiction-nonjurisdiction distinction in considering judicial authority, they should be capable of applying the same distinction in deciding what standard of review to apply to agency interpretation of law."[56] Concerning the litany of other difficult dichotomies, there is similarly good reason to believe that judges, though far from infallible, are not nearly so impotent as deference proponents pretend. Expansion of the administrative state thrives in these legal borderlands, the space separating clear dichotomies on a doctrinal continuum, where expansive and novel claims of authority are made on the assumption—held by Congress and the executive branch alike—that courts cannot or will not police them. Yet, given the scale of innovation occurring at the margins between these questions, routinized judicial deference amounts to an abdication of any meaningful role in maintaining the separation of powers.[57] It is

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[51] Justice Robert Jackson made a similar observation in his dissenting opinion in *Korematsu*, writing that the tools of law are so ill-suited to reviewing military judgments that "courts can never have any real alternative to accepting the mere declaration of the authority that issued the order that it was reasonably necessary from a military viewpoint." Korematsu v. United States, 323 U.S. 214, 245 (1944) (Jackson, J., dissenting). But that, of course, is not the case with administrative agencies, which must act reasonably and which communicate the reasons for their actions constantly. *See* Ray, *supra* note 7, at 2.

[52] Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 31, 43 (1825).

[53] *See* City of Arlington v. FCC, 569 U.S. 290, 297 (2013).

[54] *Id.*; Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting) ("But while the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts.").

[55] *See Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting) ("It is difficult to imagine a principle more essential to democratic government than that upon which the doctrine of unconstitutional delegation is founded: Except in a few areas constitutionally committed to the Executive Branch, the basic policy decisions governing society are to be made by the Legislature."); *see also* MERRILL, *supra* note 32, at 225 ("The solution to the 'fox-in-the-henhouse syndrome' according to Scalia, was for courts to strictly enforce statutory limits that are clear or unambiguous. What this means, of course, is that agency power will be limited only when Congress has legislated unambiguously to limit it.").

[56] MERRILL, *supra* note 32, at 224.

[57] *See* Gundy v. United States, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting) ("To leave this aspect of the constitutional structure alone undefended would serve only to accelerate the flight of power from the legislative to

to cede to the combination of the executive and legislative branches a practically unlimited sovereignty to reshape the federal government according to the lights of expediency. Thus, the question is not whether courts can provide unfailing answers in all borderline cases but whether they can blanketly exempt themselves from adjudicating all such controversies.

This brings us to a second related explanation: the lack of real belief in a *limited* Constitution. Instead, proponents of a muscular administrative state are convinced, at least implicitly, that "the federal government for all intents and purposes has acquired by prescription, over time, a de facto police power."[58] From the expansion of agencies in the progressive era onward to today, the judiciary has tailored and contracted itself to accommodate the growth of this police power within the administrative state.[59] Even as agencies have actively enlarged their sphere of operation, deference-prone jursists demonstrate little concern for the incentives their rulings create for agency actors. In many instances, the Supreme Court's jurisprudence has, as Justice Clarence Thomas observed, "emboldened" agencies "to make the bid for deference" to interpretations that exceed even the "extremely permissive limits on agency power."[60] One long-time appellate jurist described the problem as follows: "it seems to me that the agency is not trying to answer the same question that [courts] are. The court tries to find the best objective interpretation of the statute, based on the statutory text. The agency instead asks if there is a *colorable* interpretation that will support the policy result that the agency wants to reach."[61] It is not the ineliminable indeterminacies of language that bring about this approach; it is judicial deference, whether crystallized as a formal doctrine, *e.g.*, *Chevron* and *Auer*, or whether applied as a deeply ingrained judicial reflex that appears in the guise of ad-hoc presumptions.[62] Given the political control of agencies and the broadened policy horizons enabled by deference, it is no wonder that agencies are anxious to interpret law in this fashion, if not as a routine matter, then often enough and in important enough controversies for the approach to be a serious concern even for proponents of administrative governance.

When the Supreme Court rejects expansive agency interpretations, dissenters declare that the Court is making policy.[63] But seldom does the Court tell an agency or Congress to adopt any particular policy. By defining the spectrum of policy choices permitted by the law or the Constitution, the Court may indirectly influence policy, but so does a court that reflexively defers. Deference is a commitment to a kind of policy maximization—any means suited to the broadly defined congressional objectives in the statute must be allowed to the agency unless

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the executive branch, turning the latter into a vortex of authority that was constitutionally reserved for the people's representatives in order to protect their liberties.").

[58] ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM: RECOVERING THE CLASSICAL LEGAL TRADITION 34 (2022).

[59] *See generally* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014); JOSEPH POSTELL, BUREAUCRACY IN AMERICA: THE ADMINISTRATIVE STATE'S CHALLENGE TO CONSTITUTIONAL GOVERNMENT (2017).

[60] Michigan v. EPA, 576 U.S. 743, 763 (2015) (Thomas, J., concurring).

[61] Raymond Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 VAND. L. REV. EN BANC 315, 323 (2017) (emphasis added).

[62] *See, e.g.*, Relentless, Inc. v. Dep't of Com., 62 F.4th 621, 629 (1st Cir. 2023) (deciding in favor of an agency interpretation based on the "default norm . . . that the government does not reimburse regulated entities for the cost of complying with properly enacted regulations").

[63] *See, e.g.*, West Virginia v. EPA, 596 U.S. 697, 783 (2022) (Kagan, J., dissenting) ("In rewriting that text, the Court substitutes its own ideas about delegations for Congress's. And that means the Court substitutes its own ideas about policymaking for Congress's.").

expressly prohibited by the statutory text. Deference is, in effect, a subtler form of purposivism, a judicially supplied necessary-and-proper clause for the administrative state.

Courts should not retreat from their duty to say what the law is.[64] To be sure, courts have no roving commission to act like bushwhackers hacking off the limbs of the administrative state right and left. But when a case or controversy challenges the agencies' often audacious claims of power, judges owe their country and their office the benefit of their best independent judgment of the law.

Judicial humility, then, is not self-deprecation. Nor is it the epistemic insecurity that causes judges to worry about "getting in the way" of subject-matter experts. Rather, judicial humility is the singular focus on the core judicial duty of preserving our constitutional structures. To borrow an observation made in a different context, a humble judge "will not be thinking about humility: he will not be thinking about himself at all."[65]

[64] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").
[65] C.S. LEWIS, MERE CHRISTIANITY 114 (1960).