Judicial Humility and 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

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1. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024) (No. 22-451); Relentless, Inc. v. Dep't of Com., No. 22-1219.

2. Transcript of Record at 34, Loper Bright Enters. v Raimondo, 144 S. Ct. 2244 (2024) (No. 22-451).

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 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, a 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 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 about 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,

3. *Id.*

4. West Virginia v. EPA, 597 U.S. 697, 782 (2022).

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 nonetheless that it 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.").

6. *See* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 994 (2017); *see id.* at 994 n.370.

7. Paul J. Ray, *Lover, Mystic, Bureaucrat, Judge: The Communication of Expertise and the Deference Doctrines* (CSAS Working Paper 23-32, 2023), https://administrativestate.gmu.edu/paper/lover-mystic-bureaucrat-judge-the-communication-of-expertise-and-the-deference-doc trines [https://perma.cc/5AXJ-XULG].

8. *Id.* at 1.

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 is necessary to making a good 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's 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]

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 and in 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.

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9. *Id*. at 3.
10. *Id*. at 6–7.
11. *Id*. at 9.
12. *Id*.
13. *Id*. at 9–14.
14. *Id*.
15. *Id*.
16. *Id*.
17. *Id*.
18. *See*, *e.g*., FOOD & DRUG ADMIN., CNTR. FOR DRUG EVALUATION & RESEARCH, PSYCHEDELIC DRUGS: CONSIDERATIONS FOR CLINICAL INVESTIGATIONS, GUIDANCE FOR INDUSTRY, DRAFT GUIDANCE (June 2023).
19. Ray, *supra* note 7, at 13.
20. *Id*.
21. *Id*.

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 of their legal interpretations—which judges are expert in assessing—agencies also can effectively communicate their thinking on factual determinations to judges, even determinations on 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, then 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 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:

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22. *See* Bamzai, *supra* note 6 (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 democratically accountable officials, not least by making it easier for a new administration to oust an old regulatory order.").

> 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 as 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 gets one only so far. Congress consists of 535 members, somewhat less than the total number of federal judges. But with the assistance of considerably larger staffs and committees with investigatory power, they 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

24. West Virginia v. EPA, 597 U.S. 697, 781–82 (2022).
25. *Id*.

emergency, or so we are told.[26] 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.[27] 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.[28] 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."[29] 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.[30] 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

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26. *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/83C2-25NU] (examining the prolific use of emergency powers for non-emergencies).

27. *But cf.* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2151 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES, xi, 171 (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.").

28. *See, e.g.*, VERMEULE, *supra* note 5, at 59–60 ("Legislative institutes 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.").

29. West Virginia v. EPA, 597 U.S. 697, 783 (2022).

30. *See* DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993) (arguing that Congressional delegations undermine the accountability that the Article I lawmaking procedures provide); Peter H. Aranson, et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982) (applying a public choice lens to congressional delegation); 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").

primary interpreters as well. Of 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."[31]

Finally, it is all well to talk about honoring Congress' 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, courts paid little attention and continued building in an ad hoc fashion a jurisprudence of deference.[32] 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."[33]

Although there is some room for disagreement about the precise interpretive rules 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.[34] 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' wishes in the APA.[35] 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.[36] 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;[37] when it does not, as Kagan puts it, "get in the way."[38]

But this vision of restraint is backwards.[39] Although judicial freewheeling is a legitimate concern, the restraint that ought to concern judges at least as much is

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31. THOMAS W. MERRILL, THE *CHEVRON* DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE 231 (2022).
32. Bamzai, *supra* note 6, at 995.
33. 5 U.S.C. § 706 (West).
34. Bamzai, *supra* note 6, at 962–65.
35. MERRILL, *supra* note 31, at 94–96.
36. City of Arlington v. F.C.C., 569 U.S. 290 (2013).
37. VERMEULE, *supra* note 5, at 58–60.
38. West Virginia v. EPA, 597 U.S. 697, 782 (2022) (Kagan, J., dissenting).
39. *See* MERRILL, *supra* note 31, at 231 (arguing that the "better baseline assumption is" not that court's should defer to agency determinations but "that questions of law must be resolved by courts

restraining the *other* branches.[40] 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 the executive and legislative branches.[41] Through interpretation, courts "expound and define the [law's] true meaning and operation" without which, the laws themselves would be but "a dead letter."[42] By exercising its "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."[43] 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.[44] The question is whether that point marks the beginning of a frontier open for the agency's policy-making 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*.[45] 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. [46] Small herring vessels are not among those covered by Congress's specific delegation of fee-collecting authority.[47] 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

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unless Congress has actually delegated authority to the agency to act as the primary interpreter with respect to the provision in question").

40. *See* City of Arlington, Tex. v. F.C.C., 569 U.S. 290, 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").

41. THE FEDERALIST No. 78 (Alexander Hamilton).

42. THE FEDERALIST No. 22 (Alexander Hamilton).

43. THE FEDERALIST No. 78 (Alexander Hamilton).

44. Transcript of Record at 12, Relentless, Inc. v. Dep't of Com., No. 22-1219.

45. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024) (No. 22-451); Relentless, Inc. v. Dep't of Com., No. 22-1219.

46. Loper Bright Enters. v. Raimondo, 45 F.4th 359 (D.C. Cir. 2022), cert. granted in part sub nom. Loper Bright Enters. v. Raimondo, 143 S. Ct. 2429 (2023).

47. *Id*.

deference.[48] 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."[49]

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.[50] 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?[51] 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?[52] 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.[53]

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.[54] 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

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48. *Id.*

49. Biden v. Texas, 597 U.S. 785, 830 (2022) (Alito, J. dissenting).

50. 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.

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

52. *See* City of Arlington, Tex. v. F.C.C., 569 U.S. 290, 297 (2013).

53. *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.").

54. *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 31, 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.").

interpretation of law."[55] 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.[56] It is to cede to the combination of the executive and legislative branches 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."[57] 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.[58] Even as agencies have actively enlarged their sphere of operation, deference-prone jurists 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."[59] One longtime 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."[60] It is not the ineliminable indeterminacies of language that bring about this approach; it is judicial deference, whether

55. MERRILL, *supra* note 31, at 224.

56. *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 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.").

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

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

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

60. Raymond Kethledge, *Ambiguities and Agency Cases*, 70 VAND. L. REV. EN BANC VOL. 315, 323 (2017) (emphasis added).

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.[61] 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.[62] But seldom does the Court ever 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 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.[63] 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."[64]

ADDENDUM

As the Supreme Court sent *Chevron* deference to the depths, the theme of judicial humility and its attendant debates resurfaced. Justice Elena Kagan, with Justices Sonia Sotomayor and Ketanji Brown Jackson in tow, spent much of her dissent lobbing accusations of judicial hubris at the majority.[65] Her criticisms,

61. *See, e.g.*, Relentless, Inc. v. United States 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").

62. *See, e.g.*, West Virginia v. EPA, 596 U.S. at 783 (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.").

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

64. C.S. LEWIS, MERE CHRISTIANITY 114 (1960).

65. *See, e.g.*, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2294 (2024) (Kagan, J., dissenting) ("A rule of judicial humility gives way to a rule of judicial hubris."); *id.* at 2295 ("And the majority cannot destroy one doctrine of judicial humility without making a laughing-stock of a second.

previewed during oral arguments, did not deter the majority or save *Chevron*. They did, however, prompt responses from Chief Justice Roberts, writing for the six-justice majority, and from Justice Neil Gorsuch, who used his solo concurrence to develop his own thoughts on how humility guides a judge's relationship to judicial predecessors and precedent.

We glossed the theme of judicial humility in relation to judicial deference before the close of the Supreme Court's 2023 term.[66] Now, we reflect on these debates in light of that term's decisions in *Loper Bright Enterprises v. Raimondo* and *Relentless v. Department of Commerce* in this addendum.

Before taking up the opinions from the bench, consider an opinion that is bench-adjacent—indeed, as near to the decisions as one can be without having written them. Not long after the Supreme Court handed down its rulings, Paul Clement—appellate counsel for *Loper Bright*—characterized the decision as a "Copernican" shift in the understanding of administrative law.[67] Of course, the authors are not bound to *defer* to that characterization even coming from an advocate of Clement's eminence. Nevertheless, his opinion might prevail based on its ability to persuade the listener that it captures the decision's significance. And "Copernican" is an apt way to put the matter.

The shock Copernicus gave to the medieval mind with his insistence on a heliocentric universe did not alter reality. The celestial bodies described by his theorem remained in motion as before. Copernicus, however, changed the way people understood reality, their place in a broader cosmos. Something similar—though far less grand—is true here. The bodies of the federal government, great and small, continue to move in their courses much as they did on June 27, 2024. Neither the hopes of *Loper Bright*'s proponents nor the fears of its detractors can convert the decision into the tool that suddenly fells the cloud of administrative satellites orbiting the executive branch. What changed on June 28, 2024, when the decisions in *Loper Bright* and *Relentless* were announced, was the way that judges, civil servants, and legislators are obliged to approach questions of the administrative state's relationship to the major planets of the constitutional cosmos.

Copernican is also an apt characterization because it evokes imagery central to the administrative state's mythology. Woodrow Wilson, the godfather of the federal administrative state, considered the framers' vision of constitutional order

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(If opinions had titles, a good candidate for today's would be Hubris Squared.)"). Justice Jackson recused herself from the *Loper Bright* case given her prior exposure to the case while serving on the U.S. Court of Appeals for the District of Columbia. She did, however, hear arguments in *Relentless* and joined Justice Kagan's dissent as it applied to that case.

66. *See* discussion *supra* pp. 1–10.

67. The Federalist Society 2024 Annual Supreme Court Round Up (at 10:50) https://www.youtube.com/watch?v=LXr8Ez80kYI [https://perma.cc/36FV-B4KA].

outmoded because it was "Newtonian" in conception.[68] Wilson criticized the framers' insistence on a system in which the three branches operated in their separate spheres as a government constructed on the model of "an orrery."[69] Wilson insisted to the contrary that a government was not a "solar system" but an organism, that it answered "to Darwin, not to Newton," and that it must be permitted to evolve whatever cooperative arrangements were best adapted to the challenges of the times.[70]

But with legal formalism resurgent on the Supreme Court, the planetary analogy retains not only appeal but relevance. Despite periodic experiments in novel government arrangements—hybrid entities like the Federal Trade Commission or the Consumer Financial Protection Bureau—the tripartite separation of federal powers has not faded into history but remained the polestar for government actors in every branch. And while complete differentiation of the branches' respective powers may not be practicable, it is the beau idéal with which judges must reckon in every case that implicates the horizontal separation of powers. Thus, the Newtonian/Copernican notion that the great bodies of government should move in their appointed orbits and retain or roughly fixed relations to one another remains a serviceable analogy. While Darwin, a stranger to the founders' generation, is not in vogue with legal thinkers who aspire to understand, if not emulate, the designs of our government's architects.

Just as Copernicus's heliocentrism reoriented mankind's attention to the solar system's real center, so the *Loper Bright* decision attempts to reorient its audience's attention towards its proper focus. To what exactly? Not to the courts, at least not primarily as the dissenters think. Rather, in the most immediate sense, it is to the Administrative Procedure Act, "the fundamental charter of the administrative state," that somehow escaped notice or mention in the 1984 *Chevron* decision.[71] In a more remote sense, towards the Constitution's first three articles, which gave interpretive authority to the courts, gave legislative authority to Congress, and gave neither to the supporting cast of executive branch actors.

THE CASES

Both *Loper Bright* and *Relentless* were filed by fishermen challenging the National Marine Fisheries Service's interpretation of the Magnuson-Stevens Act.[72] The Fisheries Service oversees a congressionally mandated program under which fishing vessels are obliged to carry monitors aboard, who would, among

68. WOODROW WILSON, *What Is Progress?*, *in* THE NEW FREEDOM: A CALL FOR THE EMANCIPATION OF THE GENEROUS ENERGIES OF A PEOPLE (1912) https://www.gutenberg.org/files/14811/14811-h/14811-h.htm#II [https://perma.cc/73JJ-ZHWJ].

69. *Id.*

70. *Id.*

71. John F. Duffy, *Chevron, De Novo: Delegation, Not Deference*, 31 GEO. MASON L. REV. 541 (2024) (discussing "the glaring omission in the Chevron opinion of any mention of section 706 or any other section of the APA").

72. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2255–56 (2024).

other things, take a portion of the fishermen's catch for scientific research and ensure that the fishermen weren't overfishing or using prohibited gear.[73]

Since 1976, when Congress passed the Magnuson-Stevens Act, the government had paid its monitors' costs and wages.[74] In 2020, however, the Fisheries Service decided that the fishermen should have to pay at the rate of 710 dollars per day.[75] The fishermen sued, arguing that the Magnuson-Stevens Act gave the Fisheries Service no power to shift the costs in this manner.[76] Although the Act was silent on that point, lower courts saw enough linguistic fog in the text to conclude that it was "not wholly unambiguous" whether the Service had the power.[77] And because there was "some question" about Congress's intent, the lower courts granted the government *Chevron* deference, ratifying the Fisheries Service's late discovery of a latent power.[78]

When the case reached the Supreme Court, the fisherman offered the Court two ways to decide in their favor: (1) holding that the lower courts applied *Chevron* wrongly, or (2) overruling *Chevron* entirely or "at least clarify[ing] that statutory silence . . . does not constitute an ambiguity requiring deference."[79] The Court took up the second question, ignored its second clause, and charged headlong at *Chevron*. The fishermen, having done their duty of getting the case up to the Supreme Court, then more or less disappeared from the decision and the dissent. The facts of their case, the particulars of the Magnuson-Stevens Act, and the Fisheries Service's dubious reading of that law were all largely ignored as the justices took their positions assaulting or defending *Chevron*.

The majority, led by the Chief Justice, wielded the Administrative Procedure Act against *Chevron*.[80] That law codified "the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment."[81] The Act's plain text—"the reviewing court shall decide *all* relevant questions of law"[82]—"means what it says" and "cannot be squared" with *Chevron* deference.[83] Henceforth, courts "must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires."[84] Justice Thomas, concurring, wielded Article III to the same end: "[b]ecause the judicial power requires judges to exercise their independent judgment, the deference that

73. *Id.* at 2255.
74. *Id.*
75. *Id.*
76. *Id.* at 2256.
77. *Id.* (quoting lower court decisions).
78. *Id.* (quoting lower court decisions).
79. Petition for Writ of Certiorari, i–ii, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).
80. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2263 (2024) ("The deference that *Chevron* requires of courts reviewing agency action cannot be squared with the APA.").
81. *Id.* at 2261.
82. 5 U.S.C. § 706.
83. *Loper Bright*, 144 S. Ct. at 2262, 2263.
84. *Id.* at 2273.

Chevron requires contravenes Article III's mandate."[85] And Justice Gorsuch, also concurring, attempted to wrest the shield of *stare decisis* away from *Chevron*'s defenders: "the doctrine of stare decisis supports [ending *Chevron*]."[86]

On the opposing side, Justices Kagan (joined by Justices Sotomayor and Jackson) attempted to push back against the majority and Justice Gorsuch. Her overriding theme, as usual, was that the majority destroyed "[a] rule of judicial humility" and replaced it with "a rule of judicial hubris."[87] Reiterating her claims from previous opinions, Justice Kagan argued that Congress often writes ambiguous statutes and intends that "some other actor" will clarify them.[88] Judges, meanwhile, "do not know everything" and therefore one can conclude that Congress wants bureaucrats, not judges, to clean up the ambiguities it leaves behind.[89]

THE DISSENT CHARTS JUDICIAL HUMILITY'S DESCENT

Justice Kagan believes that the majority has sinned doubly against humility, and lest her point be overlooked, she proposes that "[i]f opinions had titles, a good candidate for today's would be Hubris Squared."[90] Stare decisis, she explains, "shares something important with *Chevron*. Both tell judges that they do not know everything, and would do well to attend to the views of others. So today, the majority rejects what judicial humility counsels not just once but twice over."[91]

For the dissenters, deference seemed the very substance of judicial humility. The majority's decision to overrule *Chevron*, therefore, is humility at its lowest ebb and hubris at its highwater mark. De novo review of legal questions, which the majority's holding now requires, is thus transformed from the default setting for judicial proceedings into a judicial power grab and the denigration of the coordinate federal branches. To make their power-grab characterization stick, the dissenters undertake both to show that the judiciary ought not to have what it is grabbing (independent judgment) and to provide a compelling historical pedigree for deference to show the majority's disregard for history and tradition.

THE GRAY SQUIRREL'S BURDEN

The western gray squirrel is an unassuming fellow.[92] He "live[s] in trees, rarely venture[s] into open spaces, and subsist[s] principally on acorn and

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85. *Id*. at 2274 (Thomas, J., concurring).
86. *Id*. at 2276 (Gorsuch, J., concurring).
87. *Id*. at 2294 (Kagan, J., dissenting).
88. *Id*.
89. *See id*. at 2307; *see generally* Part I, *supra* (collecting examples of this theme in Justice Kagan's opinions and statements at oral arguments).
90. *Id*. at 2295 (Kagan, J., dissenting).
91. *Id*. at 2307.
92. This section was originally drafted in August of 2024, before the tragic death of P'Nut, the eastern gray squirrel, at the hands of bureaucrats working for New York's inaptly named Department of Environmental Conservation. Our discussion of P'Nut's western brother was prompted only by his prominent role in Justice Kagan's dissent. Still, we would be remiss now if we did not point out that P'Nut's demise was an example of regulatory overreach so profound that it prompted a recent discussion

nuts."[93] Lately, he's had a rough go in Washington state where dwindling numbers have made him a potential object of the Fish and Wildlife Service's solicitude.[94] Unfortunately for this humble critter, Justice Kagan has assigned him an additional task: upholding the status quo in administrative law. Not the whole burden of that task, of course, squirrel shoulders being what they are; still the gray squirrel features prominently among Justice Kagan's examples of delicate statutory ambiguities now committed to the rustics appointed to the federal bench.[95]

"Deciding when one squirrel population is 'distinct' from another (and thus warrants protection) requires knowing about species more than it does consulting a dictionary."[96] The Fish and Wildlife Service is staffed with more experts than any judge's chambers, and the Service has the benefit of the expertise that can only be derived from experience administering the statute. From this, and examples like it, Justice Kagan derives *Chevron's* default congressional preference for agencies to be the authoritative interpreter of all such statutory ambiguities, gaps, or silences.[97]

According to Justice Kagan, "*Chevron* asks, what would Congress want?"[98] But that anodyne summary of a controversial practice runs into some problems, not least among them, a problem of authority. Chevron deference never asked the agency to show that the ambiguity over which it sought interpretive primacy was in fact a delegation, not an accident; rather *Chevron* reflected a blanket judicial assumption that Congress invariably intends for ambiguities to be delegations to agencies. Chief Justice Roberts is no longer willing to countenance the assumption, stating that "in our democracy unelected judges possess no authority to elevate their own fictions over the laws adopted by the Nation's elected representatives."[99]

Yet Justice Kagan defends her ideal Congress and implicitly ascribes several normative commitments to that body: that it prizes efficiency, has faith in the unalloyed goodness and uprightness of agency motives and personnel, and presumes that the projects of federal agencies are so beneficial and so urgent that their operation should not be hampered by aggrieved private parties. But to borrow a line from Justice Oliver Wendell Holmes, the views of that fictional Congress and its proponents are based on a "theory which a large part of the country does not entertain."[100]

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and tribute from Justice Neil Gorsuch, who diagnosed the incident as a symptom of our nation's pathology of regulatory overreach. *See* Zach Schonfeld, *Gorsuch Invokes P'nut the Squirrel in Federalist Society Dinner Keynote*, THE HILL (Nov. 14, 2024, 10:24 PM), https://thehill.com/homenews/administration/4992094-gorsuch-invokes-pnut-the-squirrel-in-federalist-society-dinner-keynote [https://perma.cc/DH6E-E3WR].

93. Nw. Ecosystem All. v. U.S. Fish & Wildlife Serv., 475 F.3d 1136, 1138 (9th Cir. 2007).

94. *Id.*

95. *See Loper Bright*, 144 S. Ct. at 2296, 2298, 2300, 2306 (Kagan, J., dissenting).

96. *Id.* at 2298.

97. But see, *Ray*, *supra* note 7 (arguing that this sort of expert knowledge can be taught to judges during litigation with little cost).

98. *Loper Bright*, 144 S. Ct. at 2301 (Kagan, J., dissenting).

99. *Id.* at 2282.

100. Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

The problem is not only one of authority to adopt the hypothetical; attributing preferences to Congress suffers from the same difficulties that afflict all such rationalizing exercises.[101] Whether theorizing about man's lot in a state of nature, or about justice from behind the veil of ignorance, one might identifying an array of relevant considerations and motives, but the selection of that array and the relative weight one assigns within it is likely to reflect unstated normative preferences, shielded from examination and criticism.[102] For instance, one can posit what the "warp and woof of modern government"[103] or "modern-day adaptable governance *must* look like";[104] insist that means expedient to these amorphous concepts are in fact dire necessities; and then mold the relevant law or, if needed, the Constitution to fit the contours of these necessities. This sort of tendentious reasoning, however, is what Justice Amy Coney Barrett (in another administrative law decision this term) described as "a host of policy arguments masquerading as 'matter[s] of congressional intent.'"[105] The fictional Congress, like other archetypes—the rational economic actor or utility maximizer—ends up laundering the preferences of the theorist responsible for the hypothetical.

There are myriad reasons why actual congressional representatives might not prefer to make agencies the authoritative interpreters of any and every ambiguity that a law might yield to the reader determined to find them. As noted above, Congress has good reason to suspect that independent courts may be the more faithful interpretive agents than agencies beholden to the shifting political whims and fortunes of the presidency.[106] Congress may hew to the traditional view that the adversarial process of litigation, rather than the internal process of agency rulemaking, is the better mode of liquidating the meaning of statutory terms. Congress may appreciate that generalist courts are better at weighing the competing rights and claims of regulated parties than are civil servants accustomed to internal, mission-focused agency processes. In short, Congress may prize values or hold concerns that give it a more jaundiced view of agencies' judgment and the expertise that putatively informs it. But Justice Kagan's fictional Congress need not harbor any such doubts or preferences. Meanwhile, the image of the judge

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101. United States v. O'Brien, 391 U.S. 367, 383–84 (1968) ("Inquiries into congressional motives or purposes are a hazardous matter. . . . What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it.").

102. *See* Jeffrey A. Pojanowski, *Legal Thought in Enlightenment's Wake*, 4 JURISPRUDENCE 158, 159 (2013) (discussing how appeals to non-normative frameworks such as so-called "public reason" permits disputants "to smuggle in the critical premises that [they] cannot help but hold, yet the very act of smuggling frees [them] from defending or justifying those beliefs").

103. *Loper Bright*, 144 S. Ct. at 2294 (Kagan, J., dissenting).

104. Sec. & Exch. Comm'n v. Jarkesy, 144 S. Ct. 2117, 2175 (2024) (emphasis added).

105. Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys., 144 S. Ct. 2440, 2459 (2024) (citation omitted).

106. MERRILL, *supra* note 31, at 231.

that compliments this picture calls to mind G.K. Chesterton's description of the "sceptic" who "is so humble that he doubts if he can even learn."[107]

Whether in markets or in government, the default settings that guide decision-makers matter.[108] Is Justice Kagan's account compelling enough to make the rule of deference the judiciary's default approach to agency interpretations? Most of her colleagues were unpersuaded. In fact, the majority and the two solo concurrences are curiously insensible to the gray squirrel and his plight. Perhaps, they do not think the gray squirrel has much to fear from courts interpreting the Endangered Species Act (or any other law) de novo. The majority, like many inside of government and out, chose not to be overborne by the weight of the expertise rationale.

THE REAL AND THE IDEAL AMONG JUDGES AND ADMINISTRATORS

The account of the "rational optimizer" bureaucrat and his comparative advantage over judges and legislators is too flat to be mistaken for reality.[109] As we stated before the *Loper Bright* decision, proponents of the expertise rationale tend to chronically discount the extent to which subject matter experts can and must explain themselves to non-experts within the executive branch, individuals who are (generally) no more learned or perceptive than their colleagues in Congress and on the bench. When agencies explain themselves in the context of litigation judges become "steeped in the subject matter, and reviewing courts have the benefit of their [expert] perspectives."[110]

Also discounted by proponents of agency expertise is the degree to which judicial experience prepares judges to do better than "muddl[ing]" through in the face of interpretive difficulties.[111] Before their appointments, judges may have pursued literature and philosophy more readily than the material sciences. However, the life of a judge managing varied dockets has equipped them with different skills. For instance, patent litigation relies on generalist judges to sift the competing proffers from subject-matter experts and to construe the meaning of a disputed patent. This means parsing such gnarly technical terms as "molecular

107. Gilbert K. Chesterton, ORTHODOXY (1908).

108. *Cf.* United States, et al. v. Google, LLC, No. 20-cv-3010 (APM), 2024 U.S. Dist. LEXIS 138798 at *63 (D.D.C. Aug. 5, 2024) ("That users overwhelmingly use Google through preloaded search access points is explained in part by default bias, or the power of defaults. The field of behavioral economics teaches that a consumer's choice can be heavily influenced by how it is presented. The consensus in the field is that "defaults have a powerful impact on consumer decisions." (internal citations and quotation marks omitted)).

109. The "rational optimizer" term is borrowed from Matthew Crawford. *See* Matthew Crawford, *Big Tech and the Challenge of Self-Government*, THE HERITAGE FOUNDATION (July 2, 2024) https://www.heritage.org/conservatism/report/big-tech-and-the-challenge-self-government [https://perma.cc/Y2M9-C6MB].

110. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2267 (2024).

111. *See id.* at 2298 (Kagan, J., dissenting).

weight,"[112] "metacode map,"[113] and "geodesic sphere phased array antenna system."[114] Despite the indispensability of technical knowledge in such inquiries, judges, not experts, make the final determination of the patent's meaning. Even when *Chevron* was in broad usage, courts pointedly declined to give that degree of deference to the determination of the Patent Trademark Office, only *Skidmore* consideration was afforded.[115]

Nor are judges simply a passive audience receiving the benefits of expert testimony, they are gatekeepers, even skeptics to a point. The American system of adversarial litigation asks judges to assimilate the expertise of others, decide which side has the stronger view on technical questions and even to exercise discretion at the threshold of the inquiry, deciding the types of experts and methodologies that are admissible. "This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue."[116] Contra those with a low view of judicial capabilities, the Supreme Court in *Daubert v. Merrell Dow* was "confident that federal judges possess the capacity to undertake this review."[117] And it has carried that confidence into other spheres. In *Martin v. Occupational Safety and Health Review Commission*, for example, the Court played this same gatekeeping role in choosing which of two agencies was better qualified to resolve an ambiguity within the Occupational Safety and Health Act.[118] Moreover, in *Gonzales v. Oregon*, the Court established that a precondition for deference was that the agency was actually using its

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112. In Teva Pharms. USA, Inc. v. Sandoz, Inc., the district court was obliged to parse and choose from among three competing definitions for the term molecular weight because the "phrase might refer (1) to molecular weight as calculated by the weight of the molecule that is most prevalent in the mix that makes up copolymer–1. (The scientific term for molecular weight so calculated is, we are told, 'peak average molecular weight.') The phrase might refer (2) to molecular weight as calculated by taking all the different-sized molecules in the mix that makes up copolymer–1 and calculating the average weight, i.e., adding up the weight of each molecule and dividing by the number of molecules. (The scientific term for molecular weight so calculated is, we are told, 'number average molecular weight.') Or, the phrase might refer (3) to molecular weight as calculated by taking all the different-sized molecules in the mix that makes up copolymer–1 and calculating their average weight while giving heavier molecules a weight-related bonus when doing so. (The scientific term for molecular weight so calculated, we are told, is 'weight average molecular weight.')." Teva Pharms. USA, Inc. v. Sandoz, Inc., 574 U.S. 318, 322–23 (2015).

113. i4i Ltd. P'ship v. Microsoft Corp., 670 F. Supp. 2d 568, 573 (E.D. Tex. 2009), aff'd as modified, 589 F.3d 1246 (Fed. Cir. 2009), opinion withdrawn and superseded on reh'g, 598 F.3d 831 (Fed. Cir. 2010), aff'd, 564 U.S. 91 (2011).

114. Bondyopadhyay v. United States, 129 Fed. Cl. 793, 795 (Fed. Cl. 2017).

115. Merck & Co. v. Kessler, 80 F.3d 1543, 1550 (Fed. Cir. 1996) ("Such deference as we owe to the PTO's interpretive "Final Determination" regarding the interrelationship by the URAA and the Hatch–Waxman Act thus arises, not from the rule of Chevron, but solely from, inter alia, the thoroughness of its consideration and the validity of its reasoning, i.e., its basic power to persuade if lacking power to control.").

116. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 592–93 (1993).

117. *Id.* at 593.

118. *See* Martin v. Occupational Safety and Health Review Comm'n, 499 U.S. 144, 146–47 (1991).

expertise, which naturally required the Court to assess both the scope and use of the agency's expertise.[119]

All this is far from placing judges on equal footing with those who possess true subject-matter expertise. Yet it should cast doubt on those who would increase the power of agencies based on a fear that judges could do nothing more than muddle and meddle.[120]

From a more pragmatic standpoint, the expertise rationale loses gravitas when the executive branch creates or reinforces the perception that expertise is not what it used to be. Take, for instance, the Biden-Harris administration's directive to federal departments and agencies to make use of something it refers to as "indigenous knowledge" and apply it in "Federal research, policies, and decision making."[121] The directive is vague on what indigenous knowledge is, yet it is insistent that such knowledge is "unique to each group of Indigenous Peoples."[122] Is this knowledge in which agencies can become experts? Is identity-based knowledge consistent with the rationalistic premises of the administrative state or consonant with the norms of democratic accountability that the APA requires? Although native people's communal knowledge may record certain observable phenomena accessible regardless of one's own background, whence comes the administration's authority to privilege non-rational "spiritual" elements of one community's perspective and make them authoritative?

That is but one vivid illustration of the fact that the expertise invoked inside the bureaucratic archipelago can be more mystification than the genuine article. Often enough, "expertise" is a label under which controversial value judgments are smuggled while agency personnel insist that only objective metrics are being applied.[123] Of course, these problems arose long before the current administration. In her 2001 article "Presidential Administration," then-Professor Elena Kagan candidly acknowledged that not only do "Agency officials often make decisions for reasons having little to do with expert knowledge" but "Bureaucratic expertise . . . cannot alone or even predominantly drive administrative decisions."[124] Instead, "value judgments" for which "agency experts have neither democratic warrant nor special competence" drive the choice of means for implementing or extending congressional commands.[125]

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119. *See* Gonzales v. Oregon, 546 U.S. 243, 255–56 (2006).

120. See generally Ray, *supra* note 7.

121. OFF. OF SCI. AND TECH. POLICY, EXECUTIVE OFFICE OF THE PRESIDENT, MEMORANDUM FOR HEADS OF FEDERAL DEPARTMENTS AND AGENCIES (2022).

122. *Id.*

123. *See*, *e.g.*, Temporary Halt in Residential Evictions in Communities With Substantial or High Transmission of COVID-19 To Prevent the Further Spread of COVID-19, 86 Fed. Reg. 43244, 43247 (Aug. 6, 2021) (asserting that "the COVID-19 vaccination effort has a slower rate of penetration among the populations most likely to experience eviction" as a basis for preventing certain owners from exercising control of their rental properties).

124. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2352, 2353 (2001).

125. *Id.* at 2353.

Now, in an era where it is commonplace for the executive branch to dedicate the "whole of government" to achieving purposes outside of agencies' normal remit, such expertise as agencies may bring to bear in these campaigns takes on a decidedly mercenary quality.[126]

Although agency judgments may be highly political, these are not outgrowths of the popular democratic politics undergirding the accountability rationale for judicial deference to agencies. As noted above, Congress has incentives to avoid making politically controversial judgments and to force agencies to make them instead through policymaking under the guise of statutory interpretation. In that process direct political accountability is intentionally supplanted by a more attenuated one. Even that attenuated accountability is less than it first appears to be. As then-Professor Kagan explained, there are "inherent limits on the President's capacity to control, or even interest in controlling, much administrative action," and "Presidents (and their staffs) do not often think enough, know enough, or care enough to impede" agency action.[127]

When Congress uses delegation to avoid hard choices, it creates paths which the executive may use in unforeseen ways to bypass Congress in future policymaking. Using executive action to transfer the student-debt burden of certain borrowers to taxpayers or to deploy the Veterans Administration as a Trojan horse for abortions in states where voters have restricted them are certainly attempts by the executive branch to avoid the elected representatives in Congress, perhaps the voting public as well.[128]

In certain instances, the appeal of administrative policymaking over legislative, is to save one the effort of persuading others, that is, the inconvenience of democratic politics.[129] Thus, it is the favored means "to install the automated enforcement of cutting-edge social norms," the sort that the democratic populous could not be expected to endorse were they actually consulted.[130] Examples such as mandating the use of an individual's preferred pronouns in schools, opening of women's facilities and activities to biological males, or instructing federal officers "to facilitate access" of unaccompanied minors to abortions come to mind.[131]

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126. Examples of policy areas subject to the whole-of-government approach under the Biden-Harris administration include Advancing Racial Equity, *see* 86 Fed. Reg. 7009 (2021).

127. Kagan, *supra* note 121, at 2355.

128. *See, e.g.*, Biden v. Nebraska, 143 S. Ct. 2355, 2373 (2023) ("the Secretary's assertion of administrative authority has conveniently enabled [him] to enact a program that Congress has chosen not to enact itself.") (internal quotations and citations omitted); Rachel N. Morrison, *Department of Veterans Affairs Rule Doubles Down on Abortion*, THE FEDERALIST SOCIETY BLOG (March 13, 2024), https://fedsoc.org/commentary/fedsoc-blog/department-of-veterans-affairs-rule-doubles-down-on-abortion [https://perma.cc/822M-YDGE] ("The VA claimed it had 'good cause' to issue the IFR because, after Dobbs, 'veterans living in States that ban or restrict abortions may no longer be able to receive [abortions] in their communities as a result of State restrictions.'").

129. Matthew Crawford, *Big Tech and the Challenge of Self-Government*, THE HERITAGE FOUNDATION (July 2, 2024) https://www.heritage.org/conservatism/report/big-tech-and-the-challenge-self-government [https://perma.cc/U3K6-MBDX].

130. *Id.*

131. *See* Tennessee v. Cardona, No. 24-5588, 2024 WL 3453880, at *1 (6th Cir. July 17, 2024) (describing the effects of the Biden Administration's proposed revisions to Title IX); Office of Refugee Resettlement, DEPT. OF HEALTH & HUMAN SERVICES, RE: Field Guidance #21 – Compliance with Garza Requirements and Procedures for Unaccompanied Children Needing Reproductive Healthcare

When contentious policies like these appear in forms like internal agency guidance, as the guidance on abortions for alien minors did, agency personnel seem to be muting the prospects for post-hoc political accountability by diminishing the opportunities for the public to become aware of its policies or to make their own thoughts known to the decision makers.

Factually, *Loper Bright* and *Relentless* presented the Court with a funding question that, while important, was far less controversial. Still, the dissenters' unwillingness to address the less idealized motives for administrative policymaking and its implications for the accountability rationale reduces the force of their critique.

IS THE DEVIL ACTUALLY IN DE NOVO?

The dissenters' difficulty in identifying the dire consequences of de novo review for agencies' missions does not help either. Roberts preempts that attack with several citations to the 1944 decision *Skidmore v. Swift*, which held that where a statutory question is truly within the agency's "specialized experience" then the court could accord the agency's views weight commensurate with the "thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements."[132] Expertise will necessarily remain a significant factor in judicial adjudication of agency cases. Yet, because expertise no longer has the power to bind judges, Justice Kagan contends that the "majority turns itself into the country's administrative czar."[133] That caricature leaves unanswered the question of why *Skidmore* respect would be inadequate for tough cases. Merely because it does not enjoin judges? If judges exercise judicial humility only when they are bound to do so, one wonders whether it is truly humility at all.

The claimed difficulty with *Skidmore* is that judges will "argue [] about what 'respect' requires."[134] As lawyers by training, judges can surely argue among themselves about anything, yet the legal system continues apace with all the difficult line-drawing doctrines. Justice Kagan acknowledges this, though she draws a different conclusion from it.[135] She has faith that courts can and have overcome the difficulties of *Chevron*'s imprecise inquiries for ambiguity and reasonableness, but

(November 10, 2022), https://www.acf.hhs.gov/sites/default/files/documents/orr/field-guidance-21.pdf [https://perma.cc/X37B-P4Q3].

132. Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944). The *Loper Bright* majority evidently sees nothing in *Skidmore*, a pre-APA decision, that contradicts the APA's command of de novo review. Professor John Duffy notes that what is often called Skidmore deference is, at a minimum, "the close sibling of de novo review." Duffy, *supra* note 71, at 554. Commentary from several justices during oral argument indicates that they too see little, if any, daylight between the standards because *Skidmore* is not deferential in application. *See* Jack Fitzhenry and Caleb Sampson, *After Chevron, a New Birth of Deference for the Administrative State?*, Federalist Society Blog (Aug. 13, 2024) (canvassing the justices' discussion of *Skidmore*).

133. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2295 (2024) (Kagan, J., dissenting).

134. *Id.* at 2309.

135. *See id.* at 2309–10.

she doubts that courts can manage *Skidmore*'s factors without hamstringing regulators. Justice Kagan, however, offers readers few reasons to think that chaos will ensue from *Skidmore* review or that judges (particularly lower court ones with larger dockets to manage) would have any enthusiasm for displacing the closely reasoned bases for an agency's interpretation, particularly when there is a tight connection between the contested statutory ambiguity and the types of factual determinations for which the agency would receive deferential review under APA § 706(2)(E).

Returning to our friend the gray squirrel, if his distinctness "requires knowing about species more than it does consulting a dictionary,"[136] as Justice Kagan contends, then the premises underlying Fish and Wildlife's determination would likely be heavily factual in nature. Those subsidiary premises are the sorts of determinations for which the APA expressly commands judicial deference.[137] The agency's ultimate legal conclusion, though lacking the ability to control the judge's determination, would practically speaking enjoy the aura of deference accorded to the underlying factual findings from which it derives.[138] Chief Justice Roberts seems to confirm this intuition when he states that "an agency's interpretation of a statute . . . may be especially informative 'to the extent it rests on factual premises within [the agency's] expertise.'"[139]

To the extent the gray squirrel's distinctness is a matter of historic usage, one that depends on "how the term has covered the population segments of other species"[140] in past agency determinations, then that "common-law" reasoning is the sort of information that agency counsel can readily communicate to judges because it requires no technical knowledge and trades in the same sort of reasoning that judges themselves are accustomed to applying. If "agencies often know things about a statute's subject matter that courts could not hope to," such historical knowledge is not among those things.[141] Where the agencies' usage of an ambiguous term has been consistent and longstanding, then precedent militates heavily in favor of judges according it respect.[142]

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136. *Id.* at 2298.

137. 5 U.S.C. § 706(2)(E) (providing that agency fact-finding may be overturned only if "unsupported by substantial evidence"). *But cf.* Evan D. Bernick, *Is Judicial Deference to Agency Fact-Finding Unlawful?*, 16 GEO. J.L. & PUB. POL'Y 27 (2018) (arguing that in "cases involving administrative deprivations of . . . core private rights to 'life, liberty, or property,' fact deference violates both Article III and the Due Process of Law Clause of the Fifth Amendment").

138. Justice Kagan notes that "an interpreter decide[s] when one population segment of a species is 'distinct' from another . . . by considering that requirement with respect to particular species, like western gray squirrels." *Loper Bright*, 144 S. Ct. at 2306 (Kagan, J., dissenting). The close connection in this inquiry between scientific fact and legal conclusion makes it the sort of interpretation more naturally eligible for judicial respect.

139. *Loper Bright*, 144 S. Ct. at 2267 (quoting Bureau of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89, 98 n. 8 (1983)).

140. *Id.* at 2298 (Kagan, J., dissenting).

141. *Id.*

142. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (granting an agency's judgement "weight" when that judgment is, among other things, consistent with prior decisions); *see also* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 942 (2017) ("A

A return to de novo review, though not an enabling doctrine for agencies, is hardly an invitation for courts to adopt interpretations that make a hash of Congress's regulatory programs. Although "construing statutory language is not merely an exercise in ascertaining 'the outer limits of a word's definitional possibilities," even the most rigorous textualists attempt to harmonize statutory provisions and choose the interpretation that "produces a substantive effect that is compatible with the rest of the law."[143] It is entirely possible that a certain disuniformity in regulatory schemes may result from competing judicial interpretations. But as one far more incisive commentator on this subject observed, "To note legal pluralism's costs is not the same as establishing that they are prohibitive."[144]

A DE NOVO LOOK AT THE APA

When formulating a doctrine like *Chevron* deference based on a hypothetical Congress there is a tendency to obscure the intentions and preferences of real Congresses.[145] For instance, by adopting *Chevron*'s presumption that Congress generally wants an agency's interpretation to control, courts avoid the more nuanced task of examining the breadth of the specific statutory delegations Congress made to an agency and the corresponding respect owed by courts to those determinations.[146]

Then there is the difficulty of reconciling a rule of broad-gauge deference with the intent of the 79th Congress which passed the Administrative Procedure Act in 1946. The majority's holding rests on the APA's command that "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[147]

The majority draws on, or at least agrees with, the work of Professor Aditya Bamzai, who filed an amicus brief in the case, and garnered a citation from Justice Gorsuch.[148] Bamzai's scholarship explains that previous efforts to clarify APA 706's command had misunderstood the judicial practices that the 79th Congress codified.[149] He challenges the view that there is a "long tradition of deference to agency interpretations" by demonstrating that what prevailed in courts

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number of seminal cases followed this mode of analysis by giving weight to early and longstanding constructions of ambiguous constitutional provisions.").

143. Sackett v. Env't Prot. Agency, 598 U.S. 651, 676 (2023) (internal quotations and citations omitted).

144. Jeffrey A. Pojanowski, *Without Deference*, 81 MISSOURI L. R. 4 1075, 1083 (2016).

145. *Loper Bright*, 144 S. Ct. at 2269 ("At best, our intricate Chevron doctrine has been nothing more than a distraction from the question that matters: Does the statute authorize the challenged agency action?").

146. Duffy, *supra* note 71, at 541.

147. 5 U.S.C. § 706.

148. *See* Brief of Professor Aditya Bamzai as Amicus Curiae in Support of Neither Party, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024); *Loper Bright*, 144 S. Ct. at 2283–84 (Gorsuch, J., concurring) (citing Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L. J. 908, 987 (2017)).

149. *See generally* Bamzai, *supra* note 22.

prior to the New-Deal Era was "not a form of judicial deference, as it has come to be understood in the post-*Chevron* era" but a form of "respect" accorded only to "longstanding and contemporaneous executive interpretations of law as part of a practice of deferring to longstanding and contemporaneous interpretation generally."[150] And far from incorporating the judiciary's then-recent departures from that practice, the 79th Congress intended "to stop this deviation from the traditional interpretive rules" and "to reject the experimentation of the 1940s Court."[151]

Bamzai's work gives lawyers, scholars, and judges a reason to prefer "the testimony of the more distant past, as against the more proximate past" of the 1940s decisions on which the dissent relies.[152] That is exactly what the majority does with its extended treatment of the historical norms de novo review to the core judicial function from *Marbury v. Madison* onward.[153] And though only Justice Gorsuch cites Bamzai, the majority repeatedly cites with approval the tradition of affording respect to legal interpretations that are longstanding or contemporaneous with the law's enactment—the core contributions of Bamzai's scholarship on the APA.[154]

The dissenters' disagreement with the majority over the nature of the APA's demands reproduces a version of the *Chevron* problem. The majority concludes that this language requires judges to exercise their independent judgment without deference to agencies.[155] "The text of the APA means what it says," they contend.[156] The dissenters deny that section 706 necessarily requires that meaning. Because Congress did not expressly foreclose deference, they maintain that the text must be "'generally indeterminate' on the matter of deference."[157] In other words, to create space for deference the dissenters employ the same ambiguity-injecting interpretive approach that *Chevron* deference invites. By searching only for express congressional prohibitions on their preferred interpretation, the dissenters continue the practice of treating statutory text as an obstacle to be overcome rather than a source of instruction.[158]

There is a certain irony in arguing that a case that ignored the APA entirely is nonetheless a definitive judicial construction of that law's meaning. Indeed, the dissenters cannot claim that the text of APA requires deference, they can make only the weaker claim that the APA is "compatible" with *Chevron* deference.[159] Still, they maintain that the majority has its history wrong. This argument has two

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150. *Id.* at 912, 916.
151. *Id.* at 918.
152. MATTHEW CRAWFORD, THE WORLD BEYOND YOUR HEAD: ON BECOMING AN INDIVIDUAL IN AN AGE OF DISTRACTION 289 (2016).
153. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2257–58 (2024).
154. *Id.* at 2257–59, 2262; *id.* at 2283 (Gorsuch, J., concurring).
155. *Loper Bright*, 144 S. Ct. at 2261.
156. *Id.* at 2262.
157. *Id.* at 2302 (Kagan, J., dissenting) (quoting ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 207 (2006)).
158. *Id.*
159. *Id.* at 2302 (Kagan, J., dissenting).

main elements. First "is that in the years preceding the APA, courts became ever more deferential to agencies."[160] Second, because "Section 706 was generally understood to 'restate[] the present law as to the scope of judicial review,'" it therefore codified even the aberrations from standard practice exemplified by decisions like *Gray v. Powell* (1941) and *NLRB v. Hearst Publications* (1944).[161] The dissent acknowledges that even such deference as these decisions afforded fell well short of the categorical approach that *Chevron* deference became.[162]

Perhaps the dissent's greatest weakness on this front is its failure to engage with the majority's claim that the longstanding judicial practice was not one of deference to the executive branch but only of giving non-controlling respect for longstanding and contemporaneous interpretations.[163] These terms go unmentioned in the dissent. The dissent also offers little to explain why the aberrations of *Gray* and *Hearst* were the objects of Congress's approval in the APA rather than the mistakes that Congress sought to correct. Its argument on that matter amounts to an assertion that because the *Gray* and *Hearst* decisions existed, Congress must have approved of them.

Ultimately, the dissent's fidelity to *Chevron* implies a contraction of the judicial role. The dissent insists that the "court still has a role to play: It polices the agency to ensure that it acts within the zone of reasonable options."[164] Rather than answering a critic's doubts, that contention only raises more. Can the zone of the "reasonable" be determined without reference to policy considerations? The dissent seems to think that all implied delegations are policy determinations.[165] Do courts then have any realistic means of "policing" agency's application of impliedly delegated power? Are courts limited to halting only an agency's most flagrant efforts to disobey explicit congressional commands? Although *Chevron* was nearly forty years old when it passed from existence, the Supreme Court had never settled on a consistent approach to the *Chevron* Step 2 "reasonableness inquiry."[166] Readers of Justice Kagan's dissent are left with no clearer idea of what courts might have done to police the "zone of reasonable options" at Step 2 had *Chevron* survived. They are left only with the impression that judges

160. *Id.* at 2304.

161. *Id.*

162. *Id.* ("To be clear: Deference in those years was not always given to interpretations that would receive it under Chevron. The practice then was more inconsistent and less fully elaborated than it later became.").

163. *Id.* at 2260 n.3.

164. *Id.* at 2300 (Kagan, J., dissenting).

165. *See*, *e.g.*, *id.* at 2299 ("Still more, *Chevron*'s presumption reflects that resolving statutory ambiguities, as Congress well knows, is "often more a question of policy than of law."); *id.* at 2300 ("Absent a legislative directive, either the administering agency or a court must take the lead. And the matter is more fit for the agency. The decision is likely to involve the agency's subject-matter expertise; to fall within its sphere of regulatory experience; and to involve policy choices . . . .").

166. Kent H. Barnett and Christopher J. Walker, *Chevron Step Two's Domain*, 93 NOTRE DAME L. REV. 1441, 1445 (2018) (explaining that "the Supreme Court has not articulated a coherent approach to step two—originally suggesting some sort of hypertextualist inquiry but, increasingly, suggesting that step two includes an APA-like arbitrary-and-capricious review").

are to approach agencies' interpretations cautiously, with little skepticism and few questions. Call it "laissez faire pour la bureaucratie."

FINAL JUDGMENT

What about the majority? Does its handiwork epitomize hubris or humility? The majority did not go as far as they might have; Justice Thomas's solo concurrence opposing *Chevron* on constitutional grounds makes that evident.[167] The majority chose only statutory grounds, though the petitioners offered both species of argument.[168] Thus, the Court leaves Congress the ability to prescribe deferential standards of review in specific statutes.[169]

The majority's major nod to the humility theme is to note that "part of 'judicial humility' . . . is admitting and in certain cases correcting our own mistakes, especially when those mistakes are serious."[170] Justice Gorsuch adds that "continuing to abide *Chevron* deference would require us to transgress the first lesson of *stare decisis*—the humility required of judges to recognize that our decisions must yield to the laws adopted by the people's elected representatives."[171]

As it works out its own notions of judicial humility, the majority reprises themes familiar from the last few terms of the Roberts Court: formalism; originalism (statutory and constitutional); and a derivative preference for fixity over dynamism in law.

Although the majority chose statutory grounds to resolve the cases, formalism, the concern with the maintenance of the separation of powers, seeps into the majority's discussion of (and evident concern for) the traditional judicial role.[172] Formalism may not be especially sensitive to pragmatic considerations, and that insensibility can make its proponents sound abstract or detached. But there is humility in the justices' effort to keep faith with an inherited design that is not of one's own making.

Statutory originalism, like its constitutional counterpart, is concerned with fixing the meaning of a legal command. If a particular statutory term or concept makes multiple interpretations available, then the majority's insistence on settling on a best meaning affords stability and fixity. That arguably better serves rule of law values, allowing the regulated to know what is required of them. It also has implications for intragovernmental relations. Fixity of meaning can be understood as a corollary to formalism. With less discretionary space in a statute for an

167. *Loper Bright*, 144 S. Ct. at 2273–74 (Thomas, J., concurring).

168. Brief for Petitioners at 23, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024) (No. 22-451) ("Chevron's rule of judicial deference to the executive's interpretation of statutes is flatly inconsistent with Constitution, the APA, and centuries of tradition.").

169. *See Loper Bright*, 144 S. Ct. at 2263 ("[T]he role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. The court fulfills that role by recognizing constitutional delegations, fixing the boundaries of the delegated authority.") (internal quotations omitted).

170. *Id*. at 2272 (internal citations omitted).

171. *Id*. at 2282 (Gorsuch, J., concurring).

172. *See id*. at 2257–58.

agency to fill up with interpretation, agencies will have less ability to innovate new powers not expressly granted by Congress. Thus, statutory originalism may promote greater agency reliance on Congress. Still, as Chief Justice Roberts acknowledges, the statutory originalist may find that the best available meaning of a given statute is that Congress meant to give an agency an open-ended task.[173] If a fixed dynamic meaning is not an oxymoron, then at least it must be conceded that fixity of meaning and dynamic delegations exist in tension with each other. Though, Chief Justice Roberts indicates that even dynamic delegations from Congress to the executive come with judicially enforceable limits attached.[174]

Even the formalist is not totally immune to practical appeals. Fixed statutory meanings are steady reference points that make the judge's task of setting aside agency action "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" more manageable.[175] If the power conferred by Congress is ever evolving, then "it remains a mystery how [judges] are supposed to 'ascertain whether the will of Congress has been obeyed.'"[176] Both because of and in spite of its concern for the separation of powers, the majority wants to exert some influence on Congress. The majority is concerned for how loosely Congress exercises its legislative powers. To be sure, it does not always act on that concern. In less-discussed administrative-state case from the '23 term, the Court by a vote of 7-2 resoundingly reversed a Fifth Circuit decision, which held that perpetual independent funding for the Consumer Financial Protection Bureau violated the Appropriations Clause.[177] The basis for the decision was that the laconic Appropriations Clause did not provide an enforceable limit on Congress's exercise of its legislative discretion apart from a limit on military spending.[178] The majority opinion was authored by the Court's arch formalist, Justice Clarence Thomas. Still the court's more conservative wing would prefer if Congress did not enact so-called "Rorschach Statutes."[179] If the present condition of the court's non-delegation jurisprudence prevents the court from rejecting many works verging on Rorschach-status, then *Loper Bright* expresses the majority's more modest preference that Congress enact laws defined primarily by what they do say rather than what they do not, *i.e.*, gaps and silences.

Overmuch focus on interbranch competition, though, obscures the fact that when courts have an opportunity to address an agency interpretation of law it is

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173. *Id.* at 2263 ("When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits.").

174. *Id.*

175. 5 U.S.C. § 706(2)(C).

176. Petition for Review on Petition for Rehearing En Banc at 26, Consumers' Research v. Federal Communications Commission, 109 F.4th 743, (5th Cir. July 24, 2024) (No. 22-60008) (holding that Congress violated the non-delegation doctrine in the Telecommunications Act of 1996 by delegating its taxing power to the FCC) (quoting Mistretta v. United States, 488 U.S. 361, 379 (1989)).

177. Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., Ltd., 601 U.S. 416 (2024).

178. *Id.* at 424.

179. *See* STEVEN D. SMITH, FICTION, LIES AND THE AUTHORITY OF LAW 91 (2021).

often because a private citizen or entity has brought the matter before the court, claiming an injury. When a court construes an ambiguous law, its primary concern is not with comprehensively mapping the power an agency wields, rather, it is with "ascertain[ing] the rights of the parties" before it.[180] The due-process criticism featured less prominently among the constitutional counterarguments that brought about *Chevron*'s demise. More often, critics focused on the degree to which *Chevron* detracted from the courts' Article III powers or Congress's Article I powers. Still, in cases like *Loper Bright* and *Relentless*, the applicability of the due-process criticism was too obvious to be ignored entirely, and Justice Gorsuch made sure it was not unmentioned.[181] The fishing vessels are family-owned businesses operating on tight margins, fearing that even such margins as they had would be erased by the Fisheries Service's novel interpretive requirement that they pay for on-board monitors.[182] No one doubts the importance of the Fisheries Service's mandate to preserve the marine environments and resources on which these businesses depend. But "no law pursues its purpose at all costs, and [] the textual limitations upon a law's scope are no less a part of its 'purpose' than its substantive authorizations."[183] Agencies, Justice Gorsuch reminds us, "cannot invoke a judge-made fiction to unsettle our Nation's promise to individuals that they are entitled to make their arguments about the law's demands on them in a fair hearing, one in which they stand on equal footing with the government before an independent judge."[184]

No doubt there are less sympathetic challengers to agency authority—payday lenders come to mind.[185] Nevertheless, cognizance of non-government actors and a sensitivity to interests that compete with the priorities of the federal government require a certain humility about the justness and perfection of a regulatory scheme and its application. The judiciary's role is neither to obstruct nor abet its fellow government actors. It is to mediate impartially between private parties and the government. Managing the tension in these interests with dispassionate fairness has a good claim to be the substance of humility. The end of mandated deference to executive legal interpretations removes one obstacle to that humility's realization.

180. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2257 (2024) (quoting Decatur v. Paulding, 14 Pet. 497, 515, 10 L.Ed. 559 (1840)).

181. *Id.* at 2285 (Gorsuch, J., concurring).

182. *See* Brief for Petitioner at 39, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024) (No. 22-451).

183. Rapanos v. United States, 547 U.S. 715, 752 (2006) (plurality opinion).

184. *Loper Bright*, 144 S. Ct. at 2289 (Gorsuch, J., concurring).

185. *See* Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Assoc. of America, 601 U.S. 416 (2024).