



# Lover, Mystic, Bureaucrat, Judge: The Communication of Expertise and the Deference Doctrines

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## ***Lover, Mystic, Bureaucrat, Judge:***

### ***The Communication of Expertise and the Deference Doctrines***

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#### *ABSTRACT*

*Agency expertise is one primary reason for judicial deference to agency interpretations of ambiguous statutory and regulatory text. Courts have accordingly sought to limit deference to interpretations in which agencies have and use relevant knowledge that the courts themselves lack. The courts' comparison of their own competence vis-à-vis the agencies adopts a static model of expertise: the deference cases assume that agencies best positioned to acquire expertise are also destined to keep it to themselves. But often agencies, as other litigants, can share their knowledge with courts, and a court that can acquire and use an agency's expertise has no reason to defer to the agency (and good reasons not to). The expertise rationale for deference to an agency's interpretation is therefore incomplete and unpersuasive unless it shows that the costs of communicating the agency's expertise to the reviewing court are prohibitive.*

*In fact, there are good reasons to believe that the expertise underlying the most important interpretations could be communicated to reviewing courts at quite manageable cost. That is because agency experts must already communicate their expertise to non-experts within their agency and within the broader executive branch during the course of the regulatory process. That process is thick with demands for reasons from a host of executive generalist officials and lawyers, and agency experts must satisfy those demands if they wish for their proposed interpretation to make it into regulatory text. That agency experts have, long before litigation, already communicated their expertise within the executive branch suggests that the costs to communicate it to reviewing courts is modest.*

#### *INTRODUCTION*

Confidence in the rule of experts grounds the United States' experiment with bureaucracy.<sup>1</sup> From the beginning, the basis for that confidence has been questioned. Critics have disputed the New Dealers' distinction between politics and administration and their faith in the competence and disinterestedness of agency experts.<sup>2</sup> We might say these critiques are

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<sup>1</sup> See, e.g., James Landis, *THE ADMINISTRATIVE PROCESS* 23-24 (1938).

<sup>2</sup> See, e.g., Lloyd N. Cutler & David R. Johnson, *Regulation and the Political Process*, 84 *YALE L.J.* 1395, 1399 (1975) (agencies make political decisions); Christopher C. DeMuth & Douglas

external; they attack the expertise rationale for administration from premises lying outside that rationale.

I agree with many of these critiques, but this essay takes a different path. I seek to show that one key piece of our administrative architecture—judicial deference to agency interpretations—cannot be sustained by the expertise rationale that has been offered for it. My critique is internal: I argue that the deference doctrines fail on the expertise rationale’s own logic. Even granting all the premises of the expertise rationale, current doctrines of deference to agencies in the interpretation of ambiguous statutes and regulations are unjustified. By offering an internal critique, I hope to persuade people with widely divergent views on the merits of the external critiques.

Justifications for the deference doctrines are related to their domain: much of deference jurisprudence seeks to draw bounds for deference from the rationales underlying the doctrines. As expertise is one main rationale for deference, the Supreme Court has withheld deference when confronting interpretations by agencies without expertise, agencies with the wrong sort of expertise, and agencies that have failed to apply their expertise in devising the interpretation under review.<sup>3</sup> These decisions, and the deference doctrines more broadly, are based on a comparison of institutional competence; courts should defer because expertise makes agencies likely to reach better interpretations of ambiguous terms than courts, or so the argument goes. In endorsing this rationale, courts have shown themselves acutely conscious of the limits of their own knowledge about the subject matter, often technical and obscure, with which many agencies have to do.<sup>4</sup> And they have refused deference when the subject matter is better suited to judicial rather than to agency competence.<sup>5</sup>

Yet courts’ assessment of institutional competence is curiously anemic. They assume a static model of expertise: expert knowledge must remain the sole possession of the agency rather than being shared by the agency with the reviewing court. For if the court can become expert with the agency’s help, then the agency’s possession of expertise is no reason for deference; the court should instead acquire and use expertise to evaluate the agency’s interpretation. A static model makes sense for some kinds of knowledge, namely knowledge that is incommunicable in principle. But this is not at all the kind of knowledge that agencies have. A premise of administration is that the reasons for administrative decisions are capable of rational demonstration and thus communicable, even if at considerable cost in time and effort.

If the expertise rationale holds, it must be because communicating agency expertise to courts, while possible, would impose undue burdens on the agencies, the courts, or both. The question courts therefore should—but do not—ask is how the costs of communicating agency

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H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1081 (1986) (experts’ specialization drives them toward inefficient measures).

<sup>3</sup> See *infra* at \_\_\_.

<sup>4</sup> See *infra* at \_\_\_.

<sup>5</sup> See *infra* at \_\_\_.

expertise compare to the costs of deference. If deference makes sense, it is only when the former costs outweigh the latter. The expertise rationale for deference is incomplete and unpersuasive unless this question is answered. Nor is it otherwise possible to fix sensible boundaries for the deference doctrines. This essay's first goal is to substantiate this commonsense, yet generally overlooked, point.<sup>6</sup>

The second goal is to make a *prima facie* showing that the costs of communicating agency expertise are actually quite manageable, at least in the most significant cases. That is because the federal regulatory process, as it operates both within agencies and in interagency regulatory review, calls on agency experts to share their knowledge with many executive officials, including non-experts. This sharing is a prerequisite for the experts' expertise to influence the substance of interpretations. That agency experts *already* successfully communicate their expertise to non-experts within the executive branch is a good reason to believe the additional costs for them to communicate it to non-expert judges would be modest. And that executive non-experts *already* acquire the expertise they need to evaluate arguments about interpretations is a good reason to believe non-expert judges could do the same.<sup>7</sup> To make my case, I draw on insights about the regulatory process from the academic literature and from my own experience as Administrator of the Office of Information and Regulatory Affairs (OIRA).

My conclusions suggest that, at least in the most important cases, agencies could give and courts could receive expertise with relative ease. If that is true, it calls into question the validity of the expertise rationale for anything like the current versions of the doctrines; at the very least, it suggests new limits to the scope of the deference doctrines and new questions courts should ask before awarding deference. My conclusion most obviously has important implications for *Loper Bright Enterprises v. Raimondo*,<sup>8</sup> currently pending before the Supreme Court, but also for ongoing debates about forms of deference not at issue in that case.

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<sup>6</sup> Generally overlooked by courts and the academic literature alike. There is a cottage industry of scholarship on the deference doctrines; indeed, "there is even a small cottage industry of scholarship referring to *Chevron* scholarship as a 'cottage industry.'" Kurt Eggert, *Deference and Fiction: Reforming Chevron's Legal Fictions After King v. Burwell*, 95 NEB. L. REV. 702, 721 (2017). The importance of agencies' ability *vel non* to transmit their expertise to reviewing courts for assessing the deference doctrines has not gone unremarked in this vast body of scholarship. See Cass R. Sunstein, *The Most Knowledgeable Branch*, 164 U. PENN. L. REV. 1607, 1611, 1614 (2016). But the point appears infrequently in the literature, which like the case law, *see infra* at \_\_\_, mostly assumes a static model of expertise.

<sup>7</sup> As far as I can tell, this essay is the first to make the point. A few scholars have considered some implications of the architecture of the regulatory process for deference questions. See, e.g., David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUPREME COURT REV. 201 (2001). But none seem to have explored the implications of intra-executive reason-giving for inter-branch reason-giving and thus for the deference doctrines.

<sup>8</sup> No. 22-451.

## I.

There are many deference doctrines.<sup>9</sup> This essay is about the two most prominent, articulated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,<sup>10</sup> and *Auer v. Robbins*.<sup>11</sup> I presume familiarity with *Chevron*, “the most cited (and perhaps debated) administrative law decision of all time,”<sup>12</sup> and with its only slightly less notorious cousin *Auer*. The rationales that have been offered for these doctrines are not identical.<sup>13</sup> Nevertheless, the most important rationales overlap sufficiently that we may examine them together. In the first section of this Part, I briefly trace the three main rationales for *Chevron* and *Auer* deference. In the next, I focus specifically on the expertise rationale, drawing out its underlying assumptions which will form the object of our inquiry in the balance of the essay.

### A.

The Court has rested the deference doctrines on two primary rationales, with a third rationale parasitic on these two. One primary rationale is rooted in agency expertise. The *Chevron* Court justified deference in that case by explaining that “the regulatory scheme is technical and complex” and that the agency had “great expertise” in that scheme whereas the Court itself was not an “expert[] in the field.”<sup>14</sup> Because EPA’s “more than ordinary knowledge respecting the matters subjected to agency regulations” gave it an advantage over the courts in attaining “a full understanding of the force of the statutory policy in the given situation,”<sup>15</sup> the Court concluded that deference to the agency’s interpretation of the contested statutory term “stationary source” was warranted. So too the *Kisor* plurality, which argued for retaining *Auer* on the basis that one “comparative advantage[] of agencies over courts” in resolving regulatory ambiguity is that “[a]gencies (unlike courts) have unique expertise, often of a scientific or technical nature, relevant to applying a regulation to complex or changing circumstances.”<sup>16</sup>

The other primary rationale stems from political accountability. *Chevron* explained that the interpretation of the contested statutory term came down to a choice between “manifestly

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<sup>9</sup> See, e.g., William N. Eskridge, Jr., and Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1099 (cataloging various deference doctrines).

<sup>10</sup> 467 U.S. 837 (1984).

<sup>11</sup> 519 U.S. 452 (1997).

<sup>12</sup> Eggert, *supra* n. \_\_\_, at 721.

<sup>13</sup> See, e.g., *Kisor v. Wilkie*, 139 S. Ct. 2400, 2412 (2019) (plurality op.) (offering, as a rationale for *Auer* deference, special insights an agency may have as the author of a regulation under review—a rationale that cannot support *Chevron* deference).

<sup>14</sup> 467 U.S. at 865.

<sup>15</sup> *Id.* at 844.

<sup>16</sup> 139 S. Ct. at 2413 (internal quotation marks omitted).

competing interests.”<sup>17</sup> The agency, due to its subordination to “the Chief Executive” who is in turn “directly accountable to the people,” could appropriately “resolv[e] the competing interests” at issue, whereas unaccountable judges could not.<sup>18</sup> Again, the *Kisor* plurality followed suit, justifying *Auer* deference by pointing to the political accountability that runs from the agencies through the President to the people.<sup>19</sup>

The third rationale is based on congressional intent: Congress, the Court rebuttably presumes, intends agencies rather than courts to resolve statutory and regulatory ambiguity. This rationale is in one sense decisive; the Court affords deference because it presumes that is what Congress wants rather than because of the Court’s own judgments about its expertise and accountability deficits vis-à-vis the executive branch.<sup>20</sup> But the reason for the Court’s presumption is in turn its assessment that Congress is aware of the agencies’ superior expertise and democratic pedigree<sup>21</sup>; absent these primary rationales, there would be no basis for the third justification based on congressional intent.

As between the primary rationales, Dean Manning is certainly right that the *Chevron* Court “devote[d] far greater emphasis” to the second, accountability-based one.<sup>22</sup> Yet subsequent decisions have emphasized the expertise rationale for the deference doctrines, going so far as to state that “historical familiarity and policymaking expertise account in the first instance for the presumption that Congress delegates interpretive lawmaking power to the agency

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<sup>17</sup> 467 U.S. at 865; *see also id.* at 866.

<sup>18</sup> *Id.*

<sup>19</sup> 139 S. Ct. at 2413.

<sup>20</sup> *See id.* at 2416. *Chevron* itself was less than clear whether it afforded deference due to its conclusions about congressional intent or to its own analysis of its institutional disadvantages in resolving ambiguity, but the Court has clarified in later decades that *Chevron* deference is rooted in a presumption about congressional intent. *See, e.g., Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 173 (2007) (“the ultimate question is whether *Congress* would have intended, and expected, courts to treat an agency’s rule, regulation, application of a statute, or other agency action as within, or outside, its delegation to the agency of ‘gap-filling’ authority”) (emphasis in original).

<sup>21</sup> *See Kisor*, 139 S. Ct. at 2413 (plurality op.) (“Congress, we have thought . . . is attuned to the comparative advantages of agencies over courts. . . . It is because of those [comparative advantages] that Congress, when first enacting a statute, assigns rulemaking power to an agency and thus authorizes it to fill out the statutory scheme. And so too, when new issues demanding new policy calls come up within that scheme, Congress presumably wants the same agency, rather than any court, to take the laboring oar.”); *see also id.* at 2416 (majority op.).

<sup>22</sup> *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 626 (1996).

rather than to the reviewing court.”<sup>23</sup> The expertise rationale remained prominent in *Kisor*,<sup>24</sup> and it looms large in continuing judicial<sup>25</sup> and scholarly<sup>26</sup> debates over the deference doctrines. For our purposes, we need not consider whether the expertise or accountability rationale predominates today or how those rationales relate to each other<sup>27</sup>; it is enough to see, as we have seen, that the expertise rationale plays an important role both in justifying the deference doctrines and in prescribing their scope.

## B.

Both deference doctrines have raised a host of questions about the domain to which they apply. In resolving those questions, courts have sought to exclude cases in which the “reasons for [the] presumption [of congressional intent] do not apply, or countervailing reasons outweigh them.”<sup>28</sup> Courts have refused deference on the grounds that either the expertise rationale or the accountability rationale did not apply.<sup>29</sup> And they have withheld deference when, though the primary rationales applied, other concerns outweighed them.<sup>30</sup>

As we have seen, the Court’s expertise-based rationale for deference sounds in institutional competence: agencies, with the benefit of their expertise, are likely to reach better interpretations of statutory or regulatory provisions than are courts in cases in which the deference doctrines apply.<sup>31</sup> Four conditions must be met for the expertise rationale to justify deference:

1. The agency has some technical knowledge *X*;

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<sup>23</sup> *Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 153 (1991).

<sup>24</sup> *See* 139 S. Ct. at 2417.

<sup>25</sup> *See, e.g.*, Brief for Respondent in *Loper Bright Enters. v. Raimondo*, No. 22-451 17 (Sept. 2023) (advocating for upholding *Chevron* on the basis of the expertise rationale).

<sup>26</sup> *See* Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice between Agencies and Courts*, 119 HARV. L. REV. 1035, 1042 (“Perhaps the most common explanation for why a legislator would prefer delegation to an agency rather than a court is that agencies have specialized expertise and better access to relevant information....”).

<sup>27</sup> *Cf.* Cass R. Sunstein, *Beyond Marbury: The Executive’s Power To Say What the Law Is*, 115 YALE L.J. 2580, 2588 (2006) (“technical and political justifications for *Chevron* may not march hand-in-hand; they might well conflict with one another.”).

<sup>28</sup> *Kisor*, 139 S. Ct. at 2414 (plurality op.).

<sup>29</sup> *See, e.g.*, *Martin*, 499 U.S. at 152-53 (expertise rationale); *id.* at 154 (accountability rationale).

<sup>30</sup> *See, e.g.*, *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012) (declining to afford deference because doing so would cause unfair surprise).

<sup>31</sup> Other benefits are sometimes claimed for expertise, such as limiting the potential for the abuse of power. *See, e.g.*, Landis, *supra* n. \_\_\_, at 98-99. I do not consider whether any such alternative benefits could justify the deference doctrines.

2. Knowing *X* makes it possible to reach a better interpretation than does not knowing *X*;
3. The agency in fact uses its knowledge of *X* to inform its interpretation; and
4. The reviewing court does not know *X* and cannot reasonably learn it.

Under the expertise rationale, deference would be justified when these four conditions are satisfied with respect to a particular interpretation under review.

A few comments on these conditions. First, the author agency's possession of special knowledge founds the expertise rationale, which is why the Court has declined to afford deference to an agency that is unlikely "to develop ... expertise" due to its encounter with only a modest number of "regulatory episodes."<sup>32</sup> Courts frequently say that "agencies" have expertise. That way of putting it is probably inevitable, but we must remember that to say an agency knows *X* really is to say agency *staff* know *X*. Agencies are not persons, who alone have minds, so any knowledge accurately attributed to an agency must reside in the minds of its staff. We may say the agency knows things that no one staff member knows; if every Clean Air Act case is known by at least one EPA staff member even though no single staffer knows all the cases, we may say the agency knows all the Clean Air Act case law. Much knowledge on which agencies act is necessarily dispersed in this fashion.<sup>33</sup> But even so, the agency's dispersed knowledge all exists in the minds of its members; the agency has no knowledge that they do not.

Second, the expertise rationale depends on finding that the kind of expertise an agency has is likely to enhance the possessor's ability to reach a better interpretation of a contested term.<sup>34</sup> This is why courts have declined to defer when an agency's undoubted expertise is unlikely to bear helpfully on the particular interpretive question at issue. For instance, in *King v. Burwell*, the Court declined to defer to the Internal Revenue Service's interpretation of a key provision of the Affordable Care Act related to the provision of insurance.<sup>35</sup> The Court did not doubt the IRS's tax expertise, which had prompted it just four years earlier to opine that "review of tax regulations should ... be guided by agency expertise pursuant to *Chevron* to the same extent as our review of other regulations."<sup>36</sup> Rather, the Court found that Congress was unlikely

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<sup>32</sup> *Martin*, 499 U.S. at 152. In *Martin* the question was comparative: the Court had to choose which of two agencies deserved deference, and it assessed that the Occupational Safety and Health Review Commission handled many fewer cases than its competitor for deference, the Department of Labor. *See id.* But *Martin*'s rationale should apply also in cases that do not involve comparison; an agency whose chances to develop expertise were severely limited should, under *Martin*, not be entitled to deference even if no other agency emerged as a competitor for deference.

<sup>33</sup> Thomas O. McGarity, *The Internal Structure of EPA Rulemaking*, 54 LAW & CONTEMP. PROBLEMS 57, 61 (1991).

<sup>34</sup> I put aside questions about what makes one interpretation better than another.

<sup>35</sup> *See* 576 U.S. 473, 485-86 (2015).

<sup>36</sup> *Mayo Foundation for Medical Educ. & Research v. United States*, 562 U.S. 44, 56 (2011).



to confer deference with respect to an interpretation implicating insurance policy on an agency with tax expertise.<sup>37</sup>

We should remember, for purposes that will shortly become apparent, that the expertise that actually makes for a better interpretation of a given provision is never the sum total of an agency's special knowledge. An analogy to medical practice may help. A general practitioner needs a vast sum of medical knowledge, not because it is all relevant to each (or any) case, but because without it the ability to interpret a particular set of symptoms or treat a particular disease would come down to chance. Thus while a very large body of expert knowledge is necessary to make a good doctor, a comparatively small body of knowledge is operative in any case. The same is true of agencies: EPA needs to have experts on hand to deal with all manner of clean air problems, but the interpretation of any given provision of the Clean Air Act does not draw on all the knowledge all these experts have.

Third, an agency's possession of relevant expertise is no help if the agency does not employ that expertise in a given rulemaking. Courts have therefore refused deference when agencies with relevant expertise do not put it to use. The Supreme Court, for instance, declined deference when an agency issued a regulation that simply parroted statutory language rather than "using its expertise and experience" to fill in the statutory terms.<sup>38</sup> And the D.C. Circuit declines to defer to an agency interpretation "when the agency wrongly believes that interpretation is compelled by Congress," because an agency that believes itself bound to such an interpretation does not "bring its experience and expertise to bear."<sup>39</sup>

How exactly the agency can apply its expertise to a given interpretive question is quite problematic. All the most important agencies are very large corporate bodies, and the ultimate decision-maker or -makers are almost never the staff with the greatest expertise in the questions to be decided. This is for many good reasons. Among them: because the "success of a rulemaking initiative depends to a substantial degree upon the capacity of the [agency] to integrate the contributions of widely varying professional perspectives into a single coherent product,"<sup>40</sup> agencies must have senior leaders who make the final call on matters implicating all kinds of expertise. These leaders need a way to bring the knowledge dispersed among agency staff to the point of decision.<sup>41</sup> Any knowledge that fails to make the journey in some form from the subject-matter expert (or SME, in executive parlance) to the decision-maker cannot affect the agency's interpretation (and therefore does not implicate the expertise rationale).<sup>42</sup>

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<sup>37</sup> *King*, 576 U.S. at 486.

<sup>38</sup> *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006).

<sup>39</sup> *Peter Pan Bus Lines, Inc. v. Federal Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 (D.C. Cir. 2006) (internal quotation marks omitted).

<sup>40</sup> Barron & Kagan, *supra* n. \_\_\_, at 245.

<sup>41</sup> McGarity, *supra* n. \_\_\_, at 61.

<sup>42</sup> The ways in which expert knowledge can affect a decision-maker's decision are various. The decision-maker may actually consider the expert knowledge, or defer to a decision by a lower

Fourth, deference is inappropriate unless the reviewing court does not know what the agency knows. After all, deference has indisputable costs, in particular the cost of making the executive in some measure the judge in its own cause.<sup>43</sup> Even if we think the benefits of expert interpretation of ambiguous provisions outweigh this cost, we have no reason to bear it if we need not. And we need not if the court, relying on its own expertise, can interpret terms for itself rather than defer to the agency’s interpretation. That is why “[w]hen the agency has no comparative expertise in resolving a regulatory ambiguity, Congress would presumably not grant it that authority.”<sup>44</sup>

The same point holds true if the court does not know, but could learn, what the agency knows. Of course, one way the court could learn is by being educated by the agency, rather as the court is educated by counsel about many issues that come before it. If the agency can easily communicate its special knowledge to the court, the court has no reason to defer; rather than trusting that the agency has good yet inscrutable reasons for its interpretation, the court should make the agency disclose both its reasons and the special knowledge necessary to evaluate them. Doing so would avoid the undoubted costs of making the agency the judge in its own cause. Thus the expertise rationale holds only if the agency cannot communicate its expertise to the reviewing court.

This last point has so far not been picked up by the courts. To the contrary, courts assume incommunicability: agencies know something that judges do not, and between the two a great gulf is fixed. That is certainly the approach *Chevron* itself took. Administrators of EPA, the Court explained, have “great expertise” relevant to interpreting the Clean Air Act, whereas “[j]udges are not experts in the field.”<sup>45</sup> This last statement was undoubtedly true at the beginning of the *Chevron* litigation. But whether it had to remain true came down to whether the agency could pass its expertise on to the Court and whether the Court could find a way to receive it. The Court did not take up these questions, instead presuming that the relevant knowledge had to remain just where it began, in the agency alone.

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The expertise rationale as I have described it would, in cases in which the four conditions hold, constitute a good—but not a conclusive—reason to defer. There may also be reasons not to defer in some or even all cases in which the expertise rationale holds. For instance, we may think that deference presents grave dangers of executive aggrandizement. If that’s right, then

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official that is the product of expert knowledge, or make a decision among options that are the products of expert knowledge, etc.

<sup>43</sup> See, e.g., Kevin W. Saunders, *Agency Interpretations and Judicial Review: A Search for Limitations on the Controlling Effect Given Agency Statutory Constructions*, 30 ARIZ. L. REV. 769, 788-89 (1988); see also *Buffington v. McDonough*, 143 S. Ct. 14, 19 (2022) (Gorsuch, J., dissenting from denial of cert.).

<sup>44</sup> *Kisor*, 139 S. Ct. at 2417.

<sup>45</sup> 467 U.S. at 865.

perhaps the best course is to forgo the benefits of expert decision-making in all cases. I am quite sympathetic to this view. But this essay's point is just to think through when the rationale for deference is in play rather than to weigh that rationale against others pointing in the opposite direction.

The expertise rationale is a good reason for deference in cases in which all four conditions are met; it may also be a good reason for deference in some cases in which one or more conditions cannot be evaluated. For instance, if the benefits of certainty about whether agency interpretations will receive judicial deference are high, courts may reasonably presume that agencies have expert knowledge in certain common situations rather than inquiring as to the actual knowledge of agency staff.<sup>46</sup> Naturally, whether any particular presumption is justified turns on the number and significance of false positives, that is, cases in which the four conditions are in fact not met yet deference is afforded.

## II.

The failure to consider whether agencies are able to communicate their expertise to courts calls into question the expertise rationale and the scope of the deference doctrines. To see why, we need to understand a bit more about agency expert knowledge. Some kinds of knowledge are incommunicable *in principle*. Try explaining to someone what it is like to see the color red. You can name objects and feelings with which you associate it, but you cannot explain what it is like to see the color; you can only refer to the other person's own experience of seeing the color.<sup>47</sup> Other knowledge may also be fundamentally incommunicable, for instance, knowledge of the first principles of ethics,<sup>48</sup> of our closest friends and family,<sup>49</sup> or of the Deity.<sup>50</sup> In these examples, an experience—of our own inner directedness toward human thriving, of another person, or of mystical union—may convey knowledge that cannot adequately be put into words and so cannot be given to others; if others are to share knowledge of these things with us, they must receive it directly from their own experience and not from us. We may, to be sure, talk meaningfully about these things: we may say what our spouse's favorite food is or that God is love. But in such matters we must leave unsaid much of importance, no matter how much time, effort, or skill we put into communication.

Agency expertise is highly unlikely to be incommunicable in principle. To the contrary, “in principle a system of rationally debatable ‘reasons’ stands behind every act of bureaucratic administration.”<sup>51</sup> The expertise that elucidates these reasons is knowledge of how to achieve

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<sup>46</sup> Cf. Thomas W. Merrill, *THE CHEVRON DOCTRINE* 257 (Harvard University Press 2022) (administrability is an important virtue for a deference doctrine).

<sup>47</sup> Cf. Frank Jackson, *What Mary Didn't Know*, 83 *J. OF PHIL.* 291 (1986).

<sup>48</sup> See Jacques Maritain, *NATURAL LAW: REFLECTIONS ON THEORY AND PRACTICE* 20-21 (1952).

<sup>49</sup> See, e.g., Thomas Aquinas, *SUMMA THEOLOGIAE* I-II, q. 28, a. 2.

<sup>50</sup> See Maritain, *supra* n. \_\_\_, at 16-17.

<sup>51</sup> Max Weber, *II ECONOMY AND SOCIETY* 979 (Ephraim Fischhoff et al., trans. 1978).

results, knowledge gleaned from both education and experience in the regulated field.<sup>52</sup> Education and experience reveal through observation (one's own and others') the best ways to bring about particular outcomes. The basis for judgments about the best way to achieve a given result is in principle always communicable through the description of the underlying observations and inferences from them. Agency staff who devote their careers to addressing a particular kind of problem may "have seen what works and what does not work," and they may be "sharply aware of the practical trade-offs that are needed given scarce resources for implementation"<sup>53</sup>; the staff could communicate this expertise by explaining what has worked and failed to work as well as their resource constraints. And agency staff with special training could communicate the training that has been communicated to them. Agencies do not act on the basis of knowledge such as obtained by seeing the color red, knowing and loving a spouse or child, or religious contemplation. It is impossible to imagine technical knowledge about air emissions or securities markets or telecommunications or the myriad other things agencies regulate that is incommunicable notwithstanding every conceivable expenditure of time and effort.

Further, even if agencies had fundamentally incommunicable knowledge, they could almost never act on it. That is because such knowledge would necessarily be in the mind of a particular agency employee—and if it is really incommunicable, it would have to stay there, unknown to other agency staff. The relevant decision-maker would have the benefit of this knowledge only if he also happened to be the holder of this secret regulatory knowledge (and even then we may suppose an agency head would hesitate before acting on intuitions he cannot explain to anyone else).

For these reasons, we may put aside expert knowledge that is incommunicable in principle as a basis for the deference doctrines. But knowledge that is communicable in principle may well be functionally incommunicable in light of the exorbitant costs of communication.<sup>54</sup> Can communication costs justify the deference doctrines?

We can think of two kinds of communication costs. Expression costs are borne by agencies; an example is the time SMEs would spend explaining to a reviewing court how their program works. Learning costs are borne by courts; an example is the time judges and clerks would spend reading an agency's explanation of how its program works. Both kinds of cost have bite mostly on account of other important tasks to which agency and judicial personnel need to devote their resources; even a tireless judge who in a Clean Air Act case would gladly learn all there is to know about EPA's programs does so at a cost to his other cases. If the expertise

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<sup>52</sup> *See id.* I 223-25.

<sup>53</sup> William N. Eskridge, Jr., *Expanding Chevron's Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 WISC. L. REV. 411, 421 (2013).

<sup>54</sup> For the costs of offering and receiving information, see generally George J. Stigler, *The Economics of Information*, 69 J. OF POLITICAL ECONOMY 213 (1961).

rationale for the deference doctrine holds, it must be because these costs are higher than the costs of deference itself.

We need, then, to form some idea of the costs of communicating agency expert knowledge. We must begin by defining the question, which is not how costly it would be for an agency to communicate all its expertise—as impossible as it would be pointless—but how costly it would be for an agency to explain, and a judge to understand and evaluate, the *operative* knowledge that bears on the interpretation of a provision contested in a particular case. Again an analogy to medicine may be helpful. It would be silly to wish a doctor to transmit his entire corpus of medical knowledge to a patient, but whether we should expect our doctors to explain the knowledge underlying a particular diagnosis or treatment proposal is a different question.<sup>55</sup> The costs of even this more modest explanatory foray may be too high, but we cannot know whether this is so just by knowing that the doctor has more medical knowledge than we can afford to learn. Instead, we need to think carefully about how difficult it would be for the doctor to explain and for us to understand and evaluate the bases of the particular diagnosis or treatment plan. We need to do the same for agency expertise.

But courts have done nothing of the sort. To the contrary, they have adhered to *Chevron*'s implicit assumption that agency expertise must remain in the agency where it starts. The plurality opinion in *Kisor* exemplifies this approach. The plurality explained that agencies can access information in ways courts cannot; agencies can “conduct factual investigations, can consult with affected parties, [and] can consider how their experts have handled similar issues over the long course of administering a regulatory program.”<sup>56</sup> These are all ways in which agencies are undoubtedly better than courts at assembling expert knowledge. But the plurality did not consider whether agencies are able to give courts the fruit of these efforts. In fact, agencies can do just that with respect to many of the plurality's examples of questions demanding agency expertise. As the plurality opines, surely TSA is in a better position than a court to know why “TSA ban[s] liquids and gels in the first instance” and what “makes them dangerous”<sup>57</sup>—but TSA could just as surely educate a reviewing court in these matters.<sup>58</sup>

The courts' failure to consider whether agencies can transmit their expertise is all the more puzzling because courts are in the business of receiving expertise. An attorney often has far more knowledge of his specialized field than does the judge who must decide his case—

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<sup>55</sup> See, e.g., Jukka Varelius, *The Value of Autonomy in Medical Ethics*, 9 MEDICINE, HEALTH CARE AND PHILOSOPHY 377, 380 (2006) (the information necessary to make an informed decision about a proposed medical operation is “all the medical information relevant to assessing the risks and benefits of the operation”).

<sup>56</sup> 139 S. Ct. at 2413 (plurality op.).

<sup>57</sup> *Id.*

<sup>58</sup> It could do so through building up an administrative record documenting the reasons for banning liquids and gels and then pointing the reviewing court to the relevant documentation. It could also do so through offering evidence in a hearing when available and appropriate.

knowledge often of the same sort that agency staff have.<sup>59</sup> A lawyer in such a situation is obliged to make his expert knowledge intelligible to the court and the court to do its best to understand and make use of this knowledge in deciding the case. In this situation, the lawyer's special knowledge is not "a protective shield to be worn like a sacred vestment," but rather "a competence to be demonstrated by cogent reason-giving."<sup>60</sup> Yet courts adopt a contrary approach where agency expertise is concerned.

Because the expertise rationale cannot justify deferring to agency interpretations unless the costs of communicating expertise exceeds the costs of deference, courts' failure to explore the costs of communicating agency expertise means the expertise rationale is incomplete and unpersuasive. This failure also vitiates the bounds courts draw around deference's domain. Courts draw those bounds by considering whether the interpreting agency has expertise and used it in advancing a contested interpretation. But without exploring the costs of communication, courts cannot know whether an agency's possession of expertise actually gives it a comparative advantage over courts in glossing statutory and regulatory terms.

Courts should jettison their static conception of agency expertise in favor of a dynamic one. Rather than assuming that agency expertise must remain within the agency where it begins, courts should take seriously the possibility that the agencies can educate them to the degree of expertness necessary to understand and evaluate the agencies' reasons for their interpretations. They should ask not just whether an agency enjoys an advantage over a reviewing court in acquiring expert knowledge, but whether the costs of transmitting that expertise to the court are prohibitive.

### III.

In this Part, I would like to focus on one reason to believe the costs of communicating agency expertise to courts are low, namely, that agency experts *already* communicate their expertise to non-experts in the executive regulatory process long before litigation begins.

The regulatory process is thick with demands for justification, demands that SMEs must satisfy if their expertise is to make the long journey from their own minds to regulatory text.<sup>61</sup> For an interpretation to pass into legal effect, agency staff must communicate the reasons for that interpretation to a host of interlocutors both within their own agency and throughout the broader

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<sup>59</sup> For instance, in addition to deep familiarity with the text of a lengthy and complex statute, counsel may be familiar with the statute's legislative history and historical background and its implementation across time. In some cases counsel may even have been involved in the legislative process itself.

<sup>60</sup> Mashaw, *supra* n. \_\_\_, at 10.

<sup>61</sup> Anya Bernstein & Cristina Rodriguez, *The Accountable Bureaucrat*, 132 YALE L.J. 1600, 1639 (2023) (the regulatory process is "permeated with norms of justification, explanation, and persuasion").

executive branch.<sup>62</sup> By the time of litigation SMEs have already communicated their operative expert knowledge to various executive officials; the expression costs of recomunicating these explanations to judges will therefore often be low.<sup>63</sup> And because these explanations have been prepared for executive officials who in important ways resemble judges, they are likely to be readily intelligible to and evaluable by reviewing courts.<sup>64</sup>

By giving grounds to believe the costs of communication are low, I hope to show the courts' failure to evaluate the costs of communicating agency expertise is not harmless error. Were courts to come to grips with the issue, they may well find the costs of communication to be lower than the costs of the deference doctrines, at least in a critical mass of cases. Indeed, the argument suggests that the costs of communication are lowest, and deference therefore least likely to be justified, precisely in the cases in which deference matters most.<sup>65</sup> If in the most important cases we lack reason to believe the four conditions from Part I.B are met, then the expertise rationale fails to justify anything like the current scope of the deference doctrines. For we also lack reason to believe that deference in these most important cases is worth whatever benefits may accrue from deference in other, less important cases where the four conditions more likely obtain.

#### A.

My argument depends on facts about the way regulations are crafted and approved within the executive branch. To bring out these facts, I offer an extended hypothetical illustrating how the bubble concept from *Chevron* might find its way into a regulation. Because my concern is whether the deference doctrines are justified today, my hypothetical is deliberately anachronistic; I imagine the bubble concept working its way through the regulatory process as it exists today rather than as at the time of *Chevron*. I explore how the process would look if the bubble concept were the fruit of technical expertise, though in *Chevron* itself it was “pretty clear that the agency was marching to the President’s drum.”<sup>66</sup>

Let us suppose the bubble concept originates with a senior career official within EPA’s Office of Air and Radiation (OAR) who, on the basis of his long experience with the Clean Air Act and its 1977 amendments, has formed the view that one purpose of the legislation is to offer flexibility to states and who, on the basis of much experience with the regulated public, believes a regulation adopting the bubble concept would effectively achieve the statutes’ anti-pollution

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<sup>62</sup> *Id.* at 1639-40 (describing the “multilateral accounting” resulting from demands for justification by a diverse array of officials).

<sup>63</sup> *See infra* at \_\_\_.

<sup>64</sup> *See infra* at \_\_\_.

<sup>65</sup> *See infra* at \_\_\_.

<sup>66</sup> Cynthia R. Farina, *The “Chief Executive” and the Quiet Constitutional Revolution*, 49 ADMIN. L. REV. 179, 185 (1997).

goals too.<sup>67</sup> Now, no significant federal regulation is written single-handedly; all are the work of teams, often quite large.<sup>68</sup> Our senior career official, then, might well begin the rulemaking process by talking with other OAR staff who would play important roles in the process. In my experience, very many interpretive decisions begin in just this way.

Our official would explain to his team that he favors the bubble concept because it would best achieve statutory goals. Other staff are likely to have their own views about the statutory goals and how to meet them; even if they do not, they are unlikely to cooperate zealously with our staffer on the basis of his naked assertion that the bubble concept is best. So he would need to offer his colleagues the reasons underlying his assertion. He would explain the basis for believing that one statutory purpose is to give flexibility to the States, pointing perhaps to statutory text, legislative history, the legislation's historical background, conversations with members of Congress involved in enactment, the statute's operational demands, or perhaps even his own experience drafting some portions of the legislation.<sup>69</sup> He would also explain the basis for his belief that the bubble concept would effectively achieve the statutes' anti-pollution goals, perhaps citing his prediction, rooted in experience, about how regulated industry would react to the bubble concept's enshrinement in regulation. Some colleagues to whom our senior staffer explains his proposed interpretation may well share his expertise; his explanations to them may be highly technical. But an "agency addressing complex scientific, economic, and technological issues must draw upon so many different kinds of expertise that no individual employee can know very much about all of the issues involved in a typical rulemaking."<sup>70</sup> Our senior staffer is therefore likely to work with SMEs with diverse kinds of expertise; we can expect him to seek to share with them the reasons for the bubble concept in more generally accessible terms.

If the bubble concept is to pass into regulatory text, it must eventually find its way to agency leadership. The Assistant Administrator for Air and Radiation would play a particularly important role. As the head of the office in which the regulation would be drafted,<sup>71</sup> the Assistant Administrator would own the regulation within the agency; he would also be responsible for it, jointly with the EPA Administrator, before Congress and the public. For these reasons, the Assistant Administrator may be expected to feel a keen interest in the major interpretive

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<sup>67</sup> This justification is in fact the one the D.C. Circuit understood EPA to advance. *See Nat. Res. Def. Council, Inc. v. Gorsuch*, 685 F.2d 718, 727 (D.C. Cir. 1982).

<sup>68</sup> *See Bernstein & Rodriguez, supra n. \_\_*, at 1640.

<sup>69</sup> *See, e.g., Stephen Breyer, Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 386 (1986).

<sup>70</sup> McGarity, *supra n. \_\_*, at 59; *see also* Mark Seidenfeld, *The Role of Politics in a Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1397, 1427 (2013) ("Usually agencies employ a rulemaking team to develop rules. That team often consists of members from various offices within the agency, each with its own expertise and professional outlook.").

<sup>71</sup> *See* EPA, Organization Chart for EPA's Office of Air and Radiation, <https://www.epa.gov/aboutepa/organization-chart-epas-office-air-and-radiation> (last accessed Sept. 20, 2023).



decisions adopted in the regulation. He would wish to understand the bubble concept and the rationale for it in significant detail. He would need to know the reasons for believing that one legislative purpose is conferring flexibility on the States and that the bubble concept would advance the statutes' anti-pollution purposes, both to assure himself that the bubble concept represents the best interpretation and also to defend the interpretation within the agency, within the broader executive branch, and before skeptical congressional committees, interest groups, and the press. So he would interrogate the SMEs on the reasons for their assertion that the bubble concept is best, and the SMEs in turn—both to secure adoption of their preferred interpretation and to impress their chief<sup>72</sup>—would do their best to explain their reasons for favoring the bubble concept.

The Assistant Administrator for OAR often has considerable experience with EPA's air-focused statutes and regulations. For instance, the current nominee to head the office served in a more junior role in OAR during the Obama Administration and as a staffer for the Senate Environment and Public Works Committee.<sup>73</sup> But even the most deeply experienced appointees are unlikely to have the degree of expertise that SMEs have in any but a handful of areas. More often than not, then, the SMEs within OAR must offer the Assistant Administrator reasons for their conclusions that are intelligible to a (relatively) generalist reviewer.

Of course, the Assistant Administrator may accept or reject the staff's recommendation for purely political reasons, whether idealistic or crass electoral ones. If he does so, his interest in understanding the SMEs' reasons may diminish, though it is unlikely to dissipate altogether, because the Assistant Administrator must defend his decision on the merits and so must understand the technical issues involved. But if the Assistant Administrator makes his decision based on political rather than technical knowledge, then the deference doctrines' accountability rationale would be in play rather than the expertise rationale.

OAR policy staff would play the main role in a rulemaking adopting the bubble concept, but they would not be the only ones involved. EPA's lawyers would also occupy a key role. Tasked with ensuring that EPA regulations survive judicial review, the agency lawyers would anticipate the standards applicable in court and the kind of questions judges would ask.<sup>74</sup> Because a core demand of administrative law is that "[a]dministrators ... must give reasons"<sup>75</sup> for their choices, EPA's lawyers would be both empowered and incentivized to demand adequate

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<sup>72</sup> Barron & Kagan, *supra* n. \_\_\_, at 244.

<sup>73</sup> See, e.g., Statement by Sen. Thomas Carper (Mar. 1, 2023), [https://www.epw.senate.gov/public/index.cfm/2023/3/chairman-carper-s-opening-statement-hearing-on-the-nomination-of-joseph-goffman#:~:text=WASHINGTON%2C%20D.C.%20%E2%80%94%20On%20Wednesday%20March,Environmental%20Protection%20Agency%20\(EPA\).](https://www.epw.senate.gov/public/index.cfm/2023/3/chairman-carper-s-opening-statement-hearing-on-the-nomination-of-joseph-goffman#:~:text=WASHINGTON%2C%20D.C.%20%E2%80%94%20On%20Wednesday%20March,Environmental%20Protection%20Agency%20(EPA).)

<sup>74</sup> See, e.g., McGarity, *supra* n. \_\_\_, at 67.

<sup>75</sup> Jerry L. Mashaw, REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY 10 (2018) (explaining that the "path of American administrative law" has been toward requiring administrators to give reasons for their decisions).

reasons for the proposed interpretation, including any explanations of the SMEs' expertise necessary to evaluate those reasons. The deference doctrines would, to be sure, limit the power of EPA's lawyers in the rulemaking process,<sup>76</sup> but even so the need to survive review under step two of *Chevron*, as well as arbitrariness review, would provide the hook they need to demand the reasons for the bubble concept and to object to the interpretation's adoption if those reasons fail to satisfy.<sup>77</sup> So EPA's lawyers would demand to know the reasons for OAR's interpretation. They would call on OAR to show, in terms accessible to lawyers, a reasonable basis for glossing the term "source" with the bubble concept, though they may not demand that OAR staff show it is the best interpretation.

Demands for explanation would take center stage again at the next level of agency deliberation, involving the EPA Administrator and his immediate advisors. Administrators often have significant environmental backgrounds.<sup>78</sup> But they cannot have deep experience in any but a tiny fraction of the topics with which their agency deals.<sup>79</sup> Yet the Administrator will be responsible for the interpretations taken in the regulation and for any controversies they excite, both within the broader executive branch and before Congress and the public. The Administrator and his team therefore must be satisfied that these interpretations are warranted. Further, none of the Administrator's executive and congressional interlocutors are likely to accept as a reason for the bubble concept the naked assertion that it is best. They would demand reasons for the interpretation, so the Administrator and his team must be prepared to justify it. They therefore would press the SMEs, as well as the Assistant Administrator, on the reasons underlying the interpretation; the explanations offered, to be effective, must be intelligible to an audience that is likely more generalist than the Assistant Administrator and far more generalist than the SMEs.

After the major policy decisions have been settled within the agency and the proposed regulation embodying those decisions has been drafted, the regulation would be submitted to OIRA for review. OIRA would share the draft regulation with officials in other agencies and White House offices whose priorities and programs it may affect, and these officials would have the right to object if they believe the regulation would adversely affect their own priorities or is otherwise misguided.<sup>80</sup> Just as the Assistant Administrator and the Administrator, these officials throughout the broader executive branch are unlikely to accept mere *ipse dixit* as justification for the bubble concept. An official at another agency or a White House office is, at the very least, no

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<sup>76</sup> See Elizabeth Magill & Adrian Vermeule, *Allocating Power within Agencies*, 120 YALE L.J. 1032, 1046 (2011).

<sup>77</sup> See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (standard for arbitrariness review); see also *Judulang v. Holder*, 565 U.S. 42, 52 n.7 (2011) (*Chevron* step two analysis and arbitrariness review coincide).

<sup>78</sup> See, e.g., EPA, EPA Administrator Michael Regan, <https://www.epa.gov/aboutepa/epa-administrator> (noting the current Administrator's past experience in environmental protection).

<sup>79</sup> See, e.g., McGarity, *supra* n. \_\_, at 61.

<sup>80</sup> See Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1841-42 (2013).

more likely than the EPA Administrator to have deep experience in the regulation's subject matter, so EPA's explanations to them must be suitable for generalists.<sup>81</sup>

As part of review, EPA's draft regulation would likely be circulated to both the Department of Justice (which would be tasked with eventual defense of the regulation in court) and the White House Counsel's Office, both of which would review the legal merits of the regulation and its key interpretations and demand again the kinds of lawyerly explanations that EPA's own lawyers sought. The general counsels of the various reviewing agencies may do the same. If these executive branch lawyers are not initially satisfied with the author agency's justification of its interpretation, they may convene in a lawyer's meeting, often under the auspices of the White House Counsel's Office, to debate the interpretation's legal merits. Such a meeting would yet again solicit from agency staff the reasons for the bubble concept and information sufficient to evaluate those reasons.

After OIRA review concludes, EPA would publish the proposed regulation in the *Federal Register*. Members of the public would then submit their comments. An important interpretation like the bubble concept may be expected to draw considerable interest from commenters, who would offer arguments for and against the interpretation. Because the case law requires the agency to offer an adequate response to objections raised by commenters,<sup>82</sup> EPA staff in preparing the final rule would think through the arguments of commenters that call their own analysis into doubt; they would give their reasons for adopting or declining the commenters' suggested changes in the preamble to the final rule or in the appendices attached to it. Any changes to the rule and the explanations for them would pass through the intra- and inter-agency process I have already described. In addition, EPA's lawyers, and to some degree other officials engaged in the rulemaking process, would review the preamble responses for completeness and persuasiveness<sup>83</sup>; EPA's lawyers may also assist with drafting some responses. Only after the responses to comments have been prepared would EPA issue the final rule.

I've offered the foregoing as a description of how a regulation adopting the bubble concept might come to be. Of course the process could look different. For instance, while I've imagined the EPA Administrator and the White House becoming involved only after OAR has completed its deliberations, an important rulemaking may well see top-level agency and White House involvement from the very beginning. While I've posited a career SME as the originator of the bubble concept, an expertise-driven interpretation may originate with a political appointee. The lesson is not the sequence of events or the interpretation's point of origin but the number of

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<sup>81</sup> Mark Seidenfeld, *The Role of Politics in a Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1397, 1422 (2013) (White House staff's "expertise will not compare favorably with that of the agency staff").

<sup>82</sup> See, e.g., *Env't'l Health Trust v. Fed. Communications Comm'n*, 9 F.4th 893, 909 (D.C. Cir. 2021).

<sup>83</sup> See, e.g., Merrill, *supra* n. \_\_\_, at 250 (the notice-and-comment process "will require more deliberation among multiple offices within the agency, if only to decide how to respond to the comments").

actors and, most of all, their penchant for demanding reasons as the condition for granting the bubble concept passage into regulatory text. As the illustration shows, an interpretation that survives the gamut of the federal regulatory process will very often have been the subject of extensive discussion, with both generalists and lawyers demanding and receiving reasons for the interpretation ultimately adopted.

## B.

We can now draw a few conclusions. First, as we have seen, interpretations make it into regulatory text at the price of extensive discussion of their underlying reasons within the executive branch. When the reasons for an interpretation depend on special agency knowledge, the SMEs who support that interpretation have powerful incentives to communicate their knowledge to the generalists and lawyers who participate in the regulatory process, and to communicate it in ways these officials can readily understand. In rulemakings in which an interpretation's proponents fail to offer reasons intelligible to other executive officials, those officials are less likely to sign off on the interpretation, which is then less likely to make it into regulatory text and end up before a court. Interpretations to which courts might be called upon to defer are thus precisely those for which the rulemaking process is more likely to have generated internal explanations accessible to non-experts.

This does not mean the reasons advanced for an interpretation that makes it to court necessarily convinced every participant in the intra-executive debate. Even putting aside (for now<sup>84</sup>) the question of hierarchy, few executive officials can hold out indefinitely for their preferred outcome in every rulemaking. The costs of doing so, to the official's other projects and his standing with colleagues, are likely to be prohibitive; executive officials are probably no less likely than others to go along to get along.<sup>85</sup> But an interpretation's proponents often cannot know *ex ante* how vigorously an official would press an objection if they fail to persuade him, and even if they are confident of overcoming the opposition, the time and effort necessary to do so can be quite costly. An executive official's ability to demand reasons before signing off on an interpretation thus gives the interpretation's proponents strong incentives to educate the official in a bid for cooperation, and thus to generate explanations intelligible to generalist and lawyerly reviewers, even if the official ultimately is unpersuaded.

Further, though many expertise-driven interpretations doubtless make it into regulatory text without securing the agreement of every executive reviewer, the sign-off of some reviewers is necessary. That is because at day's end at least some senior officials must own the interpretation before other members of the executive branch, Congress, and the public. These officials, who will only rarely have deep expertise in the relevant subject matter, simply cannot afford to let the interpretation go forward without understanding why it should do so. That an interpretation completes the regulatory journey is a good indicator that the SMEs have managed to make their reasons clear to at least some non-specialists—and this in turn means that the costs

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<sup>84</sup> See *infra* at \_\_\_.

<sup>85</sup> See Bernstein & Rodriguez, *supra* n. \_\_\_, at 1646.

of communicating these reasons to other non-specialists are likely low. It is most unlikely (subject to a caveat below<sup>86</sup>) that many interpretations survive the regulatory process with justifications unknown to anyone except SMEs.

Second, executive reviewers resemble reviewing judges in important ways, and the reasons that are intelligible to them are therefore likely intelligible to judges. For one thing, the agency and White House leadership that review regulations are notoriously busy people tasked with a wide array of projects implicating highly various bodies of knowledge. In this way, executive officials resemble busy federal judges with varied dockets. If agency SMEs can find ways to equip these busy, inexperienced executive officials with sufficient knowledge to evaluate a proposed interpretation, that is a good reason to believe the SMEs could get busy, inexperienced federal judges up to speed without exorbitant expression costs. Indeed, the very explanations the agency SMEs have already offered to executive officials may be offered (in a suitably altered format) to reviewing judges. And if the executive officials' costs to understand and evaluate the SMEs' justifications are not prohibitively high—witness the fact that at least some senior officials found the costs low enough to understand the reasons for the interpretation and sign off on it—then that is a good reason to believe the learning costs are not exorbitant for federal judges, either.

So too for executive branch lawyers. The explanations the SMEs produce for them, designed to satisfy lawyerly questions which anticipate judicial questions, may be expected to offer reasons perfectly intelligible to judges. And while, on account of the deference doctrines, agency lawyers may well not ask for reasons why the SMEs' interpretation is the best, they must ask whether the explanation is reasonable, and the reasons that determine whether an interpretation is reasonable would also at minimum play a large role in assessing whether it is best. So an interpretation that successfully navigates the regulatory process does so by explaining to lawyers many of the reasons, including these reasons' basis in expert knowledge, that the courts would need to determine whether an interpretation is the best available. It should not be unduly costly for the agency to reproduce, and for judges to understand and evaluate, such explanations in court.

Let's go back to our hypothetical. If the bubble concept makes it into a final regulation as the product of agency expertise, then it likely means that agency staff explained to other participants in the regulatory process, including busy officials without subject-matter expertise and lawyers within the agency and at DOJ and the White House, the reasons for believing that one purpose of the Clean Air Act and its 1977 amendments was to grant flexibility to states and that the bubble concept would achieve the statutes' anti-pollution goals. If those reasons are intelligible only to possessors of special knowledge—say about the course of enactment of the legislation or the ways regulated parties are likely to respond to the bubble concept—then the fact that the bubble concept made it through the regulatory process is a good indicator that agency staff communicated this special knowledge to the other participants in the process. The agency staff should be able to recommunicate their knowledge to reviewing judges at minimal

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<sup>86</sup> See *infra* at \_\_\_.

cost to themselves. And if executive officials and lawyers were able to understand these communications, there is no reason to believe federal judges could not.

### C.

Of course, judges differ from executive officials in important ways. In this section I examine some of these ways; I conclude they do not call into doubt whether the explanations generated within the executive branch substantially lower the costs of communicating agency expertise to judges.

First, Professor Barron and then-Professor Kagan have pointed out that senior executive officials stand “at the apex of many agency components”; they therefore “can see the interrelationships among different interpretive positions ... [and] determine the combination that most effectively will advance the agency’s substantive goals.”<sup>87</sup> Judges do not share this high vantage point; rather, the exigencies of judicial review mean they assess an interpretation’s lawfulness within the context of a single rulemaking. But the special knowledge of senior executive officials is in principle shareable, like the knowledge of SMEs, and for the same reasons. And there are no reasons to believe the costs of sharing are particularly steep; when a senior official has adopted an interpretation because it best allows pursuit of agency goals across multiple domains, that reason should be perfectly communicable to judges, who are not insensible of the need to make sense of statutory terms across multiple provisions and programs.<sup>88</sup>

Second, Professor Sunstein has observed that, to understand agency thinking, judges depend on executive branch lawyers who are not themselves experts.<sup>89</sup> He is surely correct that reliance on lawyerly translation impedes judges’ acquisition of agency expertise<sup>90</sup>; who would want to rely on a lawyer to understand anything? But while executive branch officials are not likely to suffer from this precise impediment, they too must often rely on translators. Often layers of bureaucracy lie between the SMEs with deep expertise in a particular field and the senior agency officials who must decide on an interpretation. And these senior officials themselves must often translate their agencies’ special knowledge to various White House officials. To make a sound expertise-based interpretation, participants in the regulatory process must find ways to overcome these translational barriers. There is no reason to think the barriers

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<sup>87</sup> Barron & Kagan, *supra* n. \_\_\_, at 245. Professor Strauss makes the similar point that agencies experience their statutes across time in a way that courts do not. See Peter L. Strauss, *When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 327-28 (1990).

<sup>88</sup> See, e.g., *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595-96 (discussing various considerations when interpreting a term appearing in multiple provisions across a single statute).

<sup>89</sup> See Sunstein, *supra* n. \_\_\_, at 1614.

<sup>90</sup> See *id.* at 1614-15.

imposed by communicating through lawyers in litigation are any higher or that the explanations that surmounted executive barriers would fail to clear this judicial one.

Further, recall that lawyers at the agency, the White House, and DOJ participate in the rulemaking process with an eye to the eventual defense of the final regulation in court. And while in litigation the SMEs' opportunity to correct lawyerly misunderstandings and misstatements of their expertise may be limited, not so during the rulemaking process, when the SMEs and lawyers work together and can educate each other. In particular, both SMEs and lawyers provide input to the explanations found in the final rule's preamble and can check each other's work and understanding. If SMEs discover that agency lawyers misunderstand the SMEs' expertise, the SMEs are well-situated to enlighten counsel and correct the error.

Third, Professor Mashaw has argued that, because agencies and courts play different roles, agency interpretation may reasonably rely on sources that judicial interpretation rejects.<sup>91</sup> Some of these sources are avowedly political—for instance, presidential direction.<sup>92</sup> To the extent that agencies take such sources into account, their interpretations cease to be driven by expertise and hence fall outside our concern in this essay. But Professor Mashaw also argues that agencies may reasonably inform their expertise by consulting sources, such as legislative history, that judges may feel themselves obliged to disregard.<sup>93</sup> To the extent this happens, judges could make no use of expertise rooted in these sources that agencies communicate to them. This possibility should not trouble us, however, because judges confronted with explanations reasonably based on sources outside the judicial ken could simply accept the agency's reliance as a given and assess whether the final rule reasonably follows from the source relied upon.<sup>94</sup>

Fourth, from my account so far, the federal executive branch may sound like a civic republican's paradise.<sup>95</sup> But it is not. Unlike in Congress, in which each member's ability to refuse to support legislation allows each to issue strong demands for justifications acceptable to that member, executive officials are embedded within a highly reticulated hierarchy headed by a single decision-maker. We must ask whether this fact should alter our analysis.

President George W. Bush is reported to have said “the interesting thing about being the president” is that “I don't feel like I owe anybody an explanation.”<sup>96</sup> Other executive branch

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<sup>91</sup> See Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 505-21 (2005).

<sup>92</sup> *Id.* at 506.

<sup>93</sup> *Id.* at 510-11.

<sup>94</sup> Cf. Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 82, (2009).

<sup>95</sup> See generally Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511 (1992) (embracing the discourse-promoting features of the regulatory system from a civic republican perspective).

<sup>96</sup> Bob Woodward, *Bush at War* 146 (2003).

leaders, too, can command obedience without explaining themselves to their subordinates—and each of these leaders except the President himself is someone’s subordinate.<sup>97</sup> One danger, then, is that an interpretation’s proponents will just go over the heads of objecting colleagues rather than give them explanations. We might think agency staff who can win the debate in this way have few incentives to educate their colleagues, who in turn may decide that demanding reasons is futile and even hazardous to their careers.

But for one thing, superiors usually do not overrule subordinates for no reason. Persuading an official to quash his staff’s demands for explanations itself requires an explanation to the official. That explanation may well be political—but if it is, then we have again left the domain of the expertise rationale. For interpretations driven by expertise, appeals over the heads of staff may well result in explanations just as thorough as the explanations to the staff themselves would have been.

For another thing, going over the heads of staff is a costly move. Agency leaders, even those most resistant to “going native,” need to maintain decent relations with their staff; they are not likely to grant requests to overrule them lightly, especially when the staff are seeking explanations for an interpretation rather than objecting to it. Then there is the cost, in time and decisional bandwidth, of adjudicating the request to overrule. This means that asking an official to overrule his staff requires political capital. Very often (though not always) it is more cost-effective to try to persuade the staff in the first place by educating them to see the reasons supporting an interpretation than to run directly to their boss.

That is all the more true because the demand for reasons is polycentric; as we have seen, it comes from multiple power centers throughout an author agency and the broader executive branch.<sup>98</sup> The costs of going over the heads of staff in all these various power centers is enormous. Indeed, generally, it requires going to the most senior agency and White House officials. Lower-level staff almost invariably find it more profitable to exhaust negotiations among themselves before appealing to this top level of officialdom.

That executive officials work in a hierarchy thus does not mean staff can routinely avoid explaining themselves by traveling up the chain of command. But what about travel in the other direction? We might worry that a decision from on high early in a rulemaking will shut down debate within the executive branch.<sup>99</sup> But because the demand for reasons is polycentric, a debate-ending decision can realistically come only from the President (or someone widely accepted as holding his proxy, such as the White House Chief of Staff). And this means such a

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<sup>97</sup> This statement must of course be qualified for the commissioners who head independent agencies.

<sup>98</sup> See, e.g., Mashaw, *supra* n. \_\_\_, at 40-41 (“administrators operate within a host of overlapping accountability regimes,” within which “ubiquitous” “[d]emands for substantive reasonableness and appropriate reason-giving are constructed differently”).

<sup>99</sup> See, e.g., William V. Luneberg, *Civic Republicanism, the First Amendment, and Executive Branch Policymaking*, 43 ADMIN. L. REV. 367, 394 (1991); Seidenfeld, *supra* n. \_\_\_, at 1453.



decision is extremely likely to be driven by political concerns (again, either noble or base) rather than by expertise.<sup>100</sup> This situation, then, also lies outside the domain of the expertise rationale.

To be sure, the executive branch's hierarchic structure does very seriously limit its potential to achieve the civic republican ideal of reasoned decision-making. But that is less because it restricts internal deliberation and more because, by drastically reducing (ultimately down to one) those whose agreement is necessary for action, it facilitates the kind of factionalism about which Madison worried in *Federalist* 10.<sup>101</sup> In fact, Hamilton noted in *Federalist* 70 that the Constitution's new executive lacked the protections against faction that Article I places within the legislative process.<sup>102</sup> That did not trouble Hamilton,<sup>103</sup> presumably because he did not suspect the modern executive's power over the kinds of domestic policies that the Founders believed presented acute risks of faction. With the growth of executive authority over vast swathes of domestic policy, both the need for and the lack of anti-faction protections within the executive branch has become painfully clear.<sup>104</sup> But while this state of affairs may well dramatically lower the proportion of important interpretations in which agency expertise plays a decisive role, there is no reason to believe that, within the set of rulemakings that are still driven by expertise, it lowers the proportion of rulemakings that generate explanations of agency expertise suitable for judicial consumption. The executive's hierarchic structure, then, does not cast doubt on my thesis.

#### D.

I have argued that the federal regulatory process, thick with demands for reasons, is likely to elicit explanations of expert knowledge that make that knowledge relatively accessible to non-experts. An important interpretation relying on expert knowledge that no non-expert can understand is unlikely to survive the regulatory process. But things look different for unimportant interpretations, for which a kind of deference internal to the executive branch may take effect. When this happens, an interpretation passes through stage after stage of the regulatory process on the strength of the expert originator's recommendation, generating little in the way of explanation to non-experts. In this situation, because fewer and less thorough

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<sup>100</sup> See, e.g., Seidenfeld, *supra* n. \_\_\_, at 1422-23.

<sup>101</sup> See Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 U.C.L.A. L. REV. 1217, 1246-48 (2006) (explaining that the executive branch has much lower transaction costs for decisions due to its unitary structure).

<sup>102</sup> Alexander Hamilton, John Jay, & James Madison, *THE FEDERALIST* 451-52 (Modern Library ed. 2000).

<sup>103</sup> Hamilton argued not just that giving the executive branch a plurality of decision-makers, such as Article I used to protect against faction, would impede the executive's necessary energy; he also remarkably argued that including this protection against faction would serve no purpose, i.e., he did not anticipate a meaningful threat of faction arising from executive action. See *id.*

<sup>104</sup> See, e.g., Thomas O. Sargentich, *The Emphasis on the Presidency in U.S. Public Law: An Essay Critiquing Presidential Administration*, 50 ADMIN. L. REV. 1, 27-29 (2007).

explanations are generated, we have less reason to believe the costs of communicating agency expertise to a reviewing court are low.

For an interpretation as important as the bubble concept, internal deference is unlikely. The various executive officials who would have to defend the bubble concept before Congress and the public have powerful reasons to probe the SMEs' analysis to ensure they can, and wish to, defend the concept. So too do the lawyers who would have to defend it in court. But sometimes internal deference is a rational strategy, namely when the costs to executive officials and lawyers of understanding the reasons for a given interpretation outweigh the benefits of doing so. This is more likely to be the case when understanding the reasons for an interpretation would require reviewers to amass significant new knowledge and the interpretation is of relatively minor import and hence less likely to be contested within the executive branch, before Congress and the public, and in court. When an interpretation plays a large role in a major policy effort and when executive officials must therefore explain and defend it at length, they are likely to try hard to understand the reasons for the interpretation even if doing so requires extensive new learning.

We can offer, then, a qualification to this Part's analysis: the rulemaking process is more likely to generate internal explanations for an interpretation that are accessible to generalists and lawyers, and hence to judges, the more important that interpretation is. We may suppose this qualification has only modest practical import. After all, less important interpretations are also less likely to be litigated. Still, there may be some interpretations that claim the attention of litigants but not executive officials. For such interpretations, the costs of communicating agency expertise to reviewing courts are likely to be higher.

There is one more, related qualification. In this essay I have confined my reflections to cases involving deference to interpretations advanced in rulemakings, which represent the paradigmatic case for deference.<sup>105</sup> But courts sometimes defer to other sorts of agency pronouncements.<sup>106</sup> These may pass through far less robust processes than do full-dress regulations, and interpretations advanced in them are therefore less likely to have generated thorough internal explanations of agency expertise. But again, this qualification only modestly affects the analysis. That is because interpretations advanced outside the rulemaking context are at the fringe of deference's domain. Further, an interpretation issued after no or little deliberation is less likely to warrant deference,<sup>107</sup> so even interpretations advanced outside the rulemaking

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<sup>105</sup> See *United States v. Mead Corp.*, 533 U.S. 218, 230-31 (2001).

<sup>106</sup> See, e.g., *Kisor*, 139 S. Ct. at 2416.

<sup>107</sup> See *Mead*, 533 U.S. at 230 (notice and comment represents the paradigmatic case for *Chevron* deference because “[i]t is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force”).

context for which deference is claimed are unlikely to have avoided the demand to give reasons altogether.

#### IV.

We are now ready to sketch the implications of our findings for the deference doctrines. For important interpretations, the rulemaking process is likely to generate intra-executive explanations of agency expertise that are accessible to non-experts. These explanations can likely be shared by the agencies and understood by judges at modest cost. If that is true, it calls into serious question how often the four conditions on which the expertise rationale depends are met. For interpretations which satisfy the third condition are unlikely to satisfy the fourth: important agency interpretations formed under the guidance of expertise are precisely those in which agency expertise is most likely to be accessible to judges.

In some ways the concern I raise resembles others, such as about agency inexperience, that have driven limits to the deference doctrines in past cases.<sup>108</sup> But it differs in one important respect. These other concerns largely resulted in the exclusion of marginal cases from deference's domain: courts do not afford deference when an agency regulates outside its core expertise,<sup>109</sup> adds no content of its own over and above the statute,<sup>110</sup> or acts informally and with little deliberation,<sup>111</sup> or when Congress has unusually divided rulemaking and enforcement from adjudication.<sup>112</sup> But the argument offered here calls into question whether the expertise rationale applies in deference's heartland, to interpretations adopted in notice-and-comment rulemaking pursuant to typical regulatory statutes and implicating the author agency's core expertise.<sup>113</sup> Further, it applies most of all to the most important interpretations, where deference's practical import is greatest and which are also most likely to be litigated.

The argument therefore casts doubt upon the expertise rationale's ability to justify anything like today's deference doctrines. As noted above, a sensible jurisprudence of deference may well tolerate some number of false positives, i.e., cases in which deference is afforded notwithstanding that one or more of the four conditions may not be met. But on the account presented here, the false positives swept in under the expertise rationale are both numerous and the most important applications of the deference doctrines. There is no reason to believe—indeed, it seems most unlikely—that the administrability benefits of the current doctrines warrant such overbreadth. The argument therefore offers a reason to reject the expertise rationale as a basis for the deference doctrines and, unless the Court departs from its previous justifications to

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<sup>108</sup> See *supra* at \_\_\_.

<sup>109</sup> See, e.g., *King*, 576 U.S. at 486.

<sup>110</sup> See *Gonzales*, 546 U.S. at 257.

<sup>111</sup> See *Mead*, 533 U.S. at 229-31.

<sup>112</sup> *Martin*, 499 U.S. at 151 (describing the “unusual regulatory structure established by the Act”).

<sup>113</sup> *Mead*, 533 U.S. at 230-31 (holding out notice-and-comment rulemaking as representing the core case for deference).

rest the doctrines wholly on the accountability (or some other) rationale, to reject the deference doctrines themselves.

At the very least, courts should recognize that if the expertise rationale has force, it does so only when the costs of communicating agency expertise to courts exceeds the costs of deference itself. Courts should ask not just whether an agency has relevant expertise and has put it to use in formulating a challenged interpretation; they should also ask how feasible the agency's communication of that expertise to the court would be. Without asking and answering this question, the expertise rationale must remain incomplete and unpersuasive. Courts should therefore at the very least restrict the deference doctrines to cases in which there are good grounds to believe the costs of communicating agency expertise to the reviewing court are excessive.<sup>114</sup>

### CONCLUSION

In this essay I've offered reasons to doubt the expertise rationale for the deference doctrines and thus to doubt whether the courts' presumption of congressional intent—a presumption grounded on the expertise rationale—holds up. Those reasons are internal to the rationale; they show why, even assuming the premises underlying some measure of confidence in agency expertise, we should be skeptical of the deference doctrines. The essay thus has something to say to those who are unpersuaded by external critiques of the deference doctrines just as to those who, like myself, find those critiques compelling.

My argument does touch on the external criticisms in one respect. I have tried to show that the costs of communicating agency expertise in important cases are likely to be modest. The final assessment of the expertise rationale would require comparing those costs to the costs of deference. For the reasons I've given,<sup>115</sup> it is incontestable that deference imposes *some* costs. But the magnitude of those costs is bound up with the external critiques of deference; indeed, the costs of deference largely drive the external critiques. Someone who worries more about bureaucratic abuse of power, for instance, is likely also to view deference as more costly, for one main cost of deference is the risk of abuse of power. So those less persuaded by the external criticisms may hold to the expertise rationale even if they are persuaded by my argument that communication costs are relatively low, because they may believe that the costs of deference are even lower. For those, however, who are somewhat troubled by the high costs of deference, my argument suggests a path to avoid deference's costs while retaining its benefits: require agencies to pass their expertise along to reviewing courts.

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<sup>114</sup> Under the current framework, this restriction would naturally take the form of a limit on deference's domain, *Chevron's* (and *Auer's*) domain, assessed at "step zero." See, e.g., Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 836 (2001).

<sup>115</sup> See *supra* at \_\_.