The C. Boyden Gray Center
Center for the Study of the Administrative State
Antonin Scalia Law School . George Mason University

Republicanism and Expertise in Today's Administrative State

Ronald J. Pestritto

CSAS Working Paper 25-01

January 8, 2025

George Mason University | Antonin Scalia Law School

Republicanism and Expertise in Today's Administrative State

Ronald J. Pestritto
Hillsdale College
December 2024

Paul J. Ray has written a paper on agency expertise as a justification for judicial deference to agencies, which we are asked to consider as part of a broader examination of expertise and the administrative state. My paper addresses the status of expertise not only in light of the most recent judicial decisions on deference to agency interpretations of statutes and regulations, but also in light of deference to other forms of agency action. This wider variety of judicial deference – to agency legal interpretations, policymaking, and factfinding – will be assessed to determine where the "expertise" justification currently stands, and what the consequences of that standing are for the principles of republican government. The assessment will show that the expertise premise, in its many forms, is currently alive and well, and that this status reflects a long history of development in the American political tradition.

Ray correctly points to agency expertise as one of two or three major reasons why courts have developed and followed doctrines of deference to agencies, when agencies interpret statutes they administer ("*Chevron* deference")[1] or their own regulations ("*Auer* deference").[2] Ray does not dispute the argument that agencies have more expertise than

[1] *Chevron, U.S.A, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), overruled by *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244 (2024).

[2] *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) ("Because the salary-basis test is a creature of the Secretary [of Labor]'s own regulations, his interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.' . . . That deferential standard is easily met here.") (quoting *Bowles v. Seminole Rock & Sand Co*., 325 U.S. 410, 414 (1945)); *but see*

courts, or at least that they begin with more expertise. Instead, he focuses on a central premise of this kind of deference: that courts do not believe, or do not even consider the possibility, that whatever agency expertise may exist could be shared with judges to a degree that would diminish the expertise deficit of courts and thus diminish the necessity for courts to rely on agencies. Courts simply assume that whatever expertise advantage agencies may have is unalterable, and judges are thus too prone to throw up their hands when confronted with the prospect of reviewing agency interpretations that require subject-matter expertise. Ray suggests that this judicial reluctance should be reconsidered, and he does so by examining how much expertise-sharing agencies are already required to do in the regulatory process, and by showing that the costs of this expertise-sharing may well be less than the costs that come from judicial deference.[3]

Ray's contention that expertise has been a central justification for judicial deference is borne out by a long line of case law, and most recently by the dissent in *Loper Bright Enterprises v. Raimondo*. In this case the Supreme Court overruled the *Chevron* deference doctrine that has stood at the center of administrative law for forty years, which had required reviewing courts to defer to any reasonable agency interpretation of an ambiguous statute that it administers. In

---

Kisor v. Wilkie, 588 U.S. 558, 573 (2019) (upholding but significantly narrowing *Auer* deference) ("*Auer* deference is not the answer to every question of interpreting an agency's rules. Far from it. As we explain in this section, the possibility of deference can arise only if a regulation is genuinely ambiguous. And when we use that term, we mean it—genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation. Still more, not all reasonable agency constructions of those truly ambiguous rules are entitled to deference.").

[3] Paul J. Ray, "Lover, Mystic, Bureaucrat, Judge: The Communication of Expertise and the Deference Doctrines," C. Boyden Gray Center for the Study of the Administrative State, Working Paper 23-32, at 2–3 (Oct. 17, 2023), *available at*: <<< https://administrativestate.gmu.edu/wp-content/uploads/2023/10/23-32_Ray.pdf >>> (visited Oct. 23, 2024).

lamenting the demise of this form of deference, the dissent makes clear that expertise had been a central justification for it:

> Some interpretive issues arising in the regulatory context involve scientific or technical subject matter. Agencies have expertise in those areas; courts do not. Some demand a detailed understanding of complex and interdependent regulatory programs. Agencies know those programs inside-out; again, courts do not.[4]

While Ray contends that this initial expertise deficit need not be considered insurmountable, the *Loper Bright* dissenters conclude that "agencies often know things about a statute's subject matter that courts could not hope to."[5] This is because "agencies are staffed with 'experts in the field' who can bring their training and knowledge to bear on open statutory questions,"[6] but who cannot, contra-Ray, communicate an amount of that knowledge to judges that would be sufficient for judges to conduct a well-informed *de novo* review. As is typical of defenses of deference doctrines, the dissenters point to highly technical examples – in this case, to alpha amino acid polymers, and to the subtle distinctions between squirrel populations.[7] And they point not only to scientific knowledge itself, but also to the agency's greater familiarity with the ongoing regulatory schemes that typically give them a better informed perspective than a judge who might be reviewing such a scheme for the first time.[8]

---

[4] *Loper Bright Enterprises*, 144 S.Ct. 2244, 2294 (Kagan, J., dissenting).

[5] *Loper Bright Enterprises*, 144 S.Ct. at 2298 (Kagan, J., dissenting).

[6] *Loper Bright Enterprises*, 144 S.Ct. at 2298 (Kagan, J., dissenting).

[7] *Loper Bright Enterprises*, 144 S.Ct. at 2298 (Kagan, J., dissenting).

[8] *Loper Bright Enterprises*, 144 S.Ct. at 2298–2299 (Kagan, J., dissenting).

A similar reliance on expertise was an integral part of the Court's 2019 upholding of "*Auer* deference," where judges are required to defer to an agency's interpretation of its own ambiguous regulation (thus incentivizing agencies to make regulations ambiguous, so that they can be liberated from future judicial review, as Justice Alito pointed out in 2012[9]). In the *Kisor v. Wilkie* case from 2019, the Court points to examples such as an FDA regulation about active moieties, and the question of whether or not a company has "created a new 'active moiety' by joining a previously approved moiety to lysine through a non-ester covalent bond."[10] Resolving such questions, or even reviewing how such questions have been resolved, requires an amount and kind of technical knowledge that the Court clearly presumes cannot easily be transferred or shared with non-experts outside of the agency that promulgated the original regulation. The majority in *Kisor* saved *Auer* deference – for the time being – by significantly narrowing the kinds of cases to which it can be applied,[11] but nonetheless agencies' monopoly on expertise was not greatly disputed.

---

[9] *Christopher v. SmithKline Beecham Corp*., 567 U.S. 142, 158 (2012) ("[T]his practice . . . creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit."); see also *Decker v. Nw. Env't Def. Ctr.*, 568 U.S. 597, 620 (2013) (Scalia, J., concurring in part and dissenting in part) ("*Auer* deference encourages agencies to be 'vague in framing regulations, with the plan of issuing "interpretations" to create the intended new law without observance of notice and comment procedures.' . . . *Auer* is not a logical corollary to *Chevron* but a dangerous permission slip for the arrogation of power.") (quoting Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 Admin. L.J. Am. U. 1, 11–12 (1996)) (citations omitted).

[10] *Kisor v. Wilkie*, 588 U.S. 558, 567 (2019).

[11] *Kisor v. Wilkie*, 588 U.S. at 573–579.

Deference to Expertise: The State of Play

With *Chevron* now having been overruled, has there been any change in – and in particular, has there been any retreat from – the premise that agency expertise justifies judicial deference? The fallout from *Chevron*'s demise in *Loper Bright* is still far from clear, and courts will surely be wrestling with what will take its place for some time into the future.[12] But the majority in *Loper Bright* did not kill off *Chevron* by taking on the premise of agency expertise. Instead, the Court took aim at the other major justification for deference identified by Ray: fidelity to Congressional intent. As Ray explains, the prior logic was that Congress "intends agencies rather than courts to resolve statutory and regulatory ambiguity."[13] The *Loper Bright* majority took on that long-standing premise, reasoning that while the agency's expertise still required courts to show "due respect for the views of the Executive Branch," this respect for expertise cannot take precedence over the intent of Congress that courts take responsibility for settling all questions of law.[14]

The intent of Congress is expressed most authoritatively in the Administrative Procedure Act (APA) of 1946. Section 706 of the APA (on the "Scope of Review") states that "*the reviewing*

---

[12] For one assessment of the impact of *Chevron*'s demise, see Gary Lawson, *'Then What?': A Framework for Life Without Chevron*, 60 *Wake Forest L. Rev.* (forthcoming 2025), available for download through the Social Science Research Network at: <<< https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4961745 >>> (visited Oct. 23, 2024); see also, e.g., Thomas W. Merrill, *The Demise of Deference—And the Rise of Delegation to Interpret?*, 138 Harv. L. Rev. 227 (2024); Ronald A. Cass, *The Curtain Falls on* Chevron*: Will the* Chevron *Two-Step Give Way to a Simpler* Loper Bright*-Line Rule?*, 25 Federalist Soc'y Rev. 320 (2024); No Author, *Supreme Court Ends* Chevron *Doctrine of Deference to Executive Agencies*, 101 No. 26 Interpreter Releases Art. 1 (July 8, 2024).

[13] Ray, supra note 3, at 5.

[14] *Loper Bright Enterprises*, 144 S.Ct. 2244, 2266–2267.

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."[15] In *Loper Bright*, the Court reasons that no amount of respect for agency expertise can lawfully trump this congressional command. Congress's intent for the APA was to serve as a check upon agency discretion, and this intent is directly undermined by *Chevron*'s mandate that courts defer to agency judgment. Congress's mandate, instead, was "that courts, not agencies, will decide all relevant questions of law arising on review of agency action . . . even those involving ambiguous laws – and set aside any such action inconsistent with the law *as they interpret it*."[16] To this reasoning based on the plain text of the APA, the Court adds evidence from documents contemporaneous to the APA, showing that "[e]ven the Department of Justice – an agency with every incentive to endorse a view of the APA favorable to the Executive Branch" – acknowledged the traditional, non-deferential role of the judiciary in reviewing agency legal interpretations.[17] This position of the Department of Justice was taken in the "Attorney General's Manual" on the APA, which was heavily relied upon in the earliest applications of the APA.[18] Even the executive branch, in other words, acknowledged Congress's intent for

[15] 5 U.S.C. § 706 (emphasis added).

[16] *Loper Bright Enterprises*, 144 S.Ct. 2244, 2261 (citation and internal quotation marks omitted) (emphasis added).

[17] *Loper Bright Enterprises*, 144 S.Ct. at 2262.

[18] *Loper Bright Enterprises*, 144 S.Ct. at 2262.

"the traditional understanding of the judicial function, under which courts must exercise *independent judgment* in determining the meaning of statutory provisions."[19]

The Court in *Loper Bright* also goes out of its way to state that the demise of *Chevron* does not also mean the demise of reliance on agency expertise, even on questions of statutory interpretation. Long before *Chevron* came on to the scene in 1984, federal courts had been relying on the 1944 case of *Skidmore v. Swift* to acknowledge a role for agency expertise in deciphering vague statutes[20] – and the *Loper Bright* Court makes multiple references to *Skidmore* to make clear that agency expertise must still be respected, even if it is no longer to enjoy presumptive deference.[21]

The *Skidmore* Court was asked to review an interpretation of the Fair Labor Standards Act, which had been applied to resolve the question of whether employees on-call for emergencies should be considered as engaging in work and thus receive some kind of compensation for their time. Lower courts had conducted their own *de novo* review of the statute, giving no weight to the expertise of agency administrators in determining that the statute did not require compensation for the on-call employees. In overturning the lower courts, the Supreme Court concluded that the expertise of the Act's "Administrator" ought

---

[19] *Loper Bright Enterprises*, 144 S.Ct. at 2262 (emphasis added). In separate concurrences, Justices Thomas and Gorsuch endorse the Court's assessment that *Chevron* deference happens to violate Congress's intent in the APA, but add that even without that congressional intent, *Chevron* deference would – even more significantly – run afoul of the U.S. Constitution. The judiciary's duty to interpret the law, they explain, comes from the Constitution itself; this constitutional command supersedes any congressional intent for or against deference. *See Loper Bright Enterprises*, 144 S.Ct. at 2274–2275 (Thomas, J., concurring) and 2277–2281, 2283–2286 (Gorsuch, J., concurring).

[20] *Skidmore v. Swift & Co*., 323 U.S. 134 (1944).

[21] *Loper Bright Enterprises*, 144 S.Ct. at 2267.

to have been given some degree of respect – in particular, that the lower courts erred in disregarding the legal opinion of the Administrator that had been expressed in his *amicus curiae* brief. In pointing to the Administrator's expertise, the Court reasoned that "[p]ursuit of his duties has accumulated a considerable experience in the problems of ascertaining working time in employments involving periods of inactivity and a knowledge of the customs prevailing in reference to their solution."[22] And it observed that "the Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case."[23] It is worth noting that the Court thought the administrator's interpretation to be entitled to weight, even though it was merely advisory – expressed as an *amicus* and not as a consequence of a judgment that was to have the force of law. Since the respect accorded to the agency's interpretation here does not approach the level of presumptive deference that we would eventually see in *Chevron*, the Court provided a number of factors to be considered when determining just how much respect courts might owe to agencies in these kinds of cases:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its

[22] *Skidmore*, 323 U.S. at 137–138.

[23] *Skidmore*, 323 U.S. at 139.

> consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[24]

To be sure, the persistence of *Skidmore* deference will be small comfort to advocates of *Chevron*-style mandated deference. In one of Justice Scalia's many defenses of *Chevron*, he ridiculed other kinds of "indeterminate" deference such as that based on *Skidmore*.[25] Yet it is notable that the Court does go out of its way, in *Loper Bright*, to retain some role for agency expertise – however diminished – in the interpretation of statutes.

Thus far we have examined the status of agency expertise only with respect to questions of legal interpretation – when agencies must decipher the meaning of statutes they administer and their own regulations. Ray's paper deals exclusively with expertise in this particular category of agency action ("doctrines of deference to agencies in the interpretation of

---

[24] *Skidmore*, 323 U.S. at 140. After the Supreme Court's decision in *United States v. Mead Corporation*, *Skidmore* deference remained alive and well and generally applied to instances in which an agency's action did not qualify for *Chevron* deference. See *U.S. v. Mead Corp*., 533 U.S. 218, 234 (2001) ("*Chevron* did nothing to eliminate *Skidmore*'s holding that an agency's interpretation may merit some deference whatever its form, given the specialized experience and broader investigations and information available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires.") (citations and internal quotation marks omitted). For more background on *Skidmore* deference, see generally Bradley Lipton, *Accountability, Deference, and the* Skidmore *Doctrine*, 119 Yale L.J. 2096, 2098 (2010) ("The *Mead* court held that courts should defer strongly to formal interpretations under the very deferential standard set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*., but should be less deferential to informal interpretations by using the standard articulated in *Skidmore*."); Jim Rossi, *Respecting Deference: Conceptualizing* Skidmore *Within the Architecture of* Chevron, 42 Wm. & Mary L. Rev. 1105, 1105 (2001) ("This Article addresses critically the implications of the U.S. Supreme Court's recent decision in *Christensen v. Harris County*, 120 S. Ct. 1655 (2000), for standards of judicial review of agency interpretations of law. *Christensen* is a notable case in the administrative law area because it purports to clarify application of the deference doctrine first articulated in *Skidmore v. Swift & Co*., 323 U.S. 134 (1944). By reviving this doctrine, *Christensen* narrows application of the predominant approach to deference articulated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984), thus reducing the level of deference in many appeals involving administrative agency interpretations of law.").

[25] *U.S. v. Mead Corp*., 533 U.S. 218, 239 (2001) (Scalia, J., dissenting).

ambiguous statutes and regulations"[26]). The same holds for the Supreme Court's ruling in *Loper Bright*: as it addresses only *Chevron* deference, it leaves in place the even greater deference that courts must accord to agency policymaking and factfinding. The Court correctly observes that this higher level of deference to agency expertise reflects fidelity to congressional intent in the APA: unlike agency legal interpretations,

> Section 706 *does* mandate that judicial review of agency policymaking and factfinding be deferential. See §706(2)(A) (agency action to be set aside if "arbitrary, capricious, [or] an abuse of discretion"); §706(2)(E) (agency factfinding in formal proceedings to be set aside if "unsupported by substantial evidence").[27]

In deference to their expertise, in other words, agencies need only clear a much lower bar when engaging in policymaking or factfinding – activities which constitute a considerable swath of agency action.

The high degree of deference to agencies in matters of policymaking – in those matters, in other words, where an agency acts most like a legislature,[28] as opposed to acting like a court

---

[26] Ray, supra note 3, at 2.

[27] *Loper Bright Enterprises*, 144 S.Ct. 2244, 2261 (emphasis in original). As previously stated, a plurality of justices in *Loper Bright* rests the argument exclusively on fidelity to congressional intent in the APA. This leaves open the question of whether this is the appropriate ground for establishing the judiciary's scope of review. How far could Congress go in constricting judicial review of agency action? If the APA were to be amended to mandate judicial deference to agency legal interpretations, how many justices in the *Loper Bright* majority would continue to follow the Court's logic of fidelity to congressional intent, and how many would turn to Justices Thomas and Gorsuch in grounding the judiciary's scope of review in the Constitution itself?

[28] This paper leaves aside the *propriety* of an agency acting like a legislature. Unless and until the Supreme Court follows through on the apparent intention of four justices in the 5–3 *Gundy* decision to revisit the scope and propriety of subdelegation, we will work under the assumption that congressional subdelegation of legislative power to the executive is permissible, and thus we will focus instead on the scope of judicial review of an agency's exercise of legislative power. *See Gundy v. United*

on questions of legal interpretation – was the vision of the original New Deal architects of the administrative state. The plain language of the APA reflects this vision: courts are not to substitute their own reasoning for that of the agency, but can only intervene if agency action is "arbitrary," or made without reasoning.[29] The procedural provisions of the APA thus only require agencies to issue a "concise general statement of [the] basis and purpose" for informal rulemakings, and make even fewer requirements for informal adjudications.[30] To be sure, courts have not been nearly as generous in the "post-capture" era, where the dreaminess about the virtue of administrators originally exhibited by New Deal visionaries like James Landis has worn off, and where courts are more likely to use the "arbitrary and capricious" standard to second-guess agency policy decisions. For the most part, this has come to mean that agencies must cite a substantial amount of technical data in their statements of basis and purpose[31] –

States, 588 U.S. 128, 149 (2019) (Alito, J., concurring) ("If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort.") and 149 (Gorsuch, J., dissenting, joined by Roberts, C.J., and Thomas, J.) ("Working from an understanding of the Constitution at war with its text and history, the plurality reimagines the terms of the statute before us and insists there is nothing wrong with Congress handing off so much power to the Attorney General.").

[29] 5 U.S.C. § 706(2)(A). See Gary Lawson's description of this high degree of deference in Lawson, *Federal Administrative Law*, Ninth Edition (St. Paul, MN: West Academic, 2022), 787–788. Lawson cites as notable examples: *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943); *Madison Park Corp. v. Bowles*, 140 F.2d 316, 324 (U.S. Emergency Ct. App. 1943); and *Wickard v. Filburn*, 317 U.S. 111 (1942).

[30] 5 U.S.C. § 553(c). In *Citizens to Preserve Overton Park*, the Supreme Court added, as a requirement for informal adjudications, that agencies include a statement of reasons when the record was otherwise insufficient. Such a statement, the Court concluded, was necessary for it to exercise even its minimal "arbitrary and capricious" review under Section 706 of the APA. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 417–420 (1971).

[31] *See, e.g.*, *Louisiana Fed. Land Bank Ass'n v. Farm Credit Admin*., 336 F.3d 1075, 1080 (D.C. Cir. 2003) ("The [Farm Credit Administration] should have responded to the plaintiffs' comment. Although the FCA is not required to discuss [in the statement of basis and purpose] every item of fact or opinion included in the submissions it receives in response to a Notice of Proposed Rulemaking, it

and, increasingly, even in their initial notices of proposed rulemakings,[32] where courts now want to make sure that interested parties have an opportunity to comment meaningfully and thus require agencies to make all kinds of information publicly available long before rules are finalized. Yet for all of this, the standard of review remains deferential; the premise is that, on matters of policymaking, Congress has delegated to the agencies because of the agencies' expertise, and judicial review exists for the purpose of making sure that the agency has taken a "hard look" at the question – that it has fully employed its own expertise, in other words.[33]

---

must respond to those comments which, if true . . . would require a change in [the] proposed rule.") (citations and internal quotation marks omitted); *Reyblatt v. U.S. Nuclear Regulatory Comm'n*, 105 F.3d 715, 722 (D.C. Cir. 1997) ("An agency need not address every comment, but it must respond in a reasoned manner to those that raise significant problems. Nevertheless, the detail required in a statement of basis and purpose depends on the subject of the regulation and the nature of the comments received.") (citations and internal quotation marks omitted).

[32] *See, e.g.*, *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973) ("It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, [to a] critical degree, is known only to the agency."); *Connecticut Light & Power Co. v. U.S. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530–531 (D.C. Cir. 1982) ("To allow an agency to play hunt the peanut with technical information, hiding or disguising the information that it employs, is to condone a practice in which the agency treats what should be a genuine interchange as mere bureaucratic sport. An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary."); *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 239–240 (D.C. Cir. 2008) ("Individual pages relied upon by the [Federal Communications] Commission reveal that the unredacted portions [of the technical studies, withheld from the notice of proposed rulemaking] are likely to contain evidence that could call into question the Commission's decision to promulgate the rule. . . . On remand, the Commission shall make available for notice and comment the unredacted technical studies and data that it has employed in reaching [its] decisions . . . .") (citations and internal quotation marks omitted).

[33] *See, e.g.*, *Motor Vehicle M'f'rs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("The scope of review under the arbitrary and capricious standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. In reviewing that explanation, we must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.") (citations and internal quotation marks omitted).

And the deference to that expertise is even greater in instances of agency factfinding, where the controlling case law has been stated by the D.C. Circuit in *Laro Maintenance Corporation v. NLRB*:

> The court's review of the Board's factual conclusions is highly deferential, upholding a decision if it is supported by substantial evidence considering the record as a whole. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). "So long as the Board's findings are *reasonable*, they may not be displaced on review even if the court might have reached a different result had the matter been before it *de novo*." *Clark & Wilkins Indus., Inc. v. NLRB*, 887 F.2d 308, 312 (D.C. Cir. 1989).[34]

The general premise of agency expertise is thus alive and well, and is given effect to different degrees, depending upon the kind of agency action under review. In sum, even with the recent overruling of *Chevron*'s presumptive deference, respect for agency expertise is still a factor in agency legal interpretations, and is given wider berth in other areas of agency activity.

Expertise Over Consent: Origins

The deference to expertise that has become a staple of American jurisprudence – *Loper Bright* notwithstanding – has a long and principled history in American political thought. As previously mentioned, it can be traced, in part, to the enthusiasm of the New Deal architects

---

[34] *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 228–229 (D.C. Cir. 1995) (string-citations omitted) (emphasis in original). For a summary and critique of the scope of judicial review of agency factfinding, see, e.g., Evan D. Bernick, *Is Judicial Deference to Agency Fact-Finding Unlawful?*, 16 Geo. J. L. & Pub. Pol'y 27, 27 (2018) ("This Article provides an overview of the origins, development, and present state of fact deference and subjects fact deference to a constitutional critique. It concludes that in cases involving administrative deprivations of what I will refer to as 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.").

of the administrative state such as James Landis, who worked on legislation for Franklin Roosevelt and ultimately became Chairman of the Securities and Exchange Commission. But Landis (to whom we will return) was himself a product of his Progressive-Era antecedents, the true intellectual fathers of agency power in the United States. Pioneering progressive intellectuals such as Woodrow Wilson and Frank Goodnow[35] had, since the 1880s and 1890s, been urging the adoption of a system that would rely more on the expertise of highly educated administrators and less on the consent-based political institutions that had increasingly come under a cloud of corruption in the second half of the nineteenth century. Coming on the heels of Mugwump agitation against the spoils system, the Progressives had much more comprehensive and ambitious plans for expanding the scope of federal power, and they knew that America's traditional political institutions were not suited to the task of implementing and managing such a wide-ranging regulatory scheme for the American economy.

Woodrow Wilson had a long academic career prior to his entry into politics in 1910, and one of the most important parts of that intellectual career was the publication of his landmark "Study of Administration" – an article that is still credited today as a founding pillar of the public administration discipline in the United States. Wilson's article urged his fellow intellectuals to think about national administration in fundamentally novel terms. A robust national administrative power was nothing new to the American tradition, of course; establishing

[35] Due to limitations of space this paper will focus on Wilson, but Frank Johnson Goodnow was the other late-nineteenth-century intellectual who was most involved in the development of new modes of thinking about administration in the United States. Goodnow taught at Columbia University, served as the first President of the American Political Science Association, and ultimately became President of Johns Hopkins University. Most pertinent to our topic are Goodnow's *Comparative Administrative Law* (New York: Putnam, 1893) and *Politics and Administration* (New York: Macmillan, 1900).

a competent national administration had been one of the principal arguments for the 1789 Constitution.[36] But America's administrative system had theretofore decisively prioritized consent over expertise. Administration, as vigorous as its Federalist advocates wanted it to be, had been made a function of the Constitution's separation-of-powers system; it was republicanized by way of subordinating it to the elected executive. Administration was, in other words, made subservient to republican politics – it was kept accountable to the sovereign people of the United States by way of the unitary concept of the executive. Under that concept, best explained in *Federalist* 70, all executive power, including administrative power, had to flow through the unitary president, so that it could be kept accountable to the public's will, in keeping with republican principles. There could be no separate zone for administrative power, outside of the Constitution or the political institutions ordained and established by the

---

[36] *See, e.g.*, **Federalist No. 15**, in Alexander Hamilton, John Jay, and James Madison, *The Federalist*, ed. George W. Carey & James McClellan (Indianapolis: Liberty Fund, 2001), 71 ("The great and radical vice, in the construction of the existing confederation, is in the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of whom they consist. . . . [T]he United States have an indefinite discretion to make requisitions for men and money; but they have no authority to raise either, by regulations extending to the individual citizens of America.") (emphasis in original); **Federalist No. 15**, ed. Carey & McClellan, 72–73 ("Government implies the power of making laws. It is essential to the idea of a law, that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws, will in fact amount to nothing more than advice or recommendation. This penalty, whatever it may be, can only be inflicted in two ways; by the agency of the courts and ministers of justice, or by military force; by the coercion of the magistracy, or by the coercion of arms."); **Federalist No. 68**, ed. Carey & McClellan, 354 ("[T]his will be thought no inconsiderable recommendation of the constitution, by those who are able to estimate the share which the executive in every government must necessarily have in its good or ill administration. Though we cannot acquiesce in the political heresy of the poet [Alexander Pope], who says

> 'For forms of government, let fools contest. . . .
> 'That which is best administered, is best;'

yet we may safely pronounce, that the true test of a good government is, its aptitude and tendency to produce a good administration.").

Constitution – the Constitution was the only source from which any governmental power could legitimately flow.

Wilson took aim at this way of seeing things. He believed that the national administrative apparatus would never be able to take on the tasks that Progressives had in mind for it if we continued to see it as part of politics – if, in other words, it had to answer to ordinary mechanisms of electoral consent in the fashion of America's other institutions. This tie of the national executive to the ordinary machinations of electoral politics had corrupted administration and mired it in the petty conflicts of self-interest that inevitably arise whenever institutions and officials are too closely tied to public opinion. Consent could no longer be the exclusive foundation for rule – national administrators needed to be able to exercise their share of the governing power on the authority of their own expertise, and could not be free to do so if they were always forced to look over their shoulders at the narrow political considerations that come in the realm of consent. In an essay from 1887, Wilson expressed sympathy with the goals of the socialists of his day, explaining that progressive democrats and socialists had nearly identical political principles, but that the former could not yet sign on to the full socialist program, because the country lacked the administrative means of carrying out all of the policy prescriptions that both groups largely shared. Casting himself as the democrat, Wilson concluded his essay with the following comment to the socialist:

> You know it is my principle, no less than yours, that every man shall have an equal chance with every other man: if I saw my way to it as a practical politician, I should be willing to go farther and superintend every man's use of his chance. But the means? The question with me is not whether the community has power to act as it may please

in these matters, but how it can act with practical advantage — a question of *policy*.

A question of policy primarily, but also a question of organization, that is to say of *administration*.[37]

Wilson wrote this during the very years that he was working on a new understanding of national administration for the American regime – one that borrowed from the administrative systems more prevalent in Europe to professionalize administration for the sake of having it take on progressive goals.

Thus was born Wilson's argument for the separation of politics and administration. As he explained in the landmark "Study of Administration" article, on the one side of this divide – politics – the place of public opinion would remain authoritative; but on the other side – administration – the complex programmatic management that Progressives envisioned for the national economy could go forward on the basis of politically neutral, scientific principles, liberated from self-interest and drawing, instead, on the education and expertise of the administrative class. The core principle of Wilson's separation of politics and administration is that "administration lies outside the proper sphere of *politics*. Administrative questions are not political questions." Freed not only from politics but from the Constitution altogether, administrators could turn to managing the economy like a business. Wilson reasoned that "[t]he field of administration is a field of business. It is removed from the hurry and strife of

[37] Woodrow Wilson, "Socialism and Democracy," in *Woodrow Wilson: The Essential Political Writings*, ed. Ronald J. Pestritto (Lanham, MD: Lexington Books, 2005) (hereafter "EPW"), 79 (emphasis in original).

politics; it at most points stands apart even from the debatable ground of constitutional study."[38]

This very distinction between administrative and constitutional principles was employed by Wilson to answer the obvious objection that his free-ranging administrative vision lacked the necessary checks and balances, or that it seems to place administration outside the sphere of republican accountability. Precisely because administration was to be insulated from politics, Wilson felt safe to import what was basically a Prussian administrative model into the United States:

> [I]t is the distinction, already drawn, between administration and politics which makes the comparative method so safe in the field of administration. When we study the administrative systems of France and Germany, knowing that we are not in search of *political* principles, we need not care a peppercorn for the constitutional or political reasons which Frenchmen or Germans give for their practices when explaining them to us. If I see a murderous fellow sharpening a knife cleverly, I can borrow his way of sharpening the knife without borrowing his probable intention to commit murder with it; and so, if I see a monarchist dyed in the wool managing a public bureau well, I can learn his business methods without changing one of my republican spots.[39]

Wilson also had a high degree of faith in the expertise and objectivity of those who would staff his more robust national bureaucracy. Having himself graduated from Princeton and

---

[38] Woodrow Wilson, "The Study of Administration," in *EPW*, 240 (emphasis in original).

[39] Wilson, "The Study of Administration," in *EPW*, 246–247 (emphasis in original).

then Johns Hopkins, elite education not only gave Wilson confidence in administrators, but as he saw it such an education almost entitled these public-spirited graduates to a share in national governance. Their educations gave them "special knowledge," and he argued that "an intelligent nation cannot be led or ruled save by thoroughly trained and completely-educated men." We see here in Wilson the origins of the optimism that would later come to characterize Landis's deep faith in the objectivity and public-spiritedness of the administrative class. It was through Wilson and his contemporaries at schools like Johns Hopkins that the faith in modern bureaucracy exhibited by G.W.F. Hegel and its other European founders was brought into the United States.[40] Hegel's premise, articulated in his *Philosophy of Right*, was that a position in an administrative agency, made safe with tenure and comfortable pay, would free a civil servant from the concerns about which he might normally be self-interested. Liberated from particularity, in other words, the civil servant could focus on objectivity, grounded in neutral, scientific principles.[41] Wilson learned this way of thinking about bureaucracy in part from Hegel's account of the Prussian system as it had come to exist at what Hegel claimed was the culmination of world history, though Wilson learned such ideas even more directly from his German-educated teachers. Wilson's pioneering work in advocating for this way of thinking in the United States was particularly influential on the likes of James Landis, who cited Wilson and

[40] The transformation in American higher education which made this German influence a reality is a complicated story that lies well beyond the scope of this paper. Fortunately, it is meticulously detailed in Jeffrey E. Paul, *Winning America's Second Civil War* (New York: Encounter Books, 2023). See, especially, 15–101.

[41] G.W.F. Hegel, *Philosophy of Right*, trans. T.M. Knox (London: Oxford Univ. Press, 1967), 191–192.

other early progressive thinkers on administration like Frank Goodnow in promoting his own vision for bureaucracy in the New Deal.

Putting Expertise to Work: Landis and the New Deal

Ray is quite correct to cite Landis as a principal source for the "[c]onfidence in the rule of experts" that now characterizes both the American administrative state and, as this paper has maintained, the American legal system.[42] But this confidence did not originate with Landis, who himself reflected the optimism about administrative rule that had been introduced into the American tradition by the Progressives of the preceding generation. Landis simply found himself presented with the occasion and the position to put this optimism into practice. Landis was brought into the implementation of the New Deal by Roosevelt's advisor – and Landis's senior colleague at Harvard Law School – Felix Frankfurter. He was put to work on crafting securities legislation that reflected the new administration's desire to rely on bureaucratic expertise, and he subsequently served on both the Federal Trade Commission and Securities and Exchange Commission, playing a major role in launching the administrative state as we have come to know it. His seminal work, *The Administrative Process*, was written after Landis left the SEC in 1937 to become Dean of Harvard Law School, and explicates Landis's principal ideas on administrative governance.

In that work, Landis mimicked Wilson's belief in the special qualities of civil servants – qualities that in some way seem to immunize them from the self-interestedness to which, at least according to America's founders, all human beings are prone. Landis adopted from the

[42] Ray, supra note 3, at 1.

Progressives their faith in the forward, rational movement of history, such that man's natural factiousness ceases to pose the principal threat to free government. Due to man's progress and increased rationality, civil servants in the new generation would be able to set aside their own private or particular inclinations and be driven, instead, by neutral, objective, scientific principles. Just as Wilson had praised the "patriotism" and "disinterested ambition" of his envisioned new class of civil servants,[43] Landis described them as "men whose sole urge for public service is the opportunity that it affords for the satisfaction of achievement."[44] Due to his belief in this selfless dedication to the public good, Landis also echoed Wilson's suggestion that the country owed these men an opportunity to rule:

> Government today no longer dares to rely for its administration upon the casual office-seeker. Into its service it now seeks to bring men of professional attainment in various fields and to make that service such that they will envisage governance as a career. The desires of these men to share in the mediation of human claims cannot be denied; their contributions dare not casually be tossed aside.
>
> The grandeur that is law loses nothing from such a prospect. Instead, under its banner as a commanding discipline are enlisted armies of men dedicated to the idea of justice.[45]

---

[43] Wilson, "Notes for Lectures at the Johns Hopkins," in *The Papers of Woodrow Wilson*, 69 vols., ed. Arthur S. Link (Princeton: Princeton Univ. Press, 1966–1993), 7:122.

[44] James M. Landis, *The Administrative Process* (Westport, CT: Greenwood Press, 1974), 28.

[45] Landis, *Administrative Process*, 154.

Landis's faith that a class of selfless, expert administrators could be marshalled to manage the state allowed him to downplay any traditional concerns about the potential for corruption that might come with such discretionary power.

With such concerns diminished, Landis felt liberated to advocate for granting adjudicatory power to administrators instead of independent courts. The expertise of administrators would make them more competent than Article III courts and thus more likely to reach a just result, and it would only be "delay that results from insistence upon independent judicial examination of the administrative's [*sic*] conclusion."[46] Independent judicial review of agency decision-making would undermine the primary justification for administrative authority: expertise. Landis argued that agency personnel were the most qualified to adjudicate disputes where individuals or companies were accused of wrongdoing – who better to determine whether someone had broken a regulation, than the very group of individuals who had written the regulation in the first place?[47] Submitting such questions to independent courts would interfere with reaching a just result, because those courts are bound by the "limitations" of law and judicial procedure. Courts can only rely on evidence presented on the record at trial, for instance, whereas administrators are free to employ their own expertise and understanding of what is truly in the public interest. "[I]t is imperative that controversies be decided as 'rightly' as possible," Landis argued, "independently of the formal record the parties themselves produce."[48]

---

[46] Landis, *Administrative Process*, 142–143; see also id. at 125.

[47] Landis, *Administrative Process*, 123–124.

[48] Landis, *Administrative Process*, 38–39.

The expertise of administrators could only be of benefit to the public if those administrators were shielded not only from judicial second-guessing, but also from publicly accountable legislators whose political self-interest might lead them to interfere with administrative discretion. Legislators, instead, should provide only broad directives, and give administrators maximum freedom to make the details of policy based on their expertise in the field. If this account seems potentially far-fetched, consider the following from the *Administrative Process*:

> One of the ablest administrators that it was my good fortune to know, I believe, never read, at least more than casually, the statutes that he translated into reality. He assumed that they gave him power to deal with the broad problems of an industry and, upon that understanding, he sought his own solutions.[49]

This is a degree of administrative independence upon which Landis continued to insist throughout his career. He had an opportunity in 1960, in compiling a report for president-elect Kennedy, to reflect on the successes and failures of the administrative model that he had helped put into motion during the New Deal. In pointing to instances of failure, Landis attributed such disappointments to the fact that some agencies had not been sufficiently separated and protected from political and judicial oversight.[50]

---

[49] Landis, *Administrative Process*, 75.

[50] Landis, *Report on Regulatory Agencies to the President-Elect*, Committee on the Judiciary of the U.S. Senate, 86th Congress, 2nd Session, December 1960, sections I.D, II.

In terms of jurisprudence, Landis's vision for an independent administration operating on the basis of its expertise is best illustrated in his embrace of the Supreme Court's 1935 decision in *Humphrey's Executor v. United States*.[51] But for this decision – upholding Congress's power to create administrative entities that are shielded from presidential control – the administrative state as we know it, and as Landis envisioned it, could not exist. The Roosevelt administration, of which Landis was a part, was actually on the losing side of this case, because it had removed an anti-New Deal FTC commissioner even though Congress had limited the president's removal power over FTC officials. But Landis couldn't have been more pleased, since the loss for FDR was small potatoes compared to the administrative independence from presidential/political control that the *Humphrey's* decision helped to achieve. In fact, Landis's connection to the case went all the way back to the *Myers v. United States* decision which *Humphrey's* greatly narrowed.[52] At the time the Supreme Court decided *Myers* in 1926, Landis was serving as a law clerk to Justice Brandeis, and helped Brandeis craft his dissent to Chief Justice Taft's sweeping opinion upholding the president's removal power and thus control over

---

[51] *Humphrey's Executor v. United States*, 295 U.S. 602, 624 (1935) (statutory for-cause removal protections prohibiting President from firing Federal Trade Commissioners except "for inefficiency, neglect of duty, or malfeasance in office" were upheld on the grounds that FTC's "duties are neither political nor executive, but predominantly quasi judicial and quasi legislative").

[52] *Myers v. United States*, 272 U.S. 52 (1926) (upholding President's sole power to remove postmaster from office even though statute provided for removal by President only "with the advice and consent of the Senate"). The Supreme Court quoted the following words of James Madison from a debate in the First Congress: "Vest this power [of removal] in the Senate jointly with the President, and you abolish at once that great principle of unity and responsibility in the executive department, which was intended for the security of liberty and the public good. If the President should possess alone the power of removal from office, those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest will depend, as they ought, on the President, and the President on the community." 272 U.S. at 131.

all elements of the executive branch.[53] Landis understood the significance of *Humphrey's* for his vision of administration[54] – and that decision arguably continues today to be the single most important case in the history of judicial tolerance for the administrative state's dubious constitutional footing.

In tracing today's embrace of administrative expertise to Landis, to Progressives like Wilson, and ultimately to the nineteenth-century bureaucratic philosophy of the likes of Hegel, I do not suggest that our situation today reflects the full, idealistic vision of administration that we find in these sources; nor do I suggest we have a Prussian-style bureaucracy on our hands – much as Wilson advocated for it in the "Study of Administration." History is much more complex than that and politics is too stubborn, not to mention the sobering up from the age of administrative exuberance that came with the "post-capture" developments in administrative law.[55] But when speaking to the paper's topic of judicial deference to administrative expertise, the connection to Landis's core principles is strong and obvious, as is – by relation – the connection to Wilson's general case for separating politics and administration, which he

---

[53] *See Myers*, 272 U.S. at 240–295 (Brandeis, J., dissenting).

[54] Donald A. Ritchie, *James M. Landis: Dean of the Regulators* (Cambridge: Harvard Univ. Press, 1980), 24–25, 49.

[55] *See, e.g.*, Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 Chi.-Kent L. Rev. 1039, 1043 (1997) ("My thesis . . . is that the courts' assertiveness during the period from roughly 1967 to 1983 can be explained by judicial disenchantment with the idea of policymaking by expert and nonpolitical elites. There was during this period no loss of faith in activist government. But a key instrumentality of activist government—the administrative agency—came to be regarded as suffering from pathologies not shared by other governmental institutions such as legislatures or courts. The principal pathology emphasized during these years was 'capture,' meaning that agencies were regarded as being uniquely susceptible to domination by the industry they were charged with regulating. Starting in the late 1960s, many federal judges became convinced that agencies were prone to capture and related defects and—more importantly—that they were in a position to do something about it.").

conceded was an utter novelty in the American context.[56] Tracing such connections also helps to see how the staying power of deference to administrative expertise runs counter to the original republican vision of the American Constitution.

Administration and the Founders' Republicanism

James Madison and even Alexander Hamilton – no wimp when it comes to national administrative power – would have recognized the fatal flaws in two fundamental premises of the modern administrative state. The first is the assumption that administrative discretion could be liberated from political or even constitutional supervision, all while maintaining the Constitution's core protections for individual liberty. This assumption is premised on the faith in history's moral progress – specifically, the moral progress of human nature. Whereas the founders had pointed to the ambition and self-interestedness of human nature as the justification for carefully limiting and channeling national administrative power, Landis and the Progressive fathers of modern administration made the case that human nature itself had progressed and improved with the forward movement of history. Yet while the founders surely believed that there would always be progress in science,[57] they were not naïve enough to

[56] *See* Wilson, "The Study of Administration," in *EPW*, 234: "[W]here has this science grown up? Surely not on this side [of] the sea. . . . No; American writers have hitherto taken no very important part in the advancement of this science. It has found its doctors in Europe. It is not of our making; it is a foreign science, speaking very little of the language of English or American principle. It employs only foreign tongues; it utters none but what are to our minds alien ideas. Its aims, its examples, its conditions, are almost exclusively grounded in the histories of foreign races, in the precedents of foreign systems, in the lessons of foreign revolutions. It has been developed by French and German professors . . . ."

[57] *See, e.g.*, Federalist No. 9, ed. Carey & McClellan, 38 ("The science of politics . . . like most other sciences, has received great improvement. The efficacy of various principles is now well understood, which were either not known at all, or imperfectly known to the ancients.")

believe that this scientific progress would mean a concomitant improvement in the moral capacity of human beings themselves. *The Federalist* characterizes such talk as "far gone in Utopian speculations,"[58] and reminds its readers that human history has shown that the "latent causes of faction are thus sown in the nature of man."[59] The second problematic assumption of the modern administrative vision is that those entrusted with administrative power can somehow be freed from the self-interestedness of normal human beings, by placing them in a special, separated zone where some of their basic individual concerns are provided for. If things about which other people are normally self-interested – a safe job, good pay, etc. – are taken care of by civil-service protections, the premise was that administrators could turn their focus toward the purely objective and scientific. Yet, as Landis learned in surveying the scene in 1960, people continued to be people, and seemed to be just as self-interested in administration as they had been in politics. He drew the wrong lesson from this observation, doubling down by calling for even greater freedom of action for administrators. Hamilton, by contrast, understanding the permanent characteristics of human nature, knew that the only way to secure sound executive governance was "to make interest coincide with duty" – to ground a robust administrative power, in other words, on republican accountability.[60]

---

[58] Federalist No. 6, ed. Carey & McClellan, 21.

[59] Federalist No. 10, ed. Carey & McClellan, 43.

[60] Federalist No. 72, ed. Carey & McClellan, 375. The same principle is at work in Hamilton's defense of the unitary executive – exemplified by *Myers* and undermined by *Humphrey's*: that republicanism rests on accountability to a single, elected chief executive. *See* Federalist No. 70, ed. Carey & McClellan, 366 ("But one of the weightiest objections to a plurality in the executive . . . is, that it tends to conceal faults, and destroy responsibility.").

Given the present status of deference to administrative expertise described in the first part of the paper, where does republicanism stand? Looking at the different categories of agency decision-making, the picture is somewhat muddled in terms of the balance of power between the bureaucracy and the courts. Those who would like to see the administrative state reined in can point to the recent demise of *Chevron*'s presumptive deference to agency statutory interpretations, but there is still much that weighs on the other side of the scales. Deference to agency regulatory interpretations still survives, even if diminished, and agency policymaking and factfinding still enjoy permissive scope-of-review standards, at least in principle. It is true that courts have increasingly used the "arbitrary and capricious" standard for reviewing agency policymaking in an aggressive manner, often second-guessing and striking down agency action in spite of what is supposed to be a deferential standard. But it's far from clear that this heightened scrutiny of agency policymaking, or even the fact that many of us are dancing on *Chevron*'s grave, necessarily portends a turn away from progressive principles or a return to republican fundamentals. This is because neither of the two options that have been on the table since the emergence of the administrative state necessarily bodes well for republicanism. One option offers us deference to administrative expertise, which remains a fundamental principle of administrative law in the various ways this paper has detailed. The other option suggests an increased willingness of courts to second-guess agency rule, both with a more aggressive use of "hard look" review and with the reclaiming of judicial primacy in legal interpretations. The first option perpetuates rule by unelected agency administrators; the second option signals a shift in power from unelected administrators to unelected judges. Is this a shift that advocates of republicanism should welcome? After all, there is a reason why

Chevron's strongest champions were, for a long time, conservative jurists who opposed the supervision of policymaking by the activists on the Warren Court and on the Court of Appeals for the District of Columbia Circuit. A genuinely republican challenge to the present muddled state of affairs – to the tussle between agencies and courts over which unelected branch will have the upper hand in policymaking – would require a reassertion by Congress of its constitutional duty to make law. The prospects for *that* development are best left for consideration on another occasion.