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

Stability Within the Judicial Review Pendulum: The Interpretation Versus Implementation Divide

Ronald A. Cass

CSAS Working Paper 26-03

February 6, 2026

George Mason University | Antonin Scalia Law School

STABILITY WITHIN THE JUDICIAL REVIEW PENDULUM: THE INTERPRETATION VERSUS IMPLEMENTATION DIVIDE

Ronald A. Cass[*]

INTRODUCTION

Commentary over the demise of the 40-year experiment with the *Chevron* doctrine—beginning with the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[1] and concluding with its decision in *Loper Bright Enterprises v. Raimondo*[2]—largely focuses on celebrating or bemoaning *Chevron*'s end.[3] Yet, despite being the most cited administrative law decision ever and evolving into a substantial part of the administrative law canon,[4] *Chevron* and its progeny were hardly a freestanding phenomenon. Instead, the *Chevron* interlude is better

[*] Dean Emeritus, Boston University School of Law; Distinguished Senior Fellow, C. Boyden Gray Center for the Study of the Administrative State; President, Cass & Associates, PC. The author thanks Bill Buzbee, Mark Chenowith, Eric Claeys, James Conde, Daniel Deacon, Robert Glicksman, Michael Greve, Lisa Heinzerling, Ron Levin, Jace Lington, John McGinnis, Dick Pierce, Joe Postell, Jeremy Rabkin, Adam White, and Matt Wiener for helpful comments; Corbin Witt, Antonin Scalia Law School Class of 2026, for capable research assistance; the Gray Center for its support and invitation to present the paper's central ideas at a Roundtable on "The Supreme Court's New Arbitrary and Capricious Standard;" and Jack Beermann, Clark Byse, Colin Diver, Doug Ginsburg, Henry Monaghan, Glen Robinson, Nino Scalia, Ray Randolph, and Paul Verkuil for countless hours over many years discussing topics related to the theme of this article.

[1] 467 U.S. 837 (1984).

[2] 144 S. Ct. 2244 (decided together with Relentless, Inc. v. Department of Commerce) (*Loper Bright*).

[3] *See*, *e.g.*, Emily Hammond, *Finding a Place for Expertise After* Loper Bright, 31 GEO. MASON L. REV. 559 (2024); Edward L. Rubin, Chevron *Was Not, and Cannot Be, Overruled: The Dullness of* Loper Bright, 20 DUKE J.L. CONST'L L. & PUB. POL'Y 31 (2025). More reserved, though wary, reactions include Cary Coglianese & Daniel E. Walters, *The Great Unsettling: Administrative Governance After* Loper Bright, 77 ADMIN. L. REV.1 (2025); Adrian Vermeule, *The Old Regime and the* Loper Bright *Revolution*, 2024 SUP. CT. REV. 235. Referring to the decisions following *Chevron*, and their doctrinal twists and turns, as an "experiment" largely traces to Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779 (2010) (*Failed Experiment*).

[4] *See* Christopher J. Walker, *Most Cited Supreme Court Administrative Law Decisions*, YALE J. ON REG. NOTICE & COMMENT (Oct. 9, 2014), https://www.yalejreg.com/nc/most-cited-supreme-court-administrative-law-decisions-by-chris-walker. *See also* Ronald A. Cass, *The Curtain Falls on* Chevron*: Will the* Chevron *Two-Step Give Way to a Simpler* Loper Bright*-Line Rule?*, 25 FED. SOC. REV. 320, 325 (2024) (noting that the *Chevron* decision, decisions following *Chevron*, and commentary on *Chevron*-related litigation evolved to occupy large portions of administrative law textbooks, citing for example the 83 pages devoted to these matters in RONALD A. CASS, COLIN S. DIVER, JACK M. BEERMANN & JENNIFER L. MASCOTT, ADMINISTRATIVE LAW: CASES AND MATERIALS 206–289 (Aspen Publ'g, 9th ed. 2024)).

understood as representing one pole of a judicial review pendulum that for decades has swung between judicially articulated standards that alternately prescribed more intensive judicial scrutiny of administrative decisions or more deferential judicial review.

Changes in the articulated review standards are understandable, as the basis for and effects of judicially articulated—and at times judicially applied—standards over the past half-century have been flawed in significant ways. *Chevron* and cases invoking it as the template for judicial review overstated or misstated, at least in part, the considerations for deferring to administrative decisions. So, too, a set of prior decisions did the same thing (and more) in the opposite direction.[5] Adjustments in review standards reflected in and prompted by the courts' decisions have been applauded and critiqued for their fit with underlying statutory text or congruence with norms such as efficiency, fairness, or participatory democracy.[6]

Although Supreme Court decisions have articulated different standards for judicial review of Executive branch actions,[7] the Court's language only partially reveals the reality of judicial review. Of course, some Court decisions are best understood as having employed much more skeptical or much more lenient review standards than other, similar cases.[8] Even more, particular Supreme Court decisions have encouraged lower courts to use more or less intrusive review standards, especially with respect to matters on which some degree of deference to agency actions might be expected.[9] In general, however, the Supreme Court has applied review standards that differ—and should differ—due to the nature of the question presented to the Court and the legal texts governing the challenged actions rather than to other, judge-driven considerations.

---

[5] *See* text at notes 105–131 *infra*.

[6] *See*, *e.g.*, Beermann, *supra* note 3; Ernest Gellhorn & Paul Verkuil, *Controlling* Chevron*-Based Delegations*, 20 CARDOZO L. REV. 989 (1999); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest-Group Model*, 86 COLUM. L. REV. 223 (1986); Frank I. Michelman, *Justice as Fairness, Legitimacy, and the Question of Judicial Review: A Comment*, 72 FORDHAM L. REV. 1407 (2004) (explaining John Rawls's approach to judicial review and its relation to broader concepts of legal institutions and fairness); [OTHER CITES]. *See generally* CASS R. SUNSTEIN & ADRIAN VERMEULE, LAW AND LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE (Harvard Univ. Press 2020) (discussing aspects of administrative law, including scope of judicial review, principally through the lens of consistency with internal morality of law).

[7] For broad perspectives on these developments, see, e.g., THOMAS W. MERRILL, THE *CHEVRON* DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE (Harvard Univ. Press 2022); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV 113 (1998); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

[8] *See* text at notes 12, 90–101, 120–127, 135–171 *infra*.

[9] *See* text at notes 56–62, 172–185 *infra*.

Conflicts over administrative officials' actions raise questions about underlying governmental authority on which the actions were based as well as whether officials implementing the statutes invoking that authority have adhered to statutory directions.[10] This two-part quality of judicial review provides a running thread through arguments over how courts should do their job and a fulcrum for debates over what standards they use. Failure to provide clear, consistent answers to the appropriate means for separating what each branch of government does has led courts to change review standards over time, attempting to correct perceived errors of earlier standards. The *Chevron* era itself should be seen in large measure as a reaction to the even more flawed "hard look" adventure of the decade preceding *Chevron*.[11]

Yet the pendulum effect—swinging between review standards that give substantial leeway to administrators and standards that give substantial freedom for judges to guide administrative decisions—largely is more apparent than real. Many of the most discussed Supreme Court decisions—in the *Chevron* era and in cases preceding and following it—are noted for statements that do not accurately capture what the decisions actually did.

This article explains the disconnect between the standards embraced in the Court's language and the actual intensity of review associated with different types of legal questions. It explains that, although different standards have prompted actual variations in review, the difference between questions of laws' interpretation and laws' implementation provides a better guide to the Court's decisions than the Court's own descriptions of the review standards employed.

Of course, a few cases do use very different standards from those that tend to obtain over time.[12] These cases, however, rarely are associated with

---

[10] *See*, *e.g.*, Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 989–90 (2017) (*Origins*); Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of* Chevron*'s Step Two*, 2 ADMIN. L.J. 255, 262–63, 266–67 (1988).

[11] *See*, *e.g.*, Byse, *supra* note 10, at 262–63, 266–67; Ronald A. Cass, *Getting Deference Right*, 58 NAT. AFFAIRS 91, 96–98 (2024) (*Getting Deference Right*).

[12] *See*, *e.g.*, Dept. of Com. v. New York, 588 U.S. 752 (2019); Massachusetts v. EPA, 549 U.S. 497 (2007). *See also* Jonathan Adler, *Climate Change and Constitutional Overreach*, 72 DRAKE L. REV. 223 (2025); Ronald A. Cass, Massachusetts v. EPA: *The Inconvenient Truth About Precedent*, 93 VA. L. REV. IN BRIEF 75 (2013); James Huffman, *SCOTUS Census Ruling is Judicial Decision-Making at Its Worst*, INSIDE SOURCES (July 1, 2019), http://perma.cc/T2S8-H69L; Kathryn A. Watts & Amy J. Wildermuth, Massachusetts v. EPA*: Breaking New Ground on Issues Other Than Global Warming*, 102 NW. U.L. REV. COLLOQUY 1 (2007) (praising some changes in review standards, questioning some, and defending some as appropriate applications of prior law). Some participants in the Roundtable hosted by the Center for the Study of the Administrative State, referenced at note *, *supra*, demurred to the characterization of the cases above, although not to the point that some cases are more "sports" than templates for judicial review, urging citation, instead, of Ohio v. EPA, 603 U.S. 274 (2024), and Michigan v. EPA, 546 U.S. 743 (2015). *See also*

a formal change in review standards. That is, cases that reach results inexplicable as straightforward applications of the governing review standards may be notable, but they generally do not announce a change in standards that will be applied going forward.[13] Real variance in the review standards over time—more broadly applicable changes in review standards—does occur, but it is less politically freighted than often assumed,[14] affects lower court decisions more than the Supreme Court decisions that dominate discussion among legal scholars,[15] and is more rooted in the difficulty of locating the line between interpretation of laws and the exercise of properly assigned administrative discretion over their implementation than in justices consciously changing basic standards for review.

I. JUDICIAL REVIEW IN CONSTITUTIONAL CONTEXT

Courts' determinations of whether government actions stray beyond legal bounds are both important and at times newsworthy (descriptions that do not always run in tandem). From the Founding generation on, arguments over the role and power of the judiciary have been central parts of the struggle to find the right structure of government. Early in the Constitutional

Jody Freeman & Adrian Vermeule, Massachusetts v. EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51 (defending the decision in *Mass. v. EPA*).

[13] This phenomenon has been noted in some Court decisions, predicted in some, and prayed for in others. *See*, *e.g.*, Massachusetts v. EPA, 549 U.S. 497, 550 (2007) (Scalia, J., dissenting) (claiming that the majority opinion "with no basis in text or precedent … effectively narrow[ed] the universe of potential reasonable bases [for an agency action] to a single one …."); Dept. of Com. v. New York, 588 U.S. 752, 786 (2019) (Thomas, J., concurring in part and dissenting in part) (claiming that the majority opinion "if taken seriously as a rule of decision …" would "transform administrative law."); West Virginia v. EPA, 597 U.S. 697, 766 (2022) (Kagan, J., dissenting) ("The majority today … announces the arrival of the 'major questions doctrine ….'" (expanding on that observation with critical commentary respecting the doctrine)).

[14] For arguments that judges' and justices' decisions in review of administrative actions are significantly influenced by ideology, see, e.g., William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretation from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1091, 1153–56 (2008) (suggesting some role for ideology, in many cases substantial, but by no means always the dominant role). Yet even thoughtful scholars doing critical positive analysis (including those with relatively detailed and transparent descriptions of their methodology) ultimately depend on assessments based on the supposition that ideology can be well-analyzed on a unidimensional linear basis and, even then, often require at least some *ad hoc* massaging of data (more charitably, explanations of choices in assignment of cases to particular categories) to conform to strong views of ideological bias. *See*, *e.g.*, Eskridge & Baer, *supra* at 1153–56. *See also* Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823 (2006); Richard Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997).

[15] This point has been made by Professors Kent Barnett and Chris Walker with respect to the effect of the *Chevron* decision itself. *See* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 U. MICH. L. REV. 1 (2017).

Convention, the Virginia Plan advanced a proposal to create a Council of Revision with supererogatory power over legislation.[16] The Council, which would have included federal judges, would have been able to rewrite Congress's work before it became law. The principal arguments against this focused both on the advisability of including an additional element in the lawmaking process and on inclusion of judges in the potential entity restraining Congress as conclusive lawmaker.[17] Key points made by those opposed to bringing judges into this process included assertions that judges would be sufficiently protected against assaults on the judiciary by their power to interpret the laws and to declare when laws violated constitutional authority and that it would be better to leave judges to those tasks free from prior engagement in forming the laws.[18]

The understanding that judges' domain is the interpretation of law, including constitutional as well as statutory law, was central to construction of a federal judiciary designed to be as independent of political influence as practicable. Alexander Hamilton notably explained in *Federalist 78* that without an independent judiciary empowered to check that the operation of the other branches accords with the Constitution's limits, that document's "specific reservations of rights or privileges would amount to nothing."[19]

Those sentiments were famously echoed by Chief Justice John Marshall's opinion for the Court in *Marbury v. Madison*:

> Certainly all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the Legislature repugnant to the Constitution is void. …
>
> If an act of the Legislature repugnant to the Constitution is void, does it, notwithstanding its invalidity, bind the Courts and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory …
>
> It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each.[20]

Marshall repeated Hamilton's reference to constitutional limits such as the

[16] *See*, *e.g.*, JAMES MADISON, RECORDS OF THE DEBATES IN THE FEDERAL CONVENTION OF 1787, at 118 (proceedings of May 29, 1787) (Charles C. Tansill ed., 1927; *reprinted*, Legal Classics Lib. 1989) (MADISON, RECORDS). This proposal was reintroduced by James Wilson and James Madison a few days later. *See id*., at 152 (proceedings of June 4, 1787).

[17] *See id*., at 147 (proceedings of June 4, 1787).

[18] *Id*.

[19] FEDERALIST No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

[20] 5 U.S. (1 Cranch) 137, 177 (1803).

prohibitions of *ex post facto* laws and bills of attainder.[21] Reminiscent of Hamilton's language, Marshall also declared that permitting the legislature to determine the boundaries of its constitutionally-authorized powers "reduces to nothing what we have deemed the greatest improvement on political institutions — a written Constitution."[22]

Endless commentaries have debated *Marbury*'s virtues and failings,[23] but ratification debates and writings contemporaneous with the Constitution's framing broadly accepted the understanding that courts would hold authority to review decisions of the political branches for conformity to the law, including the Constitution itself.[24] Indeed, this was one of the reasons for opposition to the Constitution by those who saw that power as making judges uncontrolled arbiters of the assignment of all governmental powers.[25] Moreover, whatever its historical and textual provenance, judicial review of the actions of other branches long ago became accepted as a constitutional fact.[26]

Part of the acceptance of judicial review of the other branches' work derived from the fact that, as Justice Antonin Scalia never tired of pointing out, U.S. courts are not self-starters.[27] They take issues as cases raising them

[21] *Id*., at 179.

[22] *Id*., at 178.

[23] *See*, *e.g.*, WILLIAM E. NELSON, *MARBURY V. MADISON*: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW (U. Press of Kansas 2018); Larry Alexander, *Constitutional Rules, Constitutional Standards, and Constitutional Settlement:* Marbury v. Madison *and the Case for Judicial Supremacy*, 20 CONST. COMMENTARY 369 (2003); Edward S. Corwin, Marbury v. Madison *and the Doctrine of Judicial Review*, 12 MICH. L. REV. 538 (1914); Michael Stokes Paulsen, *The Irrepressible Myth of* Marbury, 101 MICH. L. REV. 2706 (2003); William Treanor, *Judicial Review Before* Marbury, 58 STAN. L. REV. 455 (2005); William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1.

[24] *See*, *e.g.*, FEDERALIST No. 78; Saikrishna B. Prakash & John C. Yoo, *The Original Understanding of Judicial Review*, 70 U. CHI. L. REV. 887 (2003) (providing a carefully limited explanation of *Marbury*'s footing with respect to judicial review and also parsing different lines of argument respecting the scope, nature, and implications of judicial review). *But see* Larry D. Kramer, *The Supreme Court 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4 (2001).

[25] *See*, *e.g.*, BRUTUS NO. I (Oct. 18, 1787), *reprinted in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 270, 273–74 (Ralph Ketcham ed., Penguin Books 1986) (ANTI-FEDERALIST PAPERS); BRUTUS NO. XI (Jan. 31, 1788), *reprinted in* ANTI-FEDERALIST PAPERS, *supra*, at 293–98.

[26] *See*, *e.g.*, Bamzai, *Origins*, *supra* note 10, at 989–90.

[27] Although I do not have a handy citation for this statement, it is one that I heard Justice Scalia (a friend of roughly 40 years, who really should be referenced here simply as Nino) make frequently in the years that we taught classes together, in remarks he made when we did public appearances together (me asking him his views and him expounding them in vivid language, far from the stilted terms common to public figures and underscoring points he thought most important for both specialists in the law and broader public audiences), and in question-and-answer sessions after more formal presentations. (The foregoing apology for lacking a standard citation is the equivalent of "trust me"—not compliant with the standard law review requirement, but the best I've got for this.) That the U.S. Supreme Court selects which cases to hear from among the much larger number of cases seeking the Court's review

come before the courts. Moreover, courts in general—and certainly in theory—only decide what is necessary to resolve the dispute before them. They are not, in other words, resolving general political issues but instead are resolving specific disputes between a limited set of parties.[28] This was a critical feature of American institutional design especially lauded by Alexis de Tocqueville as preventing politics from diminishing neutral application of the law.[29]

The increasing frequency of nationwide injunctions—also referenced at times as "national injunctions" or "universal injunctions" because they are not limited to specific parties before the issuing court or to the specific geographic jurisdiction associated with that court—has raised questions respecting the degree to which the original design of America's federal judiciary still obtains.[30] Yet the responses of the Supreme Court and others to this development demonstrate the commitment of many jurists to the position that judges should be neutral arbiters of the law so far as possible, not players in a politically freighted game.[31] The operative question, of

does not contradict Justice Scalia's observation that the judges themselves cannot simply declare that a particular matter is worth opining on and, without there being a properly constituted legal dispute, proceed to instruct on their views of the matter.

[28] This is the point of the frequent—sometimes descriptive, sometimes aspirational—comparison of judges to umpires. *See*, *e.g.*, CONFIRMATION HEARING ON THE NOMINATION OF JOHN G. ROBERTS, JR., TO BE CHIEF JUSTICE OF THE UNITED STATES: HEARING BEFORE THE S. COMM. ON THE JUDICIARY, 109TH CONG. 55 (2005) (statement of John G. Roberts, Jr.); Brett M. Kavanaugh, *The Judge as Umpire: Ten Principles*, 65 CATH. U. L. REV. 683, 685–86, 689–90, 692 (2016).

[29] *See* 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 100–106 (Henry Reeve trans., Schocken Books 1961) (1835).

[30] *See*, *e.g.*, Trump v. CASA, Inc., no. 24A884, Jun. 27, 2025, slip op. at 5–11 (contrasting the demand for nationwide injunctions to the original allocation of national governance powers and to the law assigning authority to federal courts); Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017); Ronald A. Cass, *Nationwide Injunctions' Governance Problems: Forum Shopping, Politicizing Courts, and Eroding Constitutional Structure*, 27 GEO. MASON L. REV. 29 (2019); Howard M. Wasserman, *"Nationwide" Injunctions Are Really "Universal" Injunctions and They Are Never Appropriate*, 22 LEWIS & CLARK L. REV. 335 (2018). *But see* Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065 (2018); Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920 (2020); Ilya Somin, *A Simple Defense of Nationwide Injunctions*, REASON, https://reason.com/volokh/2025/05/16/a-simple-defense-of-nationwide-injunctions/ (May 16, 2025).

[31] *See*, *e.g.*, Trump v. CASA, Inc., no. 24A884, Jun. 27, 2025 (Sup. Ct.); Nat'l Ass'n of Diversity Officers in Higher Educ. v. Trump, no. 25-1189, Mar. 14, 2025 (4th Cir.); Georgia v. President of the U.S., 46 F.4th 1283, 1305–06 (11th Cir. 2022); Arizona v. Biden, 40 F.4th 375, 395–98 (6th Cir. 2022) (Sutton, C.J., concurring); City of Chicago v. Barr, 961 F.3d 882, 936–38 (7th Cir. 2020) (Manion, J., concurring in the judgment); CASA de Md., Inc. v. Trump, 971 F.3d 220, 256–62 (4th Cir. 2020) (Wilkinson, J.), *vacated for reh'g en banc*, 981 F.3d 311 (4th Cir. 2020); California v. Azar, 911 F.3d 558, 583–84 (9th Cir. 2018); *Developments in the Law—Court Reform, Chapter Four, District Court Reform: Nationwide Injunctions*, 137 HARV. L. REV. 1701, 1719 n. 127 (2024) (identifying and providing citations for several of the above cases for stays or reversals of nationwide injunctions and judicial criticism of such injunctions). Respecting broader principles of judicial decision-making,

course, is how—and how much—legal rules can achieve that goal.

II. JUDICIAL REVIEW IN A TIME OF EXPANDING EXECUTIVE AUTHORITY BEFORE THE APA

A. Basic Distinctions

Virtually every thoughtful commentary on judicial review admits the difficulty of separating matters on which courts rightly exercise independent authority from those on which decisional authority rests more fully with the political branches.[32] In general, the dividing line between those matters turns on the characterization of the issue as a question of law—interpreting the meaning of a constitutional provision, a statutory term, or another legal rule—or as a matter of law's implementation.[33] Even though there is no

also focused on the ideal and reality of neutral judging, see, e.g., Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422 (1988); Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 HARV. L. REV. 982 (1978); Kavanaugh, *supra* note 28; Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINCINNATI L. REV. 849 (1989); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). More skeptical, if sometimes still supportive, commentaries include FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND LIFE (Oxford Univ. Press 1991); Alexander Bickel, *The Supreme Court 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 47–51 (1961); Ward Farnsworth, Dustin F. Guzior, & Anup Malani, *Ambiguity about Ambiguity: An Empirical Inquiry into Legal Interpretation*, 2 J. LEGAL ANAL. 257 (2010).

[32] *See*, *e.g.*, Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 49 (2d Cir. 1976) (Friendly, J.), *aff'd sub nom*. Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977) (*Pittston Stevedoring*); Aditya Bamzai, *Delegation and Interpretive Discretion:* Gundy*,* Kisor*, and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164 (2019) (*Interpretive Discretion*); Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964); Louis L. Jaffe, *Judicial Review: Question of Law*, 69 HARV. L. REV. 239 (1955) (*Question of Law*); Brett Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016); Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 27 (1983); Antonin Scalia, *Common Law Courts in a Civil Law System*, *in* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed. 1997); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511 (*Judicial Deference*); A. Raymond Randolph, "Administrative Law and the Plain Meaning Rule" (address to D.C. Bar Administrative Law Section, May 28, 1992) (manuscript on file with author). *See also* Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 246–250 (1990) (arguing that simple propositions about the division of authority to adjudicate controversies—between Article III courts and other bodies—cannot be explained by any clear principle related to the nature of the controversies).

[33] *See*, *e.g.*, Pittston Stevedoring, *supra* note 32, 544 F.2d at 49 (characterizing implementation decisions as "applying a statute to the facts" of a case and interpretation decisions as requiring resolution of a "question [that] involves the meaning of a statutory term"); Bamzai, *Interpretive Discretion*, *supra* note 32; Byse, *supra* note 10; Ronald A. Cass, *Fixing Deference: Delegation, Discretion, and Deference under Separated Powers*, 17 N.Y.U. J.L. & LIB. 1, 50–55 (2023) (*Fixing Deference*); Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How* Chevron *Misconceives the Function of*

bright line separating these categories, this division between types of questions presented for review has been relatively durable and better fits the proper role (and actual behavior) of courts than other alternatives.[34]

The basic understanding is that judges decide matters of law based on their own reading of the legal texts, but when reviewing actions implementing the law, courts give leeway to executive decisions.[35] The amount of leeway given in the latter category of cases depends on the degree of discretion committed by law to the administrator whose acts are in issue and the nature of the specific acts.[36]

Decisions based on evidence adduced at administrative hearings, for example, generally have been reviewed for consistency with basic evidential

Agencies and Why It Matters, 59 ADMIN. L. REV. 673 (2007); Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under* Chevron, 6 ADMIN. L.J. AM. U. 187 (1992); Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 853 (2020); Lawrence B. Solum & Cass R. Sunstein, Chevron *as Construction*, 105 CORNELL L. REV. 1465, 1471–72 (2020). *See also* Ronald M. Levin, *The Evolving APA and the Originalist Challenge*, 97 CHI-KENT L. REV. 7, 34–36 (2025) (discussing, but largely rejecting, sharp distinctions between judicial review of textual interpretations and of policy-driven implementation of law); Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight*,*"* 112 COLUM. L. REV. 1143 (2012) (*Confusing*) (using different terminology but observing a related distinction between interpretation and implementation).

Professor (and former Dean) Ed Rubin asserts that the division between interpretation and implementation is a false dichotomy because implementation invariably starts with an effort to interpret the law being implemented—and, hence, understand its limitations and instructions. *See* Rubin, *supra* note 3, at 36–41. This position captures the insight that there is no bright line between the two categories, but it incorrectly posits that administrative interpretation is the same activity as judicial interpretation, rather than a different activity with some similarities. Given the frequent subordination of administrators' interpretive efforts to their policy preferences, that view elides the different roles, incentives, and influences on administrators and judges. *See*, *e.g.*, authorities cited *supra* in this note and at notes 34–36, *infra*.

[34] *See*, *e.g.*, Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 365–67 (1986); Cass, *Fixing Deference*, *supra* note 33, at 50–55; Duffy, *supra* note 7, at 115, 120; Foote, *supra* note 33; Pojanowski, *supra* note 33; Strauss, *Confusing*, *supra* note 33. *See also* Ernest Gellhorn & Glen O. Robinson, *Perspectives on Administrative Law*, 75 COLUM. L. REV. 771, 778 (1975) (making a similar point with respect to the proper role of and limits on executive policymaking).

[35] *See*, *e.g.*, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2261 (2024) (contrasting the deference due to agency factfinding under the APA, as part of the implementation process, from the judicial role in deciding questions of statutory meaning); *id*., at 2275 (Thomas, J., concurring); *id*., at 2283–84 (Gorsuch, J., concurring); Bamzai, *Interpretive Discretion*, *supra* note 32; Breyer, *supra* note 34, at 365–67; Byse, *supra* note 10; Cass, *Fixing Deference*, *supra* note 33, at 50–55; Duffy, *supra* note 7, at 115, 120; Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 453–56 (1989); Herz, *supra* note 33, at 187–90; Pojanowski, *supra* note 33; Strauss, *Confusing*, *supra* note 33. *See also* text and notes at notes 42–86 *infra*.

[36] *See*, *e.g.*, Byse, *supra* note 10; Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L.J. 191 (2023); Cary Coglianese, Chevron*'s Interstitial Steps*, 85 GEO. WASH. L. REV. 1339 (2017); Douglas H. Ginsburg & Stephen Menashi, *Our Illiberal Administrative Law*, 10 N.Y.U. J. L. & LIB. REV. 475 (2016).

requirements such as substantial evidence but not for consistency with the reviewing court's view of the best decision, best interpretation of the evidence, or best outcome.[37] Administrators making decisions in the context of formal hearings long have been treated for review purposes as functional equivalents of lower court judges, though limited to the types of decisions (such as on matters of special governmental privileges or benefits) deemed to be within administrators' purview.[38]

In contrast, decisions made in less formal settings on matters that might be better characterized as choices involving policy matters (such as those implicating agency resources or priorities) generally have been reviewed only for consistency with basic concepts of decisional propriety.[39] These include both matters of elemental rationality—basing decisions on relevant considerations rather than arbitrariness or pure whim—and matters of basic propriety—for example, avoiding use of governmental licensing authority to grant preferences to friends or relatives.[40]

B. Review Standards in the Expanding Administrative State

The expanding administrative state, beginning in the late 1800s and dramatically accelerating in the 1930s and afterward,[41] initially made little

[37] *See*, *e.g.*, Biestek v. Berryhill, 587 U.S. 97 (2019); Arkansas v. Oklahoma, 503 U.S. 91 (1992); Universal Camera Corp. v. Nat. Labor Rel'ns Bd., 340 U.S. 474 (1951).

[38] *See*, *e.g.*, Allentown Mack Sales & Serv. v. Nat. Labor Rel'ns Bd., 522 U.S. 359, 377 (1998) (describing the "substantial evidence" standard's level of deference as requiring "the degree [of evidence] that *could* satisfy a reasonable factfinder," the same standard that would uphold a factual finding from a trial judge in a bench trial or a jury in a traditional trial) (emphasis in original). *See also* John Harrison, *Legislative Power and Judicial Power*, 31 CONST. COMMENTARY 295 (2016); Saikrishna Prakash, Zivotofsky *and the Separation of Powers*, 2015 SUP. CT. REV. 1 (2015).

[39] *See*, *e.g.*, Fed. Comms. Comm'n v. Fox Television Stns., Inc., 556 U.S. 502, 514–17, 522 (2009) (finding the agency's change in policy appropriate given the implicit discretion vested in the agency, even without prior public announcement of the change). Moreover, in some instances, such as decisions analogous to selection of targets for prosecution (that is, decisions respecting initiation of enforcement actions), courts have broadly declared agency actions to be unreviewable—or at least reviewable only for a limited purpose or in extraordinary circumstances. *See*, *e.g.*, Webster v. Doe, 486 U.S. 592, 599–605 (1988); Heckler v. Chaney, 470 U.S. 821, 837–38 (1985).

[40] *See*, *e.g.*, FRANCIS X. BUSCH, *The Teapot Dome Cases*, *in* ENEMIES OF THE STATE 91–170 (1954) (discussing the Teapot Dome scandal, which involved Secretary of the Interior Albert Fall giving licenses to extract oil from government-owned lands, including the Teapot Dome location, to friends and companies that gave Fall financial inducements); [ADD CITE to "payola" scandal in 1950s' relation to FCC licensing of broadcast stations)].

[41] The changing scope and nature of administrative authority is summarized, for example, in STEPHEN BREYER, REGULATION AND ITS REFORM 1 (Harv. Univ. Press 1982); RONALD A. CASS, COLIN S. DIVER, JACK M. BEERMANN & JENNIFER L. MASCOTT, ADMINISTRATIVE LAW: CASES AND MATERIALS 3–4 (Aspen Publ'g, 10th ed. 2026); GLEN O. ROBINSON, AMERICAN BUREAUCRACY: PUBLIC CHOICE AND PUBLIC LAW 69–80 (Univ. of Michigan Press 1991); Ronald A. Cass, *Rulemaking Then and Now: From Management to Lawmaking*, 28 GEO. MASON L. REV. 683, 692–94 (2021) (*Rulemaking*).

difference in the formal attributes of judicial review. For example, the Supreme Court's unanimous decision in *Pacific States Box & Basket Co. v. White* declared that an administrative regulation would be presumed constitutional in the same fashion as a legislatively enacted law.[42] In Justice Brandeis's words, "where the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes … and to orders of administrative bodies."[43]

1. Pacific States *and* Schechter Poultry

The challenge in *Pacific States* was to a regulation that specified the size, shape, and form of containers for the sale of raspberries and strawberries in Oregon. The plaintiff asserted that the regulation precluded use of its containers, basically requiring conformity with the type of containers produced in Oregon as opposed to those produced in other states. Brandeis's opinion for the Court refused to examine that claim as a barrier to interstate trade as it did not involve the *transport* of berries in those containers into Oregon, only sales of the containers for *use* in Oregon.[44] To the modern ear, this sounds like an odd rationale for upholding a rule that on its face seems designed to—and effectively did—exclude out-of-state competitors in the container trade. Behind the linguistic distinctions, however, the decision signaled an inclination to accept any semi-plausible public-interest based regulatory rationale offered by legislators *or* administrators.

Notably, *Pacific States* was decided just six months after the Supreme Court's decision in *A.L.A. Schechter Poultry Corp. v. United States*.[45] *Schechter* applied the nondelegation doctrine—prohibiting congressional delegation of its legislative powers to others, including both government officials and private parties—to strike down a central part of President Franklin Rooselvelt's "New Deal."[46] *Pacific States* dealt with a different challenge to a state regulation, not a nondelegation challenge to a federal

[42] 296 U.S. 176 (1935).

[43] *Id*., at 186.

[44] *Id*., at 184.

[45] 295 U.S. 495 (1935).

[46] *Schechter* followed a similar decision in Panama Refining Co. v. Ryan, 293 388 (1935), which held that a different provision of the National Industrial Recovery Act violated non-delegation strictures. This combination, along with the Court's seeming retreat from enforcement of a nondelegation doctrine following those decisions, led Cass Sunstein later to quip that the doctrine "has had one good year and 211 bad ones (and counting)." Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000) (*Canons*). Professor Lawson has applauded that sentiment while also registering a partial dissent both as to the courts' sympathy to the broader nondelegation argument and, more pointedly, to its salience respecting the subdelegation argument (delegation within the executive branch as opposed to from Congress to the executive branch). *See* Gary Lawson, *"I'm Leavin' It (All) Up to You":* Gundy *and the (Sort-of) Resurrection of the Subdelegation Doctrine*, 2019 CATO SUP. CT. REV. 31, 31–33 (2019).

law and subsequent regulation. The distinction between challenges to federal and state actions may have played a role in the Court's relatively lax standard of review in *Pacific States* as contrasted with *Schechter*. But the disparate tone of the two cases also reflects the difference between justices seeing the *Pacific States* case as presenting a garden variety objection to a regulation's implementation of a law and the objection in cases such as *Schechter* to a law's assignment of authority to regulators (including, in *Schechter*'s case, assignment of regulatory power to private parties). That is, a critical difference between *Pacific States* and *Schechter* is between questions of fact and policy relied on for law's implementation, on one hand, and questions of law, such as the permissible scope of statutorily delegated authority, on the other.

2. Hearst *and* Skidmore

This distinction between questions of law's meaning and questions of law's implementation in *Pacific States* and *Schecter* also explains the division between judicial review of a law's *implementation* and its *interpretation* in many other cases. Notwithstanding the difficulty of making that distinction in some instances,[47] the division between the two categories reflects the difference between ruling on matters that turn largely on policy determinations outside the judges' ken and those that rely on the central task for judges, especially appellate judges: reading and defining the law.[48] This

[47] *See, e.g.,* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2294-95 (2024) (Kagan, J., dissenting); Kisor v. Wilkie, 139 S. Ct. 2400, 2412, 2417 (2019) (arguing that the power to implement legislation via rulemaking presumptively includes the act of interpretation, as implementation depends on understanding the terms for lawful exercise of agency authority and the terms of that exercise of authority); ROBINSON, *supra* note 41, at 69–110 (exploring complications in dividing one category from the other); Jaffe, *Question of Law*, *supra* note 32 (arguing for an understanding of questions "of law" to encompass some determinations described here as matters of implementation as well as questions of interpretation).

[48] *See*, *e.g.*, United States v. Amer. Trucking Assns., Inc., 310 U.S. 534, 544 (1940) (declaring that "the interpretation of the meaning of statutes . . . is exclusively a judicial function."). *See also* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2257 (2024) ("[T]he Court understood 'interpret[ing] the laws, in the last resort,' to be a 'solemn duty' of the Judiciary.") (quoting United States v. Dickson, 15 Pet. 141, 162 (1841)); *id.* at 2274 (Thomas, J., concurring) ("The Framers understood that 'legal texts . . . often contain ambiguities,' and that the judicial power included 'the power to resolve these ambiguities over time.'" (quoting Perez v. Mortgage Bankers Assn., 575 U.S. 92, 119 (2015)); *id.* at 2283 (Gorsuch, J., concurring) ("From the Nation's founding, [American judges] considered '[t]he interpretation of the laws' in cases and controversies 'the proper and peculiar province of the courts.'") (quoting FEDERALIST No. 78, at 467 (Clinton Rossiter ed., 1961)); ROBINSON, *supra* note 41, at 69–110 (expressing sympathy for the distinction but skepticism respecting its effectuation); Byse, *supra* note 10; Cass, *Fixing Deference*, *supra* note 33; Foote, *supra* note 33; Solum & Sunstein, *supra* note 33, at 1471–72. Other scholars have explained the proper division of authority, and hence of review standards, in terms of relative competence of the decision-makers. *See*, *e.g.*, Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 575–98 (1985) (including, along with his discussion of administrators' competence, the scope of discretion statutorily assigned to administrators); Richard J. Pierce, Chevron *and Its Aftermath: Judicial Review of Agency Interpretation of*

at least partially explains differences in the review standards courts have applied in seemingly similar cases.

Two examples have become standard fare for Administrative Law classes as illustrations of the variance across courts' decisions on similar issues: *National Labor Relations Board v. Hearst Publications, Inc.*[49] and *Skidmore v. Swift & Co.*[50] decided by the Supreme Court approximately seven months apart in 1944. Commonly, *Hearst* is seen as an instance in which the Court deferred to the NLRB's interpretation of the term "employees" in the National Labor Relations Act, which governed the class of workers who could demand that an employer engage in collective bargaining with them.[51] But the Court's opinion independently assessed the nature of the NLRA, its use of the term "employees" in context, and the law's proper reading as embracing or rejecting certain common law antecedents before reaching the question of the NLRB's determination respecting the "newsboys" seeking to bargain with Hearst.[52] Only after this did the Court turn to the Labor Board's specific application of the law to the fight between Hearst and its newsboys.[53]

Where *Hearst* commonly is seen as requiring deference to administrators' views of the laws they apply, *Skidmore* generally has been understood as synonymous with the absence of meaningful judicial deference to administrators on legal determinations. As explained below, this is often qualified by assuming that, even so, the *Skidmore* Court endorsed a limited form of deference on laws' interpretation.[54] Unlike *Hearst*, *Skidmore* did not come before the Court for review of a determination of the relevant administrative official (the Administrator of the Wage and Hour Division of the U.S. Department of Labor). Instead, the case presented litigation between the company and seven of its employees over the terms of their compensation. The Administrator was not a party to the litigation, but he

Statutory Provisions, 41 VAND. L. REV. 301 (1988). This scholarship broadly (but not completely) presents similar understandings to the interpretation-implementation divide, though in different terms. *See*, *e.g.*, Diver, *supra*, at 552–59 (distinguishing the law-finding function from the law-making function).

[49] 322 U.S. 111 (1944) (*Hearst*).

[50] 323 U.S. 134 (1944) (*Skidmore*).

[51] *See*, *e.g.*, Daniel J. Gifford, *The Emerging Outlines of a Revised* Chevron *Doctrine: Congressional Intent, Judicial Judgment, and Administrative Autonomy*, 59 ADMIN L. REV. 783, 793–94 (2007) (naming *Hearst* as an example of Supreme Court recognizing administrative agencies' "authority to resolve ambiguities in statutory terms").

[52] *Hearst*, 322 U.S. at 121–29.

[53] That same pattern holds as well for Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 412–18 (1945). *See*, *e.g.*, Ronald A. Cass, *The Umpire Strikes Back: Expanding Judicial Discretion for Review of Administrative Actions*, 73 ADMIN. L. REV. 553, 560–62 (2021) (*Umpire Strikes Back*).

[54] *See* text at notes 61–62 *infra*.

had issued advisory statements on his views of the statutory provision at issue and submitted an *amicus curiae* brief to the Court.

The Court marked out the contours of the disputed statutory provision in a companion case,[55] then in *Skidmore* restated its essential conclusion about what the law commanded and what aspects of its application depended on specific findings of fact.[56] The Court made clear that those findings, which are necessary to decide particular cases in line with the courts' interpretation of the law, are the province of the lower federal courts.[57] But, as is the case in some other notable opinions of Justice Robert Jackson,[58] the direct statement is hedged by less grounded but more memorable language. Having made its determination on the law before considering what role views of the officials charged with implementing some aspects of the law might play, Jackson added *Skidmore*'s sole famous paragraph:

> 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 consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[59]

This is the source of references to "*Skidmore* deference." Although there is a reasonable reading of the language above as a form of deference, it is better characterized as "*Skidmore* non-deference," as it suggests that courts properly "defer" to administrators on the construction of statutes only to the extent an administrative determination is "persuasive."[60] It would be odd indeed for a court to announce that, because counsel for one side had persuaded the judges that they should rule in favor of that counsel's client, the court was *deferring* to that counsel's view. Yet, that is essentially the terminology applied to "*Skidmore* deference" if it is seen as addressing the proper interpretation of the law.

It is more sensible—and more consistent with the division of authority between courts and agencies—to see *Skidmore* as recognizing the absence of deference to administrators in judges' reading of the law while also acknowledging that administrators' experience can provide insights into the

[55] Armour & Co. v. Wantock, 323 U.S. 126 (1934).

[56] *Skidmore*, 323 U.S. at 136–37.

[57] *Id*.

[58] *See*, *e.g.*, Ronald A. Cass, *Bureaucracy with Bumper Guards: Better than It Rules?*, 22 FED. SOC. REV. 16, 19 (2021) (discussing opinion of Justice Jackson in Wong Yang Sun v. McGrath, 330 U.S. 33, 40–50 (1950)).

[59] *Skidmore*, 323 U.S. at 140.

[60] *Id*.

issues that will be faced in the law's application. That is, understanding the factual settings encountered and lessons drawn from administrators' experience can help judges appreciate what problems particular interpretations of law might create.[61] In this reading of *Skidmore*, the case does not suggest any deference to administrators' construction of law but counsels judges to pay attention to the sort of problems administrators have confronted and the way they have dealt with them in implementing laws when courts decipher laws' meaning.[62]

III. THE APA AND THE COURT: STANDARDS CARRIED FORWARD, AND OCCASIONALLY BACKWARD

A. APA Framework and the Packard *Decision: Maintaining the Division Between Law and Policy*

1. *The APA's Judicial Review Plan*

The APA largely recapitulated the rules and divisions within the Court's approach to judicial review.[63] It specifically separated out instructions for the courts' review of administrative actions, giving different statements of their responsibility respecting: constitutional rights, powers and privileges; statutory authority and rights; legally mandated procedures; evidentiary determinations and support in formal adjudications or factual determinations where subject to de novo trial; and a broad category of less strict standards for review of other matters.[64]

Standards in the APA reflect the divide between interpretation and implementation,[65] including specific instructions on particular aspects of implementation—review of sufficiency of supporting evidence in fact-

---

[61] *See*, *e.g.*, Diver, *supra* note 48, at 577–78; Monaghan, *supra* note 32, at 27–29; Strauss, *Confusing*, *supra* note 33, at 1146–47.

[62] Comments from Jack Beermann, Matt Weiner, and Adam White were particularly helpful in sharpening the distinction above. *See also* Peter L. Strauss, *In Search of* Skidmore, 83 FORDHAM L. REV. 789 (2014) (proposing a similar division between issues that are best addressed as matters of judicial interpretation of law or of administrative exercises of statutorily committed discretion).

[63] *See*, *e.g.*, Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219 (1986) (emphasizing the combination of appropriate deference to administrative decision-making and controls over it). Saying this does not mean that the relative continuity from pre-APA to APA judicial review standards was arrived at without controversy, did not reflect strategic considerations by supporters and opponents of a broadened federal administrative authority, or failed to make any changes in the law of judicial review. For thoughtful discussions of the writing and adoption of the APA, see, e.g., George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U.L. REV. 1557 (1996); McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180 (1999).

[64] *See* 5 U.S.C. §706 (2)(A)–(F).

[65] *See* U.S. DEPT. OF JUSTICE, FINAL REPORT OF ATTORNEY GENERAL'S COMM. ON ADMIN. PROCEDURE 87–89 (1941) (*ATTORNEY GENERAL'S COMM.*).

based trials[66] and review of underlying evidentiary determinations in specific matters[67]—and the catchall category that suggests minimal requirements for implementation in general.[68]

2. *The* Packard *Decision*

An early illustration of the carry-over of the pre-APA distinction between issues of law (and law's interpretation) and of policy (and law's implementation) is the Supreme Court's decision in *Packard Motor Car Co. v. National Labor Relations Board*, decided in March 1947.[69] Packard challenged the NLRB's determination that plant foremen are "employees" within the meaning of the NLRA and, thus, are entitled to organize as a union and to bargain collectively with the company. A five-justice majority rejected the challenge, stating flatly that the term "employee" in the NLRA—tautologically defined in the Act as covering "any employee"—would encompass the Packard foremen "in the most technical sense at common law as well as in common acceptance of the term."[70]

After expanding on the reasons why Packard's challenge to the NLRB's decision failed as a matter of the law's interpretation, the Court's opinion went on to reject Packard's arguments insofar as they constituted challenges to the agency's exercise of its discretion under the Act. In the Court's phrasing, the first question (of law) was whether the foremen fall "within the Act at all," while the second was whether Packard's foremen "constitut[ed] an appropriate bargaining unit."[71] The Court declared that the second question was not wholly in the courts' domain, as "the Act confers upon the Board a broad discretion to determine appropriate [bargaining] units."[72] The Court found that it had "the power only to determine whether there is substantial evidence to support the Board, or its order oversteps the law."[73] Having disposed of the question of law, the Court found the only other question to be one that tilted toward the Board's special competence, subject only to boundaries of evidential sufficiency—that is, having survived the question of law, the Board only needed to show a factual basis for its exercise of discretion:

> The issue as to what unit is appropriate for bargaining is one for which no absolute rule of law is laid down by statute, and none should be by decision. It involves of necessity a large measure of informed discretion,

[66] 5 U.S.C. §706 (2)(E).
[67] 5 U.S.C. §706 (2)(F).
[68] 5 U.S.C. §706 (2)(A).
[69] 330 U.S. 485 (1947) (*Packard*).
[70] *Id.*, 330 U.S. at 488.
[71] *Id.*, at 491.
[72] *Id.*
[73] *Id.*

> and the decision of the Board, if not final, is rarely to be disturbed. [74]

Although the majority recognized the possibility that a determination of an appropriate bargaining unit could be "so unreasonable and arbitrary as to exceed the Board's power," that was not the case with its certification of Packard's foremen.[75]

Four dissenting justices, led by Justice William O. Douglas, expressed the conviction that allowing foremen to be part of the "employee" category undermined the purpose of the NLRA. The dissent noted other labor relations laws that did include managerial personnel among those defined as employees but then added that if Congress had wanted to include foremen within the employee category in the NLRA, it would be expected to have done so expressly.[76]

The main difference between the majority and dissent was over the meaning of the law. The critical nature of the divergent readings of the law was especially evident in the dissent's assertion that "[i]f we were to decide this case on the basis of policy, much could be said to support the majority view."[77] In language that reads like an early iteration of what is now known as the "major questions doctrine,"[78] Justice Douglas opined that "[t]he question [of the NLRA's application to workers with supervisory authority] is so important that I cannot believe Congress legislated unwittingly on it."[79]

Justice Douglas's comments, especially when combined with Justice Jackson's opinion for the majority, underline early acceptance of the APA's division between judicial review of issues of law (interpretation of the law itself) and issues of implementation (especially matters of implementation committed primarily to administrators' discretion). Judges may disagree on the nature of the issue presented or on the correct answer to it, but *Packard* demonstrates the Court's underlying acceptance that the APA carried forward the distinction between matters of law's meaning and matters of law's application.

B. Review's Limits and Administrative Discretion

The APA also tacitly accepts that the constitutional structure that allows statutory authorization of judicial review implicitly recognizes that review is not mandatory and that law can (and in the APA did) set limits on what can be reviewed.[80] The APA has two overlapping carve-outs from review,

---

[74] *Id*.

[75] *Id*., at 491–92.

[76] *Id*., at 499 (Douglas, J., dissenting).

[77] *Id*., at 500 (Douglas, J., dissenting).

[78] *See* text at notes 182–185 *infra*.

[79] *Packard*, 330 U.S. at 500 (Douglas, J., dissenting).

[80] *See*, *e.g*., U.S. CONST., art. III, §2, cl. 2; Heckler v. Chaney, 470 U.S. 821, 837–38 (1985); Ex parte McCardle, 74 U.S. (7 Wall.) 506, 512–15 (1869) (*McCardle*). *But see* Antonin

withholding review authority for what is committed to agency discretion by law.[81] Judicial attention to questions of what is *completely* committed to agency discretion and how to apply catch-all rules where discretion is less complete have been relatively rare, but these discussions reinforce the understanding that review is not a universal right and, by extension, is not guaranteed to be *de novo*.[82]

The absence of a constitutional right of review for everything administrators do—the constitutional authority for Congress to commit certain decisions entirely to administrators—does not equate to a total absence of limits on what tasks can be given to administrators in the first place. Nor does it equate to constitutional approval of full insulation against judicial scrutiny of the scope and nature of those limits. It does, however, mean that the limits that are most likely to be scrutinized are those restricting the authority that Congress can grant others—especially judicial inquiry into whether actions are constitutionally reserved to Congress.[83] The Supreme Court's inquiries in cases such as *Heckler v. Chaney*[84] and *Webster v. Doe*[85]—decisions written at a time when the Court was relatively reticent about reining in congressional delegations of authority—demonstrate the justices' willingness to draw lines around Congress's power to insulate issues from review. A similar, if not identical, differentiation among issues

Scalia, *Historical Anomalies in Administrative Law*, 1985 YEARBOOK [SUP. CT. HIST. SOC.] 103, 104–06 (1985) (arguing that the entire edifice of U.S. sovereign immunity law—especially federal sovereign immunity law—was based on historical misunderstandings); William W. Van Alstyne, *A Critical Guide to* Ex parte McCardle, 15 ARIZ. L. REV. 229, 248–54 (1973) (exploring the scope of the Constitution's authorization for Congress to limit the Supreme Court's appellate jurisdiction and the degree to which *McCardle* actually decided that issue).

[81] *See* 5 U.S.C. §§701(a)(1), 701(a)(2).

[82] *See*, *e.g.*, Webster v. Doe, 486 U.S. 592, 599–605 (1988); Heckler v. Chaney, 470 U.S. 821, 837–38 (1985).

[83] Despite the already cited observations about the futility of nondelegation challenges *per se*, *see* note 46, *supra*, courts have deployed other mechanisms used by courts to restrain at least some questionable delegations. *See*, *e.g.*, Sunstein, *Canons*, *supra* note 46. It is worth noting that scrutiny of what Congress gives to others broadly reflects the understanding that Congress is not giving away its constitutionally committed prerogatives out of generosity. It delegates functions—most notably what should be seen as lawmaking functions—to others because delegations provide benefits to those in Congress who are supporting those actions. *See*, *e.g.*, Nat'l Fed'n of Indep. Bus. v. Dept. of Labor, 142 S. Ct. 661, 667 (2022) (Gorsuch, J., concurring); U.S. Dept. of Transp. v. Ass'n of Am. Railroads, 575 U.S. 43, 61 (Alito, J., concurring) (*American Railroads*); *id.*, at 74–76 (Thomas, J., concurring in judgment); Peter H. Aronson, Ernest Gellhorn, & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982); Ronald A. Cass, *Delegation Reconsidered: A Nondelegation Doctrine for the Modern Administrative State*, HARV. J.L. & PUB. POL'Y 147, 153 (2017) (*Delegation Reconsidered*); Ginsburg & Menashi, *supra* note 36; Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1464–68 (2015).

[84] Heckler v. Chaney, 470 U.S. 821, 837–38 (1985).

[85] Webster v. Doe, 486 U.S. 592, 601–604 (1988).

is reflected in the standards provided in the APA for review.[86]

IV. HARD LOOK REVIEW: FIRST BAD SWING OF THE JUDICIAL REVIEW PENDULUM

A. Before the Fall

While decisions just before and soon after the APA varied in the intensity of review, the courts generally looked sympathetically on government decisions implementing the laws.[87] Having moved away from the sort of critical inquiry into delegation demonstrated in the *Schechter* era, the Court (just before the APA's passage) approved statutory provisions authorizing administrative action that contained directions phrased broadly to the point of being vaporous, along with administrative actions under them.[88] Often, the judges fell back on a general understanding of what the law was intended to accomplish rather than finding precise content for particular statutory language.[89]

The pattern of decisions in the years leading up to the APA's enactment persisted for a considerable time under the APA. For an early example, consider *American Trucking Associations v. United States*.[90] The Supreme Court found that the Interstate Commerce Commission was authorized to regulate trucking companies' leasing practices despite the absence of any

[86] *See id*., at 607–15 (Scalia, J., dissenting).

[87] *See*, *e.g.*, *ATTORNEY GENERAL'S COMM.*, *supra* note 65, at 78–80, 88–91 (describing the general acceptance of a division between the scope of review applicable to questions of law and of fact while also indicating doubt that a fully clear division can be drawn between issues of law interpretation committed to courts and of law application mixed with interpretive questions that may properly require a degree of deference to an agency's decision); Ray A. Brown, *Law and Fact in Judicial Review*, 56 HARV. L. REV. 899 (1943); Louis L. Jaffe, *Judicial Review: Question of Fact*, 69 HARV. L. REV. 1020 (1956). *See also* Jaffe, *Question of Law*, *supra* note 32 (explaining why the notion of a question being one "of law" should not fully preclude a degree of deference, using a definition of questions "of law" to encompass, at least in some circumstances, what are described here as matters of implementation rather than interpretation); Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984 (noting the continuation of deference to administrative actions pre- and post-*Chevron*).

[88] *See*, *e.g.*, Yakus v. United States, 321 U.S. 414 (1944). More recent decisions also conform to this description. *See*, *e.g.*, Mistretta v. United States, 488 U.S. 361, 371–79 (1989).

[89] This practice includes opinions eliding the clear import of earlier decisions that had expressly rejected arguments claiming the sort of authority being challenged. *See*, *e.g.*, National Broadcasting Co. v. United States, 319 U.S. 190 (1943) (*National Broadcasting*) (accepting a broad authority for the FCC to regulate business practices of radio stations and networks, even though that had been rejected not long before in Fed. Communications Comm'n v. Sanders Bros. Radio Stn., 309 U.S. 470, 475 (1940) (*Sanders Bros.*)). The conflict between the *Sanders Bros.* and *National Broadcasting* decisions was pointedly (and aptly) described in the dissent of Justice Frank Murphy. *See National Broadcasting*, 319 U.S. at 230–32 (Murphy, J., dissenting).

[90] 344 U.S. 298 (1953) (*American Trucking Associations*).

mention of that power in the relevant statute.[91] The Court declared that it could "only look to see if the Commission has applied its familiarity with transportation problems" to the arguments pro and con.[92] In the Court's view, the fact that the Commission had never asserted that authority—and, to the contrary, had expressly rejected numerous importunings to assert it—was not sufficient to demonstrate "that the Commission had no reasonable ground for [its] exercise of judgment."[93]

A bit over twenty-five years later, the Supreme Court illustrated its continued reluctance to rein in expansive assertions of regulatory authority. Its decision in *United States v. Southwestern Cable Co.*[94] upheld the Federal Communications Commission's determination that it had authority to regulate essential aspects of the cable television industry, including prohibiting it from competing with local broadcasters in the most populous television markets. The common understanding of the Communications Act of 1934,[95] the source of the FCC's regulatory authority, was that it simply combined the authority over wire communications (that is, telegraph and telephone) previously given to the Interstate Commerce Commission and the authority over radio communications previously vested in the Federal Radio Commission.[96] Essentially, Congress deemed wire communications to have more in common with radio communications than with trucking or railroads.

For many years, the FCC had concluded that cable television operations were beyond its regulatory reach, falling outside the provisions expressly covering wire and radio communications even if technically characterizable as a form of communication that utilized wire transmission and/or microwave transmission (part of the radio spectrum).[97] But in *Southwestern Cable*, the Court declared that the FCC did have authority over cable

[91] Id., at 298, 308–14.

[92] *Id*., at 314.

[93] *Id*.

[94] 392 U.S. 157 (1968) (*Southwestern Cable*).

[95] 47 U.S.C. §151 *et seq*.

[96] *See*, *e.g.*, Glen O. Robinson, *The Federal Communications Commission Act: An Essay on Origins and Regulatory Purpose*, in A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934 (Max D. Paglin ed., Oxford Univ. Press 1989), at 3, 3–5. The two regulatory structures were taken virtually without modification into the Communications Act as Title II (wire communications and common carrier regulations) and Title III (regulation of the radio spectrum). Direct statutory basis for regulation of cable television was not added until passage of the Cable Communications Policy Act of 1984, codified at 47 U.S.C. §521 *et seq.* (creating regulatory authority under a new Title IV of the Communications Act).

[97] *See* Inquiry into the Impact of Community Antenna Sys., TV Translators, TV Satellite Stations, and TV Repeaters on the Orderly Development of TV Broadcasting, 26 F.C.C. 403, 427–31 (F.C.C. 1959). After concluding that it did not have authority to regulate cable television (then principally referred to as CATV), the FCC unsuccessfully sought to secure legislation granting it that authority in the late 1950s. *See Southwestern Cable*, 392 U.S. at 164–65.

television so far as its regulations were "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."[98]

Although announcing that it was not reaching the propriety of specific FCC regulations of cable television, the Court explained why regulation of cable television was a reasonable step to preserve the regulatory structures respecting radio communications (here, television) already in place.[99] In essence, the Court understood regulation of broadcasting as necessary because the radio spectrum is inherently limited and, hence, requires allocation by a central authority to avoid interference.[100] FCC allocation decisions, however, prioritized spectrum uses that were either more expensive or less congruent with public programming tastes than other alternatives.[101] The ancillary jurisdiction argument (accurately, if unkindly, paraphrased) was that the FCC needed to regulate a relatively unlimited communications technology that might provide more publicly attractive programming, thereby undermining the Commission's allocation arrangements. Acceptance of this argument in *Southwestern Cable* was emblematic of judges' inclination to accede to agency decisions implementing statutory provisions, even when the decisions were based on logically and legally questionable grounds.

B. Hard Look Review—U-Turn at the D.C. Circuit

While decisions such as *American Trucking Associations* and *Southwestern Cable* demonstrate the Supreme Court's willingness to defer to agencies' determinations on how to implement laws within their general competence, perhaps the most notable statement of this attitude came from Judge Harold Leventhal of the D.C. Circuit. Writing in *American Airlines,*

---

[98] *Southwestern Cable*, 392 U.S., at 178.

[99] *Id*., at 173–78.

[100] This proposition had been effectively undermined by Ronald Coase long before the *Southwestern Cable* decision. *See* Ronald H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959). *See also* Thomas W. Hazlett, *Assigning Property Rights to Radio Spectrum Users: Why Did FCC License Auctions Take 67 Years?*, 41 J.L. & ECON. 529 (1998); Thomas W. Hazlett, David Porter & Vernon Smith, *Radio Spectrum and the Disruptive Clarity of Ronald Coase*, 54 J.L. & ECON. S125 (2011) (Special Issue on Markets, Firms, and Property Rights: A Celebration of the Research of Ronald Coase).

[101] First, the FCC (and its predecessor, the Federal Radio Commission) allocated stations by locality, rather than providing fewer stations with broader reach, an approach that increased potential interference problems in order to promote "localism" (giving voice to particular interests of many smaller cities and towns). In addition, the FCC made other allocation decisions—notably setting aside station allocations for educational (non-advertiser supported) channels and allocating spectrum space in the UHF portion while limiting space in the VHF portion of the spectrum—that reduced effective competition with incumbent television operators. *See*, *e.g.*, Stanley M. Besen, *The Value of Television Time*, 42 SO. ECON. J. 435 (1976); Harvey J. Levin, *Economic Effects of Broadcast Licensing*, 72 J. POL. ECON. 151,154–55 (1964); Rolla Edward Park, *Cable Television, UHF Broadcasting, and FCC Regulatory Policy*, 15 J.L & ECON. 207 (1972).

Inc. v. Civil Aeronautics Board,[102] Judge Leventhal explained the court's deference to the CAB's determination that cargo shipments priced at a discount to customers who committed in advance to reserve a certain amount of space ("blocked-space" pricing) could only be available on "all-cargo" (that is, not passenger-carrying) air carriers. In his words, "[this] is the kind of issue where a month of experience will be worth a year of hearings."[103] This pronouncement came two years before *Southwestern Cable*.

Judge Leventhal's paean to expertise reflected widespread acceptance that experience and training were critical to decisions respecting laws' implementation, especially those made under regulatory authority assigned to administrators.[104] Yet, a mere four years later (and just two years after *Southwestern Cable*), Leventhal spearheaded a sharp turn away from this deferential mode. The pivotal case was *Greater Boston Television Corp. v. Federal Communications Commission*.[105] *Greater Boston* involved an unusually protracted set of proceedings to determine which applicant—the incumbent licensee or a challenger—would be awarded the license to operate a prominent Boston television station. Typically, broadcast license contests involved a hearing in which contestants for the license were compared on a variety of qualities that might influence which would better serve the public interest—after which, as former Commissioner Glen Robinson sharply observed, the incumbent would invariably be awarded a

[102] 359 F.2d 624 (D.C. Cir.) (*en banc*), *cert. denied*, 385 U.S. 843 (1966).

[103] *Id*., at 632–33.

[104] *See*, *e.g.*, Charles H. Koch, Jr., *James Landis: The Administrative Process*, 48 ADMIN. L. REV. 419 (1996) (describing the approach embraced by Dean Landis, one of the architects of the New Deal but influential over the next several decades, principally focused on Landis's book on the administrative process). That view has continued to attract support over succeeding decades. *See*, *e.g.*, Kisor v. Wilkie, 139 S. Ct. 2400, 2413 (2019) ("Agencies (unlike courts) have 'unique expertise,' often of a scientific or technical nature, relevant to applying a regulation 'to complex or changing circumstances.'") (quoting Martin v. Occupational Safety and Health Rev. Comm'n, 499 U.S. 144, 151 (1991)); Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994); Diver, *supra* note 48, at 578; Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Jerry Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985); Pierce, *supra* note 48. For a broad defense of that view, coupled with argument that the informational deficit of judges (compared to executive officials) is magnified by the litigation context in which judges receive information, see Cass R. Sunstein, *The Most Knowledgeable Branch*, 164 U. PA. L. REV. 1607 (2016). *But see* Glen O. Robinson, *The Federal Communications Commission*, in COMMUNICATIONS FOR TOMORROW: POLICY PERSPECTIVES FOR THE 1980S (Glen O. Robinson ed. 1978) (COMMUNICATIONS FOR TOMORROW), at 353, 368–70 (observing that part of the problem with government regulation—the province of executive officials—is the built-in institutional reliance on information provided by the entities subject to regulation, which have both more relevant (and frequently more biased) information than others).

[105] 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) (*Greater Boston*).

license renewal.[106] And typically, reviewing courts accepted the FCC's decision.[107]

In *Greater Boston*, however, Leventhal presented the court not as a determiner of legal rules and a backstop against serious departures from ordinary approaches to implementing the law but instead as "part of the total administrative process."[108] In his view, "agencies and courts together constitute a 'partnership' in furtherance of the public interest, and are collaborative instrumentalities of justice."[109] Judge Leventhal declared:

> The function of the courts is to assure that the agency has given reasoned consideration to all the material facts and issues. This calls for insistence that the agency articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts …
>
> Its supervisory function calls on the court to intervene, not merely in the case of procedural inadequacies, or bypassing of the mandate in the legislative charter, but more broadly if the court becomes aware … that the agency has not really taken a "hard look" at the salient problems and has not genuinely engaged in reasoned decision-making.[110]

This view of the role of courts and agencies made clear that courts were the senior partners in their "'partnership' in furtherance of the public interest" and that agencies bore the burden of persuading courts that they had looked at the right questions, made sufficiently probing inquiries, and evaluated the evidence before them in sufficiently thoughtful ways to persuade their senior partners.[111] Leventhal's point was not that the agencies needed to convince judges that the administrators had chosen the best policy or had selected a path that produced the best outcome. Instead, it was that agencies had to demonstrate that they had done enough to at least narrow the gap between the administrators' choice of how to implement the law and what would have been the judges' choice, left to their own unfettered discretion.

---

[106] *See*, *e.g.*, Cowles Florida Broadcasting, Inc., 60 F.C.C.2d 372, 440–42 (1976) (Comm'r Robinson, dissenting), *vacated*, Central Florida Broadcasting v. Federal Communications Comm'n, 598 F.2d 37 (1978), *cert. dismissed*, 441 U.S. 957 (1979); Glen O. Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169, 242 (1978).

[107] *See*, *e.g.*, Glen O. Robinson, *The Judicial Role*, in COMMUNICATIONS FOR TOMORROW, *supra* note 104, at 428 ("in the case of broadcast licensing the courts have been remarkably tolerant in accepting the Commission's bias in favor of the status quo and stability.")

[108] *Greater Boston*, 444 F.2d at 852.

[109] *Id.*, at 851–52.

[110] *Id*., at 851.

[111] For thoughtful discussion of antecedents to this approach, especially in the writings of Professor Jaffe, see Daniel B. Rodriguez, *Jaffe's Law: An Essay on the Intellectual Underpinnings of Modern Administrative Law Theory*, 72 CHI.-KENT L. REV. 1159 (1997).

C. Hard Look at Substance and Process—Review Standards Upside Down

The problem with hard look's central message is that it accorded judges, not administrators, a substantial portion of the power to decide how best to implement legal commands. Not surprisingly, the court included a disclaimer, saying that the judges' role was limited. But, in fact, the essence of hard look review was that courts should demand that administrators both consider the arguments and evidence that judges saw as central to making a good decision on implementing the law and, beyond that, satisfy judges that the administrators' determinations were reasonable.[112] This standard looks closer to the *de novo* review standard used with respect to questions of law than to the APA's "arbitrary, capricious" standard, which incorporated the more limited benchmarks that had been applied for most of the prior two centuries.[113]

At the same time as the D.C. Circuit was dramatically reshaping judicial review's substance, other courts were endeavoring to reshape the processes required of administrative agencies, largely out of the same suspicion that agencies were not sufficiently attentive to the ideas and arguments that should be guiding their decisions.[114] The Supreme Court responded sharply with rebukes at attempts to impose procedural requirements not included in the APA's and other statutes' commands, rejecting lower courts' readings of the APA's hearing requirements for certain rulemaking proceedings in the *Allegheny-Ludlum Steel Corp.* and *Florida East Coast Railway Co.* decisions in the early 1970s.[115] And its *Vermont Yankee* decision at the end of the decade underscored the Court's rejection of judicial expansion of procedural requirements beyond those set forth in the APA—requirements that the Court characterized as generally constituting the maximum as well as the minimum legally mandated procedures.[116]

---

[112] As Judge Patricia Wald of the D.C. Circuit observed in *National Lime Association v. EPA*, 627 F.2d 416, 451 n.126 (D.C. Cir. 1980): "[O]riginally … 'hard look' described the agency's responsibility and not the court's. However, the phrase … evolved to connote the rigorous standard of judicial review applied to … informal rulemaking proceedings or to other decisions" not made on the basis of a formal record of trial-type hearings. *See* CASS ET AL., *supra* note 41, at 159.

[113] *See*, *e.g.*, Sidney A. Shapiro & Richard W. Murphy, *Arbitrariness Review Made Reasonable: Structural and Conceptual Reform of the "Hard Look"*, 92 NOTRE DAME L. REV. 331, 336–37 (2016).

[114] *See*, *e.g.*, Florida East Coast Ry. Co. v. United States, 322 F. Supp. 725 (M.D. Fla. 1971), *rev'd*, 410 U.S. 224 (1973); Allegheny Ludlum Steel Corp. v. United States, 325 F. Supp. 352 (1971), *rev'd*, 406 U.S. 742 (1972).

[115] *See* United States v. Florida East Coast Ry. Co., 410 U.S. 224 (1973) (*Florida East Coast Railway*); United States v. Allegheny-Ludlum Steel Corp., 406 742 (1972) (*Allegheny-Ludlum*).

[116] Vermont Yankee Nuclear Power Corp. v. Natural Resources Def. Coun., Inc., 435 U.S. 519 (1978).

The essential flaw with both the procedural additions and the substance of the hard look standard of review was the assumption that courts had authority to assess on their own the best way to make decisions on how to implement the law. Lower court decisions in *Allegheny-Ludlum Steel Corp.*, *Florida East Coast Railway Co.*, and *Vermont Yankee*—from three different courts—reflected the belief that courts were free to determine the best processes for agency decisions (regardless of the APA's or specific governing statutes' requirements).

Similarly, decisions like *Greater Boston* evinced a belief that courts would improve administrative decision-making by delving into the considerations that informed agencies' decisions on how to implement statutory directives, making sure that administrators explained their reasons and that the explanations were sufficiently cogent and sufficiently detailed to pass a fairly high level of judicial scrutiny. Yet nothing in the APA—and similarly, little to nothing in the underlying regulatory statutes—supported these assumptions.[117]

What explains the shift from judicial deference to administrative experience when considering actions pursuant to statute-based grants of discretion to administrators, on one hand, to critical judicial inquiries into the *bona fides* of administrative decision-making, on the other? Perhaps, the change reflected judges' increasing disappointment with agency actions that seemed inexplicable given prior experience or at least were not well explained.[118] But no matter how understandable this disappointment may have been, the review standards associated with statutory grants of administrative discretion to implement governing laws traditionally did not compass this sort of intensive review.[119]

D. Hard Look at the Supreme Court?—Overton Park

Although, as discussed below, the connection is open to question, the concept of "hard look" review at the Supreme Court level commonly is associated with *Citizens to Preserve Overton Park v. Volpe*.[120] The Court's

[117] *See*, *e.g.*, Cass R. Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177, 210 (recognizing the lack of statutory support for "hard look" review and expressing doubt as to judges' potential effectiveness in improving agency functions) (*Deregulation and Hard-Look*).

[118] This change may have been produced by increasingly broad agency mandates (often focused on matters less subject to traditional economic regulatory standards) and increasing agency reliance on rulemaking in place of adjudication to set (and to change) the course for agency actions. *See*, *e.g.*, Cass. *Rulemaking*, *supra* note 41; Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J. LEGAL ANALYSIS 121, 125 (2016).

[119] *See*, *e.g.*, Bamzai, *Origins*, *supra* note 10; Byse, *supra* note 10; Cass, *Fixing Deference*, *supra* note 33; Duffy, *supra* note 7; Foote, *supra* note 33; Pojanowski, *supra* note 33; Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197 (1991).

[120] 401 U.S. 402 (1971) (*Overton Park*).

Overton Park decision effectively rejected the Secretary of Transportation's determination of the route for an important highway (I-40) through part of Overton Park in Memphis, substituting judicial decision for administrators' exercise of discretion.

The decision itself, however, is more complicated than that. The *Overton Park* opinion encompassed both an analysis conducted under the APA's direction that reviewing courts decide if an administrative action conformed to statutory command and a related examination of the Secretary's decision under the APA's "arbitrary, capricious" standard. The decision is primarily noted for the second item, as having set a standard of review that requires proof of the administrative decision-maker's reasoned consideration of the legally appropriate standards, calling for an "inquiry into the facts [that] is to be searching and careful."[121] In this respect, the decision looks like a classic example of "hard look" review, evidencing skepticism about why the decision was made and whether it was based on sufficiently weighty reasons.[122]

While this is a fair reading of what *Overton Park* came to stand for, the decision's heavy lifting was done in the first, not the second, inquiry. The decision, thus, is better seen as turning on the Court's reading of the relevant statutes' meaning, a reading that effectively eliminated almost all administrative discretion. That reading may very well have been wrong, but it was a basis for decision on matters for which deference to the administrator's determination was not appropriate. Once the Court had construed the law to offer only an extraordinarily small set of circumstances in which parkland could be used for highway construction, the administrative determination at issue could be sustained only if certain specific supporting facts were established and if it was clear to the reviewing court that those facts were central to the siting determination.[123]

Another complicating factor is that the evidence before the Court in *Overton Park* was almost entirely in the form of litigation affidavits. Justice Thurgood Marshall's decision for the Court stated that this could not provide a sufficient basis for resolving doubts about the propriety of the decision and the considerations on which it was in fact based.[124]

Stepping back, the Court's *Overton Park* decision gave the agency action a very hard "hard look" review because the Court's reading of the law did not leave room for any significant discretion in the agency's choice of highway routes. Put another way, the decision turned on the Court's reading of the law, and that reading—not an independent position respecting the

[121] *Id*., at 416.
[122] *See*, *e.g.*, Stewart, *supra* note 7, at 1785–1800. [OTHER CITES]
[123] *Overton Park*, 401 U.S., at 415–16, 419–20.
[124] *See id.*, at 419.

right standard for reviewing matters on which administrators enjoy legal discretion—allowed almost no discretion for administrators' judgment.[125] The *Overton Park* decision, thus, illustrates that, while review standards differ in their intensity, actual differences among decisions still tend to correlate with whether the issue is interpretation or implementation of law.

The decision also is a cautionary tale on judicial scrutiny of complex administrative decisions. The outcome of the Court's *Overton Park* decision was 10 years of additional proceedings and conflict, including a 27-day trial in district court, a remand to the Secretary of Transportation, selection of a new route, redesign of its engineering, further hearings, and ultimately abandonment of the project.[126] In the end, the result was harm to Memphis businesses, residents, *and* parkland, as the original design would have imposed on a relatively small part of Overton Park but, in exchange, would have added far more parkland adjacent to Overton Park.[127] The simplest lesson from the *Overton Park* saga is that harder looks—whatever their focus—do not always produce happier consequences.

V. AFTER HARD LOOK: THE PENDULUM SWINGS TO *CHEVRON* AND BACK

A. Canons and Consequences

The central problem of "hard look" review associated with cases such as *Greater Boston* and *Overton Park* lay more in the articulated standard's governance implications than its more immediate practical implications. Taken at face value, the hard look standard was based on conceptions of courts' role that transformed judicial review of laws' implementation from a mere check on agency rationality and assurance that an agency was not grossly misbehaving (as by abusing licensing authority to favor personal

[125] *See*, *e.g.*, Cass, *Getting Deference Right*, *supra* note 11, at 97.

[126] For an extensive and interesting account of the run-up to the initial route selection for the portion of I-40 intended to run through Memphis, the litigation involving the route selection, its differential effects on the various communities in Memphis, and the proceedings and results following the litigation, see Peter L. Strauss, *Citizens to Preserve Overton Park v. Volpe*, Columbia Law School Public Law & Legal Theory Working Paper 05-85, https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=2350&context=faculty_scholarship (Fall, 2004). The aftermath of the litigation is described *id*., at 52. *See also* Peter L. Strauss, *Revisiting* Overton Park*: Political and Judicial Controls Over Administrative Actions Affecting the Community*, 39 UCLA L. REV. 1251 (1992).

[127] While from many vantages, the Overton Park saga is one of law diminishing the ability of political institutions to advance what is seen as serving broad public interests, some communities within the Memphis area saw the matter quite differently. *See*, *e.g.*, Lucie E. White, *Revaluing Politics: A Reply to Professor Strauss,* 39 UCLA L. REV. 1331 (1992). This observation also supports the view that highway routing decisions are what Professor Lon Fuller referred to as "polycentric" issues, ones that are neither simply solved on a contested (litigated) basis nor addressed helpfully through argument over specific facts. *See*, *e.g.*, Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

friends or relatives) to a much more formidable weapon against administrative decision-making.[128] That is, the hard look approach converted judicial review of exercises of administrative discretion into opportunities to insist that agencies analyze problems more or less in the same way as the reviewing judges would have if they were the operative decision-makers.[129] This is almost the exact opposite of the structure of separated powers represented by the Constitutional Convention's work and particularly the Convention's rejection of judicial involvement in a Council of Revision.[130] Hard look review was dramatically at odds as well with the structure of the APA.[131]

Not surprisingly, then, although hard look review did not evaporate after *Overton Park* at either the Supreme Court or lower courts, it did become less hard over time. The Court's *State Farm* decision,[132] for example, (rendered a dozen years after *Overton Park*) demanded more from agencies in repealing regulatory rules than in adopting them, but it still set a more easily met standard than *Overton Park* had adumbrated. At the time, however, it was far from clear whether *State Farm* signaled a change in the Court's "arbitrary, capricious" standard or merely reflected a different statutory mandate. After all, as explained above, *Overton Park* easily might be chalked up not to a much harder (hard look) "arbitrary, capricious" standard but instead to the Court's view that the Secretary of Transportation really did not have much leeway at all in his decisions respecting highway routes, no matter what the circumstances indicated about consequences of the choice among alternative highway routes.[133]

Certainly, the Court in *State Farm* seemed more attentive to potential consequences of rescission of the passive restraint rule at issue there than the *Overton Park* Court did in its treatment of the effects of highway siting decisions. So far as particulars of specific statutory directives do not fully explain different outcomes, *State Farm* indicates that even cases applying a

---

[128] *See*, *e.g.*, Breyer, *supra* note 34, at 382–84.

[129] *See*, *e.g.*, *id.*, at 382–83 (noting that in hard look review "a court sometimes will directly substitute its judgment for the agency's, on a matter of substantive policy ….").

[130] *See* text *supra* at notes 16–18.

[131] *See*, *e.g.*, Sidney A. Shapiro & Richard W. Murphy, *Arbitrariness Review Made Reasonable: Structural and Conceptual Reform of the "Hard Look"*, 92 NOTRE DAME L. REV. 331, 332–33 (2016) ("[under hard look review], the marvelously simple and speedy rulemaking procedures of 1946, when the APA was adopted, bear about as much resemblance to the rulemaking procedures of 2016 as an acorn does to a mighty seventy-year-old oak"). *See also* Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761 (2008) (positing that hard look review increased the likelihood that judicial perspectives unrelated to the considerations properly associated with the APA's arbitrary, capricious standard would determine review outcomes).

[132] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29 (1983) (*State Farm*).

[133] *See* text *supra* at notes 122–125.

version of the hard look standard were not always as far from long-run review norms as often supposed.[134]

B. Softer Look or Merely Muddled Language in Chevron*?*

A year after *State Farm*, the Supreme Court handed down its opinion in the *Chevron* case. Although *Chevron* is famous for having rewritten the rules respecting "arbitrary, capricious" review, a fair reading of the decision is that this was not the justices' intent.[135] Instead, *Chevron* should be seen first and foremost as an attempt to distinguish between interpretation of the law—there, the Clean Air Act (CAA)—and the law's implementation.[136] Justice John Paul Stevens' opinion for the six justices participating in the case struggled to explain what to do with a strict issue of legal interpretation—the meaning of the term "major stationary source" in a specific provision of the CAA[137]—and separately how to handle questions of policy and implementation.[138] The opinion's statements on each issue, however, left considerable scope for different understandings of the rule the decision had announced.[139]

---

[134] *See* Sunstein, *Deregulation and Hard-Look*, supra note 117, at 210–11.

[135] The construction of the *Chevron* opinion is explained in detail in MERRILL, *supra* note 7. *See also* Beermann, *Failed Experiment*, *supra* note 3; Kristin E. Hickman & David Hahn, *Categorizing* Chevron, 81 OHIO ST. L. REV. 611 (2020); Gary Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the* Chevron *Doctrine*, 65 ADMIN. L. REV. 1 (2013).

[136] *See*, *e.g.*, Gary S. Lawson, *Reconceptualizing* Chevron *and Discretion: A Comment on Levin and Rubin*, 72 CHI.-KENT L. REV. 1377, 1379 n.14 (1997) (noting that *Chevron*'s author, Justice Stevens, endeavored in INS v. Cardoza-Fonseca, 480 U.S. 421, 447–48 (1987), relatively soon after *Chevron*, "to limit *Chevron* to cases of law application.").

[137] The specific provision at issue, codified at 42 U.S.C. §7502(b)(6), directed states that had not achieved particular air quality standards adopted by EPA to set up permitting programs for "new or modified major stationary sources" of pollution. The term "major stationary source" was not defined in the CAA. It had, however, been the subject both of regulation by the EPA and of court challenges to the meaning of the term in regard to the EPA's regulations. *See*, *e.g.*, Ala. Power Co. v. Costle, 636 F.2d 323 (D.C. Cir. 1979); ASARCO Inc. v. Envtl. Prot. Agcy., 578 F.2d 319 (D.C. Cir. 1978). *See also* Duquesne Light Co. v. EPA, 698 F.2d 456, 473 (D.C. Cir. 1983) (calling the definition of "major stationary source" a "crucial factor in determining liability" while acknowledging that the statute does not define the phrase).

[138] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 864–66 (1984). *See also* MERRILL, *supra* note 7, at 63–66, 69–71, 71–79. The opinion's failure adequately to separate issues of legal interpretation from issues of policy implementation is noted, among other places, in Beermann, *Failed Experiment*, *supra* note 3, at 796–99; Byse, *supra* note 10, at 261; Ronald A. Cass, *Vive la Deference?: Rethinking the Balance Between Administrative and Judicial Decisions*, 83 GEO. WASH. L. REV. 1294, 1319 (2015); Duffy, *supra* note 7, at 192; Herz, *supra* note 33, at 214; Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 871–72 (2001).

[139] *See*, *e.g.*, Kenneth Bamberger & Peter L. Strauss, Chevron*'s Two Steps*, 95 VA. L. REV. 611 (2009); Barnett & Walker, *supra* note 15; Coglianese, *supra* note 36; Daniel J. Hemel & Aaron L. Nielson, Chevron *Step One-and-a-Half*, 84 U. CHI. L. REV. 757 (2017); Hickman & Hahn, *supra* note 135; Richard M. Re, *Should* Chevron *Have Two Steps?*, 89

Look first at how the decision treats questions of law. *Chevron*'s footnote 9 plainly states that "[t]he judiciary is the final authority on issues of statutory construction," which courts should do "employing traditional tools of statutory construction."[140] Yet, shortly after that, the Court's opinion declared that courts should defer to an agency's "permissible construction of the statute" when there wasn't a clear meaning to the law with respect to the legal issue at hand.[141] And the opinion's footnote 11 stated that the Court did not need to find that an "agency construction was the only one it permissibly could have adopted" or was the one that "the court would have reached if the question had initially arisen in a judicial proceeding."[142]

If these were the only statements the decision had made respecting judicial review, *Chevron* might have been known modestly as a confused announcement of how the Court viewed courts' and administrators' roles in interpretating law. Certainly, the odd juxtaposition of these statements and the impression that *Chevron* at least contemplated deference to agencies on matters of pure interpretation of law were critical to the Supreme Court's *Loper Bright* decision overturning *Chevron* forty years later.[143]

Most of the *Chevron* decision, however, dealt with how to treat EPA's policy-based determinations on how to implement provisions of the CAA. That the provision at issue referred to regulation of emissions from a "stationary source"—a term central to EPA's authority—did not truly frame the principal question the Court grappled with in its opinion. The real anchor of Justice Stevens's opinion is found in his quote from the Court's *Morton v. Ruiz* decision:

> "The power of an administrative agency to administer a congressionally created … program necessarily requires the formulation of policy and the creation of rules to fill any gap left, implicitly or explicitly, by Congress."
>
> *Morton v. Ruiz,* 415 U. S. 199, 231 (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.[144]

IND. L. REV. 605 (2014); Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597 (2009); Strauss, *Confusing*, *supra* note 33; Cass R. Sunstein, Chevron's *Step Zero,* 92 VA. L. REV. 187 (2006). *See also* Justin Walker, *The Kavanaugh Court and the* Schecter-*to*-Chevron *Spectrum: How the New Supreme Court Will Make the Administrative State More Democratically Accountable*, 95 IND. L.J. 923 (2020).

[140] *Chevron*, 467 U.S. at 843 n.9.

[141] *Id*., at 843.

[142] *Id*., at 843 n.11.

[143] *Loper Bright*, 144 S. Ct. at 2264, 2273. These were, of course, also aspects of the *Chevron* decision criticized in scholarly writings, as well as judicial comments, over the intervening years. *See*, *e.g.*, sources cited in notes 158–180 *infra*.

[144] *Chevron*, 467 U.S. at 843–44.

The Court then declared that EPA's use of the "bubble concept"—treating all equipment within a commercial plant as a single "stationary source" of emissions (as if the plant was covered by a giant plastic bubble with only one opening for emissions)—was "a reasonable *policy choice* for the agency to make."[145] The following 20 pages of the Court's *Chevron* opinion explain the way the CAA frames the policy issue EPA addressed in trying to implement the law. Despite the Court's references to the EPA *interpreting* the law, its deference language is attached to descriptions of the *policy question* underlying EPA's use of the bubble concept.[146] In context, it is most likely—and most consistent with what is known of the history of this decision—that the justices conceived their task in *Chevron* as reviewing an agency's policy-driven action *implementing* the law rather than a separable law-interpretation decision.[147]

C. *Decision as Reaction: Seeing What's Wrong, Moving the Other Way*

1. *Making* Chevron *a Doctrine—First Steps*

Although the *Chevron* decision itself did not represent an effort to change the rules on judicial review of agency action, the same cannot be said of *Chevron*'s development into a doctrine of more permissive judicial review. That development was spearheaded by judges on the U.S. Court of Appeals, most notably the D.C. Circuit.[148] Key figures in this change included conservative judges Antonin Scalia and Ken Starr and liberal judge Patricia Wald (joined in a pivotal decision by, among others, famed fellow liberals Ruth Bader Ginsburg, Abner Mikva, and J. Skelley Wright).[149] The circuit court decisions repeated—or paraphrased—*Chevron*'s two-step formula,[150] but varied in how they applied that formula. At times, decisions from the D.C. Circuit—even by avid *Chevron* advocates—applied the second

[145] *Id*., at 845 (emphasis added).

[146] *Id*., at 845–866. *See also* MERRILL, *supra* note 7, at 65–78.

[147] *See Chevron*, 467 U.S. at 843; Cass, *Fixing Deference*, *supra* note 33, at 55–67. Professor Merrill does not frame the issue in quite these terms, but his description of *Chevron*'s creation and its unanticipated impact is consistent with the description in text here. *See also* Beermann, *Failed Experiment*, *supra* note 3, at 793–94; Hickman & Hahn, *supra* note 135; Lawson & Kam, *supra* note 135; Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, in ADMINISTRATIVE LAW STORIES 398, 398–402 (Peter L. Strauss, ed. 2006); Stephenson & Vermeule, *supra* note 139, at 597–98.

[148] *See*, *e.g.*, MERRILL, *supra* note 7, at 83–87.

[149] *See* Gen. Motors Corp. v. Ruckelshaus, 742 F.2d 1561 (D.C. Cir. 1984) (*en banc*) (*General Motors*). *See also* Rettig v. Pension Benefit Guaranty Corp., 744 F.2d 133 (D.C. Cir. 1984) (*Rettig*); MERRILL, *supra* note 7, at 83–87. Roughly contemporaneous explanations for supporting *Chevron* outside court opinions include Antonin Scalia, *Judicial Deference*, *supra* note 32; Kenneth Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283 (1986).

[150] *See*, *e.g.*, *General Motors*, *supra* note 149, 742 F.2d at 1566–67; *Rettig*, *supra* note 149, 744 F.2d at 140–41.

(supposedly deference-driven) step in a fashion that was far from deferential, reversing agency actions that were deemed insufficiently well-explained or well-reasoned or responsive to contrary arguments.[151] Still, the D.C. Circuit's *Chevron*-based decisions tilted strongly toward upholding administrative decisions implementing statutory provisions that either committed implementation discretion to an agency or properly could be read as consistent with such a commitment.[152]

The *Chevron* era's beginning and end illustrate how changes in legal doctrines in large measure are explicable as conscious reactions to the then-current doctrine's perceived deficiencies. *Chevron*'s development as doctrine—as distinct from the decision itself—plainly reflected concerns about the prior decade's experience with hard look review. Judge Starr, for instance, describing the hard look review era, said judges embracing that review standard saw their role vis à vis agencies "as one of supervision rather than one of providing checks and balances" to keep agencies within the bounds of law.[153] Starr contrasted that with the advantages of the *Chevron* era's greater deference, opining that "[a]gency administrators, who have extensive experience with both the regulatory scheme and the regulated industry, are much better placed than generalist judges to make policy decisions that … broad statutory terms seem to invite."[154]

Antonin Scalia, writing both before his stint on the D.C. Circuit and after his move to the Supreme Court, reflected similar reasons to prefer *Chevron* deference to hard look review and to move decisions at both the court of appeals and the Supreme Court in that direction.[155] Professor Scalia chastised Supreme Court justices inclined to favor a hard look at agency decisions for cavalierly disregarding agency determinations on both law and policy.[156] Justice Scalia explained *Chevron* as clearly preferable to hard look decisions that preceded it primarily because it better accounted for the reality of congressional delegation of authority—explicitly, implicitly, or (even more often likely) as a fiction that best fits a more ambiguous reality—for agencies to tailor policies to fit statutory schemes.[157]

2. *Wandering in* Chevron*'s Shadow*

Decisions in the *Chevron* era, however, did not always limit (or extend) deference to the sort of determinations Justice Scalia, Judge Starr, Judge

[151] *See*, *e.g.*, *Rettig*, *supra* note 149, 744 F.2d at 155–56; Lawson & Kam, *supra* note 135, at 39.

[152] *See*, *e.g.*, Barnett & Walker, *supra* note 15; [OTHER CITES]

[153] Starr, *supra* note 149, at 305–06.

[154] *Id*. at 310. *See also id*. at 307–10, 312.

[155] *See* Scalia, *Judicial Deference, supra* note 32; Antonin Scalia, *A Note on the Benzene Case*, REGULATION (July/August 1980), at 25, 25–27 (*Benzene*).

[156] *See* Scalia, *Benzene*, *supra* note 155, at 25–27

[157] *See* Scalia, *Judicial Deference, supra* note 32, at 516–19.

Wald, and a large number of scholars of disparate political bents thought apposite.[158] Notably, although Judge and Justice Scalia's role in championing *Chevron* accurately captures his aversion to hard look review's intrusion into the proper domain of administrative decision-making, an important aspect of Scalia's views on judicial review often is overlooked.

As Justice Scalia explained, his own approach to judicial review placed a high bar to getting past *Chevron*'s first step because he rarely found th0e meaning of a law ambiguous. In a seldom referenced passage from his famous article on judicial deference, Scalia states:

> One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists.[159]

Looked at in the sweep of his decisions over time, Scalia's defense of *Chevron* deference as rightly recognizing the expertise and experience of those charged with administering specific statutes must be seen as subordinate to his even stronger commitment to *judicial* interpretation of law based on text and context.[160] One cannot read his dissent in the *Brand X* case, for example, without appreciating his distinction between what courts do in interpreting law and what they do in reviewing administrators' implementation of the law[161]—a distinction later embraced by *Brand X*'s author, Justice Thomas.[162] Justice Scalia's *Brand X* dissent states that when

---

[158] *See*, *e.g.*, Babbitt v. Sweet Home Chap. of Communities for a Great Ore., 515 U.S. 687, 703 (1995); Young v. Community Nutrition Inst., 476 U.S. 974, 980–82 (1986); Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 AM. U. ADMIN. L.J. 1, 9–11 (1996); Beermann, *Failed Experiment*, *supra* note 3; Breyer, *supra* note 35; Byse, *supra* note 10; Duffy, *supra* note 7; Eskridge & Baer, *supra* note 14; Ginsburg & Menashi, *supra* note 36; Kavanaugh, *supra* note 32; Woolhandler, *supra* note 119.

[159] Scalia, *Judicial Deference, supra* note 32,. at 521 (emphasis in original).

[160] *See*, *e.g.*, Aditya Bamzai, *Justice Scalia and the Evolution of* Chevron *Deference*, 21 TEX. REV. L. & POL. 295 (2016) (explaining different standards of review for differing kinds of legal claim in light of antecedents for challenges to administrative actions); Beermann, *supra* note 3, at 839 n.227 (noting that Scalia voted against deference during the period examined more than any other Justice); Ronald A. Cass, *Administrative Law in Nino's Wake*, 32 J.L. & POL'Y 277, 287–90 (2017) (*Nino's Wake*) (explaining nuances in Justice Scalia's approach to *Chevron*); Gregory E. Maggs, *Reconciling Textualism and the* Chevron *Doctrine: In Defense of Justice Scalia*, 28 CONN. L. REV. 393 (1996). *See also* Paul D. Clement, *Why We Read the Scalia Opinion First*, 101 JUDICATURE 52 (2021) (describing the particular devotion to clear thinking and writing that defined Scalia's opinions and flowed from his approach to judging and, more broadly, to law).

[161] *See* Nat'l Cable Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1015–19 (2005) (Scalia, J., dissenting) (*Brand X*).

[162] *See* Baldwin v. United States, 140 S. Ct. 690, 690–95 (2020) (Thomas, J., dissenting from denial of cert.). In fairness, Justice Thomas's opinion for the Court in *Brand X* was only partially at odds with Justice Scalia's dissent and can be read as motivated by similar concerns about the division of authority between courts and agencies. *See* Cass, *Fixing Deference*, *supra* note 33, at 61–62.

a judicial opinion accepts an administrative action based on the agency's construction of the law, the court is deferring to that determination as a decision within the ambit of the agency's legal authority.[163] Scalia asserts, however, that this is not tantamount to accepting the agency's reading of the law as conclusive of the law's meaning.[164] Indeed, he suggests that giving the agency's reading conclusive effect as to the law's meaning would be unconstitutional.[165] Further, in his view, the agency's reading of the law not only does not bind courts—it also does not bind the agency and may be changed as the agency's policy positions change.[166] In contrast, Scalia said that when a court construes the law, not as a matter of *Chevron* deference, the court's interpretation is binding on the agency.[167]

Although Justice Scalia did not use the same terminology deployed here and in other writings, his analysis of the appropriate division of powers between courts and agencies was quite consistent with the distinction between interpretation and implementation of the law.[168] Certainly, his devotion to the details of legal analysis—reflected in a strikingly large and diverse body of writings, including a book on "reading law" that explores canons of statutory construction in great depth[169]—is incompatible with the version of *Chevron* dubbed "*Chevron* maximalism" by judicial critics of erasing the long-observed distinction between judicial and administrative domains.[170] In the end, it should have become clear that Scalia's version of

[163] *Brand X*, 545 U.S., at 1015–16 (Scalia, J., dissenting).

[164] *See id.*, at 1017 (Scalia, J., dissenting).

[165] *See id*. Although Justice Scalia says only that "[i]t is probably unconstitutional," *id.*, there is nothing in his dissent that indicates any reason that would cast doubt on a conclusion that the courts cannot constitutionally defer to an agency's construction *of law*, as opposed to deferring to agency law-implementing decisions that a court, reading the law *de novo*, concludes fall within the ambit of legally allocated administrative authority.

[166] *See id.*, at 1015–16 (Scalia, J., dissenting) (referring to "statutory ambiguities that might be resolved in varying fashions by successive agency administrations." *Id*., at 2016 (Scalia, J., dissenting)).

[167] *See id.*, at 1018–19 (Scalia, J., dissenting).

[168] *Compare Brand X*, 545 U.S., at 1015–19 (Scalia, J., dissenting); United States v. Mead Corp., 533 U.S. 218, 239, 240–43 (2001) (Scalia, J., dissenting); Smiley v. Citibank (South Dakota), 517 U.S. 735, 740–41 (1996); Scalia, *Judicial Deference*, *supra* note 32, *with* Bamzai, *Interpretive Discretion*, *supra* note 32; Bamzai, *Origins*, *supra* note 10, at 915–17, 962–65; Breyer, *supra* note 35, at 365–67; Byse, *supra* note 10; Cass, *Fixing Deference*, *supra* note 33, at 50–55; Duffy, *supra* note 7, at 115, 120; Farina, *supra* note 35, at 453–56; Foote, *supra* note 33; Herz, *supra* note 33, at 187–90; Pojanowski, *supra* note 33, at 884–95; Woolhandler, *supra* note 119.

[169] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (West Pub. 2012).

[170] *See*, *e.g.*, Buffington v. McDonald, 143 S. Ct. 14, 17–21 (2022) (Gorsuch, J., concurring in denial of cert.); Solar Energy Indus. Ass'n v. Fed. Energy Reg'y Comm'n, 59 F.4th 1287, 1291–93 (D.C. Cir. 2023) (Walker, J., concurring in part and dissenting in part), vacated and remanded *sub nom.* Edison Elec. Inst. v. Fed. Energy Reg'y Comm'n, 144 S. Ct. 2705 (2024), reinstated (No. 21-1166 et al., D.C. Cir., Sep. 9, 2025).

Chevron was not the same as the version embraced by some of his colleagues.[171]

3. Chevron*'s Legacy—Transferring and Reclaiming Power*

While *Chevron*'s legacy may appear more starkly in black and white over time, inquiries into *Chevron*'s impact during its heyday have arrived at varied conclusions. Early studies suggested that the decision had minimal effect on the likelihood that an agency's action would be sustained in court.[172] Subsequent empirical work, however, concluded that *Chevron* did have significant impact at the court of appeals level.[173] A cogent explanation focused on the failure of earlier inquiries to account for changes in the nature of the cases being brought before the courts: with *Chevron* leading to greater willingness of courts (especially those below the Supreme Court) to accept agency decisions, agencies became more willing to test the boundaries of their authority, so even a relatively stable win rate for the government would be consistent with a significant change in governance.[174]

Whatever the actual effect of *Chevron*, undeniably over time the judiciary—especially Supreme Court justices—became more skeptical of inconsistencies in *Chevron*'s application by lower courts and its apparent diversion of judicial authority from courts to agencies, among other concerns.[175] Chief Justice Roberts aptly described Justice Scalia as "an early proponent (and later critic) of *Chevron*,"[176] though, as explained above,

---

[171] *See*, *e.g.*, Massachusetts v. Envtl. Prot. Agency, 549 U.S. 497, 549–53 (2007) (Scalia, J., dissenting); Babbitt v. Sweet Home Chap. of Communities for a Greater Oregon, 515 U.S. 687, 714 (2007) (Scalia, J., dissenting); United States v. Mead Corp., 533 U.S. 218, 239–43 (2001) (Scalia, J., dissenting) (*Mead*); Christensen v. Harris Cnty., 529 U.S. 576, 589–91 (2000) (Scalia, J., concurring in part and concurring in the judgment). *See also* Cass, *Nino's Wake*, *supra* note 160, at 287–91; Maggs, *supra* note 160.

[172] *See, e.g.,* Schuck & Elliott, *supra* note 87 (finding a modest increase in judicial affirmance of challenged agency actions immediately following *Chevron*, but after that a decline to success rates much closer to pre-*Chevron* levels). *See also* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992).

[173] *See*, *e.g.*, Barnett & Walker, *supra* note 15; E. Donald Elliott, Chevron *Matters: How the* Chevron *Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 VILL. ENVTL. L.J. 1 (2005); Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1 (1998).

[174] *See* Linda R. Cohen & Matthew L. Spitzer, *Solving the* Chevron *Puzzle*, 57 L. & CONTEMP. PROBS. 65 (1994); Elliott, *supra* note 173.

[175] Professors Kent Barnett and Chris Walker also point to the greater caseloads and relatively smaller support staff at the court of appeals level than at the Supreme Court as an explanation for the greater effect of *Chevron* on lower court decisions and the lower courts' greater continued adherence to a relatively deferential version of *Chevron*. *See* Barnett & Walker, *supra* note 15. Professor Adrian Vermeule pointed to unfortunate effects of the *Mead* decision on court of appeals decisions, especially those of the DC Circuit, as a combination of the *Mead* decision's deficiencies and limits on the lower courts' resources—but, even more, on the lower courts' inability to rewrite *Mead*. *See* Adrian Vermeule, *Introduction:* Mead *in the Trenches*, 71 GEO. WASH. L. REV. 347 (2003).

[176] *Loper Bright*, 144 S. Ct. at 2263.

Scalia's *Chevron* was not the same as the *Chevron* some judicial colleagues applied.[177] Scalia, however, was not alone in disenchantment with courts' (including his own Court's) applications of *Chevron*. Justices Stephen Breyer, Ruth Ginsburg, and Elena Kagan, all former law professors, criticized various applications of *Chevron* and supported changing the Court's approach to aspects of it.[178] More broadly, Chief Justice Roberts and Justices Gorsuch, Kavanaugh, Kennedy, and Thomas were among *Chevron*'s harsher critics (at least with respect to some aspects and applications of *Chevron*)—some of them before, as well as during, their service on the Supreme Court.[179] Prior to *Chevron*'s official demise, no Supreme Court majority opinion had relied on *Chevron* for eight years.[180]

[177] *See* text *supra* at notes 158–171.

[178] *See*, *e.g.*, SAS Inst. v. Iancu, 584 U.S. 357, 379–80 (2018) (Breyer, J., dissenting) (joined by Ginsburg, Sotomayor, and Kagan, except for Part III-A); Wisconsin Central Ltd. v. United States, (2018) (Breyer, J., dissenting) (joined by Ginsburg, Sotomayor, and Kagan, J.J.); Barnhart v. Walton, 535 U.S. 212, 220–22 (2002) (opinion of the Court per Breyer, J.); *id*., at 226–27 (Scalia, J., concurring in part and concurring in the judgment) (criticizing part of the majority's *Chevron* analysis); United States v. Mead Corp., 533 U.S. 218, 227–31 (2001) (majority op., joined by Breyer, J.); Christensen v. Harris Cnty., 529 U.S. 576, 596–97 (2000) (Breyer, J., dissenting). As Profesor Beermann noted after studying Supreme Court cases citing *Chevron*, although Justice Kagan at times has criticized applications of *Chevron*, she has had the most consistently supportive votes among the justices in favor of challenged agency positions. *See* Jack M. Beermann, Chevron *at the Roberts Court: Still Failing After All This Time*, 83 FORDHAM L. REV. 731, 734–35, 738 (2014).

[179] *See, e.g.*, Pereira v. Sessions, 585 U.S. 198, 221 (2018) (Kennedy, J., concurring) (expressing concern over courts' interpretation and applications of *Chevron*, concluding that it is "necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision."); Cuozzo Speed Techs. v. Lee, 579 U.S. 261 (2016) (Thomas, J., concurring) (broadly condemning *Chevron* deference as incompatible with statutory assignments of responsibility and constitutional division of powers); Michigan v. EPA, 576 U.S. 743, 761–62 (2015) (Thomas, J., concurring) (noting the tension between Article III's vesting clause and *Chevron* deference); Arlington v. Fed. Comms. Comm'n, 569 U.S. 290, 327 (2013) (Roberts, C.J., dissenting) (discussing concerns over applications of *Chevron* that exhibit "reflexive deference" to agencies' decisions respecting "statutory interpretation would let "an agency's interpretation of … statutory provisions … decide when it is in charge); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) ("*Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design."); Kavanaugh, *supra* note , at 2150 n. 161 ("… *Chevron* seems to flout the language of [the APA]."). *See also* Egan v. Delaware River Port Auth., 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring) ("Our Constitution was thus framed specifically to avoid the concentration of powers in the hands of a single branch of government. *Chevron*, however, has dramatically undermined that purpose."); Valent v. Comm'r of Soc. Sec., 918 F.3d 516, 524 (6th Cir. 2019) (Kethledge, J., dissenting) ("In every case where and Article III court defers to the Executive's interpretation of a statute under *Chevron*, our constitutional separation of powers is surely disordered."); Carter v. Welles-Bowen Realty, Inc., 736 F.3d 722, 730–33 (6th Cir. 2013) (Sutton, J., concurring) (recounting dangers of reflexive *Chevron* deference in criminal matters, juxtaposed with the judicial rule of lenity in interpreting laws that are predicates for criminal punishment).

[180] *See Loper Bright*, 144 S. Ct. at 2291 (Gorsuch, J., concurring).

Hard look review's extreme version had erred in transferring power over legislatively committed policy decisions from politically responsive actors to judges, and *Chevron* deference's extreme version, endeavoring to correct that error, erred in transferring power over laws' interpretation from (relatively) politically insulated judges to agencies.[181] Even if those flaws were avoided in typical, less aggressive applications of these tests, *Chevron*'s risk of permitting executive decisions to preempt judicial authority became increasingly clear.

Before overruling *Chevron* in *Loper Bright*, justices who saw that failing—or, at least, understood the risk of that failing—sought to correct it in one particular category of determinations. Building on decisions stretching over more than a century,[182] the Court's decision in *West Virginia v. Environmental Protection Agency*, just two years before *Loper Bright*, rebuffed efforts to secure deference to agency decisions that expanded their authority in ways at odds with prior (especially longstanding) interpretations of law on matters of significant practical and political salience.[183] The essence of the "major questions doctrine" described in *West Virginia* was pithily captured in Justice Scalia's earlier quip that "Congress … does not alter the details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."[184] The Court's full-throated embrace of a major questions doctrine—applicable to interpretation of an original regulatory scheme as well as to amended versions—should be seen both as a continuation of precedents on statutory interpretation and as a corrective to *Chevron*'s principal flaw.[185]

---

[181] *See*, *e.g.*, Perez v. Mortgage Bankers Ass'n, 575 U.S. 92, 112–13 (2015) (Thomas, J., concurring) (advancing the same criticism of hard look review).

[182] *See*, *e.g.*, Capozzi, *supra* note 36 (exploring a series of precedents for the Supreme Court's major questions doctrine).

[183] West Virginia v. Envtl. Prot. Agency, 597 U.S. 697, 720–24 (2022) (*West Virginia*); *id*., at 740–42, 743–44 (Gorsuch, J., concurring). Justices (both in majority opinions and dissents) also applied similar reasoning—without formally invoking the major questions doctrine—in several other cases leading up to *West Virginia*. *See*, *e.g.*, Nat'l Fed'n of Indep. Bus. v. Occupational Safety & Health Admin., 595 U.S. 109, 117–20 (2022); Alabama Ass'n of Realtors v. Dept. of Health & Human Servs., 594 U.S. 758, 764 (2021); Biden v. Missouri, 595 U.S. 87, 99, 103–04 (2022) (Thomas, J., dissenting); *id*., at 105–08 (Alito, J., dissenting).

[184] Whitman v. Amer. Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001).

[185] *See*, *e.g*., Biden v. Nebraska, 600 U.S. 482, 511 (2023) (Barrett, J., concurring); *West Virginia*, 597 U.S., at 736–42, 744–46 (Gorsuch, J., concurring); United States Telecom. Ass'n v. Fed. Comms. Comm'n, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting); Capozzi, *supra* note 36; Louis J. Capozzi III, *In Defense of the Major Questions Doctrine*, 100 NOTRE DAME L. REV. 509 (2025); Cass, *Fixing Deference*, *supra* note 33, at 72–78. *See also* Eli Nachmany, *There Are Three Major Questions Doctrines*, YALE J. ON REG.: NOTICE & COMMENT [https://perma.cc/A8F9-DLBB]. *But see West Virginia*, 597 U.S., at 766–71 (Kagan, J., dissenting); Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 ADMIN. L. REV. 217 (2022); Lisa Heinzerling, *Major Answers*, 16 NYU J.L. & LIB. 506 (2023); Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded*, 112 CALIF. L. REV. 899 (2024). For an extensive

4. *Ending* Chevron *with an Exclamation Mark*

The Supreme Court's *Loper Bright* decision emphatically rejected *Chevron*'s intimation that courts should defer to some administrative interpretations of law.[186] This followed the pattern of efforts by the Court to correct doctrinal developments that threatened to move judicial review significantly away from its established baseline.[187]

Loper Bright, however, was distinctive in plainly and unequivocally abandoning a prior judicial review test. The opinion of the Court clearly declared that, from the outset of the Republic and continuing into the era of expansive administrative government, it was understood "that questions of law were for courts to decide, exercising independent judgment."[188] The Court observed that the traditional understanding also was that, in contrast to the rule for "resolutions of questions of law," "agency determinations of *fact* [could be] binding on the courts."[189] Similarly, "[o]n occasion … the Court applied deferential review upon concluding that a particular statute empowered an agency to decide how a broad statutory term applied to specific facts found by an agency."[190] And it characterized the traditional rules for judicial review as differing for "questions … involving 'statutory interpretation'" and issues "where application of a statutory term was sufficiently intertwined with the agency's factfinding."[191]

Moreover, the Court clearly stated that [t]he APA … incorporates the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions."[192] Citing *Skidmore*, the Court recognized that "courts may … seek aid from the interpretations of those responsible for implementing particular statutes,"[193] especially where the best reading of the statute is that it delegates a degree of implementing discretion to the agency.[194] Even in those instances, however, the courts' function is to interpret the law, determine "the boundaries of the delegated authority … and ensur[e] that the agency has engaged in 'reasoned decisionmaking' within those boundaries."[195] The Court concluded that *Chevron* requires deference to

collection of scholarship on the major questions doctrine, favorable and opposed, see Beau J. Baumann, *The Major Questions Reading List*, YALE J. ON REG.: NOTICE & COMMENT [https://perma.cc/J2ZE-4VZH].

[186] *Loper Bright*, 144 S. Ct. 2244 (2024).

[187] *See* text *supra* at notes 114–119, 128–134, 148–157.

[188] *See Loper Bright*, 144 S. Ct. at 2258.

[189] *Id*. (emphasis in original).

[190] *Id*., at 2259.

[191] *Id*., at 2260.

[192] *Id*., at 2262.

[193] *Id*.

[194] *Id*., at 2263.

[195] *Id*. (quoting Monaghan, *supra* note 32).

agencies that goes beyond the limited scope of implementing authority, crossing into territory constitutionally and statutorily reserved for the courts.[196] Finally, the Court, reviewing post-*Chevron* decisions, declared that their attempts to square *Chevron* with long-held precepts on the separate roles of courts and executive officers resulted in a "byzantine set of preconditions and exceptions"[197]—attempts that ultimately failed to save *Chevron* deference.

5. Loper Bright—*Clarity in Overruling Review Precedent*

This clarity is starkly at odds with other decisions altering details of the Court's governing standards for judicial review. Perhaps the most notable contrast is with the Court's decision in *Kisor v. Wilkie*,[198] which by sleight of hand adopted a new test to replace the "*Auer* doctrine," named after the Court's 1997 decision in *Auer v. Robbins*.[199] Although *Auer* was unanimous, a substantial number of justices and scholars over the next two decades recognized problems with its declaration that courts should defer to agency interpretations of their own ambiguous rules.[200] *Auer* was based on dictum in the Court's 1945 *Seminole Rock* decision,[201] which was neither necessary to nor relied upon for the Court's decision affirming the wartime Office of Price Administration's calculation of the price charged for crushed stone over a specific period—a dictum that rightly lay dormant for the next half-century.[202] *Kisor* purported to affirm *Auer*, despite incorporating all of the justices' prior criticisms of *Auer* into a new test that was almost completely opposite *Auer*'s holding.[203]

---

[196] *Id*., at 2263–68.

[197] *Id*., at 2269.

[198] 139 S. Ct. 2400 (2019).

[199] 519 U.S. 452 (1997).

[200] *See*, *e.g.*, Perez v. Mortgage Bankers Ass'n, 575 U.S. 92, 107–08 (2015) (Alito, J., concurring in part and concurring in judgment); *id*., at 109–11 (Scalia, J., concurring in judgment); *id*., at 112 (Thomas, J., concurring in judgment); Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 615–16 (2013) (Roberts, C.J., concurring); *id*., at 616–21 (Scalia, J., concurring in part and dissenting in part); Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155–59 (2012); Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 68 (2011) (Scalia, J., concurring).

[201] Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945) (*Seminole Rock*).

[202] *See*, *e.g.*, Bamzai, *Origins*, *supra* note 10, at 924–27; Ronald A. Cass, Auer *Deference: Doubling Down on Delegation's Defects*, 87 FORDHAM L. REV. 531 (2018) (Auer *Deference*); Michael P. Healy, *The Past, Present, and Future of* Auer *Deference:* Mead*, Form, and Function in Judicial Review of Agency Interpretations of Regulations*, 62 U. KAN. L. REV. 633, 644 (2014); Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of* Seminole Rock, 65 EMORY L.J. 47, 68–99 (2015); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996); Aaron L. Nielson, *Beyond* Seminole Rock, 105 GEO. L.J. 943, 953–55 (2017). Prior to *Auer*, the one significant departure from decades of Supreme Court decisions ignoring *Seminole Rock* was the Court's invocation of it in Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989).

[203] *See*, *e.g.*, Kisor v. Wilkie, 139 S. Ct. 2400, 2429–30, 2437–39 (2019) (Gorsuch, J.,

Although the *Kisor* opinion was especially bold in rewriting, but not overruling, an earlier doctrine—an approach that gave rise to the newly created verb "Kisorizing"[204]—it was closer than *Loper Bright* to the norm for decisions changing judicial review rules. Opinions of the Court in such cases generally have sought to correct perceived departures from judicial review norms without expressly overruling prior decisions, an approach that preserves judicial flexibility at the expense of clarity.[205]

Perhaps, the justices' reluctance to overturn prior judicial review standards in clear language signals the relatively narrow range of review standards the Court embraces and the justices' instinctive understanding that the critical elements of review are fairly stable notwithstanding differences among the justices in choosing how to describe those elements and which to emphasize in particular contexts. Or perhaps it signals hesitation to dismiss a tool that might be helpful in another case. Consider, for example, the Court's decision in *Department of Commerce v. New York*,[206] which brought back a version of hard look to invalidate a decision the majority admitted was within the discretion of the Secretary of Commerce.[207] The return of hard look review for that case was described hopefully by Justice Thomas as "an aberration—a ticket good for this day and this train only."[208] Maybe so. But that merely underscores the expectation that the Court, even when it departs from long-held standards for review in a particularly difficult or sensitive or peculiar case, returns to them in short order, whether openly or surreptitiously.

concurring in judgment); Ronald A. Cass, *Deference After* Kisor, REG. REV. (July 10, 2019), https://www.theregrewiew.org/2019/07/10/cass-deference-after-kisor (analogizing the *Auer* doctrine after *Kisor* to a zombie character in "Dead Man Walking").

[204] *See*, *e.g.*, Richard Pierce, *Court's New* Chevron *Analysis Likely to Follow One of These Paths*, BLOOMBERG LAW (Feb. 7, 2024), news.bloomberglaw.com/us-law-week/courts-new-chevron-analysis-likely-to-follow-one-of-these-paths.

[205] *See*, *e.g.*, Dept. of Homeland Security v. Regents of the Univ. of California, 591 U.S. 1, 28–33 (2020); Dept. of Commerce v. New York, 588 U.S. 752 (2019) (*Department of Commerce*); [OTHER CITES]; Cass, *Umpire Strikes Back*, *supra* note 53, at 581–82, 586–90.

[206] 588 U.S. 752 (2019).

[207] The Court expressly declined to hold that political considerations are impermissible bases for changing agency policy where the underlying statute vests broad discretion in the agency. *Id*., at 781. But the opinion for the Court also declared that the agency had to confess to the political basis for its decision in order for the agency's action to be upheld. *Id*., at 785. Beyond being internally inconsistent, the latter part of the decision was at odds with a line of cases stretching back to *United States v. Morgan*, 313 U.S. 409 (1941) (commonly referenced as *Morgan IV*). *See*, *e.g.*, *Department of Commerce*, 588 U.S.., at 792 (Thomas, J., concurring in part and dissenting in part); Huffman, *supra* note 12. *See also* Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 268 n.18 (1977); Aram A. Gavoor & Steven A. Platt, *Administrative Records and the Court*, 67 KANSAS L. REV. 1, 29, 35–39 (2018).

[208] *Department of Commerce*, 588 U.S., at 799 (Thomas, J., concurring in part and dissenting in part).

CONCLUSION

The recent years' controversy over, and the Court's unequivocal declared end to, four-decades of *Chevron* jurisprudence focused particular attention on standards for judicial review of administrative actions. The two most common reactions to *Chevron* and its demise both treat *Chevron* as markedly different from other judicial review standards. One reaction is that *Chevron* was wrong because it mandated deference to administrators' construction of law (and thank goodness it has been replaced).[209] The other typical reaction is that stronger versions of *Chevron* deference were right, that ending *Chevron* deference is simply a way to curtail the administrative state, and that courts should reinstate *Chevron* to protect important values served by government.[210]

A better perspective is that *Chevron* was a poorly crafted decision that, taken on its own, did little other than attempt to apply a generally accepted approach to review of administrative actions, correcting hard look review's tendency to promote excessive judicial intrusion into policy decisions best viewed as statutorily committed to administrators. Long-accepted standards of review, observing the constitutional division between judicial and executive powers, let judges decide the parameters of statutory directives but defer to administrative decisions implementing those directives so far as the relevant statute commits discretion to the administrators and the administrators' exercise of that discretion is within bounds of reason. Although the justices who decided *Chevron* endeavored to provide guidelines that would give effect to that traditional approach, the opinion's muddled language allowed decisions following *Chevron* to display excessive deference in some cases and excessive intrusion in others.

---

[209] *See*, *e.g.*, Jack M. Beermann, Loper Bright *and the Future of* Chevron *Deference*, 65 WM. & MARY L. REV. ONLINE 1 (2024) (writing before the decision, Professor Beermann cheered *Chevron*'s expected reversal and expressed hope that the overruling would be explicit and the replacement test clear); [OTHER CITES]. *See also* Vermeule, *supra* note 3 (generally supporting a replacement for *Chevron*'s test, but expressing doubt that *Loper Bright* fully replaces prior approaches).

[210] *See*, *e.g.*, Hammond, *supra* note 3; David L. Franklin, *This Supreme Court Has Betrayed Antonin Scalia's Legacy*, SLATE, June 28, 2024, https://slate.com/news-and-politics/2024/06/supreme-court-opinions-antonin-scalia-betrayal.html. *See also* Cary Coglianese & David B. Froomkin, Loper Bright*'s Disingenuity*, 174 U. PENN. L. REV. 91 (2025) (positing that *Loper Bright* both failed to articulate a complete approach to judicial review and that its approach would not meaningfully differ from *Chevron* in many cases); Rubin, *supra* note 3 (arguing that *Chevron*'s essential framework survives—and must survive—*Loper Bright*). A broader exposition of concerns respecting changes in doctrine—actual or proposed—that casts many of them as assaults on core aspects of the administrative state is Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017). *But see* Aaron L. Nielson, *Confessions of an "Anti-Administrativist,"* 131 HARV. L. REV. F. 1 (2017); Mila Sohoni, *A Bureaucracy—If You Can Keep It*, 131 HARV. L. REV. F. 13 (2017).

Had the *Chevron* opinion more clearly recognized the distinction between *interpretation* of law as the province of judges and *implementation* of laws' execution as the domain of officials who are given some degree of discretion over that aspect of governance, much of the controversy over *Chevron* likely would have been avoided. Many of the *Chevron*esque versions applied by the courts in *Chevron*'s name even more plainly failed to appreciate the constitutionally and statutorily proper domains for judges and administrators, but it remains to be seen how long the clear recognition of proper separation of judicial and executive domains will last and how well that recognition cabins each power to its legal place. As much as *Loper Bright*'s conclusion to the "*Chevron* experiment" should be welcomed, the history of that experiment—including review rules, such as the major questions doctrine, that arguably were formulated or sharpened in reaction to *Chevron* jurisprudence—suggests that the real legacy of *Loper Bright* is better recognition of the long-term baseline for judicial review. At least for now. Because this is not a revolution but merely a clear articulation of the thread that has run through American judicial review decisions for two centuries, closing the *Chevron* chapter may make significantly less—and less lasting—difference than that chapter's most adamant critics hope and its most stalwart supporters fear.