



## OUR ILLIBERAL ADMINISTRATIVE LAW

**Douglas H. Ginsburg & Steven Menashi\***

### INTRODUCTION

Administrative law governs the processes by which government agencies issue regulations and decide cases — two procedures called, respectively, rulemaking and adjudication. The statute setting out those procedures, the Administrative Procedure Act of 1946 (APA),<sup>1</sup> also provides that final agency actions are subject to judicial review. That is, a person aggrieved by an agency's decision — whether in the form of a rule of general application or of the final order in a specific case — may petition a court to set aside the agency's action on the ground that it is "arbitrary, capricious, an abuse of discretion, or otherwise"

---

\* Respectively, Senior Circuit Judge, U.S. Court of Appeals for the District of Columbia Circuit, and Professor of Law, Antonin Scalia Law School, George Mason University; and Assistant Professor of Law, Antonin Scalia Law School, George Mason University. The authors are faculty affiliates of the Center for the Study of the Administrative State. They thank Natascha Born, Christopher C. DeMuth, Richard A. Epstein, Samuel Estreicher, Amelia Frenkel, Michael Greve, and Aaron Nielson for helpful comments. An earlier version of this essay was presented as the 11th Friedrich A. von Hayek Lecture at New York University School of Law on October 15, 2015.

<sup>1</sup> Pub. L. No. 79 404, 60 Stat. 237 (1946).

unlawful, unauthorized by the statute the agency administers, or unconstitutional.<sup>2</sup> In sum, then, the APA regulates agency conduct and makes the courts the guarantors of their adherence to the processes mandated by the Congress.

The court that hears most challenges to administrative agency actions is the U.S. Court of Appeals for the District of Columbia Circuit. Last year, two Harvard Law School professors wrote an article entitled *Libertarian Administrative Law*, in which they argued that the D.C. Circuit “seeks to use administrative law to push and sometimes shove policy in libertarian directions, primarily through judge-made doctrines that lack solid support in the standard legal sources.”<sup>3</sup> They accuse the court, and several judges in particular, of infidelity to the teachings of the Supreme Court and of overturning agency decisions based upon ideological and therefore essentially lawless grounds. That article elicited a scholarly rejoinder from a professor at the University of Virginia Law School, who concluded that “[n]one of the administrative law decisions [the Harvard team] discuss” — “with one possible exception” that the author felt “not qualified to assess” — “is a substantial departure from the [Supreme] Court’s precedents.”<sup>4</sup> To that judgment, one might add that the Harvard team, in their zeal to uncover a libertarian conspiracy, evince little understanding of libertarianism. For example, they focus upon *Cook v. FDA*,<sup>5</sup> in which the D.C. Circuit held the FDA was statutorily bound to prevent the importation of drugs used to carry out the death penalty by lethal injection that the agency had determined were misbranded and unapproved.<sup>6</sup> According to the Harvards, that decision followed not from the text

---

<sup>2</sup> 5 U.S.C. § 706.

<sup>3</sup> Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 398 (2015).

<sup>4</sup> John Harrison, *Libertarian Administrative Law, Or Administrative Law?*, 82 U. CHI. L. REV. DIALOGUE 134, 135-36 (2015).

<sup>5</sup> 733 F.3d 1 (D.C. Cir. 2013).

<sup>6</sup> Sunstein & Vermeule, *supra* note 3, at 457-62.

of the Food, Drug, and Cosmetic Act,<sup>7</sup> but from the particular judges' libertarian opposition to the death penalty.<sup>8</sup> Yet neither libertarians in general – nor the author of *Cook* in particular – oppose the death penalty.<sup>9</sup> Throughout the article, the purported evidence of a libertarian conspiracy is similarly thin.

Instead of chasing phantom conspiracies, it might be useful to remember just what administrative law is and is meant to do. The broader liberal tradition, which is the dominant tradition in American constitutional law, “emphasizes limited government, checks and balances, and strong protection of individual rights.”<sup>10</sup> By adopting the APA, the Congress intended to apply that tradition to governance of the administrative state. Yet courts have since declined to give full effect to the judicial review provisions of the APA. It is possible for critics to view meaningful judicial review of agency action as indicative of libertarian ideological intrigue only because our administrative law doctrines have drifted so far from the liberal tradition.

This essay does not seek to re-litigate prior cases but to point out the extent of that drift. Part I identifies the purpose of the APA as checking administrative excess and suggests that purpose has been undermined through a deferential judicial posture, including a series of presumptions that favor the government in litigation. Part

---

<sup>7</sup> 21 U.S.C. § 381(a).

<sup>8</sup> Sunstein & Vermeule, *supra* note 3, at 462 (“In substantive terms, the decision is classically libertarian; opposition to the death penalty is a cause on which many libertarians of left and right converge.”).

<sup>9</sup> The author of *Cook* is a coauthor of this essay. On libertarians in general, see Murray N. Rothbard, *The Libertarian Position on Capital Punishment*, MISES DAILY (Jul. 13, 2010), <https://mises.org/library/libertarian-position-capital-punishment> (noting the lack of “a broad consensus on punishment theory . . . within the libertarian movement” and urging libertarians to “advocate capital punishment for all cases of murder, *except* in those cases where the victim has left a will instructing his heirs and assigns *not* to levy the death penalty on any possible murder”).

<sup>10</sup> Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2391 (2006).

II explains that courts have not only abandoned the nondelegation principle by allowing unrestrained explicit delegations but have exacerbated the problem by recognizing additional “implicit” delegations to agencies to fill statutory “gaps.” Part III argues that deference to agencies under *Chevron* inappropriately extends beyond policy-laden judgments that are properly reserved to agencies to include legal questions that should be decided by courts. Part IV shows that courts have allowed agencies to sidestep another restraint the APA provides — the notice-and-comment requirement for rulemaking — through adjudications, interpretive rules, and policy statements or guidance documents. In sum, our administrative law is marked not by fringe judicial zealotry but by judicial passivity in enforcing mainstream liberal norms.

#### I. ADMINISTRATIVE LAW AS ACCOUNTABILITY

Just as judicial review of legislation is at the heart of constitutional law, judicial oversight of administrative action is at the heart of administrative law. Only a few years after the APA was enacted, the Supreme Court made the point this way:

The Administrative Procedure Act was framed against a background of rapid expansion of the administrative process as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices. It created safeguards even narrower than the constitutional ones, against arbitrary official encroachment on private rights.<sup>11</sup>

To this end, the APA explicitly calls for the reviewing court to “decide all relevant questions of law, interpret constitutional and

---

<sup>11</sup> *United States v. Morton Salt Co.*, 338 U.S. 632, 644 (1950).

statutory provisions, and determine the meaning or applicability of the terms of an agency action.”<sup>12</sup>

A statute enacted to place “a check upon administrators” falls within the classical liberal tradition; the point is to protect the citizenry from official acts that are arbitrary or unlawful though not unconstitutional.<sup>13</sup> Yet the body of administrative law that has grown up under the APA no longer provides that mandated check upon the agencies; the courts no longer decide “all relevant questions of law.” Instead, courts defer to the agency’s own interpretation of the law it administers to a degree that has all but marginalized the courts, relegating them to the correction of

---

<sup>12</sup> 5 U.S.C. § 706; *see also* SEC v. Cogan, 201 F.2d 78, 86 87 (9th Cir. 1951) (“In enacting the Administrative Procedure Act Congress did not merely express a mood that questions of law are for the courts rather than agencies to decide, it so enacted with explicit phraseology.”); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 194 n.406 (1998) (“Both the House and the Senate Reports also state that ‘questions of law are for courts rather than agencies to decide in the last analysis.’”) (quoting H.R. REP. NO. 79 1980, at 44 (1946); S. REP. NO. 79 752, at 28 (1945)). To clarify that intention, a recently proposed amendment to the APA would provide expressly that courts are to decide legal questions “de novo.” Separation of Powers Restoration Act, S. 2724, 114th Cong. (2016); H.R. 4768, 114th Cong. (2016).

<sup>13</sup> The APA attracted broad congressional support because by 1946 supporters of the New Deal, no longer distrustful of the courts and worried about retaining the presidency, came to embrace judicial oversight as a way to promote administrative regularity. *See* Matthew D. McCubbins, Roger Noll & Barry R. Weingast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180, 183 (1999). The legislation itself manifestly served “[t]he twin goals of procedural justice and agency control.” *Id.* at 180; *see also* STAFF OF SENATE COMM. ON THE JUDICIARY, ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 248, 79th Cong., at 252 (1946) (“The purpose of the bill is to assure that the administration of government through administrative officers and agencies shall be conducted according to established and published procedures which adequately protect the private interests involved, the making of only reasonable and authorized regulations, the settlement of disputes in accordance with the law and the evidence, the impartial conferring of authorized benefits or privileges, and the effectuation of the declared policies of Congress in full.”).

procedural errors and of only the most blatant overreaching of an agency's statutory mandate.<sup>14</sup>

In one recent case, the EPA, when making its decision to regulate the emission of hazardous air pollutants from power plants, had refused to consider the cost its regulation would impose upon the regulated firms.<sup>15</sup> The Clean Air Act broadly authorizes the EPA to regulate hazardous emissions insofar as it concludes "regulation is appropriate and necessary."<sup>16</sup> The EPA estimated that the cost of its regulations would be \$9.6 billion per year, but it found the quantifiable benefits from the resulting reduction in emissions of hazardous air pollutant would be only \$4 to \$6 million a year. When the regulated firms and 23 states sought review in the D.C. Circuit, the court upheld the agency's decision, two to one, and the majority was on solid ground; the statutory term "appropriate" is inherently ambiguous and, under the Supreme Court's decision in *Chevron v. National Resources Defense Council*, the interpretation of ambiguous terms is the province of the agency, subject only to the limitation, such as it is, that the agency's interpretation be "reasonable."<sup>17</sup> Judge Kavanaugh dissented on this point, observing that considering the cost of a regulation is so clearly "just common sense and sound government practice" that the agency's failure to

---

<sup>14</sup> Cf. Geoffrey Parsons Miller, *Judges Are Not Potted Plants*, COMPLIANCE & ENFORCEMENT (May 18, 2016), <https://wp.nyu.edu/compliance-enforcement/2016/05/18/judges-are-not-potted-plants/> ("Rights of judicial review were once ubiquitous and meaningful. Now agency action is evaluated under an 'arbitrary or capricious' standard that is little more than a charter for judicial abdication."); see also *id.* ("At one time, agency action was thought to be subject to constitutional limitations such as the right to jury trial, the right to be free of unreasonable searches and seizures, and the guarantee against excessive fines. These requirements have now eroded in administrative cases to the point where they offer only the illusion but not the reality of recourse.").

<sup>15</sup> *White Stallion Energy Ctr. v. EPA*, 748 F.3d 1222, 1236 (D.C. Cir. 2014).

<sup>16</sup> 42 U.S.C. § 7412(n)(1)(A).

<sup>17</sup> 467 U.S. 837, 844 (1984).

do so could not reasonably be deemed “appropriate.”<sup>18</sup> The Supreme Court reversed the decision of the court of appeals, vindicating Judge Kavanaugh’s point about common sense. In the words of the High Court, “One would not say that it is even rational, never mind ‘appropriate,’ to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits.”<sup>19</sup> Sadly, however, the vote was five to four and ran along predictable ideological lines.

Although the agency was overturned in the end, under the APA’s condemnation of unreasonable and arbitrary agency action this should not have been a close case. The saga, in which both reviewing courts were narrowly divided, illustrates just how far the law has drifted from the mandate of the APA to act “as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices.”<sup>20</sup> If this EPA case is at the boundary at which agency actions shade from reasonable to unreasonable, then contrary to the Harvards’ allegation, the problem is not defiant circuit judges overturning agency actions for ideological reasons but doctrines of extreme deference by which the Supreme Court has relieved the judiciary, in all but the most egregious of cases, of its responsibility to provide meaningful review.

Supremely decreed deference extends well beyond an agency’s interpretation of statutory terms when it is promulgating regulations – a process that, under the APA, requires it first to give public notice of its proposed regulation, then to solicit and consider comments and, when it issues its final regulation, to respond to those comments. Courts must also defer to the agency’s interpretation of its own regulations, even when that interpretation

---

<sup>18</sup> *White Stallion Energy Ctr.*, 748 F.3d at 1259 (Kavanaugh, J., concurring in part and dissenting in part).

<sup>19</sup> *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015).

<sup>20</sup> *Morton Salt*, 338 U.S. at 644.

is advanced for the first time in a brief during the course of litigation – “unless,” the Supreme Court has told us, “that interpretation is ‘plainly erroneous or inconsistent with the regulation.’”<sup>21</sup> An agency can evade even that degree of judicial oversight by issuing informal “guidances” or “policy statements,” which have the added appeal of not requiring public notice and comment or otherwise giving advance notice to affected parties.<sup>22</sup>

Why all this deference to administrative officials? The basic assumption is that agencies are staffed by experts in their field who apply their expertise in what they reasonably judge to be the public interest. That Wilsonian naïveté was made explicit in the New Deal frenzy that brought forth perhaps a score of economic regulatory schemes – many of which have since gone to their reward – and was at least implicit in President Nixon’s proliferation of risk regulatory agencies, such as the EPA (1970), the Consumer Product Safety Commission (1972), and the Occupational Safety and Health Administration (1970). Since then, however, there has emerged a major subfield in theoretical and empirical economics called “public choice,” the consistent findings of which are that agencies are in fact staffed by people who, whatever their expertise, have their own needs, preferences, and ambitions, making any correlation between their actions and the public interest at best a matter of opinion and at worst a mere fortuity.<sup>23</sup>

Sometimes the claim to expertise is entirely fraudulent; the most well-documented case is that of the National Labor Relations Board, the partisan majority of which routinely displaces the previous majority’s psychological assertions about what employer

---

<sup>21</sup> *Chase Bank v. McCoy*, 562 U.S. 195, 208 (2011) (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

<sup>22</sup> See generally Richard A. Epstein, *The Role of Guidances in Modern Administrative Procedure: The Case for De Novo Review*, 7 J.L. ANALYSIS 1 (advance access, Nov. 19, 2015).

<sup>23</sup> See generally MAXWELL L. STEARNS & TODD J. ZYWICKI, *PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW* (2009).



tactics do or do not coerce workers when they are deciding whether to vote for union representation.<sup>24</sup> Most often, however, expertise is simply a euphemism for policy judgments. The permanent staff of an agency may have a great deal of technical expertise, but the agency's ultimate decisions are made by the experts' political masters, who have sufficient discretion that they can make decisions based upon their own policy preferences, fearing neither that the expert staff will not support them nor that a court will undo their handiwork.

When a court reviews the agency's decision, therefore, it is typically reviewing a policy decision, yet it defers to the agency on the ground that the decision is the product of the agency's expertise, which is presumed to give the agency a superior understanding of the statute it administers. To take a contemporary example, consider the decision of the Federal Communications Commission to adopt the so-called "net neutrality" rules, which will regulate broadband providers along the lines of the regulations imposed upon local utilities, such as monopoly electric and gas companies.<sup>25</sup> In particular, the rules prohibit Internet service providers from charging different prices for the transmission of content from different websites, so-called "paid prioritization."<sup>26</sup>

There are policy arguments to be made for and against this type of regulation, but the principal legal question for the courts was whether the agency had authority to regulate broadband

---

<sup>24</sup> See Julius G. Getman & Stephen B. Goldberg, *The Myth of Labor Board Expertise*, 39 U. CHI. L. REV. 681 (1972); see also Douglas H. Ginsburg, *Appellate Courts and Independent Experts*, 60 CASE W. RES. L. REV. 303, 318-19 (2010) ("The empirical evidence suggests the decisions of the Board reflect more the majority's partisan views than any expert insight into the psychology of voters in union elections, and that is why the Board's position on these matters changes whenever the political party in the majority changes.").

<sup>25</sup> See Protecting and Promoting the Open Internet, 80 Fed. Reg. 19,738, 19,791 (Apr. 13, 2015).

<sup>26</sup> See *id.* at 19,740.

providers.<sup>27</sup> One should not be surprised, therefore, that the FCC's brief defending its decision cited *Chevron* ten times.<sup>28</sup> Because the FCC had previously decided that the Internet was not a telecommunications service and therefore beyond its authority to regulate in this way – and its present decision reversed that position – the Commission emphasized, upon good authority, that “[a]n agency is free, within the ‘permissible’ bounds of ambiguous language, and so long as its choice is explained, to revise its statutory interpretation to serve its policy goals.”<sup>29</sup> As this passage freely admits, the agency changed its policy goals and therefore changed its interpretation of the statute. Not vice versa. Yet the court was not asked what the statute means, or even which was the better interpretation, the old or the new. Instead, the court was asked only whether the agency now could reasonably interpret the statute to mean the opposite of what it said before.<sup>30</sup> Recall, again, that the APA provides for the reviewing court to “decide all relevant questions of law [and] interpret . . . statutory provisions.”<sup>31</sup> That is not the law anymore, however; the Supreme Court has decreed that the agency itself shall interpret the statute that defines and supposedly limits its authority. The reviewing court's role is only to catch the agency if it strays beyond the permissible bounds of ambiguous statutory wording.

Judicial oversight of agency action, and hence the ability of a citizen successfully to challenge an agency, is also constrained by certain presumptions in favor of the government. As one court of appeals has accurately stated, “There is a strong presumption in the law that administrative actions are correct and taken in good

---

<sup>27</sup> See *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 701 (D.C. Cir. 2016).

<sup>28</sup> Brief for Respondents, *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016) (No. 15 1063), 2015 WL 5336945.

<sup>29</sup> *Id.* at 71 (citing *Chevron*, 467 U.S. at 843; *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)).

<sup>30</sup> It could. See *U.S. Telecom Ass'n*, 825 F.3d at 701 06.

<sup>31</sup> 5 U.S.C. § 706.

faith.”<sup>32</sup> Or as the D.C. Circuit has “often said, ‘agencies are entitled to a presumption of administrative regularity and good faith.’”<sup>33</sup> The Ninth Circuit’s statement is even more direct: “unlike in the case of a private party, we presume the government is acting in good faith.”<sup>34</sup>

That presumption, of course, makes it harder for an individual to prevail against the government than against a private party. In private litigation, the plaintiff bears the burden of proving its case by a preponderance of the evidence, which means more than 50 percent; the defendant ordinarily is not entitled to a presumption that makes the plaintiff’s burden any greater than that. Why the difference? Although courts have endlessly repeated that there is a presumption in favor of the agency, they have nowhere explained, let alone justified, the presumption.

If there is to be any presumption that one party has acted in good faith and proceeded regularly – that is, in accordance with all applicable rules – one might think it would not be the government but rather private entities, which are generally subject to the rigors of competition that cause them to safeguard their reputations for honesty and reliability. When then-Chief Judge Cardozo referred to “the morals of the market place,” he did so not with disdain but properly to distinguish the even stricter obligations of a trustee from those of one “acting at arm’s length” in the marketplace.<sup>35</sup>

There is no need for a presumption favoring either party in litigation. It is common knowledge that both government and private actors often fail to act in good faith and regularity. The presumption of good faith in favor of the government, and hence of every government employee – from Lois Lerner’s IRS to the Secret Service and DEA agents caught up in prostitution scandals – is not

---

<sup>32</sup> Sanders v. U.S. Postal Serv., 801 F.2d 1328, 1331 (Fed. Cir. 1986).

<sup>33</sup> FTC v. Invention Submission Corp., 965 F.2d 1086, 1091 (D.C. Cir. 1992).

<sup>34</sup> America Cargo Transport v. United States, 625 F.3d 1176, 1180 (9th Cir. 2010).

<sup>35</sup> Meinhard v. Salmon, 164 N.E. 545, 547 (N.Y. 1928).

supported by any empirical evidence that public employees as a whole are better (or, for that matter, worse) than the rest of us.<sup>36</sup> It apparently reflects nothing more than a fairy tale about selfless “public servants” who labor lifelong for modest wages, or accept political appointments or run for office, only because of their noble commitment to the public good. Without such an assumption, it would be difficult to explain a statement like the following, from a decision in a case brought by a government contractor who claimed his contract was wrongfully terminated when it became apparent that he and the government’s contracting officer had put different interpretations upon a material term: “A contractor can overcome [the presumption that the government acts in good faith] only if it shows through ‘well-nigh irrefragable proof’ that the government had a specific intent to injure it.”<sup>37</sup> Under that standard, a private party in litigation with the government cannot prove bad faith by a mere preponderance of the evidence on that point; it must have evidence that is indisputable.<sup>38</sup> Apparently, the court considers it not just improbable but almost unthinkable that a government regulator would act in bad faith out of self-interest, bureaucratic imperatives, or ideological zeal.<sup>39</sup>

---

<sup>36</sup> See, e.g., TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, REFERENCE NO. 2013 10 053, FINAL AUDIT REPORT: INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX EXEMPT APPLICATIONS FOR REVIEW (May 14, 2013) (reviewing IRS targeting of politically disfavored groups).

<sup>37</sup> *Caldwell & Santmyer, Inc. v. Glickman*, 55 F.3d 1578, 1581 (Fed. Cir. 1995).

<sup>38</sup> *Am Pro Protective Agency v. United States*, 281 F.3d 1234, 1240 (Fed. Cir. 2002) (“‘Well nigh irrefragable’ proof . . . refers to evidence that ‘cannot be refuted or disproved; incontrovertible, incontestable, indisputable, irrefutable, undeniable.’”) (quoting OXFORD ENGLISH DICTIONARY 93 (2d ed. 1991)); see also *id.* (“[S]howing a government official acted in bad faith is intended to be very difficult, and that something stronger than a ‘preponderance of evidence’ is necessary to overcome the presumption that he acted in good faith.”).

<sup>39</sup> Courts also assume the government, even when it has acted improperly, is less likely to re offend. See, e.g., *Coral Springs St. Sys. v. City of Sunrise*, 371 F.3d 1320, 1328 29 (11th Cir. 2004) (“[G]overnmental entities and officials have been given considerably more leeway than private parties in the presumption that they are

A similar trust in the government's good faith may affect a court's choice of remedy. Sometimes a court will fault an agency but refrain from vacating the rule because the court expects that the agency will be able to justify the rule on remand once it corrects its mistake.<sup>40</sup> That approach, however, may allow agencies to ignore the defects that the court has identified – and agencies have done just that, especially in the absence of a vigilant plaintiff to alert the court to agency inaction.<sup>41</sup> Experience thus suggests that perhaps judicial confidence in the good faith of administrative agencies has not been adequately justified, and courts ought to maintain healthy skepticism.

A court applies a separate presumption – the presumption of regularity – when a litigant contends a government official failed to comply with his duty or a document produced by the government is unreliable. To rebut that presumption, the Supreme Court requires “clear evidence to the contrary.”<sup>42</sup> No such presumption attaches to the conduct of a private party; a dealer in securities or a commercial pilot can lose his license and his livelihood if the licensing agency produces merely “substantial evidence,”<sup>43</sup> short even of a bare preponderance of the evidence, that he failed to comply with an agency regulation. If the dealer or pilot challenges the termination of his license, however, the

---

unlikely to resume illegal activities.”); *Ragsdale v. Turnock*, 841 F.2d 1358, 1365 (7th Cir. 1988) (“[C]essation of the allegedly illegal conduct by government officials has been treated with more solicitude by the courts than similar action by private parties.”).

<sup>40</sup> See generally STEPHANIE J. TATHAM, THE UNUSUAL REMEDY OF REMAND WITHOUT VACATUR, FINAL REPORT FOR THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (Jan. 3, 2014); Kristina Daugirdas, Note, *Evaluating Remand Without Vacatur: A New Judicial Remedy for Defective Agency Rulemakings*, 80 N.Y.U. L. REV. 278 (2005).

<sup>41</sup> *Id.* at 302 (“[I]n one third of the examined cases, agency action in response to the remand was extremely delayed (taking longer than five years).”).

<sup>42</sup> See, e.g., *Brown v. Plata*, 563 U.S. 493, 541 (2011) (“[I]n the absence of clear evidence to the contrary, courts presume that public officers have properly discharged their official duties.”) (alteration omitted).

<sup>43</sup> 5 U.S.C. § 706(2)(E).

bureaucrat who monitors his conduct is presumed properly to have discharged his duty absent “clear evidence to the contrary.”

In a recent case involving a detainee at Guantanamo Bay, the D.C. Circuit reversed a district court’s grant of a writ of habeas corpus because the judge had failed to accord an official government record a presumption of regularity. The document in question was a report recounting both the detainee’s movements across borders in the Middle East and his statements during interrogations, at which he is said to have “admitted being recruited for jihad, receiving weapons training from the Taliban, and serving on the front line with other Taliban troops.”<sup>44</sup> The detainee, however, maintained his interrogators “so garbled his words that their summary bears no relation to what he actually said.”<sup>45</sup> The district court found there was “a serious question as to whether the [Report] accurately reflects [the detainee’s] words, the incriminating facts in the [Report] are not corroborated, and [the detainee] has presented a plausible alternative story to explain his travel,” which *was* corroborated by documentary evidence.<sup>46</sup>

Judge Tatel agreed with the trial court. In his dissent, he said “a key step in the logic of applying a presumption of regularity [is] that the challenged document emerged from a process that we can safely rely upon to produce accurate information” because it is “transparent, accessible, and often familiar.”<sup>47</sup> For example, we presume that “state court documents accurately reflect the proceedings they describe” and “that mail was duly handled and delivered.”<sup>48</sup> According to the majority opinion, however, “[c]ourts regularly apply the presumption to government actions that are

---

<sup>44</sup> *Latif v. Obama*, 677 F.3d 1175, 1178 (D.C. Cir. 2012).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 1206 (Tatel, J., dissenting) (quoting *Abdah v. Obama*, No. 04 1254, 2010 WL 3270761, at \*9 (D.D.C. Aug. 16, 2010)).

<sup>47</sup> *Id.* at 1207 08.

<sup>48</sup> *Id.* at 1207.

anything but ‘transparent,’ ‘accessible,’ and ‘familiar.’ The presumption of regularity is founded on inter-branch and inter-governmental comity, not our own judicial expertise with the relevant government conduct.”<sup>49</sup> In other words, courts credit the executive branch and other governments – including the states and foreign governments in the examples the court gave – more readily than they credit non-governmental institutions and individuals.

Courts defer most markedly to administrative agencies with respect to scientific and technical questions and to remedies. In 2001 the Congress passed the Information Quality Act specifically to prevent agencies from relying upon dubious scientific evidence.<sup>50</sup> Government-wide guidelines put out by the Office of Management and Budget set minimum standards for peer review of studies upon which an agency may rely.<sup>51</sup> The secondary literature, however, suggests that agencies frequently rely upon studies that do not meet minimum standards and that citizens who challenge them are received skeptically in court.<sup>52</sup> Because agencies generally need only “substantial evidence,” which may be far short of a preponderance of the evidence, to prevail in court, lax adherence to the Information Quality Act inflates the effect of judicial deference to agencies’ scientific and technical decisions.

---

<sup>49</sup> *Id.* at 1182 (majority opinion).

<sup>50</sup> Pub. L. No. 106 554, § 515.

<sup>51</sup> Office of Management and Budget, Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 8,452 (Feb. 22, 2002).

<sup>52</sup> Lawrence A. Kogan, *Revitalizing the Information Quality Act as a Procedural Cure for Unsound Regulatory Science: A Greenhouse Gas Rulemaking Case Study* 15 26 (Wash. Legal Found., Working Paper No. 191, 2015); *see also* Prime Time Int’l Co. v. Vilsack, 599 F.3d 678, 684 85 (D.C. Cir. 2010). Agencies also rely upon outdated methods despite academic criticism. *See, e.g.,* Art Fraas & Randall Lutter, *Uncertain Benefits Estimates for Reductions in Fine Particle Concentrations*, 33 RISK ANALYSIS 434 (2013) (questioning the methodology relied upon by the EPA for estimating the benefits of improved air quality).

As the D.C. Circuit said in an FCC case, agency discretion is “at [its] zenith and judicial power at its nadir” with respect to an agency’s choice of remedies.<sup>53</sup> There are, to be sure, instances in which the choice of remedies itself implicates an agency’s true technical expertise. The FCC, for example, may bar a transmitter from a particular location. But the agency’s technical expertise is all the more reason that its remedial decision should not get special deference from a court: If the agency is truly expert, then it should be able to make its case. If the affected party were to propose a different remedy, it is quite illiberal to defer to the agency simply because it is an agency and not to require the agency to put forth a convincing justification. In a recent case challenging a remedy imposed by the Federal Energy Regulatory Commission, the D.C. Circuit speculated that “[p]erhaps because of the multiplicity of potentially relevant factors and the broad range of choices, we approach agencies’ decisions on remedies with exceptional deference.”<sup>54</sup> One appreciates the court’s obvious uncertainty about exactly why it is so deferential on remedies. Intuitively, it would seem the proper role for the judiciary is that of a neutral arbiter, hearing both sides with equal respect. An appellate court often reviews remedial decisions by a district court under a deferential standard on the theory that the district court had direct access to the facts, having heard the testimony and delved deeply into the record. Perhaps there is room for similar deference when an agency has engaged in a similarly intensive fact-finding process.<sup>55</sup> But the

---

<sup>53</sup> *Press Commc’ns LLC v. FCC*, 194 F.3d 174 (D.C. Cir. 1999) (quoting *American Trucking Ass’ns v. ICC*, 697 F.2d 1146, 1153 (D.C. Cir. 1983)).

<sup>54</sup> *Braintree Elec. Light Dep’t v. FERC*, 550 F.3d 6, 15 (D.C. Cir. 2008).

<sup>55</sup> We say “perhaps” because administrative agencies are not required to adhere to the Federal Rules of Evidence, and most do not. *See generally* William H. Kuehne, *Standards of Evidence in Administrative Proceedings*, 49 N.Y.L. SCH. L. REV. 829, 833 (2005) (noting that agency regulations usually “expressly exclude the restrictive application of the FRE”). The rigor of agency fact finding therefore varies from one agency, if not one case, to another.



notion that judicial judgment must recede because remedies are peculiarly a matter of administrative expertise seems unfounded. If the choice of a remedy entails a technical issue, let the court hear the arguments for and against, exactly as it would if the issue were to arise in private litigation where the plaintiff would bear the burden of persuasion, each side would produce its expert, and the judge would have to decide which is more credible and persuasive on the issue at hand. If the agency truly has superior expertise, it should be able to justify its remedy without the aid of a judicial thumb on the scale of justice.

## II. NONDELEGATION

With the courts in this permissive posture, ostensibly based upon deference to the political branches, one might at least expect the courts to ensure that agencies remain accountable to the Congress that provides and defines the agencies' authority. There remains in American constitutional law, at least formally, a nondelegation doctrine, which aims to guarantee that agencies act only as agents of the national legislature and not as a law unto themselves. If an agency has so much discretion that it need not conform its conduct to any "intelligible principle" set by the Congress in advance, then the agency is impermissibly exercising legislative power, which may not be delegated.<sup>56</sup> The Supreme Court continues to maintain that the Congress may not delegate legislative power to any other body,<sup>57</sup> but as Justice Thomas recently observed, "it has become increasingly clear . . . that the test [the Court has] applied to distinguish legislative from executive power largely abdicates our duty to enforce that prohibition."<sup>58</sup> The

---

<sup>56</sup> *J.W. Hampton Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

<sup>57</sup> *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001).

<sup>58</sup> *Dep't of Transp. v. Ass'n of Am. Railroads*, 135 S. Ct. 1225, 1246 (2015) (Thomas, J., concurring in the judgment).

Court's standard of "intelligibility" has become so flaccid that the Congress may delegate authority for an agency to regulate the private sector in "the 'public interest, convenience, or necessity'"<sup>59</sup> or to be "generally fair and equitable."<sup>60</sup> These broad standards provide no meaningful check upon agency discretion.

The evisceration of the nondelegation doctrine has left a void in the constitutional structure so glaring that even the Court that eliminated the doctrine finds it necessary sometimes to fill the void through other means. Thus, we often see nondelegation principles at play in the guise of the Due Process Clause, or the "void for vagueness" doctrine, or the requirements of bicameralism and presentment, or canons of construction that cabin executive discretion.<sup>61</sup> The re-appearance of nondelegation principles in disguise undermines the Supreme Court's own rationale that policing the line between permissible and impermissible delegation is beyond judicial competence.<sup>62</sup> This point is buttressed by the experience of the state courts, the majority of which still apply a robust nondelegation doctrine under their state constitutions.<sup>63</sup> The New York Court of Appeals, for example, recently held that "[b]y choosing among competing policy goals, without any legislative delegation or guidance," an executive agency "engaged in law-making and thus infringed upon the legislative jurisdiction of the City Council."<sup>64</sup> Under that state's constitution, an executive

---

<sup>59</sup> Nat'l Broad. Co. v. United States, 319 U.S. 190, 215 (1943).

<sup>60</sup> Yakus v. United States, 321 U.S. 414, 420 (1944).

<sup>61</sup> See Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. PA. J. CONST. L. 251, 264 n.72 (2010).

<sup>62</sup> See, e.g., *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting).

<sup>63</sup> See Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1195-96 (1999) (identifying twenty states in which "statutes are periodically struck on nondelegation grounds" and twenty three states in which "state courts are much more likely to strike down statutes [on nondelegation grounds] than their federal counterparts").

<sup>64</sup> *N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene*, 23 N.Y.3d 681, 690-92 (2014) (holding the New York City

agency may not “assume[] for itself the open-ended discretion to choose ends that is the prerogative of a Legislature.”<sup>65</sup> That is a teaching we will not soon hear from the Supreme Court of the United States.

In federal administrative law, the problem created by the lack of a nondelegation doctrine is compounded by doctrines of judicial deference. The courts not only honor the Congress’s explicit delegations of broad law-making authority; they add an additional, judicially created delegation of interpretive authority on “the theory that a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.”<sup>66</sup> That theory, although obviously a legal fiction, expands the delegation of legislative power to an unjustifiable degree.

It is unjustifiable because courts apply different – and more realistic – presumptions about “congressional intent” when they, rather than the agencies, confront statutory gaps.<sup>67</sup> When interpreting statutes, judges recognize that filling in the statutory gaps is not necessarily, or perhaps even often, consistent with congressional intent. The Congress often leaves what may appear to

---

Board of Health, in adopting a rule setting the maximum size of “sugary drinks” that could be offered for sale, “violated the state principle of separation of powers”); *see also* *Boreali v. Axelrod*, 71 N.Y.2d 1, 12 (1987) (invalidating regulations governing smoking in public areas because “[s]triking the proper balance among health concerns, cost and privacy interests . . . is a uniquely legislative function”).

<sup>65</sup> *N.Y. Statewide Coal. of Hispanic Chambers of Commerce*, 23 N.Y.3d at 696 (internal quotation marks and alterations omitted); *see also* *Under 21 v. City of New York*, 65 N.Y.2d 344, 359 (1985) (holding an executive order issued by the Mayor to prohibit city contractors from discriminating in employment on the basis of sexual orientation violated the separation of powers because “an executive may not usurp the legislative function by enacting social policies not adopted by the Legislature”).

<sup>66</sup> *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

<sup>67</sup> *See* Antonin Scalia, *Common Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 17 (Amy Gutmann ed., 1997) (“[W]e do not really look for subjective legislative intent. We look for a sort of ‘objectified’ intent – the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*.”).

be a gap because it has decided to regulate only so far and no further. This might be the product of a compromise among the legislators, of their inability to resolve a particular question, or of their sense of the costs and benefits of regulating further.<sup>68</sup> As Judge Easterbrook has observed, “Almost all statutes are compromises, and the cornerstone of many a compromise is the decision, usually unexpressed, to leave certain issues unresolved.”<sup>69</sup> Gap-filling therefore dishonors congressional intent; expanding the reach of a statute beyond its precise terms upsets the terms of the underlying legislative compromise and, by signaling that a court will “plug” any “loopholes” it detects, the practice undermines the ability of the legislature to reach stable compromises in the future.<sup>70</sup>

If these considerations make it improper for the independent judiciary to engage in the creative business of statutory gap-filling, then it makes even less sense for an administrative agency – which has only the authority the Congress has delegated – to have that power. Agency gap-filling extends the imposition upon regulated

---

<sup>68</sup> Filling in a statutory “gap” under these circumstances extends a statute beyond its terms. This is not to say that an agency cannot resolve issues on which the statute is silent but that must be resolved in order to operationalize the statute as the Congress has directed. That is a distinct question discussed *infra* at notes 117-19 and accompanying text.

<sup>69</sup> Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 540 (1983); *see also id.* at 541 (“Legislators seeking only to further the public interest may conclude that the provision of public rules should reach so far and no farther, whether because of deliberate compromise, because of respect for private orderings, or because of uncertainty coupled with concern that to regulate in the face of the unknown is to risk loss for little gain.”).

<sup>70</sup> *Id.* at 540 (“What matters to the compromisers is reducing the chance that their work will be invoked subsequently to achieve more, or less, than they intended, thereby upsetting the balance of the package.”); *see also* Steven Menashi, *Article III as a Constitutional Compromise: Modern Textualism and State Sovereign Immunity*, 84 NOTRE DAME L. REV. 1135, 1187 (2009) (“If Congress did not actually resolve those broader questions, assuming that the [statute] did resolve them dishonors a congressional choice to address only one limited question at a time (or at all).”).

parties beyond what the Congress has provided.<sup>71</sup> If we took seriously the notion of a government of limited powers, it would make more sense to require agencies to fill gaps only where necessary and only through the least restrictive means. When it has passed a statute, the Congress has regulated only so far. The agency lacks authority to expand the scope of regulation. At least, there is no more justification for the agency to read into its statute an implicit authorization to expand its regulatory scope than there is for a court to do so. As Easterbrook puts it, “Like nature, regulation abhors a vacuum, and the existence of one law may create problems requiring more laws. Until the legislature supplies the fix or authorizes someone else to do so, there is no reason for judges” — or, one could add, administrators — “to rush in.”<sup>72</sup>

A framework for constraining agency discretion in the implementation or “gap-filling” phase might be provided by President Clinton’s Executive Order 12866, which succeeded President Reagan’s executive orders on regulatory review and is still in force. Under that order, federal agencies are to promulgate regulations only insofar as the regulations are “required by law,” “are necessary to interpret the law,” or “are made necessary by compelling public need.”<sup>73</sup> That last criterion may provide a large loophole for agencies intent upon regulating a particular activity; in fact, the Order subjects to robust review by OMB only “significant regulatory actions,” meaning those having an annual effect on the economy of \$100 million or more. But Executive Order 12866 still gets at the point that agencies ought to regulate only insofar as necessary to fulfill their specific statutory mandates.

The Order provides an additional check upon agency discretion by directing agencies to conduct a cost-benefit analysis “[i]n

---

<sup>71</sup> See *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986) (“[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.”).

<sup>72</sup> Easterbrook, *supra* note 69, at 550.

<sup>73</sup> Exec. Order No. 12866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

deciding whether and how to regulate” and provides that “agencies should select those approaches that maximize net benefits . . . unless a statute requires another regulatory approach.”<sup>74</sup> A recent legislative proposal would allow a party aggrieved by an agency rulemaking to petition for judicial review of the agency’s cost-benefit analysis.<sup>75</sup> Yet it is reasonable to think the APA already requires a showing that benefits exceed costs in requiring that agency action not be arbitrary and capricious.<sup>76</sup> As the Supreme Court reiterated in *Michigan v. EPA*, agencies “are required to engage in ‘reasoned decisionmaking’” and must follow a “logical and rational” process that “rests ‘on a consideration of the relevant factors.’”<sup>77</sup> It simply cannot be reasonable or rational to impose a regulation that is not cost-beneficial. The only reason for adopting a regulation that does more harm than good is to benefit one group at the expense of another even though doing so makes society as a whole worse off.<sup>78</sup>

The notion that a net benefit is an attribute of reasonable or rational decisionmaking is well accepted. In tort, for example, a defendant will not be held negligent for having failed to spend

---

<sup>74</sup> *Id.*

<sup>75</sup> See Christopher DeMuth, *The Regulatory State*, NAT’L AFFAIRS, Summer 2012, at 70, 78-79 (describing the Regulatory Accountability Act, which “would amend the Administrative Procedure Act to make the cost benefit standard, as applied by the White House review programs since 1981, a matter of statutory law, subject to judicial review”).

<sup>76</sup> 5 U.S.C. § 706(2)(A).

<sup>77</sup> *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015) (quoting *Allentown Mack Sales & Serv. v. NLRB*, 522 U.S. 359, 374 (1998) and *Motor Vehicle Mfrs. Ass’n v. State Farm*, 463 U.S. 29, 43 (1983)); see also *State Farm*, 463 U.S. at 43 (“[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”); *Kansas City v. HUD*, 923 F.2d 188, 189 (D.C. Cir. 1991) (requiring “reasoned decision making”); *Advanced Data Concepts, Inc. v. United States*, 216 F.3d 1054, 1058 (Fed. Cir. 2000) (“The arbitrary and capricious standard . . . requires a reviewing court to sustain an agency action evincing rational reasoning and consideration of relevant factors.”).

<sup>78</sup> See Steven Menashi & Douglas H. Ginsburg, *Rational Basis with Economic Bite*, 8 NYU J.L. & LIBERTY 1055, 1086-97 (2014) (discussing rent seeking legislation).

money on a precaution that would cost more than the expected harm it would avoid.<sup>79</sup> It is not a stretch, therefore, to conclude that “reasoned decisionmaking” requires that the benefits exceed the costs. If a private challenger can make a prima facie case that the cost of a regulation exceeds the benefits, one would think he has stated a claim under the APA and the court ought to resolve the disagreement. The agency legitimately might point to non-quantifiable benefits – the disruption of Inuit culture, for example – and a court can evaluate those claimed benefits under a standard of reasonableness. By cabining the delegation of interpretive power to the agency, that approach would be more faithful to the APA, which contemplated that the courts would provide a meaningful check upon administrative “zeal.”<sup>80</sup>

### III. CHEVRON DEFERENCE

Courts allow agencies not only to fill statutory gaps but even to interpret and re-interpret the terms of a statute. *Chevron* proceeds from the premise that the Congress’s delegation of rulemaking authority to the agency entails the delegation of statutory interpretative authority as well, but since *Chevron* we have learned that courts must defer to agency interpretations that appear not only in a regulation but in virtually any document issued by the agency, including litigation documents.<sup>81</sup> And that deference extends not only to applications of the agency’s authority but even to the question whether the agency has authority in the first place.<sup>82</sup>

---

<sup>79</sup> See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (Hand, J.) (“[I]f the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P.”); cf. Alan D. Miller & Ronen Perry, *The Reasonable Person*, 87 N.Y.U. L. REV. 323, 326 (2012) (“The so called Hand formula is a normative definition of reasonableness. . . . [T]he conduct is deemed reasonable if it is cost effective.”).

<sup>80</sup> *Morton Salt*, 338 U.S. at 644.

<sup>81</sup> See *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

<sup>82</sup> *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013).

The current doctrine directly conflicts with the APA, which provides that courts are to decide questions of law.<sup>83</sup> Subverting the purpose of the APA, this deferential judicial posture creates a systematic bias in favor of the government and against the citizen.<sup>84</sup> Most important, it undermines the basic notion, as Chief Justice Marshall put it in *Marbury v. Madison*, that under our Constitution it “is emphatically the province and duty of the judicial department to say what the law is.”<sup>85</sup>

*Chevron* deference transfers the judicial function to executive agencies based upon false premises about congressional intent. The Court has recognized that “[a] precondition to deference under *Chevron* is a congressional delegation of administrative authority.”<sup>86</sup> Many statutes expressly delegate authority to an agency to implement the statute through rulemaking. But where the Congress has provided statutory standards to govern the agency’s regulatory activity, it has not left the agency free to rewrite those standards, and there is no justification, as Justice Thomas said in his opinion concurring in *Michigan v. EPA*, for judges “to abandon what they believe is ‘the best reading of an ambiguous statute’ in favor of an

---

<sup>83</sup> See 5 U.S.C. § 706 (“[T]he reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.”); *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring in the judgment) (“Heedless of the original design of the APA, we have developed an elaborate law of deference to agencies’ interpretations of statutes and regulations. Never mentioning § 706’s directive that the ‘reviewing court . . . interpret . . . statutory provisions,’ we have held that agencies may authoritatively resolve ambiguities in statutes.”).

<sup>84</sup> See Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187 (2016).

<sup>85</sup> *Marbury v. Madison*, 5 U.S. 137, 177 (1803); *CSX Transp. v. United States*, 867 F.2d 1439, 1445 (D.C. Cir. 1989) (Edwards, J., dissenting) (“*Chevron*’s mandate is perplexing, because the rule of the case appears to violate separation of powers principles.”); see also *Crowell v. Benson*, 285 U.S. 22, 61 (1932) (“[W]hen fundamental rights are in question, this Court has repeatedly emphasized ‘the difference in security of judicial over administrative action.’”) (quoting *Ng Fung Ho v. White*, 259 U.S. 276, 285 (1922)).

<sup>86</sup> *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990).



agency's construction."<sup>87</sup> Applying *Chevron* in this way, he said, "wrests from Courts the ultimate interpretative authority to 'say what the law is' and hands it over to the Executive."<sup>88</sup>

There would be a serious constitutional question if the Congress attempted expressly to empower agencies to interpret laws and to prevent the courts from overriding agency interpretations. A "*Chevron* statute" that said a court cannot exercise its independent judgment but must accede to the interpretations of executive agencies would be controversial, to say the least.<sup>89</sup> Of course, the Congress has not done this. For the Supreme Court to say it has done so by implication conflicts with the well-established rule disfavoring a constitutionally suspect interpretation absent a clear statement from the Congress.<sup>90</sup> To infer that the Congress intended so dramatically to alter the judicial role without any statement at all to that effect is unjustifiable. The Congress knows how to address the scope of judicial review when it wants to. In the Religious Freedom Restoration Act, for example, the Congress expressly altered the framework courts must apply in religious liberty cases.<sup>91</sup> The Congress has not done so with respect to review of agency action.

To be sure, there are statutes that implicitly require deference from the courts. Where the Congress provides that agency action

---

<sup>87</sup> *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring).

<sup>88</sup> *Id.* (quoting *Marbury*, 5 U.S. at 177) (internal citation omitted); see also Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 ADMIN. L.J. 187, 187 (1992) ("To the extent Congress has in fact decided something, *Chevron's* own political theory requires the courts to ensure that agencies act consistently with that decision.").

<sup>89</sup> Cf. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 245 (2012) (arguing the Congress may not legislate an "interpretive command" that is "an intrusion upon the courts' function of interpreting the laws, rather than an exercise of the legislature's power to clarify the meaning of its product").

<sup>90</sup> See, e.g., *Pub. Citizen v. Dep't of Justice*, 491 U.S. 440, 465 66 (1989).

<sup>91</sup> Pub. L. No. 103 141, 107 Stat. 1488 (Nov. 16, 1993) (codified at 42 U.S.C. §§ 2000bb 2000bb 4).

should be evaluated under a standard of “reasonableness,” for example, a court has no alternative but to defer to the agency’s choice if it falls within the range of actions that can be considered reasonable. In some statutes, such as the Federal Communications Act, the Congress directs the agency to pursue a number of often conflicting goals without providing an order of priority. Under those circumstances, a court can insist that the agency’s action fits the end it is pursuing but the court has no basis for saying the agency should have pursued a different goal.<sup>92</sup> These examples of statutes that by their terms require deference only show again that the Congress is able to require judicial deference to agency decisions when it wants to do so. For that reason, the *Chevron* rule is unnecessary to effectuate congressional intent.

Recently, we witnessed a striking retreat from *Chevron* deference in *King v. Burwell*.<sup>93</sup> The question was whether, under the Affordable Care Act, which authorizes federal tax-credit subsidies for health insurance coverage that is purchased through an “Exchange established by the State,” the IRS could permissibly promulgate regulations to extend tax-credit subsidies to coverage purchased through Exchanges established by the federal government. The Court emphasized that when the Congress has addressed “a question of deep ‘economic and political significance’” — even with ambiguous statutory terms — it is unlikely that the Congress intended for an agency to resolve that question.<sup>94</sup> Instead, it is for the courts “to determine the correct reading” of the statute.<sup>95</sup>

---

<sup>92</sup> See, e.g., Nat’l Rural Telecom Ass’n v. FCC, 988 F.2d 174, 184 (D.C. Cir. 1993) (“As MCI has failed to show anything arbitrary in the point selected by the Commission to balance its conflicting goals, or anything fundamentally wrong with the Commission’s reasoning process, we reject MCI’s claim.”).

<sup>93</sup> 135 S. Ct. 2480 (2015).

<sup>94</sup> *Id.* at 2489.

<sup>95</sup> *Id.*; see also Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2444 (2014) (“We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’”); FDA v. Brown & Williamson Tobacco Corp.,

In doing so, the Court clarified that the “major-questions doctrine,” as it has come to be called, is not part of the *Chevron* framework but an antecedent question about whether *Chevron* applies in the first place.<sup>96</sup>

The Court’s embrace of this freestanding exception to *Chevron* seems to be an attempt to compensate for the loss of the nondelegation principle by adopting a presumption that the Congress intends not to delegate but to reserve to itself the resolution of major questions.<sup>97</sup> Under the Court’s precedents, however, this version of the nondelegation doctrine takes the form of opposing presumptions about congressional intent: In general the Congress is presumed to delegate by its silence but on questions of central importance to the statutory scheme it is presumed not to have delegated unless it does so expressly.<sup>98</sup> In other words, the Court shrinks from its own deferential doctrine when it faces an interpretative question with major consequences.<sup>99</sup> As a result, the

---

529 U.S. 120, 133 (2000) (“[W]e must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.”); *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 231 (1994) (“It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate regulated to agency discretion.”).

<sup>96</sup> That approach represents a rejection of the advice of those advocates of judicial deference who argued that the “major questions doctrine” should be understood as an application of *Chevron* step one out of fear that this exception to *Chevron* might swallow the rule. See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 243 (2006) (arguing that “*MCI* and *Brown & Williamson* are best regarded as Step One cases, not as Step Zero cases”).

<sup>97</sup> In this way, the doctrine resembles the “legislative function” approach of the New York state courts. See *supra* note 65 and accompanying text.

<sup>98</sup> See *Brown & Williamson*, 529 U.S. at 160 (“As in *MCI*, we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”).

<sup>99</sup> See also Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 53 (2010) (“Although the Court has effectively given up policing the nondelegation doctrine directly, the Court is still concerned about agencies making important policy choices.”).

Court has created an essentially arbitrary set of cases in which the judiciary reclaims primary interpretive authority. In this respect we agree with Professor Sunstein: We see no principled distinction for this purpose between major and non-major questions.<sup>100</sup> The Congress certainly does not make such distinctions when it legislates.

The major-questions doctrine undermines the case for deference based upon congressional intent because it presumes – contrary to *Chevron* – that the Congress wants courts rather than agencies to resolve some statutory ambiguities after all. It undermines the functionalist case based upon expertise because it presumes that the central issues in the statutory scheme should be resolved by non-expert courts rather than expert agency administrators.<sup>101</sup> Insofar as *Chevron* aims to promote political accountability, major questions present the strongest case for deference, for the courts are politically even less accountable than the agencies. So the major-questions doctrine can be explained only as the Court recoiling from what *Chevron* has wrought. But it has drawn back in an ad hoc and seemingly arbitrary fashion. The lower courts may be tempted to reclaim their role in our constitutional allocation of powers by determining that agencies resolve quite a lot of major questions by way of statutory interpretation.

A principled approach to deciding when judicial deference is proper would be to emphasize the distinction, which is made in other areas of administrative law, between legal questions and policy questions. That distinction is drawn when courts must decide whether a given matter is committed to agency discretion by

---

<sup>100</sup> See Sunstein, *supra* note 96, at 245 (“[T]he distinction between major questions and non major ones lacks a metric.”).

<sup>101</sup> Cf. *id.* at 243 (“[T]here is no justification for the conclusion that major questions should be resolved by courts rather than agencies. . . . [E]xpertise and accountability, the linchpins of *Chevron*’s legal fiction, are highly relevant to the resolution of major questions.”).

law, even if the Congress has not affirmatively barred review, because “no judicially manageable standards are available for judging how and when an agency should exercise its discretion.”<sup>102</sup> *Chevron* has been justified as a way of preserving the integrity of the judiciary by removing the courts from a policymaking role.<sup>103</sup> That is a legitimate concern, but it does not provide a convincing justification for courts to turn over to executive agencies the quintessential judicial function of interpreting the law.

Courts properly defer only where it is clear the Congress has delegated interpretive authority to the agency or where the questions are inescapably matters of policy — meaning there are no judicially manageable standards for resolving them. This rule follows from necessity for, as the Supreme Court has said, “if no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for ‘abuse of discretion.’”<sup>104</sup> If a court examines the relevant materials and concludes there is “no law to apply,” again review cannot proceed.<sup>105</sup> This distinction between law and policy means there is no risk in a post-*Chevron* world of

---

<sup>102</sup> *Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987) (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)). See, e.g., *Webster v. Doe*, 486 U.S. 592, 600 (1988) (statute allowing termination of employee when Central Intelligence Agency head deems it “necessary or advisable in the interests of the United States” provides for policy decision that “fairly exudes deference to the Director” and “appears . . . to foreclose the application of any meaningful judicial standard of review”); *Dep’t of the Navy v. Egan*, 484 U.S. 518, 528 29 (1988) (whether grant of security clearance is “clearly consistent with the interests of national security” is an unreviewable decision); *Claybrook v. Slater*, 111 F.3d 904, 908 (D.C. Cir. 1997) (decision by representative of sponsoring agency as to whether to adjourn advisory committee meeting in “the public interest,” as authorized under Federal Advisory Committee Act, is discretionary one not subject to review).

<sup>103</sup> See *Chevron*, 467 U.S. at 866 (“[F]ederal judges who have no constituency have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones.”).

<sup>104</sup> *Heckler v. Chaney*, 470 U.S. 821, 830 (1985).

<sup>105</sup> *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971).

courts deciding pure policy questions. Courts can safely assume primary interpretative authority on questions of statutory interpretation while leaving policy questions to agency policymakers.

This seems to have been the primary concern animating the original *Chevron* opinion. The Court emphasized that deference was due because the agency's "decision involves reconciling conflicting policies" and the applicable statute did not specify the required policy balance with "the level of specificity" that would be necessary for the court to resolve the issue against the agency.<sup>106</sup> In other words, *Chevron* calls for deference where the agency must make a policy choice that the Congress "has not directly addressed" in advance.<sup>107</sup> Understood in this way, *Chevron* was not a stark departure from prior cases in which the Court had held that deference to agency policymakers was appropriate "whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations."<sup>108</sup>

Justice Stevens, the author of *Chevron*, thought the opinion continued this tradition of deferring only when a case presents a policy-laden determination best left to the agency. He consistently maintained that *Chevron* does not apply to "pure questions of statutory construction," which "remain within the purview of the courts, even when the statute is not entirely clear."<sup>109</sup> In his view, *Chevron* merely "reaffirmed both that '[t]he judiciary is the final authority on issues of statutory construction' and that courts should

---

<sup>106</sup> *Chevron*, 467 U.S. at 865.

<sup>107</sup> *Id.* at 843.

<sup>108</sup> *United States v. Shimer*, 367 U.S. 374, 382 (1961).

<sup>109</sup> *Negusie v. Holder*, 555 U.S. 511, 531 (2009) (Stevens, J., concurring in part and dissenting in part).

defer to an agency's reasonable formulation of *policy* in response to an explicit or implicit congressional delegation of authority."<sup>110</sup> In applying *Chevron*, he said, courts should "distinguish between pure questions of statutory interpretation and policymaking, or between central legal issues and interstitial questions."<sup>111</sup> The Court itself has drawn that distinction – in an opinion authored by Justice Stevens three years after *Chevron* was decided – when it referred to "a pure question of statutory construction" as one "for the courts to decide."<sup>112</sup>

In later cases, the Court nonetheless extended the *Chevron* doctrine into the realm of "pure" statutory interpretation. A leading voice in that expansion was Justice Scalia.<sup>113</sup> But during his final term on the Court, Justice Scalia acknowledged that the Court had developed its "elaborate law of deference to agencies' interpretations" in contravention of "the original design of the

---

<sup>110</sup> *Id.* at 530 (quoting *Chevron*, 467 U.S. at 843 n.9) (internal citation omitted) (emphasis added); see also *id.* at 529 30 (describing *Chevron* as holding that the Clean Air Act delegated a "policy question" to the EPA).

<sup>111</sup> *Id.* at 531.

<sup>112</sup> *INS v. Cardoza Fonseca*, 480 U.S. 421, 446 (1987). The New York courts have long embraced this approach, deferring to an agency's interpretation "[w]here the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom" but not deferring where "the question is one of pure statutory reading and analysis." *Kurcsics v. Merchants Mut. Ins. Co.*, 403 N.E.2d 159, 163 (N.Y. 1980); see *Yong Myun Rho v. Ambach*, 546 N.E.2d 188, 189 (N.Y. 1989) ("When 'the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency.' This is so because 'statutory construction is the function of the courts.'") (internal citation omitted); *Charles T. Sitrin Health Care Ctr. v. Comm'r of Health*, 129 A.D.3d 1587, 1589 90 (N.Y. App. Div. 2015) (applying this rule).

<sup>113</sup> See *Cardoza Fonseca*, 480 U.S. at 454 55 (Scalia, J., concurring in the judgment) (arguing that the Court "badly misinterprets *Chevron*" when it "implies that courts may substitute their interpretation of a statute for that of an agency whenever they face 'a pure question of statutory construction for the courts to decide' rather than a 'question of interpretation [in which] the agency is required to apply [a legal standard] to a particular set of facts.'") (internal citation omitted).

APA,” which requires courts to decide legal questions and to defer on other matters.<sup>114</sup> The more limited deference doctrine that the original *Chevron* opinion articulated, with its focus on policy, better respects the mandate of the APA.<sup>115</sup>

Justice Breyer also has suggested that *Chevron* deference is appropriately applied to “interstitial” questions. He has defended the major-questions exception on the ground that the “Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute’s daily administration.”<sup>116</sup> Like Justice Stevens, Justice Breyer seems to be getting at matters of implementation — issues that are left unresolved by the statute but must be resolved as the statute is operationalized by the agency.<sup>117</sup> If a statute is silent on some issue that arises in the process of implementation, courts may defer to agency determinations because the statute simply does not resolve those questions. But cases of statutory silence do not justify judicial abdication in those cases where the statute speaks to the dispute, though the Congress has imperfectly expressed its intention.

In sum, it simply is not necessary to expound a doctrine based upon the fictitious congressional delegation of “interpretive authority” to administrative agencies in order to ensure that courts will refrain from making policy choices that the statute does not resolve. Courts already must abstain when “statutes are drawn in

---

<sup>114</sup> *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring in the judgment) (citing 5 U.S.C. § 706).

<sup>115</sup> See *Negusie*, 555 U.S. at 531 n.3 (Stevens, J., concurring in part and dissenting in part) (noting that the “Administrative Procedure Act draws a similar distinction” between law and policy).

<sup>116</sup> Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986).

<sup>117</sup> As Justice Stevens put it, “Courts are expert at statutory construction, while agencies are expert at statutory implementation.” *Negusie*, 555 U.S. at 530 (Stevens, J., concurring in part and dissenting in part).



such broad terms that in a given case there is no law to apply,”<sup>118</sup> and courts defer out of necessity when a statute provides no judicially manageable standards for resolving a dispute.<sup>119</sup> Nor is the *Chevron* doctrine necessary to ensure accountability when agencies decide such questions; courts already must ensure that agency policymaking is not “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>120</sup> Instead, what *Chevron* has accomplished is the wholesale transfer of legal interpretation from courts to agencies — in violation of the APA and of the most basic notion of judicial review that it is the province of the courts to say what the law is.

#### IV. EVADING NOTICE-AND-COMMENT

The APA guards against excesses in the policymaking realm no longer primarily through judicial review but now by requiring notice and comment prior to rulemaking.<sup>121</sup> The notice-and-comment requirement forces the agency to take note of complexities and realities of which it might otherwise be unaware.<sup>122</sup> In this way, the requirement aids the agency in

---

<sup>118</sup> *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (quoting S. REP. NO. 752, at 26 (1945)).

<sup>119</sup> See *supra* note 102 and accompanying text.

<sup>120</sup> *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983) (quoting 5 U.S.C. § 706(2)(A)); see also M. Elizabeth Magill, *Step Two of Chevron v. Natural Resources Defense Council*, in *A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES* 85, 98 (John F. Duffy & Michael Herz eds., 2005) (suggesting that “[t]he two steps of *Chevron* apply to questions of statutory interpretation, while *State Farm* applies to exercises of policy judgment”).

<sup>121</sup> 5 U.S.C. § 553(b) (c).

<sup>122</sup> See KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 65 (1969) (“The procedure of administrative rule making is . . . one of the greatest inventions of modern government. . . . Anyone and everyone is allowed to express himself and to call attention to the impact of various possible policies on his business, activity, or interest.”); Matthew D. McCubbins, Roger Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 442 (1989) (“Before it can issue a

exercising an informed judgment. Our illiberal administrative law has eroded this aspect of accountability under the APA as well. Today, agencies frequently avoid the notice-and-comment safeguard by resorting instead to adjudications, interpretive rules, and policy statements or guidance documents.

#### A. ADJUDICATION

Agencies are generally free to choose between rulemaking and adjudication, which is a trial-like proceeding, as a vehicle for formulating and announcing a policy.<sup>123</sup> The National Labor Relations Board, for example, is notorious for announcing its policies in the course of deciding individual cases rather than by issuing substantive rules. In its 80-year history, the Board has issued just two rules: a rather trivial one in 1989 and another in 2011 that was struck down by two circuits and abandoned by the Board in 2013.<sup>124</sup>

Reliance upon adjudicatory procedures denies affected interests the safeguards of notice-and-comment rulemaking. First, in a system of case-by-case adjudication, regulated parties other than the particular respondent do not have the opportunity to express their views; usually they are not even aware that the agency will

---

change in policy, an agency subject to formal rulemaking must first announce that it is considering a policy change and solicit the views of all relevant parties.”).

<sup>123</sup> *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (“[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.”); *NLRB v. Wyman Gordon Co.*, 394 U.S. 759, 765 (1969) (“Adjudicated cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein.”) (plurality opinion); see also *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) (“The views expressed in *Chenery II* and *Wyman Gordon* make plain that the Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board’s discretion.”).

<sup>124</sup> *Nat’l Ass’n of Mfrs. v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013); *Chamber of Commerce v. NLRB*, 721 F.3d 152 (4th Cir. 2013).

use a particular adjudication to announce a rule of general application affecting them. In rulemaking, by contrast, all regulated parties can and usually do pay attention in order to protect their interests. As a result, rules announced in the course of an adjudication are (1) less informed because of the reduced involvement of regulated parties; (2) less reliable because adherence to precedent is relaxed in agency adjudications, so the outcome may be different under a subsequent Administration; and (3) less transparent because there is no public input into what the rule should be.

Some agencies can choose between an internal adjudication or going to court. Prominent examples are the Securities and Exchange Commission and the Federal Trade Commission. Not surprisingly, they tend to prefer having a home-court advantage. Internal administrative adjudications, unlike court proceedings, are subject to relaxed rules of evidence and of procedure. Such adjudications occur before an Administrative Law Judge who, in larger agencies like the SEC and the FTC, is himself an employee of the agency.<sup>125</sup> Smaller agencies draw upon a pool of ALJs, so there is not even an expertise-based justification for internal adjudications at those agencies. An ALJ's decision is really a recommendation to the agency's political leadership — to the commissioners, board members, and so on. This structure allows for systematic political bias of the sort that permeated the FCC's award of television licenses in the 1950s, when newspapers that had backed Eisenhower were granted licenses while those that had endorsed Stevenson were denied licenses.<sup>126</sup>

---

<sup>125</sup> As Professor Kent Barnett has recently pointed out, sometimes agencies utilize "hearing officers" or other "administrative judges" who are even less independent of the agency than ALJs. See Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643 (2016).

<sup>126</sup> See Bernard Schwartz, *Comparative Television and the Chancellor's Foot*, 47 GEO. L.J. 655, 690-93 (1959).

Not all bias is partisan, of course. Consider the record of the FTC: over the period of 20 years ending in January 2014, the FTC never exonerated any party against whom it had authorized the staff to bring a case before an ALJ. The agency affirmed every time the ALJ found a violation and reversed every time the ALJ found no violation. In a particularly anomalous feature of the FTC's adjudicatory scheme, the commissioners have the authority, by statute, to make findings of fact and therefore make credibility determinations even though they have not seen the witnesses. One recently departed commissioner, who had been a prominent trial lawyer, wrote that he was a bit "squeamish about second-guessing an ALJ's findings of fact, especially when they are based on the credibility of witnesses."<sup>127</sup> No other commissioner is on record as having had the same misgivings.

Until about two years ago the SEC had used its internal adjudicatory process only for routine matters, taking more complex cases to federal court. When it became clear about a year ago that the agency had begun adjudicating internally some more complex cases, it encountered a firestorm from the securities bar, the press, and Judge Rakoff, who referred to the change of policy as an aspect of "administrative creep."<sup>128</sup> He was correct; substituting agency adjudication for anything other than routine or policy matters is a displacement of the judicial role – an invitation to bias and a guaranteed appearance of bias. When the agency reviews and perhaps overrules the ALJ in a case the agency heads themselves authorized, the agency is both a party and the judge in its own case – an arrangement at odds with the most basic notion of due process that a party not be the judge in his own cause.

---

<sup>127</sup> J. Thomas Rosch, *Three Questions About Part Three: Administrative Proceedings at the FTC*, Remarks Before the American Bar Association Section of Antitrust Law Fall Forum (Nov. 8, 2012), <http://1.usa.gov/1LwBErr>.

<sup>128</sup> Jed S. Rakoff, *Is the SEC Becoming a Law Unto Itself?*, Keynote Address Before the PLI Securities Regulation Institute (Nov. 5, 2014), <http://bit.ly/1Y29JCr>.

There is admittedly a compelling efficiency justification for administrative adjudication in the first instance — that is, so long as it is subject to judicial rather than agency review — but only insofar as an agency is performing a nonjudicial function, such as deciding a policy question or engaging in rate-making, or there is a strong rationale based upon expertise, as there is, for example, in resolving disability claims. Adjudications unlikely to raise legal as opposed to factual questions, such as individual hearings to determine how much back pay each employee is entitled to receive from an employer who discriminated against a group, are also properly the subject of administrative hearings. On the other hand, when an agency uses its internal forum to pass upon a matter of statutory interpretation, it does so in lieu of a court in a forum less protective of the individual, and it burdens the individual with an additional layer of litigation before he can get to a court.<sup>129</sup>

For these reasons, a more liberal system of administrative law would limit agency adjudications according to their subject matter. Insofar as a matter involves the adjudication of private rights in a trial-type proceeding, the agency should have to make its case not merely by producing “substantial evidence” but rather by a preponderance of the evidence, as it would in court, and the agency should not be the body to review the ALJ’s decision. If the agency wants to send a matter to an ALJ rather than take it to court, then review should be in court and not back before the agency (unless the respondent waives objection to agency review). On the other hand, insofar as the agency is performing a nonjudicial function, such as rate-making, or licensing under a public-interest standard, review of an ALJ’s decision first by the agency itself is unobjectionable and indeed appropriate.

---

<sup>129</sup> Of course, considering the deference the court will pay to the agency’s statutory interpretation and its choice of remedies, getting to court might not be much consolation.

Similarly, the substantial-evidence standard makes sense when the agency is formulating a rule in the furtherance of a regulatory policy; the agency is entitled to make a policy choice among alternatives without being bound to a single choice determined by the preponderance of the evidence on the question. Even if the agency's policy choice is supported by less than a preponderance, there is no justification for courts – which are less accountable than agencies – to substitute their own policy judgments. When the agency is adjudicating the rights of parties, however, it makes less sense to provide this range of discretion by lowering the agency's burden of proof.

#### B. INTERPRETIVE RULES

If an agency does not want to go to the trouble of conducting an adjudication, it can take advantage of still other ways around the notice-and-comment process. The APA exempts from notice and comment “interpretative rules, general statements of policy, [and] rules of agency organization, procedure, or practice.”<sup>130</sup> Originally, that was not much of a loophole because the APA's sponsors expected such informal statements to be of limited effect and, more important, to be subject to “plenary” judicial review.<sup>131</sup> Attorney General Robert Jackson's influential 1941 report on administrative procedure in government agencies explained that agencies' interpretive rules “are ordinarily of an advisory character” and “are not binding upon those affected, for, if there is disagreement with the agency's view, the question may be presented for determination by a court.”<sup>132</sup> Yet since the Supreme Court's decision in *Seminole*

---

<sup>130</sup> 5 U.S.C. § 553(b).

<sup>131</sup> STAFF OF SENATE COMM. ON THE JUDICIARY, *supra* note 13, at 18 (“[I]nterpretative rules as merely interpretations of statutory provisions are subject to plenary judicial review.”).

<sup>132</sup> REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES 27 (1941).

*Rock*,<sup>133</sup> which issued one year before the APA was enacted, and in *Auer v. Robbins*,<sup>134</sup> which reaffirmed the point not 20 years ago, courts accept an agency's interpretation of its own regulations as "controlling" unless that interpretation is "plainly erroneous or inconsistent with the regulation."<sup>135</sup> One might think *Auer* deference is a natural corollary of *Chevron*, but it is quite different. Under *Chevron*, the Congress enacts a statute and the agency interprets it. But under *Auer*, the agency has the power both of enactment and of interpretation because it gets to elaborate upon its own rule with an interpretation that, unlike the rule itself, is not subject to notice-and-comment.<sup>136</sup> Because interpretation may work a significant change, the agency's power to interpret — subject only to deferential review — is akin to the power to rewrite the rule.

This violation of the separation between lawmaking and law elaboration has been the basis of growing academic and judicial criticism. Professor John Manning has denounced this "fusion of lawmaking and law-exposition [as] especially dangerous to our liberties."<sup>137</sup> Justice Scalia — who authored the *Auer* opinion for a unanimous Court — was particularly vocal about his subsequent

---

<sup>133</sup> *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

<sup>134</sup> 519 U.S. 452 (1997).

<sup>135</sup> *Id.* at 461.

<sup>136</sup> Professors Sunstein and Vermeule have argued that the case for *Auer* deference is the same as the case for *Chevron*. See Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 SUP. CT. REV. 41, 76 ("Auer is right for the same reason that Chevron is right: Where Congress has not been clear, deference to the agency, in the face of genuine ambiguity, is the best instruction to attribute to it."). But the purported delegation in *Chevron* is not parallel to that in *Auer*. *Chevron* presupposes that the Congress has left an ambiguity in the statute, and infers the Congress would want the agency to resolve that ambiguity when implementing the statute. In *Auer*, the ambiguous text is the agency's own creation. If *Auer* is right, then the agency is empowered (and encouraged) to create gaps by writing ambiguous rules it may later fill in opportunistically as specific situations arise.

<sup>137</sup> John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 617 (1996).

disenchantment. In a separate opinion issued a few years ago, he wrote that “deferring to an agency’s interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases. This frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government.”<sup>138</sup> Then in the *Mortgage Bankers* case, during his last full term on the Court, he finally called for “abandoning *Auer* and applying the [APA] as written.”<sup>139</sup>

The D.C. Circuit’s partial solution to this problem, which was rejected in *Mortgage Bankers*, had been to require an agency that had provided an authoritative interpretation of a regulation adopted through notice-and-comment, and later wanted to change its interpretation, to do so through notice-and-comment rulemaking because its new interpretation effectively amends the regulation.<sup>140</sup> The Harvards cite this doctrine, first announced 20 years ago in the *Paralyzed Veterans* case,<sup>141</sup> as another example of the D.C. Circuit’s illicit effort to concoct a libertarian version of administrative law. This is a silly claim for at least two reasons. First, *Paralyzed Veterans* was joined by Judge Edwards, who is neither a card-carrying libertarian nor a likely fellow traveler duped into furthering a clandestine libertarian heterodoxy.<sup>142</sup> Second, the *Paralyzed Veterans*

---

<sup>138</sup> *Talk Am., Inc. v. Michigan Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring); see also *Decker v. Nw. Env’tl. Def. Ctr.*, 133 S. Ct. 1326, 1341 (2013) (Scalia, J., concurring in part and dissenting in part) (“[W]hen an agency interprets its own rules . . . the power to prescribe is augmented by the power to interpret; and the incentive is to speak vaguely and broadly, so as to retain a ‘flexibility’ that will enable ‘clarification’ with retroactive effect.”).

<sup>139</sup> *Mortgage Bankers*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment).

<sup>140</sup> *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 87 (D.C. Cir. 1997).

<sup>141</sup> *Id.*

<sup>142</sup> The other key case in developing the *Paralyzed Veterans* rule, *Alaska Professional Hunters Association v. FAA*, 177 F.3d 1030 (D.C. Cir. 1999), was decided unanimously by Judges Henderson, Randolph, and Tatel — far from a libertarian cabal. See *Mortgage Bankers Ass’n v. Harris*, 720 F.3d 966, 967 (D.C. Cir. 2013) (noting that “[t]he tandem of *Paralyzed Veterans of America v. D.C. Arena L.P.* and *Alaska*



rule was as likely to frustrate deregulatory as it was regulatory initiatives. That decision did not aim at any political outcome but aimed instead at the basic liberal, rule-of-law principle that the government should not be able to change the law retroactively and at will.

In the course of overruling *Paralyzed Veterans*, several Justices recognized that the rule responded to a serious lack of accountability that the Court itself had created.<sup>143</sup> Justice Scalia wrote that the *Paralyzed Veterans* doctrine “is a courageous (indeed, brazen) attempt to limit the mischief” caused by *Auer* deference.<sup>144</sup> Justice Thomas agreed, writing that *Auer* deference “undermines our obligation to provide a judicial check on the other branches, and it subjects regulated parties to precisely the abuses that the Framers sought to prevent.”<sup>145</sup> Justice Alito was slightly more circumspect, writing that although there are “substantial reasons why the . . . doctrine may be incorrect,” he would await a case in which its overruling was fully briefed and argued.<sup>146</sup> Previously, Justice Kennedy and the Chief Justice also had signed on to opinions expressing doubt about the wisdom of *Auer* deference.<sup>147</sup>

---

*Professional Hunters Ass’n v. FAA*” announced the *Paralyzed Veterans* rule) (internal citations omitted).

<sup>143</sup> For this reason, *Mortgage Bankers* is far from the “major rebuke” to the D.C. Circuit that Sunstein and Vermeule suggest. Sunstein & Vermeule, *supra* note 136, at 50.

<sup>144</sup> *Mortgage Bankers*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment).

<sup>145</sup> *Id.* at 1213 (Thomas, J., concurring in the judgment).

<sup>146</sup> *Id.* at 1210–11 (Alito, J., concurring in part and concurring in the judgment).

<sup>147</sup> *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012) (“Our practice of deferring to an agency’s interpretation of its own ambiguous regulations undoubtedly has important advantages, but this practice also creates a risk that agencies will promulgate vague and open ended regulations that they can later interpret as they see fit, thereby frustrating the notice and predictability purposes of rulemaking.”) (internal footnote, quotation marks, and alteration omitted); *see also* *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1339 (2013) (Roberts, C.J., concurring) (“The bar is now aware that there is some interest in reconsidering [*Auer* deference] . . . I would await a case in which the issue is properly raised and argued.”). Sunstein and Vermeule suggest that Justice Kennedy and the Chief Justice effectively endorsed *Auer* by signing on to footnote 4 of the *Mortgage Bankers* opinion. Sunstein

Depending upon the view of Justice Scalia's successor on the Court, that skepticism may yet lead toward a more liberal body of administrative law.

### C. POLICY STATEMENTS

As previously noted, the APA exempts from notice-and-comment requirements not only interpretative rules but also "general statements of policy" and "rules of agency organization, procedure, or practice."<sup>148</sup> In recent years, agencies have increasingly issued informal statements of policy that effectively impose new regulations. Instead of actually imposing a regulation, which would require notice-and-comment procedures, agencies simply announce their view of when an enforcement action would properly be brought. These policy statements are ostensibly a service to regulated parties who might otherwise run afoul of the agency's prosecutorial discretion.

Policy statements have real consequences, however, even when presented as non-binding. The D.C. Circuit faced this problem in a case the Chamber of Commerce brought to challenge a so-called "directive" issued by the Occupational Safety and Health Administration.<sup>149</sup> The agency had put some 12,500 workplaces on a "primary inspection list," which guaranteed that each would be subjected to a comprehensive inspection within a specified period. But, the directive said, the agency would remove a workplace from the list if the employer agreed to participate in the OSHA's "Cooperative Compliance Program," which required undertaking a

---

& Vermeule, *supra* note 136, at 70. But that footnote does not repudiate their earlier skepticism. It actually limits *Auer* by emphasizing that "[e]ven in cases where an agency's interpretation receives *Auer* deference . . . it is the court that ultimately decides whether a given regulation means what the agency says" and that "*Auer* deference is not an inexorable command in all cases" but is often inappropriate. *Mortgage Bankers*, 135 S. Ct. at 1208 n.4.

<sup>148</sup> 5 U.S.C. § 553(b).

<sup>149</sup> *Chamber of Commerce v. Dep't of Labor*, 174 F.3d 206 (D.C. Cir. 1999).

number of measures that went beyond mere compliance with the Occupational Safety and Health Act. The agency told the court the directive was merely a rule of internal agency procedure, governing which workplaces the agency would inspect. Failing that, the agency said the directive was a mere statement of policy because it did not actually impose a legally binding norm upon employers that chose not to adopt the new requirements.

The D.C. Circuit disagreed. The court was told, and the agency did not dispute, that being subjected to a comprehensive safety inspection could be quite as onerous for an employer as paying a significant fine. The court therefore saw the directive as “the practical equivalent of a rule that obliges an employer to comply or to suffer the consequences. The voluntary form of the rule,” it said, “is but a veil for the threat it obscures”; it was intended to alter — and no doubt would have altered — the safety practices of thousands of employers.<sup>150</sup> That is precisely the sort of policy change for which the APA requires the agency, before acting, to be well-informed and responsive to public comments.<sup>151</sup> The agency did not succeed in imposing an incognito regulation that time, but policy statements and various species of guidance documents ordinarily do allow agencies to announce new rules and threaten penalties without going through notice-and-comment procedures.<sup>152</sup>

---

<sup>150</sup> *Id.* at 210.

<sup>151</sup> An anecdotal but disheartening confirmation of the court’s view of the agency’s directive came to hand not long after the decision was issued: A midcareer law student, who was also a member of the Senior Executive Service and of a government wide group of SES members who met regularly to discuss agency goings on, told Judge Ginsburg that while the OSHA had been telling the D.C. Circuit that the directive represented only an informal procedural guide that imposed no new requirements, within the agency the directive was called “comply or die.”

<sup>152</sup> *See, e.g., Prof’ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 594 (5th Cir. 1995) (upholding a “Compliance Policy Guide” that provided “[p]harmacies may not, without losing their status as retail entities, compound, provide, and

This procedural short cut has the added attraction of evading judicial review because ordinarily a guidance document is not considered a final agency action.<sup>153</sup> Because what is nominally guidance can effectively convey a “comply or die” message, judicial review should be available based upon a more nuanced and case-specific approach. Courts are already expected to take a practical view of finality and ripeness, which is appropriate because regulated parties are too often deprived of liberty or property early in the regulatory process; so too when an agency issues informal guidance.<sup>154</sup>

The articulated standard of practicality is fine, but courts too often apply it in a formalistic way that blinks at the real consequences of agency action. If a regulated party is at risk,

---

dispense drugs to third parties for resale to individual patients”). *See also* Epstein, *supra* note 22, at 15.

<sup>153</sup> *See, e.g., Ass’n of Flight Attendants CWA, AFL CIO v. Huerta*, 785 F.3d 710, 713 (D.C. Cir. 2015) (holding an FAA “notice” concerning the use and stowage of portable electronic devices aboard aircraft “does not constitute final agency action”); *Ctr. for Auto Safety v. NHTSA*, 452 F.3d 798, 810 (D.C. Cir. 2006) (holding NHTSA “policy guidelines” governing regional recalls “amount to a general statement of policy, rather than a binding rule,” and therefore were not subject to review). *See generally* *Indep. Equip. Dealers Ass’n v. EPA*, 372 F.3d 420, 427 (D.C. Cir. 2004) (Roberts, J.) (“We have held that we lacked authority to review claims where ‘an agency merely expresses its view of what the law requires of a party, even if that view is adverse to the party.’”) (quoting *AT&T v. EEOC*, 270 F.3d 973, 975 (D.C. Cir. 2001)).

<sup>154</sup> *See* *Abbott Labs. v. Gardner*, 387 U.S. 136, 153 (1967) (“Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs’ conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the Administrative Procedure Act and the Declaratory Judgment Act must be permitted, absent a statutory bar or some other unusual circumstance.”); *Gardner v. Toilet Goods Ass’n*, 387 U.S. 167, 172 (1967) (“Faced with these regulations the respondents are placed in a quandary. On the one hand they can, as the Government suggests, refuse to comply, continue to distribute products that they believe do not fall within the purview of the Act, and test the regulations by defending against government criminal, seizure, or injunctive suits against them. We agree with the respondents that this proposed avenue of review is beset with penalties and other impediments rendering it inadequate as a satisfactory alternative to the present declaratory judgment action.”).

meaning the agency has told it either to follow a certain course of action or incur sanctions, it should be able to get pre-enforcement review. Parties aggrieved by agency action with present consequences – not mere criticism but an actual burden – should be able to seek relief. As long as the plaintiff has suffered an “injury in fact” at the hands of the government that is sufficient to give it constitutional standing, there is no good reason to deny it review. The argument to the contrary is that there is a risk of premature intervention – that is, before the agency decision has taken final form or while the dispute might still be resolved between the parties. Courts can use their judgment to address those circumstances, but the incentive should be for the agency to avoid burdening the public while its decision remains preliminary – rather than for the citizen suffering the harm to be remitted to the hope of eventually obtaining relief in court.

#### CONCLUSION

An alternative to the conception of courts as a check upon agency discretion is the view that courts should be the agencies’ partners in a cooperative enterprise of regulation. In this vein, Judge Harold Leventhal called for “an awareness that agencies and courts together constitute a ‘partnership’ in furtherance of the public interest, and are ‘collaborative instrumentalities of justice.’”<sup>155</sup> Judge Leventhal’s partnership would entail more probing judicial review of the merits – including the scientific merits – of agency decisions.<sup>156</sup> This led to a debate with Judge David Bazelon, who advocated judicial modesty in evaluating

---

<sup>155</sup> *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 52 (D.C. Cir. 1970).

<sup>156</sup> Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 555 (1974) (describing “the court’s central role of ensuring the principled integration and balanced assessment of both environmental and nonenvironmental considerations in federal agency decisionmaking”).

scientific findings but greater judicial engagement in policing agency adherence to administrative procedures.<sup>157</sup>

Today, the attitude of the courts has gone beyond Judge Leventhal's partnership notion and even Judge Bazelon's call for judicial modesty. Courts now defer not only on scientific matters but even on legal interpretation. Under current doctrine, the judiciary is decidedly the junior partner.<sup>158</sup> The reality of this junior partnership is illustrated by the various doctrines described above, but even where a court is nominally reversing an agency decision, the review is less meaningful than it might seem. Indeed, even when a court has determined a rule to be arbitrary and capricious, agencies typically succeed in implementing the rule nonetheless.<sup>159</sup> Agencies often adopt the same rules on successive remands, leading one scholar to conclude that "the substantive doctrines interact with

---

<sup>157</sup> *Ethyl Corp. v. EPA*, 541 F.2d 1, 67 (D.C. Cir. 1976) (Bazelon, C.J., concurring) ("Because substantive review of mathematical and scientific evidence by technically illiterate judges is dangerously unreliable, I continue to believe we will do more to improve administrative decision making by concentrating our efforts on strengthening administrative procedures."); see also Ronald J. Krotoszynski Jr., "History Belongs to the Winners": *The Bazelon Leventhal Debate and the Continuing Relevance of the Process/Substance Dichotomy in Judicial Review of Agency Action*, 58 ADMIN. L. REV. 995, 999 (2006); Patricia M. Wald, *Judicial Review in Midpassage: The Uneasy Partnership Between Courts and Agencies Plays On*, 32 TULSA L.J. 221, 225 (1996).

<sup>158</sup> But see Miller, *supra* note 14 (noting that "[g]reen shoots of judicial resistance have sprouted in several areas," such as "measures to control prosecutorial overreaching in administrative cases," which suggest "a low level but perhaps growing pushback on the part of some judges").

<sup>159</sup> William S. Jordan III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 440 (2000) ("This research seriously undermines the proposition that hard look review prevents agencies from achieving their regulatory goals through the rulemaking process. For various reasons, thirteen of the sixty one remands during an entire decade did not affect agency pursuit of regulatory objectives. Moreover, the agency recovered completely or in large part from all but twelve of the remaining forty eight decisions. In other words, agencies have successfully implemented their policies in approximately 80% of the instances in which courts have originally remanded rules as arbitrary and capricious.") (footnotes omitted).

the remedies and agency behavior in such a way as to produce results that mimic minimum rationality review” even though the “APA’s judicial review standards were intended to be more searching than minimum rationality review.”<sup>160</sup>

The APA was intended to give the public a way to get relief from administrative excess. But in the 70 years since it was enacted, evasive practices by the agencies and an increasingly deferential posture from the courts have combined to frustrate that purpose. The result is a legal regime that insulates agencies from correction and denies citizens redress. The problems discussed in this essay — presumptions that favor the government, the scope of delegated authority, *Chevron* and *Auer* deference, the evasion of notice-and-comment rulemaking — do not arise from the APA itself. Rather, these are examples of the agencies and courts alike — led by the Supreme Court — failing to fulfill their obligations under the APA. The agencies circumvent the procedures and the courts acquiesce in their interpretations of law, thereby denying redress to citizens aggrieved by agency action. The marginalization of the courts in contemporary administrative law should be a concern to all who believe in our liberal tradition of an independent judiciary, providing a check upon executive discretion through the simple duty, in the words of Chief Justice Marshall, “to say what the law is.”<sup>161</sup>

---

<sup>160</sup> Emily Hammond Meazell, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722, 1729, 1736 n.61 (2011).

<sup>161</sup> *Marbury v. Madison*, 5 U.S. 137, 177 (1803).