DISCRETION GONE TOO FAR? THE ROLE OF PUBLIC COMMENTING IN REGULATORY RULEMAKING

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Abstract

This article explores administrative discretion in the United States government, examining how agencies strive to implement legislative intent within a given framework of law. The exercise of expertise is accompanied by a modicum of discretion, but also presents the risk of bureaucratic overreach. After a discussion of the administrative role, the article explores the concerns that exist following Chevron USA, Inc. v. National Resources Defense Council.[1] *The greatest base of strength for unelected rulemaking remains entrenched in the Administrative Procedure Act. Therefore, endeavors aimed at enhancing harmony between legislative intent and program implementation should strategically leverage notice-and-comment procedures. Transparency in such measures may reduce the considerable lack of trust that exists in public discourse and work toward minimizing the political gamesmanship that undermines both effective lawmaking and accountability in program implementation.*

1. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

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INTRODUCTION

In elementary school, students learn about the three branches of government: the Executive, the Legislative, and the Judiciary. Students are taught that each of these branches allegedly have their own independent powers which check other branches' powers.[2] In that oversimplified system, each branch operates independently, and all policy decisions are enacted to positively impact United States' citizens.

Perhaps elementary students should also learn about the shadowy fourth branch of government—administrative agencies. Though technically within the purview and oversight of the executive branch, administrative agencies act both as quasi-legislators when making rules that impact the lives of millions and in a judicial capacity when refereeing disputes.[3] Elementary students might object and tell us this simply cannot be true—the legislative branch makes the laws, and the executive merely

2. Kevin Johnson, *A "Hard Look" at the Executive Branch's Asylum Decisions*, 1991 UTAH L. REV. 279, 280 (1991).

3. *See* CORNELIUS KERWIN & SCOTT FURLONG, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 50 (4th ed. 2011).

enforces the will of the legislature.[4]

In a perfect world with limited areas of policy decisions, that could be the case. Congress, however, faces myriad decisions that it is simply incapable of tackling. Indeed, Congress must decide everything from the exact amount of time and income that must be made to qualify as an exempt employee, to the proper way to ensure the safety of nuclear power plants.[5] Of course, legislators as a group have no particular expertise in any of these areas.[6] It makes much more sense to have experts in the field—individuals who have often dedicated a lifetime to education and experience—decide these detailed yet exceedingly important questions.

Even with that caveat, the elementary school student's understanding of the branches of government still holds true. The executive branch is merely implementing the will of the legislative branch.[7] For example, Congress might pass a law that provides money and support for nuclear power, but Congress likely does not know enough about nuclear physics to ensure that nuclear power plants are safely built. Congress just wants the power plants built safely and leaves implementation of their overriding goal to experts. In theory, Congress makes the laws or policies and the executive branch led by agency heads appointed by the President implements the policy goals passed by the legislative branch.

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4. Johnson, *supra* note 2, at 280 ("Congress enacts . . . laws, and the Executive Branch enforces them.").

5. *See* Max Johnson, *Defining Interim Storage of Nuclear Waste*, 117 NW. U.L. REV. 1177, 1193 (2023) ("[T]he Nuclear Regulatory Commission . . . [is] responsible for developing and implementing nuclear regulations and licensing nuclear facilities, including nuclear waste storage facilities." (footnote omitted)); *see generally* Raymond H. Brescia, *On Objects and Sovereigns: The Emerging Frontiers of State Standing*, 96 OR. L. REV. 363, 419–20 (2018) (recognizing that the Department of Labor considers regulations that change exemption statuses of employees).

6. *See generally* Ric Simmons, *The Failure of the Computer Fraud and Abuse Act: Time to Take an Administrative Approach to Regulating Computer Crime*, 84 GEO. WASH. L. REV. 1703, 1714 (2016) ("Administrative agencies have a number of advantages over legislatures and courts because they can develop and apply expertise in setting rules . . . .").

7. Martin H. Redish, *Pragmatic Formalism, Separation of Powers, and the Need to Revisit the Nondelegation Doctrine*, 51 LOY. U. CHI. L.J. 363, 368 (2019) ("[T]he executive branch was not established to function as the dominant policymaker for the country, rather it was formed primarily to implement Congress's laws.").

If that were the outer limits of administrative action, our story would have a tidy ending. However, that is increasingly becoming a myth. Instead of limiting their decision making to scientific questions, administrative agencies are regularly making policy in ways that are beginning to look like lawmaking.[8] For example, the Biden Administration recently announced a policy to practically eliminate, on a national level, all non-compete agreements in employment.[9] Ostensibly, this proposal would merely enforce Congress's directive to broadly eliminate unfair competition, but the use or non-use of noncompete agreements is nowhere to be found in the Federal Trade Commission Act.[10] The ultimate question is whether Congress has the power to make a nationwide rule with the capacity to impact up to thirty million workers.[11] The resolution involves deciding if and how Congress delegates authority to regulatory bodies which possess no popular accountability and no constitutional grant of authority to make law.[12]

This article proposes that administrative agencies should enhance their use of public comments to prevent arbitrary

8. *See* Kimberly L. Wehle, *Defining Lawmaking Power*, 51 WAKE FOREST L. REV. 881, 912 (2016) ("Executive branch agencies . . . are more akin to Congress as lawmakers . . . .").

9. Josh Sisco & Nick Niedzwiadek, *Biden's Regulators Propose Banning Non-Competes*, POLITICO, https://www.politico.com/news/2023/01/05/biden-ftc-regulations-employment-noncompetes-00076444 (last updated Jan. 5, 2023, 3:36 PM) ("The Federal Trade Commission on Thursday kicked off the process for regulating non-compete clauses in employment agreements, issuing a proposed rule that would largely ban the practice.").

10. *See FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition*, FED. TRADE COMM'N (Jan. 5, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition ("Noncompetes harm competition in U.S. labor markets by blocking workers from pursuing better opportunities and by preventing employers from hiring the best available talent.").

11. *See id.*

12. *See* Andrea Tsu, *Millions of Workers Are Subject to Noncompete Agreements. They Could Soon Be Banned*, NPR (Jan. 5, 2023, 3:13 PM ET), https://www.npr.org/2023/01/05/1147138052/workers-noncompete-agreements-ftc-lina-khan-ban#:~:text=The%20agency%20proposed%20a%20new,some%2030%20million%20American%20workers ("The agency proposed a new rule that would prohibit employers from imposing noncompete agreements on their workers, a practice it called exploitative and widespread, affecting some 30 million American workers.").

decisions, ensuring a more solid basis of popular support for their choices. C*hevron USA, Inc. v. National Resources Defense Council* has been used far too often to justify regulatory decision making that lacks the approval of either the legislative branch or the people.[13]

Section I of this article explores the traditional administrative agency role and outlines its appropriate contours. Section II discusses *Chevron* deference and explains how it is inadequate to protect the rights of the people to determine issues of public policy. Finally, Section III articulates a solution—a return to rigorous public comments that can and must form the backbone of well-formulated regulatory decisions.

I. THE ADMINISTRATIVE ROLE

Government requires a professional class of administrators.[14] Given public administration's interdisciplinary nature, leveraging diverse paradigms is crucial to navigating governmental complexities and serving the broader public.[15] The need for bureaucracy is implicit in the Constitution—it was assumed from the start that there would be work to be done in the administration of government in faithful execution of laws.[16] As Moura and Miller observed, unelected bureaucrats make law, but we should accept this because "[n]othing would get done without the exercise of discretion."[17]

13. *See generally* Grand Canyon Tr. v. Provencio, 26 F.4th 815, 825–27 (9th Cir. 2022) (holding that the Department of Interior's decision to interpret the phrase "valuable mineral deposit" to exclude sunk costs was entitled to *Chevron* deference, despite any direct statutory basis for doing so); Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 843 (1984).

14. David Cohen, *Amateur Government*, 8 J. PUB. ADMIN. RSCH. & THEORY 450, 459–60 (1998) ("Most career executives and managers are not only as responsive as political appointees to administration policies and priorities, they are by experience, mindset, and training more adept at implementing them.").

15. *See generally* Lynita K. Newswander & Chad B. Newswander, *Encouraging Cognitive Flexibility and Interdisciplinarity in Public Administration Programs*, 44 ADMIN. & SOC'Y 285, 285 (2012).

16. *See* U.S. CONST. art. II, § 3 ("[The Executive] shall take care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.").

17. David P. Moura & Hugh T. Miller, *On Legitimacy: Is Public Administration Stigmatized?*, 51 ADMIN. & SOC'Y 770, 785 (2019).

However, this delegation of authority translates into political power that is challenging to monitor at best and entirely unrestrained at worst.[18] In exercising discretion, public administrators make decisions that may determine law of legal transgressions, and because they do so without going through the processes required of the legislative branch, they may fail to satisfy due process requirements.[19] Administrative decisions can be made in the interest of the agency, putting an incredible and perhaps indefensible amount of power in the hands of administrators.[20] This power has reduced the potential for effective judicial review.[21] The notion of a consistent level of decision-making quality among administrators is a lot to take on faith, and whether the legitimacy of public administration is a matter of grave concern is the subject of some debate.[22] Because most people are not involved in government, they do not understand the machinations of public policy processes and the complexities of implementation.[23] Citizens often expect government operations to function as seamlessly as dialing a service number for an immediate response or walking into a store to find a product on a shelf. However, government functions differ significantly from a store setup, and the provision of government

18. *See* Daniel B. Listwa & Lydia K. Fuller, *Constraint Through Independence*, 129 YALE L.J. 548, 569 (2019) (noting that some skeptics of *Chevron* argue that "judges have been asked to step aside and allow federal agencies to shape the law as they will").

19. *See* Ronald A. Cass, Auer *Deference: Doubling Down on Delegation's Defects*, 87 FORDHAM L. REV. 531, 559–60 (2018) (finding that scholars have noted possible conflicts between deference and due process).

20. *See* Timothy K. Armstrong, Chevron *Defense and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL'Y 203, 212 (2004) ("[A]n agency may use its regulatory power to advantage its own contractual interests.").

21. *See* Ronald A. Cass, *Vive La Deference?: Rethinking the Balance Between Administrative and Judicial Discretion*, 83 GEO. WASH. L. REV. 1294, 1328 (2015) ("[L]ess searching judicial review exacerbates tendencies toward weakened protections against discretionary federal government power . . . .").

22. *See* Moura & Miller, *supra* note 17, at 788.

23. *See* Jonathan A. Weiss, *Should the Government Fund Legal Services? If So, What Should the Lawyers Do?*, 2 J. INST. FOR STUDY LEGAL ETHICS 401, 403–04 (1999) ("[People] are subject to a mass of rules that nobody really understands, implemented by people who are at best indifferent and, at worst, maliciously hostile. The results are often devastating upon the individuals who are dependent upon the proper functioning of that administrative agency.").

services involves complexities beyond simple transactions. Society has shifted, with more people thinking critically about government and calling for increased accountability and transparency in all aspects of the public sector.[24]

A. Principal-Agency Relationships

The constitutional system provides an excellent example of principal-agent thinking. An agent is someone who, with consent of the principal, is able to act on behalf of the principal but is "*subject to the principal's control*."[25] Here, the principal is Congress and the agents are the administrative agencies. Principals in the form of political (elected) forces require agents to implement programs and institute goals.[26] Administrative agents have the special education, expertise, and skill necessary to bring about proper coordination and implementation of these programs.[27] Importantly, the key to the principal-agent relationship is that there must be some element of control maintained by the principal throughout the relationship.[28] Agents act as a sort of contractor in government, providing a way for principals to bring their policies and laws into reality.[29]

However, because neither administrative principals nor their agents act in a way that is value neutral, the ideal type of principal-agent theory seldom works as designed in practice.[30] Agents may hold intents entirely counter to the prevailing sentiment—if not the entire mission—of an agency; an example

24. *See* Gregory A. Porumbescu et al., *Can Transparency Foster More Understanding and Compliant Citizens?*, 77 PUB. ADMIN. REV. 840, 841 (2017).

25. RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006) (emphasis added).

26. *See* Susan P. Shapiro, *Agency Theory*, 31 ANN. REV. SOCIO. 263, 271 (2005) ("Principals delegate to agents the authority to carry out their political preferences.").

27. *See id.* at 267 ("[P]rincipals [sometimes] seek out agents for their expert knowledge.").

28. *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006).

29. *See* Kalu N. Kalu, *Entrepreneurs or Conservators? Contractarian Principles of Bureaucratic Performance*, 35 ADMIN. & SOC'Y 539, 541 (2003).

30. *See* Kenneth Meier et al., *Bureaucracy and the Failure of Politics: Challenges to Democratic Governance*, 51 ADMIN. & SOC'Y 1576, 1582 (2019) ("In reality, the myth of the value free, amoral bureaucrat is just that—a myth.").

would be to place a person openly hostile to an agency in charge of it.[31] For example, Rick Perry, 14th Secretary of Energy under President Donald Trump, famously suggested that the agency should be abolished prior to his time leading it and at one point could not remember the agency's name.[32]

B. Administrative Agency Theory

Public choice theory suggests that agents, though rational, may engage in self-interested behavior.[33] Beyond self-interest, an agent may also be confronted by a lack of needed information or an aversion to risk, either of which may create dilemmas while working as an agent.[34] In the context of public administration, the difficulties just mentioned are compounded by the fact that public administrators are agents who are appointed and not subject to the pressures of electoral accountability.[35] The legitimacy of public administration stems, at least theoretically, from the consideration that the public elects the leaders who create or oversee government agencies.[36] More specifically, the people elect senators and representatives to develop policies and pass laws and they also elect the president to oversees the agencies that address

31. *See generally* Nina Antadze, *The Role of Leadership in Depleting Institutional Ethos: The Case of Scott Pruitt and the Environmental Protection Agency*, 9 J. ENV'T STUD. & SCIS. 187, 187 (2019) (considering the example of Scott Pruitt's tenure with the EPA and how he set about modifying the "institutional ethos" of the agency).

32. Claire Foran, *Will Rick Perry Promote Science at the Department of Energy?*, THE ATL. (Dec. 14, 2016), https://www.theatlantic.com/politics/archive/2016/12/rick-perry-energy-secretary-trump/510506/.

33. Eyal Zamir & Raanan Sulitzeanu-Kenan, *Explaining Self-Interested Behavior of Public-Spirited Policy Makers*, 78 PUB. ADMIN. REV. 579, 580–81 (2017).

34. *See* Kathleen Eisenhardt, *Agency Theory: An Assessment and Review*, 14 ACAD. MGMT. REV. 57, 58 (1989).

35. *See* Thomas P. Perkins, Jr., Auer *Deference Survives—But Barely*, 68 DRAKE L. REV. 603, 604 (2020) (noting that most executive branch agencies are led by administrative heads appointed by the President and confirmed by the Senate).

36. José Nederhand & Jurian Edelenbos, *Legitimate Public Participation: A Q Methodology on the Views of Politicians*, 83 PUB. ADMIN. REV. 522, 524 (2023) (describing "classical democratic theories" wherein governmental "rulemaking is [viewed as] legitimate when rules are derived from the authentic participation and preferences of the members of a community").

those policies and implement those laws. Public participation aside, governmental agencies also have legitimacy as a result of the rule of law; in other words, statutory, constitutional, and common law each delegate power to public administrators while simultaneously providing rules of administrative conduct to prevent the use of unfettered discretion in decision-making.[37]

Undoubtedly, the regulatory machine cannot properly function without successful bureaucrats effectively managing governmental agencies. Indeed, "[T]he demands of modern administration arguably call for . . . competence, continuity, and relative independence . . . ." [38] Without "career officials," we would lack the consistency and technical expertise needed to keep out government going.[39] Public administrators could shift with the winds, implementing their own views instead of implementing the will of the people.

Career civil servants create the best chance for government to break away from political leanings and move toward competent service in the implementation of law. Justice Stephen Breyer identified four virtues of career civil servants that are consistent with this view: Rationalization and the ability to develop systems to deal with problems and processes; subject matter expertise and administrative expertise; authoritative decision-making; and insulation from a changeable world of politics and public opinion.[40] "To the extent that rulemaking has political legitimacy, it derives from the right of affected interests to present facts and arguments to an agency under procedures designed to ensure the rationality of the agency's decision."[41] Ideally, for administrative processes to

37. Laurence E. Lynn, Jr., *Restoring the Rule of Law to Public Administration: What Frank Goodnow Got Right and Leonard White Didn't*, 69 PUB. ADMIN. REV. 803, 804 (2009) (arguing that "the rule of law" should have "the central place in public administration scholarship, teaching, and practice" and quoting Donald Kettl and James Fesler, who contend that "[p]ublic organizations exist to administer the law, and every element of their being—their structure, staffing, budget, and purpose—is the product of legal authority" (alteration in original)).

38. STEPHEN BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT AND CASES 190 (6th ed. 2006).

39. *See id.*

40. *Id.* at 183–84.

41. CORNELIUS M. KERWIN & SCOTT R. FURLONG, RULEMAKING: HOW

be their most legitimate, both well-connected and marginalized parties should receive an equal opportunity to take advantage of administrative structures and receive benefits.[42] However, the system as it stands benefits those that can most readily utilize the system in a way that aligns with its practices—this may translate into favoritism to well-connected interests.[43] As some scholars have noted: "Together, the legal constraints imposed by procedures and the incentives created by threat of sanction establish a decision[]making environment that channels agency policy choices in favor of constituencies important to political overseers."[44]

C. Discretion and Deference

The implementation of law requires some level of administrative discretion, but the ongoing issue has been delineating an optimal level for such discretion.[45] Courts give deference to reasonable interpretations by members of administrative agencies.[46] Even if a court considers another interpretation more reasonable than the administrative agency's interpretation, the court allows a level of deference to the administrative agency's interpretation as a "stabilizing

GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 163 (5th 2019).

42. *Cf.* Sam Williamson, G.G. ex rel. Grimm v. Gloucester County School Board: *Broadening Title IX's Protections for Transgender Students*, 76 MD. L. REV. 1102, 1129 (2017) ("By deferring to administrative agencies, the courts enable politically-minded officials to eviscerate the protections for marginalized groups as soon as their protection becomes inconvenient.").

43. Ryan Lovelace, *Sen. Mike Lee: Americans Believe They Have Lost Control of Their Government*, WASH. EXAMINER (May 17, 2017, 2:17 PM), https://www.washingtonexaminer.com/news/1542439/sen-mike-lee-americans-believe-they-have-lost-control-of-their-government/ ("[V]ast, unaccountable morass[es] of programs, agencies, and commissions are things that all tend to be captured by the powerful and well-connected." (quoting Sen. Mike Lee)).

44. Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 274 (1987).

45. *See* Ronald A. Cass, *Constitutional* Chevron*: Domains of Congress and Courts in Remedies for Unconstitutional Administrative Structures*, 21 GEO. J.L. & PUB. POL'Y 413, 419–20 (2023).

46. *See* Gregory A. Elinson & Jonathan S. Gould, *The Politics of Deference*, 75 VAND. L. REV. 475, 548 (2022) (noting that the *Chevron* doctrine tends to empower civil servants).

purpose."[47]

Although administrators themselves are not elected, executive-level agency leaders serve at the discretion of the executive and are accountable to said executive.[48] Still, while an individual instance of discretion may be concerning, courts have nevertheless allowed for deference to discretion because of this additional level of accountability.[49]

With respect to deference, precision is a key point. When Congress, through the law, has specifically addressed the appropriate response to the issue, the administrative agency's role is to implement laws according to the direction given.[50] Ideally, the administrative agency should be responsive to and acting within the authority of the delegation given to them. Discretion should not be assumed, even if it often is.[51] Agencies should consider how far the grant of authority goes in providing them with discretion to implement legal provisions. Courts, in evaluating the actions of agencies, determine after the fact whether agency actions were reasonable; this might be necessary given information asymmetry between administrators with specific subject expertise and courts.[52] In the United States, judicial review is a check on deviant agency actions.[53]

47. Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against* Chevron *Deference in Immigration Adjudication*, 70 DUKE L.J. 1197, 1233 (2021) (quoting City of Arlington v. FCC, 569 U.S. 290, 307 (2013)).

48. Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 528 (2015) ("[T]he President [can] choose agency leaders who share her ideological and policy affinities, and to fire or otherwise sanction those whose efforts prove unsatisfactory.").

49. *See* Michael Herz, Chevron *is Dead; Long Live* Chevron, 115 COLUM. L. REV. 1867, 1882 (2015).

50. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

51. *See* Phillip J. Cooper, *"Without Which Nothing": Public Law as the Sine Qua Non of Public Administration*, 49 ADMIN. & SOC'Y 634, 635, 642 (2017).

52. *See* Vincent Martenet, *Judicial Deference to Administrative Interpretation of Statutes from a Comparative Perspective*, 54 VAND. J. TRANSNAT'L. L. 83, 140–41 (2021).

53. Nuno Garoupa & Jud Mathews, *Strategic Delegation, Discretion, and Deference: Explaining the Comparative Law of Administrative Review*, 62 AM. J. COMPAR. L. 1, 3 (2014).

Laws are enacted to give direction to administrative agencies, but this direction is commonly broad and vague enough to allow for some latitude in implementing the law in a variety of circumstances.[54] Known as the "intelligible principle doctrine," administrative agencies have wide discretion to interpret statutes so long as there is some minimal statement of Congressional intent to delegate authority.[55] Just as courts engage in a statutory interpretation of what was intended, including a consideration of the law's language, a history of the law, context, and relationship with other laws, a level of interpretation is assumed when an administrative agency is tasked with implementing a law.[56] This is purposeful, as the law seeks to "empower and enable" administrators to do their jobs.[57] The text of a law typically cannot speak to all possible details necessary to fully implement a law in the context of a program in practice.[58] Therefore, decisions of an administrative agency, after the fact, allow for the legal intent to become a reality in the form of administrative direction; staffing and resource decisions; policy alignment choices; and evaluations to ensure that the program is meeting the stated intent of law. The connection of legislative intent to the needs of those impacted by administrative action is highly important.[59] If the law is unambiguous on a point or a previous decision has provided direction, the administrative agency lacks authority to engage in any kind of interpretation.[60] However, where there is ambiguity, the Supreme Court engages in what is now known as *Chevron*

54. Patrick M. Garry, *Accommodating the Administrative State: The Interrelationship Between the* Chevron *and Nondelegation Doctrines*, 38 ARIZ. ST. L.J. 921, 923 (2006).

55. *See id.* at 921.

56. Lars Tummers & Victor Bekkers, *Policy Implementation, Street-Level Bureaucracy, and the Importance of Discretion* 5–6 (working paper, 2014) (available at https://repub.eur.nl/pub/51710/Metis_189879.pdf), *published in* 16 PUB. MGMT. REV. 527 (2014).

57. Cooper, *supra* note 51, at 635.

58. Michal Tamir, *Public Law as a Whole and Normative Duality: Reclaiming Administrative Insights in Enforcement Review*, 12 TEX. J. ON CIV. LIBERTIES & CIV. RTS. 43, 47 (2006) ("[T]he legislature cannot foresee all the eventualities and flexibilities that may be required to implement legislation.").

59. *See* Tummers & Bekkers, *supra* note 56.

60. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

deference—it considers whether the interpretation adopted by the agency is permissible.[61] One key question is whether the agency interpretation aligns with legislative intent. Previous court decisions hold that precedent is important, but the elevated placement of *Chevron* deference raises the idea of agency decisions having similar stare decisis effect.[62]

Deference to agency discretion is discussed in several countries, one example being Sweden.[63] Other countries, alongside the United States, are also experiencing a shift away from the traditional practice of largely deferring to agency decisions, a practice reserved for only extreme cases of irrationality or lack of justification. Instead, there is a growing trend for both judicial and legislative bodies to regularly question these decisions. This trend has reached a point where courts, in the name of review, might even replace agency perspectives with their own.[64] "The judiciary . . . can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment . . . ."[65] Increasingly, highly independent agencies in the United States are facing scrutiny from equally independent judicial examinations, creating conflicting messages for administrative bodies regarding the extent of their delegated powers and discretionary judgments. This dilemma forces agencies to consider whether to err on the side of caution or to exercise their expertise in ways that cannot be easily verified.[66] Some of the concern with deference to administrative agency rests with the idea that on a technical basis administrative actions are essentially covert, subject only to the

61. *Id.* at 843 ("Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

62. *See* Richard W. Murphy, *Abandon* Chevron *and Modernize Stare Decisis for the Administrative State*, 69 ALA. L. REV. 1, 11 (2017) ("The advantages of stare decisis can apply with as much force to agency precedents as to judicial precedents . . . .").

63. *See generally* Henrik Wenander, *Full Judicial Review or Administrative Discretion? A Swedish Perspective on Deference to the Administration*, *in* DEFERENCE TO THE ADMINISTRATION IN JUDICIAL REVIEW 405, 414 (Guobin Zhu ed., 2019).

64. *See* Garoupa & Mathews, *supra* note 53, at 7.

65. THE FEDERALIST NO. 78 (Alexander Hamilton).

66. *See* Garoupa & Mathews, *supra* note 53 at 8.

public's calls for transparency and court's requirements to show burdens of proof.[67]

The executive and legislative branches behave as a majoritarian expression of society; to the contrary, courts might be considered "counter-majoritarian" in that they guard rights that may be otherwise trampled by majoritarian desires.[68] There is some reason to question whether courts are actually outside the political sphere at all because judges are appointed by politicians in many cases.[69] Because the executive's supervision of agencies' administration is limited, administrative agencies constitute a fourth governmental branch.[70]

The administration is only spoken about in a tangential way in the American founding documents, so the notion that such agencies constitute a branch of their own without being included in the checks and balances accorded the other branches is troubling unless deference itself is appropriately defined and constrained. Allowing judges to act in the role of a technical scientific expert when their technical expertise is law—not science or its application—is perhaps as injurious as the imagined unconstrained administrative sector.[71]

Granting deference based on issues' inherent natures shifts policy matters away from politics and into the sphere of technicalities and implementation. However, this perspective overlooks another possibility aligned with public choice theory, suggesting that officials might act, at least partially, to serve their self-interests. This could involve motives such as advancing their careers, increasing the influence or power of their agency, or

67. *See* Allison M. Whelan, *Executive Capture of Agency Decisionmaking*, 75 VAND. L. REV. 1787, 1870 (2022).

68. *See* Arash Abizadeh, *Counter-Majoritarian Democracy: Persistent Minorities, Federalism, and the Power of Numbers*, 115 AM. POL. SCI. REV. 742 (2021).

69. *See* Trump v. Clinton, 599 F. Supp. 3d 1247, 1250 (S.D. Fla. 2022) ("Every federal judge is appointed by a president who is affiliated with a major political party, and therefore every federal judge could theoretically be viewed as beholden, to some extent or another.").

70. Elizabeth A. Snodgrass, *Foreign Affairs in the Twilight Zone: The Foreign Affairs Powers of the Federal Communications Commission*, 83 VA. L. REV. 207, 207–08 (1997).

71. *See* Logerquist v. McVey, 1 P.3d 113, 129 (Ariz. 2000) (en banc).

merely safeguarding their employment.[72] The choices and decisions of public officials may have little to do with what benefits widely held conceptions of the greater good.

These self-interests should be guarded against by judicial review of administrative decisions. In the United States, the level of limitation or control on interpreting laws, as established by *Chevron*, implies that Congress allows room for interpretation when delegating authority. Agencies are permitted to make decisions as long as those decisions are reasonable and can pass basic tests of rationality.[73] This has left a wide gap for action by administrative agencies—unacceptably wide depending on one's perspective—and power to unelected administrators. This is consistent with the standard for power in America, which is not to be concentrated in any one place.[74] Courts often hesitate to challenge administrative agency interpretations and potential overreach due to their limited technical expertise. Additionally, the parties contesting administrative agency actions might represent regulated entities with a distinct agenda focused on restricting administrative agencies, which diverges from the government's interest in regulation.[75]

The United States has lived with a system of wide administrative discretion since at least the *Chevron* decision in 1984, so the sudden notion of constraining agencies may be considered revolutionary and constitutes a different conception of public interest.[76] An agency has long been able to act or not act, and requirements that agencies act only within an extremely narrow band of acceptable activities could bring government to a halt. *Chevron* aimed to clarify whether an agency had the legal authorization to carry out specific activities as prescribed within

72. *See* JOHN O'NEILL, *Public Choice Theory: Self-Interest and Universal Economics in the Market*, *in* THE MARKET: ETHICS, KNOWLEDGE AND POLITICS 160, 161 (1998).

73. John C. Reitz, *Deference to the Administration in Judicial Review*, 66 AM. J. COMPAR. L. 269, 276 (2018).

74. *See id.* at 297.

75. *See id.* at 272 ("[A]s government officials, [reviewing courts] identify more readily with agency officials than with private parties challenging them.").

76. *See id.* at 275.

the statutory authority.[77] There is no one standard of what is reasonable, and because the term reasonable might rest on the whims of lawmakers, judges, or stakeholders, these definitions are even more suspect.[78] What then is the best way forward to ensure that agencies can work as authorized and expected, without moving beyond their authorities?

II. *CHEVRON* DEFERENCE

The Supreme Court has had a long history of weighing in on the idea of deference and discretion between the co-equal branches. *Marbury v. Madison* is instructive on the role of public officials and discretion.[79] All notion of discretion and deference flows from *Marbury* rather than from the much later *Chevron* case.[80] In *Marbury*, Chief Justice Marshall wrote, on the role of the Secretary of State, that "It is the duty of the Secretary of State to conform to the law, and in this he is an officer of the United States, bound to obey the laws. He acts, in this regard, as has been very properly stated at the bar, under the authority of law . . . ."[81] Chief Justice Marshall later wrote directly to the place of the executive and the matter of discretion:

> [regarding] an attempt to intrude into the cabinet and to intermeddle with the prerogatives of the executive.
>
> It is scarcely necessary for the Court to disclaim all pretensions to such a jurisdiction. An extravagance so absurd and excessive could not have been entertained for a moment. The province of the Court is, solely, to decide on the rights of

77. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) ("Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.").

78. Katrine Benedict MacGregor, Kennecott Utah Copper Corp. v. United States Department of the Interior*: The Validity of Interior's Interpretation of "Promulgated" Within the Statute of Limitations Provisions of CERCLA*, 83 CORNELL L. REV. 1383, 1408–09 (1998) ("Chevron does not define directly when a statutory interpretation satisfies the 'reasonable' standard. Rather, the Court, and subsequent authorities that have interpreted the decision, have not focused on what 'reasonable' means, but on what it does not mean.").

79. *See* Marbury v. Madison, 5 U.S. 137 (1803).

80. *See id.*

81. *Id.* at 158.

> individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion.[82]

Justice Marshall affirmed the paramount nature of the Constitution, the role of the judiciary in interpreting law, and the limits of legislation where executive action is concerned.[83] In one of the most important Supreme Court statements in history, Justice Marshall famously wrote, "It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each."[84] This simply means that courts do not decide what executive agencies do or how they interpret rules. The place of the court is to decide individual rights and elucidate what the law is where there is ambiguity.[85] But the court does not and should not make law.[86]

In *Marbury*, Justice Marshall eloquently made the lines for judicial authority clear by offering initial considerations on the right use of executive power, noting that decisions of the executive are political and subject to political rather than legal examinability, and examining the acceptability of the "customary practice" of the executive branch.[87] Essentially, Justice Marshall provided a window into the correct behavior of government structures in a tripartite construction, notably identifying the difference between ministerial and discretionary actions.[88] A countering view suggests that executive work, from basic decision-making to prioritization, constantly involves discretion.[89] A blanket allowance of deference would not consider the customary practices of the executive, or the potential for executive overreach,

82. *Id.* at 169–70.

83. *See id.* at 170 ("The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion.").

84. *Id.* at 177.

85. *Id*.

86. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2120 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)).

87. *See* Aditya Bamzai, Marbury v. Madison *and the Concept of Judicial Deference*, 81 MO. L. REV. 1057, 1063 (2016).

88. *See id*. at 1064.

89. *Id*. at 1073.

and would therefore be counter to the founding principles as identified by Justice Marshall in the *Marbury* opinion.

Fast forward nearly 180 years; the Court issued its landmark and far-reaching decision in *Chevron*.[90] *Chevron* outlines the deference afforded to administrative agencies as follows:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.
>
> "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.[91]

So, if the agency has administered a program in a way that is permissible—"acceptable because it does not break any laws or rules"—then under *Chevron* it would be entitled to deference.[92] This is an especially broad allowance and requires comparatively little from the agency in terms of defending its decisions, or more importantly, showing its work and making a persuasive argument.[93] This is consistent with Justice Marshall's argument,

90. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

91. *Id.* at 842–44 (footnotes omitted) (citation omitted) (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)).

92. *Permissible*, COLLINS DICTIONARY, https://www.collinsdictionary.com/us/dictionary/english/permissible (last visited Apr. 1, 2024).

93. *See* Robert F. Weber, *The FSOC's Designation Program as a Case Study of the New Administrative Law of Financial Supervision*, 36 YALE J. ON REG. 359,

in that it is still not the place of the Court to provide its own construction of the statute in question. But favoring the agency to fill any gap—implicit or explicit—goes too far in assuming that Congress's intent is always plain.

The U.S. Supreme Court unanimously upheld deference to an interpretation where a law was ambiguous in the case of *Smiley v. Citibank*.[94] There, an interpretation of a fee as interest was determined to be reasonable.[95] The opinion held that long-standing interpretations have a certain level of credibility.[96] The Court also wrote that deference was presumed valid because "Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows."[97] Importantly, however, *Smiley* does not apply to all administrative agency decisions, since *Chevron* provides no quarter in situations where deference is "wholly unsupported by regulations, rulings, or administrative practice."[98] *Chevron* effectively has a sort of on-off switch in this construction—the gap left for discretion is either "wholly unsupported" or broadly allows for significant agency interpretation.[99]

As discussed below, *Chevron* deference has been extended to agency actions beyond those that strictly interpret the implementing statute. In *Auer v. Robbins*, the Court held that deference applies to an agency's interpretation of its own unclear

406 (2019) ("[C]ourts will only reverse an administrative decision when the agency 'entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" (quoting Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43 (1983))).

94. Smiley v. Citibank, 517 U.S. 735 (1996).

95. *Id.* at 744–45.

96. *Id.* at 740 ("[A]gency interpretations that are of long standing come before us with a certain credential of reasonableness, since it is rare that error would long persist.").

97. *Id.* at 740–41.

98. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988).

99. *See id.*

regulations.[100] This *Auer* deference modified the deference allowed for by the *Chevron* case.[101] The Court in *Auer* held that an agency's own regulations were subject to a "plainly erroneous or inconsistent with the regulation" standard.[102] Given that *Auer* regulations do not involve the safeguards of the notice-and-comment provisions of the Administrative Procedure Act, *Auer* regulations allow agencies to act more autonomously than those covered by *Chevron*.[103]

Administrative agencies are different from courts because "agencies do not exist to issue disinterested and authoritative interpretations of statutes based on strictly legal processes."[104] Indeed, administrative law has served as a proxy for courts to expound on their greater judicial philosophy, given that "*Chevron*'s formulation also fed an impulse of the Justices to advance their own views about the allocation of government power through judicial canons about standards of review, even in the context of statutes such as the APA[,] that should be authoritative."[105] To the extent that administrative agencies have exceeded their Constitutional discretionary powers, both courts and administration have moved out of their lanes, possibly due to inattention to the importance of neutrality in use of discretion and the necessary check of popular views through elected officials, not just those of the party in control of the executive at the time.[106] It does not serve the larger public for a minority viewpoint (whether in control of the levers of official power or not) to run roughshod over the rights of the public generally. At its most extreme, the

100. *See* Auer v. Robbins, 519 U.S. 452, 461 (1997).

101. Nicholas R. Bednar, *The Clear-Statement* Chevron *Canon*, 66 DEPAUL L. REV. 819, 866 (2017).

102. *Auer,* 519 U.S. at 461 (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)).

103. *See* Bednar, *supra* note 101, at 866.

104. Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How* Chevron *Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 675 (2007).

105. *Id*. at 723.

106. *See* Donald M. Gooch & Peyton E. Wofford, *Is Neutrality a Feature or a Bug? Delegation, Discretion, and the Democratic Implications of Administrative Law in a Polarized Institutional Environment*, 39 ADMIN. THEORY & PRAXIS 292, 293 (2017).

Chevron deference speaks to a sad paternalism, where the nanny state tells the public what it wants and needs while ignoring their rights and—worse—responsibilities. There is no guarantee or assurance of any sort because the judicial system cannot, having let the genie out of the bottle, attest to the quality of the legislative/judicial decisions then being made by administration if those decisions are not rigorously vetted through meaningful commenting procedures.[107] Checks and balances on this point were probably ceded a long time ago, except in the most extreme of extreme cases, creating a reactionary posture rather than a primary position that government should be of limited power.[108]

III. THE ADMINISTRATIVE PROCEDURE ACT

While no solution is a panacea, the infrastructure is in place to minimize the dangers of unfettered administrative discretion. Twin aims need to be met to ensure the efficient implementation of administrative law. First, administrative agencies need some latitude to make decisions clearly authorized by the underlying statute, particularly those that require some level of disciplinary expertise.[109] Second, administrative agencies must not get so powerful that they subsume or hijack the legislative function of policy making.[110] Courts now use *Chevron* in an attempt to strike that balance.[111] While that approach fulfills the first aim, it has

107. *See* Barton v. U.S. Att'y Gen., 904 F.3d 1294, 1302 n.5 (11th Cir. 2018) (noting that when "procedures are short-circuited," the justification for administrative discretion under *Chevron* "evaporates").

108. *See* Jules Lobel, *The Commander in Chief and the Courts*, 37 PRESIDENTIAL STUD. Q. 49, 62 (2007).

109. James H. Dupuis, Jr., *The Better Part of Wisdom is Deference: Judicial Review of an Office of Conservation Order in* Yuma Petroleum Co. v. Thompson, 61 LA. L. REV. 241, 255 (2000) ("[I]t is wise to allow agencies as much latitude as possible in carrying out their prescribed tasks.").

110. *See* Corrosion Proof Fittings v. EPA, 947 F.2d 1201, 1224 (5th Cir. 1991) ("[E]xpertise, however, is not a universal talisman affording the EPA unbridled latitude to act as it chooses . . . .").

111. *See generally* Am. Fed'n of Gov't Emps., Loc. 1592 v. Fed. Lab. Rels. Auth., 836 F.3d 1291, 1295 (10th Cir. 2016) (noting generally that "deference is justified" because Congress expects the agency to interpret its statutory commands and because "the agency has expertise on the subject" matter); Massi v. Hollenbach, No. 4:06-0034, 2008 WL 3074670, at *8 (M.D. Pa. May 8, 2008) ("A principal justification for *Chevron* deference is based upon practical agency

the propensity to fall woefully short of the second aim.

The solution that could act as a middle ground lies within the Administrative Procedure Act (APA). The APA contains the procedures by which federal agencies develop and promulgate procedures.[112] Within the Act there are requirements for notices of proposed rulemaking, including provisions for public comment.[113] Courts must set aside agency actions that are

> arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . contrary to constitutional right, power, privilege, or immunity; . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; . . . without observance of procedure required by law; . . . [or] unsupported by substantial evidence in a case.[114]

The existence of the APA likely shows a way forward for monitoring and toning down the abuse of discretion in administrative agencies.[115] Fisher and Shapiro suggest that the merits of expertise are a component of administrative competence, with the APA being the law of public administration but requiring a revision to bring it into the present day.[116] The APA also aligns better with *Skidmore* deference because *Skidmore* relies upon an agency's ability to be persuasive in defending its interpretation, specifically an administrator's experience and judgment, to which courts and other parties may look for guidance.[117]

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expertise.").

112. *See* 5 U.S.C. § 551.

113. *Id.* § 553.

114. Act of September 6, 1966, Pub. L. No. 89-554, § 706, 80 Stat. 378, 393.

115. *See* ELIZABETH FISHER & SIDNEY SHAPIRO, ADMINISTRATIVE COMPETENCE: REIMAGINING ADMINISTRATIVE LAW 5 (2020).

116. *See id.*

117. *See* Skidmore v. Swift & Co., 323 U.S. 134, 137–38 (1944) ("[Congress] did create the office of Administrator, impose upon him a variety of duties, endow him with powers to inform himself of conditions in industries and employments subject to the Act, and put on him the duties of bringing injunction actions to restrain violations. Pursuit of his duties has accumulated a considerable experience in the problems of ascertaining working time in employments involving periods of inactivity and a knowledge of the customs prevailing in reference to their solution.").

A. The Benefit of Oversight

A problem with public oversight of rulemaking by administrative agencies is that most people do not pay attention to what administrative agencies are doing, even with public notice via the Federal Register.[118] Most people neither read the Federal Register nor respond to executive agencies' requests for public comment unless encouraged to do so by third parties who are directly impacted by a proposed regulation.[119] One explanation for this apparent lack of interest is that the language of the proposed rules are written in hard-to-understand legalese.[120] So, while the use of the Federal Register is a good first step to reign in the power of administrative agencies, there needs to be other checks beyond traditional public noticing.

Another way to hold public agencies accountable is to require benefit-cost analyses for the impact of administrative rules.[121] However, this is not pure science, and much is taken on faith when it comes to such analyses.[122] Mannix suggests that utilization of benefit-cost analyses, supposedly an instrument allowing for evaluation of the use of discretion in administrative decisions, is actually a form of paternalism that substitutes the decisions of executive agencies for the preferred choices of the public, developed through market forces.[123] The classic benefit-cost analysis weighs the pros and cons of a potential rule before making important decisions.[124] A benefit-cost analysis is theoretically used to test whether regulators are actually acting in the public

118. Richard Cordray, *Protecting Consumers in the Financial Marketplace: Keynote Address, November 2, 2012*, 2013 U. CHI. LEGAL F. 1, 11–12 (2013) ("While the intent of this process is to create transparency through a participatory process that will enhance decision making, the problem is that, on the whole, people do not read the Federal Register." (footnote omitted)).

119. *See id.* at 12 ("Unsurprisingly, many comments come from a cottage industry of trade associations, advocates, lobbyists, and regulatory lawyers who are fluent in agency process.").

120. *Id.*

121. *See* B.J. Sanford, *Midnight Regulations, Judicial Review, and the Formal Limits of Presidential Rulemaking*, 78 N.Y.U. L. REV. 782, 787 (2003).

122. *See* Brian F. Mannix, *Benefit-Cost Analysis as a Check on Administrative Discretion*, 24 SUP. CT. ECON. REV. 155, 166 (2016).

123. *Id.*

124. *See id.* at 157.

interest.[125] However, one might also question the use of such analyses when there is reason to argue that the output of the government's decision-making system is essentially biased in favor of the government and its perspective.[126]

The biggest problem with *Chevron* perhaps lies not in the general idea of administrative discretion—which is arguably essential to the proper function of government and inherent in a system with division of responsibilities and checks and balances—but in how the use of discretion already regularly goes beyond what is provided for by law. For example, agencies may not take an action that goes beyond statutory authority or violates the Constitution.[127] Agencies should base reasoning and conclusions on a variety of components including scientific and economic bases and comments received during any rulemaking.[128] The solutions they propose should solve identified problems and accomplish goals. If all that is the case, why does this system so often result in bureaucratic overreach, with policy responses sometimes far removed from the world in which such solutions will exist; Why do government solutions so often fail to solve the problems they exist to solve?[129] Why might policy goals be left unaccomplished?

Too many decisions are based entirely on the perspective of the agency, which is not infallible.[130] Even the potential for judicial review to look at inconsistent agency decisions is not enough to

125. *See id*. at 165.

126. Philip Hamburger, Chevron *Bias,* 84 GEO. WASH. L. REV. 1187, 1211 (2016) ("[T]he *Chevron* slant . . . . is an institutionally declared and thus systematic precommitment in favor of the government.").

127. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) ("Agencies have only those powers given to them by Congress, and 'enabling legislation' is generally not an 'open book to which the agency [may] add pages and change the plot line.'" (quoting Ernest Gellhorn & Paul Verkuil*, Controlling* Chevron-*Based Delegations,* 20 CARDOZO L. REV. 989, 1011 (1999))).

128. Nancy A. Nord, *Too Many Commissioners? Finding Common Ground on Commissions Split by Party*, 10 GEO. J.L. & PUB. POL'Y 351, 354–55 (2012).

129. *See* Adam C. Smith & Todd Zywicki*, Behavior, Paternalism, and Policy: Evaluating Consumer Financial Protection*, 9 N.Y.U. J.L. & LIBERTY 201, 206 (2015) (noting that "bureaucratic overreach" is one of the causes of "distorting influences").

130. Mannix, *supra* note 122, at 161 (noting that agency heads might simply default to their own perceptions of what policies are rational).

avoid the basic concern.[131] Regardless of political party, placing discretion with an agency head is only as valid as the incumbent's own ability to make the best possible decision and admit their own mistakes as they arise.[132] There can be a tendency for an agency to listen to the strongest constituencies or those that offer a viewpoint that is most aligned with the agency's preferred policy choices.[133] An agency director may engage in active efforts to undermine an agency's work, as errors of commission.[134] An agency director may simply fail to implement rules with which they do not agree or utilize their limited resources so that those rules do not have their intended effects.[135]

This intersects in some ways with the notion of guerilla government—where agency workers act against the dictates of their supervisors.[136] Depending on perspective, undermining what a supervisor wants is laudable and akin to standing up for principles. This is the case where an agency director is dictating

131. *See* Yehonatan Givati & Matthew C. Stephenson, *Judicial Deference to Inconsistent Agency Statutory Interpretations*, 40 J. LEGAL STUD. 85, 88–89 (2011).

132. *See generally* James M. Doyle, *Learning from Error in American Criminal Justice*, 100 J. CRIM. L. & CRIMINOLOGY 109, 134 (2010) ("Once a known error puts a public reputation for infallibility out of reach, the public perception that a fallible agency honestly faced and rectified its failure can become a crucial bulwark of the agency's stature and the system's legitimacy.").

133. *See generally* Jeffrey S. Ashley, *Administrative Versus Legislative Management: The Impact of Discretion on Water Resource Management in the West*, 10 J. LAND RES. & ENV'T. L. 223, 225 (2000) (noting generally that legislators may desire to leave unpopular decisions to agencies and maintain "a loose relationship" with agencies due to the strong constituencies that are cultivated).

134. *See* Donald Moynihan, *Delegitimization, Deconstruction and Control: Undermining the Administrative State*, 699 ANNALS AM. ACAD. POL. & SOC. SCI. 36, 38 (2022) ("Anne Gorsuch's tenure as the head of the Environmental Protection Agency (EPA) during the Reagan administration stood out precisely because it was so unusual for an appointee to be so at odds with the agency mission.").

135. *See generally* Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 421, 451 (2015) ("Agency heads possess substantial discretion over how to manage their agency's rulemaking resources in ways that further their own goals and priorities.").

136. *See* Rosemary O'Leary, *Guerrilla Employees: Should Managers Nurture, Tolerate, or Terminate Them?*, 70 PUB. ADMIN. REV. 8, 8 (2010) ("'Guerrilla government' is [a] term for the actions of career public servants who work against the wishes—either implicitly or explicitly communicated—of their superiors.").

non-compliance or non-implementation of rules. In instances where an employee is acting in opposite ways—failing to implement what is required—then the possibility of a moral reason for such behavior is less likely. This brings to mind the notion of guerilla government, where doing what is right is more important than just following orders and procedures.[137] This may take the form of whistleblowing, or rule-bending.[138] If there is direction to enforce a rule that is unethical or otherwise problematic, there may be an administrative call to either not implement the rule or slow down any related processes.[139]

With this in mind, being dangerously unqualified is not limited only to administrative agencies. Legislators and court officials may also know very little about the technical nature of regulatory programs, and agreeing or not agreeing with the premises of these rules on a political basis is hardly a substitute for understanding a program before criticizing it.[140] Courts, for their part, have already indicated that they will not condone expansive, overreaching interpretations of statutes because it is clearly the place of the legislature to either provide clear law to implement, or to go back and correct unclear laws.[141] This may undermine an agency's construction of the statute, perhaps entirely missing the intent of Congress.

Speaking politically, the decision to allow sweeping entitlement for discretion to an agency head makes little sense,

137. *Cf.* Gary E. Hollibaugh, Jr., et al., *Why Public Employees Rebel: Guerrilla Government in the Public Sector*, 80 PUB. ADMIN. REV. 64, 65 (2020) ("[G]uerrilla government [occurs when] . . . . civil servants . . . behave in a way that is intended to undermine and challenge their superiors.").

138. *Id.* at 66.

139. *See id.* ("Although ethics appears to be a contributing factor to guerrilla government activities, there is still the influence of organizations and management . . . .").

140. *See* Jonathan H. Adler, *Super Deference and Heightened Scrutiny*, 74 FLA. L. REV. 267, 316 (2022) ("[A]dministrative agencies at least have a plausible claim to technical or other expertise on relevant subject matter. Legislators, as a general rule, have little such expertise and, at least at the federal level, receive minimal technical support . . . .").

141. *See generally* West Virginia v. EPA, 142 S. Ct. 2587, 2608–09 (2022) (noting, in several cases, Congress did not intend to confer expansive authority to administrative agencies when the statutory basis for doing so is flimsy. The Supreme Court, in these rulings, refused to approve such attempts to do so).

even if one is in favor of the *Chevron* decision. There is no guarantee that the agency head will be an advocate for the agency's charge.[142] There is no requirement for political appointees to feel that an agency's work is valid for them to become an agency director.[143] There is no requirement that a potential agency director know about or become an expert in the work of an agency.[144] Yet, the stable functioning of administrative agencies has been seen as essential to the proper functioning of democracy, so partisan attacks and overreach on the part of the executive in controlling if not deconstructin, administrative agencies and keeping them from accomplishing their missions are, at minimum, concerning.[145]

B. Rulemaking and Commenting

It should be noted that even though there are requirements for agencies to publish intended rulemaking notices and to seek public comment, these processes are not perfect.[146] For example, an agency can waive the notice-and-comment process when the agency determines that doing so is "impracticable, unnecessary, or contrary to the public interest."[147] This on its own is a significant amount of discretion because waiving the notice-comment period potentially opens the agency up to criticism from political quarters, interest groups, and the public.[148] However, because the agency is likely aware that such a use of waiver would be frowned upon, much like failing to respond to feedback received through the notice-comment process, agencies are perhaps more likely to

142. *See* David L. Noll, *Administrative Sabotage*, 120 MICH. L. REV, 753, 788 (2022) ("[T]he president [can] appoint agency heads who oppose the programs they administer.").

143. *See id.* at 791 ("[T]he president is free to install an agency head who opposes the agency's mission or to leave the agency headless.").

144. Philip Hamburger, *Nondelegation Blues*, 91 GEO. WASH. L. REV. 1083, 1191 (2023) (noting that agency heads sometimes are not experts in the field).

145. Moynihan, *supra* note 134, at 46 (describing Congress's inaction towards the administrative state).

146. *See generally* 5 U.S.C. § 553 (listing requirements for notice of proposed rules).

147. *Id.*

148. *See* Susan Webb Yackee, *Regulatory Capture's Self-Serving Application*, 82 PUB. ADMIN. REV. 866, 872 (2022).

respond favorably, even proactively, to feedback received.[149] As suggested above, it is for Congress to address shortfalls in legal clarity, but the process to do this—a resolution of disapproval for an administrative rule—is so rarely imposed as to be irrelevant.[150] This is unacceptable, especially when so much political power is derived from calling out the failings of executive administration.

If Congress is passing laws, then it is for Congress to determine whether those laws are being implemented in a way that is achieving the stated goals.[151] Congress should evaluate the agency, as an agency cannot be counted on to evaluate its implementation of a rule in an unbiased way. As Congress develops and passes a law and defines its intent in a certain way, Congress ought to have the responsibility for finding out if the law (1) was implemented appropriately, (2) had the intended effect, and (3) failed because of some fault in the law's construction. Congress would then have a responsibility to go back and fix the problem it created. Significant or major rules may be flagged by the Office of Information & Regulatory Affairs (OIRA), but this only satisfies a level of oversight on the part of the Executive Branch.[152]

In some circumstances this goes against standard practice, which has been to name and blame an agency for programmatic

149. *See id.*

150. *See* Jody Freeman & Matthew C. Stephenson, *The Untapped Potential of the Congressional Review Act*, 59 HARV. J. ON LEGIS. 279, 281 (2022) ("[P]residents will usually veto CRA resolutions that disapprove rules issued by the sitting President's own administration. That assumption implies that the CRA is relevant only in the few months after a presidential transition, when the incoming administration can nullify rules adopted late in the prior administration. And this has indeed been the pattern to date.").

151. *See generally* West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022) ("A decision of such magnitude and consequence rests with Congress itself . . . .").

152. Curtis W. Copeland, *The Role of the Office of Information and Regulatory Affairs in Federal Rulemaking*, 33 FORDHAM URBAN L.J. 101, 101 (2006) ("OIRA reviews the substance of about 600 to 700 significant proposed and final rules each year before agencies publish them in the *Federal Register*, and can clear the rules with or without change, return them to the agencies for 'reconsideration,' or encourage the agencies to withdraw the rules. About 100 of the rules that OIRA reviews each year are each considered 'economically significant' or 'major' . . . ." (footnote omitted)).

failures when an insufficiently explored and understood policy problem has led to ineffective or inefficient implementation.[153] But there are reasons for leaving the system as is because agencies do in fact engage in societally beneficial "deliberative [reasoning] rather than instrumental[] reasoning."[154] The inability for a polarized electorate and its representatives to achieve consensus on much of anything suggests that passing laws is not the answer; some policymaking must be done at the administrative agency level.[155]

Even with efforts to simplify often lengthy and detailed government documents, these efforts to encourage more public participation have failed in many cases.[156] Comments received from the public are sometimes few and far between on nonmainstream policy issues, and those that are submitted may be simply ignored in favor of the agency's own internal determinations.[157] Businesses are overrepresented in the comments because they are financially interested in certain proposed changes and respond in those instances where their bottom lines are affected.[158] An example of a policy situation where

153. *See generally* CHRISTOPHER HOOD, THE BLAME GAME: SPIN, BUREAUCRACY, AND SELF-PRESERVATION IN GOVERNMENT 36 (2010) (describing various players' roles in "the blame game.").

154. Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2058 (2018).

155. *See* Lily Talerman, *Name and Shame: How International Pressure Allows Civil Rights Activists to Incorporate Human Rights Norms into American Jurisprudence*, 17 DUKE J. CONST. L. & PUB. POL'Y 303, 330 (2022) ("Today, however, parties are significantly more polarized, if not more polarized than ever before. The result is often an inability of Congress to form consensus to legislate." (footnote omitted)).

156. *See* Cynthia Farina, Mary J. Newhart, & Cheryl Blake, *The Problem with Words: Plain Language and Public Participation in Rulemaking*, 83 GEO. WASH. L. REV. 1358, 1362–63 (2015) ("[T]he current rulemaking process, despite its formal promises of transparency and broad participation rights, *routinely* and *systematically* disadvantages consumers, small business owners, local and tribal government entities, nongovernmental organizations, and similar kinds of stakeholders, as well as members of the general public.").

157. *See* David Thaw, *Enlightened Regulatory Capture,* 89 WASH. L. REV. 329, 337 (2014) ("Many agencies have . . . determin[ed] that they are free to ignore comments submitted during informal rulemaking proceedings and promulgate regulations based on their own expertise.").

158. *See* Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards*

organized interests vastly outweighed general public comment was the No Child Left Behind Act and its implementation.[159]

C. The APA as a Solution

The APA requires that agencies provide notice for rulemaking and public commenting on proposed rules.[160] This requirement is justifiable, but not imperfect. Public participation can be difficult to obtain, and it can be even more difficult to engage with members of the public who are educated on particular policy issues in a way that results in positive co-production of public outcomes.[161] While it may be difficult to achieve, public participation is a major source of legitimacy in the public sphere.[162] Clearly, administrative ease is an insufficient justification for avoiding public input and interaction when so much is riding on regaining the public's trust.[163]

The Federal Government already has a tool to communicate administrative lawmaking intents to the public in the form of the Federal Register.[164] As a government website indicates, "The

Business? Assessing Interest Group Influence on the U.S. Bureaucracy, 68 J. POL. 128, 131, 133 (2006) (noting that, in one sample, over 57% of comments came from business interests).

159. *See generally* Michael W. Apple, *Ideological Success, Educational Failure?: On the Politics of No Child Left Behind*, 58 J. TEACHER EDUC. 108 (2007) (exploring the genesis of the No Child Left Behind Act and its potential negative educational implications).

160. 5 U.S.C. § 553.

161. *See* Danshera Cords, *"Let's Get Together": Collaborative Tax Resolution*, 11 PITT. TAX REV. 47, 62 (2013) ("Scholars have broadly explored the paucity of public participation in, and knowledge of, the rulemaking processes relating to labor, environmental protection, and even food safety.").

162. *See* Caitlin A. Bubar, *Improving Statutory Deadlines on Agency Action: Learning from the SEC's Missed Deadlines Under the JOBS Act*, 92 TEX. L. REV. 995, 1010 (2014) ("[I]f a deadline does not allow for a notice-and-comment period, it can take away from the democratic legitimacy that public participation provides the rulemaking process.").

163. *See* Evan Wesser, *Welcome Back to the Docket: The Case for Judicial Review of Task Order Protests*, 17 FED. CIR. BAR J. 551, 560 (2008) ("Reforms that heavily weigh administrative ease at the expense of competition raise concerns regarding the federal acquisition system's integrity and transparency.").

164. *See* United States v. Aarons, 310 F.2d 341, 348 (2d Cir. 1962) ("The only purpose of the requirement for publication in the Federal Register is to make sure that persons may find the necessary rules as to organization and procedure if

Federal Register is the official daily publication for rules, proposed rules, and notices of Federal agencies and organizations, as well as executive orders and other presidential documents."[165] "The Federal Register is updated daily by 6 a.m. and is published Monday through Friday, except Federal holidays."[166]

A serious problem with the Federal Register is the largely unsupported assumption that the public reads it.[167] Requests for public participation and comment fail not because they fall on deaf ears but because they fall on (mostly) no ears.[168] Statistics on site use from 2010 did not show particularly impressive levels of reach into the lives of regular citizens. Future research should explore if the website has made significant strides since then.[169] Having more people comment on the agency's rules might allow for some clarity for those who need it.

When agencies or the executive fail to communicate their intentions and fail to maintain fidelity to procedure, the public may lose faith in government; this is what might happen as a result of the U.S. Supreme Court's recent decision in *Biden v. Nebraska.*[170] In *Biden,* the Court found that Congress had not delegated the authority to the Department of Education (DOE) to cancel significant amounts of student loans.[171] Because the DOE

they seek them.").

165. *Federal Register*, GOVINFO, https://www.govinfo.gov/help/fr (last updated June 14, 2022).

166. *Id.*

167. Paul J. Larkin, Jr., *The Folly of Requiring Complete Knowledge of the Criminal Law*, 12 LIBERTY U.L. REV. 335, 346 (2018) ("People of 'ordinary intelligence' do not read the Code of Federal Regulations (unless they have trouble falling asleep). Few have probably heard of the Federal Register, let alone know where to find it.").

168. *See* Adamo Wrecking Co. v. United States, 434 U.S. 275, 290 (1978) (Powell, J., concurring) ("It also is totally unrealistic to assume that more than a fraction of the persons and entities affected by a regulation . . . would have knowledge of its promulgation or familiarity with or access to the Federal Register.").

169. *Federal Register.gov Progress Report,* FED. REG., https://www.federalregister.gov/reader-aids/office-of-the-federal-register-blog/2011/02/federalregister-gov-progress-report (last visited Apr. 1, 2024) (showing that only "655,820 absolute unique visitors" visited the site in a five-month period).

170. *See* Biden v. Nebraska, 143 S. Ct. 2355 (2023).

171. *Id.* at 2362 ("[T]he HEROES Act does not authorize the loan cancellation plan.").

did not have the authority to engage in such a move, millions of citizens hoping to have student loans forgiven were handed yet another reason to not trust government.[172] There is a distinct fear that the public was misled, which could lead to irrevocable harm to the administrative law process.[173] This could have been prevented if the administration was required to hear Congress's views and respond to them, given that the authority in question did not allow for the forgiveness program.[174] But this misses what happened. The executive branch acted outside its grant of authority to implement a policy objective in a way that avoided both engaging with Congress on the topic and giving political opponents an opportunity to contribute to a political and democratic solution that made sense.[175] And given the reliance on executive power here, they should have known that this approach was an overreach.

Such an approach requires communication between branches of government and an embrace of the system of checks and balances that has made American government strong. If there is an over-reliance on policy tools, the tools have undesirable consequences, but we must not ignore the notion that the system itself has undesirable outcomes. Communicative actions would be key in such a situation.[176] In order for the system to work, both

172. *See* Sequoia Carrillo & Janet W. Lee, *'There Is No Trust Now': Student Loan Borrowers Respond to Supreme Court Decision*, NAT'L PUB. RADIO (July 1, 2023, 5:00 AM ET), https://www.npr.org/2023/07/01/1185327143/student-loan-forgiveness-supreme-court-reactions.

173. *See Biden*, 143 S. Ct. at 2376 ("It is important that the public not be misled either. Any such misperception would be harmful to this institution and our country.").

174. *Id.* at 2374 ("But imagine instead asking the enacting Congress a more pertinent question: 'Can the Secretary use his powers to abolish $430 billion in student loans, completely canceling loan balances for 20 million borrowers, as a pandemic winds down to its end?' We can't believe the answer would be yes. Congress did not unanimously pass the HEROES Act with such power in mind."). Therefore, it is logical to assume that had Congress simply been asked for the permission to forgive these loans, the answer would have been a resounding no.

175. *See id.* (noting that because "Congress did not unanimously pass the HEROES Act with such power in mind," the power to make such wide sweeping change rests with "Congress itself").

176. *See generally* Carrillo & Lee, *supra* note 172 (highlighting the frustration surrounding the Supreme Court's decision striking down Biden's student loan cancellation plan).

Congress and the executive must engage in their specific work. As the *Biden* case illustrates, neither has been able to produce a way of allowing the other side to work by a set of rules that allows for stability, even though both are playing for the same team.[177]

Because we can no longer assume that government will behave in a way that respects the authority of their co-equal branches, discretion and allowances are misplaced. Continuance along this path will not lead to stability because what is desired—a sharing of power and authority—is itself not a stable, uncontested destination. It may be desirable for a politician to control, undermine, and deconstruct the EPA, but merely being elected to a political office on its own suggests broad public assent to neither the destruction of environmental protection regulatory structures nor the potential devastation of the environment itself.[178] Perhaps having rules in place that require notices and acceptance of comment, experiencing legislative responses when a lack of clarity exists, and forcing the rules to be followed will become so onerous that both sides might trust each other and work together.

CONCLUSION

Administrative discretion as originally intended allowed for flexibility to adapt to changing circumstances, even if it was criticized for causing injustice when utilized unnecessarily.[179] In seeking to write a law that accounts for every possible example, a law is necessarily weak because it will inevitably miss instances of application. Obviously, some alternative is needed to allow those

177. *See generally Biden*, 143 S. Ct. 2355 (constituting a dispute of the government's reading of the HEROES Act).

178. *See* Cayli Baker, *The Trump Administration's Major Environmental Deregulations*, BROOKINGS (Dec. 15, 2020), https://www.brookings.edu/articles/the-trump-administrations-major-environmental-deregulations/ (noting that the Trump administration's deregulation efforts within the EPA proved to be a "prominent and easy target").

179. *See* Aileen McHarg, *Administrative Discretion, Administrative Rule-Making, and Judicial Review*, 70 CURRENT LEGAL PROBS. 267, 267 (2017) (noting that while administrative discretion is valuable, "*unnecessary* discretion [is] the major source of bureaucratic injustice").

with expertise to fill in the gaps on a case-by-case basis while at the same time discouraging those in power of flip-flopping agency regulations when a president from the opposing political party takes office.[180] Unfortunately, as seen above, *Chevron* has not adequately addressed this core problem.

The best response to the problems that face administrative agencies, a political system increasingly bereft of trust and abuses to a system of administrative discretion, lies in greater utilization of public participation mechanisms coupled with a more educated and involved public. As Hamilton suggested in 1788, a strong executive is needed, but implicit in the strength of the executive is competence, and a principal expression of this is through the administrative state.[181] Public administration provides a venue for public discourse and interaction between the instruments of government and the public itself. For good governance to be achieved, public discourse must be engaged.[182]

It is not yet possible to assume that all are prepared to enter into such a discourse, and for this reason, the role of public administration as provider of information and educator becomes even more important. If public administration is properly engaged in its best role, it will bring the public back into its government in meaningful ways; otherwise, opportunities for participation may merely be window dressing and virtue signaling. Unchecked discretion is no better than any other sort of unaccountability, but it is made worse in a context where administrative rule makers are unelected, limiting the potential for accountability in traditional forms. There is something to be said for the ideal role of administration, but this must be balanced against the rights

180. *See* Richard A. Epstein, *Why the FDA Must Preempt Tort Litigation: A Critique of* Chevron *Deference and a Response to Richard Nagareda*, 1 J. TORT L. 1, 1 (2006) ("[T]he *Chevron* approach runs the enormous risk of agency flip-flop, driven by powerful political forces.").

181. *See* THE FEDERALIST NO. 70 (Alexander Hamilton) ("The ingredients which constitute energy in the Executive are, first, unity; secondly, duration; thirdly, an adequate provision for its support; fourthly, competent powers.").

182. *See* Hugh T. Miller, *Everyday Politics in Public Administration*, 23 AM. REV. PUB. ADMIN. 99, 110–11 (1993) ("If (citizens) have the opportunity to see themselves as engaged in--or inherently capable of engaging in--the exercise of administrative discretion, therefore in governance . . . they may be able to develop improved practices and make wiser judgments.").

and needs of the branches of government. Where authority exists, administration must do its job, but where this authority has not been made clear, the branches of government clearly and demonstrably need to fulfill their obligations. Anything less than that is simply business as usual.