INPUT, THROUGHPUT, AND OUTPUT LEGITIMACY – A MEANS OF RESUSCITATING JUDICIAL DEFERENCE TO AGENCY RULES AFTER *LOPER BRIGHT ENTERPRISES*

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After years of rejecting its application in adjudicating disputes as to the legality of agency rules, the U.S. Supreme Court, in Loper Bright Enterprises v. Raimondo*, finally reversed* Chevron *in June 2024 and replaced it with a framework mandating reviewing courts grant no deference to administrative agency rulemakings.*[1] *Applying this standard, the United States Court of Appeals for the Sixth Circuit issued a decision that granted no deference to the Federal Communications Commission's ("FCC") determination that Broadband Internet Service Providers are common carriers that offer consumers a "telecommunications service" subject to net neutrality restrictions under Title II of the Communications Act of 1996.*[2] *The Sixth Circuit instead applied its own interpretation of the Act to conclude that both broadband internet and mobile broadband services are outside the FCC's authority to regulate, thereby effectively ending the fight over Net Neutrality rules that would have disallowed internet service providers from slowing or blocking access to internet content based on website.*[3]

Loper Bright Enterprises *and the broader scholarship on the legality of judicial deference to agency rulemakings based on ambiguously worded statutory text focuses monographically on arriving at a particular intellectual and philosophical understanding of U.S. Constitutional Law and the Administrative Procedure Act ("APA").*[4] *This purist approach, adopted by both the majority and dissent in* Loper Bright Enterprises*, fails to jurisprudentially acknowledge that U.S. government performance needs improvement and that court decisions cabining the discretion afforded to administrative agencies risk debilitating the state and its ability to protect the rule of law. The*

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1. 603 U.S. 369, 369 (2024).
2. Ohio Telecom Ass'n v. FCC, 124 F.4th 993, 997–98 (6th Cir. 2025).
3. *Id.*
4. Kent Barnett, *How* Chevron *Deference Fits into Article III*, 89 GEO. WASH. L. REV. 1143 (2021); Ronald M. Levin, *The APA and the Assault on Deference*, 106 MINN. L. REV. 125, 129 (2021).

rule of law, in turn, is increasingly under siege from authoritarians on the right and anarchists on the left, whose support is growing due to the government's inability to address matters of public concern.

Loper Bright*'s rejection of judicial deference to administrative rules fails to acknowledge that informal legislative rulemaking is a uniquely American means of reconciling the need for government capacity with public accountability and that all mature democracies grant some form of judicial deference to agency rules and determinations. Now that* Chevron *is definitively reversed, the risk is that government performance will worsen by depriving the public of the benefits of government administration that is based on expertise and professionalism. It will force public policy to rely more on what the late Nobel Laureate Daniel Kahneman has called System 1 or fast, emotional, and irrational thoughts, as opposed to rational and reflective System 2 thoughts.*[5]

My recommendation is for Congress to amend the APA to reverse Loper Bright Enterprises *and instead incorporate the concepts of input, throughput, and output legitimacy that derive from American and European scholarship on European integration and recognize the importance of institutional legitimacy, public consultation, counterfactual critical assessment, and agency expertise as means of enhancing government capacity to legitimize and enhance the state. Under my recommended approach, the APA should be amended by Congress, such that a reviewing court shall defer to challenged agency rule in situations where it is based on a valid Congressional delegation that has benefited from public consultation and input (input legitimacy), where the agency process in arriving at the rule has demonstrated accountability, transparency, inclusiveness, and openness to counterfactually consider proposed alternatives (throughput legitimacy), and, finally, incorporated administrative and professional expertise to arrive at the proper result (output legitimacy).*

Deference is to be afforded agencies in this situation because legitimacy is an obvious concern in any framework mandating judicial deference for purposes of increasing state capacity. Increased state capacity, in turn, addresses the fundamental problem with American government today, namely a nihilism in the electorate brought about by parlous government performance that worsens the

5. *See* DANIEL KAHNEMAN, THINKING, FAST AND SLOW 20 (1st ed. 2013).

problem.[6] *My recommendation draws upon comparative scholarship as to state legitimacy and research evidencing that the best performing systems of government grant some level of deference to administrative agencies. This mode of analysis is still applied by courts reviewing agency actions, as opposed to rules, through a deferential process known as hard look review under APA section 706(2).*[7] *Congress would do well to consider it for purposes of improving living standards domestically and resuscitating U.S. democracy.*

6. *See* Chris Bodenner, *'The U.S. Has Fallen Into a State of Political Nihilism'*, ATLANTIC (Dec. 12, 2016), https://www.theatlantic.com/politics/archive/2016/12/state-of-utter-political-nihilism/622658/ [https://perma.cc/Z2JP-XBCK]. This is especially true among middle income and wealthy households whose jobs are most susceptible to economic downsizing due to technology and global trade.

7. *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

I. INTRODUCTION

The highly regarded Financial Times columnist Martin Wolf has described the United States as both the best of countries and the worst of countries.[8] By the "best of countries," he is referring to the fact that the United States has seen the wealth gap between itself and other rich countries, as measured by per capita income, grow dramatically since 2000 due to high labor productivity growth.[9] It is also home to the world's most valuable publicly traded companies, such as Apple, Nvidia, Microsoft, Alphabet, Amazon and Tesla, many of which were relatively unknown until the twenty-first century.[10] By the worst of countries, he is referring to a country with a homicide rate six times as high as that of the U.K. and thirty times that of Japan, where maternal death rates are dramatically higher than any other rich country, where life expectancy has flatlined and is now significantly lower than the rich-world average, and where the incarceration rate, at 541 per 100,000 inhabitants, is closer to third world authoritarian states such as El Salvador and Cuba than it is to other rich countries.[11] This is in spite of the fact the United States spends dramatically more money per person on health care than the rich world norm, evidencing, to Wolf, a wastefulness in resource allocation that has more to do with interest group capture than public need.[12] Wolf writes that the United States' relatively high income inequality and the insecurity of those in the bottom and middle of the income distribution has led to what he labels a "pluto-populism," which is a "political marriage of the ultra-rich, seeking deregulation and low taxes, with the insecure and angry middle and lower middle classes, seeking people to blame for what is going

8. Martin Wolf, *What Makes the US Truly Exceptional*, FIN. TIMES (Dec. 3, 2024), https://www.ft.com/content/a757fb35-889b-46a7-b32c-5e8e254f6450 [perma.cc/CZ4L-E2DU].

9. *Id.*

10. *Id.*

11. *Id.*

12. *See id.*

wrong with them."[13] The result of this dynamic, which Wolf labels Trumpism, may well undermine what he identifies as the underpinnings of the United States' rise to prosperity, namely "the rule of law, political stability, a sense of national cohesion (despite many differences), freedom of expression, and scientific excellence."[14] Why has the United States, in spite of its dominant position in the international system, been unable to improve its inhabitants' human development? Why has there been an erosion in the quality of American democracy? Might the government be inadvertently debilitated by emotional and irrational democratic choices that are worsened by a conservative fetish to keep government agencies on a very short leash? If this is the case, the Supreme Court's decision in *Loper Bright Enterprises*, which concluded that judicial deference to agency rules violates the APA, will actually worsen the problem. Let me explain.

As a full professor at a teaching-focused law school in Knoxville, Tennessee, I have been graciously welcomed into the Knoxville Bar Association, which, on May 1, 2024, hosted former Tennessee Governor Phil Bredesen as its Law Day Speaker. Bredesen, a moderate Democrat who served two very successful terms as Tennessee Governor from 2003 to 2011 but decisively lost the 2018 U.S. Senate election against then-U.S. Representative Marsha Blackburn.[15] Bredesen talked about the late Israeli-American Nobel Laureate Daniel Kahneman's book *Thinking, Fast and Slow*, and how this informs his understanding of politics today.[16] In particular, Bredesen discussed how Kahneman identified the human brain's two different systems for forming thoughts, namely a System 1, which operates at high speed, is unconscious, emotional, often irrational and tends toward stereotyping and System 2, which is conscious and rational, but slower and operates less frequently.[17] Bredesen, describing Kahneman's work, discussed how one of the major mistakes we make in evaluating democracy and the electorate is to assume that voters base their decisions on their System 2 thoughts, when System 1 thoughts more often explain the electorate's preferences.[18] Bredesen attributes this to the fact that humans evolved in the African savannah and, until very recently, were hunter-gatherers who lived in illiterate and homogeneous small clans and not the heterogeneous, literate, and multiethnic societies of today.[19] As a result, our decision-making has developed a strong bias against the unknown, often leading to fear of

13. *Id.*
14. *Id.*
15. Phil Bredesen, Former Governor of Tennessee, Address at the Knoxville Bar Association Law Day 2024: Voices of Democracy (May 1, 2024).
16. *Id*.
17. *Id.*; *see* KAHNEMAN, *supra* note 5, at 22.
18. *See* Bredesen, *supra* note 15.
19. *Id*.

foreigners and, for most communities, difficulty in addressing collective action challenges that require cooperation beyond their immediate group.[20] System 1 thoughts suffer from what is known as the anchoring effect, the availability bias, the conjunction fallacy, the optimism bias, risk-aversion, framing, and sunk cost.[21] More fully explained below, they explain why the electorate often makes suboptimal choices.

In June 2024, the U.S. Supreme Court, in *Loper Bright Enterprises*, definitively reversed *Chevron* Deference and concluded that the APA statutorily disallows reviewing courts from granting any deference to administrative agency rules in situations where the governing law is ambiguous on the precise issue.[22] A recent application of *Chevron*'s reversal is the United States Court of Appeals for the Sixth Circuit's decision to grant no deference to and reject the FCC's determination that Broadband Internet Service Providers are common carriers that offer consumers a "telecommunications service" subject to net neutrality restrictions under Title II of the Communications Act of 1996.[23] The Sixth Circuit instead applied its own interpretation of the Act to conclude that both broadband internet and mobile broadband services are outside the FCC's authority to regulate, thereby effectively ending the fight over Net Neutrality rules designed to prevent internet service providers from slowing or blocking access to internet content based on website.[24] The result is that the FCC will have fewer tools to protect against consumer data misuse and internet access manipulation.[25]

Problematically, the entirety of the jurisprudence and scholarship on reconciling the dispute as to the legality of judicial deference to agency rules has focused monographically on arriving at a particular intellectual and philosophical understanding of U.S. Constitutional Law and the APA and how this explicates the proper separation of powers between congressionally created agencies and Article III reviewing courts. This purist approach to evaluating agency rulemakings fails to acknowledge that government performance in the United States needs improvement and that much of this may be attributable to limitations in our own minds that lead us to make suboptimal and, at times, irrational democratic choices. Congress, recognizing this limitation, should amend the APA to empower courts, whose chief

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20. *Id*.

21. *See* KAHNEMAN, *supra* note 5, at 127–28, 134–35, 158–61, 261, 282–83, 343–45, 366.

22. *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412 (2024).

23. Ohio Telecom Ass'n v. FCC, 124 F.4th 993, 997–98 (6th Cir. 2025).

24. *Id.*

25. *See* FCC, Chairwoman Fact Sheet: Ten Facts About Net Neutrality Protections (Oct. 18, 2023), https://docs.fcc.gov/public/attachments/DOC-397806A1.pdf ("Net neutrality protections would increase the tools the FCC has available to protect consumer data and respond to evolving consumer threats.").

obligation is to protect the rule of law, to grant agencies a needed leash to effectuate wise policy choices. This is because the rule of law is increasingly under siege from authoritarians on the right and anarchists on the left whose support has grown due to living standard stagnation brought about by the government's inability to address matters of public concern.

Loper Bright's mandate that reviewing courts grant no deference to administrative rulemakings in situations involving statutory ambiguity risks worsening government performance by precluding application of administrative expertise and the interstitial knowledge by agency administrators in situations where Congress has not statutorily addressed the issue. Because ambiguity is inherent in all statutory schemes, public policy will increasingly reflect what Kahneman labels System 1 or emotional and irrational thoughts, as opposed to System 2 thoughts that are based on deliberative and critical thinking.

Chief Justice Roberts' majority opinion in *Loper Bright Enterprises* gutting *Chevron* was based on the Court's conclusion that APA section 706(2) statutorily precludes judicial deference to agency rules.[26] Because of this, my recommendation is for Congress to step in and amend the APA to mandate that a challenged agency rule shall be deferred to in the following situations: (1) where it is based on a valid Congressional delegation that has benefited from public consultation and input (input legitimacy); (2) where the agency process in arriving at the rule has demonstrated accountability, transparency, inclusiveness, and openness to counterfactually considered proposed alternatives (throughput legitimacy); and, (3) where the agency process in arriving the rule has incorporated administrative and professional expertise to arrive at the proper result (output legitimacy). These legitimacy doctrines derive from scholarship on European Union integration that recognize the importance of institutional legitimacy, public consultation, counterfactual critical assessment, and agency expertise as means of enhancing government capacity to legitimize the state. This proposal for Congress to amend the APA to mandate judicial deference in situations involving statutory ambiguity is supported by comparative research demonstrating that the best performing mature democracies grant some level of judicial deference to administrative agencies. My recommendation, post-*Loper Bright Enterprises*, is that APA section 706 be amended such that the same framework for evaluating agency actions be applied to the evaluation of agency rulemakings.

26. *Loper Bright Enters*., 603 U.S. at 396.

II. DEMOCRACY, THE RULE OF LAW AND THE NEED FOR ADMINISTRATIVE AGENCIES

Lon Fuller defined a democracy as a society with three institutional predicates that are necessary for "a reasonable level of democratic responsiveness and unbiased elections."[27] The three institutional predicates are namely: "(1) periodic free-and-fair elections in which a losing side cedes power; (2) the liberal rights to speech and association that are closely linked to democracy in practice; and (3) the stability, predictability, and integrity of law and legal institutions," also known as the rule of law, which, according to Fuller, is necessary to allow for democratic engagement by citizens without fear or coercion.[28]

By this measure, the United States undoubtedly remains a constitutional republic that retains the features of a liberal democracy. However, as evident from President Trump's first term in office, Trump's attempted insurrection of January 6, 2021, the failure of the U.S. Senate to subsequently hold him accountable, and Trump's election to a second term as President with a stated goal of seeking retribution against his political opponents, the United States is struggling to balance democracy with Fuller's definition of the rule of law. This struggle is manifest in the increasing partisanship in the nomination and confirmation process of federal judges and judges' increasing tendency to reject stare decisis based on their political inclinations.[29] According to the United Nations and the U.S. courts, the "[r]ule of law is a principle under which all persons, institutions, and entities be accountable to laws that are: [p]ublicly promulgated[,] [e]qually enforced[,] [i]ndependently adjudicated[,] [a]nd consistent with international human rights principles."[30] An obvious prerequisite is pluralism and inclusiveness in the political culture such that these laws are reflective of the broader public's needs as opposed to the preferences of a dominant group. This is why neither the Jim Crow South, nor Apartheid South Africa were democracies legitimately governed by the rule of law. The British liberal philosopher Isaiah Berlin wrote that a key aspect of liberalism is moderation and the rejection of a singular, absolute truth that

27. Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 87 (2018).

28. *Id*.

29. The problem of partisanship in the judicial nomination process is exemplified by the partisanship confirmation process as well as the Supreme Court's increasing tendency to reverse prior precedent based on political polarization on the Court. *See, e.g.*, *Loper Bright Enters.*, 603 U.S. at 412–13; Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 302 (2022) (subordinated stare decisis principles to end federal abortion rights); Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 231 (2023) (subordinated stare decisis principles disallow race-conscious higher education admissions).

30. *Overview – Rule of Law*, U.S. CTS., https://www.uscourts.gov/educational-resources/educational-activities/overview-rule-law [https://perma.cc/K4W3-THDG].

stifles debate.[31] This, in turn, furthers democratic responsiveness and the rule of law by encouraging citizens and elites to value the deliberative process of democracy and the institutional legitimacy of the election result more than the election outcome itself. It requires a generous disposition in the citizenry that is contingent upon many things, including a collective growth mindset facilitated by a state with sufficient resources and capacity and institutional legitimacy to effectuate public policies that engender socioeconomic mobility and improve human development.[32] State capacity, or the state's ability to marshal resources to satisfy public needs, in turn, requires capable and adequately resourced administrative agencies that are given sufficient discretion to use their expertise and professionalism to enforce publicly promulgated laws, consistent with international human rights principles. The problem is that Americans are dubious about their legitimacy.

III. A BRIEF PRIMER ON U.S. ADMINISTRATIVE AGENCIES AND THE INNOVATION THAT IS INFORMAL LEGISLATIVE RULEMAKING

The U.S. Constitution is altogether silent on the existence of agencies. As such, ignorance of the administrative state was, to paraphrase former Secretary of State Dean Acheson, present at the creation.[33] This makes the United States unlike other nation states, where the constitutional compact typically accepts the administrative state's legitimacy and necessity because agencies were used by the state prior to democratization.[34]

Agencies are, however, authorized by implication because Congress has legislative power under the Necessary and Proper Clause to create agencies to enable a sitting president to enforce its laws under the "Take Care" Clause.[35] "A purist reading of the Constitution would plausibly interpret [the president] to be … a glorified clerk, whose government enforces all laws with little discretion, regardless of the president's ideological inclinations."[36] Under this

31. *See* ISAIAH BERLIN, THE PROPER STUDY OF MANKIND: AN ANTHOLOGY OF ESSAYS 11–16 (Henry Hardy & Roger Hausheer eds., Penguin Random House 2013).

32. *See, e.g.*, DONALD SASSOON, ONE HUNDRED YEARS OF SOCIALISM: THE WEST EUROPEAN LEFT IN THE TWENTIETH CENTURY 470–72, 477–78 (1996).

33. *See generally* DEAN ACHESON, PRESENT AT THE CREATION: MY YEARS IN THE STATE DEPARTMENT (1969).

34. By way of example, the French administrative state was present long before the creation of De Gaulle's Fifth Republic in 1958. This partly explains why the legitimacy of the administrative state in France is not a political issue. *See, e.g.*, John A. Rohr, *French Constitutionalism and the Administrative State: A Comparative Textual Study*, 24 ADMIN. & SOC'Y 224, 225 (1992).

35. *See* U.S. CONST. art. II, § 3 (providing, among other things, that the president shall "take Care that the Laws be faithfully executed").

36. M. Akram Faizer, *What Everyone Needs to Know About Administrative Law*, 47 J. LEGAL PROF. 183, 189 (2023); *see, e.g.*, U.S. CONST. art. II, § 2.

view, a presidential election will have little impact, as Congress holds primary authority to shape policy by enacting legislation, repealing legislation, and occasionally overriding a presidential veto.[37] However, because so many laws have been enacted over time, all sitting presidential administrations are granted capacious discretion under the Take Care Clause to determine their enforcement priorities.[38] Ideally, enforcement discretion is cabined by proper rules and a proper deliberation of policy alternatives as opposed to pure politics.[39] Administrative law, in turn, is the law of government, or the rules that the executive branch must follow in implementing and enforcing the laws and regulations on the books, consistent with proper enforcement discretion.[40]

Until the mid-twentieth century, courts were the primary means relied on by both citizens and agencies in determining the legality of government action.[41] "Administrative officials seeking to compel compliance with a statute or impose a sanction for its violation had to commence a civil or criminal action in a trial court."[42] The paradigmatic example, which manifested itself after the country became an industrial superpower, is the Sherman Antitrust Act of 1890 which required the Justice Department to commence suit in federal court to stop anticompetitive abuses of market power.[43] This explains why the eventual breakup of John D. Rockefeller's Standard Oil Company required President Theodore Roosevelt's Department of Justice to commence a lawsuit in federal court that resulted in its eventual break-up into thirty-four independent companies.[44] It also explains why a federal lawsuit and lengthy bench trial were required for a federal court to issue a decision concluding that Google violated section 2 of the Sherman Act by maintaining its monopoly in general search services and general text advertising through exclusive distribution agreements.[45] Because the Sherman Act predated the innovation that is substantive legislative rulemaking, Sherman Act enforcement proceeds by lawsuit alone. Moreover, because itinerant federal courts typically lack expertise to expeditiously adjudicate

37. Faizer, *supra* note 36, at 189; *see, e.g.*, Clean Water Act, 33 U.S.C. § 1251 (2018); Act of Oct. 2, 1986, Pub. L. No. 99-440, 100 Stat. 1086.

38. Faizer, *supra* note 36, at 189.

39. *Id*.

40. *Id*.

41. RONALD A. CASS ET AL., ADMINISTRATIVE LAW: CASES AND MATERIALS 674 (9th ed. 2024).

42. *Id.*

43. 15 U.S.C. § 4 (2018).

44. The Learning Network, *May 15, 1911: Supreme Court Orders Standard Oil to Be Broken Up*, N.Y. TIMES (May 15, 2012, 4:02 AM), https://archive.nytimes.com/learning.blogs.nytimes.com/2012/05/15/may-15-1911-supreme-court-orders-standard-oil-to-be-broken-up/ [perma.cc/FY4Y-2EZF]. *See generally* Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911).

45. United States v. Google, 687 F. Supp. 3d 48, 54–55 (D.D.C. 2023).

these matters, Sherman Act lawsuits are an exceedingly resource-intensive and imprecise way of protecting market competition.[46] For example, the Google lawsuit that was commenced in October 2020 took until August 4, 2023, for a decision and order, and is still awaiting a decision as to an appropriate remedy.[47] Moreover, because prosecution of major companies is always a precarious thing for politicians who seek reelection and/or reappointment, presidential administrations often abjure proper antitrust enforcement for political reasons. Compounding the problem, neither the Department of Justice Antitrust Division nor the Federal Trade Commission have budgets large enough to investigate and prosecute a significant number of antitrust violations.[48]

The insufficiency of administrative enforcement by way of federal lawsuits was effectively acknowledged with the creation of modern integrated agencies like the Interstate Commerce Commission in 1887 and the Federal Trade Commission in 1914.[49] Congress has granted administrative agencies the authority to determine the liability of individuals accused of violating their laws and to impose appropriate sanctions.[50] Although Congress typically provided for subsequent judicial review of these orders, the highly deferential standard of review used by Article III reviewing courts highlights the importance of the administrative proceeding.[51]

While the New Dealers tended to subordinate due process concerns to state effectiveness, the APA of 1946, signed into law by President Truman at the tail end of Democratic Party hegemony, represented a compromise between New Deal enthusiasts whose focus was on increasing government social welfare capacity and separation of powers purists, who sought incorporation of checks and balances, transparency and due process into the administrative state.[52] The APA's framers invented substantive legislative rulemaking, which was a marked due process improvement over the status quo ante. Unlike pre-APA agency interpretative rules and guidance documents that lack the force and effect of law but are often deferred to by reviewing courts, substantive legislative rules do not raise democratic and due

46. *See, e.g.*, *id*. at 65.

47. *See id*. at 55.

48. The DOJ antitrust division's budget has been increased to roughly $288 million per year, while that of the FTC is $105 million. *See* Danielle Kaye, *Biden Requests $63 Million Boost to DOJ's Antitrust Division (1)*, BLOOMBERG L. (Mar. 11, 2024, 3:09 PM), https://news.bloomberglaw.com/antitrust/biden-requests-63-million-boost-to-justices-antitrust-division [perma.cc/HX3M-LLKY].

49. CASS ET AL., *supra* note 41, at 674.

50. *Id.*

51. *Id.*

52. *See* Noah A. Rosenblum, *Making Sense of Absence: Interpreting the APA's Failure to Provide for Court Review of Presidential Administration*, 98 NOTRE DAME L. REV. 2143, 2159–60 (2023).

process legitimacy concerns.[53] This is because they are based on valid congressional delegations of rulemaking power, require the agency to issue a notice of proposed rulemaking, in conjunction with tentative rules for public notice and comment, and then incorporate public feedback on the tentative rules in arriving at the final rules.[54] The final rules can then be collaterally challenged prior to enforcement.[55]

However, even though rulemaking was authorized by the APA when enacted in 1946, enforcement by adjudication remained paradigmatic and it took until the 1960s and 1970s for courts, scholars, and policymakers to turn their attention to rulemaking.[56] Professors Daniel Farber and Anne Joseph O'Connell effectively illustrated this shift by noting that "as late as 1974, the Gellhorn and Byse casebook in the field devoted only twenty-two pages to rulemaking proceedings, which mostly was a lengthy excerpt from a single case limiting the use of formal rulemaking."[57]

Rulemaking has today "become the most visible mode of agency policymaking, typically employed by agencies to formulate their most important and often most controversial policies."[58] Accordingly, "the rulemaking process now tends to attract substantial attention from interest groups, regulated parties, elected officials[,] and the general public."[59] The problem of divided government, with Republican presidents usually controlling the White House and Democrats controlling Congress, called into question the legality of the rulemaking discretion afforded a presidential administration under the Take Care Clause and the APA in situations where a sitting President is disinclined toward duly enacted laws and his agency heads are encouraged to water-down administrative enforcement in the rulemaking process.[60] Democrats accused Republican presidents of exploiting statutory and APA ambiguities to gutter environmental and social welfare legislation by means of rulemaking dilution and administrative underenforcement.[61] Because the Supreme Court concluded these rules could be directly challenged in federal court prior to administrative enforcement, the obvious

53. *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 617–18 (1996).

54. CASS ET AL., *supra* note 41, at 532–33.

55. Abbott Lab'ys v. Gardner, 387 U.S. 136, 141 (1967); *see also* CASS ET AL., *supra* note 41, at 437–54.

56. *See* Christopher J. Walker, *Charting the New Landscape of Administrative Adjudication*, 69 DUKE L.J. 1687, 1689 (2020).

57. Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1143–44 (2014).

58. CASS ET AL., *supra* note 41, at 529.

59. *Id.*

60. Faizer, *supra* note 36, at 221.

61. *See*, *e.g.*, Leif Fredrickson et al., *History of US Presidential Assaults on Modern Environmental Health Protection*, 108 AM. J. PUB. HEALTH 595, 596 (2018).

issue confronting reviewing courts was whether deference should be afforded agency rulemakings where the authorizing legislation is ambiguous.[62] This is because the APA is altogether silent on whether deference is to be afforded agency rules that are challenged as being beyond the scope of the enabling legislation.[63] Professor Ronald Levin has posited the APA's framers created this ambiguity by never anticipating this counterfactual.[64]

IV. *CHEVRON* DEFERENCE – A JUDICIAL RESPONSE TO AN APA OMISSION

Chevron v. National Resources Defense Council was the Supreme Court's attempt to resolve the issue of the proper level of discretion to be afforded agency legislative rules that purport to implement Congressional legislation when the governing legislation is ambiguous to the reviewing court.[65] It involved the Environmental Protection Agency's ("EPA") definition of the term "stationary sources" of air pollution under the Clean Air Act Amendments of 1977, which were signed into law by President Carter and required "new or modified major stationary sources" to comply with various stringent permit requirements with a goal of improving air quality.[66] The EPA, at first, determined that "stationary source" referred to each individual piece of pollution-emitting equipment.[67] However, after the Reagan Administration took office in 1981, the EPA—after notice and comment—issued a new definition that changed its position and construed "stationary source" to mean the entire aggregate plant, such that firms could avoid permit requirements by offsetting the emissions from new equipment with reduced emissions from old equipment in the same plant.[68] After the District of Columbia Court of Appeals invalidated the rule on the grounds it was inappropriate for a legislative scheme designed to improve air quality, the Supreme Court, in a unanimous 6-0 opinion by Justice Stevens, reversed, concluding that because the statutory text was ambiguous, the legislative history silent on the precise issue, and the general statutory purpose of improving air quality too broad and self-contradictory to be decisive, the reviewing court should defer to the EPA's "reasonable accommodation of

62. *See, e.g.*, Abbott Lab'ys v. Gardner, 387 U.S. 136, 141 (1967) (concluding that drug companies were not prohibited by the ripeness doctrine from challenging the legality of an FDA regulation pre-enforcement).

63. *See* Ronald M. Levin, *The APA and the Assault on Deference*, 106 MINN. L. REV. 125, 190 (2021).

64. *See id.* at 135.

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

66. *Id*. at 839–40.

67. *Id*. at 840.

68. *Id*. at 840–41.

manifestly competing interests."[69] This deferential approach to legislative ambiguity was plausibly because the conservative majority on the Court sought to rationally supplement the APA's requirement that courts defer to agency actions, with a requirement that deference also be applied to challenges involving legislative rulemakings because, in an era of divided government, it facilitated greater political accountability and public policy flexibility.[70]

At step one of *Chevron* Deference, the Court determines whether "the traditional rules of statutory construction" give a clear answer.[71] If so, the Court must give effect to Congress's unambiguously expressed intent by applying the answer.[72] If, however, the Court finds the statute remains ambiguous or silent after exhausting the traditional tools, the Court, at step two, is not to substitute its own construction of the statute for a reasonable interpretation made by the agency.[73] This is because Congress delegated rulemaking authority to a politically accountable agency.[74] Moreover, incorporation of public input via notice and comment with subsequent judicial review ensures that the final rulemaking is both consistent with the authorizing legislation and the received wisdom.[75]

Chevron's proponents support this framework both because agencies are designed to be democratically accountable and because agencies have greater flexibility, expertise, and specialized knowledge with respect to a statutory scheme than non-expert reviewing courts.[76] *Chevron*'s decision to fill the gap left by the APA makes obvious sense if one recognizes that the Court had long required that deference be afforded non-legislative agency interpretive rules that lacked public input.[77] It was likely supported by conservative justices both because it supplemented the deference to agency rules rationale first enunciated in *Skidmore v. Swift* and because, at a time of Republican White

69. *See id*. at 865–66. The unanimous opinion was only 6-0 because Justice Marshall and Justice Rehnquist were absent for health reasons, and Justice O'Connor recused herself after oral argument because she had inherited a beneficial interest in one of the companies.

70. *See* Rosenblum, *supra* note 52, at 2146; Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (arguing that *Chevron* was a necessary concomitant to very broad Congressional delegations and a judicial attempt to police Congressional intent would be overwhelming and counterproductive because it would take away flexibility in public policy).

71. *See* Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986).

72. *Id*. at 233; Manning, *supra* note 53, at 619.

73. Manning, *supra* note 53, at 619.

74. *Id.* at 617.

75. *Id.* at 660–61.

76. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984); Jonathan R. Siegel, *The Constitutional Case for "Chevron" Deference*, 71 VAND. L. REV. 937, 961 n.148 (2018).

77. This lower level of deference is known as "Skidmore Deference" after *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

House control, it reinforced the Court's unitary executive jurisprudence, under the "Take Care Clause" that was anticipated by *United States v. Myers*.[78] This theory of a unitary executive was subsequently elaborated upon by Justice Scalia's dissent in *Morrison v. Olson*,[79] and since made paradigmatic by the Roberts Court's jurisprudence, most recently in its decision in *Seila Law LLC v. Consumer Financial Protection Bureau*, involving a successful challenge brought against the Dodd-Frank Wall Street Reform and Consumer Protection Act's provision of "for cause" removal protection to the CFPB chair.[80]

With a reversal of the divided government framework starting in the mid-1990s and Democrats regaining the White House and Republicans often taking control of Congress, liberals reconciled themselves to *Chevron*, most likely because they are more comfortable with the professionalism and rule of law concomitants of empowering a professional civil service as compared to non-expert and increasingly conservative legislators and judges.[81] Conservatives, by contrast, found the deference requirement of *Chevron*'s step two to be at odds with APA section 706(2)'s statutory text, Article III's vesting clause requirement that the judiciary interpret the law and Article I's requirement that legislative power come only from Congress.[82] A recent manifestation of this trend was *Securities and Exchange Commission v. Jarkesy*, where Chief Justice Roberts's majority opinion concluded that the SEC's imposition of civil penalties by way of administrative enforcement violated the Seventh Amendment guarantee of a jury trial for "suits at common law."[83] It also explains why the Court, lacking the votes to reverse *Chevron*, purported to sideline it by way of the Major Questions Doctrine.

78. Myers v. United States, 272 U.S. 52, 163–64 (1926).

79. Morrison v. Olson, 487 U.S. 654, 710 (1988) (Scalia, J., dissenting).

80. 591 U.S. 197, 204–05 (2020). For an excellent elaboration, see generally Blake Emerson, *The Binary Executive*, 132 YALE L.J. 756 (2022) (Emerson's thesis, based on his analysis of the relevant history, is that the Roberts Court has created a unitary executive in the president when applying jurisprudence under the Take Care Clause, but has made the Court the relevant executive for purposes of evaluating the legality of administrative actions).

81. See Gregory A. Elinson & Jonathan S. Gould, *The Politics of Deference*, 75 VAND. L. REV. 475, 477–83 (2022), for a discussion of differences between liberals and conservatives on the *Chevron* doctrine.

82. *See id.* at 488; U.S. CONST., art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L.J. 908 (2017); Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187, 1189 (2016) (raising questions about the interplay between *Chevron* Deference and courts' Article III powers); Egan v. Del. River Port Auth., 851 F.3d 263, 279 (3d Cir. 2017) (Jordan, J., concurring) ("*Chevron* not only erodes the role of the judiciary, it also diminishes the role of Congress.").

83. *See* Sec. & Exch. Comm'n v. Jarkesy, 603 U.S. 109, 122, 125 (2024); U.S. CONST. amend. VII.

V. MAJOR QUESTIONS DOCTRINE – AN INTERIM MEASURE

The increasingly conservative Rehnquist Court struggled with *Chevron* but rejected an outright reversal, most likely because it lacked the votes to do so. The five justices who signed onto Justice Stevens's 6-0 decision in *Chevron* included Chief Justice Burger, Justices Brennan, White, Blackmun, and Powell.[84] Justices Marshall and Rehnquist did not participate for health reasons and Justice O'Connor recused herself after oral argument because she was devised shares in one of the litigants.[85] By 1994, Chief Justice Burger was replaced by the more conservative Rehnquist, whose position as an associate justice was filled by the even more conservative Justice Scalia.[86] Justice Powell was eventually replaced by Justice Kennedy, Justice Brennan was replaced by Justice Souter, Justice Marshall was replaced by the dramatically more conservative Justice Thomas, and Justice White was replaced by the more liberal Justice Ginsburg.[87] As such, when the Court heard oral argument in *MCI Telecommunications v. AT&T Co*., it consisted of at least four justices who were strong *Chevron* proponents, namely Justices Blackmun, Stevens, Souter, and Ginsburg, two who revealed themselves to be equivocal supporters, namely Chief Justice Rehnquist and Justice Scalia, an equivocal opponent, Justice Kennedy, and Justice Thomas who was and still remains hostile to judicial deference doctrines.[88]

In *MCI*, the issue before the Court was whether the Federal Communications Commission ("FCC") overstepped its authority when it set aside the Communication Act of 1934's requirement that each telecommunications common carrier file a tariff establishing fixed terms and prices based on the "modify any requirement" in the law provision found in 47 U.S.C. § 203(b)(2).[89] In a majority opinion by Justice Scalia, joined by Chief Justice Rehnquist, and Justices Kennedy, Thomas, and Ginsburg, the

84. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 839, 866 (1984).

85. Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253, 270 (2014); Joan Biskupic, *What Sandra Day O'Connor's Papers Reveal About a Landmark Supreme Court Decision – and Why It Could Be Overturned Soon*, CNN, https://www.cnn.com/2024/04/09/politics/sandra-day-oconnor-chevron-case/index.html [perma.cc/QEK8-RL4E] (Apr. 9, 2024, 9:47 AM).

86. *See Justices 1789 to Present*, SUP. CT., https://www.supremecourt.gov/about/members_text.aspx [https://perma.cc/M8J9-5B2U]; *William Rehnquist Court (1986-2005)*, JUSTIA, https://supreme.justia.com/supreme-court-history/rehnquist-court/ [https://perma.cc/Q53G-G6LD]; Andrew D. Martin & Kevin M. Quinn, *Scalia Was Almost Never The Most Conservative Justice On The Supreme Court*, ABC NEWS: FIVETHIRTYEIGHT (Feb. 15, 2016, 10:17 AM), https://fivethirtyeight.com/features/scalia-was-almost-never-the-most-conservative-justice-on-the-supreme-court/ [https://perma.cc/8MTT-FFXA].

87. *See Justices 1789 to Present*, *supra* note 86.

88. *Id*.

89. MCI Telecommc'ns Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 220 (1994).

Court rejected application of *Chevron*'s two-step because it found the FCC's interpretation "beyond the meaning that the statute can bear."[90] By contrast, Justice Stevens's dissent, joined by Justices Blackmun and Souter, would have applied *Chevron*'s step two to conclude the FCC "permissibly interpreted its § 203(b)(2) authority in service of the goals set forth in the Act" and "sustain its eminently sound, experience-tested, and uncommonly well-explained judgment."[91]

MCI anticipated what became known as the "Major Questions Doctrine" that can be traced back to *FDA v. Brown & Williamson Tobacco Corp*., when the Court, in an opinion by Justice O'Connor, who took no part in *MCI* and recused herself from *Chevron* after oral argument, concluded that reviewing courts should not grant any deference to agency rulemakings of central relevance to statutory schemes of major economic and political significance.[92] The decision denied the FDA the ability to assert regulatory jurisdiction over tobacco under the Food, Drug and Cosmetic Act ("FDCA") because the Court, applying its own highly political interpretation of Congressional intent, concluded the Act did not grant FDA the authority to do so.[93] By contrast, if the Court had applied *Chevron*, step two would have required deference to the FDA's legitimate decision to regulate.[94] Because all rulemakings in Washington are obviously of huge economic and political significance, the Major Questions Doctrine gives courts broad license to reject agencies' interpretation of statutory schemes while leaving *Chevron* on the books.[95]

Justice O'Connor's announced retirement in 2005[96] followed by Chief Justice Rehnquist's sudden death later that year[97] resulted in a more conservative Court less inclined towards *Chevron* deference because of the Justices' replacement by Justice Alito[98] and Chief Justice Roberts,[99] respectively. By the time the Court more controversially applied Major

90. *See id.* at 218–19, 234 (Justice O'Connor took no part in the consideration or decision of the case).

91. *Id.* at 245 (Stevens, J. dissenting).

92. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000).

93. *See Brown & Williamson*, 529 U.S. at 160.

94. *Id.* at 132.

95. *See* Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2024 (2018).

96. Letter from Chambers of Justice Sandra Day O'Connor to President George Bush (July 1, 2005), https://www.supremecourt.gov/publicinfo/press/oconnor070105.pdf [https://perma.cc/6MJP-5LYF].

97. Nina Totenberg, *Chief Justice William H. Rehnquist Dies at 80*, NPR, (Sept. 4, 2005, 12:00AM ET), https://www.npr.org/2005/09/04/4132357/chief-justice-william-h-rehnquist-dies-at-80 [https://perma.cc/78CX-9WY7].

98. *Supreme Court Nominations (1789-Present)*, U.S. SENATE, https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm [https://perma.cc/K5YK-LM8T] (showing Justice Alito replacing Justice O'Connor).

99. *Id.* (showing later Chief Justice Roberts replacing Justice Rehnquist).

Questions Doctrine in *King v. Burwell*, involving the legality of the Internal Revenue Service's ("IRS") rulemaking provision of tax credits for Patient Protection and Affordable Care Act health policies, the liberal Justices Stevens and Souter had been replaced by the equally liberal Justices Sotomayor and Kagan, both of whom are supporters of judicial deference.[100] The Chief Justice's majority opinion, joined by the conservative Justice Kennedy and the liberal Justices Ginsburg, Breyer, Sotomayor and Kagan, concluded that it was appropriate for the IRS to effectively rewrite the statute to grant tax credits for policies purchased on both state and federal exchanges although the statutory text limited credits to policies purchased only on state exchanges, because granting credits for policies purchased on both exchanges furthered Congress's intent to provide universal health care through vibrant insurance marketplaces.[101] Application of Major Questions Doctrine in this case meant the Court did not defer to the IRS's interpretation of the ACA and instead had the Court, per Professor Blake Emerson, acting as chief executive by supplying its own interpretation of the statutory scheme.[102] Although the Chief Justice correctly interpreted the statute to save the ACA from yet another judicial challenge, application of the Major Questions Doctrine in this case led Justice Scalia, in a dissent joined by Justices Thomas and Alito, to question the Court's judicial integrity and recommend renaming the ACA "SCOTUScare."[103] Should the court have applied *Chevron* instead, it would have struggled to overcome the obvious mistake in the statutory language to arrive at step two, where deference could be afforded. The Roberts Court was, at the time, able to get the Court's four liberals to sign onto a decision applying Major Questions Doctrine because it saved the ACA's insurance marketplaces from a death spiral that would have gutted arguably the most significant piece of social welfare legislation enacted since the Johnson Administration.[104] Problematically, however, it furthered the problem of ambiguity in the governing law by applying major questions while still leaving *Chevron* in-

100. King v. Burwell, 576 U.S. 473, 485–86 (2015) (affirming that the Court, not the IRS, should interpret a question regarding the IRS Rule connected to the Affordable Care Act that granted tax credits for health plans purchased on both federal and state exchanges because the question was one of "economic and political significance").

101. *Id.* at 498.

102. *See id.* at 492–93. Blake Emerson, *The Binary Executive*, 132 YALE L.J. FORUM 756, 760–62 (2022).

103. *King*, 576 U.S. at 518 (Scalia, J. dissenting).

104. *See generally* Gerald F. Kominski et al., *The Affordable Care Act's Impacts on Access to Insurance and Health Care for Low-Income Populations*, 38 ANN. REV. PUB. HEALTH 489 (2017) (explaining the importance of the ACA to social welfare); Civil Rights Act of 1964, 42 U.S.C. §§ 2000d–2000d-7 (arguably President Johnson's largest advancement of social welfare).

place. This is because the Court's liberals and Justice Scalia remained *Chevron* supporters.[105]

The Roberts Court moved in a dramatically more conservative direction during President Trump's first term in office because of the appointment of three conservative conservatives: Justice Gorsuch replaced the late Justice Scalia,[106] Justice Kavanaugh replaced Justice Kennedy who retired from the Court in 2018,[107] and Justice Coney Barrett replaced the liberal Justice Ginsburg who died on the eve of the 2020 presidential election.[108] All three reject the legitimacy of the *Chevron* two-step.[109] In *National Federation of Independent Businesses v. Department of Labor* and *Alabama Association of Realtors v. Department of Health and Human Services*, involving the legality of the Biden Administration's Occupation Safety and Health Administration ("OSHA") Rule that mandated COVID-19 vaccinations for employees in large workplaces and the Center for Disease Control's COVID-related eviction moratorium, respectively, the Court applied the Major Questions Doctrine to invalidate both measures as beyond the scope of the authorizing legislation.[110]

West Virginia v. EPA involved the legality of the Obama Administration's 2015 EPA rule, known as the Clean Power Plan ("CPP"), that purported to rely on statutory authority found in Clean Air Act section 111(d) to regulate the entirety of the nation's electricity grid to facilitate carbon emission reductions consistent with U.S. obligations under the Paris Climate Agreement.[111] Beyond mandating uncontroversial energy efficiency

105. *See, e.g.*, Scalia, *supra* note 70 (arguing that *Chevron* was a necessary concomitant to very broad Congressional delegations and a judicial attempt to police Congressional intent would be overwhelming and counterproductive because it would take away flexibility in public policy).

106. *Supreme Court Nominations (1789-Present)*, *supra* note 98.

107. *Id.*; Amy Howe, *Anthony Kennedy, Swing Justice, Announces Retirement*, SCOTUSBLOG (June 27, 2018, 7:01PM), https://www.scotusblog.com/2018/06/anthony-kennedy-swing-justice-announces-retirement/ [https://perma.cc/UR7H-PNWZ].

108. *Supreme Court Nominations (1789-Present)*, *supra note* 98; Nina Totenberg, *Justice Ruth Bader Ginsburg, Champion Of Gender Equality, Dies At 87*, NPR (Sept. 18, 2020, 7:28PM ET), https://www.npr.org/2020/09/18/100306972/justice-ruth-bader-ginsburg-champion-of-gender-equality-dies-at-87 [https://perma.cc/ZC49-AN2D].

109. *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024) (majority opinion joined by Justices Gorsuch, Kavanaugh and Coney-Barrett); *see also id*. at 416 (Gorsuch J. concurring); Adam Liptak, *Supreme Court Overturns Chevron Doctrine*, N.Y. TIMES (June 28, 2024), https://www.nytimes.com/2024/06/28/us/supreme-court-chevron-ruling.html.

110. Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 595 U.S. 109, 123 (2022); *see* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758, 764–65 (2021); *see also, e.g.*, Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S. 109, 122 (2022) (Gorsuch, Thomas, Alito, Js., concurring) (applying the Major Questions Doctrine to arrive at a majority for repealing the OSHA Rule).

111. *See* West Virginia v. EPA, 597 U.S. 697, 706 (2022).

requirements, CPP went further and authorized the EPA to mandate industry-wide "generation shifting" from high to low-emitting sources, i.e., from coal-fired power plants to natural gas-fired plants and from coal and natural gas-fired plants to renewables such as wind and solar.[112] Notwithstanding the clear consensus that aggregate and per capita U.S. carbon emissions needed to be reduced, the Chief Justice's majority opinion, joined by the Court's five other conservatives, applied the Major Questions Doctrine to invalidate the CPP on the dubious grounds that it was illegal and lacking "clear congressional authorization" because it was unprecedented.[113]

The unprecedented-as-a-proxy-for-unauthorized rationale to invalidate agency rules using major questions was reapplied in *Biden v. Nebraska*, involving the Biden Administration's Student Loan Forgiveness Plan that enabled the Education Secretary to cancel, for income eligible households, student loan debt in amounts ranging from $10,000 to $20,000 per borrower.[114] The Court's rationale was that the governing statute, the Higher Education Relief Opportunities for Students Act of 2003 ("HEROES Act"), granted the Education Secretary only limited power to modify loan repayments and not the power to implement a "sweeping" forgiveness plan.[115] The decision, however, inadequately considered the Education Department's rationale for the plan, namely that student loan debt is regressively allocated and has become a bedraggling burden for many low to middle income households that then undermines the country's economic potential (output legitimacy).[116] It also refused to defer to the agency's response to obvious public need and its relatively modest application of the term "waive or modify," to disallow an income based cancelation that, at an aggregate cost of $430 billion, would have been only about a quarter of the $1.6 trillion or so in outstanding student loans.[117] On the contrary, although the plan was based on a broad statutory delegation to the agency consistent with the President's stated political objectives, it was never subjected to APA notice and comment or any other form of public consultation thereby violating the general principles of administrative law.[118]

A proper loan cancellation plan that had been subjected to notice and comment would most certainly have anticipated the arguments of its

112. *Id.* at 712.
113. *Id.* at 732.
114. Biden v. Nebraska*,* 600 U.S. 477, 495–96 (2023).
115. *Id.* at 500–01.
116. *See id.* at 537 (Kagan, Sotomayor, Jackson, Js., dissenting).
117. *Id.* at 504 (majority opinion).
118. *See, e.g.*, Emily Bremer, Notice & Comment, *Final Agency Action on Student Loan Forgiveness: Whether, When, and How Will (and Should) It Come?*, YALE J. ON REGUL. (Sept. 29, 2022), https://www.yalejreg.com/nc/final-agency-action-on-student-loan-forgiveness-whether-when-and-how-will-and-should-it-come/ [https://perma.cc/C55T-MVVV].

opponents, namely that it was unfair to taxpayers who abjured higher education to avoid incurring debt, that it would worsen the problem of college attendance inflation, and that many state not-for-profit entities would object to the loss of federal loan servicing fees.[119] A potential remedy might have been to provide federal grants to households who could demonstrate they were eligible for but did not seek higher education for expense-related reasons, a requirement that colleges and universities limit cost of attendance inflation, and a requirement for some consultation with states to provide compensation to states for losses to state-owned loan servicing agencies.

Blake Emerson has detailed how the Major Questions Doctrine rests on a formalistic and antibureaucratic view of the modern state that posits that the source of democratic legitimacy rests with the legislature such that agencies must therefore be kept on a short leash.[120] By contrast, the progressive view of administrative agencies is to not only implement an already specified political program but to incorporate the perspectives of multiple actors with partial democratic authority.[121] Accordingly, while the President is in charge of the administrative state, the progressive theory insulates administrative action from complete presidential control to allow for other voices to influence policy by means of public participation through notice and comment and "discursive reasoning in administrative decision-making."[122] Emerson writes that proponents of judicial control over agencies "often ignore the possibility that 'output legitimacy' can complement the procedural legitimacy that arises from reasoned public discourse."[123] Emerson would modify the Major Questions Doctrine to require "judicial deference to an agency's resolution of a major question" in situations where the agency undertakes "deliberative decision-making procedures," but would also "require that the relevant economic or political questions had been rationally addressed by the agency on the record."[124] Unlike the majority in *King v. Burwell*,[125] Emerson would have applied this approach to require more explanation and elaboration from the IRS as to the legitimacy of tax credit provision on both federal and

119. *See id.* at 490 (for example, the Missouri Higher Education Loan Authority was granted standing to challenge the Biden Administration's Loan Forgiveness Plan because it would lose an annual $88.9 million in administrative fees for servicing five million student loans).

120. Emerson, *supra* note 95, at 2024 (as detailed more fully below, the Major Questions Doctrine posits that reviewing courts should grant no deference to agency rulemakings of vast political and economic significance).

121. *Id.* at 2064.

122. *Id.* at 2025–28.

123. *Id.* at 2072.

124. *Id.* at 2093.

125. *See* 576 U.S. 473, 485–86 (2015).

state exchanges. Unlike *United States v. Texas*,[126] where the Court affirmed a Fifth Circuit Court of Appeals decision that invalidated the Obama Administration's Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") program on the grounds that it bypassed notice and comment before implementation through enforcement memorandum, Emerson would have instead required some form of robust public consultation without specifically requiring full notice and comment.[127] He writes that agency deference is merited in situations where "the agency has reached its interpretation through an open, inclusive, and rational discussion of the policy choices at issue" and that courts should not "defer to hastily drafted and nonconsultative declarations that have failed to engage the considered judgment of the persons they affect or respond to their concerns in a reasoned fashion."[128]

As evidenced by the decisions applying Major Questions Doctrine, the Court, since 2016, abjured but did not officially overrule *Chevron*, presumably because it initially lacked the votes to do so.[129] After Justice Ginsburg's replacement by Justice Coney Barrett, the Court, after *Dobbs*,[130] which reversed *Roe v. Wade*,[131] may well have known that overruling *Chevron* was too much too soon. However, *Chevron* was finally reversed in June 2024 when the Court issued *Loper Bright Enterprises v. Raimondo*.[132]

VI. *LOPER BRIGHT ENTERPRISES* AND THE REVERSAL OF *CHEVRON*

Loper Bright Enterprises involved a challenge brought by fishing companies to a National Marine Fisheries Service ("NMFS") rule, effectuated to implement the Magnuson-Stevens Fishery Conservation and Management Act ("MSA") that required that Atlantic herring fisherman pay third-party

126. *See* 579 U.S. 547 (2016) (per curiam), *aff'g* Texas v. United States, 809 F.3d 134 (5th Cir. 2015).

127. *See* Emerson, *supra* note 95, at 2096.

128. *Id.* at 2098.

129. S*ee, e.g.*, King v. Burwell, 576 U.S. 473 (2015) (applying Major Questions Doctrine and not Chevron Deference because the issue of the viability of the ACA's insurance marketplaces that relied on the legality of the IRS Rule granting insurance subsidies for policies purchased on both federal and state exchanges, was one of major political and economic significance); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 595 U.S. 109 (2022) (applying Major Questions Doctrine and not Chevron Deference because the legality of the OSHA Rule's vaccine mandate was an issue of major political and economic significance); Alabama Ass'n of Realtors v. Dep't of Health & Human Services, 594 U.S. 758 (2021) (applying Major Questions Doctrine because the legality of the Center for Disease Control's COVID-related eviction moratorium because the economic impact of the regulation was of major political and economic significance).

130. Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

131. 410 U.S. 113 (1973).

132. 603 U.S. 369, 412–13 (2024).

government certified observers to be present on their fishing boats to prevent overfishing when the MSA is silent on who should pay.[133] Petitioners Loper Bright, H&L Axelsson, Lund Marr Trawlers LLC, and Scombrus One LLC brought a challenge to this requirement under the MSA and APA claiming the MSA did not authorize NMFS to mandate that they pay for observers that cost boats up to $710 per day and depress annual returns by up to twenty percent.[134] After the district court granted summary judgment to the Government, the United States Court of Appeals for the District of Columbia applied *Chevron* step two to affirm, because the MSA is ambiguous on the precise issue and the NMFS's interpretation was reasonable.[135]

In a parallel case, petitioners Relentless Inc., Huntress Inc., and Seafreeze Fleet LLC, brought a challenge because the NMFS interpretation required payment to third-party observers for up to fourteen days, even where no herring is harvested, because a trip may last that long.[136] The district court, applying *Chevron*, deferred to the NMFS's interpretation and granted summary judgment to the Government.[137] The United States Court of Appeals for the First Circuit, also applying *Chevron*, affirmed the district court.[138] The Supreme Court granted certiorari in both cases, "limited to the question of whether *Chevron* should be overruled or clarified."[139]

A. Chief Justice Roberts's Majority Opinion

The Chief Justice's majority opinion, joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Coney Barrett, reversed the lower courts and overruled *Chevron* as defying APA section 706's requirement that courts must "decide all relevant questions of law."[140] The Chief Justice's opinion found that nothing in the New Deal era or before it resembled *Chevron* and that APA section 706 disallows reviewing courts from presuming statutory ambiguities are implicit delegations to agencies when there is often no manifest Congressional intent that an agency, as opposed to a court, resolve the resulting interpretive question.[141] The Chief Justice rejected the claim that agencies have special competence in resolving statutory ambiguity by positing that interpretive issues in connection with a regulatory scheme "may fall more

133. *Id.* at 380–82.
134. *Id.* at 382.
135. *Id.* at 382–83.
136. *Id.* at 383.
137. *Id.*
138. *Id.* at 384.
139. *Id.*
140. *Id.* at 411–13.
141. *Id.* at 390–92.

naturally into a judge's bailiwick" than that of an agency.[142] With respect to the claim that *Chevron* furthers uniformity in the construction of federal law, he writes that the degree to which *Chevron* promotes uniformity "is unclear" and "[we] see no reason to presume that Congress prefers uniformity for uniformity's sake over the correct interpretation of the laws it enacts."[143] He then rejected the argument that resolving statutory ambiguities can involve policymaking best left to political actors, rather than courts, writing that that resolution of statutory ambiguities involves legal interpretation, which does not become policymaking "just because a court has an 'agency to fall back on'" and that by forcing courts to pretend ambiguities are delegations, "[*Chevron*] prevents [judges] from judging."[144]

B. Justice Thomas and Justice Gorsuch's Concurring Opinions.

Justices Thomas and Gorsuch, who both joined the Chief Justice's majority opinion, added concurring opinions arguing that *Chevron* violated the constitutional separation of powers by depriving courts from independently adjudicating "Cases" and "Controversies" as required by Article III.[145]

C. Justice Kagan's Dissent

Justice Kagan's dissent, joined by the Court's two other liberals, Justices Sotomayor and Jackson, is a compelling defense of *Chevron* as a means of improving government accountability, expertise and uniformity in judicial review.[146] Justice Kagan characterized the majority opinion as judicial hubris, based on an incorrect reading of the APA, that makes the Court an "administrative czar."[147] She then provided a series of examples of typical *Chevron* questions to highlight its importance for effective administration, namely:

- Under the Public Health Service Act, the Food and Drug Administration (FDA) regulates "biological product[s]," including "protein[s]." When does an alpha amino acid polymer

142. *Id.* at 401 (quoting Kisor v. Wilkie, 588 U.S. 558, 578 (2019)).
143. *Id.* at 403.
144. *Id.* at 403–04.
145. *See id.* at 414–15 (Thomas, J., concurring); *id.* at 431 (Gorsuch, J., concurring).
146. *See id.* at 449–50 (Kagan, Sotomayor, Jackson, Js., dissenting).
147. *Id.* at 450.

qualify as a "protein"? Must it have a specific, defined sequence of amino acids?

- Under the Endangered Species Act, the Fish and Wildlife Service must designate endangered "vertebrate fish or wildlife" species, including "distinct population segment[s]" of those species. What makes one population segment "distinct" from another? Must the Service treat the Washington State population of western gray squirrels as "distinct" because it is geographically separated from other gray squirrels? Or can the Service take into account that the genetic makeup of the Washington population does not differ markedly from the rest?

- Under the Medicare program, reimbursements to hospitals are adjusted to reflect "differences in hospital wage levels" across "geographic area[s]." How should the Department of Health and Human Services measure a "geographic area"? By city? By county? By metropolitan area?

- Congress directed the Department of Interior and the Federal Aviation Administration to reduce noise from aircraft flying over Grand Canyon National Park—specifically, to "provide for substantial restoration of the natural quiet." How much noise is consistent with "the natural quiet?" And how much of the park, for how many hours a day, must be that quiet for the "substantial restoration" requirement to be met?

- Or take *Chevron* itself. In amendments to the Clean Air Act, Congress told States to require permits for modifying or constructing "stationary sources" of air pollution. Does the term "stationary source[ ]" refer to each pollution emitting piece of equipment within a plant? Or does it refer to the entire plant and thus allow escape from the permitting requirement when increased emissions from one piece of equipment are offset by reductions from another?[148]

Rejecting the majority's claim that reviewing courts are better at resolving statutory ambiguity consistent with legislative intent as compared to agencies as "malarkey," Justice Kagan emphasized that deference only comes into play when courts cannot discern Congressional intent and standard legal tools "will

148. *Id.* at 452–53 (internal citations omitted).

not avail to fill a statutory silence or give content to an ambiguous term."[149] This is because agencies, unlike reviewing courts, possess subject-matter expertise, long engagement with a regulatory scheme, and the flexibility and legitimacy to make policy choices—all attributes of agencies and not courts.[150] Because Congress left this framework in for four decades, Justice Kagan concluded it aligned with legislative intent.[151]

Rejecting the majority's claim that *Chevron* violates APA section 706's requirement that reviewing courts must decide "all relevant questions of law" by citing legal scholarship that concludes otherwise, she then picked apart the majority's contention that APA section 706 allows courts to only defer to agency fact-findings and policy-making, writing that most "respected commentators" on the subject understood APA section 706 "as allowing, even if not requiring, deference."[152] She wrote that the majority forgets that in the years immediately preceding the APA's enactment, courts became more deferential to agencies, and in the years after the APA's enactment, the Court "came nowhere close to accepting the majority's view of the APA," which Justice Kagan labeled "grounded on air."[153]

On the stare decisis issue, conceding that while respecting precedent is not an "inexorable command," Justice Kagan wrote that more is required "than the majority has offered up here," because overturning *Chevron*, which Congress has left in place for forty years, will cast "'doubt on many settled constructions' of statutes and threaten[] the interests of many parties who have relied on them for years."[154] She wrote that stare decisis is particularly warranted in the case of *Chevron* because it is a matter of statutory interpretation that Congress has left in place for forty years such that federal courts have systematically used it "on thousands upon thousands of occasions" in a way that "as compared with *de novo* review, use of the *Chevron* two-step framework fosters *agreement* among judges."[155] She closed by writing that leaving *Skidmore* Deference in place, which asks reviewing courts to show respect for non-legislative agency interpretations, contradicts the majority's claim that *Chevron* is unworkable and too difficult to apply.[156]

149. *Id.* at 460.
150. *Id.*
151. *Id.* at 461–62.
152. *See id.* at 464–65.
153. *See id.* at 466, 470.
154. *Id.* at 470–71 (citation omitted).
155. *Id.* at 470–71, 474 (emphasis in original).
156. *See id.* at 476.

D. A Risk of Inflexible Government

Chevron's end purportedly closes the book on deferential judicial review by granting agencies no leash at all and problematically requiring politically unaccountable and itinerant reviewing courts to reject the benefits of agency expertise and instead apply their own statutory interpretations. It renders the Major Questions Doctrine effectively superfluous by requiring reviewing courts to always implement their own interpretation of legislative rules.[157] By denying reviewing courts the ability to infer a delegation of legislative power to agencies, even in situations of statutory ambiguity, it grants an inflexible judiciary, cabined by stare decisis and other doctrines designed to promote judicial stability, an oversized role in formulating policy as compared to agencies that are designed to be flexible and responsive.[158] This is highly problematic because it is incorrectly premised on the supposition that agencies are non-pluralistic entities when in fact the opposite holds true.

VII. AGENCIES – PLURALISTIC ENTITIES THAT ENGENDER DEMOCRATIC ACCOUNTABILITY

When the Court enjoined the Biden Administration's OSHA Rule, Justice Gorsuch praised the decision for helping "to prevent government by bureaucracy supplanting government by the people."[159] This formalistic view that accountability stems solely from elections is belied by Anya Bernstein and Cristina Rodríguez's scholarship, which, based on interviews taken from agency employees, reveals that agency officials work within structures that promote deliberation, inclusivity, and responsiveness—the very values accountability serves.[160] They support this by way of empirical evidence demonstrating that (1) political appointees and career civil servants work together and represent complementary decision-making modalities that promote deliberation informed by public opinion and the public interest; (2) agency employees, who are often assumed to work under a strict hierarchy,

157. *See, e.g.*, Ohio Telecom Ass'n v. FCC, 124 F.4th 993, 997–98 (6th Cir. 2025) (concluding that application of Major Questions Doctrine is unnecessary because the Court applied its own interpretation of the Telecommunications Act of 1996 because the reversal of *Chevron* meant it need not defer to the FCC's statutory interpretation).

158. *See generally* Scalia, *supra* note 70, at 517–18 (arguing that *Chevron* was a necessary concomitant to very broad Congressional delegations and a judicial attempt to police Congressional intent would be overwhelming and counterproductive because it would take away flexibility in public policy).

159. Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 595 U.S. 109, 125 (2022) (quoting Antonin Scalia, *A Note on the Benzene Case*, AM. ENTER. INST. J. ON GOV'T. & SOC'Y, July/Aug. 1980, at 25, 27).

160. *See* Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 YALE L.J. 1600, 1600 (2023).

instead work through a dispersed "decision-making web" that "promotes the pluralistic inclusivity of views in a way hierarchical decision-making does not"; and (3) practices, such as notice-and-comment rulemaking, that connect agencies directly and pervasively to the people and situations they regulate, i.e., their findings suggest that agencies have more diverse, frequent, and interactive relationships with the public and situations they regulate than elections could provide.[161] Bernstein and Rodríguez write that their "interviews with administrators across a range of federal agencies, reveals numerous structures, relationships, and practices within the state itself" that act as "scaffolds" to "augment and complement the accountability created by elections, in some cases producing the very sorts of accountability that elections supposedly, but do not actually, provide."[162] They argue that "placing excessive emphasis on elections" to constrict administration "gets in the way of understanding how to build and sustain an accountable democratic state."[163] This is because often the critical time for responsiveness is during a decision-making process, when officials learn about real-world situations and incorporate the views of people with different interests in the matter who come from overlapping constituencies that are not clearly delineated by partisan politics. Contrary to Justice Gorsuch's supposition that elections are the sole means of accountability, the reality is that "elections do not provide voters with a means to voice their objections to one decision while also voicing their support for another decision by the same representative or by the President."[164] Agencies are not mere administrative black boxes that work against pluralism and democratic accountability. Rather, their prioritization of deliberation, their use of dispersed decision-making webs to promote a pluralistic inclusivity of views, their professionalism, and their connectivity to the broader and regulated public evidences deeply pluralistic institutions that often represent a broad cross-section of American civil society.[165] It evidences that well-resourced agencies further government capacity and the rule of law by supplementing elections and the legislative process with administrative accountability in the form of pluralism, expertise, and professionalism in rulemaking elaboration.[166] This explains why Bernstein and Rodríguez deride Major Questions Doctrine has "anemic conceptions of accountability" that empowers the courts and thwarts Congress.[167] Their scholarship evidences that deferring to agency rulemaking power is consistent

161. *See id.*
162. *Id*. at 1604, 1638 (citation omitted).
163. *Id*. at 1604.
164. *See id.* at 1653.
165. *See id.* at 1637.
166. *See id.* at 1676.
167. *See id.*

with not only expertise, but pluralism and the rule of law. This position is supported by a comparative analysis of other mature democracies.

VIII. INTERNATIONAL APPROACHES TO JUDICIAL DEFERENCE

How do other democracies address the issue of judicial deference to agencies? American scholars of the U.S. administrative state typically disregard an international comparison and instead focus on an entirely endogamous approach to the issue. Although this is understandable in that the United States has a unique system of checks and balances, much can be learned from foreign countries, even if they have far smaller populations and economies. To illustrate, I taught an Erasmus course on comparative administrative law at the University of Lisbon in March 2024, and was taken not only by the English language proficiency of my Portuguese students, but by their interest in U.S. approaches to administrative law as compared to Portugal and other EU member states. These Portuguese students, unlike my own American students, would express amazement that the world's most powerful country seemed incapable of addressing the problems facing its own citizens. Because all mature democracies struggle with the consequences of globalization, including migration from the developing world and socioeconomic stagnation for much of the middle and working class, the American political culture's assessment of its own administrative state might improve should it learn from administration in other mature democracies. The lack of a comparative perspective is not only a jurisprudential consequence of the country's inordinate size and power, but a concomitant of the fact that when the APA was signed into law, all of Europe and Japan had barely begun their post-World War II recovery and no country in Europe or Asia, with the exception of Switzerland, had living standards remotely comparable to those found in the United States.[168] The APA's framers did not seek input from Europe because they reasonably felt there was nothing to learn.

While the reality has dramatically changed with respect to global economic and human development, U.S. administrative law has failed to incorporate any innovations from Europe or other parts of the world. This is a glaring failure in that many European and Asian countries have found ways to deliver higher living standards to households, consistent with more equality in income distribution, lower rates of social exclusion, lower per capita carbon emissions, and higher levels of social and political cohesion. Most importantly, in none of these countries is the administrative state treated by a

168. *See generally Post-War Economic Reconstruction: Policies and Challenges*, SOCIALSTUDIESHELP.COM, https://socialstudieshelp.com/post-war-economic-reconstruction-policies-and-challenges/ [https://perma.cc/TD4J-FHZ8] (discussing the role of the United States in the economic redevelopment of Europe and Japan immediately following World War II).

large segment of the political culture as somehow antithetical to the rule of law as has been the case in the United States, where Trump Administration officials identified deconstructing the administrative state as a key governing priority.[169]

To illustrate why other mature democracies are worthy of consideration in their approach to the administrative state, consider the United Nations Human Development Index, which purports to measure per capita income, mean life expectancy, and education levels.[170] The United States currently ranks only twentieth under this index, with Switzerland, Norway, and Iceland ranked first, second, and third, respectively.[171] Recognizing these are small countries with respect to population, it is noteworthy that Germany, the Netherlands, Australia, Canada, and South Korea consistently score higher on the index.[172] The UN HDI is not an outlier in this regard. The *U.S. News and World Report*'s index of the best countries to live, factoring affordability, the job market, economic stability, family friendliness, income equality, political stability, safety, the health system, and the education system, ranked Denmark as the number one country, followed by Sweden, Switzerland, Norway, and Canada.[173] The United States comes in after Poland at number twenty-two.[174] The poor comparative performance is notwithstanding the fact the United States, in terms of per capita annual income, ranks at the top for large developed countries at $89,680 per person, as compared to $67,980 for Australia, $70,610 for the Netherlands, $59,510 for Sweden, $55,890 for Canada, $57,910 for Germany, $54,280 for the United Kingdom, $49,530 for France, and $25,040 for Poland.[175] Unlike European countries, however, the United States' high per capita income has been facilitated by extremely high budget deficits since the George W. Bush presidential administration that have reached Brobdingnagian levels since the Obama Administration.[176] These record high deficits have been masked by the fact the U.S. Dollar remains the

169. *See* Bethany A. Davis Noll, *"Tired of Winning": Judicial Review of Regulatory Policy in the Trump Era*, 73 ADMIN. L. REV. 353, 369 (2021).

170. *Human Development Index (HDI)*, HUM. DEV. REPS., https://hdr.undp.org/data-center/human-development-index#/indicies/HDI [https://perma.cc/S52B-WDPV].

171. *Id.*

172. *See id.*

173. *Quality of Life*, U.S. NEWS & WORLD REP., https://www.usnews.com/news/best-countries/rankings/quality-of-life [https://perma.cc/7CW4-2G89].

174. *Id.*

175. *GDP Per Capita, Current Prices*, INT'L MONETARY FUND, https://www.imf.org/ /external/datamapper /NGDPDPC@WEO /OEMDC/ADVEC/ WEOWORLD [https://perma.cc /BTS9-UH2J].

176. *See generally General Government Deficit*, ORG. FOR ECON. COOP. & DEV., https://www.oecd.org/en/data/indicators/general-government-deficit.html [https://perma.cc/ VS8U-3WZB] (showing an interactive graph of the general government deficit for the United States from 1970 to 2023).

world's major reserve currency, U.S. tech companies dominate the world rankings in terms of market capitalization, and U.S. Treasuries remain the preferred debt instrument for global investors and foreign sovereign wealth funds.[177] In short, the United States achieves remarkably low human development in spite of its wealth and structural advantages afforded to it by the global economy, including the ability to incur debt under highly favorable terms. What might it learn from its foreign counterparts in the realm of administrative law and especially with respect to the issue of deference afforded by reviewing courts to administrative actions?

Although public input into legislative rulemaking is one of the APA's crowning achievements that distinguishes U.S. administrative law, the fact is that forcing agencies to draft tentative rules, inviting public notice and comment on these tentative rules, incorporating the received feedback to arrive at final rules, subjecting the final rulemakings to White House Office of Information and Regulatory Affairs ("OIRA") review prior to finalization, and then subjecting this process to judicial review, can inordinately delay and therefore debilitate the government, especially since some scholars consider the entire process to be a glorified form of "Kabuki theater."[178] Although this is an altogether uniquely American means of administrative governance, Eduardo Jordão and Susan Rose-Ackerman, who have undertaken a detailed international comparison of judicial approaches to administrative actions, write that all mature democracies "need to strike a balance between deference to the expert choices of specialized administrative bodies and review of their decisions to assure that they are taken in a transparent and responsive way."[179]

Kent Barnett and Lindsey Vinson undertook a comparative analysis of how courts in Germany, Italy, the United Kingdom, Canada, and Australia approach the issue of agency deference.[180] They write that their comparative review evidences that while *Chevron*-type deference is not inevitable because

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177. Anshu Siripurapu & Noah Berman, *The Dollar: The World's Reserve Currency*, COUNCIL ON FOREIGN RELS., https://www.cfr.org/backgrounder/dollar-worlds-reserve-currency [https://perma.cc/623P-APUS] (July 19, 2023, 2:30 PM); *Largest Companies by Market Cap*, COS. MKT. CAP, https://companiesmarketcap.com [https://perma.cc/U6NZ-UZMY]; *see* Anna Nordstrom, Head of the Domestic and Int'l Mkts. Functions, The Important Role of the Foreign Investor in the U.S. Treasury Market: Remarks at 2023 U.S. Treasury Market Conference, Federal Reserve Bank of New York, New York City (Nov. 16, 2023), https://www.newyorkfed.org/newsevents/speeches/2023/nor231116 [https://perma.cc/R4L6-6LAZ].

178. *See generally* H. R. REP. NO. 112-294, at 32, 77 (2011) (demonstrating that informal rulemaking can take as long as ninety-six months to finalize); Jud Mathews, *Minimally Democratic Administrative Law*, 68 ADMIN. L. REV. 605, 636 (2016).

179. Eduardo Jordão & Susan Rose-Ackerman, *Judicial Review of Executive Policymaking in Advanced Democracies: Beyond Rights Review*, 66 ADMIN. L. REV. 1, 5 (2014).

180. Kent Barnett & Lindsey Vinson, *Chevron Abroad*, 96 NOTRE DAME L. REV. 621, 621 (2020).

only one of these five countries has something analogous to *Chevron*, each uses some form of agency deference while purporting to strike a balance between judicial deference to administrative bodies and the need for transparency and democratic accountability.[181] Barnett and Vinson point out that excessive deference to agencies is viewed skeptically by Germans as it facilitated the Nazis' rise to power in 1930s.[182] Accordingly, western Europe's largest country in terms of population and economic output, Germany, applies a much more limited two-step deference doctrine that only applies to "technical, scientific, or economic matters that the legislature has delegated to the agency."[183] It is, however nowhere near Ukraine's "extreme skepticism of bureaucracy and overbearing judicial review" that has stunted agency maturation.[184]

Jordão and Rose-Ackerman focus on the administrative approaches taken by the United States, Canada, France, and Italy.[185] They write that although courts serve an important function in protecting individual rights from an overweening state, state legitimacy involves more than the protection of individual rights, requiring states to demonstrate both democratic responsiveness and competence that excessive judicial oversight can hinder.[186] They write:

> Judges need to be sure that they do not invoke the protection of individual rights as an excuse for imposing their policy preferences.
>
> Courts need to strike a balance between deference to the expert choices of specialized administrative bodies and review of those decisions to assure that they are taken in a transparent and responsive way.[187]

While those challenging agency actions will use the language of rights, reviewing courts should seek to assure that democratic values and competent expert advice infuse administrative choices to enhance government legitimacy.[188] In other words, the goal of protecting individual rights by judicial review should not hinder agencies in their goals of furthering human development provided input, throughput, and output legitimacy requirements are satisfied. One key difference between the United States, Canada, France,

181. *See id.* at 626.
182. *Id.* at 622–23.
183. *Id.* at 626.
184. *Id.* at 623.
185. Jordão & Rose-Ackerman, *supra* note 179, at 2.
186. *Id.* at 3.
187. *Id.* at 5.
188. *See id.* at 5.

and Italy is that the United States is unique in being characterized by divided government and separation of powers that, in turn, complicates any attempt to revisit the judicial invalidation of a legislative rule. While Canada, France, and Italy provide for judicial review of administrative determination, they lack any means for judicial review of agency rulemakings.[189] In both France and Italy, this is done by specialized administrative courts that are absent in Canada and the United States.[190]

Canada, a country that has systematically achieved higher living standards than the United States despite lower income levels and higher tax rates, is lauded for having settled on a workable and highly deferential form of judicial review of agency adjudications, bearing in mind it lacks a means of incorporating public input into proposed rules or a means of challenging rulemaking legality before implementation.[191]

While Canadian courts initially subjected agency adjudications to what Jordão and Rose-Ackerman call aggressive review, this led to conflict with the Canadian parliament and led the Supreme Court of Canada to intervene and criticize what it called "excessive judicial intervention" in administrative matters, resulting in the "patent unreasonableness" standard of review that applies today.[192] Under this highly deferential form of review, courts annul administrative decisions only when they are "so patently unreasonable that [their] construction [could not] be rationally supported by the relevant legislation," or when they were "so flawed that no amount of curial deference [could] justify letting [them] stand."[193] This means that Canadian courts defer to agency interpretations that are reasonable.[194] This deference, which applies most pronouncedly with respect to review of policy choices in the area of the agency's expertise, is because agencies, unlike courts, have regulatory expertise and are designed to make policy choices.[195] Jordão and Rose-Ackerman write that "the Canadian approach to substantive review responds better to the relative competence of courts than the U.S. approach" under *Chevron* because its "pragmatic and functional approach allows the courts to strike a balance among the threefold aspects of legitimacy: rights, democratic responsiveness, and competence," with courts usually deferring to agency choices "[i]f competence or democratic responsiveness is critical to the

189. *See id.* at 8.

190. *See id.* at 23, 29–30.

191. *See id.* at 8. *See generally* Barnett & Vinson, *supra* note 180, at 626 (describing Canada's judicial review process and its default reasonableness standard).

192. Jordão & Rose-Ackerman, *supra* note 179, at 11–12.

193. *Id*. at 12 (quoting Law Soc'y of New Brunswick v. Ryan, [2003] S.C.R. 247, 269–70 (Can.)).

194. *See id.*

195. *See id.* at 14–15.

decision under review."[196] A more searching form of review is applied, however, in situations requiring the protection of individual rights.[197] This level of deference is absent in the United States where review of a rule occurs before it goes into effect, thereby delaying implementation and giving the courts the ability to examine and influence an agency's actions of the underlying statutory text before they can be applied to individual cases.[198] Comparing the United States to Canada, Jordão and Rose-Ackerman write that "Canada has found a good balance for review of substance but lacks review of rulemaking procedures."[199] While the U.S. *Chevron* framework did mandate deferential judicial review of agency rules and actions, the U.S. courts' "explicit concern for the democratic legitimacy of delegated policymaking" is time-consuming and delays implementation of important rules.[200]

Canada has found a way to uncontroversially reconcile democratic accountability and government capacity with individual rights protection. This is obviously facilitated by Canada's Westminster system of government, which fuses the executive and legislative branches, thereby making it less likely that courts will confront an agency adjudication implementing a rule contravening parliamentary intent.

Italy, like Canada, lacks "notice-and-comment rulemaking that is subject to judicial review."[201] It does, unlike either Canada or the United States, have a separate system of administrative courts culminating in the Consiglio di Stato, that, especially since 2004, rejects deference to administrative agency adjudications.[202] Accordingly, Italian courts engage in an aggressive review of agency actions that, consistent with the civil law tradition, grants agencies little room for policy consideration and grants no judicial deference to agency statutory interpretations that are used in agency adjudications.[203] This might explain why Italy, more so than other large European Union countries, has struggled with economic stagnation, the success of far-right and authoritarian political parties, and rule of law backsliding.[204]

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196. *Id.* at 15, 23.

197. *Id.* at 16.

198. *Id.* at 20.

199. *Id.* at 72.

200. *Id.*

201. *Id.* at 23.

202. *See id. See generally* Cons. Stato, 02 marzo 2004, n. 926 (It.) (describing how an administrative agency's control will not be substituted for the decision-making of a court).

203. *See* Jordão & Rose-Ackerman, *supra* note 179, at 28–29; Maciej Bernatt, *Transatlantic Perspective on Judicial Deference in Administrative Law*, 22 COLUM. J. EUR. L. 275, 289 (2016); Barnett & Vinson, *supra* note 180, at 626.

204. *See generally* Servaas Storm, *How to Ruin a Country in Three Decades*, INST. FOR NEW ECON. THINKING (Apr. 10, 2019), https://www.ineteconomics.org/perspectives/blog/how-

French courts have far broader standing rules than U.S. courts and French courts, consistent with the civil law tradition, engage in a very intrusive judicial review that has been called the "judicialization of administration" because it prohibits any judicial deference to agency statutory interpretations.[205] Jordão and Rose-Ackerman write that French judicial review has become more aggressive over time, as both democratic accountability and deference to agency expertise are less relevant concepts in French judicial review.[206] France's three-tiered system of specialized administrative courts culminates in the Conseil d'Etat, which is France's main tribunal for agency review.[207] Conseil d'Etat review rejects any notion that agency administrators are acting based on delegated authority, and its decisions, which are extremely concise, impose unexplained legal conclusions that make minimal reference to legal texts.[208] Conseil d'Etat decisions are secretive, lack any provision for dissenting opinions, and fail to elaborate as to the reasoning behind its opinions.[209] However, more so than other mature democracies, French government in the Fifth Republic has become increasingly Bonapartist, especially under President Macron, and policy changes are increasingly implemented by decrees and ordinances that cannot be challenged in court.[210] They are, however, subject to pre-implementation advisory opinions by the Conseil d'Etat that tend to be very narrow and are typically kept secret unless released by the government.[211] Jordão and Rose-Ackerman write that their review of available examples of these advisory opinions evidences that they are written similarly to Conseil d'Etat judicial opinions.[212]

President Macron's unilateral use of a constitutional provision to raise the retirement age, was highly divisive and he conceded, in his New Year's Address that the snap elections he called in June 2024 resulted in increased

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to-ruin-a-country-in-three-decades [https://perma.cc/M9K4-DBM4] (discussing the Italian economy and its backslide into another recession); Ben Munster, *Italy's Government is Stuffed with the Far Right*, FOREIGN POL'Y (Nov. 24, 2022, 7:00 AM), https://foreignpolicy.com/2022/11/24/italy-meloni-government-far-right/ [https://perma.cc/V87S-2GQV] (arguing that the "so-called moderate" Italian Prime Minister is a far-right politician and discussing the effect of far-right Italian politics on the rule of law).

205. *See* Vincent Martenet, *Judicial Deference to Administrative Interpretation of Statutes from a Comparative Perspective*, 54 VAND. J. TRANSNAT'L L. 83, 117 (2021); Jordão & Rose-Ackerman, *supra* note 179, at 30.

206. Jordão & Rose-Ackerman, *supra* note 179, at 32.

207. *Id.* at 30.

208. *See id.* at 37.

209. *Id.*

210. *See id.* at 38; Wahid Abdel Maguid, *Macron's High-Handed Rule Draws Napoleonic Comparisons*, AL MAJALLA, https://en.majalla.com/node/296226/opinion/macrons-high-handed-rule-draws-napoleonic-comparisons [https://perma.cc/VP8S-SQHD] (July 26, 2023).

211. *See* Jordão & Rose-Ackerman, *supra* note 179, at 37–38.

212. *See id.* at 38.

political instability rather than providing solutions for the French people.[213] The inconclusive election results have made it difficult to form a stable government, highlighting the growing strain in the balance of power between the executive and legislative branches under the Fifth Republic—a system increasingly in need of recalibration.[214]

Jordão and Rose-Ackerman write that exacting review by specialized administrative tribunals in Italy and France prioritizes formalistic legality over other goals, namely "administrative efficiency, technical competence and political accountability."[215] Moreover, while exacting judicial review by these specialized administrative tribunals does not raise the same separation of powers concerns as non-deferential review by American and Canadian generalist courts their research evidences that "the institutional capabilities of the French and Italian administrative courts are no stronger than those of ordinary courts in Canada and the U.S. . . . [and] are poorly adapted to address technically complex or politically sensitive issues."[216] Although U.S. courts have, applying *Chevron*, deferred to agency rules and adjudications, judicial review of substance in the United States, as compared to Italy and France, is problematic because U.S. courts typically scrutinize consistency between agency rules and statutes in areas such as health, safety, and financial standards "as if they had knowledge that they, in fact, lack."[217] "In France and Italy, review of rules and regulations is less common, but this means that major policy initiatives are not reviewed at all while individual decisions of less overall importance obtain stringent oversight."[218]

Jordão and Rose-Ackerman also write that while aggressive judicial review of government decisions in situations where judges lack expertise on the precise issue is problematic, the solution is not for a complete abdication of judicial oversight because "of the risk of capture and of simple incompetence."[219] Instead, they recommend courts defer to agencies, but require they give reasons for their rules and verify that policy is made in an accountable, transparent, and responsive manner that draws on necessary expertise.[220] This approach seeks to balance democratic legitimacy, administrative expertise, and the protection of individual rights, while

213. Ian Johnston, *Emmanuel Macron Issues Mea Culpa Over French Legislative Elections*, FIN. TIMES (Dec. 31, 2024), https://www.ft.com/content/55aae3ae-d321-4cc7-8d90-964e0d657069 [https://perma.cc/E8GN-N2YV].

214. Sylvie Kauffmann, *France's Political Institutions Are Creaking*, FIN. TIMES (Dec. 8, 2024), https://www.ft.com/content/ebcf2234-195e-41da-98ad-c17391e7626a [https://perma.cc/8EZT-BMKL].

215. *See* Jordão & Rose-Ackerman, *supra* note 179, at 38.

216. *Id.*

217. *Id.* at 39.

218. *Id.*

219. *See id.* at 68.

220. *Id.* at 39.

acknowledging that judicial review—especially in technically complex policy areas—is often ill-equipped to assess the substance of executive decisions.[221] However, requiring that agency rules and adjudications be accompanied by reasons helps judges better understand the administrative system and empowers them to protect the proper separation of powers and encourage public participation focused on stressing "transparency and direct public involvement in the policymaking process."[222]

Jordão and Rose-Ackerman write that the focus should be on granting agencies a long leash to undertake procedures "that help determine broad policies," with less focus on the typical due process concerns of individual rights that characterizes the intrusive judicial review of agency procedures in France.[223] Comparing the United States, Canada, France, and Italy, they write that the French and Italian approaches to administrative judicial review are problematic and "privilege the protection of legal rights to the detriment of other goals, such as administrative efficiency, technical competence, and political accountability."[224] By contrast, the most pervasive form of review prioritizing these other goals is APA informal rulemaking in the United States, with its emphasis on "transparency, openness to outside views, accountability, and functional policymaking, not individualized due process rights," places greater emphasis on judicial review as a means of facilitating these virtues as compared to Canada, Italy, and France.[225] However, the time consuming nature of the rulemaking process problematically precludes timely rule implementation.[226]

Maciej Bernatt writes that "[t]he challenge for legislators, regulators, and judges is to build a model of judicial review to guarantee effective judicial control of administrative agencies, while preserving the characteristics of expert administrative agencies that aid in the efficient functioning of the democratic state."[227] Recognizing that judicial deference to agency determinations is foreign to the European civil law tradition, Bernatt sought to verify whether a doctrine mandating judicial deference to agency decisions and rules can be applied to judicial review of the supranational standards emanating from Article 6 of the European Convention of Human Rights.[228]

Bernatt writes that notwithstanding the lack of any *Chevron*-like doctrine mandating judicial deference to agency determinations in Europe, "analysis of the ECHR's standards governing judicial review and the analysis of the EU

221. *Id.* at 68.
222. *Id.* at 69.
223. *See id.* at 39, 68.
224. *Id.* at 72.
225. *Id.* at 69–70, 72.
226. *Id.* at 72.
227. Bernatt, *supra* note 203, at 277.
228. *Id.* at 278, 289.

Courts' practice in the field of competition law" demonstrates that judicial deference to agencies is practiced in Europe.[229] Bernatt recommends a model of judicial review that would "preserve[] the positive aspects of judicial deference," and still provide safeguards against administrative overreach.[230] Under his three-prong approach, greater deference should be afforded to the agency in situations where (1) due process guarantees are provided in the administrative phase of proceedings; (2) administrative decision-makers are impartial and kept separate from the persons responsible for investigating and arguing the case within the agency; and (3) the agency possesses an established expertise in the field, e.g. both the European Commission and the U.S. Federal Trade Commission have legal and economic expertise in competition rule enforcement.[231]

Surveying administrative policymaking in mature democracies, Vincent Martenet writes that judicial deference to administrative statutory interpretation pragmatically allocates limited resources and acknowledges that agencies have greater expertise, especially as to non-legal matters, as comparted to reviewing courts.[232] Martenet recommends that in situations where (1) a statute allows for a margin of interpretation; (2) the administrative statutory interpretation remains within this margin; (3) the applicable constitutional, statutory or other constrains do not preclude judicial deference, then the courts "may, or depending on the country, must defer to the administrative statutory interpretation, especially when or, depending on the country, provided that" (4) the interpretation requires non-legal expertise; (5) the administrative body has greater expertise in this area; and (6) the legislature was or should have been aware of this asymmetry.[233] Martenet writes that this does not endanger the proper separation of powers because certain conditions must be met and the legislature retains the final say.[234] Martenet, in other words, is calling for adoption of something akin to *Chevron*'s two-step.

IX. CONSIDERATION OF INPUT, THROUGHPUT, AND OUTPUT LEGITIMACY IN EVALUATING AGENCY RULEMAKINGS

As detailed above, disallowing judicial deference risks inconsistent jurisprudence that tends to reflect the ideology and inclinations of generalist judges and risks undermining government capacity by disallowing the full

229. *Id.* at 320.
230. *Id.* at 324.
231. *See id.* at 324–25.
232. Martenet, *supra* note 205, at 145.
233. *Id.* at 145–46.
234. *Id.*

elaboration of agency expertise, pluralism and flexibility. As evident from *West Virginia v. EPA* and *Biden v. Nebraska*, gutting judicial deference to agencies will further erode government capacity and, concomitantly, trust in government, which is already under siege for heterodox reasons, including the inability of the state to protect citizens from the rapid demographic and technological changes brought about by globalization, migration, and climate change.[235]

In the long litany of debates surrounding the administrative state, the issue of input, throughput, and output legitimacy has not arisen. Rather, the broader political culture and reviewing courts have relied on very formalistic arguments as to the proper separation of powers in resolving disputes as to administrative overreach. This was the case with Justice Kagan's magnificent dissenting opinion in *Loper Bright Enterprises*.[236] Although it highlighted the need for agency discretion as a means of furthering government expertise, Justice Kagan's dissent monographically relied on vindicating a liberal perspective on the proper separation of powers and never explicitly called for adopting a mode of analysis recognizing that support for government and the rule of law is based more on public perceptions of legitimacy and government responsiveness more than separation of powers purism.[237]

Support for democratization and the rule of law, much more so than is often acknowledged or appreciated by courts in their jurisprudential approach to evaluating agency actions, is input, and output legitimacy, concepts first enunciated by the German scholar Fritz W. Sharpf, and throughput legitimacy which was later elaborated upon by Professor Vivien A. Schmidt.[238] They are designed to supplement purist readings of the proper separation of powers, with a pragmatic one that recognizes that legitimacy provides a "reservoir of support for institutions and authorities" to increase government capacity to implement policy.[239] According to Zack Taylor:

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235. *See generally* FAREED ZAKARIA, AGE OF REVOLUTIONS: PROGRESS AND BACKLASH FROM 1600 TO THE PRESENT (2024) (discussing historical and present revolutions and the effects of economics, technological advances, and geopolitics).

236. *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 448 (2024) (Kagan, J., dissenting).

237. *See id.* at 449.

238. *See* FRITZ W. SCHARPF, GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC? 6–7 (1999) [hereinafter GOVERNING IN EUROPE]. *See generally* Vivien A. Schmidt, *Democracy and Legitimacy in the European Union Revisited: Input, Output, and 'Throughput'*, 61 POL. STUD. ASS'N 2 (2013) (exploring the interactions of output, input, and "throughput," and discussing the ways in which the three can be used in both normative as well as empirical arguments about the legitimacy of the European Union).

239. *See* Zack Taylor, *Pathways to Legitimacy*, 18 PLAN. THEORY 214, 214 (2019) (quoting TOM R. TYLER, WHY PEOPLE OBEY THE LAW 281 (2006)); GOVERNING IN EUROPE, *supra* note 238, at 188.

> In Scharpf's framework, *input legitimacy* flows from the governance system's responsiveness to public preferences through public participation in the deliberative production of laws and rules. The EU is seen to have low input legitimacy because citizens do not directly participate in the legislative process . . . . While in national politics policy choice is structured by partisan electoral conflict, EU policymaking occurs through competition among national and EU-level bureaucratic interests—a situation that Schmidt characterizes as "policy without politics." Moreover, EU institutions lack a "constructive precondition" of regime support: a pan-European political identity that can compete with national identities.[240]

For purposes of this piece, input legitimacy is enhanced not only by clear statutory authorization for the rule at issue, but by the agency's use of public feedback, such as APA section 553 notice and comment or other forms of public consultation.

Output legitimacy, by contrast, is concerned with positive policy performance, construed as the impacts that policies have on society. Scharpf posits that "government derives legitimacy from its capacity to solve problems requiring collective solutions."[241] Scharpf's scholarship, which focused on the EU, posited that "output legitimacy is complicated by multilevel governance," between the European Commission and the EU member states.[242] The same could be said about the United States with respect to the separation of powers within the federal government and allocation of power between the federal government and the states.

Scharpf posits that constituent member states' governments undermine the EU's problem-solving capability by limiting delegations to EU-level institutions when problems emerge that they cannot independently address.[243] He writes that member states seek to maximize their influence over outcomes by insisting on supermajority or unanimous member state approval before implementation.[244] This results in *bargaining* rather than *problem solving*, as the dominant means of decision-making, leading either to gridlock or suboptimal outcomes that undermine policy coherence and effectiveness.[245]

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240. Taylor, *supra* note 239, at 217 (internal citations omitted).

241. *Id.* (quoting GOVERNING IN EUROPE, *supra* note 238 (internal citations omitted)).

242. *See id.* at 217–19.

243. *Id.* at 219.

244. *Id.* at 219.

245. *Id. See generally* Fritz W. Scharpf, *The Joint-Decision Trap: Lessons from German Federalism and European Integration*, 66 PUB. ADMIN. 239 (1988) (discussing how European integration's process has caused frustration); Fritz W. Scharpf, *The Joint-Decision Trap Revisited*, 44 JCMS 845 (2006) (explaining how some failures of German and European policy making could be attributed to negotiation theory).

The result, which Scharpf labels a "joint-decision trap," is that the price of agreement tends to be inaction and distributive policies "that would impose localized losses in exchange for collective benefits—are virtually impossible to enact."[246]

An important political manifestation of output legitimacy is what Paul Pierson calls "*positive policy feedback*—the generation of societal support coalitions that defend policies against challengers," which is "complicated by multilevel governance."[247] Pierson notes that although many citizens benefit from EU initiatives like agricultural subsidies and the free movement of goods and labor, these policies are implemented at the EU level but interpreted through the lens of national politics and identities—leading citizens to resent perceived losses of national sovereignty despite the advantages.[248] This tends to happen in the United States with respect to the allocation of power between the federal government, state governments, and, because of political contestation, a broadly shared dislike of federal government initiatives.

This takes us to what Vivien Schmidt has labeled throughput legitimacy, which supplements the input-output distinction and describes the importance of the governance processes as "contributing to a different kind of normative legitimacy."[249] Schmidt argues that the quality of interaction among decision-makers—and the way these interactions unfold—plays a crucial role in enhancing or undermining their "throughput" legitimacy.[250]

To Schmidt, "*throughput legitimacy* accrues to the 'quality of governance processes as established by their efficacy, accountability, transparency, inclusiveness, and openness' as inputs are translated into outputs."[251] According to Taylor "[t]hroughput" corroborates Paul A. Sabatier and Daniel A. Mazmanian's "emphasis on agency staff's sustained and open cultivation of support from politicians, stakeholders, and the public as a precondition for the achievement of statutory objectives."[252]

> This framework has informed proposals to enhance the EU's legitimacy. In the input domain, it has been argued that directly electing the executive would democratize technocratic policymaking (Schmidt's "policy without politics"), while throughput legitimacy

246. Taylor, *supra* note 239, at 219.

247. *Id.* (citing Paul Pierson, *When Effect Becomes Cause: Policy Feedback and Political Change*, 45 WORLD POL. 595, 598 (1993)).

248. *Id.*

249. *Id.* (quoting Schmidt, *supra* note 238, at 5).

250. *Id.* (quoting Schmidt, *supra* note 238, at 5–6).

251. *Id.* (quoting Schmidt, *supra* note 238, at 6).

252. *Id. See generally* Paul Sabatier & David Mazmanian, *The Implementation of Public Policy: A Framework of Analysis*, 8 POL'Y STUD. J. 538, 538–60 (1980) (framing how statutes can be better implemented through several processes).

> could be increased through robust public education, transparent reporting requirements, and the systematic incorporation of interests into implementation processes. Finally, output legitimacy may be increased by creating supportive conditions for problem-solving as opposed to bargaining—for example, by replacing unanimity or supermajority rule with majority rule in routine matters.[253]

An approach focusing on public perceptions of legitimacy and government responsiveness is supported by Professors John Hibbing and Elizabeth Theiss-Morse's empirical scholarship on American public opinion showing that citizens tend to care more about the results of politics, or outputs, more than about process, or inputs, and that public support for democratic institutions remains strong provided the public is content with the system outputs and elected politicians' behavior.[254] Professors Bernauer, Mohrenberg, and Koubi, using three experiments embedded in nationally representative surveys of the German and U.K. populations, found that while voters do concern themselves with both inputs and outputs, "output appears to matter more."[255] They write that for both countries, "while prospects of reaching effective/ineffective and favorable/unfavorable output in governance does not significantly affect support for improvements in input (process) quality, we observe that citizens are less tolerant (supportive) of poor output performance when this coincides with weak input quality."[256] While this finding "implies that process improvements are unlikely to compensate effectively for poor output performance" in the public's approach to evaluating policy, input improvements may still be useful by making citizens more tolerant and avoiding political backlash in situations involving equivocal outputs.[257] The virtuous cycle of positive outputs being reinforced by positive inputs was evident in the United States during the Cold War, when high economic growth and full employment facilitated a bipartisan consensus on immigration and the expansion of civil and political rights for racial minorities. It also applied in Europe during the same time frame, first during the period of very high economic growth, known as "Les Trentes

253. *See* Taylor, *supra* note 239, at 219–20.

254. *See generally* JOHN R. HIBBING & ELIZABETH THEISS-MORSE, STEALTH DEMOCRACY: AMERICANS' BELIEFS ABOUT HOW GOVERNMENT SHOULD WORK (James H. Kuklinski & Dennis Chong eds., 2002) (describing how when the public is frustrated by the government's process, change is desired).

255. *See* Thomas Bernauer et al., How Relevant Are Input and Output Performance to Popular Legitimacy of International Governance? 43 (unpublished research paper, presented at the 10th Annual Conference on Political Economy of International Organizations, Jan. 12, 2017), https://wp.peio.me/wp-content/uploads/2016/12/Input-Output-BMK-12Nov2016.pdf [perma.cc/Y7BG-2FUR].

256. *Id*.

257. *Id.* at 44.

Glorieueses," as well as the 1980s, when Jacques Delors, as President of the European Commission, succeeded in obtaining member state approval to deepen European integration by way of the Single European Act and expand European Union membership to include the previously authoritarian states of southern Europe and the former Soviet-bloc states of central and eastern Europe.[258] The European project was broadly popular with member state electorates because European integration provided definite output legitimacy in the form of amicable and peaceful relations between member states, increased incomes for most EU citizens, dramatically improved primary, secondary, and tertiary education attainment levels, and, as a result, dramatically improved living standards, especially for the working class.[259] The output legitimacy of European integration and expansion coincided improved living standards in western European countries that facilitated further public support for the European Union, which, in turn, facilitated further integration and expansion.[260]

The fact that U.S. legal jurisprudence has monographically focused, by implication, on aspects of input legitimacy by explicating constitutional and statutory requirements for the proper separation of powers, without any acknowledgment that throughput and output legitimacy are key components in support for the rule of law, evidences a problematic naivete, especially at a time when western electorates are evidencing illiberal, patrimonial, and authoritarian trends inconsistent with the rule of law.[261] By monographically focusing on separation of powers purism and disregarding the need for effective government, it improperly treats Congress as the sole font of pluralism and democratic legitimacy when in fact Congress, due to political polarization, a very low political representation rate, the baneful consequences of single member plurality districting and equal Senate suffrage, is hardly

258. *See generally Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, at 2, COM (2023) 690 final (Aug. 11, 2023) (evidencing the Western Balkans, Turkey, Ukraine, Moldova, and Georgia forging a bond with the European Union).

259. *See generally Key European Union Achievements and Tangible Benefits*, EUR. UNION, https://european-union.europa.eu/achievements_en [https://perma.cc/R432-Q2UW] (discussing the benefits and achievements of the European Union).

260. *See* Bernauer et al., *supra* note 255, at 43.

261. *See, e.g.*, *Between 2023 and 2024, Rule of Law Weakened in a Majority of Countries*, WORLD JUST. PROJECT, https://worldjusticeproject.org/rule-of-law-index/insights [https://perma.cc/N3JM-FDLU] (providing a graph evidencing that the rule of law is declining in the United States, Hungary, Poland, France, and Germany); John McEldowney, *Prorogation, Brexit, and the Rule of Law*, UNIV. OF WARWICK (Sept. 5, 2019), https://warwick.ac.uk/newsandevents/knowledgecentre/society/law/prorogation_brexit_and_law/ [https://perma.cc/25Z6-RATJ] (describing the United Kingdom's decision to vote for and effectuate Brexit and the relationship between Brexit and the rule of law in the United Kingdom).

that.[262] Although agency heads are obviously not subject to direct election, their boss, the President, is elected by nationwide ballot; agency heads are subject to Congressional oversight; and agencies are often far more inclusive of ideological heterogeneity than is often assumed.[263] Based on their political accountability, institutional expertise, and ideological heterogeneity, judicial deference to agencies is more likely to expand government capacity and institutional legitimacy.[264]

With respect to the United States, input legitimacy would be strongest in situations where the agency has adopted the rule in question based on a clear statutory scheme that is consistent with the broader political culture's understanding of the law in question's purpose. This input legitimacy would be enhanced in situations where the agency has submitted the proposed rule for public feedback by way of APA section 553 notice and comment. Throughput legitimacy, in turn, could be demonstrated by agency transparency, including how the final rulemakings incorporated the received public comments in the final rules. Finally, output legitimacy would ideally demonstrate that the agency rules reflect the application of agency expertise and professionalism, including contemporaneous consideration of alternative rules, both before and after issuance of the tentative rules and how the agency arrived at the final rule in question.

Because *Loper Bright Enterprises* overruled *Chevron* and disallowed reviewing courts from deferring to agency rules because APA section 706(2) purportedly disallows it, Congress should amend the statute to mandate judicial deference to agency rules in situations where input, output, and throughput legitimacy are demonstrated by the agency to the reviewing court. As applied, a reviewing court shall defer to challenged agency rule in situations where it is based on a valid Congressional delegation that has benefited from public consultation and input (input legitimacy), where the agency process in arriving at the rule has demonstrated accountability,

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262. *See generally* Jeffrey M. Jones, *Congress' Approval Rating Remains Near Historical Lows*, GALLUP (Aug. 13, 2013), https://news.gallup.com/poll/163964/congress-approval-rating-remains-near-historical-lows.aspx [https://perma.cc/QG7G-NEXN] (discussing how divided party control is likely a key factor contributing to low ratings of Congress); Dalibor Rohac et al., *Drivers of Authoritarian Populism in the United States*, CTR. AM. PROG. (May 10, 2018), https://www.americanprogress.org/article/drivers-authoritarian-populism-united-states/ [https://perma.cc/564A-M69P] (describing how the American public feels that elected officials are not responsive to their needs and act in a self-interested manner).

263. *See* Bernstein & Rodríguez, *supra* note 160, at 1676.

264. *See* BENJAMIN M. BARCZEWSKI, CONG. RSCH. SERV., R48320, *LOPER BRIGHT ENTERPRISES V. RAIMONDO* AND THE FUTURE OF AGENCY INTERPRETATIONS OF LAW 9 (2024), https://crsreports.congress.gov/product/pdf/R/R48320 [https://perma.cc/NS7N-R5V7]; Martha Kinsella & Benjamin Lerude, *Judicial Deference to Agency Expertise in the States*, STATE CT. REP., https://statecourtreport.org/our-work/analysis-opinion/judicial-deference-agency-expertise-states [https://perma.cc/2ZG8-RKKP] (June 28, 2024).

transparency, inclusiveness, and openness to counterfactually consider proposed alternatives (throughput legitimacy), and, finally, incorporated administrative and professional expertise to arrive at the proper result (output legitimacy). Deference should apply under these circumstances unless the rule is clearly disallowed by the statutory text or where the legislation explicitly precludes the regulatory endeavor. This does not mean judicial review is to be so supine that it risks contempt for judicial review. Rather, hard look review should be retained to make sure that agency rules properly incorporate agency expertise by way of proceduralism requirements designed to protect agency professionalism and expertise from improper political pressure that would harm public policy outcomes. This framework currently applies to how the Court evaluates agency actions, findings, and conclusions under APA section 706.

X. HARD LOOK REVIEW OF AGENCY ACTIONS UNDER APA SECTION 706 – A MEANS OF "MINDING THE GAP" ON AGENCY RULEMAKING

In *Loper Bright Enterprises*, the majority rejected the dissent's contention that APA section 706 is silent on the issue of deference to agency legislative rulemakings.[265] APA section 706, however, has always been understood to mandate deferential judicial review of agency actions and factual determinations, by providing that the reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions" that are, among other things, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[266] Though deferential, it is not supine and intended to make sure the agency removes itself from political pressures of the sitting White House to consider the public feedback received and use its professional expertise to consider the available alternatives before arriving at a particular agency action or decision.[267] In other words, APA section 706 requires that reviewing courts verify that agencies do not subordinate their independent professional judgment and expertise to political pressure. It effectively insists that agencies demonstrate input, throughput, and output legitimacy as a means of availing the broader public of the benefits of a professional civil service that is designed to improve government performance and therefore protect the

265. *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 470 (2024) (Kagan, J., dissenting); Levin, *supra* note 63, at 129; Cass R. Sunstein, *Chevron as Law*, 107 GEO. L.J. 1613, 1656 (2019). *See also generally* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 947 (2017) (arguing that the APA mandates *de novo* as opposed to deferential review).

266. *See* 5 U.S.C. § 706(2)(A).

267. *See, e.g.*, Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41–42 (1983).

rule of law. Congress should amend APA section 706 to apply this requirement to the judicial evaluation of agency rules.

An example of how hard look review was effectuated to reverse agency action based on an obvious lack of legitimacy was the Court's decision to invalidate the Trump Administration Department of Homeland Security's ("DHS") decision to rescind DHS' Deferred Action for Childhood Arrivals ("DACA") program, implemented by an Obama Administration enforcement memorandum that purported to defer deportation and grant lawful presence status to eligible unauthorized migrants by contravening the textual requirements of the Immigration and Nationality Act of 1965.[268] DHS subsequently sought to expand DACA eligibility and created the related DAPA program that would have protected the unauthorized migrant parents of U.S. citizens or lawful permanent residents from deportation, in conjunction with provision of work authorization and lawful presence benefits.[269] Because neither the DACA expansion nor DAPA was introduced with public consultation in the form of notice and comment or any manifestation of public or professional consultation, a nationwide preliminary injunction barring their implementation that was obtained and affirmed by the Fifth Circuit Court of Appeals, was left in place by a divided Supreme Court.[270]

President Trump took office after repeatedly making demotic attacks against migrants during the 2016 presidential campaign, and his administration's DHS rescinded the DAPA Memorandum and, based on the Attorney General's recommendation, purported to terminate DACA on the grounds that it shared DAPA's legal flaws.[271] Several groups of plaintiffs challenged the DACA rescission decision on APA, Equal Protection and Due Process grounds.[272] The Court invalidated DHS's DACA rescission order on the grounds it evidenced an inexpert response to White House political pressure that failed to consider the policy alternatives or the consequences of its actions.[273] The Court arrived at this conclusion because (1) the agency's purported reasons for the rescission consisted primarily of "post hoc rationalizations" that, by failing to demonstrate how DHS deliberated or acted contemporaneously, undermined agency accountability; (2) DHS relied on the Attorney General's conclusion that DACA's grant of lawful presence was

268. Dep't of Homeland Sec. v. Regents of the Univ. of California, 591 U.S. 1, 9–10, 33 (2020).

269. *Id.* at 1–2.

270. *See id.* at 1–2, 11–12, 35–36.

271. *See id.* at 1–3; Eric Bradner, *7 Lines That Defined Trump's Immigration Speech*, CNN, https://www.cnn.com/2016/08/31/politics/donald-trump-immigration-top-lines/index.html [perma.cc/TZK3-JY3U] (Sept. 1, 2016, 10:34 A.M.).

272. *Regents of the Univ. of California*, 591 U.S. at 2.

273. *Id.* at 5; *id.* at 56 (Thomas, J., concurring).

unlawful to justify rescinding both lawful presence benefits and deportation forbearance—without explaining why it did not consider retaining forbearance alone as an alternative policy; and (3) DHS acted arbitrarily and capriciously by failing to weigh the legitimate reliance interests on the original DACA Memorandum against its policy justifications for rescission.[274] These failures were compounded by the fact the rescission order's consequences would be felt by a very vulnerable and scapegoated population group. By contrast, an attempted recission that manifested aspects of input, throughput, and output legitimacy would likely have been affirmed.

DHS points to the importance of judicial review under APA section 706(2) as a means of protecting the rule of law and agency professionalism from rule by agency fiat based on political coercion. This approach—marked by deference but not blind acquiescence—was further illustrated in *Department of Commerce v. New York*, where the Court rejected the Trump Administration's attempt to reinstate a citizenship question on the U.S. Census, finding the justification pretextual and inconsistent with expert agency advice.[275] The Constitution's requirement that a decennial census be taken led Congress, via the Census Act, to delegate the task to the Commerce Secretary, aided by the U.S. Census Bureau, "in such form and content as he may determine" based on this Constitutional requirement.[276] All censuses until 1950 asked households about citizenship status and all but one of the decennial censuses "between 1820 and 2000 asked at least some of the population about their citizenship or place of birth."[277] The question was also asked of a fraction of the population on an alternative long-form questionnaire, sent to between one-fourth to one-sixth of households between 1960 and 2000.[278] In 2010, the question was moved from the census to the American Community Survey, which is a longer questionnaire sent to 2.6% of households.[279] Proposals to reinstate the citizenship question were resisted by the Census Bureau and former Bureau officials, who argued it would discourage noncitizens from responding and therefore undermine the accuracy of the population count.[280]

In March 2018, Commerce Secretary Ross, rejecting this advice, announced in a memo that he had decided to reinstate the citizenship question

274. *See id.* at 4–5.

275. *See* Dep't of Com. v. New York, 588 U.S. 752, 771 (2019).

276. *Id.* at 752; *see* U.S. CONST. art. I, § 2; 13 U.S.C. § 141(a) (requiring the Secretary to conduct a decennial census and authorizing the Secretary to obtain other census information as necessary). *See generally id.* amend. XIV, § 2 (showing how congressional representatives are apportioned among the state based on the states' respective populations).

277. *Dep't of Com. v. New York*, 588 U.S. at 752.

278. *Id.* at 760.

279. *Id.* at 761.

280. *Id.*

on the 2020 census questionnaire because the Department of Justice requested he do so for Voting Rights Act ("VRA") enforcement purposes.[281] The memo explained that Ross carefully considered the several factors, including the possibility that reinstating a citizenship question would depress the response rate, the long history of the citizenship question on the census, and several other factors, before concluding that "the need for accurate citizenship data and limited burden of the question" outweighed fears about a lower response rate.[282] Ross noted the United Nations recommends collecting citizenship data on the census and that other major democracies such as Australia, Canada, France, Ireland, Germany, Mexico, Spain, and the United Kingdom do so.[283]

After two separate suits filed against the measure in New York federal court were consolidated, discovery proceeded based on the lower court allowing plaintiffs' APA and Equal Protection claims to proceed.[284] In June 2018, the Government submitted its administrative record of materials considered by Secretary Ross in making his decision, including the DOJ's letter requesting reinstatement of the citizenship question.[285] However, at DOJ's urging, the Government supplemented the record to include a new memo from Secretary Ross, which stated he had begun considering the addition of a citizenship question in early 2017 and had asked whether DOJ would formally request its inclusion.[286] Accepting respondents' argument that the supplemental memo evidenced an incomplete administrative record, the district court compelled the Government to correct the record.[287] This, in turn, led to the production of a supplemental administrative record of more than 12,000 pages, which included documents that confirmed Ross and his staff never sought the advice of agency administrators and instead sought reinstatement of a citizenship question shortly after his 2017 confirmation, attempted to elicit citizenship data from other agencies, and actually instigated the DOJ request for reinstatement of the citizenship question.[288] After the district court concluded Secretary Ross's action was "arbitrary, capricious and based" on a pretextual rationale that violated the Census Act, the Supreme expedited a direct appeal from the district court for reasons of "imperative

281. *See id.* (specifically addressing the citizen voting-age population of the group to enforce the VRA's ban on vote dilution which prevents racial minorities from electing their preferred candidates).

282. *Id.* at 763.

283. *Id.*

284. *Id.* at 764.

285. *Id.*

286. *Id.* at 764–65.

287. *Id.* at 765.

288. *See id*.

public importance" and because the census questionnaire needed to be finalized for printing by the end of June 2019.[289]

The Chief Justice's majority opinion concluded that the deferential "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" standard of APA section 706(2), requires that the agency show a "rational connection between the facts found and the choice made."[290] He then concluded the district court improperly substituted its judgment for that of the agency and that the evidence before Secretary Ross supported his decision to reinstate the citizenship question notwithstanding the fact the Census Bureau recommended against him doing so.[291] This is because although the Bureau "had 'high confidence' that it could develop an accurate model for estimating the citizenship of 35 million people for whom administrative records were not available" without reinstating a citizenship question, it had not yet developed such a model when the time came for Secretary Ross to make his decision and the "choice between reasonable policy alternatives in the face of uncertainty was the Secretary's to make."[292]

The Court, however, concluded this was not the end of the story and that the record revealed Secretary Ross's claim about the VRA playing a significant role in the decision making process was a contrived *post hoc* rationale because he had already made the decision to reintroduce the citizenship question and prompted the DOJ to disingenuously request it for VRA enforcement purposes.[293] Conceding that it is perfectly proper for an agency head to come into office with policy preferences and ideas, the Court concluded it shared the district court's conviction that there was a "significant mismatch between the decision the Secretary made and the rationale he provided," and that, the Court is "not required to exhibit a naiveté from which ordinary citizens are free."[294] "The reasoned explanation requirement of administrative law, after all, is, meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public."[295] In other words, the agency failed to demonstrate that it properly consulted the public, used any expertise to engage in a contemporaneous hard look at alternative courses of action, and instead succumbed to political pressure.[296] The Court remanded the matter because

289. *Id.* at 766.
290. *Id.* at 771, 773.
291. *See id.* at 777.
292. *Id.* at 774–75.
293. *See id.* at 784–85.
294. *See id.* at 783, 785 (quoting United States v. Stanchich, 550 F.2d 1294, 1300 (2d Cir. 1977)).
295. *Id.* at 785.
296. *See generally id.* (holding the agency failed to pursue its goals reasonably and explain its action).

the rescission order was based on contrived political reasons and failed to incorporate agency expertise and professionalism by use of proper procedures.

Judicial hard look review of agency decisions, though deferential, is not supine and requires agencies to provide contemporaneous adequate explanations for their actions such that reviewing courts can "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."[297] Though narrow, this searching review is intended to protect the rule of law by insulating agency officials from improper political pressure that would deprive the broader public of their professional and administrative expertise.[298] In other words, it is intended to verify that agency decisions conform with input, throughput, and output legitimacy.

Congress should amend APA section 706(2) such that a challenged agency rule shall be deferred to in situations where it is based on a valid Congressional delegation that has benefited from public consultation and input (input legitimacy), where the agency process in arriving at the rule has demonstrated accountability, transparency, inclusiveness, and openness to counterfactually consider proposed alternatives (throughput legitimacy), and, finally, incorporated administrative and professional expertise to arrive at the proper result (output legitimacy).

Why is it that I am so insistent on resuscitating judicial deference to agency rules, especially on the heels of *Loper Bright Enterprises*? It stems from my concern that limiting agencies to a short rulemaking leash will deny them the ability to flexibly address important regulatory endeavors needed by the broader public in an increasingly resources scarce and environmentally depleted country that has needed dramatic amounts of debt-financed stimulus to sustain living standards. This view is supported by the fact that all mature democracies effectively grant some deference to administrative agencies and the best performing mature democracies, as measured by living standard growth and democratic responsiveness, such as Canada and Germany explicitly do so.[299]

297. *See id.* at 802 (Breyer, J., concurring) (quoting Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971)).

298. *See generally id.* (holding an agency fails to meet its standard for several reasons, including if the agency's decision could not be deemed the product of agency expertise because it is so implausible).

299. *See* Bernatt, *supra* note 203; Eduardo Jordão & Susan Rose-Ackerman, *Judicial Review of Executive Policymaking in Advanced Democracies: Beyond Rights Review*, 66 ADMIN. L. REV. 1, 5 (2014).

XI. A PROPOSAL TO BRIDGE THE GAP ON JUDICIAL DEFERENCE TO AGENCY RULEMAKINGS BY AMENDING THE APA

Loper Bright Enterprises and the gutting of *Chevron*'s two-step framework risks further eroding state capacity by disallowing expert agency administrators the ability to flexibly fill the gap in situations involving broad Congressional delegations to the agency. By replacing the interstitial knowledge and flexibility of politically accountable agencies with the inflexible and inexpert analysis of un-accountable and often politically biased federal judges, *Loper Bright Enterprises* risks worsening public policy outcomes by depriving the public of agency expertise in the rulemaking process. It will also prevent agencies from flexibly adapting legislation to changed circumstances and instead infeasibly require Congress to somehow expand its legislative output at a time of political hypercontestation. It therefore risks forcing legislation into what Daniel Kahneman would refer to as our collective System 1, or high speed, unconscious, emotional, irrational, and biased thoughts, as opposed to our System 2, which is conscious and rational, but slower and less frequent.[300] System 1 thoughts suffer from what is known as the anchoring effect, availability bias, the conjunction fallacy, optimism bias, risk-aversion, framing, and sunk cost.[301]

The anchoring effect leads us to make decisions based on irrelevant information.[302] To illustrate, Kahneman's research demonstrated that people irrationally assumed Gandhi died at a more advanced age when asked whether he died when he was more than 114 years of age as compared to whether he died when he was more than 35 years of age, merely because introduction of an irrelevant higher number led them to assume he died at a more advanced age.[303]

The availability fallacy leads us to irrationally assume the probability of events on the basis of how easy it is to think of examples.[304] This includes the public's tendency to focus on crime, notwithstanding demonstrably lower crime rates since the 1990s, based on the prevalence of crime depictions in popular culture and local news media.[305] Another example of the availability fallacy might be the public's demand for immense spending on national

300. *See generally* KAHNEMAN, *supra* note 5, at 21 (describing the differences between System 1 and System 2 in terms of psychology).

301. *See* Bredesen, *supra* note 15, at 2; KAHNEMAN, *supra* note 5, at 122, 158, 250, 254, 273–74, 363.

302. *See* KAHNEMAN, *supra* note 5, at 120.

303. *See id.* at 119–20.

304. *See* KAHNEMAN, *supra* note 5, at 129; Bredesen, *supra* note 15, at 5.

305. *See* Bredesen, *supra* note 15, at 5.

security as compared to improved infrastructure, even though our likelihood of dying is much higher due to inadequate infrastructure.[306]

The conjunction fallacy leads us to substitute a simpler question for a more complicated one.[307] For example, in what is known as the "Linda Problem," Linda is described as a "thirty-one years old, single, outspoken, and very bright" woman who majored in philosophy, "was deeply concerned with issues of discrimination and social justice and also participated in antinuclear demonstrations."[308] Based on this description, "Linda is a very good fit for an active feminist and a very poor fit for a bank teller."[309] However, when subjects, who are major university undergraduate students, are asked whether Linda is more likely to be a bank teller or a feminist bank teller, 85% to 90% incorrectly choose the latter when, in Venn diagram terms, the set of feminist bank tellers is wholly included in the set of bank tellers, as every feminist bank teller is a bank teller.[310] In short, our emotional minds tend to substitute "is Linda a feminist?" even though logic dictates that the probability that Linda is a feminist bank teller must be lower than the probability of her being a bank teller.[311] This conjunction fallacy also leads voters to, at times, blame unauthorized migrants for crime when immigrants have a lower crime rate than the native-born population and, as discussed above, crime rates have been falling for a long time.[312]

The optimism bias generates the illusion of control that leads us, for example, to feel safer driving a car than being flown, and, for gun enthusiasts, to overemphasize the potential benefits of gun ownership as compared to the more statistically relevant risk of accidental misuse or suicide.[313] It also very likely explains the polling popularity of autarkic policies such as "America First" and tariff implementation, compared to policies recognizing interdependence such as the United States-rejected Trans-Pacific Partnership or the Paris Climate Accords.[314]

The loss aversion bias leads us to be irrationally motivated by fear of loss.[315] The obvious example is that a significant majority of people will

306. *See* KAHNEMAN, *supra* note 5, at 144.

307. *See id.* at 158–59.

308. *Id.* at 156.

309. *Id.* at 157.

310. *See id.* at 158.

311. *See id.* at 158–59.

312. *See* Bredesen, *supra* note 15, at 5 (discussing how people consistently overestimate the presence of crime because of the media's focus on it).

313. *See generally id.* at 9 (describing a situation where gun activists and gun owners learned they shared similar views during a meeting); KAHNEMAN, *supra* note 5, at 255–65 (explaining the optimistic bias and the illusion of control it creates using several examples).

314. *See generally* Vesna Corbo & Chiara Osbat, *Optimism bias? The Elasticity Puzzle in International Economics Revisited* (Eur. Cent. Bank Working Paper No. 1482, 2012).

315. *See* KAHNEMAN, *supra* note 5, at 282–83; Bredesen, *supra* note 15, at 5–6.

irrationally refuse a coin toss that would offer us $600 for heads and require payment of $400 for tails when a rational decision maker would obviously see the choice as a 50/50 proposition.[316] It also keeps us in suboptimal situations, such as staying in a failing relationship, for fear of loneliness or of the unknown.[317] Framing refers to how we irrationally make choices based on the context in which they are presented.[318] For example, more people opt for surgery when told the survival rate is 90% than when told the mortality rate is 10%.[319]

Finally, our System 1 minds engage in sunk cost thinking that leads us to throw good money after bad.[320] For example, people tend to continue investing in a project with poor prospects based on resources already spent, such as time shares, in the illusory hope that they can be sold for a profit at a later date.[321]

As things stand, the Court's decision to overturn *Chevron* will almost undeniably result in public policy choices reflecting what Kahneman would call System 1, as opposed to, System 2 thoughts. This will worsen public policy outcomes because a sharply divided Congress is unlikely to be up to the task of enacting a sufficient volume of enlightened legislation to make up for the loss of agency flexibility. This rejection of judicial deference to agency rules in situations of legislative ambiguity is particularly problematic in the United States as compared to other mature democracies, because the division of power between the bicameral legislature and the White House complicates the problem of updating stale legislation or enacting legislation that is of sufficient breadth and scope.

Currently, APA section 706, dealing with the scope of review, provides, in relevant part, that the reviewing court shall decide all questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. My recommendation is for Congress to step in and amend APA section 706(2) to require courts to defer to agency rules as well as agency actions, findings, and conclusions of law.[322] However, to address the legitimate concerns of those seeking to preserve the proper separation of powers, judicial deference should be afforded only in situations where the challenged rule is based on a valid Congressional delegation and benefited from public consultation and or other forms of input (input legitimacy), that the agency process demonstrated accountability, transparency, inclusiveness, and openness to counterfactually consider

316. *See* KAHNEMAN, *supra* note 5, at 283–84.
317. *See id.* at 284.
318. *See id.* at 363; Bredesen, *supra* note 15, at 6.
319. *See* KAHNEMAN, *supra* note 5, at 367.
320. *See id.* at 343–44; Bredesen, *supra* note 15, at 6.
321. *See* KAHNEMAN, *supra* note 5, at 346.
322. *See* 5 U.S.C. § 706(2).

proposed alternatives (throughput legitimacy), and, finally, incorporated administrative and professional expertise to arrive at the proper result (output legitimacy). Deference is to be afforded agency rules reflecting input, throughput, and output legitimacy because manifestations of legitimacy address the fundamental problem with the American state today, namely government incapacity that worsens the performance of the state and undermines the rule of law.[323] Now that the Court has overruled *Chevron*, Congress must act.

The crown jewel of American administrative law, as compared to other mature democracies, is the innovation of informal legislative rulemaking that benefits from democratic legitimacy in that the rulemaking incorporates public input in notice and comment and requires agency professionalism and accountability in incorporating the received comments into the final rules.[324] Requiring reviewing courts, under these circumstances, to grant no deference to agency rules where the organic statute is ambiguous on the precise issue would overwhelm an inexpert trial judge and debilitate government by denying it the ability to accountably and flexibly interpret the law based on changed circumstances.[325] A reinvigorated form of agency deference that protects against the authoritarian temptation by requiring deference only in situations where the agency decision-making manifests consideration of input, throughput, and output legitimacy would ideally protect government capacity and nimbleness to adapt to changed circumstances consistent with democratic accountability.

Congress should amend APA section 706(2) to read, in relevant part, as follows:

> The reviewing court shall-
>
> (2) hold unlawful and set aside agency action, findings, conclusions and *rules* found to be (A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law. With respect to rules, this level of deference should only apply when the agency can show that the rules under review are based on a valid Congressional delegation and benefited from public consultation and or other forms

323. *See id.* This is especially true among middle income and wealthy households whose jobs are most susceptible to economic downsizing due to technology and global trade.

324. *See generally* Administrative Procedure Act, 5 U.S.C. § 553(a)-(c) (showing how statutory law requires the agency to give the public notice and the opportunity to be heard and will incorporate this feedback into its decisions).

325. *See* Scalia, *supra* note 70, at 517 (arguing that *Chevron* was a necessary concomitant to very broad Congressional delegations and a judicial attempt to police Congressional intent would be overwhelming and counterproductive because it would take away flexibility in public policy).

> of input, that the agency process demonstrated accountability, transparency, inclusiveness, and openness to counterfactually consider proposed alternatives, and, finally, incorporated administrative and professional expertise to arrive at the proper result.

The agency is to demonstrate it fulfilled these requirements by demonstrating its rulemakings were based on reasonable interpretations of the organic statute, that it consulted with the public and experts in the field before finalizing the rules, that it considered the feedback received in public and expert consultation, that it counterfactually considered public policy alternatives, and, finally, how it used its expertise and professionalism to arrive at the final rules. This framework is effectively used by the Court in its use of deferential "hard look" review to review agency actions and factual determinations under APA section 706. This approach is taken with awareness that agencies are not bureaucratic black holes designed to merely implement White House preferences, but instead pluralistic entities housed within the executive branch designed to enhance the rule of law by improving public policy outcomes based on counterfactual consideration of the alternatives within the parameters of the agency's organic statute. It is also based on a comparative international approach that demonstrates that doctrinal judicial deference to agencies improves public policy outcomes.

XII. CONCLUSION

A comparative analysis reveals that the United States has higher levels of political polarization and dysfunction than other mature democracies. This problem, which first manifested at the end of the Cold War when divided government became paradigmatic, has become pathological as evidenced by the events of January 6, 2021, and the most recent presidential election campaign that saw a deeply divided country reelect Donald Trump to the presidency. Those who believe the source of the country's ills is President Trump need only be reminded that burgeoning economic inequality, racial polarization, financial crises, and growing political polarization were the legacy of his immediate predecessors and that there has been a growth of anarchism and militancy on the left. The problem of political polarization and dissatisfaction with the country's trajectory has grown and persisted in-spite of a debt-fueled economic expansion that has seen the United States far outperform other mature democracies in terms of economic, wage, and stock market capitalization growth. The obvious concern for all observers, especially countries dependent on U.S. security guarantees, is, to paraphrase former President Kennedy, that neither Congress nor the White House has

been "repairing the roof while the sun still shines."[326] Those most obviously at risk of any forced austerity measures are the United States' most vulnerable inhabitants, especially racial minorities, the poor, rural Americans and migrants. The country needs to find a path to sustainable economic development consistent with responsible fiscal policies. At the very least, this requires a nimble and responsive state that can address, rather than stymy, public social welfare needs consistent with environmental sustainability.

This article was a modest attempt to update the scholarship on adapting the American administrative state to the non-deliberative hyper-polarized Washington of today. It drew on the research of the late Nobel laureate Daniel Kahneman and scholarship on European integration to incorporate the legitimacy doctrines of input, output, and throughput legitimacy as a means of reconciling what is currently the almost unbridgeable gap between advocates of judicial deference to agencies, who prioritize the benefits of agency expertise, and its opponents, who prioritize keeping agencies on a shorter leash as a means of democratic accountability. Its fundamental conclusion is that rejecting judicial deference to agency rulemakings is likely to be a costly misadventure that will compound the problem of state incapacity that has fueled the twin problems of anarchy and authoritarianism on both left and right. A plausible means of reconciling this divide is to statutorily require a resuscitated form of agency deference that protects against the authoritarian temptation by requiring the agency rulemaking process to conform with the legitimacy doctrines of input, throughput, and output legitimacy in situations where deference is sought from a reviewing court. This mode of analysis is akin to what is currently applied by courts reviewing agency decisions, as opposed to rules, through a deferential process known as hard look review under APA section 706(2). Amending the APA to apply this framework to the judicial evaluation of agency rulemakings will ideally help the United States enhance government capacity, improve living standards, and protect the rule of law.

326. President John F. Kennedy, Annual Message to Congress on the State of the Union (Jan. 11, 1962), https://www.presidency.ucsb.edu/documents/annual-message-the-congress-the-state-the-union-4 [perma.cc/TYD6-W6ML].