

DISAGREEMENT ABOUT *CHEVRON*: IS ADMINISTRATIVE LAW THE “LAW OF PUBLIC ADMINISTRATION”?

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Should the US Supreme Court overturn the two-step test in *Chevron*?¹ One group of judges² and commentators³ perceive overthrowing *Chevron* as a battle for American constitutional democracy and a fight to ensure that judges are the ultimate arbiters of what law is. For another group, it just isn't. From their perspective, *Chevron* and its variations⁴ involve the realities of judicial review that arise from the doctrinal complexities entangled in courts adjudicating on what is an acceptable interpretation of a statutory mandate.⁵ They point out that any doctrine that replaces *Chevron* will probably require a court to engage in a type of legal analysis similar to that which it is already carrying out because of the legal relevance of agency expertise.⁶

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

2. See, e.g., *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (“*Chevron* deference raises serious separation-of-powers questions.”); *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1223 n.6 (2015) (Thomas, J., concurring) (“Reflecting th[e] belief that bureaucrats might more effectively govern the country than the American people, the progressives ushered in significant expansions of the administrative state”); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (“*Chevron* . . . permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers’ design.”).

3. See generally Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL’Y 103 (2018) (literature review).

4. E.g., *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

5. Richard J. Pierce, Jr., *The Future of Deference*, 84 GEO. WASH. L. REV. 1293, 1297 (2016) [hereinafter Pierce, *The Future of Deference*].

6. See Cass R. Sunstein, *Chevron Without Chevron*, 2018 SUP. CT. REV. 59, 79; Kristin E. Hickman, *To Repudiate or Merely Curtail? Justice Gorsuch and Chevron Deference*, 70 ALA. L. REV. 733, 737 (2019).

These disagreements amount to two different groups, who imagine administrative law in two completely different ways, talking past each other.⁷ Their disagreement cannot even be called a debate since each group employs a different vocabulary and preoccupation. Nor is it a political disagreement either. While the ideological roots of some of those who wish to overturn *Chevron* are quite obvious,⁸ their dislike of the doctrine also stems from assumptions about what the law should be.⁹ By comparison, those who see *Chevron* as doctrinally inevitable are ideologically and methodologically diverse.¹⁰

What is not recognized is this: The root cause of disagreements about overruling *Chevron* is whether administrative law is to be the law of public administration. When administrative law is the “law of public administration,” it addresses the competence of agencies to fulfill their statutory duties. A competent agency has the legal authority to act as well as the capacity to fulfill the legislative mission that Congress has assigned to it. Historically, administrative law has focused on both of these concerns, but many administrative lawyers since the 1970s have adopted a narrower understanding, one that maintains that the sole purpose of this area of law is the constraint of administrative agencies.¹¹

This exclusive focus on constraint has resulted in the anti-*Chevron* movement that considers the legal significance of administrative competence in terms that are far narrower than those that are in the evidence from the administrative history of the United States. This narrowing has also affected those who recognize the value of the *Chevron* doctrine. They have been unable to articulate the legal significance of administrative competence to the retention of the doctrine because of the exclusive focus on constraint in contemporary administrative law.

7. For an attempt to intersect, see generally Cass R. Sunstein, *Chevron as Law*, 107 GEO. L.J. 1613 (2019) [hereinafter Sunstein, *Chevron as Law*] (engaging with the arguments of contemporaneous critics of *Chevron*).

8. E.g., RICHARD EPSTEIN, *THE DUBIOUS MORALITY OF THE MODERN ADMINISTRATIVE LAW*, pt. 3 (2020). There have been ideological shifts in anti-*Chevron* thinking over time, however. *Id.* at 1618.

9. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2120, 2154 (2016); Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 854–55 (2020).

10. E.g., Nicholas R. Bednar, *What To Do About Chevron—Nothing*, 72 VAND. L. REV. EN BANC 151, 153–54 (2019); Antonin Scalia, *Judicial Deference to Administrative Interpretations of the Law*, 1989 DUKE L.J. 511, 516–17.

11. ELIZABETH FISHER & SIDNEY A. SHAPIRO, *ADMINISTRATIVE COMPETENCE: REIMAGINING ADMINISTRATIVE LAW* 9, 23 (2020).

Our Essay shows how the recognition of administrative law as addressing both the capacity and authority of agencies not only explains what is behind the disagreement about jettisoning or retaining *Chevron*, it also offers a constructive way forward to think about judicial review of statutory interpretation. Parts I and II consider the arguments for and against overturning *Chevron*. Part III explains why we believe that the focus in administrative law should be on the competence of public administration. While administrative lawyers might regard the idea of administrative competence as strange, Part IV provides a brief account of the rich history of the idea. In Part V, we show that the administrative law imagination has narrowed so as to exclude ideas about administrative competence in the last forty years. We then demonstrate how administrative competence is legally relevant to both steps in applying *Chevron*. Finally, Part VI considers three implications of understanding *Chevron* as partially driven by administrative competence. We note that how a judge approaches *Chevron* is influenced by whether the judge has a narrow or a robust understanding of administrative competence. We take issue with the adoption of bright-line rules for statutory interpretation, including the *Chevron* two-step test, and argue that the real challenge in statutory interpretation does not concern governing agencies but instead requires governing of the lower courts.¹²

I. REASONS FOR OVERRULING *CHEVRON*

The *Chevron* test is well known and included in every U.S. administrative law textbook:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with

12. This is an exploratory Essay. Readers can consult our recent book for a more detailed account of administrative competence and its specific relevance to the *Chevron* doctrine. *See generally id.* (describing our theory of how administrative law should incorporate understandings of competence). More importantly, we hope that this Essay will encourage readers to read the case law in a new light.

respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.¹³

Since the case was decided, this two-step test has attracted considerable academic scrutiny.¹⁴ That is inevitable, given that a court's review of an agency's construction of a statute is practically important, and also conceptually challenging in that it requires an engagement with both law and administration. However, reliance on *Chevron* has become more polarized and heated in the last five years primarily due to the emergence of a group of scholars and lawyers who are animated by a dual concern for upholding law and limiting administrative power.¹⁵

The concern for upholding law has focused on (1) stopping public administration from “impermissibly supplanting the judiciary's constitutional duty to independently say what the law is (Article III concerns),” and (2) “[dis]couraging members of Congress [from] over-delegat[ing] broad lawmaking authority to federal agencies in tension with nondelegation values (Article I concerns).”¹⁶ Justice Clarence Thomas, for example, argues that the *Chevron* doctrine “wrests from Courts the ultimate interpretative authority to ‘say what the law is.’”¹⁷ And referencing § 706 of the Administrative Procedure Act (“APA”),¹⁸ Justice Neil Gorsuch has stated that the APA's “unqualified command requires the court to determine legal questions—including questions about a regulation's meaning—by its own lights, not by those of political appointees or bureaucrats who may even be self-interested litigants in the case at hand.”¹⁹

For these critics of *Chevron*, law is something pure, and its purity must be maintained. *Chevron* deference puts at risk that purity. Professor Richard Epstein, for example, describes the *Chevron*

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

14. Peter L. Strauss, “Deference” Is Too Confusing—Let's Call Them “Chevron Space” and “Skidmore Weight,” 112 COLUM. L. REV. 1143, 1144 (2012) [hereinafter Strauss, “Deference” Is Too Confusing]; Thomas W. Merrill, *Justice Stevens and the Chevron Puzzle*, 106 NW. U. L. REV. 551, 553 (2012) (noting *Chevron* has been cited in over 8,009 articles).

15. Jamelle C. Sharpe, *Delegation and Its Discontents*, 64 WAYNE L. REV. 185, 187 (2018).

16. Walker, *supra* note 3, at 113; see also Edwin E. Huddleson, *Chevron Under Siege*, 58 U. LOUISVILLE L. REV. 17, 23–31 (2019) (describing the main critiques of *Chevron* doctrine).

17. *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

18. Pub. L. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

19. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2432 (2019) (Gorsuch, J., concurring).

doctrine as an “abject neglect of legal duty.”²⁰ For Professor Phillip Hamburger, it “is contrary to the very nature of American constitutional law to suggest that judges should lighten up when the government acts outside the structures of power established by the Constitution.”²¹ Ultimately, these critics believe that *Chevron* allows agencies to distort this true and independent meaning of the law.

The second concern, about administrative power, exists because the *Chevron* doctrine is perceived as giving too much power to the administrative state.²² Chief Justice John Roberts has noted, for example, his anxiety has been “heightened, not diminished, by the dramatic shift in power over the last 50 years from Congress to the Executive—a shift effected through the administrative agencies.”²³ Or take Justice Brett Kavanaugh’s observation, writing before his elevation to the Supreme Court, that “[i]n many ways, *Chevron* is nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch.”²⁴ Public administration, if it is to exist, therefore must be kept reined in so as to protect law. As Professor Cass Sunstein has noted, “some of *Chevron*’s contemporary critics are in the grip of a picture” that *Chevron* is a “green light to lawlessness.”²⁵ Since these objections are more focused on where power lies than a judge’s fidelity to the Constitution, they can come across as more ideological.²⁶

For those who argue for the overruling of *Chevron*, the capacity of agencies to fulfill their statutory mission does not figure into their *legal* imagination. By “legal imagination,” we mean the collective mental constructs that are deployed by lawyers and legal scholars in thinking about law and how it operates. As Professor James Boyd White once observed, the “life of imagination work[s] with inherited materials and against inherited constraints.”²⁷ “The greatest power of law,” he continued, “lies not in particular rules or decisions but . . . in

20. EPSTEIN, *supra* note 8, at 4.

21. Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187, 1226 (2016).

22. Ronald A. Cass, *Vive la Deference?: Rethinking the Balance Between Administrative and Judicial Discretion*, 83 GEO. WASH. L. REV. 1294, 1316 (2015).

23. *City of Arlington v. FCC*, 569 U.S. 290, 327 (2013) (Roberts, C.J., dissenting).

24. Kavanaugh, *supra* note 9, at 2150.

25. Sunstein, *Chevron as Law*, *supra* note 7, at 1667–68.

26. Cass Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 SUP. CT. REV. 41, 41; Cass Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 398 (2015).

27. JAMES BOYD WHITE, *THE LEGAL IMAGINATION* xii (1973).

the way it structures sensibility and vision.”²⁸ As we will see below, expansion of legal imagination, by comparison, allows for consideration of how an agency’s capacity as well as authority relates to administrative law issues.

Since public administration is not part of how this group imagines administrative law, it has no legal relevance. Take, for example, Epstein’s critique of the second step of *Chevron*. He asks, “[W]hy is it that the insertion of an administrative agency requires a fundamental revision of responsibility on key questions of statutory construction?”²⁹ For Epstein, the answer is “the same devices needed to deal with private law disputes also work for legislative and administrative actions as well as constitutional theory.”³⁰ That is, there are only legal issues subject to review by judges without regard to the role of administrative agencies in our system of government. There is therefore no need to engage in any form of deference to an agency’s construction of a statute.

This approach to *Chevron* “is heavily constitutional, marked by a formalist and originalist approach to the separation of powers, a deep distrust of bureaucracy, and a strong turn to the courts to protect individuals against administrative excess and restore the original constitutional order.”³¹ In short, as Professor Gillian Metzger has noted, anti-*Chevron* thinking is “anti-administrativist.”³²

A good example, is Justice Gorsuch’s view of the role of public administration expressed in his dissenting opinion in *Gundy v. United States*,³³ which addressed whether the statute being challenged had laid down an intelligible principle for delegation to the Attorney General:

To determine whether a statute provides an intelligible principle [for delegation], we must ask: Does the statute assign to the executive only the responsibility to make factual findings? Does it set forth the facts that the executive must consider and the criteria against which to measure them? And most importantly, did Congress, and not the Executive Branch, make the policy judgments? Only then can we

28. *Id.* at xiii.

29. EPSTEIN, *supra* note 8, at 90.

30. *Id.* at 97.

31. Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 3 [hereinafter Metzger, *The Roberts Court*].

32. Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 3–4, 33–46 (2017).

33. *Gundy v. United States*, 139 S. Ct. 2116 (2019).

fairly say that a statute contains the kind of intelligible principle the Constitution demands.³⁴

This is an eye-wateringly narrow vision of the role of administrative institutions in executing public policy. But it is a natural consequence of thinking of law in the way described above.

For those seeking to overturn *Chevron*, law is a fixed and eternal restraint. The emphasis is on “limited government.”³⁵ The starting point for this argument is a certain vision of constitutional law and an assumption about the dominance of the common law.³⁶ Law is law is law.

II. ARGUMENTS AGAINST OVERRULING *CHEVRON*

Those recognizing the validity of *Chevron*, by comparison, understand law as a thicker set of legal reasoning processes in which administrative knowledge has legal relevance. They are not so much defending *Chevron* as pointing out the inevitability of agency interpretation being legally germane to determining what the law is.³⁷ They find there is room for more nuanced thinking about how courts review agency interpretations in a variety of settings,³⁸ and even room for doctrinal reform,³⁹ but they also find the arguments for overthrowing *Chevron* misplaced. As Professors Nicholas Bednar and Kristin Hickman note, “[C]asting *Chevron* as administrative law’s bogeyman has always been a bit overwrought.”⁴⁰

These scholars understand administrative knowledge as having legal relevance based on pragmatic and functional grounds,⁴¹ which include the “comparative institutional advantages of agencies”⁴² and

34. *Id.* at 2141 (Gorsuch, J., dissenting).

35. Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 N.Y.U. J.L. & LIBERTY 475, 477 (2016).

36. D. A. Candeub, *Tyranny and Administrative Law*, 59 ARIZ. L. REV. 49, 61 (2017).

37. Sunstein, *Chevron as Law*, *supra* note 7, at 1670.

38. *E.g.*, Strauss, “*Deference*” *Is Too Confusing*, *supra* note 14, at 1143; Peter L. Strauss, *A Softer, Simpler View of Chevron*, 43 ADMIN. & REG. L. NEWS 7, 8 (2018); Cary Coglianese, *Chevron’s Interstitial Steps*, 85 GEO. WASH. L. REV. 1339, 1339 (2017); Kristin E. Hickman & Aaron L. Nielson, *Narrowing Chevron’s Domain*, 70 DUKE L.J. 931, 936–39 (2021).

39. Richard W. Murphy, *Abandon Chevron and Modernize Stare Decisis for the Administrative State*, 69 ALA. L. REV. 1, 8 (2017).

40. Nicholas R. Bednar & Kristin E. Hickman, *Chevron’s Inevitability*, 85 GEO. WASH. L. REV. 1392, 1461 (2017).

41. Metzger, *The Roberts Court*, *supra* note 31, at 45–46; Evan J. Criddle, *Chevron’s Consensus*, 88 B.U. L. REV. 1271, 1320 (2008).

42. Pierce, *The Future of Deference*, *supra* note 5, at 1313; *see also* Stephen Breyer, *The Executive Branch, Administrative Action, and Comparative Expertise*, 32 CARDOZO L. REV. 2189,

“the virtues of placing interpretive decisions in the hands of accountable and knowledgeable administrators.”⁴³ As Sunstein notes regarding § 706 of the APA:

The text of the APA does not resolve the *Chevron* question. It is true that courts “shall decide all relevant questions of law,” but the right way to decide those questions might be to consult the agency’s view and to accept it so long as it is reasonable. One more time: Perhaps the law means what the agency says it means (so long as it is ambiguous).⁴⁴

This group also acknowledges the nuance, malleability, and inevitability of the doctrine as reflected in case law.⁴⁵ Professor Evan Criddle notes, for example, that *Chevron* “offered a new vision of continuous, flexible, agency-directed statutory administration.”⁴⁶ By comparison, much of the criticism of the anti-*Chevron* movement focuses on the doctrine as a “hornbook doctrine” of judicial review rather than the doctrine as it is actually applied.⁴⁷ As Bednar and Hickman sum up, *Chevron* is “first and foremost, just a standard of review,”⁴⁸ and “standards of review generally do not determine case outcomes. In the vast majority of cases, judicial evaluation of statutory text, history, and purpose—not *Chevron*—determines whether courts uphold an agency’s interpretation of a statute.”⁴⁹

What is notable of these defenders is that, unlike those who wish to do away with *Chevron*, they do not resort to first principles; they do not offer an overarching or theoretical explanation of why *Chevron* matters. Their defense, as noted, is functional and pragmatic. They recognize the legal relevance of administrative expertise, but they are left with a conundrum. If the focus of administrative law is on constraining agencies, as is generally assumed, why does administrative expertise matter? Why is it legally relevant that institutions can and

2193 (2011) (“Courts find the notion of comparative expertise useful, indeed necessary, when reviewing administrative decisions.”); Metzger, *The Roberts Court*, *supra* note 31, at 43–44 (noting that “agencies’ greater political accountability, expertise, or congressional authorization” creates a “push toward deference in law application, which easily spills over into law interpretation.”).

43. David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 223.

44. Sunstein, *Chevron as Law*, *supra* note 7, at 1642 (emphasis omitted) (citation omitted).

45. *See supra* notes 37–40.

46. Criddle, *supra* note 41, at 1282.

47. Pojanowski, *supra* note 9, at 856.

48. Bednar & Hickman, *supra* note 40, at 1398.

49. *Id.* at 1444.

usually do host a complex institutional environment of expert public administration?

As we explain next, the capacity of agencies is legally relevant because administrative law is about the capacity and authority of public administration—that is, its “competence.” This understanding dates back to the Founding period and continues to this day, although it has been overshadowed by the contemporary assumption that administrative law is all about constraining administrative power. *Chevron* itself reflects this focus on capacity and authority of agencies. Those who support retaining *Chevron* recognize this association although they lack the means to express it. Those who oppose *Chevron* maintain that administrative law is only about constraint.

III. ADMINISTRATIVE LAW AS THE LAW OF PUBLIC ADMINISTRATION

Administrative law is essentially the law of public administration. It constitutes, limits, and holds public administration to account. In doing these things, it is concerned with the “competence” of public administration, that is, its capacity to act *and* its authority to do so. The reason is straightforward. Congress creates agencies for their capacity to do things with authority, and they must thus be “[s]uitable, fit, appropriate, proper” and “[p]ossess[] the requisite qualifications”⁵⁰ to act legitimately, and thus legally, in relation to a particular issue.

Administrative competence exists because government cannot be done through the articulation of rules alone. It requires expert administrative capacity—not only to execute a set of legislative mandates, but also to articulate what those mandates mean. American citizens expect government to strengthen the economy, ensure safe food, alleviate poverty, and much else.⁵¹ Institutional capacity transforms expectations such as those for clean water, clean air, and safe workplaces into realizable realities. An institutional response is necessary in order to undertake functions such as collecting and assessing information; considering specific circumstances while applying general principles; and/or the need for dynamic

50. 3 OXFORD ENGLISH DICTIONARY 603–04 (2d ed. 1989).

51. See *Beyond Distrust: How Americans View Their Government*, PEW RSCH. CTR. (Nov. 23, 2015), <https://www.pewresearch.org/politics/2015/11/23/beyond-distrust-how-americans-view-their-government> [<https://perma.cc/WB2Q-UJ9A>] (finding that “[o]verwhelming numbers” of Republicans and Democrats expected the government to play some role in thirteen areas, including “ensuring safe food,” “strengthening the economy,” and “helping people get out of poverty”).

decisionmaking, among other things.⁵² This is why Congress establishes an agency as a set of coordinated types of expertise that can be marshalled to determine how an agency's mandate is to be fulfilled.⁵³

From a descriptive perspective, the recognition of competence accurately reflects the reality of the law. As noted above, law constitutes and empowers public administration. It is clear then that an understanding of the institutions that this area of law governs should be at its core. Those who teach corporation law would not presume that courts should interpret the law without any appreciation of the institutional arrangements that encompass a corporation. Those supporting *Chevron* are implicitly pointing to that fact in the context of agencies. They are not so much making an ideological argument for the administrative state, but rather making an argument about a factual state of affairs.

From a prescriptive perspective, the recognition of administrative law as the law of public administration acknowledges public administration and therefore the important role it plays in American democracy. The creation of an agency and its mission is an act of democratic will that government should address the problems or issues that gave rise to the legislation. The recognition that an agency's legitimacy depends not only on whether it has legal authority to act, but also on whether it has the capacity to do what it is supposed to do, is not wishful thinking or aspiring to a utopia. It is making sure that the substantive and complex role that public administration does play is reflected in the law.

The idea of administrative law as the law of public administration therefore reflects the expectations that the American people have of public administration—both that it does not have unbounded power and that it will be used for a set of purposes that the public expects to be accomplished. Administrative law, so imagined, ensures such capacity and authority by focusing on both of these elements of competence.

When administrative law only focuses on constraining agencies, not enabling them, public administration flounders in achieving legislative mandates, which is anti-democratic. The legitimacy of public

52. See ELIZABETH FISHER, RISK REGULATION AND ADMINISTRATIVE CONSTITUTIONALISM 19–22 (2007) (explaining the factors necessitating administrative body decisionmaking in the context of technological risk evaluation).

53. See FISHER & SHAPIRO, *supra* note 11, at 40 (noting how President Richard Nixon's comments reflected his view of the EPA's capacity as including coordinating expertise, so that it could work with the states to "produce regulatory standards that were clear and consistent for regulated entities").

administration depends not only on its legal authority to act, but also on the capacity to do so proficiently.

Professor Jerry Mashaw has noted “‘competence’ can convey a concern for either ‘authority’ or ‘capacity.’”⁵⁴ Regarding public administration, it refers to both.⁵⁵ Both are necessary for the “law” of public administration. Legitimacy requires that an agency not exceed its legal authority, *and* that it is able to comply with the “law” that requires it to protect the public, the environment, or provide benefits to the public.

The recognition that administrative law encompasses considerations of the competence of public administration comes with two challenges. The first is for administrative lawyers, as it requires them to think about administrative law in an institutional way that is alien to how the subject has been characterized for at least forty years. The second challenge is to recognize the diversity inherent in this body of law. Administrative and legal architecture will vary between legislative and administrative contexts.

As Part IV will explain, the history of public administration dating back to the Founding shows a concern with both capacity and authority. It is only since the 1980s that the academic discussion has shifted so significantly to make constraint the exclusive focus of administrative law. This history, however, is unknown and unappreciated by many lawyers today who are accustomed to limiting how they imagine the role and purpose of administrative law. In order to reorient administrative law back to its long-standing concern with capacity and authority, the challenge is to reimagine administrative law despite long ingrained ideas about it.

Once you acknowledge that administrative law is also about capacity, it is necessary to understand that capacity, which is the second challenge because of the diversity of the different types of administrative capacity that exist. The Clean Water Act provides a different set of interpretative issues than the Clean Air Act (“CAA”).⁵⁶ The Federal Communications Commission is a distinct type of administrative institution from the Environmental Protection Agency

54. Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 504–05 (2005).

55. FISHER & SHAPIRO, *supra* note 11, at ch. 1.

56. *Compare* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 859–64 (1984) (considering the statutory text and legislative history of the CAA, as well as the EPA’s interpretation, to interpret the term “stationary source” in the CAA), *with* Rapanos v. United States, 547 U.S. 715, 731–39 (2006) (applying canons of textual interpretation to determine the meaning of “navigable waters” in the Clean Water Act).

(“EPA”). This diversity is partly due to the nature of different types of problems that the administrative state administers: clean water, clean air, social security, and so on. It is also due to over 200 years of administrative evolution. As Justice Elena Kagan commented in her dissent in *Selia Law LLC v. Consumer Financial Protection Bureau*,⁵⁷ “Our history has stayed true to the Framers’ vision. Congress has accepted their invitation to experiment with administrative forms.”⁵⁸

Despite the need to understand the institutional capacity of agencies, the nature of expertise and its legal relevance remains elusive.⁵⁹ In *Chevron* itself, Justice John Paul Stevens remained rather vague as to what he meant by agency expertise.⁶⁰ A Westlaw search of the law review literature reveals almost no discussion of what expertise is or how it works inside of agencies.⁶¹ There is a general assumption that agencies have experts because they hire people with specialized training, but this is a very thin understanding of expertise. As we have shown previously, expertise is a far more complicated set of interrelated concepts and abilities.⁶²

An important aspect of these institutional arrangements is the generation of internal norms and processes that establish what is expected of agency employees and that define good decisionmaking.⁶³ Professional training, for example, includes a “code of conduct and emphasis on adherence to it” and a “feeling of ethical obligation to render service to clients . . . with emotional neutrality.”⁶⁴ Adding to the internal motivation, professionals tend to this aspect of the education and training because their peers and other professional civil servants

57. *Selia L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020).

58. *Id.* at 2245 (Kagan, J., concurring in part and dissenting in part).

59. Sidney Shapiro & Elizabeth Fisher, *Chevron and the Legitimacy of “Expert” Public Administration*, 22 WM. & MARY BILL RTS. J. 465, 471–73 (2013). For exceptions, see EDWARD RUBIN, *BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE* 117, 138–39 (2005); Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1297 (2017) (“The judicial warrant for monitoring and regulating a wide swath of internal administrative law also reflects some degree of judicial distrust or ignorance of agencies’ capacities for self-governance.”).

60. *Chevron*, 467 U.S. at 865.

61. Sidney A. Shapiro, *The Failure To Understand Expertise in Administrative Law: The Problem and the Consequences*, 50 WAKE FOREST L. REV. 1097, 1098 n.7 (2015).

62. *Id.* at 1102–16; FISHER & SHAPIRO, *supra* note 11, at ch. 2.

63. FISHER & SHAPIRO, *supra* note 11, at ch. 3; Sidney A. Shapiro, *Why Administrative Law Misunderstands How Government Works: The Missing Institutional Analysis*, 53 WASHBURN L.J., 1, 5–8 (2013).

64. HAL G. RAINEY, *UNDERSTANDING AND MANAGING PUBLIC ORGANIZATIONS* 304–05 (4th ed. 2009).

expect them to do so.⁶⁵ While we cannot do justice to the nature of all of these arrangements here, we can point out that there is considerable evidence of their efficacy.⁶⁶

The lack of understanding of public administration as a diverse mixture of knowledge and accountability practices has led lawyers to understand their choices in binary terms. Controlling the administrative state is often viewed in conflict with public administration delivering on its mandates. From this perspective, if public administration is to be efficacious, it must be untrammelled by law; it must have space in which law does not interfere. While there are different variations of this binary, they all see the choice in administrative law as between two options: either to interfere with public administration or to leave it be. This choice is described in a variety of ways: as between “law’s abnegation”⁶⁷ and the dominance of singular vision of the rule of law;⁶⁸ as between rules and discretion,⁶⁹ or as between deference and intensive review.⁷⁰

As the next Part explains, these binary understandings betray a long history of concerns about both administrative competence and authority although they reflect the more recent emphasis on constraint over the last forty years. Nevertheless, the conception of administrative law as fostering competence can still be found in more recent case law. As we will discuss later, *Chevron* itself reflects this older history of administrative law related to agency competence.

IV. ADMINISTRATIVE COMPETENCE OVER TIME

Public administration “has had a prominent role, as both means and object, in every major effort at political and governmental reform associated with the political development of the United States.”⁷¹ And administrative competence has been a legal reality and aspiration of

65. Hugh Hecl, *OMB and the Presidency—The Problem of “Neutral Competence,”* 38 PUB. INT. 80, 81–83, 92 (1975).

66. Sidney A. Shapiro & Ronald F. Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside-Out*, 65 U. MIAMI L. REV. 577, 599–603 (2011).

67. See generally ADRIAN VERMEULE, *LAW’S ABNEGATION: FROM LAW’S EMPIRE TO THE ADMINISTRATIVE STATE* (2016).

68. PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 7–9 (2014).

69. See generally KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969).

70. Emily Hammond Meazell, *Presidential Control, Expertise, and the Deference Dilemma*, 61 DUKE L.J. 1763, 1763–64 (2012) (emphasizing that the fidelity to statute and reasoned decisionmaking are touchpoints of judicial review to solve “deference dilemma”).

71. BRIAN J. COOK, *BUREAUCRACY AND SELF-GOVERNMENT* 26 (2014).

American constitutional democracy since before the Founding.⁷² While we cannot fully document this history in this Essay, this Part will provide a brief description that shows this long pedigree.⁷³

As a number of scholars have documented, attention to competence was part and parcel of the American experiment in the Founding and Federalist periods.⁷⁴ After the Constitution was ratified, the Founders created new administrative structures to do the work of government.⁷⁵ There were vigorous debates concerning how this was to be done, and the necessity of public administration and competence were “important themes in those debates.”⁷⁶

Once they were in charge of the government, President George Washington and his cabinet members fashioned reporting and management processes that fostered the capacity of government to act. In particular, the Founders sought to ensure that the new institutions would be staffed with people who could do their jobs. For this purpose they relied on the reputation of a person or “fitness of character” as a check on the honesty and competency of those who were hired.⁷⁷

As this brief description suggests, there was a “deadly fear of governmental impotence” particularly among the Federalists.⁷⁸ The courts acted consistently with this concern by recognizing that Congress constituted a set of administrative departments (Department of Foreign Affairs, the Department of War, and the Department of the Treasury) to carry out the functions of government by considering both the capacity of the government to act and its authority to do so. This emphasis on competence can be seen even in Justice John Marshall’s statement in *Marbury v. Madison*⁷⁹ that “[i]t is emphatically the

72. See FISHER & SHAPIRO, *supra* note 11, at ch. 4; WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 1 (1996); JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 29–78 (2012); see generally LEONARD WHITE, *THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY* (1948).

73. For a more complete description of this history, see FISHER & SHAPIRO, *supra* note 11, at pt. II.

74. COOK, *supra* note 71, at ch. 2; JOHN A. ROHR, *TO RUN A CONSTITUTION: THE LEGITIMACY OF THE ADMINISTRATIVE STATE* chs. 2–4 (1986); MASHAW, *supra* note 72, at chs. 2–4.

75. FISHER & SHAPIRO, *supra* note 11, at 109–21.

76. *Id.* at 119.

77. *Id.* at 123–24.

78. Leonard White, *Public Administration Under the Federalists*, 24 B.U. L. REV. 144, 180 (1944).

79. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

province and duty of the judicial department to say what the law is.”⁸⁰ In order to answer one of the legal questions before the Court in that case—“Has the applicant a right to the commission he demands?”⁸¹—the Court had to understand how the administrative process worked, including the way in which the roles of the president in signing the commission and the secretary of state in assigning a seal to it were fixed in law.⁸² This question also required the Court to determine whether the administrative process of communicating the commission to an individual was legally relevant or not.⁸³

In doing this, the Court considered the administrative competence of the Department of State through a “legal” lens.⁸⁴ Given the Court’s analysis, it is no surprise that Professor Thomas Merrill has eloquently argued that the case is an administrative law decision.⁸⁵ *Marbury* is “administrative law” because Chief Justice Marshall sought to understand how Congress meant for the commission process to work as a necessary step in determining the legality of Marbury’s commission.

President Andrew Jackson and his successors overthrew the previous administration’s reliance on the appointment of men from the “natural aristocracy” as the most fit for ensuring the capacity of government.⁸⁶ The Jacksonians assumed that any “able man” could undertake administrative duties,⁸⁷ which seems like a move away from competence, but a driving logic behind these reforms was that it would deliver administrative accountability. Patronage was supposed to accomplish this by making public administration an arm of the Jacksonians’ political party, which would impose and maintain the proper constraints on public administration.⁸⁸ It did nothing of the sort, of course, but the fact remains that the spoils system was a vision of competence, albeit a mistaken one.

80. *Id.* at 177.

81. *Id.* at 154.

82. *Id.* at 143–47.

83. *Id.* at 160.

84. *See supra* notes 80–83.

85. *See generally* Thomas W. Merrill, *Marbury v. Madison as the First Great Administrative Law Decision*, 37 J. MARSHALL L. REV. 481 (2004) (defining the paradigm of an administrative law decision and explaining how *Marbury* fulfills this paradigm).

86. MATTHEW A. CRENSON, *THE FEDERAL MACHINE: BEGINNINGS OF BUREAUCRACY IN JACKSONIAN AMERICA* 24, 27 (1975).

87. FISHER & SHAPIRO, *supra* note 11, at 132.

88. *Id.* at 131–32.

New ideas of administrative competence emerged during the Progressive Era. The “Progressives’ approach to governing,” as Professors Stephen Skowronek and Stephen Engel have noted, “informed successive waves of political innovation and embedded itself in the operations, assumptions, and expectations of the modern American state.”⁸⁹ Different thinkers, particularly Herbert Croly, John Dewey, and Woodrow Wilson, expressed different concepts of how best to ensure the competence of public administration.⁹⁰ Yet, a common understanding of this era is that the Progressives’ promotion of public administration was based on a commitment to “neutral competence” derived from objective science.⁹¹ It is true that the Progressives were deeply troubled by the impact of *partisan* politics on government,⁹² but their main preoccupation was on how to develop a robust concept of administrative competence in terms of both capacity and accountability in light of the lessons learned from the previous era.⁹³

Despite their reliance on expertise, the Progressives were not arguing that the capacity of the government required independence from political oversight as it is commonly assumed. Nor were they arguing that expertise would furnish its own legitimacy as suggested by Wilson’s proposal for a “science of administration” which would operate “outside the proper sphere of *politics*.”⁹⁴ Rather, as Professor David Rosenbloom has argued, his aim was to separate public administration from partisan politics rather than a broader concept of politics *per se*.⁹⁵ Wilson was reacting to the political corruption that had plagued the Jacksonians, but he also recognized the limitations of

89. Stephen Skowronek & Stephen M. Engel, *The Progressives’ Century*, in *THE PROGRESSIVES’ CENTURY: POLITICAL REFORM, CONSTITUTIONAL GOVERNMENT, AND THE MODERN AMERICAN STATE 1* (Stephen Skowronek, Stephen M. Engel & Bruce Ackerman eds., 2016).

90. FISHER & SHAPIRO, *supra* note 11, at 138–43.

91. See Shapiro & Wright, *supra* note 66, at 597–98 (describing the viewpoint that systematically hiring administrative agency employees on the basis of expertise would render a scientifically efficient agency).

92. See FRANK J. GOODNOW, *POLITICS AND ADMINISTRATION* 255 (1900) (drawing conclusions regarding the combination of centralized administration and a weak party system, and vice versa); see also David H. Rosenbloom, *The Politics–Administration Dichotomy in U.S. Historical Context*, 68 *PUB. ADMIN. REV.* 57, 57 (2008) (describing reformers’ belief in the necessary separation of administrative decisionmaking from partisan politics).

93. See Brian J. Cook, *Curing the Mischiefs of Faction in the American Administrative State*, 46 *AM. REV. PUB. ADMIN.* 3, 3–4 (2016).

94. Woodrow Wilson, *The Study of Administration*, 2 *POL. SCI. Q.* 197, 197, 210 (1887).

95. Rosenbloom, *supra* note 92, at 57.

“administrative science” and was aware that public administration had to be responsive to democratic politics.⁹⁶

The New Deal did not produce a wholly original and virgin vision of competence in government, but instead was an evolution of all that had gone before. As in the Progressive era, New Dealers, such as Felix Frankfurter, James Landis, and Jerome Frank, offered a whole range of different administrative arrangements and thinking about administrative competence.⁹⁷

The report of the Attorney General’s Committee on Administrative Procedure, which was the capstone of this attention to administrative competence, is an exemplar of taking administrative competence seriously.⁹⁸ With its detailed underlying reports of the types of problems with which administrative decisionmakers were dealing and the types of issues that emerged from such problems, the Committee understood the importance and variety of administrative structures used to grapple with the problems of the day. In short, it acknowledged the capacity of public administration and proposed administrative procedures that were crafted in accordance with that understanding.

V. THE NARROWING OF HOW WE UNDERSTAND ADMINISTRATIVE LAW

Our brief engagement with this history of the thinking about administrative competence cannot do justice to this rich past. But even this glimpse indicates how little of it fits into the binary narratives that we now tell about administrative law. Recognition of the long pedigree of administrative competence also underlines what administrative law is really about. It is the law of public administration, and in being so, it must directly relate to how public administration has developed in the United States.

Ironically, the point at which scholars lost sight of administrative competence was the time during which it was most needed—the rulemaking revolution of the 1970s.⁹⁹ During that era, reformers depended on government to regulate business, and they understood

96. FISHER & SHAPIRO, *supra* note 11, at 138–41.

97. *Id.* at 148–52.

98. See generally ATT’Y GEN.’S COMM. ON ADMIN. PROC., FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE (1941).

99. FISHER & SHAPIRO, *supra* note 11, at ch. 7.

the importance of administrative expertise to achieve this aim,¹⁰⁰ but they were also dubious concerning the ability of the administrative status quo to administer new environmental, civil rights, health and safety, and other laws. To use Professor Andrew McFarland's description, they were "civic skeptics."¹⁰¹

Their answer, as Professor Richard Stewart famously described this era, was the "reformation" of administrative law,¹⁰² which depicted administrative law as largely a body of law concerned with interest representation. It also fed the binary conception of administrative law as either following law or agency discretion. Stewart, for example, pointed to the "problem of discretion" as the central question in administrative law. The solution was to create an interest group system that enabled public interest groups to use the courts to hold the government accountable. In other words, interest representation was important because it was a form of control,¹⁰³ and Stewart considered how the reformation set about making this happen.

What is striking in Stewart's article is that he makes no mention of how Congress had created legislative structures that required a new form of administrative capacity.¹⁰⁴ The reformation was entirely a matter of creating rights of public interest participation in the administrative process that could neutralize the business advantage.¹⁰⁵ For Stewart and others, agencies had a blank check for discretionary decisionmaking unless they were limited by the constraints of public participation.¹⁰⁶ Philip Harter, for example, pictured an agency as merely a "referee" among the "multitude of political forces [which] influence the decision."¹⁰⁷ As Bill Funk has objected, administrative competence had been sidelined.¹⁰⁸

100. See MICHAEL W. MCCANN, *TAKING REFORM SERIOUSLY: PERSPECTIVES ON PUBLIC INTEREST LIBERALISM* 78–79 (1986).

101. ANDREW S. MCFARLAND, *PUBLIC INTEREST LOBBIES: DECISION MAKING ON ENERGY* 16–17 (1976).

102. Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1670 (1975).

103. Sidney A. Shapiro, *Law, Expertise and Rulemaking Legitimacy: Revisiting the Reformation*, 49 ENV'T L. 661, 663 (2019).

104. Daniel B. Rodriguez & Barry R. Weingast, *The "Reformation of Administrative Law" Revisited*, 31 J.L., ECON., & ORG. 782, 788–89 (2015).

105. Stewart, *supra* note 102.

106. Sidney A. Shapiro, *Administrative Law after the Counter-Reformation: Restoring Faith in Pragmatic Government*, 48 U. KAN. L. REV. 689, 694–95 (2000).

107. Phillip Harter, *Negotiating Regulations: A Cure for the Malaise*, 71 GEO. L.J. 1, 17 (1982).

108. William Funk, *When Smoke Gets in Your Eyes: Regulatory Negotiation and the Public Interest—EPA's Woodstove Standards*, 18 ENV'T L. 55, 90–91 (1987).

Deborah Stone, in what she has termed the “rationality project,” described the continued failure to engage with the actual institutional contexts of public administration by identifying and summarizing the range of accountability mechanisms that emerged after 1980.¹⁰⁹ These accountability mechanisms require administrative agencies to justify their decisions using processes of closely bounded analysis.¹¹⁰ These developments have been widely praised and criticized in the literature. Our point here, however, is simply that the rationality project is a direct manifestation of understanding the choices in administrative law as only being between discretion and limiting that discretion.

VI. CHEVRON AND COMPETENCE

Now let us return to the disagreement about *Chevron*. As discussed earlier, the dispute is between those who would overrule it because it is the duty and province of the courts to decide “legal” issues, and those who would retain it based on the legal inevitability of agency interpretation being legally relevant to determining what is the law. Both groups start with the current premise that the purpose of administrative law is to constrain public administration, and in light of this premise, the defenders lack a coherent explanation of why expertise is legally relevant except that it obviously takes place and can shed light on the meaning of ambiguous or vague statutory language.

Once, however, the premise of administrative law as pursuing the competence of public administration is recognized, it is possible to move past this binary by showing that *Chevron* requires a judge to assess the nature of administrative competence at both Steps One and Two. When administrative law is thought of in this more holistic way, the legal relevance of administrative expertise is demonstrated.

Take the rule that was the focus of *Chevron*. The “bubble policy” adopted by the EPA and at issue in the case undoubtedly reflected the new Reagan administration’s more flexible approach to administration,¹¹¹ but it also was the product of the agency’s expert

109. DEBORAH A. STONE, POLICY PARADOX: THE ART OF POLITICAL DECISION MAKING 9–13 (3d ed. 1988).

110. THOMAS O. MCGARITY, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY 5–6 (1991).

111. The EPA’s rule treated all emissions from a single plant as amounting to a single “statutory source,” or “bubble” under a provision of the Clean Air Act that required a permit from a state regulator before the construction of any “new or modified stationary sources” of pollution in states that had not attained air quality standards under previous legislation. 42 U.S.C. § 7502(b)(6) (Supp. I 1977). This permitted a plant to modify or install a piece of equipment that

capacity regarding how the CAA could be practically implemented. As Professor Tom McGarity has explained, the EPA rulemaking blends skills, knowledge, and experience about “the extent to which compliance with relevant regulations can be induced in the real world.”¹¹² The agency explained that a definition of “stationary source” based on individual equipment acted “as a disincentive to new investment and modernization.”¹¹³ The EPA also stressed that the definition of “stationary source” could not be seen in isolation, but in a context where strict legal obligations were imposed on the states.¹¹⁴ And they pointed out that there was a “lack of express statutory language” and “conflicting Congressional signals.”¹¹⁵ The resulting rule was thus a product of the EPA’s expert capacity.

The conventional understanding of *Chevron* supports a bifurcation where Step One involves a judicial interpretation of the statutory language and Step Two requires deference to the agency’s statutory interpretation. The expert capacity of the EPA is thus only relevant at Step Two, and when it is, it displaces law. Sunstein, for example, argued in 1990: “For the [first *Chevron* step], strictly legal expertise seems relevant. For the [second *Chevron* step], it is the agency that has a comparative advantage.”¹¹⁶ This makes the case, as Sunstein also noted, a “kind of counter-*Marbury*” doctrine for the administrative state.¹¹⁷ Since this reading reinforces that binary discussed earlier, it is not surprising that the case has become a flashpoint for ideological battles.¹¹⁸

The conventional understanding of the case, however, misses Justice Stevens’s understanding that *legal* questions of statutory construction are entangled with understandings of administrative competence and specifically expert capacity. In other words, understandings of administrative competence inform the overall

emitted pollution if the total pollution emissions from the plant (i.e., the bubble) did not change. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 840 (1984).

112. Thomas O. McGarity, *The Internal Structure of EPA Rulemaking*, 54 LAW & CONTEMP. PROBS. 57, 61 (1991).

113. U.S. Environmental Protection Agency, Requirements for Preparation, Adoption and Submittal of Implementation Plans and Approval and Promulgation of Implementation Plans, 46 Fed. Reg. 50,766, 50,768 (Oct. 14, 1981).

114. *Id.* at 50,768.

115. *Id.* at 50,769.

116. Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2095 (1990).

117. Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 189 (2006) [hereinafter Sunstein, *Chevron Step Zero*].

118. Hickman, *supra* note 6; Walker, *supra* note 3.

process of statutory interpretation at both Steps One and Two. Both steps require the court to assess the nature of the statute, administrative competence, and the reasons that an agency gave for their approach.

At Step One, Justice Stevens's opinion took specific note of the EPA's capacity. He acknowledged that Congress left "gaps" in the statute and assigned the EPA the "power" to fill them,¹¹⁹ and found therefore that "considerable weight" should be given to "an executive department's construction of a statutory scheme it is entrusted to administer."¹²⁰ After a considerable discussion of legislative history, Justice Stevens described the 1977 Amendments as "a lengthy, detailed, technical, complex, and comprehensive response to a major social issue."¹²¹ He went on to review the history of how the EPA had interpreted the word "source" and then concluded, "Our review of the EPA's varying interpretations of the word 'source' . . . convinces us that the agency primarily responsible for administering this important legislation has consistently interpreted it flexibly—not in a sterile textual vacuum, but in the context of implementing policy decisions in a technical and complex arena."¹²²

Step One is usually framed as a question of congressional intent, but it is actually a question about what type of institutional structure Congress created, which makes it an issue of administrative competence. When Justice Stevens analyzed the issue of what Congress expected the EPA to do under the Act, he was asking the question whether Congress established the capacity in the EPA to define "source" for purposes of the CAA. This inquiry was relevant to determining whether Congress had defined the term or delegated that power to the EPA.

At Step Two, it is tempting to read Justice Stevens's opinion as judicial deference to the EPA's interpretation, and some of the language can be seen as supporting this view.¹²³ Viewed this way, as noted earlier, the case supports a bifurcation that interprets Step One

119. See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

120. *Id.* at 844.

121. *Id.* at 848.

122. *Id.* at 863.

123. Justice Stevens noted that "perhaps" Congress had not spoken precisely to the question at issue, "thinking that those with great expertise and charged with responsibility for administering the statute would be in a better position" to choose an appropriate policy. *Id.* at 865. He also stated deference was appropriate in light of the agency's political accountability. *Id.* at 865–66. And he acknowledged that courts did not have such competence. *Id.* at 866.

as a judicial interpretation of the statutory language and Step Two as requiring “deference” to the agency’s statutory interpretation.

This characterization, however, misses Justice Stevens’s understanding that *legal* questions of statutory construction are entangled with understandings of administrative competence. In other words, understandings of administrative competence inform the overall process of statutory interpretation at both Steps One and Two. Both steps require the court to assess the nature of the statute, administrative competence, and the reasons that an agency gives for their approach.

At Step Two, the common understanding is that a court will “defer” to the agency’s construction of the statute because Congress has delegated the resolution of an ambiguity to the agency. But Justice Stevens “deferred” only after he determined that the EPA had used its capacity for administrative expertise in a manner that produced a reasonable definition of the term “source.” The fact that the agency applied its capacity in a reasonable manner was therefore relevant to the legal issue of whether the resolution was “permissible.”¹²⁴

After *Chevron* was decided, the Supreme Court created what is now called “Step Zero” in which there is a preliminary determination of whether *Chevron* applies at all.¹²⁵ If a court decides at Step Zero that *Chevron* does not apply, it avoids the necessity of “deferring” to the agency’s construction of an ambiguous term or terms at Step Two. Instead, the responsibility of defining the terminology falls to the court. Step Zero also requires a determination to be made about whether any institutional structure or process is legally relevant. At Step Zero, there is a judicial analysis of whether Congress actually created administrative capacity that an agency could use to resolve the policy issues involved in resolving a statutory ambiguity.

As an example, Justice David Souter in *United States v. Mead Corp.*,¹²⁶ engaged in a study of the U.S. Customs Service’s practices to determine whether tariff classifications were subject to the *Chevron* test. He noted that “[a]ny suggestion that rulings intended to have the force of law are being churned out at a rate of 10,000 a year at an agency’s 46 scattered offices is simply self-refuting.”¹²⁷

Finally, the same focus on whether Congress created the requisite institutional capacity arises when a court applies the “major questions”

124. *Id.* at 843.

125. Sunstein, *Chevron Step Zero*, *supra* note 117, at 193–94.

126. *United States v. Mead Corp.*, 533 U.S. 218 (2001).

127. *Id.* at 233.

exception, in which a court considers whether Congress intended to delegate an “interpretative” issue with significant policy implications to an agency.¹²⁸ In *Food and Drug Administration v. Brown and Williamson Corp.*,¹²⁹ for example, Justice Sandra Day O’Connor for the majority construed the administrative competence of the Food and Drug Administration (“FDA”) in narrow terms so that it could only act in certain ways when certain evidentiary criteria were fulfilled.¹³⁰ The existence of tobacco-specific legislation reinforced this view.¹³¹ By comparison, Justice Stephen Breyer’s dissent concluded that Congress’s intent had been to delegate to the FDA’s competence the definition of what products constitute a “drug” for purposes of FDA regulation.¹³²

What these examples highlight is that administrative competence is not a byword for deference. Rather highlighting it underscores the legal significance of the capacity and authority of any administrative institution in questions concerning statutory interpretation. That is inevitable given that administrative law is the law of public administration.

VII. THREE INSIGHTS ABOUT *CHEVRON*

Once *Chevron* is understood as being about administrative competence, it is possible to see how understandings of administrative competence inform the application of *Chevron* in all of its varieties. Besides being a powerful example of the importance of understanding administrative law as the law of public administration, this approach opens up three insights about the case law.

First, it becomes clear that how judges approach Step One is influenced by whether they adopt a restrictive or narrow understanding of administrative capacity or a more expansive understanding. Consider, for example, *Environmental Protection Agency v. EME Homer City Generation*,¹³³ which concerned an EPA rule that interpreted the provision of the CAA that addresses an upwind state’s

128. Sunstein, *Chevron Step Zero*, *supra* note 117, at 187, 236–42.

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

130. *Id.* at 131–32.

131. *Id.* at 137–39.

132. *Id.* at 165 (Breyer, J., dissenting).

133. *EPA v. EME Homer City Generation*, 572 U.S. 489 (2014).

contribution to a downward state's air pollution.¹³⁴ Among other considerations, the EPA took the cost of abatement into account in setting the limitations for an upwind state. The majority, which upheld the construction of the statute at the second step of *Chevron*, recognized the complexity of assessing an upwind state contribution and that the CAA required “the Agency to address a thorny causation problem.”¹³⁵ As such, the expertise of the EPA was in “crafting” a solution to a multifaceted problem.¹³⁶ After reviewing what the EPA did, the majority found it a permissible construction.

Justice Antonin Scalia, who dissented along with Justice Thomas, concluded that the statute was clear on its face and it should be resolved at Step One of *Chevron*.¹³⁷ This was because he understood the EPA's expertise as one of quantitative assessment,¹³⁸ which involved only calculating limitations on downwind pollution. He noted, “I am confident, however, that EPA's skilled number-crunchers can adhere to the statute's *quantitative* (rather than efficiency) mandate by crafting *quantitative* solutions.”¹³⁹ This example highlights that agency expertise is not only legally relevant, but that how such expertise is understood by judges will figure into how the doctrine is applied.

Second, understanding the two-step test as a binary choice between law and discretion is unhelpful because it draws bright lines between law and policy and law and administration. As a result, it skews focus away from administrative competence. Although the idea that *Chevron* is about administrative competence is not well-recognized, scholars have exposed the problems with characterizing *Chevron* as a two-step test.¹⁴⁰ One problem is there are now more than two steps with the arrival of Step Zero and the “major questions

134. Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48,208 (Aug. 8, 2011) (interpreting 42 U.S.C. § 7410(a)(2)(D)(i)(I) (2006)).

135. *EME Homer City Generation*, 572 U.S. at 514.

136. *Id.* at 496–97.

137. *Id.* at 525–26 (Scalia, J., dissenting).

138. *Id.* at 531.

139. *Id.* at 535.

140. See generally Catherine M. Sharkey, *Cutting in on the Chevron Two-Step*, 86 FORDHAM L. REV. 2359 (2018) (arguing that *Chevron* Step Two is “perfunctory” in many cases); Richard Murphy, *The Last Should Be First-Flip the Order of the Chevron Two-Step*, 22 WM. & MARY BILL RTS. J. 431 (2013) (describing the confusion arising from *Chevron*'s two-step framework); Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597 (2009) (“*Chevron*, properly understood, has only one step.”); Michael Herz, *Chevron Is Dead; Long Live Chevron*, 115 COLUM. L. REV. 1867 (2015) (noting that agencies rarely lose at Step Two).

doctrine.” Another is the variable reasoning that judges employ regarding these various “steps.” As explained in the last Part, once you recognize that *Chevron* is about administrative competence, the various steps have a common starting point. By fully considering administrative competence, lawyers can better understand the *Chevron* doctrine with which they have been struggling for so long.

Finally, the merit of the two-step test concerns how it governs the lower courts rather than how it governs administrative action. There is nothing new in highlighting this.¹⁴¹ As Professor Richard Pierce recently noted, one of the virtues of the two-step test is that “it increases the number of federal statutes that have the same meaning throughout the country.”¹⁴² Likewise, Professor Richard Murphy recently argued that there are reasons for overturning *Chevron* due to its doctrinal complexity, but any replacement should acknowledge the value of the two-step doctrine in “block[ing] horizontal stare decisis from distorting review of the merits of an agency’s statutory construction.”¹⁴³ And Robert Adler and Brian House have pointed out, the doctrinal confusion concerning the “Waters of the United States” is a case in point.¹⁴⁴

When you understand administrative law as the law of public administration, the important and challenging role that a decentralized court system has in interacting with administrative competence is brought into focus. The issue is less about judicial power versus administrative power and more about how *Chevron*, as a form of essential outside-in accountability,¹⁴⁵ frames the way in which decentralized courts can ensure meaningful accountability. When administrative law is understood in binary terms, however, this function is hidden.

Overall, these three insights point to a very different way forward for administrative law. It is a way forward in which the development of a robust body of precedent is grounded in the institutional reality of the subject instead of attempting to draw sharp lines between law and administration. In this regard, we are reminded of Professor Jeremy

141. Jerry L. Mashaw, *Agency-Centered or Court-Centered Administrative Law? A Dialogue with Richard Pierce on Agency Statutory Interpretation*, 59 ADMIN. L. REV. 889, 903 (2007).

142. Richard J. Pierce, *The Combination of Chevron and Political Polarity Will Have Awful Effects*, 70 DUKE L.J. ONLINE 91, 103 (2021).

143. Murphy, *supra* note 41, at 8.

144. Robert W. Adler & Brian House, *Atomizing the Clean Water Act: Ignoring the Whole Statute and Asking the Wrong Questions*, 50 ENV'T L. 45, 52–57 (2020).

145. Shapiro & Wright, *supra* note 66, at 578; Elizabeth Fisher, Pasky Pascual, & Wendy Wagner, *Rethinking Judicial Review of Expert Agencies*, 93 TEX. L. REV. 1681, 1688 (2015).

Waldron's perception about the rule of law. Waldron explains: "We want to be ruled thoughtfully. Or to put it in a more democratic idiom, we want our engagement in governance to be thoughtful and reasoned, rather than rigid and mechanical."¹⁴⁶ Thoughtfulness for Waldron is "the capacity to reflect and deliberate, to ponder complexity and confront new and unexpected circumstances with an open mind."¹⁴⁷ The existence of the administrative state with its capacity and authority—its competence—is an example of this commitment to thoughtfulness. Judicial review in ensuring meaningful accountability should promote such thoughtfulness.

CONCLUSION

The dispute concerning *Chevron* is ultimately about the nature of law in administrative law, and whether administrative competence does and should figure into the administrative law imagination. It is a choice between recognizing the reality of the American polity and not doing so. The desirable way forward is to accept that reality and ensure administrative law is the law of public administration. Not least because it ensures that, as lawyers, we do not engage in pretense about what is going on in the administrative state.

But there is a problem. While the history of administrative law is rich in ideas of administrative competence, we have seen such discourses recede since 1980, resulting in ideas of administrative competence that are thin and threadbare. To talk of the legal relevance of public administration and administrative competence now appears paradoxical. It is just a case of appearances, however. While ideas of administrative competence may not animate administrative law scholarship, they are clearly present in the case law. As we have shown, it is inevitable that the application of the *Chevron* test is informed by understandings of administrative competence.¹⁴⁸

Professor Brian Tamanaha notes that "no existing theory of law adequately accounts for government entities that utilize legal mechanisms in myriad ways in their activities."¹⁴⁹ Tamanaha is correct in one sense. The current binary that dominates administrative law reflects a lack of proper engagement with administrative competence. The way in which *Chevron* is commonly understood is Exhibit A.

146. Jeremy Waldron, *Thoughtfulness and the Rule of Law*, 18 BRIT. ACAD. REV. 1, 1 (2011).

147. *Id.*

148. For additional examples, see FISHER & SHAPIRO, *supra* note 11, at ch. 8; Shapiro & Fisher, *supra* note 59, at 471–83.

149. BRIAN TAMANAHA, *A REALISTIC THEORY OF LAW* 126 (2017).

Administrative law is therefore not a true law of public administration, and there are attempts to make it less so by those who argue for the overruling of *Chevron*. But Tamanaha is wrong in another sense. *Chevron* implicitly recognizes administrative competence. Likewise, there is a rich and varied history of administrative competence in which administrative law is entangled. The problem is that in the last forty years there has been a narrowing of the administrative law imagination.