Deference to Agency Expertise in Statutory Interpretation

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Abstract. Federal courts defer to federal agencies' expertise when reviewing those agencies' statutory interpretations. But "agency expertise" has become a catch-all term in the caselaw for several kinds of agency knowledge. A good amount of that knowledge is irrelevant to the job of statutory interpretation, which is the particular task of determining the meaning of the text of a law. This Article identifies three types of agency expertise and concludes that only one is germane to statutory interpretation. With respect to any statutory scheme, an agency might have (1) scientific expertise, (2) political or policymaking expertise, or (3) interpretive expertise. That third type of expertise—relating to an agency's ability to decipher the meaning of a statute's text—is the only type of expertise that courts should consider when affording respect to an agency's interpretation of a given statute.

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Introduction

Agency expertise is everywhere. Across the federal government, agencies regularly bring expertise to bear on the problems of the day.[1] And because agencies are creatures of statute, administrators must interpret the law whenever they act.[2] Courts have long assumed that an agency's expertise is relevant to these agency statutory interpretations.[3] And pursuant to the rule of *Chevron U.S.A. Inc. v. Natural Resources Defense Council*,[4] courts defer to these expert agencies' reasonable interpretations of ambiguous statutes.[5] But a broad judicial understanding of "expertise" has done a disservice to administrative law. Time and again, courts have credited (and deferred to) expertise that is irrelevant to the task of statutory interpretation.

Three types of expertise populate the *Chevron* caselaw, but only one of them is relevant to statutory interpretation. The first kind is scientific expertise—the agency's comparative scientific know-how vis-à-vis courts.[6] The second kind is policymaking or political expertise—the agency's understanding of what policies are best in a specialized field or its skill in navigating the desires of variegated interest groups.[7] The third

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[1] *See* Mark Seidenfeld, *The Role of Politics in a Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1397, 1427–28 (2013).

[2] Article II requires the President to interpret statutes. As Professors Gary Lawson and Christopher Moore have pointed out, "the President's power to execute the laws necessarily includes the power to interpret them." Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1286 (1996). Lawson and Moore list a panoply of provisions in Article II and take the view that "[m]any of these powers require law interpretation and thus indirectly empower the President, in contexts involving the exercise of those powers, to interpret the laws." *Id.* at 1280. Judge Frank Easterbrook has put it more bluntly: "No one would take seriously an assertion that the President may not interpret federal law. After all, the President must carry out the law, and faithful execution is the application of law to facts. Before he can implement he must interpret." Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RSRV. L. REV. 905, 905 (1989). In carrying out his duties, the President often acts as a law-interpreter. And under prevailing Supreme Court doctrine, whenever the executive interprets the law, it is exercising executive power. In *City of Arlington v. FCC*, the Supreme Court opined that anything done by the executive branch constitutes—"indeed, under our constitutional structure . . . *must be*"—an exercise of executive power. 569 U.S. 290, 304 n.4 (2013); *see also* Garcia v. Garland, 64 F.4th 62, 70 n.7 (2d Cir. 2023) ("Even when an executive agency *acts* like a legislative or judicial actor, it still exercises executive power.").

[3] *See* Rust v. Sullivan, 500 U.S. 173, 186 (1991); *see also, e.g.*, Continental Seafoods, Inc. v. Schweiker, 674 F.2d 38, 42 n.11 (D.C. Cir. 1982) ("Courts must defer to the expertise of the agency charged with exercising Congress' broad power to bar articles from import.").

[4] 467 U.S. 837 (1984).

[5] *See id.* at 842–43.

[6] *See infra* Section I.A.

[7] *See infra* Section I.B.

kind is interpretive expertise—the agency's knowledge of what the particular terms of a law mean.[8] This knowledge may come from assisting with a statute's drafting or from understanding specialized terms in a statute that are alien to a general audience.[9]

Courts should look for interpretive expertise when considering whether an agency's interpretation merits special weight. When the agency has this kind of expertise concerning a certain statute, the agency can be genuinely helpful to a court attempting to do statutory interpretation. Yet even when interpretive expertise is present, deference to the agency's position is inappropriate. The proper relationship between court and agency in these cases is like that of the court and an amicus brief filer. While the filer may be able to shed light on a law's meaning, the court still has comparative expertise in the general practice of statutory interpretation. Courts should, therefore, retain the final say when interpreting laws, even if an expert agency could be helpful with this task.

I. Three Kinds of Expertise

Outside the context of statutory interpretation, the idea of comparative agency expertise—vis-à-vis courts—has some intuitive appeal. Judge Patricia Wald once wrote that the law asks "a great deal" when it calls on "judges to familiarize themselves enough with the policies and operations of the dozens of agencies that appear in hundreds of cases a year, and whose functions vary from labor to shipping to nuclear energy to gas regulation, so that [judges] can participate as equals in their good governance."[10] In reviewing an order of the Department of Transportation that was based on economic analysis, Judge Laurence Silberman explained that the Court of Appeals for the D.C. Circuit does "not sit as a panel of referees on a professional economics journal, but as a panel of generalist judges obliged to defer to a reasonable judgment by an agency acting pursuant to congressionally delegated authority."[11] Judge Silberman's point implies that, in general, judges do not have the capacity to evaluate the merits of high-level economic analyses. In the main, the argument is that judges are simply not equipped with the particularized subject-matter expertise that agencies possess in discrete areas of policy.[12]

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8 *See infra* Section I.C.

9 *See id.*

10 Patricia M. Wald, *The "New Administrative Law"—With the Same Old Judges in It?*, 1991 DUKE L.J. 647, 658–59 (1991).

11 City of Los Angeles v. U.S. Dep't of Transp., 165 F.3d 972, 977 (D.C. Cir. 1999).

12 *But cf.* Melissa F. Wasserman & Jonathan D. Slack, *Can There Be Too Much Specialization? Specialization in Specialized Courts*, 115 NW. L. REV. 1405, 1407 (2021) (describing judicial specialization

The *Chevron* cases have relied, at least in part, on expertise to justify deference.[13] But in describing what purports to be a unified understanding of agency "expertise," the cases rotate through different *types* of expertise: namely, scientific expertise (the agency knows how to engage in scientific analysis better than do the judges), policy or political expertise (the agency will be *better* than the judges are at resolving complicated policy questions that implicate various competing interests), and interpretive expertise (a generalist will struggle to understand a statute, so the agency's interpretation merits deference because the agency understands the scheme by virtue of its familiarity with the issue area). As Professor Sidney Shapiro contends, "[e]xpertise is complex and multifaceted."[14] To understand how the cases have grappled with expertise and the lessons that one can draw from these examples, separating out these three types of expertise is important.

A. *Scientific Expertise*

The first type of expertise—scientific expertise—implicates an administrative agency's purportedly superior ability (as compared to judges) to undertake the sort of scientific, economic, or other analysis that might underlie agency policy. For example, determining the environmental impact of operating a light-water nuclear powerplant is the sort of analysis that requires advanced training, specialized knowledge, and technical expertise in a discrete field of the sciences.[15] In the context of arbitrary-and-capricious review under the Administrative Procedure Act, the Supreme Court has described this sort of analysis as a "kind of scientific determination" made "at the frontiers of science" to which "a reviewing court must generally be at its most deferential."[16] In

through opinion writing); Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 N.Y.U. J.L. & LIBERTY 475, 482 (2016) ("Why all this deference to administrative officials? The basic assumption is that agencies are staffed by experts in their field who apply their expertise in what they reasonably judge to be the public interest.").

[13] *See* Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. REV. 112, 119 (2011) (describing the theory that "an agency's topical expertise and ability to engage with the factual record make it better equipped for the task of delegated lawmaking" as "[u]nderlying [*Chevron*'s] assumption about congressional intent"); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 189 (1998–1999) ("The *Chevron* Court . . . justified its ruling with case law and its own assessment of the policy reasons (*agency expertise* and democratic accountability) for preferring agency interpretation over judicial interpretation." (emphasis added)).

[14] Sidney A. Shapiro, *The Failure to Understand Expertise in Administrative Law: The Problem and the Consequences*, 50 WAKE FOREST L. REV. 1097, 1098 (2015).

[15] *See* Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 90–91 (1983).

[16] *Id.* at 103; *see also* Ctr. for Biological Diversity v. EPA, 749 F.3d 1079, 1087–88 (D.C. Cir. 2014) (collecting cases from the Court of Appeals for the D.C. Circuit standing for a similar proposition).

some of the *Chevron* cases, courts also extol this scientific know-how. Consider *National Ass'n of Manufacturers v. U.S. Department of the Interior*,[17] in which the Court of Appeals for the D.C. Circuit explained that, in deferring under *Chevron* "to the scientific judgment of an agency," courts "do not review scientific judgments of the agency as the chemist, biologist, or statistician that [they] are neither qualified by training nor experience to be, but as a reviewing court exercising [its] narrowly defined duty of holding agencies to certain minimal standards of rationality."[18] Put "in the context of *Chevron* step two," the court assures "at a minimum the reasonableness of the judgment in light of the requirements imposed (or discretion granted) by the authorizing statute."[19]

In *National Ass'n of Manufacturers*, the court applied *Chevron* in holding that the Department of the Interior's "interpretation of subsection 301(c)(2)(A) [of the Comprehensive Environmental Response, Compensation, and Liability Act] to permit the use of predictive computer submodels to determine causation and injury [to natural resources for the purpose of collecting damages] is plainly reasonable."[20] This case is not the only judicial opinion to rest its *Chevron* analysis on agency technical expertise.[21] Here, the expertise rationale makes perhaps the most sense,[22]

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17 134 F.3d 1095 (D.C. Cir. 1998).

18 *Id.* at 1103 (alteration and internal quotation marks omitted).

19 *Id.*

20 *Id.* at 1106–07.

21 *See, e.g.*, Teva Pharms. USA, Inc. v. FDA, 514 F. Supp. 3d 66, 116–17 (D.D.C. 2020) ("FDA's scientific judgment that a 'specific, defined sequence' is an essential enough feature of proteins that it must be shared even by 'analogous' products is thus a reasonable interpretation of the 'analogous product' provision. At a minimum, given the ambiguity of the term 'analogous' standing alone, FDA's choice of the 'specific, defined sequence' criterion as the determining factor is a rational one. Other options, including the alternative construction suggested by Teva, might offer equally viable or even better interpretations, but a reviewing court, in an area characterized by scientific and technological uncertainty, must proceed with particular caution, avoiding all temptation to direct the agency in a choice between rational alternatives." (internal quotation marks and alterations omitted)); Miami-Dade Cnty. v. EPA, 529 F.3d 1049, 1064–71 (11th Cir. 2008) (applying the arbitrary-and-capricious standard as a stand-in for "the second level of *Chevron* analysis" and explaining that "courts must be 'extremely deferential' when an agency's decision rests on the evaluation of complex scientific data within the agency's technical expertise"). As *Miami-Dade County* demonstrates, courts sometimes incorporate the Administrative Procedure Act's arbitrary-and-capricious standard for review of agency policy—which is explicitly deferential to agency scientific judgments, *see* Balt. Gas & Elect. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 86, 103 (1983)—when undertaking the *Chevron* step two analysis.

22 *But see* Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733, 735–36 (2011) ("[A]gency science is a peculiar product, quite removed from the traditional image of pure research science [and] laced with policy decisions at numerous levels, making it susceptible to misuse."); Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613, 1650–51 (1995) ("[A]gencies are responding

but it is also perhaps the most divorced from statutory interpretation—understanding the science underlying a congressional act provides no special insight into the meaning of the words of the statute. The question of whether a statute authorizes, for example, the use of a particular computer modeling system differs from whether the use of that model would be a good idea.[23] Likewise, technical expertise in a given subject-matter area does not always line up with the issue at hand.[24]

B. *Political or Policymaking Expertise*

The second type of expertise in the *Chevron* cases is policy or political expertise. As the argument goes, agencies are better at making policy because they better understand how to reconcile competing interests.[25] Sometimes these interests are political in nature.[26] Thus, the claim that an agency has "expertise" is sometimes just a shorthand for saying that

to multiple political, legal, and institutional incentives to cloak policy judgments in the garb of science.").

[23] *Cf.* Sofco Erectors, Inc. v. Trs. of the Ohio Operating Eng'rs Pension Fund, 15 F.4th 407, 423 (6th Cir. 2021) ("There is a difference between the 'technical judgment' a reasonable actuary might use to decide how to estimate something and the policy choice about what to estimate.").

[24] *See, e.g.*, Gun Owners of Am., Inc. v. Garland, 992 F.3d 446, 461 (6th Cir. 2021) ("[W]e understand that the Court would consider the bureaucrats at the ATF as experts in firearms technology. But that technical knowledge is inapposite to the question of what should be criminally punished and what should not."); *see also id.* at 462 ("[M]astery of one field does not mean mastery of all. The ATF is not an expert on community morality, so the rationale of deferring to 'agency expertise' on this question fails.").

[25] In *King v. Burwell*, 576 U.S. 473 (2015), the Court refused to defer under *Chevron* to an Internal Revenue Service interpretation of the Affordable Care Act because "[i]t is especially unlikely that Congress would have delegated this decision to the *IRS*, which has no expertise in crafting health insurance policy of this sort." *Id.* at 486. *See also* Cazun v. Att'y Gen. of the U.S., 856 F.3d 249, 260 (3d Cir. 2017) ("[T]he agency has expertise making complex policy judgments related to asylum, withholding of removal, and [Convention Against Torture] protection. Deference regarding questions of immigration policy is especially appropriate.").

[26] *See* Shapiro, *supra* note 14, at 1115; Thomas O. McGarity, *The Internal Structure of EPA Rulemaking*, 54 LAW & CONTEMP. PROBS. 57, 64 (1991). The most extreme idea of this phenomenon flows from the "public choice" theory of administrative law, which sees the agency decision-making process "as an economic marketplace in which those whose interests are at stake, including agency officials themselves, rationally negotiate a 'deal' that reflects their relative power, the nature and intensity of their interests, their 'transaction costs,' and always, their individual assessments of how their own interests are best served." KEITH WERHAN, PRINCIPLES OF ADMINISTRATIVE LAW 8 (3d ed. 2019); *cf.* Ginsburg & Menashi, *supra* note 12, at 482 ("[T]here has emerged a major subfield in theoretical and empirical economics called 'public choice,' the consistent findings of which are that agencies are in fact staffed by people who, whatever their expertise, have their own needs, preferences, and ambitions, making any correlation between their actions and the public interest at best a matter of opinion and at worst a mere fortuity.").

agencies are better at playing politics because they are most familiar with the main players and the key pressure points. But more often, the courts explain the agencies' expertise on this point in terms of being best equipped to balance weighty, conflicting policy objectives. Take, for example, the Court of Appeals for the Seventh Circuit's determination that "[t]he Securities and Exchange Commission can determine better than . . . generalist judges whether the protection of investor and other interests" is nevertheless advanced by an interpretation "that will destroy a promising competitive innovation in the trading of securities."[27]

The policy or political expertise cases rest on a wrongheaded assumption: that "the resolution of ambiguities in legal texts will more often turn on policy preferences than parsing."[28] Balancing competing interests (like applying scientific know-how) is an appropriate element of agency policy implementation—the type that courts review under the Administrative Procedure Act's arbitrary-and-capricious standard. But

[27] Bd. of Trade v. SEC, 923 F.2d 1270, 1273 (7th Cir. 1991); *see also* S.F. Baykeeper v. Cargill Salt Div., 481 F.3d 700, 706 (9th Cir. 2007) ("Deference is especially suitable because this borderline determination of non-navigable areas to be made subject to the [Clean Water Act] is one that involves 'conflicting policies' and expert factual considerations for which the agencies are especially well suited."); PDK Labs. Inc. v. U.S. Drug Enf't Admin., 362 F.3d 786, 797–98 (D.C. Cir. 2004) ("It may be that here . . . what we have is a continuum, a probability of meaning. In precisely those kinds of cases, it is incumbent upon the agency not to rest simply on its parsing of the statutory language. It must bring its experience and expertise to bear in light of competing interests at stake." (citing *Chevron*)); Allied Loc. & Reg'l Mfrs. Caucus v. EPA, 215 F.3d 61, 72–73 (D.C. Cir. 2000) ("An agency is entitled to the highest [*Chevron*] deference in deciding priorities among issues, including the sequence and grouping in which it tackles them." (internal quotation marks omitted)); Batanic v. Immigr. & Naturalization Serv., 12 F.3d 662, 665–66 (7th Cir. 1993) (explaining that "[t]he agency, when interpreting a statute which it administers in an area in which it has expertise, is better able to evaluate and weigh the competing policy interests in that field than is a generalist federal court" but ultimately denying deference in part because, "in its application of the statute in the decision under review, the Board did not weigh carefully the competing policy interests involved"); Pauley v. Bethenergy Mines, Inc., 501 U.S. 680, 697 (1991) ("The Benefits Act has produced a complex and highly technical regulatory program. The identification and classification of medical eligibility criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns. In those circumstances, courts appropriately defer to the agency entrusted by Congress to make such policy determinations."); Caleb Nelson, *Statutory Interpretation and Decision Theory*, 74 U. CHI. L. REV. 329, 350–51 (2007) ("The standard defense of *Chevron* deference . . . [asserts that] compared to generalist judges, agency decisionmakers are likely to have more experience in the relevant field, better information about problems that need solving, and a better sense for the practical consequences of various possible rules. . . . To be sure, specialist agencies might be more prone than generalist judges to harmful forms of tunnel vision (or, on some accounts, to capture by regulated industries). On balance, though, both their greater expertise and their greater responsiveness to the political branches arguably give them a sounder basis than courts for many types of discretionary judgments.") (reviewing ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION (2006)).

[28] Bruh v. Bessemer Venture Partners III L.P., 464 F.3d 202, 207 (2d Cir. 2006).

this kind of expertise is not relevant to statutory *interpretation*, which is distinct from the "administrative work" of executing a statute's mandate.[29] As Professor Elizabeth Foote explains, "the legally established carrying-out function of public administration differs from 'statutory interpretation.'"[30] While policymaking expertise may warrant deference in arbitrariness review, it does not follow that courts should defer to this expertise in review of statutory interpretations.

C. *Interpretive Expertise*

The third and final kind of agency expertise is interpretive expertise: a comparative competency, vis-à-vis courts, in *interpreting* particular statutes. Here, the court will point to the complexity of the statute at issue and conclude that the agency has an advantage in ascertaining the meaning of a complicated term against the backdrop of a dense statutory scheme.[31] Interpretive expertise generally comes about as a result of one of two situations. First, the agency might have been involved in the

[29] Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How* Chevron *Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 677 (2007); *cf.* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2153–54 (2016) (describing agency interpretations of "open-ended terms like 'reasonable,' 'appropriate,' 'feasible,' or 'practicable'" as essentially "policy choices within the discretion granted to [the agency] by the statute").

[30] Foote, *supra* note 29, at 678.

[31] Some statutes may well be more difficult for generalist courts to interpret. As Tara Leigh Grove explains, "the broader public may not be the target audience for some statutes. Instead, some laws may be aimed at, for example, federal agencies and regulated parties." Tara Leigh Grove, *Testing Textualism's "Ordinary Meaning*," 90 GEO. WASH. L. REV. 1053, 1075 (2022); *see also, e.g.*, *id.* at 1077 ("[T]he primary audience for [certain] provisions of the Federal Communications Act would seem to be the agency itself and the carriers. Such entities would have some background 'understanding . . . of the Commission's efforts to regulate and then deregulate the telecommunications industry'—knowledge that, Justice Scalia suggested [in *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218 (1994)], was important to grasp the legal issues in the case. That is, the 'ordinary readers' of these provisions may be highly sophisticated and especially well-informed." (alteration in original)); *cf.* Lawrence B. Solum, *Disaggregating* Chevron, 82 OHIO ST. L.J. 249, 285 (2021) ("When the primary audience for a statute is the regulatory agency and regulated industry, it would be a mistake to assume that the meaning of each and every term in the statute is its ordinary meaning. . . . [T]erms in the statute may have both ordinary and technical meanings—a special kind of ambiguity. . . . In such cases, the plain meaning of a regulatory statute would be the technical meaning for the regulatory agency and the regulated industry."). Whether this difficulty should permit courts to abdicate their interpretive duties, however, is a separate question. *Cf.* La Buy v. Howes Leather Co., 352 U.S. 249, 254, 259 (1957) (confronting situation of a district court judge who had repeatedly referred antitrust cases to a master in part because "the cases were very complicated and complex" and upholding writ of mandamus issued against the judge to hear the cases anyway, given that even though "most litigation in the antitrust field is complex[, i]t does not follow that antitrust litigants are not entitled to a trial before a court").

drafting process of a law and have unique insights into the choices that Congress made in crafting a statute. Second, the agency might be up to date on the lingo in a specialized field and be able to inform a court that a statute uses a term of art that would be otherwise unfamiliar to a generalist judge.

The Court of Appeals for the Sixth Circuit has expressed an interpretive-expertise view of *Chevron* clearly, opining that "[t]he special deference required by *Chevron* is based on the expertise of an administrative agency in a complex field of regulation with nuances perhaps unfamiliar to the federal courts."[32] Other courts express similar sentiments.[33] Here, one would be interested to know whether "[t]he agency . . . had a hand in drafting [the statute's] provisions" and whether it "possess[es] an internal history in the form of documents or 'handed-down oral tradition' that casts light on the meaning of a difficult phrase

[32] Dolfi v. Pontesso, 156 F.3d 696, 700 (6th Cir. 1998).

[33] *See, e.g.*, Douglas v. Indep. Living Ctr. of S. Cal., Inc., 565 U.S. 606, 614 (2012) ("[T]he agency is comparatively expert in the statute's subject matter. And the language of the particular provision at issue here is broad and general, suggesting that the agency's expertise is relevant in determining its application."); Appalachian Power Co. v. EPA, 135 F.3d 791, 801–02 (D.C. Cir. 1998) ("Our analysis is guided by the deference traditionally given to agency expertise, particularly when dealing with a statutory scheme as unwieldy and science-driven as the Clean Air Act."); Sierra Club v. Larson, 2 F.3d 462, 469 (1st Cir. 1993) ("The Clean Air Act is an immensely complex and technical statute more familiar to EPA than to anyone else, and the task of making its parts function together harmoniously is entrusted to many actors but above all to the EPA."); *cf.* Sierra Club v. EPA, 499 F.3d 653, 656 (7th Cir. 2007) ("[T]he treatment of differences of degree in a technically complex field with limited statutory guidance is entrusted to the judgment of the agency that administers the regulatory scheme rather than to courts of generalist judges." (citing *Chevron*)). Sometimes, the fact that the agency was involved in drafting the statute weighs in favor of deference based on interpretive expertise. *See* Aluminum Co. of Am. v. Cent. Lincoln Peoples' Util. Dist., 467 U.S. 380, 390 (1984) ("These principles of deference have particular force in the context of this case. The subject under regulation is technical and complex. [The federal Bonneville Power Administration] has longstanding expertise in the area, and was intimately involved in the drafting and consideration of the statute by Congress."); Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under* Chevron, 6 ADMIN. L.J. AM. U. 187, 194 (1992) ("The most obvious explanation for deference to agency interpretations would be that the agency is better able to understand the statute than is the court. The agency may have helped draft the statute; it may possess an institutional memory about the statute's history and true meaning; it is better informed of Congress's current views; and, in light of its technical expertise and complete familiarity with the statute, it can determine the interpretation that will be most workable in practice and best advance the statute's overall goals. In these ways, the agency interpretation can be trusted to comport with congressional will and statutory purposes, which the agency understands better than the court." (footnotes omitted)). *But cf. id.* ("Although this justification for deference has a lengthy pedigree, it is not the theory that underlies *Chevron*. In *Chevron*, the Court deferred not because it deemed the agency to have a superior understanding of the statute, but because there was nothing to understand. Congress had left a 'gap' for the agency to fill, thereby implicitly instructing the courts to accept the agency's decision.").

or provision."[34] Moreover, the agency's "staff, in close contact with relevant legislators and staffs, likely understands *current* congressional views, which, in turn, may, through institutional history, reflect prior understandings."[35]

II. Crediting Interpretive Expertise

An agency's interpretive expertise would be the most relevant type of expertise when thinking about whether deference is appropriate, as the expertise (in statutory interpretation) matches the thing on which the court is deferring to the agency: statutory interpretation.[36] But agencies' interpretive expertise need not trump that of the courts. As the Court of Appeals for the Sixth Circuit explained in an opinion denying *Chevron* deference to the Bureau of Alcohol, Tobacco, and Firearms on a regulation banning a particular firearm technology: "judges are experts on one thing—interpreting the law."[37]

Courts engaging in statutory interpretation are attempting to get the law *right*. And when the statute is complex—either because it addresses experts or because it has complicated elements—agencies can help courts in the latter institution's search for the correct meaning. While agencies' scientific and policymaking or political expertise may help inform the interpretive expertise, these other kinds of expertise generally go to the agency's superior ability to *administer* the statute once its meaning has been determined.

Courts have interpretive expertise, too. Concurring in *Perez v. Mortgage Bankers Ass'n*,[38] Justice Clarence Thomas wrote that "[j]udges are at least as well suited as administrative agencies" at interpreting laws; "[i]ndeed," he continued, "judges are frequently called upon to interpret the meaning of legal texts and are able to do so even when those texts

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34 Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 368 (1986).

35 *Id.*

36 *But cf.* Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 129 (2015) (Thomas, J., concurring in the judgment) ("Fundamentally, the argument about agency expertise is less about the expertise of agencies in interpreting language than it is about the wisdom of according agencies broad flexibility to administer statutory schemes.").

37 Gun Owners of Am., Inc. v. Garland, 992 F.3d 446, 462 (6th Cir. 2021), *cert. denied*, 143 S. Ct. 83 (2022); *cf.* Forrest Gen. Hosp. v. Azar, 926 F.3d 221, 234 (5th Cir. 2019) ("Generalist judges are not policy experts. That said, interpreting the laws under which Americans live is a quintessentially judicial function. And when legal texts are unambiguous, . . . courts should stand firm and decide, not tiptoe lightly and defer.").

38 575 U.S. 92 (2015).

involve technical language."[39] This is to say nothing of the fact that, at least with respect to particular cases, "determining the meaning of the law is a task for the judicial power of the United States, which is vested in the judicial branch."[40] If the courts are comparatively expert at (and better situated—in our constitutional system—to do) one thing, it is interpretation of law: the hallmark of judicial expertise. As then-Judge Stephen Breyer put it, "[c]ourts are fully capable of rigorous review of agency determinations of law, for it is the law that they are expert in, and it is in interpreting law that their legitimacy is greatest."[41]

In the October 2021 Term, the Supreme Court demonstrated that courts are entirely capable of interpreting even a highly technical statutory scheme and coming to a conclusion about its meaning. Consider the results in *Becerra v. Empire Health Foundation*[42] and *American Hospital Ass'n v. Becerra*.[43] The Court was able to avoid mentioning *Chevron* in those cases by doing what many of the *Chevron* cases in this category seem to fear: making sense of an almost hopelessly complicated legal regime. In these cases, "[d]espite the complexity, the Justices were able to arrive at clear answers after finding the provisions unambiguous."[44] And if the Justices can do that in cases concerning the Medicare statute,[45] the

[39] *Id.* at 129 (Thomas, J., concurring in the judgment) (citing Barber v. Gonzales, 347 U.S. 637, 640–43 (1954) (interpreting deportation statute according to technical meaning)); *see also Gun Owners of Am.*, 992 F.3d at462 ("[W]e judges are experts on one thing—interpreting the law." (citation omitted)); Zipf v. Am. Tel. & Tel. Co., 799 F.2d 889, 893 (3d Cir. 1986) ("[S]tatutory interpretation is not only the obligation of the courts, it is a matter within their peculiar expertise.").

[40] Peter M. Torstensen, Jr., Note, *The Curious Case of* Seminole Rock*: Revisiting Judicial Deference to Agency Interpretations of Their Ambiguous Regulations*, 91 NOTRE DAME L. REV. 815, 834 (2015) (footnote omitted).

[41] Breyer, *supra* note 34, at 394.

[42] 597 U.S. 424 (2022).

[43] 596 U.S. 724 (2022). Another good example of this phenomenon is *King v. Burwell*, 576 U.S. 473 (2015), in which the Court eschewed *Chevron* deference and interpreted the Affordable Care Act on its own, despite acknowledging "that the text is ambiguous." *Id.* at 492; *see also* Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 64–65 (2015).

[44] Eli Nachmany, *SCOTUS Demonstrates Why We No Longer Need* Chevron *Deference*, NEWSWEEK (July 6, 2022, 6:00 AM), https://perma.cc/7LG5-8LTV.

[45] *See* Robert Wood Johnson Univ. Hosp. v. Thompson, 297 F.3d 273, 282 (3d Cir. 2002) ("The broad deference of *Chevron* is even more appropriate in cases that involve a complex and highly technical regulatory program, such as Medicare, which requires significant expertise and entails the exercise of judgment grounded in policy concerns.") (internal quotation marks and citation omitted)); Rehab. Ass'n v. Kozlowski, 42 F.3d 1444, 1450 (4th Cir. 1994) ("There can be no doubt but that the statutes and provisions in question, involving the financing of Medicare and Medicaid, are among the most completely impenetrable texts within human experience.").

argument that they cannot do so in cases about other statutes becomes more difficult to make.

Still, these cases demonstrate a truism: sometimes, interpreting the law is difficult. Whatever one thinks about administrative agencies, few would dispute that—as a general matter—they possess valuable insight into the statutory schemes they administer.[46] Often, statutory schemes address these agencies or the highly regulated entities with which the agencies interact, as opposed to the ordinary person.[47] In addition, even though the Supreme Court can interpret complex schemes, lower courts might struggle to marshal the necessary judicial resources to wade through hard-to-parse statutes.[48]

Thus, developing a framework of review for these cases should take account of the fact that agencies—by virtue of their *interpretive* expertise—can help the courts. The challenge involves striking a balance between the helpfulness of some supplemental clarity and the danger of wholesale deference to agencies in these cases.[49] Courts should, therefore, employ a modified version of *Skidmore* deference to incentivize agencies to provide insights into the task of statutory interpretation. In *Skidmore v. Swift & Co.*,[50] the Supreme Court wrote that agencies' interpretations of laws were entitled "to respect" depending on "the thoroughness evidenced in their consideration, the validity of their reasoning, their consistency with earlier and later pronouncements, and all those factors which give them power to persuade, though lacking power to control."[51]

Rather than according respect to the agency's interpretation based on its "power to persuade," courts should consider the agency's ability to

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46 *Cf.* Cass R. Sunstein, *The Most Knowledgeable Branch*, 164 U. PA. L. REV. 1607, 1630 (2016) (describing the "informational" and "epistemic advantages" of agencies in suggesting answers to highly technical interpretive questions).

47 *See* Grove, *supra* note 31, at 1075; Solum, *supra* note 31, at 285.

48 *Cf.* Ryan C. Williams, *Lower Court Originalism*, 45 HARV. J.L. & PUB. POL'Y 257, 272 (2022) ("[B]ecause the [Supreme] Court chooses to hear and decide only a tiny fraction of the cases that reach the circuit courts each year, it is able to devote substantially more time and decisional resources to the resolution of each case. The Supreme Court may also have other institutional advantages vis–à–vis the lower courts that render it better suited to resolve complex legal issues, such as its larger size, its ability to reframe and modify the legal questions presented by the parties, its ability to draw on the experiences and decisions of the lower courts, and its greater access to amicus briefing by interested third parties." (footnotes omitted)).

49 *Cf.* Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167 (1962) ("Expert discretion is the lifeblood of the administrative process, but unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion." (internal quotation marks and citation omitted)).

50 323 U.S. 134 (1944).

51 *Id.* at 140.

clarify, elucidate, or otherwise provide insight. In the words of then-Judge Breyer, "[t]here is nothing the Secretary knows about the legal question that the court doesn't know; if there is something, she can tell the court."[52] This approach to the doctrine would incentivize federal agencies—repeat players before the federal courts—to assist overworked judges in the task of interpretation in the most difficult cases. Here, judges could look to agency briefing to shed light on the statutory drafting process, the interaction between sections of "impenetrable" statutory schemes, the meaning of specialized terms, and other such pieces of information about which the agency might have something useful to add. At that point, courts could make independent determinations about the meaning of statutes—even complex ones—with the benefit of agency interpretive expertise.

Conclusion

Not all expertise is the same. Agencies have multiple kinds of expertise: scientific expertise, policymaking or political expertise, and interpretive expertise. When courts interpret statutes that agencies have themselves interpreted, only that agency's interpretive expertise is relevant to the value of that interpretation to the court. Yet even when an agency comes forward with interpretive expertise, deference to that expertise is not appropriate. Rather, courts should take agencies' interpretive opinions under advisement, then decide the question on their own.

[52] Breyer, *supra* note 34, at 376, 379.