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Congress After Chevron: What Citizens Should Demand of Their Legislature

GianCarlo Canaparo

KEY TAKEAWAYS

The administrative state puts both the lawmaking and law-enforcing powers in the President's hands—a placement incompatible with liberty.

Only Congress can fix this problem, and it will only do so if Americans citizens demand it.

The end of *Chevron* deference alone will not restore Congress, but we can take some small steps to begin cultivating the culture of self-government that will.

If you asked high-school civics students, "Who makes America's laws at the federal level?" they would probably answer, "Congress." After all, the Constitution gives the lawmaking power to Congress. That answer, however, would be only partially right: In truth, it would be mostly wrong. Although Congress makes some of America's laws—typically a few hundred during each two-year term—most are made by administrative agencies, which produce between 3,000 and 4,500 laws every year, many of enormous political, economic, or cultural significance.[1] This is not the government that the Framers of the Constitution created, and at no point in American history did the people change their Constitution to make bureaucrats their primary lawmakers.

A very small part of the blame for the ongoing move away from constitutional government toward administrative government falls at the feet of a doctrine

called *Chevron* deference. That doctrine, which the Supreme Court created in 1984, held that whenever a law that gave Congress's power to an agency was ambiguous, judges had to defer to the agency's interpretation of that statute provided that it was "reasonable."[2] That doctrine allowed agencies to expand their powers without clear or express congressional authorization. Before *Chevron*, Congress could give agencies just about any power it wanted to give them, but after *Chevron*, agencies could often take whatever power they wanted to take. Our first branch of government was already withered when *Chevron* came along in 1984, but *Chevron* made things worse because it allowed partisan Presidents—who control agencies—to drain away Congress's powers for their own purposes. Thus, the lawmaking and law-enforcing powers were placed in the same hands—a placement incompatible with liberty.[3]

Wiser Americans than those who presided over the end of Congress's legislative supremacy fought against that development. They knew that the solutions to today's problems are usually less important than the composition, structure, and arrangement of the governing institutions that will address the problems of the future.[4]

Americans who remember that wisdom are rightly encouraged by the Supreme Court's decision last term to overrule the *Chevron* case and end deference,[5] but they will be expecting too much if they think that the end of *Chevron* will restore Congress. That goal is beyond the reach of any court. It is even likely beyond the reach of Congress as currently constituted. Restoring Congress will require improving its culture, and improving its culture will likely require us to improve ours. These are daunting tasks that admit of no neat solutions. There are, however, some first steps that might set us on the right path.

The Condition of Congress

Chevron's end will not restore Congress because there are too few people in Congress these days who hold fast to the wisdom that governmental structure is usually more important than any contemporary dispute. As Senator Russell Long (D–LA) once remarked, "a U.S. Senator is primarily interested in two things: one, to be elected, and the other, to be reelected," and for many members of Congress, good governance is not a means to that end.[6] A sorry situation, to be sure, and the death of *Chevron* does little if anything to change it. Members will continue to face all the bad incentives to dodge their duty that they did when *Chevron* lived, and the Supreme Court cases that so radically changed Congress and helped it to become

more of a platform for spectacle than an institution for governance remain on the books.

Congress worked better when it was constrained. When it had limited powers—before the Supreme Court gave it nearly plenary power[7]—and when it had to do its own work—before the Court allowed it to delegate its now unwieldy power to the executive[8]—it could function as a deliberative body of knowledgeable and serious generalists.[9] No longer. Now, Congress has more power than it can wield, and it has been pressed by the weight of that power to give it away to administrative agencies. The end of *Chevron* changes none of that. Nor, realistically speaking, is Congress likely to change it.

Congress also worked better when its members weren't performers. When members thought of themselves as deliberators, lawmakers, and builders, they did not play the part of performative outrage artists pandering to partisan audiences.[10] They sought to govern, and in pursuit of that noble aim—and it is indeed "among the noblest of human occupations"[11]—they deliberated, they compromised, they worked together, and they jealously guarded their collective prerogative to steward the nation. All members, no matter the zeal with which they disagreed about this or that policy, agreed with at least equal zeal that "in republican government, the legislative authority necessarily predominates."[12] Together, the members maintained not only their personal ambitions, but an "institutional ambition"[13] that Congress should, could, and would lead. No longer. Now, many members are actors who play the same part, criticizing the stage that lifts them into the public eye.[14] Each one seems to fight every other one for attention while shoving the work of governing off the stage and down into the complex cogs of the bureaucratic machine.

This is our status quo, and the end of *Chevron* alone will not change it. Nevertheless, Americans should not be content with the status quo. We should demand more of Congress.

There are good reasons for this. Chief among them is that the Constitution—a document imbued with a wisdom still untouchable by cheap modern criticism—makes Congress the nation's primary policymaker. What is more:

- Congress is structured to be more deliberative than the President and his bureaucrats are;
- Congress is more accountable to the people than they are;
- Congress includes better safeguards against capture by faction than they do;

- Congress provides the people with more opportunities to participate in their own governance than they do; and

- Congress represents the peoples' vast diversity of interests better than the President and his bureaucrats do.[15]

Only slightly less important is that bureaucrats are just as human as the rest of us. Contrary to the view of old defenders of the administrative state like Woodrow Wilson and new ones like Justice Elena Kagan,[16] agency employees are not always neutral, wise, or expert.[17] Sometimes they aim to do only what their expertise tells them is the right thing; other times they act beyond the scope of their expertise.[18] Sometimes they want to impress the President with their commitment to his agenda or build their own personal empires; other times their expertise is infected by their political ideology or other biases.[19] And sometimes their expertise in one field blinds them to costs and benefits visible to others with a broader view. Consider the failure of our infectious disease experts to foresee the spiritual, mental, and economic costs of shuttering churches, restricting travel, and closing businesses during the COVID-19 pandemic. Or consider how agency expertise is always focused on extrinsic goods like safety, health, and wealth so that even the most well-intentioned agency employees will undervalue intrinsic goods like self-government.[20]

Finally, agencies sometimes are forced to do whatever the President—who is always a partisan—wants, regardless of expertise. For example, no neutral and unbiased expert would have justified cancelling $400 billion of student loan debt as an emergency health measure, but an agency did so because the President told it to do so.[21] Likewise, no neutral and unbiased expert would argue that the environment is protected from pollution by giving and withholding grants on the basis of skin color, but an agency does that because the President told it to do it.[22] Obeying a partisan President is better than going rogue, but both options are worse than having major policy decisions made by the branch of government that was designed to make them well and that holds the strongest claim to the legitimacy that only wide representation and deliberation can give.

Yet none of these reasons has ever moved Congress to change the status quo. They have moved the Supreme Court to take the small step of ending *Chevron*, but there is no sign that they will move the Court to reverse its disastrous Commerce Clause, Necessary and Proper, or delegation cases[23]—that is, to put Congress's power back in the bottle where, constrained, it works better. Nevertheless, these reasons ought to move American citizens to demand more of their government.

Perhaps it is naïve to assume that these reasons will move us or that, even if we are so moved, we will succeed in restoring the first branch of government. After all, Congress is ultimately a reflection of "We the People."[24] If Congress is filled with partisan performers rather than serious governors, perhaps that reflects the sorry state of our national character. Or perhaps the institutional incentives are just so broken that only the most virtuous representatives could resist them.[25] But all is not lost, because character is improved by habitual good work, and in the work of trying to restore Congress, we will find many opportunities to build our character. That work will produce self-governance, wisdom, justice, candor, industry, maybe even courage, surely a healthy dose of righteous indignation, and—perhaps best of all—a long-missing sense of civic friendship. For that reason alone, we ought to make the attempt.

What We Should Demand of Congress

There are a few things that we as citizens can and should do to improve Congress. We should build Congress's knowledge-gathering capacity. We should increase Congress's opportunities to deliberate and debate candidly about serious issues. And we should try to restore to Congress a jealous institutional ambition. What follows are some general ideas about how to achieve these goals and some specific proposals that might serve as first steps on the path to reform.

- **Increase knowledge-gathering capacity.** When its power was constrained, Congress could be a knowledge-holding institution, possessing most of the information it needed to govern. Its hundreds of members knew the thoughts of millions of Americans. Each member carried little bits of knowledge from his or her life, constituents, staff, and outside contacts. The member who was a chemist, a doctor, an engineer, a farmer, a salesman, a machinist, a chef, or a civil servant knew something that the others did not. Each member, therefore, added a unique drop to the pool in which knowledge coalesces in new ways into new ideas.[26] Regrettably, that is no longer true.

  Now Congress cannot know enough. The federal government, with its now nearly unfettered powers, regulates many complicated things from food production to financial markets, from nuclear power to occupational safety, from novel drugs to family planning, and measureless more. Congress lacks the knowledge required to do all this

well. This lack has been turned into an argument for the administrative state: That is, because Congress lacks the expertise necessary to make highly technical, granular decisions, it should simply hand over all decisions involving complex subjects to the administrative state.

But this argument goes too far. Congress may never have the expertise to decide whether a new chemical compound is safe for consumption and, if so, in what quantities, but it can and should develop the expertise necessary to guide and prescribe the aims and powers of the bureaucrats who will make that decision. This same principle is at work wherever Congress gives power to subject-matter experts in agencies. Congress must develop at least enough expertise of its own to be sure that the bureaucrats' expertise is both constrained and directed at the common good within the means prescribed by Congress.

To that end, although Congress is not and perhaps never again can be a knowledge-holding body, it can and should be a better knowledge-gathering body. It should go to greater lengths to hear from experts both inside and outside the administrative state before it makes its decisions. It should solicit letters and comments on proposed legislation and regulations from experts and the public. For example, it could develop a comment portal like Regulations.gov (call it Laws.gov) to solicit the views of the people about legislative proposals this bill or that one. The portal could be managed by committee staffers, and both members and their staffs could deliberate and debate with each other about the knowledge that they gathered.

Much of Congress's expert knowledge, such as it is, resides in committee staff members. They develop subject-matter expertise on technical issues and, necessarily, on the administrative agencies and processes that regulate those issues. They also tend to know where to find the right outside experts who can serve as witnesses in congressional committee hearings. Although the administrative state has grown substantially since the 1970s, the number of committee staffers has plummeted over that same period.[27] This has left Congress without the expertise it needs to guide and check the agency staffs. Thus, Congress often finds itself with little choice but to hand the reins of power over to the agencies and strap in for the ride. This is regrettable, but the situation might be improved by the hiring of additional committee staff.

- **Increase deliberation and debate.** Improving Congress's knowledge-gathering capacity is good but not sufficient for the institution's renewal. Congress must use that knowledge and use it well.[28] Knowledge must be examined, evaluated, amended, and reformed before it produces good ideas.[29] Debate does this best, but Congress does not engage in debate as much as it used to—at least, not substantive debate about issues and bills.

  Former Senator Pat Toomey (R–PA) recently lamented that the Senate has replaced its culture of debate with a culture of debate avoidance.[30] He lays the blame for this cultural shift on the rule that "effectively requires unanimous consent" to hold a vote on any amendment to a bill.[31] The amendment process, he argues, echoing Vice President Adlai E. Stevenson,[32] is where knowledge is stirred, minds are engaged, and ideas are formed. Yet Senate leaders have sought to insulate their members from political accountability for tough votes by functionally killing the amendment process, which in turn has killed the chambers' culture of debate. House of Representatives procedures have the same debate-killing effect.[33] These and any other rules standing in the way of debate, argues Toomey, ought to be undone. Likewise, the committee system and old filibuster rules ought to be reinvigorated so that members might be encouraged to develop expertise and apply it carefully. In sum, as Yuval Levin argues, Congress needs "more rather than fewer power centers" to increase debate, deliberation, and accommodation.[34] One hopes that from these goods will grow a culture of serious-minded governance.

  In addition to weak committees,[35] there is a lack of privacy in which members might deliberate. A legislative hearing, for example, is supposed to afford members, in good faith and with open minds, the opportunity to deliberate and debate with each other and with experts in an effort to understand a problem and the trade-offs that Congress can make in response, but this ideal is mostly fiction. Because hearings are televised, they often devolve into partisan spectacles in which members and guests treat each other like fools and foils useful for foisting themselves into the media spotlight. Even when hearings don't devolve into spectacles, the mere risk that they might do so severely constrains the behavior of both members and witnesses. A member is unlikely to ask a question to which he doesn't know the answer for fear that his apparent foolishness will get his name dragged

into the limelight of the evening talk shows; a witness is likely to answer any question in a guarded manner or to stick to prepared talking points rather than engage in a free and deliberative dialogue for fear that a slip of the tongue will make him look like a fool in a 15-second clip that zips around the Internet.

But free and deliberative dialogue between Congress and experts is precisely what is needed. Members must be free to ask questions that betray their ignorance, and witnesses must be free to think and talk extemporaneously with them. Neither members nor witnesses should fear public embarrassment from the good-faith pursuit of the knowledge required to govern well. To remove this fear, Congress ought to switch off the video feeds so that members and witnesses cannot play to or fear cameras.[36] Then a member might more freely ask a question to which he doesn't already know the answer, and a witness might more comfortably think aloud without fearing that a slip of the tongue or an unexpected attack will set a partisan mob on his heels.

What goes for legislative hearings goes for much of Congress's work generally. Congress would do its job better if it reduced its incentives for partisan spectacle. We should not reward members for treating their colleagues on the other side of aisle as antagonists in their personal stories. We should not reward members for attacking the stage on which it is their unbelievable privilege to stand. We should not reward members for treating Congress as if it were a stage at all. But we do all of these things, and Congress has set itself up to reap the rewards.

More than that, these bad incentives have made it unlikely that members would use such private deliberative spaces if they were available. Members are human and are no more willing than anyone else to sit down at a working lunch with someone who regularly stands before the nation and blackens their character, intelligence, and integrity. It really is too much to ask. Of course, it might be too much for us to ask those performative representatives simply to stop it, but it might *not* be too much to ask them to reduce their incentives for grandstanding and to increase their opportunities to work in private where deliberation and even friendship might have a chance to grow.

Ultimately, there may be many ways to increase opportunities for deliberation and to reduce incentives for grandstanding. Whether Congress should adopt any particular measure is a matter of judgment, but the overarching goal should be to make genuine communication among members easier and to reduce the incentives for partisan spectacle.

- **Build jealous institutional ambition.** None of the forgoing proposals will matter, however, if Congress remains, as it is now, happy simply to cede its power to the President and his bureaucrats. This buck-passing impulse is well and truly entrenched in Congress so that there seems to be little we can do but shout, "snap out of it." Of course, there seems to be little to say to a person who criticizes that impulse besides "good luck changing it." But hope springs eternal that members of Congress will rediscover some of their convictions, take courage from them, and face the nation's problems like the leaders they are supposed to be. As before, the only sure way to make that hope a reality is for the people to demand that Congress stop handing off the reins of power. Some small reforms might start Congress along the right path.

  Step one might be to remind Congress not to panic. Congress writes the worst laws when, in a panic, it fires text in a scattershot pattern at problems that it sees only dimly at a distance. The major spending bills of the past few years are excellent examples of terrible lawmaking.[37] It is not just that these bills threw vast amounts of money haphazardly at ill-defined problems like a lunatic striking wildly at ghosts in a mist, but that all were "unambiguously regulatory" before a dollar was spent.[38] With each of these laws, Congress panicked in response to poorly understood issues and granted the administrative state vast powers to "do something" about them.[39] Congress's first—and only—impulse was to throw bags of cash at the bureaucrats and pray that they would move in mysterious ways to the nation's rescue. There was the world's greatest deliberative body on its knees, begging and bribing bureaucrats for "solutions" of dubious necessity.

  Step two might be to encourage members to pass the few pieces of legislation that aim to force Congress to retake its primary legislative role. Chief among these proposals is the Regulations from the Executive in Need of Scrutiny (REINS) Act.[40] The core provision of this bill

says that "major" new agency rules will not take effect until Congress approves them. Rules are major if they cost at least $100 million per year or have other significant costs for consumers or anticompetitive effects. The bill would do some good: It would force Congress to take accountability for major new rules, encourage members to debate and deliberate about those rules, and give major rules more legitimacy by giving them the support not only of the President and his bureaucrats, but also of the people's elected representatives. The bill also has its downsides: It addresses only future regulations, Congress would likely rubber-stamp and therefore not debate all but the most controversial rules, and many rules that are not "major" but are nonetheless important would escape review. Nevertheless, the REINS Act represents a significant improvement over the status quo.

The Sunset Chevron Act would partially plug the gap left by the REINS Act for preexisting rules.[41] That bill would impose an automatic sunset date on all agency rules upheld by a court based on *Chevron* deference. When the Court overruled *Chevron*, it did not make its decision retroactive, but there is no reason for Congress not to do so. *Chevron* was wrong, and the rules that rely on it have lost legitimacy. Coupled with the REINS Act, old rules that are also major, if renewed, would gain the legitimacy that congressional approval would provide.

With respect to delegation, we might also encourage Congress to improve its day-to-day legislative drafting. Congress loves to write vague and ambiguous statutes because they allow members to tell constituents that they have "done something" while sparing themselves from the challenge of hard policy work. Congress has happily trusted the administrative state to fill in the holes it leaves in laws. With the end of *Chevron*, however, ambiguities in statutes no longer create space into which agencies (and the Presidents who control them) can move in their mysterious and self-aggrandizing ways. This means that if Congress leaves important terms undefined or legislative powers unspecified, an agency cannot fill in the gaps (although a judge might still do so, which raises other serious concerns[42]).

Consider *Sackett v. Environmental Protection Agency*, which involved the Clean Water Act.[43] With the Clean Water Act, Congress gave the EPA the power to regulate the "waters of the United States," but Congress did not define "waters of the United States." That "frustrating

drafting choice" led to decades of immensely complex litigation.[44] The EPA had tried to solve this problem for Congress by adopting various definitions, but those can no longer receive deference. The same goes for any other terms in any other statutes involving any other agencies. Definitions decide disputes, and a lack of definitions creates disputes. Congress therefore ought to provide those definitions.

Consider, too, *Alabama Association of Realtors v. Department of Health and Human Services*.[45] The Director of the Centers for Disease Control and Prevention imposed a nationwide eviction moratorium because of the COVID-19 pandemic and argued that the CDC had this power because its statute directed it to "make and enforce regulations" necessary to prevent "the introduction, transmission, or spread of communicable diseases."[46] To that end, the statute gave the CDC the specific powers of "inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles" and "other measures, as in [the Surgeon General's] judgment may be necessary."[47] The Director argued that the "other measures" provision gave the CDC functionally limitless power to do whatever it wanted to do in response to a pandemic. The Supreme Court disagreed. Congress might be able to give the agency that sort of vast power (suspending, for the sake of argument, other constitutional concerns), but where Congress has given an agency a list of specific powers, the Court presumes that an "other measures" provision tacked on to the end of such a list shares a family resemblance with all that preceded it: *Ejusdem generis*, after all.[48] It will be even harder now for agencies to sneak broad powers into enumerated lists. If Congress wants an agency to have a particular power, it will have to specify it in precise language.[49]

All of the proposals discussed so far are probably unrealistic to varying degrees. Many people have asked Congress to implement them for many years, and nothing has come of it. Again, Congress is not likely to do any of this on its own, and the end of *Chevron* does not change that. But we as citizens ought to demand them anyway. More than this, we ought to demand even more: that members of Congress come to understand Congress's original role in our constitutional system. Congress should be the primary lawmaker, and its lawmaking power should be limited. At present, Congress is not primary; that honor goes to the administrative state. And Congress's power is not limited; it is nearly plenary and therefore more than Congress can manage.

This status quo has its defenders who would likely respond to the demands made here by saying that Congress cannot possibly fulfill them. There is just too much for Congress to do. It cannot review new rules because there are too many, and it cannot gather more information because there is no time.[50] But those arguments rely on an erroneous premise: that the federal government should do all that it currently does. For a vast array of reasons—both practical and philosophical—much of what the federal government does it should not do. Members should shake off the erroneous assumption that every public policy issue has a federal solution. To do this, they will need a good understanding of the powers, limits, strengths, and weaknesses of Congress vis-à-vis the executive and those of the federal government vis-à-vis the states. A Congress with a correct sense of its true powers and limits will find that it has plenty of time to deal effectively with the problems that fall within them.

Nevertheless, we return to the point that Congress will not care about these things until we do. Our representatives will not snap out of the impulse to hide from debate and accountability until we demand it. If we reward the media with attention when the media reward members' bad behavior with fame, members will behave badly. If we cheer for policies made of fool's gold because we are distracted by the shine, members will give us foolish policies. If we hate our political enemies more than we love good character in our political allies, we will have representatives who lack the character necessary to govern well. All of this means that we as citizens will have to demand more of ourselves than we demand of Congress because no one—not Congress as now constituted, not the Supreme Court, not any President—that can fix the first branch of government except us.[51]

Conclusion

Getting Congress to retake the reins of power from the administrative state will be difficult not because an action plan is hard to formulate—it is the easiest thing in the world—but because only Congress can put the plan into action, which is something it does not want to do. This is the status quo, but it is not a status quo with which we as citizens ought to be content. The unification of both the lawmaking and law-enforcing powers in the hands of the President will undermine our liberty. We ought therefore to demand that Congress retake its powers from the administrative state. Perhaps the demands suggested here are unrealistic. Certainly, it is unrealistic to think

that Congress will adopt any of them on its own. Nevertheless, demanding that it do so is the only way to rejuvenate our shriveled first branch and probably one of few ways for us to develop the national character that is essential for reform.

We can start with small internal reforms. We should demand that Congress have the tools it needs to be well informed and the incentives it needs to put that knowledge to good use. Then we might think bigger. We might demand that members deliberate with one another, with experts, and with us. We might demand that they debate, discuss, interrogate, and speak freely in private where there is neither a political cost to being wrong nor a political benefit to partisan posturing. We might demand that Congress resist the temptation to rush for solutions. We might demand that members zealously guard Congress's prerogatives, bearing in mind that the good of the nation depends even more on a healthy custom of self-governance than it does on getting the right solutions to the problems of the day. These demands may be naïve, but they are also necessary.

GianCarlo Canaparo is a Senior Legal Fellow in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation.

Endnotes

1. *See* Maeve P. Carey, *Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the Federal Register*, Cong. Res. Serv. Rep. No. R43056, Sept. 3, 2019, https://crsreports.congress.gov/product/details?prodcode=R43056.
2. Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984).
3. *See*, *e.g.*, Montesquieu, The Spirit of the Laws 157 (Anne M. Cohler et al. eds & trans., 1989) (1768) ("When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically."); 1 William Blackstone, Commentaries 142 ("where the legislative and executive authority are in distinct hands, the former will take care not to entrust the latter with so large a power, as may tend to the subversion of its own independence, and therewith of the liberty of the subject."); The Federalist No. 47 (James Madison) ("The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed [sic], or elective, may justly be pronounced the very definition of tyranny."). Defenders of administrative rule might disagree that concentrated power is anathema to liberty. *See*, *e.g.*, John Dewey, Liberalism and Social Action 32 (1935) ("[Classical liberals] put forward their ideas as immutable truths good at all times and places; they had no idea of historic relativity, either in general or in its application to themselves."); Thurgood Marshall, *The Constitution's Bicentennial: Commemorating the Wrong Document?*, 40 Vand. L. Rev. 1337, 1341 (1987) (finding no wisdom in the Constitution's structural limitations upon power, but finding it, instead, in the minds of certain elites who "refused to acquiesce in outdated notions of 'liberty,' 'justice,' and 'equality,' and who strived to better them").
4. *See*, *e.g.*, The Federalist No. 34 (Alexander Hamilton) ("[W]e must bear in mind that we are not to confine our view to the present period, but to look forward to remote futurity. Constitutions of civil government are not to be framed upon a calculation of existing exigencies, but upon a combination of these with the probable exigencies of ages, according to the natural and tried course of human affairs.").
5. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) ("*Chevron* is overruled.").
6. Fred S. McChesney, Money for Nothing: Politicians, Rent Extraction, and Political Extortion 47 (1997) (quoting Senator Russell Long).
7. The Supreme Court gave Congress nearly plenary power by interpreting the Commerce Clause and the Necessary and Proper Clause much too broadly. With respect to the Commerce Clause, *see*, *e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (permitting Congress to regulate local economic activity under the Commerce Clause if that local activity has a "close and substantial relation" to interstate commerce); United States v. Darby Lumber Co., 312 U.S. 100 (1941) (same in the context of employment conditions); Wickard v. Filburn, 317 U.S. 111 (1942) (holding that the Commerce Clause allowed the federal government (there, an agency wielding delegated power) to regulate the production of small amounts of wheat grown purely for personal consumption under the theory that it might nevertheless have some direct or indirect effect on interstate commerce); Gonzales v. Raich, 545 U.S. 1 (2005) (holding that the Commerce Clause gives the federal government the power to criminalize the production of small amounts of marijuana used exclusively for personal medicinal purposes). With respect to the Necessary and Proper Clause, *see*, *e.g.*, Sabri v. United States, 541 U.S. 600 (2004) (holding that the Necessary and Proper Clause imposes only a rational-basis check on Congress's lawmaking power); United States v. Comstock, 560 U.S. 126 (2010) (treating the Necessary and Proper Clause as a "grant" of "broad authority" to Congress to enact legislation).
8. *See*, *e.g.*, Nat'l Broad. Co. v. United States, 319 U.S. 190 (1943) (holding that the FCC had the power to regulate "chain networks," even though that power was not given to the agency by Congress, because the power that the FCC claimed was guided by "public interest, convenience, or necessity" and arguably within the "purpose" of the original statute). Since 1935, every "nondelegation doctrine" challenge to a delegation of Congress's powers to an agency has failed. *See* Ilan Wurman, *Constitutional Administration*, 69 Stan. L. Rev. 359, 375 (2017).
9. Joseph Postell, *From Administrative State to Constitutional Government*, Heritage Found. Spec. Rep. 116 at 1, Dec. 14, 2012, https://www.heritage.org/political-process/report/administrative-state-constitutional-government ("But as the national government expanded and began to focus more and more on every aspect of citizens' lives, the need for a new kind of government—one focused on regulating the numerous activities of citizens rather than on protecting their individual rights—became apparent.").
10. *See* Yuval Levin, A Time to Build 48 (2020) ("[M]any members of Congress have come to understand themselves most fundamentally as players in a larger cultural ecosystem, the point of which is not legislating or governing but rather a kind of performative outrage for a partisan audience.").
11. "The pursuit of power," wrote Winston Churchill, "with the capacity and in the desire to exercise it worthily is among the noblest of human occupations." Winston Churchill, 2 Marlborough: His Life and Times 521 (1934).
12. The Federalist No. 51 (Madison).
13. Levin, *supra* note 10 at 47.
14. *See* Joseph Postell, *Can Congress Reclaim Its Status as "The World's Greatest Deliberative Body?"*, Heritage Found. First Principles No. 96, Mar. 7, 2024, https://www.heritage.org/conservatism/report/can-congress-reclaim-its-status-the-worlds-greatest-deliberative-body.
15. The Federalist No. 10 (Madison) ("Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.").
16. *See* Woodrow Wilson, *The Study of Administration*, 2 Pol. Sci. Quarterly 197 (1887); *see also* Ashraf Ahmed, Lev Menand, and Noah A. Rosenblum, *The Making of Presidential Administration*, 137 Harv. L. Rev. 2131 (2024) (describing Justice Kagan's view of presidential administration as "fundamentally progressive.").

17. *See* Paul J. Ray, *Lover, Mystic, Bureaucrat, Judge: The Communication of Expertise and the Deference Doctrines* (C. Boyden Gray Ctr., Ctr. for Study of Admin. State, Working Paper 23-32, 2023), https://administrativestate.gmu.edu/paper/lover-mystic-bureaucrat-judge-the-communication-of-expertise-and-the-deference-doctrines/; Jack Fitzhenry & GianCarlo Canaparo, *Judicial Humility and Reticence in Administrative Law*, 1 Geo. J. of L. & Pub. Pol Online (2024), https://www.law.georgetown.edu/public-policy-journal/sample-page/online/online-volume-1-2024/judicial-humility-reticence-in-administrative-law/ (summarizing and responding to the positions held by Justice Kagan, among others).
18. *See*, *e.g.*, King v. Burwell, 576 U.S. 473, 485–86 (2015) (denying deference to the Internal Revenue Service with respect to a provision of insurance because the agency's expertise was limited to taxation).
19. *See* Raymond Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 Vand. L. Rev. En Banc 315, 323 (2017) ("[I]t seems to me that the agency is not trying to answer the same question that [courts] are. The court tries to find the best objective interpretation of the statute, based on the statutory text. The agency instead asks if there is a *colorable* interpretation that will support the policy result that the agency wants to reach."); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2151 (2016) ("We must recognize how much *Chevron* invites an extremely aggressive executive branch philosophy of pushing the legal envelope (a philosophy that, I should note, seems present in the administrations of both political parties)."); *see also Biden Does a Stealth Medicare Rewrite*, Wall St. J., Aug. 6, 2024, https://www.wsj.com/articles/medicare-part-d-inflation-reduction-act-insurance-premiums-biden-harris-administration-625711a6?mod=hp_opin_pos_3#cxrecs_s ("This was a back-door way for Democrats to ration access to costly drugs while shifting the political blame for doing so to insurers.").
20. This observation owes its presence here to conversations the author has had with Paul J. Ray.
21. *See* Jack Fitzhenry & GianCarlo Canaparo, *Student Loans, Major Questions, and the Dean Wormer Theory of Administrative Law*, 27 Tex. Rev. L. & Pol. 371 (2023).
22. *See* Environmental Protection Agency, *Climate Equity*, Jan. 2, 2024, https://www.epa.gov/climateimpacts/climate-equity (last accessed July 31, 2024); Joseph Biden, *Remarks at Signing of an Executive Order on Racial Equity*, Jan. 26, 2021, https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/01/26/remarks-by-president-biden-at-signing-of-an-executive-order-on-racial-equity/ ("[W]e need to make the issue of racial equity not just an issue for any one department of government; it has to be the business of the whole of government."). For an in-depth discussion of the illogic of race-based policies, *see* GianCarlo Canaparo, *The Intellectual Failings of Antiracism*, Heritage Found. Legal Memo. No. 347 (Dec. 2023), https://www.heritage.org/progressivism/report/the-intellectual-failings-antiracism.
23. *See* sources cited in notes 7 & 8, *supra*.
24. U.S. Const., preamble.
25. *Cf.* Morris P. Fiorina, Congress: Keystone of the Washington Establishment (2d rev. ed., 1989) (explaining how and why Congress members face incentives to give away their institution's powers and responsibilities); Postell, *supra* note 9.
26. *See generally* James Webb Young, A Technique for Producing Ideas 24 (2003 reprint) ("Now this gathering of general materials is important because this is where the previously stated principle comes in—namely, that an idea is nothing more nor less than a new combination of elements.").
27. R. Eric Petersen, *House of Representatives Staff Levels, 1977–2023*, Cong. Res. Serv. Rep. No. R43947, updated Nov. 28, 2023, https://crsreports.congress.gov/product/pdf/R/R43947; R. Eric Petersen, *Senate Staff Levels 1977–2022*, Cong. Res. Serv. Rep. No. R43946, updated Aug. 2, 2023, https://crsreports.congress.gov/product/pdf/R/R43946.
28. For a detailed discussion of the loss of deliberation in Congress and some proposals to reacquire it, *see* Postell, *supra* note 14.
29. Young, *supra* note 26.
30. *See Former Sen. Pat Tommey Discusses Chevron Deference Ruling*, CSPAN, July 16, 2024, https://www.c-span.org/video/?537049-2/sen-pat-toomey-discusses-chevron-deference-ruling.
31. Sen. Patrick J. Toomey, *Farewell to the Senate*, S. Cong. Rec., S7224, Dec. 15, 2022.
32. Adlai E. Stevenson, *Farewell Address to the United States Senate*, Mar. 4, 1897, *reprinted in* Postell, *supra* note 14 (celebrating that the Senate has preserved "the right of amendment and of debate, maintaining intact the time-honored parliamentary methods and amenities which unfailingly secure action after deliberation [and] possess[] in our scheme of government a value which can not [sic] be measured by words.").
33. *See* Christopher Davis, *How Measures Are Brought to the House Floor: A Brief Introduction*, Cong. Res. Serv. Rep. No. RS20067, updated Dec. 14, 2022, https://crsreports.congress.gov/product/pdf/RS/RS20067.
34. Levin, *supra* note 10 at 54; *see also* Joseph Postell, *The Rise and Fall of Political Parties in America*, Heritage Found. First Principles No. 70, Sept. 30, 2018, https://www.heritage.org/political-process/report/the-rise-and-fall-political-parties-america (arguing that stronger political parties increase deliberation in Congress and encourage members to think of the national interest before special interests).
35. *See* sources cited in notes 13, 14, & 34, *supra*.
36. *See*, *e.g.*, Don Wolfensberger, *Has Televising Congress Dumbed It Down?*, The Hill, April 4, 2024, https://thehill.com/opinion/congress-blog/4573756-has-televising-congress-dumbed-it-down/; Fred Bauer, *The Case Against Liberating C-SPAN's Cameras*, National Review Online, Jan. 11, 2023, https://www.nationalreview.com/2023/01/the-case-against-liberating-c-spans-cameras/.

37. *See*, *e.g.*, Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116–136, 134 Stat. 281, Mar. 27, 2020; American Rescue Plan Act of 2021, Pub. L. No. 117–2, 135 Stat. 4, Mar. 11, 2021; CHIPS and Science Act, Pub. L. No. 117167, 136 Stat. 1366, Aug. 9, 2022; Inflation Reduction Act of 2022, Pub. L. No. 117–169, 136 Stat. 1818, Aug. 16, 2022.
38. Clyde Wyne Crews Jr., *A Deep State Guide to Post-Chevron Regulating*, Forbes, Jul. 10, 2024, https://www.forbes.com/sites/waynecrews/2024/07/09/a-deep-state-guide-to-post-chevron-regulating/.
39. *See* Thomas Sowell, Basic Economics: A Common Sense Guide to the Economy 482 (4th ed. 2011) ("One of the pressures on governments in general, and elected governments in particular, is to 'do something'—even when there is nothing they can do that is likely to make things better and much that they can do that will risk making things worse.").
40. Regulations from the Executive in Need of Scrutiny Act of 2023, H.R. 277, 118th Cong. (2023–24). For a thorough discussion of the bill, see Jonathan H. Adler, *Would the REINS Act Rein in Federal Regulation?*, Regulation (Summer 2011), https://www.cato.org/regulation/summer-2011/would-reins-act-rein-federal-regulation.
41. Sunset Chevron Act, H.R. 8889, 118th Cong. (2023–24).
42. The end of *Chevron* has the added effect of making judicial appointments much more important. It also will likely make conflicts between the White House and the judiciary more common. For that reason alone, we should hope that the end of *Chevron* is not the end of the judiciary's work on the administrative state. The judiciary must join in the effort to get Congress to take more responsibility for policymaking; otherwise, the courts will likely find themselves taking the blame for Congress's failures. That criticism may be fair or unfair depending on how committed individual judges are to their duty of rigorous and impartial textual interpretation.
43. 598 U.S. 651 (2023).
44. *Id*. at 671.
45. 594 U.S. 758 (2021).
46. *Id*. at 761 (quoting 42 U.S.C. § 264(a)).
47. *Id*.
48. A canon of construction translating to "of the same kind" and signifying that when a general phrase follows a list of specifics, it must be interpreted as referring to the same kinds of things as those listed. For example, if a law gave a regulator the power to protect "fish, mollusks, crustaceans, amphibians, and invertebrates," the word "invertebrates" would rightly be interpreted as applying to aquatic invertebrates not already included by "mollusks" and "crustaceans" (for example, sponges). *But see* GianCarlo Canaparo & Louis Pham, *When Are Bees Fish?*, Heritage Found. Commentary, Aug 12, 2022, https://www.heritage.org/courts/commentary/when-are-bees-fish (describing a decision by a California court erroneously concluding that "invertebrates" in that context included terrestrial bugs, specifically bees).
49. This is also one of the lessons of *Loper Bright v. Raimondo*, the case that overruled *Chevron*. Without a clear statutory source for the power to force fisherman to pay the salaries of their federal monitors, no such power existed.
50. *See*, *e.g.*, Adrian Vermeule, Law's Abnegation: From Law's Empire to the Administrative State 67 (2016) ("Legislative institutions are structurally incapable of supplying policy change at the necessary rates," and the administrative state must therefore rule even if it sacrifices "the quality of policy," "impartiality," and the "very goal of minimizing abuses of power.").
51. *Cf*. Dante Alighieri, The Divine Comedy: Purgatorio 16:82 (Robert M. Durling ed. & trans., 2003) ("Thus, if the present world has gone astray, in you is the cause, in you let it be sought….").