Intro: Welcome to a hard look, the Administrative Law review podcast from the Washington College of Law. We'll discuss how administrative law impacts your daily life from regulatory actions by agencies and the litigation over them to the balance of power among branches of the government.

This is A Hard Look.

Bennett Nuss (BN): Hello and welcome to another episode of a hard look, an administrative law podcast brought to you by the Administrative Law Review, Washington College of Law and the American Bar Association.

My name is Bennett, The Senior Technology Editor of the Administrative Law Review and supporting me in the booth as always is the irrepressible Anthony Aviza, a large technology editor.Before we begin, please note that the positions, views and ideas advanced by speakers on this podcast are representative of themselves alone. Their positions cannot be fairly attributed to the administrative law review, the Washington College of Law, the American Bar Association, nor any other organization to which the speakers may be affiliated.

This goes especially for yours truly, as I will be playing quite a bit of devil's advocate in this episode in the seminal case of Marbury v Madison, which cemented the once informal concept of judicial review and the supremacy of the Federal Supreme Court, Chief Justice Marshall wrote the following quote: “It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule.”

In the two centuries following this groundbreaking case, the Supreme Court has utilized its independence and appellate powers to review countless cases that have come before it.

However, it is this very independence to exercise the court's own judgment that some critics levy as a constitutional complaint against Chevron deference, arguing that the requirement to defer to agencies is an unconstitutional abdication of judicial responsibilities and contributes to an imbalance of power among the allegedly coequal branches of government favoring the executive over the judicial or legislative.

This critique of Chevron as unconstitutional for this reason. among many, has come to the Supreme Court in this current term. In the case of Loper Bright Enterprises versus Raimondo.

This single case has the potential to change the very nature of administrative law as we know it, potentially requiring Congress to shift its approach to legislating the executive in the promulgation of delegated powers and the courts and how they interpret agency action.

But above all, should Chevron be eliminated, such a disappearance will require our much beleaguered law professors to rewrite their textbooks and lesson plans, but it will view the administrative law reviews pages for years to come–so that's a plus.

If you haven't listened to our episode on Major Questions Doctrine with Professor Cohen from a few months back, I'd encourage you to do so now. It should provide a good foundation for our discussion here, although we will do our best to quickly recap in this episode here to discuss the intricacies of this case is Mr. Daniel Sullivan.

Mr. Sullivan is a partner at the New York based law firm Holwell Shuster and Goldberg.

After graduating with high honors from the University of Chicago Law School, Mr. Sullivan clerked for the honorable Diarmuid O'Scanlain of the US Court of Appeals for the Ninth Circuit for a year before clerking for the late justice Antonin Scalia during October term 2009, meaning from summer 2009 to summer 2010. Since joining Holwell Shuster and Goldberg in 2014, M. Sullivan's work has focused mainly on complex commercial litigation, constitutional litigation and appeals in state and federal courts around the country.

Mr. Sullivan has been named to multiple law journals hot lists for rising attorneys and trail blazers and routinely engages in complex appellate litigation across the United States.

Mr Sullivan is joining us today because he is the council of record for the amicus brief in support of respondents filed by administrative and federal regulatory law professors representing professors Andrew Popper, William Araiza, Marshall Berger, William Buzbee, Samuel Estreicher, David Noll, Peter Strauss and Sidney Shapiro.

Thanks for coming onto the podcast.

Daniel Sullivan (DS): Well, thank you, Bennett. It's my pleasure to be on with you today. I should add just at the outset that as you, as you said, I submitted an amicus brief on behalf of some professors.I am here speaking for myself, though I represent those, those, those a Miki, I'm not speaking for them and, and when I say it shouldn't be attributed to them.

BN: All right. So moving kind of straight into the question central to *Loper Bright* is *Chevron* deference, which is the general method by which courts review an agency interpretation of a statute if it gets challenged in court. So as a brief recap for the audience who may be unaware of the specifics, can you briefly explain Chevron deference?

DS: Surely. So this may take some of some of your audience back to law school, but Chevron of course, is named for, for the case, as you noted, *Chevron v. National Resources Defense Council* from 1984. It's a doctrine in administrative law that governs how a court is supposed to review an agency's interpretation of a statute that the agency is charged with administering.

So for example, the EPA is charged with administering the Clean Air Act and in doing so, the agency might promulgate a rule to interpret the statute. In *Chevron* itself, the EPA had issued a rule interpreting what the statute meant by referring to pollution limits on so-called stationary sources, stationary source was a statutory term. And what the doctrine essentially says is that a court first has to decide if the statute is ambiguous or indeterminate or silent on, on the question at hand.

If Congress spoke clearly, then the court must apply the statutory meaning period without deference to what the agency's interpretation is. Right? What Congress says goes, that's step one of Chevron. If the statute is ambiguous and we can talk more about exactly what that means. It's an important question, then the court must consider whether the agency's construction of the statute is a reasonable one. And if it is reasonable, the court refers to the, to the agency's interpretation. That's step two.

So that's the classical statement of *Chevron's* two steps. Since *Chevron* itself, the Supreme Court has added in a case called *United States v. Mead*, a prior step which they call step zero. And in that step, the court has to first decide if the agency interpretation is the kind of interpretation that Congress has allowed the agency to make with the force of law.

Among other things, the agency has to be interpreting the statute it's charged with administering, and the agency must be speaking through a recognized mode of interpretation, like notice and comment, rule making and the like, rather than in some less formal way, like an agency statement in a brief before the Court.

So there are various other adjustments to the doctrine over the years that have been made. But what I've said is kind of the standard account.

BN: As a bit of a callback to earlier this season. According to Professor Cohen on that episode, he argued that *Chevron* deference was merely a formalization of how courts were approaching administrative review cases before its formalization in Chevron v. NRDC. What do you make of this argument, and do you think it provides some basis for protecting Chevron in the current day?

DS: Well, yeah, so it's a good question as Professor Cohen emphasized in that earlier episode, which was excellent, by the way, just Steve's opinion for the Court in *Chevron* itself did not suggest that the Court thought it was blazing a new trail as opposed to recapitulating the way that courts had analyzed administrative interpretations of statutes before Chevron.

It's sort of commonplace to say that the court didn't, that its decision did not get a lot of press and it wasn't a herald thing at the time. So, I've not undertaken an exhaustive review of Pre-*Chevron* case law to compare, you know, the Pre-Chevron with the Post-Chevron analysis.

I'm just a humble practitioner. I know there's been some literature I gather, as you probably know, Professor Thomas Merrill has a book in which he says that some academics have done empirical work on the rates at which courts accepted or rejected the agency interpretations, you know, either pre or post *Chevron*, though it does not tell me that that analysis has been, you know, exhaustive or comprehensive. And some covered some periods, some covered other periods that may be taking different rubrics.

And you have to be careful about, you know, selection bias in so far as the Court might not apply Chevron at all if it's going to reject the interpretation of the agency. But I think the general sense is that the agency does somewhat better under Chevron, but as I said, I don't know that the analysis is complete on that question. As far as whether it furnishes an argument to protect Chevron.

Now, I think, you know, maybe, maybe not. Obviously, if Chevron mirrored the historical practice and that practice was theoretically well grounded, it would tend to suggest that Chevron is not a wrong term. On the other hand, you know, Chevron has developed its own life since 1984. And, you know, as a doctrine, it has to be evaluated on its own terms as a matter of first principles.

Yeah, I, I also think that, you know, especially compared with, for example, the 1940's and 50's when the courts seriously confronted the legal questions arising out of the growth of the administrative state for purposes of judicial review of agency action.

And I should say I'm not, I'm not suggesting courts didn't address the issues before, just that it became more pressing after the New Deal. But as compared with that era, in particular, you know, judicial interpretation of statutes now is rather more rigorous.

You know, under the influence of textualism and similar interpreted methodologies, courts are better able to confidently parse statutory language that might have in an earlier era caused courts to sort of throw up their hands. So that's right. And, and all I have is a hunch. It's not an empirically grounded view. But if that's right, then you have to consider Chevron in light of the modern approach to statutory interpretation that the Supreme Court uses today.

BN: Right, and so that kind of question regarding whether *Chevron* should be at the center of agency interpretation is kind of where *Loper Bright* is coming from. So, while not necessarily central to the discussion of *Chevron* and its propriety, where is the *Loper Bright* case coming from on a factual basis?

DS: Sure. So the case is about everybody's favorite statute, the Magnuson Stevens Fishery Conservation and Management Act of 1976. Yeah, it's, it's everyone knows that it's at 16 USC § 1801-1884 if anybody's taking notes at home. So the statute permits the National Marine Fisheries Service, the NMFS to develop management plans, hatchery and fishery management plans, and that's done in consultation with Regional Advisory councils.

These fishery management plans have certain requirements. They must include measures necessary and appropriate for the conservation and management of the fishery. And the proposing council may include specific conservation and management measures that are enumerated in the statute as well as any other measures determined to be necessary and appropriate. Specifically, plans the statute provides may require, this is just a quote, "may require that one or more observers be carried on board a vessel for the purpose of collecting data necessary for the conservation and management of the fishery." Close quote.

Now, the particulars of the Loper Bright case involve the Atlantic Herring fishery. Again, I know nothing gets the legal juices flowing like a good herring fishery. But in, you know, in seriousness, the case has huge implications for the good people who make a living from commercial fishing. So it's, it's a big deal economically.

In consultation with the Regional Council, the NMF has adopted a plan where about 50% of herring trips in the Atlantic fishery would require monitors as we saw the statute says that plans may require the carrying of monitors. But in certain cases, the cost of those monitors will be paid, paid for by the owners

of the vessel. And that's really the rub, those costs are meaningful. The aggregate costs to the industry, this is according to the briefing, are estimated at $710 a day or approximately 20% of annual returns. So, like I said, it's a big deal for the people involved.

Now in the Magnuson Stevens Act, and I, forgive me, I'm gonna go again a little bit in a little bit of depth in the statute so that it helps to sort of frame the problem and the case as it came to the Supreme Court. But in the statute, Congress provided specifically for three circumstances in which fishing vessels could or must be required to pay the costs of federally mandated observers.

So I'll just talk through them quickly. The first is that it applies to the North Pacific Council which as you might expect, this encompasses Alaska, Washington and Oregon, not the Atlantic carrying fishery, and that council may establish a plan that requires observers. And it may establish a system of fees, "to pay for the cost of implementing the plan."

Those fees are capped and they are "not to exceed 2% of the unprocessed vessel value of fish and shellfish harvested." So there's a 2% cap.

That's the first circumstance. The second circumstance applies to what are called limited access privilege programs, which are programs where persons are allowed to harvest a specific quantity of the total allowable catch for that fishery. And the MSA provides that regional councils again, shall provide the system for you know, enforcement, monitoring and the like. And it "shall provide for a program of fees paid by limited access privilege holders that will cover the costs of the management, data collection analysis and enforcement activities."

Again, those fees are capped. So shall not exceed 3% of the vessel value of fish harvested under any such program. So that's the second one.

So you've got the North Pacific Council out in the Northwest, you've got limited access programs and the third one has to do with foreign fishing vessels. It says that a United States observer will be stationed aboard such vessels when they're engaged in fishing within a particular area and it "shall impose a surcharge in an amount sufficient to cover the costs of providing that observer aboard the vessel."

And then there are some other ancillary provisions there. But bottom line is that the NMFS is supposed to establish a schedule of fees that will be paid by the owners of the owners and operators of these foreign fishing vessels for the United States observers. You will note as I was saying, none of these particular regimes applies to the Atlantic fishery. That's at issue in *Loper Bright*.

OK. So the NMFS rule regarding the compensation for observers gets challenged in the DC Circuit. DC Circuit upholds the regulation over a dissent by Judge Walker. And the majority opinion held that there was, as the court put it, "no wholly unambiguous answer", at step one of Chevron, right. So it says that the agency makes it past step one and then finds the regulation reasonable at step two.

Now, Judge Walker's dissent emphasized that the statute was silent, and in particular, although the agencies allowed to require vessels to carry observers, it didn't say anything about except in the three

situations that I mentioned about paying their costs. So, from Judge Walker's perspective, with no affirmative evidence that Congress had authorized the agency to fill that statutory silence in the manner that has done here, the agency should, should lose so that tease the case up for the Supreme Court and, and the petition for certain.

BN: So, while the DC Circuit opinion specifically had to do with Chevron and how they were looking at NMFS, and again, that Chevron issue is being appealed to the Supreme Court, is there anything within these case facts that might give the court a way out from deciding the case? May it be that the facts are too unique or some other hurricane reason that they can conjure?

DS: Sure, you know, sometimes the court looks, looks for a way out of things.Yeah, it's interesting in this, in this case, there were two questions presented in the petition for certiorari. The first was really specific to the Magnus and Stevens Act. And that was whether the statute specifically that statute grants the NMFS the power to do what it did. Second question presented was whether the court should either overrule Chevron, which of course is what we're here to talk about or clarify that statutory silence concerning powers expressly but narrowly granted in one part of the statute, does not constitute the kind of ambiguity that the agency can fill with respect to that same power in a different part of the statute.

So the court did not grant the petition for certiorari on question one, the Magnus and Stevens specific question, just on question two. So, you might think that the court, you know, really wants to reach the Chevron question and that certainly, you know, obviously is a possibility in the briefing though the challengers do offer the narrower way out previewed in the sort of subpart of question two. And they asked the court even if it does not overrule Chevron to hold that the statutory silence here does not allow the agency to do what the NMFS did.

So, you know, it's not specific to this statute, it's specific that would be specific to the kind of silence that exists here. They say that where Congress expressly conveyed what they describe as an extraordinary power in certain parts of the statute to force fishing vessels to pay the salaries of observers and cabin that power in certain respects, right? Remember it's capped et cetera. When that happens, the agency cannot construe the silence as to that same power in another part of the statute as effectively a grant of authority to wield that same power. So, that's essentially Judge Walker's assenting view from the DC circuit.

So, if it sounds familiar that's why it, and, and you know, it raises this sort of the interesting question of what kind of ambiguities in in a statute authorize the agency to fill the gap with its own interpretation, which is a question on which much ink has been spilled including in, in the amicus brief that that I submitted.

BN: And so before looking to the attacks on Chevron Doctrine proper, the petitioners in this case argue that Chevron is not entitled to stare decisis or in normal speak respect as binding precedent. This is somewhat counterintuitive considering that there has been almost 40 years of case law on Chevron proper. But, there is some academic writing on the idea that it's not entitled to stare decisis.

Quoting from a footnote in justice Kavanaugh's partial concurrence in Alan v Milligan from 2023: “unlike ordinary statutory precedents, the court's precedents applying common law statutes and pronouncing the

court's own interpretive methods and principles do not fall within that category of stringent statutory stare decisis." And, while this is merely a footnote from a concurring opinion and not binding law, there's been a series of scholarly works on the topic that seem to find the same way.

So, in your view is stare decisis warranted for Chevron deference, considering that it is a formalized interpreted method.

DS: Yeah, it's a great question. And, and as you say, there's been some academic writing on it and, and it's, it's addressed in the briefs as well. So, you know, I haven't plumbed the depths of all of the theoretical arguments, as I said at the beginning, I'm a humble private practitioner, but I'll offer a few observations for what they're worth.

So in a case called Kaiser v. Wilkie from a few terms ago, and in full disclosure, I submitted an amicus brief on behalf of a largely overlapping group of law professors in that case. In Kaiser, the Supreme Court considered whether to overrule a related administrative law doctrine, the deference doctrine called auer deference after a case called Auer v. Robbins. And in Justice Kagan's decision for the court refusing to overrule Auer and a predecessor case called Seminole Rock.

Justice Kagan noted that stare decisis got strongly against the overruling in that, in that case, I should add that, you know, that the Justice Kagan's opinion for the court, although it didn't overrule our did significantly cut it back so that may or may not be a preview of things to come, but we'll see.

Other interpretive method cases have also received similar stare decisis treatment. In Pearson v. Callahan, the Supreme Court overruled its ill fated qualified immunity misadventure inaugurated by Saucier v. Katz, which held that a court reviewing a qualified immunity defense in a 1983 case,, a constitutional civil rights case had to adhere to a rigid two step procedure.

First consider whether there was a constitutional violation.

And then only after that consider whether the right was clearly established. In Pearson, the court said, no, it's not mandatory. You can do it, but it's not required. And importantly in doing so, the court considered much of the usual stare decisis analysis.

So the bottom line, you know, I think it's, it's likely the court will apply some form of stare decisis to Chevron, whether it ultimately overrules it or not. But there are a few caveats to what I just said.

So, you know, Pearson is a funny case to consider because while the court did apply some stare decisis, it, it also essentially said that the saucier rule, which it was overruling, did not have to be badly reasoned or unworkable. It was enough that procedural rule like that was found wanting after meaningful experience with it. That's not much of a thumb on the scales that usually associate with stare decisis so you got to consider the details. Also, it is surely true that interpretive methods like say originalism or textualism or the use or non use of legislative history are not holdings that command stare decisis effect. It is also true at a minimum that judge made interpretive rules like Chevron or the Saucier rule considered in Pearson, do not receive as much stare decisis weight as interpretations of statutes or even constitutional decisions,

which of course receive a little less weight because Congress can't revise or reject constitutional decisions. But, you know, general cross cutting interpretive methods like the weight.

That command stare decisis effect. It is also true at a minimum that judge made interpretative rules like Chevron or the Saucier rule considered in Pearson do not receive as much stare decisis weight as interpretations of statutes or even constitutional decisions, which of course receive a little less weight because Congress can't revise or reject constitutional decisions.

But you know, general cross cutting interpretive methods like the weight assigned to legislative history or whether to, you know, apply an original method or a purpose driven method or whatever are different than specific judge made rules applicable to a, a discrete class of cases, which is what Chevron is, what Saucier was. So the latter have received at least some stare decisis effect the former so far as as I'm aware, have not.

BN: Taking a different method to potentially protecting Chevron in some form: one can make the argument that agencies have developed an entire infrastructure reliant on Chevron to protect their interpretations from antagonistic judicial scrutiny, if only to keep the country running effectively. Is this kind of institutional reliance interest on Chevron a compelling enough reason for the court to keep the doctrine in place even if we concede for a moment that Chevron may be unconstitutional?

DS: Well, before I answer that, let me just clarify that, you know, Chevron could be wrong and could be overruled for reasons apart from it being unconstitutional. It's a judge made rule of analysis. It might just be wrong because it's not a correct statement of how courts should review agency interpretations of statutes. It might also itself violate the statute. So the petitioner in Loper argues that Chevron violates Section 706 of the Administrative Procedure Act. So just a note of clarification there and then to your question about reliance, interests, you know, I'm not sure that an agency's interest in protecting its interpretations from antagonistic judicial scrutiny is, is kind of a Trump card.

You know, I mean, scrutinizing whether an agency is acting in accordance with the law after all is what courts are supposed to do, whichever administration it is that adopted the role. So the question is really how courts are supposed to do that. The point that the petitioner makes is that in reality, you know, there's not much institutional reliance here because first, right, an agency is not relying on Chevron's step one analysis. Right, step one is designed to weed out agency interpretations that contradict the statute, so if the agency loses it, it's not the possibility of its loss is not, is not something it's relying on. So it's only with respect to the possibility of the agency's interpretation, getting through step two, that there could be reliance. And, you know, I think the difference between when step one is satisfied and when not, which is what determines whether there could be institutional alliance under any theory, that's one of the really kind of vexed questions of administrative law. So, you know, it's not as though an agency can confidently predict or rely upon, you know, whether it's going to get through Chevron or not. So, I don't see a lot of institutional alls necessarily as sort of a formal or logical matter. You know, I'm not a government lawyer. So I can't say what goes on behind the closed doors of agencies and whether they, you know the extent to which they're crafting rules or interpretations and alliance on Chevron sort of in, in practice. But as sort of a logical or theoretical matter, I don't know that that gets you home.

BN: So kind of approaching it from maybe the opposite side of the argument is. So for those in the audience that are not first amendment scholars or practitioners, the United States courts have a test for determining whether or not there's been a violation of the establishment clause called the Lemon Test. However, Lemon is something of a vestigial organ because the court departs from Lemon, constantly.

Justice Scalia even mocked the test remarking that Lemon is treated as binding law only when useful Chevron much in the same vein has been largely ignored at the Supreme Court for the last decade or so and abandoned by some jurisdictions entirely. Considering that there are alternative methods of deciding administrative review cases such as major questions, doctrine and ascendancy should Chevron carry as much weight as Lemon? That being none at all.

DS: Well, you know, Justice Scalia of course said a lot more than that about lemon over the years. I will say the Lemon's demise has been announced yet again. This time perhaps for good, the decision last year in Kennedy versus Bremen in school district, so it's an interesting parallel to draw and not necessarily an optimistic one for the government side, but I think it's a little far fetched. You know, Lemon addressed the kind of dispute that is, first of all, it's much less common if only because agencies are promulgating interpretations all the time. I don't mean to trivialize establishment clause challenges or disputes far from it, but the volume of litigation over agency interpretations is just much greater.

They're different in another important way. So, you know, Lemon offered a supposedly unifying theory of establishment clause jurisprudence. And so when courts stopped using it, that pretty much signaled that the experiment had failed, it took time for the court ultimately to get to what seems to be the definitive burying in Kennedy.

But you know, just by virtue of not being used, you know, Lemon was sort of already a failed experiment. Chevron is, although very important, it's not a sort of unifying theory of all administrative law. It's really a way to address a particular kind of situation, right–what do you do when the statute is indeterminate on the question? But the agency charged with implementing the statute has developed its own interpretation of how the statute applies to that question. So when a court ignores Chevron because it, you know, quote on quote, “ignores Chevron” because it interprets the statute on its own.

All it's saying is that Congress actually did speak to the issue in a way that courts can interpret or construe with their usual tools of judicial construction. That's not necessarily a rebuke of Chevron; it's just a recognition that the problem that addresses maybe doesn't come up as much as one might have been led to believe in law school or by the number of articles about it.

BN: So turning to Chevron itself and calling back to the quote from the introduction from Marbury, the interest in granting the judiciary the power of review was to prevent. In the words of federalist 47 “the accumulation of all powers, legislative executive and judiciary in the same hands.” Judicial review has historically prevented both Congress and the presidency from over extension.

However, critics of Chevron argue that this original stance is impossible with a grant of deference in the case of statutory ambiguity as is provided in Chevron, some have even gone so far as to consider this case

as the antithesis of marbury in its results. What do you make of this argument? And if it is plainly wrong, where does this logic fail?

DS: Well, you know, there is as you're probably aware, there's a famous law review article by Henry Monaghan called *Marbury and the Administrative State* which addresses this question in part, you know, I think she can certainly be used and it has been, it is not supposed to allow for judicial abdication. And I would imagine the court will make that clear whatever it does in Loper Bright, taking back again to what justice Kagan did in Kaiser and, you know, just being aware of the fact, the reality is this, this Supreme Court has certainly at least some serious skeptics of Sharon.

And it's no secret too that the court members of the court have been skeptical of the excesses of the administrative state and frankly, rightly. You know, courts are supposed to ensure that the executive stays within the lines. And of course, the Congress does so as well, but there are matters that courts are not equipped to resolve. And here, I mean, less matters of agency expertise necessarily, but rather matters where Congress has delegated to the agency authority to act. So the brief that I submitted on behalf of my clients basically argued that Chevron is a doctrine of delegation.

If Congress has delegated to the agency, the power to interpret the statute expressly, of course. Right. That's an easy one. The court is bound to respect that assuming the delegation was constitutional. Right.

What Chevron says is that Congress can do the same thing by implication. By leaving a space in the statute that only the agency can fill with its effectively enforcement discretion. Because a court using all of its usual tools of statutory construction simply cannot come up with a principled answer. So if the statute says that railroad shipping rates must be just and reasonable, right? How is the court supposed to interpret that? There will be some play in the joints sort of inevitably in the agency charged with implementing the statute, you know, can fill that by setting some detail but reasonable rules to govern whatever the question is.

So under that view of the matter, the court reviewing the agency action is still ensuring that the executive doesn't go beyond the bounds of the delegation Congress has made. So in that sense, it is still saying what the law is, but what the law is, is a limited delegation to the agency to, to fill up the details.

But the agency cannot fill up the space in the statute by, for example, making up a whole new statute and consistent with the one that Congress wrote, it can't interpret part A of the statute in a way that makes nonsense of part B or contradicts part B. So the court is still doing judicial work and the agency cannot arrogate to itself legislative work, at least under, under, one view of Chevron or, you know, a properly cabined view of Chevron.

BN: Critics of Chevron further cite that statutory interpretation is a power reserved to the judiciary in that neither the legislature nor the executive really have the constitutional grant of statutory interpretation where Congress may implement or revise laws and the executive has the sole power to enact those laws interpretation is reserved for the judiciary via Marbury. So the kind of fundamental question is why should the executive have the power of interpretation in the case of ambiguity if it is not constitutionally

delegated? And wouldn't this be the evidence of Chevron being wrongly decided as it infringes on the power of the judiciary itself?

DS: Yeah, I think my previous answer gets at this, you know, the outset, right, if it is, you know, the caveat in your question is if it is not constitutionally delegated, right? So in a sense, we, if there is a constitutional delegation, that's a precondition for Chevron, but much depends on what kinds of ambiguities, agencies are allowed to resolve. In other words, what kinds of ambiguities? One takes as an implicit delegation of authority to the agency to resolve if it's the kind of ambiguity that courts ordinarily resolve with their usual tools of construction, right? If, then the court ought to do that at step one.

And the Supreme Court has said as much, if one takes that seriously, then Chevron is really for areas where the statute is,, sort of meaningfully in determinate. In other words, the court cannot answer how the statute applies in a particular situation as a matter of judicial construction. Now, you know, there are a lot of decisions on Chevron and not everyone takes exactly that tack. And you know, so it may be if that's the way the Supreme Court goes and knows whether it will or won't that there's room to, to clarify that. And rein in some of the maybe more extravagant conceptions of the doctrine. But if you look at it that way, it, it, it kind of solves the problem that you post.

BN: Going back to Marbury again, is that some argue that the mandated job of any judge as provided in Marbury, the constitution and by kind of notions of common law is that it's their role to be a neutral adjudicator between parties. And to some extent, we recognize this by having judges recuse themselves when hearing a case that may provide a conflict of interest, for example, isn't compelling a judge to have deference for one side in a legal dispute as Chevron necessitates once you reach step two up and what would be a normal process of law? Meaning more specifically doesn't Chevron step two necessitate favoring the government over private institutions and people?

DS: Yeah, so it's an interesting question. I mean, you know, I don't, I don't think there's any connection and may not have been suggesting this between Chevron deference and, you know, conflicts of interest or recusal rules, right? The judge has no personal interest here. But again, whether Chevron masks a pernicious bias in favor of the government, sort of systematically is an important and a fair question to ask. But, you know, again, I think if step one is sufficiently rigorous, the doctrine prevents judicial arbitrariness rather than allowing executive aggrandizement. So, you know, and now that, that requires that Chevron be paired with other doctrines that also rein in administrative access, right? You've got a non delegation doctrine which has largely been dormant, but, you know, we'll see in the future; the Major Questions Doctrine, which you mentioned, which fulfills that function in similar doctrines.

BN: So Chevron step two indicates that if the statute is silent or ambiguous, with respect to a specific issue, the question for the court is whether the agency's answer is based on permissible construction of the statute and Justice Kagan and others have indicated that this permissible construction framework for an ambiguous statute is a kind of base rationality analysis. This is not to mention that ambiguity in the realm of Chevron has not been defined to any degree of substantial clarity. Does this framework of permitting considerable extrapolations based on statutory language, create perverse incentives for Congress to both draft and pass laws that are substantially undetailed and unrefined. Thus deferring their responsibilities to a branch of government that's not traditionally entitled to such power in a schoolhouse rock sense.

DS: Yeah. So again, you know, legitimate and important question to ask, you know, I do think that treating Chevron as a kind of Trump card for resolving run of the mill ambiguities would have this kind of risk. And, you know, there's a, like I said earlier, there's a lot of decisions particularly in the courts of appeals on Chevron. I think in Professor Cohen's episode, he was, it was something like, it was in the high hundreds, I think it was a lot of something around there.

BN: Yeah. I think it was a lot of something around there.

DS: But again, you know, it all depends upon what one does that step one and language you quoted is, you know, it's easy to take it out of context and, and make it something like a, you know, an interpretive Trump card on the basis of some of the things that the, that the court has said. But if you look at the holdings of the court, it hasn't itself could have indulged in the, in, in those extravagances of it not much.

So, again, if one says step one requires courts to be able to apply on their usual tools of statutory interpretation to come up with an answer, you know, then, you know, perhaps Congress can gain the process right by using so vague and difficult to apply language that you would often have ambiguity even at step one as I've described it. But, you know, nothing is free in this world, right? You know, Congress would create other problems for itself by doing that.

Criminal and some civil statutes are subject to vagueness challenges, right under Clark v. Martinez. If a civil statute has a criminal application, you interpret it for constitutional purposes according to the standard, you would hold the criminal application to this comes up a lot in the immigration context. And the President Supreme Court is as I said earlier, it's liable to take things like the non delegation doctrine seriously. Admittedly, the last go around we had in Gundy, I think it was a, a term or two ago. I forgot exactly when the court did reject a non delegation challenge, but they were, you know, strong to dissents. And you know, of course, there's always the risk of the court will interpret broad language aggressively and Congress will not end up with what it was hoping for in the first place.

So, you know, I think if you're maybe this is naive of me or insufficiently cynical, but the better course if your Congress is to, is to,, be as precise as the situation allows. I'm not necessarily,, holding my breath for that, but…

BN: But, its slightly a big ask. Yeah. So going back to this kind of non deeg question, improper use of delegator grants is central to fights over Chevron, critics of the doctrine like Justice Kavanaugh wrote in the Harvard law review in 2016, that quote, "Chevron encourages the executive branch with whichever party controls it to be extremely aggressive and seeking to squeeze its policy goals into ill fitting statutory authorizations and restraints." Does Justice Kavanaugh's critique have merit or is there some crucial aspect to Chevron deference that he ignores in this denouncement?

BN: No, I think it's a fair criticism again depending upon how tightly one applies step one. And you know, we have certainly seen aggressive uses of statutory language by administrations of both parties to pursue their policy goals when, when they don't either get a statute through Congress or have any other way of doing it.

BN: And as observers have noted, and even Professor Carroll stated on our previous episode, agencies likely don't think about Chevron extensively when drafting rules and regulations. A skeptic would state that this indicates that agencies act consciously in unconstitutional fashion knowing that they can attempt to defend their actions with the auspices of a favorable review doctrine in Federal Court. And arguably we can seek instances of this within the past few years which have backfired in which the Biden Administration has been rejected at the Supreme Court for acting in ultra vires fashion such as in the COVID-19 eviction, moratorium and student loan forgiveness. However, these cases may just have been alternatively decided if there were sharp adherence to Chevron.

So simply put, has Chevron and administrative deference created a problem of agencies simply acting and then creating ex post facto constitutional justifications for how they act.

DS: Well, the recent experience you say should be a cautionary tale to agencies. You know, there'll always be advantage taking, probably no matter what the rule is. I remember in law school and my tax class, you know, we had a number of went through a number of examples where the IRS would create some rule and then everybody would come up with a way around it and then the IRS would tighten the rule to fix the the loophole type behavior and then the, you know, that would create another loophole. People would figure out a way around that and so on and so forth. So, you know, and courts have to have to police it, but there's, there's some, some amount of whack a mole is probably inevitable. The question is how, you know, effective the, the hammer is.

BN: So kind of broadening the scope of its not just the federal government and its relationship with private entities but also turning to how states interact with the federal government, Governor Brian Kemp of Georgia filed an amicus brief as well for Loper Bright focusing primarily on the effect that Chevron has had on the several states ability to govern themselves, which I want to focus on for a bit. So, first and foremost, he argues that Chevron in tandem with the supremacy clause serves to enforce federal programs onto the states, which in most instances is incontestable under Chevron Step two.

And considering this dynamic, Kemp argues that even small intrusions into areas where states traditionally hold sovereignty is something of a death by paper cuts for the very concept of a state's right to self governance as the federal government continually grows, protected by Chevron like deference. What do you make of that critique? And is it missing something?

DS: Yeah, I think it's a very interesting brief. But it appears to me that it's criticisms which are certainly understandable coming from a governor are really directed at other aspects of the Federal administrative state. So for example, one of the points made in the brief is that federal agencies crowd out state action or further crowd out state action even beyond the scope of what Congress has done, including in violation of a canon of construction well established, requiring a clear statement before a federal statute will be held to preempt an area traditionally reserved to the states.

So, you know, the idea is there's, there's federal statute in place that lacks such a clear statement, the agent, but it's silent or there's a gap in some other way and the agency uses the silence to go even farther than the statute itself explicitly goes. So, you know, if you include substantive canons, assuming they're valid, which is a separate issue. If you include substance canons in the courts, tools of construction, then

the point falls away even on its own terms. But second, the root problem, Governor Kemp's brief is complaining about is the growth of federal legislation into areas once thought reserved to the states. That's an issue with the expansion of the Commerce Clause or maybe an argument for aggressively applying the 10th amendment, but it's not, it's not really about deference to administrative, at least not in the first instance, the argument about the scope of deference to administrative interpretations.

BM: So secondly, Kemp argues that affording Chevron deference to agency interpretations undermines the ability of the states to enact their own policies even if there isn't necessarily federal preemption. He cites specifically to the relationship that the Federal Center for Medicare and Medicaid have with State Medicare Medicaid programs and that very often federal regulations related to those programs caused drastic changes at the state level, which had considerably negative health outcomes for patients. However, these federal regulations which caused harm to these patients were protected by Chevron deference. Even if those regulations were promulgated with the best of intentions when they may have been handled better by state executive agencies instead of federal. So why should federal regulations which intrude on the state executive agency interests be afforded Chevron deference?

DS: Right, so in a sense, I'm not really sure, I understand the critique. If the federal program is constitutional and federalism issues can impact that question, Of course, but if it is constitutional, then the fact that a state, you know, might have done a better job doesn't really factor into how a court would analyze the federal regulation. But to the extent that I do understand the critique, I believe what the brief is saying is that for example, Medicare and Medicaid reimbursement rates end up controlling standards of care that are supposed to be the province of state licensing and other professional regulation, right?

And the reason for that is that doctors or hospitals will do what the federal programs will pay for. So again, I think it's a fair criticism but directed to the wrong target. It's about the growth of federal legislation writ large, perhaps with the 10th amendment overlay on top. Chevron is not causing the problem though. It you know, might seem to make the incursion worse at the margins.

BN: So we've spent a great deal of time kind of addressing or treating the main critiques of Chevron that have been afforded in this case. So turning to a more optimistic or supportive bent, what is the best elevator pitch that you can make to preserve Chevron in anything kind of resembling its current form?

DS: Well, look, I mean, I think properly circumscribed, it's, it's kind of inevitable if Congress passes a statute that inherently calls for discretion in the enforcement or application of the statute then at a certain point, a court will not be able to say whether this or that application is, correct or not. It can say whether it's reasonable, it can say whether it contradicts the statute, it can say whether it exceeds the scope of the delegation that the gap in the statute implies, but, you know, asking courts to, to say whether, you know, rates are just and reasonable, or the like, you know, substitutes a limited degree of executive discretion for judicial arbitrariness. And there will always be statutes that have to do that because, you know, of the nature of the problems that Congress has to address, and I don't even think this is necessarily limited to, you know, the modern world, there are always, innumerable permutations of a problem that Congress is addressing and it's much older than the 20th century that Congress has passed statutes that leave some plan, the joints for agencies to fill in.

BN: Right. So 2024 is shaping up to be a really big year for administrative law generally, but turning specifically to this question, well, I mean, while attempting to prophesize how the court acts is somewhat foolish and generally ends in embarrassment for people that try. I do think it's appropriate to try and tempt fate here. Do you think that the court will reaffirm Chevron, modify it, or kind of salt the earth and eradicate it entirely from American jurisprudence?

DS: Well, it's always exciting to be invited to embarrass myself. But as you say, there's no quicker way to to make a fool of oneself than to try to predict what an appellate court will do. So I it is with, with some trepidation that I, I will offer something. You know, if you put a gun to my head, I suppose I would expect the court to do, you know, something like what it did in Kaiser to limit Chevron but not do away with it. That just so happens to be pretty much what the amicus brief argued. So I'm not sure that's a prediction as much as an expression of hope. But that's what I got, right?

BN: So kind of looking to perhaps a potential result that the court might come to is a middle ground where Chevron deference is only afforded in instances of highly technical and specific aspects of rulemaking which would require agency attention rather than that of Congress, potentially a good outcome of over bright and this increased skepticism of Chevron.

DS: Yeah. So that's sort of the position we argued but not quite. And, and I'll just pause for a second here to say that, you know, and a lot of the academic literature that I have read and I have not read a tremendous amount of it, but there's a and you should probably know this in law school as well, the discussion will often turn on comparative competence of agencies versus courts and agencies being better able to address highly technical matters in which they are expert. And that's one of the defenses of Chevron. But if you think of it in delegation terms, right, it certainly can be the case that a statute leaves open some highly technical matter of application, right? Certainly can be what is a stationary source. And that could be the space the agency is therefore charged with occupying, but statutes can speak to highly technical matters too. So if the statute does so, then there's no room for the agency to do something different. It's just the case that in the sort of way of things more often the matters that are left unsaid or left to the agency tend to be more technical matters, But I mean, look in Loper Bright itself. You know, it's not a, it's not really a technical issue so much, but, you know, we'll see what the outcome of Loper Bright, right?

BN: And so turning to some law professors, doomsday scenario coming out of this case, let's assume that Chevron is entirely done away with what does the American Administrative State even look like most people practicing law now only have experience in a post Chevron universe or a legal system entirely controlled by Chevron or at least where it pervades administrative decisions. So, does this kind of new fangled method of doing agency interpretation potentially indicate a bright future or a dark period of unclear doctrines and endless litigation over every rule that gets put out.

DS: And a lot of law review articles, let’s not forget. It'll be, it'll be a boon.

BN: Yes, we're going to be very busy over the next few years.

DS: So look, obviously, it all depends on what replaces Chevron in that scenario where it gets overruled.

You know, Chevron doctrine is not, it's not always the clearest. Now, there's certainly plenty of litigation and there will be no matter what. But of course, if the court were to do away with Chevron, there would be a period of uncertainty as parties just, but their entropy cannot last long alone forever.

So the question is always what comes after and it's hard for me to believe that the court would simply leave it open to the lower courts to figure out, you know, what highly abstract or general terms in the statute mean? You know, what does it mean to have just and reasonable rates? So there would likely be some scheme of deference on questions like that.

Which of course raises the question of why overall Chevron in the first place as opposed to simply clarify or narrow it as needed. So we'll see whether or not if, if it, it's a court were to overrule Chevron, whether we end up in a place that's not dissimilar to it, at some point after that, and it's something we're definitely gonna have to keep an eye on.

BN: Well, thank you so much for coming onto the podcast, Dan, we really appreciate it.

DS: My pleasure. Thank you very much Bennett

BN: And if you want further reading on Chevron, Loper Bright, or anything else related to this topic, you can find some recommended reading in the description of this episode. Until next time, my name is Bennett Nuss and this has been another episode of A Hard Look brought to you by the Administrative Law Review. We'll see you next time.