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Fun with Administrative Law: A Game for Lawyers and Judges

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FUN WITH ADMINISTRATIVE LAW: A GAME FOR LAWYERS AND JUDGES

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The practice of law is not a game. Administrative law in particular can implicate important issues that impact people's health, safety, and welfare and change business' profitability or even viability.[1] Nonetheless, it can *seem* like a game. This is because courts rarely explain administrative law rulings in terms of the public purposes and policies at issue in lawsuits. Instead, the courts' administrative law opinions tend to turn on arcane interpretive doctrines with silly names, such as the "*Chevron* two-step"[2] or "*Chevron* step zero."[3] To advance doctrinal arguments, advocates and courts engage in linguistic debates that resemble a smokescreen—tending to obscure the real issues.[4] Grammatical arguments about things like the "rule of the last antecedent" abound, and they rarely serve to make clear language any clearer, or to clarify ambiguous language.[5] At its worst, this type of analysis frustrates

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1. *See, e.g.*, Corrosion Proof Fittings v. Envtl. Prot. Agency, 947 F.2d 1201, 1208 (5th Cir. 1991) (vacating a "staged ban of most commercial uses of asbestos" that EPA based on a finding "that asbestos constituted an unreasonable risk to health and the environment."). Dean Ian Holloway argues:

> It can be fun for our colleagues to poke fun at administrative law. And even the most zealous scholar in our field is forced to admit that the questions with which we occupy ourselves can often seem highly arcane. But I tell students that, in fact, administrative law is probably one of the two or three most important courses they will take in law school. . . . [T]he tentacles of the administrative state still reach so deeply into our day-to-day lives. . . . [Further,] the rights enshrined in the corpus of administrative law amount to a right to be taken seriously by the government, which in a democratic state is the most important civil right of all.

Ian Holloway, *"A Bona Fide Attempt": Chief Justice Sir Owen Dixon and the Policy of Deference to Administrative Expertise in the High Court of Australia*, 54 ADMIN. L. REV. 687, 697-98 (2002).

2. *See* Hearth, Patio & Barbecue Ass'n v. Dep't of Energy, 706 F.3d 499, 503 (D.C. Cir. 2013). For a summary of the *Chevron* two-step test, see *infra* notes 35-38 and accompanying text.

3. Matadin v. Mukasey, 546 F.3d 85, 93 (2d Cir. 2008) (Walker, J., concurring in the judgment) (internal quotation marks omitted) (citing Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 836 (2001); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 191 (2006)).

4. *See* Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 111 (2007) (Scalia, J., dissenting) (accusing the majority of laying down a "smokescreen").

5. *See* Barnhart v. Thomas, 540 U.S. 20, 26 (2003) (internal quotation marks omitted). In *Barnhart*, the Court determined that it is reasonable to deny disability benefits to people whose disability prevents them from working at any available job based on the "'rule of the last antecedent,' according to which a limiting clause or phrase (here, the relative

one goal of the requirement of reasoned decisionmaking: preventing agency officials "from cowering behind bureaucratic mumbo-jumbo."[6] In this context, it is not surprising to see courts treat legislative goals and public policy as all but irrelevant to their decisions.[7] Perhaps because much of the popula-

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clause 'which exists in the national economy') should ordinarily be read as modifying only the noun or phrase that it immediately follows (here, 'any other kind of substantial gainful work')." *Id.* Lengthy analyses that purport to shed light on whether a statutory phrase is or is not ambiguous are almost inherently suspect. *See, e.g.*, Zuni Pub. Sch. Dist. No. 89, 550 U.S. at 93-98 (providing a more-than-ten-paragraph analysis to find ambiguity in the "literal language" of a short statutory phrase); Dole v. United Steelworkers of Am., 494 U.S. 26, 43 (1990) (White, J., dissenting) (complaining that the majority required "more than 10 pages" to find that a statutory provision was "clear and unambiguous"); *cf*. Stern v. Marshall, 131 S. Ct. 2594, 2621 (2011) (Scalia, J., concurring) ("The sheer surfeit of factors that the Court was required to consider in this case should arouse the suspicion that something is seriously amiss with our jurisprudence in this area."). Despite the masterful obfuscation of the *Zuni* majority's "literal language" analysis, Justice Stevens suggested "a more direct route to the Court's patently correct conclusion [that the agency's regulation was consistent with congressional intent]," arguing that a "policy-driven interpretation" is appropriate as long as the "driving policy is faithful to the intent of Congress (or, as in this case, aims only to give effect to such intent)—which it must be if it is to override a strict interpretation of the text—[in which case] the decision is also a correct performance of the judicial function." 550 U.S. at 105-06 (Stevens, J., concurring).

6. *See* Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin., 956 F.2d 321, 327 (D.C. Cir. 1992).

7. *See* Friends of the Everglades v. S. Fla. Water Mgmt. Dist., 570 F.3d 1210, 1227 (11th Cir. 2009) (deferring to an interpretation which creates a regulatory gap that "may seem inconsistent with the lofty goals of the Clean Water Act" because it is "no more so [i.e., inconsistent with these lofty goals]" than to allow other gaps in coverage that "we know the Act does."). The court essentially threw up its hands at the prospect of ever understanding statutory purposes, explaining that:

> [T]he legislative process serves as a melting pot of competing interests and a face-off of battling factions. What emerges from the conflict to become the enactment is often less pure than the preamble promises. The provisions of legislation reflect compromises cobbled together by competing political forces and compromise is the enemy of single-mindedness.

Id.

The *Friends of the Everglades* court cited *In re Hedrick*, 524 F.3d 1175, 1188 (11th Cir. 2008), for the proposition that courts "interpret and apply statutes, not congressional purposes," and *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998), for the recognition that "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which [courts] are governed."

In *Hazardous Waste Treatment Council v. Envtl. Prot. Agency*, 886 F.2d 355, 362-63 (D.C. Cir. 1989), the court upheld a regulation that would sometimes require companies to treat hazardous waste to levels *beyond* drinking water standards before placing that waste in a hazardous-waste landfill. In other words, waste would sometimes have to be cleaner than water suitable for drinking *before* it could be placed in a landfill. Noting, *inter alia*, that EPA considers cost when setting drinking water standards but not when developing the disposal-in-a-landfill standards at issue, the court deferred to an interpretation that, on its face, appears to defy common sense.

tion has already written lawyers off as idiots and leeches,[8] there is little public outrage at the spectacle of courts resolving important public issues in terms that only lawyers can understand.[9] And even lawyers do not necessarily take these doctrines seriously.[10]

The ideas that animate administrative law jargon are far from nonsensical, although they tend to elevate the question of "turf" to a more prominent role in judicial decisionmaking than might be desirable. But the "turf" issue is important: When the legislative meaning of regulatory legislation is in dispute, "Who [d]ecides?"[11] The courts, whose "province and duty [is] to say what the law is"?[12] Or agencies, to which Congress has arguably "delegated . . . the authority to interpret [legislative] ambiguities with the force of law"?[13] Understandably, some judges do not trust agency bureaucrats to advance congressional policies without relatively strict supervision, warning

8. *Cf.* Wilson v. Washington, 138 F.3d 647, 650 (7th Cir. 1998) ("Only lawyers would ignore all common sense and dispute the meaning of 'the.'"); David Barnhizer, *Abandoning an "Unethical" System of Legal Ethics*, 2012 MICH. ST. L. REV. 347, 349 (2012) ("At this point in American history, lawyers seem to be the only ones who think well of their profession."); Jonathan J. Lerner, *Putting the "Civil" Back in Civil Litigation*, N.Y. ST. B.A.J., Mar.-Apr. 2009, at 33, 33 ("[U]nflattering associations with vile creatures such as bloodsucking leeches seem reserved for lawyers . . .").

9. *See* Tom Leahy, *This Year's Charge! For Section Officers*, 81 ILL. B.J. 348, 348 (1993) (evoking "the faces of the public who mistrust and distrust our profession," the author states that these "are faces of ordinary people (probably a lot of our own relatives!) who believe the legal profession was made by lawyers and for lawyers, and that only lawyers can understand and work within it."); *see also* LAWRENCE M. SOLAN, THE LANGUAGE OF JUDGES 6-7 (1993) (suggesting that judicial use of some "linguistic principles to justify their decisions, without any explanation of why one principle was chosen instead of another" can result in "a perceived lack of candor").

10. *See* Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 97 (2011) ("I now share the view of many scholars that courts will never announce a doctrine that cannot accommodate the powerful tendency of judges and Justices to act in ways that are consistent with their strongly held political and ideological perspectives.").

11. Sierra Club v. Envtl. Prot. Agency, 536 F.3d 673, 681 (2008) (Kavanaugh, J., dissenting); *see also* E. Donald Elliott, Chevron *Matters: How the* Chevron *Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 VILL. ENVTL. L.J. 1, 4 (2005) ("*Chevron* and its progeny created a fundamental change in the rules of the power struggle between the courts and executive agencies.").

12. Marbury v. Madison, 5 U.S. 137, 177 (1803); *see also* Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring in the judgment) (stating that, "[h]eedless of the original design of the APA, [courts] have developed an elaborate law of deference" which tasks courts with deciding "whether the law means what the agency says it means.").

13. City of Arlington, Texas v. Fed. Commc'ns Comm'n, 133 S. Ct. 1863, 1880 (2013) (internal quotation marks and citations omitted). Justice Scalia has explained his view that some court discussion of delegation is really about "a fictional, presumed intent [to delegate, which] operates principally as a background rule of law against which Congress can legislate."

of "the danger posed by the growing power of the administrative state."[14] Bureaucrats, left to their own devices, may become subject to "capture"[15] and "hubris."[16] But other judges do not trust their comrades on the bench. In this view, judges—if afforded too much interpretive latitude—are likely to end up imposing their own policies as law, since even "[i]ntellectual honesty does not exclude a blinding intellectual bias."[17] Because neither bureaucrats nor judges are inherently trustworthy,[18] these differences seem unlikely to be resolved soon. But to a large degree, the differences are papered over by confining interpretative analyses to the famous *Chevron* doctrine, which at key points employs vague language that can support conflicting views.[19] Nonetheless, a Supreme Court majority purports to believe

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Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (1989).

14. City of Arlington, 133 S. Ct. at 1879 (Roberts, J., dissenting).

15. "'Agency capture,' as explained by legal scholars, is the undesirable scenario where the regulated industry gains influence over the regulators, and the regulators end up serving the interests of the industry, rather than the general public." Wood v. Gen. Motors Corp., 865 F.2d 395, 418 (1st Cir. 1988) (citing John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 724-26 (1986); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1684-87, 1713-15 (1975)).

16. *See, e.g.*, Sierra Club v. Envtl. Prot. Agency, 311 F.3d 853, 861 (7th Cir. 2002) ("It is not the EPA's prerogative to disregard statutory limitations on its discretion because it concludes that other remedies it has created out of whole cloth are better."); Brungart v. BellSouth Telecomms., Inc., 231 F.3d 791, 797 (11th Cir. 2000) ("The rule of law in general, and separation of powers principles in particular, require that . . . administrative hubris be reined in, and that the task of improving the basic provisions of statutes be left to the same body that wrote them in the first place."); Se. Minerals, Inc. v. Harris, 622 F.2d 758, 761, 767 (5th Cir. 1980) (condemning "bureaucratic hubris that confuses abuse of power with reason").

17. Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 116-17 (2007) (Scalia, J., dissenting) (noting that "once one departs from 'strict interpretation of the text' . . . fidelity to the intent of Congress is a chancy thing" and that "what judges believe Congress 'meant' (apart from the text) has a disturbing but entirely unsurprising tendency to be whatever judges think Congress *must* have meant, *i.e.*, should have meant.").

18. *See, e.g.*, Bob Warren, *Slidell City Council Takes Exception to N.O. Inspector General's Comments*, NEW ORLEANS TIMES-PICAYUNE, Sept. 17, 2013 (reporting on elected officials' outrage over the New Orleans Inspector General's suggestion that "the world is full of 'thieves and liars' and that some in that class are attracted to government work.").

19. *See* Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 781, 784 (2010) ("*Chevron*'s multiple meanings make analysis of *Chevron* very difficult."); Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 750 (1995) (noting that the Supreme Court "has not applied the *Chevron* test in a consistent manner"); W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 112 (1991) (Stevens, J., dissenting) (arguing that "the Court has vacillated between a purely literal approach to the task of statutory interpretation and an approach that seeks

that the *Chevron* doctrine stands between relative predictability and "chaos."[20]

Does administrative law doctrine offer predictability?[21] Well—it is undeniable that the doctrine embodies and reinforces a long-standing[22] judicial reluctance to lightly dismiss the interpretations of the agencies that Congress has charged with implementing regulatory programs.[23] This is no small thing; it means at minimum that the government has an advantage in complicated or confusing cases. The more administrative law cases resemble "scary math problem[s],"[24] the more likely judges are to defer.[25] But aside

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guidance from historical context, legislative history, and prior cases identifying the purpose that motivated the legislation").

20. City of Arlington, Texas v. Fed. Commc'ns Comm'n, 133 S. Ct. 1863, 1874 (2013).

21. Sometimes it clearly does. Like any category of law, administrative law contains its fair share of reasonably straightforward rules. For example, courts presume that administrative decisions not to bring enforcement actions are "committed to agency discretion by law" and therefore unreviewable under the Administrative Procedure Act. Heckler v. Chaney, 470 U.S. 821, 834-35 (1985) (interpreting 5 U.S.C. § 701(a)(2)). Similarly, "any waiver of the National Government's sovereign immunity must be unequivocal." Dep't of Energy v. Ohio, 503 U.S. 607, 615 (1992) (citations omitted).

22. *See, e.g.*, United States v. Moore, 95 U.S. 760, 762-63 (1877) ("The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons."); Nat'l Muffler Dealers Ass'n, Inc. v. United States, 440 U.S. 472, 476-77 (1979) (stating that when a term is "so general . . . as to render an interpretive regulation appropriate," the court "customarily defers to the regulation, which, if found to implement the congressional mandate in some reasonable manner, must be upheld") (citations and internal quotation marks omitted); *see also* David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. Rev. 921, 955 (1992) (noting that a cannon which "militates in favor of accepting an agency's construction of a statute as long as the statute is sufficiently ambiguous to admit of that construction" dates "at least as far back as the New Deal").

23. *See* Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 Duke L.J. 984, 1036 (1990) (finding "a dramatic decrease in substantive law remands following *Chevron*, and that the number of remands in other [e.g., procedural] categories remained constant").

24. *See* Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 111 (2007) (Scalia, J., dissenting) ("This case is not a scary math problem; it is a straightforward matter of statutory interpretation.").

25. *See* Gary Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the* Chevron *Doctrine*, 65 Admin. L. Rev. 1, 73 (2013) ("Step two of *Chevron* remains a mystery, beyond the observation that agencies usually win when they get to it.").

Acronyms can go a long way toward draining legal arguments of human interest and helping them sound like "scary math problems." *See* Zuni Pub. Sch. Dist., 550 U.S. at 111 (Scalia, J., dissenting). For example, for a government lawyer defending an (hypothetical) agency approval of a highway project that might disproportionately affect members of a minority group, why use the term "environmental justice" more than necessary? The phrase can be quickly defined as "EJ"—which has a bloodless, non-threatening tone to it. *See, e.g.*, Latin Ams. for Soc. & Econ. Dev. v. Fed. Highway Admin., 858 F. Supp. 2d 839, 860 (E.D. Mich. 2012) ("Putting aside whether LASED has the right to mount an EJ challenge under

from this bias toward deference to government decisions, it is questionable whether administrative law doctrine is often outcome-determinative.[26] Even judges with carefully constructed philosophies about the doctrine have a tendency to ignore those philosophies when the result is important enough.[27] Further, U.S. Supreme Court precedent supports the idea that courts may abandon deference when they deem the issues sufficiently important.[28] Specifically, the Court expects Congress to "speak clearly [as opposed to ambiguously] if it wishes to assign to an agency decisions of vast

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NEPA, the argument that the FHWA 'predetermined' the location of the DRIC is not borne out by the AR."). Similarly, there may be little need to refer repeatedly to a "highway" running through someone's neighborhood, which might sound distressingly real. Why not call it a "LULU," and move the case to a higher level of abstraction? *See, e.g.*, Lydia B. Duff, *Beyond Environmental LULUs: Thoughts of an Urban Environmental Lawyer*, 5 MD. J. CONTEMP. LEGAL ISSUES 49, 49 (1994). From the government's perspective, you may not wish the facts and equities to distract the court from principles of deference "to the 'informed discretion' of deciding agencies." *See, e.g.*, Latin Ams. for Soc. & Econ. Dev., 858 F. Supp. 2d at 849 (citations omitted). The flip side of course, is that lawyers who challenge the government should seek to tell their clients' stories clearly and in English (without ignoring the administrative law principles that the court will need to justify a result). For example, if you bring a lawsuit to protect asthmatic children from air pollution, would you rather talk about "health protection standards" or "NAAQS"? *Cf., e.g.*, Mississippi v. Envtl. Prot. Agency, 744 F.3d 1334, 1341 (D.C. Cir. 2013) (discussing the stringency of "NAAQS").

26. *See, e.g.*, Beermann, *supra* note 19, at 783 ("*Chevron* is so pliable that courts applying it can still reach any desired result . . . ."); Scalia, *supra* note 13, at 521 (explaining that because [Justice Scalia] usually finds statutes clear from their text and their "relationship with other laws," it is "relatively rare that *Chevron* will require [him] to accept an interpretation which, though reasonable, [he] would not personally adopt.").

27. Justice Scalia, for example, is the U.S. Supreme Court's most eloquent champion of deference to "authoritative" agency interpretations, advocating for deference even to the interpretations that the U.S. Justice Department advances in briefs on behalf of client agencies. United States v. Mead Corp., 533 U.S. 218, 259 n.6 (2001) (Scalia, J., dissenting). Yet Justice Scalia joined the majority in *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000), denying deference to the Federal Drug Administration's interpretation of the statutory term "drug" as broad enough to include tobacco when the statute defined that term to include "articles (other than food) intended to affect the structure or any function of the body," 529 U.S. at 126. The Court employed a wide-ranging analysis to interpret statutory words "in their context," including the context of "other Acts" and "common sense," and to construe the law "as a symmetrical and coherent regulatory scheme." 529 U.S. at 132-33 (internal quotation marks and citations omitted).

28. See Brown & Williamson Tobacco Corp., 529 U.S. at 159 ("In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.") (citing Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986), for the proposition that courts "may also ask whether the legal question is an important one."); *id.* at 160 ("Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.").

'economic and political significance.'"[29] And as the Seventh Circuit noted in a different context: "'significance' often lies in the eye of the beholder."[30]

If administrative law doctrines do not actually determine outcomes, they nonetheless create a risk of confusing advocates and causing them to give short-shrift to the persuasive power of their clients' stories and the equities that underlie their cases.[31] Experienced lawyers know, however, not to put all of their eggs in the basket of dry, administrative law doctrine.[32] This can be verified by looking behind the judicial rulings and reading the briefs in administrative law cases. While good lawyers are careful to show courts how administrative law principles can be used to express a ruling in their favor, they do not neglect to show—as a matter of policy, truth, and justice—why their favored result is best.[33]

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29. Util. Air Regulatory Grp. v. Envtl. Prot. Agency, 134 S. Ct. 2427, 2444 (2014) (citations omitted).

30. Knudsen v. Liberty Mut. Ins. Co., 411 F.3d 805, 806 (7th Cir. 2005). For example, dissenting in *Brown & Williamson Tobacco Corp*., Justice Breyer noted that even if there were a rule that required "in close cases that a decision with 'enormous social consequences' should be made by democratically elected Members of Congress rather than by unelected agency administrators[,]" such a rule would not "control[ ] the outcome" in a case about whether the FDA had authority to regulate tobacco as a drug. 529 U.S. at 190 (Breyer, J., dissenting) (citation omitted).

31. *Cf.* Beermann, *supra* note 19, at 837 (arguing that *Chevron* provides "courts with a mechanism for reducing their accountability by hiding their decisions approving agency action behind a veneer of deference").

32. For related reasons, Professor Karl N. Llewellyn explained as part of his "Seven ABC's of Appellate Argument" that "it is in the statement of the facts that the advocate has his first, best, and most precious access to the court's attention." KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 237-38 (1960). This is, in part, because there is usually "an equally perfect technical case to be made on [either] side." *Id*. at 237. Thus, a persuasive case should make sense not only in terms of doctrine, but also "in simple terms of life and justice." *Id.* at 238.

33. For example, in *Ethyl Corp. v. Envtl. Prot. Agency*, 51 F.3d 1053, 1055 (D.C. Cir. 1995), the court overturned EPA's decision not to grant a waiver to allow sale of a gasoline fuel additive, MMT. The court based its ruling on step one of the *Chevron* test. Specifically, the court held that EPA violated the Act's "clear terms . . . in denying Ethyl a waiver for MMT on public health grounds." *Id.* This is because the Act's "plain language . . . makes clear that waiver decisions are to be based on one criterion: a fuel additive's effect on emission standards." *Id.* at 1058. Thus, "[i]n basing her waiver decision on the public health implications of MMT, the [EPA] Administrator acted contrary to the plain language of [the relevant statutory provision]." *Id.* Because the court's ruling flowed from unambiguous congressional direction, the administrative law novice might expect that the legal briefs before the court would have been short, dry, and focused on statutory interpretation. Not so. The petitioner's fifty-seven-page brief does, of course, stress the Act's limited criterion. *See* Brief for Petitioner at 4-40, Ethyl Corp. v. Envtl. Prot. Agency, 51 F.3d 1053 (D.C. Cir. 1995) (No. 94-1505), (1994 WL 16182838). But the brief also takes more than fifteen pages to show that EPA's approach to its "public health" analysis was unfair, unscientific, and

In sum, administrative law jurisprudence tends to boil down to a body of judicial opinions that serve poorly to enlighten or sharpen public discourse. Many administrative law opinions read as if they were in code, designed to obscure rather than illuminate the considerations driving the result. For lawyers, however, the doctrine boils down to a flexible tool for advocacy—a language capable of justifying whatever result the advocate favors. Although the doctrine's gist appropriately favors deference to the government in close cases, it supplies a counter-argument to almost any opponent's argument. In this respect, the doctrine is reminiscent of a children's game, known as "fortunately/unfortunately," which involves some variation of the following recitation:

> Unfortunately, a man fell out of an airplane. Fortunately, there was a haystack in the field below. Unfortunately, there was a pitchfork in the haystack. Fortunately, the man missed the pitchfork. Unfortunately, he missed the haystack.

For lawyers, of course, what is unfortunate in one case may be fortunate in the next. Therefore, for our purposes, the doctrine is more appropriately phrased in value-neutral terms, i.e., "on one hand" and "on the other." If we were to succumb to the lure of legal analysis that focuses on the "two step" and the "zero step" and begin to treat administrative law as a game, it might look something like this:

> *Instructions:* Select the principles that support your case or the result you wish to reach. If you notice an administrative law principle that is contrary to your preferred result, don't worry! There is likely to be a contrary principle in the next column.[34]

"smack[ed] of Orwellian 'doublespeak,'" and that, in fact, there is no evidence that MMT presented a significant threat to public health. *See id*. at 41-55 (the "Orwellian doublespeak" quote is on page fifty-one of the brief). Why did the petitioners bother? The petitioners' lawyers presumably wanted the court to feel comfortable that it was reaching the correct result in terms of justice and good public policy. In other words, they were presumably not confident that having the best side of a *Chevron* step-one argument would be enough. Further, those parts of the petitioner's argument that focused on fairness, science, and public policy had a logical function in the brief as a fallback "arbitrary and capricious" argument under 5 U.S.C. § 706(2)(A). *Id.* at 52 ("EPA's denial of Ethyl's application on the basis of this record is arbitrary and capricious and must be set aside.").

34. Professor Karl N. Llewellyn used a similar chart to demonstrate that "there are two opposing canons [of statutory construction] on almost every point." LLEWELLYN, *supra* note 32, at 521. He explained, "to make any canon take hold in a particular instance, the construction contended for must be sold, essentially, by means other than the use of the canon . . . ." *Id.*

On one hand:	*On the other:*
• Courts review agency interpretations of regulatory laws by applying the *Chevron* two-step test: "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter . . . . [Second, if] the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute . . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[35] An agency's view of ambiguous statutory language "governs if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts."[36]	• The *Chevron* two-step analysis only applies when [1] "Congress delegated authority to the agency generally to make rules carrying the force of law, and [2] that the agency interpretation claiming deference was promulgated in the exercise of that authority."[37] Otherwise, the appropriate degree of judicial deference depends on the "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[38] Further, courts need "accept [as reasonable] only those agency interpretations that are reasonable in light of the principles of construction courts normally employ."[39]
• "[I]f the language of the statute is open or ambiguous . . . then [the court] must uphold the [agency's] interpretation as long as it is reasonable."[40]	• But courts apply "traditional tools of statutory construction" to ascertain whether there is ambiguity, *i.e.*, whether "Congress had an intention on the precise question at issue."[41] And there is no definitive list of these "traditional tools."[42] Further, "plain meaning, like

35. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

36. Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 217-18 (2009) (citing *Chevron*, 467 U.S. at 843-44).

37. United States v. Mead Corp., 533 U.S. 218, 226-27 (2001).

38. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

39. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 272 (2010) (citation and internal quotation marks omitted) (rejecting an interpretation that relied on cases that the Court had disapproved).

40. Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 89 (2007) (citing *Chevron*, 467 U.S. at 842-43).

41. *Chevron*, 467 U.S. at 843 n.9.

42. *See* Lawson & Kam, *supra* note 25, at 74 ("Professor Lawson has been waiting for almost thirty years for a court to openly acknowledge there is some uncertainty about how to determine the 'clear' meaning of a statute—and he is still waiting patiently."); Craig Allen Nard, *Deference, Defiance, and the Useful Arts*, 56 Ohio St. L.J. 1415, 1509 n.246 (1995). Arguably, this is all for the good. If we wanted the legal system to resolve disputes according to rigid rules, we presumably could replace judges with computers. Because judges "are not automata," Universal Camera Corp. v. Nat'l Labor Relations Bd., 340 U.S. 474, 489 (1951), we expect them to apply their wisdom to traditional and evolving tools of legal and factual analysis, tempered by a humble appreciation of the judiciary's limited role in making policy.

	beauty, is sometimes in the eye of the beholder."[43]
• Where statutory text is "not crystalline," deference to a reasonable construction is appropriate.[44]	• "In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. . . . It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. . . . A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into an harmonious whole. Similarly, the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand."[45]
• "The plain meaning of legislation should be conclusive . . . ."[46]	• "[E]xcept in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'"[47]

See id. ("The ultimate reliance for the fair operation of any standard is a judiciary of high competence and character and the constant play of an informed professional critique upon its work."); Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 14 (1983) ("*Marbury*'s justification for judicial review, grounded as it is in the 'ordinary and humble judicial duty' of the common law courts, seems necessarily to entail a general obligation of independent law-exposition by article III courts. This is what courts 'do'; it is their 'job.'").

43. Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 737 (1985); *see also* Jacob E. Gersen & Adrian Vermeule, Chevron *As A Voting Rule*, 116 YALE L.J. 676, 705 (2007) (arguing that "whether deference will be given in practice is a function of heterogeneous interpretive methods used by individual judges and divergent views about the degree of clarity in statutes").

44. *See* New Mexico v. Watkins, 969 F.2d 1122, 1130 (D.C. Cir. 1992).

45. Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132-33 (2000) (internal quotation marks and citations omitted) (applying post-hoc legislative history to determine the unambiguous meaning of a statute); *see also* MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 227 (1994) (stating that "a meaning set forth in a single dictionary" that differs from "virtually all other" dictionary definitions is not sufficient to create ambiguity).

46. United States v. Ron Pair Enters., 489 U.S. 235, 242 (1989).

47. *Id.* (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)).

• "The power of executing the laws . . . does not include a power to revise clear statutory terms that turn out not to work in practice."[48]	• Courts routinely construe the "owner and operator" language of 42 U.S.C. § 9607(a)(1) as "owner *or* operator" where there is "no rational explanation, other than careless statutory drafting, for imposing liability upon 'owners *or* operators' under one section but only holding 'owners *and* operators' liable under another section."[49]
• "The fact that the agency has from time to time changed its interpretation" does not mean "that no deference should be accorded . . . ." Thus, an "initial agency interpretation is not instantly carved in stone." Instead, the agency must consider "the wisdom of its policy on a continuing basis."[50]	• "An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view."[51]
• Agencies must "examine the relevant data."[52]	• But if the law required agencies to re-think decisions every time "some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening."[53] Further, "[i]t is well settled that an agency need not reopen administrative proceedings merely because some new piece of evidence has come to light that was not before the agency at the time it made its decision."[54]

48. Util. Air Regulatory Grp. v. Envtl. Prot. Agency, 134 S. Ct. 2427, 2446 (2014). In that same case, however, the Court approvingly cited EPA's tendency to interpret the Clean Air Act's phrase "any pollutant" to include only some pollutants, since "the Act is far from a chef d'oeuvre of legislative draftsmanship." 134 S. Ct. at 2441.

49. United States v. Fleet Factors Corp., 901 F.2d 1550, 1554 n.3 (11th Cir. 1990); *see also* SOLAN, supra note 9, at 45 (discussing the "and/or rule," under which courts sometimes treat these conjunctions as interchangeable to correct common drafting errors).

50. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 863-64 (1984).

51. Immigration & Nationality Serv. v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987) (internal quotation marks and citations omitted).

52. Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

53. Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 554-55 (1978) (quoting Interstate Commerce Comm'n v. Jersey City, 322 U.S. 503, 514 (1944)).

54. Am. Mining Cong. v. Marshall, 671 F.2d 1251, 1257 (10th Cir. 1982).

• An agency "typically has wide latitude in determining the extent of data-gathering necessary to solve a problem."[55]	• "[T]he agency must explain the evidence which is available, and must offer a 'rational connection between the facts found and the choice made.' Generally, one aspect of that explanation would be a justification for [acting in the face of uncertainty] before engaging in a search for further evidence."[56]
• The doctrine of *stare decisis* has "'special force' . . . with regard to questions of statutory interpretation . . . ."[57]	• But a "court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."[58] A contrary rule "would 'lead to the ossification of large portions of our statutory law.'"[59]
• A party challenging an administrative rule must "exhaust its administrative remedies before seeking judicial review."[60]	• But an agency has a "preexisting duty to examine key assumptions as part of its affirmative burden of promulgating and explaining a non-arbitrary, non-capricious rule" and the agency "must justify that assumption even if no one objects to it during the comment period."[61]

55. Sierra Club v. Envtl. Prot. Agency, 167 F.3d 658, 662 (D.C. Cir. 1999).

56. Motor Vehicle Mfrs. Ass'n, 463 U.S. at 52 (citation omitted) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

57. Global-Tech Appliances, Inc. v. SEB S.A., 131 S. Ct. 2060, 2068 (2011) (citation omitted) (quoting John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 139 (2008)).

58. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005).

59. *Id.* at 983 (quoting United States v. Mead Corp., 533 U.S. 218, 247 (2001) (Scalia, J., dissenting)).

60. Natural Res. Def. Council, Inc. v. Envtl. Prot. Agency, 824 F.2d 1146, 1150 (1987).

61. Okla. Dept. of Envtl. Quality v. Envtl. Prot. Agency, 740 F.3d 185, 192 (D.C. Cir. 2014) (internal quotation marks and citation omitted); *see also* Ne. Md. Waste Disposal Auth. v. Envtl. Prot. Agency, 358 F.3d 936, 948 (D.C. Cir. 2004) (party that failed to exhaust administrative remedies did not forfeit a challenge to a key assumption underlying and administrative rule).

• Courts "have recognized two distinct species of exhaustion requirements: (1) non-jurisdictional exhaustion, which is a judicially created doctrine requiring parties who seek to challenge agency action to exhaust available administrative remedies before bringing their case to court; and (2) jurisdictional exhaustion, which arises when Congress requires resort to the administrative process as a predicate to judicial review."[62]	• If "some other party has put an objection on the record, the obligation to exhaust [administrative remedies] is discharged."[63]
• "The task of the reviewing court is to apply the appropriate APA standard of review . . . to the agency decision based on the record the agency presents to the reviewing court."[64]	• Particularly when "the procedural validity" of agency action is "in serious question," it may "sometimes be appropriate to resort to extra-record information to enable judicial review to become effective."[65] Also, at times "[t]o ignore [specific extra-record] facts is to ignore reality. For the law to have any credibility or respect, it must be grounded in reality."[66]

So what is the prize for winners? Ideally, the game will help all players internalize the fact that—aside from its role in reinforcing the traditional principle of deference to agencies charged with carrying out Congress' schemes—administrative law doctrine is a language, not a generator of results. Advocates must be steeped in the doctrine, of course, and use it to highlight a path to the results they seek. But the bottom line remains: What is your client's story? Why do truth, justice, and the American way demand that your client prevail? Your results may vary.

62. Vt. Dep't of Pub. Serv. v. United States, 684 F.3d 149, 156 (D.C. Cir. 2012) (internal quotation marks and citation omitted).

63. Safir v. Kreps, 551 F.2d 447, 452 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 820 (1977).

64. Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985).

65. Esch v. Yeutter, 876 F.2d 976, 991 (D.C. Cir. 1989).

66. Holy Cross v. U.S. Army Corps of Engineers, 455 F. Supp. 2d 532, 539 (E.D. La. 2006).