BY LAND OR BY SEA, CHALLENGES TO *CHEVRON* DEFERENCE WILL NOT CEASE

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Legal doctrines that strain against the constitutional system in which they operate are not likely to bring about stability. Perhaps that's why after nearly forty years, the *Chevron* doctrine continues to be both the source and the focus of unabating controversy. The latest agonists are herring fishermen from the North Atlantic coasts hoping to jettison a new rule that requires them to pay the wages of federal monitors aboard their vessels.[1] To do so, the fishermen and their amici have asked the Supreme Court to sink the *Chevron* doctrine.[2]

On May 1, 2023, the Supreme Court granted certiorari on one of the two questions presented in the fishermen's petition: "Whether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency."[3] By forgoing the opportunity to review the other, milder question presented in the petition, which proposed that the lower courts merely misapplied *Chevron*,[4] the Supreme Court signaled that it is prepared to give the doctrine serious reconsideration and perhaps retire it for good.

The *Chevron* doctrine, derived from the Supreme Court's 1984 decision in *Chevron v. Natural Resources Defense Council, Inc.*, directs courts to defer to a federal agency's interpretation of an ambiguous federal law that the agency administers.[5] The doctrine's application is guided by a two-step inquiry: if a court finds the law's meaning is clear, it applies the plain meaning; but if the statute is

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[1] Brief for Petitioners at 2, Loper Bright Enters. v. Raimondo, No. 22-451 (July 17, 2023), 2023 WL 4666165, at *2.

[2] Petition for Writ of Certiorari, Loper Bright Enters. v. Raimondo, No. 22-451 (Nov. 10, 2022), 2022 WL 19770137.

[3] *Id.*; Loper Bright Enters. v. Raimondo, 45 F.4th 359 (D.C. Cir. 2022), *cert. granted*, 143 S. Ct. 2429 (U.S. May 1, 2023) (No. 22-451).

[4] Petition for Writ of Certiorari, *supra* note 2. The other, milder question presented by the petitioners was: "Whether, under a proper application of *Chevron*, the [Magnuson-Stevens Act] implicitly grants [the National Marine Fisheries Service] the power to force domestic vessels to pay the salaries of the monitors they must carry." *Id.*

[5] 467 U.S. 837, 842–43 (1984).

ambiguous or silent on the matter in controversy, the court must defer to the federal agency's "reasonable" interpretation of the law.[6]

The doctrine's apparent simplicity made it attractive to lower court judges bewildered by the task of parsing Congress's impenetrable prose.[7] And its rule-like formulation[8] garnered the support of conservative luminaries such as the late Justice Antonin Scalia, known lover of judge-constraining rules and trenchant critic of multi-factor tests in all their judge-liberating forms.[9]

But the doctrine's twin channel markers of statutory "ambiguity" and agency "reasonableness" proved inconsistent checks on both agency heads and judges.[10] Instead, the doctrine established a broad and permissive presumption in favor of congressional delegations to agencies. One consequence is that agencies have spent decades evolving their roles from Congress's agents to its co-legislators.[11]

The presumption that Congress intends to give away as much legislative power as can be packed within the broadest reading of a given statute's text is in tension with several constitutional principles: that the people of the United States vested the federal government with limited powers; that those which are legislative belong to Congress; and that the courts are to act as a check on the political branches.[12] It

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[6] *Id.* at 842–44.

[7] THOMAS W. MERRILL, THE *CHEVRON* DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE 94–95 (2022) ("Lower-court judges were drawn to the *Chevron* doctrine because it is refreshingly simple in contrast to the complex matrix of factors that prevailed in the pre-*Chevron* era.").

[8] *Id.* at 73 ("[A] close examination . . . reveals that the two-step sequence is rule-like only in the sense that it prescribes a certain ordering of inquiries. The substances of the inquiries themselves is not rule-like at all.").

[9] *Id.* at 86, 87, 90, 96, 97 (explaining that Justice Scalia intensely advocated for the *Chevron* doctrine and became "identified as *Chevron*'s champion after he was named to the Supreme Court"); *see, e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178–80 (1989) ("The fact is that when we decide a case on the basis of what we have come to call the 'totality of circumstances' test, it is not *we* who will be 'closing in on the law' in the foreseeable future, but rather thirteen different courts of appeals . . . . To adopt such an approach . . . is effectively to conclude that uniformity is not a particularly important objective with respect to the legal question at issue.").

[10] *See* MERRILL, *supra* note 7, at 2–4.

[11] *Id.* at 3–4.

[12] Chief Justice John Marshall famously justified his expansive reading of the Necessary and Proper Clause by reasoning that the Constitution could not detail the federal government's every proper object and power without "partak[ing] of the prolixity of a legal code." McCulloch v. Maryland, 17 U.S. 316, 407 (1819). In so reasoning, Marshall assumed that when writing the nation's legal code, rather than a constitution, a diligent legislature could be expected to delineate the object of its attentions and the methods of its achievement in detail. *See id.* at 411–13 ("That a legislature, endowed with legislative powers, can legislate, is a proposition too self-evident to have been questioned."). Yet the modern approach embodied in *Chevron* essentially assumes the opposite—that the subjects

also creates tension with an elementary principle of administrative law that agencies have no power to act unless Congress grants them such power.[13]

There are signs that, after decades on the rise, those tensions are beginning to drag *Chevron* downward. Lately, the Supreme Court has set the doctrine adrift, failing even to mention the name *Chevron* in cases where both parties have invoked it and declining to afford agency interpretations the deference they received from lower courts.[14] But for now, the doctrine remains afloat, and lower courts must treat it as binding.

Into this familiar picture sails the latest cast of would-be assailants on the long-troubled doctrine petitioning the Supreme Court to hear their case and relieve them of an onerous new requirement. A fisherman's livelihood is regulated under the laconically named Magnuson-Stevens Fishery Conservation and Management Act of 1976.[15] This law delegates power "to conserve and manage" the nation's fisheries from Congress to the Secretary of Commerce, who in turn delegates it again to the National Marine Fisheries Service.[16]

Under the Magnuson-Stevens Act, the Fisheries Service approves fishery management plans for each of the eight regions that make up the nation's fisheries.[17] The Act provides that management plans shall include measures "necessary and appropriate for the conservation and management of the fishery."[18] Further, the Act expressly allows the Fisheries Service to require fishermen to carry at-sea observers, known as monitors, aboard their vessels.[19] Relying on these provisions, the Fisheries Service adopted a rule that requires fishermen operating in the New England region to pay the salaries of the federally required

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of modern legislation are so complicated and the legislators themselves are either so harried or so dull that laws must be read more like the Constitution, suggesting a broadly conceived purpose and a non-exhaustive set of means for achieving it, both of which will remain malleable enough to permit revision by interpretation in perpetuity. *Cf.* West Virginia v. EPA, 142 S. Ct. 2587, 2642 (2022) (Kagan, J., dissenting) ("The very first Congress gave sweeping authority to the Executive Branch to resolve some of the day's most pressing problems . . . .").

[13] La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.").

[14] *See, e.g.*, Am. Hosp. Ass'n v. Becerra, 596 U.S. 724 (2022) (excluding any mention of *Chevron* in a case involving executive interpretation of a statute).

[15] 16 U.S.C. §§ 1801–1884.

[16] Loper Bright Enters. v. Raimondo, 45 F.4th 359, 363 (D.C. Cir. 2022).

[17] 16 U.S.C. § 1852(a)(1).

[18] *Id.* § 1853(a)(1)(A).

[19] *Id.* § 1853(b)(8). These at-sea monitors are third-party inspectors who are hired to go aboard fishing vessels to monitor general vessel operations and track information such as which fish are being caught and discarded and what gear is being used. 50 C.F.R. § 648.2; *Loper Bright*, 45 F.4th at 373 (Walker, J., dissenting).

monitors aboard their vessels.[20] The rule responded to the Service's own inability to fund the monitor program, but its implementation threatens to reduce annual returns for fishermen in the region by twenty percent.[21]

In August 2022, a split panel of the Court of Appeals for the D.C. Circuit relied on *Chevron* to uphold the fisherman-funded-monitors scheme, reasoning that while the Magnuson-Stevens Act did not expressly allow this kind of cost shifting, a combination of congressional silence and the ambiguity of "necessary and appropriate" measures rendered the Fisheries Service's interpretation reasonable and thus entitled to deference.[22] In dissent, Judge Justin Walker maintained that the Act "unambiguously does not authorize the Fisheries Service to force the fishermen to pay the wages of federally mandated monitors."[23]

The dueling opinions vividly illustrate how *Chevron*'s presumptions about delegation turn silences into statutory gaps and statutory gaps into delegations, disposing courts to permit agencies to do whatever Congress does not expressly prohibit (yes, even when circuit precedent expressly says otherwise).[24]

The significance of silence is a point of contention between the majority and the dissent, specifically the Magnuson-Stevens Act's silence on whether fishermen can be required to pay for their own at-sea monitors. Judge Walker maintains that, in general, "silence indicates a lack of authority."[25] To this the majority offers an enigmatic response: "Courts 'construe [a statute's] silence as exactly that: silence.'"[26] Reading further, one discovers that in the majority's view, silence is silence except when it is not. In addition to silence

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[20] 50 C.F.R. § 648.11(b); *Loper Bright*, 45 F.4th at 363.

[21] *Loper Bright*, 45 F.4th at 364.

[22] *Id.* at 369.

[23] *Id.* at 373 (Walker, J., dissenting).

[24] In *New York Stock Exchange v. SEC*, the D.C. Circuit held that "[a] precondition to deference under *Chevron* is a congressional delegation of administrative authority." 962 F.3d 541, 552 (D.C. Cir. 2020). And "[t]o suggest that *Chevron* [deference is due] any time a statute does not expressly *negate* the existence of a claimed administrative power . . . is both flatly unfaithful to the principles of administrative law and . . . refuted by precedent." *Id.* at 553 (alteration in original) (quoting Am. Bar Ass'n v. FTC, 430 F.3d 457, 468 (D.C. Cir. 2005)). "[W]ere courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well." *Id.* at 554 (quoting Ry. Lab. Execs.'s Ass'n v. Nat'l Mediation Bd., 29 F.3d 655, 671 (D.C. Cir. 1994)).

[25] *Loper Bright*, 45 F.4th at 374 (Walker, J., dissenting).

[26] *Id.* at 368 (majority opinion) (alteration in original) (quoting EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 774 (2015)).

simpliciter, the majority explains that silence is "room for agency discretion";[27] silence is a signal for courts to defer to agency interpretation;[28] and thus, silence is not the failure to grant authority but the (probably intentional) failure to withhold it.

Here, the majority maintains that its assessment of silence is grounded in statutory context. According to the majority, the statutory silence regarding industry funding of monitors is situated "in the context of a comprehensive statutory fishery management program."[29] To describe the regulatory scheme as comprehensive is question-begging,[30] preempting doubts that certain powers may not have been delegated. It sets the boundaries so wide as to reach the regulatory horizons, where the limits are nearly indiscernible.

Similarly question-begging is the majority's determination that the silence is necessarily *within* the regulatory framework rather than outside it[31]—a rhetorical move that sounds more plausible once one is inured to the idea that the scope of the Fisheries Service's authority is exceedingly broad. Placing the silence within the rather hazy but assuredly broad expanse of regulatory authority makes it easier to conceptualize it as a gap that the agency needs to address. Because the "question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority*,"[32] the majority's framing presupposes an answer to the question of whether the agency's interpretation is permissible.

The majority, having thus explained the Act's statutory context, reaches the point where it can limit its tour through the text to a search for express prohibitions on the authority the Fisheries Service seeks to exercise. Since Congress rarely legislates a litany of "thou-shalt-nots," the majority unsurprisingly finds none.[33]

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[27] *Id.*

[28] *Id.* at 369.

[29] *Id.* at 370.

[30] "Whether [a law] is 'comprehensive' and leaves not even the most minor regulatory 'gap' surely depends on what it says and not on what its proponents hoped to achieve." FERC v. Elec. Power Supply Ass'n, 577 U.S. 260, 302 (2016) (Scalia, J., dissenting).

[31] *Loper Bright*, 45 F.4th at 368.

[32] City of Arlington v. FCC, 569 U.S. 290, 297 (2013).

[33] The D.C. Circuit has expressly held that any "failure of Congress to use '[t]hou [s]halt [n]ot' language" does not automatically trigger *Chevron* deference. U.S. Telecom Ass'n v. FCC, 359 F.3d 554, 566 (D.C. Cir. 2004); *see* Ry. Lab. Execs.'s Ass'n v. Nat'l Mediation Bd., 29 F.3d 655, 671 (D.C. Cir. 1994) ("To suggest . . . that *Chevron* . . . is implicated any time a statute does not expressly *negate* the existence of a claimed administrative power (i.e.[,] when the statute is not written in 'thou shalt not' terms), is both flatly unfaithful to the principles of administrative law outlined above[] and refuted by precedent.").

Because the majority has primed itself to look only for explicit prohibitions, it nullifies the capacity of other clauses in the Magnuson-Stevens Act to act as structural limitations on the agency's interpretative license to discern new powers under the "necessary and appropriate" heading.[34] For instance, the majority declined to draw any negative implications for the scope of the Fisheries Service's authority from the fact that two other sections of the Magnuson-Stevens Act grant the agency some limited authority to require industry funding for monitors in specific circumstances.[35] In the North Pacific region, the nation's largest and most profitable fishery,[36] the Fisheries Service can require fishermen to contribute fees to a fund which will pay for monitors, but the Act limits those fees to a maximum of two percent of a voyage's value.[37] The majority explained that "Congress's specific authorization of a single fishery program funded by fees paid to the government does not unambiguously demonstrate that the Act prohibits the Service from implementing a separate program in which industry pays the costs of compliance . . . ."[38]

The majority took the same attitude towards the Act's only other express grant of authority to require industry funding for monitors, in this case from foreign vessels.[39] "This provision for industry-funded observers in the foreign-fishing section of the Act . . . has no unambiguous consequences for the Service's authority to implement industry-funded monitoring in other contexts."[40]

These provisions demonstrate that Congress was alert to the issue of industry funding for monitors—it was not a matter that Congress overlooked or failed to anticipate—and that Congress knew how to delegate the authority to require fishermen to contribute to the payment

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[34] *See Loper Bright*, 45 F.4th at 366.

[35] *Id.* at 366–67; *see* 16 U.S.C. §§ 1821, 1862.

[36] *See* Petition for Writ of Certiorari, *supra* note 2, at 5, 17 (explaining that the North Pacific Council's jurisdiction "encompasses Alaska, Washington, and Oregon and some of the largest and most commercially successful enterprises"); *see also* NAT'L OCEANIC AND ATMOSPHERIC ADMIN., U.S. DEP'T OF COM., 2020 FISHERIES OF THE UNITED STATES 8–9 (2022).

[37] 16 U.S.C. § 1862(a)(1)–(2), (b)(2)(E).

[38] *Loper Bright*, 45 F.4th at 367.

[39] *Id.* at 367–68; 16 U.S.C. § 1821(h)(4).

[40] *Loper Bright*, 45 F.4th at 367–68. Congress made a third grant of authority to assess fees against the industry in connection with the "limited access programs," which restrict fishermen to catching a predetermined amount of the available fishing quota. *Id.*; 16 U.S.C. § 1853a. Unlike the two provisions mentioned above, this fee-program does not expressly cover the costs of at-sea monitors. *See* 16 U.S.C. § 1853a(e). Nonetheless, the majority's approach to its significance is effectively the same: the limited access program "does not suggest any limitation on the Service's discretion to impose monitoring costs on industry . . . ." *Loper Bright,* 45 F.4th at 367.

of monitors.[41] But Congress chose to do so in only those two instances: (1) governing foreign fishermen (*read*: nonvoters) and (2) governing the lucrative fisheries of the Pacific Northwest where Congress expressly restricted the agency's discretion to shift costs by capping exactions to two percent of a vessel's earnings.[42]

In contexts where *Chevron* does not apply, courts have assigned considerably greater interpretive significance to the presence of related provisions within the same statute as the alleged implied power. Courts have generally presumed in non-agency cases that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act," the omission is intentional.[43] And under the guise of field preemption, the Supreme Court has readily inferred that the statutory grant of certain powers to the states necessarily precluded the inference of other related powers, despite the fact that the states have the inherent police power whereas agencies have no such inherent power.[44]

Were the court to apply a similar reasoning here, an express grant of industry-funding authority in certain sections of Magnuson-Stevens would militate against implying that authority in another section where it has not been expressly granted. This inference would constrain the interpretative scope of any ambiguity in the phrase "necessary and appropriate." The consequent "gaps" in the Fisheries Service's ability to require industry funding could then plausibly be interpreted as the result of conscientious tailoring by Congress rather than an implicit delegation. The majority, viewing the question through the *Chevron* lens, declined to make this inference.[45]

History provides some additional interpretive context that bears on the plausibility of the agency's interpretation. Since Congress enacted the Magnuson-Stevens Act in 1976, the Fisheries Service has had the authority to adopt measures "necessary and appropriate" for conservation.[46] And since 1990, the agency has been able to require monitors aboard U.S. vessels.[47] Yet, the majority did not identify a

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[41] *See id.* at 366–67.

[42] *See* 16 U.S.C. §§ 1821, 1862.

[43] Russello v. United States, 464 U.S. 16, 23 (1983).

[44] *See, e.g.*, Arizona v. United States, 567 U.S. 387, 410 (2012) (holding that a federal statute that permits state law enforcement to cooperate with the U.S. Attorney General in identifying and apprehending illegal aliens does not impliedly afford the states the power to arrest illegal aliens based on the possibility of removal).

[45] *Loper Bright,* 45 F. 4th at 368–69.

[46] Fishery Conservation and Management Act of 1976, Pub. L. No. 94–265, § 303(a), 90 Stat. 331, 351.

[47] Fishery Conservation Amendments of 1990, Pub. L. No. 101–627, § 109(b), 104 Stat. 4436, 4448.

single instance before now where the Fisheries Service interpreted that phrase to confer the power to require fishermen to pay for their monitors. The majority's failure to identify such a prior instance to that effect casts doubt on the agency's new discovery of a supposedly "long-extant" power.[48]

What's more, the type of power the agency implies from the supposed ambiguity should have given the court pause. Not all powers are equal, and not all should be equally inferable from ambiguity.[49] That is important for two reasons. The first reason is that there is a critical difference between (1) implying an unspecified power to manage the internal affairs of an *agency* and (2) implying an unspecified power to manage the internal affairs of a *private party*.[50] The former might be reasonable in a host of circumstances that would not justify the latter. In other words, agencies can decide how to assign personnel within the statutory constraints set by the civil service law but should not dictate how a private business manages its own affairs.[51]

The second reason is that the Fisheries Service's interpretation was not the adoption of a new conservation measure but rather the creation of a new funding source for one of its conservation measures. Thus, in addition to burdening fishermen with a considerable new expense, the agency has found a way to augment its budget without needing to make a request to Congress. As Judge Walker noted in his dissent, neither the majority nor the Fisheries Service provides any limitation on using the phrase "necessary and appropriate" to require regulated parties to cough up the funding for their regulators.[52] The

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[48] *See* West Virginia v. EPA, 142 S. Ct. 2587, 2610 (2022) ("[T]he want of assertion of power by those who presumably would be alert to exercise it[] is equally significant in determining whether such power was actually conferred." (quoting FTC v. Bunte Brothers, Inc., 312 U.S. 349, 352 (1941))).

[49] *See id.* at 2616 (Gorsuch, J., concurring) ("Congress means for its laws to operate in congruence with the Constitution rather than test its bounds.").

[50] *Compare* Jonathan H. Adler, *A "Step Zero" for Delegations*, *in* THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT: PERSPECTIVES ON THE NONDELEGATION DOCTRINE 161–83 (Peter J. Wallison & John Yoo eds., Am. Enter. Inst. 2022) (explaining that courts, when determining if an agency had the implied authority to impose certain regulation, should start by asking whether Congress intended to authorize the agency to regulate internal affairs of the agency or the conduct of private parties), *with* John Harrison, *Executive Administration of the Government's Resources and the Delegation Problem*, *in* THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT: PERSPECTIVES ON THE NONDELEGATION DOCTRINE 232–63 (Peter J. Wallison & John Yoo eds., Am. Enter. Inst. 2022) (explaining that Congress does not overreach when it confers authority to agencies to regulate public conduct and public property); *see also* Paul J. Larkin, *Revitalizing the Nondelegation Doctrine*, 22 FED. SOC'Y REV. 238, 247–51 (2022).

[51] *See* Larkin, *supra* note 50, at 250–51.

[52] Loper Bright Enters. v. Raimondo, 45 F.4th 359, 376–77 (D.C. Cir. 2022) (Walker, J., dissenting).

tendency of an agency's interpretation to create a consequential power without a limiting principle might be expected to evoke skepticism that the interpretation is faithful to Congress's intent.

It has in other cases, such as *West Virginia v. EPA*.[53] There the Supreme Court considered whether Congress had given the EPA authority to impose a "Clean Power Plan," which devised emission limits so restrictive that they could force coal plants to "cease making power altogether."[54] The Court held that the EPA lacked authority to require this grid-wide shift in the nation's electricity production.[55] In fact, given the nature of the Clean Power Plan, "there [was] every reason to 'hesitate before concluding that Congress' meant to confer on EPA the authority it claims."[56] Similarly, in *National Federation of Independent Business v. OSHA*, the Court held that OSHA did not have the authority to impose a COVID-19 vaccination mandate for private businesses.[57] The Court explained that Congress gave OSHA the "power to regulate occupational dangers," but "it has not given that agency the power to regulate public health more broadly."[58] Thus, the judiciary is typically expected to "greet assertions of 'extravagant statutory power over the national economy' with 'skepticism.'"[59] But it did not here.

Additionally, because the Constitution vests Congress alone with the power to appropriate funds and because agencies are required to go to Congress for funding,[60] the power to establish another source of funding outside of the constitutional norm is not the sort of question that Congress would have left to the agency to resolve. For example, in *King v. Burwell*, the Supreme Court held that a general delegation of rulemaking authority did not authorize the Internal Revenue Service to fix an ambiguity regarding tax credits central to a plan regulating healthcare exchange.[61] And in *West Virginia v. U.S. Department of Treasury*, the Eleventh Circuit declined to hold that a "necessary and appropriate" rulemaking grant, similar to the one at issue in *Loper Bright*, allowed the United States Treasury to resolve a statutory

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[53] 142 S. Ct. at 2614–16.

[54] *Id.* at 2610–12.

[55] *Id.* at 2615–16.

[56] *Id.* at 2610 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 123 (2000)).

[57] 595 U.S. 109, 117–21 (2022).

[58] *Id.* at 120.

[59] *West Virginia v. EPA*, 142 S. Ct. at 2609 (quoting Utility Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

[60] U.S. CONST. art. I, § 8, cl. 18.

[61] 576 U.S. 473, 485–86 (2015).

ambiguity on how to calculate state tax revenues necessary for enforcing legislation under the Spending Clause.[62]

The ambiguity here raises a similar question of authority. The price tag on the Fisheries Service's rule may not be as economically significant as the EPA's Clean Power Plan or OSHA's vaccine mandate.[63] But by leveraging a putative statutory gap to transfer to an agency an enumerated power vested by the Constitution in Congress, the rule might present a challenge to the separation of powers serious enough to raise a "major question."[64] If so, the Fisheries Service would need clear authorization, not mere silence or ambiguity to enact this rule.[65]

But under the majority's reasoning, these inferences do not "unambiguously" withdraw the power Congress is presumed to have given nor defeat the Fisheries Service's pretensions to broader authority.[66] Thus, *Chevron*'s delegation-by-default presumption kicks in and displaces competing explanations of Congress's design.[67] If the specific delineation of a power within one section of the statute does not preclude the agency from inferring an unrestricted form of that power from vague language elsewhere, then only in rare circumstances will a statute's structural features check the scope of agency interpretations. An arguably more reasonable presumption would be that the Fisheries Service may interpret "reasonable and appropriate" as delegating certain unenumerated powers related to conservation, but it may not use that clause to imply a power that has been expressly given elsewhere in a more restricted form.

Some may argue that this is a misuse of *Chevron*: a misinterpretation of its commands.[68] That may be, but if so, *Chevron* may be defective inasmuch as it is vulnerable to this sort of frequent misapplication.[69] That is, by stating that "*Chevron* instructs that judicial deference is appropriate 'if the statute is silent or ambiguous with respect to the specific issue,'" as the majority did here, it is easy

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[62] 59 F.4th 1124, 1146–48 (11th Cir. 2023).

[63] *See West Virginia v. EPA,* 142 S. Ct. at 2616; *Nat'l Fed'n of Indep. Bus*., 595 U.S. at 119–20 (relying on the major questions doctrine to stay implementation of the COVID-19 vaccination mandate for private businesses).

[64] *See West Virginia v. EPA*, 142 S. Ct. at 2615–16.

[65] *See id.* at 2614.

[66] *See* Loper Bright Enters. v. Raimondo, 45 F.4th 359, 368 (D.C. Cir. 2022).

[67] *See id.* at 368–69.

[68] *See, e.g.*, Ethyl Corp. v. EPA, 51 F.3d 1053, 1060 (D.C. Cir. 1995) ("Were courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, *a result plainly out of keeping with Chevron* and quite likely with the Constitution as well." (quoting Ry. Lab. Execs.'s Ass'n v. Nat'l Mediation Bd., 29 F.3d 655, 671 (D.C. Cir. 1994) (emphasis added))).

[69] *See* MERRILL, *supra* note 7, at 98, 260.

for courts to lapse into the unreflective view that all silence or ambiguity is a transfer of power to the agency to create new law out of the old.[70] The result here is that the Fisheries Service can interpret its way to a new source of private funding for its activities outside of the congressional appropriations process under the pretense that forcing vessel owners to pay monitors is simply a generic type of compliance cost. By accepting for review only the frontal challenge to *Chevron* itself, the Supreme Court gives the impression that the doctrine, rather than its potential (mis)application, is the true problem.[71]

The unwillingness to consider a distinction between compliance costs and direct private funding of a regulatory scheme seems obtuse when the activities of another federal agency have been recently declared unconstitutional precisely because they are funded outside of the congressional appropriations process.[72] In October 2022, the U.S. Court of Appeals for the Fifth Circuit held that the Consumer Financial Protection Bureau's independent funding scheme, which absolved that agency of the need to seek funding from Congress, impermissibly derogated from Congress's constitutional supremacy in fiscal matters.[73] The Magnuson-Stevens Act does not exempt the Fisheries Service from seeking congressional funding, but by interpreting the Magnuson-Stevens Act in a way that diminishes the agency's dependence on those appropriations and allows the agency to fundraise unspecified amounts from private sources, the agency and the D.C. Circuit's majority weaken the link of accountability between the Fisheries Service and the nation's elected representatives.[74]

Justifications, theoretical or practical, for deference here seem lacking. It is difficult to characterize the interpretation discovering the power to require industry funding as an application of the Fisheries Service's expertise that would warrant the deference of a generalist court. Whether the Fisheries Service has the power to impose this burden at all is a legislative question, not a technical or scientific policy question.[75] "When the agency has no comparative expertise in

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[70] *Loper Bright*, 45 F.4th at 369 (quoting Chevron v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984)).

[71] *See supra* notes 3–4 and accompanying text.

[72] *See* Cmty. Fin. Servs. Ass'n of Am., Ltd. v. Consumer Fin. Prot. Bureau, 51 F.4th 616, 635 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 978 (U.S. Feb. 27, 2023).

[73] *Id.* at 642.

[74] *Cf. id.* at 635–42.

[75] *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2413 (2019). In *Kisor*, the Court explained that agencies have "unique expertise" in solving issues technical or scientific in nature. *Id.* And Congress "is attuned to the comparative advantages of agencies over courts in making such policy judgments." *Id.* But when the policy at issue is not technical nor scientific, and it does not "implicate [an agency's] substantive expertise," courts are unlikely to find

resolving a regulatory ambiguity, Congress presumably would not grant it that authority."[76] The Fisheries Service surely thinks it desirable to have at-sea monitors observing as many vessels as possible.[77] But the desirability of more vigorous execution of the agency's priorities does not answer the question of what powers it has to accomplish its task: "No matter how desirous of protecting their policy judgments, agency officials cannot invest themselves with power that Congress has not conferred."[78]

Nor does the agency's relatively greater (though highly attenuated) democratic accountability,[79] relative to life-tenured judges, work much in the agency's favor here. Were the Supreme Court to rule against the Fisheries Service in this instance, it would not deprive the agency of all interpretive power over the phrase "necessary and appropriate"; a court need not definitively expound the full extent of the phrase's permissible meanings.[80] A ruling that declines to imply a grant of broad legislative power to the agency on matters of funding honors the constitutional rule that legislative power is vested with Congress while still allowing the agency to pursue the Magnuson-Stevens Act's conservationist mandate through established means. What's more, following Judge Walker's approach to statutory silence in connection with efforts to regulate private parties ensures maximal democratic accountability for this costly funding scheme.[81] The ambiguity-based approach, on the other hand, obfuscates whether Congress or the Fisheries Service—through forced payments by regulated parties—is ultimately responsible for this heavy financial burden.

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that Congress granted the agency the power to solve such issues. *Id.* at 2417; *see* West Virginia v. EPA, 142 S. Ct. 2587, 2612–13 (2022).

[76] *Kisor*, 139 S. Ct. at 2417.

[77] *See* NAT'L OCEANIC AND ATMOSPHERIC ADMIN., U.S. DEP'T OF COM., NORTHEAST FISHERIES AT-SEA MONITORING PROGRAM MANUAL 2–4 (3rd ed. 2011).

[78] Mozilla Corp. v. FCC, 940 F.3d 1, 83 (D.C. Cir. 2019).

[79] *See* City of Arlington v. FCC, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting) ("[N]o President (or his executive office staff) could, and presumably none would wish to, supervise so broad a swath of regulatory activity." (quoting Elena Kagan, *Presidential Administration,* 114 HARV. L. REV. 2245, 2250 (2001))); *see also* MERRILL, *supra* note 7, at 23 ("[T]he administrative state has grown to such enormous dimensions that Congress cannot engage in continual monitoring and adjustment of the scope of agency authority.").

[80] *Cf. West Virginia v. EPA*, 142 S. Ct. at 2614–16 (holding that the phrase "best system of emission reduction" as used in the Clean Air Act did not include the environmental protection agency's "generation shifting" plan, but declining to determine exhaustively what the phrase might encompass).

[81] *See* Loper Bright Enters. v. Raimondo, 45 F.4th 359, 372–77 (D.C. Cir. 2022) (Walker, J., dissenting).

Based on their petition for certiorari, the fishermen sound optimistic that they are sailing with a tide of anti-*Chevron* sentiment.[82] But even though the Supreme Court has decided to hear the case, it will not necessarily scuttle the doctrine. Note that the question accepted for review invites the Court to overrule *Chevron* or to tailor it more narrowly by clarifying that silence alone does not require judicial deference at least if the implied agency power is "consequential."[83] Because of its connection to funding, the power asserted here appears consequential and addressing the significance of silence would resolve the primary disagreement among the D.C. Circuit panel members. By addressing only these concerns, the Court could resolve the case with a narrower opinion that leaves a considerable remnant of *Chevron* in place. The Court recently employed this clarify-and-narrow approach in the 2019 decision *Kisor v. Wilkie*, where it saved another administrative law doctrine known as "*Auer* deference" by confining its application to a narrower set of agency rule interpretations.[84] That approach might prevail again here.

Since the Court granted certiorari in *Loper Bright*, some have argued (persuasively) that cabining *Chevron* would not meaningfully affect the ways in which the lower courts employ the deference doctrine.[85] The argument goes that merely resolving the dispute over silence would provide the lower courts with only marginally more guidance on when deference is required.[86] Thus, to provide adequate clarity to the lower courts, the Supreme Court ought to overrule *Chevron* entirely.[87]

This argument does not, however, advise us what will remain if *Chevron* is no more. That concern will weigh heavily on the Justices. Are all agency interpretations to be reviewed *de novo*, i.e., with no deference at all? Should courts revert to the less deferential, "respectful consideration" that prevailed under the earlier *Skidmore* approach?[88] One approach, drawn from Chief Justice Roberts's dissent in *City of Arlington v. FCC*, would afford no deference to agencies when the

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[82] *See* Petition for Writ of Certiorari, *supra* note 2, at 28–36.

[83] *See supra* notes 1–4 and accompanying text.

[84] *See* 139 S. Ct. 2400, 2417 (2019).

[85] *See, e.g.*, Isaiah McKinney, *Loper Bright—Chevron Needs a Gravestone, Not Another Exception*, YALE J. ON REGUL. (May 14, 2023), https://www.yalejreg.com/nc/loper-bright-chevron-needs-a-gravestone-not-another-exception-by-isaiah-mckinney/ [https://perma.cc/7RL7-BLVF].

[86] *See id.*

[87] *Id.*

[88] *See* MERRILL, *supra* note 7, at 44 (describing the approach attributed to the Supreme Court's decision in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

interpretation at issue concerns the scope of the agency's jurisdiction.[89] Applied here, that approach might save both the fishermen and *Chevron*, albeit in a narrowed form. Critics, however, maintain that the distinction between jurisdictional and non-jurisdictional questions is illusory in the context of agency interpretation and unmanageable for the lower courts.[90] Other thoughtful proposals exist for how the Court might reform *Chevron* internally rather than devising something entirely new by tying the level of deference to the type of process the agency used in its decision-making.[91] A process-oriented approach, however, is less likely to assuage concerns that agencies are arrogating to themselves powers that Congress has not vested in them.

The grant of certiorari informs us that at least four Justices are willing to reconsider *Chevron*, but it is less clear that a majority is prepared to live in a legal regime where courts afford no deference to agency interpretations. Although the legal merits may weigh against deference, its practical benefits are not easily ignored. Deference does ease the friction between the executive and the judiciary. It also lightens the burden on lower courts laboring under large caseloads. If a majority of the Justices are not ready to live in a world without some form of deference to agencies but cannot agree on when it applies, the Court may just continue bailing water from *Chevron*'s leaking hull even if a few other boats are swamped in the process.

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[89] *See id.* at 263, 271; *see also* City of Arlington v. FCC, 569 U.S. 290, 312 (2013) (Roberts, C.J., dissenting) ("[T]he question whether an agency enjoys that authority must be decided by a court, without deference to the agency.").

[90] *See* McKinney, *supra* note 85.

[91] *See, e.g.*, MERRILL, *supra* note 7, at 265–67.