

## Meditations on Independence

By John Mauldin | July 6, 2024



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I am writing this letter on the afternoon of July 4th, so it is natural to think about our government and independence. I want to comment on the *Chevron* case which is blowing up my X (Twitter) feed as well as my news feeds, both for and against. It is both less and more than many of the quick reactions. I would like to interject a little calmness, as not a great deal will immediately change, but it will change our experiment with self-government.

Long-time readers know I have not been a fan of the *Chevron* deference. I think it was one of the worst decisions of the last century. I’ve been aware of it because I’m in a regulated business. Some 15 years ago my friend Rod Martin gave me a deep dive into *Chevron*, and we have discussed it on and off since then. Rod is a lawyer and was a *very* early hire at PayPal, part of the original PayPal mafia. His shortened resume: “Rod Martin is a venture capitalist, technology entrepreneur and futurist from Destin, Florida. He was a senior advisor to PayPal founder and CEO Peter Thiel, served as policy director to Governor Mike Huckabee, and was thrice elected president of the National Federation of Republican Assemblies.”

After the ruling we began to have discussions and I decided July 4 is indeed a good time to write about it, because it has economic implications in addition to the legal consequences. He agreed to send me some bullet points which became the paper below. I expanded some of it and then added my own thoughts at the end. I should note this was reviewed by Karen Cook, the lead lawyer for one of the Chevron cases. This is very serious legal thought from great minds. You might not agree, but I respect their expertise.

I don't want to bury the lead. In my follow-on notes I will point out essentially only two administrative rulings were overturned. There will likely be others, but it is not going to be the end of the world. It will not be open season on the environment, health care, financial regulations, and so forth. We need regulations and rules. With that said, let's look at Rod's analysis of the actual philosophy behind the case. Note: You will soon see that Rod is quite passionate about liberty and the Constitution.

## Representative Government vs. the Priesthood of Experts

By Rod D. Martin

The Supreme Court's overturning of *Chevron* was an early Independence Day gift. *Chevron* stood for an imperial bureaucracy, neither responsible to the people nor accountable to anyone, a priesthood of experts pursuing what Thomas Sowell called "[the vision of the anointed](#)," interpreting, adjudicating, and above all, *making* the laws we must live by, however they saw fit.

Last week, in their *Loper* and *Jarkesy* rulings, the Court overturned that half-century travesty, partly upending the statist technocratic order and, at least to a degree, replacing it with the Constitutional vision of the Founders.

James Madison would be proud.

## The Administrative State: Subject-Matter Dictatorships

To understand the principles at stake, we first must grasp the radical shift in governance represented by the advent of the administrative state a century ago.

The Founding Fathers established responsible government: elected leadership that must regularly stand accountable for its actions and their effects. Their Revolution explicitly repudiated the idea of lawmaking and enforcement by far-away elites, in favor of that government which was closest to the people. They recognized the benefit of continent-wide (though not unelected or transoceanic) policy on a handful of key issues; but to achieve that, they created multiple competing elected bodies to check each other's hubris, and they wrote a Constitution that restricted their new government to only a short list of subjects.

Why did they do this? Because they had experienced the tyranny born of unrestricted arrogance. And while they knew they couldn't change the nature of man, they could use competition among men to restrain man's more venal and predatory impulses.

They thus also created a very small bureaucracy, every part of it directly accountable to one or more elected officials. With no Civil Service Act, and a Senate elected by the state legislatures, if your mailman kicked your dog, you could go find your state representative at the coffee shop and complain. Enough complaints and change was certain: elected officials have a lot of incentive to listen.

Over time, usually for practical reasons but increasingly motivated by a very real shift in philosophy, not only did government grow exponentially, but elected officials became both more remote and less able to help. We decided we wanted to “protect” bureaucrats from the “spoils system,” so we made it nearly impossible for presidents to fire them. We decided to delegate vast authority to those bureaucrats, people whose only constituents, aside from their current bosses, were the companies and interest groups who might hire them later. We did this in the name of “nonpartisanship” and “expertise.”

By the end of the New Deal, we’d curbed representative government at every point, in favor of a permanent unelected elite. And while we did not create a true unitary state as other countries did in the 1930s, we did establish a sea of subject-matter dictatorships: unaccountable entities with nearly unlimited power in their assigned areas.

Take the Environmental Protection Agency as one example. The EPA, like countless other agencies, concentrates the powers of all three branches of government in its agency administrator, the *de facto* dictator. The agency makes law, and its lawmakers work for the administrator. The agency enforces the laws that it makes, and those enforcers also work for the administrator. Worse still, the agency employs a small army of Administrative Law Judges, or ALJs, whom it may haul you in front of whenever it chooses. They work for the administrator too.

All of this is a grossly unconstitutional violation of the separation of powers. It eliminates virtually all checks and balances. And the *Chevron* Court acknowledged that, to a degree: It said that by 1984, things had been done this way so long that it would just be too disruptive to change things.

In short, *Chevron* established *constitutionality by longevity*. You can apply that logic to [Plessy v. Ferguson](#) which said in 1896 that segregation was legal within limits and tell me whether you think it’s a good idea.

## **Jarkesy and Juries, the Bulwark of Your Liberty**

But *Chevron* did more and worse still. *Chevron* implicitly eliminated your Seventh Amendment right to a jury trial, by largely eliminating your right to appeal an ALJ’s ruling to an actual, constitutionally authorized Article III court.

Let’s say that again: Under *Chevron* an agency could sue you in front of its own judges, over its own made-up rules, enforced by its own bureaucrats, and you had no right to an appeal. You didn’t even get a jury of your peers.

That last bit is the keystone, the philosophical crux, of the entire matter. It is the core of the disagreement between King George and George Washington, between Madison and Marx. (The legal trail goes back to *Marbury vs. Madison*. This is a big deal! —JM)

The bureaucrats argue, as do their statist supporters, shrieking over *Chevron's* overthrow, that the subject matter addressed by the various agencies is so complex, so intricate, so specialized that not only can a jury not understand, *neither can an Article III federal court*. They tell us in more and more blatant terms that, though they constantly pursue rule by unelected judges, even those experts are insufficiently elite. For true “democracy,” we must have rule by a class of super-experts, not subject to any oversight at all.

At every step of the process, *Chevron* replaced “government by the people” with that priesthood of experts, those who must simply be trusted to be benevolent, all-knowing, and true. This is the technocrat’s and socialist’s (but I repeat myself) dream: to eliminate the great unwashed from the process of scientific government.

And if federal judges are too unwashed for our would-be betters, how much more so juries?

But juries matter, and not just because they are constitutionally guaranteed. Judges apply the law, but juries establish the facts: what happened, what didn’t, who’s believable, who’s not. There’s a reason for “of your peers.” The most basic fact which must be established is whether or not the accused had any intent to commit the act for which he’s being prosecuted. The priesthood, far removed from your life experience, is poorly positioned to determine that; your peers can stand in your shoes and imagine themselves in the same situation.

Your jury can also nullify a law they believe to be unjust—subject to appeal, of course. Juries are not always perfect either.

Agency employees, regardless of their title, aren’t going to do that. Most of the time, you’re just going to lose, either outright or through a settlement. And if no appeal is possible, there’s no incentive for the priesthood to be reasonable, not in making law and not in its adjudication. After all, who the heck are you?

It’s worse. Increasingly, agency regulations are “strict liability,” which means that your intent doesn’t matter. By this standard, an accidental killing becomes murder. And speaking of murder, agencies issue not just civil but their own criminal laws, by some estimates as many as 300,000 separate agency-made offenses, all adjudicated solely by their own ALJs with no juries and no possibility of appeal.

Last week, in *SEC v. Jarkesy*, the Supreme Court upended that, reestablishing your Sixth and Seventh Amendment rights. And the howling began.

## ***Loper* and the Abomination of “*Chevron* Deference”**

But the crying was about to get louder. The very next day the Supremes handed down *Loper Bright Enterprises v. Raimondo* and wiped out much of the rest of the philosophy backing *Chevron*.

*Loper* is about so-called “*Chevron* deference,” the doctrine that if you somehow do get to an Article III court, that body must defer to an agency’s interpretation of any ambiguity in a law the agency enforces. *Chevron* deference didn’t just upend centuries of principles of statutory construction. It also neutered the Article III courts.

Again, this was a feature, not a bug. The three dissenting justices made that clear, by not focusing on the constitutionality (or lack thereof) of *Chevron* but rather lamenting the priesthood's loss of power. The philosophy is simple: The anointed "experts" should rule you. Peasant.

Freedom is impossible if those who wield force are not accountable to the people. But in [David Harsanyi's words](#), "bureaucrats do not function under a notion of 'accountability' that most normal people would recognize. When was the last time an agency cleaned house because its policies had failed? When was the time the administrative state was reined back in any genuine way? How many regulators or appointees are ever fired? (Come back and read this for more depth. —JM)

## The Founders' Vision vs. "Our Democracy"

When power is vested in the elected branches, as our Constitution requires, you have exactly that power every election. The *Chevron* philosophy is the opposite: technocratic at best, socialistic at worst, without accountability always.

But technocracy is failing, and losing legitimacy, everywhere. There's a reason for the increasingly global populist revolt: The self-anointed elites have lost all touch with those they rule (and rule they do, not serve). George Friedman writes about this, and what he believes will come next, in his excellent [The Storm Before the Calm](#). From a somewhat different direction so does Neil Howe in his brilliant [The Fourth Turning Is Here](#).

The Founders' answer was and surely would be smaller government; but even if they could not make government smaller, at the very least they would shift its power back to the elected branches and thus the election process. Give individual House members and Senators enough staff to actually oversee the government we have. Force agencies to defend their "brilliance" before real, constitutional courts. Force Congress to actually legislate, rather than (now unconstitutionally) delegating its powers to the bureaucracy.

The Founders' vision gave us the America we know, the tiny colonies huddled along the Atlantic coast that in barely more than a century grew into the colossus of the world by attracting millions to its opportunity and liberty, and by harnessing their talents "like an invisible hand" to create a near-universal prosperity unknown in all the history of man. Liberty is chaotic, and brilliant, and wildly innovative; and that innovation is called forth by a system that does not direct, but rather allows everyone to imagine the better future that would come from solving other people's problems, and then doing so not through top-down coercion but through the marketplace.

For millennia, the aristocratic, elitist vision produced a stultified world in which as late as 1800 fully 94% of humanity lived in extreme poverty. Freedom has doubled life expectancy, put a supercomputer in the hands of billions, and upended tyrannies as old as the world.

But this century-old debate is far from over. Increasingly hostile to the Constitutional order our Founders gave us, many evidently believe technocracy is essential to what they call "Our Democracy." They are increasingly clear that "Our Democracy" means a priesthood of experts, shielded from accountability or responsibility, making decisions "for the good of the people" without their involvement or consent. In short, "Democratic Centralism."

## Scotch in My Water

John here: take a deep breath. There are 150,000 pages of government and bureaucracy rules. Just two cases were overturned. The vast majority of those rules are necessary and important and generally the large majority of people will agree. We need EPA, FTC, FDA, and all the other alphabet agencies.

I don't want to see the air I breathe, and I don't want anything in my water but Scotch. (Please note that is a joke. I would never dilute a great single malt with water. Maybe a cube of ice.) While my intentions are ever so pure (again, sarcasm), some of my fellow investment professionals' are not. We need regulations to protect investors. And with possibly a few exceptions that I'm not aware of, that goes for all of the rest of the administrative agencies.

Some of the objections are that these areas are so technical that juries can't understand them. But juries make decisions all the time on very technical issues with which they are not expert. Seriously, how many of us are expert on murder or arcane business issues and all the rest? In fact, most lawyers go out of their way to keep people off a jury that are experts on the subject matter. The work of the lawyer is to provide expert witnesses on both sides to educate the jury on the facts and issues.

Another objection is that Congress can't seemingly pass laws now, so how could they pass laws dealing with details beyond their capacity? That's a fair point. I don't know how many of you have been in a congressional office, but the offices are small and packed. Congressmen and women get maybe 12 to 15 staffers who are always overworked, underpaid, and certainly not experts on all the issues that come before Congress.

Let me propose something radical. If we actually want Congress to pass the laws needed for a functional bureaucracy, then we need to expand congressional staffs. Dramatically. But where to put them? There's this neat new technology called remote work. You can actually use your computer to interact with people in your office who are in a different place. You can use messenger apps and videos to stay in touch. There is plenty of room in Alexandria or Bethesda to build large office spaces to house Congressional and Senate staff. Even more radical? Maybe put them in your district? What's the difference between a few miles and across the country?

Further, if you really want the expertise, hire people from the agencies to be on your staff. There is nothing to prevent the head of (pick an alphabet agency) from going to the head of the relevant legislative committee to say we need to put these administrative rules into legislation. The committee head then has his committee staff look at these rules. Committee members do the same, maybe saying they can get 95%+ of these rules passed, but the other 2-4% need to be changed or dropped. We can't get consensus on those. That's the way it should work.

More radical: You can still have administrative law judges (ALJs) but they are subject to appeal. If a certain number of their rulings are overturned (say five?) then these ALJs are terminated. They clearly don't have enough judicial restraint to be in that position. Further, if an agency or ALJ realizes they could be subject to appeal, they will be far less likely to overreach. After they get a few decisions overridden? As Judge Roy Bean said, "There's nothing like a hanging to focus the mind."

Yes, I understand that every Tom, Dick, and Mary are going to want to appeal their case. It will initially clog the courts. Just like Congress is going to need more staff, we're going to need more federal judges and especially [magistrate judges](#). Congress can authorize those. We are a large complex society and if we want representative government and the right of appeal, we have to enable it. In fact, some of those ALJ's can be moved into the federal judiciary system if they qualify and can get Senate approval.

Will it be perfect? Of course not. It will sometimes be ugly and messy, but that's liberty. But it will be accountable to We the People. And as I meditate on independence, that seems like a good thing to me.

One last note: I have no proof other than my gut instinct, but let's look back in 10 years and see whether this ruling doesn't eventually lead to a Cambrian explosion of innovation.

## Fireworks and Writing to Me

I will be off to a July 4th party in a few hours where we will be on the beach and watch fireworks. I thought Texans like fireworks, but it is nothing compared to Puerto Ricans. Scores of my neighbors will be setting off serious fireworks tonight, even though July 4th is not their holiday. They just need an excuse. Every holiday is a fireworks holiday. I like it.

I want to encourage you to [join our new online comment community](#), which you can access either on your computer or via a mobile app. Both have the same content. I read every comment on my letters on that app, watch the interaction among readers and often write future letters inspired by their questions and comments. I try to respond whenever possible.

I trust you had a great holiday! Have a great week and don't forget to [follow me on X](#).

Your loving Liberty and our country analyst,



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