Opinion
NCR Voices

Herring are unloaded from a fishing boat in Rockland, Maine, July 8, 2015. (AP/Robert F. Bukaty, File)

by Michael Sean Winters

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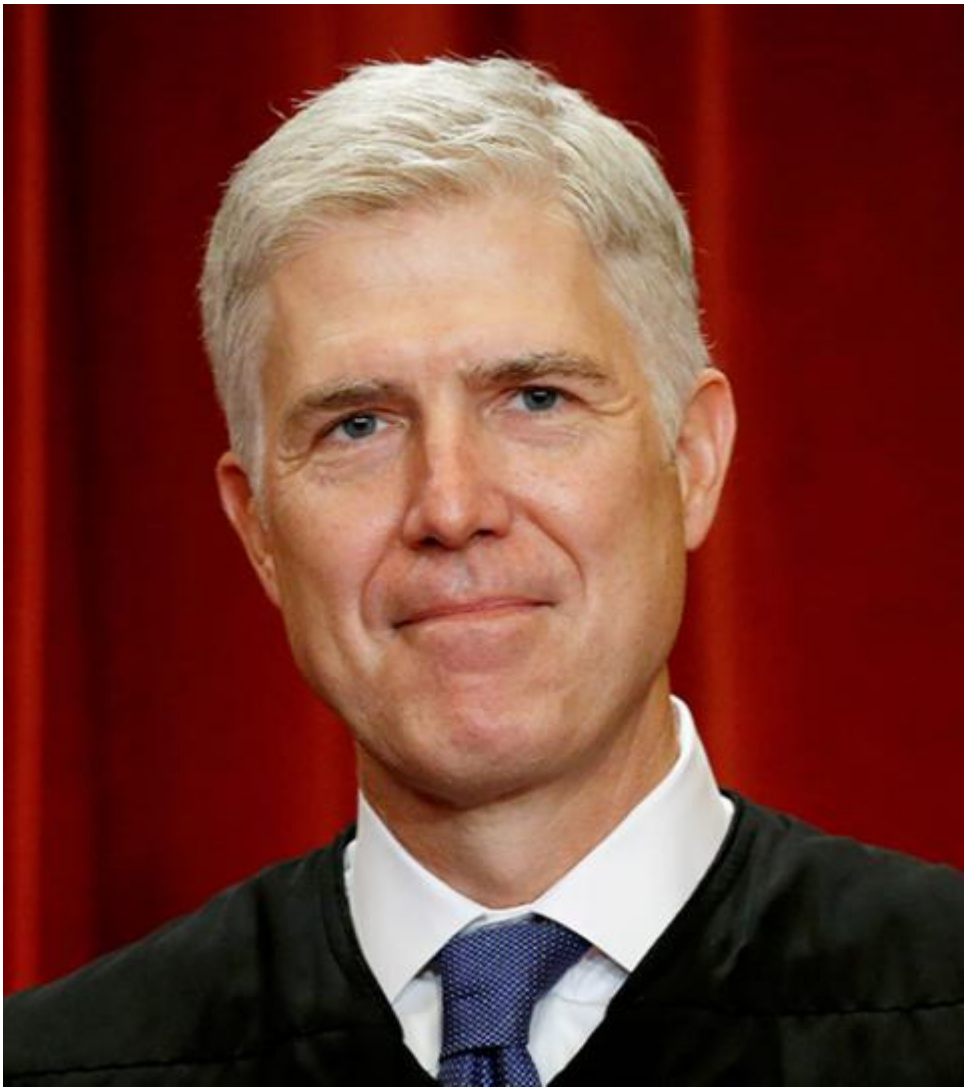
The U.S. Supreme Court heard oral arguments this week in *Loper Bright Enterprises* v. *Raimondo*, "a case brought by a group of family-owned companies that fish for Atlantic herring," as SCOTUSblog describes it. There are deeper issues than herring fisheries in the case. Some of those issues are legal, which are entwined with issues of governance, and others specifically epistemological.

The legal issue is the so-called *Chevron* doctrine, named for the 1984 decision by the court in which, according to the always-reliable analyst Amy Howe, "Justice John Paul Stevens set out a two-part test for courts to review an agency's interpretation of a statute it administers. The court must first determine whether Congress has directly addressed the question at the center of the case. If it has not, the court must uphold the agency's interpretation of the statute as long as it is reasonable."

The *Chevron* case focused on the precise issue of what counted as a definition of "stationary sources" of air pollution under the Clean Air Act. "With regard to judicial review of an agency's construction of the statute which it administers, if Congress has not directly spoken to the precise question at issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute," the court held in 1984.

The court added: "The EPA's interpretation of the statute here represents a reasonable accommodation of manifestly competing interests and is entitled to deference."



Justice Neil Gorsuch (CNS/Reuters/Jonathan Ernst)

In Wednesday's oral arguments, some of the conservative majority, especially the libertarian Justice Neil Gorsuch, seemed positively eager to overturn *Chevron*. "Lower court judges, even here in this rather prosaic case, can't figure out what *Chevron* means," he complained.

Confusion is not the problem. The New York Times reported on the lawyers' libertarian bona fides: "The lawyers who represent the New Jersey-based fishermen are working pro bono and belong to a public-interest law firm, Cause of Action, that discloses no donors and reports having no employees. However, court records show that the lawyers work for Americans for Prosperity, a group funded by Mr. [Charles] Koch, the chairman of Koch Industries and a champion of anti-regulatory causes."

Justice Amy Coney Barrett came at the legal and governmental conundrum from a different angle. "Isn't it [overturning *Chevron*] inviting a flood of litigation?" she asked.

That is exactly why her pro-business, libertarian colleagues want to overturn it. The hope is that businesses will always be able to afford more and better lawyers than special interest groups that might have stronger, and less expensive, connections to government regulators.

Legal decisions do not happen in a vacuum. The legal case before the justices will decide who gets to govern in the area of corporate regulation — big business, which can always afford better lawyers, or the people, who at least have a shot with regulatory agencies.

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If you ever wondered why the so-called "worker protection" clauses of trade agreements were never enforced, this is the reason: The trade agreements always required cases challenging violations of the worker protections to be heard in Manhattan courtrooms. There are not a lot of impoverished workers from the Global South who can hire expensive law firms in Manhattan. The multinational corporations exploiting the workers can.

Justice Elena Kagan however, raised the epistemological question, which is at the heart of the legal and the governmental issues. Raising the hypothetical of determining whether a certain medicine is more properly regulated as a drug or as a dietary supplement, Kagan said: "It's best to defer to people who do know, who have had long experience on the ground, who have seen a thousand of these kinds of situations. And, you know, judges should know what they don't know."

Justice Elena Kagan (CNS/Reuters/Larry Downing)

Policy is equal parts law and facts. Law contains many components: the will of the people, national ideals, historic constitutional precedents, promises made on a campaign trail, etc. Facts are more particular and stubborn things. Or should be.

Kagan's point was well taken: In assessing the rules adapted to implementing a statute, let the people who swim in the waters where facts and law collide make the call.

Kagan was not the only person raising the issue of epistemology this week. In an address at a conference on Catholic higher education sponsored by the University of San Diego, Cardinal Robert McElroy spoke about the need to place the theological vision of *Laudato Si*', Pope Francis' 2015 encyclical on the environment. In one

section of the talk, which was published here at NCR, he said:

> Laudato Si' speaks powerfully to the concept of truth which should lie at the center of every Catholic university. In an age when the notion of objective truth is dissipating under the barrage of solipsism and the fracturing special interests in our society and our world, the encyclical points starkly to the dangers of a relativist notion of truth. And that lesson should be part of the aim of every Catholic university.

It is difficult to overemphasize the need to reject that dissipation. The threat comes more obviously from the right, as I discussed while looking at the entrance polls for Iowa's caucuses, in which 66% of caucusgoers said President Joe Biden was not elected legitimately in 2020. But the threat exists in progressive circles, too, where attacks on the idea of objectivity have roiled newsrooms such as The New York Times and The Washington Post.

Cardinal Robert McElroy (OSV News/Courtesy of Diocese of San Diego)

How can a government, or a civilization for that matter, prosper if it believes all knowledge is relative? If it is not willing to wrestle with the reality of things? Certainly, our climate has no hope if we dismiss the objective reality staring us in the face.

Gorsuch and his libertarian friends think unlimited human freedom, and the invisible hand of the market, is the best resolution of any and all problems. As Catholics, nothing is more offensive to our intellectual tradition than libertarianism.

We also need to be humble about the limits of our knowledge, recognizing that our theories must change to accommodate new information. Fox News routinely criticized Dr. Anthony Fauci and other government health experts during the coronavirus epidemic whenever they changed their recommendations, forgetting that more information was being gathered daily, making previously unthought of recommendations possible and sometimes necessary. Forgetting, too, that viruses change by their very nature.

We could all cite a dozen cases of facticity being set aside for ideological ends without breaking a sweat.

McElroy got the relationship between objectivity and subjectivity precisely right in his talk:

> As Pope Benedict underscored so constantly and compellingly, the Catholic conviction that objective truth exists is under constant assault in the world in which we live. We are in a moment when relativism, if not as a systemic creed, then as a default operating principle, suffuses our culture, including our university cultures. The notion of "my truth" can be very effective in conveying the moral reality that every person's experience and perspective is sacred and should be treated with utter respect. But the notion of "my truth" can easily slip into a self-referential epistemology that empties our culture of substantive respect for objective truth.

Let's hope the Supreme Court keeps such distinctions in mind when it rules on the case of the herring fishermen.