

1-24-2024

## Loper Bright and the Future of Chevron Deference

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### Repository Citation

Beermann, Jack M. (2024) "Loper Bright and the Future of Chevron Deference," *William & Mary Law Review Online*: Vol. 65, Article 1.

Available at: <https://scholarship.law.wm.edu/wmlronline/vol65/iss1/1>

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# William & Mary Law Review Online

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VOLUME 65

No. 1, 2024

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## *LOPER BRIGHT* AND THE FUTURE OF *CHEVRON* DEFERENCE

JACK M. BEERMANN\*

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## INTRODUCTION

The question presented in *Loper Bright Enterprises v. Raimondo* is “[w]hether 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.”<sup>1</sup> The Court denied certiorari on another question focused on the merits of the case,<sup>2</sup> indicating that at least four of the Justices are anxious to revisit or at least clarify *Chevron*.<sup>3</sup> It is about time, although it is far from certain that the Court will actually follow through with the promise the certiorari grant indicates.<sup>4</sup>

The decades-long lack of clarity on the Court concerning the status of *Chevron* deference is a prominent example of one of the Court’s shortcomings—that it sometimes does a poor job of providing clarity on important issues of federal law. As the head of one of the three branches of the United States government, the Court can and should do better. Thousands of judges, millions of lawyers and hundreds of millions of citizens look to the Court for answers on important questions of law, and the Court is the only organ of government with the power to provide definitive answers. In *Loper Bright*, the Court should take the opportunity to overrule or clarify

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1. *Loper Bright Enters. v. Raimondo*, 143 S. Ct. 2429 (Mem.) (2023) (granting certiorari “limited to Question 2 presented by the petition”); Petition for Writ of Certiorari at i-ii, *Loper Bright*, 143 S. Ct. 2429 (No. 22-451).

2. Brief for Writ of Certiorari, *supra* note 1, at i. Question 1 asked “Whether, under a proper application of *Chevron*, the [Magnuson-Stevens Act (MSA)] implicitly grants [the National Marine Fisheries Service (NMFS)] the power to force domestic vessels to pay the salaries of the monitors they must carry.”

3. *See id.* at i-ii; *see generally* *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

4. The fact that the Court granted certiorari on a question focused on *Chevron* does not necessarily mean that the Court will address it when it decides the case. For example, in *American Hosp. Ass’n v. Becerra*, the Court failed to mention *Chevron* in its opinion in the case after granting review on “whether *Chevron* deference permits HHS to set reimbursement rates based on acquisition cost and vary such rates by hospital group if [HHS] has not collected required hospital acquisition cost survey data.” *See* Petition for Writ of Certiorari at i, *American Hosp. Ass’n v. Becerra*, 596 U.S. 724 (2022) (No. 20-1114). Further, at oral argument, *Chevron* was mentioned fifty-one times, including twice by Justice Kavanaugh who wrote the Court’s opinion rejecting the agency’s statutory construction without mentioning *Chevron*. Transcript of Oral Argument, *Becerra*, 596 U.S. 724 (No. 20-1114).

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the status of *Chevron* deference and turn over a new leaf by resolving to provide lower federal and state courts with clearer instructions on the status of important federal legal doctrines.

This essay proposes that the Court overrule the *Chevron* two-step standard of review of agency statutory construction and replace it by reviving deference under the factors announced in the *Skidmore* case<sup>5</sup> with a twist that preserves *Chevron*'s greatest virtue: agency freedom to alter its statutory interpretations so long as the agency remains within the zone of reasonable construction. This essay also proposes that the Court clarify the boundary between cases involving statutory construction and cases involving agency policy decisions that are reviewed under the arbitrary and capricious standard articulated in cases such as *Motor Vehicles* and *Overton Park*.<sup>6</sup> On this matter, this essay proposes that this boundary be drawn based on a straightforward and, in my view, simple inquiry into whether the case centers on the correct understanding of a statute (where the *Skidmore* factors would apply) or the policy implications of the agency's actions (where arbitrary, capricious review would apply). In my view, this understanding is relatively easy for courts and litigants to apply, is consistent with the structure established by the Administrative Procedure Act (APA), and would focus judicial review on the issues that ought to matter to the parties and the courts.

This essay proceeds as follows. Part I briefly describes the *Loper Bright* case and the issues involved. Part II examines the current status of *Chevron* deference, including the turmoil evident in lower federal courts over the correct application of *Chevron*, the problem of the boundary between *Chevron* and arbitrary and capricious review, and my proposed solution to both sets of problems. Part III looks at other areas of law with similar problems created by the lack of clarity at the Supreme Court level and discusses proposals made by academic amici in the *Loper Bright* litigation. Part IV concludes by urging the Court to turn over a new leaf and provide clarity on the status of important doctrines of federal law that appear to be disfavored at the Supreme Court.

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5. *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140 (1944).

6. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 40-41 (1983); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 414, 416 (1971).

I. *LOPER BRIGHT*

*Loper Bright* is a relatively simple case. A group of commercial herring fishing operations, including Loper Bright, challenged a rule promulgated by the National Marine Fisheries Service (NMFS) requiring them to pay for federal monitoring to ensure compliance with federal fishing regulations.<sup>7</sup> The NMFS has authority under the Magnuson-Stevens Fishery Conservation and Management Act of 1976 (the Act) to implement a fishery management program.<sup>8</sup> In concert with the New England Fishery Management Council (the Council), the NMFS promulgated a rule that requires fishing operations to carry and pay for federal monitors.<sup>9</sup> Although the costs are disputed, it appears that the cost of monitoring may amount to 20 percent of the subjects' annual returns.<sup>10</sup>

The challengers claim that the rule is not authorized by the Act<sup>11</sup> and that the procedures the NMFS employed to promulgate it were defective.<sup>12</sup> In particular, the challengers argue that while the Act authorizes monitoring, the Act does not authorize the NMFS to require them to pay for it.<sup>13</sup> In language that resonates with the Supreme Court's major questions doctrine, they suggest that agencies may not require the subjects of regulation to pay for monitoring unless Congress clearly authorizes it by statute.<sup>14</sup> The district court rejected the challenges, and the fishing operations appealed to the D.C. Circuit.<sup>15</sup>

The court of appeals first rejected the argument that clear statutory authorization is required before agencies may require

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7. This description of the case is drawn from the opinion of the D.C. Circuit. *Loper Bright Enters. v. Raimondo*, 45 F.4th 359, 364 (D.C. Cir. 2022).

8. 16 U.S.C. §§ 1801-91(d).

9. See Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Industry Funded Monitoring, 85 Fed. Reg. 7414, 7417 (Feb. 7, 2020) (to be codified at 50 C.F.R. pt. 648).

10. See *id.* at 7418.

11. See *Loper Bright*, 45 F.4th at 366.

12. *Id.* at 371.

13. *Id.* at 366.

14. *Id.*

15. See *id.* at 359-60.

subjects of regulation to pay for monitoring.<sup>16</sup> It then found, as conceded by the challengers, that the statute clearly authorizes agency monitoring of fishing operations, but found the statute silent on whether the agency may require the boat owners to pay the costs.<sup>17</sup> It then applied *Chevron* step two and accepted the NMFS's rule as based on a reasonable interpretation.<sup>18</sup> The court also rejected the procedural challenge to the agency's rule.<sup>19</sup>

Judge Walker dissented, arguing that under accepted principles of statutory construction, the Act does not authorize a rule requiring the subject of monitoring to pay for it.<sup>20</sup> Judge Walker sounded a theme that he has invoked in other *Chevron* cases,<sup>21</sup> that before jumping to *Chevron*'s step two, the court should “empty [its] interpretive toolkit” to determine whether Congress truly delegated interpretive authority to the agency.<sup>22</sup> He then engaged in a detailed examination of the statute to discern whether it was ambiguous, and he concluded that it was not.<sup>23</sup> His most persuasive argument was that because Congress expressly authorized agencies to require subjects to pay for monitoring in certain other contexts, it could not have intended by silence to authorize such a requirement in this context.<sup>24</sup> This is a classic *expressio unius* argument and it is pretty persuasive as applied here. He also argued that the burden should be on the agency to establish that Congress intended to authorize it to require subjects to pay monitoring costs, characterizing such requirements as a “workaround” to avoid the general rule that agencies may not spend money they collect unless Congress authorizes them to do so.<sup>25</sup>

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16. *Id.* at 367.

17. *Id.* at 368.

18. *Id.* at 369. In a wrinkle that is discussed below, the court also held that the agency offered a “reasoned explanation” for its construction, suggesting a way to incorporate the arbitrary, capricious standard’s review of policy into *Chevron* step two, as I suggest in this essay.

19. *Id.* at 370.

20. *Id.* at 377-78 (Walker, J., dissenting).

21. *See, e.g., Solar Energy Indus. Ass’n v. Fed. Energy Regul. Comm’n*, 59 F.4th 1287, 1298 (D.C. Cir. 2023) (Walker, J., dissenting).

22. *Loper Bright*, 45 F.4th at 374.

23. *Id.* at 375-76.

24. *See id.*

25. *Id.* at 373.

Thus far, *Loper Bright* looks like an unexceptional dispute over agency authority and the scope of *Chevron* deference. But when the challengers petitioned the Supreme Court for a writ of certiorari, in addition to a question challenging the substance of the rule,<sup>26</sup> they also posed a question urging the Court to overrule *Chevron* or at least carve out an exception to *Chevron* stating that silence on “controversial powers ... does not constitute an ambiguity requiring deference to the agency.”<sup>27</sup> And when the Court granted the petition, it limited the grant to the latter question, setting up the possibility that *Chevron* might be overruled or substantially reformed.<sup>28</sup>

It is far from certain that the Court will overrule or even substantially clarify *Chevron*. The case could be decided for either party without applying or even mentioning *Chevron*. The Court could agree with the NMFS that the power to require monitors implicitly includes authority to require regulatory subjects to pay their salaries. The Court could also reverse by adopting Judge Walker’s statutory argument under the “traditional tools” approach without mentioning *Chevron*, as it has done in other recent cases.<sup>29</sup> But similar to the Court’s grant in *Kisor v. Wilkie* on whether to retain *Auer* deference,<sup>30</sup> the fact that the Court limited the grant to the *Chevron*-focused question indicates that either overruling or a

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26. See *supra* note 1. The petition’s first question was “Whether, under a proper application of *Chevron*, the MSA implicitly grants NMFS the power to force domestic vessels to pay the salaries of the monitors they must carry.” *Id.*

27. *Id.* The petition’s second question was “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.” *Id.*

28. See *supra* note 4 and accompanying text.

29. *E.g.*, *Am. Hosp. Ass’n v. Becerra*, 596 U.S. 724, 733, 739 (2022). For what it is worth, my own view is that the government has the better of the case based on the argument that power to require payment is implicit in the power to require the monitoring and based on my sense that Judge Walker’s presumption against such powers would cripple agency enforcement of important regulatory requirements. But it is a close case, and it is not difficult to imagine that the Court might agree with Judge Walker’s suggestion that agencies should not be allowed to require subjects to fund monitoring absent clear statutory authorization. This is not, as the petitioners would have it, a major question subject to rejection under the Court’s major questions doctrine; there is no substantial political controversy over this power and the economic effects are insubstantial, except perhaps to the parties involved in the case.

30. In *Kisor*, the Court granted certiorari limited to the question “[w]hether to overrule *Auer* and ... *Seminole Rock*.” *Kisor v. Wilkie*, 139 S. Ct. 2400, 2409 (2019). The Court then declined to overrule those cases, but its opinion did clarify and perhaps narrow the circumstances under which the deference principle announced in those cases would apply. *Id.*

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significant clarification of *Chevron* is more likely now that it has been since that landmark was established. Either would be a welcome development because, as the next Part of this essay elaborates, there are compelling reasons why the Court ought to do something regarding the status of *Chevron* deference.

## II. THE *CHEVRON* PROBLEM

As has been recounted hundreds if not thousands of times in law journals, in the *Chevron* decision, issued in 1984, the Supreme Court announced what appeared to be a new standard of review for agency statutory construction decisions.<sup>31</sup> Under *Chevron*'s two-step inquiry, when an agency's construction of a statute is reviewed, the first question is whether Congress's intent is clear; if so, "that is the end of the matter," because the reviewing court must apply clear congressional intent regardless of the agency's views.<sup>32</sup> However, if Congress's intent is not clear, for example because the statute is silent or ambiguous on the disputed matter, then the court should defer to any reasonable or permissible agency construction even if it would have read the statute differently absent the agency's involvement.<sup>33</sup>

### A. *Chevron* at the Supreme Court

This standard was controversial from the get-go, but more important for present purposes, the Supreme Court's application of it has been inconsistent and unclear.<sup>34</sup> The decision itself was unclear on whether *Chevron* deference was really about deference to agency statutory construction, concluding in a footnote that

[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which

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31. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-45. (1984).

32. *Id.* at 842.

33. *Id.* at 843-45.

34. For a catalog of all, or at least many, of *Chevron*'s problems, 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. 779 (2010)[hereinafter Beermann, *Failed Chevron Experiment*].



are contrary to clear congressional intent.... If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.<sup>35</sup>

If *Chevron* is not about deferring to agency statutory construction, then what is it about? It cannot be about review of agency policy decisions, since those decisions are generally reviewed under the arbitrary and capricious test unless a statute specifies a different standard of review.<sup>36</sup>

Further compounding the unclarity surrounding the *Chevron* standard, the Court has not been clear on when *Chevron* should apply or even whether *Chevron* is still good law. From the beginning, the Court did not even mention *Chevron* in a high percentage of cases in which most observers would agree that it should apply,<sup>37</sup> and it has not deferred to an agency statutory construction under *Chevron* since 2016.<sup>38</sup>

Sometimes confusion over the law is a natural consequence of novel or complicated situations involving developing legal understandings. But in this case, the Court itself has created the confusion. Language from two opinions in which the Court at least mentioned *Chevron* and explained why it did not apply illustrates the Court's complicity in the confusion perfectly. In 2000, in a decision rejecting the FDA's assertion of authority to regulate tobacco products, the Court proclaimed that "[b]ecause this case involves an administrative agency's construction of a statute that it administers, our analysis is *governed by Chevron*."<sup>39</sup> Fifteen years later, the Court began its analysis of whether the IRS's interpretation of a provision of the Affordable Care Act was correct by

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35. *Chevron*, 467 U.S. at 843 n.9 (citations omitted).

36. For example, by statute, rules issued by the Department of Labor enforcing the Occupational Safety and Health Act are reviewed under the substantial evidence test. *See* 29 U.S.C. § 655(f). While Congress may have intended this to mean that such rules are reviewed under a less deferential standard than the arbitrary, capricious test, it is unclear whether substantial evidence review actually makes a difference. *See* Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 764 n.25 (2008).

37. *See supra* note 4 and accompanying text.

38. *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 289 (2016).

39. *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (emphasis added).

explaining that “[w]hen analyzing an agency’s interpretation of a statute, we *often apply* the two-step framework announced in *Chevron*.”<sup>40</sup> Perhaps the latter statement accurately reflected the fact that, by then, the Court had recognized two major exceptions to *Chevron*’s application,<sup>41</sup> but without elaboration it appeared that *Chevron* might have been relegated to an optional standard with little guidance on when the courts should exercise the option. That is certainly an accurate reflection of the Court’s own treatment of *Chevron* for its entire nearly forty-year existence.

It appears that the Court itself may not understand the depths of the confusion it has caused for others who are affected by the vitality of *Chevron*. Justice Neil Gorsuch apparently believes that the lower federal courts are emulating the Supreme Court and have significantly limited the application of *Chevron*. Recently, in a dissent from denial of certiorari in a case in which the Federal Circuit applied *Chevron* and affirmed the V.A.’s denial of benefits to a veteran, Justice Gorsuch attacked what he characterized as a “maximalist” view of *Chevron* which he views as a serious departure from the judicial role in ensuring that agencies remain within their statutory mandates.<sup>42</sup> However, Justice Gorsuch took solace in the “fact” that *Chevron* has apparently lost much of its vitality:

Lower federal courts have also largely disavowed the project. One recent survey revealed that a substantial majority of federal appellate judges disapprove of the broad reading of *Chevron* and avoid applying it when they can. See A. Gluck & R. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1312-1313 (2018). An extraordinary number of federal judges have written about the problems associated with reading *Chevron* broadly too ... [T]he aggressive reading of *Chevron* has more or less fallen into desuetude—the government rarely invokes it, and courts even more rarely rely upon it. The Federal Circuit’s decision at issue here is thus something of an outlier.

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40. *King v. Burwell*, 576 U.S. 473, 485 (2015) (emphasis added).

41. See *Brown & Williamson*, 529 U.S. at 159 (*Chevron* does not apply in certain “extraordinary cases”); *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001) (*Chevron* does not apply in certain cases involving decentralized informal decision making).

42. *Buffington v. McDonough*, 143 S. Ct. 14, 16-21 (2022) (Gorsuch, J., dissenting from the denial of certiorari).

And maybe that is a reason to deny review of this case. Maybe *Chevron* maximalism has died of its own weight and is already effectively buried.<sup>43</sup>

As we shall see, this may be wishful thinking on Justice Gorsuch's part, but the grant of certiorari on the *Chevron* issue in *Loper Bright* may fulfill his wish. More to the point, under the Court's own precedent, unless and until the Court itself overrules *Chevron*, the lower courts are bound to follow it.<sup>44</sup> If Justice Gorsuch was correct (which, as we shall see, he is not) that lower courts have stopped applying *Chevron*, he should be criticizing them, not applauding them, and he should be calling on his colleagues at the Court to overrule *Chevron*.

Lest it be suspected that *Chevron* is a special case in which the Court has failed to provide clear guidance, there are other areas of law in which the Court seems to have changed the law without telling state and lower federal courts. The best example of an area that needs more specific guidance from the Court involves the *Lemon* test for determining whether state subsidies to religious institutions violate the Establishment Clause.<sup>45</sup> Although I personally favor maintaining a strict bar against such subsidies, clearly the Supreme Court thinks otherwise, yet it has not provided clear guidance to the lower and state courts on the matter. Twice, Justice Gorsuch has chided lower courts for applying the *Lemon* test, a doctrine that he stated the Court had "interred" and "abandoned."<sup>46</sup> Perhaps "interred" and "abandoned" are euphemisms for "overruled," but under the Court's own precedent, to overrule a case, the Court must be more explicit. This is illustrated by an earlier controversy over the application of the *Lemon* test. In a case in which a lower court accurately predicted that the Court would no longer adhere to it, the Court told lower courts to continue to apply *Lemon* and its progeny unless and until the Court itself overruled it even

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43. *Id.* at 21-22.

44. *Agostini v. Felton*, 521 U.S. 203, 238 (1997).

45. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

46. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427 (2022) ("this Court long ago abandoned *Lemon*"); *Shurtleff v. City of Boston*, 596 U.S. 243, 288 (2022) (Gorsuch, J., concurring in the result) ("[t]his Court long ago interred *Lemon*, and it is past time for local officials and lower courts to let it lie.").

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if the Court has given strong indications that, given the chance, it would overrule prior cases:

[w]e do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that “[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”<sup>47</sup>

Again, Justice Gorsuch’s disagreement is with his colleagues for failing to clarify *Lemon*’s status, not with the lower courts for following his Court’s instructions.<sup>48</sup>

### *B. Chevron at the Lower Federal Courts*

Contrary to Justice Gorsuch’s suggestion, the application of *Chevron* has been and remains much more generous to agencies at the lower federal courts than at the Supreme Court. The lower courts rightly saw *Chevron* as an easy way to dispose of large numbers of

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47. *Agostini*, 521 U.S. at 237 (quoting *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989)). See also Hugh Baxter, *Managing Legal Change: The Transformation of Establishment Clause Law*, 46 UCLA L. REV. 343, 356 n. 53 (1998) (“Thus the Court, in deciding *Agostini*, rules that *Aguilar* already is not good law. But the Court forbids the lower courts from recognizing this change in the law.”)

48. *Bremerton*, 142 S. Ct. at 2427; *Shurtleff*, 142 S. Ct. at 1610. There are additional areas of the law in which the Court has failed to provide clear instructions to lower courts, resulting in controversy and the need for repeated Supreme Court intervention. Examples include the standards for recognizing implied rights of action under federal regulatory statutes and for creating damages remedies for constitutional violations by federal officials. In the former area, compare *Cort v. Ash*, 422 U.S. 66, 80-85 (1975) (establishing four-factor test for recognizing implied rights of action) with *Karahalios v. Nat’l Fed’n of Fed. Emps.*, 489 U.S. 527, 536-37 (1989) (observing, counter-textually, that “Congress undoubtedly was aware from our cases such as *Cort v. Ash*, 422 U.S. 66 (1975), that ... such issues were being resolved by a straightforward inquiry into whether Congress intended to provide a private cause of action”). In the latter area, compare *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) and *Carlson v. Green*, 446 U.S. 14 (1980) (creating and expanding damages remedy against federal officials for constitutional violations) with *Egbert v. Boule*, 142 S. Ct. 1793, 1799-1800 (2022) (expressing skepticism that the Court will extend *Bivens* to any new context). As Justice Gorsuch observed, by leaving *Bivens* in place, the Court gives litigants the “false hope” that they might prevail where others have failed. *Id.* at 1810 (Gorsuch, J., concurring).

cases without engaging in the difficult analysis that non-deferential statutory construction cases often require.<sup>49</sup> In cases of doubt, so long as the agency's statutory construction was built on a plausible textual basis, the agency was very likely to prevail when all it had to establish was that its construction was "reasonable" or "permissible."<sup>50</sup> This left open a wide field for agency innovation, whether in response to changed circumstances or changed administration policy.

Whether, as Justice Gorsuch claimed, lower courts have actually abandoned "maximalist" *Chevron* is subject to serious dispute.<sup>51</sup> Conventional *Chevron* continues to be cited as good law in every circuit,<sup>52</sup> and as the Federal Circuit's opinion that provoked Justice Gorsuch's dissent from the denial of certiorari in *Buffington* exemplifies, it sometimes is employed to approve agency statutory constructions without embarking on a serious inquiry into whether the agency has arrived at the best reading of the statute in light of

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49. See Gary Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the Chevron Doctrine*, 65 ADMIN. L. REV. 1, 60 (2013).

50. See *id.* at 2-3, 60.

51. Thomas Schmidt has raised the possibility that lower courts ought to defer to "politically accountable" agencies even if the Supreme Court does not. See Thomas P. Schmidt, *Judicial Minimalism in the Lower Courts*, 108 VA. L. REV. 829, 891-92 (2022).

52. In December, 2022, to prepare for a discussion of Tom Merrill's recent book on *Chevron* and to evaluate Justice Gorsuch's claim that maximalist *Chevron* has fallen into desuetude, I searched on Westlaw for opinions in the Courts of Appeals that mentioned "*Chevron* deference." Reading the cases in reverse chronological order, by the time I got to August 2022, I found at least one opinion in each circuit that treated *Chevron* as good law, with several of the opinions deferring to an agency in step 2. Some of the opinions held that *Chevron* did not apply to the particular case at bar and some decided the case in step 1, so my informal survey did not reveal the strength of judicial commitment to "maximalist *Chevron*." But it suggests that Justice Gorsuch's confidence that *Chevron* is no longer important is unfounded. I repeated this survey on December 19, 2023, and the results were similar in all circuits except the Seventh Circuit, which has not cited *Chevron* since 2022, but that court also did not disavow its previous reliance on the doctrine. Interestingly, in November 2023, the Sixth Circuit noted, as suggested above, that, under *Agostini v. Felton*, 521 U.S. 203, 237 (1997), it must defer under *Chevron* to an agency's permissible interpretation of a statute unless and until the Supreme Court overrules its prior decision affording *Chevron* deference to the agency's construction of the statute at issue. See *Ohio v. Becerra*, 87 F.4th 759, 787 (6th Cir. 2023). The cases that treated *Chevron* as good law in the 2022 survey include *Song v. Garland*, 54 F.4th 233 (4th Cir. 2022) and *Zaragoza v. Garland*, 52 F.4th 1006 (7th Cir. 2022). In addition to *Ohio v. Becerra*, discussed above, the cases that treated *Chevron* as good law in the 2023 survey include *Calumet Shreveport Refining, L.L.C. v. United States Environmental Protection Agency*, 86 F.4th 1121 (5th Cir. 2023) and *Idaho Conservation League v. Poe*, 86 F.4th 1243 (9th Cir. 2023).

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general legal principles and the policies underlying the program involved.<sup>53</sup> More recently, dissenting from a D.C. Circuit decision that upheld (under *Chevron*) the Federal Energy Regulatory Commission's construction of an ambiguous provision of the Public Utility Regulatory Policies Act of 1978, Judge Walker lamented that "[o]n the D.C. Circuit, *Chevron* maximalism is alive and well."<sup>54</sup>

Just what does Judge Walker mean by "*Chevron* maximalism"?<sup>55</sup> Judge Walker characterized "*Chevron* maximalism" as a court "mak[ing] a beeline to agency deference—before any inquiry into statutory structure, cross-references, context, precedents, dictionaries, or canons of construction. Then, they use the tools of statutory interpretation not to find the best reading of the text but instead to test whether the agency's interpretation is 'reasonable.'"<sup>56</sup> In other words, there should be no deference under *Chevron* unless and until the court is unable to determine the statute's meaning using the traditional tools of statutory construction, as suggested by the footnote in the *Chevron* opinion itself. In Judge Walker's view, a proper understanding of *Chevron* requires the incorporation of the traditional tools of statutory interpretation into *Chevron* step one.<sup>57</sup> Only if the court finds it impossible to construe the statute after carefully employing those tools should it reach step two and defer to any reasonable or permissible interpretation.<sup>58</sup>

Confusion in the lower courts over the status of *Chevron* is further illustrated by a 2023 decision in the Second Circuit involving a criminal statute.<sup>59</sup> The court noted that while the Supreme Court has held that the definition of "minor" in a statute involving sexual abuse of a minor is not subject to *Chevron* deference in cases

53. See *Buffington v. McDonough*, 7 F.4th 1361, 1366-67 (Fed. Cir. 2021).

54. *Solar Energy Indus. Ass'n v. Fed. Energy Regul. Comm'n*, 59 F.4th 1287, 1295-1301 (D.C. Cir. 2023) (Walker, J., dissenting).

55. *Id.* at 1297-98.

56. *Id.*

57. Professor Sunstein suggests that taking *Chevron* step one more seriously would help rehabilitate *Chevron* and preserve its policy advantages. See Cass R. Sunstein, *Zombie Chevron: A Celebration*, 82 OHIO ST. L.J. 565, 575-76 (2021).

58. If the agency construes an ambiguous statute to delegate authority to address an important social problem, agency authority may still be found lacking under the major questions doctrine. See Jack M. Beermann, *The Anti-Innovation Supreme Court*, 65 WM. & MARY L. REV. (forthcoming May 2024).

59. *Debique v. Garland*, 58 F.4th 676 (2d Cir. 2023) (per curiam).

involving the immigration status of offenders, the more generic determination of whether the crime of sexual abuse of a minor has been committed is subject to *Chevron* deference.<sup>60</sup> On this subject, the court employed conventional *Chevron*.<sup>61</sup> A concurring judge pointed out that circuit precedents may be insufficiently attentive to the Supreme Court's emphasis on resolving statutory questions using the traditional tools of statutory interpretation.<sup>62</sup> When circuit precedent takes a wrong turn, the Supreme Court should step in and prescribe corrections.<sup>63</sup> In another case in which the Sixth Circuit held that *Chevron* never applies when a statutory construction has implications for criminal law, a dissenting judge reminded her colleagues that *Chevron* is still good law that they are bound to follow and that on more than one occasion the Supreme Court has applied *Chevron* to issues with criminal law implications.<sup>64</sup> Perhaps the Sixth Circuit was following the Supreme Court's example, searching for any excuse not to apply *Chevron*. In my view, that is not a proper practice in a hierarchical case law system in which the lower courts depend on the Supreme Court to tell them when to ignore *Chevron* and engage in de novo review or some other less deferential form of review of agency statutory construction decisions.

The Supreme Court has certainly contributed to the narrowing of the circumstances in which conventional *Chevron* deference applies in the lower courts, most importantly by authorizing them (if not yet clearly instructing them) to apply traditional tools of statutory

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60. *Id.* at 680-81.

61. *Id.*

62. *Id.* at 685-86 (Park, J., concurring) ("In recent years, the Supreme Court has warned against too readily deferring to the agencies and has emphasized that Step One's command to employ the 'traditional tools of statutory construction' means what it says.")

63. *See id.*

64. *Gun Owners of Am., Inc. v. Garland* 992 F.3d 446, 475 (6th Cir. 2021) (White, J., dissenting). The majority held unlawful the Bureau of Alcohol, Tobacco and Firearms' rule banning "bump stocks," attachments that allow a shooter to convert guns into virtual machine guns. *Id.* at 474-75. The majority's categorical rejection of applying *Chevron* to statutes with criminal law implications is contrary to the practice at the Supreme Court. *See, e.g., United States v. O'Hagan*, 521 U.S. 642, 673. (1997) (deferring under *Chevron* to SEC rule with implications for defendant's criminal responsibility). But the decision does support Justice Gorsuch's claim that lower courts are also reluctant to apply *Chevron*. Again, the way to ensure that lower courts stop applying *Chevron* is to overrule it, rather than sanction lawless conduct by lower courts.

interpretation to determine whether a statute is ambiguous,<sup>65</sup> by confining *Chevron* to statutory construction arrived at in “relatively formal” agency proceedings such as rulemaking and formal adjudication,<sup>66</sup> and by ruling out *Chevron* deference when the issue is a matter of major political or economic significance.<sup>67</sup> However, it appears that Justice Gorsuch and other members of the Court want more, they do not want courts deferring to agency statutory construction decisions even if the matter is unimportant or trivial and even if employing the traditional tools of statutory construction does not reveal a clear legislative intent. When establishing rules of decision, it is insufficient for the Court to lead by example; the Court needs to create binding rules that lower courts are required to follow. Otherwise, life-tenured circuit and district judges will continue to decide cases according to their own views, which are often not congruent with the views of the majority of the Supreme Court, especially now that the Court has taken a hard turn in one political direction.

### *C. What Should the Supreme Court Do?*

If the Supreme Court majority truly wants the lower courts to stop applying *Chevron* deference, it should say so explicitly by overruling *Chevron*, or at least the part of *Chevron* that announced the two-step standard of review of agency statutory interpretation. That is the only way that the Court can ensure that the lower courts will stop applying *Chevron*. There is also the possibility that the Court will choose to clarify and limit *Chevron*’s application, much as it did in *Kisor* with regard to *Auer* deference.<sup>68</sup> The remainder of this Part describes what I view as the best course of action: the first subpart proceeds under the assumption that the Court rejects the *Chevron* framework once and for all, and alternatively, the second

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65. *Immigr. & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 445-48 (1987); *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 38 (1990); *Voigt v. U.S. Env’t Prot. Agency*, 46 F.4th 895, 900-01 (8th Cir. 2022).

66. *See United States v. Mead Corp.*, 533 U.S. 218, 229-31 (2001); *Sanofi Aventis U.S. LLC v. U.S. Dep’t of Health & Hum. Servs.*, 58 F.4th 696, 703 (3d Cir. 2023) (*Chevron* does not apply to agency advisory opinions).

67. *King v. Burwell*, 576 U.S. 473, 484-86 (2015).

68. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2413-18, 2421-24 (2019).



subpart assumes that the Court preserves *Chevron* while clarifying its scope and application.

### 1. *Overrule Chevron*

First, if the Court determines that the best course is to end *Chevron* deference, it should unequivocally overrule *Chevron*'s methodology. Anything short of using the term "overruled" is insufficient to ensure that courts and litigants do not continue to apply the *Chevron* two-step standard of review of agency statutory construction. Even if the Court concludes that there is merit in judicial deference to agency statutory construction in some circumstances, the Court should overrule *Chevron* rather than reform it, because that is the only way that the Court can ensure that lower courts will no longer engage in *Chevron* maximalism.

Second, the Court should allow for modest deference to agency decisions of statutory construction under the factors articulated in the *Skidmore* decision.<sup>69</sup> Courts should consider deferring to agency statutory construction based on factors such as: whether the agency's construction is longstanding including whether it dates back to the early days of the statute or at least to the first time the agency was confronted with the particular issue; whether the agency's analysis is thorough, well-reasoned and persuasive; and whether it is based on matters within the agency's expertise.<sup>70</sup> Courts should be less deferential when the agency seems to have arrived at its statutory construction simply for the purpose of winning the particular case, especially when the construction was announced as part of the litigation. Examples include statutory constructions in a brief or memorandum in support of a motion and when the agency's analysis is relatively superficial, not well-reasoned and involves matters not directly in the agency's area of expertise.

Even if the reviewing court is presented with a situation which, under *Skidmore*, indicates potential deference, the Court should not accept the agency's construction if the court is confident that the best reading of the statute, based on the language, history, or policy of the statute, is otherwise. As under *Chevron*, if Congress's intent

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

70. See Beermann, *Failed Chevron Experiment*, *supra* note 34, at 849-50.

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is easily discernible, no matter how persuasively an agency argues for a different construction, the rule of law requires that the reviewing court follow Congress's instructions. This does not mean that only purely interpretive arguments are acceptable; courts should be free to take agency policy arguments into account, much as Chief Justice Roberts did when he agreed with the IRS's construction of the Affordable Care Act in part, because of the potentially disastrous policy outcome of rejecting it.<sup>71</sup> Even without *Chevron*, in cases of uncertainty, reviewing courts should take an administering agency's views into account when deciding whether to impose what it finds to be the best reading of the statute at issue.

Finally, the Court should expressly leave room for agency innovation. In particular, it should treat agency changes in statutory construction the same as it treats agency policy changes under *Fox Television* by allowing agencies to alter their construction of statutes they administer to a different understanding that is within what the court finds to be the zone of reasonable interpretation.<sup>72</sup> In other words, when a court applies the *Skidmore* factors to uphold an initial agency statutory construction decision, it should allow the agency to disavow that interpretation in favor of what it now considers a better understanding of the statute, as the Supreme Court allowed in *Brand X* for cases governed by *Chevron*.<sup>73</sup> As in *Fox Television*, to ensure reasoned decision-making, reviewing courts should ensure that the agency is aware that it is changing its interpretation, and the agency should be required to explain the reasons for the change. This flexibility should exist whether the agency has altered its view for linguistic or policy reasons.

I recognize that this proposal may seem to be in tension with the traditional view of judicial supremacy in statutory matters. That is why *Brand X*'s view of agency flexibility under *Chevron* was controversial.<sup>74</sup> In my view, this sort of flexibility adapts traditional

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71. *King*, 576 U.S. at 492 (“[T]he statutory scheme compels us to reject petitioners’ interpretation because it would destabilize the individual insurance market in any State with a Federal Exchange, and likely create the very ‘death spirals’ that Congress designed the Act to avoid.”).

72. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 517 (2009).

73. *Nat’l Cable & Telecommc’ns Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 969 (2005).

74. *See id.* at 967.

understandings to the contemporary reality of the delegation of authority to administrative agencies. Of course, a novel construction contrary to prior practice has less of a claim to deference under *Skidmore*. Thus, the agency might not have as much freedom to alter interpretations as under conventional *Chevron*. Rather, the point is simply not to rule out agency flexibility when the initial interpretation was upheld after deferential review, answering Justice Scalia's complaint in *Mead* that *Skidmore* would freeze agency interpretations because of stare decisis.<sup>75</sup> The *Skidmore* factors are just that—factors. They are not rules that operate as on/off switches for acceptance of agency interpretations. In essence, the argument is that the *Skidmore* factors are among the traditional tools of statutory interpretation in the field of judicial review of agency action.

## 2. If Chevron Is Preserved

As noted, there is a significant likelihood that the Court in *Loper Bright*, or in a later case, will explicitly decline to overrule *Chevron*, but instead narrow and clarify it. If it does so, the Court should take the opportunity to explicate how lower courts should apply *Chevron*.

First, the Court should apply *Chevron* consistently to those cases involving statutory construction by the agency that administers the statute being construed or explain why it is not applying *Chevron* in the particular case. This is consistent with a basic requirement of the rule of law, that legal rules are applied consistently by courts and would provide lower courts with guidance on when to apply *Chevron*. Currently, *Chevron* is missing in action with no explanation, and because the Court often does not mention *Chevron* at all, it cannot provide lower courts with alternatives to the *Chevron* framework or guidance on when *Chevron* applies and when it does not.

Second, the Court should state definitively that applying the traditional tools of statutory construction is part of *Chevron*'s step one inquiry into whether Congress's intent is clear.<sup>76</sup> *Chevron* step

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75. *United States v. Mead Corp.*, 533 U.S. 218, 247-50 (2001) (Scalia, J., dissenting).

76. The principal difference between *Chevron* and non-*Chevron* statutory construction is that whether Congress implicitly delegated interpretive authority to an agency is a factor

one should be virtually identical to what statutory construction would look like without *Chevron*. The inquiry into this factor should be based on the language and history of the statute, the complexity of the regulatory regime, and the expertise of the agency. Connected to this, the Court should abandon the language referring to agency authority to make decisions with “the force of law.”<sup>77</sup> This confusing language is inconsistent with the reality that even when *Chevron* applies, courts have the authority to review and reject unreasonable agency constructions. In ordinary circumstances, only a court has the authority to make a ruling with the force of law and only Congress has the authority to pronounce substantive rules with the force of law. Agencies depend on delegation from Congress and their determinations have the force of law only if reviewing courts agree that their determinations are consistent with a delegation.

Third, the Court should harmonize *Chevron* and review under the statutory arbitrary and capricious standard in two ways. Initially, it should specify that *Chevron* applies only when the issue before the Court is the meaning of a statute administered by the agency and not the application of, or policy underlying, a statute or rule. Although it may be impossible to easily separate all cases involving statutory construction from cases involving review of agency policy, the Court should do its best to explain that *Chevron* applies to “an interpretation of ... statutory language”<sup>78</sup> or “a process reasonably described as interpretation”<sup>79</sup> and not to cases involving something else, such as applying statutory or regulatory language when determining agency policy or to resolve a particular matter before the agency.

Further, rather than merely assert that step two incorporates the arbitrary, capricious inquiry,<sup>80</sup> or implausibly state that the analysis under the two standards “would be the same,”<sup>81</sup> the Court should

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relevant only in *Chevron* cases.

77. *Mead Corp.*, 533 U.S. at 226-27.

78. *See Judulang v. Holder*, 565 U.S. 42, 52-53 n.7 (2011).

79. *Cf. Hootor v. U.S. Dep’t of Agric.*, 82 F.3d 165, 170 (7th Cir. 1996) (“[I]t is an interpretive rule ... only if it can be derived from the regulation by a process reasonably described as interpretation.... ‘Interpretation’ in the narrow sense is the ascertainment of meaning.”).

80. *See Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 242 (2004); *Verizon Commc’ns Inc. v. FCC*, 535 U.S. 467, 527 n.38 (2002).

81. *See Judulang*, 565 U.S. at 52 n.7.

adopt the D.C. Circuit's practice of inquiring into the substantive reasonableness of the agency's decision to adopt one interpretation among all of the potentially permissible interpretations.<sup>82</sup> This is consistent with *Chevron* step two's reference to a reasonable interpretation and would allow courts applying *Chevron* step two to examine, as it appears the D.C. Circuit already does,<sup>83</sup> whether the agency has engaged in a reasoned analysis of the advantages and disadvantages of the available statutory interpretations and would force the agency to justify its choice in light of the policy underlying the statute.<sup>84</sup> This, in turn, would depend on factors similar to those applied in the Court's decisions applying the arbitrary and capricious standard, resulting in harmonization between *Chevron* and statutory judicial review provisions such as APA § 706.<sup>85</sup>

#### D. *Chevron Academic Amici*

The grant of review over the *Chevron* question in *Loper Bright* has attracted a storm of attention including approximately four dozen amicus curiae briefs, four of which are written by academics representing themselves as amici.<sup>86</sup> Professors Chris Walker and Kent Barnett argue, largely based on stare decisis principles, that the Court should not overrule *Chevron*.<sup>87</sup> They argue, inter alia, that

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82. See *Village of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 660 (D.C. Cir. 2011) (inquiring under step two into whether the agency “has offered a reasoned explanation for why it chose that interpretation.”) The D.C. Circuit has applied this requirement in numerous *Chevron* cases including *Cigar Ass’n of Am. v. F.D.A.*, 5 F.4th 68, 78 (D.C. Cir. 2021) and *Loper Bright*, 45 F. 4th at 374 itself.

83. See *Village of Barrington*, 636 F.3d at 660; *Cigar Ass’n of Am.*, 5 F.4th at 78; *Loper Bright*, 45 F.4th at 374.

84. Scholars have been advocating for something like this since at least the 1990s. See Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 128-30 (1995); Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1270 (1997); Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313, 315-16 (1996); Gary S. Lawson, *Reconceptualizing Chevron and Discretion: A Comment on Levin and Rubin*, 72 CHI.-KENT L. REV. 1377, 1382, 1384 (1997).

85. I use APA § 706 only as an example because there are specialized review statutes that incorporate the APA's arbitrary, capricious language, such as the provision of the Clean Air Act that applied in *Chevron* itself. See 42 U.S.C. § 7607(d)(9).

86. See *Loper Bright Enterprises v. Raimondo*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/loper-bright-enterprises-v-raimondo/> [<https://perma.cc/2VDZ-CS2C>].

87. See Brief of Law Professors Kent Barnett and Christopher J. Walker as *Amici Curiae*

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*Chevron* is settled law, that Congress and agencies have relied on it, and that it advances the rule of law by minimizing the role of judges' personal preferences in judicial review of agency action.<sup>88</sup> In particular, they argue that the delegation basis of *Chevron*, "that Congress seeks to delegate interpretive primacy to agencies over statutory ambiguities in statutes that agencies administer" is real, not a fiction as even *Chevron*'s proponents have admitted.<sup>89</sup> For all of the reasons explored in my work on *Chevron* and more, I disagree with just about every aspect of their analysis.<sup>90</sup> In my view, silence or ambiguity does not indicate delegation of interpretive authority; the manipulability of *Chevron* means both that it could not have created any justifiable reliance and it does not constrain judges from imposing their policy views on the law.

Professor Thomas Merrill, author of a recent outstanding book about *Chevron*,<sup>91</sup> argues for preserving *Chevron*, but a careful reading of his brief reveals that his argument is similar to mine: that step one of *Chevron* should be applied with careful attention to the traditional tools of statutory construction and step two of *Chevron* should be applied using the *Skidmore* factors, especially that the degree of deference should depend on the process applied by the agency.<sup>92</sup> As he puts it: "If the agency has adopted its interpretation in a process that affords an opportunity for public participation and the agency has provided a reasoned response to material criticisms advanced in that process, this should weigh in favor of determining that its interpretation is reasonable."<sup>93</sup> I agree with Merrill that the agency's process and the presence of a reasoned explanation are important to the degree of deference courts should afford agency interpretations; I just do not see the need for

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in Support of Neither Party at 4-8, *Loper Bright Enterprises v. Raimondo*, 143 S. Ct. 2429 (2023) (No. 22-451).

88. *Id.* at 8, 14, 29.

89. *Id.* at 13.

90. See Beermann, *Failed Chevron Experiment*, *supra* note 34, at 782-84; Jack M. Beermann, *Chevron at the Roberts Court: Still Failing After All These Years*, 83 *FORDHAM L. REV.* 731, 750-51 (2014).

91. THOMAS W. MERRILL, *THE CHEVRON DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE* (2022).

92. See Brief of Professor Thomas W. Merrill as *Amicus Curiae* in Support of Neither Party at 24-27, *Loper Bright Enters.*, 143 S. Ct. 2429 (No. 22-451).

93. *Id.* at 25.

preserving *Chevron* as an element of deference under *Skidmore*. The biggest problem with this proposal is that if the Court decides to preserve *Chevron* while insisting that courts rigorously apply the traditional tools of statutory interpretation in step one, there is nothing to prevent some lower court judges from carrying on as if nothing had changed. In my view, the only way to banish *Chevron* maximalism is to banish *Chevron* itself.

Although he does not come out and say so, Professor Aditya Bamzai agrees with me that conventional *Chevron* should be overruled.<sup>94</sup> Based on his observation that “[r]ather than one consistent approach, the Court adopted several different perspectives on parceling out deference to agency legal interpretation,” Professor Bamzai argues that the Court should adopt a clear standard that “require[s] a form of de novo review for legal questions and arbitrary-and-capricious review for policy questions.”<sup>95</sup> Because he views *Chevron*-like deference as inconsistent with the APA’s instruction that the Court decide all questions of law,<sup>96</sup> he apparently disagrees with my suggestion that post-*Chevron* the Court should embrace *Brand X* on interpretive matters, but his suggestion that policy questions be reviewed under the arbitrary, capricious standard would preserve some of the advantages of *Chevron* in terms of flexibility.<sup>97</sup>

A group of Law Professors headed by Professor Samuel Estreicher of NYU Law School and Professor David Noll of Rutgers Law School have filed a brief arguing in favor of preserving *Chevron* based on what they characterize as the “proper” understanding of *Chevron* as allowing agencies to fill gaps only in indeterminate statutes, rather than empowering agencies to resolve mere ambiguities.<sup>98</sup> As they put it, “*Chevron* addresses, not instances where statutory text might be judicially construed to have this meaning or that, but where, using these ‘traditional tools,’ the court cannot confidently arrive at

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94. See Brief of Professor Aditya Bamzai as *Amicus Curiae* in Support of Neither Party at 7-8, *Loper Bright Enters.*, 143 S. Ct. 2429 (No. 22-451).

95. *Id.* at 7, 15.

96. See *id.* at 18.

97. *Id.* at 30-31 (“Legal meaning would settle, but policy determinations need not.”).

98. See Brief of *Amici Curiae* Administrative and Federal Regulatory Law Professors in Support of Respondents at 3-6, *Loper Bright Enters.*, 143 S. Ct. 2429 (No. 22-451) [hereinafter Administrative and Federal Regulatory Law Professors].

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a judicial construction at all.”<sup>99</sup> Their proposal amounts to an attempt to preserve *Chevron* in much the same way the Court preserved *Auer* deference in *Kisor*, by limiting *Chevron* to a narrower class of cases than its original language indicated.<sup>100</sup> Basically, Estreicher and Noll argue for preserving *Chevron* while eliminating *Chevron* maximalism.<sup>101</sup> Estreicher and Noll also embrace the understanding that *Chevron* applies when “the agency was delegated authority to administer to very statute in question, with the force of law.”<sup>102</sup> As discussed above, in my view, the Court ought to banish the misleading and inaccurate “force of law” language.<sup>103</sup>

Another group of academic amici that includes Professor Adrian Vermeule of Harvard, Professor Kevin Stack of Vanderbilt, Professor Renée Landers of Suffolk, and Professor Ron Levin of Washington University also argue for preserving *Chevron*.<sup>104</sup> Their focus is on the APA; they argue that deference to agency determinations of statutory meaning is consistent with the APA’s injunction that “the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions.”<sup>105</sup> Their main point is that when it enacted the APA, Congress legislated against a well-established background of judicial deference to agency legal determinations, and thus the language of the APA should not be taken literally to require that reviewing courts decide all questions of statutory meaning *de novo*.<sup>106</sup> Their argument is essentially an effort to convince the Court’s textualists that *Chevron* deference is consistent with their commitment to textualist statutory construction.<sup>107</sup>

I have serious doubts as to the accuracy of this brief’s characterization of pre-APA law. In particular, I do not see a strong enough tradition of deference to agency legal determinations to justify the

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99. *Id.* at 4.

100. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2424 (2019).

101. Administrative and Federal Regulatory Law Professors, *supra* note 98, at 27.

102. *Id.* at 18.

103. *See supra* Part II.C.

104. *See* Brief of Scholars of Administrative Law and the Administrative Procedure Act as Amici Curiae in Support of Respondents at 1, 2, *Loper Bright Enters.*, 143 S. Ct. 2429 (No. 22-451) [hereinafter Brief of Scholars].

105. *Id.* (quoting 5 U.S.C. § 706 (2018)).

106. *See* Brief of Scholars, *supra* note 104, at 26-27.

107. *Id.* at 10.



counter-textual reading of the APA that this brief supports. But more importantly, the brief does not address more substantial problems with the *Chevron* doctrine—that it has become an unmanageable legal standard that causes unnecessary confusion concerning judicial review of agency legal determinations.

In my view, none of the academic amici have presented any persuasive reason for preserving *Chevron*. While I sympathize with the desire to honor stare decisis and preserve *Chevron*'s advantages, in my view they do not appreciate the problems that *Chevron* has spawned over the decades and the difficulties that lower courts are having due to the lack of Supreme Court guidance. But whether the Court chooses to overrule *Chevron* or clarify when and how it applies, their amicus briefs provide valuable guidance for the Court on how to approach the future of *Chevron* and a post-*Chevron* world.

#### CONCLUSION: TURNING OVER A NEW LEAF

The current role and importance of the Supreme Court is way beyond anything imagined by the Framers of the Constitution or, perhaps more to the point, by the judges and justices who constructed the system of legal reasoning and opinion writing that we have inherited. The federal courts, and especially the Supreme Court, regularly resolve controversies involving millions and billions of dollars and the lives, livelihoods, and welfare of countless people across the globe. The quaint practice of expecting readers to divine the meaning of Supreme Court opinions and discern the status of the Court's doctrines from indications other than the Court's explicit pronouncements is not fit for the times. Not only should the Court overrule *Chevron*, or at least clarify its status, the Court should resolve to turn over a new leaf and provide clearer instructions on the status of legal doctrines that govern the conduct of millions of Americans and thousands of state and federal officials and judges.<sup>108</sup>

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108. Justice Gorsuch is currently the Court's most outspoken member on the status of disfavored doctrines that are still on the books; perhaps he could lead this effort. *See, e.g.*, *Buffington v. McDonough*, 143 S. Ct. 14, 16-21 (2022) (J. Gorsuch, dissenting from denial of certiorari); *Shurtleff v. City of Boston*, 142 S. Ct. 1483, 1610 (2022).

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Lower and state courts should be forgiven for sometimes not understanding or anticipating the Supreme Court's doctrinal conclusions when the Court fails to tell them in advance what to do. It may be pie in the sky to hope that the members of the Court with diverse jurisprudential approaches and policy orientations will always issue clear, unanimous rulings, but it is not too much to ask the Court to provide clarity on the status and application of important legal doctrines. For example, if the Court no longer wants the lower federal courts to apply *Chevron* or the *Lemon* test, it should say so by using the magic word "overruled." Silence is not overruling. Abandoning is not overruling. A moribund case has not been overruled and a case that has fallen into desuetude has not been overruled. If a majority prefers to reduce the scope of *Chevron*, or confine *Lemon* more narrowly than its language suggests, it should announce the circumstances under which each doctrine should and should not be applied. And it should resolve to do the same regarding other legal doctrines that may be regarded as having been abandoned or fallen into desuetude.