Chevron Deference Is Dead, Long Live Deference

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Finally!

Fourteen years ago,[1] I urged the Supreme Court to overrule its *Chevron*[2] decision. I argued that the Court should revert to applying the factors enunciated in the Court's pre–Administrative Procedure Act (APA) *Skidmore* decision, which set out the appropriate level of deference to executive branch legal interpretations.[3] In *Loper Bright Enterprises v. Raimondo*[4] and a companion case,[5] the Supreme Court did exactly that. In this article, I will explain and analyze both the Court's decision to abandon the *Chevron* rule of deference and what the demise of *Chevron* deference might mean for the future of judicial review of federal agency regulation. In doing so, I feel a bit like Brutus eulogizing Julius Caesar. *Chevron* was an important doctrine in administrative law, and it may have seemed like a good idea when it was decided. But over the years it proved to be at best a distraction from the regulatory issues at stake, and at worst a fundamental mistake.

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[1] *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).

[2] *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837 (1984).

[3] *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[4] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

[5] Relentless, Inc. v. Dep't of Com., 144 S. Ct. 2244 (2024) (decided together with *Loper Bright*).

The *Chevron* rule, in brief, instructed reviewing courts to defer to reasonable agency constructions of ambiguous or incomplete regulatory statutes. The *Loper Bright* Court relied primarily on the language of the APA to hold that *Chevron* deference is unlawful. But in my view, *Chevron* deference was fatally flawed for a multitude of reasons besides its inconsistency with the language of the APA. These reasons include *Chevron*'s lack of clarity on key issues and the numerous qualifications, side-issues, and exceptions that *Chevron* spawned. But the *Loper Bright* Court overstated its case against *Chevron* deference when it claimed that deference to agencies on questions of law was inconsistent with "the settled pre-APA understanding that deciding such questions was exclusively a judicial function."[6] In fact, as the *Loper Bright* opinion itself makes clear, the Supreme Court had approved a measure of deference to agency statutory interpretations well before both *Chevron* and the enactment of the APA. That pre-APA level of deference is consistent with the language of the APA, and the *Loper Bright* Court itself explicitly endorsed continuing deference under pre-*Chevron* standards.[7]

The demise of *Chevron* deference standing alone may turn out to be much less important for the future of administrative law and agency regulation than many believe. The Court explicitly approved of deference under the *Skidmore* factors, which instruct reviewing courts to "resort for guidance, even on legal questions" to "the interpretations and opinions of the relevant agency, made in pursuance of official duty and based upon specialized experience."[8] Further, the Court had already created numerous limitations to the reach of *Chevron* deference and, as the Court noted, it had not deferred under *Chevron* in nearly a decade. *Chevron* deference was already a rather weak doctrine, even in some lower federal courts. More fundamentally, many of the cases in which the government could have argued for *Chevron* deference pre–*Loper Bright* will now be decided under the relatively deferential APA standards of review such as arbitrary, capricious, and substantial evidence. Thus, agency action will continue to receive deference on judicial review. In any event, whether *Chevron* was the deciding factor in many or even any important cases is doubtful. In numerous

[6] *Loper Bright*, 144 S. Ct. at 2261 (internal quotation marks and citation omitted).

[7] *Id.* at 2262 (citing *Skidmore*, 323 U.S. 134).

[8] *Id.* at 2259 (internal quotation marks, citations, and ellipsis omitted).

instances, the Supreme Court and other courts overturned agency statutory constructions even while *Chevron* was good law.

While the demise of *Chevron* itself may have little material effect on federal regulatory power, those who believe that robust federal regulation is important for advancing and preserving social welfare may still have cause for concern. *Loper Bright* sends out anti-regulatory signals, and its effects may interact with other recent anti-regulatory Court decisions. The ascension of the major questions doctrine,[9] the Court's narrow reading of agency authority over "waters of the United States,"[10] its allowance of challenges to administrative rules even decades after they were finalized,[11] and its recognition of a right to a trial by jury in some agency civil enforcement actions[12] could all significantly reduce the scope of agency power.[13] For those skeptical of the social value of federal regulation, *Loper Bright* is cause for optimism. That is especially true if Justice Neil Gorsuch's concurring opinion—aimed at weakening the role of precedent in judicial decisionmaking—signals that the Court is willing to revisit additional fundamental pro-regulatory administrative law doctrines.

I. Past as Prologue

To put *Loper Bright* into perspective, it is first necessary to review (briefly) when and how *Chevron* deference arose and what happened to it between its appearance and its demise. In 1980, the Supreme Court seemed to be on the verge of reducing the degree to which Congress may delegate discretionary authority to administrative agencies. At the time, the Court had not invalidated a federal statute for excessive delegation since 1935.[14] But a plurality of four Justices

[9] *See* Mila Sohoni, *The Major Questions Quartet*, 136 Harv. L. Rev. 262, 263–64 (2022).

[10] *See* Sackett v. EPA, 143 S. Ct. 1322, 1336 (2023) (limiting the statutory jurisdiction of the Environmental Protection Agency (EPA) over "waters of the United States" to include only "streams, oceans, rivers, and lakes") (internal quotation marks omitted); Craig B. Brinkerhoff et al., *Ephemeral Stream Water Contributions to United States Drainage Networks*, 384 Science 1476 (2024) (concluding that the *Sackett* decision leaves many waterways unprotected from damaging pollution).

[11] *See* Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 144 S. Ct. 2440 (2024).

[12] SEC v. Jarkesy, 144 S. Ct. 2117 (2024).

[13] For a more general view of the Court's recent suppression of agency regulatory power, see Jack M. Beermann, *The Anti-Innovation Supreme Court: Major Questions, Delegation,* Chevron*, and More*, 65 Wm. & Mary L. Rev. 1265 (2024).

[14] *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 318 n.19 (2000).

invoked the possibility as support for a narrow reading of agency authority in a case concerning the Occupational Safety and Health Administration (OSHA). An opinion authored by Justice John Paul Stevens rejected OSHA's understanding of the scope of its own authority to regulate workplace exposure to suspected carcinogens, proclaiming that "[i]f the Government were correct . . . the statute would make such a 'sweeping delegation of legislative power' that it might be unconstitutional[.]"[15] A fifth Justice, William Rehnquist, would have invalidated the statute as an unconstitutional delegation of legislative power to the agency.[16] Then-Justice Rehnquist's primary normative justification for his view was that "Congress [is] the governmental body best suited and most obligated to make the choice confronting us in this litigation."[17] Delegation of regulatory authority to agencies seemed to be under attack by a majority of the Court.

However, the Court did not act on its skeptical view of delegations of regulatory authority. Just a few years later, in an opinion again written by Justice Stevens, the Court embraced judicial deference to agency interpretations of the statutes they administer.[18] In his opinion for the Court, Justice Stevens announced what would become an iconic two-step process for judicial review of agency construction of statutes it administers:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation.

[15] Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 646 (1980) (plurality opinion) (quoting A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 539 (1935)).

[16] *Id.* at 675 (Rehnquist, J., concurring in the judgment).

[17] *Id.* at 672. The following year, Justice Rehnquist (this time joined by Chief Justice Warren Burger) argued that the Occupational Safety and Health Act unconstitutionally delegated legislative authority to the Department of Labor. Am. Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 543 (1981) (Rehnquist, J., dissenting).

[18] *See Chevron*, 467 U.S. at 865–66.

> Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[19]

Rather than rein in agency discretion, the *Chevron* opinion embraced it. Indeed, the opinion even celebrated agency discretion as a way to keep unelected judges from intervening in what ought to be agency decisions. The opinion described judges as "not experts in the field," contrasting them with agencies that make decisions in light of both policy and political considerations.[20] The obvious tension between the Court's then-recently expressed delegation concerns and its new *Chevron* doctrine did not go unnoticed.[21] Although Justice Rehnquist did not participate in *Chevron*, Chief Justice Warren Burger did, and neither Chief Justice Burger nor Justice (later Chief Justice) Rehnquist expressed disagreement with the *Chevron* doctrine when the doctrine appeared in later cases.[22]

What changed after 1980 that led conservatives on the Court who might otherwise be concerned about delegation of power to agencies to accept judicial deference to agencies' legal interpretations of their own authority? Cynics supposed that it was the election of Ronald Reagan and his administration's efforts to ease federal regulatory burdens.[23] Judicial deference to Reagan's agencies allowed

[19] *Id.* at 842–43.

[20] *Id.* at 865.

[21] *See* Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 Tex L. Rev. 469, 506 (1985).

[22] Justice Rehnquist never expressed disagreement with the *Chevron* doctrine. He also applied it at least once, cited it as governing law, and joined opinions applying it. *See* Rust v. Sullivan, 500 U.S. 173, 184 (1991) (Rehnquist, C.J.) (upholding agency's "plausible construction of the plain language of the statute" and noting that the construction "does not otherwise conflict with Congress' expressed intent"); Reno v. Koray, 515 U.S. 50, 61 (1995) (Rehnquist, C.J.) (citing *Chevron* for rule granting deference to an agency's "permissible construction of the statute."); Yellow Transp., Inc. v. Michigan, 537 U.S. 36, 46–48 (2002) (O'Connor, J., joined by, inter alia, Rehnquist, C.J.) (applying *Chevron* and upholding agency statutory construction).

[23] *See* Gregory A. Elinson & Jonathan S. Gould, *The Politics of Deference*, 77 Vand. L. Rev. 475, 508–15 (2022) (describing how conservatives embraced *Chevron* deference while liberals opposed it).

them to interpret and even reinterpret regulatory statutes to accommodate deregulation. Similarly, in *Chevron*'s early days, Republican-appointed judges seemed to embrace *Chevron* while Democratic appointees, as *Chevron* scholar Tom Merrill put it, "were having second thoughts."[24] Commentary also seemed to run along liberal/conservative lines, with newly appointed Justice Antonin Scalia leading the conservative charge in favor of *Chevron* deference.[25]

The tide of political and legal opinion on *Chevron* deference began to noticeably turn during Barack Obama's administration, when liberals on and off the bench embraced *Chevron* as supporting that administration's regulatory efforts. Conservatives, by contrast, realized that they had created a monster with the potential to overcome judicial resistance to innovative and expansive regulation.[26] Over the years, Republican opposition to *Chevron* deference became strong enough to lead the House of Representatives to repeatedly pass bills abolishing it, but none of those efforts passed in the Senate.[27] The House bills bore the title "The Separation of Powers Restoration Acts," reflecting the view that deference to agency statutory interpretation usurped judicial power in favor of excessive executive discretion.[28]

In the latter half of the 40 years during which *Chevron* deference was the law, the conservative Supreme Court displayed increasing discomfort with the doctrine. Opposition to the robust regulatory initiatives that *Chevron* deference seemed to facilitate led the Court to limit the doctrine's scope. During this era, the

[24] *See* Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, 66 Admin. L. Rev. 253, 280 (2014). More than second thoughts, Judge Harry Edwards of the D.C. Circuit opined that *Chevron* was inconsistent with separation of powers principles. *See* CSX Transp. v. United States, 867 F.2d 1439, 1445 (D.C. Cir. 1989) (Edwards, J., dissenting) (observing that the *Chevron* rule "appears to violate separation of powers principles" and usurp the role of the courts to conduct statutory interpretation).

[25] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511. The best example of an early attack on *Chevron* from a liberal perspective is Cynthia Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum. L. Rev. 452 (1989). By contrast, as early as 1985, liberal commentator Dick Pierce praised *Chevron* as a way to ensure that "policy choices [are] made by the most politically accountable branch of government, and . . . the judiciary is the least politically accountable branch." Pierce, *supra* note 21, at 506.

[26] *See* Elinson & Gould, *supra* note 23, at 523–30.

[27] *See* Beermann, *supra* note 13, at 1282 (describing legislation designed to overrule *Chevron* from 2016–2023).

[28] *See id*.

Court created exceptions, prerequisites, and competing doctrines, making it less and less likely that agency interpretations would receive *Chevron* deference.[29] These limitations included a rule known as "*Chevron* step zero," which limited *Chevron* deference to agency action pursuant to relatively formal procedures.[30] Other limitations included a rule that *Chevron* deference does not apply in extraordinary cases[31] and a requirement that reviewing courts must apply all of the "traditional tools of statutory construction" before moving to *Chevron* step two and deferring.[32]

More fundamentally, the Court's major questions doctrine means that on important matters, courts resolve doubts about agency authority against the agency without resorting to conventional judicial review of the agency's interpretation of its enabling statute.[33] Eventually, the Court itself simply stopped applying *Chevron* or even citing it in cases which seemingly implicated *Chevron* deference.[34]

By the time *Loper Bright* reached the Supreme Court, *Chevron* deference was virtually irrelevant in that Court. And it had lost much of its vitality in some lower federal courts, despite complaints that it was being applied uncritically by panels at the courts of appeals.[35] With several conservative Justices expressing doubts about the wisdom of *Chevron* deference, it seemed only a matter of time before the Supreme Court either overruled *Chevron* or further confined it, as it had with a related form of deference in 2019.[36]

[29] *See generally* Beermann, *supra* note 1, at 810–48.

[30] *See* United States v. Mead Corp., 533 U.S. 218 (2001) (limiting *Chevron* deference in most cases to agency rulemaking and agency formal adjudication).

[31] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000); King v. Burwell, 576 U.S. 473, 485 (2015).

[32] *See* Epic Sys. Corp. v. Lewis, 584 U.S. 497, 521 (2018).

[33] *See* West Virginia v. EPA, 597 U.S. 697, 723 (2022) (in cases involving major questions, agency must point to "clear congressional authorization" for the power it claims) (citation and internal quotation marks omitted).

[34] *See* Am. Hosp. Ass'n v. Becerra, 142 S. Ct. 1896 (2022); Beermann, *supra* note 13, at 1281 & n.65.

[35] *See* Solar Energy Indus. Ass'n v. FERC, 59 F.4th 1287, 1297–98 (D.C. Cir. 2023) (Walker, J., concurring in part and dissenting in part); *see also* Isaiah McKinney, *The* Chevron *Ball Ended at Midnight, but the Circuits Are Still Two-Stepping by Themselves*, Yale J. Regul. Notice & Comment Blog (Dec. 18, 2022), https://perma.cc/V4AD-B8KW.

[36] *See* Kisor v. Wilkie, 588 U.S. 558 (2019).

II. *Loper Bright*

In *Loper Bright* and a companion case,[37] the Supreme Court granted certiorari "limited to the question whether *Chevron* should be overruled or clarified."[38] Both cases involved a simple legal question: Did the National Marine Fisheries Service (NMFS) have statutory authority to require Atlantic Ocean herring fishing vessel operators to pay for onboard observers who monitor compliance with fishery management requirements? Because the relevant statutes explicitly required *other* vessels to pay for monitors, the operators had a strong, but not conclusive, statutory construction argument that the relevant statutes did *not* authorize a requirement for them to pay.[39] However, both the D.C. and First Circuits upheld the NMFS's payment requirement under *Chevron*.[40] That the Supreme Court limited its review to *Chevron* and did not grant certiorari to review the two decisions on the statutory merits heightened the expectation that the Court was finally going to address the future of *Chevron* deference.

On June 28, 2024, the Court issued its decision. In an opinion by Chief Justice John Roberts, the Court left no doubt that *Chevron* deference is dead, proclaiming that "*Chevron* is overruled."[41] A statement to this effect was required to prevent lower courts from continuing to apply *Chevron*. According to black letter law, unless and until the Supreme Court announces that a decision is overruled, lower federal courts and state courts are required to apply that decision—even if it seems that the Court itself no longer would.[42]

[37] *Loper Bright*, 144 S. Ct. at 2257. The Court appears to have taken both cases—*Loper Bright* and *Relentless, Inc.*—so that Justice Ketanji Brown Jackson, who recused herself in *Loper Bright*, could participate in considering whether *Chevron* should be overruled.

[38] *Loper Bright*, 144 S. Ct. at 2257.

[39] The fact that the statute itself required some vessels to pay for monitors is not logically inconsistent with an implicit power in the NMFS to require other vessels to pay, but it suggests that Congress may have intended that a payment requirement was limited to those mentioned in the statute.

[40] *See* Loper Bright Enters. v. Raimondo, 45 F.4th 359, 368–69 (D.C. Cir. 2022); Relentless, Inc. v. U.S. Dep't of Com., 62 F.4th 621, 633–34 (1st Cir. 2023). The First Circuit did not specify whether it was applying *Chevron* step one or step two, concluding that either way, the agency had the authority to require payment. *Relentless*, 62 F.4th at 633–34.

[41] *Loper Bright*, 144 S. Ct. at 2273.

[42] Agostini v. Felton, 521 U.S. 203, 238 (1997); *see also* Jack M. Beermann, Loper Bright *and the Future of* Chevron *Deference*, 65 Wm. & Mary L. Rev. Online 1, 9–10 (2024).

The original justification for *Chevron* was that statutory silence or ambiguity indicates Congress's intent to delegate interpretive authority to the administering agency. But the *Loper Bright* Court batted away that justification as a "fiction."[43] Now, the federal courts know that when they are reviewing an agency's interpretation of a statute, *Chevron* deference is no longer an acceptable mode of analysis. To put the final nail in *Chevron*'s coffin, just a few days after issuing its decision, the Court remanded nine lower-court decisions applying *Chevron* for reconsideration in light of *Loper Bright*.[44]

The primary basis for the Court's decision to overrule *Chevron* was the language of the APA, which instructs courts conducting judicial review to "decide all relevant questions of law [and] interpret . . . statutory provisions."[45] The Court read this section of the APA to require *non*deferential judicial review of legal questions. And the Court found further support for this reading by comparing this section to other APA provisions specifying deferential standards of review only for "agency policymaking and factfinding."[46] Thus, although the Court also mentioned *Chevron*'s indeterminacy and unworkability,[47] *Loper Bright* was not a case in which the Court overruled a precedent primarily because it proved, over time, to be unworkable or out of step with other legal developments. Rather, *Loper Bright* found, akin to the *Dobbs* decision overruling *Roe v. Wade*, that *Chevron* was "wrong from the start."[48]

[43] *Loper Bright*, 144 S. Ct. at 2268.

[44] *See* Supreme Court Order List (July 2, 2024), https://www.supremecourt.gov/orders/courtorders/070224zor_2co3.pdf.

[45] 5 U.S.C. § 706; *see Loper Bright*, 144 S. Ct. at 2261.

[46] *Loper Bright*, 144 S. Ct. at 2261 (citing 5 U.S.C. §§ 706(2)(A), (2)(E)).

[47] *Id.* at 2270–71.

[48] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022). In addition to the plain language of the APA, the Court relied on the APA's legislative history. The Court cited House and Senate Committee Reports and floor statements by one of the APA's leading proponents, all to the effect that Congress expected courts to use their independent judgment on questions of statutory interpretation arising in judicial review cases. *See Loper Bright*, 144 S. Ct. at 2262 (referring to House and Senate Reports and floor statements in Congress on the APA). It remains to be seen whether resort to legislative history will become routine now that Justice Scalia is no longer around. Justice Scalia would often remind the Court that legislative reports lack the status of enacted law and that references to legislative history, and especially to floor statements, are akin to looking into a crowd and finding your friends. *See, e.g.*, Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment) (attributing the "friends" comment to Circuit Judge Harold Leventhal).

The Court characterized the APA as incorporating a "settled pre-APA understanding that deciding such questions [of statutory meaning] was 'exclusively a judicial function.'"[49] It is a common tool of statutory construction that when a statute is enacted, it presumptively incorporates well-established preexisting legal principles unless the statute explicitly says otherwise.[50] The problem with this line of reasoning in *Loper Bright* is that when the APA was enacted in 1946, it was far from clear that courts would presumptively exercise independent judgment over statutory construction issues in cases involving agency action.

Two well-known decisions issued in 1944, *Hearst Publications*[51] and *Skidmore*,[52] held that reviewing courts owed some deference to an agency's legal conclusions. In *Hearst*, the Court granted strong deference to the National Labor Relations Board (NLRB) in reviewing that agency's application of the law to facts.[53] And in *Skidmore*, the Court determined that an agency's legal views are entitled to "respect" when an agency with jurisdiction has opined on a statutory matter arising in litigation between two private parties. In that situation, *Skidmore* held that the court adjudicating the case may resort

[49] *Loper Bright*, 144 S. Ct. at 2258 (quoting United States v. Am. Trucking Ass'ns, 310 U.S. 534, 544 (1940)).

[50] This tool of construction is, for example, the basis for the Court's recognition of official immunities in cases against government officials arising under 42 U.S.C. § 1983. Even though the language of that statute imposes liability on "every person" who injures another person while violating their constitutional rights, the Court has held that Congress intended to preserve well-established common-law immunities. This means that judges, legislators, and prosecutors are absolutely immune from damages and that all other officials enjoy a qualified immunity. *See* Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 Stan. L. Rev. 51, 66 (1989).

[51] NLRB v. Hearst Publ'ns, 322 U.S. 111 (1944).

[52] Skidmore v. Swift & Co., 323 U.S. 134 (1944).

[53] *Hearst*, 322 U.S. at 131 (holding that a state-law definition of "employee" did not govern NLRB's determination of employee status, and that "where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited. . . . [T]he Board's determination . . . is to be accepted if it has 'warrant in the record' and a reasonable basis in law").

to the agency's legal views "for guidance."[54] Further, a pre-APA report by the Attorney General's Committee on Administrative Procedures, formed in 1939 by President Franklin Roosevelt and chaired by renowned administrative law Professor Walter Gellhorn, opined, "Even on questions of law [independent judicial] judgment seems not to be compelled."[55] Whatever these relatively vague characterizations mean, they do not establish a settled practice of judicial independence that should be presumed to have been incorporated by the Congress that enacted the APA. The Court would have done better to stick to the statutory language and stress the doctrinal mess that *Chevron* had created in its 40-year life.

The Chief Justice's opinion in *Loper Bright* has several additional notable aspects. Its discussion of the merits of *Chevron* deference begins with references to Article III of the Constitution, *The Federalist Papers*, *Marbury v. Madison*, and other early cases. All these sources indicate that the Framers and early jurists expected that "the final 'interpretation of the laws' would be 'the proper and peculiar province of the courts.'"[56] The opinion is a wishy-washy discussion of constitutional principles: The Court does not say flat out that *Chevron* was unconstitutional, which some have contended over the years.[57] In my view, the notion that *Chevron* was unconstitutional cannot be based on an originalist understanding of the separation of powers. Discretionary executive branch action is now subject to judicial review as codified

[54] *Skidmore*, 323 U.S. at 140 ("We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.").

[55] Scalia, *supra* note 25, at 513 (quoting S. Doc. No. 8, 77th Cong., 1st Sess. 90–91 (1941)).

[56] *Loper Bright*, 144 S. Ct. at 2257 (quoting Federalist No. 78, at 525 (Alexander Hamilton) (Jacob Cooke ed., 1961) (citing, inter alia, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (Marshall, C.J.) and United States v. Dickson, 40 U.S. (15 Pet.) 141 (1841) (Story, J.)).

[57] *See* Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of* Chevron*'s Step Two*, 2 Admin. L.J. 255, 261 (1988); Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187 (2016); H. Rep. No. 114-622, at 4 (2016) (report on the Separation of Powers Restoration Act which would have overruled *Chevron*).

in the APA, but such action had been immune from judicial review from the time of the Founding until relatively recently.[58] Such review is necessary to control executive excess, but it is not supported by any plausible originalist constitutional understanding. Further, it does not appear that the *Loper Bright* Court intended to cast doubt on the constitutionality of statutes in which Congress has expressly granted agencies the power to define statutory terms. Although it may have been irresistible to the Court's conservative supermajority, the Court should have left Article III and the separation of powers out of the discussion unless it was willing to base its decision on constitutional law and rewrite the history of the law of the United States in the name of originalism.

In its *Loper Bright* opinion, the Court noted that the dissent's primary argument for preserving *Chevron* turns on "*Kisor*izing"[59] it. A reference to the Supreme Court's earlier *Kisor* decision, this would have meant retaining *Chevron* but emphasizing that courts should defer only when they are unable to discern Congress's meaning after exhausting all of the tools of statutory construction.[60] Had the lower courts followed the Supreme Court's lead over the last decade and rigorously applied all of the traditional tools of statutory interpretation, the scope of *Chevron* deference might have been narrow enough that the attacks on it would have subsided. However, in the Court's view, the risk was too great that lower courts would continue to find circumstances in which Congress has left "policy space" for agencies in the form of statutory silence and ambiguity.[61] In fact, the majority simply denied that a reviewing court would ever be unable to arrive at a judgment concerning a statute's "best meaning."[62] This understanding is completely inconsistent with the basis of *Chevron* deference, that when courts are unable to determine

[58] *See Marbury*, 5 U.S. (1 Cranch) at 170 ("Questions, in their nature political, or which are, by the constitution and laws, submitted to the Executive, can never be made in this court.").

[59] *See* Kisor v. Wilkie, 588 U.S. 558 (2019) (requiring that a reviewing court exhaust the traditional tools of statutory construction before deferring to an agency construction of its own regulation).

[60] *See Loper Bright*, 144 S. Ct. at 2271.

[61] *See* Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight*," 112 Colum. L. Rev. 1143 (2012).

[62] *Id*.

a statute's meaning due to silence or ambiguity, they should defer to the agency's views on the meaning of the statute. *Chevron* and the *Loper Bright* majority's view of reality cannot exist in the same legal universe.

The Court next addressed whether the 40-year-old *Chevron* precedent should be preserved under principles of *stare decisis*. The Court held that *Chevron* was so plainly inconsistent with the language of the APA that the Court's obligation to obey Congress's instructions outweighed the strength of precedent. And the Court found additional flaws in *Chevron*'s workability. These included, most importantly, the lack of a clear understanding of when a statute is ambiguous. The Court also found that its own constant tinkering with the *Chevron* doctrine had made reliance on that doctrine impossible.[63] But even in the discussion of *stare decisis*, the Court's primary basis for overruling *Chevron* remained its conclusion that *Chevron* was simply inconsistent with a governing statute.

Justice Gorsuch detailed his own views on *stare decisis* in his concurring opinion in *Loper Bright*. These views are worth extended treatment in their own right, which is not possible in this article. In brief, he argued for relatively weak adherence to *stare decisis* based on the classical view of judicial decisionmaking in which the judge searches for a correct answer to a legal question in a preexisting universe of legal rules and principles.[64] To Justice Gorsuch, the judge's job is not to blindly follow precedents but rather to assess their validity, including their congruence with the overall fabric of the law and whether they are the product of the particular facts and arguments that led to them. In this sense, he adopted Karl Llewellyn's "grand style" of judging in which judges openly assess the persuasive value of precedent,[65] while at the same time characterizing law as composed of preexisting rules and principles with no judicial creativity in the mix.

[63] *Loper Bright*, 144 S. Ct. at 2272.

[64] *Id.* at 2276 (Gorsuch, J., concurring); *cf.* Roscoe Pound, *The Theory of Judicial Decision*, 36 Harv. L. Rev. 641, 660 (1923) (describing an archaic view of the law as "something given absolutely by logic on a basis of authority [or] revealed absolutely and definitely by history [or] deducible infallibly from an absolute, fundamental metaphysically-given datum").

[65] Karl Llewellyn, The Common Law Tradition 5 (1960).

Justice Gorsuch linked the willingness to reexamine precedents with judicial humility, reasoning that judges should not prioritize their previous decisions, or those of their predecessors, over the work of the legislature or the Framers of the Constitution.[66] The irony of this aspect of Justice Gorsuch's theory is self-evident; he is using modesty to justify increasing the power of judges to ignore, limit, or overrule precedents. This view undeniably increases the power of current judges, unless, I suppose, you believe that judges override precedents only to correct their predecessors' (or their own) errors by following preexisting legal rules that they have discovered through better reasoning. Justice Gorsuch's weaker version of *stare decisis* would reduce the ability of Congress to legislate in reliance on the Court's statutory precedents. In any event, Justice Gorsuch agreed with the majority's central conclusion that *Chevron* should be overruled because it was inconsistent with the APA. He added that the case for overruling *Chevron* is strengthened by the fact that "*Chevron* deference runs against mainstream currents in our law."[67]

Justice Gorsuch's concurrence espouses a premodern view of the importance of judicial independence to the rule of law. *Chevron*, by contrast, was based in part on a realistic and modern view of judicial behavior. For all its faults, one of *Chevron*'s central understandings was that politically insulated judges lacking technical expertise are likely to impose their own policy views when reviewing agency decisions on how to interpret ambiguous regulatory statutes or how to fill statutory gaps.[68] The *Chevron* Court characterized agency officials as being part of a "political branch of the Government," and agency decisionmaking as preferable to judicial decisionmaking. Justice Gorsuch's concurrence and the *Loper Bright* majority opinion ignore this central modern paradox: Federal judicial independence,

[66] *Loper Bright*, 144 S. Ct. at 2279 (Gorsuch, J., concurring).

[67] *Id.* at 2281.

[68] *Chevron*, 457 U.S. at 865 ("Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences."); *see* Richard J. Pierce, Jr., Chevron *and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 Vand. L. Rev. 301, 313 (1988). Differences in ability or interpretive approaches cannot explain the oft-observed fact that liberal judges tend to interpret regulatory statutes more generously than conservative judges. But even under *Chevron*, deference to agency interpretations seemed to line up along those political lines. *See* Jack M. Beermann, Chevron *at the Roberts Court: Still Failing after All These Years*, 83 Fordham L. Rev. 731, 733–38 (2014).

fundamental to the rule of law, allows unelected, unaccountable, and often highly partisan judges to impose their will[69] over the preferences of the government and the electorate. Pretending that judges are neutral arbiters of the law does not make it so.

Thus far, I have said little that did not enter into Justice Elena Kagan's dissenting opinion in *Loper Bright*. She complained, on behalf of the three-member liberal wing of the Court, that Congress would prefer agency resolution of issues implicating agency expertise.[70] She also argued that the Court had undervalued *stare decisis*. In her view, this consideration was especially strong because Congress, throughout *Chevron*'s 40-year reign, could have statutorily overruled *Chevron*. Congress presumably would have done so if it, as a body, had disagreed with the Court's assessment that Congress meant to delegate interpretive authority to agencies.[71] And she urged that, between courts and agencies, democratic accountability counsels in favor of agency power.[72] Finally, Justice Kagan argued that allowing agencies interpretive freedom is not inconsistent with the text of the APA, so long as that freedom is not exercised beyond the limits specified by Congress.[73]

Although I share the concern that overruling *Chevron* is part of a larger plan to prevent the federal government from engaging in what I consider important regulatory efforts, I remain unconvinced that *Chevron* was worth preserving. No matter how theoretically attractive agency primacy in regulatory decisionmaking may be, the *Chevron* doctrine as it developed was too unclear, manipulable, and ineffective to realize the potential it may have initially borne. In my view, *Skidmore* provides a simpler and at bottom clearer roadmap for reviewing courts to follow. However, there are causes for concern for the future of judicial review of both agency interpretive decisions and agency policy decisions. Let us turn to the possible future without *Chevron*.

[69] The mantra of the premodern view of judicial decisionmaking is that judges exercise judgment while the political branches impose their will. *See Loper Bright*, 144 S. Ct. at 2283 (Gorsuch, J., concurring); Philip Hamburger, Is Administrative Law Unlawful 144 (2014).

[70] *Loper Bright*, 144 S. Ct. at 2294 (Kagan, J., dissenting).

[71] *Id.* at 2295.

[72] *Id.* at 2294.

[73] *Id.* at 2302. In my view, Justice Kagan understated the inconsistency between *Chevron* and the language of APA Section 706.

III. *Loper Bright* and the Future of Judicial Review of Agency Construction

What happens next? The best we can say at this point is "it depends." The fear from the pro-regulatory side is that the conservative Supreme Court, and conservative lower court judges, will use their power of independent review to read regulatory statutes narrowly and restrict agency power even more than they have already done in recent years.[74] Less conservative judges on the courts of appeals may be unable to prevent this, because even though relatively few cases reach the Supreme Court, challengers will continue to bring cases in sympathetic forums such as district courts in Texas and the Fifth Circuit. Further, as already noted, the Court remanded several cases to the courts of appeals for reconsideration in light of *Loper Bright*. Those cases may provide a good early test of *Loper Bright*'s effect. Whether agencies lose the remanded cases that they had won under *Chevron* will be more enlightening than the public speculation that has been rampant since *Loper Bright* was announced, including the views expressed here.

Another unanswered question is whether *Loper Bright* weakens the precedential status of the numerous cases decided over the last 40 years in which *Chevron* step two was applied to uphold an agency's statutory interpretation. Although that would seem to be a logical implication of overruling *Chevron*, in *Loper Bright* the Court insisted that cases decided under *Chevron* are still good law:

> [W]e do not call into question prior cases that relied on the *Chevron* framework. . . . Mere reliance on *Chevron* cannot constitute a "'special justification'" for overruling such a holding, because to say a precedent relied on *Chevron* is, at best, "just an argument that the precedent was wrongly decided[,]" . . . [which] is not enough to justify overruling a statutory precedent.[75]

[74] For an example of a very recent ruling that appears to limit agency regulatory authority, see *Ohio v. EPA*, 144 S. Ct. 2040 (2024) (granting stay of EPA Clean Air Act "good neighbor" rule due to agency's failure to address important public comments). This case was decided the day before *Loper Bright* and provoked a dissent from Justice Amy Coney Barrett, joined by Justices Sonia Sotomayor, Kagan, and Jackson. *See id.* at 2058 (Barrett, J., dissenting).

[75] *Loper Bright*, 144 S. Ct. at 2273.

It's not clear how this can be so, because in cases decided under *Chevron* step two, the reviewing court would not have determined the statute's best meaning. Further, *Loper Bright* concluded that *Chevron* "defie[d] the command of the APA" and "turn[ed] the statutory scheme for judicial review of agency action upside down."[76] This language indicates that *Chevron* was not just wrong but so fundamentally wrong that anything built on its foundation should also be questioned. When confronted with a renewed attack on an agency's action approved years or even decades before under *Chevron* step two, lower courts may feel empowered to ask whether, under *Loper Bright*, the earlier court wrongly ignored the statute's "best meaning" and deferred to an agency's second or third (or even fourth) best construction. It remains to be seen whether the courts, including the Supreme Court, will treat precedents based on *Chevron* step two as binding.

Another likely consequence of *Chevron*'s demise is that agencies will channel their decisions away from statutory issues and toward policy issues where the judicial review is governed by the relatively deferential "arbitrary or capricious" standard or the "substantial evidence" test. Further, the *Loper Bright* opinion leaves room for judicial deference to agency statutory construction under the pre-APA and pre-*Chevron* factors that were summarized best in the Supreme Court's *Skidmore* decision. And it remains to be seen whether *Loper Bright* signals the end of the agency flexibility that was built into the *Chevron* framework. The rest of this article explores these and other potential implications of the abandonment of *Chevron* deference.

A. Revival of Skidmore

Although it seems to be in tension with much of the opinion's reasoning, the *Loper Bright* Court acknowledged and appeared to approve of the pre-APA and pre-*Chevron* tradition of giving weight, even great weight, to agency interpretations of regulatory statutes.[77] Most important, the Court apparently revived what has been referred to as "*Skidmore* deference." As the *Loper Bright* Court put it, in *Skidmore* "the Court explained that the 'interpretations and opinions' of the relevant agency, 'made in pursuance of official duty' and 'based

[76] *Id.* at 2265.

[77] *See id.* at 2259.

upon . . . specialized experience,' 'constitute[d] a body of experience and informed judgment to which courts and litigants [could] properly resort for guidance,' even on legal questions."[78] *Skidmore* appears to have replaced *Chevron* as the governing deference standard.[79]

The *Loper Bright* Court's approval of deference to agency statutory construction seemed strongest when it addressed statutes that grant interpretative authority to agencies. The relevant passage is worth quoting:

> When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. The court fulfills that role by recognizing constitutional delegations, "fix[ing] the boundaries of [the] delegated authority," . . . and ensuring the agency has engaged in "'reasoned decisionmaking'" within those boundaries, . . . By doing so, a court upholds the traditional conception of the judicial function that the APA adopts.[80]

This language characterizes deference to reasonable agency interpretations as consistent with the APA, at least when a regulatory statute leaves space for agency construction. According to *Loper Bright*, *Chevron*'s central error was that it viewed silence or ambiguity as the equivalent of a congressional delegation of interpretive authority to an administering agency. So perhaps the Court is not similarly hostile to agency construction pursuant to clearer delegation.

[78] *Id.* (quoting Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944)) (alterations in original).

[79] In an earlier case in which the Court determined that *Chevron* did not apply, the Court similarly invoked *Skidmore* as the proper standard of review for agency constructions of ambiguous statutes. *See* United States v. Mead Corp., 533 U.S. 218, 234–35 (2001). In *Loper Bright*, the Court did not quote the entire *Skidmore* formulation of the factors relevant to deference to agency interpretations. But Justice Gorsuch did, lending credence to the view that the *Loper Bright* Court intended to revive *Skidmore*. *See Loper Bright*, 144 S. Ct. at 2284 (Gorsuch, J., concurring) (quoting *Skidmore*, 323 U.S. at 140) ("[C]ourts may extend respectful consideration to another branch's interpretation of the law, but the weight due those interpretations must always 'depend upon the[ir] thoroughness . . . , the validity of [their]reasoning, [their] consistency with earlier and later pronouncements, and all those factors which give [them] power to persuade.'").

[80] *Loper Bright*, 144 S. Ct. at 2263 (citations omitted).

What does this imply for litigation in the immediate future over agency decisions on the meaning of ambiguous statutes? In my view, the analysis will center on the factors outlined in *Skidmore*: (1) whether the contested issue implicates agency expertise, (2) whether the agency's interpretation is longstanding, (3) whether the interpretation was made after thorough consideration, (4) whether the interpretation is consistent with other agency pronouncements, and (5) whether the agency's reasoning is persuasive.[81] However, the *Loper Bright* Court also contrasted fact-bound determinations with "pure legal question[s]," which are for the courts to resolve. Giving agency views "appropriate weight" echoes the more transformative change in administrative law of *Hearst* and *Skidmore* in 1944.[82]

Many of the arguments under *Skidmore* will echo arguments that, pre–*Loper Bright*, would have been relevant in debating whether a statute's meaning was clear enough to resolve the case without resort to the highly deferential standard of *Chevron* step two. Importantly, under no circumstances will the agency's determination of statutory meaning be binding on the courts. Nonetheless, *Loper Bright* appears to allow for greater deference when a statute assigns to an agency the authority to apply the law to facts.[83] As this discussion illustrates, *Loper Bright* leaves open substantial questions surrounding the future of judicial review of agencies' interpretations of ambiguous statutes.

Assuming that *Loper Bright* does indeed revive *Skidmore*, a glance back at pre-*Chevron* post-APA cases that applied the *Skidmore* factors may be helpful to predicting the future course of administrative law. In one such case, the Court explained the meaning of deference under *Skidmore* in terms that bring *Chevron* deference to mind:

> [I]n determining whether the Commission's action was "contrary to law," the task for the Court of Appeals was not to interpret the statute as it thought best but rather the narrower inquiry into whether the Commission's construction was "sufficiently reasonable" to be accepted by a reviewing court. . . . To satisfy this standard it is not

[81] *Skidmore*, 323 U.S. at 139–40.

[82] *Loper Bright*, 144 S. Ct. at 2260 n.3.

[83] *See id.* at 2259. Here, the Court cited Gray v. Powell, 314 U.S. 402 (1941), and NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111 (1944), as examples of deferential review of "fact-bound determinations."

> necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.[84]

In another roughly contemporaneous case, the Court upheld the legality of an OSHA regulation that allowed employees to refuse to perform dangerous tasks. The Court cited *Skidmore* for the statement that its "inquiry is informed by an awareness that the regulation is entitled to deference unless it can be said not to be a reasoned and supportable interpretation of the [statute]."[85] In another case, the Court invalidated a regulation for failing *Skidmore*'s "power to persuade" factor, explaining that it did so because the agency had failed to identify the source of its statutory authority to promulgate the regulation.[86] Interestingly, in a decision approving an order issued by the Interstate Commerce Commission, the dissenters cited *Skidmore* in opposition to the agency, noting that the agency's "interpretation was adopted largely as a matter of expediency rather than as a reasoned interpretation."[87]

Before moving on, two points are worth noting. First, the Court's rejection of *Chevron* may lead it and the lower courts to similarly reject the more deferential formulations of *Skidmore* deference. If the Court believes that judges can and should always arrive at a statute's best meaning, it is difficult to imagine that it would approve of an interpretation other than "the reading the court would have reached." Second, as Justice Scalia complained in his dissent in *United States v. Mead Corp.*,[88] the *Skidmore* factors are uncertain and manipulable. Thus, it remains to be seen whether a revived *Skidmore* will provide any more clarity to the law of judicial review than did *Chevron*. Further, as always, judges' and Justices' attitudes toward the wisdom of regulation may be more important to the future of regulation than the language of *Skidmore* or *Loper Bright*.

[84] Fed. Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 39 (1981) (citations omitted).

[85] Whirlpool Corp. v. Marshall, 445 U.S. 1, 11 (1980).

[86] *See* Adamo Wrecking Co. v. United States, 434 U.S. 275, 287 n.5 (1978).

[87] Pan-Atl. S.S. Corp. v. Atl. Coast Line R. Co., 353 U.S. 436, 447 (1957) (Burton, J., dissenting).

[88] *See* United States v. Mead Corp., 533 U.S. 218, 240–41 (2001).

B. The Shift to "Arbitrary or Capricious" Review

Why a particular case would be evaluated under *Chevron* or one of the other standards of review was never particularly clear, except that the government had an incentive to invoke *Chevron* to receive what it viewed as maximum deference.[89] Now, the government is likely to do whatever it can to move cases into the more deferential "arbitrary or capricious" realm.

Under the APA, courts should "hold unlawful and set aside" an agency action if it is "arbitrary[or] capricious."[90] One of *Chevron*'s recurring problems was that the arbitrary or capricious standard for reviewing agency policy decisions seemed to vanish whenever the *Chevron* standard applied. This was frustrating because the question whether an agency has statutory authority to do something is separate from the question whether exercising that authority makes sense in light of the overall statutory scheme.[91] Early on, at least one court applied a third step in a *Chevron* case, asking whether the agency's application of its statutory authority was arbitrary or capricious.[92] The Supreme Court remained vague on the relationship between *Chevron* deference and arbitrary or capricious review. Sometimes, the Court seemed to equate *Chevron* step two with review under the arbitrary or capricious standard.[93] The Court once even stated that whether an agency decision was reviewed under "arbitrary or capricious" or *Chevron* did not matter. The Court stated that regardless, its "analysis would be the same, because under *Chevron* step two,

[89] *See, e.g.*, Judulang v. Holder, 565 U.S. 42, 52 & n.7 (2011) (applying the arbitrary or capricious standard despite the government's argument that *Chevron* was the applicable standard of review).

[90] 5 U.S.C. § 706(2)(A).

[91] For example, the question whether an agency has the statutory authority to regulate the emissions from an entire plant rather than each individual smokestack or vent is separate from the question whether doing so makes sense in light of the statutory scheme. This example is, of course, drawn from the *Chevron* decision itself.

[92] Int'l Bhd. of Elec. Workers v. Interstate Com. Comm'n, 862 F.2d 330, 338 (D.C. Cir. 1988). This opinion was written by Judge Harry Edwards, who had also expressed the view that *Chevron* step two violated the separation of powers. *See* CSX Transp. v. United States, 867 F.2d 1439, 1445 (D.C. Cir. 1989) (Edwards, J., dissenting).

[93] Mayo Found. for Med. Educ. & Rsch. v. United States, 562 U.S. 44, 53 (2011); Household Credit Servs., Inc. v. Pfennig, 541 U.S. 232, 242 (2004).

[the Court asks] whether an agency interpretation is 'arbitrary or capricious in substance.'"[94]

Of course, agency efforts to push cases into the arbitrary or capricious category will not always be successful. Inevitably, parties seeking judicial review will sometimes convince reviewing courts that a case presents an issue of statutory interpretation and that the agency's construction is not the statute's best reading. But lower courts more open to upholding regulatory action will in many cases be able to play up the prominence of policy questions and play down issues of statutory construction, shielding some cases from Supreme Court review. Thus, at the margin, the uncertain boundary between cases presenting legal questions and cases presenting policy issues is likely to reduce the importance of *Chevron*'s demise.

Further, this discussion assumes that the application of the arbitrary or capricious standard is and will remain deferential, or at least more deferential than the review of statutory construction questions under the revived *Skidmore* factors. The Court has, in recent years, given some indications that the era of highly deferential review of agency policy decisions may be ending or already over.[95] Or the level of deference may depend on the political and policy context. For example, the Court recently applied a fairly stringent standard of review when it stayed enforcement of an EPA rule under the Clean Air Act.[96] But it applied a highly deferential arbitrary or capricious standard of review to a rule that generally ran in a direction favored by free-market conservatives, upholding the Federal Communications Commission's decision to ease restrictions on media ownership.[97]

C. Agency Flexibility without Chevron

One of *Chevron*'s few virtues was that it facilitated agency innovation, reserving to agencies at least some power to revisit statutory questions. Under *Chevron*, if an agency interpretation was upheld

[94] *See Judulang*, 565 U.S. at 52 n.7 (quoting *Mayo Found.*, 562 U.S. at 53) (internal quotation marks and citation omitted); *see also* Verizon Commc'ns, Inc. v. FCC, 535 U.S. 467, 527 n.38 (2002); *Mayo Found.*, 562 U.S. at 53; Household Credit Servs., Inc. v. Pfennig, 541 U.S. 232, 242 (2004); Beermann, *supra* note 1, at 835; Beermann, *supra* note 68, at 746.

[95] *See* Beermann, *supra* note 13, at 1276, 1314–22.

[96] Ohio v. EPA, 144 S. Ct. 2040 (2024).

[97] FCC v. Prometheus Radio Project, 592 U.S. 414 (2021).

as permissible under step two, the agency remained free to change course and adopt a different permissible interpretation. This aspect of *Chevron*, which was explicitly approved in the Supreme Court's *Brand X* decision,[98] became extremely controversial in recent years. But this ability to change course was inherent in the original *Chevron* decision, since that case involved an agency's reversal of its previous construction of the governing statute.[99] Now, when a Court upholds an agency's interpretation under the *Skidmore* factors, the Court's decision will presumably have precedential effect. Going forward, the only way an agency can change its interpretation is to convince the reviewing court to overrule its prior decision.[100]

In my view, this is unfortunate: "[W]hen 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."[101] Of course, when an agency changes its interpretation, the *Skidmore* factors of consistency and longevity will point against deference. But if an agency's revised understanding of its statute implicates the agency's expertise and the agency justifies the change in a thorough, well-reasoned analysis, *Skidmore* points in favor of judicial deference to the agency's decision. Otherwise, one of the consequences of overruling *Chevron* would be a power shift from agencies to the courts. Without the *Brand X* power to reconsider agency interpretations, only the federal courts or Congress would be able to alter those aspects of the rule that depend on the meaning of the governing statute.

[98] Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 969 (2005).

[99] Under well-established Supreme Court precedent, agencies that act through adjudicatory orders remain free to reverse their views on the meaning or at least application of statutes. *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009). In the *Fox Television* case, the Court approved of an agency reversal of policy related to statutory meaning that took the law in a more conservative direction, just as the *Chevron* Court moved the law to what was considered a more conservative position. Perhaps if agencies begin to use this flexibility to move the law in a more liberal direction, the Court will figure out a way to discard the principles underlying *Fox Television* as well.

[100] This was one of Justice Scalia's arguments against reviving *Skidmore* in the *Mead* case. *See Mead*, 533 U.S. at 247 (Scalia, J., dissenting). The importance of agency flexibility under *Brand X* depends, in part, on how often agencies actually used this authority, which is unknown.

[101] *See* Beermann, *supra* note 42, at 17.

This power shift to the judiciary may be aggravated by another decision late in the Court's recent Term, *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*.[102] In that case, the Court held that parties newly subject to longstanding agency regulations have the full six years allowed under the federal statute of limitations to challenge them. That means some agency rules will be perpetually subject to challenge by, for example, new businesses or people born after the rule's promulgation. This consequence is not universal because many regulatory statutes require that challenges to agency rules be brought within a specified number of days (often 60) from the rule's promulgation or publication, in language that may be read as a statute of repose.[103] But there are exceptions and one important complication. The exceptions are that some statutes preserve the right to bring a challenge later based "on grounds arising after such sixtieth day."[104] The complication is that, consistent with the spirit of *Corner Post*, a court might entertain a challenge to the application of an old rule when a newly regulated party is ordered to comply with the rule or is otherwise made subject to it.[105] *Corner Post* thus potentially enhances the power of today's federal judges by allowing them to review decades-old rules that may have never been challenged, or that were challenged and upheld years or decades ago.

Those who view *Loper Bright* as a manifestation of the Court's anti-regulatory attitude fear that the Supreme Court and some lower federal courts will use their newfound power to review longstanding regulations and further suppress the ability of federal agencies

[102] Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 144 S. Ct. 2440 (2024).

[103] Examples include the Hobbs Act, which covers numerous agencies. *See, e.g.*, 28 U.S.C. § 2344; 42 U.S.C. § 7607(b)(1) (requiring that petitions for review of rules issued under the Clean Air Act be brought within 60 days "from the date notice of such promulgation, approval, or action appears in the Federal Register"); 29 U.S.C. § 655(f) (allowing challenges to standards promulgated under the Occupational Safety and Health Act to be brought "at any time prior to the sixtieth day after such standard is promulgated").

[104] 29 U.S.C. § 7607(b)(1).

[105] *See, e.g.*, United States v. Nova Scotia Foods Prods., Corp., 568 F.2d 240 (2d Cir. 1977) (allowing a party subject to an order based on a seven-year-old regulation to contest and avoid enforcement based on the regulation's alleged invalidity). However, more recently, the D.C. Circuit has twice rejected claims brought to challenge new applications of old rules. *See* Coal River Energy LLC v. Jewell, 751 F.3d 659, 663 (D.C. Cir. 2014); Sierra Club de Puerto Rico v. EPA, 815 F.3d 22, 26–29 (D.C. Cir. 2014).

to regulate in the interest of public health, safety, and welfare. The Supreme Court, in particular, seems hell-bent on depriving federal agencies of their authority to enforce the nation's environmental laws and financial regulations. Just how far this Court will go remains to be seen, perhaps when the next pandemic hits, the next financial crisis strikes, or the effects of climate change threaten to overwhelm vital infrastructure.

D. The Silver Lining?

Is there a regulatory silver lining to the demise of *Chevron* deference? Perhaps, but it depends on numerous unknowns and possible futures. If the federal courts, including the Supreme Court, somehow became dominated by judges and Justices who are less skeptical of the benefits of regulation, then less deferential judicial review could result in rulings that force conservative administrations to regulate more robustly than they might have otherwise. But that scenario is unlikely to occur in the near future. More immediately, less deferential judicial review could temper the ability of an extremist administration to move the law very far in either a pro- or anti-regulatory direction. Courts will no longer be able to hide behind *Chevron* deference when an agency mangles the meaning of a regulatory statute to pursue policies seriously at odds with those Congress expressed in the law.

Thus far, with few exceptions,[106] the current Court's nondeferential decisions have run in favor of business interests and against less powerful individuals who benefit from robust regulation, such as consumers, individual investors, people who suffer the ill effects of environmental degradation, workers in unsafe workplaces, and people whose health is at risk from communicable disease. But in some areas, less privileged litigants may benefit from more stringent judicial review. For example, immigration lawyers are hopeful that less deferential judicial review could benefit their clients, where courts have tended to be highly deferential to immigration

[106] One exception is *King v. Burwell*, 576 U.S. 473 (2015). The ruling denied *Chevron* deference to the IRS's broad reading of a provision of the Patient Protection and Affordable Care Act but then agreed with the IRS that persons who purchased health care insurance on a federally operated exchange were entitled to tax credits to subsidize the costs.

enforcement agencies.[107] The same could be said of government benefits determinations. Courts have reviewed benefits denials fairly deferentially, and more stringent judicial review might prevent agencies from twisting statutes to justify benefits denials when the best reading of the governing statute would support a favorable result for the applicant.

Of course, the effects of *Chevron*'s demise depend on how the courts, agencies, litigants, and Congress behave going forward.

Conclusion

The *Chevron* doctrine, in my view, was doomed from the start because the opinion was internally inconsistent and hopelessly unclear. It was further undermined when it spawned a complicated, virtually inscrutable set of limits, exceptions, and counter-doctrines. Had *Chevron* created a clear standard of review that facilitated certainty and uniformity across the circuits and validated agency action when expertise and experience were vital to effective regulation, I might mourn its passing. I believe the health, welfare, safety, and economic prospects of the American people depend to a great extent on agency regulatory power. But *Chevron* never met the ambitions that some had for it. Thus, I write not to praise or mourn *Chevron*, but to observe its burial, with a tinge of regret for those positive aspects of the doctrine that may have been worth preserving but that likely have met their demise along with their progenitor. On the bright side, at least none of us will have to write, or perhaps even read, another word criticizing *Chevron*.

[107] Brian Green et al., *Think Immigration:* Chevron *Is Dead! Thoughts on the Immigration Impact of* Loper Bright Enterprises, Am. Immigr. Laws. Ass'n Blog (July 2, 2024), https://www.aila.org/library/think-immigration-chevron-is-dead-thoughts-on-the-immigration-impact-of-loper-bright-enterprises; *see also Judulang*, 565 U.S. 42 (overruling an immigration agency's policy determination as arbitrary and capricious and rejecting *Chevron* as the proper standard of review).