"THEN WHAT?": A FRAMEWORK FOR LIFE WITHOUT *CHEVRON*

Gary Lawson[*]

Then what? Where you gonna turn
When you can't turn back for the bridges you burn,
And fate can't wait to kick you in the butt.
Then what? Oh, oh, then what?[1]

The Supreme Court overruled Chevron *in* Loper Bright Enterprises v. Raimondo *and* Relentless, Inc. v. Department of Commerce. *What happens next? What should happen next?*

This Article does not try to answer either of those important questions. Rather, it seeks to provide a framework to promote careful thinking about those questions. Specifically, any predictive or prescriptive account of the law governing judicial review of federal agency legal interpretations needs to think carefully about four issues.

First, what does "deference" actually mean in any given context? "Deference" can mean anything from polite respect to absolute obeisance, and everything in between. The magnitude of deference given to agency legal interpretations was never spelled out clearly during the Chevron *era, and it is not clear how the term was used by the Court in* Loper Bright *and* Relentless. *Whether and how deference remains appropriate after* Chevron *may depend on precisely what one means by "deference."*

Second, what could justify deference, however defined, in specific contexts? There are numerous possible justifications for deference, ranging from treating deference as a helpful tool for decisional accuracy to using it as a cost-savings measure. Having a clear sense of how some or all of those reasons apply in various contexts is crucial to clear thinking, whether one is engaged in description, prediction, or prescription.

Third, what was the precise holding in Loper Bright *and* Relentless, *and does that holding really matter in the real*

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1. CLAY WALKER, *Then What*, *on* RUMOR HAS IT (Giant Records 1997).

world? *The Court told lower courts not to apply* Chevron, *but it said surprisingly little about what would take* Chevron*'s place. Bare case-specific* Skidmore *deference? Pre-1984 law, which included at least some categorical deference to agencies when legal interpretation was bound up with fact-finding? Categorical deference grounded in epistemic concerns? The Court did not say. More importantly, even if one can decode the Court's prescription in* Loper Bright *and* Relentless, *it remains to be seen how lower courts will respond to it. If lower courts constructed the* Chevron *doctrine for reasons of judicial economy, as I think they did, telling them not to apply* Chevron *may simply encourage them to find alternative means to accomplish the same ends.*

Fourth, assuming that Loper Bright *and* Relentless *successfully reduce the level of deference afforded agency legal interpretations, will that simply encourage litigants and lower courts to push cases out of the "law" category and into the "policy" category, where deference still prevails? The case law has never drawn a sharp line between law and policy, and nothing in* Loper Bright *or* Relentless *helps draw such a line. Is there any way to draw that line in the modern world?*

Again, the object of this Article is not to answer these questions. It is to provide an analytic framework to promote clear thinking about the present and future direction of administrative law. Hopefully, it at least points the way towards asking the right questions.

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INTRODUCTION

On June 28, 2024, the Supreme Court declared that "*Chevron* is overruled."[2] For many administrative law junkies, those three words from the twin cases *Loper Bright Enterprises, Inc. v. Raimondo* and *Relentless, Inc. v. Department of Commerce* (henceforth *Loper Bright/Relentless*) seemed seismic. Over the previous four decades, *Chevron U.S.A. Inc. v. Natural Resource Defense Council, Inc.*'s[3] two-step approach to reviewing federal agency interpretations of (certain) statutes administered by those agencies dominated federal administrative law to an unprecedented degree.[4] The so-called "*Chevron* two-step" was a mantra learned by every administrative law student, lawyer, agency official, and judge:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. 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

2. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

3. 467 U.S. 837 (1984).

4. Properly speaking, one should say "the two-step approach to reviewing federal agency interpretations of (certain) statutes administered by those agencies that has been ascribed to *Chevron U.S.A. Inc. v. Natural Resource Defense Council, Inc.*," because the so-called *Chevron* doctrine has very little to do with the *Chevron* decision. *See infra* notes 43–71 and accompanying text. The *Chevron* doctrine was constructed by lower courts and only later adopted, largely by default, by the Supreme Court. *See* Gary Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the* Chevron *Doctrine*, 65 ADMIN. L. REV. 1, 4–6 (2013). The Court in *Chevron* certainly had no consciousness that it was saying anything significant, much less revolutionary, about the court-agency relationship. *See* Thomas W. Merrill, *The Story of* Chevron USA Inc. v. Natural Resources Defense Council, Inc.*: Sometimes Great Cases Are Made Not Born*, *in* STATUTORY INTERPRETATION STORIES 164, 168 (William N. Eskridge, Jr. et al. eds., 2011). Alas, the properly formulated expression is too cumbersome to put into text, so I have chosen compactness over accuracy. And I say "(certain) statutes administered by those agencies" because the *Chevron* doctrine spawned a complicated—and in June 2024 still fluid—web of preconditions for application of the doctrine, which Professors Tom Merrill and Kristen Hickman famously labeled "*Chevron* step zero." *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 836 (2001). Administering the statute in question was a necessary but not sufficient condition for application of *Chevron*. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218 (2001) (requiring courts to determine, before applying *Chevron* deference, whether the agency interpretation carries the "force of law" and whether, all things considered, it seems that Congress intended the agency interpretation to receive *Chevron* deference). It is impossible to describe in a simple sentence the circumstances in which the *Chevron* doctrine applied, so a one-word parenthetical will have to do.

> 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. 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.[5]

In recent decades, *Chevron* was by any account the most important case in federal administrative law, as evidenced by its more than 18,000 Westlaw citations in court opinions and more than 22,000 Westlaw citations in secondary literature.[6] On a personal note, the *Chevron* doctrine consumed 170 pages of the ninth edition of my administrative law casebook.[7] But in *Loper Bright/Relentless*, the Court "place[d] a tombstone on *Chevron* no one can miss."[8] One hundred seventy painstakingly wrought pages are now birdcage liner.

In the eloquent words of David Essex: "And where do we go from here?"[9] What will administrative law doctrine look like in a post-*Chevron* world? What *should* administrative law doctrine look like in a post-*Chevron* world?

In this Article, I am not going to try to answer either of those two important questions. With respect to the latter normative question, I am not a moral theorist and have neither the expertise nor the desire to design a legal system.[10] On the predictive front, if I was any good at predicting legal developments, I would not be writing law review articles; I would be selling that remarkable talent to the highest bidder and setting up multiple offshore accounts.

My goal in this Article, rather, is more modest but, I believe, constructive: I hope to set forth a *framework* for thinking about the descriptive, predictive, and normative questions to come in the wake of *Loper Bright/Relentless*. That framework will hopefully make it easier for courts and commentators going forward to think carefully and rigorously about how judicial review of federal agency legal

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5. *Chevron*, 467 U.S. at 842–43.

6. Citing References for *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, THOMAS REUTERS WESTLAW PRECISION, http://www.westlaw.com (last visited Apr. 1, 2025).

7. *See* GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 615–784 (9th ed. 2022).

8. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2275 (2024) (Gorsuch, J., concurring).

9. DAVID ESSEX, *Rock On*, *on* ROCK ON (Columbia Records 1973).

10. I have said this to tedium over the course of nearly four decades, *see, e.g.*, Gary Lawson & Guy Seidman, *Authors' Response: An Enquiry Concerning Constitutional Understanding*, 17 GEO. J.L. & PUB. POL'Y 491, 494–95 (2019); Gary Lawson, *The Ethics of Insider Trading*, 11 HARV. J.L. & PUB. POL'Y 727, 775–83 (1988), and I will say it to tedium with my dying breath. The moment that I start getting normative, I would be appropriately hit with Jonathan Edwards's potent retort: "But he can't even run his own life—I'll be damned if he'll run mine." JONATHAN EDWARDS, *Sunshine*, *on* JONATHAN EDWARDS (Capricorn Records 1971).

interpretations will and ought to be handled in the years ahead. I will describe an analytic *process* that does not prejudge (or postjudge) how that process will be applied. That ecumenical framework, or analytic process, has four stages.

The first stage concerns the definition of deference. Before one can thoughtfully determine whether, when, and how courts will or should defer to agencies, in any context, one needs to know what deference entails. The term "deference" remains radically undefined and under-examined, both in general and specifically in connection with judicial review of federal agency action. It can mean anything from modest respect to utter obeisance, and its meaning in the *Chevron* era was never fully spelled out. *Loper Bright/Relentless*, for its part, said very little that is helpful about what deference concretely means, and will mean going forward, in the context of review of agency legal determinations. But defining deference is an essential first step to clear thinking about whether, when, and how to engage in it.

The second stage concerns the possible rationales for deference once the term is properly defined. Knowing *why* one might defer can help establish *whether* one will do so and whether one *should* do so, regardless of how those predictive and normative assessments are ultimately made. There is a wide range of reasons—some reinforcing, some not—that might drive or justify deference in any given context. Again, *Loper Bright/Relentless* is not much help on this score for courts and lawyers going forward. And again, careful thinking about the reasons that might justify deference can help one understand the present and navigate the future.

The third stage of my framework involves grappling more directly with the meaning of the *Loper Bright/Relentless* decision. It is, to say the least, not entirely clear what *Loper Bright/Relentless* decided. True, it overruled *Chevron* as explicitly as one can overrule a case, but it never articulated very well what overruling *Chevron* means. Nor is it entirely clear what overruling *Chevron could* mean once one recognizes, as did the Court, that the decision in *Loper Bright/Relentless* says nothing about the meaning of the term "stationary source" in the Clean Air Act, which was the subject of *Chevron*'s holding. The Court in *Loper Bright/Relentless* was obviously giving lower courts instructions about interpretative methodology, but it is not clear that the Court has the power to prescribe methodologies that lower courts must follow. Nor is it clear what methodology the Court purported to prescribe in *Loper Bright/Relentless* (assuming for the moment that it has power to do so) as opposed simply to stating what courts are *not* supposed to do. Before one can make prescriptions or predictions about the law's future, one must first understand the law's present, and that is no easy task in this instance. A *via negativa*, which defines what one must do by describing some things that one must not do, can only go so far.

One must also understand whose post-*Chevron* present or future one is trying to describe, prescribe, or predict. Whose perspective is at issue? Scholars? Agencies and other litigants? Lower courts? The Supreme Court? It may turn out that very different considerations prove controlling depending on whose actions are at issue. In particular, lower courts face a very different set of circumstances, constraints, and incentives than does the Supreme Court—or do academics. The lower courts' vision of a post-*Chevron* world may be quite different from whatever was envisioned by the Supreme Court that decided *Loper Bright/Relentless*, and that lower-court vision is likely to make burnt hash out of any academic theorizing that does not understand the forces that generated *Chevron* in the first place and that have not magically disappeared simply because the Supreme Court uttered the words, "*Chevron* is overruled." Put another way, what *Loper Bright/Relentless* said is far less important than what lower courts are going to do.

Fourth, and finally, it is important to identify *Loper Bright/Relentless*'s domain of application. Whatever one thinks that *Loper Bright/Relentless* prescribes as the judicial role, to what class of agency decisions does that prescription extend? It surely extends to agency interpretations involving questions of law, but what counts as a question of law? If all agency decisions fell neatly into a law-fact dichotomy, the task of distinguishing legal from factual questions would be manageable, given long-standing conventions regarding what counts as law and what counts as fact. In the modern world, however, many agency decisions transcend that dichotomy and constitute policy choices that are not reducible to matters of law or fact. *Loper Bright/Relentless* purports to say nothing about judicial practice in reviewing agency policy decisions, which involves granting a substantial degree of deference (however that is ultimately defined) to such agency decisions. But *Loper Bright/Relentless* provides little guidance on how to identify questions of policy and distinguish them from questions of law. If issues previously characterized in *Chevron* terms can simply be recast as policy decisions subject to deferential arbitrary or capricious review, the impact of *Loper Bright/Relentless* could be minimal.

Administrative law marches on, with or without *Chevron*. My goal here, once more, is neither to predict nor prescribe the marching path but simply to help one plan the trip, wherever it leads. I do not offer answers, but I hope to provide—or at the very least to point towards—the right questions.

I. "YOU KEEP USING THAT WORD. I DO NOT THINK IT MEANS WHAT YOU THINK IT DOES."[11]

The *Chevron* case, considered just as a case, was about agency administration of the "stationary source" provisions in the Clean Air Act. The *Chevron doctrine* that emerged following that case was about judicial deference.

"*Chevron*" did not become a standard part of legal vocabulary because everyone in the administrative law world cared deeply about whether the Environmental Protection Agency could draw an imaginary bubble around factories. It became a buzzword because it stood in for a relationship among federal statutes, federal agencies, and federal courts in which the courts would review only for reasonableness a large class of agency interpretations of statutes. The broad term for that relationship is "deference." The precise phrase *"Chevron* deference" has more than 6,000 case citations and more than 7,000 references in legal scholarship.[12] It even has its own entry in *Black's Law Dictionary*.[13] The term "deference" shows up two dozen times in the majority opinion in *Loper Bright/Relentless*, with four more appearances for "defer."

But what does the term "deference," shorn for the moment of any adjectives, actually mean? In legal practice, the term is oft used but seldom defined. The definition of the word "deference" in *Black's Law Dictionary* is thin and generic: "1. Conduct showing respect for somebody or something; courteous or complaisant regard for another. 2. A polite and respectful attitude or approach, esp. toward an important person or venerable institution whose action, proposal, opinion, or judgment should be presumptively accepted."[14] That is a definition that could function in non-legal settings, as when one respectfully treats a house guest—or even lets someone else of distinguished service speak first (or longest) at a faculty meeting. An account of deference more focused on usage in distinctively legal contexts would require a book devoted to the subject.[15] For now, a fair working definition of deference that describes actual usage within the United States legal system is "*the giving by a legal actor of some measure of consideration or weight to the decision of another actor in exercising the deferring actor's function.*"[16] This definition, one should note, was derived inductively from an examination of actual usage

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11. WILLIAM GOLDMAN, THE PRINCESS BRIDE 92 (1973).

12. Advanced Search Results for "*Chevron* Deference," THOMAS REUTERS WESTLAW PRECISION, http://www.westlaw.com (last visited Jan. 6, 2025) (in the search bar, enter "advanced: "*Chevron* deference""; then select the "Content types" tab).

13. Chevron *Deference*, BLACK'S LAW DICTIONARY (12th ed. 2024).

14. *Deference*, BLACK'S LAW DICTIONARY (12th ed. 2024).

15. I humbly suggest GARY LAWSON & GUY I. SEIDMAN, DEFERENCE: THE LEGAL CONCEPT AND THE LEGAL PRACTICE (2019).

16. *Id.* at 106.

and practice by federal courts. A normative theorist constructing an ideal legal system from scratch might well come up with something different. In formulating this definition, Guy Seidman and I were just trying to give an account of the various practices described by United States federal courts as deference. Those practices vary widely—one might even say wildly—in the *degree* of consideration or weight afforded prior decisions. Some involve strong, and sometimes even conclusive, presumptions of correctness for the original decision, while some involve little more than a polite nod to what came before. The term "deference" potentially covers a lot of territory, and the legal significance of deference depends on which territory one inhabits at any given moment when applying something labeled deference.

If all that *Chevron* involved was giving "some measure of consideration or weight" to an agency's view of the law, it would not excite much attention. Courts will naturally give "some measure of consideration or weight" to the views of a federal agency regarding the meaning of a federal statute. The real issue is how much consideration or weight they give. One can give an agency's views on legal meaning "some measure of consideration or weight" simply by looking at them and giving them whatever weight their intellectual worth merits, which could easily be zero in many cases. That minimalist account is precisely what we know today as "*Skidmore* deference," so named for the 1944 decision in *Skidmore v. Swift & Co.*,[17] which treats an agency's view of the law as "a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[18] Under *Skidmore,* the agency's view receives weight consummate with "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."[19] If the court does not find the agency's view persuasive, the agency's view drops out of the picture. *Skidmore* deference thus represents the lower bound of what deference might involve, akin to the polite respect described in the generic *Black's* definition of "deference."

To be sure, deference in such a form, even at its lowest magnitude, has some worth to agencies. It at least requires the court to pay attention to the agency's views, in a way that courts are not obliged to pay attention to the views of amici or writers of law review articles, and in that sense there is some rationale for attaching the label "deference" to treatment of an agency's views under *Skidmore*.[20] If one focuses, however, on the quantum of evidence needed to support a decision on review, *Skidmore* does not assign any particular quantum—or even a non-zero quantum—to the fact that an agency's

17. 323 U.S. 134 (1944).
18. *Id.* at 140.
19. *Id.*
20. *See* LAWSON & SEIDMAN, *supra* note 15, at 124–29.

interpretation is under review, and in that respect it possibly would not merit being called deference at all but for the frequent use of "*Skidmore* deference" as a term in actual legal practice.[21] One might just as well say that courts "defer" to the views of private litigants when courts find those views persuasive.

The Supreme Court in *Loper Bright/Relentless* clearly had something more robust than *Skidmore* in mind when it spoke of *Chevron* deference. The Court sharply distinguished "respect" for executive branch interpretations from the kind of deference associated with *Chevron*, noting that "although exercising independent judgment is consistent with the 'respect' historically given to Executive Branch interpretations, *Chevron* insists on much more."[22]

How much more?

No one during the *Chevron* era ever really knew. The original *Chevron* decision initially spoke of courts upholding "permissible"[23] resolutions of statutory ambiguity, which of course says nothing helpful because it leaves open what counts as "permissible." A few sentences later, "permissible" became—at least when legislation delegates interpretative authority to an agency—"reasonable."[24] Once the *Chevron* doctrine emerged from later cases, that language of reasonableness took over, somewhat divorced from its initial context of express or implied congressional delegations of interpretative authority to the agency.[25] It was never clear, however, what it meant for an agency's interpretation of an ambiguous statute to be "reasonable." It obviously meant something much more substantially deferential than respect, since the agency win rate on questions of reasonableness in the face of ambiguity approached 95 percent across

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21. *See, e.g.*, Transcript of Oral Argument at 52, Relentless, Inc. v. Dep't of Com., 144 S. Ct. 2244 (2024) (No. 22-1219), 2024 WL 250638, at *52 [hereinafter *Relentless* Oral Argument Transcript] (statement of Kavanaugh, J.) ("[T]here was reference to *Skidmore* deference, and I guess I don't think that's the right term, that it's respect or pay attention to."); Transcript of Oral Argument at 30, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024) (No. 22-451), 2024 WL 250658, at *30 [hereinafter *Loper* Oral Argument Transcript] (statement of Paul Clement) ("So my understanding of *Skidmore*, consistent with Justice Kavanaugh's, is it's not actually a deference doctrine."). *But see id.* at 31 (statement of Roberts, C.J.) ("Well, it's usually described as a deference doctrine. People talk about *Skidmore* deference."); LAWSON & SEIDMAN, *supra* note 15, at 41 ("Any descriptive account of US federal court deference that does not include *Skidmore* deference is radically incomplete.").

22. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2265 (2024) (citation omitted).

23. Chevron U.S.A. Inc. v. NRDC, Inc., 467 U.S. 837, 843 (1984).

24. *See id.* at 844 ("[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").

25. *See, e.g.*, Montana v. Clark, 749 F.2d 740, 746 (D.C. Cir. 1984).

Chevron's history.[26] Agencies got considerably less of a bump than that on the threshold question whether a statute presented an ambiguity, though again the precise calibration of deference on that issue was never clarified either. The bottom line is that *Chevron* deference was something far removed from the lowest possible magnitude of deference, but how far removed was always something of a mystery.

The *Chevron* doctrine thus died leaving unanswered some key, and indeed fundamental, questions about its application. Courts never clarified how one identified whether and when statutes had "clear" meanings,[27] nor did they say much about what it meant for a resolution of ambiguity to be "reasonable."[28] The *Chevron* doctrine muddled through for forty years without explicit consideration or discussion of some basic elements of both its first and second steps. Now, post-*Chevron*, there is seemingly no need to try to resolve those long-looming questions.

At least some of those questions, however, are likely to persist in a different form in the post-*Chevron* world. When we come shortly to what *Loper Bright/Relentless* does and does not say, we will revisit the definitional problems surrounding the term "deference." For now, it is enough to keep in mind that deference can mean anything from polite respect to absolute obeisance, and everything and anything in between. It can mean something akin to the deference afforded jury verdicts. It can mean a strong presumption of correctness. It can mean a thumb on the scale. It can mean a pinkie on the scale. It can mean polite attention. How one thinks about deference in any given context depends very much on what one means by it. This is a simple observation, but sometimes simple observations are the most important.

II. "ALL OUR REASONS START TO FADE."[29]

Why would a legal actor ever think of deferring to another? If you conclude that something is the right answer to a legal question, why would you ever subordinate your judgment to someone else's?

As with many topics surrounding deference, an adequate treatment of these questions regarding the rationales for deference requires a book.[30] As with the definition of deference, a few words will hopefully be enough for present purposes.[31]

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26. *See* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 6 (2017).

27. *See* LAWSON, *supra* note 7, at 698–727.

28. *See id.* at 727–56.

29. EARTH, WIND & FIRE, *Reasons*, *on* THAT'S THE WAY OF THE WORLD (Columbia Records 1975).

30. Did I mention LAWSON & SEIDMAN, *supra* note 15?

31. For a lot more words, see *id.* at 85–106, 151–54.

There are at least six classes of reasons why you, as a legal actor, might choose to give weight to someone else's views. In any given context, it is quite likely that more than a single reason will operate, though one will often be able to identify a small number of these reasons as primary.

First, and perhaps most obviously, you might think that someone else is in a better position than you to get the right answer. Deference in this sense is part of an independent search for the right answer; someone else's view is seen as good evidence of that right answer, even if you cannot, using your own capacities, necessarily see or recreate the process that led to that answer. That is surely the rationale that underlies *Skidmore v. Swift*: Agencies are sometimes—not always, but sometimes—well positioned to reach good answers. It also surely underlies the long practice of giving weight "when an Executive Branch interpretation was issued roughly contemporaneously with enactment of the statute and remained consistent over time."[32] Those considerations, along with an agency's expertise in the subject area of the statute, are perhaps good indicia that the agency's view might be the correct answer. (The requirement of consistency, presumably across time, administrations, and changes in policy preferences, provides some protection against partisan bias in the interpretative process.) Deference can sometimes be an indirect means of pursuing accuracy.

Relatedly but distinctly, a second rationale focuses on the perceived *legitimacy* of different decisionmakers. That legitimacy may stem from epistemic considerations, as when an actor is deemed legitimate precisely because that actor is likely to get right answers, but one can in principle separate legitimacy from accuracy. Someone may be seen as a legitimate decisionmaker because of how that person was selected, not because that person is perceived as wise or knowledgeable. Sometimes actors get deference because of who they are, not because of what they do or know. More broadly, sometimes one searches for a right *answerer* rather than a right *answer*.[33]

Third and fourth, one might choose to defer to an actor for either prudential or strategic reasons. In the extreme, one might fear reprisals if one does not give a certain degree of consideration or weight to someone else's views. On the prudential side, perhaps one maximizes one's future powers (or future lifespan?) by giving way to a certain degree. Deference in the present can enhance one's relative position in the future. Put bluntly, sometimes deference is just a form of sucking up—and sometimes sucking up is a wise strategy. These

32. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2258 (2024).

33. I am grateful to John Harrison for highlighting the potential importance of a right answerer. *See Discussion: The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 386, 399 (1988) (comment of John Harrison).

prudential or strategic concerns can work in tandem with or entirely separately from concerns of either accuracy or legitimacy.

Fifth, one might defer simply because it saves time, effort, and money. One could, in theory, construct a layered system of legal decisionmaking in which each layer independently reassesses every aspect of every decision. Perhaps that would lead to more accurate decisionmaking. It will certainly—no "perhaps" involved—require a lot of energy from a lot of people, and the game may therefore not be worth the candle even if the potential gains in accuracy are large. Over a significant range of matters, it makes sense to have the later (or "higher") levels of decisionmaking check only for especially egregious errors rather than to try to achieve the most accurate possible decision in each instance. Deference, in short, often has an economic justification. If that means that bad decisions are sometimes allowed to stand merely because of the costs of error correction—well, "[a]nyone who says there is no price tag on justice understands neither price tags nor justice."[34]

The sixth rationale for deference, which in a legal hierarchy perhaps should be slotted as the first rationale, nods toward legitimation but has a more specific and concrete foundation: Sometimes one defers because one has been ordered to do so—or declines to defer for the same reason. Sometimes deference is not a choice. It is a command.

One must, of course, choose whether to obey commands, so there is a sense in which deference is always discretionary rather than mandatory. But, as a practical matter, if certain sources of law are deemed authoritative, commands issuing from those sources are likely to be seen as dispositive. The initial choice to recognize certain sources of law as authoritative renders commands issuing from those legal sources mandatory rather than discretionary.

The classic example is deference to jury verdicts. The United States Constitution commands a certain level of deference to fact-finding by juries. The Seventh Amendment limits judicial re-examination of fact-finding in civil cases to "the rules of the common law,"[35] and jury fact-finding in criminal cases receives absolute deference when it results in acquittal.[36] A judge evaluating a jury verdict does not need to—and indeed is not permitted to—inquire into the specific fact-finding capacities or reliability of any particular jury. The jury's fact-finding gets deference at the high end of the deference scale simply because there is a constitutional command to that effect. That command may or may not be justified by some combination of

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34. Gary Lawson, Guy I. Seidman & Robert G. Natelson, *The Fiduciary Foundations of Federal Equal Protection*, 94 B.U. L. REV. 415, 446 (2014).

35. U.S. CONST. amend. VII.

36. *See* Margaret H. Lemos, *The Commerce Power and Criminal Punishment: Presumption of Constitutionality or Presumption of Innocence?*, 84 TEX. L. REV. 1203, 1229–30 (2006).

the other rationales for deference, but once one takes the Constitution as authoritative, those other potential rationales do not matter. As then-Admiral James T. Kirk once said, "The word is given."[37]

Constitutions can also categorically forbid deference. Article V of the Florida Constitution, for example, says: "In interpreting a state statute or rule, a state court . . . may not defer to an administrative agency's interpretation of such statute or rule, and must instead interpret such statute or rule de novo."[38] Once again, the word is given, without regard to case-specific features of a particular agency decision.

With this short introduction to the concept of deference at hand, we can now turn to the *Loper Bright/Relentless* decision to see what questions remain to be addressed by courts and scholars in the years ahead and how thinking carefully about deference and its rationales might help with those questions.

III. "WHAT THE *$@# DID YOU SAY?"[39]

The facts and law in *Loper Bright/Relentless,* involving the extent to which the federal government can force fishing boat owners to pay for observers who monitor compliance with federal fishery management plans, are fascinating.[40] They are also irrelevant to the *Loper Bright/Relentless* decision. The Supreme Court did not decide who must pay for the required federal observers; that is all left to the lower courts. Indeed, the Court conspicuously *did not even grant certiorari* on the questions that would decide whether Loper Bright and Relentless had to fork over 20 percent of their income to pay for government monitors. The Court agreed to decide *only* abstract questions about the application of *Chevron*.[41] The Supreme Court simply purported to give instructions to the lower courts about how to go about resolving the cases without itself trying to resolve the cases.

The bedrock instruction issued to the lower courts was: Don't employ *Chevron* anymore. What does that mean in concrete terms? What is the legal significance of that instruction?

Start with unpacking what the decision claims to hold. That is not an easy task.

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37. STAR TREK II: THE WRATH OF KHAN (Paramount Pictures 1982)

38. FLA. CONST. art. V, § 21.

39. CLEDUS T. JUDD, *What the *$@# Did You Say?*, *on* JUST ANOTHER DAY IN PARODIES (Sony Music Ent. 2000).

40. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2254–56 (2024).

41. *See* Gary Lawson, *Life, the Universe, and the Judicial Power*, 48 HARV. J.L. & PUB. POL'Y 107, 117 (2025).

A. "Yeah, 'whatever you say.'"[42]

Loper Bright/Relentless is the story of three purported commands. One is the command supposedly represented by the *Chevron* doctrine. A second is the command supposedly represented by section 706 of the Administrative Procedure Act.[43] The third is the command supposedly represented by the *Loper Bright/Relentless* majority opinion. Once those commands are identified, one can make some judgments about the legal authorities behind them.

First comes *Chevron*. Neither the *Chevron* decision nor the subsequent *Chevron* doctrine invented the idea of granting some measure of deference to federal agency legal interpretations. We have already seen *Skidmore v. Swift* and its limited conception of deference based on epistemic criteria. There was considerable history of deference of some sort to federal agency legal interpretations long before 1944. Aditya Bamzai has elegantly captured how deference was sometimes built into forms of review; mandamus, for example, required *clear* justification for legal action, not just a sense that the executive actor got it wrong, so some strong form of deference was baked into the remedial scheme.[44] Epistemic concerns also sometimes justified a nontrivial measure of deference to agency interpretations that were consistent, long-standing, and grounded in expertise.[45] Cases from the New Deal and early post-New Deal eras then expanded such deference to generate a strong presumption of agency correctness when legal interpretation was bound up with facts so that the agency was filling in the meaning of ambiguous terms through case-by-case, fact-bound determinations. Here, deference was grounded less in fact-specific epistemic features pushing towards accuracy than in legitimation-based features that look to the identity of the decisionmaker rather than its case-specific capacities. The classic cases for this presumptive deference to agencies when legal interpretation was bound up with law application were *Gray v. Powell*,[46] *NLRB v. Hearst*,[47] and *O'Leary v. Brown-Pacific-Maxon, Inc.*[48] Under this regime, if the agency was deciding an abstract legal question that did not depend on the facts of a particular case (in class I call them "ivory-tower questions," because a law professor in an ivory tower with no knowledge of the specific context in which the law

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42. MARTINA MCBRIDE, *Whatever You Say*, *on* EVOLUTION (Sony Music Ent. 1997).

43. Administrative Procedure Act, 5 U.S.C. § 706.

44. *See* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 967 (2017).

45. *See Loper Bright*, 144 S. Ct. at 2257–58.

46. 314 U.S. 402 (1941).

47. 322 U.S. 111 (1944).

48. 340 U.S. 504 (1951). For a detailed summary of those cases and their role in the development of judicial review, see Lawson & Kam, *supra* note 4, at 13–23.

is applied could figure out the law's meaning using conventional tools of statutory interpretation), agencies would presumptively receive no deference, though on occasions some measure of deference might be warranted by special accuracy-assuring circumstances, such as the doctrines regarding consistent, long-standing, and expertise-based agency interpretations.[49] And sometimes Congress would directly confer interpretative authority on agencies in organic statutes, as when Congress refers to "unemployment (as determined in accordance with standards prescribed by the Secretary [of Health, Education, and Welfare])."[50] Courts in the pre-*Chevron* era treated these agency-empowering statutes as calling for substantial deference to agency interpretations.[51]

So, given this backdrop circa 1984, what did *Chevron* do—or, more importantly, what did lower courts treat *Chevron* as doing?

The answer to the first iteration of the question is that *Chevron* itself did nothing of general consequence. It simply applied the long-standing rule that, on some occasions, agencies would merit deference even for abstract legal interpretations, such as the question whether the words "stationary source" in the Clean Air Act could refer to an entire production unit rather than to each individual opening from which pollutants might emerge. As the Court in *Chevron* explained: "In these cases the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies."[52] The colon following "entitled to deference" indicates that there were case-specific reasons why deference was considered appropriate in this instance. Where those factors are not present, according to this (natural and even obvious) reading of *Chevron*, the agency would not receive deference for the kind of abstract legal interpretation at issue in that case. So understood, *Chevron* was a routine application of pre-existing law. That is how the Court, and all the parties, in *Chevron* understood the case,[53] and it is how *Chevron*'s author understood the case right up until his retirement from the Court.[54]

The lower courts had other ideas. Through a process that Stephen Kam and I have traced at painful length elsewhere,[55] lower courts,

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49. *See, e.g.*, FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27 (1981).

50. 42 U.S.C. § 607(a) (1976).

51. *See, e.g.*, Batterton v. Francis, 432 U.S. 416, 425–26 (1977).

52. Chevron U.S.A. Inc. v. NRDC, Inc., 467 U.S. 837, 865 (1984).

53. *See* Merrill & Hickman, *supra* note 4, at 848.

54. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 445–48 (1987); *see also* Negusie v. Holder, 555 U.S. 511, 531 (2009) (Stevens, J., concurring in part and dissenting in part).

55. *See* Lawson & Kam, *supra* note 4.

and in particular the D.C. Circuit, turned the unpromising language in the *Chevron* decision into a transformative doctrine. The new doctrine extended a regime of presumptive deference for some agency interpretations in the law-application context, and occasional case-specific deference to agencies on pure legal interpretation, to categorical deference to *all* agency legal interpretations, so long as the agency administered the statute in question. Over time, the courts, including the Supreme Court, narrowed the scope of *Chevron* deference through the construction of what came to be called "step zero,"[56] but the basic categorical rule of substantial deference to agency legal interpretations governed for four decades.

And it was a categorical rule. Courts could and would be reversed for failing to apply the *Chevron* framework and failing to give the agency's view sufficient weight.[57] The Supreme Court decided cases about whether classes of agency decisions were *entitled* to *Chevron* deference,[58] again meaning that it would be reversible error for a court to fail to apply the *Chevron* framework when it supposedly governed. In *Loper Bright/Relentless*, the Court consistently described *Chevron* as a mandatory doctrine of deference. The Court wrote that *Chevron* "*required* courts to defer to 'permissible' agency interpretations of the statutes those agencies administer—even when a reviewing court reads the statute differently,"[59] that "[o]ur *Chevron* doctrine *requires* courts to use a two-step framework to interpret statutes administered by federal agencies,"[60] that a reviewing court "must"[61] apply both steps of *Chevron*, that *Chevron "requires*"[62] deference, that it was a "*governing* standard,"[63] that it "*requires* a court to *ignore*"[64] its best judgment, that it "*demands* that courts mechanically afford *binding* deference to agency interpretations,"[65] that it "forces"[66] courts to do so, that it "demands"[67] or "requires"[68]

56. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2268 (2024) (citing United States v. Mead Corp., 533 U.S. 218 (2001)).

57. *See, e.g.*, INS v. Aguirre-Aguirre, 526 U.S. 415, 423 (1999).

58. *See, e.g.*, Mayo Found. for Med. Educ. & Rsch. v. United States, 562 U.S. 44, 56 (2011) (no "tax exceptionalism" for *Chevron*); United States v. Haggar Apparel Co., 526 U.S. 380, 390, 394 (1999) (*Chevron* applies to Customs Service regulations).

59. *Loper Bright*, 144 S. Ct. at 2254 (emphasis added).

60. *Id.* (emphasis added).

61. *Id.*

62. *Id.* at 2263 (emphasis added).

63. *Id.* at 2264 (emphasis added).

64. *Id.* at 2265 (first emphasis added).

65. *Id.* (first emphasis added).

66. *Id.*

67. *Id.* at 2267.

68. *Id.* at 2270.

deference, and that it "was a judicial invention that *required* judges to disregard their statutory duties."[69]

The perceived *Chevron* command was grounded in court decisions rather than congressional statutes, at least outside the narrow context of statutes that expressly seemed to grant interpretative authority to agencies. One possible move for the Court in *Loper Bright/Relentless* was thus to change, or perhaps clarify, the judicial command to indicate that lower courts, and the Supreme Court in subsequent years, had misunderstood the import of the *Chevron* decision—as Justices Stevens and Breyer had urged as recently as 2009.[70] That is not how the Court proceeded in *Loper Bright/Relentless*. Rather, it said that *Chevron*'s apparent command was superseded by a prior command with more authority: section 706 of the APA.[71]

Section 706 purports to prescribe standards for judicial review of various aspects of agency decisions. Agency factual findings in formal proceedings get affirmed unless they are "unsupported by substantial evidence,"[72] though the standard switches to "unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court."[73] In informal proceedings, agency factual findings cannot be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,"[74] which is also the residual standard for review of all aspects of agency decisionmaking not covered by a more specific standard. Certain domains of decisionmaking are subject to review without express specification of a standard:

> The reviewing court shall—
> . . .
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
> . . .
> (B) contrary to constitutional right, power, privilege, or immunity;
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> (D) without observance of procedure required by law.[75]

It seems clear from context that the default standard of review in these domains is de novo review. That is obviously the standard for review of agency constitutional decisions, and the statute does not distinguish

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69. *Id.* at 2272 (emphasis added).

70. *See* Negusie v. Holder, 555 U.S. 511, 531 (2008) (Stevens, J., concurring in part and dissenting in part).

71. *See Loper Bright*, 144 S. Ct. at 2261.

72. 5 U.S.C. § 706(2)(E).

73. *Id.* § 706(2)(F).

74. *Id.* § 706(2)(A).

75. *Id.* § 706(2)(B)–(D).

constitutional decisions from other legal determinations. Any doubt on that score vanishes in the first sentence of section 706: "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[76] Again, review of all legal questions is treated the same way as review of constitutional issues.

As Mike Rappaport has carefully delineated,[77] there are two plausible ways to interpret how section 706 attempts to prescribe the court-agency relationship with respect to legal questions. One is to say that section 706 mandates de novo judicial review of agency legal determinations.[78] That is certainly the interpretation that seems most consistent with the statutory language and structure; as noted above, the statute does not distinguish review of constitutional questions from other kinds of legal questions. More than a quarter century ago, John Duffy made the case for reading section 706 to prescribe de novo review of legal questions,[79] and Professor Rappaport has forcefully restated that case.[80] A second possibility is that the APA was enacted in 1946 essentially to codify the then-existing practices of judicial review.[81] That would involve presumptive strong deference to agency legal interpretations bound up with fact-finding, strong deference when Congress clearly left interpretative authority to the agency, and something like *Skidmore* all-things-considered respect in other instances.[82] Neither plausible interpretation of section 706 yields anything like the strong categorical rule of the *Chevron* doctrine that applies strong deference across the board even to pure, ivory-tower legal questions.

Neither *Chevron* nor any other major decision in the *Chevron* era, in either the Supreme Court or lower courts, had much to say about section 706. That was not surprising in 1984. No member of the Court at that time could remotely be considered a textualist (Justice Scalia was still two years away), and many administrative law practices grew up in apparent defiance of—or at least with unbenign neglect towards—the text of the APA.[83] Over time, as textualism gained a

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76. *Id.* § 706.

77. Michael B. Rappaport, Chevron *and Originalism: Why* Chevron *Deference Cannot Be Grounded in the Original Meaning of the Administrative Procedure Act*, 57 WAKE FOREST L. REV. 1281, 1284 (2022).

78. *Id.* at 1293.

79. *See* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 193–99 (1998).

80. *See* Rappaport, *supra* note 77, at 1284.

81. *Id.*

82. *See* Lawson & Kam, *supra* note 4, at 22–23.

83. *See* Duffy, *supra* note 79, at 193–99; Kristin E. Hickman & Mark R. Thomson, *Textualism and the Administrative Procedure Act*, 98 NOTRE DAME L. REV. 2071, 2102 (2023).

foothold in the federal courts, there have been some modest movements towards paying more attention to the APA's actual language. The Court in 1993 tossed out decades of lower-court practice of requiring exhaustion of administrative remedies even when no statute or regulation suspended the effect of agency action[84]—a practice that flew directly in the face of the APA's prescription of the availability of judicial review of "final agency action."[85] Then-Judge Brett Kavanaugh in 2008 noted tension between the APA's language and the judge-made requirements for agency rulemaking that have been in place since the early 1970s.[86] Nonetheless, for the most part, the APA has had relatively little effect on such important aspects of federal administrative law as rulemaking procedures and standards of judicial review.

Loper Bright/Relentless strikingly rested wholly on a straightforward application of section 706 of the APA. According to the Court:

> The APA thus codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment. It specifies that courts, not agencies, will decide "*all* relevant questions of law" arising on review of agency action, § 706 (emphasis added)—even those involving ambiguous laws—and set aside any such action inconsistent with the law as they interpret it. And it prescribes no deferential standard for courts to employ in answering those legal questions. That omission is telling, because Section 706 does mandate that judicial review of agency policymaking and factfinding be deferential. See § 706(2)(A) (agency action to be set aside if "arbitrary, capricious, [or] an abuse of discretion"); § 706(2)(E) (agency factfinding in formal proceedings to be set aside if "unsupported by substantial evidence").[87]

In sum, "[s]ection 706 makes clear that agency interpretations of statutes—like agency interpretations of the Constitution—are *not* entitled to deference . . . . The APA, in short, incorporates the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions."[88] Under this conception, "[t]he deference that

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84. *See* Darby v. Cisneros, 509 U.S. 137, 154 (1993).

85. 5 U.S.C. § 704.

86. *See* Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 246 (D.C. Cir. 2008) (Kavanaugh, J., concurring). That opinion was foreshadowed by Jack M. Beermann & Gary Lawson, *Reprocessing* Vermont Yankee, 75 GEO. WASH. L. REV. 856, 894 (2007).

87. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2261 (2024).

88. *Id.* at 2261–62.

Chevron requires of courts reviewing agency action cannot be squared with the APA."[89]

A natural assumption is therefore that *Loper Bright/Relentless* replaces the *Chevron* judicial command with a superseding judicial command that supposedly reflects a temporally and hierarchically prior legislative command: Follow "the APA's demand that courts exercise independent judgment in construing statutes administered by agencies."[90] That raises, however, a question that the *Loper Bright/Relentless* decision does not address in any depth: What does it mean to "exercise independent judgment in construing statutes," assuming that that is what the APA instructs courts to do?

One possible meaning of "independent judgment" is that judges should ascertain the correct meaning of the relevant statute without regard to the agency's views. Several passages in *Loper Bright/Relentless* suggest this meaning. The Court repeatedly (at least thirteen times) talks about "independent" judgment exercised by courts. Independent of what? Presumably independent of the agency's views. The key passage in this regard reads:

> Courts . . . routinely confront statutory ambiguities in cases having nothing to do with *Chevron* . . . . [W]hen faced with a statutory ambiguity in such a case, the ambiguity is not a delegation to anybody, and a court is not somehow relieved of its obligation to independently interpret the statute. Courts in that situation do not throw up their hands . . . . Courts instead understand that such statutes, no matter how impenetrable, do—in fact, must—have a single, best meaning. That is the whole point of having written statutes; "every statute's meaning is fixed at the time of enactment." *Wisconsin Central Ltd. v. United States*, 585 U.S. 274, 284 (2018) (emphasis deleted). So instead of declaring a particular party's reading "permissible" in such a case, courts use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity.
>
> In an agency case as in any other, though, even if some judges might (or might not) consider the statute ambiguous, there is a best reading all the same—"the reading the court would have reached" if no agency were involved. *Chevron*, 467 U.S. at 843, n. 11. It therefore makes no sense to speak of a "permissible" interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best. In the business of statutory interpretation, if it is not the best, it is not permissible.[91]

This is de novo review with a vengeance.

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89. *Id.* at 2263.
90. *Id.* at 2269.
91. *Id.* at 2266.

Or is it? Here is where it helps to think carefully about the concept of deference and its possible rationales. On a narrower view than was just suggested, "independent judgment" simply means searching for the right answer using whatever tools help in that task. It is quite possible that the agency's view can be good evidence of the right answer. It might even be possible to generalize across classes of cases in which agency views are likely to be good evidence of the right answer, in which case "independent judgment" can include *categorically* giving a certain degree of weight to the agency's view. *Loper Bright/Relentless* rules out deference grounded in concerns about legitimation; the Court is very clear that courts rather than agencies are prima facie the most legitimate interpreters of statutes.[92] It also probably rules out deference grounded in strategic or prudential concerns; the Court's strong language about the responsibilities of judges says as much.[93] But it does not rule out deference grounded in concerns about accuracy. The whole point of *Loper Bright/Relentless* is that courts have an obligation to ascertain statutory meaning correctly. Maybe deferring to agencies is a good way to do that?

There are passages pointing in that direction. The Court repeatedly notes that agency decisions are sometimes—not always, but sometimes—good evidence of right answers.[94] The Court objects to judges considering themselves "bound"[95] by agency decisions, not to judges considering themselves *influenced* by agency decisions. The case-by-case respect represented by *Skidmore* remains fair game, according to *Loper Bright/Relentless*.[96]

The more interesting question is whether any kind of categorical deference, in addition to the case-specific and case-calibrated deference of *Skidmore,* is still allowed. In particular, what about the New Deal cases in which agencies filled in the meaning of vague statutes over time by applying those statutes to particular sets of facts? The dissenting opinion in *Loper Bright/Relentless* doubts whether the majority means to permit that kind of deference,[97] but the majority opinion at least suggests that the pre-New Deal categorical line still holds.[98] The Court contended that "[n]othing in the New Deal era or before it thus resembled the deference rule the

92. *Id.* at 2257, 2261–62.

93. *Id.* at 2268.

94. *See id.* at 2257–58, 2262, 2265.

95. *Id.* at 2258 ("Whatever respect an Executive Branch interpretation was due, a judge 'certainly would not be bound to adopt the construction given by the head of a department.' Otherwise, judicial judgment would not be independent at all." (citations omitted) (quoting Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 515 (1840))).

96. *See id.* at 2262.

97. *See id.* at 2305–06 (Kagan, J., dissenting).

98. *See id.* at 2258–60 (majority opinion).

Court would begin applying decades later to *all varieties* of agency interpretations of statutes."[99] The problem, in other words, was not deference as such but deference across the board, without reference to the contexts that warranted deference. Fact-bound law determination might be such a context.

The Court in *Loper Bright/Relentless* never directly says what lower courts are supposed to do going forward. It tells them what *not* to do, but it leaves open a great deal of space in which deference of some sort, and of some degree, might (or might not) be permissible. Thus, there is substantial uncertainty about precisely what *Loper Bright/Relentless* means to accomplish by overruling *Chevron*. Does that overruling simply restore the pre-1984 legal regime, which allowed for varying levels of deference in varying contexts? Or does the invocation of section 706 mean that all forms of deference that go beyond *Skidmore*-style epistemic deference are off the table, presumably including the categorical deference to fact-bound legal interpretations from the New Deal, as well as any deference to agency interpretations of their own regulations that survives *Kisor v. Wilkie*?[100]

In sum, *Loper Bright/Relentless* does not tell courts when it is permissible to defer nor how much it is permissible to defer in those circumstances.[101] And without making clear what deference means and what justifies it in any instance, such direction is going to be hard to formulate.

B. "I know you can hear me, but I'm not sure you're listenin'."[102]

Whatever the content of the directions contained in *Loper Bright/Relentless*, the decision identifies two sources for them: section 706 and the Court's own opinion. Both presumably command that lower courts maintain a certain relationship with agencies regarding legal interpretation. Beyond the difficulties with identifying that prescribed relationship, there are two additional questions that *Loper Bright/Relentless* does not address. One is theoretical, with no obvious relevance to modern practice. The other is intensely practical and probably determines the course of any descriptive, predictive, or prescriptive path that anyone wants to pursue regarding judicial review of agency legal interpretations.

The theoretical question concerns whether either Congress or the Supreme Court has the constitutional power to tell lower courts how to decide cases.

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99. *Id.* at 2260 (emphasis added).

100. 588 U.S. 558 (2019).

101. *See* Thomas W. Merrill, *The Demise of Deference—and the Rise of Delegation to Interpret*, 138 HARV. L. REV. 227, 264–66 (2024) (highlighting some of the gaps and ambiguities in *Loper Bright/Relentless*).

102. MARTINA MCBRIDE, *Whatever You Say*, *on* EVOLUTION (Sony Music Ent. 1997).

Recall that authoritative legal sources can give legally binding instructions on methodology, including methodology regarding deference. The United States Constitution gives legally binding instructions on deference to juries.[103] The Florida Constitution gives legally binding instructions on deference to administrative interpretations of law.[104] All one needs to do is identify the source of the instructions, certify the source's legal authority to issue them, and then ascertain their meaning. The authority of the United States Constitution for federal courts and of the Florida Constitution for Florida courts is not a difficult question.

The authorities behind *Loper Bright/Relentless* are not as clear. Consider first section 706 of the APA. As noted above, it contains multiple instructions to courts—lower courts and the Supreme Court alike—about how to review various agency decisions. Sometimes those instructions command a specified level of deference, sometimes they command no deference, and sometimes the instructions are capable of several different interpretations. But the central premise of *Loper Bright/Relentless* is that congressional instructions are decisive, just as would be instructions written into the Constitution.

That assumption has certainly guided practice across a wide range of cases for a very long time. It is so well established that scholars have proposed everything from federal rules of statutory interpretation to federal statutes regulating the use of precedent.[105] As a practical matter, the question of congressional authority in this respect is not a serious question. Nonetheless, as a matter of first principles, it is far from obvious where Congress gets the power to tell federal courts how to decide cases. Congress can certainly prescribe substantive law for courts to apply, but that is a far cry from prescribing the decision process that courts must employ ("give X weight to the views of the government") when deciding cases. I have elsewhere made the case at length for raising doubts about the constitutional propriety of Congress trying to control the decisionmaking processes of federal judges.[106] For now, I simply note those continuing doubts and move on.

Suppose for a moment that I am right that Congress does not have constitutional power to prescribe how courts must decide cases. Might the Supreme Court have such power, so that the opinion in *Loper Bright/Relentless*, even if founded on a false assumption about

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103. *See* U.S. CONST. amend. VII.

104. FLA. CONST. art. V, § 21.

105. *See generally* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002); John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503 (2000); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535 (2000).

106. *See* Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191 (2001).

congressional power, has independent force of its own as the pronouncement of the "supreme Court"[107] and is thus binding on lower courts?

There is a burgeoning literature on so-called methodological precedent, and I have nothing to add to the descriptive and normative discussions in that literature.[108] A question left open in that literature, however, is a large one, at least for those concerned about original constitutional meaning: What does it mean for the Supreme Court to be "supreme"? It surely means that the Court can overrule any lower-court decision that it does not like. It also means (so I think) that the Court's rulings on the meaning of law are precedents vertically binding on inferior courts,[109] though not on the Court itself.[110] It is less clear that being a "supreme Court" gives the Court the wholesale power to tell lower-court judges, who are equally vested with the federal "judicial Power,"[111] how to do their jobs when textual meanings have not concretely been fixed by higher vertical precedent. Again, the practice of methodological precedent is settled enough so that these academic concerns are—well, academic. But first principles matter, and so it surely behooves anyone who thinks that methodological instructions given by the Court are legally binding to explain how that can be.

There are also some far less academic questions about the real-world effects of Supreme Court methodological decisions such as *Loper Bright/Relentless*. Indeed, there are important questions about the scope of the real-world effects of just about anything done by the Supreme Court in the world of administrative law. Those questions are especially large in the post-*Chevron* world. Put bluntly: Even if the Supreme Court, alone or in conjunction with Congress, has the theoretical power to dictate methodology to the lower courts, it is not at all clear that purported exercises of that power will have much, if any, effect on actual legal practice. It is quite possible that *Loper Bright/Relentless* will change very little in the world of administrative law, regardless of what the Supreme Court thought it was saying.

It is vital to keep in the forefront of one's mind exactly how and why the *Chevron* doctrine emerged. It did not come from the Supreme

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107. U.S. CONST. art. III, § 1.

108. To avoid an unnecessary string-citation: A good summary of the state of the art is Aaron-Andrew P. Bruhl, *Eager to Follow: Methodological Precedent in Statutory Interpretation*, 99 N.C. L. REV. 101 (2020).

109. *See* Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the* Hamdan *Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1032 (2007).

110. *See generally* Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1 (2007); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994).

111. U.S. CONST. art. III, § 1.

Court—either in the *Chevron* case or afterwards. The *Chevron* doctrine was a fait accompli by the time the Supreme Court took it over. It was created by lower courts out of, to say the least, very unpromising language in a Supreme Court opinion that showed no consciousness of trying to change the law.[112] Indeed, even after a majority of the Court in 1987 made it clear as day that *Chevron* was not meant to effect any change in legal practice,[113] many lower courts continued to apply the *Chevron* doctrine as it stood from 1984 to 1987.[114] Not all of the lower courts, to be sure,[115] but enough of them so that the *Chevron* doctrine was the dominant force in administrative law even after five Supreme Court Justices seemingly crushed it.[116] Any prediction of or prescription for what is to come after *Loper Bright/Relentless* needs to understand how and why all this happened.

I have no way to prove how and why all this happened, other than to offer the observations and theories of a first-hand witness to the events. All readers can make up their own minds whether this account makes sense.

Two features of garden-variety administrative law cases stand out even to a casual observer. First, they are often very complex, technical, and just plain hard. Some of the difficulty stems from the nature of the various subject matters raised by the cases, but much of it comes from the character of the underlying statutes, which are often written in a fashion that makes discerning meanings, much less the best or correct meanings, a tricky enterprise. Justice Kagan's dissenting opinion in *Loper Bright/Relentless* highlights some of the hard cases that make up the bread and butter of administrative law.[117] Compounding the problem is the age-old lack of consensus regarding how to ascertain statutory meaning. There is no consensus theory of statutory interpretation.[118] Indeed, there is some reason to think that many judges are deeply suspicious of the whole idea of statutory interpretation theory and prefer to proceed, as judges have proceeded for centuries, by using whatever seems to work to resolve the cases at hand, without regard to how academics will try to slot that work product into methodological categories or critique it as

112. *See* Lawson & Kam, *supra* note 4.
113. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 446–48 (1987).
114. *See, e.g.*, Grinspoon v. DEA, 828 F.2d 881, 884–85 (1st Cir. 1987).
115. *See* Lawson & Kam, *supra* note 4, at 69 n.277.
116. *Id.* at 39–44.
117. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2296–97 (2024).
118. Just witness the multi-variant methodological splits in cases such as *Zuni Public School District No. 89 v. Department of Education*, 550 U.S. 81 (2007), and *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017) (en banc), not to mention the endless debates in law reviews.

insufficiently rigorous or theorized.[119] Judges exist to resolve disputes, not to conform to academic theories. In any event, if you put together the general problems with statutory interpretation, the general features of statutes in the administrative state, and the technical and factual complexity of many administrative law cases, you have a recipe for judicial indigestion.

Second, and perhaps even more importantly, administrative law cases are often (there is no other way to say this) *boring* to the point of tedium. That is not always true. Some administrative law cases involve "hot button" issues that will engage the attention (and perhaps the biases) of just about anyone. But that is a small percentage of the administrative law cases that fill the federal docket. A randomly selected administrative law case is unlikely to be seen as a good read. Just to be clear: It is precisely the complex and boring character of administrative law that drew me to the subject and has kept me there for nearly four decades. I love this stuff. But I am a nerd by nature,[120] so what the rest of the world considers close to unbearable is what keeps my juices going. I strongly suspect that most of the legal world finds most of administrative law painfully tedious. How many judges will list administrative law cases as their favorite pulls on the docket? There will be some, to be sure, but my guess is that the list is not long.

The combination of complexity and tedium means that judges—or at least enough judges to make the point relevant—faced with a stream of administrative law cases will be eager for tools that help get the cases off their desks. Enter deference. Over a large range of cases, it is surely going to be easier to figure out whether an agency decision is *reasonable* than to figure out whether it is *correct*. That is equally true for both legal and factual questions. Just as judges invented deference to agency fact-finding long before Congress began prescribing such deference in statutes,[121] no one should be surprised when judges invent deference doctrines for tricky legal questions. They have dockets to manage and lives to lead.

But how does this square with the Supreme Court's vigorous declarations of the paramount judicial role in statutory interpretation? The Court began its discussion in *Loper Bright/Relentless* by quoting Alexander Hamilton on how

119. *See* Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1302 (2018).

120. My favorite topic when teaching Property is the Rule Against Perpetuities.

121. *See* Evan D. Bernick, *Is Judicial Deference to Agency Fact-Finding Unlawful?*, 16 GEO. J.L. & PUB. POL'Y 27, 34–39 (2018).

interpretation is "the proper and peculiar province of the courts."[122] That was just the warmup:

> This Court embraced the Framers' understanding of the judicial function early on. In the foundational decision of *Marbury* v. *Madison*, Chief Justice Marshall famously declared that "[i]t is emphatically the province and duty of the judicial department to say what the law is." 1 Cranch 137, 177 (1803). And in the following decades, the Court understood "interpret[ing] the laws, in the last resort," to be a "solemn duty" of the Judiciary. *United States v. Dickson*, 15 Pet. 141, 162 (1841) (Story, J., for the Court). When the meaning of a statute was at issue, the judicial role was to "interpret the act of Congress, in order to ascertain the rights of the parties." *Decatur v. Paulding*, 14 Pet. 497, 515 (1840).[123]

And perhaps most tellingly: "agencies have no special competence in resolving statutory ambiguities. Courts do."[124] Thus, said the Court, "*Chevron* was a judicial invention that required judges to disregard their statutory duties."[125] This certainly does not sound like an attempt to get cases off the desk by making the job of judicial review easier.

It doesn't, and it isn't. But this is the Supreme Court speaking. The Court faces a very different set of constraints and incentives, and a very different docket, than do the lower courts. The Supreme Court gets to pick and choose its cases. It is going to pick cases that the Court thinks are interesting and important. It is not going to select the cases on Justice Kagan's list, nor will it choose to hear the routine but important cases that fill the dockets of the lower courts. Thus, "[t]he Court's docket consists of a small and unrepresentative set of cases that are chosen precisely because the law governing them is underdeterminate and, often, because the cases have high moral and political stakes."[126] The lower courts, by contrast, do not have the luxury of denying certiorari to dry or (except to the parties) minor cases. They have to decide whatever cases the parties choose to bring. It is simply a different world from the one facing the Supreme Court (or from the one facing the Supreme Court when it still had a substantial docket consisting of cases from mandatory appellate jurisdiction).[127] Sensible doctrine is not fashioned for great cases. It is fashioned for routine cases. And in routine administrative law cases, deference is a lifeline for the courts.

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122. *Loper Bright*, 144 S. Ct. at 2257 (quoting THE FEDERALIST No. 78, at 525 (Alexander Hamilton) (J. Cooke ed., 1961)).

123. *Id.*

124. *Id.* at 2266.

125. *Id.* at 2272.

126. Bruhl, *supra* note 108, at 106.

127. For an intriguing account of how the Court's docket became almost wholly discretionary, see Benjamin B. Johnson, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793 (2022).

My hypothesis is that lower courts invented the *Chevron* doctrine for precisely the reasons just described. Theoretical rationales such as presumed congressional intent, separation of powers, agency expertise, and the like all came later. The real story behind *Chevron* deference is docket management. How else to explain the desperate grasp at random language in *Chevron* to reshape administrative law doctrine?

If this is even close to the mark, any prediction about the path of the law must account for the forces that generated *Chevron* in the first place. If the Supreme Court orders lower courts to stop applying *Chevron*, what will lower courts do? Will they dutifully slog their way through every misbegotten statute in every case that comes onto the docket, or will they find some alternative mechanism for accomplishing the same goals served by the *Chevron* doctrine? Similar questions face any prescriptive theory. Academics can prescribe anything they would like to prescribe. It does not mean that lower courts will do it.

Everyone, from the Supreme Court to the academic community, needs to keep in mind the wisdom of The Bard, from *King Henry the Fourth*, Part 1, Act 3, Scene 1:

> GLENDOWER. I can call spirits from the vasty deep.
> HOTSPUR. Why, so can I, or so can any man;
> But will they come when you do call for them?[128]

C. "One way or another, I'm gonna find ya, I'm gonna get ya, get ya, get ya, get ya."[129]

Assuming that lower courts, akin to nature in *Jurassic Park*,[130] will find a way to defer no matter what the Supreme Court says, what mechanisms might lower courts employ to recreate the effects of the *Chevron* doctrine in a post-*Chevron* world?

One obvious path is to pump juice into *Skidmore*.[131] The *Loper Bright/Relentless* decision expressly leaves *Skidmore* in place. In order for *Skidmore* effectively to replace *Chevron*, however, lower courts would need to identify case-specific reasons why deference to the agency's legal views would be appropriate in certain instances. Sometimes that will be easy; perhaps the cases identified by Justice Kagan are good examples of candidates for post-*Chevron Skidmore*

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128. WILLIAM SHAKESPEARE, HENRY IV act 3, sc. 1, l. 55–57.

129. BLONDIE, *One Way or Another*, *on* PARALLEL LINES (Chrysalis Records 1978).

130. JURASSIC PARK (Universal Pictures 1993).

131. *See* Kristin E. Hickman, *Anticipating a New Modern* Skidmore *Standard*, DUKE L.J. ONLINE (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4941144.

treatment,[132] with the level of deference pushing far away from the "polite respect" minimum. Other times it might be more difficult to move much beyond polite respect. As I have described elsewhere,[133] there was, for example, no conventional grounds for deference to the agency in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*,[134] even though the Supreme Court managed to invent one anyway. Assuming that a steroidal *Skidmore* is not the full answer, what other avenues does *Loper Bright/Relentless* leave for lower courts who are actively looking for reasons to defer to agency legal interpretations?

As it happens, there is an autobahn-sized avenue left open by *Loper Bright/Relentless*, and that is the topic of the final stage of this Article's framework.

IV. "YOU MAY CALL ME TERRY, YOU MAY CALL ME TIMMY, YOU MAY CALL ME BOBBY, YOU MAY CALL ME ZIMMY, YOU MAY CALL ME RJ, YOU MAY CALL ME RAY, YOU MAY CALL ME ANYTHING."[135]

When the *Chevron* doctrine governed, what did it govern? At the most general level, *Chevron* governed a subset of circumstances in which courts reviewed federal agency interpretations of federal statutes.[136] The precise boundaries of the subset were never fully fixed,[137] but it was always a subset of distinctively *legal* questions.

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132. *See* Loper Bright Enters. v. Raimondo 144 S. Ct. 2244, 2296–97 (2024) (Kagan, J., dissenting).

133. *See* Gary Lawson, *The Ghosts of* Chevron *Present and Future*, 103 B.U. L. REV. 1647, 1710–14 (2023).

134. 557 U.S. 261 (2009).

135. BOB DYLAN, *Gotta Serve Somebody*, *on* SLOW TRAIN COMING (Columbia Records 1979). With a tip of the hat and a puff of the cigar to Bill Saluga, a.k.a. Raymond J. Johnson, Jr.

136. Some lower courts extended *Chevron* to other kinds of legal instruments, such as contracts, deeds, and settlement agreements. *See* LAWSON, *supra* note 7, at 658–59. The Supreme Court never directly addressed those issues. *See* Scenic Am., Inc. v. Dep't of Transp., 138 S. Ct. 2, 2–3 (2017) (Gorsuch, J., respecting the denial of certiorari).

137. Those boundaries were the subject of the ever-evolving *Chevron* step zero. A good illustration of the uncertainty of those boundaries came in the oral argument in *Loper Bright*. Both Justice Gorsuch and Solicitor General Elizabeth Prelogar treated as an open question whether *Chevron* deference could apply to interpretative rules. *See Loper* Oral Argument Transcript, *supra* note 21, at *67–68. It is true that no Supreme Court decision, including *United States v. Mead*, 533 U.S. 218 (2001), categorically said that interpretative rules could never receive *Chevron* deference. But both *Mead* and *Christensen v. Harris County*, 529 U.S. 576 (2000), made clear that a precondition for *Chevron* deference was that the agency interpretation has "the force of law." *Id.* at 587; *see also Mead*, 533 U.S. at 221, 229–32 (emphasizing the "force of law" prerequisite for deference). Interpretative rules are interpretative, and hence exempted from notice and comment requirements, *see* 5 U.S.C. § 553(b)(A), precisely because they do not

Chevron did not apply to agency factual findings.[138] Nor did it govern review of agency exercises of discretion in matters such as setting enforcement priorities or decisions whether to initiate rulemakings. Those discretionary actions, when reviewable at all, were (and still are) subject to review under a highly deferential standard that asks whether the agency action was "arbitrary . . . [or] capricious"[139] and that takes the words "arbitrary" and "capricious" literally. Reversal of an agency under that deferential standard is close to impossible.[140]

Law, fact, and discretion, however, do not exhaust the categories of agency decisions. Agencies, at least in the modern world, are recognized by long-settled doctrine as appropriate *policymaking* authorities over a wide range of cases. The *Chevron* framework never applied to agency policymaking decisions. At least over the last half-century or so, those decisions have been reviewed under the same "arbitrary . . . [or] capricious" standard that governs agency exercises of discretion, but in the policy context the words "arbitrary" and "capricious" have become words of art that describe a unique form of review that is simultaneously deferential and rigorous: the so-called "hard look" inquiry, under which courts ask whether the agency took a sufficiently hard or careful look at the underlying issues, adequately considered alternatives, and gave a thorough enough explanation of its action.[141] *Loper Bright/Relentless* takes that form of policymaking review for granted and proposes no change in its scope or application.[142]

The relationship between *Chevron* and hard-look review was never fully settled. In particular, if one reached step two of *Chevron*, could an agency's interpretation of a statute be judged "reasonable" by the same criteria that would determine the reasonableness of a policy decision? That would make sense if the failure to find a clear answer at step one of *Chevron* meant that there was no further work to be done in the field of statutory interpretation and that all that was left was policy work.[143] In that case, step two of *Chevron* was simply another label for something that one might call "policy question

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have the force and effect of law. If that was still considered a close question in 2024, that said something important about the contours of *Chevron*'s domain.

138. Review of factual findings is governed by "substantial evidence" or "arbitrary or capricious" standards found in organic statutes and/or the APA. *See* LAWSON, *supra* note 7, at 581, 599–600.

139. 5 U.S.C. § 706(2)(A).

140. *See* LAWSON, *supra* note 7, at 918–19.

141. *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983). For a detailed treatment of hard-look review, see LAWSON, *supra* note 7, at 793–894.

142. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2263 (2024).

143. For an early, and particularly insightful, articulation of this approach, see Richard J. Pierce, Jr., Chevron *and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301 (1988).

subject to hard-look review."[144] On the other hand, perhaps the reasonableness of an agency's actions at step two had to be evaluated purely *from the standpoint of statutory interpretation*. That is, step two would involve some of the same formal elements as hard-look review—adequate agency consideration of issues and alternatives and a thorough explanation of its choice—but those elements would all have to focus on *ascertaining statutory meaning* rather than *formulating sensible policy*.[145]

Those issues were never resolved during the *Chevron* era. Neither was the thorny question how to tell whether an issue was a question of law subject to *Chevron* or a question of policy subject to hard-look review. At one level, every agency decision is a question of law, because agencies cannot act without statutory authority.[146] At some point, however, statutes are so vague that there is nothing to interpret—or, alternatively, the meaning of the statute is obviously something like: "Agency, go figure out the problems and fix them." If one treated the question as one of statutory interpretation, one would run it through the *Chevron* framework, with the above-noted unanswered questions about the meaning of step two lurking once one sees that the statute says nothing useful about the problem at hand. If, on the other hand, one treated the question as one of policymaking, one would go straight to the hard-look framework and address a very different set of concerns about the agency's thought process and explanation. In both theory and practice, a lot can turn on a threshold classification of the agency's action.

In practice, there was surprisingly little open argument about these classification questions during the *Chevron* era. Either all parties and judges coalesced around a particular characterization of the agency action or, as often happened, the parties argued the case both ways and the court said something like: "Well, luckily it doesn't matter how we characterize the agency action because it comes out the same either way."[147] As a consequence, we do not have a thick body of doctrine discussing how to tell questions of law from questions of policy in close cases.

A ready example of the *Chevron* era confusion regarding the law/policy line is the case cited by *Loper Bright/Relentless* as the Supreme Court's last actual use of the *Chevron* doctrine to decide a

144. *See id.* at 307–08.

145. Or so I tried to argue. *See* Gary Lawson, *Reconceptualizing* Chevron *and Discretion: A Comment on Levin and Rubin*, 72 CHI.-KENT L. REV. 1377 (1997).

146. *See* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 665 (2022) (noting that agencies are "creatures of statute" and "accordingly possess only the authority that Congress has provided").

147. For some examples, see LAWSON, *supra* note 7, at 896–97.

case[148]: *Cuozzo Speed Technologies, LLC v. Lee*.[149] The Patent Office issued a regulation saying that when the validity of patents are challenged in inter partes review proceedings, the challenged patent must be given "its broadest reasonable construction in light of the specification of the patent in which it appears."[150] Parties challenged the regulation's validity, and the Supreme Court treated the question on review as one of statutory interpretation subject to *Chevron*:

> We interpret Congress' grant of rulemaking authority in light of our decision in *Chevron* . . . . Where a statute is clear, the agency must follow the statute. But where a statute leaves a "gap" or is "ambigu[ous]," we typically interpret it as granting the agency leeway to enact rules that are reasonable in light of the text, nature, and purpose of the statute.[151]

So stated, this is a straightforward articulation of the *Chevron* framework, with a seemingly strong nod to the notion that step two focuses on *statutory meaning* rather than general policy reasonableness.

This all disintegrates, however, once one reads the statute at issue: "The Director [of the Patent and Trademark Office] shall prescribe regulations . . . establishing and governing inter partes review under this chapter and the relationship of such review to other proceedings under this title."[152] To quote Justice Gorsuch: "Yes, that's it."[153]

There is obviously no issue of statutory interpretation involved in this case. The statute authorizes the agency to issue regulations for inter partes review, and the agency did that.[154] No one could plausibly say that the agency violated the terms of the statute—at either step one or step two. The claim in the case had nothing to do with the agency's statutory authority.

> Rather, the agency was making policy under a straightforward subdelegation of authority. The decision to choose one claim construction norm (broadest possible construction) over another (the claim construction norms generally used by district courts) is not in this instance the resolution of statutory ambiguity. It is a direct policy determination under a statute that grants

148. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2269 (2024).

149. 579 U.S. 261 (2016).

150. 37 C.F.R. § 42.100(b) (2012). The rule has since been replaced. *See* 37 C.F.R. § 42.100(b) (2024).

151. *Cuozzo*, 579 U.S. at 276–77 (citations omitted).

152. 35 U.S.C. § 316(a)(4).

153. Gundy v. United States, 139 S. Ct. 2116, 2132 (2019) (Gorsuch, J., dissenting).

154. *See Cuozzo*, 579 U.S. at 276.

> power without prescribing constraints or criteria for its exercise.[155]

The Court's substantive analysis, unsurprisingly, had nothing to do with statutory interpretation under any conventional (or unconventional) approach to interpretation. Instead, it posed and answered, as Justice Thomas pointed out in his concurring opinion,[156] precisely the questions one would expect hard-look review to pose and answer:

> We conclude that the regulation represents a reasonable exercise of the rulemaking authority that Congress delegated to the Patent Office. For one thing, construing a patent claim according to its broadest reasonable construction helps to protect the public. A reasonable, yet unlawfully broad claim might discourage the use of the invention by a member of the public. Because an examiner's (or reexaminer's) use of the broadest reasonable construction standard increases the possibility that the examiner will find the claim too broad (and deny it), use of that standard encourages the applicant to draft narrowly. This helps ensure precision while avoiding overly broad claims, and thereby helps prevent a patent from tying up too much knowledge, while helping members of the public draw useful information from the disclosed invention and better understand the lawful limits of the claim.
>
> For another, past practice supports the Patent Office's regulation. . . .
>
> . . . .
>
> . . . Having concluded that the Patent Office's regulation, selecting the broadest reasonable construction standard, is reasonable in light of the rationales described above, we do not decide whether there is a better alternative as a policy matter. That is a question that Congress left to the particular expertise of the Patent Office.[157]

These arguments have nothing to do with statutory meaning and much to do with policymaking. If the Supreme Court, with two former administrative law professors on the bench,[158] could not properly characterize the issue in *Cuozzo Speed* more than thirty years into the *Chevron* doctrine, the line between law and policy is even fuzzier than it seems at first glance.

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155. Lawson, *supra* note 133, at 1656–57.

156. *See Cuozzo*, 579 U.S. at 286–87 (Thomas, J., concurring).

157. *Id.* at 280–81, 283 (majority opinion).

158. Justices Breyer and Kagan were the two former administrative law professors on the bench in *Cuozzo*. *Id.* at 264; *see* Lawson, *supra* note 133, at 1654, 1676.

Now enter a world in which *Chevron* is gone. Assume that *Loper Bright/Relentless* takes on its strongest possible interpretation, which would instruct lower courts to avoid deferring, with any level of magnitude, to agency legal interpretations in any circumstances other than those circumstances warranting *Skidmore* epistemic deference, as determined by messy case-by-case analysis. If you are a lower-court judge bound and determined to get cases off your desk, or a litigant defending an agency decision for which you hope to get deference, "then what"?

One possible route is to try to characterize the agency decision in question as one of policy warranting deference under the hard-look variant of arbitrary or capricious review rather than as a legal interpretation entitled to nothing resembling deference. To be sure, hard-look review is no picnic. It requires judges (and their hapless law clerks) to parse often technical material in considerable detail; to navigate equally technical—and frequently turgid and poorly written—submissions to agencies, agency decisions, and briefs; and to make difficult and ill-defined judgments about whether the agency adequately considered issues and explained its decision.[159] It does, however, at least involve a considerable amount of deference to agencies on such matters as the generalizability of studies and, most importantly, the ultimate judgments of policy wisdom of the agency's actions.[160] At least over some range of cases, that deferential review might be considerably easier for a court than struggling over the meaning of frequently turgid and poorly written statutes. Within that range, if courts have a choice, "policy" might be a more favored characterization than "law" of the matter at hand.

Sometimes "policy" will not be a plausible characterization. For example, whether tobacco fell within the jurisdiction of the Food and Drug Administration circa 2000 could not reasonably have been viewed as a question of policy for the agency to resolve.[161] That was a question of law—of the meaning of various statutory terms—under any conventional mode of classification of issues, and no one on the Supreme Court in 2000 suggested otherwise.[162] But sometimes the characterization is less clear. Consider the issue presented in *Chevron*.

The Clean Air Act provision at issue in *Chevron* said (and still says) that State Implementation Plans for so-called non-attainment areas must "require permits for the construction and operation of new

159. *See* LAWSON & SEIDMAN, *supra* note 15, at 101.

160. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 53 (1983).

161. The agency received statutory authority to regulate tobacco to some degree in 2009. *See* Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified at 21 U.S.C. § 387).

162. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132–33 (2000).

or modified major stationary sources" of pollution.[163] The "major" part of the term "major stationary source" is determined by the volume of emitted pollution.[164] The real issue in *Chevron* involved the meaning of "stationary sources."

The statutory provisions governing existing sources of pollution, for whatever reason, did not define the term, though the provisions involving new sources said that "[t]he term 'stationary source' means any building, structure, facility, or installation which emits or may emit any air pollutant" subject to regulation under the Act.[165] In 1980, the EPA by regulation adopted that same definition for existing pollution sources,[166] adding that the term "means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control)."[167] This is the famous "bubble" concept, which treats facilities with multiple pollution outlets as a single source for regulatory purposes.[168] The agency, however, balked at applying that "bubble" concept of "stationary source" across the board, primarily because of worries that it would not pass muster in the D.C. Circuit under then-governing circuit precedent.[169] The next year, however, after the Reagan Administration took office, the EPA full-bore adopted the "bubble" understanding of "stationary source[s]."[170] The agency's earlier doubts about the viability of this position in the D.C. Circuit proved accurate,[171] and the question for the Supreme Court then became whether the EPA's understanding that a "stationary source" can be an entire production unit rather than only a single emission point was lawful.

On the surface, that seems like a question of statutory interpretation. There is a statutory phrase—"stationary sources"—to which the agency gave content, and the issue is whether the content is within the terms of the statute. The statutory term "stationary sources" is not like the provision in *Cuozzo Speed*, which simply gave the agency authority to make rules regarding inter partes

163. 42 U.S.C. § 7502(c)(5).

164. *Id.* § 7602(j).

165. *Id.* § 7411(a)(3).

166. *See* Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans, 45 Fed. Reg. 52676, 52731 (Aug. 7, 1980).

167. *Id.*

168. *See* Chevron U.S.A. Inc. v. NRDC, Inc., 467 U.S. 837, 840 (1984).

169. *See* Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans, 45 Fed. Reg. 52676, 52697 (Aug. 7, 1980).

170. *See* Requirements for Preparation, Adoption and Submittal of Implementation Plans and Approval and Promulgation of Implementation Plans, 46 Fed. Reg. 50766, 50767 (Oct. 14, 1981).

171. *See* NRDC, Inc. v. Gorsuch, 685 F.2d 718, 720 (D.C. Cir. 1982).

proceedings. The law in *Chevron* gave the agency authority to set standards for implementation plans regarding existing "stationary sources" of pollution, not anything that struck the EPA's fancy. The term "stationary sources" looks like the kind of phrase that can latch onto some things and relations in the world but not others, so that one can meaningfully ask, for example, whether whole factories are within the set of latchable things. That is how the *Chevron* opinion seemed to characterize the issue before it. That is how we got the *Chevron* doctrine in the first place.

But is that really a question of statutory interpretation? The statute says that whatever is the subject of the EPA's regulations for state implementation plans must be a "source" of pollution and must be "stationary."[172] All fine and well. Smokestacks are both stationary and sources of pollution, and so are factories. In that sense, there is no real issue of statutory interpretation involved, or at least no issue worth litigating; the EPA's regulation was obviously a regulation involving "stationary sources" of pollution, in a way that regulations of, for example, rockets or zeppelins would not be. Is anyone going to claim that polluting factories are not "stationary"? Absent something in the statute further narrowing the universe of "stationary" sources to individual openings in factories, there was nothing more to be gleaned from reading the statute. The real issue was whether the agency had adopted a reasonable policy regarding which stationary sources to make the central objects of regulation, not a question of the agency's legal authority.

The *Chevron* opinion can easily be read to say exactly what I just said. The Court' s basic conclusion, after all, was that "the EPA's use of that [bubble] concept here is a reasonable policy choice for the agency to make."[173] After the Court explained that the statute does not prescribe what counts as a stationary source beyond it being both stationary and a source,[174] its concluding section was labeled "*Policy*."[175] It is not unreasonable to say that *Chevron* was not really a case about statutory interpretation. It was a case about hard-look review of a policy call, on which the expert agency dealing with a complex subject was entitled to a large dose of deference.

Had the *Chevron* opinion been written more expressly in this fashion, history might have come out very differently.

Whether or not the foregoing is the "best" reading of the *Chevron* opinion, it does illustrate how the line between questions of law and questions of policy is not crisp. Over a large range of cases, there is no obviously "right" way to characterize questions involving vague statutes—even statutes that are far more specific than general

172. 42 U.S.C. § 7411(a)(3).
173. *Chevron*, 467 U.S. at 845.
174. *See id.* at 859–60.
175. *Id.* at 864.

rulemaking authorizations or injunctions to pursue the public interest.[176]

This issue drew a great deal of attention during the oral argument in *Relentless v. Raimondo*. It was raised early on by Chief Justice Roberts, when he asked the lawyer for Relentless whether a statute authorizing the Department of Transportation to set "reasonable" length limits for trucks was "a legal question for the courts or . . . a policy question for the agency"?[177] Justice Kavanaugh later opined that such a statute would pose "a *State Farm* question as I would see it."[178] Justice Jackson added shortly thereafter that many of the hard cases raised by Justice Kagan as prime candidates for deference "are hard . . . because, at bottom, they're not asking legal questions; they're asking policy questions."[179] Justice Barrett then starkly posed the fundamental question: "Where is the line between something that would be then subject to arbitrary and capricious review and something that's a question of law"?[180]

No one answered the question. The Solicitor General declined the invitation to blur the line between law and policy,[181] and no one offered a means of drawing the line.

Given the attention paid to this issue during oral argument, one might have expected the opinion in *Loper Bright/Relentless* to say something substantial about how to identify questions as legal questions governed by section 706's non-deferential command versus policy questions for which deference is not only permitted but purportedly mandated by section 706(2)(A) (and numerous organic statutes as well). That did not happen. The *Loper Bright/Relentless* decision takes for granted that there is a category of questions of law governed by section 706, but it does not identify how to tell when a statute provides enough content so that decisions regarding it are plausibly categorized as legal questions rather than policy questions. The closest the opinion comes to addressing that issue is to note that Congress sometimes expressly commits discretion to agencies to fill in the meaning of empty terms.[182] In those situations, the Court said,

176. *See* Lisa Schultz Bressman, *The Ordinary Questions Doctrine,* 92 GEO. WASH. L. REV. 985, 987, 1014–15 (2024) (making similar points about the law/policy divide).

177. *Relentless* Oral Argument Transcript, *supra* note 21, at *7.

178. *Id.* at *140.

179. *Id.* at *25–26; *see also id.* at *148 (characterizing *Chevron* step two questions as involving a policy choice rather than law).

180. *Id.* at *30.

181. *See id.* at *101 ("I wouldn't call it policymaking, but I do think it means that the court can't suggest that the answer it is giving is absolutely dictated on that precise issue by Congress.").

182. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2263 (2024); *see also id.* at 2268 ("That is not to say that Congress cannot or does not confer discretionary authority on agencies. Congress may do so, subject to constitutional limits, and it often has. But to stay out of discretionary policymaking left to the

statutory interpretation runs out once it establishes that Congress has authorized the agency to act. Further review of the agency decision then takes place pursuant to *State Farm* as hard-look review of policymaking.[183] That is fine as far as it goes, but it does not address the hard cases where Congress has not expressly subdelegated authority to the agency to define statutory terms, but the statutes themselves are vague enough so that conventional accounts of statutory interpretation do not seem appropriate tools of analysis. That large set of questions is left for the future.

Justice Kagan's dissenting opinion, for its part, makes numerous references to how questions that seem like statutory interpretation actually involve policy judgments,[184] but it provides no criteria for ascertaining when and how to draw a line between law and policy. The dissenting opinion does highlight, however, how policy questions receive deferential treatment even when legal interpretations do not.

Thus, a potential consequence of *Loper Bright/Relentless* is to encourage litigants and judges to slot at least some cases that previously would have wound up as "*Chevron* cases" into the world of hard-look review of policymaking. If that happens, we might see more robust litigation over how to draw that line, as parties now see higher stakes in that classification than existed under the *Chevron* regime.

Perhaps that will not happen. Lower courts, after all, might see trying to draw a law/policy line more difficult even than parsing turgid and poorly written congressional statutes while looking for a best answer. Justice Jackson, for her part, worried about the opposite effect, in which courts classify everything as legal rather than policy questions precisely in order to decide cases without having to defer to agencies.[185] That could happen with judges who have, and are willing to impose, strong views about the regulatory process, as happened with the D.C. Circuit in the era that gave us hard-look review.

My guess is that there are fewer such judges than there are judges who want to get administrative law cases off the desk. If that is so, *Loper Bright/Relentless* will change relatively few case outcomes, though it might change the way those outcomes are explained.

That is, however, only a guess. It will be at least several years before we have a sufficient database of lower-court decisions to make

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political branches, judges need only fulfill their obligations under the APA to independently identify and respect such delegations of authority, police the outer statutory boundaries of those delegations, and ensure that agencies exercise their discretion consistent with the APA.").

183. *See id.* at 2263.

184. *See, e.g.*, *id.* at 2294, 2299, 2300–01 (Kagan, J., dissenting).

185. *See Relentless* Oral Argument Transcript, *supra* note 21, at *65–66 ("I'm concerned that judges are going to look at all of the questions related to a statute and call them legal if we don't have something like *Chevron* that requires judges to be actually thinking about their proper role relative to this issue.").

serious judgments about the effects of *Loper Bright/Relentless*. I accordingly offer no strong predictions about what is to come. I simply offer a set of considerations that hopefully will prove useful to those who are bolder about predictions and prescriptions than I will ever be.