Loper Bright and the Future of Chevron Deference

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Loper Bright and the Future of Chevron Deference

Jack M. Beermann*


The question presented in Loper Bright Industries v. Raimondo1 is “[w]hether the Court should overrule Chevron or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.” The Court denied certiorari on another question focused on the merits of the case,2 indicating that at least four of the Justices are anxious to revisit or at least clarify Chevron. It’s about time, although it’s far from certain that the Court will actually follow through with the promise the certiorari grant indicates.3

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

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* Philip S. Beck Professor of Law, Boston University School of Law. Thanks to Gary Lawson for help with this project. © 2023 Jack M. Beermann, all rights reserved.
1 Loper Bright Enterprises v. Raimondo, 143 S. Ct. 2429 (2023), granting certiorari “limited to Question 2 presented by the petition.”
2 Question 1 asked “Whether, under a proper application of Chevron, the MSA [Magnuson-Stevens Act] implicitly grants NMFS [National Marine Fisheries Service] the power to force domestic vessels to pay the salaries of the monitors they must carry.” Petition for Writ of Certiorari, Loper Bright Enterprises v. Raimondo
3 Becerra case whole case litigated on Chevron, never mentioned.
federal and state courts with clearer instructions on the status of important federal legal doctrines.

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

This essay proceeds as follows. Part I briefly describes the Loper Bright case and the issues involved. Part II examines the current status of Chevron deference, including the turmoil evident in lower federal courts over the correct application of Chevron, the problem of the boundary between Chevron and arbitrary, capricious review and my proposed solution to both sets of problems. Part III looks at other areas of law with similar problems created by the lack of clarity at the Supreme Court level. Part IV concludes.

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

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

The court of appeals first rejected the argument that clear statutory authorizing is required before agencies may require subjects of regulation to pay for monitoring. It then found, as conceded by the challengers, that the statute clearly authorizes agency monitoring of fishing operations, but found the statute silent on whether the agency may require the boat owners to pay

4 16 U.S.C. §§ 1801 et seq,
7 See Loper Bright Enterprises, Inc. v. Raimondo, 45 F.4th 359 (D.C. Cir. 2022).
the costs. It then applied Chevron step two and accepted the NMFS’s rule as based on a reasonable interpretation. The court also rejected the procedural challenge to the agency’s rule.

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

Thus far, Loper Bright looks like an unexceptional dispute over agency authority and the scope of Chevron deference. But when the challengers petitioned the Supreme Court for a writ of

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8 Loper Bright, 45 F.4th at 369. In a wrinkle that is discussed below, the court also held that the agency offered a “reasoned explanation” for its construction, suggesting a way to incorporate the arbitrary, capricious standard’s review of policy into Chevron step two, as I suggest in this essay.
9 45 F.4th at 377-78 (Walker, J. dissenting).
11 45 F.4th at 374.
12 Id.
13 Id. at 373.
certiorari, in addition to a question challenging the substance of the rule,\textsuperscript{14} they also posed a question urging the Court to overrule Chevron or at least carve out an exception to Chevron that silence on “controversial powers . . . does not constitute an ambiguity requiring deference to the agency.”\textsuperscript{15} And when the Court granted the petition, it limited the grant to the second question, setting up the possibility that Chevron might be overruled or substantially reformed.\textsuperscript{16}

It is far from certain that the Court will overrule or even substantially clarify Chevron. The case could be decided for either party without applying or even mentioning Chevron. The Court could agree with the NMFS that the power to require monitors implicitly includes authority to require regulatory subjects to pay their salaries. The Court could also reverse by adopting Judge Walker’s statutory argument under the “traditional tools” approach without mentioning Chevron, as it has done in other recent cases.\textsuperscript{17} But similar to the Court’s grant in Kisor v. Wilkie\textsuperscript{18} on whether to retain Auer deference, the fact that the Court limited the grant to the Chevron-focused question indicates that either overruling or a significant clarification of Chevron is more likely now that it has been since that landmark was established. Either would be

\textsuperscript{14} The petition’s first question was “Whether, under a proper application of Chevron, the MSA implicitly grants NMFS the power to force domestic vessels to pay the salaries of the monitors they must carry.”

\textsuperscript{15} The petition’s second question was “Whether the Court should overrule Chevron or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.”

\textsuperscript{16} E.g. American Hospital Associations v. Becerra, 142 S. Ct. 1896 (2022). For what it’s worth, my own view is that the government has the better of the case based on the argument that power to require funding is implicit in the power to require the monitoring and based on my sense that Judge Walker’s presumption against such powers would cripple agency enforcement of important regulatory requirements. But it’s a close case, and it’s not difficult to imagine that a conservative Court might agree with Judge Walker’s suggestion that agencies should not be allowed to require subjects to fund monitoring absent clear statutory authorization.

\textsuperscript{17} Kisor v. Wilkie, 139 S. Ct. 2400 (2019). In Kisor, the Court granted certiorari limited to the question “Whether the Court should overrule Auer and Seminole Rock.” Petition for writ of certiorari at 1. The Court then declined to overrule those cases, but its opinion did clarify and perhaps narrow the circumstances under which the deference principle announced in those cases would apply.
a welcome development because, as the next Part of this essay elaborates, there are compelling reasons why the Court ought to do something regarding the status of Chevron deference.

II. The Chevron Problem

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

A. Chevron at the Supreme Court

This standard was controversial from the get go, but more important for present purposes, the Supreme Court’s application of it was inconsistent and unclear. The decision itself was unclear on whether Chevron deference was really about deference to agency statutory construction, concluding in a footnote that “[t]he judiciary is the final authority on issues of statutory construction, and must reject administrative constructions which are contrary to clear congressional intent. [Citing cases.] If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that

20 For a catalog of all, or at least many, of Chevron’s problems, see Jack M. Beermann, End the Failed Chevron Experiment Now...
intention is the law, and must be given effect.”21 If Chevron is not about deferring to agency statutory construction, then what is it about? It cannot be about review of agency policy decisions, since those decisions are generally reviewed under the arbitrary and capricious test unless a statute specifies a different standard of review.22

Further compounding the unclarity surrounding the Chevron standard, the Court has not been clear on when Chevron should apply or even whether Chevron is still good law. From the beginning, the Court did not even mention Chevron in a high percentage of cases in which most observers would agree that it should apply,23 and it has not deferred to an agency statutory construction under Chevron since 1986.24

Sometimes confusion over the law is a natural consequence of novel or complicated situations involving developing legal understandings. But in this case, the Court itself has created the confusion. Language from two opinions in which the Court at least mentioned Chevron and explained why it did not apply illustrates the Court’s complicity in the confusion perfectly. In 2000, in a decision rejecting the FDA’s assertion of authority to regulate tobacco products, the Court proclaimed that “[b]ecause this case involves an administrative agency’s construction of a statute that it administers, our analysis is governed by Chevron. . . . ”25 Fifteen

21 Chevron n. 9.
22 For example, by statute, rules issued by the Department of Labor enforcing the Occupational Safety and Health Act are reviewed under the substantial evidence test. See CITE. While Congress may have intended this to mean that such rules are reviewed under a less deferential standard than the arbitrary, capricious test, it is unclear whether substantial evidence review actually makes a difference. CITE.
23 For a very recent example, the Court did not mention Chevron in American Hospital Associations v. Becerra, 142 S. Ct. 1896 (2022), even though one of the questions presented in that case was “Whether Chevron deference permits HHS to set reimbursement rates based on acquisition cost and vary such rates by hospital group if HHS has not collected required hospital acquisition cost survey data.” See Brief for Petitioners at x. Further, at oral argument, Chevron was mentioned 51 times, including twice by Justice Kavanaugh who wrote the Court’s opinion rejecting the agency’s statutory construction.
years later, the Court began its analysis of whether the IRS’s interpretation of a provision of the Affordable Care Act was correct by explaining that “[w]hen analyzing an agency's interpretation of a statute, we often apply the two-step framework announced in Chevron. . . .”26 Perhaps the latter statement accurately reflected the fact that by then the Court had recognized two major exceptions to Chevron’s application,27 but without elaboration it appeared that Chevron might have been relegated to an optional standard with little guidance on when the courts should exercise the option. That is certainly an accurate reflection of the Court’s own treatment of Chevron for its entire nearly forty-year existence.

It appears that the Court itself may not understand the depths of the confusion it has caused for others who are affected by the vitality of Chevron. Justice Neil Gorsuch apparently believes that the lower federal courts are emulating the Supreme Court and have significantly limited the application of Chevron. Recently, in a dissent from denial of certiorari in a case in which the Federal Circuit applied Chevron and affirmed the VA’s denial of benefits to a veteran, Justice Gorsuch attacked what he characterized as a “maximalist” view of Chevron which he views as a serious departure from the judicial role in ensuring that agencies remain within their statutory mandates.28 However, Justice Gorsuch took solace in the “fact” that Chevron has apparently lost much of its vitality:

Lower federal courts have also largely disavowed the project. One recent survey revealed that a substantial majority of federal appellate judges disapprove of the broad reading of *Chevron* and avoid applying it when they can. See A. Gluck & R. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of

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27 Mead and Brown and Williamson.
Appeals, 131 Harv. L. Rev. 1298, 1312–1313 (2018). An extraordinary number of federal judges have written about the problems associated with reading *Chevron* broadly too. [Citing cases.] . . .

[T]he aggressive reading of *Chevron* has more or less fallen into desuetude—the government rarely invokes it, and courts even more rarely rely upon it. The Federal Circuit’s decision at issue here is thus something of an outlier. And maybe that is a reason to deny review of this case. Maybe *Chevron* maximalism has died of its own weight and is already effectively buried.

As we shall see, this may be wishful thinking on Justice Gorsuch’s part, but the grant of certiorari on the *Chevron* issue in Loper Bright may fulfill his wish. More to the point, under the Court’s own precedent, unless and until the Court itself overrules *Chevron*, the lower courts are bound to follow it.29 If Justice Gorsuch was correct (which as we shall see he isn’t) that lower courts have stopped applying *Chevron*, he should be criticizing them, not applauding them, and he should be calling on his colleagues at the Court to overrule it.

Lest it be suspected that *Chevron* is a special case in which the Court has failed to provide clear guidance, there are other areas of law in which the Court seems to have changed the law without telling state and lower federal courts. The best example of an area that needs more specific guidance from the Court involves the Lemon test30 for determining whether state subsidies to religious institutions violate the Establishment Clause. Although I personally favor maintaining a strict bar against such subsidies, clearly the Supreme Court thinks otherwise, but the Court has not provided clear guidance to the lower and state courts on the matter. Twice,

29 Agostini v. Felton
30 Lemon v. Kurtzman, 403 U. S. 602 (1971),
Justice Gorsuch has chided lower courts for applying the Lemon test, a doctrine that he stated the Court had “interred” and “abandoned.”31 Perhaps “interred” and “abandoned” are euphemisms for “overruled,” but under the Court’s own precedent, to overrule a case the Court must be more explicit. This is illustrated by an earlier controversy over the application of the Lemon test. In a case in which a lower court accurately predicted that the Court would no longer adhere to it, the Court told lower courts to continue to apply Lemon and its progeny unless and until the Court itself overruled it even if the Court has given strong indications that, given the chance, it would overrule prior cases: “[w]e do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that ‘[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.’”32 Again, Justice Gorsuch’s disagreement is with his colleagues for failing to clarify Lemon’s status, not with the lower courts for following his Court’s instructions.33

31 Kennedy v. Bremerton, 142 S. Ct. 2407, 2427 (2022) (this Court long ago abandoned Lemon); Shurtleff v. City of Boston, 142 S. Ct. 1583, (2022) (Gorsuch, J., concurring in the result) (“[t]his Court long ago interred Lemon, and it is past time for local officials and lower courts to let it lie.”)
33 There are additional areas of the law in which the Court has failed to provide clear instructions to other courts, resulting in controversy and repeated Supreme Court intervention. In J. I. Case Co. v. Borak, 377 U.S. 426 (1964), the Court announced relatively liberal standards for recognizing implied private rights of action under regulatory and criminal statutes, and even though in recent decades it has severely cut back on the availability of such rights of action, it has not completely overruled the doctrine. First, the Court attempted to cut back on private rights of action by announcing a new, four factor test that it intended to be more restrictive than earlier law. See Cort v. Ash, 422 U.S. 66 (1975). Then, when that decision failed to prevent lower courts from too readily implying private rights of action, the Court recharacterized Cort as creating a much more restrictive doctrine than the language of the opinion supports. See Karahalios v. National Federation of Federal Employees, 489 U.S. 527 (1989), in which the Court disavowed Cort’s four factor test without explicitly overruling it, observing that “Congress undoubtedly was aware from our cases such as Cort v. Ash, 422 U. S. 66 (1975), that the Court had departed from its prior standard for resolving a claim urging that an implied statutory cause of action should be recognized, and that such
B. Chevron at the Lower Federal Courts

Contrary to Justice Gorsuch’s suggestion, the application of Chevron has been and remains much more generous to agencies at the lower federal courts than at the Supreme Court. The lower courts rightly saw Chevron as an easy way to dispose of large numbers of cases without engaging in the difficult analysis that non-deferential statutory construction cases often require.\(^{34}\) In cases of doubt, so long as the agency’s statutory construction was built on a plausible textual basis, the agency was very likely to prevail when all it had to establish was that its construction was “reasonable” or “permissible.” This left open a wide field for agency innovation, whether in response to changed circumstances or changed administration policy.

Whether, as Justice Gorsuch claimed, lower courts have actually abandoned “maximalist” Chevron is subject to serious dispute.\(^{35}\) Conventional Chevron continues to be cited as good law in every circuit,\(^{36}\) and as the Federal Circuit’s opinion that provoked Justice Gorsuch’s dissent issues were being resolved by a straightforward inquiry into whether Congress intended to provide a private cause of action.”

In a related doctrinal area, the Court has narrowed the circumstances in which it will recognize a damages action for constitutional violations by federal officials without overruling the case, Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971) (creating damages action against federal officials for constitutional violations), that created the cause of action in the first place. Rather, it has repeatedly and adamantly rejected attempts to extend Bivens. See Egbert v. Boule, 142 S. Ct. 1793 (2022). The Court noted that in the previous 42 years, it had turned away eleven attempts to extend Bivens to a new context. See id at 1799-1800 (citing cases). In an opinion concurring in the judgment, Justice Gorsuch urged his colleagues to “return the power to create new causes of action to the people’s representatives in Congress.” Id. at 1810 (Gorsuch, J. concurring in the judgment). Without expressly saying so, he is urging the Court to overrule Bivens, which in his view only gives litigants the “false hope” that they might prevail where others have failed. Id


\(^{35}\) Thomas Schmidt has raised the possibility that lower courts ought to defer to “politically accountable” agencies even if the Supreme Court does not. See Thomas P. Schmidt, Judicial Minimalism in the Lower Courts, 108 Va. L. Rev. 829, 891-92 (2022).

\(^{36}\) In December, 2022, to prepare for a discussion of Tom Merrill’s recent book on Chevron and to evaluate Justice Gorsuch’s claim that maximalist Chevron has fallen into desuetude, I searched on Westlaw for opinions in the Courts of Appeals that mentioned “Chevron deference.” Reading the cases in reverse chronological order, by the time I got to August 2022, I found at least one opinion in each circuit that treated Chevron as good law, with several of the opinions deferring to an agency in step 2. Some of the opinions held that Chevron did not apply to the particular case at bar and some decided the case in step 1, so my informal survey did not reveal the strength of
from the denial of certiorari in Buffington exemplifies, it sometimes is employed to approve agency statutory constructions without embarking on a serious inquiry into whether the agency has arrived at the best reading of the statute in light of general legal principles and the policies underlying the program involved. More recently, dissenting from a D.C. Circuit decision that upheld (under Chevron) the Federal Energy Regulatory Commission’s construction of an ambiguous provision of the Public Utility Regulatory Policies Act of 1978, Judge Walker lamented that “[o]n the D.C. Circuit, Chevron maximalism is alive and well.”

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

judicial commitment to “maximalist Chevron.” But it suggests that Justice Gorsuch’s confidence that Chevron is no longer important is unfounded.

40 Id. at 1297-98.
41 Professor Sunstein suggests that taking Chevron step one more seriously would help rehabilitate Chevron and preserve its policy advantages. See Sunstein, Zombie, supra note x at 575-76.
employing those tools should it reach step two and defer to any reasonable or permissible interpretation.\footnote{As we shall see, if the agency construes an ambiguous statute to delegate authority to address an important social problem, agency authority may still be found lacking under the Major Questions Doctrine. See infra at xxx.}

Confusion in the lower courts over the status of Chevron is further illustrated by a 2023 decision in the Second Circuit involving a criminal statute.\footnote{Debique v. Garland, 58 F.4th 676 (2d Cir. 2023).} The court noted that while the Supreme Court has held that the definition of “minor” in a statute involving sexual abuse of a minor is not subject to Chevron deference in cases involving the immigration status of offenders, the more generic determination of whether the crime of sexual abuse of a minor has been committed is subject to Chevron deference. And on this subject the court employed conventional Chevron. A concurring judge pointed out that circuit precedent may be insufficiently attentive to the Supreme Court’s emphasis on resolving statutory questions using the traditional tools of statutory interpretation.\footnote{Id. at 685-86 (Park, J. concurring in the judgment).} When circuit precedent takes a wrong turn, the Supreme Court should step in and prescribe corrections.

In another case in which the Sixth Circuit held that Chevron never applies when a statutory construction has implications for criminal law, a dissenting judge reminded her colleagues that the Chevron is still good law that they are bound to follow and that on more than one occasion the Supreme Court has applied Chevron to issues with criminal law implications.\footnote{Gun Owners of America, Inc. v. Garland 992 F.3d 446, 475 (6th Cir. 2021) (White, J. dissenting). The majority held unlawful the Bureau of Alcohol, Tobacco and Firearms’ rule banning “bump stocks,” an attachment that allows a shooter to convert a gun into a virtual machine gun. The majority’s categorical rejection of applying Chevron to statutes with criminal law implications is contrary to the practice at the Supreme Court. See, e.g. United States v. O’Hagan, 521 U.S. 642 (1997) (deferring under Chevron to SEC rule with implications for defendant’s criminal responsibility). But the decision does support Justice Gorsuch’s claim that lower courts are also reluctant to apply Chevron. Again, the way to ensure that lower courts stop applying Chevron is to overrule it, rather than sanction lawless conduct by lower courts.} Perhaps the Sixth Circuit was following the Supreme Court’s example, searching for any excuse
not to apply Chevron. In my view, that is not a proper practice in a hierarchical case law system in which the lower courts depend on the Supreme Court to tell them when to ignore Chevron and engage in de novo review or some other less deferential form of review of agency statutory construction decisions.

The Supreme Court has certainly contributed to the narrowing of the circumstances in which conventional Chevron deference applies in the lower courts, most importantly by authorizing them (if not yet clearly instructing them) to apply traditional tools of statutory interpretation to determine whether a statute is ambiguous, by confining Chevron to statutory construction arrived at in “relatively formal” agency proceedings such as rulemaking and formal adjudication, and by ruling out Chevron deference when the issue is a matter of major political or economic significance. However, it appears that Justice Gorsuch and other members of the Court want more, they do not want courts deferring to agency statutory construction decisions even if the matter is unimportant or trivial and even if employing the traditional tools of statutory construction does not reveal a clear legislative intent. When establishing rules of decision, it is insufficient for the Court to lead by example; the Court needs to create binding rules that lower courts are required to follow. Otherwise, life-tenured Circuit and District Judges will continue to decide cases according to their own views, which are often not congruent with the views of the majority of the Supreme Court, especially now that the Court has taken a hard turn in one political direction.

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47 See United States v. Mead Corp., 533 U.S. 218, (2001); Sanofi Aventis U.S. LLC v. United States Department of Health and Human Services, 58 F.4th 696 (3d Cir. 2023) (Chevron does not apply to agency advisory opinions).
48 King v. Burwell, CITE.
49
C. What Should the Supreme Court Do?

If the Supreme Court majority truly wants the lower courts to stop applying Chevron deference, it should say so explicitly by overruling Chevron, at least the part of Chevron that announced the two-step standard of review of agency statutory interpretation. That is the only way that the Court can ensure that the lower courts will stop applying Chevron. There is also the possibility that the Court will choose to clarify and limit Chevron’s application, much as it did in Kisor with regard to Auer deference. This remainder of this part describes what I view as the best course of action first assuming that it decides to reject the Chevron framework once and for all and second if it decides to preserve Chevron while clarifying its scope and application.

1. Overrule Chevron

First, if the Court decides to end Chevron deference, the Court should unequivocally overrule Chevron’s methodology. Anything short of using the term “overruled” is insufficient to ensure that courts and litigants do not continue to apply the Chevron two-step standard of review of agency statutory construction.

Second, the Court should allow for modest deference to agency decisions of statutory construction under the factors articulated in the Skidmore decision: courts should defer to agency statutory construction when the agency’s construction is longstanding, dates back to the early days of the statute or at least to the first time the agency was confronted with the particular issue, when the agency’s analysis is thorough, well-reasoned and persuasive and is based on matters within the agency’s expertise.50 Courts should be less deferential when the agency seems to have arrived at its statutory construction simply for the purpose of winning the particular case,

50 This is what I argued in End the Failed Chevron Experiment Now.
especially when the construction was announced as part of the litigation, for example in a brief or memorandum in support of a motion and when the agency’s analysis is relatively superficial, not well-reasoned and involves matters not directly in the agency’s area of expertise.

Even if the reviewing court is presented with a situation which, under Skidmore, indicates potential deference, the Court should not accept the agency’s construction if the court is confident that the best reading of the statute, based on the language, history or policy of the statute, is otherwise. As under Chevron, if Congress’s intent is easily discernible, no matter how persuasively an agency argues for a different construction, the rule of law requires that the reviewing court follow Congress’s instructions. This does not mean that only purely interpretive arguments are acceptable: courts should be free to take agency policy arguments into account, much as Chief Justice Roberts did when agreed with the IRS’s construction of the affordable care act in part because of the potentially disastrous policy outcome of rejecting it. Even without Chevron, in cases of uncertainty, reviewing courts should take an administering agency’s views into account when deciding whether to impose what it finds to be the best reading of the statute at issue.

Finally, the Court should expressly leave room for agency innovation. In particular, it should treat agency changes in statutory construction the same as it treats agency policy changes under Fox Television51 by allowing agencies to alter their construction of statutes they administer to a different understanding that is within what the court finds to be the zone of reasonable interpretation. In other words, when a court applies the Skidmore factors to uphold an initial agency statutory construction decision, it should allow the agency to disavow that

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51 Fox Television v. FCC.
interpretation in favor of what it now considers a better understanding of the statute, as the Supreme Court allowed in Brand X52 for cases governed by Chevron. As in Fox Television, in order to ensure reasoned decisionmaking, reviewing courts should ensure that the agency is aware that it is changing its interpretation and the agency should be required to explain the reasons for the change. This flexibility should exist whether the agency has altered its view for linguistic or policy reasons.

I recognize that this proposal may seem to be in tension with the traditional view of judicial supremacy in statutory matters. That is why Brand X’s view of agency flexibility under Chevron was controversial. In my view, this sort of flexibility adapts traditional understandings to the contemporary reality of the delegation of authority to administrative agencies. Of course, a novel construction contrary to prior practice has less of a claim to deference under Skidmore. Thus, the agency might not have as much freedom to alter interpretations as under conventional Chevron. Rather the point is simply not to rule out agency flexibility when the initial interpretation was upheld after deferential review, answering Justice Scalia’s complaint in Mead that Skidmore would freeze agency interpretations because of stare decisis. The Skidmore factors are just that, factors, not rules that operate as on/off switches for acceptance of agency interpretations. In essence, the argument is that the Skidmore factors are among the traditional tools of statutory interpretation in the field of judicial review of agency action.

2. If Chevron is Preserved.

52 National Cable & Telecommunications Ass'n v. Brand X Internet Services, 545 U.S. 967 (2005).
As noted, there is a significant likelihood that the Court in Loper Bright, or in a later case, will explicitly decline to overrule Chevron, but instead narrow and clarify it. If it does so, the Court should take the opportunity to explicate how lower courts should apply Chevron.

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

Second, the court should make clear that the step one analysis of whether Congress’s intent on a matter is clear should be made using the traditional tools of statutory construction, virtually, but not completely, identical to what statutory construction would look like without Chevron. In particular, the Court should state definitively that applying the traditional tools of statutory construction is part of Chevron’s step one inquiry into whether Congress’s intent is clear.53 The inquiry into this factor should be based on the language and history of the statute, the complexity of the regulatory regime and the expertise of the agency. Connected to this, the Court should abandon the language referring to “agency authority to make decisions with the force of law.” This confusing language is inconsistent with the reality that even when Chevron applies, courts have the authority to review and reject unreasonable agency constructions. In

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53 The principal difference between Chevron and non-Chevron statutory construction is that whether Congress implicitly delegated interpretive authority to an agency is a factor relevant only in Chevron cases.
ordinary circumstances, only a court has the authority to make a ruling with the force of law and only Congress has the authority to pronounce substantive rules with the force of law.

Third, the Court should harmonize Chevron and review under the statutory arbitrary and capricious standard in two ways. Initially, it should specify that Chevron applies only when the issue before the Court is the meaning of a statute administered by the agency and not the application of or policy underlying a statute or rule. Although it may impossible to cleanly separate all cases involving statutory construction from cases involving review of agency policy, the Court should do it’s best to explain Chevron applies to “an interpretation of . . . statutory language”54 or “a process reasonably described as interpretation” and not to cases involving something else, such as applying statutory or regulatory language when determining agency policy or to resolve a particular matter before the agency.55

Further, rather than merely assert that step two incorporates the arbitrary, capricious inquiry56 or implausibly state that the analysis under the two standards “would be the same”57 the Court should adopt the D.C. Circuit’s practice of inquiring into the substantive reasonableness of the agency’s decision to adopt one interpretation among all of the potentially permissible ones.58 This is consistent with Chevron step two’s reference to a reasonable interpretation and would allow courts applying Chevron step two to examine, as it appears the D.C. Circuit already does,59

55 See Hoctor v. United States Department of Agriculture, 82 F.3d 165, 170 (7th Cir. 1996) (“it is an interpretive rule . . . only if it can be derived from the regulation by a process reasonably described as interpretation. . . . ‘Interpretation’ in the narrow sense is the ascertainment of meaning.”)
58 Village of Barrington, Ill. v. Surface Transp. Bd., 636 F.3d 650, 660 (D.C. Cir. 2011) (inquiring under step two into whether “has offered a reasoned explanation for why it chose that interpretation.” The D.C. Circuit has applied this requirement in numerous Chevron cases including Cigar Association of American v. FDA, 5 F. 4th 68, 78 (D.C. Cir. 2021) and Loper Bright itself, 45 F. 4th at 374.
59 See supra note x.s
whether the agency has engaged in a reasoned analysis of the advantages and disadvantages of the available statutory interpretations and would force the agency to justify its choice in light of the policy underlying the statute.\textsuperscript{60} This, in turn, would depend on factors similar to those applied in the Court’s arbitrary, capricious decisions, resulting in harmonization between Chevron and statutory judicial review provisions such as APA § 706.\textsuperscript{61}

D. Chevron Academic Amici

The grant of review over the Chevron question in Loper Bright has attracted a storm of attention including approximately four dozen amicus curiae briefs, three of which are written by academics representing themselves as amici. Professor Chris Walker and Kent Barnett argue, largely based on stare decisis principles, that the Court should not overrule Chevron. They argue, inter alia, that Chevron is settled law, that Congress and agencies have relied on it and that it advances the rule of law by minimizing the role of judges’ personal preferences in judicial review of agency action. In particular, they argue that the delegation basis of Chevron, “that Congress seeks to delegate interpretive primacy to agencies over statutory ambiguities in statutes that agencies administer” is real, not a fiction as even Chevron’s proponents have admitted.\textsuperscript{62} For all of the reasons explored in my work on Chevron\textsuperscript{63} and more, I disagree with just about every aspect of their analysis; in my view, silence or ambiguity does not indicate delegation of

\begin{footnotesize}
\begin{enumerate}
\item I use APA § 706 only as an example because there are specialized review statutes that incorporate the APA’s arbitrary, capricious language, such as the provision of the Clean Air Act that applied in Chevron itself. See 42 U.S.C. § 7607.
\item Brief at p. 13.
\item Cite Failed Experiment, Chevron and the Roberts Court . . .
\end{enumerate}
\end{footnotesize}
interpretive authority and because of the manipulability of Chevron it could not have created any justifiable reliance and it does not constrain judges from imposing their policy views on the law.

Professor Thomas Merrill, author of a recent outstanding book about Chevron,\textsuperscript{64} argues for preserving Chevron, but a careful reading of his brief reveals that his argument is similar to mine, that step one of Chevron should be applied with careful attention to the traditional tools of statutory construction and step two of Chevron should be applied using the Skidmore factors, especially that the degree of deference should depend on the process applied by the agency. As he puts it: “If the agency has adopted its interpretation in a process that affords an opportunity for public participation and the agency has provided a reasoned response to material criticisms advanced in that process, this should weigh in favor of determining that its interpretation is reasonable.”\textsuperscript{65} I agree with Merrill that the agency’s process and the presence of a reasoned explanation are important to the degree of deference courts should afford agency interpretations, I just don’t see the need for preserving Chevron as an element of deference under Skidmore.

Although he does not come out and say so, Professor Aditya Bamzai agrees with me that conventional Chevron should be overruled. Based on his observation that “[r]ather than one consistent approach, the Court adopted several different perspectives on parceling out deference to agency legal interpretation,” Professor Bamzai argues that the Court should adopt a clear standard that “require[s] a form of de novo review for legal questions and arbitrary-and-capricious review for policy questions.”\textsuperscript{66} Because he views Chevron-like deference as inconsistent with the APA’s instruction that Court decide all questions of law, he disagrees with my suggestion that post-Chevron the Court should embrace Brand X on interpretive matters, but

\textsuperscript{64} Merrill book.
\textsuperscript{65} Merrill brief at x.
\textsuperscript{66} Bamzai brief at x.
his suggestion that policy questions be reviewed under the arbitrary, capricious standard would preserve some of the advantages of Chevron in terms of flexibility.

While I sympathize with the instinct that Professors Merrill, Walker and Barnett have to honor stare decisis and preserve Chevron’s advantages, in my view they do not appreciate the problems that Chevron has spawned over the decades and the difficulties that lower courts are having due to the lack of Supreme Court guidance. But whether the Court chooses to overrule Chevron or clarify when and how it applies, their briefs, and Professor Bamzai’s brief, provide valuable guidance for the Court on how to approach the future of Chevron and a post-Chevron world.

III. Conclusion: Turning Over a New Leaf

The current role and importance of the Supreme Court is way beyond anything imagined by the Framers of the Constitution or, perhaps more to the point, by the judges and justices who constructed the system of legal reasoning and opinion writing that we have inherited. The federal courts and especially the Supreme Court regularly resolve controversies involving millions and billions of dollars and the lives, livelihoods and welfare of countless people across the globe. The quaint practice of expecting readers to divine the meaning of Supreme Court opinions and discern the status of the Court’s doctrines from indications other than the Court’s explicit pronouncements is not fit for the times. Not only should the Court overrule Chevron, or at least clarify its status, the Court should resolve to turn over a new leaf and provide clearer instructions
on the status of legal doctrines that govern the conduct of millions of Americans and thousands of state and federal officials and judges.67

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

67 Justice Gorsuch is currently the Court’s most outspoken member on the status of disfavored doctrines that are still on the books; perhaps he could lead this effort.