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Is *Chevron* Out of Gas?: An Overview of the Chevron Doctrine, the Cases Set to Consider the Continued Applicability of the Doctrine, and the Potential Impact of Those Cases

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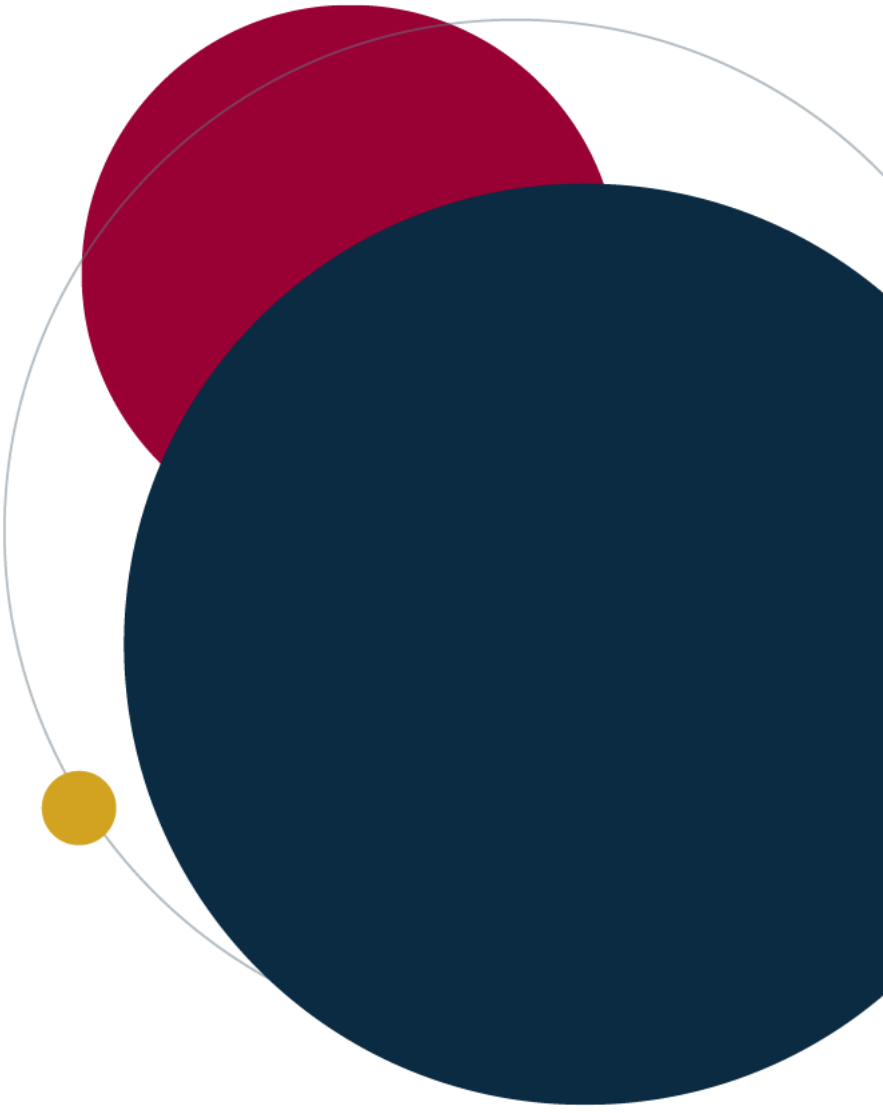

Is *Chevron* Out of Gas?: An Overview of the *Chevron* Doctrine, the Cases Set to Consider the Continued Applicability of the Doctrine, and the Potential Impact of Those Cases

(By John Byron, Brendan Hammond, Shannen Coffin, Shaun Boedicker, and Crystal Robles)

Almost forty years ago, the Supreme Court authored an opinion that gave wide latitude to administrative agencies to fill the gaps in statutes enacted by Congress. That opinion—*Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)—held that a court must defer to a reasonable interpretation of an administrative agency when confronted with statutory language that is either silent or ambiguous. This was the birth of what has come to be known as "*Chevron* deference."

Since its birth, courts have struggled to apply this doctrine, which has drawn fire from both courts and legal scholars as a potential violation of constitutional principles and the Administrative Procedure Act. As stated by Justice Gorsuch, "[w]ith the passage of time," the "problems" with *Chevron* "have become widely appreciated."[1] This has led to open calls by members of the Supreme Court to reconsider the continued applicability of *Chevron*.

The Supreme Court now has set itself up to do just that. In a pair of cases—*Loper Bright Enterprises v. Raimondo* and *Relentless, Inc. v. Department of Commerce*—the Courtgranted review expressly to decide whether to overrule *Chevron* or at least to substantially limit its applicability. Those cases were heard in January 2024, and an opinion is expected sometime between May and July 2024. Given the hostility to *Chevron* of the

[1] *Buffington v. McDonough*, 143 S. Ct. 14, 21 (2022) (Gorsuch, J., dissenting from denial of certiorari).

Court's conservative majority, many commentators believe that the Court's decision will upend the status quo.

This whitepaper examines the *Chevron* doctrine, discusses the manner in which *Loper Bright* and *Relentless* could be decided, and outlines the possible implications of the Court's expected reconsideration of *Chevron*. *Loper Bright* and *Relentless* could have a major impact on the law and regulations across multiple agencies and regulatory spaces. For some regulated entities, the outcome of those cases may present opportunities, but for others, the outcome may create uncertainty. Either way, regulated entities should be prepared for the Court's decisions.

A. The Origin: A Primer on *Chevron*

Chevron arose from a challenge to an Environmental Protection Act ("EPA") regulation interpreting the Clean Air Act.[2] The Clean Air Act required States that had not achieved certain national air quality standards to establish a permit program regulating "new or modified major stationary sources" of air pollution.[3] The EPA regulation promulgated to implement the permit requirement allowed a State to adopt a plantwide definition of the term "stationary source."[4] This definition allowed States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single "bubble."[5] The D.C. Circuit set aside the EPA's regulation and definition after

[2] *Chevron*, 467 U.S. at 840.

[3] *Id.*

[4] *Id.*

[5] *Id.* at 840-41.

finding that the EPA's definition of "stationary source" was inappropriate in light of the Clean Air Act's goal of improving rather than maintaining air quality.[6]

The Supreme Court reversed and explained that the "Court of Appeals misconceived the nature of its role in reviewing the regulations at issue."[7] In the Court's view, the Court of Appeals should have applied the following two-step analysis that has come to be known as the *Chevron* two-step:

- Step One: Determine whether Congress has directly spoken to the precise question at issue. If Congress has spoken on the issue and its intent is clear, then give effect to the unambiguously expressed intent of Congress.
- Step Two: If the relevant statute is "silent or ambiguous" with respect to the specific issue, ask if the agency's interpretation is based on a "permissible" or "reasonable" interpretation of the statute. If that is the case, defer to the agency's interpretation.[8]

Under this two-part analysis, the Court found that the EPA's interpretation of the Clean Air Act was reasonable and concluded that the Court of Appeals committed reversible error by not deferring to that interpretation.[9]

The Court gave three reasons for deferring to an agency's interpretation of a statute that it administers. First, the Court concluded that silence or ambiguity in a statute amounts to an "implicit" Congressional delegation of authority to an agency to "interpret[]" and "constru[e]" a "statute which it administers."[10] Second, the Court concluded that agencies have greater institutional competence and subject matter expertise than the judicial branch

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[6] *Id.* at 841-42.

[7] *Id.* at 845.

[8] *Id.* at 842-44.

[9] *Id.* at 866.

[10] *Id.* at 842-44.

to resolve "policy battle[s]" and make policy choices that accommodate "manifestly competing interests" within a "technical and complex" regulatory scheme.[11] Third, the Court stated—in a nod to the separation of powers—that judges should not be in the business of "reconcil[ing] competing political interests" because it is "entirely appropriate for th[e] political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities."[12]

B. The Outflow: The Wake of *Chevron*

In the last forty years, *Chevron* has become the single most influential decision in administrative law. *Chevron* has been cited in at least 19,000 cases, making it one of the most-cited Supreme Court decisions of all time.[13] But the application of the two-part test has proven difficult, with the Supreme Court weighing in on more than 200 occasions.[14]

One of the biggest issues with applying *Chevron* is determining whether a statute is ambiguous. At an early stage, Justice Scalia observed that the determination of ambiguity would be "the chink in *Chevron*'s armor" and forecasted it would incite many "battles."[15] Justice Scalia was correct. "[D]ifferent judges have wildly different conceptions of whether

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[11] *Id.* at 864-66.

[12] *Id.* at 865-66.

[13] Bob Egelko, *The Supreme Court Appears Poised to Overturn a Ruling Cited in More Than 19,000 Cases*, S.F. Chron (May 17, 2023), https://www.sfchronicle.com/politics/article/supreme-court-chevron-doctrine-18101145.php.

[14] Jonathan Siegel, *The Constitutional Case for* Chevron *Deference*, 71 VAND. L. REV. 937, 938 n.2 (2018).

[15] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 520.

a particular statute is clear or ambiguous,"[16] and this had led to courts applying *Chevron* deference with different levels of frequency.[17] This has led Justice Kavanaugh to comment that *Chevron* "can be antithetical to the neutral, impartial rule of law."[18]

The ambiguity determination is not the only issue with administering *Chevron*. Over time, the Supreme Court has introduced new concepts to limit the application of the *Chevron* framework. In theory, these concepts were meant to clarify when the framework applies and when it does not, but in practice, they have only made matters more confusing.

The first limiting principle has come to be known as *Chevron* "Step Zero." Step Zero developed in a trilogy of Supreme Court cases in the early 2000s.[19] The Step Zero inquiry presents a gating question that asks whether Congress has delegated authority to the agency by assessing whether the agency interpretation arises in a setting in which "Congress would expect the agency to speak with the force of law."[20] The focus of this inquiry is on the interpretative process that the agency used to arrive at a contested interpretation. A statutory interpretation that is the result of notice-and-comment rulemaking, for example, generally satisfies *Chevron* Step Zero, whereas a more informal interpretation may not do so.

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[16] Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2152 (2016) (book review).

[17] A 2017 study, for example, found that the D.C. Circuit relied on the doctrine in 89% of the cases that concerned agency interpretations of a statute, whereas the Sixth Circuit only relied on the doctrine in 61% of cases involving an agency interpretation. Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 49 (2017).

[18] Kavanaugh, *supra* note 16, at 2154.

[19] *See Christensen v. Harris Cty.*, 529 U.S. 576 (2000); *United States v. Mead Corp.*, 553 U.S. 218 (2001); *Barnhart v. Walton*, 535 U.S. 212 (2002); *see also* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 193 (2006).

[20] *Mead*, 533 U.S. at 229.

The Step Zero trilogy outlined certain types of agency interpretations that do and do not satisfy Step Zero. In *Christensen*, for example, the Court found that an opinion letter from the Acting Administrator of the Wage and Hour Division of the Department of Labor did not satisfy Step Zero. Speaking for the Court, Justice Thomas wrote that interpretations "such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference."[21] These more informal agency interpretations are afforded a lesser degree of deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), which means that they are entitled to respect but "only to the extent that those interpretations have the 'power to persuade.'"[22]

The Court in *Mead* similarly found that a tariff classification ruling of the U.S. Customs Service did not qualify for *Chevron* deference.[23] The Court reasoned that there was no indication that Congress delegated authority to the Customs Service to issue classification rulings that carried the force of law.[24] Key to the Court's decision was the absence of procedures, such as public notice and an opportunity for public comment, around the issuance of tariff classification rulings and the significant quantity of rulings issued by many different members of staff.[25]

In contrast to the *Christensen* and *Mead*, the Court in *Barnhart* found that a Social Security Administration interpretation of the Social Security Act's disability benefit

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[21] *Christensen*, 529 U.S. at 587.

[22] *Id.* (quoting *Skidmore*, 323 U.S. at 140).

[23] *Mead*, 533 U.S. at 227.

[24] *Id.* at 231-32.

[25] *Id.* at 233.

provisions was entitled to *Chevron* deference.[26] While the agency's interpretation ultimately was enacted as formal regulations via notice-and-comment rulemaking, those regulations were enacted after the *Barnhart* litigation began.[27] The Court stated that the fact that the agency reached its interpretation through means less formal than notice-and-comment rulemaking does not *automatically* deprive that interpretation of *Chevron* deference.[28] The Court concluded that:

> In this case, the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to the administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicated that *Chevron* provides the appropriate lens through which to view the legality of the Agency interpretation here at issue.[29]

The decisions in the Supreme Court's Step Zero trilogy have caused a great deal of confusion in the lower courts. *Christensen* and *Mead* signaled that the Court might have been headed toward a bright-line test for Step Zero that steered all informal agency interpretations away from the *Chevron* framework, but *Barnhart* prevents courts from reaching that destination. What the cases did was effectively flip the *Chevron* presumption of agency authority to resolve ambiguity into a presumption against such authority that must be overcome by affirmative legislative intent.[30] And in all cases except those on the extremes, the question of whether Congress intended the agency to speak with the force of law is not one that has a clear answer. Indeed, in his dissent in *Mead*, Justice Scalia criticized *Chevron*

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[26] *Barnhart*, 535 U.S. at 214.

[27] *Id*. at 221.

[28] *Id*.

[29] *Id*

[30] *Mead*, 533 U.S. at 239 (Scalia, J., dissenting).

Step Zero and accurately forecasted that the courts would "be sorting out the consequences . . . for years to come."[31]

The second limiting principle that has engrafted additional complexity and confusion onto *Chevron* is the major questions doctrine. That doctrine began to appear in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), and came into clearer focus in subsequent Supreme Court jurisprudence.[32] In *West Virginia v. EPA*, the court assigned the doctrine its formal name and set out the doctrine in clear terms: In cases involving a question of great "economic and political significance," *Chevron* does not apply unless there is a "clear congressional authorization" for the agency to address the question.[33]

In many ways, the major questions doctrine raises more questions than it answers. The Court's decision in *West Virginia* suggests that the doctrine applies in a wide variety of

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[31] *Id.* at 239-40 ("The Court has largely replaced *Chevron*, in other words, with that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th'ol' 'totality of the circumstances' test.").

[32] *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468-69 (2001) (finding that there was not a sufficient "textual commitment of authority" in the Clean Air Act to support the EPA's assertion that Congress had given the EPA authority to consider costs when regulating air pollutants); *Gonzales v. Oregon*, 546 U.S. 243, 267-68 (2006) (holding that Congress had not given the Attorney General authority to issue an interpretative rule regarding the use of controlled substances in assisted suicides "as a statement with the force of law"); *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 321-24 (2014) (concluding that Congress had not conferred authority on EPA to regulate greenhouse gas emissions from stationary sources); *King v. Burwell*, 576 U.S. 473, 485-86 (2015) (finding that economic and political significance of interpretation of Patient Protection and Affordable Care act rendered *Chevron* entirely inapplicable); *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (vacating the Centers for Disease Control and Prevention's eviction moratorium because it was of major national significance and the CDC did not have clear Congressional authority to implement such a program); *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, 142 S. Ct. 661, 662 (2022) (invalidating OSHA's vaccine mandate for private employers because OSHA lacked clear statutory authorization).

[33] *West Virginia v. EPA*, 142 S. Ct. 2587, 2608-09 (2022).

cases arising from "all corners of the administrative state."[34] But the Court did not precisely define what constitutes a "major question," leaving it to the lower courts to flesh out this significant exception to judicial deference. Justice Kagan has been particularly critical of the major questions doctrine, stating that it "works not to better understand—but instead to trump—the scope of legislative delegation" and noting that the "goalposts" of the doctrine continue to shift.[35] In Justice Kagan's view, the doctrine is "made-up" and "specifically crafted to kill significant regulatory action, by requiring Congress to delegate not just clearly but also micro-specifically."[36]

C. The Retreat: The Supreme Court's Recent Retreat From and Criticism of *Chevron*

The web of post-*Chevron* case law has led many to lament that the *Chevron* framework is unworkable. The Supreme Court's introduction of new analytical frameworks for the application of *Chevron* has marked a shift by the Court away from the doctrine. While lower courts apply the doctrine regularly, the Court has not deferred to an agency interpretation of federal law since 2016 and is citing the doctrine less and less.[37] Led by a conservative majority, the Court has gravitated its analysis toward the major questions doctrine or determined interpretive questions using "traditional tools of statutory interpretation" without resort to *Chevron*.[38]

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[34] *Id.* at 2608.

[35] *Biden v. Nebraska*, 143 S. Ct. 2355, 2397-99 (2023) (Kagan, J., dissenting).

[36] *Id.* at 2400.

[37] Isaiah McKinney, *The* Chevron *Ball Ended at Midnight, but the Circuits Are Still Two-Stepping by Themselves*, YALE J. REG. (Dec. 18, 2022), https://www.yalejreg.com/nc/chevron-ended/.

[38] *See Am. Hosp. Ass'n v. Becerra*, 142 S. Ct. 1896 (2022) (employing "traditional tools of statutory interpretation" to analyze agency rule, without resort to Chevron); *Becerra v. Empire Health Found.*, 142 S. Ct. 2354 (2022) (same).

Early on, *Chevron* was viewed by an increasingly conservative Supreme Court as a welcome tool to correct the "purposivism" of the 1970s era courts. Lower courts, especially the D.C. Circuit, were apt to substitute their judgment for that of administrative agencies based on their own sense of Congress's purpose in enacting a statute. A common criticism was that courts had unnecessarily injected themselves into the world of policy best left for the political branches. Justice Scalia thus hailed *Chevron* as providing "needed flexibility, and appropriate political participation, in the administrative process."[39]

But in more recent years, *Chevron* has been criticized for going too far in the opposite direction—allowing courts to rubber stamp an agency's rewriting of statutes—raising serious separation-of-powers issues relating to both encroachment of executive agencies on the legislative powers of Congress and interference with the judicial function, interpreting the law. Today's conservative majority has not been shy about expressing its distaste for an expansive application of *Chevron*. Five of the six conservative Justices have explicitly called into question a broad-application of *Chevron.* Justice Thomas, for instance, has written that *Chevron* rests on the "fiction that ambiguity in a statutory term is best construed as an implicit delegation of power to an administrative agency to determine the bounds of the law," "raises serious separation-of-powers issues," and "is in serious tension with the Constitution, the APA, and over 100 years of judicial decisions."[40] Justice Gorsuch has

[39] Scalia, *supra* note 15, at 517.

[40] *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 268 (2016) (Thomas, J., concurring); *Michigan v. EPA*, 576 U.S. 743, 761 (2015) (Thomas, J., concurring); *Baldwin v. United States*, 140 S. Ct. 690, 691 (2020) (Thomas, J., dissenting from denial of certiorari).

characterized *Chevron* as "a judge-made doctrine for the abdication of the judicial duty" and stated that "the whole project deserves a tombstone no one can miss."[41]

Justices Kavanaugh, Alito, and Roberts have been more restrained but still have written opinions and articles that either have questioned the wisdom of *Chevron* or advocated for a narrower application of the doctrine.[42] Justice Coney Barrett has not overtly

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[41] *See Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring); *Buffington*, 598 U.S. at 9, 16 (Gorsuch, J., dissenting from denial of certiorari).

[42] Before his confirmation to the Court, Justice Kavanaugh criticized *Chevron* in his legal scholarship, taking aim primarily at the ambiguity determination under *Chevron*. Kavanaugh, *supra* note 16. Then-Judge Kavanaugh wrote that *Chevron* "has no basis in the Administrative Procedure Act" and "is nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch." *Id.* at 2150. In the view of Judge Kavanaugh, the biggest issue with *Chevron* is that "different judges have wildly different conceptions of whether a particular statute is clear or ambiguous" and "there is no particularly principled guide for making th[e] clarity versus ambiguity decision." *Id.* at 2152-53. That reality can lead to result-oriented jurisprudence, which "threatens to undermine the stability of the law and neutrality (actual and perceived) of the judiciary." *Id.* at 2143. Despite recognizing these issues, Judge Kavanaugh did not go so far as to say that *Chevron* has no utility and expressly recognized that "*Chevron* makes a lot of sense in certain circumstances." *Id.* at 2152. In particular, Judge Kavanaugh stated that *Chevron* is useful when Congress uses broad and open-ended terms like "reasonable," "appropriate," "feasible," or "practicable," which express a clear invitation for an agency to fill the interpretative gap, but should have no role when an agency is interpreting a specific statutory term or phrase. *Id.* at 2153-54. Since joining the Court, Justice Kavanaugh has suggested that he is not inclined to overrule *Chevron* but that he is a "footnote 9 person," which is the footnote in *Chevron* that instructs courts to carefully scrutinize the relevant statutory language, using all of the traditional tools of statutory construction. Jonathan Adler, *Justice Kavanaugh on Major Questions*, Chevron, *and US News Rankings*, *The Volokh Conspiracy* (Jan. 26, 2023).

Justice Alito has called *Chevron* an "increasingly misaligned precedent." *Pereira v. Sessions*, 138 S. Ct. 2105, 2121 (2018) (Alito, J., dissenting). But despite being one of the Court's more hardline conservatives, Justice Alito has not been as critical of *Chevron* as Justices Thomas and Gorsuch. In fact, in his dissent in *Pereira*, Justice Alito seemed to defend *Chevron*, stating that the majority was "simply ignoring" the doctrine. *Id.* In that same dissent, though, Justice Alito acknowledged Justice Thomas and Gorsuch's criticisms of the doctrine but stated that "unless the Court has overruled *Chevron* in a secret decision that has somehow escaped my attention, it remains good law." *Id.* at 2129. And Justice Alito has endorsed strong disavowals of undue deference. *See Kisor v. Wilke*, 139 S. Ct. 2400, 2425 (2019) (joining Justice Gorsuch's concurrence criticizing the Court's decision not to overrule *Auer* deference).

Chief Justice Roberts has advocated that *Chevron* be applied in more limited circumstances than lower courts are currently applying it. In his dissent in *City of Arlington v. FCC*, the Chief Justice

expressed her views on *Chevron* in judicial scholarship, but she has embraced the major questions doctrine, and many believe that she might line up with Chief Justice Roberts and the more moderate conservatives in any reconsideration of *Chevron*.[43]

The Court's three-Justice liberal minority has been less critical of *Chevron*. But these Justices have treaded lightly in recent opinions involving agency interpretations. Justice Kagan, for example, wrote the majority opinion in *Becerra v. Empire Health Foundation*.[44] Despite the fact that *Chevron* was mentioned seventeen times during oral argument, Justice Kagan's decision did not mention *Chevron* a single time and instead, used traditional tools of statutory interpretation—including the "text, context, and structure"—while ultimately confirming the agency's interpretation.[45]

Though Justice Kagan seemingly ignored *Chevron* in *Empire Health*, she has not abandoned it all together. In her dissenting opinion in *West Virginia v. EPA*, which was delivered a few days after her opinion in *Empire Health*, Justice Kagan expressed her support for *Chevron* as part of her criticism of the majority's use of the major questions doctrine. In *Chevron*'s defense, Justice Kagan stated that "Members of Congress often don't know

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endorsed *Chevron* but emphasized that a court "must on its own decide whether Congress—the branch vested with lawmaking authority under the Constitution—has in fact delegated to the agency lawmaking power over the ambiguity at issue." 569 U.S. 290, 317 (2013) (Roberts, C.J., dissenting). As part of that determination, courts should employ *Chevron* Step Zero to determine whether Congress expected the agency to speak "with the force of law" and employ the "traditional tools of statutory construction." *Id.* at 320, 323. In other words, the Chief Justice believes that courts should not be so reflexive in granting deference to agency interpretations but should, instead, engage in the delegation determination with rigor. The Chief Justice's decision to join the Court's then-four-Justice liberal minority in *Kisor* in retaining a form of *Auer* deference—albeit a much weaker one—may also signal his unwillingness to jettison *Chevron* deference in its entirety.

[43] *See Biden*, 143 S. Ct. at 2376 (Barrett, J., concurring); Pamela King, Chevron *Doctrine: Not Dead Yet*, *E&F News (Politico)* (May 24, 2023).

[44] 597 U.S. 424 (2022).

[45] *Id.* at 428-445.

enough—and know they don't know enough—to regulate sensibly on an issue" and as a result, "rely on . . . people with greater expertise and experience" who are "found in agencies."[46]

It is difficult to know the precise stance of the liberal Justices on *Chevron* given the Court's recent retreat from the doctrine, but the Court's decision in *Kisor v. Wilkie* may provide a clue. That case considered the continued viability of *Auer* deference, which is a doctrine similar to *Chevron* in which courts defer to an agency's reasonable interpretation of its own regulations.[47] The Court upheld the doctrine, with Justice Kagan delivering an opinion that was joined by Justice Sotomayor and two other liberal Justices then on the Court (Justice Ginsburg and Justice Breyer), and, in part, by Chief Justice Roberts. In that opinion, Justice Kagan wrote that "*Auer* deference retains an important role in construing agency regulations."[48] But then, in the view of Justice Gorsuch, she "maimed," "enfeebled," and "zombified" the doctrine.[49] This was done by imposing new qualifications and limitations on the doctrine that significantly reduced the circumstances in which *Auer* deference is applied.[50]

While no one can know all the specifics about the views of every member of the Court, it is clear that, regardless of ideological leaning, the Justices are thinking critically about when and how to defer to agency interpretations. The Court now has the opportunity to directly confront that issue as it relates to agency interpretations of statutes.

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[46] *West Virginia*, 142 S. Ct. at 2642 (Kagan, J., dissenting).

[47] *Kisor*, 139 S. Ct. 2408.

[48] *Id.*

[49] *Id.* at 2425 (Gorsuch, J., dissenting).

[50] *Id.*

D. The Reconsideration: *Loper Bright Enterprise v. Raimondo* and *Relentless v. Department of Commerce*

On May 1, 2023 and October 13, 2023, the Supreme Court granted certiorari in *Loper Bright* and *Relentless* to consider the continued viability of *Chevron*.[51] Both cases center on an interpretation of the Magnuson-Stevens Fishery Conservation and Management Act ("Act") by the National Marine Fisheries Service ("Service"). That Act established eight fishery management regional councils to manage fisheries and required each of them propose to the Service "fishery management plans." 16 U.S.C. § 1852(b)-(c), (h). The Act specifies that the plans "shall contain the conservation and management measures" that are "necessary and appropriate for conservation and management of the fishery." *Id.* § 1853(a)(1)(A). The Act sets out certain elements that the fishery management plan must contain and several elements that the plan may include. *Id.* § 1853(a)-(b). The optional elements include items specifically enumerated in the statute and other measures "determined to be necessary and appropriate." *Id.* § 1853(b). The permissive provisions explicitly allow a council to include in a fishery management plan, a requirement "that one or more observers be carried on board a vessel . . . for the purpose of collecting data necessary for the conservation and management of the fishery." *Id.* § 1853(b)(8).

The dispute at issue in *Loper Bright* and *Relentless* arose as a result of an amendment that the New England Fishery Management Council ("Council") made to its Atlantic Herring Fishery Management Plan. The Council's original fishery management plan was

[51] *Looper Bright* is an appeal from D.C. Circuit, *Loper Bright Enterprises, Inc. v. Raimondo*, 45 F.4th 359 (D.C. Cir. 2022). *Relentless* is an appeal from the First Circuit, *Relentless, Inc. v. U.S. Department of Commerce*, 62 F.4th 621 (1st Cir. 2023). The facts in this section are drawn from the Court of Appeals' opinions.

implemented in 2000, and provided that the Atlantic herring fishery is subject to monitoring, including by government-funded observers. In 2013, the Council started a process to provide for the use of industry-funded monitors to reduce uncertainty around catch estimates. To effect that program, the Council proposed an amendment to its fishery management plans. The amendment provided general guidelines for industry-funded monitoring in all of the Council's fishery management plans and specifically provided for the owners of herring vessels to bear the expense of contracting for some of the monitors. The amendment was presented to the Service and went through notice-and-comment rulemaking before being implemented.

The final rule issued by the Service does not require monitors on all vessels but sets a target percentage of 50% of herring trips to be monitored. The rule provides that government-funded observers under the original fishery management plan count toward the 50% target, but that industry is responsible for funding additional monitors to reach the target. The Service estimated that the industry cost of the final rule to the herring fishery would be $710 per day and could reduce annual vessel returns by around 20%.

In each of the cases before the Court, two groups of commercial fishermen challenged the final rule, claiming, among other things, that the Act does not authorize the Service to create industry-funded monitoring requirements. The fisherman (at least in *Loper Bright*) acknowledged that the Act permits the Service to require at-sea monitors but argued that it does not permit the Service to require industry to fund those monitors, focusing on the absence of language in the Act allowing the Service to force industry to pay for the monitors.

Both the D.C. Circuit and the First Circuit rejected the fishermen's argument but employed slightly different reasoning in doing so. The D.C. Circuit conducted a thorough

analysis regarding whether *Chevron* applied and, if so, whether to defer to the agency's interpretation. The court started its analysis by addressing and disposing of the major questions doctrine; the agency interpretation was not one of particular "economic or political significance" but was, instead, a discrete interpretation in an area of the agency's expertise and experience. That being the case, the court applied the *Chevron* two-step framework. In step one, the court employed the "traditional tools of statutory interpretation" and determined that Congress had not spoken on the issue of whether the Act allows the Service to pass on to industry the costs of monitoring requirements included in fishery management plans. The court therefore moved to step two and found that the Service's interpretation of the Act was reasonable.

Like the D.C. Circuit, the First Circuit cited *Chevron* as part of its analysis, but unlike the D.C. Circuit did not really apply the *Chevron* framework. Instead, the court did its own analysis of the proper interpretation of the Act and concluded that the Act permitted the Service to pass on monitoring fees to industry. As a wrap-up on the *Chevron* issue, the court stated that it "need not decide whether we classify this conclusion as a product of *Chevron* step one or step two" because its interpretation was consistent with the agency's interpretation.

The differing manner in which the Circuit Courts analyzed the issues surrounding the Service's interpretation highlights the difficulties with applying *Chevron*. To further underscore the inconsistency in how courts treat *Chevron*, the D.C. Circuit's opinion drew a dissent. In that dissent, Judge Justin Walker applied an intermediate step between *Chevron* step one and step two that looked very similar to the test applied in major question cases. According to Judge Walker, even when a statute is ambiguous and the case does not involve

a major question, a court must decide whether "Congress either explicitly or implicitly delegated authority [to the agency] to cure that ambiguity" before moving to *Chevron* Step Two and deferring to the agency's interpretation. While Judge Walker found that the Act was ambiguous, he concluded that the Act does not implicitly delegate the authority to the Service to require industry to pay for the at-sea monitors.

Both groups of fishermen petitioned for Supreme Court review. In the *Loper Bright* petition, the fishermen presented two questions to the Court for review: (1) "Whether, under a proper application of *Chevron*, the MSA implicitly grants [the Service] the power to force domestic vessels to pay the salaries of the monitors they must carry"; and (2) "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." In what many interpreted as a signal of its intent, the Court rejected the first question and only granted review for the second question, whether to overrule or narrow *Chevron*.

The Court provided another possible indication of its intent when it granted review in *Relentless*. As in *Loper Bright*, the Court decided not to hear the statutory interpretation question presented by the petition in *Relentless*. The Court, instead, granted review of the exact same question as it had in *Loper Bright*, and scheduled the cases to be heard in tandem in January 2024.[52]

[52] The Court's decision to grant certiorari in a case nearly identical to *Loper Bright* (rather than simply hold the *Relentless* petition) might be explained by the posture of *Loper Bright*. Justice Brown Jackson recused herself in *Loper Bright* because she heard argument in that case while on the D.C. Circuit, and the Court's decision to review *Relentless* gives the entire court an opportunity to consider what may be a significant decision of the Court.

E. The Arguments: The Case For and Against *Chevron*

The *Loper Bright* and *Relentless* cases present the Court with an opportunity to give the *Chevron* doctrine a makeover. No matter whether it is a facelift or reconstructive surgery, the Court is likely to do something. The application of the doctrine is too complex, too inconsistent, and too unpredictable for the status quo to stand.

Since the grant of certiorari in *Loper Bright*, judicial scholars and legal practitioners have been lining up on both sides of the *Chevron* debate. There are good arguments for both keeping the doctrine and doing away with it.

1. *Arguments Against* Chevron

Chevron's detractors have mounted a strong case against the doctrine. Critics argue that *Chevron* is inconsistent with the Constitution, at odds with the Administrative Procedure Act ("APA"), contrary to the historical record, and unmanageable. With the help of the briefing in *Loper Bright*, this section provides an overview of the primary criticisms of *Chevron*.

a. Inconsistent with the Constitution

Critics take aim at *Chevron* for being inconsistent with constitutional principles, most fundamentally, the separation of powers.[53] This principle is rooted in Articles I-III of the Constitution, with Article I vesting "[a]ll legislative Powers" in Congress, Article II vesting "[t]he executive Power" in the President, and Article III vesting "[t]he judicial Power" in the

[53] *See, e.g.*, *Michigan*, 576 U.S. at 761 (Thomas, J., concurring) (stating that *Chevron* violates the separation of powers by "wrest[ing] from Courts the ultimate interpretative authority to 'say what the law is'" and "hand[ing] it over to the Executive"); *Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring) ("*Chevron* seems no less than a judge-made doctrine for the abdication of the judicial duty."); *CSX Transp. v. United States*, 867 F.2d 1439, 1445 (D.C. Cir. 1989) (Edwards, J., dissenting) ("*Chevron*'s mandate is perplexing, because the rule of the case appears to violate separation of powers principles[.]").

courts.[54] The Framers established the separation of powers because, in their view, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."[55]

Opponents say *Chevron* upsets the separation of powers, first, by shifting a judicial function to the Executive Branch. The Supreme Court in *Marbury v. Madison* stated that "[i]t is emphatically the province and duty of judicial department to say what the law is."[56] As Alexander Hamilton put it, the power to "ascertain" the meaning of not only "the Constitution" but also "any particular act proceeding from the legislative body" must "belong[]" to "the judges" alone.[57] *Chevron* disturbs the constitutional balance of powers by taking the power to decide what the law means out of the hands of the judiciary. Rather than reserving statutory interpretation for the court, *Chevron* requires a court to defer to a reasonable interpretation of an Executive agency even if the court disagrees with the agency. In this sense, one legal scholar has dubbed *Chevron* as the "counter-*Marbury*" for the administrative state.[58]

Though some note that *Chevron* is founded on an implicit delegation of authority by Congress for an Executive agency to decide matters of statutory interpretation, critics of *Chevron* argue that this does not cure the separation of powers problem. This is because the

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[54] U.S. Const. arts. I-III.

[55] THE FEDERALIST NO. 47 (James Madison).

[56] 5 U.S. (1 Cranch) 137 (1803).

[57] THE FEDERALIST NO. 78 (Alexander Hamilton); *id.* ("The interpretation of the laws is the proper and peculiar province of the courts.").

[58] Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2075 (1990).

Supreme Court has explicitly held that Congress lacks the power to delegate the judicial power to a different branch.[59]

A second concern is the constitutional prohibition on delegating legislative power to the Executive Branch—a principle known as the non-delegation doctrine.[60] The non-delegation doctrine finds its footing in the separation of powers and Article I's Vesting Clause, which gives all legislative power to Congress.[61] Because the Framers allocated all legislative power to Congress, the Constitution "permits no delegation of those powers."[62] Non-delegation critics say that *Chevron* endorses a constitutionally infirm shift in legislative power from Congress to the Executive Branch.

Opponents of *Chevron* also contend that it violates due process.[63] The Fifth Amendment guarantees that no person shall be "deprived of life, liberty, or property, without due process of law."[64] A basic requirement of due process is "[a] fair trial in a fair tribunal" in which a party is not a "judge in [its] own case."[65] *Chevron* antagonists say that the doctrine

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[59] *See Stern v. Marshall*, 564 U.S. 462, 484 (2011) ("Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government's 'judicial Power' on entities outside Article III.").

[60] *See* Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post-Chevron Era*, 32 B.C. L. REV. 757, 773-74 (1991) ("[*Chevron*] upsets the balance created by the Supreme Court in its nondelegation doctrine.").

[61] U.S. Const. art. I, § 1.

[62] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001).

[63] *See Egan v. Delaware River Port Auth.*, 851 F.3d 263, 281 (3d Cir. 2017) (Jordan, J., concurring in judgment) ("We would never allow a private litigant the power to authoritatively reinterpret the rules applicable to a dispute, yet we routinely allow the nation's most prolific and powerful litigant, the government, to do exactly that.").

[64] U.S. Const. Amend. V.

[65] *In re Murchison*, 349 U.S. 133, 136 (1955),

violates due process because it places the thumb on the scale for the government by pre-committing the court to favor the government's "judgments about the law."[66]

b. Violation of APA

Another criticism of *Chevron* is that it is inconsistent with the APA.[67] Section 706 of the APA states in plain terms that "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." 5 U.S.C. § 706. *Chevron* detractors say that the APA leaves no room for deference to agency interpretations. Indeed, Congress placed a "court's duty to interpret statutes on an equal footing with its duty to interpret the Constitution."[68] *Chevron* "flout[s] the language of the [APA]."[69]

c. Contrary to the Historical Record

Commentators have argued that *Chevron* is at odds with the historical record.[70] According to this argument, judicial interpretation of statutes in cases involving agency action traces its roots to 1875 when Congress conferred general federal-question jurisdiction on the courts. With the new-found jurisdiction, courts did not defer to agency interpretations and interpreted statutes on their own. This was the case until the 1940s when the Supreme Court "steadily expanded the zone of interpretive discretion given to

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[66] Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187, 1212 (2016).

[67] See *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 109 (2015) (Scalia, J., concurring in judgment) (describing *Chevron* as "[h]eedless of the original design of the APA").

[68] John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEXAS L. REV. 113, 194 (1998).

[69] Kavanaugh, *supra* note 16, at 2150 n.161.

[70] Aditya Bamzi, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L. J. 908 (2017); Michael B. Rappaport, Chevron *and Originalism: Why* Chevron *Deference Cannot Be Grounded in the Administrative Procedure Act*, 57 Wake Forest L. Rev. 1281 (2022).

administrative agencies."[71] In response to this trend, Congress enacted the APA, which made clear that statutory interpretation was the exclusive province of the courts.

d. Unworkable Application

Chevron opponents cite to the complexity, subjectivity, and inconsistency in application of the doctrine as a reason to get rid of it. The most basic issue with *Chevron* is its threshold tests for triggering agency deference. Whether it is determining the applicability of the major questions doctrine, deciding whether Congress would expect an agency to speak with the force of law, or assessing ambiguity, there is considerable leeway for courts to reach different results. For example, some judges readily find ambiguity and engage in "reflexive deference" to agencies,[72] whereas other judges never find ambiguity.[73] The inconsistency in *Chevron*'s application has caused Justice Kavanaugh to observe that the doctrine may be "antithetical to the neutral, impartial rule of law."[74]

e. Frustration of Legislative Process

Chevron's detractors point to its impacts on the legislative process as a flaw with the doctrine. According to these critics, the doctrine discourages legislative compromise because one side of the congressional aisle has little incentive to give in when it can lean on

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[71] Bamzi, *supra* note 70, at 976-77.

[72] *Pereira*, 138 S. Ct. at 2120 (Kennedy, J., concurring).

[73] *See, e.g.*, Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 VAND. L. REV. EN BANC 315, 323 (2017) ("I personally have never had occasion to reach Chevron's step two in any of my cases[.]").

[74] Kavanaugh, *supra* note 16, at 2152-54.

its party members in the Executive Branch to further their policy objectives.[75] Some observe that this has made Congress "all too happy to stay out of the business of governing."[76]

Commentators also suggest that *Chevron* has emboldened the Executive Branch to take extreme positions and push its agenda through regulatory decree rather than legislative compromise. According to Justice Kavanaugh, "*Chevron* encourages the Executive Branch (whichever party controls it) to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints."[77] "[E]very few years," new presidential administrations take office and make "radical changes to the meaning of numerous laws."[78] This, in the view of some, is no way to govern and is inconsistent with how the Constitution allocated responsibilities.

f. Impact on Citizenry

Justice Gorsuch has observed that *Chevron* has real-world consequences for the governed. The citizenry is "charged with an awareness of *Chevron*," and the full range of executive lawmaking it empowers.[79] Citizens are, therefore, "required not only to conform their conduct to the fairest reading of the law they might expect from a neutral judge, but forced to guess whether the statute will be declared ambiguous; to guess again whether the

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[75] *See West Virginia*, 142 S. Ct. at 2618 (Gorsuch, J., concurring) (identifying problems with permitting Congress to divest its legislative power to the Executive Branch); *Egan*, 851 F.3d at 279 (Jordan, J., concurring in the judgment) (explaining that, because of *Chevron*, Congress refuses to "undertak[e] the difficult work of reaching consensus on divisive issues").

[76] Jonathan Wood, *Overruling* Chevron *Could Make Congress Great Again*, THE REG. REV. (Sept. 12, 2018), https://www.theregreview.org/2018/09/12/wood-overruling-chevron-make-congress-great-again/.

[77] Kavanaugh, *supra* note 16, at 2150.

[78] Richard J. Pierce, Jr., The Combination of *Chevron* and Political Polarity Has Awful Effects, 70 Duke L.J. Online 91, 92 (2021).

[79] *Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., dissenting).

agency's initial interpretation of the law will be declared 'reasonable'; and to guess *again* whether a later and opposing agency interpretation will *also* be held 'reasonable.'"[80] This "make[s] it impossible for Americans to be able to rely on any stable legal regime as the basis for their decisionmaking in many important contexts."[81]

2. *Arguments for* Chevron

Chevron is not without supporters. The proponents argue that *Chevron* strikes an appropriate balance between the three branches of government and promotes better policy by putting technical and scientific issues in the hands of agency experts. The supporters also argue that *Chevron* fosters uniformity in the administration of federal law and minimizes judicial activism. According to the pro-*Chevron* camp, the doctrine should not be jettisoned because the government, regulated parties, and the public have arranged their affairs around it. Again with the help of the briefing in *Loper Bright*, this section outlines the primary arguments in support of *Chevron*.

a. Appropriately Invokes and Defers to Agency Expertise

Chevron adherents point out that the government faces many complex issues that involve technical or scientific matters. Members of Congress often do not have the requisite expertise to address those issues, and federal judges are frequently "not experts in the field."[82] These issues are generally best addressed by subject matter experts at the agencies.

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[80] *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., dissenting from the denial of certiorari).

[81] Pierce, *supra* note 78, at 92.

[82] *Chevron*, 467 U.S. at 865.

As recognized by Justice Kagan, the *Chevron* doctrine respects the "'unique expertise'" that federal agencies can bring to bear when addressing issues left unresolved by Congress.[83] The decision of Congress to leave an ambiguity for an agency to resolve in a statute, in the view of the *Chevron* Court, often reflects a principled judgment that "those with great expertise . . . would be in a better position" to "strike the [appropriate] balance."[84]

Those that proffer this argument frequently cite cases that have deferred to agency interpretations on especially complex and technical issues as evidence of the utility of *Chevron*. For example, *Chevron* deference has been afforded to agency regulations applicable to nuclear energy and the development of new drugs, which are issues that many argue Congress and the judiciary are not equipped to handle.[85]

b. Promotes National Uniformity in Administration of Federal Law

Some say that *Chevron* promotes uniformity in the administration of federal law. This is because the doctrine instructs courts—meaning all courts—to defer to an agency's reasonable interpretation rather than deciding the issue *de novo* on a case-by-case basis, which has the potential to generate conflicting views about the meaning of the statute.[86] If *Chevron* were to disappear, some argue that it would invite a patchwork of conflicting

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[83] *Kisor*, 139 S. Ct. at 2413.

[84] *Chevron*, 467 at 865.

[85] *See, e.g.*, *Environmental Def. Fund v. NRC*, 902 F.2d 785, 788-789 (10th Cir. 1990) (applying *Chevron* to an agency's "regulation of uranium and thorium mill tailings"); *Otsuka Pharm. Co. v. Price*, 869 F.3d 987, 993-995 (D.C. Cir. 2017) (applying *Chevron* to agency interpretation surrounding development of new drugs).

[86] *See Kisor*, 139 S. Ct. at 2413 (calling uniformity in interpretation a "well-known benefit" of agency deference and recognizing "Congress's frequent 'preference for resolving interpretive issues by uniform administrative decision, rather than piecemeal litigation'").

statutory interpretations and "would render the binding effect of agency rules unpredictable."[87]

c. Promotes Greater Political Accountability for Regulatory Policy

Chevron proponents argue that the doctrine facilitates the application of better policy that includes input from industry and the public. One of the primary ways in which agencies promulgate their statutory interpretations is through notice-and-comment rulemaking. The notice-and-comment process invites the public and industry to comment about whether an agency interpretation is consistent with the underlying statute and good policy. In the absence of *Chevron*, a court could override a carefully constructed policy by substituting its interpretation for the agency's interpretation.

d. Reduces Legislative Gridlock

Commentators have suggested that *Chevron* enables the legislative process. In particular, *Chevron* permits Congress to leave open certain issues when enacting legislation for an agency to address. This saves Congress time and avoids disagreement in the legislative process. Without *Chevron*, Congress likely would need to be more specific to ensure that legislation accomplishes the appropriate policy goals and likely would need to address contentious issues rather than deferring them to agencies. This could lead to legislative gridlock, especially given the severely fractured nature of today's Congress.

[87] *City of Arlington*, 569 U.S. at 307.

e. Appropriately Balances the Roles of the Executive and Judicial Branches

The Supreme Court has recognized that *Chevron* "reflects a sensitivity to the proper roles of the political and judicial branches."[88] As the *Chevron* Court put it, the judiciary should not be responsible for "reconcil[ing] competing political interests."[89] Instead, policy choices should be made by the Executive Branch, which must rely on its "views of wise policy to inform its judgments."[90] The reason is that Executive "agencies . . . have political accountability, because they are subject to the supervision of the President, who in turns answers to the public."[91] Federal judges, on the other hand, do not have to account to the public and as a result, may resolve statutory ambiguities "on the basis of [their] personal policy preferences."[92] Indeed, empirical researchers have concluded that *Chevron* has been effective at "remov[ing] politics from judicial decisionmaking."[93]

f. Rooted in Tradition of Deference

Chevron supporters attempt to counter the suggestion that the doctrine is inconsistent with the historical record. *Chevron* itself stated that the Supreme Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme" and identified a number of examples.[94] As early 1878,

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[88] *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680 (1991).

[89] *Chevron*, 467 U.S. at 865.

[90] *Id.*

[91] *Kisor*, 139 S. Ct. at 2413.

[92] *Chevron*, 467 U.S. at 865-66.

[93] Kent Barnett et al., *Administrative Law's Political Dynamics*, 71 VAND. L. REV. 1463, 1466 (2018).

[94] *Chevron*, 467 U.S. at 844.

the Supreme Court stated in *United States v. Moore*, that the "construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration."[95] This, according to *Chevron* proponents, coupled with several additional instances of judicial deference both before and after the enactment of the APA demonstrates a strong tradition of agency deference.

g. Adherence to *Stare Decisis*

Those that support *Chevron* suggest that overruling the decision would violate *stare decisis*. But the pro-*Chevron* and anti-*Chevron* camps vigorously debate whether *Chevron* is entitled to *stare decisis*, and if so, in what form. The advocates argue that *stare decisis* provides a particularly high barrier to overruling *Chevron* because the decision has been on the books for 40 years and Congress has not altered it despite being able to do so. These proponents contend that the application of *stare decisis* in *Loper Bright and Relentless* should be no different to how the issue was decided in *Kisor*, which found that *stare decisis* cut strongly against overruling *Auer*.

The *Chevron* detractors argue that the decision is entitled to little to no *stare decisis*. This is because, in their view, *Chevron* is merely an "interpretive methodology" or a "procedural" rule. These opponents also argue that *stare decisis* does not apply because *Chevron* was "egregiously wrong" and had "significant jurisprudential" and "real world consequences," and overruling it would not "unduly upset reliance interests."

[95] 95 U.S. 760, 763 (1878).

h. Frustration of Reliance Interests

The two sides spar over whether overruling *Chevron* would upset reliance interests. Supporters note that *Chevron* has been invoked in thousands of decisions to uphold an agency's reasonable interpretation and that the government and private parties have organized their affairs around *Chevron*. These *Chevron* champions predict a veritable doomsday if the Court were to overrule *Chevron*, with such a decision casting doubt on many settled statutory constructions and introducing significant uncertainty in many areas of law. The critics of *Chevron*, however, argue that *Chevron* is itself a reliance-destroying doctrine. This is because the doctrine enables agencies to change statutory import and enables every new administration to change the rule on issues of fundamental importance.

i. Workability of *Chevron*

The *Chevron* proponents disagree that the doctrine is unworkable. These advocates chastise the suggestion that *Chevron* fosters an unacceptable level of inconsistency because judges have different views of ambiguity. Without *Chevron*, the courts would have no unifying North Star because they would all be approaching statutory interpretation on a fresh slate. This, in the eyes of *Chevron* supporters, would exacerbate, not ameliorate, concerns about inconsistency.

The *Chevron* disciples also argue that *Chevron* is a familiar framework that sets forth a clear path to deciding issues involving agency interpretations. These advocates contend that the Court's recent decisions that clarify and limit the application of the *Chevron* framework make the doctrine more workable, rather than less.

j. Consistent with Constitution

Chevron supporters say that it is wrong to suggest that the doctrine is inconsistent with the Constitution. These individuals assert that the doctrine does not dishonor Article III because reviewing courts "retain a firm grip on the interpretive function" when applying *Chevron*.[96] This includes a determination about whether Congress has directly spoken on the precise question at issue and if not, whether the agency's interpretation falls within the zone that Congress has left open for the exercise of judgment and discretion. This, the supporters say, all demonstrates that the doctrine does not impermissibly shift judicial power to the Executive Branch.

The advocates also note that *Chevron* is founded on an implicit delegation of authority by Congress to an agency to interpret a statute. Just like for an express delegation authority, Article III does not permit a federal court to disregard Congress's implicit delegation and supplant an agency's definition with the court's own. A court is not "abdicating its constitutional duty to 'say what the law is' by deferring to agency interpretations of law."[97] It is instead appropriately recognizing that the most faithful interpretation is that of the body to whom Congress delegated.[98]

The proponents also attempt to refute the suggestion that *Chevron* is inconsistent with the non-delegation doctrine. They note that the Supreme Court has repeatedly found that it is appropriate for Congress to delegate authority to an agency so long as it provides

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[96] *Kisor*, 139 S. Ct. at 241

[97] Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 27-28 (1983).

[98] Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1, 21 (1985).

"an intelligible principle" to guide the agency's discretion.[99] *Chevron*, in their view, is consistent with this principle.

Finally, the supporters contest the suggestion that *Chevron* violates due process. They argue that due process focuses on "actual bias on the part of [a] judge"[100] and that a judge does not evince bias when determining under *Chevron* whether an agency's interpretation is reasonable. These supporters also argue that *Chevron* is embracing the will of the people by giving effect to the choices of an elected President.

k. Consistent with APA

Chevron defenders disagree with the suggestion that the doctrine is at odds with the APA. As the *Kisor* court recognized, while the APA directs a reviewing court to "decide all relevant questions of law," it does not "specify the standard of review a court should use" and thus does not foreclose reviewing an "agency's reading for reasonableness."[101]

F. The Ways in Which *Loper Bright* and *Relentless* May be Decided

The arguments for and against *Chevron* will be put to the test in *Loper Bright* and *Relentless*. The Court's decision could range from maintaining *Chevron* in its current form to getting rid of *Chevron* entirely. This section discusses the ways in which the Court could decide *Loper Bright* and *Relentless*.

1. Option 1: Retain *Chevron* in Its Current Form

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[99] *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019).

[100] *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 877 (2009)

[101] *Kisor*, 139 S. Ct. at 2419; *see also* John F. Manning, Chevron *and the Reasonable Legislator*, 128 HARV. L. REV. 457, 459 (2014) ("[T]he reviewing court fulfills its duty to 'interpret' the statute by determining whether the agency has stayed within the bounds of its assigned discretion.").

The first way in which the Court could decide the *Loper Bright* and *Relentless* cases is to uphold the *Chevron* doctrine without alteration. The Court in this scenario would reaffirm the *Chevron* two-step process surrounding agency interpretations and instruct courts to continue to adhere to the limitations on the doctrine imposed by the major questions doctrine and *Chevron* Step Zero.

This outcome is unlikely. The Court probably did not grant review on the particular question of the continued viability of *Chevron* deference simply to affirm the doctrine. A majority of the current Court has spoken out against the prevailing application of *Chevron.* But even the liberal members of the Court are unlikely to embrace *Chevron* in its current form. There almost is no chance that the conservative majority will leave *Chevron* untouched, and the best a *Chevron* defender could likely hope for is a decision like *Kisor* that maintains *Chevron* but emphasizes its limitations. The liberal Justices in *Kisor* understood that they needed to broker a compromise to maintain *Auer* deference, and it would not be a surprise if they do the same here, lest a different approach lead to a more extreme rebuke of *Chevron*.

The circumstances surrounding the Court's grants of certiorari also suggest that the Court is poised to alter *Chevron*. The petitioners in *Loper Bright* presented the Court with two questions for review, one of which was a simpler question about statutory interpretation. The Court decided to only take up the harder question of whether to overrule *Chevron*. Against the backdrop of the doctrine of constitutional avoidance, the Court's decision to hear only the *Chevron* question, which presents a constitutional quandary, indicates that the Court may be ready to modify the rules around agency deference. Similarly, the Court's decision to grant certiorari in a second case that allows Justice Brown

Jackson to participate in the decision signals that the Court may be prepared to make a significant change.

2. Option 2: Keep the *Chevron* Doctrine But Clarify and Narrow Its Applicability

The second way in which the Court could decide the *Loper Bright* and *Relentless* cases is to keep the *Chevron* doctrine and alter the manner in which it works. The Court may frame such an opinion as a "clarification" of how it believes courts always should have been treating agency deference, but the opinion likely will alter the manner in which agency deference is handled in the future.

The Court's opinion addressing *Auer* deference in *Kisor* may provide a good roadmap for what this option would look like. In that case, a badly fractured Court decided to retain *Auer* but morphed it and diminished its impact. Relying in part on *stare decisis*, the plurality wrote that the Court was "uphold[ing]" *Auer*, but as Justice Gorsuch put it while concurring in judgment, the majority actually introduced a "kinder, gentler version of *Auer*."[102] Many of the same arguments that are raised in the context of *Chevron* were raised and rejected by the *Auer* majority. The plurality opinion laid out several principles for *Auer* deference that may find their way into an opinion upholding but refining *Chevron*:

- First, agency deference only applies if a regulation—or a statute in the case of *Chevron*—is *genuinely* ambiguous, meaning that "the interpretive question still has no single right answer" even after *exhausting* all the traditional tools of construction.[103] Put another way, "a court cannot wave the ambiguity flag just because it found the [statute] impenetrable on first read."[104] The court

[102] *Kisor*, 139 S. Ct. at 2446 (Gorsuch, J., concurring in judgment).

[103] *Id.* at 2415.

[104] *Id.*

must, instead, "'carefully consider' the text, structure, history, and purpose" of the statute, "in all the ways it would if it had no agency to fall back on."[105]

- Second, if a statute is genuinely ambiguous, the agency's reading must be "reasonable," meaning that it "must come within the zone of ambiguity that the court has identified after employing all its interpretative tools."[106] This should be viewed as a "requirement an agency can fail."[107]

- Third, the agency interpretation at issue must be the official position of the agency, meaning that it "must at least emanate from those actors, using those vehicles, understood to make authoritative policy in the relevant context."[108]

- Fourth, the agency's interpretation "must in some way implicate its substantive expertise."[109]

- Fifth, the agency's interpretation "must reflect 'fair and considered judgment.'"[110] The agency's interpretation, for example, may not create "unfair surprise," such as when an agency substitutes one interpretation for a conflicting one.[111] Similarly, the agency's interpretation would not trigger deference in a case in which it post-dated the relevant conduct and in effect, imposed retroactive liability.[112]

The *Kisor* majority embraces an approach to decisions surrounding agency deference in a manner consistent with footnote 9 of *Chevron*. In that footnote, the *Chevron* Court emphasized that a reviewing court must employ the "traditional tools of statutory construction" when determining the issue of ambiguity.[113] The *Kisor* majority's emphasis on the language of *Chevron* footnote 9 and its emphasis on the point that there must be a *genuine*

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[105] *Id.*

[106] *Id.* at 2415-16.

[107] *Id.* at 2416.

[108] *Id.* at 2416.

[109] *Id.* at 2417.

[110] *Id.*

[111] *Id.* at 2417-18.

[112] *Id.* at 2418.

[113] *Chevron*, 467 U.S. at 844 n.9.

ambiguity for deference to apply (guidance Justice Kagan repeated twelve times) provide some reason to believe that the Court will adopt the *Kisor* approach with *Chevron*. The *Kisor* majority consisted of Justices Kagan, Ginsburg, Breyer, and Sotomayor and Chief Justice Roberts. Justices Ginsburg and Breyer are, of course, no longer on the Court. So assuming that Chief Justice Roberts stays with Justices Kagan and Sotomayor, the *Kisor* approach would need two more votes to win the day in *Loper Bright* and *Relentless*. Justice Brown Jackson likely will side with the other liberal Justices. And *Kisor*'s embrace of *Chevron*'s footnote 9 may sway Justice Kavanaugh, who has described himself as a footnote 9 adherent, and possibly Justice Coney Barret, who is a noted textualist and a more moderate conservative.

If the Court decides to modify *Chevron*, it could also make other tweaks to the doctrine. The Court could, for example, conclude that it is inappropriate to treat statutory silence as an implicit delegation of authority that triggers *Chevron* and thereby limit the application of the doctrine to cases of genuine ambiguity.[114] The Court could also conclude that the *Chevron* framework does not apply unless there is convincing proof of an actual delegation or unless the interpretation at issue flows from notice-and-comment rulemaking.

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[114] *See* Nathan Alexander Sales & Jonathan H. Adler, *The Rest is Silence:* Chevron *Deference*, *Agency Jurisdiction, and Statutory Silences*, 2009 UNIV. ILL. L. REV. 1497, 1518 ("Those that have weighed the issue generally have held that Congress's failure to expressly deny a power to an agency is not an ambiguity on whether that power has been delegated."); *see also City of Arlington*, 569 U.S. at 321-22 (Roberts, C.J., dissenting) ("*Chevron* deference is based on, and finds legitimacy as, a congressional delegation of interpretive authority. An agency interpretation warrants such deference only if Congress has delegated authority to definitively interpret a particular ambiguity in a particular manner. Whether Congress has done so must be determined by the court on its own before *Chevron* can apply.").

Regardless of how the Court modifies the doctrine, a modification would not mean that the Court will abandon the major questions doctrine or *Chevron* Step Zero. Those doctrines will almost certainly continue to be limitations on the invocation of *Chevron*. A new *Chevron* framework would only apply if a case gets past these limitations.

3. Option 3: Overrule *Chevron*

The third way in which the Court may decide *Loper Bright* and *Relentless* is by outright overruling *Chevron.* At first blush, it may seem that the Court's *Kisor* decision portends the survival of *Chevron*. After all, that case dealt with very similar arguments to those made against *Chevron*. But in his concurring opinion in *Kisor*, Chief Justice Roberts wrote that "[i]ssues surrounding judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes enacted by Congress. I do not regard the Court's decision today to touch upon the latter question."[115] The issues being referred to by the Chief Justice include heightened constitutional concerns and significant workability issues. The *Kisor* opinion, therefore, does not necessarily predict a result in *Loper Bright* and *Relentless*.

Additionally, the composition of the Court also has changed since *Kisor*. The Court has one fewer liberal Justice and one more conservative Justice. Justices Gorsuch and Thomas are certainly ready to see the *Chevron* doctrine go. That means that the anti-*Chevron* camp likely needs to pick up three additional votes from a potential pool that likely includes Chief Justice Roberts, Justice Kavanaugh, Justice Alito, and Justice Coney Barret. The opinion authored by Justice Kavanaugh in *Kisor*, which concurred in the judgment and was joined by

[115] *Kisor*, 139 S. Ct. at 2425 (Roberts, C.J., concurring in part) (internal citation omitted).

Justice Alito, suggests that those Justices may be receptive to the elimination of *Chevron*. Justice Kavanaugh ultimately expressed comfort with the *Kisor* majority opinion because of its mandate for the rigorous application of *Chevron* footnote 9, but he stated that "[f]ormally rejecting *Auer* would have been more direct."[116]

If the Court does eliminate *Chevron*, the result may not be as drastic as one might expect. The opinion would likely be similar to Justice Gorsuch's opinion in *Kisor*. In that opinion, Justice Gorsuch rejected the idea that an agency interpretation should receive *controlling* weight, but he did not say that agency interpretations should, as a rule, receive no weight at all. Instead, Justice Gorsuch advocated that the Court should go back to a world that affords only *Skidmore* deference to agency interpretations, meaning that courts would "decide cases based on [their] independent judgment and 'follow [the] agency's [view] only to the extent that it is persuasive.'"[117] Under this rule, a court would only consider an agency interpretation to the extent that it had the "power to persuade" based on "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.'"[118]

If the Court were to adopt Justice Gorsuch's approach in deciding *Loper Bright* and *Relentless*, the effective result would not be meaningfully different than if it adopted the *Auer* framework set out by the *Kisor* majority. Chief Justice Roberts observed that the "distance between" the two approaches "is not as great as it may initially appear," and Justice

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[116] *Id.* at 2448 (Kavanaugh, J., concurring in judgment).

[117] *Id.* at 2447 (Gorsuch, J., concurring in judgment).

[118] *Id.*

Kavanaugh made a similar observation.[119] This is because Justice Gorsuch's "reasons that a court might be persuaded to adopt an agency's interpretation as its own" under *Skidmore* and the prerequisites and limitations to *Auer* deference set out by Justice Kagan "have much in common."[120]

Some may suggest that the Court is unlikely to jettison *Chevron* because of the impact it would have on prior decisions decided under the doctrine. But Justice Gorsuch addressed this issue in *Kisor*, as it related to *Auer* deference, and stated that "[w]e are not dealing with a precedent that purported to settle the meaning of a single statute or regulation or resolve a particular case."[121] Any case decided under *Chevron*'s Step One, under the major questions doctrine, or *Chevron* Step Zero would be unaffected by overruling *Chevron*. So too would any case decided under *Chevron* Step Two to the extent that the agency's interpretation had the power to persuade. The only cases that may be impacted are those that relied on an agency interpretation that is inconsistent with the best reading of the statute under traditional interpretive principles.

G. Oral Argument in *Loper Bright* and *Relentless*

The Supreme Court heard oral argument in *Relentless* and *Loper Bright* on January 17, 2024. Based on the questions posed during oral argument, a majority of the Court appears to be considering serious changes to—or outright rejection of—the *Chevron* doctrine.

1. Justices Gorsuch and Kavanaugh

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[119] *Id.* at 2424 (Roberts, C.J., concurring in part); *Id.* at 2448 (Kavanaugh, J., concurring in judgment).

[120] *Id.* at 2424-25 (Roberts, C.J., concurring in part).

[121] *Id.* at 2444 (Gorsuch, J., concurring in judgment).

Justices Gorsuch and Kavanaugh were the harshest critics of *Chevron* and seemed to favor jettisoning the doctrine altogether. Justice Gorsuch, for example, was deeply troubled that agency interpretations of the same statute can swing from pole to pole each time a new administration takes office. He noted, for instance, that the FCC had flip flopped on its interpretation of how broadband service should be classified under the relevant statute with every new administration since President Bush and repeatedly criticized the *Brand X*[122] case, which essentially rubber-stamped this practice.[123] He decried *Brand X* as a "recipe for instability"[124] and *Chevron* as a "recipe for anti-reliance."[125] Justice Gorsuch also seemed to reject the notion that "ambiguity" could be defined in any way that provided meaningful guidance to the lower courts,[126] noting that "even the federal government at the podium can't answer the question what triggers ambiguity."[127]

Justice Gorsuch was the only justice to emphasize that *Chevron* is routinely weaponized against the individual and vulnerable:

> [T]he immigrant, the veteran seeking his benefits, the Social Security Disability applicant, who have no power to influence agencies, who will never capture them, and whose interests are not the sorts of things on which people vote, generally speaking . . . . I didn't see a case cited . . . where *Chevron* wound up benefitting those kinds of peoples. And it seems to me that it's arguable . . . that *Chevron* has this disparate impact on different classes of persons . . . .[128]

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

[123] Tr. of Oral Arg. at 23:23–24:9, *Relentless, Inc. v. U.S. Dep't of Com.*, 144 S. Ct. 325 (2023).

[124] *Id*. at 93:10–12.

[125] *Id*. at 93:24–94:1.

[126] *Id.* at 87:23–90:13.

[127] *Id.* at 88:19–21; *see also* Tr. of Oral Arg. at 52:9–12, *Loper Bright Enters. v. Raimondo*, 143 S. Ct. 2429 (2023).

[128] Tr. of Oral Arg. at 132:10–133:2, *Relentless*, 144 S. Ct. 325.

The concept of implied delegation was particularly offensive to Justice Gorsuch in this context: "[T]here are many instances where Congress didn't think about it. And in every one of those, *Chevron* is exploited against the individual and in favor of the government."[129]

Justice Gorsuch did not appear amenable to the suggestion that *Chevron* could be "*Kisorized*"[130] or otherwise tweaked to be saved. When the Solicitor General suggested that the Court could issue a "correction," Justice Gorsuch remarked "haven't . . . we done that . . . like 15 times over the last eight or ten years?"[131] Instead, he seemed to prefer to return to the *Skidmore*[132] regime, "which was good enough for 40 years . . . and the world seemed to continue on its axis just fine."[133]

Justice Kavanaugh shared Justice Gorsuch's concerns that *Chevron* undermines stability and reliance. He was not persuaded that overruling *Chevron* would be a shock to the system because "the reality of how this works is *Chevron* itself ushers in shocks to the system every four or eight years when a new administration comes in . . . . [I]t's a source of extreme instability in the law."[134]

Justice Kavanaugh took particular issue with the notion that the "law runs out" at some point and a court can't find an answer *only* when the case involves an agency. He

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[129] *Id*. at 134:24–135:3.

[130] *Kisor*,139 S. Ct. 2400.

[131] Tr. of Oral Arg. at 91:1–9, *Relentless*, 144 S. Ct. 325; *see also* Tr. of Oral Arg. at 68:18–23, *Loper Bright*, 143 S. Ct. 2429 ("Nobody knows what *Mead* means . . . it's got seven factors to it . . . . is that another factor we're going to add to *Mead*?").

[132] *Skidmore*, 323 U.S. 134.

[133] Tr. of Oral Arg. at 92:16–23, *Relentless*, 144 S. Ct. 325.

[134] *Id*. at 96:13–25,. 97:2–6; Tr. of Oral Arg. at 74:4–6, *Loper Bright*, 143 S. Ct. 2429 (noting that National Labor Relations Board "moves from pillar to post fairly often.").

reasoned that if a court applies all the tools of statutory interpretation—as they must pursuant to Footnote 9 of *Chevron*—it will arrive at an answer. He said we know this is the case because if an agency was not party to the case, the court would supply an answer every time.[135] And he was concerned that many, many cases were being decided under *Chevron* step two when courts believed there were better readings of the statute.[136]

Like Justice Gorsuch, Justice Kavanaugh seemed to prefer *Skidmore* to *Chevron*—*i.e.*, overruling *Chevron*—because "*Skidmore* is more about the power to persuade, not the power to control."[137]

2. Justices Alito and Thomas

Justices Alito and Thomas were less vocal than Justices Gorsuch and Kavanaugh, but still seemed critical of *Chevron.* Justice Alito shared the general skepticism that a workable definition of ambiguity exists. He rejected the Solicitor General's attempt to illustrate the concept through an example, and instead insisted, "no, I . . . really would just like a definition so that all the courts that have to apply the regime that you're advocating will be able to apply it in the many different cases that come before them."[138] And like Justice Kavanaugh, he stressed that, "in cases that don't involve an agency, we never say we have exhausted all of our tools of interpretation and we just can't figure out what this means."[139]

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[135] Tr. of Oral Arg. at 82:19–83:9, 109:5–11, *Relentless*, 144 S. Ct. 325 ("Same statutory interpretation issue in a non-agency case, could the Court decide it? And if the answer is yes, the Court could decide it, then the law hasn't run out, so, therefore, you could ask yourself that question in an agency case.").

[136] *Id*. at 86:6–14.

[137] *Id*. at 53:25–54:2.

[138] *Id*. at 115:14–21.

[139] *Id*. at 114:5–11.

Justice Thomas asked only a handful of questions that suggested he was sympathetic to the view that Section 706 of the APA requires courts apply a *de novo* standard of review to questions of statutory interpretation and that a lesser standard may also offend separation of powers.[140]

3. Chief Justice Roberts and Justice Barrett

Chief Justice Roberts and Justice Barrett were harder to read. Chief Justice Roberts posited twice the possibility that *Chevron* may have already been effectively overruled: "we haven't relied on *Chevron* over that time . . . [h]ave we overruled it in practice even if we've . . . had to leave the lower courts to continue to grapple with it?"[141] And he asked if *Chevron* is overruled "[a]nd *Skidmore* is going to occupy a more prominent role going forward," what the Court's understanding of *Skidmore* should be.[142] Together, these questions suggest that the Chief Justice is reckoning with at least the possibility of major changes to the doctrine.

Justice Barrett's questions did not clearly telegraph a position. Like the more liberal justices, she was interested in how to draw the line between interpreting the law and making policy judgments.[143] She also expressed concerns about *stare decisis* and the specter that overturning *Chevron* would invite "a flood of litigation."[144] But Justice Barrett did seem

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[140] *Id*. at 77:9-12; Tr. of Oral Arg. at 5:9–6:15, *Loper Bright*, 143 S. Ct. 2429.

[141] Tr. of Oral Arg. at 81:15–19, 34:20–25, *Relentless*, 144 S. Ct. 325.

[142] Tr. of Oral Arg. at 30:1–7, *Relentless*, 144 S. Ct. 325.

[143] *Id*. at 31:17–25

[144] *Id*. at 59:8–60:21, 62:14–22 (noting that the Court declined to overrule *Auer* largely on *stare decisis* grounds and asking why the result should be different here).

sympathetic to criticism of *Chevron*, including the notion that Congress delegates to agencies through silence even when it "doesn't intentionally leave the ambiguity or gap."[145]

4. Justices Kagan, Jackson, and Sotomayor

The three liberal justices appeared to favor preserving *Chevron* in at least some form. Justices Kagan and Jackson were very worried about the prospect of the judiciary wading into policy making, in violation of separation of powers and without the necessary expertise. Justice Kagan discussed several examples of policy questions ill-suited for courts, such as whether a product designed to promote healthy cholesterol levels is a dietary supplement or drug,[146] whether the term production capacity refers to AC power that is sent out to the electric grid or DC power that's produced by a solar panel,[147] and likely future legislation on AI.[148] Justice Kagan suggested that the traditional methods of statutory interpretation would not yield clear answers to questions like these because "sometimes law runs out. Sometimes there's a gap. Sometimes there's a genuine ambiguity."[149] In those instances, Justice Kagan would prefer the agency fill in those gaps as opposed to courts:

> Will courts be able to decide these issues as to things they know nothing about, courts that are completely disconnected from the policy process, from the political process, and, you know, that just don't have any expertise and . . . experience in an area, or are people in agencies going to do that? That's what this case is about.[150]

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[145] *Id*. at 107:24–108:2.

[146] *Id*. at 11:4–13.

[147] *Id*. at 13:14–17

[148] Tr. of Oral Arg. at 44:12–48:4–14, *Relentless*, 144 S. Ct. 325.

[149] *Id*. at 12:25–13:5.

[150] *Id*. at 48:4–14.

Justice Kagan regards *Chevron* as a "doctrine of humility" because it requires judges to acknowledge that Congress "would have wanted agencies to do something rather than the courts."[151] *Stare decisis*, according to Kagan, is likewise a doctrine of humility because it permits the court to reverse prior decisions only if there is a special justification—and an especially lofty justification is needed here given the 70 Supreme Court decisions and 17,000 lower court decisions relying on *Chevron*.[152] She was troubled that the Court appears poised to "blow up" two doctrines of humility.[153]

Neither was Justice Kagan persuaded that *Skidmore* is an adequate substitute for *Chevron*: "[T]he idea that *Skidmore* is going to be a backup once you get rid of Chevron, that *Skidmore* means anything other than nothing, *Skidmore* has always meant nothing."[154]

Perhaps seeing the writing on the wall, Justice Kagan asked towards the end of argument in *Loper Bright* what "*Kisorizing*" *Chevron* would look like.[155] The Solicitor General responded that the Court could do four things: (1) reemphasize the rigor of step one, *i.e.*, courts need to robustly apply and exhaust the tools of statutory interpretation; (2) re-emphasize that in step two, "reasonableness is not just anything goes"; (3) emphasize that this process only applies when Congress directly empowered the agency to speak with the force of law; and (4) look for any other statutory indication that *Chevron* deference was not meant to apply.[156]

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[151] Tr. of Oral Arg. at 34:10-16, *Loper Bright*, 143 S. Ct. 2429.

[152] *Id*. at 34:22–35:1.

[153] *Id*. at 35:1–10.

[154] *Id*. at 32:19–23.

[155] *Id*. at 81:2–6.

[156] *Id*. at 81:7–83:22.

Justice Jackson echoed the policymaking concerns expressed by Justice Kagan, "I see *Chevron* as doing the very important work of helping courts stay away from policymaking[157] . . . . [I]f we take away something like *Chevron*, the court will then suddenly become a policymaker, by majority rule or not, making policy determinations."[158] She reasoned that judges will view all questions related to a statute as questions of law and asked "when does the Court decide that this is not my call?"[159] She also noted that a multiplicity of courts will interpret statutes in different ways that will take years to sort out.[160]

Justice Sotomayor appeared skeptical that courts were really arriving at "best" interpretations of statutes and then yielding to inferior agency interpretations under *Chevron*. She doubted that there was really a clear "best answer" to most questions of statutory interpretation, as evidenced by the fact that the Justices of the Court "routinely disagree and . . . routinely disagree 5-4."[161] Sotomayor suggested that where the Court can reasonably disagree and you need a tie-breaker, the tie should be given "to the entity with all of the qualities, expertise, experience, on-the-ground execution, knowledge of consequences[.]"[162]

Justice Sotomayor emphasized the rigors of *stare decisis* and warned against the prospect of "putting to question" all 77 cases the Court decided relying on *Chevron*.[163] She

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[157] Tr. of Oral Arg. at 26:18–25, *Relentless*, 144 S. Ct. 325.

[158] *Id*. at 27:12–15.

[159] *Id*. at 68:16–17

[160] *Id*. at 72:23–25.

[161] *Id*. at 17:7–12

[162] *Id*. at 18:2–10.

[163] Tr. of Oral Arg. at 9–10, *Relentless*, 144 S. Ct. 325.

also noted that Congress had not passed legislation overruling *Chevron*, even though it had considered such legislation.[164]

In sum, a majority of the Court seems posed to make major changes to *Chevron* that will make it easier to challenge agency action. Whether *Chevron* is eliminated entirely or reworked is likely to depend on whether Justice Barrett and Chief Justice Roberts can be persuaded that *Chevron* is worth preserving in *some* form—perhaps out of respect for *stare decisis*—even if the doctrine becomes a shadow of its former self. However, Justices Gorsuch and Kavanaugh's view that the Court's many prior attempts to course-correct *Chevron* prove that the doctrine is inherently unworkable—meaning "*Kisorization*" would be futile—may ultimately prevail.

H. The Implications: The Potential Outflows of *Loper Bright* and *Relentless*

All signals point to an impending change to the *Chevron* doctrine. The manner in which the Court treats the doctrine likely will be somewhere between the manner in which Justice Kagan and Justice Gorsuch's opinions treated *Auer* deference in *Kisor*. Since the approaches set forth in those opinions "have much in common," the implications of the Court's decision are likely not to be meaningful different no matter if the Court formally overrules *Chevron* or severely neuters it. The potential implications of the Court's decision include the following:

- *Greater Ability to Challenge Agency Positions*: One of the most significant outflows of a decision that alters or overrules *Chevron* will be to provide regulated parties an increased ability to challenge agency positions and increased odds at being successful in those challenges. In cases that apply *Chevron*, the agency wins the vast majority of the time. If the Court's decision makes it significantly harder for an agency to get to and make it through *Chevron* or overrules *Chevron*, agencies will not enjoy such a significant

[164] *Id*. at 79:16–18.

advantage in interpretative litigation. A regulated party that shows that Congress did not delegate the agency authority or proffers a better definition than the agency will be much more likely to succeed.

- *Increased Care in Selecting Favorable Forums*: One of the points in support of *Chevron* is its potential to promote uniform applications of the law by requiring *all* courts to defer to reasonable agency interpretations. A decision that either eliminates or severely limits *Chevron* will give courts greater freedom to diverge from an agency's statutory interpretation. A skeptic would say that such a decision would promote judicial activism and decisions based on judge-specific policy views. Whether that is true or not, a decision that alters *Chevron* will likely put an even greater premium on selecting a favorable forum when challenging an agency's interpretation.

- *Open Up Potential Challenges to Settled Agency Interpretations and Enforcement*: A decision that changes the way *Chevron* works or eliminates the doctrine could open the door to challenges to agency interpretations that were deferred to under *Chevron*. The Court could, of course, make any new rule prospective in application to apply only to statutes enacted after the Court's decision in *Loper Bright* and *Relentless*, leaving *Chevron* to govern extant statutes. This is unlikely though based on the way prior adjustments to *Chevron*, like the major questions doctrine, have worked and the potential that *Chevron* is overruled on constitutional grounds. If the Court's change to *Chevron* is not merely prospective, agency interpretations that received deference under *Chevron* are susceptible to attack, especially if those interpretations are not the best interpretation of the statute. The attack on the agency interpretations likely would not be limited to facial challenges to seemingly settled regulatory regimes but also would likely include as-applied challenges in the enforcement context.

- *More Difficult for Executive Branch to Pursue Its Regulatory Agenda*: A reduction in deference to administrative agencies will make it more difficult for the Executive Branch to pursue policy through regulation. In the past, presidential administrations have accomplished policy goals through the regulatory process, such as actions addressing climate change. *Chevron* deference has helped the Executive Branch achieve its policy goals by requiring courts to defer to agency interpretations rather than performing an independent interpretation.

- *Increased Challenges in the Legislative and Regulatory Processes*: A decision diminishing or eliminating *Chevron* would introduce new challenges to the legislative process. If *Chevron* is maintained in some form, the doctrine likely will require Congress to provide a direct, clear, and unambiguous delegation of authority to an agency when it wants the agency to gap-fill in legislation. If *Chevron* is eliminated, Congress would likely have to get much more specific in legislation to ensure that it achieved desired policy goals, and the agency

rulemaking process likely would have diminished importance. This could lead to increased legislative gridlock as the political parties fight over policy goals.

The implications of the Court's decision in *Loper Bright* and *Relentless* will likely present opportunities to regulated industries and parties to bring challenges not only to future regulations but also to current regulations based on, and precedent that deferred to, a questionable agency interpretation. Regulated industries and parties dissatisfied with the current regulatory scheme should take the opportunity to prepare for the Court's opinions by: (1) identifying agency regulation with a shaky statutory basis; (2) looking at cases in which a judge expressed dissatisfaction with an agency interpretation but begrudgingly followed it under *Chevron*; and (3) evaluating the regulatory circumstances surrounding current or recent enforcement.