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WHO MAY RECEIVE *CHEVRON* DEFERENCE—THE RESPONSIBLE AGENCY SECRETARY, THE U.S. ATTORNEY GENERAL, OR NO ONE?

Paul J. Larkin[*]

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I. WHO DECIDES QUESTIONS OF LAW: AN ARTICLE III JUDGE OR AN ARTICLE II OFFICIAL?

The question "who decides a factual or legal issue?"—a private party (a grand or petit juror), an executive official (an agency decisionmaker), or a magistrate (a trial judge)—arises throughout American law in the federal and state systems. In the federal system, private parties often have the responsibility to decide factual issues,[1] while Article III judges have the power and duty to answer legal questions.[2] In the most famous opinion handed down by the Supreme Court of the United States, *Marbury v. Madison*, the Court made it clear that "[i]t is emphatically

* George, Barbara & Victoria Rumpel Senior Legal Research Fellow, The Heritage Foundation; M.P.P., George Washington University, 2010; J.D., Stanford Law School, 1980; B.A., Washington & Lee University, 1977. The views expressed in this Article are my own and should not be construed as representing any official position of The Heritage Foundation. I thank GianCarlo Canaparo, Jack Fitzhenry, Seth Lucas, and John G. Malcolm for their valuable comments on an earlier version. Any mistakes are mine.

1. *See* U.S. CONST. amend. VII ("In Suits at common law . . . no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."); Ball v. United States, 163 U.S. 662, 671 (1896) (ruling that a jury's verdict of acquittal, even if erroneous, cannot be reviewed by a court).

2. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

the province and duty of the judicial department to say what the law is."[3] The Court has often reaffirmed that proposition,[4] most recently in June of this year.[5]

In its 1984 decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, the Supreme Court adopted what is likely the best-known contemporary rule of statutory interpretation in federal administrative law.[6] *Chevron* also adopted what certainly appears to be an exception to *Marbury*. The Court held that whenever a statute is silent or ambiguous as to the meaning of a provision, the federal courts should defer to a federal agency's reasonable interpretation of the act, rather than construe the statute independently.[7] In the Court's own words:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[8]

3. *Id.*

4. *See, e.g.*, Rucho v. Common Cause, 139 S. Ct. 2484, 2494 (2019); Bank Markazi v. Peterson, 578 U.S. 212, 225–26 (2016); United States v. Windsor, 570 U.S. 744, 762 (2013); City of Boerne v. Flores, 521 U.S. 507, 524 (1997); Plaut v. Spendthrift Farms, Inc., 514 U.S. 211, 218–19 (1995).

5. *See* Moore v. Harper, 143 S. Ct. 2065, 2079–80 (2023).

6. 467 U.S. 837 (1984). The Court decided *Chevron* without dissent, but only six justices voted on the case. Justices Marshall, O'Connor, and Rehnquist took no part in the decision. *Id.* at 866.

7. *Id.* at 843.

8. *Id.* at 842–43 (footnotes omitted). The same rule, if not a far stronger variant of it, also applies to an agency's interpretation of its own rules. Kisor v. Wilkie, 139 S. Ct. 2400, 2418 (2019). The Court's decision in *Kisor* sought to resolve the issue whether that canon of construction was the proper one, but the 4-1-4 lineup did not resolve it. *Id.* The issue remains a live one. *See* Paul J. Larkin, Jr., *Agency Deference after* Kisor v. Wilkie, 18 GEO. J.L. & PUB. POL'Y 105, 122–26 (2020). In all likelihood, as goes *Chevron*, so goes *Kisor*.

Since then, the Court has developed and applied, in a host of cases, what is known as the *Chevron* doctrine.[9] For some time, that doctrine appeared to be settled law.

That, however, is true no longer. Like several other formerly settled administrative law doctrines, *Chevron* deference has come under attack.[10] A considerable number of esteemed academics have urged the Court to reconsider its decision.[11] More importantly, several Supreme Court justices have suggested that the delegation of law-interpreting authority is tantamount to the "judicial Power" that Article III reserves for federal judges, with the result that *Chevron* raises serious separation of powers considerations that the Court did not consider in that case.[12]

Critics have faulted *Chevron* on a host of grounds,[13] but two of the most damning criticisms of *Chevron* are these: One is that the *Chevron* doctrine is facially inconsistent with the longstanding Article III doctrine

9. A Westlaw search reveals that the Court has cited *Chevron* in 244 later cases. *See*, *e.g.*, Michigan v. EPA, 576 U.S. 743 (2015); King v. Burwell, 576 U.S. 473 (2015); Utility Air Regulatory Grp. v. EPA, 573 U.S. 302 (2014).

10. Two other New Deal era lines of precedent have also fallen into question. One allows Congress to vest agencies with lawmaking power over private parties informed by only the most vague and gossamer instructions how to use it. *See*, *e.g.*, Lichter v. United States, 334 U.S. 742, 785–86 (1948) (upholding delegation of authority to determine "excessive profits"). The other challenged doctrine is that Congress may limit the President's ability to remove without cause whatever executive officials hinder his or her ability to implement the law and policy. *See*, *e.g.*, Humphrey's Ex'r v. United States, 295 U.S. 602, 631–32 (1935). Recent Supreme Court decisions have indicated that the Court looks askance on those rulings. *See*, *e.g.*, Paul J. Larkin, Jr. & GianCarlo Canaparo, *Gunfight at the New Deal Corral*, 19 GEO. J.L. & PUB. POL'Y 477, 479–82 (2021); Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 855–56 (2020) ("[H]ornbook doctrine on judicial review is under fire for being both too timid and too intrusive.").

11. *See*, *e.g.*, RICHARD A. EPSTEIN, THE DUBIOUS MORALITY OF MODERN ADMINISTRATIVE LAW (2020); Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 908 (2017); Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187, 1187 (2016); Cory R. Liu, Chevron*'s Domain and the Rule of Law*, 20 TEX. REV. L. & POL. 391, 392 (2016). *Chevron* also has some heavy-hitting defenders. *See*, *e.g.*, THOMAS W. MERRILL, THE *CHEVRON* DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE (2022); CASS R. SUNSTEIN & ADRIAN VERMEULE, LAW & LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE (2020). Among them was Justice Antonin Scalia, who was an administrative law professor before joining the bench. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521.

12. *See* Michigan v. EPA, 576 U.S. at 760–64 (Thomas, J., concurring); *cf. Kisor*, 139 S. Ct. at 2437–41 (Gorsuch, J., concurring) (writing that deference to an agency's interpretation of its rules raises the same Article III issues that *Chevron* does).

13. *See generally* Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 782–84 (2010) (listing and summarizing shortcomings in the Supreme Court's reasoning and problems that the *Chevron* decision creates).

articulated in *Marbury*. Allowing an agency to resolve the meaning of a statute when the interpretive issue is a close one, at a minimum, is facially inconsistent with *Marbury*'s teaching. Yet, in *Chevron* the Court made no effort to reconcile its new canon of construction with *Marbury*'s foundational principle. In fact, *Chevron* did not even cite *Marbury*.[14] The second criticism—one in the nature of adding insult to injury—is that a direct consequence of *Chevron*'s canon of construction is to grant agencies a preferred position in litigation. *Chevron* does so by affording the responsible agency's interpretation of a statute no less than tie-breaking status whenever an act does not clearly resolve an interpretive issue and the agency's construction is not farfetched.[15] That result is quite extraordinary. Without invoking any supporting act of Congress—in fact without discussing or even citing the most relevant statute, the Administrative Procedure Act of 1946 (APA)[16]—the Court picked a winner in *Chevron* and all subsequent closely contested cases.

Those omissions are a critical ones. *Marbury* and the APA quite clearly foreclose giving an agency the final words on a matter of statutory interpretation. Section 706 of title 5 U.S.C. expressly states 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."[17] The directive to "decide all relevant questions of law" carries forward the *Marbury* principle that it is the responsibility of the courts to answer legal questions.[18] But section 706 also goes on to say that a reviewing court "shall . . . hold unlawful and set aside" any "agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;" "contrary to constitutional right, power, privilege, or immunity;" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."[19] Congress could not have been clearer if it added the line "And we mean it."

14. *See generally* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

15. *Id.* at 842–43.

16. *See generally id*; 5 U.S.C. §§ 551–59 (2006). Indeed, the APA is front and center in the second trenchant criticism of *Chevron*. In his 2017 article, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 988 (2017), Professor Aditya Bamzai explained that the text of and background to the APA reveals that the federal courts must engage in de novo review of agency action.

17. 5 U.S.C. § 706.

18. *Id.*

19. *Id.* § 706(2)(A)–(C).

The Court in *Chevron* adopted its canon of construction based on the presumption that, via its conscious silence or deliberate ambiguity on the meaning of a legal issue, Congress explicitly or implicitly intended to vest the agency with discretion to construe that unclear law.[20] Without justifying that presumption empirically or morally,[21] and without even asking if Congress could grant an Article II agency the power to bind the legal decisionmaking responsibility of an Article III court, the Court effectively gave the agency a thumb on the scale of a closely divided issue. In practice, of course, that means an agency can receive a thumb or the whole hand (and perhaps even more) based upon the conscious or unconscious inclinations of the judges reviewing the agency's action.[22]

Taken together, those criticisms, in my opinion, are quite persuasive. The Court has never handed over, even to learned subject matter experts such as Philip Areeda, Arthur Corbin, William Prosser, David Shapiro, or John Henry Wigmore, the power to adopt the correct legal interpretation of a disputed rule of law within their respective fields of expertise. And it is absolutely certain that the Court has *never* directed the federal courts to accept the reasonable interpretation of any statute (or principle of common law, for that matter) offered by *any private party* under *any circumstances*. Nonetheless, agencies are treated differently, even preferentially. In baseball, a tie goes to the runner; in administrative law, it goes to the agency. A private party has to beat the throw to the bag.

Maybe Congress could adopt that rule.[23] But it hasn't; instead, the Court made it up in *Chevron*. As the Court explained in that case and its

20. Chevron, U.S.A, Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984) ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.") (footnotes omitted).

21. *See generally id*. For comparison purposes, the presumption of sanity is empirically based, while the presumption of innocence is morally based.

22. *See* GERD GIGERENZER, GUT FEELINGS: THE INTELLIGENCE OF THE UNCONSCIOUS (2008) (discussing the benefits to decisionmaking of heuristics and "gut feelings").

23. And maybe not. The Framers gave tenure and salary protection to Article III judges to assure their independence and impartiality. *See*, *e.g.*, Stern v. Marshall, 564 U.S. 462, 482–84 (2011). It therefore makes little sense to empower an Article III court to adjudicate a case if it must accept an interpretation of the governing law offered by an Article II official, particularly when the court would not have come to that conclusion in the first instance, which is another of *Chevron*'s creations. *Chevron*, 467 U.S. at 843 n.11 ("The court need not conclude that the agency construction was the only one it permissibly could have

offspring, the Court did so by disavowing any judicial interest in policymaking;[24] by assuming that Congress may empower agencies to undertake that task (rather than act as the lawmaking body that the Framers intended it to be);[25] and by imagining (remember, delegations can be "implicit rather than explicit"[26]) that ambiguity is an intentional or implied congressional delegation of lawmaking authority to an agency, instead of being attributable to oversight, flubbing the ball, or shirking its lawmaking responsibility.

Yet perhaps the tide is turning. Over the last few terms, the Supreme Court has clearly avoided relying on *Chevron* in what should have been classic cases for its application: ones where a statute had an uncertain meaning, and the agency responsible for implementing it had a clear understanding what the law meant.[27] Moreover, the Court has demanded that agencies identify statutory authority that clearly authorizes its actions. An injunction to "do the right thing" is insufficient.[28] Toward the

adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."). The *Chevron* doctrine also affords an agency's legal position dispositive weight in a lawsuit when it is a party. *Id.* That violates the longstanding principle, first applied by Judge Edward Coke in. *College of Physicians (Dr. Bonham's Case)*, 77 Eng. Rep. 646 (C.P. 1610), of "*nemo judex in cause sua*"—(or, for those lacking an education in the classics, "No one may be a judge in his own cause"). The Supreme Court has applied that principle under the Due Process Clause in a host of cases. *See* Paul J. Larkin, Jr. & Elizabeth H. Slattery, *The World After* Seminole Rock *and* Auer, 42 HARV. J.L. & PUB. POL'Y 625, 627–28 & nn.12–19 (2019) (collecting cases). *Chevron* did not discuss that issue either.

24. *Chevron*, 467 U.S. at 865–66.

25. *See* Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 740–41 (1996) ("We accord deference to agencies under *Chevron,* not because of a presumption that they drafted the provisions in question, or were present at the hearings, or spoke to the principal sponsors; but rather because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.").

26. *Chevron*, 467 U.S. at 844.

27. The best example is the Court's decision in *American Hospital Association v. Becerra*, 142 S. Ct. 1896 (2022). The case involved provisions of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, addressing Medicare coverage for certain outpatient drugs. The statute is maddingly complicated and raises questions of statutory construction that *Chevron* would have assumed Congress left to the Department of Health and Human Services to figure out. Yet, the Court did not cite *Chevron* anywhere in its opinion. *See generally id.* The omission is quite striking.

28. *See*, *e.g.*, Biden v. Nebraska, 143 S. Ct. 2355, 2368 (2023) (setting aside President Biden's college and graduate student-debt forgiveness program based on a statute empowering the Secretary of Education to provide relief only for servicemembers); West Va. v. EPA, 142 S. Ct. 2587, 2614–16 (2022) (setting aside the EPA's clean power plan rule, which effectively would have shuttered fossil fuel-fired plants, to address "climate change"); Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 662–63 (2022) (staying an Occupational

end of the October Term 2022, the Court granted review in a case—*Loper Bright Enterprises v. Raimondo*—that allows the Court to overturn *Chevron* should it choose to do so.[29] We should learn its fate during the Court's upcoming term.

As the next three parts explain, it is time to "retire" or reformulate the *Chevron* deference standard.[30] To get there, Part II argues that there are statutes other than the APA that are relevant to this issue. Congress has granted the U.S. Attorney General the authority to decide what legal position the United States will advance in litigation, and that includes deciding what statutory interpretation best advances the federal government's interests. Accordingly, the relevant positive law vests the Attorney General, not the secretary of the responsible agency, with the authority to identify the federal government's legal position. Part III then explains that, under both the rationale of *Chevron* and the Court's post-*Chevron* precedents, the Attorney General is not entitled to any deference for its interpretation of the law. Finally, Part IV submits that, under a revised interpretation of *Chevron*, an agency should receive respect for its judgment about how best to implement a statute, but only the same respect that a court would afford a scholar for his or her understanding of the optimal answer to a legal question. That much, but no more. In law school, the justices might have been taught the law of contracts by a sensei like Samuel Williston or Arthur Corbin, and they are entitled to

Safety and Health Administration (OSHA) mandatory Covid-19 vaccination requirement based on a statute allowing OSHA to establish workplace safety rules); Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2486–87 (2021) (staying the home eviction moratorium adopted by the Centers for Disease Control and Prevention (CDC) based on a statute authorizing the CDC to assist state in quarantines).

29. The Court granted review in *Loper Bright Enterprises v. Raimondo*, 143 S. Ct. 2429 (2023) (No. 21-451), limited to Question 2 presented by the certiorari petition, which was the following: "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." Petition for Writ of Certiorari, *Loper Bright*, 143 S. Ct. 2429 (No. 21-451). Recently, the Court granted review in another case—*Relentless, Inc. v. U.S. Dep't of Commerce*, 2023 WL 6780370 (Oct. 13, 2023) (No. 22-1219)—limited to Question 1, which was identical to the question in *Loper Bright*. Petition for Writ of Certiorari, *Relentless*, 2023 WL 6780370 (No. 22-1219) at i ("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."). *Loper Bright* and *Relentless* will be argued in tandem in January 2024.

30. The Supreme Court followed that course in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 562–63 (2007), when it declined to read literally the standard it had adopted in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), to review the sufficiency of a complaint under Rule 12, Fed. R. Civ. P. Rather than simply overrule the *Conley* standard, *Twombly* reformulated it, calling its action a "retire[ment]" of the *Conley* standard.

treat the teachings of their hanchis with all the respect they have earned. But it remains a justice's responsibility to resolve all legal issues de novo because that obligation comes with a black robe.

II. DID CONGRESS CHOOSE AN AGENCY OFFICIAL AS THE GOVERNMENT'S AUTHORITATIVE VOICE ON LEGAL ISSUES?

A statute clearly answers that question, and the answer is "No." Congress has expressly vested "the conduct of litigation in which the United States, an agency, or officer thereof is a party," or in which the United States "is interested," in the "officers of the Department of Justice, under the direction of the Attorney General."[31] As the "principal Officer" of the U.S. Department of Justice,[32] the U.S. Attorney General is the federal government's chief legal official. He or she is responsible for "conduct[ing] and argu[ing]" or "supervis[ing] all litigation" in which the United States is a party, as well as any investigations the department conducts.[33] The Attorney General may handle each case personally or direct one of his or her lieutenants, such as the solicitor general, to do so.[34]

That gives the Attorney General responsibility for managing the litigation work of every Justice Department lawyer and agency they represent—such as the Department of Commerce, the defendant in *Loper Bright*. In addition, as the nation's chief legal officer, the Attorney General also must "give his advice and opinion on questions of law" to

31. 28 U.S.C. § 516 (2018) ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.").

32. U.S. CONST. art. II, § 2, cl. 1; 28 U.S.C. §§ 501, 503 (2018).

33. 28 U.S.C. §§ 518–19; 28 U.S.C. § 515(a) ("The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrate judges, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.").

34. 28 U.S.C. § 518; *see also* 28 U.S.C. §§ 504–07 (authorizing the President to appoint a Deputy Attorney General, Associate Attorney General, Solicitor General, and thirteen Assistant Attorneys General); *id.* § 510 (authorizing the Attorney General to delegate or reassign his authority to other department officers, employees, or agencies); *id.* §§ 517–19 (authorizing the Attorney General to conduct, direct, or supervise all litigation in which the United States has an interest); *see generally* U.S. Dep't of Justice, Organizational Chart (Oct. 28, 2021), https://www.justice.gov/d9/doj_chart_10.28.2021-2.pdf.

the President and other cabinet officials, including the military departments, on all legal issues.[35] In the exercise of his authority to delegate decision-making responsibility to other Justice Department officials, the Attorney General has assigned to the Solicitor General the power to decide whether to seek further review of an adverse decision and to decide what position to take in any such appeal, as well as to represent the United States in the Supreme Court.[36] Like the Attorney General, the Solicitor General is a lawyer. In fact, by statute, he or she must be "learned in the law."[37]

Those statutes reflect not merely the sterile assignment of responsibilities found in any organizational chart, but "salutary policies" necessary for the government to manage its legal responsibilities authoritatively, effectively, and efficiently. As the Supreme Court explained in *United States v. Providence Journal Co.*:

> Among the reasons for reserving litigation in this Court to the Attorney General and the Solicitor General, is the concern that the United States usually should speak with one voice before this Court, and with a voice that reflects not the parochial interests of a particular agency, but the common interests of the Government and therefore of all the people. Without the centralization of the decision whether to seek certiorari, this Court might well be deluged with petitions from every federal prosecutor, agency, or instrumentality, urging as the position of the United States, a variety of inconsistent positions shaped by the immediate demands of the case *sub judice,* rather than by longer term interests in the development of the law.[38]

That discussion directly bears on the validity of *Chevron* deference. The Supreme Court made it clear that the Attorney General—not another agency official, however senior; an independent agency chair; or one of their lieutenants—has the authority to identify and endorse the best reading of the law for the government and public when a legal issue arises in litigation.[39] That includes the administrator of the Environmental Protection Agency, the official whom the Court designated in *Chevron* as entitled to receive deference. *Providence Journal* also explained that Congress made this assignment not to

35. 28 U.S.C. §§ 511–14.
36. *See* 28 U.S.C. § 517; 28 C.F.R. § 0.20(a)–(d) (2023).
37. 28 U.S.C. § 505.
38. 485 U.S. 693, 706 (1988).
39. *Id.*

promote "the immediate demands of the case *sub judice*," but to advance "longer term interests in the development of the law."[40] Only "centralization" of litigation decisionmaking authority could accomplish that result.

To be sure, before a dispute results in litigation, an agency can—indeed, must—interpret the law to implement the statutes that Congress entrusted to its care. An agency must construe an act of Congress in the course of its daily work, and the agency can state its position in a guidance document, "Dear Colleague" letter, handbook, or any other publication else that it uses to make its position known.[41] But that happens *before* the federal government winds up in court. Once a lawsuit is filed, interpretive authority shifts from agencies to the Justice Department. Unless Congress has expressly granted an agency what is known as "independent litigating authority"—viz., the power to decide whether and how to pursue litigation, generally below the Supreme Court, without the Attorney General's approval or oversight, a rare occurrence in federal law[42]—the conduct of litigation, including the choice of what litigating position to take, rests in the hands of the Attorney General, the Deputy Attorney General, the Solicitor General, and one or more of the subject matter Assistant Attorneys General.[43] Of course, senior and subordinate Justice Department officials regularly consult with the client agencies they represent in court, as any good lawyer would, and those officials might defer to a reasoned agency interpretation of an ambiguous statute. That is particularly the case when a statute is

40. *Id.*

41. The range of options an agency has to make its legal position known is vast. *See*, *e.g.*, 5 U.S.C. § 551(4) (defining a rule (in part) as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy"); Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1320 (1992) ("[R]ules" include "legislative rules, interpretive rules, opinion letters, policy statements, policies, program policy letters, Dear Colleague letters, regulatory guidance letters, rule interpretations, guidances, guidelines, staff instructions, manuals, questions-and-answers, bulletins, advisory circulars, models, enforcement policies, action levels, press releases, testimony before Congress, and many others").

42. There are a few instances in which Congress has granted an agency such power. *See*, *e.g.*, 52 U.S.C. § 30107 (empowering the Federal Election Commission); Fed. Election Comm'n v. NRA Pol. Victory Fund, 513 U.S. 88, 90–97 (1994). *Chevron* cannot qualify as an "authorized" exception because that would be tantamount to disregarding the text of the statute under the guise of interpreting it.

43. 28 U.S.C. § 504 ("Deputy Attorney General"); *id.* § 504a ("Associate Attorney General"); *id.* § 505 ("Solicitor General, learned in the law, to assist the Attorney General in the performance of his duties."); *id.* § 506 ("Assistant Attorneys General").

quite complex, the issue is highly technical, the agency's interpretation is based upon its peculiar subject matter expertise, that interpretation reflects a longstanding agency position, it is critical to making the statute work, and it is consistent with the administration's policies. That is how it should be. But the Attorney General has the final decision-making authority, not a cabinet secretary or agency administrator, let alone "inferior Officers" in one of the government's many departments.[44]

Chevron never discussed those statutes.[45] That failure leaves the decision open to much the same criticism noted above regarding the APA: Congress has spoken to the issue, and *Chevron* missed what Congress said. That should torpedo the stare decisis value of *Chevron* because the Court did not address those statutes there.[46]

III. IS THE ATTORNEY GENERAL ENTITLED TO DEFERENCE WHEN INTERPRETING AN ACT OF CONGRESS DURING LITIGATION?

That question follows from the answer to the one above it. The answer, again, is "No." The Framers chose Article III courts to adjudicate "Cases" and "Controversies" raising issues arising under federal law,[47] and the Constitution grants federal judges tenure and salary protection to ensure their impartiality and independence from the political branches.[48] By and large, only Article III judges may adjudicate federal law disputes.[49] The Attorney General cannot exercise that responsibility.

44. U.S. CONST. art. II, § 2, cl. 2.

45. *See generally* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

46. *See*, *e.g.*, *Fed. Election Comm'n*, 513 U.S. at 97 ("[T]his Court has never considered itself bound [by prior *sub silentio* holdings] when a subsequent case finally brings the jurisdictional issue before us.") (citation and punctuation omitted); Stone v. Powell, 428 U.S. 465, 479–82 (1976).

47. *See* U.S. CONST. art. III, §§ 1–2.

48. *See id* § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."); Stern v. Marshall, 564 U.S. 462, 482–84 (2011).

49. Congress cannot generally displace Article III courts in civil cases, particularly ones posing issues with a non-statutory origin. *Cf.*, *e.g.*, *Stern*, 564 U.S. at 485–503 (ruling that Article III bars bankruptcy courts from adjudicating state-law counterclaims); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 84–87 (1982) (addressing common-law contract issues), *with*, *e.g.*, Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1379 (2018) (ruling that Article III does not prohibit the U.S. Patent and Trademark Office from reconsidering the grant of a patent); Crowell v. Benson, 285 U.S. 22, 65 (1932) (upholding the constitutionality of a federal workers' compensation program); Foley v. Harrison, 56 U.S. (15 How.) 433, 448 (1854) (addressing administration of land

Like the King's representative at common law, the Attorney General is a lawyer, not a judge; he or she represents the federal government as its counsel. He or she also enjoys none of the protections afforded Article III judges; he or she serves at the pleasure of the President.[50] Accordingly, the Attorney General must persuade an Article III court that his or her interpretation is the correct one. Indeed, Justice Antonin Scalia, one of the most fervent defenders of *Chevron*, made it clear that the Attorney General's interpretation of federal law is *not* entitled to *Chevron* deference,[51] and the full Court later agreed with him.[52]

Justice Scalia announced that conclusion in *Crandon v. United States*, a government-initiated civil suit for the alleged violation of a criminal statute.[53] The Boeing Company had given a severance package to several executives who left to work for the federal government, even though their public service would cost each one a considerable loss of income, stock options, and retirement benefits.[54] Claiming that the payments violated federal criminal law, the government sued to obtain the funds.[55] The legal issue in *Crandon* was whether those payments violated a provision in the federal criminal code prohibiting private parties from supplementing the income of government employees.[56] Relying on the text and history of the law, the Court held that the payments were lawful because the Boeing executives were not government employees when they received them.[57] Justice Scalia agreed with that result, but disagreed with the majority's interpretation of the statute.[58] He unmistakably rejected the notion that the federal government's interpretation of a criminal statute is entitled to *Chevron* deference.[59] Every official must construe the criminal law to ensure that his or her own actions remain lawful, and the Justice Department must interpret the criminal code in deciding whether to prosecute someone for

claims); Am. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 545–46 (1828) (addressing territorial courts).

50. *See*, *e.g.*, Myers v. United States, 272 U.S. 52, 175–76 (1926) (holding that the President can remove senior executive officials without the need to prove cause); *supra* note 8 (collecting recent decisions).

51. Crandon v. United States, 494 U.S. 152, 177–78 (1990) (Scalia, J., concurring).

52. *See* Abramski v. United States, 573 U.S. 169, 191 (2014); Larkin, *supra* note 8, at 134–36.

53. *Crandon*, 494 U.S. at 177–78.

54. *Id.* at 154-55 (majority opinion).

55. *Id.* at 156–57.

56. *Id.*

57. *Id.* at 158-68.

58. *Id.* at 168–84 (Scalia, J., concurring).

59. *Id.* at 177.

a crime. But "we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference."[60] Why?—Because the Justice Department does not implement the federal penal code; that job belongs to the courts.[61]

A majority of the Supreme Court later adopted Justice Scalia's position. In two cases decided the same term, the Court refused to afford *Chevron* deference to the government's reading of a criminal law.

The issue in the first case, *United States v. Apel*, was whether the defendant had unlawfully re-entered a military installation after a military officer ordered him not to do so.[62] Apel argued that the area he re-entered was not part of the installation because it was not subject to the military's exclusive control.[63] To support his argument, Apel pointed to several government documents construing the relevant statute as requiring exclusive federal possession of the area in dispute.[64] Writing for the Court, Chief Justice Roberts rejected Apel's argument, ruling that neither the text of the relevant law nor the nation's historical practice imposed his sought-after limitation.[65] He also gave the back of his hand to Apel's claim that internal government documents supported his position.[66] As Chief Justice Roberts explained, those views might reflect "overly cautious legal advice" based on lower court decisions, or they might just be wrong.[67] "Either way," he concluded, "we have never held that the Government's reading of a criminal statute is entitled to any deference."[68] As support for that proposition, the Chief Justice cited Justice Scalia's concurring opinion in *Crandon*.[69]

60. *Id.*

61. *Id.* ("The law in question, a criminal statute, is not administered by any agency but by the courts. It is entirely reasonable and understandable that federal officials should make available to their employees legal advice regarding its interpretation; and in a general way all agencies of the Government must interpret it in order to assure that the behavior of their employees is lawful—just as they must interpret innumerable other civil and criminal provisions in order to operate lawfully; but that is not the sort of specific responsibility for administering the law that triggers *Chevron*. The Justice Department, of course, has a very specific responsibility to determine for itself what this statute means, in order to decide when to prosecute; but we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference.") *Id.*

62. 571 U.S. 359, 361 (2014).

63. *Id.* at 365–66.

64. *Id.* at 368–69.

65. *Id.* at 369.

66. *Id.* at 368–69.

67. *Id.* at 369.

68. *Id.*

69. *Id.* (citing *Crandon*, 494 U.S. at 177 (Scalia, J., concurring)).

The Court reaffirmed that proposition four months later in *Abramski v. United States.*[70] *Abramski* involved a federal law prohibiting a "straw purchase" of a firearm—that is, the purchase for someone else who is legally barred from owning a gun.[71] Abramski maintained that his false statement of making the purchase for himself was irrelevant because pre-1995 opinions by the Bureau of Alcohol, Tobacco, and Firearms (ATF) stated that "a straw purchaser's misrepresentation counted as material only if the true buyer could not legally possess a gun."[72] Again, the Court brushed that argument aside, noting, in reliance on *Apel*, that "[t]he critical point is that criminal laws are for courts, not for the Government, to construe."[73] Congress was "the entity whose voice *does* matter," and it did not limit the act as Abramski had argued.[74] "Whether the Government interprets a criminal statute too broadly (as it sometimes does) or too narrowly (as the ATF used to in construing [the relevant law in *Abramski*]), a court has an obligation to correct its error."[75] The "ATF's old position" was "no more relevant than its current one," the Court emphasized, meaning that both were "not relevant at all."[76]

That principle also applies when the Attorney General and his lieutenants interpret a *civil* statute. The *raison d'être* for *Chevron* deference is to give effect to Congress's decision to empower agencies to implement unclear regulatory schemes in light of the policies of the administration then in power. *Chevron* expressly made that point,[77] and the Court's later decision in *United States v. Mead Corp*. reinforces it.[78] The issue in *Mead* was whether to afford *Chevron* deference to tariff classification decisions made by the U.S. Customs Service, which was responsible for deciding how to characterize imported goods (including Mead's "day planners") for tariff purposes at the nation's forty-six ports of entry.[79] The issue was whether they were subject to a tariff because they were "notebooks and address books."[80] The Court concluded that the Customs Service's tariff classification decisions were not entitled to *Chevron* deference.[81] As the Court held, "administrative

70. 573 U.S. 169 (2014).
71. *Id*. at 171–72.
72. *Id*. at 191.
73. *Id*.
74. *Id*.
75. *Id*.
76. *Id*.
77. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 843–44, 865–66.
78. 533 U.S. 218, 227–30 (2001).
79. *Id*. at 224.
80. *Id*.
81. *Id*. at 221.

implementation of a particular statutory provision" can qualify for *Chevron* deference only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and . . . the agency interpretation claiming deference was promulgated in the exercise of that authority."[82] In *Mead*, the Court found no evidence of such congressional intent.[83] The same is true once a case lands in court. Congress certainly has not authorized the Attorney General to issue substantive rules binding private parties in the course of the varied types of litigation in which the department represents agencies. He may adopt whatever view of the law he finds to best serve the agency and the public in whatever pleading must be filed during litigation. But, as much as the Attorney General might wish it to be true, his pleadings do not automatically become law. An Article III court must first agree.

That division of responsibility is a sensible one. Judges are better equipped than scientists at resolving the legal issues involved in any interpretation of the terms of acts of Congress that agencies must administer. Law schools train nascent lawyers how to construe statutes, and law school graduates gain experience in doing so by practicing law. Lawyers are in a superior position to scientists when it comes to analyzing contracts, wills, constitutions, statutes, regulations, or any other form or law, as well as predicting how a judge likely would evaluate a particular legal argument and deciding how best to persuade a court to achieve the result that the agency and administration seek. But Article III judges are in a better position than any party's attorney when it comes to neutrally construing what a statute means.

Yes, there are few aspects of contemporary life immune from some type of legal regulation. For that reason, lawyers come into contact, as advisors, litigators, and administrators, with numerous fields of endeavor unseen during their education, training, and experience. Like the Justice Department, agencies have lawyers in their general counsel's offices to advise regulators what is and is not legally permissible, and those attorneys gain considerable experience working with the statutes in the agency's care. But the skill set lawyers acquire at the Justice Department or elsewhere in the federal government does not and cannot guarantee their independence and impartiality. The Framers believed that only by assigning final law-interpreting authority to Article III judges would the public's interests, not just the federal government's, be best served. Agency officials and government lawyers therefore should stay in their lanes and leave to those judges the responsibility for

82. *Id.* at 226–27.
83. *See id.* at 229–33.

entering final judgments reflecting the judiciary's interpretation of the law.

IV. SHOULD AN AGENCY'S INTERPRETATION RECEIVE ANY WEIGHT?

This time, the answer is "Yes." Federal courts are not required to treat an agency's—or the Justice Department's—interpretation of a federal statute as entitled to only the same respect afforded to a high school student's first draft of a term paper. Agency personnel have the front-line responsibility to successfully implement acts of Congress to serve the public. In doing so, those officials are likely to know problems and pitfalls that arise in the day-to-day management of a complex, possibly scientifically oriented, program, knowledge that legally trained judges generally lack unless they have been in the same position as a member of the responsible agency. It would be a mistake to ignore what agency officials say an act of Congress means. But it would be an equally big mistake to treat an agency's interpretation as if it were the Eleventh Commandment that Moses brought down from Mount Sinai but dropped before he returned to camp.[84]

Four justices have already suggested the best way to reconcile the desire to take advantage of agency expertise while remaining faithful to the judicial responsibility to interpret the law. Justice Neil Gorsuch, joined by Justices Clarence Thomas, Samuel Alito, and Brett Kavanaugh, explained how to accomplish that result in *Kisor v. Wilkie* in the context of giving effect to an agency's interpretation of one of its own rules.[85] As Justice Gorsuch explained:

> Justice Kagan next suggests that *Auer* is justified by the respect due agencies' "technical" expertise. But no one doubts that courts should pay close attention to an expert agency's views on technical questions in its field. Just as a court "would want to know what John Henry Wigmore said about an issue of evidence law [or] what Arthur Corbin thought about a matter of contract law," so too should courts carefully consider what the Food and Drug Administration thinks about how its prescription drug safety regulations operate. The fact remains, however, that even agency experts "can be wrong; even Homer nodded." *Skidmore* and the traditional approach it embodied recognized both of these facts of life long ago, explaining that,

84. HISTORY OF THE WORLD, PART I (20th Century Fox 1981).
85. 139 S. Ct. 2400 (2019).

> while courts should of course afford respectful consideration to the expert agency's views, they must remain open to competing expert and other evidence supplied in an adversarial setting. Respect for an agency's technical expertise demands no more.[86]

The same can be said of an agency's statutory interpretation. *Chevron* went further than it needed to do and should have done to respect an agency's expertise. But respect is not deference. Justice Gorsuch's position harmonizes the respective responsibilities and expertise of the executive and judicial branches. A majority of the Court should endorse it in the *Loper Bright* case.

CONCLUSION

The Framers anticipated that there would be agencies comprised of executive personnel that would assist the President implement acts of Congress. But the Framers also contemplated that Article III courts would have the final say as to the meaning of whatever laws Congress would pass and agencies would implement. Insofar as the Supreme Court's 1984 decision in *Chevron* transferred any of that authority outside of the judicial branch, the Court went wrong. The Court has the opportunity to correct that error during its upcoming term in *Loper Bright* (and *Relentless*). With luck, it will.

86. *Id*. at 2442–43 (Gorsuch, J., concurring) (quoting Paul J. Larkin, Jr. & Elizabeth H. Slattery, *The World After* Seminole Rock *and* Auer, 42 HARV. J.L. & PUB. POL'Y 625, 647 (2019)).