Foreword

The Ordinary Questions Doctrine

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Abstract

In Loper Bright Enterprises v. Raimondo*, the Supreme Court overruled* Chevron *as inconsistent with the Administrative Procedure Act ("APA"), which requires courts to decide "all relevant questions of law" and therefore prohibits them from deferring to agency interpretations because the relevant statutory language is ambiguous. A different approach now governs judicial review of the countless routine, often specialized questions of statutory interpretation that agencies answer in the normal course of implementing their statutes—the "ordinary" questions. But* Loper Bright *did not provide direction on how courts should determine which of these questions* are *questions of law. This issue arises because many, if not most, ordinary questions involve questions of law that depend on questions of policy for resolution and can be characterized either way for purposes of judicial review. Under* Chevron*, courts did not need to decide how to characterize such mixed questions because the doctrine instructed them to treat statutory ambiguities as presenting questions of policy for the agency to decide. That directive eased the pressure of determining how*

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to handle such questions for purposes of judicial review under the APA. Loper Bright *has altered the doctrine but not the nature of ordinary questions. Even though courts may no longer treat these questions as ones of policy "simply because the statute is ambiguous," they do not need to characterize every question as one of law simply because a statutory term or phrase is involved. Many agency interpretations are no different in kind or degree from the agency policy decisions subject to the arbitrary and capricious standard of review in the APA. Courts determine which of the underlying questions are for them to decide independently and which are for the agency to decide, subject to the arbitrary and capricious test. This is a judicial policy choice, and we should be interested in how courts make it. Before* Chevron*, courts made the choice on an ad hoc basis. After* Loper Bright*, the temptation is for courts to ignore the problem and decide what they can. This Foreword contends that courts should make the choice mindful of established judicial norms for questions of policy. More specifically, a court should consider whether resolving a question itself would amount to judicial policymaking in the relatively concrete ways that the arbitrary and capricious test discourages. The claim is not that courts should apply the arbitrary and capricious test straight away to ordinary questions. Rather, the considerations for applying that test are useful in the first instance to discern whether a question is best regarded as one of law or policy, consistent with the APA and the normative values that undergird the allocation of authority between courts and agencies.*

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Introduction

"*Chevron* is overruled."[1] In *Loper Bright Enterprises v. Raimondo*,[2] the Supreme Court overruled the famous case as inconsistent with the Administrative Procedure Act ("APA"),[3] which requires courts to "decide all relevant questions of law" and therefore prohibits them from deferring to an agency interpretation "simply because a statute is ambiguous."[4] A different approach now governs the countless routine, often specialized questions of statutory interpretation that agencies answer in the normal course of implementing their statutes—the "ordinary" questions. After *Loper Bright*, courts "must exercise independent judgment in determining the meaning of statutory provisions," though they "may . . . seek aid from the interpretations of those responsible for implementing particular statutes."[5] A court may decide that the "best reading of a statute is that it delegates discretionary authority to an agency," and under these circumstances, it must "independently interpret the statute and effectuate the will of Congress subject to constitutional limits."[6]

But *Loper Bright* does not provide direction on how courts should decide which of the ordinary questions that agencies answer *are* "questions of law."[7] This issue arises because such questions, by their nature, often involve questions of law that depend on questions of policy for resolution, and therefore can be characterized as either for purposes of judicial review under the APA. Consider tobacco products. It was

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1 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024); Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984), *overruled by Loper Bright*, 144 S. Ct. 2244. I first presented the arguments and examples in this Foreword in a draft article published on the Social Services Research Network, https://www.ssrn.com, on September 14, 2023, and revised on January 11, 2024. I have edited it here to engage *Loper Bright*.

2 144 S. Ct. 2244 (2024).

3 Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

4 *Loper Bright*, 144 S. Ct. at 2273 (quoting 5 U.S.C. § 706).

5 *Id.* at 2262.

6 *Id.* at 2263.

7 5 U.S.C. § 706.

once a "major" question whether the Food and Drug Administration ("FDA") had authority to regulate tobacco products such as cigarettes, but now that Congress has expressly granted the FDA such authority, the ordinary questions have been many and varied—for example, whether the FDA has authority to regulate premium cigars, whether the statutory requirements extend to vape shops, and when a new tobacco product is the substantial equivalent of a product already subject to regulation.[8] The answers to these questions turn on scientific studies, experience-based findings, predictive judgments, and policy calls made by teams within the agency of physicians, statisticians, scientists, and policy specialists.[9] The answers also involve, or interpret, statutory language, including "new tobacco product," "manufacture," and "substantially equivalent," which brings in agency lawyers.[10] The questions are mixed questions of law and policy.

Mixed questions—and thus many, if not most, ordinary questions—create a puzzle for judicial review precisely because of their dual nature.[11] The APA prescribes a standard of judicial review for questions of law (de novo review) and a standard for questions of policy (arbitrary and capricious review).[12] Under *Chevron*, courts did not need to decide how to characterize mixed questions because the doctrine provided its own approach, instructing them to treat agency interpretations as presenting questions of policy, so long as the relevant statutory language was

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8 *See* West Virginia v. EPA, 597 U.S. 697, 725–25 (2022); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000) (finding that FDA regulation of tobacco products is a question of "economic and political significance"); Deeming Tobacco Products To Be Subject to the Federal Food, Drug, and Cosmetic Act, 81 Fed. Reg. 28,974 (May 10, 2016) (to be codified at 21 C.F.R. pts. 1,100, 1,140, 1,143) (FDA's 2016 "Deeming" Rule, including deeming premium cigars and regulation of vape shops that manufacture tobacco products for direct sale to customers as "meeting the statutory definition of 'tobacco product'"); Food and Drug Administration Actions on Substantial Equivalence Reports, 86 Fed. Reg. 55,224 (Oct. 5, 2021) (to be codified at 21 C.F.R. pts. 16, 1,107) (FDA's 2021 "Substantial Equivalence Reports" rule, clarifying the information necessary to determine a new tobacco product is equivalent to a previously regulated product); Cigar Ass'n of Am. v. FDA, No. 16-cv-01460, 2022 WL 2438512, at *1 (D.D.C. July 5, 2022) (finding arbitrary and capricious the FDA's Deeming Rule as to premium cigars); Cigar Ass'n of Am. v. FDA, No. 16-cv-01460, 2023 WL 5094869, at *6 (D.D.C. Aug. 9, 2023) (vacating FDA's decision to deem premium cigars).

9 *See e.g.*, *The FDA's Drug Review Process: Ensuring Drugs Are Safe and Effective*, FDA (Nov. 24, 2017), https://www.fda.gov/drugs/information-consumers-and-patients-drugs/fdas-drug-review-process-ensuring-drugs-are-safe-and-effective [https://perma.cc/9T7B-EHXA].

10 Deeming Tobacco Products To Be Subject to the Federal Food, Drug, and Cosmetic Act, 81 Fed. Reg. at 28,974; Food and Drug Administration Actions on Substantial Equivalence Reports, 86 Fed Reg. at 55,224.

11 *See* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 913–16 (2017); *see infra* Section I.

12 *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2261 (2024) (describing section 706).

ambiguous.[13] That directive eased the pressure of determining how to handle mixed questions for purposes of judicial review under the APA. When a particular agency interpretation had obvious policy aspects, a court could treat it basically the same whether understood, on some hard-to-define register, as an interpretation of the statute (resolving a question of law) or an implementation of the statute (resolving a question of policy), if the relevant statutory language was ambiguous.

The Court has disposed of *Chevron*, reasserting that courts must decide all questions of law and are "not somehow relieved of [this] obligation" just because statutory language is ambiguous.[14] Still, courts need not *characterize* a mixed question as one of law for them to decide just because statutory language is involved. They may decide that an agency interpretation is best understood as an agency policy decision, subject to arbitrary and capricious review under the APA. *That* is a judicial policy choice, and we should have an interest in how courts make it.

The core argument of this Foreword is that courts should decide whether to characterize an ordinary question as one of law or policy in consideration of established judicial norms for questions of policy, not on an ad hoc basis. More specifically, a court should hesitate to characterize an ordinary question as a question of law when resolving it independently would amount to judicial policymaking in the relatively specific ways that *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*[15] and the Supreme Court's other decisions elaborating the arbitrary and capricious test warn against.[16] Those decisions tell courts to ensure that agencies have engaged in reasoned decision-making but to avoid substituting their judgment for that of the agency.[17] Although the particular considerations that guide this review are expressed in terms of what agencies must do to survive it, they concomitantly establish norms of judicial behavior. After four decades of applying these decisions, courts appreciate the need for restraint when reviewing (1) the data, studies, assessment methods, or analyses that the agency has employed, (2) the facts that the agency has found based on its experience administering the statutory scheme, (3) a discretionary factor that the agency has deemed relevant to its conclusion, or (4) the policy options that the agency has identified and selected among.[18] Ordinary questions frequently involve issues that fall

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13 *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984), *overruled by Loper Bright*, 144 S. Ct. 2244.

14 *Loper Bright*, 144 S. Ct. at 2266.

15 463 U.S. 29, 42 (1983).

16 *See infra* Section II.A.

17 *See generally* Bamzai, *supra* note 11, at 981–85 (describing the history of the arbitrary and capricious standard).

18 *See infra* Section II.B.

into one of these basic categories. The claim is not that the arbitrary and capricious test should apply straight away to such questions.[19] Rather, the considerations for applying that test are useful in the first instance to discern whether a question is best regarded as one of law or policy for purposes of judicial review, consistent with the APA.[20]

Under this approach, no court should decide for itself whether, for example, (1) RiVive (naxoline hydrochloride), a nasal spray for the emergency treatment of opioid overdose, is "safe" and "effective" for over-the-counter use because that interpretation relies on the scientific risk assessment and the risk tolerance of the FDA;[21] (2) graduate students are "employees" for purposes of labor law because that interpretation relies on the factfinding and the experience of the National Labor Relations Board ("NLRB");[22] (3) gender diversity and equity are relevant factors for allocating broadcast licenses "in the public interest" because that interpretation relies on the evaluation of broadcast use, given ever-changing conditions, by the Federal Communications Commission ("FCC");[23] or (4) a solar facility's "power production capacity" is based on the capacity "of all the facility's components working together to produce grid-usable AC power" (i.e., a solar array plus the battery system that stores, inverts, and sends solar to the grid) rather than the subunit generating power (i.e., the battery) because that interpretation relies on the understanding of solar in the overall statutory scheme of "promot[ing] alternative energy sources" by the

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19 *Cf.* David Zaring, *Reasonable Agencies*, 96 Va. L. Rev. 135, 135 (2010) (arguing that courts should apply reasonableness review to all agency interpretations).

20 Others have been interested in the possible return of the law-policy distinction in judicial review of agency statutory interpretation. Most notably, Jeffrey Pojanowski has articulated an entire "neoclassical" theory of administrative law, an important part of which is interested in "pull[ing] apart the overlap between review of interpretation and policymaking," and referring the latter to arbitrariness review. Jeffrey A. Pojanowski, *Without Deference*, 81 Mo. L. Rev. 1075, 1086 (2016) [hereinafter, Pojanowski, *Without Deference*]; *see also* Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 Harv. L. Rev. 852, 888 (2020) [hereinafter, Pojanowski, *Neoclassical Administrative Law*]; Pojanowski, *Without Deference*, *supra*, at 1086–87 (arguing that courts should "independently resolve" "questions of statutory interpretation that, from the perspective of traditional lawyerly argument, are unclear" and treat "as questions of policy judgment subject to standard arbitrary-and-capricious review" questions of statutory interpretation that "turn on facts about the world, non-legal, technical expertise, and judgments about policy priorities and likely outcomes"). Part III addresses his strategy.

21 *See FDA Approves RiVive*, Drugs.com (July 28, 2023), https://www.drugs.com/new-drugs/fda-approves-rivive-naloxone-hydrochloride-over-counter-nasal-emergency-opioid-overdose-6068.html [https://perma.cc/U248-77GZ] (reporting FDA approval of over-the-counter RiVive nasal spray).

22 *See* N.Y. Univ., 332 N.L.R.B. 1205, 1209 (2000), *overruled by* Brown Univ., 342 N.L.R.B. 483 (2004).

23 *Cf.* FCC v. Prometheus Radio Project, 592 U.S. 414, 427 n.3 (2021) (refusing to decide the issue of whether the FCC may consider "minority and female ownership" in reviewing broadcast ownership).

Federal Energy Regulatory Commission ("FERC").[24] These questions all manifest familiar indications of policy and should be characterized as questions of policy for the agency to interpret.

When an agency interpretation manifests no comparable policy-making indications, however, a court may conclude that it presents a question of law, even if the statutory language at issue is ambiguous. Suppose a workers' compensation statute refers to "employees and independent contractors" in various provisions but leaves out the phrase "and independent contractors" in one provision for no reason apparent in the statute's text, structure, or purpose. Under these circumstances, a court may conclude that the question of whether this provision includes independent contractors is a question of law for it to resolve, even though the provision is unclear on this issue. Consistent with *Loper Bright*, it may resolve the question with the help of the agency's interpretation.[25]

With new doctrine that distinguishes questions of law from questions of policy, courts instead may return to the ad hoc approach that predated *Chevron*, but they should not.[26] Before *Chevron*, courts framed some questions as general, amenable to judicial resolution, and some as specialized, or fact-based, for the agency to decide, subject to a deferential standard of review.[27] History reveals that this approach is unpredictable at best, and partisan at worst.[28] Scholars worried that courts decided mixed questions independently when they wanted and deemed questions as delegated to the agency, subject to arbitrary and capricious review, when they did not.[29] More recent history shows when courts are faced with uncertainty about which standard of review applies to a particular interpretation, they may avoid choosing one and say they would reach the same result under either.[30] As the Court recognized in *Loper Bright*, such inconsistency and avoidance occurred after it decided *United States v. Mead Corp.*,[31] and told courts to make a threshold determination whether *Chevron* or *Skidmore v. Swift &*

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24 *See* Solar Energy Indus. Ass'n v. FERC, 59 F.4th 1287, 1291–93 (D.C. Cir. 2023).

25 *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2262 (2024).

26 *See infra* Section I.A.

27 *See* Bamzai, *supra* note 11, at 913–17.

28 *See id.*; *infra* Section I.A.

29 *See* Bamzai, *supra* note 11, at 913–17; *infra* Section I.A.

30 *See* Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1445–46, 1489 (2005); Adrian Vermeule, *Introduction:* Mead *in the Trenches*, 71 GEO. WASH. L. REV. 347, 347 (2003) (describing the aftereffects of *Mead*); *Loper Bright*, 144 S. Ct. at 2269 n.7 (citing Bressman, *supra* note 30; Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1127–29 (2009); Daniel S. Brookins, *Confusion in the Circuit Courts: How the Circuit Courts Are Solving the* Mead*-Puzzle by Avoiding It Altogether*, 85 GEO. WASH. L. REV. 1484, 1496–99 (2017)).

31 533 U.S. 218 (2001).

Co.[32] applied to a particular interpretation, in consideration of nearly identical factors.[33] Although *Loper Bright* eliminated this confusion by dispensing with *Chevron*, it may provoke similar confusion.

Some may respond that *Loper Bright* establishes—indeed mandates—a particular approach: courts must decide independently any question that is amenable to judicial resolution using the traditional tools of statutory construction and announce a "single, best meaning" or determine that a statute delegates "discretionary authority" to an agency, in which case, they must ensure that the agency interpretation is within its scope of that authority.[34] The difficulty is that these instructions do not solve the problem of ordinary questions so much as restate it or ignore it. Almost every statutory term or phrase has a "single, best meaning" if courts work hard enough—and this is especially true if courts may freely seek help from the agency interpretation.[35] Even if courts can separate fixed-meaning terms from delegating terms, almost every question that arises under delegating terms can be understood as defining the limits of agency authority in some sense. Ordinary scope-of-authority questions lack formal features that might help to distinguish them from other ordinary questions. They are unlike "major" questions, which the Supreme Court has felt comfortable distinguishing in "extraordinary" cases based on their vast "economic and political significance" or statute-altering consequence.[36] Courts must make judgment calls for ordinary questions if they are interested in "respect[ing] [congressional] delegations of authority" and "polic[ing] the outer statutory boundaries of those delegations," as *Loper Bright* demands.[37]

This Foreword proceeds in three parts. Part I introduces the problem of ordinary questions. Part II discusses the judicial norms for questions of policy that are useful to solve the problem, helping to discern which questions are for courts to decide independently and which questions are for agencies to decide subject to arbitrary and capricious review. This Part illustrates how such an approach might work, using a sampling of cases from the D.C. Circuit. Part III situates the approach sketched here in the context of judicial review and statutory interpretation. It includes consideration of the alternative approach for solving the problem of ordinary questions that some might say is more consistent with the tone, if not the demand, of *Loper Bright*, as well as the concern that the approach proposed here is unworkable.

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32 323 U.S. 134 (1944).

33 *Loper Bright*, 144 S. Ct. at 2269 & n.7 (noting that "some courts have simply bypassed *Chevron*," citing cases and academic articles); *Mead Corp.*, 533 U.S. at 231–35; Barnhart v. Walton, 535 U.S. 212, 224–25 (2002).

34 *Loper Bright*, 144 S. Ct. at 2263, 2266.

35 *Id.* at 2262, 2266.

36 *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000).

37 *Loper Bright*, 144 S. Ct. at 2268.

I. The Problem of Ordinary Questions

Courts and commentators have long acknowledged that questions of statutory interpretation occur on both sides of the law-policy divide.[38] But disagreements have arisen during different periods in the administrative state about how to incorporate that observation into judicial review.[39] If questions of statutory interpretation involve matters that require specialized skill and knowledge, which institution—court or agency—should decide them? For forty years, this issue had been mostly settled, at least concerning nonmajor, ordinary questions.[40] But the Court's decision in *Loper Bright* has unsettled it again.[41] This Part provides an account of ordinary questions, both their nature and their place in judicial review.

A. Ordinary Questions as Mixed Questions of Law and Policy

Agencies charged with implementing statutory schemes confront countless questions of statutory interpretation in the normal course of doing their jobs.[42] Most are not "extraordinary" questions of vast "economic and political significance" to which the major questions doctrine applies.[43] Rather, they are ordinary questions to which *Chevron* has long applied. That is not to say such questions are unimportant. To the contrary, they often are quite significant, especially to the parties they directly affect.[44] Rather, they are ordinary in the sense that they are routine, arising because agencies exercise their statutory authority under broadly worded mandates and nonspecific terms that acquire meaning as agencies work them out, typically through the administrative procedures that Congress provides for that purpose, including notice-and-comment rulemaking and formal adjudication.[45] That meaning may change to the extent it depends on technical data, factual findings, relevant factors, and policy judgments that change over time.[46]

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38 *See* Bamzai, *supra* note 11, at 960–62.

39 *See id.*

40 *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984), *overruled by Loper Bright*, 144 S. Ct. 2244.

41 *See Loper Bright*, 144 S. Ct. at 2273.

42 *See* City of Taunton v. EPA, 895 F.3d 120, 123–24 (1st Cir. 2018) (setting the level of a certain pollutant that wastewater treatment plants may discharge without violating any state water quality standard).

43 *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000).

44 *See, e.g.*, Christina Jewett, *Judge Strikes Down F.D.A. Rule Regulating Premium Cigars*, N.Y. Times (Aug. 10, 2023), https://www.nytimes.com/2023/08/10/health/fda-cigar-exemption.html [https://perma.cc/ZX3F-NF8J].

45 *See, e.g.*, Lisa Schultz Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 Va. L. Rev. 2009, 2017 (2011).

46 *See supra* text accompanying note 18.

By their nature, ordinary questions often are mixed questions of law and policy. The "mixed questions" label is frequently associated with the application of law to fact, but this is only one form or perhaps the traditional encapsulation.[47] It may go without saying, but the type of questions that arise under modern regulatory statutes tend to involve more than the application of law to fact. For example, the meaning of "stationary source," as either a single smokestack or an entire factory that emits pollution, for purposes of the Clean Air Act,[48] involves the interpretation of a nonspecific statutory term based on environmental science and policy.[49] Similarly, the method for project emissions accounting in the New Source Review ("NSR") permitting process, including whether it is even possible to provide a single definition of "project" to cover all different NSR sources, is based partly on the Administrator's judgment, which is based partly on experience with the process (and affected parties) over time.[50] Questions that involve the application of a broad statutory mandate to a particular subject or party also involve law and policy. The Clean Air Act requires the Environmental Protection Agency ("EPA") to regulate "any air pollutant which, in the judgment of the Administrator, causes, or contributes to, air pollution which may reasonably be anticipated to result in an increase in mortality or an

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47 *See* Thompson v. Keohane, 516 U.S. 99, 109–10 (1995) (describing, in the habeas corpus context, "issues of fact" as "basic, primary, or historical facts: facts 'in the sense of a recital of external events and the credibility of their narrators'" and "[s]o-called mixed questions of fact and law" as "the application of a legal standard to the historical-fact determinations" (quoting Townsend v. Sain, 372 U.S. 293, 309 n.6 (1963))); U.S. Bank Nat'l Ass'n *ex rel.* CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC, 583 U.S. 387, 394 (2018) (describing a bankruptcy court as "mak[ing] findings of what we have called 'basic' or 'historical' fact—addressing questions of who did what, when or where, how or why," adopting legal tests, and addressing "so-called 'mixed question[s]' of law and fact" by applying a legal standard to those facts (first quoting *Thompson*, 516 U.S. at 111; and then quoting Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982))); *Pullman-Standard*, 456 U.S. at 289 n.19 (describing mixed questions as "questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated").

48 42 U.S.C. §§ 7401–7675.

49 *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 858–59 (1984) (quoting 42 U.S.C. § 7411(a)(3)), *overruled by* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

50 *See* Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Regulations Related to Project Emissions Accounting, 89 Fed. Reg. 36,870, 36,873, 36,875 (May 3, 2024) ("In developing this proposed rulemaking, the EPA has considered a petition for reconsideration it received on the 2020 PEA rule, the comments received on that rule's proposal, and the Agency's own experience . . . ."). *See generally* Denial of Petition for Reconsideration and Administrative Stay: "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting," 86 Fed Reg. 57,585 (Oct. 18, 2021); U.S. Env't Prot. Agency, Response to Petition for Reconsideration Submitted on Behalf of the Environmental Defense Fund (EDF) et al. (2021); New Jersey v. EPA, 989 F.3d 1038, 1051 (D.C. Cir. 2021) (addressing other aspects of the EPA's new source review methodology).

increase in serious irreversible, or incapacitating reversible, illness."[51] The Administrator's determination concerning a potentially hazardous pollutant involves a policy judgment about the potential pollutant's health effects, in accordance with risk assessment guidelines developed over time by one office in the agency, based on information prepared and reviewed in scientific databases by another office.[52]

Mixed questions of law and policy pose a puzzle for judicial review of agency interpretations. They do not fall neatly under either the de novo standard of review for questions of law or the deferential standard for questions of policy—or fact—because, by their nature, they involve both types of questions.[53] This conundrum occupied early debates about administrative law. Professor Aditya Bamzai has gathered the history of mixed questions of "law and fact," and his work, though intended for a different purpose, is quite helpful here.[54] As he recounts, the initial approach to such questions was formal, instructing courts to separate the law parts from the fact parts and subject each to the relevant standard of review.[55] Questions of law were thus for courts to decide de novo, while questions of fact were for courts to review under an appropriately deferential standard.[56] With the rise of the modern administrative state

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51 42 U.S.C. § 7422(a).

52 Si Duk Lee, *Risk Assessment and Risk Management of Noncriteria Pollutants*, 6 Toxicology & Indus. Health 245, 245–47 (1990).

53 *See* Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 Geo. L.J. 1, 23 (1985) (describing the "difficulty of knowing where the judge's province ends and the administrator's begins" with mixed questions because "there is no standard of review"); Bernard Schwartz, *Mixed Questions of Law and Fact and the Administrative Procedure Act*, 19 Fordham L. Rev. 73, 73–74 (1950) (noting the difficulty of drawing the law/fact distinction); Thompson v. Keohane, 516 U.S. 99, 110 n.10 (1995) (noting that when courts must decide mixed questions of law and fact under a federal statute, including in the criminal, habeas, Federal Rules of Civil Procedure, and Title VII contexts, "the proper characterization of a question as one of fact or law is sometimes slippery").

54 *See* Bamzai, *supra* note 11, at 959–76. Bamzai's account of mixed questions is part of a larger project recovering a lost convention—that courts defer to contemporaneous and consistent agency statutory interpretations but otherwise decide questions of law de novo—which, he argues, Congress intended to preserve in the scope of review provision of the APA. *Id.* at 908. There are many excellent discussions of the law-fact and law-policy distinctions in administrative law. *See* Adrian Vermeule, Law's Abnegation 27–36 (2016); Theodore J. St. Antoine, *The NLRB, the Courts, the Administrative Procedure Act, and* Chevron*: Now and Then*, 64 Emory L.J. 1529, 1532–37 (2015); Stephen Breyer, *Judicial Review of Questions of Law and Polic*y, 38 Admin. L. Rev. 363 (1986). There are also many histories of the APA, including some that challenge Bamzai's version. *See* Cass R. Sunstein, Chevron *as Law*, 107 Geo. L.J. 1613, 1641–56 (2019); Ronald M. Levin, *The APA and the Assault on Deference*, 106 Minn. L. Rev. 125, 145–47 (2021). In *Loper Bright*, the majority and the dissent each provide their own historical account of judicial review of agency interpretations, but I do not take them to be inconsistent with the account that I present here. *See Loper Bright*, 144 S. Ct. at 2257–63; *id.* at 2301–06 (Kagan, J. dissenting); *infra* text accompanying notes 99–106, 169–74.

55 *See* Bamzai, *supra* note 11, at 959–62.

56 *Id.* at 959.

during the New Deal, legal realists challenged the notion that questions of law could be distinguished from questions of fact.[57] Scholars observed that whether a particular question was for the court or agency depended on how the court chose to characterize it.[58] Bamzai writes:

> The standard of judicial review, therefore, turned on whether a particular issue was characterized as one of "law" or one of "fact." As one might expect, the distinction between law and fact in this context mirrored the law-fact line traditionally drawn in the law of evidence. And as one might expect, just as in the context of the law of evidence, the distinction between "law" and "fact" could pose line-drawing problems. In an influential treatise on the law of evidence, James Bradley Thayer observed that the application of a legal rule to facts had been incorrectly characterized by others as a "mixed question of law and fact," whereas the jury "always [sic] . . . must reason, and must 'judge the facts.'" According to Thayer, there was no bright-line rule separating "law" from "fact" because the difference between cases involving the application of a legal term—such as "reasonableness"—to unique facts "is simply one of more or less." "The reasons for leaving questions as to the meaning and construction of [contract] writing to the judges," Thayer reasoned, is not "that these are questions of law, for, mainly, they are not," but rather "ground[s] of policy." The same problem could arise in administrative law. In *Marquez v. Frisbie*, for example, the Court reasoned that "where there is a mixed question of law and fact, and the court cannot so separate it as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive."[59]

Similarly, Bamzai notes, John Dickinson, a leading figure in the development of administrative law, acknowledged agreement at this time that there "are not two mutually exclusive *kinds* of questions."[60] He stated that "[d]rawing the line between 'facts' and 'law' for purposes of judicial review . . . was not a matter of mere formal categorization, but rather a policy call dependent on the generality of the legal principle that the court or agency was articulating."[61] A court chose the level of generality at which to frame a question on an ad hoc basis.[62] Some questions were general enough for courts to resolve, while others

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57 *Id.* at 971–76.

58 *Id.* at 972–73.

59 *Id.* at 960–61 (alterations in original) (footnotes omitted) (first quoting JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 249–51 (1898); then quoting James Bradley Thayer, *"Law and Fact" in Jury Trials*, 4 HARV. L. REV. 147 (1890); and then quoting Marquez v. Frisbie, 101 U.S. 473, 476 (1879)).

60 *Id.* at 972–73 (quoting JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 55 (1927)).

61 *Id.* at 975.

62 *See id.*

were "of insufficient abstraction to justify the involvement of generalist courts in the functioning of expert agencies."[63]

As a doctrinal matter, Bamzai writes, the Supreme Court seemed to send mixed signals about how to handle "mixed question[s]" of law and fact during this period.[64] Some thought the Court was "experiment[ing]" with judicial deference to agencies on mixed questions.[65] They pointed, for example, to the 1941 case *NLRB v. Hearst Publications, Inc.*,[66] in which the Court said that mixed questions were for agencies to decide.[67] There, the Court deferred to the NLRB's determination that "employees" includes newsboys, who were essentially independent contractors, for purposes of the National Labor Relations Act ("NLRA").[68] It reasoned that the "task [of defining the term] has been assigned primarily to the agency created by Congress to administer the Act."[69] The NLRA applies to employees "where all the conditions of the [employment] relation require protection," and any "[d]etermination" thereof "involves inquiries for the Board charged with this duty."[70] It stressed:

> Everyday experience in the administration of the statute gives [the NLRB] familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the workers for self-organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employers.[71]

However, during the same period, the Court also found that, in some cases, a mixed question was not for the agency. For example, in the 1944 case *Skidmore v. Swift & Co.*, the Court did not accord controlling weight to the Administrator's determination that the time firefighters spend waiting in the fire house for the fire alarm to sound is "working

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63 *Id.* To be clear, Dickinson later stated that the APA prohibited courts from deferring to agency interpretations. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2262 (2024) ("[Dickinson] read the APA to 'impose a clear mandate that all [questions of law] shall be decided by the reviewing Court itself, and in the exercise of its own independent judgment.'" (second alteration in original) (quoting John Dickinson, *Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review*, 33 A.B.A. J. 434, 513 (1947))); *id.* at 2303 n.4 (Kagan, J., dissenting) (agreeing with this characterization of Dickinson's view but clarifying that he "viewed [the bar on judicial deference to agency interpretations] as a 'change' to, not a restatement of, pre-APA law" (quoting Dickinson, *supra*, at 516)).

64 Bamzai, *supra* note 11, at 980.

65 *See id.* at 918; *cf.* Levin, *supra* note 53, at 24 (noting that "the supposedly contradictory" opinions issued during this period "can be reconciled").

66 322 U.S. 111 (1944).

67 *Id.* at 132–33.

68 29 U.S.C. §§ 51–169; *Hearst*, 322 U.S. at 132–33.

69 *Hearst*, 322 U.S. at 130.

70 *Id.* (quoting Lehigh Valley Coal Co. v. Yensavage, 218 F. 547, 552 (2d Cir. 1914)).

71 *Id.*

time" for purposes of the Fair Labor Standards Act ("FLSA").[72] It said that the Administrator's interpretation was "not controlling upon the courts" because "Congress did not utilize the services of an administrative agency to find facts and to determine in the first instance whether particular cases fall within or without the Act. Instead, [Congress] put this responsibility on the courts."[73] The Court said that the Administrator's interpretations, however, "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[74]

When Congress enacted the APA in 1946, confusion arose as to whether it departed from any pre-existing deference rule for mixed questions.[75] Section 706 set forth the "[s]cope of review," specifying that "court[s] shall decide all relevant questions of law," and apply a more deferential "arbitrary [and] capricious" standard of review to "agency action."[76] Bamzai notes that some commentators argued that section 706 was intended to repudiate the Court's "experimentation" of allocating mixed questions to agencies and reinstate the formal view that courts must decide all questions of law.[77] Some contended that Congress did not address the issue of mixed questions at all and left in place a deferential *Hearst*-type rule.[78] Others predicted that, whatever Congress's intent, the approach to mixed questions in the lower courts would devolve into a determination of relative institutional competence—courts are expert at general questions, agencies are expert at specialized questions.[79] Courts would decide the former independently and defer to agencies on the latter.[80]

This prediction played out over the next few decades. Courts continued to determine on an ad hoc basis in particular cases how to characterize the relevant question of statutory interpretation for purposes of judicial review under the APA—as a question of law for them or a question of fact or policy for the agency.[81] Courts made the "policy

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72 29 U.S.C. §§ 201–219; *Hearst*, 322 U.S. at 136.

73 *Hearst*, 322 U.S. at 137, 140. The Administrator was responsible for "bringing injunction actions to restrain violations" of the FLSA and not issuing rules to implement the FLSA. *Id.* at 137–38.

74 *Id.* at 140.

75 *See* Bamzai, *supra* note 11, at 918.

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

77 Bamzai, *supra* note 11, at 994, 1000.

78 *See id.* at 992.

79 *See id.* at 917–18, 986–87.

80 Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 476 (1989) (describing courts' role in deciding "questions of law" and agencies' expertise on "facts . . . [and] policy").

81 *See* St. Antoine, *supra* note 54, at 1535–36 (describing vacillation in Supreme Court decisions involving the NLRB, where the Court "seem[ed] to have set out on its own to" review agency decisions).

call" based on the perceived need for legal acumen or specialized knowledge in deciding the question.[82] Legal realists worried that courts were especially likely to find a question as amenable to independent judicial resolution when they disagreed with the agency's interpretation.[83]

B. Chevron

Then, in 1984, *Chevron* supplied its own approach to judicial review of agency statutory interpretations and changed the terms of the debate.[84] Without referring to the APA, the Court announced that reviewing courts must decide whether the relevant statutory language has a clear meaning, and if it does not, the interpretation of that language essentially is a question of policy for agencies to decide.[85] The Court grounded its rule on a theory of legislative intent.[86] The Court said that Congress delegates authority to agencies explicitly, charging them to implement statutory provisions, and implicitly, intending them to resolve ambiguities that it inadvertently or intentionally leaves in those provisions.[87] The role of courts is not to resolve statutory ambiguities but to determine whether they exist, applying the "traditional tools of statutory construction."[88] If a court finds that Congress has not spoken to an issue, it should allow the agency to fill the statutory gap—i.e., it should accord controlling weight or judicial deference to the agency's interpretation—so long as that interpretation is "permissible."[89] This rule is appropriate, the Court reasoned, because agencies, not courts, possess the expertise and political accountability—via the President—to make the policy choices that the resolution of statutory ambiguities

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82 Bamzai, *supra* note 11, at 975.

83 *Cf. id.* at 976 (questioning whether courts had more expertise than agencies at deciding questions of law).

84 *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984), *overruled by* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

85 *See* Bamzai, *supra* note 11, at 997–98; *Chevron*, 467 U.S. at 845. *See generally* Thomas W. Merrill, The *Chevron* Doctrine: Its Rise and Fall, and the Future of the Administrative State (2022) (providing the quintessential history of *Chevron*). After it decided *Chevron*, the Court maintained the practice of separating law from fact when reviewing mixed questions decided by other courts, while acknowledging that the "fact or law" distinction is "slippery" and making it "will not always be easy." *See* Thompson v. Keohane, 516 U.S. 99, 110–11 (1995) (quoting Wainwright v. Witt, 469 U.S. 412, 429 (1985)). But *Chevron* changed the debate about mixed questions in the administrative law context. *Cf.* Cass R. Sunstein, *Law and Administration After* Chevron, 90 Colum. L. Rev. 2071, 2093–97 (1990) (discussing the limitations of *Chevron* deference for mixed questions); Sunstein, *supra* note 80, at 475–76 (1989) (explaining the "tension" that exists between respecting the "policymaking competence" of agencies and applying "independent judicial review" to agency action).

86 *Chevron*, 467 U.S. at 843–44.

87 *Id.*

88 *Id.* at 843 n.9.

89 *Id.* at 843–44.

demands.[90] *Chevron* provided a separate framework for judicial review of agency interpretations, directing courts to treat the underlying questions as questions of policy for agencies to decide, whenever the relevant statutory language was ambiguous. It therefore eased the pressure of deciding how to characterize mixed questions for purposes of judicial review under the APA.

That is not to say *Chevron* cleared up all the confusion in this area. Over the subsequent decades, the Court cut back on the application of *Chevron*, tailoring the notion of congressional delegation upon which the deference rule relied. In 1994, it began by planting the seeds of the major questions doctrine, saying that Congress does not license agencies to alter the fundamental aspects of their regulatory scheme through relatively insignificant statutory provisions, that is, Congress does not "hide elephants in mouseholes."[91] In 2000, it said that Congress does not give agencies authority to reach matters of great "economic and political significance" through broadly worded provisions.[92] In 2001, it decided that if Congress has not given an agency the authority to issue a controlling interpretation of the statute, or if the agency fails to exercise that authority in issuing a particular interpretation, the standard from *Skidmore* rather than *Chevron* applies.[93] It continued to reinforce these principles in the ensuing years.[94]

But *Chevron* still applied to most cases, directing courts to decide whether the relevant statutory language is clear, and if not, defer to the agency interpretation so long as permissible.[95] For most questions, *Chevron* effectively allocated interpretive authority this way: the court decides the legal question of whether Congress has provided or precluded a specific meaning for statutory language at issue, and if not, the agency decides the policy question that Congress did not resolve, within given statutory limits. In other words, it instructed courts to use statutory ambiguity to draw the line between questions of law for courts and questions of policy for agencies.

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90 *Id.* at 865–66.

91 Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001); *see also* MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 225 (1994) (holding that the FCC lacked authority to alter a fundamental provision of its statutory scheme under its authority to "modify any requirement" of the statute).

92 FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000).

93 *See* United States v. Mead Corp., 533 U.S. 218, 231–35 (2001).

94 *See* Barnhart v. Walton, 535 U.S. 212, 224–25 (2002); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982–86 (2005); King v. Burwell, 576 U.S. 473, 496–97 (2015).

95 *Chevron*, 467 U.S. at 843–44.

C. Loper Bright

In *Loper Bright*, the Court found that "[t]he deference that *Chevron* requires of courts reviewing agency action cannot be squared with the APA" and overruled the decision accordingly.[96] Chief Justice Roberts wrote the opinion for the Court, joined by all conservative Justices, with Justices Thomas and Gorsuch each writing a concurrence, and Justice Kagan writing the dissent for herself, Justice Sotomayor, and Justice Jackson.[97] Many will discuss what *Loper Bright* means, how it applies, and whether it is correct. This Section sets it out not for the purpose of evaluating it directly but in relation to the problem of ordinary questions, concentrating on the majority and dissenting opinions. This Section quotes those opinions generously because, as of this writing, *Loper Bright* is brand new, and attention is warranted to the Justices' actual words rather than paraphrasing them.

The Court began with the history of judicial review, from Article III and *Marbury v. Madison*[98] to other early cases, which established that "[w]hen the meaning of a statute was at issue, the judicial role was to 'interpret the act of Congress, in order to ascertain the rights of the parties.'"[99] The Court noted that "exercising independent judgment often included according due respect to Executive Branch interpretations of federal statutes," particularly when those interpretations were "issued roughly contemporaneously with the enactment of the statute" and by "masters of the subject," who often drafted and then later interpreted the laws."[100] The Court underscored: "'Respect,' though, was just that. The views of the Executive Branch could inform the judgment of the Judiciary, but did not supersede it."[101]

The Court found no departure from this understanding in the cases leading up to the APA. To the contrary, those cases reaffirmed that "'[t]he interpretation of the meaning of statutes . . .' was 'exclusively a judicial function.'"[102] Meanwhile, *Skidmore* reinforced and elaborated the "respect" or "great weight" that courts could give an agency interpretation to "inform[]" their independent judgment.[103] The Court

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96 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2263 (2024).

97 Justice Jackson did not participate in the decision of *Loper Bright*; she did participate in the decision of the companion case, *Relentless, Inc. v. U.S. Dep't of Commerce*. *See id.* at 2294 (Kagan, J., dissenting).

98 5 U.S. (1 Cranch) 137 (1803).

99 *Loper Bright*, 144 S. Ct. at 2257 (quoting Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 515 (1840)).

100 *Id.* at 2257–58 (quoting United States v. Moore, 95 U.S. 760, 763 (1877)).

101 *Id.* at 2258.

102 *Id.* (quoting United States v. American Trucking Ass'ns., Inc., 310 U.S. 534, 544 (1940)).

103 *See id.* at 2259 (first quoting Gray v. Powell, 314 U.S. 402, 412 (1941); then quoting *Am. Trucking Ass'ns*, 310 U.S. at 549; and then quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

acknowledged some inconsistency in cases such as *Gray v. Powell*[104] and *NLRB v. Hearst*, in which it had "applied deferential review upon concluding that a particular statute empowered an agency to decide how a broad statutory term applied to specific facts found by the agency."[105] But it did not regard those cases as weakening or displacing the basic rule that courts decide all questions of law.[106] At any rate, the Court noted, they certainly did not come close to embracing *Chevron*-style deference.[107]

Nor did the APA. The Court pointed to the text of section 706, which plainly states that a "court shall decide all relevant questions of law" while ensuring that agency decisions are not "arbitrary, capricious, [or] an abuse of discretion."[108] Based on this and surrounding text, the Court declared that the APA "means what it says."[109] It confirmed the plain meaning by examining the history of the APA as well as the views of leading administrative law scholars then.[110] It found ample evidence that the APA instructs courts to decide "*all* [questions of law]," exercising "independent judgment in determining the meaning of statutory provisions."[111]

The Court described how courts perform their duty.[112] They use their traditional tools and "may—as they have from the start—seek aid from the interpretations of those responsible for implementing particular statutes," citing *Skidmore*.[113] And, the Court stated, "[w]hen the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits."[114] Courts "fulfill[] that role by recognizing constitutional delegations, 'fix[ing] the boundaries of [the] delegated authority,' and ensuring that the agency has engaged in 'reasoned decision-making' within those boundaries."[115]

The Court announced that *Chevron*, which made no effort to engage with the APA, "defies the command of the APA that 'the reviewing court'—not the agency whose action it reviews—is to 'decide

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104 314 U.S. 402 (1941).

105 *Loper Bright*, 144 S. Ct. at 2259 (first citing *Gray*, 314 U.S. at 402; and then NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111 (1944)).

106 *See id.* at 2259–60.

107 *See id.* at 2260.

108 *Id.* at 2261 (citing Administrative Procedure Act, 5 U.S.C. § 706).

109 *Id.* at 2262.

110 *See id.*

111 *Id.* (quoting Dickinson, *supra* note 63, at 513 (alteration in original) (emphasis added)).

112 *Id.*

113 *Id.*

114 *Id.* at 2263.

115 *Id.* (citation omitted) (first quoting Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 27 (1983); and then quoting Michigan v. EPA, 576 U.S. 743, 750 (2015)).

all relevant questions of law' and 'interpret . . . statutory provisions.'"[116] *Chevron* "requires a court to *ignore*, not follow, 'the reading the court would have reached' had it exercised its independent judgment as required by the APA."[117] Furthermore, *Chevron* "demands that courts mechanically afford *binding* deference to agency interpretations, including those that have been inconsistent over time," which is "much more" than "the 'respect' historically given to Executive Branch interpretations."[118] "Still worse," *Chevron* "forces courts to do so even when a pre-existing judicial precedent holds that the statute means something else—unless the prior court happened to also say that the statute is 'unambiguous.'"[119]

The Court said that *Chevron* "cannot be reconciled with the APA . . . by presuming that statutory ambiguities are implicit delegations to agencies" for several reasons.[120] For one thing, that presumption does not "approximate reality" because "[an] ambiguity is simply not a delegation of law-interpreting power."[121] Quoting *Chevron*, the Court observed that statutory ambiguities may result from "an inability on the part of Congress to squarely answer the question at hand, or from a failure to even 'consider the question' with the requisite precision."[122] They may be "unintentional," owing to the "complexity" of ideas and the limits of language.[123] Ambiguity is not a reliable indication that Congress intends "an agency, as opposed to a court, resolve the resulting interpretive question."[124]

The Court further noted that ambiguities arise all the time in cases that do not involve a purported delegation or an agency. When courts confront such cases, they "understand that such statutes . . . do, in fact—must—have a single, best meaning," and they "use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity."[125] They "do not throw up their hands because 'Congress's instructions have' supposedly 'run out,' leaving a statutory 'gap'" or "declar[e] a particular party's reading 'permissible.'"[126] In fact, the Court went on, the very notion of a "permissible" reading "makes no sense"

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116 *Id.* at 2265 (quoting Administrative Procedure Act, 5 U.S.C. § 706).

117 *Id.* (quoting Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.11 (1984), *overruled by Loper Bright*, 144 S. Ct. 2244).

118 *Id.* (quoting *Chevron*, 467 U.S. at 863).

119 *Id.* at 2265 (quoting Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005)).

120 *Id.*

121 *Id.* (quoting Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 445 (1989)).

122 *Id.* (quoting *Chevron*, 467 U.S. at 865).

123 *Id.* at 2266.

124 *Id.* at 2265.

125 *Id.* at 2266.

126 *Id.* (quoting *id.* at 2294 (Kagan, J., dissenting)).

because "[i]n the business of statutory interpretation, if it is not the best, it is not permissible."[127]

"Perhaps most fundamentally," the Court remarked, "*Chevron*'s presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do."[128] Although *Chevron* recognized that courts are the "final authority on issues of statutory construction," and that "in the absence of an administrative interpretation" a court must "impose its own construction on the statute," it "gravely erred . . . in concluding that the inquiry is fundamentally different just because an administrative interpretation is in play."[129] Indeed, the Court continued, "[t]he very point of traditional tools of statutory construction—the tools courts use every day—is to resolve statutory ambiguities."[130]

The Court rejected the Government's—and the dissent's—various arguments about why "Congress must generally intend for agencies to resolve statutory ambiguities": to enlist agency "subject matter expertise," to "promote[] uniform construction of federal law," and to leave policymaking to political officials not courts.[131] As to agency "subject matter expertise," the Court said *Chevron*'s presumption ignores that courts are the experts for resolving statutory ambiguities, plus the presumption extends beyond technical issues as to which agency expertise is relevant.[132] The Court noted that, even for technical issues, "delegating ultimate interpretive authority to agencies is simply not necessary to ensure that the resolution of statutory ambiguities is well informed by subject matter expertise" because courts can seek assistance from the parties in the case and the agency's interpretation.[133]

The Court quickly dismissed the argument that *Chevron* is necessary for the "uniform construction of federal law."[134] It questioned whether *Chevron* delivered uniformity when courts have been inconsistent in applying the decision. Additionally, it commented, there is "no reason to presume that Congress prefers uniformity for uniformity's sake over the correct interpretation of the law it enacts."[135]

The Court then addressed the contention that *Chevron* is necessary to prevent courts from making policy in place of politically accountable officials. Although "[i]t is reasonable to assume that Congress intends

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127 *Id.*

128 *Id.*

129 *Id.* (quoting Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 & n.9 (1984), *overruled by Loper Bright*, 144 S. Ct. 2244).

130 *Id.*

131 *Id.*

132 *See id.* at 2267.

133 *Id.*

134 *Id.*

135 *Id.*

to leave policymaking to political actors," the Court said that *Chevron* is "especially mistaken, for it rests on a profound misconception of the judicial role."[136] That is because the "resolution of statutory ambiguities involves legal interpretation," a "task" that "does not suddenly become policymaking just because a court has an 'agency to fall back on.'"[137] Moreover, "[c]ourts interpret statutes, no matter the context, based on the traditional tools of statutory construction, not individual policy preferences."[138] The Court said that all courts must do to avoid "discretionary policymaking" is to "identify and respect such delegations of authority, police the outer statutory boundaries of those delegations, and ensure that agencies exercise their discretion consistent with the APA."[139] Thus, "*Chevron* does not prevent judges from making policy. It prevents them from judging."[140]

Observing that *Chevron*'s presumption is a "fiction,"[141] the Court briefly canvassed the various "refinements" that it had to make—from *Mead*, restricting the application of *Chevron* to cases in which "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority,"[142] to the major questions doctrine, carving out issues of "deep economic and political significance"[143] that are too "[e]xtraordinary" for Congress to have delegated through "modest words, vague terms, or subtle device[s,]" and others.[144] It noted that these "byzantine . . . preconditions and exceptions" had negative practical effects, causing some courts to "bypass[] *Chevron*," either one of the steps or entirely, and avoid determining at which "step" they were deferring to the agency interpretation.[145]

Having dismantled *Chevron*, the Court then found that stare decisis did not prevent it from overruling the long-standing precedent. It first observed that "[e]xperience has . . . shown that *Chevron* is unworkable."[146] Not only had the Court needed to continually clarify the framework's application over time, but no one in the decision's lifetime had provided courts guidance on the pivotal issue: "How clear

136 *Id.* at 2268.

137 *Id.* (quoting Kisor v. Wilkie, 588 U.S. 558, 575 (2019) (plurality opinion)).

138 *Id.*

139 *Id.*

140 *Id.*

141 *Id.*

142 *Id.* (quoting United States v. Mead Corp., 533 U.S. 218, 226–27 (2001)).

143 *Id.* at 2269 (quoting King v. Burwell, 576 U.S. 473, 486 (2015)).

144 *Id.* (quoting West Virginia v. EPA, 597 U.S. 697, 723 (2022)).

145 *Id.*

146 *Id.* at 2270.

is clear?"[147] Courts know they can always find a "best meaning" for statutory language using their traditional tools; what they do *not* know, the Court stressed, is when they should stop applying those tools and declare ambiguity, thus triggering judicial deference.[148] The reality is that "[o]ne judge might see ambiguity everywhere; another might never encounter it."[149] Because ambiguity is "[s]uch an impressionistic and malleable concept," the Court said it "'cannot stand as an every-day test for allocating' interpretive authority between courts and agencies."[150] The Court also found that *Chevron* has not "foster[ed] meaningful reliance" as a "stable background rule" given the Court's "constant tinkering" and the doctrine's lack of a "clear or easily applicable standard."[151] Furthermore, *Chevron* "affirmatively destroys" reliance and "fosters unwarranted instability in the law" by allowing an agency "to change positions" as much as it likes, subject to minimal legal constraints.[152]

Before concluding, the Court stated that its decision to overrule *Chevron* does "not call into question prior cases that relied on the *Chevron* framework."[153] It noted that "[t]he holdings of those cases that specific agency actions are lawful . . . are still subject to stare decisis despite our change in interpretive methodology."[154] And the claim that a case relied on the wrong framework does not constitute a "special justification" for overruling; it is tantamount to a claim that the case reached the wrong result, which is "not enough to justify overruling a statutory precedent."[155]

Justice Thomas concurred, writing that whether agencies decide questions of law or policy when interpreting statutes under *Chevron*, neither can stand.[156] Agencies usurp judicial power when they make law and usurp legislative power when they make policy.[157] Justice Gorsuch concurred to note that, in his view, *Chevron* violates separation of powers by abdicating judicial responsibility for questions of law.[158] He also offered a lengthy theoretical discussion of stare decisis and then explained why stare decisis does not save *Chevron*.[159]

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147 *Id.* (quoting Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 521).

148 *See id.* at 2271.

149 *Id.* at 2270.

150 *Id.* at 2270–71 (quoting Swift & Co. v. Wickham, 382 U.S. 111, 125 (1965)).

151 *Id.* at 2272 (first quoting *id.* at 2298 n.1 (Kagan, J., dissenting); and then quoting Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., 585 U.S. 878, 927 (2018)).

152 *Id.*

153 *Id.* at 2273.

154 *Id.*

155 *Id.* (quoting Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 266 (2014)).

156 *See id.* at 2273–75 (Thomas, J., concurring).

157 *See id.*

158 *See id.* at 2281–82 (Gorsuch, J., concurring).

159 *See id.* at 2276–94.

In her dissent, Justice Kagan defended *Chevron*'s presumption that agencies, not courts, should resolve the myriad ambiguities that invariably arise in regulatory statutes.[160] She pointed out in concrete terms "the problem that gave rise to *Chevron* (and also to its older precursors): The regulatory statutes Congress passes often contain ambiguities and gaps."[161] She offered example upon example from prior circuit court cases demonstrating "what a typical *Chevron* question looks like—or really, what a typical *Chevron* question *is*."[162] These examples involved highly specialized matters that demanded the precise expertise of the agencies in charge of implementing the statutory schemes; likewise, they were not the sort that Congress likely would resolve itself when drafting a statute.[163] A *Chevron* question, Justice Kagan said, involves "a statutory phrase [that] has more than one reasonable reading. And Congress has not chosen among them: It has not, in any real-world sense, 'fixed' the 'single, best meaning' at 'the time of enactment' (to use the majority's phrase)."[164] Thus, the question that *Chevron* addresses is: "Who decides which of the possible readings should govern?"[165] In Justice Kagan's view, *Chevron* provides a reasonable answer that Congress generally would intend for the agency not the court to decide.[166]

Justice Kagan noted that "[t]his Court has long thought Congress would choose an agency, with courts serving only as a backstop to make sure the agency makes a reasonable choice among the possible readings."[167] She explained why, using concrete examples to show the importance of agency subject matter knowledge, particularly in implementing scientific and technical statutes.[168] In addition, she highlighted that "Congress would value the agency's experience with how a complex regulatory regime functions," again pointing to specific examples on a wide range of subjects.[169] That said, she continued, "deference . . . is [not] always appropriate," which accounts for the Court's "fine-tun[ing] the *Chevron* regime to deny deference in classes of cases in which Congress has no reason to prefer an agency to a court."[170] Justice Kagan described *Chevron*'s presumption as a "default rule" based on what Congress likely would want, observing that Congress has not acted to change the rule in the hundreds of statutes it has enacted since *Chevron*, though

160 *See id.* at 2294 (Kagan, J., dissenting).
161 *See id.* at 2295.
162 *Id.* at 2296.
163 *See id.*
164 *Id.* at 2297 (quoting *id.* at 2266 (majority opinion)).
165 *Id.*
166 *See id.*
167 *Id.*
168 *See id.* at 2298.
169 *Id.* at 2298–99.
170 *Id.* at 2299.

"[t]he drafters of those statutes knew all about *Chevron*," nor enacted legislation overruling it.[171] Acknowledging that "the *Chevron* presumption is 'fiction[al]'—as all legal presumptions in some sense are," Justice Kagan said that the presumption has "gotten less and less so every day for 40 years."[172]

Justice Kagan took on the majority's reading of the APA's text, history, and scholarly understandings, observing that "Section 706 does not specify *any* standard of review for construing statutes" and "most 'respected commentators' understood Section 706 . . . as allowing, even if not requiring deference."[173] She also challenged the majority's understanding of the cases leading up to the APA, in particular *Gray v. Powell* and *NLRB v. Hearst*, which approved deference on "so-called mixed questions . . . involving the application of a legal standard to a set of facts."[174] She said that the majority "first appears to distinguish between 'pure legal question[s]'" and "mixed questions," requiring courts to decide only the former and allowing them to defer on the latter, but she doubted that the majority has such an intent "because that approach would preserve *Chevron* in a substantial part of its current domain."[175] Observing that mixed questions greatly outnumber pure legal questions, she noted that "[i]t is frequently in the consideration of mixed questions that the scope of statutory terms is established and their meaning defined."[176] She found that "[t]he majority's next rejoinder—that 'the Court was far from consistent' in deferring—falls equally flat."[177] On her reasoning, if the cases leading up to the APA were inconsistent in requiring deference, and "the majority agrees that Section 706 was not meant to change the then-prevailing law," then section 706 "cannot possibly be thought to have *prohibited* deference."[178]

After defending *Chevron*, Justice Kagan addressed stare decisis.[179] She said that *Chevron* was "entitled to a particularly strong form of *stare decisis*" because Congress "remains free to alter what we have done" and *Chevron* is "as embedded as embedded gets in the law," applied by the Court some seventy times and lower courts "thousands upon

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171 *Id.* at 2301 (citing Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 928 fig.2, 994 (2013)).

172 *Id.* at 2301 (quoting *id.* at 2268 (majority opinion)).

173 *Id.* at 2302–03 (quoting *id.* at 2303).

174 *Id.* at 2305.

175 *Id.* at 2305–06.

176 *Id.* at 2306.

177 *Id.* (quoting *id.* at 2260 (majority opinion)).

178 *Id.*

179 *See id.* at 2306–10.

thousands" of times.[180] She also disputed the majority point-by-point concerning *Chevron*'s workability. As to the "variation" among judges as to "what 'ambiguity' means," she stated that "the legal system has for many years, in many contexts, dealt perfectly well with that variation."[181] As to the "difficult" and "complicate[d]" exceptions that the Court has made to *Chevron*'s default rule, she said that those exceptions "fit with *Chevron*'s rationale."[182] Furthermore, "on the difficulty scale, they are nothing much" because courts will agree "[i]n 99 of 100 cases," and, though "judges have indeed disputed [the] nature and scope," of the "major questions exception," that "disagreement concerns, on everyone's view, a tiny subset of all interpretations."[183]

Meanwhile, she said the majority's approach is "no walk in the park."[184] She doubted that courts will know which statutory words or phrases denote "delegate[d] discretionary authority," and which agency interpretations are "entitled to respect" under *Skidmore*.[185] Furthermore, she remarked, "[i]f the majority thinks that the same judges who argue today about where 'ambiguity' resides are not going to argue tomorrow about what 'respect' requires, I fear they will be gravely disappointed."[186]

Justice Kagan also warned that overruling *Chevron* would provide a "jolt to the legal system."[187] She predicted that "[s]ome agency interpretations never challenged under *Chevron* now will be."[188] And despite the Court's assertion that its new decision would not unsettle prior decisions upholding agency action, of which "[t]here are thousands . . . many settled for decades," she was not so "sanguine."[189] To her mind, "[c]ourts motivated to overrule an old *Chevron*-based decision can always come up with something to label a 'special justification.'"[190]

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180 *Id.* at 2307–08 (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989)) (citing Kent Barnett & Christopher J. Walker, Chevron *and Stare Decisis*, 31 Geo. Mason L. Rev. 475, 477 & n.11 (2024)).

181 *Id.* at 2309 (quoting *id.* at 2271 (majority opinion)).

182 *Id.* at 2308 (quoting *id.* at 2270 (majority opinion)).

183 *Id.* at 2309.

184 *Id.*

185 *Id.* at 2309–10 (first quoting *id.* at 2263 (majority opinion); and then quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

186 *Id.* at 2309 (citation omitted) (quoting *id.* at 2265 (majority opinion)).

187 *Id.* at 2310 (quoting Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 357 (2022) (Roberts, C. J., concurring in judgment)).

188 *Id.*

189 *Id.*

190 *Id.* (quoting *id.* at 2273 (majority opinion)).

D. Ordinary Questions After Loper Bright

Loper Bright claims questions of law for courts, but it does not fully address the conundrum that ordinary questions pose for judicial review under the APA: How should courts decide whether a particular question is one of law for the court or one of policy for the agency when it can be characterized as either? Any number of questions that involve statutory terms or phrases involve questions of law *and* science, law *and* technology, or law *and* policy. They therefore can be characterized either as legal questions for courts or exercise-of-authority questions for agencies. Furthermore, as Justice Kagan wrote in her dissent, "[i]t is frequently in the consideration of mixed questions that the scope of statutory terms is established and their meaning defined."[191] Such questions can be characterized either as scope-of-authority questions for courts or exercise-of-authority questions for agencies. *Loper Bright* does affirm that courts have the responsibility under the APA to decide all questions of law, even when the statutory language is ambiguous, and confirms that the agency's interpretation is available to provide technical assistance.[192] But it does not say that courts must decide every question that involves statutory language or agency authority in some sense. Many policy decisions subject to the arbitrary and capricious test look this way, too. Courts make the judicial policy call concerning the proper standard of review under the APA in particular cases. How should they do so?

Courts may return to the ad hoc approach that predated *Chevron*. But history shows that this approach has significant limitations. During those years, the Court's own cases reflected inconsistency, as the *Loper Bright* majority admits and the dissent confirms.[193] So, too, in lower courts, where the result was unpredictable and worse, charges of partisanship in judicial review, both prior to and under the APA.[194] Courts decided the questions they wanted and remitted to agencies the ones they did not.[195]

Today, there is reason for concern that another pathology might emerge. As they begin to live with *Loper Bright*, courts will face uncertainty in particular cases about whether the question at issue is for them to decide independently, with the assistance of the agency's interpretation under *Skidmore*, or for the agency to decide, subject to deferential review albeit no longer under *Chevron* but under the arbitrary and capricious test of the APA. This is the choice that existed for agency

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191 *Id.* at 2306.

192 *See id.* at 2261, 2273 (majority opinion).

193 *See id.* at 2259–60; *id.* at 2284 (Gorsuch, J., concurring); *id.* at 2306–07 (Kagan, J., dissenting).

194 *See supra* Section II.A; *supra* text accompanying note 83.

195 *See supra* text accompanying note 83.

interpretations before *Chevron*.[196] Courts may choose arbitrarily or, worse, use *Skidmore* especially when they want to narrow the agency's authority. But even when a court is inclined to agree with an agency interpretation, there is still a possible concern: a court might not choose a standard if it is uncertain which applies and instead say it would uphold the interpretation under either. Then no one knows whether the agency persuaded the court under *Skidmore* or reasonably exercised its own authority under the arbitrary and capricious test—not courts, agencies, Congress, or affected parties. That difference may matter if the agency seeks to change its interpretation in the future. Does it need to persuade the court to overrule statutory precedent, or does it have discretion to change, subject to reasoned decision-making constraints? As the *Loper Bright* majority indicated, a similar phenomenon occurred when the Court decided *Mead*, directing courts to consider, as a condition of applying *Chevron*, whether an agency has authority to issue interpretations with the "force of law" and has exercised that authority to issue the interpretation under review, and if not, to decide the question itself, affording the agency interpretation the "power to persuade" under *Skidmore*.[197] Courts found the *Mead* inquiry confusing when the agency did not possess or use traditional lawmaking procedures because the other factors that militated toward applying *Chevron* were nearly identical to those that favored applying *Skidmore*.[198] Some began to decide cases without selecting a standard, deferring to the agency under either and creating uncertainty in the law.[199]

Ultimately, the extent of lower court confusion after *Loper Bright* is an empirical question. But prior experience with doctrinal change in this area does not bode well, and courts will face more cases challenging agency interpretations than ever before, if Justice Kagan's prediction is correct.[200] A return to the ad hoc approach is not the only way for courts to move forward. The next Part offers guidance to courts for navigating the problem of ordinary questions in the new administrative law era.

II. Familiar Considerations, New Approach

When courts are asked to review agency statutory interpretations, they should not ignore what they already know—the judicial norms for

196 *See supra* text accompanying note 83.

197 United States v. Mead Corp., 533 U.S. 218, 231–35 (2001); *Loper Bright*, 144 S. Ct. at 2269 & n.7 (collecting cases).

198 *See* Bressman, *supra* note 30, at 1445–46.

199 *See id.*

200 *See Loper Bright*, 144 S. Ct. at 2310 (Kagan, J., dissenting) (doubting the majority's assurance that decisions upholding reasonable agency interpretations under *Chevron* would not be overruled on this basis, and noting that "some agency interpretations never challenged under *Chevron* now will be").

questions of policy. These norms come from the Court's decisions over the past four decades elaborating the arbitrary and capricious test of the APA. The suggestion here is that the considerations underlying that test might be useful to determine in the first instance whether an ordinary question is properly regarded as a question of law or a question of policy. If a question of law, the court should resolve it independently; if a question of policy, the court should route the agency's interpretation to arbitrary and capricious review. This Part describes the approach and illustrates how it might work.

A. Judicial Review of Agency Policy Decisions

The "scope of review" provision, section 706 of the APA, directs courts to "hold unlawful and set aside agency action, findings, and conclusions . . . [that are] arbitrary, capricious, an abuse of discretion, or [contrary to law]."[201] Although this language is hardly self-explanatory, the Supreme Court only began to elaborate it in earnest four decades after Congress enacted it, as courts were beginning to review agency decisions under the regulatory statutes of the 1960s and 1970s.[202] The most famous case is *State Farm*, which the Court decided in 1983, one term before *Chevron*. The considerations from *State Farm* and decisions that followed have come to comprise their own doctrine known as both "the reasoned decision-making requirement" and "the hard look doctrine."[203]

State Farm contains several formulations of judicial review under the arbitrary and capricious standard. The most general description is that "a reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by the statute."[204] The Court described this standard as "narrow" and clarified that "a court is not to substitute its judgment for that of the agency."[205] It also offered further

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201 5 U.S.C. § 706(2).

202 *See* Bamzai, *supra* note 11, at 995.

203 *See, e.g.*, Allentown Mack Sales and Service, Inc. v. NLRB, 522 U.S. 359, 374 (1998) ("The Administrative Procedure Act . . . establishes a scheme of 'reasoned decision-making.'" (quoting Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 52 (1983)); Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355, 1360 (2016) (examining Supreme Court cases and concluding that arbitrary and capricious review has been deferential and "far more flexible, accommodating, and intelligent about agency rationality"); Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 767 (2008) (empirical analysis suggesting that judges' political affiliation and other influences determine the validation rate of NLRB and EPA decisions).

204 *State Farm*, 463 U.S. at 42.

205 *Id.* at 43; FCC v. Fox Television Stations, Inc., 556 U.S. 502, 513 (2009) (quoting *State Farm*, 463 U.S. at 42) (describing the arbitrary and capricious standard as "narrow"); FCC v. Prometheus Radio Project, 592 U.S. 414, 423 (2021) ("Judicial review under [the arbitrary and capricious]

detail on what agencies and courts are expected to do; thus, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[206] Further, "[i]n reviewing that explanation, [a court] must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'"[207] More specifically, the Court stated:

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[208]

In subsequent decisions, the Court offered more nuance, especially to this last, most concrete set of considerations.[209]

Though often framed in terms of what an agency must demonstrate to survive judicial review, the Court's considerations establish norms of judicial behavior as well. For example, although a court must ensure that the agency has examined the relevant data, it must not provide its own assessment of the data.[210] And although a court must ensure that the agency has relied on relevant factors and no irrelevant factors in reaching its conclusion, it must not mandate a factor it prefers or strike a discretionary factor it dislikes.[211] Thus, courts understand that when reviewing an agency's policy decision, they normally should not second-guess that decision in the relatively specific ways that the Court has

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standard is deferential, and a court may not substitute its own policy judgment for that of the agency."); Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 658 (2007) ("Review under the arbitrary and capricious test is deferential . . . .").

206 *State Farm*, 463 U.S. at 43 (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

207 *Id.* (quoting Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971)).

208 *Id.*

209 *See* Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 15–17 (2009) (listing factors that courts consider under the arbitrary and capricious test); Louis J. Virelli III, *Deconstructing Arbitrary and Capricious Review*, 92 N.C. L. REV. 721, 729–33 (2014). The Court has decided other arbitrary and capricious cases, some of which can be understood to address a particular concern for presidential opportunism concerning politically significant issues. *See* Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748, 1752 (2021) (arguing that the Court has implemented an "accountability-forcing" version of arbitrariness review that focuses on "ensuring robust political accountability" and "political neutrality of agency decisions"); *cf.* Dep't of Homeland Sec. v. Regents of Univ. of Cal., 591 U.S. 1, 33 (2020) (holding that agency choice is arbitrary and capricious when it fails to consider an option in front of it); Dep't of Com. v. New York, 588 U.S. 752, 785 (2019) (remanding agency choice if based on pretextual reasons).

210 *See supra* notes 204–08 and accompanying text.

211 *See supra* notes 204–08 and accompanying text.

identified over time.[212] Absent unusual circumstances, they should not disturb (1) data, studies, and decision-making methods upon which the agency has relied, analyses it has performed, and related judgments it has made;[213] (2) facts the agency has found and conclusions it has drawn based on its experience in administering the statute;[214] (3) discretionary factors the agency has deemed relevant or irrelevant to its decision;[215] or (4) policy options the agency has identified and selected among.[216]

These considerations can be helpful under the APA as indications that a court should not review a particular agency interpretation de novo but under the arbitrary and capricious standard of review. Courts know what they should *not* be doing when reviewing agencies' policy decisions, and they should not disregard these norms because a particular policy decision has implications for the meaning of statutory language or the scope of agency authority, as so many do. Thus, a court should

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212 The claim is that courts have familiarity with the applicable considerations under the arbitrary and capricious test, not that courts apply those considerations consistently across cases or even across circuits. *Cf.* Miles & Sunstein, *supra* note 203, at 796 (conducting empirical study of arbitrary and capricious cases and concluding that the D.C. Circuit applies the test differently than the other circuits).

213 *See* FCC v. Prometheus Radio Project, 592 U.S. 414, 1153 (2021) (allowing an agency to interpret empirical studies and make predictive judgments based on data submitted in the notice-and-comment rulemaking process and recognizing that "[t]he APA imposes no general obligation on agencies to conduct or commission their own empirical or statistical studies"); FERC v. Elec. Power Supply Ass'n, 577 U.S. 260, 292–93, 295 (2016) (declining to find arbitrary and capricious the agency's method for compensating certain electricity providers, which it developed in reliance on regulatory economist's views and applied using a "net benefits" test it also chose); Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 103–04 (1983) (stating that under the arbitrary and capricious test of the APA, when an agency had made a decision "within its area of special expertise, at the frontiers of science . . . as opposed to [making] simple findings of fact, a reviewing court must generally be at its most deferential," and declining to find arbitrary and capricious the agency's predictive judgment though the data involved uncertainties); *see also* Cass R. Sunstein, *Cost-Benefit Analysis and Arbitrariness Review*, 41 Harv. Env't L. Rev. 1, 2–6 (2017) (discussing arbitrary and capricious review of an agency's cost-benefit analysis).

214 *See* Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

215 *See* Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 645–46 (1990) (allowing an agency to disregard the factor the court of appeals found relevant and stating that an agency can limit its consideration to the factors that Congress identified in the statute the agency is implementing); Mobil Oil Expl. & Producing Se., Inc. v. United Distrib. Cos., 498 U.S. 211, 230–31 (1991) (allowing an agency to disregard a problem related to the one it was addressing, even if the latter affected the former); *see also* Richard J. Pierce, Jr., *What Factors Can an Agency Consider in Making a Decision?*, 2009 Mich. State L. Rev. 67, 68–69 (describing factors that a statute neither prohibits nor requires as "discretionary decisional factors," providing cases elaborating the "relevant factors" agencies must consider, and noting that agencies determine which factors to consider in the absence of a statutory duty).

216 *Elec. Power Supply Ass'n*, 577 U.S. at 292 ("A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives."); *see* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 518 (2009) (refusing to hold arbitrary and capricious an agency decision based on change in the agency's "overall enforcement policy" and in light of "technological advances").

not find that an agency interpretation answers a question of law without pausing to examine the substance of that interpretation for any of the relatively specific indications that it addresses a question of policy. If such an indication is present, the court should categorize the question as one of policy for the agency to decide, subject to arbitrariness review. If no such indication is present, a court should conclude that the question is one of law for it to resolve independently.

The contention here is not that courts should apply the arbitrary and capricious test to agency interpretations manifesting these indications straight away.[217] Rather, courts should use the considerations for applying that test to help address the law-policy problem that ordinary questions present. The familiar policy indicia may help courts to discern, in a conscious and consistent manner, whether to resolve a question themselves or route the agency's interpretation to arbitrariness review.

B. The Ordinary Questions Approach in Practice

In practice, the approach sketched here has two analytical steps. When confronted with an agency interpretation, a court should first determine whether the statutory language at issue has a congressionally specified meaning—though for some broad statutory language, that inquiry will rest on whether the statutory language is narrow enough to foreclose the agency's interpretation.[218] If the statutory language does not have a particular meaning or is not narrow enough to rule out the agency's interpretation, a court should not announce the best meaning. Rather, at this juncture, the court essentially should determine the applicable standard of judicial review for the agency's interpretation. If the court finds a well-recognized indication of policy (e.g., data, facts, factors, options) in the substance of the agency's interpretation, it should treat the interpretation as presenting a question of policy to which the arbitrary and capricious test applies. If it finds no such indication, the court should conclude that the interpretation presents a question of law

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217 *Cf.* Pojanowski, *Without Deference*, *supra* note 20, at 1086–87 (suggesting that, without *Chevron*, courts would "independently resolve" "questions of statutory interpretation that, from the perspective of traditional lawyerly argument, are unclear" and treat "as questions of policy judgment subject to standard arbitrary-and-capricious review" those questions that "turn on facts about the world, non-legal, technical expertise, and judgments about policy priorities and likely outcomes"). Many have argued *Chevron*'s step two does or should incorporate arbitrary and capricious review, or that the doctrine does or should collapse into arbitrary and capricious review. *See* Lisa Schultz Bressman, *Lower Courts After* Loper Bright, 31 Geo. Mason L. Rev. 499, 505–06 (2024) (collecting sources).

218 One might say there has to be discretionary "space" in the statutory language for the agency's interpretation. Peter L. Strauss, *"Deference" is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight*,*"* 112 Colum. L. Rev. 1143, 1145 (2012).

for it to decide de novo. Given the nature of ordinary questions, courts should expect to find more questions of policy than law.

As described, this approach may sound no different than *Chevron* or *Chevron*-plus-arbitrariness review—and therefore inconsistent with *Loper Bright*. It relieves courts of the obligation to resolve questions of law when Congress has not specified a meaning for the term or phrase at issue. It also requires courts to determine whether the agency interpretation is a reasonable interpretation of the statute, even if not the best interpretation.[219] In *Loper Bright*, the Court said *Chevron* "makes no sense" because it asks a court to determine whether an agency's interpretation is a "permissible" interpretation of a statutory ambiguity, but an agency's interpretation is only a permissible one if it is the "best" one, which is to say, "the reading that the court would have reached if no agency was involved."[220]

But the approach suggested here is meaningfully different. It does not use statutory ambiguity to separate questions of law and policy; it guides courts in determining whether they are properly characterizing a question as one of law, not policy, notwithstanding statutory ambiguity. And it does not challenge the logic of statutory interpretation; it asks courts to read text as written. Courts can figure out whether a statutory term or phrase has a general meaning but no specific enough meaning to decide the case and whether broad statutory language is just that—not narrow enough to rule out the agency's chosen action though broad enough to include it. If they cannot distance themselves from selecting a specific meaning or deciding whether the agency's action is a go, that is okay. They can simply seek confirmation that the choice was theirs to make, using signals that reflect the Court's own understanding of the judicial role for questions of policy under the APA.

C. D.C. Circuit Cases

A sampling of *Chevron* cases from the D.C. Circuit helps to illustrate how an ordinary questions approach would work—and perhaps counter-intuitively given the *Chevron* connection, how it would differ from that framework even when reaching the same result. The sampling here is not random. It consists of cases decided since the Roberts Court has been positioned to review them, applying *Chevron* in a distinctive manner. In each case, the D.C. Circuit found that traditional interpretive tools ran out quickly and that the statutory language had no meaning that either prohibited the agency's interpretation or required another interpretation under step one of *Chevron*.[221] The court typically devoted

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219 *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2266 (2024).

220 *Id.*

221 *See e.g.*, United Parcel Serv. v. Postal Regul. Comm'n, 890 F.3d 1053, 1062 (D.C. Cir. 2018).

a dozen or more pages to describing the statutory scheme and followed with a paragraph or so of conclusory statutory analysis.[222] But the court did not then take the expected pathway under step two. It neither automatically deferred to the agency's interpretation, as some courts do at step two, nor applied the arbitrary and capricious test to evaluate the reasonableness of the agency's interpretation at step two, as the D.C. Circuit generally does.[223] Rather, it superficially asked whether the agency's interpretation was reasonable in consideration of statutory sources other than the text (i.e., the statutory scheme or purpose) and then essentially terminated the interpretive inquiry by focusing on the extent to which the interpretation relied on policy sources (i.e., data, analytical methods, discretionary factors, or policy options).[224] In each case, the court applied the arbitrary and capricious test separately from *Chevron* to evaluate whether the agency's interpretation was the product of reasoned decision-making.[225] Sometimes the court noted that under D.C. Circuit precedent, step two and the arbitrary and capricious test overlapped "at the margins."[226] But, in these cases, the court tended to apply them with little overlap at all.

Although the D.C. Circuit found in these cases that the agency's interpretation was "reasonable" under step two, one might say instead that the court found that it was reasonable for the agency to decide the question. The court highlighted in each case that the agency's interpretation involved at least one indication (e.g., data, fact, factor, option), and sometimes many indications, that the underlying question was one of policy. Although the court applied *Chevron*, as it was required to do, its analysis was not particularly dependent on the framework. As demonstrated below, the D.C. Circuit's approach basically would have been the same under an ordinary questions approach, which might indicate something: the D.C. Circuit seems to have been following something like an ordinary questions approach without saying so. In a way, the D.C. Circuit's approach, though nominally related to *Chevron*, can serve as a model for one that courts could follow in a post-*Chevron* world and suggests that such would be workable. The D.C. Circuit has not taken this method in every *Chevron* case,[227] nor does this Foreword

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222 *See e.g.*, *id.* at 1053–62.

223 *See* Kent Barnett & Christopher J. Walker, Chevron *Step Two's Domain*, 93 Notre Dame L. Rev. 1441, 1462–68 (2018) (describing the different approaches to step two in federal appellate court decisions from 2003–2013).

224 *See, e.g.*, *United Parcel Serv.*, 890 F.3d at 1062.

225 *See, e.g.*, *id.* at 1066.

226 Baystate Franklin Med. Ctr. v. Azar, 950 F.3d 84, 92 (D.C. Cir. 2020) (quoting Arent v. Shalala, 70 F.3d 610, 615 (D.C. Cir. 1995)).

227 *See, e.g.*, Solar Energy Indus. Ass'n v. FERC, 59 F.4th 1287, 1292–94 (D.C. Cir. 2023) (engaging in analysis of each element and finding that FERC's interpretation of "facility" and "power production capacity" under the Public Utilities Regulatory Policies Act of 1978 was "reasonable"

claim that this approach reflects its dominant methodology in all such cases.[228] Rather, the contention is that the D.C. Circuit has seemed to chart a possible path for ordinary questions in the future.

1. Empirical Evidence (Plus Analytical Methodology and Longstanding Usage)

One thread in the D.C. Circuit's cases involves agency interpretations that are based on empirical evidence. Sometimes empirical evidence is easy to spot because it constitutes scientific data and technical studies. Other times, it looks a bit different. In *United Parcel Service v. Postal Regulatory Commission*,[229] the D.C. Circuit examined an interpretation of the Postal Regulatory Commission that relied on expert testimony, as well as on the agency's choice of analytical methodology and longstanding usage of relevant statutory terms—which is to say, its experience-based and time-proven interpretation of those terms.[230] The Commission had issued a rule selecting the methodology for the U.S. Postal Service to use in setting the rates of shipping products that compete with shipping products of other companies, like the United Parcel Service ("UPS"), under the Postal Accountability and Enhancement Act.[231] The Act requires the Commission to "'ensure that each competitive product covers its costs attributable,' defined as 'the direct and indirect postal costs attributable to such product through reliably identified causal relationships,'" and covers "an appropriate share of the institutional costs of the Postal Service."[232] The Commission defined "costs attributable" to include costs that varied with each product (such as highway transportation costs), and "institutional costs" to include fixed costs (like Postal Service facilities).[233] It further defined variable costs as including costs that varied by the total amount of products ("volume-variable costs"), and specifically, "the principle of diminishing marginal costs" where the cost of adding another new unit decreases as the number of products increases.[234] But the Commission discovered

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under *Chevron* step two "in light of [the statute's] language, structure, and purpose" and because it was "consistent with the legislative history" (quoting Nat'l Treasury Emps. Union v. Fed. Lab. Rels. Auth., 754 F.3d 1031, 1042 (D.C. Cir. 2014))).

228 *But see* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 46–49 (2017) (conducting empirical analysis of Circuit Court decisions applying *Chevron* and finding that the D.C. Circuit sometimes has a distinctive approach).

229 890 F.3d 1053 (D.C. Cir. 2018).

230 *Id.* at 1056–61, 1066.

231 Pub. L. No. 109-435, 120 Stat. 3198 (codified as amended in scattered sections 39 U.S.C.); *United Parcel Serv.*, 890 F.3d at 1055–56.

232 *United Parcel Serv.*, 890 F.3d at 1055 (citation omitted) (quoting 39 U.S.C §§ 3633(a)(2), 3631(b), 3633(a)(3)).

233 *See id.* at 1055–56.

234 *Id.* at 1056–57.

that its methodology "left some variable costs unattributed to any one product," and it fixed the problem by shifting "these 'inframarginal costs'" to "institutional costs," which are divided among all products.[235] This shift, in turn, lowers the price that the Postal Service charges for any individual product.[236] During rulemaking, UPS challenged this methodology and proposed a different one.[237] The Commission found that UPS's methodology "relied on 'unverifiable assumptions' for both 'the calculation and allocation of inframarginal costs.'"[238]

The D.C. Circuit ventured into this highly technical matter.[239] It found that the Act did not unambiguously prohibit the Commission's methodology or "unambiguously compel[]" UPS's methodology, and it devoted the remainder of the discussion to whether the Commission's interpretation was "reasonable under *Chevron*" step two.[240] In finding the Commission's methodology reasonable, the court acknowledged the agency's "longstanding usage" of the term "institutional costs" and the expert testimony on which the Commission had relied in determining the meaning of "indirect costs," as well as its rejection of UPS's contrary evidence and analysis.[241] The court went on to apply the arbitrary and capricious test, finding that the agency's interpretation reflected reasoned decision-making because it was well explained in the rulemaking record.[242]

Under an ordinary questions approach, the analysis would be similar. Any rate-setting methodology under the statutory language requires economic analysis performed by agency officials based on their own expertise and the testimony of outside economists. The Commission not only collected its own evidence but evaluated UPS's contrary evidence, concluding that it rested on "unsupported assumption[s]."[243] It also relied on its own experience with postal costs over time.[244] Under the circumstances, a court could not treat the issue as a question of law without claiming authority to substitute its judgment (or UPS's judgment) for the Commission's. It would characterize the question as one of policy for the agency to decide, subject to arbitrariness review.

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235 *Id.* at 1058 (quoting Order Concerning United Parcel Service, Inc.'s Proposed Changes to Postal Service Costing Methodologies (UPS Proposals One, Two, and Three), Docket No. RM2016-2, Order No. 3506 (Postal Regul. Comm'n Sept. 9, 2016)).

236 *See id.*

237 *Id.*

238 *Id.* at 1059 (quoting *Order Concerning United Parcel Service, Inc.'s Proposed Changes to Postal Service Costing Methodologies*, slip op. at 55–56).

239 *Id.* at 1060.

240 *Id.* at 1061–63.

241 *Id.* at 1062–64.

242 *Id.* at 1066.

243 *Id.* at 1059.

244 *Id.*

2. *Factfinding Based on Experience Administering the Statute*

Another strand of cases involves interpretations based on facts the agency gathered in the process of administering the statute. In *Pharmaceutical Research & Manufacturers of America v. FTC*,[245] the D.C. Circuit reviewed the Federal Trade Commission's ("FTC") rule governing which asset transfers of patent rights were subject to the premerger reporting requirement under section 7A of the Hart-Scott-Rodino Antitrust Improvements Act.[246] Part of the rule applied exclusively to certain asset acquisitions in the pharmaceutical industry, and the pharmaceutical industry rejected this selective targeting.[247] During the rulemaking proceedings, the industry parties submitted a declaration of an economic consultant that the pharmaceutical industry was not the only industry with this arrangement.[248] But the FTC found that its own "experience" contradicted this assertion.[249] It had received no comparable nonpharmaceutical filings among the sixty-six it received over a five-year period, and it wished to "tailor[]" its rule to the specific sorts of problems that it had seen in the pharmaceutical industry.[250]

The D.C. Circuit found that "[n]othing in the plain meaning, context, or legislative history of the Act unambiguously precludes the FTC from promulgating a rule . . . merely because the rule focuses on a specific industry that is the sole source of the problem being addressed."[251] It then referred to the FTC's experience-based findings but did not even attempt to dispute such findings under *Chevron* step two, stating that "[t]he FTC's interpretation of the Act reflected in the Rule is obviously 'rationally related to the goals of' the statute" and "is perfectly reasonable."[252] It also found, separately applying the arbitrary and capricious test, that the interpretation was well explained in the rulemaking record.[253]

A court would reach the same conclusion under an ordinary questions approach. The agency's rule was based on its administration of the statutory scheme. To reach a contrary conclusion, the court would have to discount the agency's knowledge of its own process and look to the generalized evidence that the challengers provided—which is exactly

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245 790 F.3d 198 (D.C. Cir. 2015).

246 Pub. L. No. 94-435, 90 Stat. 1390 (codified as amended at 15 U.S.C. §§ 1311–1314); *Pharm. Rsch. & Mfrs. of Am.*, 790 F.3d at 199, 201–02.

247 *Pharm. Rsch. & Mfrs. of Am.*, 790 F.3d at 199–200.

248 *Id.* at 203.

249 *See id.* (quoting Premerger Notification; Reporting and Waiting Period Requirements, 78 Fed. Reg. 68,705, 68,708 (Nov. 15, 2013) (to be codified at 16 C.F.R. pt. 801)).

250 *Id.* at 208.

251 *Id.* at 200.

252 *Id.* at 208 (quoting Vill. of Barrington v. Surface Transp. Bd., 636 F.3d 650, 665 (D.C. Cir. 2011)).

253 *Id.* at 207–09, 212.

what the court should be reluctant to do. This is a question of policy for the agency, subject to arbitrary and capricious review.

In *National Treasury Employees Union v. Federal Labor Relations Authority*,[254] the D.C. Circuit confronted an agency interpretation that arguably looked more like a question of law because it was tied more closely to the statutory language.[255] The Federal Service Labor-Management Relations Statute[256] permits union representatives to sit in on "'any examination' of a federal employee the union represents if . . . conducted by a 'representative' of the employing agency" and at which "the employee requests representation and . . . believes" the examination will "result in disciplinary action."[257] The Internal Revenue Service ("IRS") excluded representatives of the National Treasury Employee Union ("NTEU") from certain investigations of IRS employees conducted by Office of Personnel Management ("OPM") investigators, and it was charged with unfair labor practices.[258] The Federal Labor Relations Authority ("FLRA") is responsible for implementing the statute, and it determined that the IRS was entitled to exclude the NTEU representative from the interviews because the OPM investigators were not "'representatives' of the IRS."[259] In making this determination, the FLRA relied on a definition of "representative of the agency" from a prior decision involving investigations by outside contractors, who are also not employed by the agency.[260] The test was whether the investigator "performs an agency function and . . . is subject to agency control."[261] The NTEU challenged this test and its application to the OPM investigators.[262]

Applying *Chevron*, the D.C. Circuit quickly concluded that the phrase "'representative of the agency' is ambiguous as there is nothing in the text of the Statute that gives precision to the broad phrase or otherwise evinces a clear congressional intent to foreclose the Authority's interpretation."[263] It then found that the agency's "function and control" analysis was reasonable as applied to OPM investigators.[264] The D.C. Circuit observed that the FLRA relied on its own precedent concerning outside contractors, making fact-based comparisons between

254 754 F.3d 1031 (D.C. Cir. 2014).

255 *See id.* at 1034–35.

256 5 U.S.C. §§ 7101–7135.

257 *See Nat'l Treasury Emps. Union*, 754 F.3d at 1034 (quoting 5 U.S.C. § 7114(a)(2)(B)).

258 *Id.* at 1034–38.

259 *Id.* at 1034.

260 *Id.* at 1037 (quoting Nat'l Treasury Emps. Union, 66 F.L.R.A. 506, 509 (2012)).

261 *Id.* at 1042.

262 *Id.* at 1034, 1036.

263 *Id.* at 1042.

264 *Id.* at 1044.

their functions and relationship to the agency.[265] Furthermore, the FLRA declined to rely on a line of Supreme Court decisions involving investigators employed in the National Aeronautics and Space Administration's ("NASA") Office of Inspector General because it found that the functions of the investigator and relationship to the agency were factually dissimilar to OPM investigators.[266]

This case involves a mixed question of law and fact in a traditional sense. The agency decided a question of law (whether "representative of [an] agency" is determined under a "function and control" analysis) and applied its interpretation to the facts (whether OPM investigators are representatives of the IRS).[267] The court treated both as questions for the agency and that approach is consistent with an ordinary questions approach. The function-and-control test is not separable from its application but developed through its application in different contexts. Put differently, the FLRA did not first announce the rule and then apply that rule to the facts in the case, as a traditional law-fact focus might suggest. Rather, it engaged in analogical reasoning to determine the status of OPM investigators under a function-and-control analysis, choosing the relevant factual comparison—outside contractors rather than NASA investigators—based on its experience.[268] To extract the question of law, a court would have to make judgments about the facts and claim authority to pick the proper analogy. Interpretations that are the product of experience and prior fact-based applications are for the agency, even if they can be seen in some sense as presenting separable questions of law.

3. Decision-Making Methods and Processes

Sometimes an agency interpretation specifies the decision-making or analytical method that the agency has chosen to implement provisions of its statute. In *Center for Sustainable Economy v. Jewell*,[269] the D.C. Circuit examined the Department of the Interior's ("Interior") methodology for approving leases for exploration and development of oil and gas resources in the Outer Continental Shelf ("OCS") under the Outer Continental Shelf Lands Act.[270] The statute requires the Secretary of the Interior to implement a program for offshore drilling that "strike[s] an appropriate balance . . . between local and national environmental, economic, and social needs," including consideration, for example, of whether proposed leases might be "unduly harmful to aquatic life

265 *Id.* at 1043.

266 *Id.* at 1043–44.

267 *Supra* text accompanying notes 260–64.

268 *Supra* text accompanying notes 265–67.

269 779 F.3d 588 (D.C. Cir. 2015).

270 43 U.S.C. §§ 1331–1356; *see Ctr. for Sustainable Econ.*, 779 F.3d at 593.

in the area, result in pollution, create hazardous or unsafe conditions, unreasonably interfere with other uses of the area, or disturb any site, structure, or object of historical or archeological significance."[271] Interior adopted "a cost-benefit methodology" to implement this language, one aspect of which was determining "the costs of forgoing drilling" in a particular area.[272] Specifically, Interior evaluated whether "the environmental and social costs of relying on substitute sources of energy are equal to or greater than the costs from producing area resources."[273] The D.C. Circuit described this aspect of Interior's methodology as "rest[ing] on the somewhat counterintuitive notion that *not* drilling for fossil fuels on the OCS would harm the environment" because people would rely on substitute fuel sources that would increase "air pollution, oil spills, and other disturbances."[274] In addition to including nondrilling costs, Interior decided to "tabulate costs nationally and allocate them proportionally," meaning that the costs of "disturbances" experienced anywhere in the nation from substitute fuel sources were allocated proportionately among all potential leases, even if a potential drilling area would not experience the disturbance.[275] The result was that "if extracting natural gas from the Alaskan OCS would cause less net social and environmental harm nationwide than would obtaining natural gas from substitute sources, Interior's cost-benefit analysis should favor leasing on the Alaskan OCS over forgoing it."[276] This was true even though protecting the "pristine Alaskan wilderness" might be "more socially and environmentally beneficial than forgoing production in the Gulf of Mexico."[277]

Applying *Chevron*, the D.C. Circuit found that Interior's methodology "was neither expressly proscribed by the statute nor unreasonable."[278] The statute "requires consideration of the particular ecological characteristics and environmental sensitivities of the various program areas, but does not specify precisely how they must be considered."[279] The court determined that Interior "reasonably chose an analytical approach that captured what it concluded are two significant elements of environmental and social assessment": foregoing drilling and national cost attribution.[280] The agency's approach was also consistent with the statute's instruction "that the Secretary develop

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271 *Ctr. for Sustainable Econ.*, 779 F.3d at 594 (citing 43 U.S.C. § 1340(g)(3)).

272 *Id.* at 603.

273 *Id.* (quoting J.A. 1873).

274 *Id.* at 603–04.

275 *Id.* at 604–05.

276 *Id.* at 604.

277 *Id.* at 605.

278 *Id.*

279 *Id.* (citing 43 U.S.C. § 1344(a)(2)(B), (G)).

280 *Id.* at 604.

a . . . program 'which [s]he determines will best meet national energy needs,'" as well as the stated purpose of the statute "to treat 'the [OCS] [a]s a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs.'"[281]

This case would come out no differently under an ordinary questions approach because it involved the agency's choice of decision-making methodology. If "[n]othing in [the statute] require[d the challenger's] methodology over [the agency's]," then the court's selection of a non-national allocation methodology would substitute the methodology it preferred for that of the agency.[282] Likewise, if the court decided that the cost-benefit analysis should not include the costs of foregoing drilling, it would have substituted its determination of the important aspects of the leasing program for that of the agency.[283] These decisions were for the agency to make, subject to arbitrary and capricious review.[284]

One might think that this result is obvious under any approach; after all, the statute specifies the relevant considerations and tells the agency, not the court, "to strike an appropriate balance at each stage between local and national environmental, economic, and social needs."[285] But a future court, freed of *Chevron*, might disagree. The D.C. Circuit, though ruling against Alaska, seemed sympathetic to its interests, taking great pains to note that "Interior's judgments may be debatable" and "[s]ome . . . may reasonably conclude they are not the best judgments."[286] Nevertheless, it resisted any urge to impose its own view.[287] Offshore drilling is a sensitive issue on which reasonable minds can disagree. If Interior wishes to adopt a more protective stance under a new presidential administration, a reviewing court might see the Alaska matter as not for the agency to decide after all.[288] Under an ordinary questions approach, a court would not revisit the agency's authority to address the issue. Congress has granted the Secretary of the

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281 *Id.* at 606 (alterations in original) (quoting 43 U.S.C. §§ 1344(a), 1332(3)).

282 *See id.*

283 *See id.* at 605.

284 *Id.* at 600.

285 *Id.* at 594.

286 *See id.* at 606.

287 *Id.*

288 *Cf.* Timothy Puko, *Biden to Block Oil Drilling in 'Irreplaceable' Alaskan Wildlands*, Wash. Post (Sept. 6, 2023, 6:23 PM), https://www.washingtonpost.com/climate-environment/2023/09/06/biden-alaska-oil-drilling-ban-willow/ [https://perma.cc/V8AT-GUXT] (reporting that the Biden administration has cancelled oil leases granted during the Trump administration and banned oil drilling in "iconic" Alaskan wildlife preserve).

Interior authority to implement an offshore drilling program, specifying the relevant considerations for awarding drilling licenses and tasking the Secretary with striking the balance among them. The precise balance, as reflected in the Secretary's methodology, is for the agency to decide. Though the Secretary's decision is consequential, it is not for courts to second guess.[289]

Baystate Franklin Medical Center v. Azar[290] is another sort of methodology case, involving the Department of Health and Human Services' ("HHS") process for calculating the wage index under its Prospective Payment System ("PPS").[291] HHS uses the PPS "to reimburse [participating] hospitals for treating Medicare [patients]," providing a set reimbursement rate for patients rather than reimbursing hospitals for the actual cost of service.[292] HHS calculates the payments on an annual basis and is required to adjust the labor-related portion of the hospitals' payments for geographic wage differences using a "'factor . . . reflecting the relative hospital wage level in the geographic area of the hospital compared to the national average,' . . . known as the 'wage index.'"[293] Each year, the Centers for Medicare and Medicaid Services ("CMS") in HHS collects wage data from the hospitals and reviews that data

289 This does not mean that courts should stop determining whether a statute proscribes a particular factor under the statute. For example, in *Eagle Pharms., Inc. v. Azar*, 952 F.3d 323 (D.C. Cir. 2020), the D.C. Circuit held that the FDA could not require a showing of clinical superiority for an orphan drug to receive market exclusivity under the Orphan Drug Act. *Id.* at 340. This Act allows the FDA to designate a drug as an "orphan drug" during development if it "treat[s] a rare disease or condition" and approve it for marketing after certifying its "safety and efficacy," as is required for all drugs. *Id.* at 325 (first quoting Spectrum Pharms., Inc. v. Burwell, 824 F.3d 1062, 1064 (D.C. Cir. 2016); and then quoting Otsuka Pharm. Co., Ltd. v. Price, 869 F.3d 987, 989 (D.C. Cir. 2017)). If the FDA approves an orphan drug for marketing, the Act requires the agency to grant the manufacturer a seven-year exclusivity period for "such drug." *Id.* (quoting 21 U.S.C. § 360cc(a) (2012), *amended by* Pub. L. No. 115-52, § 607, 131 Stat. 1005, 1049 (2017)). The Act "does not define 'such drug.'" *Id.* at 326. The FDA determined that no subsequent drug with the same "moiety" or "active ingredient" may be approved as an orphan drug during the exclusivity period and granted its own exclusivity period, except if that drug is "clinically superior to the first drug." *Id.* (quoting 21 C.F.R. § 316.3(b)(14)(i)). This essentially means it has greater effectiveness and safety than the first drug. *See id.* The FDA had a reason for its decision: an orphan drug could tie up the market for seven years—even if a more therapeutic version emerged during this time—and deprive another drug from receiving its own orphan drug benefits thereafter. *See id.* at 327. The D.C. Circuit found that the Act prohibited the FDA from considering the clinical superiority of the competing drug, when the Act provided that "[i]f the Secretary . . . approves an application . . . for a drug designated . . . for a rare disease or condition, the Secretary may not approve another application . . . for such drug." *Id.* at 326 (quoting 21 U.S.C. § 360cc(a) (2012)). Thus, the court determined that Congress was clear about the requirements for market exclusivity, and a showing of clinical superiority was not one of them. *Id.* at 340.

290 950 F.3d 84 (D.C. Cir. 2020).

291 *Id.* at 86.

292 *Id.*

293 *Id.* (first quoting 42 U.S.C. § 1395ww(d)(3)(E)(i); and then quoting Anna Jacques Hosp. v. Burwell, 797 F.3d 1155, 1158 (D.C. Cir. 2015)).

under "an iterative process . . . outlined in a timetable" it publishes.[294] Hospitals have an opportunity to correct their data before CMS finalizes the wage index through the notice-and-comment rulemaking process.[295] Six months after the 2017 fiscal year deadline for data submission—and right before CMS published a notice of proposed rulemaking containing the wage index—Nantucket Cottage Hospital ("Nantucket") sought to correct its data.[296] CMS refused to accept the revised data, which would have required it to recommence its iterative process.[297] Baystate Franklin Medical Center ("Baystate") challenged the final rule, arguing that CMS's failure to accept Nantucket's corrected data was arbitrary and capricious because the agency did not rely on accurate data in setting the wage index.[298] The D.C. Circuit rejected this argument and then went on to consider the rule under *Chevron*, although Baystate had not challenged the rule as a statutory interpretation.[299] The court understood Baystate to be contesting the scope of the agency's authority to set the wage index without accurate data.[300] It found that the statute was silent on the issue of retroactive corrections and CMS could have gone either way.[301] The choice between "accuracy," on the one hand, and "finality and efficiency," on the other, was for the agency to make under the statutory scheme, and the choice it made was reasonable.[302]

In a circuit seemingly sensitive to indications of policy in agency decisions, this case should have been more straightforward than it was. CMS's decision was on the line between policy and law to such extent that the challenger did not even make a *Chevron* argument. The D.C. Circuit might have stayed in the arbitrariness lane in evaluating CMS's refusal to reopen the wage index process, and one wonders more generally how often courts have defaulted to or engaged *Chevron* analysis simply because an agency decision, in some sense, implicates statutory language as so many do—judicial propensities we might call "*Chevron* defaulting" and "*Chevron* hedging."[303] One also might wonder how many "legislative silence" cases are not statutory interpretation cases at all but statutory implementation cases. In any event, the D.C. Circuit thought the issue could be framed as statutory interpretation, involving

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294 *Id.*

295 *Id.* at 87.

296 *Id.*

297 *Id.* at 88.

298 *Id.*

299 *Id.* at 88–89.

300 *Id.* at 89.

301 *See id.* at 92.

302 *Id.* at 93.

303 I am unaware of empirical evidence of these phenomena, which now have greater significance in view of *Chevron*'s demise. I address this issue in a separate essay prepared for a symposium on *Chevron*'s future. *See* Bressman, *supra* note 217, at 7–8.

the issue of retroactive corrections or the scope of CMS's authority to set the wage index, and it preferred to hedge by applying *Chevron*.[304] Once there, the choice between "accuracy" and "finality and efficiency" was for the agency to make.[305] The decision whether to allow retroactive corrections would fall to the agency under an ordinary questions approach too. It is bound up in the design of the process for setting the wage index, whether viewed as the statutory choice between "accuracy" and "finality" or just a routine matter of statutory implementation.

4. Policy Options and Choices

The largest set of D.C. Circuit cases involves policy judgments comparable to those in the Supreme Court's prominent ordinary questions (or nonmajor questions) cases, including *Chevron*, *Mead*, *Barnhart*, and *National Cable & Telecommunications Ass'n v. Brand X Internet Services*.[306] They involve a balancing of statutory purposes, the sorting of a subject into one statutory bucket or another, or the choice between specific meanings of more general statutory terms. These types of decisions are quintessential ones of policy, even though *Chevron* et al., no longer govern that determination.[307] Below are representatives of each.

a. Statutory Purposes

In *Overdevest Nurseries, L.P. v. Walsh*,[308] the D.C. Circuit reviewed a Department of Labor regulation governing the H-2A program of the Immigration and Nationality Act.[309] The Act permits employers to hire workers under temporary visas when there are insufficient U.S. workers "who are able, willing, and qualified" ("Subsection A") to do the job and when such employment "will not adversely affect the wages and working conditions of workers in the United States similarly employed" ("Subsection B").[310] The Secretary of Labor issued a regulation requiring agricultural employers to pay H-2A (non-U.S.) workers and non-H-2A (U.S.) workers in the "corresponding employment"

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304 *See Baystate Franklin*, 950 F.3d at 89.

305 *Id.* at 93.

306 545 U.S. 967 (2007); *see* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984), *overruled by* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024); United States v. Mead Corp., 533 U.S. 218 (2001); Barnhart v. Walton, 535 U.S. 212 (2002).

307 *See* Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1330 (2014) (arguing that when agency judgments involve balancing "a host of incommensurate values, . . . courts have no constitutional authority to revise that judgment and no epistemic basis for thinking they can make a better one").

308 2 F.4th 977 (D.C. Cir. 2021).

309 Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.); *Overdevest Nurseries*, 2 F.4th at 980–81.

310 *Overdevest Nurseries*, 2 F.4th at 980 (quoting 8 U.S.C. § 1188(a)(1)(A)–(B)).

the same hourly "adverse effect wage rate" and pay the adverse effect wage to non-H-2A workers who performed "any work included in the job order, or in any agricultural work performed by the H-2A workers."[311] Under the old definition, Overdevest Nurseries paid the adverse effect wage to H-2A "order pullers," whose responsibilities were largely administrative and supervisory, and a lower hourly wage to less-skilled, non-H-2A "production workers."[312] Under the new definition, it was required to pay both types of workers the adverse effect wage.[313]

Overdevest Nurseries challenged the new definition, arguing that the language "who are able, willing, and qualified" in Subsection A referred to the same class of workers who were "similarly employed" for purposes of Subsection B, based on the canons *ejusdem generis* and *noscitur a sociis* and the statute's purpose to protect similarly employed American workers.[314] The D.C. Circuit disagreed and found that the statutory provision was not "unambiguous" because the canons did not support the inferences that Overdevest Nurseries had drawn.[315] Furthermore, the statute could be read as not only protecting U.S. agricultural workers doing the same jobs as foreign workers but also more generally as protecting all U.S. agricultural workers from "an influx of foreign workers performing unskilled work."[316] It then determined that the Secretary's new interpretation was reasonable under step two.[317] While the old definition was intended to further the purpose of protecting similarly employed U.S. workers, the Secretary discovered that its regulation in practice afforded less protection for longtime U.S. workers and "allowed employers to claim a need for [foreign] H-2A workers without defining the specific work they needed."[318] The new definition repaired those flaws, extending protections beyond those U.S. workers engaged in "corresponding employment" to those engaged in any agricultural work.[319] It was reasonable because it comported with the more general purpose of the statute to protect all U.S. agricultural workers,[320] and it was not arbitrary and capricious because the Secretary fully acknowledged and sufficiently explained the change.[321]

This case involved a change from one specific interpretation of more general statutory language to another, both of which advanced the statute's

311 *Id.* at 981 (quoting 20 C.F.R. § 655.103(b)).
312 *Id.*
313 *Id.*
314 *Id.* at 982.
315 *Id.* at 982–83.
316 *Id.* at 983.
317 *Id.* at 983–84.
318 *Id.* at 985.
319 *Id.* at 981.
320 *Id.* at 984.
321 *Id.* at 985–86.

purpose, depending on how that purpose was construed as applied to the particular provision. As *Overdevest Nurseries* demonstrates, the task of characterizing statutory purposes is based on policy considerations, including the agency's experience in administering the statutory scheme and enforcing its own regulations, and is therefore also for the agency. The result would be no different under an ordinary questions approach.

b. Statutory Buckets

In *Cigar Association of America v. FDA*,[322] the D.C. Circuit reviewed a part of the FDA's 2016 "Deeming Rule" implementing the Tobacco Control Act.[323] The court described the Act as subjecting "newly regulated tobacco products . . . to requirements akin to those previously imposed by statute on cigarettes."[324] The Act extends the Food Drug and Cosmetics Act ("FDCA")[325] to "'any other tobacco products' that [the] FDA 'by regulation deems to be subject to' the [Act]."[326] It further provides that the Secretary of HHS may issue regulations "appropriate for the protection of the public health."[327] Under the Deeming Rule, the FDA classified a pipe as a "'component or part' of a tobacco product subject to" regulation under the FDCA, "rather than an 'accessory'" which is not.[328] The Cigar Association of America ("Cigar Association") challenged the rule, arguing that a "component" must be "integrated into" a tobacco product.[329] The D.C. Circuit found the statutory language ambiguous after examining the text, consulting dictionary definitions, and employing several textual canons of construction.[330] It also rejected the Cigar Association's argument that the FDA failed to consider whether "pipes themselves have any direct effect on public health."[331] The court rejected this contention because, as the agency had determined in its rule, the "definition of 'component or part' does not require [the] FDA to identify a product's health effects in order to classify it as a 'component or part.'"[332]

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322 5 F.4th 68 (D.C. Cir. 2021).

323 Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009); *Cigar Ass'n of Am.*, 5 F.4th at 73–74.

324 *Cigar Ass'n of Am.*, 5 F.4th at 73 (quoting Cigar Ass'n of Am. v. FDA, 964 F.3d 56, 60 (D.C. Cir. 2020)).

325 21 U.S.C. §§ 301–399.

326 *Cigar Ass'n of Am.*, 5 F.4th at 73 (quoting 21 U.S.C. § 387a(b)).

327 *Id.* at 76 (quoting 21 U.S.C. § 387g(a)(3)(A)).

328 *Id.*

329 *Id.* at 77.

330 *Id.*

331 *Id.* at 78 (quoting Brief for Plaintiffs-Appellants at 46, Cigar Ass'n of Am. v. FDA, 5 F.4th 68 (D.C. Cir. 2021) (No. 20-5266), 2021 WL 1160495, at *46).

332 *Id.* (quoting Deeming Tobacco Products to Be Subject to the Federal Food, Drug, and Cosmetic Act, 81 Fed. Reg. 28,974, 28,975 (May 10, 2016) (codified at 21 C.F.R. §§ 1100, 1140 & 1143)).

Under an ordinary questions approach, this case would come out the same. It involves a classic policy decision, determining whether a subject falls into one statutory category or another.[333] The classification depends on which qualities of the subject are relevant to achieving the purposes of the statutory scheme.[334] Whether a pipe is more like a cigarette filter (a "component") or the pouch that holds loose tobacco (an "accessory") is a judgment for the agency to make.[335] The only way for the D.C. Circuit to reach a different interpretation is to choose the other bucket—that is, to directly substitute its judgment (or the Cigar Association's judgment) for that of the agency. This is a question for the FDA.

c. Reasonable Choices

In *Prime Time International Co. v. USDA*,[336] the D.C. Circuit reviewed a United States Department of Agriculture ("USDA") rule calculating "monetary assessments [imposed] on tobacco . . . manufacturers and importers" under the Fair and Equitable Tobacco Reform Act[337] to fund a subsidy program for tobacco growers.[338] The Act requires the USDA to (1) "calculate the total monetary assessment needed to fund the subsidy program"; (2) "apportion [the assessment] among six classes of tobacco products—cigarettes, cigars, snuff, roll-your-own, chewing, and pipe—based, in part, on each class's share of the gross domestic volume of tobacco products"; and (3) "divide . . . assessment[s] . . . within [a] class 'on a pro rata basis . . . based on each manufacturer's and importer's share of gross domestic volume.'"[339] The agency issued the "Per Stick Rule," which "calculates each cigar manufacturer's" pro rata share of the assessment under the third prong "based on the number of cigars—also known as 'sticks'—that the manufacturer puts into commerce."[340] "Prime Time, a manufacturer of small cigars, challenged the . . . [r]ule" because it did not account for the different tobacco volume between small and large cigars and only counted the number of sticks sold.[341] The D.C. Circuit began by stating, "This court hears many complex and difficult cases. This is not one of them."[342] The USDA had relied on a reasonable interpretation of the Act, and Prime

333 *See supra* text accompanying notes 306–07.

334 *See supra* text accompanying notes 306–07.

335 Cigar Ass'n of Am. v. FDA, 5 F.4th 68, 77, 80 (D.C. Cir. 2021).

336 753 F.3d 1339 (D.C. Cir. 2014).

337 Pub. L. No. 108-357, 118 Stat. 1521 (codified as amended at 7 U.S.C. §§ 518–519).

338 *Prime Time*, 753 F.3d at 1340–41.

339 *Id.* at 1340 (quoting 7 U.S.C. § 518d(e)(1)).

340 *Id.*

341 *Id.*

342 *Id.* at 1341.

Time relied on a series of false premises—including that there was only one good dictionary definition of "volume" (there was not) and that the USDA applied inconsistent metrics to its two volume determinations (it did not).[343] The court said that even if Prime Time's interpretation was the best one, that was irrelevant.[344]

Under the ordinary questions approach, this case is easy as well. Although the challenger made arguments based on the interpretation of the statute and the regulation, it only sought to contest the agency's judgment to focus on the number of products sold rather than on the amount of tobacco sold.[345] When a statutory term or phrase is general and may mean one more specific thing or another, the pick between or among the specific options is for the agency to make, subject to arbitrariness review.

D. Questions of Law for Courts

If these D.C. Circuit cases are any indication, courts might expect an ordinary questions approach to largely point in the same direction as *Chevron* because of the nature of ordinary questions—but not always. Sometimes, a statutory provision is ambiguous, but the question is not for the agency because a court may see none of the established indications of policy. Under these circumstances, a court may confidently conclude that the agency's interpretation involves a question of law for it to review de novo using statutory sources, and, consistent with *Loper Bright*, consulting the agency interpretation for subject matter expertise if helpful.[346]

Consider the following example from a D.C. Circuit decision involving the interpretation of statutory terms that incorporate common law standards, *Browning-Ferris Industries of California, Inc. v. NLRB*.[347] This case was part of the ongoing saga over the meaning of

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343 *See id.* at 1342.

344 *Id.*

345 *Id.* at 1340.

346 *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2262 (2024). Sometimes consulting the agency's interpretation in resolving a question of law is quite helpful. *See, e.g.*, Becerra v. Empire Health Found., 597 U.S. 424, 434 (2022) (finding technical statutory provisions "disclose a surprisingly clear meaning" when read with agency's assistance).

347 911 F.3d 1195, 1206 (D.C. Cir. 2018). For at least thirty years, the NLRB required a "joint employer" to exercise "direct and immediate control" over a work force shared with another employer; however, in 2015 during the Obama era, it shifted to making indirect control and control reserved-but-not-exercised a relevant factor. *Id.* at 1201, 1209. The D.C. Circuit ended up reviewing this case twice. *See* Sanitary Truck Drivers & Helpers Loc. 350 v. NLRB, 45 F.4th 38, 40 (D.C. Cir. 2022). Meanwhile, the NLRB during the Trump era issued a rule reinstating the direct control test, though it has just finalized a rule repealing that one and reinstating the indirect control test. *See Browning-Ferris Indus. of Cal., Inc.*, 911 F.3d at 1206; Standard for Determining Joint Employer Status, 88 Fed. Reg. 73,946, 73,946–47, 74,018 (Oct. 27, 2023) (to be codified at 29 C.F.R. pt. 103).

the term "joint employer" in the NLRA.[348] Joint employers of the same workforce can be liable under the Act for unfair labor practices committed by the other, but the statute does not specify the factors that make companies joint employers.[349] In a 2015 adjudication involving Browning-Ferris Industries, the NLRB interpreted "joint employer" to incorporate the common law of agency, and that under the common law, whether an employer had indirect control of or reserved a right to control the "essential terms and conditions of employment" was a relevant factor of a principal-agency relationship.[350] For the previous thirty years, the agency had interpreted the phrase to require actual, direct control of the shared employees.[351] The D.C. Circuit concluded that the NLRB could change its test to incorporate common law standards but was not entitled to *Chevron* deference for its interpretation of what the common law entails.[352] The court stated that "the content and meaning of the common law is a 'pure' question of law, and its resolution requires 'no special administrative expertise that a court does not possess.'"[353] It agreed with the NLRB, however, that indirect and reserved control are elements of a principal-agency relationship under common law.[354]

The issues surrounding the joint employer test are many and will continue to afflict the NLRB's interpretation of the term in the future.[355] Be that as it may, the general lesson is that, when a statutory term or phrase incorporates common law standards, it is for the court to determine which standards the common law prescribes and for the agency to apply those standards to the facts in particular cases.[356] This distribution

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348 *Browning-Ferris Indus. of Cal., Inc.*, 911 F.3d at 1200–01.

349 *See id.* at 1206–07.

350 *Id.* at 1204–05, 1209.

351 *Supra* text accompanying note 347.

352 *See Browning-Ferris Indus. of Cal., Inc.*, 911 F.3d at 1206, 1222–23.

353 *Id.* at 1207 (quoting NLRB v. United Ins. Co. of Am., 390 U.S. 254, 260 (1968)).

354 *Id.* at 1209.

355 John Gotaskie Jr., *Did the D.C. Circuit Overrule or Uphold* Browning-Ferris*? Yes.*, JDSUPRA (Jan. 21, 2019), https://www.jdsupra.com/legalnews/did-the-d-c-circuit-overrule-or-uphold-12006/ [https://perma.cc/YY96-EQ8V].

356 *See, e.g.*, Int'l Longshoremen's Ass'n v. NLRB, 56 F.3d 205, 211–12 (D.C. Cir. 1995) (because the term "agent" in the NLRA "incorporat[es] common law agency principles," courts do "not defer to the agency's judgment as [they] normally might under the doctrine of *Chevron*" but recognizing that "because even common law agency questions" involve factual determinations the "standard of review is not de novo"); N. Am. Van Lines, Inc. v. NLRB, 869 F.2d 596, 598 (D.C. Cir. 1989) (alteration in original) (holding that whether workers are employees or independent contractors is "a determination of pure agency law" that "involve[s] no special administrative expertise that a court does not possess" (quoting *United Ins. Co.*, 390 U.S. at 260)); *see also* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322–23 (1992) (interpreting the Employment Retirement Income Security Act and stating that courts should infer that Congress uses the term "employee" in its common law sense).

of authority would remain so under an ordinary questions approach. For example, in a future case, it would be for the court to determine whether the reserved right to control the essential terms and conditions of employment is not only a relevant factor at common law but also a sufficient one to establish that a company is a "joint employer."[357] Similarly, it would be for the court to resolve whether the precise factors that the NLRB considers as evidence of control exceed common law.[358]

A different and perhaps more recurrent example comes from a Third Circuit case, *Helen Mining Co. v. Elliott*.[359] The Federal Coal Mine Health and Safety Act ("CMHSA") provides disability benefits to coal miners suffering from "black lung" disease.[360] To qualify for benefits, the Act imposes on miners the burden of proof on a series of complicated criteria and establishes equally complicated presumptions about some of the elements, such as causation of the disease, which can be rebutted by the Secretary of Labor.[361] The Act has been amended many times since it was enacted in 1969, including to permit rebuttal by the mine operator as well.[362] The most recent amendment revised the standards for rebuttal in the original provision that referred to rebuttal only by the Secretary.[363] A question arose whether the revised standards also applied to rebuttal by the mine operator.[364] The Department of Labor issued a regulation extending the revised standards to any "party opposing entitlement."[365] Finding the amendment ambiguous, the Third Circuit deferred to the agency's interpretation under *Chevron*.[366]

Under an ordinary questions approach, a court could reasonably conclude instead that the question in *Helen Mining Co.* is the sort that courts, and not agencies, should address. It is a basic question of statutory interpretation that does not depend on empirical data or policy analysis, nor does it require any special experience with the statutory

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357 The court in did not address this question in *Browning-Ferris*. *See Browning-Ferris Indus. of Cal., Inc.*, 911 F.3d at 1222.

358 It would be for the NLRB to determine, however, whether a particular employer has sufficient control of "essential terms and conditions of employment," in the context of the actual employment relationship, even though this determination involves and affects the interpretation of the common law standard. *See id.* at 1200. The D.C. Circuit has acknowledged that sometimes the common law determination is "permeated at the fringes by conclusions drawn from the factual setting of the particular industrial dispute," in which case, the NLRB is owed some deference. *Int'l Longshoremen's Ass'n*, 56 F.3d at 212 (quoting *N. Am. Van Lines, Inc.*, 869 F.2d at 599).

359 859 F.3d 226 (3d Cir. 2017).

360 Pub. L. No. 91-173, 83 Stat. 742 (codified as amended in scattered sections of 30 U.S.C.); *Helen Mining Co.*, 859 F.3d at 229 (quoting 30 U.S.C. § 901).

361 *Helen Mining Co.*, 859 F.3d at 229–30 (citing 30 U.S.C. § 921(c)(4)).

362 *Id.* at 230.

363 *Id.* at 231.

364 *Id.* at 231, 233.

365 *Id.* at 231 (quoting 20 C.F.R. § 718.305(d)(1) (2013)).

366 *Id.* at 237–38.

scheme. Rather, it calls for a determinate answer—either the amendment extends the new standards to mine operators, or it does not—that Congress failed to provide due to the vagaries of the legislative process.[367]

Some cases would present difficult line drawing problems, particularly those involving nonscientific and nontechnical issues. Consider whether a graduate student is an "employee" under the NLRA.[368] This question can be easily characterized as one of law because it involves the interpretation of a broad statutory term that is amenable to legal judgment, with the benefit of the agency's experience concerning the terms and conditions that universities typically impose on graduate students.[369] Furthermore, it involves a particularly important type of question—concerning the scope of the agency's authority—because it determines whether graduate students are within the reach of the NLRB.[370] But these are superficial descriptions. Even a slightly closer look reveals that the question depends on weighing the risks to the educational mission against the benefits of collective action in this context, which is based on empirical studies on both sides of the risk-benefit analysis and experience with the application of the statute in similar contexts.[371] These are the tasks that Congress would intend, and a reasonable observer would expect, the NLRB to undertake. By the same token, they are tasks within the agency's authority, not concerning the

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367 The Supreme Court employed similar reasoning in *King v. Burwell*, 567 U.S. 473 (2015), albeit to a major question: whether a provision in the Patient Protection and Affordable Care Act authorizing individual tax deductions for health insurance obtained from a "State exchange" also applied to health insurance obtained from a "Federal" exchange, mentioned elsewhere in the statute. *Id.* at 483. The Court said that this was not a question for the IRS because it concerned a central piece of major health care legislation. *Id.* at 486. It also suggested that question was not for the agency because it was the sort of basic interpretive question that courts typically address and that required a determinate meaning. *See id.* Of interest, this provision was enacted by the same Congress as the ambiguous rebuttal amendment to the CMHSA. *Supra* note 363 and accompanying text.

368 Bos. Med. Ctr. Corp., 330 N.L.R.B. 152, 152 (1999).

369 *See* Louis L. Jaffe, *Judicial Review: Question of Law*, 69 HARV. L. REV. 239, 243–44 (1955).

370 *Bos. Med. Ctr.*, 330 N.L.R.B. at 152.

371 *See* Michael C. Harper, *Judicial Control of the National Labor Relations Board's Lawmaking in the Age of* Chevron *and* Brand X, 89 B.U. L. REV. 189, 218–20 (2009) (evaluating the NLRB's decisions and arguing that the decision of whether to include or exclude graduate students should balance "weigh[ing] threats" to "educational goals and values like close faculty-student relationships and academic freedom," against the "values of collective worker action," based on empirical evidence about collective bargaining involving graduate students, studies of the effect of economic pressures on graduate students, and examples of collective-bargaining agreements in which there is assertedly no intrusion on the educational process); Beth Israel Med. Ctr., No. 02-RC-121992, slip op. at 28–33 (N.L.R.B. May 13, 2014) (declining to apply its graduate student precedent to medical interns and residents). Note that, in a different context, the Supreme Court has determined that the Department of the Treasury has the authority to determine whether medical residents are "students" or full-time employees under the Federal Insurance Contributions Act. Mayo Found. for Med. Educ. & Rsch. v. United States, 562 U.S. 44, 52–58 (2010).

scope of agency's authority in a *legal* sense. Courts should be mindful that they are at greatest risk of overstepping when they feel competent to make basic determinations of policy.

That said, courts would need not uphold an agency interpretation because they agree to review it under the arbitrary and capricious test. That test is not a free pass for the agency, as some courts thought *Chevron* was.[372] Indeed, several of the leading arbitrary and capricious cases, including *State Farm*, involved circumstances in which the Supreme Court pushed back on an agency's data, analysis, or policy choice.[373]

III. The Ordinary Questions Approach in Context

Under an ordinary questions approach, courts would refrain from characterizing a question of statutory interpretation as one of law when established norms of judicial review indicate that it is better understood as a question of policy. Courts might instinctively gravitate toward this approach because it is consistent with what they know about questions of policy, *Loper Bright* notwithstanding. But should they? This Part shows that the approach sketched here is justifiable in terms of the normative values that underlie the allocation of interpretive authority between courts and agencies, *Loper Bright* included. This Part then shows that the approach can be conceptualized within the framework of judicial review and statutory interpretation. Finally, it addresses an alternative solution to the problem of ordinary questions and the concern that the approach here is unworkable.

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372 Some circuits, like the D.C. Circuit, found that step two overlapped with the arbitrary and capricious test. Chamber of Com. of the U.S. v. FEC, 76 F.3d 1234, 1235 (D.C. Cir. 1996) ("[T]he second step of *Chevron* . . . overlaps with the arbitrary and capricious standard."); *see also* Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 Va. L. Rev. 597, 603–04 (2009) (describing approaches to reconciling *Chevron* step two and the arbitrary and capricious test); Pojanowski, *Without Deference*, *supra* note 20, at 1085–88 (discussing "the relationship between Step Two and arbitrary-and-capricious review" and noting that "important questions remain open, particularly regarding th[is] relationship").

373 *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 52 (1983); Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1, 5, 30 (2020) (finding arbitrary and capricious the Department of Homeland Security's rescission of the Deferred Action for Childhood Arrivals program in part because the agency "fail[ed] to consider the option to retain deferred action" when it was "the centerpiece of the policy"); Judulang v. Holder, 565 U.S. 42, 64 (2011) (finding arbitrary and capricious the Bureau of Immigration Appeals' rule permitting a resident noncitizen to apply for relief from deportation if the grounds for deportation were "comparable" to the grounds for exclusion from the country under a separate provision of the statute because agency considered factors "unmoored" from the statute).

A. Normative Values

Although the Supreme Court has produced divergent interpretive doctrines, it has consistently grounded the modern ones (at least since the mid-1980s) in separation of powers and legislative intent values.[374] For example, the major questions doctrine seeks to ensure that Congress, not agencies, decide big-ticket policy issues and to respect Congress's unlikely choice to delegate such issues without clearly saying so.[375] *Chevron* sought to ensure that expert and politically accountable agencies, not courts, make policy decisions under regulatory statutes, and to respect Congress's likely assignment of interpretive authority to agencies.[376] *Loper Bright* does not disagree with the general values of agency expertise, political accountability, and congressional delegation—just the assumptions that *Chevron* makes about them, and the consequent presumption it creates.[377] An ordinary questions approach finds foundation in these values, too.

An ordinary questions approach promotes separation of powers between agencies and courts but addresses the assignment of interpretive authority with more sensitivity than *Chevron*. It acknowledges that questions of law for courts may exist even if the statutory language is ambiguous, consistent with *Loper Bright*.[378] Still, it continues to recognize that the routine questions of statutory interpretation are not always—and probably not even often—questions of law for courts. Rather, they are mixed questions of law and policy—and to the extent that courts should avoid deciding questions of policy that belong to another branch, they should carefully consider how to regard these questions. Toward this end, courts should refrain from treating questions as ones of law for them to resolve if doing so would amount to judicial policymaking in the familiar ways that the Court's arbitrary and capricious decisions discourage.[379] The claim is not that separation of powers requires an ordinary questions approach. Rather, an ordinary questions approach promotes the values that separation of powers serves.[380]

Some might object, arguing that separation of powers requires courts to decide *all* questions of law, not just some—echoing Justice Gorsuch's concurrence in *Loper Bright*.[381] But the ordinary questions

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374 *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161 (2000); Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984), *overruled by* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

375 *See Brown & Williamson*, 529 U.S. at 160.

376 *See Chevron*, 467 U.S. at 865–66.

377 *See Loper Bright*, 144 S. Ct. at 2266–69.

378 *See id.* at 2264–66.

379 *Supra* note 16 and accompanying text.

380 *See supra* Section II.A.

381 *See Loper Bright*, 144 S. Ct. at 2281–82 (Gorsuch, J., concurring).

approach sketched here is not inconsistent with this argument for the same reason it is not inconsistent with the APA. Separation of powers need not be understood to require courts to *characterize* a question of statutory interpretation as a question of law whenever they can. Nor should it be understood this way. In a system of separated powers, courts should seek to avoid resolving questions of policy when Congress has chosen an agency for that task.[382] Thus, if an ordinary question can be characterized as one of policy, courts should at least hesitate before concluding that it is for them to resolve. As explained above, that does not mean courts should conclude that every ordinary question is for an agency to decide. If the agency's interpretation contains no indication of policy comparable to those the Supreme Court has identified, courts should feel confident in the decision to resolve it.

Some might raise a more focused objection, arguing that separation of powers requires courts to decide all questions that concern the scope of agency authority. An agency that lacks statutory authority cannot issue interpretations at all.[383] An ordinary questions approach is not inconsistent with this argument either. The response is similar: separation of powers need not be understood as requiring courts to resolve any question that can be *characterized* as a scope of authority question, nor should it. Many agency interpretations can be viewed as implicating the scope of agency authority in some sense because statutory mandates are broad and definitional terms are general.[384] But these interpretations, no less than any other, may involve the sort of policy matters that, in a system of separated powers, agencies rather than courts should decide. None of this is to say that courts should abdicate their role of ensuring that agencies act within the basic parameters of their statutory authority. Courts must always do so, and they might find that an ordinary interpretation is so unrelated to the agency's statutory mandate that it is unauthorized, even though the statutory language is broad enough to permit it. As Justice Stephen Breyer once wrote, although the FDA has power to regulate "drugs" and "devices" that "affect the structure or any function of the body" under the FDCA, the agency cannot regulate "room air conditioners" or "thermal pajamas."[385]

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382 *See Chevron*, 467 U.S. at 843–84 ("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.").

383 *See* City of Arlington v. FCC, 569 U.S. 290, 297 (2013) (explaining that the core question in any case involving agency interpretation is "whether the agency has stayed within the bounds of its statutory authority" (emphasis omitted)).

384 *See, e.g.*, Nathan Richardson, *Antideference: COVID, Climate, and the Rise of the Major Questions Canon*, 108 VA. L. REV. ONLINE 174, 204 (2022) ("[B]road delegations of authority . . . are at the core of modern administrative government.").

385 FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 167–68 (2000) (Breyer, J., dissenting) (quoting 21 U.S.C. § 321(h)).

Of course, some might believe that separation of powers requires no or substantially less congressional delegation of authority to agencies and that courts should enforce this restriction through statutory interpretation. But that is a different separation of power issue than asking courts to secure the boundaries of the authority that Congress has delegated to an agency, within existing constitutional limits. The ordinary questions approach sketched here admittedly operates within this baseline.

In addition to promoting separation of powers as between courts and agencies, an ordinary questions approach respects the wishes of Congress—another foundation of the Court's modern interpretive doctrines. Congress intends to delegate policymaking to agencies, and policymaking is often intertwined with statutory language. An ordinary questions approach helps courts to judge Congress's intent. In *Loper Bright*, the Court rejected *Chevron*'s presumption that Congress intends agencies, not courts, to resolve statutory ambiguities.[386] An ordinary questions approach does not make this mistake. It recognizes that statutes may present interpretive questions of the sort that have fallen to courts since *Marbury v. Madison*.[387] It thus aims to provide guidance for discerning which questions are delegations and which are better understood as common byproducts of the legislative process. In this way, it helps courts to better ascertain and prioritize congressional intent.

B. Relationship to Judicial Review and Statutory Interpretation

An ordinary questions approach can be conceptualized within the framework of judicial review and statutory interpretation in different ways. It can be understood as a mechanism for operationalizing section 706 of the APA or organizing judicial review of agency interpretations. It also can be understood as a rule of thumb for interpreting regulatory statutes.

An ordinary questions approach can be viewed as operationalizing section 706 of the APA because it assists courts in determining which standard of review to apply, pointing them toward one standard of review (de novo for questions of law) or the other (arbitrary and capricious review for questions of policy) in consideration of whether that interpretation evinces certain policy indicia. In essence, it is analogous to *State Farm*, which provides specific considerations that guide judicial application of the arbitrary and capricious test.[388] It is different from *State Farm*, though, because it does not flesh out a particular standard of review but ensures the overall functioning of judicial review

386 *See Loper Bright*, 144 S. Ct. at 2265–66 (2024).

387 5 U.S. (1 Cranch) 137, 153–77 (1803).

388 *See* Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 44–57 (1983).

under section 706. In this respect, it is a bit like *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*,[389] which clarifies the text of the notice-and-comment rulemaking provision, section 553.[390] That decision forbids courts from imposing procedural requirements for the notice-and-comment rulemaking process beyond those that section 553 provides.[391] An ordinary questions approach is not a stop sign, prohibiting courts from going further like *Vermont Yankee*, but more of a directional arrow, pointing courts to relevant standard of review for the particular question under review. Nevertheless, it enables the text of the APA to work.

One might conceptualize an ordinary questions approach apart from the APA, emerging as a form of judicial "common law," which is how some described *Chevron*.[392] *Chevron* was said to reflect the Court's recognition that some judicially created principle is necessary for allocating interpretive power between courts and agencies.[393] With *Chevron* gone, reviewing courts may turn to self-help for separating questions of law from questions of policy. In this respect, an ordinary questions approach can be understood to supply the overarching framework for deciding how to characterize an ordinary question, and section 706 of the APA supplies the actual standards of review. Judicial common law was never a particularly strong basis for *Chevron*, as the Court in *Loper Bright* made evident in overruling the decision.[394] It probably is not the soundest foundation for an approach that assists courts in applying the APA going forward.

An ordinary questions approach also can be understood as a rule of thumb for interpreting regulatory statutes. It helps courts decide which routine questions arising under those statutes should be filled by politically accountable, subject-matter experts (agencies) and which by tenure-protected, legal interpretation experts (courts)—to embrace the Chief Justice's styling in *Loper Bright*.[395] It also can be understood in relation to how Congress drafts those statutes, as Justice Amy Coney

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389 435 U.S. 519 (1978).

390 *See id*. at 542, 547–48; Administrative Procedure Act, 5 U.S.C. § 553.

391 *See Vermont Yankee*, 435 U.S. at 547.

392 *See* Gillian E. Metzger, *Embracing Administrative Common Law*, 80 Geo. Wash. L. Rev. 1293, 1300–01 (2012) ("*Chevron* analysis represents judicially created administrative law."); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 Tex. L. Rev. 113, 189–99 (1998) (describing and critiquing *Chevron* as a common law doctrine).

393 *See* Lisa Schultz Bressman & Kevin M. Stack, Chevron *Is a Phoenix*, 74 Vand. L. Rev. 465, 467 (2021).

394 *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2272 (2024) ("*Chevron* was a judicial invention that required judges to disregard their statutory duties.").

395 *See id.* at 2273 (noting that judges are the "experts" in the "field . . . [of] legal interpretation"); *see also id.* at 2266 ("[A]gencies have no special competence in resolving statutory ambiguities.").

Barrett has recently understood the major questions doctrine.[396] In Justice Barrett's view, part of interpreting statutory text in context is considering how Congress likely drafts statutory language and how a reasonable observer comprehends it.[397] With respect to the major questions doctrine, she explains that the textual context includes an awareness that Congress is unlikely to delegate away politically and economically significant questions without saying so—an awareness that is long-standing and empirically grounded.[398]

Seen in this light, an ordinary questions approach recognizes that Congress drafts regulatory statutes in a manner that raises mixed questions of law and policy. History shows that Congress was aware of mixed questions when enacting the APA.[399] In addition, empirical work (the same work that Justice Barrett cites to explain the major questions doctrine) suggests that legislative drafters were aware of *Chevron* and understood that agencies would resolve statutory ambiguities that resulted from the drafting process—a point that Justice Kagan makes dissenting in *Loper Bright*.[400] So even if it is unrealistic to presume that all statutory ambiguities are implicit delegations, as *Chevron* did, it is realistic to assume that Congress has drafted statutes with an appreciation that agencies, not courts, would resolve statutory ambiguities. At least for statutes enacted after *Chevron* and before it was called into question, this background drafting convention would hold.

C. An Alternative and an Objection

An ordinary questions approach endeavors to solve the problem of ordinary questions, helping courts to decide whether to review an agency interpretation de novo or under the arbitrary and capricious test of the APA. There is an alternative solution that some might say is more consistent with the tone of *Loper Bright*, if not its doctrinal demand.[401]

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396 *See* Biden v. Nebraska, 143 S. Ct. 2355, 2376–78 (2023) (Barrett, J., concurring); *cf.* Amy Coney Barrett, Essay, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2195 (2017) ("Textualists consider themselves bound to adhere to the most natural meaning of the words at issue because that is the way their principal—the people—would understand them.").

397 Biden v. Nebraska, 143 S. Ct. at 2378–80.

398 *Id.* at 2380–81. *See generally* Gluck & Bressman, *supra* note 171 (examining the connections between the legislative drafting process and judicial statutory interpretation principles).

399 *See supra* text accompanying notes 75–83.

400 Gluck & Bressman, *supra* note 171, at 1003–06 (the study cited by Justice Barrett); *Loper Bright*, 144 S. Ct. at 2301 (Kagan, J., dissenting) ("The drafters of those statutes knew all about *Chevron*." (citing Gluck & Bressman, *supra* note 171, at 928 fig.2, 994)); *cf. id.* at 2272 ("Given our constant tinkering with and eventual turn away from *Chevron*, and its inconsistent application by the lower courts, it instead is hard to see how anyone—Congress included—could reasonably expect a court to rely on *Chevron* in any particular case.").

401 *See Loper Bright*, 144 S. Ct. at 2268 ("[R]esolution of statutory ambiguities involves legal interpretation. That task does not suddenly become policymaking just because a court has an

Some also might doubt that the approach here is workable. This Section addresses these issues.

1. "Legal Craft" Plus "Outer Boundaries"

As part of an overall rethinking of administrative law years before *Loper Bright*, Professor Jeffrey Pojanowski took up the law-policy problem in statutory interpretation and proposed a particular solution.[402] Rejecting *Chevron*'s effort to draw the line at statutory ambiguity, Pojanowski contended that a court should separate questions of law and policy by asking whether the statutory text at issue is "tractable to standard lawyers' arguments" about its meaning.[403] If so, the court should treat the question as one of law to decide independently.[404] But if the text is so discretionary that its interpretation is not susceptible to legal arguments, the court should treat the agency's interpretation as a policy decision, subject to arbitrariness review.[405] Pojanowski identified the phrase "in the public interest" as falling into this latter category because "legal craft" alone cannot address the meaning or application of this phrase.[406] He offered several other examples, including the phrase "adequate margin of safety" and the terms "reasonable" and "feasible."[407] According to Pojanowski, a court confronting a question involving such statutory language would "file the question as one delegated to the agencies subject to arbitrary and capricious review."[408]

Pojanowski's approach sounds remarkably close to Chief Justice Roberts's description of the judicial role in *Loper Bright*. Roberts writes that courts conduct "legal interpretation" when resolving statutory ambiguities, using their legal tools to do so ("That is the very point of the traditional tools of statutory construction," he remarked).[409] He states that "[w]hen the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits."[410] Such statutes include those that "empower an agency . . . to regulate subject to the limits imposed by a term or phrase that 'leaves agencies with

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'agency to fall back on.'" (quoting Kisor v. Wilkie, 588 U.S. 558, 575 (2019))); *id.* at 2271 ("[T]he basic nature and meaning of a statute does not change when an agency happens to be involved.").

402 *See* Pojanowski, *Neoclassical Administrative Law*, *supra* note 20, at 887.

403 *Id.*

404 *Id.*

405 *Id.*

406 *Id.* at 899, 902.

407 *Id.* at 887, 889.

408 *Id.* at 887.

409 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2266, 2268 (2024).

410 *Id.* at 2263.

flexibility.'"[411] As examples, he points to the statutory terms "appropriate" and "reasonable."[412]

The difficulty is that this approach does not fully address the problem of ordinary questions.[413] It may work as to the most discretionary statutory terms or phrases—though even here judges and scholars may disagree on what counts as discretionary.[414] For the most part, however, it simply directs courts to resolve any question of statutory interpretation for which they possess the legal tools to do so. The difficulty is evident—and not just to legal realists. Almost all statutory terms and phrases are "[]amenable to formal legal craft," and that might be especially true the more textualist judges become.[415] Justice Scalia candidly admitted that textualism permitted him almost always to find clear meaning for statutory language and thus defeat "agency-liberating ambiguity" under *Chevron*.[416] Even when text is ambiguous, Chief Justice Roberts underscores that courts are accustomed to finding a best meaning for statutes "no matter how impenetrable," and do so "us[ing] every tool at their disposal."[417] He clarified that those tools include consulting the agency interpretation for assistance, as in *Skidmore*.[418] If every statutory term has a best meaning if courts work hard enough, then which terms delegate discretionary authority to agencies, subject to arbitrariness review? Statutory terms and phrases are as varied as the matters they address. Courts will still have to make the call—and if their choice is to just give most every statutory term or phrase a fixed meaning because they can, they are not attempting to "identify and respect [congressional] delegations."[419] They are choosing the law side, as Justice Scalia recognized.

Skidmore itself drew a sharper line. In that case, "Congress did not utilize the services of an administrative agency to find facts and to determine in the first instance whether particular cases fall within or without the Act. Instead, it put this responsibility on the courts."[420] The Administrator did make "rulings" in the context of enforcing the

411 *Id.* (quoting Michigan v. EPA, 576 U.S. 743, 752 (2015)).

412 *Id.*

413 *Id.* at 2263–64, 2267–68.

414 *See* Lawrence B. Solum & Cass R. Sunstein, Chevron *as Construction*, 105 Cornell L. Rev. 1465, 1477–78 (2020) (arguing that agencies should resolve statutory ambiguities that involve "construction" as opposed to "interpretation," which includes statutory terms like "source" or "harm"); Pojanowski, *Neoclassical Administrative Law*, *supra* note 20, at 887 n.185 (acknowledging that some might disagree as to which terms are in the "construction zone").

415 Pojanowski, *Neoclassical Administrative Law*, *supra* note 20, at 889.

416 Scalia, *supra* note 147, at 521.

417 *Loper Bright*, 144 S. Ct. at 2266.

418 *See id.* at 2262 (noting that courts may "seek aid" from the agency interpretation in exercising independent judgment, consistent with the APA (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944))).

419 *Id.* at 2268.

420 *Skidmore*, 323 U.S. at 137.

statute, but those rulings did not "constitute an interpretation of the Act . . . which binds a district court's processes."[421] So the district court had no choice but to independently interpret that statute; there was no delegated agency authority to respect. Put differently, there was no law-policy problem. *Skidmore* therefore did not sweep statutory terms to the law side simply because courts possessed the tools to interpret them. The whole statute existed on the law side.

Even when a court does find that a statute delegates discretionary authority to an agency, the law-policy problem emerges when it seeks to determine whether an agency has remained within the "outer statutory boundaries" of that authority.[422] No one would dispute that courts have an obligation to ensure that agencies remain within the scope of their authority. To do so, however, courts must distinguish scope-of-authority questions from exercise-of-authority questions. Chief Justice Roberts has long believed that courts can draw the line, though the Court, with Justice Scalia writing for the majority, rejected the distinction between "jurisdictional" and "nonjurisdictional" questions.[423] Despite Chief Justice Roberts' faith, as Justice Scalia acknowledged, most every agency interpretation can be understood to define the scope of agency authority in some respect.[424]

Nor do ordinary questions have formal features that can help courts decide whether an agency has exceeded its delegated authority. They are unlike major questions, where the Court has felt more confident making this determination—not that lower courts will be so sure.[425] At least, courts must point to some special "economic and political" or statute-altering "significance" suggesting that Congress would not intend to delegate the question without clearly saying so.[426] Consider the questions that qualified as major in several of the Court's central cases: whether the Occupational Safety and Health Administration ("OSHA") can impose a COVID-19 vaccine mandate in the workplaces it regulates,[427] whether the FDA can regulate nicotine and cigarettes in

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421 *Id.* at 139.

422 *Loper Bright*, 144 S. Ct. at 2268.

423 *See* City of Arlington v. FCC, 569 U.S. 290, 296–301 (2013) (rejecting the distinction between "jurisdictional" and "nonjurisdictional" agency interpretations); *id.* at 316–22, 327 (Roberts, J., dissenting) (arguing that courts must ensure that Congress has delegated interpretive authority to an agency and fix the "boundaries" of that authority).

424 *See id.* at 296–98 (majority opinion) (describing the line between an agency interpretation that "concerns the scope of the agency's statutory authority (that is, its jurisdiction)" and nonjurisdictional agency interpretations as "illusory").

425 *See, e.g.*, West Virginia v. EPA, 597 U.S. 697 (2022).

426 *See id.* at 721 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000)).

427 *See* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 595 U.S. 109, 119 (2022) ("[Finding] that the mandate extends beyond the agency's legitimate reach.").

response to a national smoking-related health epidemic,[428] and the manner in which the EPA can regulate carbon dioxide emissions related to climate change.[429] It is easy to see the significance of these issues, though they were all in a day's work for the agencies—and to see them as on the periphery of each agency's authority, though reasonable minds may disagree on which side of the line they fall.

Now consider some ordinary questions by the same agencies under the same sources of authority. They look like the following: whether OSHA can regulate "the use of electronic surveillance and algorithmic management in the workplace,"[430] the extent to which the FDA can regulate artificial intelligence ("AI") "or machine learning-enabled medical devices,"[431] and whether the EPA can regulate industry-related discharge of naturally occurring, always present manganese.[432] Although these questions are undoubtedly on the cutting edge of science, technology, and policy, they involve the exercise of authority the agency very likely has: OSHA *may* regulate virtual workplace practices and production processes that pose risks to worker's safety and health,[433] the FDA *may* regulate AI-enabled devices that are intended for "therapeutic"

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428 *See Brown & Williamson*, 529 U.S. at 160 (claiming that FDA's interpretation was an overly "expansive construction of the statute").

429 *See* West Virginia v. EPA, 597 U.S. at 735 ("[I]t is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme . . . .").

430 Rebecca Rainey, Parker Purifoy & Diego Areas Munhoz, *Punching In: OSHA Urged to Set Standard for Workplace Monitoring*, Bloomberg L. (Apr. 3, 2023, 5:45 AM), https://news.bloomberglaw.com/daily-labor-report/punching-in-osha-urged-to-set-standard-for-workplace-monitoring-28 [https://perma.cc/G7Z3-VP4R].

431 Jeannie Baumann, *ChatGPT Poses New Regulatory Questions for FDA, Medical Industry*, Bloomberg L. (June 21, 2023, 5:35 AM), https://news.bloomberglaw.com/health-law-and-business/chatgpt-poses-new-regulatory-questions-for-fda-medical-industry [https://perma.cc/UZ9A-GPDZ]. *See generally Artificial Intelligence and Machine Learning in Software as a Medical Device*, FDA (Mar. 15, 2024), https://www.fda.gov/medical-devices/software-medical-device-samd/artificial-intelligence-and-machine-learning-software-medical-device [https://perma.cc/BPX5-KR7E]; Marketing Submission Recommendations for a Predetermined Change Control Plan for Artificial Intelligence/Machine Learning-Enabled Device Software Functions, 88 Fed. Reg. 19,648 (Apr. 3, 2023).

432 *See* Press Release, Ctr. for Biological Diversity, EPA Petitioned to Update 47-Year-Old Toxic Pollutant List (July 31, 2023), https://biologicaldiversity.org/w/news/press-releases/epa-petitioned-to-update-47-year-old-toxic-pollutant-list-2023-07-31/ [https://perma.cc/G448-5EDY] (reporting that the EPA has been "[p]etitioned to [u]pdate [its] 47-[y]ear-[o]ld [t]oxic [p]ollutant [l]ist" to include, among other substances, manganese, a pollutant with "severe neurological impacts," which is released by "coal mining and other industrial processes;" it "is particularly severe in Appalachia and has been detected at extremely high levels in drinking water, especially in low-wealth communities"); *Manganese*, Nat'l Insts. Health: Off. Dietary Supplements (Mar. 29, 2021), https://ods.od.nih.gov/factsheets/Manganese-HealthProfessional [https://perma.cc/EH9U-RQJH] ("Manganese is a[] . . . trace element that is naturally present in many foods and available as a dietary supplement.").

433 29 U.S.C. § 651.

use,[434] and the EPA *may* regulate the discharge of some naturally prevalent elements that cause severe health effects.[435] The questions are not measurably different in degree or fit than the other routine decisions that Congress has delegated to these agencies. Courts are left to draw the line. If courts decide independently any question that concerns the scope of agency authority at some level, they are not "polic[ing] the outer statutory boundaries of those delegations" but setting them.[436]

Sometimes drawing the line is relatively easy—no "room air conditioners" for the FDA, though they can be understood in a literal sense as "devices" that affect "any function" of the body under the FDCA.[437] But the reason that the FDA cannot regulate room air conditioners is because most everyone would agree that these home appliances are clearly, not arguably, outside the zone of its delegated authority to regulate drugs and drug-related devices, or even devices that are intended for "therapeutic" use.[438] Ordinary questions tend to not present such obvious mismatches, as the previous examples demonstrate. That is the very problem.

Some might contend that the ordinary questions approach sketched here does not draw the line or respect congressional delegation any better. It just favors the policy side. Thus, it tells courts to look for policy signals when Congress does not always intend to delegate discretionary authority to an agency just because so-called "policy" is involved. Furthermore, it tells courts to consider evidence found in the agency's interpretation, not in congressional triggers like statutory text, and this evidence is subject to agency manipulation. These arguments misunderstand the approach proposed here. First, it does not establish a rule favoring the policy side. As discussed above, it sets up no presumption that Congress intends agencies to resolve all questions with policy aspects; it helps courts determine the proper standard of review for questions that involve law and policy, and it is at most a rule of thumb.[439] To the extent it favors the policy side as applied, that result owes to the nature of ordinary questions and the reality of congressional delegation. Second, the approach here does not disregard the text or rely solely on agency triggers. It tells courts to engage the text,

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434 *See* 21 U.S.C. §§ 321(h), 331; Marketing Submission Recommendations for a Predetermined Change Control Plan for Artificial Intelligence/Machine Learning-Enabled Software Functions, 88 Fed. Reg. at 19,648.

435 *See* 33 U.S.C. § 1317(a)(1); Massachusetts v. EPA, 549 U.S. 497, 532 (2007) ("hold[ing] that [the] EPA has the statutory authority to regulate the emission of [greenhouse] gases" because they "fit well within the . . . definition of 'air pollutant'").

436 Loper Bright Enters. v, Raimondo, 144 S. Ct. 2244, 2268 (2024).

437 FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161, 168 (2000) (Breyer, J., dissenting) (quoting 21 U.S.C. § 321(g)(1)).

438 *See supra* text accompanying note 434 (quoting 21 U.S.C. §§ 321(h), 331).

439 *See supra* Section II.C.

even determine the best reading of that text, and to consult the agency's interpretation to help confirm that the question is theirs to decide. If the agency's interpretation reflects strategic behavior, a court need not credit that interpretation any more than it must when deciding a question independently under *Skidmore*. Courts decide how to characterize the questions under review, no matter how agencies (or their challengers) choose to present them.

2. Workability

Some might argue that an ordinary questions approach is unworkable, however otherwise appealing. The approach injects complexity into judicial review by asking courts to bifurcate their analysis and look for certain indications that a question of statutory interpretation is one of policy for the agency to decide before claiming it for themselves. Courts might be uncertain when to terminate their statutory analysis and look for policy indicia. In *Loper Bright*, the Court found *Chevron* unworkable for a similar reason: the doomed precedent required a court to "give up on its 'interpretive work' before it has identified [the] best meaning," without providing adequate guidance on when it should stop.[440] Courts also might be uncertain what constitutes sufficient policy indicia in the substance of the agency's interpretation. Almost every agency interpretation has some policy aspect, so when do courts hold the reins? Thus, an ordinary questions approach purports to offer guidance on the allocation of authority between courts and agencies, but all it offers is opportunity for confusion.

There is reason for concern about the workability of any interpretive approach that is more complicated than a simple rule. As a practical matter, however, an ordinary questions approach is less likely to confuse courts than validate their instincts about judicial review of agency interpretations. At bottom, it would allow courts to defer when they feel the least well-equipped to exercise their own judgment—when an agency interpretation involves data-driven, fact-based, methodological, or substantive choices that normally are not subject to de novo review.[441] By the same token, it would confirm their sense that not every statutory ambiguity constitutes a congressional delegation or an agency matter. Sometimes a statutory ambiguity is just a statutory ambiguity, which is to say an unexceptional question of law for them to resolve.

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440 *Loper Bright*, 144 S. Ct. at 2271.

441 *See* Breyer, *supra* note 54, at 380–81; Bressman & Stack, *supra* note 393, at 479–80; Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 861 (2001) ("federal statutory programs have become so complex that it is beyond the capacity of most federal judges to understand the full ramifications of the narrowly framed interpretational questions that come before them.").

The approach sketched here is also fairly user-friendly. It directs courts to identify indications in an agency's interpretation that are familiar and relatively concrete. These indications are certainly less amorphous than were the factors that determined whether a particular agency interpretation carried the force of law for purposes of applying *Chevron*.[442] The D.C. Circuit's experience in the cases discussed above might be loosely understood to provide some anecdotal support for the view that courts can manage them.[443]

Some might argue that no court would follow an ordinary questions approach, even if they could or should—they will keep for themselves questions they want and defer on questions they do not. There is no denying that courts may choose to resolve questions when they want and, of more concern, especially when they disagree with an agency's interpretation. But courts may be more inclined to follow an ordinary questions approach than we might suppose. They may welcome a way to avoid micromanaging the continuous flow of ordinary decisions that agencies make, especially if *Loper Bright* prompts an exponential increase in the number of cases they see. Statutory schemes are complex, and issues are specialized. Agency interpretations arrive before courts in a variety of procedural postures, accompanied by voluminous records.[444] The pressure to get through the case docket is intense. Judges are not incapable of handling complicated questions of statutory interpretation or "scary" technical issues, and they frequently must dig in.[445] At the same time, they may appreciate an approach that acknowledges the realities of judicial review and allows them to defer to an agency interpretation when they know they should.[446]

Conclusion

So long as regulatory statutes exist, courts will be asked to review the constant stream of interpretations that agencies make in the normal course of implementing those statutes. Such interpretations do not involve the type of "extraordinary" questions to which the major questions doctrine applies. They involve the kind of ordinary questions that,

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442 *See* Barnhart v. Walton, 535 U.S. 212, 222 (2002) (applying *Chevron* after considering "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration [of] the Agency").

443 *See supra* Section II.B.

444 Breyer, *supra* note 54, at 373.

445 *See, e.g.*, Becerra v. Empire Health Found., 597 U.S. 424, 434 (2022) ("The [statute's] provisions are technical . . . [b]ut when read in that suitable way, the fraction descriptions disclose a surprisingly clear meaning . . . .").

446 For an argument that lower courts may have been overusing *Chevron* anyway, applying that framework to agency interpretations when they might actually have applied *State Farm* instead and not *Chevron* at all, see Bressman, *supra* note 217, at 507–08.

though not unimportant, agencies answer as a regular part of doing their jobs. Ordinary questions *do* pose a challenge for judicial review. They often are mixed questions of law and policy and can be characterized as either. A court, therefore, can frame a mixed question as amenable to judicial judgment or specialized, for the agency to decide like any matter of policy. This is a judicial policy choice.

For the first four decades of the APA, courts made this choice on an ad hoc basis, with little predictability even in the Supreme Court's own cases. For the four decades after that, courts did not need to decide how to characterize ordinary questions because *Chevron* took over, instructing them to treat agency interpretations as addressing questions of policy when the relevant statutory terms or phrases were ambiguous, and therefore making the call easier for purposes of the APA. *Loper Bright* ushers in a new era, directing courts to decide all questions of law, regardless of whether a statute is ambiguous. But it does not change the nature of ordinary questions: they often involve statutory language that gains meaning through the scientific, technological, economic, and policy judgments that agencies routinely make. When agencies answer these questions, their interpretations are not different in kind or degree from those that courts review under the arbitrary and capricious test of the APA. And so, courts may again struggle to determine "what is a question of law" under the APA. They can always choose to ignore the problem and decide any question they can. If the Court is to be taken at its word about respecting congressional delegations, they should not.

After *Loper Bright*, how a court chooses to characterize an ordinary question is consequential. It is the difference between deciding the question independently and allowing the agency to decide, subject to arbitrary and capricious review.[447] This Foreword proposes that courts make this choice mindful of the judicial norms for questions of policy, which instruct them not to substitute their judgment for that of the agency. These norms come from the Court's decisions elaborating the arbitrary and capricious test. Courts know the sorts of agency policy decisions they should not be reviewing de novo, and they should not disregard these norms because a particular agency policy decision has implications for the meaning of statutory language or the scope of agency authority, as so many do. Rather, courts should harness the considerations for applying the arbitrary and capricious test to determine whether the underlying question is for them to resolve de novo or for the agency to decide, subject to arbitrariness review.

The approach sketched here does not suggest that courts ignore the law part of ordinary questions. In fact, it gives primacy to that part, directing courts to start with the statutory text, even though some might

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447 *Cf.* Dickinson v. Zurko, 527 U.S. 150, 162 (1999) ("The upshot in terms of judicial review is some practical difference in outcome depending upon which standard is used.").

ask why if a question could be characterized as either law or policy. Thus, a court first should consider whether the statutory language at issue has a congressionally specified meaning or meaning that necessarily rules out the agency's interpretation. When neither is the case, the court then should ask whether the substance of the agency's interpretation manifests a familiar policy indication. If a court finds such an indication, it should characterize the question as one of policy for the agency to decide, even if it could resolve the question itself. If a court finds no such indication, it should conclude that the question is one of law for it to resolve, even if the statute is ambiguous.

Judicial responsibility for questions of law is a cornerstone of the APA and separation of powers.[448] In *Loper Bright*, the Court restored a more formal commitment to this role. Yet neither the APA nor separation of powers requires reviewing courts to characterize every ordinary question that involves a statutory term or phrase as a question of law simply because they can. Courts make this judgment call. They should seek to avoid deciding questions of the sort that they can appreciate belong to another branch. By their nature, ordinary questions often are such questions.

448 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); *cf.* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2293–94 (2024).