Four Futures of *Chevron* Deference

*Daniel E. Walters**

Abstract. In two upcoming cases, the Supreme Court will consider whether to overturn the Chevron *doctrine, which, since 1984, has required courts to defer to reasonable agency interpretations of otherwise ambiguous statutes. In this Article, I will defend the proposition that, even at death's door,* Chevron *deference is likely to be resurrected, and I will offer a simple positive political theory model that helps explain why. The core insight of this model is that the prevailing approach to judicial review of agency interpretations of law is politically contingent—that is, likely to represent an equilibrium that efficiently maximizes the Supreme Court's policymaking utility over the long haul, given certain institutional constraints that Supreme Court Justices must operate under. The model produces four possible futures of* Chevron *deference, with each possible future's probability depending on the Court's certainty about the future allyship or opposition of the executive branch.*

The Article unfolds as follows. Part I will provide a brief political history of Chevron *deference. Recent work in this vein has helped us better appreciate the political contingency of the rise and decline of* Chevron *deference. Part II will build on this insight, articulating a simple model that can tell us under what political conditions something like* Chevron *deference likely arises, as well as when it likely fades or disappears completely. The model this Article will offer differs from other accounts that proclaim* Chevron*'s "inevitability" in its parsimonious focus on political circumstance and preference maximization, as well as in its forthright acknowledgment that* Chevron *may very well not be inevitable in any given moment if the right political circumstances for its erosion exist. Part III will then engage with political science literature to argue that, while political conditions do not favor* Chevron *deference currently, in the long run they are almost certain to. Indeed, I will argue that regime theory*

* Associate Professor of Law, Texas A&M University School of law. I am grateful for discussions about the ideas in this Article with Ben Johnson, Dave Bridge, Lisa Schultz Bressman, John Duffy, the Honorable David Porter, Don Elliott, and Tom Merrill, as well as to the *George Mason Law Review* and the C. Boyden Gray Center for the Study of the Administrative State for their financial support for this Article and for the opportunity to participate in this "*Chevron* On Trial" symposium.

> *teaches us that the conditions favoring* Chevron *deference are a natural default for our political system. Thus, if the model bears any relationship to the reality of what is really driving the Court's construction of deference doctrines, we likely have not seen the last of* Chevron *deference.*

Introduction

Forty years is a long time—I would know, as it almost perfectly encapsulates my entire lifetime (I was born less than a month after the *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[1] decision and am therefore in a very real sense a "*Chevron* Baby"). Unsurprisingly, the nearly forty-year life of the *Chevron* doctrine saw phases of growth, maturity, evolution, and decline.[2] Now, in *Loper Bright Enterprises v. Raimondo*[3] and *Relentless, Inc. v. Department of Commerce*,[4] the doctrine appears ready to face life's ultimate milestone. One can already faintly hear the doctrine's opponents dancing on *Chevron*'s tombstone, as well as the soft, resigned murmurs of mourning from its supporters. All seem to accept that *Chevron*'s time has come.

Except legal ideas and doctrines, unlike people, never actually die.

This Article, through a simple positive political theory model, defends the proposition that although at death's door (to keep the metaphor going), *Chevron* deference is likely to be resurrected.[5] The core insight of this model is that the prevailing approach to judicial review of agency interpretations of law is politically contingent. That is, such review likely represents an equilibrium that efficiently maximizes the U.S. Supreme Court's policymaking utility over the long haul, given certain institutional constraints on the Supreme Court Justices. The model produces four possible futures of *Chevron* deference, with each possible future's probability depending on the Court's certainty about the future allyship or opposition of the executive branch.[6]

If one entertains this starting point, it turns out that something like *Chevron* deference follows when judges are highly confident that a particular configuration of regime politics is occurring, and will occur, over some time. As explained below, this particular configuration existed at *Chevron*'s founding moment but has eroded in recent decades, making it highly likely that *Chevron* will be abandoned, or at least significantly

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1 467 U.S. 837 (1984).

2 I cannot claim credit for first seeing parallels between *Chevron* and the rollercoaster of life. *See* Linda Jellum, Chevron*'s Demise: A Survey of* Chevron *from Infancy to Senescence*, 59 ADMIN. L. REV. 725, 730 (2007); Michael Herz, Chevron *is Dead; Long Live* Chevron, 115 COLUM. L. REV. 1867, 1909 (2015).

3 45 F.4th 359 (D.C. Cir. 2022), *cert. granted in part*, 143 S. Ct. 2429 (argued Jan. 17, 2024) (mem.).

4 62 F.4th 621 (1st Cir. 2023), *cert. granted in part*, 144 S. Ct. 325 (argued Jan. 17, 2024) (mem.).

5 *See infra* Part 0.

6 The Article's title, and, indeed, its spirit of modeling doctrinal change, is inspired by Professor Andrew Coan. *See* Andrew Coan, *Eight Futures of the Nondelegation Doctrine*, 2020 WIS. L. REV. 141, 147–51 (2020) (sketching six possible future scenarios for nondelegation depending on judicial capacity).

curtailed, by the Supreme Court.[7] Yet, as this Article also shows, the particular configuration conducive to *Chevron* deference will likely reemerge at some point in the future. At that point, it will be only a matter of time until the Supreme Court gains the confidence to bring deference back to life.[8] Indeed, the political conditions currently eroding the utility of *Chevron* for the Supreme Court are historically anomalous, and anomalies usually dissipate with time.[9] While forty years is practically a whole lifetime for people, it is hardly a blip in political time.

The Article unfolds as follows. Part I provides a brief political history of *Chevron* deference. Recent work in this vein has helped us to better appreciate the political contingency of the rise and decline of *Chevron* deference.[10] Part II builds on this insight, articulating a simple model that can tell us under what political conditions something like *Chevron* deference is likely to arise, as well as when it is likely to fade or disappear completely. Unlike other accounts that proclaim *Chevron*'s "inevitability,"[11] the model this Article offers differs in its parsimonious focus on political circumstance and preference maximization, as well as in its forthright acknowledgment that *Chevron* may very well not be inevitable in any given moment if the right political circumstances for its erosion exist. Part III then engages with political science literature to argue that, while political conditions do not favor *Chevron* deference currently, in the long run they are almost certain to. Indeed, this Article will argue that regime theory teaches us that the conditions favoring *Chevron* deference serve as a natural default for our political system.[12] Thus, if the model bears any relationship to the reality of what really drives the Court's construction of deference doctrines, we likely have not seen the last of *Chevron* deference.

I. *Chevron* Politics

It is, of course, possible to approach *Chevron* deference through a purely doctrinal lens. Viewed this way, *Chevron* deference is simply the rule, dating back to 1984, that courts must defer to the reasonable

[7] *See infra* Part I.

[8] *See infra* Part III.

[9] *See infra* Section III.A.

[10] *See, e.g.*, Craig Green, *Deconstructing the Administrative State:* Chevron *Debates and the Transformation of Constitutional Politics*, 101 B.U. L. REV. 619, 657–68 (2021); Gregory A. Elinson & Jonathan S. Gould, *The Politics of Deference*, 75 VAND. L. REV. 475, 478 (2022); THOMAS W. MERRILL, THE *CHEVRON* DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE 6 (2022).

[11] Nicholas R. Bednar & Kristin E. Hickman, Chevron*'s Inevitability*, 85 GEO. WASH. L. REV. 1392, 1398–99 (2017); *see* ADRIAN VERMEULE, LAW'S ABNEGATION: FROM LAW'S EMPIRE TO THE ADMINISTRATIVE STATE 13–14 (2016).

[12] *See infra* Part III.

interpretations of statutes offered by agencies if the statute itself does not precisely answer the question presented.[13] In other words, *Chevron* deference says that agencies, not courts, get to decide how to exercise the discretion inherent in the interpretation of ambiguous statutory language.[14] Forests have been laid to waste unpacking the nuances of the doctrine,[15] which have grown exponentially as courts have struggled with the boundaries of deference. And, of course, like any doctrine with stakes this high, *Chevron* has inspired a deep normative and legal debate about its provenance and propriety.[16]

This doctrinal and normative perspective, however, risks missing much of what is important about the *Chevron* story. To really understand *Chevron*—where it came from, why it exists, and why it is fading—we need to view it through a positive political theory lens. This Part builds on recent work in this vein to situate *Chevron* in politics, and it argues that *Chevron* is, and always was, politically contingent. In other words, *Chevron* is one possible solution to an endemic political problem in our separation-of-powers system.

A. *Political Origins*

It has become increasingly clear that *Chevron* deference was politically constructed at a precise moment in time when pivotal parties deemed it advantageous for their purposes.[17] First, as Professor Craig Green describes, "[i]n the 1980s, Republican conservatives used administrative deference to roll back federal power without amending federal statutes," and they could do so because deference took statutory interpretation partly out of the hands of "liberal judges" and put it in the hands of

[13] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43, 845 (1984).

[14] Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 601 (2009).

[15] *See, e.g.*, *id.* at 597–98; Cary Coglianese, Foreword, Chevron*'s Interstitial Steps*, 85 GEO. WASH. L. REV. 1339, 1345–46 (2017); Daniel J. Hemel & Aaron L. Nielson, Chevron *Step One-and-a-Half*, 84 U. CHI. L. REV. 757, 765 (2017); Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 835–37 (2001); Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1450–51 (2005); Note, *Major Question Objections*, 129 HARV. L. REV. 2191, 2192 (2016).

[16] *See generally* Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL'Y 103 (2018) (providing a literature review of arguments "to eliminate or narrow [*Chevron*] deference").

[17] Of course, deference—as a practice rather than a doctrine with a name—was with us long before *Chevron*. *See* Brief of Scholars of Administrative Law & the Administrative Procedure Act as *Amici Curiae* in Support of Respondents at 10–16, Loper Bright Enters. v. Raimondo, 143 S. Ct. 2429 (filed Sept. 22, 2023) (No. 22-451) (collecting sources confirming that deference as a practice existed at the time of the passage of the Administrative Procedure Act ("APA")).

"deregulatory bureaucrats."[18] Normally, bureaucrats are not deregulatory, but the 1980s saw the Reagan Revolution, a major part of which involved the Reagan administration's efforts to seize control of the administrative state and bend it toward deregulatory purposes.[19] These changed political circumstances fundamentally flipped the conservative position on deference.[20] The notoriously liberal Court of Appeals for the D.C. Circuit (and, to some extent, the more moderate Supreme Court) acted as the main roadblock to deregulation during the Reagan years,[21] so it made perfect sense for movement conservatives at the time to support a doctrine that pried power from ideological opponents in the judiciary and placed it with ideological allies in the executive branch. Justice Antonin Scalia was shockingly transparent about these goals.[22] Although it may surprise modern readers used to concerted attacks on *Chevron* from the political right, the doctrine initially was very much driven early on by Republican politicos who confidently predicted the triumph of Republican presidential politics in the wake of Reagan.[23]

Second, the nascent *Chevron* doctrine also received a boost from a strange bedfellow—Judge Patricia Wald of the Court of Appeals for the D.C. Circuit.[24] As Professor Thomas Merrill argues, Wald attempted to articulate and elevate the doctrine—specifically, the two-step framework—to thread the needle in certain environmental cases,

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[18] Green, *supra* note 10, at 622.

[19] *See generally* Thomas O. McGarity, *Regulatory Reform in the Reagan Era*, 45 MD. L. REV. 253 (1986) (conveying the forces of the Reagan administration in regulatory reform); MARISSA MARTINO GOLDEN, WHAT MOTIVATES BUREAUCRATS? POLITICS AND ADMINISTRATION DURING THE REAGAN YEARS (2000) (describing "bureaucratic behavior" during Reagan's presidency); RICHARD A. HARRIS & SIDNEY M. MILKIS, THE POLITICS OF REGULATORY CHANGE: A TALE OF TWO AGENCIES (1989) (contrasting the "social regulation" of the 1970s and the deregulation of the Reagan administration in the 1980s).

[20] Elinson & Gould, *supra* note 10, at 480 (discussing the Bumpers Amendment—a piece of legislation supported by conservative forces in the 1970s—which would have eliminated deference to agency decisions a decade before *Chevron*, and the reversal of position after the *Chevron* decision).

[21] *See* Harry T. Edwards, *Public Misperceptions Concerning the "Politics" of Judging: Dispelling Some Myths About the D.C. Circuit*, 56 U. COLO. L. REV. 619, 622–23 (1985) (collecting contemporaneous sources that describe the Court of Appeals for the D.C. Circuit as liberal, but disagreeing with that interpretation).

[22] Elinson & Gould, *supra* note 10, at 511 (quoting then-Professor Antonin Scalia as saying, congressional Republicans "seem perversely unaware that the accursed 'unelected officials' downtown are now *their* unelected officials, presumably seeking to move things in their desired direction; and that every curtailment of desirable agency discretion obstructs (principally) departure from a Democrat-produced, pro-regulatory status quo").

[23] *See* MERRILL, *supra* note 10, at 84 ("The *Chevron* doctrine, once it got going, was likewise regarded for some time as a 'conservative' doctrine, given its association with the Reagan Administration's deregulation efforts and strenuous advocacy of the doctrine by Justice Scalia.").

[24] *Id.* at 85.

supporting "a sensible, if legally questionable, EPA interpretation" in one case while "preserving a significant degree of discretion for courts to overturn decisions regarded as less sensible" at step two of the doctrine.[25] Although Judge Wald was a Democratic appointee who likely did not share Justice Scalia's policy preferences in any way,[26] she worked behind the scenes to elevate *Chevron* into the doctrine that we now recognize.[27] By articulating an ostensibly liberal reason for supporting *Chevron*, Judge Wald helped solidify the judiciary's embrace of the doctrine in the face of the Reagan Revolution. As it turned out, Judge Wald miscalculated: in subsequent deployments of the doctrine, the courts elevated the step-one inquiry into a stringent statutory interpretation exercise and turned the step-two inquiry into a rote exercise of arbitrariness review.[28] Over time, the two-step doctrine that Wald believed would give liberal judges power to resist deregulatory policies emanating from deregulatory presidential administrations ended up crystallizing into a more categorical rule of deference, provided the statute's interpretation did not resolve the case.[29] By the time that evolution was complete, however, the Reagan Revolution had passed, giving way to a period of unexpectedly close partisan competition for the presidency.[30] The stark partisan stakes of the doctrine

[25] Merrill argues that Judge Wald was perhaps motivated by a short-term interest in achieving a lasting reversal of certain environmental opinions by the Court of Appeals for the D.C. Circuit that vacated EPA rules that had attracted both liberal and conservative judges to statutory interpretations that reflected the "most plausible reading." *Id.* at 84–85. On this account, Judge Wald adapted *Chevron*'s two-step framework to thread the needle in these cases, using it as a "device to justify a sensible, if legally questionable EPA interpretation in *General Motors*" while also using it in *Rettig* to "preserv[e] a significant degree of discretion for courts to overturn decisions regarded as less sensible." *Id.* at 85. As Merrill notes, "If this is indeed where the seeds of 'the *Chevron* doctrine' were planted, it suggests that a large part of its appeal [to Wald] was that it *enhanced* the discretion of judges to accept or reject particular agency interpretations based on the nebulous requirements of 'clarity' and 'reasonableness'—free from the encrustations of traditional doctrine." *Id.*

[26] *Cf.* Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1718–19 (1997) (arguing that the party of the appointing President is an acceptable proxy for the ideology of court of appeals judges).

[27] MERRILL, *supra* note 10, at 85.

[28] *See* Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1265 (1997). *But see* Kent Barnett & Christopher J. Walker, Chevron *Step Two's Domain*, 93 NOTRE DAME L. REV. 1441, 1452–57 (2018) (finding that many circuit courts follow the arbitrary and capricious test but many also apply a hyper-purposivist analysis).

[29] Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 32–34 (2017).

[30] The competition has been close both in the sense that elections themselves have often been close—as in the nailbiters of 2000, 2016, and 2020—but also in the sense that Democratic and Republican candidates have evenly split victories in the six elections since 2000. *See Statistics*, AM. PRESIDENCY PROJECT, perma.cc/89UG-MMBL.

consequently became more fuzzy.[31] As a result, *Chevron* solidified itself as a relatively uncontroversial fixture of administrative law preserved more or less by inertia for almost two decades.[32]

What can we learn from this? Most important for present purposes is that the *Chevron* doctrine was born of political calculation. Overall, *Chevron* emerged when it did and how it did because of predictions about the likely configuration of the political terrain around regulation. At root, *Chevron* was an answer to a salient question of interbranch political power-sharing presented at a pivotal moment in time—namely, when a long-standing alignment of the branches changed in a seemingly lasting way, leading judges to recognize the advantages of a doctrinal reconfiguration. The birth of *Chevron* also highlights the uncertainty of this kind of political response and the risks of strategic miscalculation—Judge Wald may have won several battles, but she did not win the war, at least if the goal was to protect judicial power against encroachment by bureaucrats. And Justice Scalia was similarly wrong about the durability of the Reagan Revolution. Finally, the episode underscores the inertial quality of regime politics. Once a new doctrinal configuration solidifies, it can last for quite a while—at least until a major policy shock upsets that configuration or until pivotal actors' understanding of the strategic terrain has time to update.[33]

B. *Political Erosion*

As discussed above, after an overtly political beginning, *Chevron* deference became a fixture of administrative law for about two decades. During this period, judges appointed by presidents of both parties invoked *Chevron* without much concern about the doctrine.[34] That period of

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[31] *See infra* Part III.

[32] Elinson & Gould, *supra* note 10, at 480 (noting that the *Chevron* doctrine experienced "two decades of relative quiescence in the 1990s and 2000s").

[33] For helpful background on how social scientists think about political change over time, and in particular how change is sporadic and rapid, see generally FRANK R. BAUMGARTNER & BRYAN D. JONES, AGENDAS AND INSTABILITY IN AMERICAN POLITICS (1993) (articulating a theory of "punctuated equilibrium" in which periods of stasis (equilibria) are upset at inflection points, often fomented by policy activism or new ideas, and replaced by new arrangements that are themselves likely to last for some time); PAUL PIERSON, POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS (2004) (highlighting the importance of the "temporal dimension" of politics more generally).

[34] To be sure, internecine fights over particular policies led *Chevron* to be applied in ways that statistically evinced partisan biases. *See* Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 831 (2006). *But see* Barnett & Walker, *supra* note 29, at 28–44 (showing that this pattern was not as apparent in the circuit courts). This period also saw some limitations on "*Chevron*'s domain," Merrill & Hickman, *supra* note 15, at

apparent consensus might at first glance give the appearance that *Chevron* had become de-politicized.[35] Over the last ten to fifteen years, however, any illusion of *Chevron*'s cross-partisan political support has clearly eroded.[36] Whatever happens in *Loper Bright* and *Relentless*, most observers predict that the Justices' votes will align with their partisan identification, with some combination of the conservative Republican appointees voting to end or significantly curtail *Chevron* deference.[37]

It would be tempting for lawyers to chalk up this radical change in the political valence of *Chevron*, and the resulting instability of *Chevron* deference, to ideas and first principles. On this account, more conservative jurists have simply awakened to the mistakes of Justice Scalia in supporting a doctrine that fundamentally recalibrates the separation of powers or undermines due process,[38] while liberals and progressives have come to believe that *Chevron* protects cross-ideological values, like agency

838–48, namely in the *Christensen*, *Mead*, and *Barnhart* cases, but was also matched by some expansions, such as in the *Brand X* case. *See* Bressman, *supra* note 15, at 1475–77.

[35] As I discuss below, it would be a mistake to read the evidence of cross-partisan application of *Chevron* in the 1990s and 2000s as evidence that undermines a political explanation of *Chevron*. Political scientists have long recognized that the crudest form of the "attitudinal model"—that judges vote on a case-by-case basis according to their political priors—is an incomplete model of judicial decision-making. *See, e.g.*, Donald R. Songer, *The Dog that Did Not Bark: Debunking the Myths Surrounding the Attitudinal Model of Supreme Court Decision Making*, 33 JUST. SYS. J. 340 (2012) (collecting critiques of the attitudinal model). Nobody would expect judges to oscillate violently between deference and anti-deference based solely on the political stakes of the individual cases in front of them; rather, as I show in Part II, the Justices are more likely to make strategic decisions about the optimal deference doctrine in light of their predictions of the likelihood that they will be sympathetic or opposed to the average case that comes before them over a period of time. Factoring in long-range strategy and uncertainty complicates any effort to paint ostensibly apolitical application of *Chevron* as a triumph for the "legal model," as it could be, and likely was, the case that the 1990s and 2000s were simply a period of high uncertainty about key variables in a strategic approach to choosing whether to displace the *Chevron* status quo. *See infra* Section II.B.

[36] Cass R. Sunstein, Chevron *as Law*, 107 GEO. L.J. 1613, 1617 (2019) ("*Chevron* has become the flashpoint for contemporary concerns over the power and the legitimacy of the modern administrative state."); *id.* at 1618 ("A remarkable shift, to which I shall devote some attention, involves *Chevron*'s political valence—that is, the perceived connection between *Chevron* and identifiable sets of political convictions. Once celebrated by the right and sharply criticized by the left, *Chevron* is now under assault from the right and (for the most part) accepted on the left.").

[37] *See, e.g.*, Ian Millhiser, *A New Supreme Court Case Seeks to Make the Nine Justices Even More Powerful*, VOX (May 2, 2023, 7:30 AM), https://perma.cc/5H59-DYRK. In fact, some observers believe that the Court has already effectively abandoned *Chevron* without saying so. *See, e.g.*, Lisa Heinzerling, *How Government Ends*, BOS. REV. (Sept. 28, 2022), https://perma.cc/RGC4-CNRB.

[38] Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 795–96 (2010) (nodding to separation of powers concerns with *Chevron*); Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187, 1209–10 (2016) (arguing that *Chevron* undermines due process of law by causing judges to exercise something less than "independent judgment").

expertise.[39] There certainly has been no shortage of work done in recent years to build an ostensibly legal foundation for deconstructing many aspects of the administrative state, starting with *Chevron*.[40]

This apolitical and doctrinal explanation of *Chevron* dissensus misses too much. There is no real way to explain why smart conservative lawyers, who would have been well aware of early criticisms of *Chevron* as a "counter-*Marbury* for the administrative state,"[41] would have accepted deference for so long, only to snap out of it just recently. Nor is it possible to explain why liberals and progressives have rallied around *Chevron* deference despite overwhelming evidence that *Chevron* allows for as much deregulation as regulation,[42] and indeed was forged for that very purpose.[43] *Chevron*'s politics have flip-flopped and become entrenched in recent years, but these trends have little to do with legal principles and far more to do with changing political circumstances.

Recent scholarly accounts that center the politics of *Chevron* have helped us begin to unpack why the astonishing change in *Chevron*'s political valence over the past ten to fifteen years actually occurred. Professors Jonathan Gould and Gregory Elinson point to a conservative backlash against a surge of rulemaking by administrative agencies during the Obama administration, all of which "increased *Chevron*'s overall salience" and highlighted the ways that *Chevron* could support an

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[39] *See, e.g.*, Sidney Shapiro & Elizabeth Fisher, Chevron *and the Legitimacy of "Expert" Public Administration*, 22 WM. & MARY BILL RTS. J. 465 (2013) (asserting "[e]xpertise is central to the deference required by *Chevron*").

[40] Elinson & Gould, *supra* note 10, at 529 (noting that a "new set of actors came onto the scene between the 1970s and 2010s: ideological conservatives," and concluding that "this 'new class' of libertarian-leaning conservatives . . . expressed hostility to the regulatory state's very existence"). This project hardly stops with eliminating or limiting *Chevron*; it also entails limiting the independence of agencies from presidential oversight and curbing Congress's ability to delegate power to agencies in the first place.

[41] Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2589 (2006); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 478–80 (1989). You cannot be more explicit about this than Justice Scalia was. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 513 (1989) ("[O]n its face [*Chevron*] seems quite incompatible with Marshall's aphorism that '[i]t is emphatically the province and duty of the judicial department to say what the law is.'").

[42] Professor Jonathan Masur's contribution to this symposium makes this point quite effectively—*Chevron*'s valence is entirely driven by the agency actions that it is applied to, and therefore neither inherently deregulatory nor inherently pro-regulatory. Jonathan S. Masur, Loper Bright *as Entrenchment*, 31 GEO. MASON L. REV. 573, 574 (2024); *see also* Pamela King, *How SCOTUS Gutting* Chevron *Could Haunt Republicans*, E&E NEWS (May 16, 2023, 1:26 PM), https://perma.cc/9K5U-WZS3.

[43] *See supra* Section I.A.

ambitious progressive regulatory agenda.[44] Thomas Merrill, while highlighting essentially apolitical concerns about the functionality of the doctrine,[45] also acknowledges conservative backlash against President Barack Obama's regulatory policy as a core driver of *Chevron*'s current "crisis of legitimacy."[46] Professor Craig Green points to "personnel shifts in the judiciary" and to "broader ideas about the 'deconstruction of the administrative state'" that became more mainstream in just the last decade or so.[47] These explanations no doubt capture much of the story.

Still, there is something puzzling about the shifting terrain. Were simple backlash the whole story, one might have expected positions to flip again once President Donald Trump assumed office and began aggressively pursuing a deregulatory agenda.[48] Yet that is not what happened.[49] Explaining this "dog that didn't bark" moment might tempt us to fall back on legal explanations, but, again, these stories cannot explain why *Chevron*'s political valence shifted so drastically. And while the composition of the federal judiciary (in particular, the Supreme Court) surely matters a great deal, what are we to make of the fact that Republican-appointed Justices have long had a solid majority but have apparently hesitated to roll back deference entirely despite opportunities to do so?[50] Clearly, a reductive attitudinalist account that centers only the Justices' contemporary political preferences misses something important that pushes toward more stasis in the law.

In short, there is much that we do not understand about what truly drives the perennially shifting debates about *Chevron*. That lack of understanding hampers our ability to predict what might happen next.

II. Modeling *Chevron*'s Political Contingency

Both scholarship and practice would benefit from a greater understanding of *Chevron*'s enduring political dynamics. In this Part, I contribute to this endeavor by laying out a simple positive political theory

44 Elinson & Gould, *supra* note 10, at 524, 525–30.

45 Merrill, *supra* note 10, at 257–61.

46 *Id.* at 1.

47 Green, *supra* note 10, at 622 (citation omitted).

48 Elinson & Gould, *supra* note 10, at 531.

49 *See* James Kunhardt & Anne Joseph O'Connell, *Judicial Deference and the Future of Regulation*, BROOKINGS (Aug. 18, 2022), https://perma.cc/93C3-PUM2 (noting that the Trump administration often declined to request *Chevron* deference in its briefing in statutory interpretation cases involving agencies, and that the Court has not applied *Chevron* since 2016).

50 *See, e.g.*, Buffington v. McDonough, 143 S. Ct. 14, 14 (2022) (denying certiorari over a dissent by Justice Neil Gorsuch); Kisor v. Wilkie, 139 S. Ct. 2400, 2418 (2019) (declining to do away with *Auer* deference on account of stare decisis).

model that captures the core insights of the emerging literature on the politics of *Chevron* deference. This is an important project because, while the political contingency of *Chevron* is a reality and should "give us pause before telling deterministic stories about the past and make us more hesitant to offer predictions concerning the future,"[51] there may be some things that are relatively predictable about the future of deference. Models necessarily simplify, but, precisely because of that, they can reveal the political logic that really drives change, providing both parsimonious explanation of the past and predictions for the future.[52]

The chief assumption my simple model makes, which will be familiar to political scientists but perhaps not as familiar (or acceptable) to lawyers, is that judges are policy preference maximizers—they seek to decide cases, and to decide among doctrinal means of deciding cases, based on their beliefs about how different options will benefit the realization of political goals they may have.[53] The second assumption the model makes is that judges prefer to minimize their workload in doing so—that is, all else equal, judges would prefer to exert less effort to realize their policy goals.[54]

In non-agency cases presenting statutory interpretation questions, the prescription for judges is clear: judges should invest as much effort as they feel necessary to support their decisions in a credible, public-facing

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[51] Elinson & Gould, *supra* note 10, at 536.

[52] For general background on models and their uses, see Kevin A. Clarke & David M. Primo, *Modernizing Political Science: A Model-Based Approach*, 5 PERSP. ON POL. 741, 741–44 (2007). I do not mean to do anything more than invoke a general, informal modeling approach here, though much political science research employs more complex, mathematical models that trade off on parsimony for greater accuracy.

[53] *See generally* TOM S. CLARK, THE SUPREME COURT: AN ANALYTIC HISTORY OF CONSTITUTIONAL DECISION MAKING (2019) (discussing political science research, which often argues or assumes that judges are political actors but also shows that many factors besides pure outcome-driven considerations (e.g., strategic considerations) may structure judicial politics). Of particular relevance here is a body of work in political science—dubbed the "new judicial politics of legal doctrine"—that acknowledges the role that legal doctrines play in the politics of judicial decisionmaking. *See* Jeffrey R. Lax, *The New Judicial Politics of Legal Doctrine*, 14 ANN. REV. POL. SCI. 131, 134–35 (2011). This work harmonizes "attitudinal" or "strategic" models of judicial decisionmaking with evidence that, at least at times, precedent and doctrine do seem to constrain judges. *See* Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305, 315–16 (2002). If judges are voting for doctrinal frameworks that will govern future disputes, they are still making policy-oriented decisions but in a legal register familiar to lawyers. The model I offer picks up on the questions that are left over after this recognition that doctrine is the object of politics: *What drives change of legal doctrines?* Work on this question is in its infancy. *See generally, e.g.*, Brandon L. Bartels & Andrew J. O'Green, *The Nature of Legal Change on the U.S. Supreme Court: Jurisprudential Regimes Theory and Its Alternatives*, 59 AM. J. POL. SCI. 880 (2015) (reorienting the debate over "legal change and constraint").

[54] Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everyone Else Does)*, 3 SUP. CT. ECON. REV. 1, 3–5, 39–41 (1993).

way. In agency cases, however, judges have a potential shortcut—namely, agencies may provide the work to defend a particular policy outcome, and if that policy aligns with what the judge would have chosen, then the need for independent exertion is eliminated.[55] Moreover, judges might be able to hide behind the apparent neutrality of doctrine requiring deference to legitimize their policy-driven rulings if the doctrinal prescription fortuitously coincides with the judge's own preferences for the resolution of cases.[56] Thus is born the possibility of *Chevron* deference.

A. *Two Driving Factors*

The problem with the shortcut is that agencies do not always produce policies aligning with judicial preferences because the policy visions of presidential administrations do not always align with judicial preferences. Consequently, a judge who wishes to take advantage of the shortcut will want to do so only selectively—that is, only when the policies promulgated by the agency are likely to align with judicial preferences. Otherwise, if agency policies do not align with judicial preferences, the shortcut (while saving judges effort) will start to cost judges in terms of maximization of their preferences, and judges would, all things considered, prefer to exert the effort necessary to independently justify their policy preferences. Just as bad is the reverse possibility: if agency policies generally align with a judge but the judge has elected to do away with deference, that judge will have to work harder to uphold agency action that they could have approved with little effort under a deference doctrine. A judge that realizes all of this would consider, if only implicitly, two key factors in deciding whether the prevailing doctrine should default to deference or default to judicial review.

First, a judge would look at their general allyship with the executive branch, as allyship would indicate that first moves by the agency will usually align with the judge's preferences.[57] While there are many

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[55] *Cf.* Tonja Jacobi & Emerson H. Tiller, *Legal Doctrine and Political Control*, 23 J.L. ECON. & ORG. 326, 327 (2007) (outlining a model of hierarchical control of the lower courts by a higher court that similarly relies on the higher court's ability to rely on lower courts to reach similar results and which counsels use of rules to constrain lower courts when there is risk of slack).

[56] Kent Barnett, Christina L. Boyd & Christopher J. Walker, *The Politics of Selecting* Chevron *Deference*, 15 J. EMPIRICAL LEGAL STUD. 597, 601 (2018) (noting that, by choosing to deploy *Chevron* deference, judges may be able to "align the outcome with their policy preferences" and "shroud their chosen outcome under the cover of neutral principles of judicial review that appear independent from the merits").

[57] Elinson & Gould, *supra* note 10, at 538 ("It stands to reason, then, that a party with control over the executive branch but facing an unfriendly judiciary would favor *Chevron*. Conversely, a party

determinants of agency decision-making, in an era of "presidential administration,"[58] the best indicator of allyship is the partisanship of the President. To be sure, there are probably many agencies where this assumption is not reliable. Independent agencies, for instance, are more likely to promulgate policies that depart from the sitting President's preferences.[59] Likewise, some agencies have unique cultures and political identities that might make it more difficult for Presidents of certain parties to shape policy.[60] But, overall, Presidents are likely to get their way, especially on the most significant policymaking initiatives and the ones that judges would care the most about.[61] This makes the President's preferences a decent proxy for judges who want to predict allyship and, by extension, the utility of *Chevron*.

Second, a judge would consider the certainty of their prediction of *future* allyship or opposition.[62] Because judges craft doctrine that presumptively should not be reversed every four years (this would probably look unseemly and would potentially risk institutional delegitimization or at least substantial political pushback), judges cannot precisely tailor the deference regime to the sitting President. Instead, judges are likely to try to make a prediction about what party will control the White House for some period of time and to select a doctrinal approach that maximizes the average policy payoff across multiple administrations—perhaps for a judge's entire career. At the same time, because judges are not oracles, they will need to discount their predictions to account for uncertainty, particularly the further into the future the judge wants to try to predict the average political configuration.[63]

that does not control the White House but has a sympathetic Supreme Court (or, secondarily, D.C. Circuit) would take the reverse position.").

58 Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2250–51 (2001).

59 David E. Lewis & Jennifer L. Selin, *Political Control and the Forms of Agency Independence*, 83 GEO. WASH. L. REV. 1487, 1490, 1514 (2015).

60 Joshua D. Clinton, Anthony Bertelli, Christian R. Grose, David E. Lewis & David C. Nixon, *Separated Powers in the United States: The Ideology of Agencies, Presidents, and Congress*, 56 AM. J. POL. SCI. 341, 352 (2012).

61 Kenneth Lowande, *Politicization and Responsiveness in Executive Agencies*, 81 J. POL. 33, 45 (2018).

62 The positive political theory literature gives close attention to these factors, recognizing that long-range predictions about electoral competition and future allyship can shape strategic incentives of lawmakers. *See*, *e.g.*, Rui J. P. de Figueiredo, Jr., *Electoral Competition, Political Uncertainty, and Policy Insulation*, 96 AM. POL. SCI. REV. 321, 330–31 (2002) (examining the role of uncertainty about electoral competition in decisions by Congress to structure the administrative state to either be insulated or subject to greater political control).

63 There is a robust debate between rational actor models, which assume low levels of uncertainty, and bounded rationality models, which do not. *See generally* BRYAN D. JONES, POLITICS

B. *The Complete Model*

The two key factors in our model can be combined to create a two-by-two contingency table (see Table 1 below). The upshot of this exercise is that high levels of certainty about future allyship will likely lead to judges taking a strong stance in favor of a rule-like approach (either pro-deference or anti-deference), depending on whether the prediction is for future allyship or future opposition. All else equal, a judge who feels certain about the future will make a relatively undiluted decision on whether the shortcut is advantageous and craft doctrine accordingly, while a judge uncertain about the future will resort to strategies to mitigate risks of mistake while still acting in accordance with the dominant strategy vis-à-vis the executive branch—for instance, by endorsing doctrinal formulations that preserve greater flexibility for judges to toggle in or out of deference. On the margins, a judge uncertain of the future but predicting allyship might begin carving out specific exceptions to *Chevron* that would allow judges to selectively deploy the shortcut. By contrast, a judge uncertain of the future but predicting opposition might favor a more across-the-board deployment of *Skidmore* respect that allows the judge to refuse to defer to the agency's interpretation if necessary but contains enough flexibility to allow the judge to point to the agency's comparative expertise to obviate the need for an independent judgment call by the court.[64]

Table 1: Modeling Optimal Deference Doctrines

	Future Allyship with Presidents	Future Opposition with Presidents
High Certainty	Strong Deference (e.g., Chevron)	Strong Anti-Deference (e.g., de novo review)
Low Certainty	Weak Deference (e.g., Chevron but with exceptions)	Weak Anti-Deference (e.g., Skidmore respect)

There is, of course, much that this model leaves out. For instance, it is likely that concerns about control of lower courts' discretion in

AND THE ARCHITECTURE OF CHOICE: BOUNDED RATIONALITY AND GOVERNANCE (2001) (characterizing the debate using formal complex institutions, like government agencies).

64 *See* Barnett et al., *supra* note 56, at 601–02 (discussing the political utility of being able to elect out of *Chevron*'s framework on more of a case-by-case basis).

implementing doctrine marginally affect these choices.[65] A more complicated model might also factor in Congress's preferences.[66] Yet even this simple model maps fairly clearly, and powerfully, onto the available options for judges confronting choices about how to design deference doctrine for the long haul. The model also seems to fit the data we have reasonably well.

First, as discussed above, *Chevron* arose at a pivotal moment in American political history when it seemed to the more conservative Justices that future allyship with the executive branch was relatively likely.[67] That confidence faded slightly in a subsequent era of fierce partisan competition for the presidency, resulting in more doctrinal hedging by the Court.[68] But, overall, the core of *Chevron* (as modified by *Mead* and similar cases) survived for as long as it did because of this competition—"hope springs eternal."[69]

Second, the model can help make sense of the current political terrain and the puzzling ossification of views of *Chevron* even amidst the rapid changes of control of the White House over the past sixteen years. President Obama's 2008 election and subsequent reelection was widely recognized as transformative and threatening to Republicans' long-term prospects for taking control of the White House.[70] Indeed, it was not until Donald Trump shocked the world in 2016 that we stopped hearing so much about the "demographics as destiny" argument that Democrats would dominate the presidency for the foreseeable future.[71] This

65 Much political science modeling of doctrine looks at the difficulties of control of lower courts as a key variable for determining whether, for instance, to formulate doctrine as a rule or a standard. *See, e.g.*, Jacobi & Tiller, *supra* note 55, at 326–27. This variable may be less important in light of the Supreme Court's increasing use of the shadow docket to police lower court decisions. *See generally* STEPHEN VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC (2023).

66 *See, e.g.*, Virginia A. Hettinger & Christopher Zorn, *Explaining the Incidence and Timing of Congressional Responses to the U.S. Supreme Court*, 30 LEG. STUD. Q. 5, 7 (2005); John A. Ferejohn & Barry R. Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT'L REV. L. & ECON. 263, 267–69 (1992).

67 *See supra* Section I.A.

68 *See supra* note 30 and accompanying text.

69 ALEXANDER POPE, AN ESSAY ON MAN, 5 (1734).

70 *See, e.g.*, Alan I. Abramowitz, *Transformation and Polarization: The 2008 Presidential Election and the New American Electorate*, 29 ELEC. STUDS. 594, 596–99 (2010) (discussing factors in the 2008 presidential election that "are likely to affect elections for many years to come").

71 For discussion of the "demographics as destiny" hypothesis, see Philip Elliott, *Are Demographics Destiny? Maybe Not, New Pew Numbers Suggest*, TIME (June 30, 2021, 2:02 PM), https://perma.cc/NG7A-KH85. For a particularly robust statement of confidence in this thesis, see JAMES CARVILLE WITH REBECCA BUCKWALTER-POZA, 40 MORE YEARS: HOW DEMOCRATS WILL RULE THE NEXT GENERATION 31–35 (2011).

prediction was overstated—it turns out that demographic change does not uniformly benefit Democrats,[72] and the electoral college gives Republican candidates a (small) counterweight to any demographic advantage for Democrats[73]—but it would probably be a mistake to overcorrect predictions. The smart money remains with Presidents being more often Democratic than Republican for the foreseeable future due to a strong popular vote advantage,[74] generally favorable (if somewhat unpredictable) demographic trends,[75] as well as an increasingly fractured Republican Party.[76] Meanwhile, little doubt exists that the Supreme Court, and indeed the courts generally, are as ideologically conservative, and therefore as aligned with the Republican coalition, as they have been for some time.[77] Given life tenure and the age of many recent nominees to the courts, there is little reason to think this configuration on the Court or the courts in general will change any time soon.[78]

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[72] Elliott, *supra* note 71.

[73] David Leonhardt, *Is the Electoral College Becoming Fairer?*, N.Y. TIMES (Sept. 12, 2023), https://perma.cc/Z9SP-793G (acknowledging that the "Electoral College has been very kind to Republicans in the 21st century," but that "over the past few years the Republican advantage in the Electoral College seems to have shrunk").

[74] David A. Walker, *Forecasting the 2020 and 2024 U.S. Presidential Elections*, 42 J. FORECASTING 1519, 1528 (2023) (predicting a 53.7% popular vote favoring an unnamed Democratic candidate in 2024).

[75] ROBERT GRIFFIN, RUY TEIXEIRA & WILIAM H. FREY, AMERICA'S ELECTORAL FUTURE: DEMOGRAPHIC SHIFTS AND THE FUTURE OF THE TRUMP COALITION 14 (2018).

[76] SAMUEL L. POPKIN, CRACKUP: THE REPUBLICAN IMPLOSION AND THE FUTURE OF AMERICAN POLITICS 3 (2021). As I write, the Republican Party has just finished several weeks of infighting over its leadership in the House, prompting calls for a "break up" among its warring coalitions. *See* Max Burns, Opinion, *End of an Era: It's Time for the Republicans to Break Up*, HILL (Oct. 25, 2023, 10:00 AM), https://perma.cc/VV94-WCGD.

[77] Stephen Jessee, Neil Malhotra & Maya Sen, *A Decade-Long Longitudinal Survey Shows that the Supreme Court Is Now Much More Conservative than the Public*, 119 PROC. NAT'L ACAD. SCI. 1, 2 (2022); *see also* April Rubin, *Supreme Court Ideology Continues to Lean Conservative, New Data Shows*, AXIOS (July 3, 2023), https://perma.cc/43S2-HYM8. Comprehensive quantitative metrics on the ideological composition of the lower courts are harder to come by, but currently there are more judges appointed by Republican Presidents than Democratic Presidents in the courts of appeals (but not the district courts). *See Circuit Status*, BALLS & STRIKES (Jan. 4, 2024, 10:48 AM), https://perma.cc/S8PH-825J. Subject-matter specific studies of voting patterns suggest that Trump-appointed judges in the lower courts are indeed distinctively conservative. *See, e.g.*, Stephen J. Choi, Mitu Gulati & Eric A. Posner, *Trump's Lower-Court Judges and Religion: An Initial Appraisal* 2–3 (Pub. L. & Legal Theory, Rsch. Paper No. 2023-49, 2023).

[78] Adam Chilton, Dan Epps, Kyle Rozema & Maya Sen, The Endgame of Court-Packing 2 (May 4, 2023) (unpublished manuscript) (on file with the *George Mason Law Review*) (conducting a simulation exercise and finding that, without a court-packing event, it would take on average forty-four years for a 3-6 minority on the Supreme Court to reclaim a majority).

It is no surprise, then, that the Court's most conservative Justices began changing their tune on *Chevron* in recent years—deference on average could be plausibly forecasted to favor a pro-regulatory agenda offered by Democratic Presidents. A one-term, and largely ineffectual, Trump presidency, followed by election of another Democratic President in Joe Biden, has only reinforced these concerns among conservatives.[79] It would not be unreasonable for the Court's conservative majority to shift to a prediction that deference, on average, will not benefit them in realizing their policy goals, given that it is more likely that Presidents will be opponents for the foreseeable future.

What remains to be seen, and what will likely be answered in the *Loper Bright* and *Relentless* cases, is how confident the conservative Justices are about this prediction. The answer to that question could well determine whether the Court decides to scrap *Chevron* altogether or whether it simply limits the doctrine.

III. Assessing the Four Possible Futures of *Chevron*

So far, we have focused on the past and present, but one advantage of trying to distill *Chevron*'s politics down to a parsimonious model is that it can, if it is at all valid, provide tentative insights about the future. In this Part, I ask what political science work relevant to the variables in the model offered above could teach a curious Justice—the Justice who has not made up their mind about whether they predict future allyship or future opposition, and whether they are confident or uncertain about that prediction. Of course, it is somewhat fanciful to think that Justices would consider this kind of information in making their assessments, although maybe they should. After all, we have already seen that jurists make mistakes in reading the political future,[80] and it does not seem implausible that overly confident members of the Supreme Court's current conservative coalition will box themselves in unnecessarily by assuming too quickly that Democrats will dominate the White House and doing away with the useful device of *Chevron*. But don't let them say they weren't warned.

One insight that emerges from this exercise is that *Chevron* (with or without exceptions) is a dominant strategy for preference-maximizing Justices, given longstanding patterns of regime politics. The recent erosion of support for *Chevron* and embrace of anti-deference by some of

[79] *See, e.g.*, Amy Gunia, *Republicans Are Divided on Trump's Third Bid for the Presidency*, TIME (Nov. 16, 2022, 1:45 AM), https://perma.cc/64W9-2M2G; Editorial Board, Opinion, *The 2024 Republican Choice*, WALL ST. J. (Jan. 21, 2024, 5:56 PM), https://perma.cc/JVE7-J7G7.

[80] *See supra* Section I.A.

the Justices are, in part, attributable to anomalous political circumstances that raise, for the first time in the *Chevron* era, the distinct possibility that the Court will be persistently at odds with a dominant lawmaking coalition. These conditions, though, will almost certainly revert to normalcy in the long run. This does not guarantee *Chevron* deference will return to us regardless of what happens this term, but it does come close. Perhaps more important in the short run, these considerations suggest that, on balance, it would be smart for the Court to hedge its bets and decline to discard deference entirely in the *Loper Bright* and *Relentless* cases.

A. *The Court-President Relationship in Historical Perspective*

In 1957, the political scientist Robert Dahl observed that "the policy views dominant on the [Supreme] Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States."[81] At the time, Professor Dahl was pushing back against the idea, popular among law professors, that the Supreme Court was a counter-majoritarian institution by its very nature.[82] It was not, and to see why it was not, one needed to consider only that regular turnover on the Court could be expected, on average, to afford Presidents two nominations to the Supreme Court per term[83]—often enough to leave a major imprint on the institution. Especially in times of one-party dominance of the Presidency and of Congress, which historically have been the norm, this device for regular appointments virtually ensures that the Supreme Court will not be wildly out of step with the dominant lawmaking coalition. A large body of regime theory in American Political Development ("APD") work demonstrates this basic pattern,[84] and more formalistic game

[81] Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957).

[82] Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 35 (1993).

[83] Lee Epstein, Jack Knight & Andrew D. Martin, *The Supreme Court as a* Strategic *National Policymaker*, 50 EMORY L.J. 583, 586 (2001).

[84] *See, e.g.*, Keith E. Whittington, *Law and the Courts*, *in* THE OXFORD HANDBOOK OF AMERICAN POLITICAL DEVELOPMENT 321 (Robert M. Valelly et al., eds., 2014); Thomas M. Keck, *Party Politics or Judicial Independence: The Regime Politics Literature Hits the Law Schools*, 32 LAW & SOC. INQUIRY 511, 519 (2007); George I. Lovell & Scott E. Lemieux, *Assessing Juristocracy: Are Judges Rulers or Agents?*, 65 MD. L. REV. 100, 100 (2006); Kevin J. McMahon, *Will the Supreme Court Still "Seldom Stray Very Far"?: Regime Politics in a Polarized America*, 93 CHI.-KENT L. REV. 343, 345 (2018); Dave Bridge & Curt Nichols, *Congressional Attacks on the Supreme Court: A Mechanism to Maintain, Build, and Consolidate*, 41 LAW & SOC. INQUIRY 100, 101 (2016).

theoretical models basically predict the same thing.[85] Our constitutional system highly discourages a persistent divergence—the kind that would last for more than a few years here and there—between the Supreme Court and the President. If the pattern holds in the future, the implications for the model of *Chevron* offered above are clear: on balance, the Supreme Court should be more likely to view the President as a probable ally over the long haul. Any prediction of future opposition should be, in light of these longstanding and structural trends, naturally tentative.

To be sure, there are some who believe that the pattern may be breaking. Professors Paul Baumgardner and Calvin TerBeek, for instance, argue that Dahl's regime theory desperately needs an update in a time where "our politics have become more conflictual and ideologically polarized" and where the Supreme Court has become "allied to a specific political project set forth by modern movement conservatism."[86] Baumgardner and TerBeek see a future where that movement "comes to thoroughly dominate American judicial politics," and where a more persistent divergence between the Supreme Court and the President therefore emerges.[87]

There is surely something to the idea that the conservative legal movement has outmaneuvered opponents to build powerful machinery for the continued appointment of allies on the bench.[88] It is also probably true that the Supreme Court is currently, and historically, at odds with the dominant lawmaking coalition due to a series of fortuitous circumstances that gave Republican Presidents over the past twenty years more appointment opportunities than Democratic Presidents, despite a high degree of electoral competitiveness.[89] None of this, however, suggests that our current moment is anything but an outlier. The mechanics that have undergirded the Supreme Court's regime politics for most of our history have not fundamentally changed. How Baumgardner and TerBeek's break

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85 *See generally* Epstein et al., *supra* note 83.

86 Paul Baumgardner & Calvin TerBeek, *The U.S. Supreme Court Is Not a Dahlian Court*, 36 STUD. AM. POL. DEV. 148, 149 (2022).

87 *Id.*

88 *See generally* Robert O'Harrow Jr. & Shawn Boburg, *A Conservative Activist's Behind-the-Scenes Campaign to Remake the Nation's Courts*, WASH. POST (May 21, 2019), https://perma.cc/WJY8-GY26. For general background on the conservative legal movement, see generally STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW (2010); AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION (2015).

89 *See* Daniel Hemel, *Can Structural Changes Fix the Supreme Court?*, 35 J. ECON. PERSPS. 119, 126–27 (2021) (examining the Court's current crisis of legitimacy and locating it in a breakdown of the Dahlian pattern of regular replacement by the dominant lawmaking coalition).

in regime theory is supposed to sustain itself going forward is unclear: for a thorough and *persistent* Republican domination of the Court to materialize, there would need to be a fairly significant run of Republican Presidents to stock the Supreme Court with reliable conservatives. But if that's true, then it would also likely be true that the dominant lawmaking regime would be an ally, not an opponent, of the Court's conservatives.

Moreover, one thing that regime theory teaches is that moments of counter-majoritarianism exist, often due to fortuitous historical circumstances, but when the Court asserts itself against a dominant lawmaking coalition, the results can backfire. One distinct possibility in the *Chevron* space is that a Court that chooses to act on a prediction of future opposition may foment a reaction from the elected branches. At the most extreme, the Court may risk the escalation of conflict into a court-packing plan that reduces the opposition between the branches. In other words, the allyship-opposition dimension of the model may be endogenous.

B. The Unpredictability of American Political Competition in an Era of Polarization

Baumgardner and TerBeek are clearly right, though, that we live in an era of high partisan competition for the presidency and for control of government writ large.[90] By the end of President Biden's first term, the last twenty-four years will have seen twelve years of Republican Presidents and twelve years of Democratic Presidents. Arguably, this era of fierce competition extends even further back, to the beginning of the breakup of the dominant New Deal coalition in the 1970s or 1980s.[91] So close is the competition that "inversions"—that is, cases in which the popular-vote winner loses the election due to the electoral college—which have occurred only four times since 1836, have occurred twice since 2000.[92] While enough doubt may exist about the continuation of electoral competitiveness to at least raise the possibility that we are on the precipice of persistent domination of the presidency by the conservative Justices' Democratic opponents,[93] it seems more likely that we will continue to

[90] *See also* FRANCES E. LEE, INSECURE MAJORITIES: CONGRESS AND THE PERPETUAL CAMPAIGN 1 (2016) (noting that recent years have featured "a ferocious power struggle for control of US national government," but that "it has not always been so").

[91] Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2335 (2006).

[92] Michael Geruso, Dean Spears & Ishaana Talesara, *Inversions in US Presidential Elections: 1836-2016*, 14 AM ECON. J.: APPLIED ECON. 327, 329 (2022).

[93] *See supra* notes 69–77 and accompanying text.

experience high partisan competition for the presidency for the foreseeable future.

These circumstances matter a great deal for the second dimension in the model offered above: the certainty or uncertainty of predictions. When the Justices make their long-range predictions about future allyship or opposition with the executive branch, the best evidence they have is likely to be current political conditions. If the Justices are anything like most people, they will use new information to update their prior beliefs about political facts, but will do so cautiously, favoring what they know about the present state of play.[94] Thus, uncertainty over the long run may follow from competition now, and it may take a substantial amount of time for this uncertainty to diminish. However, it cannot be ruled out that the Justices may not be normal—that is, that they update quicker than the average political observer, perhaps because of overconfidence. It seems like overconfidence, in part, led to the birth of *Chevron*,[95] which suggests that *Chevron* could also come undone because of overconfidence. Ultimately, it is difficult to know where the Justices stand on their predictions for future allyship or opposition, but an educated guess might be that they are likely to be relatively uncertain about their prediction for the foreseeable future. Under the model, this is conducive to retention of *Chevron* in diluted form.

What this might look like is anybody's guess. The Court could decide in *Loper Bright* and *Relentless* to do nothing except restate existing limitations on *Chevron*'s domain, or to inveigh against lower courts' sloppiness in applying *Chevron*'s two-step framework. The Court may well not need to do much more than this in light of the major questions doctrine. The major questions doctrine provides an ideal tool for the Court to limit *Chevron* while retaining its core, since so much will be determined by whether the Court believes agency action triggers the doctrine under currently quite manipulable criteria.[96] Perhaps the Court will be a bit bolder, if it is inclined to predict opposition, adopting an across-the-board posture of *Skidmore* respect. Probably categorically off the table, in light of prevailing conditions of political uncertainty, is a

[94] *See* Seth J. Hill, *Learning Together Slowly: Bayesian Learning About Political Facts*, 79 J. POL. 1403, 1403 (2017); Lukas F. Stoetzer, Lucas Leemann & Richard Traunmueller, *Learning from Polls During Electoral Campaigns*, 46 POL. BEHAV. 543, 544 (2022).

[95] *See supra* Section I.A.

[96] *See* Todd Phillips & Beau J. Baumann, *The Major Questions Doctrine's Domain*, 89 BROOK. L. REV. (forthcoming 2024) (manuscript at 20–23); Natasha Brunstein, *Taking Stock of* West Virginia *on its One-Year Anniversary*, YALE J. ON REGUL.: NOTICE & COMMENT (June 18, 2023), https://perma.cc/TP5Y-HQGR; Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded*, 112 CAL. L. REV. (forthcoming 2024) (manuscript at 31).

more unequivocal move to an undiluted strategy of unconditional *Chevron* or across-the-board de novo review.

Conclusion

The very name of this symposium—"*Chevron* on Trial"—suggests finality. I hope to have convinced you, though, that this moment is hardly so determinative. Anybody hoping that *Loper Bright* and *Relentless* might bring an end to the need for symposia and Articles like this one is bound to be disappointed. Anybody who is fascinated by questions of where legal doctrines come from and what sustains them should pay attention. This moment is indeed historic and important, but it really just starts a new chapter.