

**DEATH IS NOT THE END:
WHAT FLORIDA’S CONSTITUTIONAL PROHIBITION
ON AGENCY DEFERENCE CAN PREDICT ABOUT THE
FEDERAL ADMINISTRATIVE STATE POST-CHEVRON,
WITH A FOCUS ON ENVIRONMENTAL POLICY**

HANNAH L. ROBINSON

ABSTRACT

The 2024 case Loper Bright Enterprises v. Raimondo presented the U.S. Supreme Court with an opportunity to overturn its decision in Chevron v. Natural Resources Defense Council, which established the current standard of agency deference. Many believe that Chevron’s demise will severely negatively impact the environment because they presume environmental agencies’ statutory interpretations will lose in court without deference, and that agencies will thus be unable to regulate in the Earth’s interest. At the state level, Florida is the sole jurisdiction to have already prohibited agency deference via a voter-approved constitutional amendment.

This Note uses Florida caselaw featuring judicial discussions of agency statutory interpretations to assert that the federal administrative state and particularly environmental protections may not be so gravely impacted, and that agencies’ interpretations can still be upheld even without a deferential standard of review. Specifically, Part I explores public and professional opinion regarding overturning Chevron. Part II explains federal agency deference doctrines and the Loper Bright litigation, focusing on Chevron’s relation to the environment. Part III presents relevant Florida jurisprudence pre- and especially post-amendment and relates it to the federal level, including a brief statistical analysis. Part IV examines three environmental post-amendment cases and the federally applicable lessons that can be gleaned from them. Part V considers and demystifies the federal “zombie Chevron” concept through breaking down the related notion within Florida using a recent state case.

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INTRODUCTION

Federal agency deference has had its moments at the forefront of academic and mainstream debate, but 2024 finds that debate livelier than ever. Seemingly imminent was the U.S. Supreme Court’s long-expected overturning of its seminal 1984 decision in *Chevron v. Natural Resources Defense Council*,¹ which established arguably the most well-known and significant (and controversial) administrative law doctrine in this country’s history; the case that allowed the Court to strike down *Chevron* was *Loper Bright Enterprises v. Raimondo*.² The primary doctrinal consideration in *Loper Bright* was whether *Chevron* deference should be discarded,³ a question the Court answered in the affirmative.⁴

Many agency interpretations have been deferred to and upheld under *Chevron* since 1984, at both the Supreme Court and lower appellate courts. This has resulted in a wide array of strong support for, or deep detestation of, *Chevron* agency deference, both leading up to and in the months after the *Loper Bright* decision. Before *Chevron*’s reversal, many proponents believed the Court’s ultimate rejection of *Chevron* deference would be a drastically negative development in the realm of administrative law, and several specifically focused on what

1. 467 U.S. 837 (1984).

2. *Docket No. 22-451*, U.S. SUPREME COURT, <https://www.supremecourt.gov/docket/docketfiles/html/public/22-451.html> (last visited Apr. 18, 2024).

3. *Docket No. 22-451: Questions Presented*, U.S. SUPREME COURT, <https://www.supremecourt.gov/docket/docketfiles/html/qp/22-00451qp.pdf> (last visited Apr. 18, 2024) (the second part of this inquiry involved potentially considering whether *Chevron* should instead only be clarified).

4. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024).

they anticipate will be severely harmful implications to environmental regulations.⁵ Opponents of *Chevron*, though, looked forward to its being overturned and celebrate the same expected impacts in the workings of federal agencies that proponents fear.⁶ There are yet other neutral theorists who opined that *Chevron's* being struck down will not so deeply affect the federal administrative state, especially in regards to environmental policy.⁷ This paper argues that this more muted outcome is likely the most correct perspective following the Court's reversal of *Chevron* based on an observation of trends in Florida in the years following the state's rejection of agency deference in its own intrastate affairs.

In late 2018, voters in Florida approved a proposed amendment to the state constitution to prohibit agency deference in the courts.⁸ Effective two months later, Florida judges have since been required to review agency interpretations de novo.⁹ Several such interpretations have been challenged in the last few years, allowing Florida courts to demonstrate what de novo review looks like in practice.¹⁰ Notably, Florida's administrative state is still alive and indeed robust, active, and capable—and courts still affirm agency interpretations when warranted.

The potential consequences of the federal *Chevron* doctrine's death have been written on in great detail and in different ways the last few years as *Loper Bright* has progressed through the courts. At the state level, law students, academics, and practicing attorneys have opined on Florida's constitutional amendment and its implications since its passage in 2018.¹¹ However, seemingly no one has yet specifically used Florida post-amendment jurisprudence as a predictive case study for what the federal administrative state could look like post-*Chevron*. This paper seeks to fill that gap in the discussion, asserting that Florida's post-amendment jurisprudence demonstrates that federal

5. See, e.g., CleanLaw Podcast, *The Loper Bright Case and Fate of the Chevron Doctrine with Jody Freeman and Andy Mergen*, HARV. L. SCH. ENV'T & ENERGY L. PROGRAM (Aug. 23, 2023), <https://eelp.law.harvard.edu/cleanlaw-the-loper-bright-case-and-fate-of-the-chevron-doctrine-with-jody-freeman-and-andy-mergen/>.

6. See, e.g., *Pacific Legal Foundation calls for an end to Chevron judicial deference*, PAC.LEGAL FOUND. (July 17, 2023), <https://pacificlegal.org/press-release/pacific-legal-foundation-calls-for-an-end-to-chevron-judicial-deference/>.

7. See, e.g., Berit DeGrandpre, *What Overruling Chevron Could Mean for Environmental Law*, GEO. ENV'T. L. REV. ONLINE (Nov. 6, 2023), <https://www.law.georgetown.edu/environmental-law-review/blog/what-overruling-chevron-could-mean-for-environmental-law/>.

8. *Proposed Constitutional Amendments and Revisions for the 2018 General Election*, FLA. DIV. OF ELECTIONS 1, 19 (2018), <https://files.floridados.gov/media/699824/constitutional-amendments-2018-general-election-english.pdf>.

9. FLA. CONST. art. V, § 21.

10. See, e.g., *Citizens v. Brown*, 269 So. 3d 498 (Fla. 2019).

11. See, e.g., Frank Shepherd et al., *The Demise of Agency Deference: Florida Takes the Lead*, 94 FLA. B.J. 18, 18 (2020).

agencies' statutory interpretations can still be upheld in the absence of a highly deferential standard, that *Chevron* being overturned will not inherently result in the loss of environmental protections, and that the overall impact of *Chevron's* demise may not result in a sea change within the federal administrative state.

This paper is presented in five major parts. Part I introduces mainstream sentiments regarding the then-expected death of *Chevron*, especially regarding views on *Chevron's* connection to environmental policy and regulations. Part II, as background, discusses federal agency deference generally, the Court's opinions in *Skidmore* and *Chevron*, the *Chevron* doctrine's relation to environmental law, and the *Loper Bright* case. Part III explores Florida's standards of agency deference and judicial review of agency interpretations before and after its 2018 amendment, analyzes statistics from caselaw post-amendment, explains what de novo review means for agencies and what these statistics might reveal at the national level, and discusses why Florida is likely a good federal comparison on this topic. Part IV presents three major environmental law cases decided in Florida post-amendment and argues why these cases represent that a prohibition on agency deference does not inherently mean the inability of agencies to regulate and, more importantly, the loss of environmental protections. Finally, Part V briefly considers the "zombie *Chevron*" concern within Florida and at the federal level, using a recent Florida opinion in an attempt to demystify this concept.

It should be noted that agency deference, at both the federal and state levels, is multi-faceted and complex. This paper does not seek to address every aspect of overturning the *Chevron* doctrine nor all the jurisprudential implications of Florida's 2018 amendment. For example, *Chevron* deference hinged upon the existence of ambiguity in a statute, raising essential questions (indeed raised during the *Loper Bright* arguments¹² and by Justice Kavanaugh years prior¹³) about what constitutes ambiguity and whether that distinction is itself ambiguous. Additionally, the major questions doctrine is an oft debated (and oft controversial) feature of *Chevron* agency deference and legislative delegation discussions.¹⁴ Both of these are outside the specific scope of this paper. There are several cases¹⁵ establishing judicial agency deference standards for agency interpretations of

12. *E.g.*, Transcript of Oral Argument at 50, *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024) (No. 22-451).

13. *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2136 (2016) (book review).

14. *See, e.g.*, Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009 (2023); KATE R. BOWERS, CONG. RSCH. SERV., IF12077, THE MAJOR QUESTIONS DOCTRINE 1 (2022).

15. *See* *Bowles v. Seminole Rock*, 325 U.S. 410 (1945); *Auer v. Robbins*, 519 U.S. 452 (1997); *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

regulations, which will not be discussed herein as this paper is concerned only with statutory interpretation.

Finally, perhaps the most frequent argument for overturning *Chevron*, and prohibiting deference generally, was a concern for separation of powers and of an overpowerful executive branch resulting from judicial and legislative abdication, which is often considered together alongside the nondelegation doctrine.¹⁶ Considerable research, thought, and literature has been devoted to this notion; it is unnecessary to reinvent the wheel by discussing it herein, and it is also outside the needs and purpose of this paper's environmental focus.

I. PROLIFERATION OF PUBLIC AND PROFESSIONAL OPINION

Since the dawn of federal agency deference, and certainly since *Chevron* was decided, the field of academic literature and public opinion has been saturated with varying views as to its constitutionality and legality.¹⁷ And if that saturation existed before, then early 2024 found that field flooded as *Chevron* stood poised to be overturned by *Loper Bright*. Perhaps a promising sign of a healthy democracy is indeed that so many citizens, public policy and legal theorists, news outlets, and practitioners have found themselves discussing federal agency deference and its implications. But perhaps concerning is the alarmist language regarding deference used by some of those participating in the discussion.

Depending on where someone looks for answers regarding the consequences of overturning *Chevron*, one might very likely come away with the impression that it will prove “utterly disastrous for [the] administrative state,”¹⁸ and that it will “create an upheaval—a large shock to the legal system.”¹⁹ Specifically, many proponents of keeping *Chevron* alive focused on the potential environmental impacts of killing it: “Everything from the climate to consumer safety could be worse off”;²⁰ citizens would “face more polluted air and water, ... and

16. See, e.g., LINDA TSANG & KATE R. BOWERS, CONG. RSCH. SERV., LSB10666, CONGRESS'S DELEGATION OF “MAJOR QUESTIONS”: THE SUPREME COURT'S REVIEW OF EPA'S AUTHORITY TO REGULATE GREENHOUSE GAS EMISSIONS MAY HAVE BROAD IMPACTS 4 (2021); Rachel Scholz-Bright, *Walking the Tightrope: Finding Balance Between Strict Nondelegation and the Administrative State through an Examination of State Experiences*, 20 GEO.J.L. & PUB. POL'Y 427, 428 (2022).

17. As rough quantitative support for this assertion, entering “chevron AND agency” in Westlaw's search bar results in over 10,000 secondary sources; an equivalent Google search brings about 48,500,000 sources.

18. Randvek, Comment to *What Happens if the Chevron Deference is Overturned?*, REDDIT (Jan. 2024), https://www.reddit.com/r/AskALiberal/comments/19asofy/what_happens_if_the_chevron_deference_is/.

19. Cass R. Sunstein, *Zombie Chevron: A Celebration*, 82 OHIO ST. L. J. 565, 572 (2021).

20. *Chevron Case Imperils Environmental Protections To Benefit Big Oil*, ACCOUNTABLE.US (Jan. 17, 2024), <https://accountable.us/chevron-case-imperils-environmental-protections-to-benefit-big-oil/>.

more inaction on the climate crisis”;²¹ and the Court would be “gut[ting] environmental protections.”²² Some well-educated and experienced legal professionals and environmental advocates took the stance that overturning *Chevron* would limit the ability of federal agencies like the Environmental Protection Agency (EPA) to effectively regulate corporations’ actions, which has helped prevent environmental damage from big businesses.²³

Many citizens and experts alike shared concerns that sounding the death knell to *Chevron* agency deference would simultaneously put a nail in the coffin of environmental regulations. But what if overturning *Chevron* is no occasion for grieving? What if the fear that environmental progress dies alongside *Chevron* never comes to fruition? Strong evidence pointing to that very outcome comes from the state of Florida—where it has already been demonstrated that the death of agency deference is, in fact, not the end.

II. FEDERAL AGENCY DEFERENCE

Before exploring and comparing Florida’s situation, it is imperative to understand the situation at the federal level. First, what exactly is agency deference? Regardless of the specific standard employed, agency deference is the notion that a court should or will defer to an agency’s interpretation of a statute.²⁴ That statute is often the agency’s organic act, wherein the agency was created and typically also granted the power to promulgate rules and otherwise act according to its legislatively defined duties.²⁵

A. *Then and Now: Skidmore And Chevron*

*Skidmore v. Swift*²⁶ was decided forty years before *Chevron*, and first officially established a standard for judges to follow when

21. *Overturning Chevron Deference Would Harm the Public*, PUBLIC CITIZEN (Jan. 17, 2024), <https://www.citizen.org/news/overturning-chevron-deference-would-harm-the-public/>.

22. Justine Calma, *How the Supreme Court could gut environmental protections in 2024*, THE VERGE (June 28, 2024, 10:33 AM), <https://www.theverge.com/24080192/supreme-court-pollution-environment-cases-2024-epa>.

23. See, e.g., Justine Calma, *Why a Supreme Court decision on fishing boats could change everything*, THE VERGE (Jan. 20, 2024, 8:00 AM), <https://www.theverge.com/2024/1/20/24044179/supreme-court-chevron-doctrine-deference> (Harvard Environmental and Energy Law Program director Jody Freeman’s opinion quoted and discussed therein).

24. See GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 570-71 (8th ed. 2019).

25. *Organic Statute*, BALLOTPEdia, https://ballotpedia.org/Organic_statute (last visited Sept. 21, 2024).

26. 323 U.S. 134 (1944).

considering agency interpretations.²⁷ That standard could be grossly simplified in two words: how persuasive?²⁸ The Court noted that agency interpretations were “not controlling upon the courts” but “do constitute a body of experience and informed judgment” which could prove helpful to courts in these considerations.²⁹ Under *Skidmore*, whether a judge upheld an agency’s interpretation depended on different factors “which give it power to persuade, if lacking power to control”; these factors included (among others) whether the interpretation at hand was consistent with the agency’s interpretations previously and subsequently, and what proof existed that the interpretation was a quality decision based upon careful deliberation.³⁰ Finally, the *Skidmore* doctrine required that the persuasiveness of each interpretation be considered in isolation under all of the factors laid out by the Court.³¹

Given that applications of *Skidmore* depended on various factors and were conducted individually, *Skidmore* is very similar to de novo (meaning “anew”³²) review. De novo review is the antithesis to complete deference, and *Skidmore*’s standard is far closer to that end of the agency deference spectrum than *Chevron*’s. There is a strong argument that *Skidmore* is not actually deferential at all; supportive of this assertion is Justice Kavanaugh’s statement during the *Loper Bright* arguments that he considered *Skidmore* to be “respect” rather than “deference,” and the petitioner’s calling it “a doctrine of weight or persuasiveness.”³³ The very essence of *Skidmore* is that agency interpretations are given weight, not that they are deferred to by way of permissibility or not being clearly erroneous.

The *Skidmore* doctrine, which rendered agency interpretations persuasive but not controlling, remained the standard for cases of agency statutory interpretations until *Chevron* was decided.³⁴ *Chevron* deference is in part so well-known and frequently debated because of how much more deferential courts inherently were required to be to

27. See Nicholas Mosvick, *How the Supreme Court created agency deference*, NAT’L CONST. CTR.: CONST. DAILY BLOG (June 25, 2021), <https://constitutioncenter.org/blog/how-the-supreme-court-created-agency-deference#:~:text=On%20this%20day%20in%201984,a%20law's%20language%20is%20ambiguous>.

28. *Id.*

29. *Skidmore*, 323 U.S. at 140.

30. *Id.* (There are a handful of other factors involved in a *Skidmore* deference analysis).

31. *Id.* (“Each case must stand on its own facts.”).

32. *De Novo*, BLACK’S LAW DICTIONARY (12th ed. 2024).

33. Transcript of Oral Argument at 30, 39, *Loper Bright Enters. v. Raimondo* (2024) (No. 22-451).

34. See *Deference: When the Court Must Yield to the Government’s Interpretation*, CIRC. 230 DESKBOOK 1-1, 1-4 (2006), <https://www.thecre.com/oira/wp-content/uploads/2015/03/ABA-Deference.pdf>.

agencies under this standard.³⁵ Ironically, the Supreme Court seemingly did not think this 1984 opinion was significant precedent or a major change to agency deference, which it quickly proved to be.³⁶

Since 1984, *Chevron* has been cited in over 18,700 cases; 22,000 secondary sources such as law journals; and 40,000 appellate documents—Westlaw reports more than 101,000 total citations to *Chevron*.³⁷ However, this number does not include state cases whose individual jurisdictions’ deference standards are synonymous with or equivalent to *Chevron* but have a different (or no) name. For example, Florida’s standard prior to the 2018 constitutional amendment “was known simply” as agency deference,³⁸ though many cases indeed employed a deference doctrine that had a distinct *Chevron* flavor.³⁹

But, back to *Chevron* itself: this 1984 opinion established what has been coined the “*Chevron* two-step”⁴⁰ for courts considering agency interpretations. Step One was originally “whether Congress ha[d] directly spoken to the precise question at issue”⁴¹ but over time evolved into whether the statute was ambiguous.⁴² If Congress had directly answered the immediate question—or rather, if the statute was clear—then the court was to stop and follow that “unambiguously expressed intent of Congress.”⁴³ If not, the court moved to Step Two and considered whether the agency’s interpretation was “based on a permissible construction of the statute.”⁴⁴ The *Chevron* Court explained that agency deference was not novel, as interpretations—since at least the *Skidmore* decision in 1944—have been granted “considerable weight” in the course of agencies fulfilling their statutory duties.⁴⁵

35. See, e.g., James P. McLoughlin Jr. et al., *In Loper Bright and Relentless, Supreme Court returns to high-stakes question of viability of the Chevron doctrine*, REUTERS (Nov. 7, 2023, 11:15 AM), <https://www.reuters.com/legal/legalindustry/loper-bright-relentless-supreme-court-returns-high-stakes-question-viability-2023-11-07/>.

36. LAWSON, *supra* note 24, at 594-95.

37. Citing References to *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), WESTLAW (enter “467 U.S. 837 (1984)” in Westlaw’s main search bar and click “Citing References” under the case name; the following page displays the number of total citations and the number of citations according to each content type on the left-hand side). Last updated Sept. 22, 2024.

38. Shepherd et al., *supra* note 11, at 18.

39. See, e.g., *State Dep’t of Health & Rehab. Serv. v. Framat Realty, Inc.*, 407 So.2d 238, 241 (Fla. 1st DCA 1981); *Doyle v. Dep’t of Bus. Regul.*, 794 So.2d 686, 690 (Fla. 1st DCA 2001).

40. See, e.g., Catherine M. Sharkey, *Cutting in on the Chevron Two-Step*, 86 FORDHAM L. REV. 2359, 2360 (2018).

41. *Chevron*, 467 U.S. at 842.

42. See Daniel J. Hemel & Aaron L. Nielson, *Chevron Step One-and-a-Half*, 84 U. CHI. L. REV. 757, 760 (2017).

43. *Chevron*, 467 U.S. at 843.

44. *Id.* at 843.

45. *Id.* at 844.

In 2001, the Court added to the equation what has been called *Chevron's* “Step Zero” in *U.S. v. Mead*,⁴⁶ holding that *Chevron* deference should only apply to interpretations wherein a court first determines that the agency was acting properly under a legislatively delegated authority to make legally binding rules.⁴⁷ Though *Mead's* ruling is not insignificant, for the sake of this paper's scope, reference to and consideration of the *Chevron* doctrine will implicitly focus only on the core two-step analysis.

Skidmore required courts to conduct individualized assessments of how persuasive each agency's statutory interpretation was, according to a handful of listed factors, before deciding whether to accept that interpretation. *Chevron* required courts to first consider whether a statute was clear and then whether an agency's interpretation was reasonable under the statute before deferring to that interpretation. Comparing the two doctrines in that way—persuasive versus permissible—makes it easy to label *Chevron* as the far more deferential standard. One would then expect agencies and their interpretations to have been more successful in practice under the more agency-friendly *Chevron* than under *Skidmore*, and indeed they were according to a major study of federal circuit courts spanning from 2003 to 2013.⁴⁸

When *Chevron* deference was applied (which was 74.8% of the time), agencies had a win rate of 77.4%; when courts used *Skidmore* (10.8%), that success rate dropped to 56.0%.⁴⁹ Further, when these courts employed a *de novo* standard—like Florida after the 2018 amendment—agencies were successful 38.5% of the time.⁵⁰ Of those cases involving *Chevron* deference, 70.0% got to Step Two; of those Step Two instances, agencies were successful at an impressive rate of 93.8%.⁵¹ According to a smaller study conducted more recently, these numbers had changed some and agencies were not so highly successful at Step Two, but *Chevron* was still applied far more than *Skidmore* and the general trends remained.⁵²

46. 533 U.S. 218 (2001).

47. *Id.* at 226-27.

48. See Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1 (2017).

49. *Id.* at 6, 29.

50. *Id.* at 6, 30 (In the other 6.9% of cases, “courts declined to choose a deference standard, usually holding that the answer would be the same under any standard.”).

51. *Id.* at 6.

52. See Isaiah McKinney, *The Chevron Ball Ended at Midnight, but the Circuits are Still Two-Stepping by Themselves*, YALE J. ON REG.: NOTICE & COMMENT BLOG (Dec. 18, 2022), <https://www.yalejreg.com/nc/chevron-ended/>.

B. Agency Deference and the Environment

Throughout legal practice, academic literature, and public opinion, *Chevron* is often associated with environmental regulations, protection, and progress.⁵³ The *Chevron* case itself was about environmental law, with the Court ruling in favor of the EPA's statutory interpretation of the Clean Air Act as a "permissible construction of the statute which seeks to accommodate progress in reducing air pollution with economic growth."⁵⁴ Similarly, *Loper Bright* involved federal fishery management legislation and the National Marine Fisheries Service's (NMFS) observation aboard fishing vessels.⁵⁵ NMFS, alternatively called NOAA Fisheries, is the federal agency "responsible for the stewardship of the nation's ocean resources and their habitat."⁵⁶

Specific case facts aside, *Chevron* deference and the administrative state generally are frequently associated with environmental law and policy because "it is a virtual certainty" that agency promulgations regarding the environment will result in some form of litigation.⁵⁷ This is because some parties (namely, businesses whose activities impact the environment in some way) will typically want to contest rules that limit their conduct; others (including activist groups) will often challenge promulgations they feel should do more to regulate commercial activity and protect the environment.⁵⁸ Further, the environmental context is usually highly technical and specific, so Congress tends to delegate rulemaking authority to the EPA (and some other related agencies like NMFS, depending on the legislation) to promulgate appropriate regulations through proper procedures,

53. See, e.g., Jason J. Czarnezki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the Chevron Doctrine in Environmental Law*, 79 U. COLO. L. REV. 767 (2008); Pamela King, *How a diminished Chevron doctrine could weaken Biden's climate law*, E&E NEWS (Jan. 25, 2024, 1:25 PM), <https://www.eenews.net/articles/how-a-diminished-chevron-doctrine-could-weaken-bidens-climate-law/>; *How will the changes from the USA Supreme Court on the Chevron Deference case alleviate and protect the oil industry? Will we lose the clean water protections?*

QUORA, <https://www.quora.com/How-will-the-changes-from-the-USA-Supreme-Court-on-the-Chevron-Deference-case-alleviate-and-protect-the-oil-industry-Will-we-lose-the-clean-water-protections>.

54. *Chevron*, 467 U.S. at 866 (emphasis added).

55. *Docket No. 22-451: Questions Presented*, *supra* note 3.

56. *About Us: Our Mission*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/about-us> (last visited Apr. 23, 2024).

57. Thomas J. Grever, *The Demise of Chevron, or Another Red Herring?*, A.B.A. SECTION OF ENV'T, ENERGY, & RES. (Feb. 22, 2024), https://www.americanbar.org/groups/environment_energy_resources/resources/natural-resources-environment/2024-winter/the-demise-chevron-or-another-red-herring/.

58. *Id.*

based on a presumed high level of relevant expertise and capability of handling such scientific matters.⁵⁹

That same expertise and technical nature (pun intended) of environmental regulation is largely why *Chevron* was decided as it was,⁶⁰ and a significant part of the reason why agency deference exists at all.⁶¹ One practitioner observes that “[c]ourts reviewing the regulation are generally reluctant to question or overrule an agency’s evaluations and conclusions, especially when rooted in technical or scientific analysis within the agency’s statutory charge.”⁶²

All of the above, in addition to the increase in opinionated online explanations of agency deference by prominent environmental organizations,⁶³ is very likely why so many associate the *Chevron* doctrine with environmental law. This is a valid connection to make, and it is indeed backed by academic studies and jurisprudential observations. Part I of this paper explored more in depth some of the strong thoughts and opinions expressed by those regarding *Chevron* and the environment. However, *Chevron* is likely not the make-or-break for environmental regulations that many may assume it is; one law professor’s empirical study from 2008 suggests instead that courts have demonstrated “a strong willingness to defer, *under any doctrine or framework*, to agency action when environmental scientific expertise is required.”⁶⁴ This quote, and other evidence, point to the potential for *Chevron*’s death to not be so significantly impactful.⁶⁵

59. See generally *Our Mission and What We Do*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/aboutepa/our-mission-and-what-we-do> (last visited Apr. 23, 2024) (“EPA works to ensure that . . . federal laws protecting . . . the environment are administered and enforced fairly, effectively, and as Congress intended When Congress writes an environmental law, we implement it by writing regulations.”); see also Michael B. Rappaport, *Using Delegation to Promote Deregulation*, CATO INST. (Winter 2015-2016), <https://www.cato.org/regulation/winter-2015-2016/using-delegation-promote-deregulation> (“[A]gencies have significant policy and political expertise Such expertise is one of the most common justifications offered for delegation.”)

60. *Chevron*, 467 U.S. at 865 (discussing the EPA’s ability and duty to politically balance interests in a way such that the judicial branch could not. “[T]he [EPA] Administrator’s interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies.”).

61. See, e.g., Grever, *supra* note 57.

62. *Id.*

63. See, e.g., *A Pair of Supreme Court Cases About Fisheries Management Could Put Important Protections at Risk*, EARTHJUSTICE (Jan. 16, 2024), <https://earthjustice.org/article/loper-bright-chevron-doctrine-relentless>.

64. Czarnecki, *supra* note 53, at 771 (emphasis added).

65. See generally DeGrandpre, *supra* note 7 (arguing that overturning *Chevron* may not have the expected “watershed impact on environmental law” and regulations).

C. *Loper Bright and the Digging of Chevron's Grave*

For the purposes of this paper, an analysis of the particular facts, prior history, and outcome of the *Loper Bright* case is unnecessary, but the broader doctrinal concept itself is crucial. *Loper Bright Enterprises v. Raimondo* was a consolidated case with *Relentless, Inc. v. Department of Commerce*,⁶⁶ wherein the Court certified two questions, one specifically (and here, unrelatedly) analyzing the NMFS regulation at hand and the other addressing whether *Chevron* should officially be overturned.⁶⁷

Chevron has been debated and disliked by many jurists since 1984, and arguments had been made several times for its rejection. Multiple former and current Supreme Court Justices had indeed expressed a strong disdain for deferring to agency interpretations, especially under the *Chevron* two-step, for various reasons. As two prevalent examples, Justice Thomas wrote in his concurrence in the Court's 2015 *Michigan v. Environmental Protection Agency* decision that "*Chevron* deference raises serious separation-of-powers questions."⁶⁸ In criticizing the Step One ambiguity inquiry, Justice Kavanaugh wrote in a 2016 book review: "No wonder people suspect that judges' personal views are infecting [agency interpretation] cases. We have set up a system where that suspicion is almost inevitable because the reality is almost inevitable."⁶⁹ Additionally, he opined that "*Chevron* encourages the Executive Branch (whichever party controls it) to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints."⁷⁰

Regarding the *Loper Bright* litigation itself, certain questions and answers from oral arguments demonstrate the strong likelihood that *Chevron's* head was already poised on the Court's chopping block before the death warrant was signed. For example, during the petitioner's argument, Justice Kavanaugh said something that echoed his distaste for *Chevron* as discussed in his above cited work, *Fixing Statutory Interpretation*:

Then Justice Kagan raises an important point about judicial restraint or humility in terms of *Chevron*, and that—that's an important concern for any judge. I think the flip side, why this is hard, the other concern for any judge is abdication to the executive branch running roughshod over limits established in the Constitution or, in this case, by Congress.

66. See Mcloughlin Jr. et al., *supra* note 35.

67. *Docket No. 22-451: Questions Presented*, *supra* note 3 (as part of the second question regarding overruling *Chevron*, the Court adds that it will consider whether it should "at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.").

68. *Michigan v. EPA*, 576 U.S. 743, 761 (2015).

69. Kavanaugh, *supra* note 13, at 2142.

70. *Id.* at 2150.

So I think we've got to find the—that's—that's why it's hard, find the right balance between restraint and letting the executive get away with too much.⁷¹

Further, Justice Gorsuch asked the respondent's counsel a series of questions that revealed his (and other judges and justices') difficulty with the Step One question of ambiguity:

JUSTICE GORSUCH: The fact that you think [the statute is] clear and [petitioner's counsel] thinks it's clear but a court below thought it was ambiguous should tell us something, shouldn't it? . . . [Y]ou think you win under Step One, and so does [petitioner's counsel]. And yet here we are.

RESPONDENT'S COUNSEL: I don't think it's at all unusual to find a case where the government thinks it has both the—the—the clear interpretation of the statute on its side and that the agency has acted unreasonably.

JUSTICE GORSUCH: Yeah, because – because we have this ambiguous ambiguity trigger that nobody knows what it means.⁷²

These and other quotes from the arguments ominously foreshadowed the impending demise of *Chevron*. Indeed, decided in late June of 2024, the Supreme Court officially sounded the funeral toll for the *Chevron* doctrine: “*Chevron* is overruled.”⁷³ Though a great number of articles, blogs, and discussions have been and will be devoted to *Loper Bright* that more deeply analyze the decision itself and the resulting judicial review standard (or intended lack thereof), for the purposes of this paper, the following quote from the majority is helpful:

Courts must exercise their *independent judgment* in deciding whether an agency has acted within its statutory authority And when a particular statute delegates authority to an agency consistent with constitutional limits, *courts must respect the delegation*, while ensuring that the agency acts within it. But courts need not and under the APA *may not defer to an agency interpretation . . . simply because a statute is ambiguous.*⁷⁴

Given the expansive judicial discourse surrounding the implications of *Chevron*'s highly deferential standard to executive agencies, not to mention the opinions of other professionals and many members of the public, the Court's decision to hear *Loper Bright* was not the groundbreaking of *Chevron*'s grave. That had been slowly underway for years—indeed since the late 1980s—as more facets of

71. Transcript of Oral Argument at 40-41, *Loper Bright Enters. v. Raimondo* (2024) (No. 22-451).

72. Transcript of Oral Argument at 52-53, *Loper Bright Enters. v. Raimondo* (2024) (No. 22-451).

73. *Loper Bright*, 603 U.S. at 412.

74. *Id.* (emphasis added).

the debate had surfaced over time. Rather, *Loper Bright* can more accurately be analogized to be the final nail in *Chevron's* coffin, and the subsequent dumping of the 1984 doctrine into that long-expanding hole in the ground.

III. FLORIDA AGENCY DEFERENCE BEFORE AND AFTER THE 2018 AMENDMENT

The state of Florida prides itself on being a preeminent example in government administration, especially with its Sunshine Law—an expansive open public records requirement.⁷⁵ Florida is furthermore considered nationally to be a leader in many ways.⁷⁶ It comes as no surprise, then, that Florida would similarly pave the way in an area of government law as widely controversial as agency deference.

A. *Then and Now: Judicial Review of Agency Interpretations*

Before 2018, Florida courts employed a particularly high deferential standard. Two early Florida Supreme Court cases called agencies' interpretations "persuasive but ... not controlling"⁷⁷ and held that they should be granted "great weight" by courts.⁷⁸ The Court held in a third case that the "*contemporaneous* administrative construction of [a statute] by those *charged with its enforcement* and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized."⁷⁹ If all this mention of an agency interpretation's ability to persuade a court and the subsequent weight that comes with it sounds familiar, it should—it seems similar to the federal *Skidmore* doctrine.

The latter two of the above cited quotations came from cases decided right after *Skidmore*, in 1949 and 1952 respectively; the italicized portions of the final quote are indeed two of the several factors that the *Skidmore* opinion required courts to consider. Interestingly, the first of the above quotes comes from a pre-*Skidmore* 1941 case, further demonstrating Florida's uniquely longstanding history of judicial deference to agency interpretations. However, the Florida standard, especially following the state supreme court's 1952 decision, was much more deferential than *Skidmore*; at its core, *Skidmore* is closer to de novo review because it requires an

75. See, e.g., *Open Government*, OFF. OF THE ATTY GEN., <https://www.myfloridalegal.com/open-government/open-government> (last visited Sept. 21, 2024).

76. See, e.g., *Best States Rankings: Education*, U.S. NEWS & WORLD REP., <https://www.usnews.com/news/best-states/rankings/education> (last visited Apr. 19, 2024).

77. *Lee v. Gulf Oil Corp.*, 4 So. 2d 868, 870 (Fla. 1941).

78. *City of St. Petersburg v. Carter*, 39 So. 2d 804, 806 (Fla. 1949) (en banc).

79. *Gay v. Canada Dry Bottling Co. of Fla.*, 59 So. 2d 788, 790 (Fla. 1952) (emphasis added).

individualized, factor-based approach to each interpretation. Florida instead held that interpretations should be given weight according to *Skidmore*-like factors, but that they should ultimately be deferred to unless clearly incorrect. This is therefore a more agency-friendly standard than *Skidmore*.

In 1985, a year after *Chevron* was decided, the Florida Supreme Court held that judges were required to defer to agency interpretations if they were “consistent with legislative intent” and the agency provided “substantial, competent evidence.”⁸⁰ Several other Florida cases provided or expanded upon qualifications to this standard, namely, that interpretations do not warrant judicial deference if they are “clearly erroneous,”⁸¹ if the situation is not one that invokes agency expertise,⁸² or if the statute itself is unambiguous.⁸³ Exceptions aside, courts often upheld agency interpretations, especially as the highly deferential *Chevron* took hold at the federal level.⁸⁴ In Florida, there was seemingly no formula equivalent to *Chevron*’s two steps, though perhaps it could be argued that Florida’s “clearly erroneous” standard constituted a Step One-esque threshold, wherein courts would not defer to obviously incorrect interpretations but generally defer to interpretations that passed that qualification.

Though a formal two-step was never implemented, many of Florida’s judicial opinions during this time demonstrated that the state was very much aligned with the federal *Chevron*-era jurisprudence—even before *Chevron* itself was decided by the Supreme Court. For example, in 1981, Florida’s First District Court of Appeals (DCA) opined that “[w]hether the Department’s interpretation of section 381.272(7) is the only possible interpretation of the statute, or the most desirable one, we need not say. It is within the range of permissible interpretations of the statute”⁸⁵ This court’s holding based on a “permissible interpretation” all but matches the *Chevron* Court’s emphasis on a “permissible construction.” A month after *Chevron* was decided, the same Florida court upheld another agency interpretation and said that “[a]gencies are afforded wide discretion . . . and will not be overturned on appeal unless clearly erroneous. . . . The reviewing court will defer to any interpretation

80. Pub. Emps. Rel. Comm’n v. Dade Cnty. Police Benevolent Ass’n, 467 So. 2d 987, 989 (Fla. 1985).

81. Doyle v. Dep’t of Bus. Regul., 794 So. 2d 686, 690 (Fla. 2001).

82. See, e.g., Schoettle v. State, Dep’t of Admin., Div. of Ret., 513 So. 2d 1299, 1301 (Fla. 1st DCA 1987); Bd. of Tr. of Northwest Fla. Cmty. Hosp. v. Dep’t of Mgmt. Serv., 651 So. 2d 170, 173 (Fla. 1st DCA 1995).

83. See, e.g., City of Safety Harbor v. Comm’n Workers of America, 715 So. 2d 265, 267 (Fla. 1st DCA 1998); Conservation All. of St. Lucie Cnty. Inc. v. Fla. Dep’t of Env’t Prot., 144 So. 3d 622, 624 (Fla. 4th DCA 2014).

84. See Shepherd et al., *supra* note 11, at 20.

85. State Dep’t of Health & Rehab. Servs. v. Framat Realty, Inc., 407 So. 2d 238, 241 (Fla. 1st DCA 1981).

within the range of *possible* interpretation.”⁸⁶ The Florida Supreme Court in 2006 even made mention of the fact that federal and other states’ courts “share [Florida’s] principles” of agency deference, specifically citing *Chevron*.⁸⁷

As demonstrated, Florida’s strong history of agency deference, with some narrow exceptions, mirrored *Chevron* deference in terms of weight given to agency interpretations. Given this similarity, the jump from this almost reflexive deference to the current *de novo* review seems jarring, but it followed a statewide and national trend of more conservative jurisprudence regarding separation of powers and, more generally, regarding administrative law as a whole.⁸⁸

The constitutional amendment, approved by Florida voters during the 2018 election, added Section 21 to the end of Article V (Judiciary), which now reads:

Judicial interpretation of statutes and rules—In interpreting a state statute or rule, a state court or an officer hearing an administrative action pursuant to general law may not defer to an administrative agency’s interpretation of such statute or rule, and must instead interpret such statute or rule *de novo*.⁸⁹

As of the amendment’s effective date, then, there is no agency deference in Florida, and all challenged agency interpretations of statutes must be independently evaluated by each court.

Several Florida court opinions published soon after the amendment took effect specifically discuss this change in the standard of judicial review.⁹⁰ The Florida Supreme Court even analyzed the new *de novo* standard in the context of an environmental protection case (wherein the Court upheld the agency’s interpretation), described below. After the amendment, agency statutory interpretations are still regularly upheld in Florida, even with *de novo* review—meaning that the fear of agencies predominantly losing post-*Chevron* may not hold much weight.

In the area of public utilities, Florida courts post-amendment (including the state’s supreme court) have particularly cited the Florida Public Service Commission’s (PSC) understanding and expertise in its consideration of regulations, rate setting, or other

86. *Natelson v. Dep’t of Ins.*, 454 So. 2d 31, 32 (Fla. 1st DCA 1984) (emphasis in original).

87. *McKenzie Check Advance of Fla., LLC v. Betts*, 928 So. 2d 1204, 1218 n.9 (Fla. 2006).

88. *See, e.g., Shepherd et al., supra* note 11, at 20-21.

89. FLA. CONST. art. V, § 21.

90. *E.g., Kanter Real Est., LLC v. Dep’t of Env’t Prot.*, 267 So. 3d 483, 487-88 (Fla. 1st DCA 2019); *Lee Mem’l Health Sys. Gulf Coast Med. Ctr. v. Agency for Health Care Admin.*, 272 So. 3d 431, 436-37 (Fla. 1st DCA 2019).

agency activities.⁹¹ The supreme court in 2023 even recognized that agencies “lost any deference” with the amendment, but discussed the specific legislative delegation and past caselaw that acknowledged the PSC’s “specialized knowledge and expertise in this area” in its opinion.⁹² Ultimately, the court in that case remanded to the PSC because it had likely acted outside of the bounds of its legislative authority,⁹³ but the mention of an agency’s expertise (which is, as aforementioned, a primary reason that agencies exist in the first place) is telling.

Further, Florida’s First DCA in a separate case affirmed another of the PSC’s interpretations in part and reversed in part, stating that the PSC “has much discretion . . . under the statutory framework” and (citing another case) that the PSC’s “determinations of the applicable . . . considerations should be given greater weight since [they] are infused with policy considerations for which the [PSC] has special responsibility and expertise.”⁹⁴ A review of reported post-amendment Florida cases shows that public utilities challenges stand out as an area where the courts will consider the particular expertise of the agency; time will tell if that respect will be bestowed upon other agencies or within other areas.

B. Statistical Analysis of Agency Success in Florida and What This Can Reveal About the Federal Level

Before analyzing three key environmental state cases decided after the amendment’s passage, it will be helpful to delve into some statistics of what Florida’s judicial review has looked like in practice. First, the author of this paper does not claim to be a statistical research expert, and these numbers are not meant to represent an empirical study. They are, however, intended to shed light on how often courts have affirmed and currently do affirm agency interpretations, and what that can possibly predict about federal agency deference.⁹⁵

91. See *Floridians Against Increased Rates, Inc. v. Clark*, 371 So. 3d 905, 910 (Fla. 2023); *Citizens of State through Fla. Off. of Pub. Couns. v. Fla. Pub. Serv. Comm’n*, 294 So. 3d 961, 965 (Fla. 1st DCA 2019).

92. *Floridians Against Increased Rates*, 371 So. 3d at 922 n.23, 910.

93. *Id.* at 914.

94. *Citizens of State through Fla. Off. of Pub. Couns.*, 294 So. 3d at 965 (citing *Palm Coast Util. Corp. v. State*, 742 So. 2d 482, 484 (Fla. 1st DCA 2019)).

95. The statistics in this section were gathered by entering the following in Westlaw’s search bar: “*de novo*” AND *agency* AND *interpretation* AND *statute*, narrowed to show Florida courts only. From there, results were narrowed by Date for each selected time period: since the amendment’s effective date (“all dates after” 01/08/2019 [as of mid-April in 2024, when this paper was written]); that same span of time before the amendment’s effective date (“date range” 09/26/2013 to 01/07/2019); and the same span of time before 09/26/2013 (“date range” 06/14/2008 to 09/25/2013). From there, each result in each time period was read

Three different time periods were collected: all cases addressing challenges to agency interpretations since the amendment's effective date (seventy-eight opinions), all such cases decided roughly five years right before the amendment (sixty-one), and all such cases from approximately five years before that (fifty-one). Notably, several more cases were heard each five-year period, which some may see as analogous support for the concern of a larger docket load for federal circuit courts following *Chevron's* reversal.⁹⁶ However, this author believes it is likely instead a result of expanding executive action as Florida's agencies are legislatively tasked with handling more specialized matters to accommodate a rapidly growing population with increasingly complex issues (like environmental preservation, insurance, and health care). An average of only two or three additional cases per year does not seem particularly significant considering this growth of the administrative state via corresponding legislation, coupled with Florida's population increase of over four million between 2008 and 2023.⁹⁷ Whether that legislative delegation is desirable is outside the scope of this paper.

Since the amendment's effective date, 20.7% of the case outcomes upheld agency interpretations, 28.0% reversed them, and 51.2% of the decisions fell outside of that binary. Excluding that third category, agency interpretations were upheld 42.5% and reversed 57.5% of the time.

In the five years right before the amendment's effective date, 31.3% of the outcomes were affirmations and 20.3% were reversals; 48.4% of the outcomes fell into the third "other" category. Removing the "other" outcomes, courts affirmed agency interpretations 60.6% of the time and struck them down 39.4% of the time.

through for the holding and reasoning; tallies were made and categorized by Affirm/Agency Win, Reverse/Agency Loss, and Other Holding/Catch-all. That "Other" category includes non-state agencies (i.e., cities or other localities, citizen/private parties), cases considering an Administrative Law Judge's interpretation, cases regarding regulations rather than statutes, criminal cases, and other matters unrelated to state agency interpretations of statutes. Where a case was decided with more than one outcome, for example—an agency interpretation was affirmed in part and reversed in part, that was recorded as "0.5" Affirm and "0.5" Reverse; each "0.5" became essentially its own case, because each interpretation outcome was collected independently, even if two came from the same opinion.

Finally, these statistics include "bad law" because many deference cases, following the amendment, no longer comply with the current *de novo* standard but are inherently necessary for the analysis purpose here; therefore, if an opinion was marked as "treated negatively" or overturned on Westlaw, it was still included so long as the discussion was related to an agency's statutory interpretation.

96. See, e.g., Philip Hamburger, *Professor Thomas W. Merrill on the Future of the Chevron Doctrine*, COLUM. LAW SCHOOL STORY ARCHIVE (Jan. 11, 2024), <https://www.law.columbia.edu/news/archive/professor-thomas-w-merrill-future-chevron-doctrine>.

97. See *Florida Population 1900-2023*, MACROTRENDS, <https://www.macrotrends.net/global-metrics/states/florida/population> (last visited Apr. 28, 2024).

Finally, in the five years preceding that, an immense 72.7% of the outcomes were outside the binary assessment; agencies were successful 12.7% of the time and unsuccessful 14.5% of the time. Disregarding those irrelevant cases, agency interpretations were upheld 46.7% of the time during this period and struck down 53.3% of the time. All of these numbers are, for the sake of clarity, represented below in a simple table.

	AFFIRM (Agency Win)	REVERSE (Agency Loss)
After amendment's effective date (since 01/08/2019 [as of mid-April, 2024])	42.5%	57.5%
Right before the amendment (09/26/2013 – 01/07/2019)	60.6%	39.4%
Leading up to the amendment (06/14/2008 – 09/25/2013)	46.7%	53.3%

Percentages disregard the outcomes outside of the Affirm/Reverse binary.

These are the statistics, but what do they mean? For one, they reveal that, despite how deferential the judicial review standard of interpretations was on paper long before the amendment, agency wins and losses were comparable. Further, over half of the agency interpretations during that period were actually reversed rather than upheld. The expected trend of high deference to agencies is more clearly observed in the years immediately before the amendment's effective date, where interpretations were affirmed almost twice as frequently as reversed. That ratio supports many of the concerns about judicial deference to agencies in Florida previously, and indeed observation of this trend is likely why the amendment was brought to voters in the first place.

Perhaps most telling is the agency win ratio post-amendment, where interpretations are still upheld nearly half of the time. This is important because it helps alleviate the concern that agencies will never win following *Chevron's* being overturned. Not only are Florida agencies still successful after the prohibition on deference, but it is almost an even split, which proves a crucial point. There is likely an assumption that de novo review results in more losses for agencies and far fewer (maybe even zero) wins, because a court starting anew when considering interpretations instead of looking at prior precedent or deferring based on permissibility certainly sounds less promising for those agencies. Indeed, this might be driving some of the fear that the loss of *Chevron* will hinder the ability of agencies to regulate because they will not be upheld in court. But a de novo standard of review *should* be expected to produce an even division over time; at its core, an application of de novo is a simple “yes” or “no” answer removed from

the factors that weigh in support or opposition of agencies. Therefore, an agency's interpretation (a bit simplistically) has a fifty-fifty chance of being upheld in court under a de novo standard.

Further, as these statistics demonstrate, most of the cases were decided on other grounds or were otherwise unrelated to the focused question of an agency's statutory interpretation. This might suggest, then, that the number of cases decided specifically on that issue of interpretation and regarding specifically an executive agency are smaller than is presumed, and that the fear of a post-*Chevron* tidal wave of agency reversals is not supported.

Thus, if Florida judges uphold interpretations almost half of the time even under a de novo review standard, then it seems a strong argument that federal agencies will also continue to see success in court if *Loper Bright* is ultimately understood to require de novo review (and more so if it is instead a stunted return to *Skidmore* deference⁹⁸). Based on this evidence from Florida and the cases discussed below, it appears that the future of administrative law is *bright* indeed.

C. *Why Florida Can be a Good Federal Indicator*

Why should Florida post-amendment be analyzed as a predictive comparison to the federal level post-*Chevron*? Florida is colloquially regarded as a leader in governmental operations, including, for example, the responsiveness of its Division of Emergency Management and the sometimes-groundbreaking enactments of its legislature. Florida is also demographically comparable to the country at large in terms of race and sex (among other attributes),⁹⁹ as well as party affiliation. Currently, Republican support stands at roughly 38% in Florida and 30% within the U.S. generally, and Democratic support is about 32% in Florida and 28% in the country.¹⁰⁰ As the third largest state in the U.S. by population, one attorney has commented that Florida's size might likely be a large factor in other states observing

98. See, e.g., Christopher J. Walker, *What Loper Bright Enterprises v. Raimondo Means for the Future of Chevron Deference*, YALE J. ON REG.: NOTICE & COMMENT BLOG (June 28, 2024), <https://www.yalejreg.com/nc/what-loper-bright-enterprises-v-raimondo-means-for-the-future-of-chevron-deference/> (explaining that there remains some disagreement over whether *Loper Bright* officially demands de novo review or allows some lesser form of deference).

99. See *QuickFacts: United States*, U.S. CENSUS BUREAU (July 1, 2023), <https://www.census.gov/quickfacts/fact/table/US/PST045221>; *QuickFacts: Florida*, U.S. CENSUS BUREAU (July 1, 2023), <https://www.census.gov/quickfacts/fact/table/FL/PST045223>.

100. See *Party Affiliation*, GALLUP, <https://news.gallup.com/poll/15370/party-affiliation.aspx> (last visited Apr. 9, 2025); *Voter Registration – By Party Affiliation*, FL. DIV. OF ELECTIONS (Apr. 9, 2024), <https://dos.fl.gov/elections/data-statistics/voter-registration-statistics/voter-registration-reports/voter-registration-by-party-affiliation/>.

Florida to see how a prohibition on agency deference looks in practice.¹⁰¹

Further, Florida is presently the only state in the country to prohibit judicial deference to agencies via constitutional amendment.¹⁰² As one study explained, this fact likely makes Florida “the most significant” of all the jurisdictions to have put a statewide stop to agency deference.¹⁰³ This is so because in using a constitutional amendment, Florida is the sole state to have rejected deference through the approval of citizen voters—under a requirement of 60% voter approval, no less¹⁰⁴—as opposed to a majority of legislators through lawmaking or judges via an opinion.¹⁰⁵ Florida’s size and demographics, the state’s known history of being particularly deferential to agency interpretations (including in *Chevron*-like opinions published right before the amendment’s passage),¹⁰⁶ and this precedential constitutional change through a unique method likely make Florida a good indicator for how the federal level could operate post-*Chevron*.

IV. FEDERAL LESSONS FROM FLORIDA CASES REGARDING ENVIRONMENTAL PROTECTIONS POST-AMENDMENT

One of the biggest concerns regarding *Chevron* being overturned, as previously discussed, is the detrimental impact to the environment which many believe will be caused by the death of such an agency-friendly deferential standard. At first glance, this fear is not baseless: environmental agencies like the EPA interpret their enacting statutes (like the Clean Air Act) to make rules which constrain businesses’ activities and therefore protect the environment. Under *Chevron*, so long as those statutes were ambiguous (which was not a high threshold) and the EPA’s interpretation was permissible, then that interpretation was upheld, and the EPA could enforce its

101. Daniel M. Ortner, *The End of Deference: The States That Have Rejected Deference*, YALE J. ON REG.: NOTICE & COMMENT BLOG (Mar. 24, 2020), <https://www.yalejreg.com/nc/the-end-of-deference-the-states-that-have-rejected-deference-by-daniel-m-ortner/>.

102. Martha Kinsella & Benjamin Lerude, *Judicial Deference to Agency Expertise in the States*, STATE COURT REP. (Oct. 26, 2023), <https://statecourtreport.org/our-work/analysis-opinion/judicial-deference-agency-expertise-states>.

103. Ortner, *supra* note 101.

104. See FLA. CONST. art. XI, § 5(e) (proposed amendments must be approved of by at least 60% of voters in that election to pass); *Florida Amendment 6, Marsy’s Law Crime Victims Rights, Judicial Retirement Age, and Judicial Interpretation of Laws and Rules Amendment (2018)*, BALLOTEDIA, [https://ballotpedia.org/Florida_Amendment_6,_Marsy%27s_Law_Crime_Victims_Rights,_Judicial_Retirement_Age,_and_Judicial_Interpretation_of_Laws_and_Rules_Amendment_\(2018\)](https://ballotpedia.org/Florida_Amendment_6,_Marsy%27s_Law_Crime_Victims_Rights,_Judicial_Retirement_Age,_and_Judicial_Interpretation_of_Laws_and_Rules_Amendment_(2018)) (last visited Apr. 28, 2024) (this particular amendment passed with 61.61% of citizens’ votes in the 2018 election).

105. Ortner, *supra* note 101.

106. Shepherd et al., *supra* note 11, at 20. See also Kinsella & Lerude, *supra* note 102; Ortner, *supra* note 101.

environmental regulations. Without the *Chevron* doctrine, so that argument goes, courts will more frequently overturn EPA and other agency regulations instead of upholding them.¹⁰⁷

However, there are likely two strong interrelated arguments to contradict this assertion and alleviate this concern. First, a less deferential standard of judicial review does not inherently mean that courts will strike down every interpretation; this was the main takeaway from the statistical analysis above, with proof from Florida courts that have continued to uphold agency interpretations (including environmental regulations) since the state's prohibition on deference. Second, just because an environmental agency's interpretation *is* struck down by a court does not automatically mean it is to the detriment of environmental protection, as has also been observed in Florida courts. Three key environmental cases have been decided in Florida since the amendment became effective; each has a different outcome and reveals more about what a prohibition on agency deference looks like in practice.

As a primer, Florida's Department of Environmental Protection (DEP) was created in 1993 by the legislature and is tasked with, among other things, "coordinating the development, review, and implementation of the state's energy policy."¹⁰⁸ That same statute also confers rulemaking authority upon DEP.¹⁰⁹ These DEP regulations, which (like all regulations) are necessarily interpretations of those statutes, are sometimes challenged by businesses and citizens. When those challenges result in interpretations being struck down by the court, the result is sometimes a negative environmental impact—but not always.

A. *Struck Down on Erroneous Interpretation and Abuse of Discretion*

In 2019, Florida's First DCA controversially¹¹⁰ struck down DEP's denial of a business's permit application to drill for oil in the Everglades.¹¹¹ At first glance, that indeed seems a worrisome outcome for the environment, but a deeper read of the opinion reveals more.

The legislature delegated power to DEP to accept or deny these kinds of permits in a natural resources statute,¹¹² and in 1999 the same court had affirmed DEP's interpretation of this statute as being a

107. See, e.g., *Chevron Case Imperils Environmental Protections To Benefit Big Oil*, *supra* note 20.

108. Fla. Stat. § 20.255 (2024).

109. *Id.*

110. See, e.g., Jim Saunders, *Court clears way for drilling in Everglades*, THE FLA. TIMES-UNION (Feb. 7, 2019, 6:54 PM), <https://www.jacksonville.com/story/news/2019/02/07/court-clears-way-for-drilling-in-everglades/6057158007/>.

111. *Kanter Real Est., LLC*, 267 So. 3d at 485.

112. Fla. Stat. § 377.241 (2018).

balancing test.¹¹³ In this instance, the court stated that whether it deferred to DEP as it had previously or reviewed the interpretation de novo, DEP's understanding of the balancing test was still correct; the question was whether DEP applied said test correctly here.¹¹⁴ Holding that DEP had clearly misinterpreted a provision within the aforementioned statute, and that the DEP Secretary had committed a fact-finding "abuse of discretion" besides, DEP was ultimately found to have improperly applied the balancing test and the agency's action was struck down.¹¹⁵

From this holding can be drawn the necessary conclusion that even without the 2018 amendment and under the previous standard of deference, this court would still have rejected DEP's interpretation and ordered the acceptance of the requested permit. Moreover, the important lesson here is not that de novo review resulted in an environmental protection being struck down, but that the agency tasked with such environmental protection in this instance improperly abused its discretion and erroneously interpreted its authority. This fact stands with or without agency deference, at the state or federal level.

B. Struck Down on Improper Interpretation that Did Not Comply with Statute, and In Practice Did Not Protect Environment

In a science-heavy opinion released in 2023, Florida's First DCA again rejected a DEP interpretation of one of its authority-granting statutes—but this time with a clear environmentally-friendly outcome.¹¹⁶ Several environmental advocacy groups challenged Basin Management Action Plans (BMAPs) created by DEP on the grounds that the agency had not complied with two statutory requirements in designing and using those BMAPs.¹¹⁷ Specifically, they argued that DEP's BMAPs did not include sufficient details regarding certain pollutants for the springs.¹¹⁸ The challenge was ultimately, then, based upon the groups' belief that the agency had misinterpreted (or simply

113. *Coastal Petroleum Co. v. Fla. Wildlife Fed'n, Inc.*, 766 So. 2d 226, 228 (Fla. 1st DCA 1999).

114. *Kanter Real Est., LLC*, 267 So. 3d at 488.

115. *Id.* at 490-92 ("Whether we review [DEP's] interpretation under a de novo standard, as required by [the new amendment], or with the deference required by our prior decisions, we reach the same conclusion: we reject the [DEP's] interpretation of [the statute], as it was both incorrect and clearly erroneous.")

116. *Sierra Club v. Dep't of Env't Prot.*, 357 So. 3d 737 (Fla. 1st DCA 2023). See also *VICTORY: FDEP must rewrite Outstanding Florida Springs Basin Management Action Plans*, SIERRA CLUB FLA. CHAPTER (Feb. 19, 2023), <https://www.sierraclub.org/florida/blog/2023/02/victory-fdep-must-rewrite-outstanding-florida-springs-basin-management-action>.

117. *Sierra Club*, 357 So. 3d at 739.

118. *Id.* at 737.

disregarded) its statutory duties and thus was inadequately fulfilling its obligation to protect Florida's environment.

Upon a *de novo* review, the court agreed with the challengers that DEP had misinterpreted the statute and had not properly created detailed BMAPs meant to "restore Florida springs from pollution."¹¹⁹ In practice, DEP's interpretation was struck down because it did not adequately protect the environment according to its legislatively delegated authority. This holding demonstrates that simply because an agency's interpretation of an environmental statute is struck down does not necessarily mean that it is to the detriment of the environment. Indeed, the court's rejection of DEP's interpretation in this case ultimately served to protect the environment; this is a helpful lesson that can be applied at the federal level with agencies like the EPA.

C. Upheld on Proper Inclusive Interpretation of "Protect the Environment"

Perhaps most importantly for this paper's argument is a Florida Supreme Court opinion from 2019. In *Citizens v. Brown*,¹²⁰ the court upheld a decision by the Florida Public Service Commission (PSC) to allow Florida Power and Light (FPL) "to recover certain environmental compliance costs from ratepayers" under the PSC's reading of a statute titled "[E]nvironmental cost recovery."¹²¹ That statute defined "environmental laws or regulations" as all legal authority regarding utilities and "designed to protect the environment."¹²²

Reviewing the interpretation *de novo*, the court held that the plain meaning of "protect" does, as the appellants urged, have a prospective and future-looking application.¹²³ However, in the environmental context, "protect" can also be retroactive and apply to "remediation of past harm," especially in order to better shield still unpolluted areas.¹²⁴ Therefore, the court affirmed the PSC's interpretation of "protect the environment" as allowing FPL to recover past environmental compliance costs.¹²⁵

A Florida agency's interpretation regarding the very meaning of environmental protection was thus upheld under a *de novo* review by the highest court in the state—but more importantly, it was an arguably progressive meaning that included both past and future

119. Federico M. Pohls, *The Demise of Agency Deference in Florida Has Produced Mixed Results Regarding Separation of Powers and Due Process*, 48 NOVA L. REV. 120, 131 (2023).

120. 269 So. 3d 498, 506 (Fla. 2019).

121. *Id.* at 499.

122. Fla. Stat. § 366.8255(1)(c) (2018).

123. *Citizens*, 269 So. 3d at 504.

124. *Id.*

125. *Id.* at 505.

harm prevention and cost recovery. The court even acknowledged that, as opposed to most contexts where harm has future impact only, environmental harm is such that can necessitate recovery costs for past injury to best protect nature moving forward.

From *Citizens* can be gleaned three important lessons for looking to the future of judicial review of statutory interpretation at the federal level post-*Chevron*. One, courts can (and should) be trusted with interpreting environmental statutes and understanding when the environmental context requires at least some special consideration. The Florida Supreme Court could have chosen to stop at the dictionary definition of “protect” as meaning “prevention of future harm,” but it did not. Instead, the court discussed how pollutants and other contaminants expand the meaning of “protect the environment” to include remedial damage. Second, the court clearly did not need to defer to the agency’s interpretation in order to rule as it did. Citing the recent amendment before launching into its own statutory interpretation discussion,¹²⁶ the court’s analysis did not hinge on whether the agency’s understanding was permissible, reasonable, or clearly erroneous—and one can imagine a federal court similarly considering an EPA interpretation with the same independent eye. Third, after *Citizens* Florida (a state with typically more conservative ideologies and laws) recognizes an environmentally friendly understanding of an important statutory authority that may encourage other states as well as federal courts to follow suit, but which may alleviate the concern that environmental protections can never be affirmed or gained following the *Loper Bright* decision.

Finally, to assume that environmental agencies require a deferential standard of judicial review to be upheld discounts both the agency and the bench; an executive interpretation upheld without the mandate of agency-friendly deference is arguably a stronger indication of the propriety of that interpretation.¹²⁷

V. BACK FROM THE DEAD? A BRIEF EXAMINATION OF THE “ZOMBIE *CHEVRON*” CONCERN AT THE FLORIDA AND FEDERAL LEVEL

The final component to discuss in comparing Florida post-amendment to the potential federal administrative state post-*Chevron* is a concept that has been coined “zombie *Chevron*,” a term derived from Justice Gorsuch’s concurrence in *Kisor v. Wilkie*.¹²⁸

126. *Id.* at 504.

127. See generally *VeggieTales: A Snoodle’s Tale* (Warner Home Video May 18, 2004) (“A gift that’s demanded is no gift at all.”).

128. 139 S.Ct. 2400, 2425 (U.S. 2019) (“So the [*Auer*] doctrine emerges maimed and enfeebled—in truth, zombified.”); see Cass R. Sunstein, *supra* note 19, at 570.

Before *Loper Bright*, the general concern of zombie *Chevron* at the federal level seemed to be that the Court would strike down *Chevron* while keeping a version of agency deference that would function as if the doctrine is back from the dead, or that lower courts might continue to apply a *Chevron*-like deferential standard. This particular fear has also been expressed within Florida jurisprudence after the amendment's passage,¹²⁹ and an analysis at the state level might help shed light.

In discussing a zombie *Chevron* issue as it relates to Florida caselaw, at least two articles analyze the 2020 opinion from Florida's Second DCA, *Department of Highway Safety and Motor Vehicles (DHSMV) v. Chakrin*.¹³⁰ Decided after the state's amendment took effect, the Second DCA held in *Chakrin* that the lower court had departed from the essential requirements of law and thus quashed the court's reversal of DHSMV's decision.¹³¹

This case involved DHSMV's interpretation of section 322.271(4)(a) of the Florida Statutes—specifically the phrase “drug-free,” which the agency understood to include alcohol consumption.¹³² Under this interpretation, the agency had refused to reinstate a citizen's driving license under the statute because he had admitted to drinking a beer, which the agency found violated the requirement that the citizen remain drug-free for five years before the reinstatement hearing.¹³³ Based on the recent amendment prohibiting deference to agencies, the lower court did not consider prior caselaw but instead held that chapter 322 and specifically section 322.271(4) did not explicitly include “alcohol,” subsequently striking down DHSMV's interpretation and resultant action.¹³⁴ The Second DCA in turn found that the court had committed two errors: “fail[ing] to apply controlling case law of this court that was directly relevant . . . and . . . fail[ing] to apply the unambiguous language of section 322.271(4).”¹³⁵

Regarding prior precedent, the Second DCA noted that the lower court seemingly understood the recent amendment as “removing the circuit court's duty to follow any case law that interpreted the statute at the time when the agency-deference rule was in effect”; the court repudiated this interpretation and stated that not only is that assertion absent from the amendment, but the rule remains that lower

129. See, e.g., Federico M. Pohls, *supra* note 119, at 143; *Florida's Zombie Chevron Problem*, FUERST ITTLEMAN DAVID & JOSEPH (Oct. 30, 2020), <https://fdjlaw.com/floridas-zombie-chevron-problem/>.

130. 304 So. 3d 822 (Fla. 2d DCA 2020).

131. *Id.* at 829.

132. *Id.* at 824-25.

133. *Id.*; see also Fla. Stat. § 322.271(4)(a)3 (2018). (“[petitioner must have] been drug-free for at least 5 years prior to the hearing”).

134. *Chakrin*, 304 So. 3d at 828-29.

135. *Id.* at 829.

courts must follow higher court precedent until it is overturned.¹³⁶ The Second DCA focused on its prior ruling in *DHSMV v. Abbey*, which it said the lower court should not have ignored in its analysis since *Abbey* remained higher court precedent notwithstanding the amendment.¹³⁷ In its discussion, the Second DCA noted that *Abbey* was not decided solely on the grounds of pre-existing agency deference; rather, the *Abbey* court ultimately found through its analysis of the same statute that DHSMV's interpretation of drug-free as including alcohol was not simply a permissible reading, but that "in view of related statutes and legislative intent, it was the *only* reasonable interpretation."¹³⁸ The Second DCA reiterated that this ruling was based on "reasons beyond mere deference to DHSMV interpretation."¹³⁹ For example, the *Abbey* court evaluated a similar and consistent past agency decision as well as legislative intent and policy.¹⁴⁰

Further, the *Chakrin* court conducted its own statutory interpretation analysis, which it held the lower court did not sufficiently do even outside of the *Abbey* opinion; in doing so, the DCA upheld the interpretation of drug-free as including alcohol based on plain meaning and consideration of legislative intent.¹⁴¹ The Second DCA finally stated that the circuit court should not have "substitute[d] its arbitrary conclusion that the dictionary definition it selected could not be used to reach the plain meaning of the term simply because it was a potentially broad one."¹⁴²

One article discussing zombie *Chevron* at the state level concludes that *Chevron*-era caselaw after *Chakrin* thus "remains a jurisprudential revenant" in Florida.¹⁴³ But based upon the Second DCA's actual ruling in *Chakrin*, it seems more likely that this is indeed a "touch of hyperbole."¹⁴⁴ Calling this an example of zombie *Chevron* glosses over the basis of the actual holding in both *Abbey* and *Chakrin*. As demonstrated, the Second DCA in *Chakrin* did not reprimand the lower court for a failure to defer to the agency's interpretation, but rather for a refusal to follow prior binding precedent. And that prior precedent was explained by the court as not solely a product of *Chevron*-esque deference, but rather of a thorough independent review

136. *Id.*

137. *Id.* at 831.

138. *Id.* (emphasis in original).

139. *Id.* at 832.

140. *Dep't of Highway Safety and Motor Vehicles v. Abbey*, 745 So. 2d 1024, 1025 (Fla. 2nd DCA 1999).

141. *Chakrin*, 304 So. 3d at 833.

142. *Id.* at 833-34.

143. *Florida's Zombie Chevron Problem*, *supra* note 129.

144. Federico M. Pohls, *supra* note 119, at 144 ("That *Chakrin* represents a 'zombie *Chevron*' problem may be a touch of hyperbole, considering the [DCA] made a careful reading of *Department of Highway Safety & Motor Vehicles v. Abbey* to conclude that agency deference was not the sole legal standard that informed the [DCA's] ruling in that case.").

of the statute's meaning and legislative intent. Moreover, *Chakrin* was ultimately decided not through the court's deferring to the DHSMV's interpretation, but through the court's looking to its own prior holding in *Abbey* as well as a fresh statutory analysis.

Zombie *Chevron* implies that courts continue to apply a disallowed deferential standard or that, like the argument here, courts blindly follow past precedent that was decided based on a deferential standard. If that were truly happening here, then this aspect of the zombie *Chevron* concern would be a valid one—but that is not what really happened. *Abbey* was not decided on a *Chevron* Step Two basis; the court did not defer to the agency because its interpretation of “drug-free” including alcohol was a permissible construction. The court upheld the interpretation because “drug-free” in that statute's context could *only* be understood to include alcohol, given legislative intent, surrounding statutory text, and plain meaning. Neither was *Chakrin* decided through veiled deference to the agency, but rather based upon the DCA's fresh interpretive analysis and consideration of its own caselaw—both of which are typical and expected attributes of judicial opinions. The argument that *Chakrin* represents a reanimated agency deference standard in Florida after the 2018 amendment does not have much life to it.

As for the federal level, author Cass R. Sunstein wrote in 2021 that if the Supreme Court ultimately chose to “discipline and constrain” then-current *Chevron* doctrine, then what was blasted as a frightening undead deference could actually represent a “reasonable path forward.”¹⁴⁵ Even before the *Loper Bright* opinion, it appeared unlikely that the Court would elect to retain *Chevron* in a limited form like this, but Sunstein's point is well taken. Considering it and the above deeper analysis of *Chakrin*, it seems probable that, just as in Florida, the fear of a federal zombie *Chevron* will simply remain a horror story that does not come to fruition.

CONCLUSION

Just as Stephen King's Pennywise returns to haunt the children of Derry, Maine, every twenty-seven years,¹⁴⁶ a new U.S. Supreme Court decision changing the landscape of agency deference every forty years may prove haunting to administrative law practitioners, theorists, and professors (and certainly students), as well as citizens who are impacted by and interested in agency regulations. The latest go-around in 2024 is no different, as the well-known *Chevron* doctrine was formally overruled by the Court's *Loper Bright* decision. Many praise the death of *Chevron*, while many others have grieved it.

145. Cass R. Sunstein, *supra* note 19, at 583.

146. See STEPHEN KING, *IT* (1986).

As mentioned in Part I, one esteemed legal author opined that *Chevron*'s reversal would lead to a "large shock to the legal system."¹⁴⁷ In the absence of evidence to the contrary, this view is not unreasonable. But, as this paper has demonstrated, such contrary evidence *does* exist within Florida's caselaw since a voter-approved constitutional amendment prohibiting agency deference took effect. Through analyzing statistics, drawing various comparisons between Florida and the federal level (including the respective histories of agency deference standards and zombie *Chevron* concern), and discussing how Florida can very well represent a predictive analogy for what happens federally post-*Chevron*, this paper demonstrates that the demise of *Chevron*—while significant jurisprudentially—will very likely not upheave the federal administrative state.

For all the reasons discussed throughout this paper, there is good reason to believe that the 2024 version of the Deference Curse will not be as novel as the 1944 and 1984 renditions. The death of *Chevron* certainly will not kill the federal administrative state, nor is it a foregone conclusion that environmental regulations will all be struck down and protections all lost. *Loper Bright* may well deeply impact how the administrative state is perceived by professionals and the public, which is understandable given that for the last forty years, the highly deferential *Chevron* has been the known and oft debated standard. But beyond courts abandoning the two-step dance and reviewing agency interpretations according to the Court's mandate that judges "exercise their independent judgment" in *Loper Bright*¹⁴⁸ (and authors rewriting administrative law textbooks), all signs seem to point instead towards a more muted change in course. Florida's own experience, brought about by a specific and complete constitutional prohibition, demonstrates that agencies' statutory interpretations can still be upheld and affirmed without *Chevron*-like deference—even in the environmental context that is understandably of great importance to many citizens and professionals.

Given this paper's discussion, Florida likely provides good evidence that the death of *Chevron* will not prove as momentous as many fear for agencies and their statutory interpretations, and that the outlook of administrative law and environmental policy may not nearly be so bleak as a quick online search might indicate. Though *Chevron*, and the known federal agency deference more generally, did not survive the U.S. Supreme Court's October 2023 term, the sky may not fall after all. Indeed, the Sunshine State rather seems to promise sunny skies for the federal administrative state after the Court's 2024 interment of *Chevron*.

147. Cass R. Sunstein, *supra* note 19, at 572.

148. *Loper Bright*, 603 U.S. at 412.

