ABSTRACT

For many years, American judges and legal scholars have heralded the downfall of Chevron deference: the idea that courts should generally defer to an executive agency’s interpretation of a vague or ambiguous statutory provision if that interpretation is reasonable. In the October 2023 Term, the Supreme Court will directly confront the question of whether to overrule Chevron and curtail judicial deference to agency statutory interpretation in Loper Bright Enterprises, Inc., et al. v. Raimondo. Criticism of Chevron is vociferous and varied, but two primary strands suggest that Chevron deference facilitates agency overreach and arbitrary, lawless government action, and that Chevron imperils the separation of powers by improperly transferring to the executive branch the judiciary’s responsibility to say what the law is. Perhaps in response to such concerns, lower courts have found ways to circumvent or neuter Chevron even as the decision remains good law.

What does the potential end of Chevron have to do with Xi Jinping’s China? At first glance, not much. Chinese leaders have consistently disavowed separation of powers among branches of government and an independent judiciary as “erroneous Western views.” Yet recent popular protests and unrest in China over events such as the government’s zero-COVID policy and rural land expropriation suggest that China is seeing a groundswell of opposition along the same lines as the American push against Chevron: strong popular pushback against arbitrary local government action that is either contrary to, or not clearly authorized by, popular law and largely insulated from any meaningful review.

This Article explores the parallels between challenges to agency deference in the United States and recent popular concerns about arbitrary local government action in China. By analyzing both legal scholarship and media reports, the Article shows that these phenomena are two sides of the same coin. While China is not likely to embrace judicial independence, this Article suggests two ways to address perceived local government overreach in China—inspired by the American experience with Chevron. Rather than rely on normal judicial review, which is likely to be highly deferential in the Chevron mold, the Chinese judiciary might embrace broader policy suggestions and conduct more probing textual analysis of whether local governments are acting in accordance with positive, statutory law.

* Lecturing Fellow and Director, Center for Firearms Law, Duke University School of Law. I would like to thank Shitong Qiao for his help working through ideas and pointing me to sources regarding administrative law and the judiciary in China, and ______.
# TABLE OF CONTENTS

**INTRODUCTION** .............................................................. 3

**I. CHEVRON’S DETRACTORS AND LOPER BRIGHT** ........... 4
   A. CHEVRON AND THE GROWTH OF THE ADMINISTRATIVE STATE: AN ABBREVIATED SUMMARY .................................................. 5
   B. CHEVRON’S DETRACTORS .................................................. 9
      1. Lawlessness and Arbitrary Government Power .............. 10
      2. The Separation of Powers ........................................... 11
   C. RECENT DEVELOPMENTS .................................................. 13

**II. POPULAR BACKLASH AGAINST ARBITRARY, LAWLESS GOVERNMENT ACTION IN CHINA** .................................... 18
   A. ZERO COVID ..................................................................... 18
   B. PROPERTY LAW AND EXPROPRIATION ........................... 22

**III. SINO-AMERICAN PARALLELS AND THE PATH FORWARD FOR CHINA** ......................................................... 24
   A. THE CHINESE JUDICIARY WILL BE HIGHLY DEFERENTIAL IN ADMINISTRATIVE LAW CASES ......................................... 25
   B. EMPOWERING A DEPENDENT JUDICIARY .......................... 29
      1. Judicial Suggestions ...................................................... 30
      2. Textualism .................................................................... 32

**CONCLUSION** .................................................................. 34
Introduction

In January, the Supreme Court will hear oral argument in a pair of cases that present the question whether to overrule—or substantially curtail—the Court’s agency deference framework initially articulated in the 1984 decision *Chevron, USA, Inc. v. NRDC.* Generally speaking, *Chevron* provides that, when the legislature has delegated interpretive authority to an executive branch agency, a court must defer to the agency’s interpretation of ambiguous statutory language and “may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.” Over the past four decades *Chevron* has triggered a mounting pile of scholarly criticism (and even scorn), and its detractors are not limited to the legal academy. Sitting Supreme Court justices—including members of the current Court—have heaped criticism on *Chevron* deference, suggesting that the Court may be poised to overrule the decision. And lower court judges are, increasingly, finding ways to avoid applying *Chevron* to reflexively refer to an agency’s interpretation of an ambiguous statute.

One major area of criticism is that the judicially rule established by *Chevron* countenances arbitrary, lawless agency action that harms civilians. This criticism is often linked to arguments about the separation of powers and the claim that, by excessively deferring to agency statutory interpretation, the federal judiciary abdicates its proper governmental role. These same concerns echo thousands of miles away in China, where citizen complaints about arbitrary, lawless government action harming civilians are raised in response to COVID-related restrictions, the use of eminent domain, and other local government actions. Comparing developments on opposite sides of the world, the Article seeks to make the case that the underlying concerns of *Chevron*’s detractors are, in some ways, the same concerns that have animated many criticisms of Chinese local government action in recent years—concerns about the exercise of arbitrary government power, not authorized by formal legislation, that harms ordinary people without any opportunity for grievances to be meaningfully adjudicated. While the Chinese government officially eschews judicial independence and the separation of powers as erroneous Western beliefs, China must find some way to rein in mounting popular backlash against arbitrary bureaucratic action.

---

2 467 U.S. 837.
3 *Chevron*, 467 U.S. at 844.
This Article suggests that empowering the judiciary to review agency action in the normal fashion, without a meaningful shift to a truly independent judiciary, is unlikely to make progress in resolving these concerns because Chinese courts will be highly deferential to government actors. This Article, instead, suggests two possible paths forward informed by the American experience with *Chevron* and the methods some courts have increasingly used to chip away at the *Chevron* framework without explicitly repudiating it. First, Chinese courts might use broader policy suggestions available in the Chinese legal system to deter agency overreach before it occurs. And, second, the Chinese judiciary might embrace textualist methods of interpretation and place more emphasis on whether local governments have acted in accord with statutory law (which Xi Jinping’s government is increasingly enacting to codify what were once informal slogans and campaigns).

The Article will proceed in three parts. Part I summarizes the *Chevron* framework for agency deference in the United States, its history and the major criticisms raised by its detractors, and the arguments raised in *Loper Bright*—where the Court seems ready to overrule, or at least scale back, the *Chevron* approach. Part II seeks to show that some of the major underlying concerns about *Chevron*’s potential to enable arbitrary, lawless government action insulated from judicial review are the very same as those concerns driving recent popular backlash against the government in China—specifically with regard to aggressive enforcement of zero-COVID policies and the use of eminent domain to seize private property by local Chinese governments. Finally, Part III argues that the only way for China to fully address these mounting concerns is by empowering its non-independent judiciary to act in ways that will constitute a meaningful check on the actions of local government officials—rather than embracing a deferential post-hoc judicial review process.

I. *Chevron’s Detractors and Loper Bright*

The Supreme Court’s 1984 decision in *Chevron U.S.A., Inc. v. NRDC* is, by almost any measure, the most cited administrative law decision of all time and one of the most cited Supreme Court decisions, period. The decision
was undeniably influential—creating, in the words of the late Justice Antonin Scalia, a world “full of promise for administrative-law professors in need of tenure articles and, of course, for litigators.”5 The decision also immediately spawned intense criticism from scholars, litigators, and judges, criticism that has only gained strength of late. This term, the justices will directly confront the question of “[w]hether the Court should overrule Chevron or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.”6 This section will summarize the holding in Chevron, describe several major criticisms lodged against its framework for deferring to a federal agency’s interpretation of an ambiguous statute, and identify how those specific concerns have surfaced in the Loper case—where the Court seems poised to scale back Chevron deference.

A. Chevron and the Growth of the Administrative State: An Abbreviated Summary

Chevron itself dealt with a highly technical question of statutory construction under the Clean Air Act and subsequent amendments. That legislation required states that had failed to meet certain earlier-imposed air quality standards to establish a permit program for “‘new or modified major stationary sources’” of air pollution.7 The general idea was that these non-compliant states would have to institute strict standards that would apply to any new or modified potential source of air pollution—a newly built factory, for example—and thus lower that new source’s contribution to air pollution in the state. The specific question in Chevron involved how broad the agency tasked with implementing the CAA (the EPA) could construe the words “stationary source” in the legislation. One interpretation would have read the phrase to apply to each individual piece of major equipment within a plant or factory—thus meaning that companies in non-compliant states would be required to go through the permit process and meet the new standards even when installing or modifying a single piece of equipment. The other option was to construe “stationary source” to mean “all of the pollution-emitting devices within the same industrial grouping as though they were encased

---

6 Petition for Writ of Certiorari, Loper Bright Enterprises, Inc. v. Raimondo, No. 21-5166 (filed Nov. 10, 2022)
7 Chevron, 467 U.S. at 840.
within a single “bubble”—thus reserving the permit process for only new 
plants, not new equipment, and lessening the burden on corporations.8

Congress had not provided any specific guidance on the meaning of 
“stationary source” as used in the CAA, and the EPA chose to apply the latter, 
narrower definition of the term (sometimes referred to as the “bubble concept”) that would require adherence to the new permitting system only for 
new facilities. Environmental groups challenged the EPA’s construction of 
the statutory language; the court of appeals agreed and “set aside the 
regulations embodying the bubble concept as contrary to law.”9 The 
Supreme Court reversed. The Court first clarified that, when Congress 
speaks in unambiguous language, that is the end of the matter for both the 
implementing agency and the judiciary.10 But, the Court said, “if the statute 
is silent or ambiguous with respect to the specific issue, the question for the 
court is whether the agency’s answer is based on a permissible construction 
of the statute.”11 And as to that inquiry, the Chevron majority emphasized a 
long tradition of deferring to executive agency interpretations of ambiguous 
statutory language or executive agency efforts to plug statutory silences. 
Thus the Court held that the appeals court not only got it wrong when it 
rejected the EPA’s interpretation of “stationary source,” but rather 
“misconceived the nature of its role in reviewing the regulations at issue.”12 
The majority examined the statutory context and legislative history of the 
CAA and—finding nothing to establish a clear meaning of the disputed 
phrase—held that courts must defer to EPA’s “permissible construction of 
the statute” rather than seeking to resolve policy disagreements between the 
agency and those challenging the agency’s interpretation:

When a challenge to an agency construction of a 
statutory provision, fairly conceptualized, really centers 
on the wisdom of the agency's policy, rather than 
whether it is a reasonable choice within a gap left open 
by Congress, the challenge must fail. In such a case, 
federal judges—who have no constituency—have a 
duty to respect legitimate policy choices made by those 
who do.13

8 Id.
9 Id. at 842.
10 Id. at 842-43.
11 Id. at 843.
12 Id. at 845.
13 Id. at 865-66.
The decision itself was unanimous, although several justices recused themselves from the case. One contemporary commentator described the *Chevron* approach as follows:

The court must accept any reasonable construction offered by the agency, so long as the statutory language or, possibly, the legislative history is not patently inconsistent. In this “deferential model,” the agency’s function is to give meaning to the statute: the court determines only whether the interpretation the agency has chosen is a “rational” reading, not whether it is the “right” reading.14

Phrased slightly differently, the test is designed to “separate[e] those elements of the judicial relationship to agency action that are appropriate for independent judicial judgment from those for which the judicial role is constrained to oversight.”15 Courts have generally divided this inquiry into two separate analytical steps: (1) asking first whether the statutory language is ambiguous (if not, *Chevron* deference should not enter the picture at all), and (2) if the language is ambiguous, performing a deferential review of the legislative history and surrounding context to determine whether the agency’s interpretation is reasonable.16 Despite debate surrounding the legal mechanics of the *Chevron* test, the decision has had an undeniably major impact on American administrative law over the past four decades.

The quip that one goes bankrupt “gradually and then suddenly” applies, with some force, to the rise of the *Chevron* doctrine as the prevailing judicial approach to agency deference after 1984.17 While the decision’s impact was muted in the years immediately following its issuance, it eventually came to be widely accepted as “as announcing a new relationship between courts and agencies” by the mid-1990s—due in large part to developments in appellate

---

16 *In re Polar Bear*, 748 F Supp 2d at 24–25; *see also* Daniel J. Hemel & Aaron L. Neilson, *Chevron Step One-and-a-Half*, 84 U. CHI. L. REV. 757, 758-60 (2017) (summarizing scholarly disagreement over the number of steps contained within the *Chevron* inquiry); *Carter v Welles-Bowen Realty, Inc*, 736 F.3d 722, 731 (6th. Cir 2013) (Sutton, J., concurring) (arguing that “[i]f you believe that *Chevron* has two steps, you would” reach a result one way, and “[i]f you believe that *Chevron* has only one step,” you would reach the same result another way).
17 ERNEST HEMINGWAY, THE SUN ALSO RISES (1926).
courts such as the D.C. Circuit.\textsuperscript{18} Professor Thomas Merrill attributes the rise of the case as a doctrinal rule—in other words, near universal acceptance of the decision’s methodology for determining whether the EPA’s construction of the CAA was permissible, as opposed to merely the narrow issue of whether the “bubble concept” itself was a permissible reading of the CAA—largely to the allure of simplicity for busy district and appellate judges: “If a lower-court judge sees nothing particularly disturbing about an agency action, and the challenge can be characterized as raising a question of statutory interpretation, the \textit{Chevron} doctrine offers a quick exit ramp.”\textsuperscript{19}

Because \textit{Chevron} could be easily read to “say that deference was the default rule in any case where Congress has not spoken to the precise issue in controversy,” the decision was heavily cited and relied upon by government lawyers to urge judicial acceptance of agency action, with much success.\textsuperscript{20}

Especially in the 1990s and on through 2000, “the \textit{Chevron} doctrine dominated judicial review of agency statutory interpretation” and resulted in a high rate of affirmance of challenged agency action.\textsuperscript{21} At a broad level, \textit{Chevron} “facilitated the transfer of power from Congress to the administrative state” during that time.\textsuperscript{22}

\textit{Chevron} was, at least initially, not particularly associated with any political party or ideology. The EPA’s narrow construction of the CAA that \textit{Chevron} approved was put forward by Reagan administration bureaucrats seeking to limit the sweep of an environmental protection statute passed by a Congress with large Democratic majorities and signed into law by Democratic President Lyndon Johnson.\textsuperscript{23} Interestingly, however, the \textit{Chevron} decision itself was unanimous and “there is no evidence during these early years that \textit{Chevron} was associated with partisan affiliation.”\textsuperscript{24} Rather,
“the politics of deference have varied over time” depending on which party controls the White House and Congress. Recently, “conservatives charge that Chevron deference violates the separation of powers and enables administrative overreach[, . . . while l]iberals, in turn, maintain that Chevron is an important tool of effective, pragmatic governance, defending the decision with increasing fervor.” Perhaps in part due to this increasing political valence, Chevron has come under withering criticism in recent years from multiple angles.

B. Chevron’s Detractors

The critics of Chevron are many and varied. Supreme Court justices from opposite sides of the ideological spectrum have offered strident critiques of the decision and its agency-deference framework. And the House of Representatives has even passed a bill that would overrule or neuter Chevron through legislation—which is somewhat ironic, since it is often legislative gridlock in the first place that leads to expansive agency action and subsequent administrative law litigation. This Section will attempt to

---

25 Gregory A. Elinson & Jonathan S. Gould, The Politics of Deference, 75 VAND. L. REV. 475, 478 (2022); see also Cass Sunstein, Chevron as Law, 107 GEO. L.J. 1613, 1664 (2019) (“In recent years, Chevron has been under assault, largely from the right. Its political valence has flipped. How has a decision originally celebrated—mostly by the right—for its insistence on judicial humility come to be seen as a kind of abdication or capitulation?”).

26 Id. at 477-78.


28 See Stephen Breyer, Judicial Review of Questions of Law and Policy, 38 ADMIN. L. REV. 363, 381 (1986) (arguing that, “[i]f taken literally, the Court’s language suggests a greater abdication of judicial responsibility to interpret the law than seems wise, from either a jurisprudential or an administrative perspective,” and advocating a narrow application of Chevron); Michigan v. E.P.A., 576 U.S. 743, 762 (2015) (Thomas, J., concurring) (“Statutory ambiguity thus becomes an implicit delegation of rule-making authority, and that authority is used not to find the best meaning of the text, but to formulate legally binding rules to fill in gaps based on policy judgments made by the agency rather than Congress.”).

summarize and briefly unpack two major criticisms raised against the *Chevron* deference framework as it has been used by federal courts especially since the early 1990s: first, that the framework countenances—and potentially even incentivizes—arbitrary, lawless agency action and improperly insulates that action from meaningful judicial review; and, second and relatedly, that the framework violates the fundamental separation of powers that is a hallmark of the American system of democratic governance by improperly allocating interpretive authority to the executive branch.

1. **Lawlessness and Arbitrary Government Power**

   A recurring critique of deferring to agency interpretation of ambiguous statutory language is that the approach provides far too much latitude and power to unelected bureaucrats, including power to act *outside* of statutory authorization. As Professor Philip Hamburger notes,

   the executive interpretation that qualifies for *Chevron* deference binds Americans in an irregular or extralegal manner. The Constitution authorizes the government to bind Americans (that is, impose legal obligation on them) only through the law, whether through acts of Congress or the courts. In contrast, under *Chevron*, the executive uses its interpretation to bind Americans through a mechanism other than law, and in this sense, it binds them extralegally.

   In other words, *Chevron* facilitates and potentially encourages the concentration of power in the executive branch—and permits agencies to act in arbitrary ways (outside of any formal legislative authorization) to the detriment of ordinary American citizens. As Cass Sunstein notes, this argument “often takes the form of a concern that agencies have undue power, consolidating traditionally separated functions and threatening core constitutional values, including both accountability and liberty,” and overlaps significantly with skepticism toward the administrative state generally.30

   Administrative state skepticism embrace the concern that “executive actions [have] became increasingly opaque and nonpublic, and public pronouncements increasingly abrupt and conclusory.”31 Indeed, some have

---

30 Sunstein, *Chevron as Law*, at 1664.

31 Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J. LEGAL ANALYSIS 121, 139, 147 (2016); see also PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014).
even gone so far as to say that “[t]he post New-Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution.”\textsuperscript{32} In terms of impact on ordinary citizens, the administrative-state skeptics assert that “[e]xecutive government, especially in its current freewheeling unilateralism, [] undermines the stability and predictability that are essential virtues of the rule of law.”\textsuperscript{33} When compared to formal legislation, expansive agency rule-making outside the bounds and limits of formal, positive law requires “more frequent adjustments to private activities in response to new rules.”\textsuperscript{34} This is because citizens can determine what the law is at any time and changes to the law occur only through the democratic process—but citizens cannot anticipate changes to executive rules which occur outside of that process. Thus, “extra-statutory executive improvisation makes the problems worse by adding the element of surprise—of shifting legal obligations that cannot be anticipated even probabilistically from statutes, judicial precedents, speeches, agency notices, and other public information (‘unknown unknowns’).” The costs, as the story goes, of this uncertainty fall largely on the shoulders of private citizens and private businesses—it is very difficult to run your business when you might be forced to comply with additional, unexpected emission limits or pay substantial third-party observer salaries at on short notice; just as the ever-present specter of the government seizing your factory and leveling it to build apartments is a strong disincentive to growing and maintaining a successful business.

2. The Separation of Powers

Concerns about the practical impact of an expansive administrative state buttressed by highly-deferential judges applying \textit{Chevron} are closely tied to broader structural arguments about the separation of powers. As Professor Hamburger argues, deferential agency review may “restructure[] the government by shifting judicial power back into executive power [and] . . . compromis[ing] the essential role of judges as independent arbiters between the government and the people, thereby undermining the very legitimacy of government.”\textsuperscript{35} James Madison himself warned against “[t]he accumulation of all powers legislative, executive and judiciary in the same hands” as the

\textsuperscript{33} DeMuth, \textit{supra} note __, at 173.
\textsuperscript{34} \textit{Id.} at 174.
\textsuperscript{35} Hamburger, \textit{Chevron Bias}, at 1236-37.
“very definition of tyranny.” 36 That concern appears frequently in critiques of Chevron—as the argument goes, Chevron requires judges to abdicate their proper role in the governmental structure to the executive branch and, perhaps, improperly allows executive branch agencies to assume functions that are legislative in nature. At a high level, the idea is that an exceedingly deferential judicial approach to review of agency actions upsets the carefully calibrated balance among the different branches of American government.

The argument that Chevron deference contravenes—or, at least, is damaging to—the separation of powers dates back almost to the decision itself. Professor Cass Sunstein wrote in a 1987 law review article that “Chevron suggests that administrators should decide the scope of their own authority. That notion flatly contradicts separation-of-powers principles that date back to Marbury v. Madison” 37; and leading scholars have made similar arguments in recent years. 38 Multiple current Supreme Court justices have expressed these very concerns as well. Justice Clarence Thomas, concurring in a 2015 decision which rejected EPA’s interpretation of an authorizing statute as unreasonable and thus did not apply deference, argued that “Chevron deference raises serious separation-of-powers questions . . . [and] wrests from Courts the ultimate interpretative authority to ‘say what the law is.’” 39 Justice Neil Gorsuch similarly posited that Chevron “pose[s] a serious threat to some of our most fundamental commitments as judges and courts” 40; and Justice Brett Kavanaugh opined in a 2016 law review article that the Chevron framework “threatens to undermine the stability of the law and the neutrality (actual and perceived) of the judiciary.” 41

These critiques frequently frame overruling or declining to follow Chevron as facilitating a return to proper balance among the various branches

38 See, e.g., Kent H. Barnett, How Chevron Deference Fits into Article III, 89 GEO. WASH L. REV. 1143, 1145 (2021) (describing the argument that Chevron might “permit agencies either to assume the judicial power of the United States in violation of Article III or, alternatively, to exercise the legislative power in violation of Article I by establishing policy with the force of law”).
39 Michigan v. Envt’l Protection Agency, 576 U.S. 743, 761 (2015) (Thomas, J., concurring) (quoting Marbury v. Madison, 1 Cranch 137, 177, 2 L.Ed. 60 (1803)). Justice Thomas was alarmed, he said, that an executive branch agency “felt sufficiently emboldened by [ ] precedents to [even] make the bid for deference that it did” in that case. Id. at 763.
40 Buffington v. McDonough, 598 U.S. __, Slip. Op. at 9, 14 (2022) (Gorsuch, J., dissenting from denial of certiorari) (observing that “[m]any other Members of this Court have expressly questioned Chevron maximalism”).
of government, as such balance was originally understood. For one, the argument goes, in the absence of a highly deferential framework for evaluating agency rule-making judges would be restored to their proper role of interpreting statutes and saying what the law is.\(^{42}\) In the absence of *Chevron*—most likely, under some slightly less acquiescent framework such as *Skidmore* deference\(^{43}\)—“there is reason to expect that statutes would shift toward express and specific authorization for agency rulemaking” and use less ambiguous language.\(^{44}\)

**C. Recent Developments**

In the midst of this rising criticism of the doctrine, courts have found numerous ways to chip away at *Chevron* without expressly repudiating it as precedent.\(^{45}\) In other words, federal courts have developed mechanisms to conduct more probing inquiries of expansive agency interpretations of ambiguous statutory language, either within or outside of the *Chevron* framework. For one, the universe of cases where *Chevron* simply does not apply at all—either because the government has waived deference by not invoking *Chevron*, or because the regulation at issue concerns a question of such significance that executive deference is inappropriate as a threshold matter—seems to be expanding. In at least two recent major cases, *King v.*

---

\(^{42}\) James Madison, *The Federalist* No. 78 (1788) (“The interpretation of the laws is the proper and peculiar province of the courts. . . . It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body.”).

\(^{43}\) In its 1944 decision in *Skidmore v. Swift & Co.*, the Supreme Court set forth a rule for deferring to agency interpretations in certain instances based on “the thoroughness evident in [the agency’s] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” 323 U.S. 134, 140 (1944). While there is debate about what *Skidmore* required and what a return to this approach might look like, “the decision presupposes that responsibility for determining the meaning of the law remains with the courts.” Merrill, *supra* note __, at 44.

\(^{44}\) Hamburger, *Chevron Bias*, at 1241.

\(^{45}\) In fact, scholars have argued that the precedential scope of the *Chevron* decision—in other words, what the decision actually requires lower courts to do—is narrow and does not encompass the full two-step deference test that has generally prevailed in the wake of the decision. See, e.g., Randy J. Kozel, *Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis*, 97 Tex. L. Rev. 1125, 1129, 1157 (2019) (arguing that “administrative-deference regimes like *Chevron* . . . are not entitled to stare decisis effect, at least as those regimes are presently justified in the Court’s jurisprudence”; contending that “there may be ways to implement something like the *Chevron* approach without dictating future Justices’ interpretive choices”).
Burwell\textsuperscript{46} and West Virginia v. EPA\textsuperscript{47}, the Court held “that, once the major questions doctrine applies, Chevron deference does not apply and so a court must interpret the statute itself rather than defer to an agency’s reasonable interpretation after an initial finding of ambiguity.”\textsuperscript{48} As the Court asserted in West Virginia, “agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted” cannot receive Chevron deference under the major questions doctrine.\textsuperscript{49} The Supreme Court itself seems to have largely approved of using the major questions doctrine to sideline Chevron in appropriate cases.\textsuperscript{50} Relatedly, a growing number of appellate courts have held that, “when an agency fails to invoke Chevron deference during litigation, the reviewing court will assume that Chevron does not apply.”\textsuperscript{51} And an emerging strand of jurisprudence relies on the rule of lenity—which generally provides that statutes or provisions imposing criminal penalties should be narrowly construed, against the government—to hold that, “if an ambiguous statute contains criminal provisions, Chevron does not apply” (a similar result might occur when other canons of statutory construction are implicated).\textsuperscript{52} In all of these instances, litigation challenging agency action proceeds without Chevron deference and the court is free to conduct a more probing inquiry into whether the agency


\textsuperscript{47} 597 U.S. __, 142 S. Ct. 2587 (2022)

\textsuperscript{48} Natasha Brunstein and Donald L. R. Goodson, Unheralded and Transformative: The Test for Major Questions After West Virginia, 47 WM. & MARY ENVTL. L. & POL’Y REV. 47, 84 (2022); see also Michael Herz, Chevron is Dead, Long Live Chevron, 115 COLUM. L. REV. 1867, 1868-69 (2015) (describing King v. Burwell as “hold[ing] that judicial deference is out of place with regard to hugely significant policy question”).

\textsuperscript{49} 142 S. Ct. at 2609; see also id. at 2634-35 (Kagan, J., dissenting) (arguing that the majority’s use of the major questions doctrine is contrary to Chevron and the Court’s past emphasis on statutory interpretation rather than the “importance” of the decision at issue).

\textsuperscript{50} Mila Sohoni, The Major Questions Quartet, 136 HARV. L. REV. 262, 264 (2022) (describing recent cases as heralding “a transition to a new order of operations for evaluating the legality of major regulatory action, . . . [where] the Court will not sustain a major regulatory action unless the statute contains a clear statement that the action is authorized”).

\textsuperscript{51} Waiving Chevron Deference, 132 HARV. L. REV. 1520, 1520 (2019) (arguing that this approach is unwarranted and providing examples); see also Jeremy D. Rozansky, Waiving Chevron, 85 U. CHI. L. REV. 1927, 1940 (2018) (Comment) (defining Chevron waiver as “[t]he failure to seek such deference or the intentional abandonment of the arguments for deference” by an agency).

\textsuperscript{52} Justin Levine, A Clash of Canons: Lenity, Chevron, and the One-Statute, One Interpretation Rule, 107 GEO. L.J. 1423, 1435 (2019); see also Hardin v. ATF, 65 F.4th 895, 900 (6th Cir. 2023) (“[W]e conclude that the particular statutory scheme before us is not an appropriate one to apply Chevron deference. We so hold because the statutory scheme is predominantly criminal in scope and because of the nature of the actions that it criminalizes.”); United States v. McGoff, 831 F.2d 1071, 1077 (D.C. Cir. 1987).
Another option is to simply apply *Chevron* itself in a less deferential, more demanding manner as to the federal agency whose regulation is being challenged. There are many ways in which such a less deferential review might take shape. One example identified by Professors Daniel Hemel and Aaron Nielsen is that some circuits, “[a]fter deciding that the statute is ambiguous but before deciding whether the agency’s construction is permissible, . . . [ask] whether the agency itself recognized that it was dealing with an ambiguous statute.”53 Under this approach, “the agency will lose if it mistakenly says that the issue can be resolved at *Chevron* Step One while the court determines that it should be resolved at *Chevron* Step Two”—in other words, if the agency relies solely on the statutory language and does not explain why its interpretation is reasonable even assuming ambiguity.

The rise of judicial textualism—which, as Professor Merrill notes, is in considerable tension with some aspects of *Chevron* deference, specifically the doctrine’s emphasis on intentionalism54—also presents a major opportunity for courts seeking to circumvent or avoid the framework. *Chevron* itself privileges the type of legislative history analysis eschewed by textualist judges and, “[o]nce courts embrace [an] autonomous interpreter model when dealing with legislative branch materials, it may be difficult to shift gears and assume the posture of the faithful agent when dealing with executive branch agencies.”55 As Professor Lawrence Solum similarly observes, the *Chevron* “doctrine seems inconsistent with core commitments of textualism. . . . [and] textualists are likely to be suspicious of the idea of ‘reasonable’ interpretations.”56 Perhaps unsurprisingly, then, courts (including the Supreme Court) confronted with requests to apply *Chevron* and defer to an agency’s interpretation are, increasingly, determining that there is simply no textual ambiguity whatsoever in the authorizing legislation and thus no reason to even use the framework.57

---

54 Thomas W. Merrill, Textualism and the Future of the Chevron Doctrine, 72 WASH. U. L. Q. 351, 352-54 (1994); see also id. at 366 (noting that “the rise in textualism may be associated with a decline in use of the *Chevron* doctrine”).
55 Id. at 353
56 Lawrence B. Solum, Disaggregating *Chevron*, 82 OHIO ST. L.J. 249, 277 (2020).
57 See, e.g., Pereira v. Sessions, 138 S. Ct. 2105, 2113-14 (2018) (“[T]he Court need not resort to *Chevron* deference, as some lower courts have done, for Congress has supplied a clear and unambiguous answer to the interpretive question at hand.”); Arangure v. Whitaker, 911 F.3d 333, 339-43 (6th Cir. 2018) (holding that canons of interpretation that “assist a court in determining a statute’s meaning” should be used initially to discern statutory
On January 17, 2024, the Supreme Court will hear oral argument in two consolidated cases challenging a lower court’s use of the *Chevron* deference framework to uphold an agency action challenged under the Administrative Procedure Act. The facts in these two cases illustrate well some of the concerns scholars have raised about *Chevron*’s real-world impact. The issue in *Loper* is whether an executive agency (the National Marine Fisheries Service, or NMFS) that requires fishing vessels to carry agency personnel as observers in certain circumstances—to verify a vessel’s compliance with federal rules governing fishing and collect data—may also require the vessel’s owner to pay part of the observer’s salary. A federal statute called the Magnuson-Stevens Act authorizes the federal observer program but generally ties the payment of observer salaries to the total value of the vessel’s catch. In a regulatory plan set forth in 2017, the NMFS increased the targeted observer coverage for Atlantic herring fishing trips and provided that, if government funding was insufficient to pay the increased cost of observer salaries, vessel owners would be responsible for paying the gap—subject to a system of waivers. There is some debate about whether vessel owners actually bore any increased cost under the herring observer expansion program, which ended in April 2023. But the question presented in *Loper* is simply whether the agency was within its authority to impose the fee-shifting plan in the first place, when the MSA itself is silent on that specific issue. And, in deciding that question, the Court has explicitly agreed to consider whether to overrule *Chevron* and its presumption that—if Congress has not spoken on a specific issue, such as the maximum percentage of NMFS observer salaries that shipowners can be required to pay—the agency’s interpretation is entitled to deference if it is reasonable.

---

58 [NOTE: This section will be updated with additional material after the oral argument.]

59 The second case, *Relentless, Inc., et al., Petitioners v. Department of Commerce, et al.*, No. 21-1886, presents the exact same issue of the permissibility of NMFS’ construction of the MSA, but will allow the full Court to consider the question because Justice Ketanji Brown Jackson has recused herself from *Loper* (due to her involvement with the case when she was an appellate judge on the First Circuit). See, e.g., James, P. McLaughlin, et al., *In Loper Bright and Relentless, Supreme Court returns to high-stakes question of viability of the Chevron doctrine*, REUTERS (Nov. 7, 2023).


61 *Id.* at 9.


63 *Id.* at 5.

64 *Loper Br.* at i (Question Presented).
The briefs filed in *Loper*—the petitioner’s merits brief and those of its supporting amici—forcefully articulate the concerns described in *supra* Part I.B about lawless, arbitrary executive branch authority. Loper’s brief decries “NMFS’ *overreaching* effort to regulate the herring industry into nonexistence” and argues that, “as damaging as *Chevron* is for the judiciary and Congress, the real loser is the citizenry.” And Loper’s brief frames *Chevron* as encouraging a regime where it is “impossible for Americans to . . . rely on any stable legal regime as the basis for their decisionmaking in many important contexts.”

One amicus brief argues that *Chevron* deference “encourage[s] executive branch enforcement agencies to actively work to ‘fill the gaps’ in laws wherever their unelected bureaucrats see fit by unilaterally creating new legal requirements outside the legislative process.” Another brief by the U.S. Chamber of Commerce decries an “unpredictable, unstable regulatory environment . . . [where] regulatory obligations [] turn on unstable agency statutory interpretations, . . . [at] times [change] without any prior notice at all [and only weak] after-the-fact adjudications.” And a brief filed by a group of state governments asserts that *Chevron* allows bureaucrats to “push expansive constructions of [] governing statutes that bind our citizens with ‘crushing’ criminal penalties and steep civil fines’ for even inadvertent regulatory violations.”

Many briefs also argue that *Chevron* presents serious separation of powers issues by forcing the judicial branch to abdicate interpretive authority to the executive branch.

---

65 *Id.* at 18, 38.
66 *Id.* at 39.
70 See, e.g., Loper Br. at 26 (“*Chevron* constitutes a grievous separation-of-powers violation.”); States Br. at 24 (“Anything less [than overruling *Chevron*] will deny the people of our States the relief they need and that our separation of powers promises.”); Brief of the Manhattan Institute and Professors of Law as Amicus Curiae in Support of Petitioners at 7, *Loper Bright Enters. v. Raimondo*, No. 22-451 (July 20, 2023) (“This dynamic is an affront to the separation of powers: the most politically difficult questions are precisely the ones that most need to be answered by the most politically accountable branch.”)
II. Popular Backlash against Arbitrary, Lawless Government Action in China

There are not many similarities between the U.S. and China these days, and certainly not many issues on which one might say that American and Chinese citizens are aligned. Former President Donald Trump’s aggressive rhetoric toward China and hawkish trade policy, among other developments, have moved “China, the US, and Asian countries [toward] a ‘security dilemma’ that no country rationally desires” and “arouse[d] greater suspicions about the US’s ‘ulterior motives’ toward China.” By almost any estimation, US-China relations remain close to an all-time low even under the Biden administration, as both countries turn to military strengthening amidst a seemingly intractable ideological divide. Yet, this Section seeks to extract a thread of consistency in citizen concerns about government overreach and arbitrary government power. As we have seen, these normative concerns undergird much of the backlash against Chevron and the push for the Supreme Court to scale back agency deference in the United States. And these forces are part of a broader movement that is concerned with government overreach—as one scholar wrote in 2017, “a resurgence of the antiregulatory and antigovernment forces that lost the battle of the New Deal.” What, then, of China?

A. Zero COVID

China’s response to the COVID-19 pandemic was unique and, in numerous ways, draconian. In incidents that were covered across the world, the Chinese government sealed its own citizens inside of neighborhoods and homes, shipped them in busses to cramped and run-down quarantine centers, separated families from one another and pets from owners, increased digital citizen surveillance to unprecedented levels, and often made it extraordinarily difficult to for residents in affected areas to obtain basic necessities. It is

no surprise, then, that China’s zero-COVID policies provoked strong, negative reactions among a large segment of the Chinese populace, especially as the containment efforts dragged on over multiple years. Scholars have noted that local discretion and autonomy was an ever-present and often necessary element of the Chinese government’s response to the pandemic. For example, one account observes that “evidence from Nancun gathered during the peak of China’s COVID-19 crisis from January to April 2020 shows that fragmented forms of policy discretion influence local disease control initiatives and emergency responses within China’s authoritarian system”—for example, local townships occasionally developed their own COVID-response policies somewhat on the fly in response to changing circumstances.75 Other researchers found that individual Chinese provinces had “significant autonomy to choose their own policies [which they] maintained at the re-opening stage.”76

The popular backlash against zero COVID was driven by an overriding concern about arbitrary, lawless enforcement of COVID restrictions by the “enforcers” of zero COVID, namely local government officials. As protests against zero COVID surged in late 2022, even the central government itself acknowledged that “[l]ocal governments should show more responsibility and follow national guidelines, [instead of following practices like] arbitrarily stopping schools and industry.”77 Another government official noted that “[i]mprecise, untargeted containment policies jeopardize people’s lives and livelihoods, . . . [which] is not aligned with national policies.”78 These complaints targeted two different categories of government abuse. First, officials who overzealously enforced COVID-related rules without making exceptions in special cases (adhering to the letter of the law even when that led to absurd and tragic results) became the target of popular opprobrium and even official sanction. For example, when a pregnant Xi’an woman entered labor but was denied entry to the local hospital because she offered proof of

75 Hong Gao, Adam Tyson, and Guangxin Cheng, Novel virus, novel response: Local discretion and responses to COVID-19 in Hebei Province, China, 9 ASIA PAC. POL’Y STUDIES 5-22 (2022), available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9011562/
a negative COVID test that was four hours too old, the relevant local officials were punished and the CCP issued a warning. Second, officials were frequently criticized for ordering or allowing enforcement of COVID restrictions in an arbitrary manner or inconsistent with existing government policies and regulations. For example, local government officials often gave “confused and even contradictory messaging”—such as when the Guangzhou provincial government released individuals from quarantine centers while also ordering all those without a local residence permit to leave the city immediately, requiring some to leave even without first returning to their homes. A bus carrying people to a COVID quarantine site in Guizhou province crashed at around 2:40 am local time in September 2022—killing 27—despite government transportation regulations that prohibited coaches from operating between 2:00 and 5:00 am. Moreover, Professor Shitong Qiao has detailed numerous instances where Chinese homeowners clashed with local government officials enforcing COVID restrictions and specifically argued that the bureaucrats had no legal basis to take certain actions (such as sealing homes or preventing individuals from leaving a certain area).

Although the popular protests against zero COVID that spread in late 2022 often used dramatic rhetoric, most Chinese people upset with zero-COVID abuses were almost certainly not asking for regime change or broader reforms (perhaps due in large part to the personal risk of advocating such changes explicitly) but merely for consistency and uniformity in how the zero-COVID policy was enforced on the ground. As one article

---

79 See Helen Davidson, China fires hospital officials after pregnant woman loses baby due to Covid lockdown rule, The Guardian (Jan. 6, 2022).
81 Yong Xiong, Nectar Gan, and Philip Wang, China’s quarantine bus crash kills 27 people, sparks anger against zero-Covid policy, CNN (Sep. 20, 2022).
82 Shitong Qiao, Cooperating to Resist: Society and State during China’s COVID Lockdowns, unpublished manuscript, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4575093, at 34-37 (2023). Professor Qiao’s work also illuminates how much of the Chinese government’s COVID policy was enacted without any clear basis in constitutional or statutory law. See id. at 28-34. Some local governments, in part specifically “to elude liabilities, . . . [even] refrained from producing written directives or official documents to validate [] lockdowns” or other zero-COVID measures.” Id. at 35.
83 See, e.g., Dake Kang and Huizhong Wu, Crowd angered by lockdowns calls for China’s Xi to step down, AP NEWS (Nov. 27, 2022).
84 See, e.g., Qiao, Cooperating to Resist, at 20-22, 28, 34-37 (arguing that much of the sustained resistance to zero COVID occurred among those with close connections to the CCP and the Chinese state who resisted in part by emphasizing the value of their cooperation).
summarizing rising resentment toward zero COVID noted, “[t]he fear of punishment [for failing to meet unachievably low case numbers] motivates local party chiefs to be overly strict; the harm it causes to civilians is a price they are all too willing to pay.”85 Professor Qiao similarly argues that “[a] hallmark of [] neighborhood resistance [to zero COVID] was homeowners . . . conveying] their intention was not to challenge the party-state or even the entire COVID control system, but merely the unjustified lockdown measures. . . [which] lacked a proper legal basis or [a foundation in] formal authority to enforce lockdowns.”86 The government understood the protests as such—even threatening to punish “local efforts [to control the spread of the virus that are] ‘inconsistent with national policies.’”87 In fact, a major ingredient of the Chinese government’s response to rising citizen opposition was to frame the worst abuses of zero COVID as the result of local discretion and thus deflect attention from the central government’s role—a response which, accompanied by the sudden ending of the entire zero-COVID policy in December 2022, seems to have successfully diffused citizen anger for the time being.

One can see echoes of Xi Jinping’s earlier crackdown on local government corruption in this saga and the central government’s effort to reign in local discretion:

Most famously, Xi’s anti-corruption campaign has shaken local bureaucracies to their core and led to paralysis. Local officials know that they are losing their formerly high levels of discretion. The newly formed National Supervisory Commission expands the jurisdiction of anti-corruption efforts and institutionalises the anti-corruption campaign into state governance. This increasingly centralised authority will only lead to stricter administrative control and oversight of local officials and a higher price for noncompliance.88

86 Qiao, Cooperating to Resist, manuscript at 28.
88 William Weightman, Xi cracks down on local governments’ compliance and creativity, EAST ASIA FORUM (June 14, 2018), available at
Other scholars observed, of the earlier corruption crackdown, that it reflected a desire “to make anti-corruption investigations more frequent, predictable, and procedurally transparent.” Unpredictability and opacity, however, returned during the COVID pandemic—often driven by necessity when officials were required to meet strict benchmarks while responding to an acute, evolving public health threat. And the results were not positive: local officials were frequently criticized for abusing their power in a lawless manner. It is perhaps not a far cry, then, from a Massachusetts fisherman suddenly saddled with a hefty bill for the salary of an NMFS observer to a Chinese neighborhood leader who resists COVID lockdown measures arguing that they are beyond the local government’s authority. In both cases, the target of resistance is an arbitrary, unpredictable exercise of state power not explicitly authorized by any legislative act.

**B. Property Law and Expropriation**

Another example of popular concern about arbitrary, lawless local government action in China relates to the expropriation of rural land. China’s Constitution provides that “[t]he State may, in the public interest and in accordance with law, expropriate or requisition land for its use and make compensation for the land expropriated or requisitioned.” Yet, by all accounts, the practice of land expropriation at the local level—especially over the past two decades—has been highly arbitrary and local officials have at times taken full advantage of the flexibility of the phrase “public interest.” For example, one Chengdu businessman who had his business property seized for the construction of high-rise apartment buildings petitioned the government in 2010 “challenging the authority of local governments to heat up the real estate market through the arbitrary seizure and resale of


91 See, e.g., Valerie J. Washburn, *Regular Takings or Regulatory Takings?: Land Expropriation in Rural China*, 20 PAC. RIM L & POL’Y J. 71, 81 (2011) (“Local governments quite routinely expropriate collectively-owned land and then promptly transfer use rights in that land to private developers or joint private-public for-profit ventures.”).
properties.”

“Driven by what is perhaps the fastest rate of urbanization in history, Chinese municipal governments have been annexing surrounding farmland at an accelerating pace over the last three decades,” often doing so by taking advantage of “a legal structure that does not adequately protect farmers whose land is taken.”

A large part of the problem is that—despite the existence of strict constitutional and legal processes and approval requirements for the use of eminent domain power, “the sheer size of the country and its numerous subnational units make it costly, if not impossible, for the central authority to monitor local governments effectively.”

And local governments have more than ample financial incentive to expropriate property by expansively interpreting or even disregarding the relevant controls—in 2009, for example, “about 50 percent of local government revenues came from sales of land use rights to developers.”

Rather than protecting private rights, “[I]local urban-demolition regulations passed by municipal governments thus tend to lean toward the interests of parties requesting demolition and relocation permits, since the government obtains financial gains from urban redevelopment.”

As with the subsequent zero-COVID protests, the incentives favor arbitrary and uneven application of the eminent domain power and Chinese citizen resistance to local government seizure of private land often focuses on that aspect. Protests are often driven by concerns about arbitrary and inconsistent (i.e., lawless) local government action viewed as contrary to the Constitution and the principle that land should be taken from private parties only when that is in the public interest and with appropriate compensation.

As one commentator noted, “the ambiguity [in] . . . Chinese regulations provides fertile ground for corrupt officials and real estate developers to expropriate land in the name of public interest without the need to compensate people on just terms.”

A high profile 2010 self-immolation

---


95 Deng, Dousing the Flames, at 588.

96 Id. at 600.

97 Peter Yuan Cai, In the shadow of Pandora: China’s expropriation law, EAST ASIA
protest by a Chengdu woman whose business was slated for demolition due to planned urban construction was triggered by “great anger at the raging real estate game in which the party plays such a central role”; that incident led to certain changes in the regulations governing expropriation after a group of concerned Chinese law professors wrote to the central government. And scholars generally agree that part of the solution to arbitrary rural land seizures is that “the government’s discretion in altering zoning plans and authorizing takings must be restrained.” Moreover, as with the zero-COVID protests, popular backlash against rural land expropriation in China has been intense and long-lasting but, as a general matter, has not evolved into large-scale demands for regime change of the type seen in Tiananmen Square in 1989. Rather, the protests are generally localized and do not lead to widespread social disruption even within specific cities or areas; as a recent empirical study found, “the adverse effects [of perceived expropriation abuses] do not persist over many years and do not spill over to households whose land is not expropriated.”

III. Sino-American Parallels and the Path Forward for China

American backlash against deferential judicial treatment of agency actions and Chinese backlash against arbitrary government abuses both emphasize that the government is taking liberties outside of clearly defined statutory authority in a way that negatively impacts ordinary citizens and is insulated from meaningful review and remedy. This Section will attempt to use the ongoing American debate about Chevron deference to identify potential solutions to China’s crisis of arbitrary, lawless local government abuses. Some scholars who focus on China have identified—and voiced support for—a greater role for Chinese courts in reining in these excesses. At the same time, the Chinese government under Xi Jinping has staunchly


99 Liu, Informal Rules, at 27.

rejected Western-style separation of powers, limited government, and judicial independence. This Section will argue that any attempts to use the Chinese courts to meaningfully address arbitrary local government abuses through ordinary judicial review are likely dead on arrival; due to the lack of judicial independence in China, such efforts will merely lead to rubberstamping of government action (potentially in an even more deferential form than *Chevron*), and Chinese citizens will continue to raise the same types of concerns as *Chevron*’s detractors in the U.S. (and perhaps even louder, knowing that there is—in theory—a mechanism that *should* address their concerns but is not functioning as intended). Finally, drawing on the ways in which U.S. courts have chipped away at *Chevron* without fully repudiating its framework, this Section proposes two potential avenues for even the highly dependent Chinese judiciary to address local government overreach.

### A. The Chinese Judiciary will be Highly Deferential in Administrative Law Cases

Some legal scholars of China have suggested that the optimal solution for arbitrary, lawless local government excesses—such as property expropriation by corrupt and self-motivated local bureaucrats, for example, and perhaps similar abuses such as those that occurred during the zero-COVID era—is to strengthen the Chinese judiciary and provide more “teeth” for judicial review of administrative actions\(^{101}\) (or, to provide for substantive judicial review of administrative rules and enforcement actions in the first place\(^ {102}\)). For

101 The entire concept of judicial review of administrative rules and actions in China dates only to the 1989 Administrative Litigation Law, which “gave the courts very limited jurisdiction to review administrative activity,” at least until it was significantly expanded in 2014. Zhang and Ginsburg, *China’s Turn Toward Law*, at 337-39. The 2014 amendments made four new categories of government action subject to judicial review: “administrative decisions concerning ownership or usage rights over land and some other natural resources; any exercise of eminent domain; any interference by a governmental entity on agricultural land use rights; and any issuance of compensation following an act of eminent domain.” *Id.* at 339. There is no possibility of *constitutional* challenges to government action in China, as such a concept does not exist in the Chinese legal system. *See, e.g.*, Shiling Xiao and Yang Lin, *Judicial Review of Administrative Rules in China: Incremental Expansion of Judicial Power*, 17 J. of Comp. L. (2022), manuscript at 2-3.

102 “[L]oopholes or shortcomings” that prevent judicial review entirely in some cases might be closed; for example, by adding specific categories of cases to the approved list in the ALL. RANDALL PEERENBOOM, ASIAN DISCOURSES OF LAW 113 (2004). *See also* Tom Ginsburg, “Administrative Law and Judicial Control of Agents in Authoritarian Regimes,” in RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES (Tom Ginsburg and Tamir Moustafa, eds.), at 2 (2008), *available at*
example, Professors Mao and Qiao argue that “it is politically safe and practically feasible for the Chinese courts to review whether local governments have exercised their eminent domain power in accordance with the procedures laid out in national laws . . . [and that] courts are not challenging the political authority, but rather helping upper-level governments to monitor lower-level governments.”

Professor Tom Ginsburg asserts that, even in authoritarian states, “administrative litigation and procedural rules will tend to constrain the government . . . [because b]ureaucracies will become more ‘rationalized’ in response to the threat of exposure of errors.” In a similar vein, Professor Chenglin Liu argues in favor of constrained “judicial independence, which is essential for limiting the opportunities for government to abuse its powers.”

The challenge, of course, is how to meaningfully empower Chinese courts to rein in government discretion as those courts remain weak and subservient within China’s authoritarian system of government. The Chinese government consistently rejects outright the idea of judicial independence, and China currently ranks 97th out of 142 countries on the World Justice Project’s “Rule of Law Index.” Rather than serving as an effective counter-weight to the central government, the role of the Chinese judiciary is primarily “to assist the state in carrying out its political agenda by legalizing state policies and volitions.” As one scholar has noted, “the entire modern
state apparatus, including the judiciary, consists of inventions created by the
governing political parties on the basis of their political ideals, policies, and
organizational structures,”¹⁰⁹ and ultimately all judicial officials in China
answer to the party leadership. Moreover, “[e]xternal interference with the
adjudicatory process is the norm, rather than the exception.”¹¹⁰ “[L]ocal
people’s congresses select judges and local governments [and] fund the
courts, including not only judicial salaries but more discretionary items such
as housing and other welfare benefits,”¹¹¹ and Xi Jinping’s government has
recently mandated that “all judges must receive political education and risk
losing their jobs if accused of being disloyal and dishonest to the Party.”¹¹²
Efforts to reform the Chinese judiciary to marginally increase independence
(with official support from the CCP) have been widely criticized as
ineffectual—in large part because any true movement toward judicial
independence would require loosening central government control over the
judiciary in the first place, something the CCP remains unwilling to do.¹¹³

The American experience with *Chevron*—and, specifically, the recent
push to overrule that framework—suggests that highly deferential
approaches to judicial review of government actions are unlikely to address
underlying concerns about the arbitrary, lawless exercise of power. Indeed,
judicial review of government rules and practices in China is likely to be even
more deferential than *Chevron* due to the party’s top-down control of the

¹¹⁰ Peter H. Chan, *An Uphill Battle: How China’s obsession with social stability is
blocking judicial reform*, 100 JUDICATURE INT’L 3 (2016), available at
https://judicature.duke.edu/articles/an-uphill-battle-how-chinas-obsession-with-social-
stability-is-blocking-judicial-reform/

¹¹¹ PEERENBOOM, ASIAN DISCOURSES OF LAW, at 112; see also id. (observing that “Party
organs continue to play a role in setting general policies for the courts”).
¹¹² Sitao Li and Sida Liu, *The irony and efficacy of China’s judicial reforms*, EAST ASIA
FORUM (Nov. 17, 2021), available at https://www.eastasiaforum.org/2021/11/17/the-irony-
and-efficacy-of-chinas-judicial-reforms/

¹¹³ Meng Ye, *How the CCP is stalling China’s legal system*, EAST ASIA FORUM (June
24, 2022), available at https://www.eastasiaforum.org/2022/06/24/how-the-ccp-is-stalling-
chinas-legal-system/ (noting that such reforms have not meaningfully increased the volume
of administrative law litigation brought by private plaintiffs; observing that plaintiff success
rates as a whole remain very low in China; and lamenting that “[q]uestions remain as to how
conducive the CCP’s intensifying supremacy is to achieving many of its own policy goals”).
Data and observations from China largely bear this out. For example, Professors Shiling Xiao and Yang Lin have studied the judicial review of administrative rules in China with disheartening findings. Xiao and Lin conclude that—while the judicial ability to review administrative actions in the first instance has expanded in China—data from 2014-2021 “reveal[] the timid and deferential attitude of courts towards reviewing administrative rules.” Rather than conducting any kind of probing review, Xiao and Lin found that Chinese courts “dismiss requests for reviewing administrative rules in a large majority of cases, . . . seldom closely and effectively scrutinize the substantive content and merits, . . . [and] consult with the executive authorities and defer to their opinion during administrative litigation.”

Another recent paper notes the lack of data and the absence of a “normative framework for conceptualising what forms enhanced judicial power should take”—suggesting that there is no clear sign that judicial review of administrative actions is accomplishing its objective. Finally, Professors Mao and Qiao provide some reason for optimism in the property law and expropriation context, finding that—in a data set of 586 judicial decisions regarding a local government’s use of eminent domain power from 2014-2015—the plaintiffs succeeded in 71.6% of cases and that percentage was even higher when the plaintiffs raised procedural claims.

In sum, however, these findings suggest that turning solely to run-of-the-mill administrative law in China to address local government abuses will not succeed. Courts are likely to be highly deferential and will continue to coordinate with executive authorities. Even taking the Mao and Qiao findings and comparing to the Chevron context, 71% is (interestingly) nearly the exact percentage that U.S. administrative law scholars have pinpointed as the rate at which federal agency interpretations are upheld in federal courts.

---

114 PEERENBOOM, ASIAN DISCOURSES OF LAW, at 128-29 (noting that PRC courts “have shown considerable deference to administrative agencies, for example by interpreting very narrowly the abuse of authority standard for quashing administrative decisions. In particular, they have been reluctant to interpret abuse of authority to include a concept of fundamental rights, as have courts in some Western liberal democracies”).

115 Xiao and Lin, Judicial Review of Administrative Rules in China (SSRN manuscript).

116 Id. at 4.

117 Id. Specifically, Xiao and Lin found that courts rejected petitions challenging the propriety of certain documents promulgated by regulatory agencies in over 90% of cases. Id. at 19.


120 See Kent Barnett & Christopher J. Walker, Chevron in the Circuit Courts, 116 MICH. L. REV. 1, 1, 30-31 (2017) (noting that “circuit courts overall upheld 71% of [agency]
That should tell us something. As to the suggestion of addressing local government abuses through administrative litigation, encouraging and expanding judicial review as a general matter (without suggesting specific ways courts might eschew a *Chevron*-esque level of deference, or an even more deferential review, in certain contexts) may be a road to nowhere because it is likely to rubber stamp a high percentage of government actions and does not actually address popular concerns about bureaucrats operating outside the law. In fact, to the extent these suggestions present false hope of meaningful judicial review, they may by themselves do more harm than good.

**B. Empowering a Dependent Judiciary**

With simple administrative law solutions and meaningful judicial independence largely off the table—at least in Xi Jinping’s China—how might it be possible to truly address the emerging Chinese popular backlash against arbitrary local government abuses? Again, the American debate over *Chevron* may have something to teach us. Recall that American courts have chipped away at *Chevron* even as the framework remains good law, often in creative ways that rely increasingly on textual analysis of the underlying, authorizing statute. There may similarly be inventive ways for Chinese courts to act as a counterbalance to government authority and help to rein in local bureaucratic excesses, even in a fundamentally weak and subordinated role within the government structure. This Section will suggest interpretations” with a “77.4% agency-win rate” when *Chevron* was applied, from 2003-2013); Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, at 2-6, ADMIN L. REV. (2010) (summarizing different studies that found affirmance rates ranging from 64 to 81.3% when a court applied *Chevron*)

---

121 See Xi Jinping, *Strengthen the Party’s leadership in comprehensively governing the country according to law* [加强党对全面依法治国的领导], QIUSHI JOURNAL [求是] (Feb. 15, 2019), available at http://www.qstheory.cn/dukan/qs/2019-02/15/c_1124114454.htm (“We must never follow the path of Western ‘constitutionalism,’ ‘separation of powers,’ or ‘judicial independence’. . . .”).

122 The similarity between the underlying concerns with zero-COVID enforcement and rural property expropriation suggest that these issues are ongoing and almost certain to flare up with increasing intensity in the future if not meaningfully addressed. One possible way these concerns might reemerge is with regard to China’s real estate crisis, which has prompted protests in recent months including by homebuyers and unpaid construction workers. See, e.g., Kevin Slaten and Ming-tse Hung, *China's property crisis is stirring protests across the country*, NIKKEI ASIA (Nov. 20, 2023), available at https://asia.nikkei.com/Opinion/China-s-property-crisis-is-stirring-protests-across-the-country.

123 See supra Part I.C.
two possible routes\textsuperscript{124} that seem promising and may warrant future exploration: the use of judicial suggestions and probing textual analysis of positive law (which the CCP is currently enacting on a broader scale).

1. Judicial Suggestions

First, one possibility is that Chinese judges might make broader pronouncements in administrative law cases that are not necessarily limited to the facts of the case and could influence the decision calculus of local bureaucrats ex ante (even if those pronouncements lack binding legal effect). Professors Minhao Chen and Zhiyu Lin detail in a recent article the use of “judicial suggestions,” or “official documents issued by Chinese courts . . . [to] bring social problems to the attention of relevant organizations or individuals and urge the recipients to take certain measures.”\textsuperscript{125} As Chen and Lin describe, “[u]nlike judgments, judicial suggestions can transcend the legal questions presented for decisions and [raise general, high-level concerns] to any private actor or public entity, including non-litigants.”\textsuperscript{126} They further describe how these suggestions might be used in administrative law cases:

Suggestions may be directed to the defendant agency before trial to request a timely correction of its erroneous actions, during trial to urge the appearance of agency leaders in hearings, and after trial to ensure the performance of remedies and to advise on future actions and activities.\textsuperscript{127}

The use of judicial suggestions in China is on the rise and the Supreme People’s Court has reiterated their importance and encouraged judges to issue suggestions.\textsuperscript{128}

\textsuperscript{124} These suggestions are not offered to the exclusion of other possibilities, including other ways in which China might heed the lessons of the current U.S. debate over \textit{Chevron}. For example, just as some U.S. courts have declined to apply a highly deferential review framework when an agency rule imposes criminal penalties, see, e.g., Cargill v. Garland, 57 F.4th 447, 468 (5th Cir. 2023) (“\textit{Chevron} does not apply here because the statutory language at issue implicates criminal penalties”), Chinese courts might apply a more probing review of government rules or actions that carry the potential for criminal sanction.


\textsuperscript{126} \textit{Id.}

\textsuperscript{127} \textit{Id.}

\textsuperscript{128} \textit{Id.} at 230-32.
One might imagine a Chinese court using a judicial suggestion to warn an administrative agency, local government, or similar actor about objectionable behavior while officially toeing the party line and rejecting a legal challenge. Indeed, as Chen and Lin note, “[i]n administrative law cases, . . . courts may issue judicial suggestions instead of ruling against defendant administrative agencies, even when their actions are in violation of law”—thus saving face while expressing general disapproval of the government’s actions.129 That would be of little help to the hapless plaintiff in a specific case, of course, but it might well serve to discourage government overreach prospectively.130 In this way, China’s “repudiation of the separation of powers principle also makes it possible for socialist courts to take on extrajudicial functions forbidden to their liberal democratic cousins and, perhaps, exercise influence in salutary ways” without formally challenging the government by issuing a binding decision voiding government action.131

Consistent with how some American courts have harnessed the major questions doctrine to undermine *Chevron*,132 these judicial suggestions might be justified in part by the importance of the issues at stake (the ability of citizens to leave their homes, run their businesses, and so on). In other words, the consequences are of such importance that reflexive approval of local government action—at least in future cases—is unwarranted. Here, a potential friendly amendment to Chen and Lin’s trenchant observations about the use of judicial suggestions in Chinese administrative law cases is that suggestions should use the policy importance of the issues merely to undergird the court’s *legal* analysis and conclusions—rather than blurring legal declarations with policy recommendations and value judgments. For example, a court’s suggestion that a certain type of COVID quarantine order not authorized by law (especially when a specific statute or rule exists on that subject matter, as discussed further below), accompanied by a recognition of how important the issues at stake are to Chinese citizens, is more likely to actually influence government action than a suggestion phrased solely in policy terms. This proposal may lead to a level of judicial independence that the current CCP government finds objectionable. But, to be clear, judicial

---

129 *Id.* at 240.

130 As one local Chinese judge has noted, the judicial suggestion process allows judges to “break out of the conventional role of the judiciary, which solely provides ‘ex post remedies’ and . . . identify and plug loopholes, and strive to nip conflicts in the bud.” Chuan Qin, *Chongfen Fahui Sifa Jianyi Canyu Shehui Guanli Chuangxin de Zuoyong* [Fully Realize the Functions of Judicial Suggestions in Participating in Social Administration and Innovations], *Renmin Fayuan Bao* [People’s Court Daily] (Dec. 25, 2011,) available at http://rmfyb.chinacourt.org/paper/html/2011-12/25/content_38090.htm.

131 *Id.* at 251.

132 See *supra* Part I.C.
suggestions have strong historical roots in China and it is hard to believe that a non-binding advisory opinion would itself be considered an existential threat to the central government’s control.

2. Textualism

Second, Chinese judges might become textualists in some instances—at least, if they are not already. Professor Jerome Cohen observed that, as recently as the late 1980s, “China displayed virtually none of the indicia of a formal legal system[; i]ts Constitution was merely an unenforceable collection of political slogans and general principle[s; and the country] had few useful laws.” In at least some ways, these issues have persisted with only marginal improvements to the present day. A lack of positive law, of course, poses a special problem for judges tasked with evaluating whether administrative rules, promulgations and actions are consistent with the law: what would those judges look to in determining consistency? However, the CCP under Xi Jinping has recent begun a concerted effort to codify what


135 PEERENBOOM, *ASIAN DISCOURSES OF LAW*, at 112 (“The quality of much legislation remains low, in part due to the lack of practical experience and competence of drafters. Laws and regulations are subject to frequent change. Even more worrisome, there is a shockingly high incidence of inconsistency between lower and superior legislation.”); see also id. at 113 (observing that Chinese courts’ “inability to overturn abstract acts (generally applicable laws and regulations) that are inconsistent with higher legislation exacerbate[s] . . . legislative inconsistency problems”).

136 This harkens back to the scholarly discussion of the inherent conflict between textualism and deference to executive agencies. See supra Part I.C; see also Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 366 (1994) (characterizing textualism “as a doctrine of judicial restraint, reducing the range of possible statutory meanings, and thus reducing the occasions on which reference to agency views is appropriate”); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 (1989) (“One who finds more often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds less often that the triggering requirement for *Chevron* deference exists.”). In other words, to the extent *Chevron* required, or requires, elevating agency intent over the text of authorizing legislation, it may essentially seek to place American judges in the world Chinese judges frequently occupied before Xi’s current codification push—one where the agency’s purposes govern and legislative text is not highly relevant (or, in the Chinese case, nonexistent).
were once slogans and informal pronouncements into legislation. For example, “[u]nder Xi, the legislature has issued a flurry of new laws governing issues like internet controls, espionage and even how to sing the Chinese national anthem.”\(^{137}\) The Patriotic Education Law, enacted in October 2023, is another example which controversially mandates “patriotic” classes and activities within the Chinese educational system and includes special requirements for citizens of Hong Kong and Macau.\(^{138}\) These laws, which China watchers have framed as an effort by the CCP to “centralize power in order to exert that power over China’s unruly bureaucracy,” do so “by codifying previously informal restrictions, or campaigns” into positive law.\(^{139}\)

While this effort may seem like a purely selfish move on the part of the central government, it also (perhaps unwittingly) opens the door for a more prominent judicial role in adjudicating administrative law claims. Courts that adjudicated such disputes with little textual guidance or positive law were, perhaps understandably, highly likely to defer to the government and affirm government actions. When the only material with which to gauge the bureaucracy’s compliance with the law is a set of informal slogans and campaigns, there is not much basis to find that a local government has violated “legal principles” or acted outside of “the law.” But, when relevant principles, ideas, and concepts are distilled into formal legislation—as is increasingly occurring in modern-day China—there is a much stronger basis for courts to find administrative rules and actions inconsistent with those words and, potentially, to do so without clearly asserting their own independence in ways that would disturb authoritarian leaders.\(^{140}\) Slogans and informal pronouncements might mean different things to different


\(^{139}\) Shephard, supra note ___ (China’s Xi set to codify legal clout, anti-graft campaign at congress).

\(^{140}\) Those leaders, after all, chose to pass the relevant legislation and determined what it would say.
people, and they might well be flexible enough to stack the deck strongly in favor of the government in many administrative law cases and be subject to change at the whim of CCP leaders. On the other hand, when it comes to legislation, a textualist believes that “[t]he text is the law, and it is the text that must be observed.” 141 The proliferation of formal legislation in China, then, potentially provides another way for Chinese courts to take a stronger stance against arbitrary actions by local bureaucrats even within the current system.

Conclusion

[TO COME]

* * *