LOPER BRIGHT AS JURISPRUDENCE: INSTITUTIONAL CHOICE AND THE EXPRESSIVE VALUE OF THE LAW

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Loper Bright *is not a judicial power grab, nor is it a necessary corrective to an administrative state run amok. It is an expressive act—an attempt to make a value statement rather than an attempt to destroy the administrative state. The Supreme Court felt the need to state clearly that even in cases involving review of an agency action, courts must have the final word on the "interpretation" of "law." The opinion can thus best be seen as a self-conscious assertion of the Court's independence from the President and executive branch more generally—a Declaration of Judicial Independence, so to speak.*

Doctrinally, the Court merely provided an analytically cleaner structure into which the same considerations that courts used under Chevron *can play out. We can see this in at least four features of the majority opinion: (1) the opinion's purely deductive structure; (2) the absence of any criticism, or even mention, of specific agency interpretations or cases wrongly decided under* Chevron*; (3) the obsession over* Chevron *footnote 11, which told courts to defer to an agency's interpretation even when the court would have interpreted the statute differently; and (4) the explicit acknowledgment that Congress at times delegates "discretionary authority" to agencies and that courts may continue to give agencies* Skidmore *"respect."*

Stepping outside of the opinion, we can also see that Loper Bright*'s changes are likely to be minor by looking at the broader institutional environment in which litigated challenges to agency actions play out. Key is that* Loper Bright *does not change anything about the broader underlying factors that shape challenges to agency actions. The opinion does not affect the comparative competence of courts and agencies, an important part of how doctrine played out under* Chevron; *it also*

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leaves open the role of courts in the many cases involving so-called "mixed questions of law and fact," many of which implicate agency expertise. Nor does the opinion affect the comparative capacity of agencies and courts—or of the litigating bar. These institutional factors are likely to dampen the overall impact Loper Bright *will have on the aggregate scope of decisions agencies can make.* Loper Bright *is completely consistent with a continued robust administrative state.*

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INTRODUCTION

The core of *Loper Bright*[1] is to serve the expressive function of the law: to express simply and clearly that courts must have the final word on the "interpretation" of "law" and must be independent when they do so.[2] While many have lamented the case as a judicial power grab[3] or lauded it as a necessary

1. Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024); *see also id.* at 413 (Thomas, J., concurring).

2. The use of inverted commas here and throughout when referencing "interpretation" and "law" is intentional. As we will see, the very question of what constitutes the interpretation of law is one the Court skirts. *See infra* Subsection III.A.2.

3. *See Loper Bright*, 603 U.S. at 450 (Kagan, J., dissenting) ("In one fell swoop, the majority today gives itself exclusive power over every open issue—no matter how expertise-driven or policy-laden—involving the meaning of regulatory law."). For commentary viewing the case this way, see, for example, Rachel Barkow, *The Imperial Court: SCOTUS's Decision to Overturn* Chevron *Amounts to a Massive Power Grab*, N.Y. MAG. (June 29, 2024), https://nymag.com/intelligencer/article/supreme-courts-overturning-of-chevron-is-massive-power-grab.html [https://perma.cc/XUP4-HZQL] (referring to *Loper Bright* as "nothing short of a revolution in the allocation of authority between unelected federal judges and politically accountable agency officials"); Erwin Chemerinsky, *The Supreme Court's Purely Ideological Reasoning Will Change Our Lives*, L.A. TIMES: OP. (June 28, 2024, at 15:50 ET), https://www.latimes.com/opinion/story/2024-06-28/supreme-court-homelessness-chevron-grants-pass [https://perma.cc/6NFU-XTS7] ("The decision

represents a huge shift in power from federal agencies to the courts." and "Agency rules to protect the public's health and safety are much more likely to be overturned."); Abbe Gluck, *Overruling* Chevron *Without a Coherent Theory of Statutory Interpretation and the Court-Congress Relationship*, 62 HARV. J. ON LEGIS. 275, 276 (2025) ("[I]n overruling *Chevron*, *Loper Bright* transfers even more interpretive authority to courts . . . ."); *id.* at 278 (referring to the case as "a judicial power grab"); Ian Millhiser, *The Supreme Court Just Made a Massive Power Grab It Will Come to Regret*, VOX (June 28, 2024, at 3:20 ET), https://www.vox.com/scotus/357900/supreme-court-loper-bright-raimondo-chevron-powergrab [https://perma.cc/B4AF-MRLP] (referring to the decision as "an earthquake that reorders US law" and that decision "transfers a simply astonishing amount of authority away from democratically accountable officials and to a Republican judiciary"); Jasjit K. Mundh, *With* Loper Bright*, the Supreme Court Guts the Administrative State and Shifts Power to the Courts*, ABA J. (July 1, 2024), https://www.americanbar.org/groups/labor_law/publications/labor_employment_law_news/summer-issue-2024/loper-bright-supreme-court-guts-administrative-state-shifts-power-to-courts/ [https://perma.cc/69LV-3MRH] (referring to *Loper Bright* as "shifting power from administrative agencies to the courts in what may be the biggest power grab since *Marbury v. Madison*"); Elie Mystal, *We Just Witnessed the Biggest Supreme Court Power Grab Since 1803*, THE NATION (June 28, 2024), https://www.thenation.com/article/society/chevron-deference-supreme-court-power-grab/ [https://perma.cc/44DQ-RJSG] (referring to *Loper Bright* as "the biggest judicial power grab since 1803" by giving the Court "nearly unlimited power over the administrative state and its regulatory agencies"); Mark Nevitt, *Analysis: Nevitt on* Loper Bright Enterprises, EMORY L. NEWS CTR. (July 30, 2024), https://law.emory.edu/news-and-events/releases/2024/07/2024-07-30-nevitt-loper-bright-scotus.html [https://perma.cc/Y33Z-XSJC] ("The judiciary, with federal courts now poised to have even greater authority over agency interpretation and decision-making . . . *Loper Bright* ensures that the court will play an even more important role in shaping environmental law for the foreseeable future."); K. Sabeel Rahman, *After* Chevron*: Political Economy and the Future of the Administrative State*, LPE PROJECT (July 23, 2024), https://lpeproject.org/blog/after-chevron-political-economy-and-the-future-of-the-administrative-state/ [https://perma.cc/DCE2-HYWT] (including *Loper Bright* in a list of decisions that "are fundamentally a judicial power grab"); Mark Joseph Stern, *Elena Kagan Is Horrified by What the Supreme Court Just Did. You Should Be Too.*, SLATE (June 28, 2024, 12:47 PM), https://slate.com/news-and-politics/2024/06/elena-kagan-dissent-supreme-court-john-roberts-chevron-disaster.html [https://perma.cc/DD2K-JBBV] (arguing that *Loper Bright* "fundamentally altered the way that our federal government functions . . . , transferring an almost unimaginable amount of power from the executive branch to the federal judiciary"); *Evaluating the Supreme Court: Harvard Law Faculty Weigh in on 2023-2024 SCOTUS Term*, *Statement of Laurence Tribe '66, Carl M. Loeb University Professor of Constitutional Law Emeritus*, HARV. L. TODAY (July 2, 2024), https://hls.harvard.edu/today/evaluating-the-supreme-court-harvard-law-faculty-weigh-in-on-2023-scotus-term/ [https://perma.cc/2BWT-LZWQ] (arguing that *Loper Bright* "essentially deconstructed the administrative state by overruling the agency deference doctrine known as *Chevron*, thereby shifting government power wholesale from the agencies in the executive branch to the federal judiciary . . . "); Joyce Vance, *Why You Should Be Concerned About* Loper Bright, CIV. DISCOURSE WITH JOYCE VANCE (June 29, 2024), https://joycevance.substack.com/p/why-you-should-be-concerned-about [https://perma.cc/MAE4-ADKC] ("Cases like *Loper Bright* dramatically reshape the balance of power between the three branches of government, knocking the checks and balances envisioned by the Founding Fathers off kilter."); *cf., e.g.*, Kate Shaw, *The Imperial Supreme Court*, N.Y. TIMES (June 29, 2024), https://www.nytimes.com/2024/06/29/opinion/supreme-court-chevron-loper.html [https://perma.cc/3QJC-NP39] (arguing that the decision "has the potential to fundamentally transform major aspects of the health, safety and well-being of most Americans"). To be clear, I am *not* making a claim about any other

corrective to a bloated administrative state,[4] a close look at the case and the broader institutional environment shows that the Supreme Court's doctrinal change is unlikely to affect—and is certainly not likely to significantly undermine—the administrative state or the relationship between courts and agencies.[5]

Supreme Court case, nor am I making a claim about the Court's broader trend in administrative law jurisprudence.

4. *See, e.g.*, Randolph May, Chevron*'s Demise Curbs Agency Power, Boosts Congress*, REALCLEAR MKTS. (July 2, 2024), https://www.realclearmarkets.com/articles/2024/07/02/chevrons_demise_curbs_agency_popow_boosts_congresss_1041679.html [https://perma.cc/26S5-UB2M] ("*Loper Bright* . . . should help check the ever-present bureaucratic imperative to expand federal agency power"); Craig Orji & Jason Hayes, *Why All the Hysteria over Supreme Court's* Loper Bright *Ruling?*, MACKINAC CTR. FOR PUB. POL'Y (July 19, 2024), https://www.mackinac.org/blog/2024/why-all-the-hysteria-over-supreme-courts-loper-bright-ruling [https://perma.cc/92KB-ZEJL]; Elon Musk & Vivek Ramaswamy, *Elon Musk and Vivek Ramaswamy: The DOGE Plan to Reform Government*, WSJ: OP. (Nov. 20, 2024, at 12:33 ET), https://www.wsj.com/opinion/musk-and-ramaswamy-the-doge-plan-to-reform-government-supreme-court-guidance-end-executive-power-grab-fa51c020 [https://perma.cc/E7HM-Y236] (arguing that together with *West Virginia v. EPA*, *Loper Bright* "suggest[s] that a plethora of current federal regulations exceed the authority Congress has granted under the law"). For an exhaustive list of legal commentary in the first month after the decision, see Cary Coglianese & Daniel E. Walters, *The Great Unsettling: Administrative Governance After* Loper Bright, 77 ADMIN. L. REV. 1, 39–46, 54–64 (2025).

5. *See* Peter Van Doren, *The Game Continues*, 47 REG. 30, 32 (2024) (arguing that in the broader determination of administrative policymaking, "neither *Chevron* nor its repeal is that important"); Adrian Vermeule, *The Old Regime and the* Loper Bright *"Revolution"*, 2024 SUP. CT. REV. 235, 251 (2024) ("I suspect that there is less to *Loper Bright* than meets the eye. Even after *Loper Bright* there is a rather large domain in which courts that would have deferred under *Chevron* can still defer, just with a different legal framework."); Ronald Levin, *The Real Significance of the Supreme Court's '*Chevron *Deference' Ruling*, CNN OP. (July 2, 2024, at 13:50 ET), https://www.cnn.com/2024/07/02/opinions/supreme-court-chevron-deference-levin/index.html [https://perma.cc/QK79-VNQX] ("[T]he significance of the decision in *Loper Bright* should not be overstated. Judicial review standards have always embodied flexibility, and future judges will have a fair amount of latitude to apply judicial deference concepts as they see fit, just as judges have done in the past."); Nicholas Bednar, Chevron *on the Eve of* Loper Bright, 34 WIDENER COMMONWEALTH L. REV. 1, 3 (2024) ("How much change will *Loper Bright* bring to judicial review of agency interpretations of law? Perhaps not much."); Jack M. Beermann, Chevron *Deference Is Dead, Long Live Deference*, 2024 CATO SUP. CT. REV. 31, 32 (2024) ("The demise of *Chevron* deference standing alone may turn out to be much less important for the future of administrative law and agency regulation than many believe."); Victoria F. Nourse, Loper Bright *in a Larger Interpretive Perspective: Is This Justice Scalia's Court Anymore?*, 31 GEO. MASON L. REV. 601, 618 (2024); Jonathan Adler, *From "Deference" to "Respect"—The Real Import of* Loper Bright, VOLOKH CONSPIRACY (July 3, 2024, at 12:36 ET), https://reason.com/volokh/2024/07/03/from-deference-to-respect-the-real-import-of-loper-bright/ [https://perma.cc/D63Q-9NLD] ("[C]ount me among those who think the effects of the decision will be more modest than some portend."); Ben Merriman, *Overturning* Chevron *Won't Change Much—And What Was So Great About* Chevron*, Anyway?*, 57 ADMIN. & SOC. 859, 860 (2025) ("These effects may be surprisingly modest. Most administrative action elicits no litigation. Most challenged action deferred to under *Chevron* would also withstand judicial review under the somewhat less permissive standards left in place, and appellate judges likely have little inclination to make new forays into the technical domains of agency

What do I mean by the "expressive function of the law"? I mean that at times, the function of law is to make value statements rather than control behavior directly.[6] *Loper Bright* articulates a principle that the Court believes in—and wants its many audiences to believe in—but will likely not affect the behavior of potentially affected parties directly, whether that be the public or (more plausibly) lower courts, agencies, or Congress. To be sure, I am not denying that *Loper Bright* could have *some* effect on behavior—more on that below—but it might not, and to the extent that it does, the direct impact might well be insignificant.[7] Importantly, if the effect turns out to be insignificant, that fact would not undermine the case's value.[8]

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work or to reopen questions settled under *Chevron*."); *accord* Lisa Schultz Bressman, *Lower Courts After* Loper Bright, 31 GEO. MASON L. REV. 499, 500 (2024) (predicting that if *Loper Bright* overrules *Chevron*, the decision may have less practical effect in the lower courts than we might expect); *Congress in a Post-*Chevron *World: Hearing Before the H.R. Comm. on H. Admin*., 118th Cong. 3 (2024) (statement of Kevin R. Kosar, Senior Fellow of the American Enterprise Institute) ("From where I sit, [claims that the administrative state is being neutered] look overstated . . . . [T]he administrative state and regulation will live on."); *cf.* Christopher J. Walker, *What* Loper Bright Enterprises v. Raimondo *Means for the Future of* Chevron *Deference*, YALE J. ON REGUL. NOTICE & COMMENT (June 28, 2024), https://www.yalejreg.com/nc/what-loper-bright-enterprises-v-raimondo-means-for-the-future-of-chevron-deference/ [https://perma.cc/HN7Q-59V8] ("I don't agree with the strongest version of this argument, but I definitely agree that courts will conclude that the best interpretation of many statutory provisions is that Congress delegated policymaking authority to the agency to implement the broad statutory directive—to fill the regulatory gaps.").

6. *See, e.g.*, Cass R. Sunstein, *On the Expressive Function of the Law*, 144 U. PA. L. REV. 2021, 2024 (1996). My claim uses the phrase "expressive power of the law" as an example of what Professor McAdams describes as an "expressive theory of law's effects." *See* RICHARD MCADAMS, THE EXPRESSIVE POWERS OF THE LAW 13 (2015). Picking up further on Professor McAdams's taxonomy, it is more akin to what he calls the expressive power to inform beliefs (law's "information function") than the power to coordinate behavior (law's "coordinating function"). *See id.* at 5–6. I am indebted to Dan Walters for this insight. To the extent that *Loper Bright* simplifies the judicial decisionmaking process—or even was designed to simplify that process, see *infra* text accompanying note 130—the case might also serve a coordinating function. *Chevron*, though, likely served a similar coordinating function.

7. My point here is limited to the *direct* impact of *Loper Bright*. *See infra* text accompanying note 109. Moreover, I do not mean to imply that other legal developments happening contemporaneously with *Loper Bright* will not constrain agencies. *See supra* note 3. For example, President Trump's multiple executive orders aimed at reducing the size of the federal civilian workforce, see Exec. Order No. 14,210, 90 Fed. Reg. 9669 (Feb. 11, 2025); Exec. Order No. 14,217, 90 Fed. Reg. 10577 (Feb. 19, 2025); Exec. Order No. 14,238, 90 Fed. Reg. 13043 (Mar. 14, 2025), and reducing regulations, Exec. Order No. 14,219, 90 Fed. Reg. 13043 (Feb. 19, 2025); Exec. Order No. 14,270, 90 Fed. Reg. 15643 (Apr. 9, 2025); Exec. Order No. 14,192, 90 Fed. Reg. 9065 (Jan. 31, 2025); Memorandum on Directing the Repeal of Unlawful Regulations, 2025 DAILY COMP. PRES. DOC. 466 (Apr. 9, 2025), are likely to constrain agencies in significant ways. For more on this point, see *infra* Section III.B.

8. The broader point is a variation of a point Professor Hickman has made about the nondelegation doctrine. *See* Kristin E. Hickman, *Nondelegation as Constitutional Symbolism*, 89 GEO. WASH. L. REV. 1079, 1131 (2021) ("[R]eplacing one murky and case-dependent standard with another would be an exercise of constitutional symbolism, more important for what the Court has to say at that particular moment than for its actual impact (or lack thereof) on future jurisprudence."); *id.* at 1137 ("[S]ome degree of formal adherence

Loper Bright established a new methodology for federal courts to use when interpreting statutes in cases challenging agency action. Overturning the methodological approach courts had used for the previous 40 years under the so-called *Chevron* doctrine, *Loper Bright* held that courts should determine the "best" interpretation of a statute, rather than defer to, i.e., accept, any "reasonable" agency interpretation.[9] On its face, this might seem like a dramatic change in doctrine, one that gives greater power—and responsibility—to courts over agencies. My claim is that it is not. As a doctrinal matter, the opinion simply creates a new analytical structure through which courts can continue to incorporate all the same concerns about judicial review of agency action that played out under *Chevron*.

Rather than creating a new legal regime for greater judicial involvement in agency action, the Court has instead used *Loper Bright* to further another of its roles in the American legal system: to make an expressive statement.[10] What is that expressive statement? A very simple one: the core principle that in our system of government and separation of powers, courts should have the final word on deciding "interpretive" questions about "law." That's it.[11]

Why does this matter? Because lower-court judges, agencies, future litigants, and scholars—indeed, the public more broadly—need to respond to *Loper Bright* appropriately. Alarmist, overwrought concern or animated elation has the potential to do more damage than the case itself.[12] *Loper Bright* is just a message, a

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to separation of powers principles carries with it a certain symbolism that hits many ordinary people at a visceral level and contributes to perceptions of the fairness and legitimacy of government.").

Moreover, I am purposely eliding the intent–effect line here, i.e., whether the Court *intends* for the decision to have very little effect. As we will see in Part II, the opinion itself—and the rhetoric the Chief Justice uses—suggests that the Court does indeed intend to serve an expressive function rather than to, say, undermine the administrative state. As I explain in Part III, however, my principal claim is that the Court's intent here may be irrelevant; institutional factors will dampen the opinion's effect.

9. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 398–400 (2024).

10. *Cf.* Coglianese & Walters, *supra* note 4, at 46–52.

11. Since I suspect the Court intends to send the same message—"law" is ultimately for courts, not agencies—to all of its various audiences, I do not view the Court as engaging in an attempt at "acoustic separation" between the public and government officials or as distinguishing between conduct rules and decision rules. *See* Meir Dan-Cohen, *Decisions Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 630–31 (1984). Although judicial methodology is probably the paradigm of a decision rule, the Court's assertion of judicial authority to decide questions of "law" unencumbered by "deference" has spinoff effects on agency officials, which can in turn affect the public. The Court undoubtedly wants the public—including those subject to government regulation who might want to challenge such regulation in court—to hear its assertion of judicial authority just as much as it wants lower-court judges and administrative agencies to hear it.

12. *See* Coglianese & Walters, *supra* note 4, at 24–25 ("*Loper Bright*'s impact will depend not only on how lower courts (and future Supreme Court decisions) resolve [the case's] ambiguities and implement *Loper Bright*, but also on how other institutions and actors respond."); *cf. id.* at 6 (suggesting that *Loper Bright* has the potential to "disrupt the administrative governance game").

message from the Supreme Court about the importance of judicial independence, not a judicial takeover of the administrative state and policymaking.[13]

This Article proceeds as follows. In Part I, I describe the decision in *Loper Bright*, how it overturned the *Chevron* doctrine, the expressive statement it made, and the Court's underlying rationale. In Part II, I explain how the Court's opinion, and the supposedly new doctrine of judicial review of agency interpretation it articulated, tells us that *Loper Bright* is an expressive act and not a blow to the administrative state—or even to agency policymaking discretion. In Part III, I argue that even if one disagrees and reads the opinion as an attack on the administrative state, it doesn't matter: the broader institutional environment structuring litigation will significantly dampen the aggregate effect *Loper Bright* can have on challenges to agency actions.

I. *LOPER BRIGHT* AS AN EXPRESSIVE ACT

Loper Bright overturned a methodological approach to judicial review of agency interpretation of federal statutes known as the *Chevron* doctrine.[14] *Chevron* had set forth a two-step inquiry. First, a court was to ask whether Congress had spoken "directly" to the precise question at issue. If so, the court's job was to enforce the statute as Congress intended, irrespective of the agency's interpretation.[15] The second step, known as "*Chevron* deference," kicked in if the statute was "silent or ambiguous with respect to the specific issue."[16] If a court reached the second step, it was to accept the agency's interpretation, rather than "substitute its own," as long as the agency's interpretation was "reasonable."[17] Importantly, *Chevron* included a footnote stating that in such circumstances the court was to defer to the agency's interpretation even if that interpretation was not "the reading the court would have

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13. As Professor Vermeule nicely put it in a blog post the day after the decision, everyone just needs to "take a deep breath." Adrian Vermeule, Chevron *by Any Other Name: From "*Chevron *Deference" to "*Loper Bright *Delegation"*, THE NEW DIG. (June 29, 2024), https://substack.com/@thenewdigest/p-146087490 [https://perma.cc/DQF7-LKR8]. For further elucidation of Professor Vermeule's views, largely consonant with those I express here, see Vermeule, *supra* note 5, at 253–54. The Court does seem determined, however, "to return to the belief structures of the old world by brute force," something Professor Vermeule views as "probably impossible," comparable to "induc[ing] in ourselves an unironic belief in the four humors of Hippocratic medicine." Adrian Vermeule, *Neo-?*, 133 HARV. L. REV. F. 103, 110 (2020) [hereinafter Vermeule, *Neo-?*]; *see also id.* at 111 ("Once the apple of realism has been tasted, everything changes, and the way back to the garden of naive classicism is forever barred. It is not possible to reinstate belief in a classical law-policy distinction by fiat, however useful the resulting framework would be, even as a kind of noble lie.").

14. The doctrine was named after the 1984 case of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Court assumed *Chevron* was in fact binding, and it certainly was treated as such by lower court judges prior to *Loper Bright*. *But see* Randy J. Kozel, *Statutory Interpretation, Administrative Deference and the Law of Stare Decisis*, 97 TEX. L. REV. 1125, 1152–57 (2019) [hereinafter Kozel, *Statutory Interpretation*]; Randy J. Kozel, *Is* Chevron *Binding Law?*, YALE J. ON REGUL. NOTICE & COMMENT (Dec. 14, 2023) [hereinafter Kozel, *Is* Chevron *Binding Law?*], https://www.yalejreg.com/nc/is-chevron-binding-law-by-randy-j-kozel/ [https://perma.cc/KAH3-2KDP].

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

16. *Id.* at 843.

17. *Id.* at 844.

reached if the question initially had arisen in a judicial proceeding."[18] In other words, the court was to defer to a reasonable agency interpretation even if the court thought the agency had not arrived at the best interpretation. A key presumption the *Chevron* Court made was that congressional silence or ambiguity on a specific issue constituted an implicit delegation of interpretive authority from Congress to the implementing agency—and thus, not a delegation of such authority to the courts.

In *Loper Bright*, the Court overturned *Chevron*.[19] The Court held that the Administrative Procedure Act's ("APA") language dictating that courts are to decide "all relevant questions of law" prohibited courts from ever deferring to an agency on an interpretation of "law": courts must always apply their own judgment to determine the "best" reading of a statute.[20] In so holding, however, the Court noted two important points about the courts' role in interpretation: (1) courts may seek aid from, and give due "respect" to, agency interpretations;[21] and (2) if the best reading of a statute is that it delegates discretionary authority to an agency, the court's task is simply to "fix the boundaries of the delegated authority" and "ensur[e] the agency has engaged in reasoned decisionmaking within those boundaries."[22] The former is known as "*Skidmore* respect" after the 1944 case explaining that courts should give such respect to agency interpretations.[23] The latter I will refer to as the concept of "delegated discretionary authority." One might see it as an exception to *Loper Bright*'s rule because it gives agencies a form of interpretive discretion akin to *Chevron* Step Two, but the Court instead frames it as deriving from the basic idea that a "best" interpretation could in fact be that the agency has some discretionary authority. I will return to this point shortly.[24] Finally, the *Loper Bright* Court made one other point, this one by omission: the Court said nothing explicit about how

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18. *Id.* at 843 n.11.

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

20. *Id.* at 398–400 (quoting 5 U.S.C. § 706).

21. *Id.* at 385; *id.* at 388 (citing Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944)). Exactly what this *Skidmore* "respect" consists of has long been of dispute and will likely remain so. *See* Kristin E. Hickman, *Anticipating A New Modern* Skidmore *Standard*, 74 DUKE L.J. ONLINE 111, 117–25 (2025). It might reasonably be seen through the lens of Professor Dyzenhaus's distinction between "deference as respect" and "deference as submission." *See* David Dyzenhaus, *The Politics of Deference: Judicial Review and Democracy*, *in* THE PROVINCE OF ADMINISTRATIVE LAW 279, 286, 302–07 (Michael Taggart ed., 1997). This aspect of the decision plays a supporting, but not central, role in my argument.

22. *Loper Bright*, 603 U.S. at 395 (citation modified). While one scholar has suggested that this language may have been Justice Kavanaugh's contribution to the opinion, *see* Donald L. R. Goodson, *Discretion Is Not (*Chevron*) Deference*, 62 HARV. J. ON LEGIS. (SPECIAL *LOPER BRIGHT* SYMP. EDITION) 12, 14 (2024) (stating that "[f]ew understand this distinction between discretion and deference better than Justice Kavanaugh, and it is hard to avoid the assumption that he played a role in ensuring the inclusion of key passages on the distinction in *Loper Bright*."); *id.* at 15, 18 (when referencing the portions on delegation in *Loper Bright*, stating that "the Supreme Court echoed Justice Kavanaugh"), the language comes directly from the Chief Justice's dissent in *City of Arlington v. FCC*, 569 U.S. 290, 327 (2013) (quoting Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 27 (1983)); *see also City of Arlington*, 569 U.S. at 317.

23. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

24. *See infra* Section II.D.

courts are to treat so-called "mixed questions of law and fact," including applications of law to fact. I'll return to this point shortly too.[25]

The Court's decision was 6–3 with Chief Justice Roberts writing for the majority. Justice Thomas wrote a concurrence arguing that *Chevron* deference was not only contrary to the APA but also violated the Constitution's separation of powers by (1) "compel[ling] judges to abdicate their Article III 'judicial Power'"; and (2) "permit[ting] the Executive Branch to exercise powers not given to it."[26] Justice Gorsuch wrote a concurrence explaining his view of why stare decisis did not prevent the Court from overturning *Chevron*. And Justice Kagan penned a dissent arguing that *Chevron* properly allocated decisionmaking authority between agencies and courts. According to Justice Kagan, *Chevron* was "rooted in a presumption of legislative intent": because Congress knows that ambiguities in statutes are inevitable and that agencies have expertise, experience, and political accountability that courts do not, deference to agency interpretations was both consistent with congressional intent and appropriate as a practical matter.[27] Key to Justice Kagan's dissent is a slate of examples that she gives to illustrate why agencies, not courts, should be making many interstitial interpretive decisions.[28] I return to this point below.[29]

As noted in the Introduction, the Court's expressive statement is a simple one: in our system of government and separation of powers, courts have the final word on deciding "interpretive" questions about "law."[30] As the Court understands it, *Chevron* misstated this core principle of Anglo-American jurisprudence—and the related idea that law is distinct from policy. This is why we can think of *Loper Bright* largely as the Court attempting to articulate a jurisprudential view of law. Embedded in this view is the related principle that statutes authorizing agencies to act are no different from other statutes.[31] Statutes are statutes and are thus *law*. Even if an

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25. *See infra* Subsection III.A.2.

26. *Loper Bright*, 603 U.S. at 414–15 (Thomas, J., concurring).

27. *Id.* at 449–50 (Kagan, J., dissenting).

28. *Id.* at 452–53; *see also infra* Subsection II.B.1.

29. *See infra* Subsection II.B.1.

30. Again, the use of inverted commas here is intentional. *See supra* note 2.

31. We see the Court articulate this principle loud and clear: "the basic nature and meaning of a statute does not change when an agency happens to be involved. Nor does it change just because the agency has happened to offer its interpretation through the sort of procedures necessary to obtain deference, or because the other preconditions for *Chevron* happen to be satisfied. The statute still has a best meaning, necessarily discernible by a court deploying its full interpretive toolkit." *Loper Bright*, 603 U.S. at 408–09 (majority opinion); *id.* at 401 ("*Chevron* gravely erred . . . in concluding that the inquiry is fundamentally different just because an administrative interpretation is in play."); *id.* at 400 ("Courts, after all, routinely confront statutory ambiguities in cases having nothing to do with *Chevron*—cases that do not involve agency interpretations or delegations of authority. . . . [W]hen faced with a statutory ambiguity in such a case . . . a court is not somehow relieved of its obligation to independently interpret the statute. . . . In an agency case *as in any other*, . . . even if some judges might (or might not) consider the statute ambiguous, there is a best reading all the same—'the reading the court would have reached' if no agency were involved." (emphasis added) (quoting Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.11 (1984))).

agency gets the first shot at interpreting a statute, courts must have the final word on its meaning. *Loper Bright* is the Court's way of stating its disapproval of courts ceding to agencies the courts' responsibility to interpret "law."[32]

The Supreme Court majority needed to overrule *Chevron* to make that point—and to say it explicitly and without apology. To be sure, *Chevron* had recognized the courts' role in law. After all, what was Step One of *Chevron*, if not a clear statement that sometimes "law" speaks "directly" to an issue and that, in such circumstances, a court must follow the "law" no matter what the agency says?[33] But because Step Two's "deference" presumed that an agency was "interpreting" the statute—and that agencies could thus presumably interfere with courts doing "law"[34]—*Chevron* could not stand. In particular, the Court needed to reject *Chevron*'s infamous footnote 11, that a court is to uphold a "reasonable" agency

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32. This expressive principle has a different character from those we ordinarily associate with the expressive value of the law. Usually, when one thinks of the "expressive value of the law," it evokes issues with a more palpably emotional valence, whether about the meaning of segregation (*Brown v. Board of Education*), capital punishment (*Furman v. Georgia* or *Gregg v. Georgia*), flag burning (*Texas v. Johnson*), etc. *See generally* Sunstein, *supra* note 6 (using these and other similar examples). In some ways, the separation-of-powers principle here is a meta-principle, one level of generality up from how the idea of the expressive value of law is ordinarily used, since the principle is about law itself. This is what I mean when referring in the title to *Loper Bright* as "jurisprudence": the Court's expressive statement is a claim about the philosophy of law.

33. *See supra* text accompanying note 15; Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) ("First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

34. *Chevron*, 467 U.S. at 843 ("If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

Notice the *Chevron* Court's use of the verb "impose" to describe what a court would be doing in the absence of Congress directly addressing an issue. Citing Roscoe Pound's *Spirit of the Common Law* for the proposition that a court would be "impos[ing]" its construction on the statute, *see id.* at 843 n.10, the *Chevron* Court is striking a realist pose here. *Cf.* Vermeule, *Neo-?*, *supra* note 13, at 109–10 (describing *Chevron* as "best understood as a product of a limited form of legal realism, one that understands that when agencies 'interpret' statutes like the Clean Air Act over time in changing unforeseen circumstances, giving rise to hard cases, those agencies will inevitably be faced with policy choices, whose resolution is not obviously better entrusted to a generalist and unaccountable judiciary"). The relevant portion from Dean Pound's lecture explicitly connects "interpretation" with courts "mak[ing] law." *See* ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 174 (1921) ("The difficulties arise in the myriad cases in respect to which the lawmaker had no intention because he had never thought of them. Indeed, perhaps he could never have thought of them. Here, if we insist on the dogmatic separation of powers, the courts, willing or unwilling, must to some extent make the law under the guise of interpretation and our security that it will be made as law and not as arbitrary will lies in the judicial and juristic tradition from which the materials of judicial lawmaking are derived.").

interpretation of a statute even if that interpretation was not "the reading the court would have reached if the question initially had arisen in a judicial proceeding."[35]

Moreover, the Court insists not only *that* courts do law better than administrative agencies, but also *why*: courts' independence. We might thus think of *Loper Bright* as a self-conscious assertion of the Court's own independence from the President and the executive branch more generally—a Declaration of Judicial Independence, so to speak.[36] The Court quotes Federalist No. 78 in the second paragraph of its analysis to explain that "[*u*]*nlike the political branches*, courts . . . exercise 'neither Force nor Will, but merely judgment.'"[37] Continuing in this same vein, the majority explains that "the Framers structured the Constitution to allow judges to exercise that judgment *independent of influence from the political branches*."[38] Why? In order to "ensure the 'steady, upright and *impartial* administration of the laws.'"[39] The kind of "judgment" that the interpretation of law demands requires independence and impartiality—or, as the Chief Justice has long framed it, that judges act as umpires.[40]

Key too is that courts' independence on interpretive questions is a fundamental component of the Anglo-American tradition.[41] The Court makes this

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35. *Chevron*, 467 U.S. at 843 n.11.

36. For readers who are sympathetic to this message, this assertion of judicial independence can be seen not simply through the lens of the "administrative state," but rather through the lens of broader concerns about executive branch authoritarianism. The loss of judicial independence vis-à-vis strong Executives has been a concern in other countries, such as Poland, Hungary, and most recently, Mexico—and of course many in the United States are concerned about the potential for a loss of judicial independence in the second Trump Administration. *Cf.* JEREMY WALDRON, THOUGHTFULNESS AND THE RULE OF LAW 38 (2023) (noting that the "rule of law is not just about general rules; it is about their impartial administration" and noting that "the rule of law has become associated with political ideals such as the separation of powers and the independence of the judiciary").

37. *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 385 (2024) (emphasis added) (quoting Federalist No. 78) (Alexander Hamilton).

38. *See id.* at 385 (emphasis added).

39. *Id.* (emphasis added) (quoting Federalist No. 78) (Alexander Hamilton); *see also id.* at 403 ("[T]he Framers crafted the Constitution to ensure that federal judges could exercise judgment free from the influence of the political branches."); *id.* at 430 (Gorsuch, J., concurring) (including many of the same Federalist No. 78 quotations and further noting that "[t]his duty of independent judgment is perhaps 'the defining characteristi[c] of Article III judges'" (quoting Stern v. Marshall, 564 U.S. 462, 483 (2011))).

40. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55–56 (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States); *see generally* Charles Fried, *Balls and Strikes*, 61 EMORY L.J. 641 (2012) (exploring the analogy between judges and umpires); Theodore A. McKee, *Judges as Umpires*, 35 HOFSTRA L. REV. 1709 (2007) (same); Bruce Weber, *Umpires v. Judges*, N.Y. TIMES (July 11, 2009), https://www.nytimes.com/2009/07/12/weekinreview/12weber.html [https://perma.cc/A23H-TYMB] (same).

41. *See, e.g.*, Robin Cooke, *The Struggle for Simplicity in Administrative Law*, *in* JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN THE 1980S: PROBLEMS AND PROSPECTS 10 (Michael Taggart ed., 1986), *quoted in* PHILIP A. JOSEPH, JOSEPH ON CONSTITUTIONAL AND ADMINISTRATIVE LAW 962 (5th ed. 2021) (noting "a fundamental rule of our mainly unwritten

point explicitly: for example, in one of the opinion's many footnotes directly responding to the dissent, the majority states that the dissent "fails to recognize the deep roots that [the rule of judicial supremacy on questions of legal interpretation] has in our Nation's judicial tradition."[42] While Justice Kagan's failure to address this point directly does not significantly undermine the thrust of her dissent, it does suggest that the dissent has no response to the decision's role in serving the expressive function of the law.

Relatedly, although the Court only hints at this, the principle is driven not by the fear of a leviathan administrative state[43] but instead by the concern of a self-interested administrative state.[44] These are not mutually incompatible characterizations of the administrative state, but they do represent distinct concerns: one is about size, and the other is about bureaucratic bias.[45] While the Court only mentions these concerns explicitly in a few places,[46] that may be largely because the

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constitution: namely that determination of questions of law is always the responsibility of the Courts of general jurisdiction").

42. *Loper Bright*, 603 U.S. at 390 n.3; *see also id.* at 394 ("The APA . . . incorporates *the traditional understanding of the judicial function*, under which courts must exercise independent judgment in determining the meaning of statutory provisions." (emphasis added)); *id.* at 427 (Gorsuch, J., concurring) (noting that "*Chevron* deference runs against mainstream currents in our law regarding the separation of powers, due process, and *centuries-old interpretive rules* that fortify those constitutional commitments" (emphasis added)); *id.* at 448 (Gorsuch, J., concurring) (referring to *Chevron* as "a grave anomaly when viewed against the sweep of historic judicial practice").

43. As a point of comparison, the Chief Justice's dissent in *City of Arlington v. FCC* more than a decade ago expresses far more skepticism about the size of the federal government than does his opinion in *Loper Bright*. The *City of Arlington* dissent includes a lament that "[t]he Framers could hardly have envisioned today's vast and varied federal bureaucracy. . . . The administrative state with its reams of regulations would leave them rubbing their eyes. . . . And the federal bureaucracy continues to grow . . . ." *City of Arlington v. FCC*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting) (citation modified); *see also id.* at 314 (referring to independent agencies as the "headless fourth branch"); *id.* at 315 ("[T]he danger posed by the growing power of the administrative state cannot be dismissed."), language nowhere to be found in *Loper Bright*.

44. *Cf.* Jonathan Adler, *The Delegation Doctrine*, 12 HARV. J.L. & PUB. POL'Y: PER CURIAM 1, 10–13 (2024) (arguing, pre-*Loper Bright*, that the Court's *Chevron* jurisprudence can be seen through the lens of a "delegation doctrine," embodying the principle that agencies' powers are limited to those which Congress has delegated them); *id.* at 2 (referring to the delegation doctrine as a "meaningful check on agency self-aggrandizement").

45. One way to pull out the analytical strands of the difference is to note that even a small administrative state can be self-interested and even a large one can be neutral.

46. *See Loper Bright*, 603 U.S. at 401 ("The very point of the traditional tools of statutory construction—the tools courts use every day—is to resolve statutory ambiguities. That is no less true when the ambiguity is about the scope of an agency's own power—perhaps the occasion on which abdication in favor of the agency is *least* appropriate."); *see also id.* at 391 (beginning the APA portion of the decision by stating that Congress "enacted the APA as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices" (citation modified)).

National Marine and Fisheries Service—the agency whose action is being challenged in *Loper Bright*—hardly seems to be engaged in a major power grab.[47]

Justice Gorsuch's concurrence, although focused on stare decisis rather than the underlying correctness of *Chevron*, articulates this agency self-bias principle even more clearly.[48] His opening line states the principle in its pure form: "In disputes between individuals and the government about the meaning of a federal law, federal courts have traditionally sought to offer *independent judgment about 'what the law is' without favor to either side*."[49] He goes on to reiterate this point numerous times, including with citations to Professor Hamburger's article making this very argument.[50]

In sum, *Loper Bright* overturned *Chevron*. In doing so, the Court made clear its view that courts must exercise their independent judgment when interpreting law. In the Court's view, courts are better than agencies at interpretation

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47. *But see* Loper Bright Enters., Inc. v. Raimondo, 45 F.4th 359 (D.C. Cir. 2022), *vacated and remanded sub nom.*, Loper Bright Enters. v. Raimondo, 603 U.S. 369, 373 (2024) (Walker, J., dissenting) (arguing that the Fisheries Service "attempted a workaround"); *id.* at 379 (referring to the "novelty" of the Fisheries Service's fee program); *cf. also Loper Bright*, 603 U.S. at 439 (Gorsuch, J., concurring) (referring to agency regulation in *Buffington* that results in saving the government money as "self-serving").

48. As he has elsewhere many a time. *See, e.g.*, Buffington v. McDonough, 143 S. Ct. 14, 16–17 (2022) (dissenting from denial of certiorari); NEIL GORSUCH & JANIE NITZE, OVER RULED: THE HUMAN TOLL OF TOO MUCH LAW 88–90 (2024); Neil Gorsuch & Janie Nitze, *America Has Too Many Laws*, THE ATLANTIC (Aug. 5, 2024), https://www.theatlantic.com/ideas/archive/2024/08/america-has-too-many-laws-neil-gorsuch/679237/ [https://perma.cc/P8QG-UBDE]. While we're on the topic of Justice Gorsuch, I should clarify that, even though he joins the majority, I do not mean to imply in my broader thesis about *Loper Bright* being an expressive act that *he* doesn't want to constrain the administrative state. I suspect he does. *See generally* GORSUCH & NITZE, *supra* (arguing that the United States has "too much law" based on examples of overreach). I doubt the opinion would have been the same if he had written it.

49. *Loper Bright*, 603 U.S. at 416 (Gorsuch, J., concurring) (emphasis added) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)); *id.* at 421 (Gorsuch, J., concurring) (life tenure premised on the idea of a federal judge as "a neutral party to interpret and apply the law without fear or favor in a dispute between others" (citation modified)); *id.* at 432–33 (Gorsuch, J., concurring) (noting that the framers built a world of judicial independence, "[o]ne in which impartial judges, *not those currently wielding power* in the political branches, would 'say what the law is' in cases coming to court" (emphasis added) (quoting *Marbury*, 5 U.S. (1 Cranch) at 177)).

50. *See id.* at 433 (Gorsuch, J., concurring) (claiming that "*Chevron* deference guarantees 'systematic bias' in favor of whichever political party currently holds the levers of executive power" (quoting Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187, 1212 (2016))); *id.* at 448 (referring to the courts' job as to "resolve cases and controversies *without any systemic bias in the government's favor*" (emphasis added)). The concern is a variation of the ancient public law principle *nemo iudex in causa sua*. *See, e.g.*, Dr. Bonham's Case (1610) 77 Eng. Rep. 638, 652; 8 Co. Rep. 107a, 118a; *see generally* Adrian Vermeule, *Contra* Nemo Iudex in Sua Causa*: The Limits of Impartiality*, 122 YALE L.J. 384 (2012) (arguing that *nemo iudex* principle is "a misleading half-truth" and identifying conditions when rule designers depart—and should depart—from the principle).

and are necessary as an independent entity to adjudicate interpretive disputes between the government and challengers to government action.

II. EVIDENCE THAT *LOPER BRIGHT* IS AN EXPRESSIVE ACT

In this Part, I look more closely at the Chief Justice's opinion in *Loper Bright*. My principal point is that the opinion itself, read in light of Justice Kagan's dissent, tells us that the opinion is an expressive act and that the Court does not intend to undermine the administrative state. Four features of the opinion support this understanding of the case: (1) the opinion has a purely deductive structure, using no facts in its analysis; (2) related, the opinion does not criticize—or even mention—any specific agency interpretations, nor does it say that its holding would result in any cases being decided differently than under *Chevron*; (3) the opinion obsesses over *Chevron* footnote 11, the idea that a court should approach interpretation of statutes differently in cases reviewing agency interpretations; and (4) the opinion retains doctrinal tools allowing courts mostly to continue to do what they had been doing under *Chevron*.

A. Deductive Nature of Reasoning

What clues does the opinion give us that it is largely an expressive act on the Court's part, rather than an attempt to undermine the fundamental role of the administrative state in American society? First, the structure of the *Loper Bright* majority's approach is purely deductive, with nary a mention of any incorrect decisions that *Chevron* might have caused. This suggests a desire to articulate a broad principle, rather than a desire to rein in agencies. Rhetorically, the Court is focused on what it sees as the methodological error by courts, rather than any actual harm agencies have caused in the real world or any mistakes courts might have made upholding agency action under *Chevron*. Methodological error and concrete harm are of course not mutually exclusive, but the syllogistic framing of the case based solely on a broad principle—that it is "emphatically" the province of the judiciary to decide questions of law—is telling.[51] What exactly is the majority's syllogism? Major premise: courts must always have the final word on the "interpretation" of "law." Minor premise: *Chevron* deference allowed for agencies, not courts, to have the final word on the "interpretation" of "law" in some circumstances. Conclusion: *Chevron* deference is wrong. True, the Court does analyze the case as an interpretation of the APA. But the Court's statutory analysis of the APA still follows

51. Some scholars have argued that a syllogistic approach to judicial reasoning is indicative of a form of "judicial populism." *See* Anya Bernstein & Glen Staszewski, *Judicial Populism*, 106 MINN. L. REV. 283, 341–43 (2021); *see generally* Anya Bernstein & Glen Staszewski, *Populist Constitutionalism*, 101 N.C. L. REV. 1763, 1785–93 (2023) (making the argument that the Court's anti-deference ideas are manifestations of such populist approaches to judicial decisionmaking). One could just as well simply call it a civil-law approach to judicial reasoning. *See* JOHN HENRY MERRYMAN & ROGELIO PEREZ-PERDOMO, THE CIVIL LAW TRADITION 36 (4th ed. 2018) (describing the "whole process of judicial decision" in the civil law system as "made to fit into the formal syllogism of scholastic logic"). Just to be clear, neither of these is not my point here. I am simply making a descriptive claim about the majority's reasoning—and, in turn, contrasting it with Justice Kagan's dissent.

the logic of this syllogism[52] based primarily on the APA's language that courts decide "all relevant questions of law."[53]

Importantly, because it is framed as a simple syllogism, the opinion's deductive structure does not depend on any facts. The Court does not point to a single case reviewing an agency interpretation that it thinks should be decided differently. In theory, nothing about the Court's decision requires that there even be such a case. Now I suspect *Brand X*[54] is such a case, but *Brand X* involved a court explicitly rejecting its own determination of the best interpretation in favor of an agency's view—in other words, *Brand X*'s holding explicitly relied on *Chevron* footnote 11.[55] Even assuming *Brand X* has been overruled, though, the Court avoids any mention of agency overreach in past cases where courts upheld agency action under *Chevron* Step Two. The Court does not even say that the substantive holding of *Chevron* itself[56] has been overruled.[57] Surely if the Court wanted to show that *Chevron* had been a tool of agency self-aggrandizement, it could have pointed to errors *Chevron* had caused. In short, the deductive structure of the Chief Justice's opinion—and the strikingly eloquent first post-dinkus paragraph responding to Justice Kagan's dissent[58]—leave little doubt that the majority was not so much

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52. *See Loper Bright*, 603 U.S. at 391–92 (majority opinion) (describing the APA as codifying "for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment").

53. *See id.* at 392 (quoting the APA and noting with emphasis that the APA "specifies that courts, not agencies, will decide '*all* relevant questions of law' arising on review of agency action"). Justice Thomas didn't even need the statute for his articulation of this syllogism, relying as he did on the nature of the judicial power in Article III of the Constitution. *See id.* at 413–16 (Thomas, J., concurring).

54. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980–83 (2005).

55. *See id.* at 982–83; *id.* at 980 ("If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, *even if the agency's reading differs from what the court believes is the best statutory interpretation*." (emphasis added) (citing Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.11 (1984))).

56. Here I mean the *Chevron* Court's upholding as "reasonable" the EPA's determination that the term "stationary source" embodies the "bubble" concept. *See Chevron*, 467 U.S. at 840, 866.

57. *See* Cary Coglianese & David Froomkin, Loper Bright*'s Disingenuity*, 174 U. PA. L. REV. (forthcoming 2025) (manuscript at 32), https://dx.doi.org/10.2139/ssrn.5371349) [https://perma.cc/4K2M-N3YS] (after analyzing the interpretive question in *Chevron* through the lens of *Loper Bright*'s delegated-discretionary-authority idea, concluding that "applying the *Loper Bright* framework today to the facts of *Chevron* would have yielded the same result that the Court reached in 1984"); Cass R. Sunstein, *Our* Marbury*:* Loper Bright *and the Administrative State*, 74 DUKE L.J. 1893, 1904–05 (2025) (exploring the same question and concluding that the answer was unclear); *see also infra* note 66.

58. *Loper Bright*, 603 U.S. at 412 ("The dissent ends by quoting *Chevron*: '"Judges are not experts in the field."' That depends, of course, on what the 'field' is. If it is legal interpretation, that has been, 'emphatically,' 'the province and duty of the judicial department' for at least 221 years. *Marbury*, 1 Cranch at 177. The rest of the dissent's selected epigraph is that judges '"are not part of either political branch."' Indeed. Judges have always been expected to apply their 'judgment' *independent* of the political branches when

reining in the administrative state, but instead placing a stake in the ground on the principle that agencies may not be the ultimate determiners of the "interpretation" and meaning of "law."

B. Failure to Address Any Actual Agency Interpretations

Second, and directly related, the Court says nothing about how it would decide *any* specific challenges to agency interpretation differently—even after Justice Kagan's dissent defends *Chevron* by using several examples of "interpretive" questions that an agency is better positioned to decide than courts.[59] The majority's silence is deafening. The majority completely avoids addressing the dissent's principal argument! Indeed, we have no reason to think that the new *Loper Bright* methodological approach would yield a different interpretation of the Magnuson–Stevens Fisheries Conservation and Management Act—the statute at issue in the case—than would analyzing the question under *Chevron*. What does this tell us? If all the cases Justice Kagan raises as examples and *Loper Bright* itself could come out exactly as they would under *Chevron*, this tells us that the Court is largely engaged in an expressive act, rather than an attempt to change decisionmaking or results on the ground.

To be sure, the majority's silence might have been the result of disagreement among the majority justices on how lower courts should treat such cases—an incompletely theorized agreement, so to speak[60]—or simple caution on the Chief Justice's part.[61] But the scenarios Justice Kagan relies on are precisely her argument in favor of *Chevron*. The majority's failure to respond at the very least allows cases to come out under *Loper Bright* exactly as they would have under *Chevron*.

1. Examples from Justice Kagan's Dissent

The majority's response to Justice Kagan—focusing solely on the abstract idea of independent judgment—suggests that the Court isn't trying to tell courts how to decide any of her examples or examples like it.[62] In stark contrast to the majority,

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interpreting the laws those branches enact. The Federalist No. 78, at 523. And one of those laws, the APA, bars judges from disregarding that responsibility just because an Executive Branch agency views a statute differently." (citation modified)).

59. *See* discussion *infra* Subsection II.B.1.

60. *See* Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735–37 (1995).

61. As he has often put it, "If it is not necessary to decide more to a case, then in my view it is necessary not to decide more to a case." *See* The Associated Press, *Chief Justice Says His Goal Is More Consensus on Court*, N.Y. TIMES (May 22, 2006), https://www.nytimes.com/2006/05/22/us/chief-justice-says-his-goal-is-more-consensus-on-court.html [https://perma.cc/J874-4H9R].

62. *But see* Goodson, *supra* note 22 (arguing that under *Loper Bright*, courts would fix the meaning of "stationary source" and citing to then-Judge Kavanaugh's article making this argument); DIVIDED ARGUMENT: *Evil Batman* (Simplecast, July 19, 2024), https://www.dividedargument.com/episodes/evil-batman/transcript [https://perma.cc/5UN7-4A9L] (Professor Baude arguing that courts will not view the "stationary source" language in *Chevron* as a delegation of discretionary authority: "Dan: That's presumably when we're under the new approach, the court would just have to pull out the dictionary and figure that meaning out, right? Will: Yes.").

Justice Kagan's approach is inductive rather than deductive.[63] It is grounded in real-world cases challenging agency action where the challenge includes an argument that the agency misinterpreted a statute. She frames the question of judicial review of agency interpretation through the lens of five examples involving the application of law to fact. Although the precise examples Justice Kagan uses aren't crucial for my point, they illustrate the kind of questions that agencies are generally in a better position to answer than courts and that courts are likely to decide the same way under *Loper Bright* as they previously did under *Chevron*: (1) questions about "scientific or technical subject matter"; (2) questions that "demand a detailed understanding of complex and interdependent regulatory programs"; and (3) questions that "present policy choices, including trade-offs between competing goods."[64]

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63. Inductive reasoning is an approach through which a generalization or principle is derived from specific examples. Justice Kagan's argument runs something like this:

> 1. Here are some examples of "interpretive" questions on which, under *Chevron*, a court would have deferred to an agency.
> 2. Courts are ill-equipped to decide these questions and so agencies should make them.
> 3. Therefore, the majority's holding—that courts are to decide these questions—is wrong.

Key is that, at no point, does the majority contest step 2 in this logic.

64. *Loper Bright*, 603 U.S. at 449 (Kagan, J., dissenting). Here are Justice Kagan's precise examples:

• Under the Public Health Service Act, the Food and Drug Administration (FDA) regulates "biological product[s]," including "protein[s]." 42 U.S.C. § 262(i)(1). When does an alpha amino acid polymer qualify as such a "protein"? Must it have a specific, defined sequence of amino acids? *See* Teva Pharms. USA, Inc. v. FDA, 514 F. Supp. 3d 66, 79–80, 93–106 (D.D.C. 2020).

• Under the Endangered Species Act, the Fish and Wildlife Service must designate endangered "vertebrate fish or wildlife" species, including "distinct population segment[s]" of those species. 16 U.S.C. § 1532(16); *see* § 1533. What makes one population segment "distinct" from another? Must the Service treat the Washington State population of western gray squirrels as "distinct" because it is geographically separated from other western gray squirrels? Or can the Service take into account that the genetic makeup of the Washington population does not differ markedly from the rest? *See* Nw. Ecosystem All. v. U.S. Fish & Wildlife Serv., 475 F.3d 1136, 1140–45, 1149 (9th Cir. 2007).

• Under the Medicare program, reimbursements to hospitals are adjusted to reflect "differences in hospital wage levels" across "geographic area[s]." 42 U.S.C. § 1395ww(d)(3)(E)(i). How should the Department of Health and Human Services measure a "geographic area"? By city? By county? By metropolitan area? *See* Bellevue Hosp. Ctr. v. Leavitt, 443 F.3d 163, 174–76 (2nd Cir. 2006).

• Congress directed the Department of the Interior and the Federal Aviation Administration to reduce noise from aircraft flying over Grand Canyon National Park—specifically, to "provide for substantial restoration of the natural quiet." § 3(b)(1), 101 Stat. 676; *see* § 3(b)(2). How much noise is consistent with "the natural quiet"? And how much of the park, for how many hours a day, must be that quiet for the "substantial restoration" requirement to be met? *See* Grand Canyon Air Tour Coal. v. FAA, 154 F.3d 455, 466–67, 474–75 (CADC 1998).

• Or take *Chevron* itself. In amendments to the Clean Air Act, Congress told States to require permits for modifying or constructing "stationary sources" of air pollution. 42 U.S.C.

Those examples, she contends, tell us why agencies must have some sort of interpretive authority, even if that authority is necessarily bounded. On that, she is almost certainly correct: many of *Chevron* Step Two "interpretive" decisions amount to "policy" determinations, and notwithstanding Justice Thomas's argument to the contrary,[65] someone other than Congress will necessarily be making those policy calls. Incredibly enough, despite overruling the *Chevron* "doctrine" (the methodological approach to interpretation in cases with preexisting agency interpretations), the Court does not even overrule the substantive holding of *Chevron* itself,[66] let alone disagree with Justice Kagan's assessment that the agency—rather than a court—should make the decision in any of the other examples she uses to defend *Chevron*'s methodology. Indeed, the Court does not even decide *Loper Bright* itself, remanding the case to the lower courts, even though on the Court's own view, the question in the case is presumably[67] a pure question of law that a court should make.[68]

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§ 7502(c)(5). Does the term "stationary source[ ]" refer to each pollution-emitting piece of equipment within a plant? Or does it refer to the entire plant, and thus allow escape from the permitting requirement when increased emissions from one piece of equipment are offset by reductions from another? *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 857, 859 (1984).

Loper Bright Enters. v. Raimondo, 603 U.S. 369, 452–53 (2024) (Kagan, J., dissenting). For a thoughtful analysis of how courts should analyze those questions under one interpretation of *Loper Bright*, see Matthew C. Stephenson, *The* Gray *Area: Finding Implicit Delegation to Agencies after Loper Bright* Part III (manuscript at 58-69) (June 28, 2025) (unpublished manuscript), https://papers.ssrn.com/abstract=5328964 [https://perma.cc/4GR4-SCA8].

65. *See Loper Bright*, 603 U.S. at 415 (Thomas, J., concurring) (stating that "*Chevron* deference cannot be salvaged by recasting it as deference to an agency's formulation of policy. If that were true, *Chevron* would mean that agencies are unconstitutionally exercising legislative Powers vested in Congress" (citation modified)).

66. *Id.* at 412 (majority opinion) ("The holdings of [cases that relied on the *Chevron* framework] that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory *stare decisis* despite our change in interpretive methodology.").

67. I say "presumably" here because that is of course the presumption implicit in the idea that the courts below that applied *Chevron* wrongly failed to find the "best" interpretation of the statute. But, as I note in the next subsection, the question in *Loper Bright* depends on statutory terms such as "necessary and appropriate"—terms implying delegated discretionary authority—and so intertwines with agency expertise and factfinding in ways that will likely necessitate courts at least "respect[ing]"—and perhaps ultimately even deferring to—the agency's own interpretation.

68. I don't want to overstate the importance of this point, as this is not an uncommon practice for the Court. *Cf.* Thomas W. Merrill, *The Demise of Deference — and the Rise of Delegation to Interpret?*, 138 HARV. L. REV. 227, 247 (2024) ("The Court, *as is increasingly common when it proceeds in its law-declaration mode*, did not decide whether the self-funding regulation in *Loper Bright* was lawful; it remanded to the lower courts with directions to redecide the issue without the benefit of *Chevron*." (emphasis added)). But together with other clues, this suggests at least that the Court did not come to Judge Walker's conclusion in his dissent in the case below. *See* discussion *infra* Subsection II.B.2.

2. The Interpretive Question in Loper Bright *Itself*

The statute in *Loper Bright* illustrates why little needs to change in how judicial review of agency interpretations operates. That statute, the Magnuson–Stevens Fishery Conservation and Management Act of 1976, authorizes the National Marine Fisheries Service to implement a comprehensive fishery management program and to promulgate "fishery management plan[s]."[69] Those plans are to include certain "required provisions," including such "measures . . . which are . . . *necessary and appropriate* for the conservation and management of the fishery," including specific conservation and management measures enumerated in the statute.[70] In addition, in a subsection entitled "*discretionary* provisions," the statute states that "[a]ny fishery management plan . . . , with respect to *any fishery*, may . . . prescribe such other measures, requirements, or conditions and restrictions *as are determined to be necessary and appropriate* for the conservation and management of the fishery."[71] The statute then authorizes regulations deemed "*necessary or appropriate* for the purposes of . . . implementing a fishery management plan . . . ."[72] Notice the multiple uses of the phrase "necessary [and/or] appropriate," especially in the phrase "such other measures . . . *as are determined to be necessary and appropriate* for the conservation and management of the fishery."[73]

The "necessary and appropriate" language is verbatim the language given by the *Loper Bright* Court to exemplify cases where Congress has delegated discretionary authority to an agency, and "as are determined to be" is a clear reference to *the agency* having the power to make that determination. It is the epitome of language that delegates "discretionary authority" to agencies—that, in the words of the majority in *Loper Bright*, "leaves agencies with flexibility."[74] We'll return to this in a moment.

The legal question in the case is whether the statute permits the National Marine Fisheries Service to charge Atlantic fishing boat owners for the costs of inspectors—what we could call "industry-funded monitoring."[75] Notice first how minor of a question this is in the broader array of challenges to administrative action. This is not remotely like climate change[76] or a nearly-half-trillion-dollar student loan forgiveness program.[77] Other than the parties and other Atlantic fishermen, the underlying substantive question is not an issue that many people are likely to care about, one way or the other.[78] Indeed, I doubt the Supreme Court justices themselves

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69. 16 U.S.C. § 1853(a).

70. *Id.* § 1853(a)(1)(A) (emphasis added).

71. *Id.* § 1853(b)(14) (emphases added).

72. *Id.* § 1853(c)(1) (emphasis added).

73. *See id.* § 1853(b)(14) (emphasis added).

74. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 395 (2024) (quoting Michigan v. EPA, 576 U.S. 743, 752 (2015)); *see supra* text accompanying note 22.

75. *See* Relentless, Inc. v. U.S. Dep't of Com., 62 F.4th 621, 626–27 (1st Cir. 2023) (using the phrase).

76. *See* West Virginia v. EPA, 597 U.S. 697, 727–28 (2022).

77. *See* Biden v. Nebraska, 600 U.S. 477, 502–03 (2023).

78. *See* Millhiser, *supra* note 3 (noting that the "specific policy question in *Loper Bright*" is one "that virtually no one who doesn't own a fishing vessel has any reason to care

care. Now I don't want to be flippant here. Overfishing and the underenforcement of conservation laws may well be significant in some absolute sense. But there was no circuit split on the question, and this simply isn't the type of issue that the Court would normally take.[79] Indeed, before *Loper Bright*, the Court had *never* taken a case involving the interpretation of the Magnuson–Stevens Act in the nearly half-century since Congress adopted it.[80] If this is agency overreach, it's a pretty minor one in the grand scheme of agency action. If the Court had wanted to make *Chevron* appear as a poster child for enabling an administrative state gone wild, it easily could have chosen a different vehicle to overrule the case. Of course, some might see the fishermen in *Loper Bright* as sympathetic victims of an overreaching government agency.[81] But the choice of a relatively insignificant interpretive question suggests that the Court is expressing a principle, not attacking the supposed excesses of the administrative state.[82]

In the lower courts, the agency argued that this was a *Chevron* Step One case and, only in the alternative, that its interpretation was "reasonable" under *Chevron* Step Two. The core of the Step One argument was that the statute's "necessary and appropriate" language "directly" (in the words of *Chevron*) authorized the agency to impose the inspection costs on the fishing vessel owners.[83] Although the D.C. Circuit rejected the Step One argument, it concluded that the interpretation was "reasonable" under Step Two.[84] My point here is not that the Step One argument is necessarily correct, but simply that the agency plausibly made the argument. A court could comfortably take what had previously been the *Chevron* Step Two argument and make it an argument about the "boundaries" of delegated "discretionary authority" in precisely the way the *Loper Bright* majority has framed the new "delegated discretionary authority" doctrine.[85] After all, *Loper Bright* explicitly says that language like "necessary and appropriate" gives agencies

about whatsoever"). *But cf.* Nourse, *supra* note 5, at 616 (describing "*Loper Bright*'s facts [as] a dream case for those who see the administrative state as overweening").

79. *See* SUP. CT. R. 10(a). *But cf.* Merrill, *supra* note 68, at 234 (arguing that the dispute in *Loper Bright* "presented an attractive case for reconsidering *Chevron*" in part because "it revealed disagreement among the lower courts about how to apply the doctrine").

80. *See generally* 16 U.S.C. § 1853 (lacking any decision interpreting the statute on Westlaw Notes of Decisions).

81. *See* Loper Bright Enters. v. Raimondo, 45 F.4th 359, 379 (D.C. Cir. 2022) (Walker, J., dissenting) ("Fishing is a hard way to earn a living. And Congress can make profitable fishing even harder by forcing fishermen to spend a fifth of their revenue on the wages of federal monitors embedded by regulation onto their ships. But until Congress does that, the Fisheries Service cannot.").

82. *Cf., e.g.*, West Virginia v. EPA, 597 U.S. 697, 700 (2022) (announcing new doctrine in case invalidating regulation that "restructur[ed] the Nation's overall mix of electricity generation"). It could of course cut the other way. Perhaps the Court stealthily chose a low-stakes case, a camel's nose under the tent. But when the Court seeks to change the law, it often uses dramatic and sympathetic facts to do so. In any event, the publicity the case engendered suggests that the Court was not really trying to be stealthy.

83. *See Loper Bright*, 45 F.4th at 365–66.

84. *See id.* at 370 ("Under the well-established *Chevron* Step Two framework, the Service's interpretation of the Act to allow industry-funded monitoring was reasonable.").

85. *See supra* text accompanying note 22; *see also generally* Vermeule, *supra* note 5.

"flexibility," particularly when the statute explicitly gives the agency discretion to "determine[]" what is "necessary and appropriate."[86] And this language, used as paradigmatic language for "delegated discretionary authority" in *Loper Bright* itself, is precisely what the D.C. Circuit relied on when initially ruling for the agency in its *Chevron* Step Two analysis.[87]

This is why no one should be surprised that, on remand, at least one judge has already concluded that, lo and behold, the "best" reading of the statute is that, yes, the agency *can* charge the fishing vessel owners because doing so is within the agency's "delegated discretionary authority"—exactly what the agency concluded in its regulation.[88] Since we already know that Judge Walker—who dissented in the D.C. Circuit on *Chevron* Step One grounds—believes that the statute does *not* permit the agency to charge the vessel owners,[89] judges will disagree about the meaning of the law.

To the extent that there is a distinction between "law" and "policy" (which both the *Loper Bright* majority and dissent clearly presume), the lower courts will need to incorporate factors that most of us would deem "policy" into their resolution of the case, just as they did under *Chevron*.[90] Let's start with the "law." On the one hand, the statute provides the agency with broad statutory authority. On the other hand, the statute explicitly provides for industry-funded monitoring for certain Pacific fishing vessels, i.e., for vessels other than the Atlantic fishing vessels covered by the challenged rule. Thus, on the one hand, a judge can read "necessary and appropriate" broadly, as the agency's *Chevron* Step One argument did. On the other hand, a judge can make a negative inference from the fact that the statute excluded the Atlantic fishing vessels from the explicit industry-funded monitoring

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86. *See supra* text accompanying note 74.

87. *See Loper Bright*, 45 F.4th at 370 ("[T]he Supreme Court has instructed that a broad 'necessary and appropriate' provision, as appears in the Act, 'leaves agencies with flexibility' to act in furtherance of statutory goals, [Michigan v. EPA, 576 U.S. 743, 752 (2015)], and here the Service pointed to the Act's conservation and management goals.").

88. *See* Relentless Inc. v. U.S. Dep't of Com., No. 20-108 WES, 2025 WL 1939025, at *5–6 (D.R.I. July 15, 2025). Of course, the courts can no longer frame things under *Chevron* Step Two and thus have a formally different framework to use. Key, though, is that, for the question of whether the agency can charge the vessel owners, determining that an agency's interpretation is "reasonable" under *Chevron* Step Two question amounts to virtually the same thing as determining the scope of the agency's "delegated discretionary authority."

89. *Id.* at 374–75 (Walker, J., dissenting).

90. *See* Lisa Schultz Bressman, *The Ordinary Questions Doctrine*, 92 GEO. WASH. L. REV. 985, 987–89 (2024). Professor Bressman makes the related point that there is a meta-question that *Loper Bright* now asks courts to answer, whether a particular aspect of an agency's action is a question of "law" subject to *Loper Bright* or one of "policy" subject to "arbitrary and capricious" review. *See id.* at 987 ("*Loper Bright* does not provide direction on how courts should decide which of the ordinary questions that agencies answer *are* 'questions of law.'"). Of course, this is just a variation of the question courts effectively had to ask under *Chevron* when determining whether to decide a case at Step One versus Step Two. I make an analogous point as to how courts might characterize mixed questions of law and fact. *See infra* Subsection III.A.2.

imposed on the Pacific fishers (as Judge Walker did with his *Chevron* Step One argument[91]).

Now, what might explain these two different interpretations of the "law"? A judge willing to read "necessary and appropriate" as "delegated discretionary authority" to permit industry-funded monitoring is likely moved in part by an extra-textual factor: the fact that Congress has not given the agency sufficient resources to enforce the law.[92] In contrast, a jurist like Judge Walker used the negative inference from the fact that the statute lists specific circumstances in which vessel owners must pay for the inspector,[93] but he did so in part because of the significant impact those costs impose on the financial viability of small business owners.[94] Negative inferences of this sort are never mandatory in statutory interpretation—they are simply one contextual tool among many for divining statutory meaning.[95] Something other than a possible negative inference from language elsewhere in the statute is almost certainly playing a role in Judge Walker's thinking.

Nothing in *Loper Bright* changes the resolution of this disagreement. Without considering those "policy" concerns, the statute does not seem to have a single best "legal" answer. To the extent that one believes it does,[96] using *Loper*

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91. *See Loper Bright*, 45 F.4th at 373–79 (Walker, J., dissenting).

92. *Cf.* Orji & Hayes, *supra* note 4 (supporters of *Loper Bright* majority arguing that "[i]t is not unreasonable to wonder whether the clear financial interest of federal employees and agency budgets, as opposed to purely impartial technical expertise, influenced the Fisheries Service's decision").

93. *See Loper Bright*, 45 F.4th at 377–78 (Walker, J., dissenting).

94. I suspect the fact that the cost of the inspector amounted to 20% of the owner's revenue, while completely irrelevant to an interpretation of the semantic meaning of the statutory text, is likely to continue to loom large in any remand. Judge Walker's rhetoric on this conveys this concern. The closing lines of his opinion read as follows: "Fishing is a hard way to earn a living. And Congress can make profitable fishing even harder by forcing fishermen to spend a fifth of their revenue on the wages of federal monitors embedded by regulation onto their ships. But until Congress does that, the Fisheries Service cannot." *Id.* at 379 (Walker, J., dissenting). Judge Walker seems likely to think it would be bad *policy* to "require fisherman to spend a fifth of their revenue on the wages of federal monitors." *Id.*

95. *See, e.g.*, Marx v. Gen. Revenue Corp., 568 U.S. 371, 381 (2013) ("The force of any negative implication . . . depends on context. We have long held that the *expression unius* canon does not apply unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it, and that the canon can be overcome by contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion." (internal citations and quotation marks omitted)).

96. I am indebted to Nina Varsava for raising this possibility. After all, perhaps "Hercules" can figure it out. *See* RONALD DWORKIN, LAW'S EMPIRE 338 (1986). Perhaps the "law" really does never "run out." Loper Bright Enters. v. Raimondo, 603 U.S. 369, 400 (2024) (majority opinion) (In "cases that do not involve agency interpretations, . . . [c]ourts do not throw up their hands because 'Congress's instructions have' supposedly 'run out,' leaving a statutory 'gap.'") (quoting *Loper Bright*, 603 U.S. at 449 (Kagan, J., dissenting)); *see also* Charles F. Capps, *Does the Law Ever Run Out?*, 100 NOTRE DAME L. REV. (forthcoming 2025), https://ssrn.com/abstract=4908863 [https://perma.cc/9BUE-ZAXR]; *cf.* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1098 (2017). But I have my doubts. These are simply conflicting pragmatic policy concerns that are incommensurable as applied to this case. *See* Michael C. Dorf, Chevron*,* Brand X*,*

Bright rather than *Chevron* will not affect how a judge decides the case. Though judges will do their "level best" to "construe the law 'with clear heads . . . and honest hearts,' not with an eye to policy preferences that had not made it into the statute,"[97] such policy preferences will inevitably play into the ultimate "legal" resolution of the interpretive question. It may be that we can characterize both of those extra-textual factors as "law" that the courts must reconcile and/or decide between. But the judge who does that is likely to be like Judge Walker, who did the same thing before *Loper Bright*, just under *Chevron* Step One instead.[98]

C. Chevron*'s Dreaded Footnote 11*

Third, the *Loper Bright* majority's multiple mentions of *Chevron* footnote 11 is another clue that the decision is an expressive act, rather than a substantive change in judicial or administrative practice. *Chevron* footnote 11 told courts to defer to an agency's reasonable interpretation even if that interpretation was not "the reading the court would have reached if the question initially had arisen in a judicial proceeding."[99] This may well be what the Court views as the most galling statement of judges ceding responsibility of their proper role. The *Loper Bright* majority criticizes this footnote several times.[100] To be sure, the opinion is long, but the Chief Justice is not known for redundancy in his writing. The fact that the *Loper Bright* majority picks out a single footnote from *Chevron* for condemnation multiple times is telling.

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and Ronald Dworkin's Right-Answers Thesis, DORF ON L. (Jan. 23, 2024), https://www.dorfonlaw.org/2024/01/chevron-brand-x-and-ghost-of-ronald.html [https://perma.cc/MH89-HEDV].

97. *Loper Bright*, 603 U.S. at 403–04. It may be that Justice Kagan is correct that *Loper Bright* will increase ideologically tinted judicial decisionmaking, *see Loper Bright*, 603 U.S. at 474–75 (Kagan, J., dissenting) (citing Kent Barnett, Christina L. Boyd & Christopher J. Walker, *Administrative Law's Political Dynamics*, 71 VAND. L. REV. 1463, 1502 (2018)); *see also* Cass R. Sunstein, *The Consequences of* Loper Bright 12 (Harv. Pub. L. Working Paper No. 24-29, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4881501 [https://perma.cc/JWU7-A5B7], but whether it does depends on how many formerly Step Two cases cannot now be characterized as a "delegation of discretionary (policymaking?) authority" or in what one could call the "law entwined with facts" category, see discussion *infra* Subsection III.A.2.

98. A recent post-*Loper Bright* case, U.S. Sugar Corp. v. EPA, 113 F.4th 984, 991–97 (D.C. Cir. 2024), provides a good example. The Industry Petitioners briefed the case, pre-*Loper Bright*, as a *Chevron* Step One case, *see* Final Opening Brief of Industry Petitioners, at 33, U.S. Sugar Corp. v. EPA, 113 F.4th 984 (2024) (No. 22-1271), 2023 WL 8676030, at *19 (citing *Chevron* Step One as the relevant standard of review), and the Court decided it, post-*Loper Bright*, under *Loper Bright*'s de novo standard, *U.S. Sugar*, 113 F.4th at 991 (noting *Loper Bright*'s *de novo* standard); *see also* Rest. L. Ctr. v. U.S. Dep't of Lab., 115 F.4th 396, 403–07 (5th Cir. 2024) (post-*Loper Bright* decision under *Loper Bright* de novo standard); Brief of Appellants, at 46–55, Rest. L. Ctr. v. U.S. Dep't of Lab., 115 F.4th 396 (5th Cir. 2024) (No. 23-50562), 2023 WL 7279936, at *33–42 (in same case, pre-*Loper Bright* brief arguing that agency's rule fails *Chevron* Step One).

99. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.11 (1984).

100. *Loper Bright*, 603 U.S. at 396–401 (2024).

The flip side is that, as superbly crafted as it is, Justice Kagan's dissent nowhere explicitly defends *Chevron* footnote 11. Indeed, she doesn't mention it at all. Instead, as noted above, the thrust of Justice Kagan's dissent is the difficulty in practice of having courts be the final arbiter of the endless stream of "interpretive" disputes about "law" that agencies necessarily address when implementing statutes.

D. Loper Bright*'s Doctrinal Change Is Less Significant Than It Appears*

Fourth, the doctrinal change is less significant than it appears at first blush. What exactly has changed? Yes, it is now the case that courts will "independently" determine all questions of "law," whereas under *Chevron*, they were supposed to do that only when Congress had spoken "directly" to the relevant issue. But *Chevron* Step One had long permitted courts to determine "independently" that the agency interpreted a statute incorrectly. Under *Chevron* Step One, courts could always overturn an agency action on the grounds that the statute doesn't authorize it. For judges skeptical of the administrative state, they had no trouble using Step One this way.[101] Indeed, in recent years, courts had increasingly been relying on *Chevron*'s footnote nine,[102] which instructed them to use the "traditional tools of statutory interpretation," to more aggressively decide interpretive questions for themselves.[103] More importantly, the Court planted the seeds of what was formerly the *Chevron* Step Two analysis in the "delegated discretionary authority" idea at the end of Part II of *Loper Bright*.[104]

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101. *See, e.g.*, MCI Telecomm. Corp. v. AT&T, 512 U.S. 218, 225–29 (1994); *see* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 (1989) ("It is . . . relatively rare that *Chevron* will require me to accept an interpretation which, though reasonable, I would not personally adopt."). Indeed, Judge Walker's dissenting opinion in *Loper Bright* itself is a perfect exemplar of the ability of a judge to use *Chevron* Step One. Loper Bright Enters., Inc. v. Raimondo, 45 F.4th 359, 372–79 (Walker, J., dissenting).

102. *Chevron*, 467 U.S. at 843 n.9 ("The judiciary is the final authority on issues of statutory construction, and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law, and must be given effect." (citation omitted)).

103. *See* Nicholas Bednar, Chevron *on the Eve of* Loper Bright, 34 WIDENER COMMONWEALTH L. REV. 1, 17–21 (2024) (noting that courts were increasingly using Step One and the "traditional tools of statutory interpretation" to decide cases under *Chevron*); *see also, e.g.*, Richard J. Pierce, Jr., *Is* Chevron *Deference Still Alive?*, REGUL. REV. (July 14, 2022), https://www.theregreview.org/2022/07/14/pierce-chevron-deference/ [https://perma.cc/2DKK-CYN6].

104. *See supra* text accompanying note 22; Vermeule, *supra* note 5, at 247–49. Justice Kavanaugh also referenced this idea when recently admonishing listeners not to "over-read *Loper Bright*[;] oftentimes Congress will grant a broad authorization to an executive agency." *A Conversation with Brett Kavanaugh Transcript*, CATH. UNIV. OF AM. (Sept. 26, 2024), https://cit.catholic.edu/a-conversation-with-brett-kavanaugh-transcript/ [https://perma.cc/J9TJ-QP3M]. Just to reiterate, the Court made clear that if the best reading of a statute is such that Congress delegated discretionary authority to the agency, a court need merely determine whether the agency's action is within the boundaries of that delegation. *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 395 (2024) (majority opinion) ("When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the

The concept of "delegated discretionary authority" should shift the courts' focus from whether the statute is, in linguists' terms, "ambiguous" to whether it is "vague."[105] But it leaves open plenty of agency authority within the scope of what was previously *Chevron* Step Two. As the Court did with review of agency fact-finding in the seminal 1951 case *Universal Camera Corp. v. NLRB*,[106] the Court "expressed a mood" as to review of agency legal interpretation.[107] But by 2024, the judicial mood about agency interpretation had long since changed from the mood during *Chevron*'s first quarter century. And so, in contrast to *Universal Camera*, *Loper Bright* did little more than announce a previously understood change in that mood.[108]

To be sure, there remains an open doctrinal question as to how many formerly Step Two cases will *not* be viewed as fitting into the new "delegated discretionary authority" framework. It is, of course, hard to know how many there will be.[109] One key question will be whether, in cases that will be difficult to characterize as delegated discretionary authority—cases where the language is in fact "ambiguous," but not "vague," and cases which are, as Justice Kagan points

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reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. The court fulfills that role by recognizing constitutional delegations, fixing the boundaries of the delegated authority, and ensuring the agency has engaged in reasoned decisionmaking within those boundaries." (citation modified)). This is directly comparable to what courts were doing under *Chevron* Step Two, albeit with a different linguistic formulation.

105. *See* CALEB NELSON, STATUTORY INTERPRETATION 102–05 (2d ed. 2024); *see also* sources cited *supra* in note 62. For a helpful analysis of one approach to how courts should address the question of what I'm calling agencies' "delegated discretionary authority," based on the pre-APA cases *Gray v. Powell* and *NLRB v. Hearst Publications*, see Stephenson, *supra* note 64.

106. 340 U.S. 474, 487 (1951); *see also id.* at 489 ("But the fair interpretation of a statute is often the art of proliferating a purpose revealed more by the demonstrable forces that produced it than by its precise phrasing.").

107. I am indebted to Jennifer Nou for this point.

108. *See* Vermeule, *supra* note 5, at 265; Coglianese & Walters, *supra* note 4, at 45 (referring to this as the myth that "*Loper Bright* may do little to change administrative governance because the shift in judicial politics that it signaled had already occurred").

109. *Compare, e.g.*, Vermeule, *supra* note 5 *with*, *e.g.*, DIVIDED ARGUMENT: *Evil Batman*, *supra* note 62 (Professor Baude arguing that "EPA doesn't get deference when the question is [whether] carbon dioxide [is] a pollutant within the meaning of the Clean Air Act"); *cf. generally* DIVIDED ARGUMENT: *Evil Batman*, *supra* note 62 (Professor Baude noting that the question of how many formerly Step Two cases courts will continue to give agencies deference might depend on which agency: "My hypothesis is it probably also differs agency by agency. My hypothesis is that they're going to be agencies like immigration that I think don't have a ton of delegated authority and have been getting *Chevron* deference about how to interpret the code. [They] might well lose a lot more under this ruling and . . . other agencies and maybe the EPA is one of them, I don't know, are not really going to be as affected."). As Professors Hickman & Wildermuth have argued, it seems likely to depend, at least in part, on the type of Congressional delegation at issue. *See* Kristin E. Hickman & Amy J. Wildermuth, *Harmonizing Delegation and Deference After* Loper Bright, 100 N.Y.U. L. REV. (forthcoming 2025) (manuscript at 5–8), http://dx.doi.org/10.2139/ssrn.5175305 [https://perma.cc/T4V4-PD65] (referencing "different types of delegation provisions found in contemporary statutes" and framing a typology of delegations).

out, clearly policy calls—the courts will, in fact, be more "respectful" under *Skidmore*. But it is worth noting that in the first year since the decision, courts—including both the Supreme Court and the Fifth Circuit (!)—have already used the "delegated discretionary authority" principle to uphold agency rules, exactly as they would have under *Chevron* Step Two deference.[110] In other circumstances, courts have concluded that an agency acted outside of the "boundaries" of its "delegated discretionary authority" and thus acted in an "arbitrary and capricious" manner under the APA, almost identical to the framework they would have used under *Chevron* Step Two.[111] Applying the new doctrine of *Loper Bright* to concrete disputes already bears an uncanny resemblance to how courts reasoned under *Chevron*.[112]

Relatedly, it is worth emphasizing the important way in which the Court could have significantly destabilized the administrative state but didn't. The Court explicitly stated (in what was, in formal terms, simply dicta)[113] that past cases decided under *Chevron* retained their status as good law under principles of stare decisis.[114] This is consistent with the idea that the underlying substantive decisions

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110. Indeed, in the Fifth Circuit, exactly as the district court did under *Chevron* Step Two in the very same case! *Compare* Mayfield v. U.S. Dep't of Lab., 117 F.4th 611, 614, 617–19 (5th Cir. 2024) (using *Loper Bright* "delegated discretionary authority" idea to uphold Department of Labor rule that raised from $455 per week to $684 per week the minimum salary required to qualify for the Fair Labor Standards Act's so-called "White Collar Exemption" that exempts "any employee employed in a bona fide executive, administrative, or professional capacity" from minimum FLSA wage and overtime requirements) *with* Mayfield v. U.S. Dep't of Lab., 693 F. Supp. 3d 712, 720–21 (W.D. Tex. 2023) (pre-*Loper Bright*, using *Chevron* Step Two to uphold the same rule). *See also* Seven Cnty. Infrastructure Coal. v. Eagle Cnty., 145 S. Ct. 1497, 1511–12 (2025) (noting that once an agency exercises discretion granted by a statute, judicial review is limited to determining whether agency action was "reasonable and reasonably explained" under APA's "deferential arbitrary-and-capricious standard" and determining that, though courts are to determine "the meaning of 'detailed'" in the statute requiring an Environmental Impact Statement, the question of "what details need to be included in that EIS "involves primarily issues of fact" and the "agency is better equipped to assess what facts are relevant to the agency's own decision than a court is").

111. Rest. L. Ctr. v. U.S. Dep't of Lab., 115 F.4th 396, 408 (5th Cir. 2024) (treating a determination of the "boundaries" of "delegated discretionary authority" as equivalent to "arbitrary and capricious" review); *see* Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1285–86 (1997) (noting that *Chevron* Step Two is effectively equivalent to the APA's "arbitrary and capricious" standard).

112. *See* Coglianese & Froomkin, *supra* note 57, at 44 ("Despite proclaiming to have overruled *Chevron*, *Loper Bright* only reproduced the *Chevron* doctrine using different language."). *But see* Eric R. Bolinder, *Litigating* Loper Bright*: Interpretive Challenges and Solutions for the Post-*Chevron *Era*, 128 W. VA. L. REV. (forthcoming 2025) (manuscript at 6–10), https://dx.doi.org/10.2139/ssrn.5205437 [https://perma.cc/6GUU-GHRE] (disagreeing with this claim). More on why this is likely to continue in Part III, *infra*.

113. Of course, since the Court did not even decide the Magnuson–Stevens Act interpretive question, perhaps the whole case is dicta, and none of it is binding! *See* Kozel, *Is* Chevron *Binding Law?*, *supra* note 14; *see also* Kozel, *Statutory Interpretation*, *supra* note 14.

114. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412 (2024) ("[W]e do not call into question prior cases that relied on the *Chevron* framework. The holdings of those

under *Chevron* might well have all been correct. In fact, it is unclear whether even the underlying substantive holding of *Brand X* has been overturned, even though as a methodological matter it surely was.[115] But if the Court had not made that statement, 40 years of challenges to administrative action would have been open to relitigation. If the Court had wanted to destabilize the administrative state, that would have been an easy way to do it.

* * *

Before turning in Part III to the institutional reasons *Loper Bright* is best seen as an expressive opinion rather than an attack on the administrative state, two additional points: first, one can also view the majority opinion and Justice Kagan's dissent as exemplars of formalism and functionalism.[116] That framing certainly makes sense. But my claim is somewhat different: since the two opinions are likely not that far apart in their practical effects—in contrast to some formalist–functionalist disputes like *Chadha*[117] or even *Seila Law*[118]—viewing the majority opinion as an attempt to express a value in the law better describes the true *raison d'être* of *Loper Bright*. A formalist opinion can—though it need not—have important practical ramifications on the ground that a functionalist might oppose. Here, though, functionalists have less to fear from the majority's rhetorical formalist framing of the decision—hence, my focus on the expressive function that the decision plays.

Second, as I noted briefly in the Introduction, I am not claiming that *Loper Bright* as an expressive act will have no effect in practice.[119] While a court that engages in an expressive act may well not shape behavior *directly*, nothing in my claim precludes the possibility that *Loper Bright* is a part—albeit largely a rhetorical part—of a broader movement to change judicial and societal attitudes towards the administrative state, which could in turn lead to further constraints on agency power. Ideological (in the literal sense of that word) changes may indeed have material

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cases that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory *stare decisis* despite our change in interpretive methodology."). What exactly will happen with such cases remains open of course. *See* Jonathan Remy Nash, Chevron *Stare Decisis in a Post*-Loper Bright *World*, 110 IOWA L. REV. ONLINE 180, 189–201 (2025). *But cf.* Gluck, *supra* note 3, at 289 (noting that when the Michigan Supreme Court changed its methodological approach to interpretation, lawyers relitigated many previously decided cases). But my point here is simply that the Court could have explicitly overruled all cases in which a court had upheld an agency interpretation based on *Chevron* Step Two.

115. The battles about the interpretation of the Communications Act's definitions of "information service" and "telecommunications service" that *Brand X* addressed have been a constant over the past two decades. For the most recent iteration of the debate, see *In re MCP No. 185*, 124 F.4th 993, 997, 1002–03 (6th Cir. 2025). Unless Congress steps in (which it has been unable to do over the past quarter century) or the Supreme Court tells us what the "best" interpretation is, the fights may well continue.

116. *See* Coglianese & Froomkin, *supra* note 57, at 14 ("[J]ust as elevators in tall buildings often play background music, the *Loper Bright* opinion has a common melody that runs up and down its many pages: formalism.").

117. *See* Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 951 (1983).

118. *See* Seila L. LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 223–24 (2020).

119. *See supra* text accompanying note 7.

effects. An expressive act embodying an ideology can, and often does, impact the real world.[120] The long-term consequence of the decision, when combined with many others the Court has decided over the past decade[121] (and will decide in coming decades?), could aggregate to destabilize the administrative state over time.[122]

III. INSTITUTIONAL FACTORS

The final reason the decision can be seen more as an expressive act than a fundamental challenge to the administrative state is practical: even if one could view the opinion in *Loper Bright* as an attempted power grab and/or signal to lower courts to slash-and-burn through the Federal Register,[123] institutional factors will dampen whatever impact the legal doctrinal change could have. Put another way, the Court's opinion does nothing to change the institutional factors that shape the litigation system in which the putative undermining of the administrative state would occur.[124]

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120. *See* Tom Schulman, *Dead Poets Society* (Final Draft Feb. 22, 1988), https://www.dailyscript.com/scripts/dead_poets_final.html [https://perma.cc/N7JV-C6EV] ("[W]ords and ideas can change the world."); *see also* Coglianese & Walters, *supra* note 4, at 47 (referring to *Loper Bright*'s "symbolic resonance" and noting that law "holds expressive value that can induce changed behavior even in the absence of formal sanction" and that "[s]ymbols also matter greatly in politics"); *id.* at 52 ("Symbols can matter, even when we cannot fully predict with precision how or when they will."). I am indebted to Miriam Seifter and Alex Huneeus for this point.

121. *See, e.g.*, SEC v. Jarkesy, 603 U.S. 109, 140–41 (2024); Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 603 U.S. 799, 825 (2024); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 483–84 (2010); Seila L., LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 202–05 (2020). *But see* Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., 601 U.S. 416, 420–26 (2024).

122. For an argument along these lines with respect to *Seila Law*, see Ganesh Sitaraman, *The Political Economy of the Removal Power*, 134 HARV. L. REV. 352, 389–92 (2020). Moreover, nothing I am claiming about *Loper Bright* as an *opinion* is meant as a claim, one way or the other, about whether *Loper Bright* as a *case* was brought to the Supreme Court as, and in fact is, part of a broader "assault on the administrative state." *See, e.g.*, Jack M. Beerman, *The Never-Ending Assault on the Administrative State*, 93 NOTRE DAME L. REV. 1599, 1609 (2018). For discussion of the "synergies" among these decisions and their potential aggregate interaction effects, see Renee Farmer & Daniel G. Aaron, Loper Bright*'s Deregulatory Synergies*, 55 SETON HALL L. REV. 1697, 1698, 1717–19 (2025); Vermeule, *supra* note 5, at 254–58. Finally, and relatedly, the baseline in my argument is the state of judicial review of agency action just prior to *Loper Bright*. It is of course possible that we could have a doctrine of even greater deference than the state of the law immediately prior to *Loper Bright*—perhaps *Chevron* in the 1990s was such a doctrine—but I am using the status quo immediately before *Loper Bright* as my baseline, since that is the backdrop against which the Court issued the opinion. I am indebted to Rob Yablon for helping me clarify this point.

123. *See* sources cited *supra* note 3.

124. Of course, *perceptions* of the Court's holding might well affect some of the actors within the system. *See* Coglianese & Walters, *supra* note 4, at 47 (arguing that "*Loper Bright* is likely to bring about a significant disequilibrium due to the symbolic resonance of its three key words: '*Chevron* is overruled[]'"). Possibilities include agencies becoming more cautious, *see* Stuart Shapiro, *Short-Term vs. Long-Term Effects*, 47 REGUL. 33, 34 (Fall 2024) (arguing that agencies will likely be more risk-averse in the near term), "activist" judges becoming bolder, and lawyers willing to take on more litigation. [I am indebted to Bridget Dooling for this point.] This might in turn result in impact on the ground. But that is all the

At least two important institutional factors will play a role here: comparative competence and comparative capacity.[125]

A. Comparative Competence/Expertise

1. Agencies or Judiciary in General

Let's start with the more familiar, comparative competence. On the one hand, the Court appears to reject arguments about relative agency competence on the question of statutory interpretation. After all, isn't Justice Kagan's dissent a paean to the view that agencies are better positioned to "interpret" statutes when Congress has not explicitly dictated an interpretive outcome—in other words, when interpretation involves policymaking? And doesn't the majority refuse to join Justice Kagan's dissent? Yes, and yes! But as a practical matter, the question is ultimately not simply what the doctrine says but whether the number of successful legal challenges to agency action will increase. Or perhaps, put another way, whether under *Loper Bright* rather than *Chevron* the courts are more likely to reject agency decisions that principles of comparative competence suggest would better be decided by agencies. On this, the jury is, of course, still out.[126] But count me as skeptical. Recall that the majority not only does not say how the substantive legal question in *Loper Bright* comes out under its new test but also studiously avoids discussion of *any* of the examples Justice Kagan raises. Thus, there may not be much disagreement between the majority and Justice Kagan on the application of the doctrine as it plays out through the crucial issue of comparative competence. Indeed, the majority's rhetorically powerful, first post-dinkus paragraph at the end of the opinion is itself a clear articulation of comparative expertise: where "independence" is needed in decisionmaking—that is, in the realm of "legal interpretation"—judges *are* the experts.[127]

While the majority's opinion may seem like a power grab on questions that agencies are better positioned to answer, it might instead just be an attempt to create a more analytically sound doctrinal structure into which questions of comparative expertise can play out. The majority may well believe that it is *simplifying* the analytical structure, if it views the new approach as easier for the lower courts to

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more reason for everyone, including actors within the system, to understand clearly what the case does and does not hold.

Just as importantly in light of the second Trump Administration's deregulatory efforts, nothing in my argument precludes the President and/or Executive Branch more generally from itself destabilizing the administrative state. Indeed, the capacity of the administrative state compared with the judiciary gives it more relative power to either regulate or deregulate as it so chooses. *See* discussion *infra* Section III.B.

125. Jed Handelsman Shugerman, *The Major Questions Doctrine, Post-*Chevron*?:* Skidmore*,* Loper-Bright*, and a Good-Faith Emergency Question Doctrine*, 48 HARV. J.L. & PUB. POL'Y 73, 78 (2025) (referring to "triage" and "comparative expertise" as "[t]wo rationales for *Chevron*").

126. *See* Mila Sohoni, Chevron*'s Legacy*, 138 HARV. L. REV. F. 66, 66 (2025) ("It is still too soon to gauge the on-the-ground difference."); Coglianese & Walters, *supra* note 4, at 4–5 (noting that the question of "[h]ow much . . . *Loper Bright* [will] affect the frequency with which agencies' actions are rejected by courts" is "unsettlingly unanswerable at this time").

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

apply. Of course, the majority may be wrong about that.[128] After all, judicial review of agency interpretations is hard, and no doctrinal formulation can completely eliminate its complexity. That's why *Chevron* had "refinements," and why *Loper Bright* has the "delegated discretionary authority" category and maintains *Skidmore* "respect."[129] But the majority may believe *Loper Bright* is easier to apply than *Chevron*, and if so, this would dovetail nicely with my claim that *Loper Bright* is primarily an expressive act on the Court's part. "Dear lower court judge," the Supreme Court is in effect saying, "Your task is to do law (find the 'best' interpretation), and we think you'll find this crisp, clear statement of your task easier to apply than the 'dizzying breakdance' *Chevron* has necessitated you perform over the past four decades."[130] Moreover, the Court's first post-dinkus paragraph responding to the dissent's comparative-competence argument[131] could be viewed as adding, "And, dear lower court judge, here is how you know if something is 'law' and thus your decision to make: if it is in fact the kind of thing that is within *your* relative competence more than the agency's because it requires judgment independent of the political branches."[132]

Along the same lines, *Loper Bright* may also be part of a broader dialogue between the courts and agencies.[133] Rather than seeing *Loper Bright* as a limitation on agency freedom to "interpret" statutes, the case could just as well be seen as the Court's way of clarifying the message to agencies about the respective roles of courts and agencies. "Dear agencies, here is a more straightforward way to determine when and whether courts will have the final word on a question related to an agency action. Rather than statutory 'ambiguity' triggering deference to your

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128. *But see* Andrew Hammond & Christopher J. Walker, *Stare Decisis and The Missing Administrability Inquiry*, 100 N.Y.U. L. Rev. (forthcoming 2025) (manuscript at 38), http://dx.doi.org/10.2139/ssrn.5382014 [https://perma.cc/L965-FZKB] (noting that neither the briefs in *Loper Bright* nor the Court made any attempt to assess the administrability of the de novo standard relative to *Chevron* and arguing that the de novo standard will in fact be more difficult to administer than *Chevron*).

129. And remains ambivalent on how courts are to treat mixed questions of fact and law. *See* discussion *infra* Subsection III.A.2.

130. This point is of course largely conjecture on my part, but the Court does explicitly state that it views *Chevron* as too indeterminate to be workable. *See Loper Bright*, 603 U.S. at 409 ("Because *Chevron* in its original, two-step form was so indeterminate and sweeping, we have instead been forced to clarify the doctrine again and again. Our attempts to do so have only added to *Chevron*'s unworkability, transforming the original two-step into a dizzying breakdance."). *But see id.* at 475–76 (Kagan, J., dissenting) ("For the most part, the exceptions that so upset the majority require merely a rote, check-the-box inquiry. If that is the majority's idea of a 'dizzying breakdance,' the majority needs to get out more" (citation omitted)).

131. *See id.* at 412 ("The dissent ends by quoting *Chevron*: "'Judges are not experts in the field.' That depends, of course, on what the 'field' is. If it is legal interpretation, that has been, 'emphatically,' 'the province and duty of the judicial department' for at least 221 years. *Marbury*, 1 Cranch at 177. The rest of the dissent's selected epigraph is that judges '"are not part of either political branch."' Indeed. Judges have always been expected to apply their 'judgment' independent of the political branches when interpreting the laws those branches enact. The Federalist No. 78, at 523." (citation modified)).

132. *See also generally* discussion *infra* Subsection III.A.2.

133. I am indebted to Emily Bremer for this point.

'interpretation,' here's the framework: If the question is one of pure 'law,' we will have the final word, subject of course to *Skidmore* respect. But if the statutory language, either explicitly or implicitly, delegates discretion to you, we will respect that delegation, subject only to 'arbitrary and capricious' review."[134]

As a side point, one needn't even agree with the Court's claim that it has comparative expertise at statutory interpretation to understand the importance of the argument as an expressive principle. It would be perfectly reasonable to reject, as an empirical matter, the Court's argument of having comparative expertise at "legal interpretation."[135] After all, agencies have lawyers too, and in any significant agency decision, those lawyers are indispensable players in determining the scope of an agency's statutory authority.[136] Importantly, an agency never takes any significant action without the lawyers signing off on an interpretation of a statute that authorizes that action. One could thus view agency lawyers as *better* able to parse through and interpret complex regulatory statutes than generalist federal judges. Like judges, they too are lawyers, but unlike judges, they are steeped in the regulatory statutes they are tasked with interpreting and so are more likely to interpret them correctly.[137]

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134. While the Court does not explicitly allude to "arbitrary and capricious" review, it does say that, "[w]hen the best reading of a statute is that it delegates discretionary authority to an agency, . . . [t]he court fulfills [its] role by recognizing constitutional delegations, fixing the boundaries of the delegated authority, and ensuring the agency has engaged in *reasoned decisionmaking* within those boundaries." *Loper Bright*, 603 U.S. at 395 (emphasis added) (citation modified). The phrase "reasoned decisionmaking" has long been associated with "arbitrary and capricious" review. *See, e.g.*, Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 52 (1983). The Court has subsequently made clear that the "arbitrary and capricious" standard is in fact what lower courts should use in such circumstances. *See* Seven Cnty. Infrastructure Coal. v. Eagle Cnty., 145 S. Ct. 1497, 1511–12 (2025). For a normative argument that this is in fact what courts ought to be doing, see Jeffrey Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 857 (2020) ("[N]eoclassical administrative law holds that courts should be less engaged in review of agency policymaking than current doctrine suggests. Such an approach insists that the line between law and policy is sharper than administrative law's standard account, and that courts should be more vigilant in patrolling that boundary."). *But see* Vermeule, *Neo-?*, *supra* note 13, at 104.

The Court could be on the verge of a more searching approach to "arbitrary and capricious" review, *see* Ohio v. EPA, 603 U.S. 279, 292 (2024), decided the same week as *Loper Bright*; *see also* Dep't of Homeland Sec. v. Regents of the Univ. of Calif., 591 U.S. 1, 26-28 (2020). *But see* FCC v. Prometheus Radio Project, 592 U.S. 414, 423 (2021). But, even if true, the question of how searching lower courts will be might have a different answer than how searching the Supreme Court will be in the relatively rare cases that reach the Court.

135. *See* Anya Bernstein & Cristina Rodriguez, *Working with Statutes*, 103 TEX. L. REV. 921, 986 (2025) (alluding to the Roberts Court's "baseless assumption . . . that agencies have no special expertise in interpreting statutes"); *id.* at 992 ("[C]ourts should regard agencies at least as equals, if not leaders, in the interpretation of statutes—agencies *do* have special expertise in interpreting."). *See generally id.* (using an interview-based empirical study, arguing that by acting as "a statute's custodians," agencies are better positioned "to make long-term, informed, and accountable policies about specific issues" than are courts).

136. *See id.* at 942–43 (alluding to lawyers' "significant, if not lead, role in tying agency action to fidelity to statutory texts").

137. Although it is common to focus on cases that go to the Supreme Court or at least on those cases that arise out of statutory schemes that place venue for review of agency

In short, agency lawyers are specialists, and judges are generalists.[138] Moreover, for important executive agency rules and guidance, agency lawyers are subject to Executive Order 12866 regulatory review, including checks by other lawyers in the executive branch, including at DOJ, White House Counsel, the Office of Management and Budget, and (where relevant) lawyers from other agencies. But even if one views agencies as better than courts at interpreting their own statutes, that does not undermine the Court's articulation of the point as an expressive statement about the role judges play in our system of government. Nor does it undermine the concern about agency self-interest and bias.

The Court also implicitly incorporates agency legal expertise into the doctrine by drawing on *Skidmore*'s idea that courts should give agency interpretations "respect."[139] If I'm right about this, one can expect to see a positive correlation between how much "respect" courts give to an agency interpretation and the complexity of the regulatory regime. Ultimately, though, the Court views individual agencies—indeed, perhaps even the entire executive branch—as monoliths subject to the potential for self-dealing bias and thus in need of a check from the *independent* judiciary.[140] *This*, rather than the relative ability to parse through thick regulatory arcana embedded in the United States Code, is what the Court thinks gives the courts their comparative competence.[141]

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action in the courts of appeals, large numbers of petitions for review are brought before individual federal district judges. So, the comparative expertise argument can't be limited to, say, the D.C. Circuit, where the judges regularly hear APA challenges to agency action. More on this point below. *See infra* text accompanying notes 169–80.

138. *See* LAWRENCE BAUM, SPECIALIZING THE COURTS 1–2 (2011); *cf.* Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 889 (2003) ("[E]ven if courts should follow the ordinary meaning of text, it is reasonable to suggest that administrative agencies need not, in part because agencies are specialists rather than generalists. Compared to courts, agencies are likely to have a good sense of whether a departure from formalism will seriously damage a regulatory scheme; hence it is appropriate to allow agencies a higher degree of interpretive flexibility.").

139. *See supra* text accompanying note 21. In *Skidmore*, the Court held that agency interpretations, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its 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." Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

140. *See* Sec. & Exch. Comm'n v. Jarkesy, 603 U.S. 109, 132 (2024); Loper Bright Enters. v. Raimondo, 603 U.S. 369, 414–15, 427–28 (2024) (Gorsuch, J., concurring). A recent study of lower-court rulings applying *Loper Bright* supports the idea that this concern about bias is an important driver. *See* Robin Kundis Craig, *The Impact of* Loper Bright v. Raimondo*: An Empirical Review of the First Six Months*, 109 MINN. L. REV. 2671, 2734 (2025) (describing cases as "provid[ing] evidence that *Loper Bright* licenses the federal courts to thoroughly examine a federal agency's basic statutory authority, not just its statutory interpretations" and quoting one court as saying that "when there is an ambiguity about the scope of an agency's own power . . . abdication in favor of the agency is least appropriate" (internal citation and quotation marks omitted)).

141. This concern about administrative agency political bias long predates even the New Deal in Anglo-American jurisprudence. *See* William Bull, *Whither Are We Tending?*,

Indeed, the Court further incorporates this point when describing the judicial decisionmaking process in glowing terms: "Courts, after all, do not decide such questions blindly. The parties and *amici* in such cases are steeped in the subject matter, and reviewing courts have the benefit of their perspectives."[142] But, even putting aside the question of whether lower court cases will always have amici—they surely won't—a comparative-competence lens will still ask whether using the "traditional tools of statutory interpretation" is the best way to decide most of these questions. And even if we have an expanded conception of the "traditional tools of statutory interpretation," one that includes more pragmatic considerations, one still needs to ask whether we want legally trained judges within the constraints of an adversarial system or agency heads within the constraints of the informal rulemaking system making the final call on such things.[143] But let's put all that aside for a moment.

2. Mixed Questions of Law and Fact

My descriptive point here is distinct: comparative competence will in fact dampen the likelihood that *Loper Bright* will serve as a significant unravelling of the administrative state. Here, it is worth not only reiterating that the majority does not address either the Magnuson–Stevens Act or any of Justice Kagan's five examples, but also noting that the majority does not take issue with her claim that the decision may be limited to "the pure type of legal issue," such that courts would still "defer when law and facts are entwined."[144] While Justice Kagan "suspect[s] the majority has no such intent, because that approach would preserve *Chevron* in a substantial part of its current domain,"[145] the majority may well have such intent![146] After all, as Justice Thomas has put it in another context, "longstanding historical

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86 THE ACADEMY 823, 823 (1914) (in reviewing ALBERT VENN DICEY, LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY (1905), noting that Dicey "regrets the gradual ousting of the authority of the courts of law in favour of permanent officials appointed by the Government—not only to make new laws by means of by-laws, but also to be in some cases the final court of appeal of these laws. He affirms quite truly that an administrative court is never a completely independent tribunal.").

142. *Loper Bright*, 603 U.S. at 402; *see also* Peter M. Shane, *The Roberts Court's* Chevron *Ruling and Darkening Clouds Over the Administrative State*, WASH. MONTHLY (July 16, 2024), https://washingtonmonthly.com/2024/07/16/the-roberts-courts-chevron-ruling-and-darkening-clouds-over-the-administrative-state/ [https://perma.cc/ZXX4-MNEU] (referring to "the Court's hubristic valorization of the judicial process").

143. In practice, of course, judges don't actually make the final call on anything, since courts are reactive institutions. Judges don't affirmatively *make* policy—under the APA, they can simply stop agencies from doing what they want to do.

144. *Loper Bright*, 603 U.S. at 469 (2024) (Kagan, J., dissenting); *see* Hickman, *supra* note 21, at 134 (noting that the Court in *Loper Bright* approved of an unspecified judicial deference, but not necessarily *Skidmore*, for agency interpretations of statutes that represent mixed questions of fact and law).

145. *Loper Bright*, 603 U.S. at 469 (Kagan, J., dissenting).

146. Justice Gorsuch does not seem to have such an intent. *See Loper Bright*, 603 U.S. at 431 (Gorsuch, J., concurring) (rejecting the "limited experiment" of "a form of deference akin to *Chevron*, at least for so-called mixed questions of law and fact"). But perhaps one can draw the negative inference that the rest of the majority doesn't agree with Justice Gorsuch on this point from the fact that no one else joined his opinion.

practice indicates that the phrase ['questions of law'] does *not* encompass mixed questions of law and fact."[147] That may be an overstatement: sometimes mixed questions of law and fact are deemed to be questions of "law" and sometimes questions of "fact."[148]

As the Court implicitly recognized in *Loper Bright* itself, this conundrum has been a perennial question in determining the standard of judicial review of agency action since time immemorial—and one that does not admit of easy answers based on abstract categories or principles. The Court favorably cites a 1950 article by Professor Bernard Schwartz that provides a nuanced exploration of the difficulty of determining when a mixed question gets characterized as one of "fact" subject to the very deferential "substantial evidence" standard or one of "law" subject to the APA's admonition that courts decide "all relevant questions of law." We can thus see the Court as *sub silentio* incorporating Professor Schwartz's understanding of the difficulties in determining when judicial deference to agencies is appropriate in mixed questions of law and fact, including applications of law to fact.[149]

Indeed, we already have a "courts decide all questions of law de novo" regime in federal administrative law, and it suggests that this "mixed question of law and fact" deference problem will persist under *Loper Bright*. The Federal Circuit has long rejected *Chevron* deference for the Patent and Trademark Office, using a de novo standard in its review of certain kinds of questions. Yet that has not obviated the need to determine when exactly a question is a question of "law" rather than "fact" in the (many) circumstances that can reasonably be characterized as mixed questions of law and fact.[150]

In any event, the majority's intent may not matter much, since the "delegated discretion" portion of the decision[151] and *Skidmore* "respect" may together "preserve *Chevron* in a substantial part of its current domain."[152] In other words, *Loper Bright* permits judges to continue to recognize their relative competence—just as did *Chevron*. We thus have reason to think that in cases that

147. Guerrero-Lasprilla v. Barr, 589 U.S. 221, 238 (2019) (Thomas, J., dissenting).

148. *Id.* at 228 (majority opinion) (concluding that "the statutory term 'questions of law' . . . can reasonably encompass questions about whether settled facts satisfy a legal standard"). So the mixed questions will likely play out with comparative expertise as a backdrop, as they did in the *Chevron* era. *Cf.* Gwendolyn Savitz, *Reviewing Mixed Questions of Fact and Law in Administrative Adjudications*, 68 VILL. L. REV. 463, 494–98 (2023) (noting that courts are confused not only about the standard of review for mixed questions of law and fact but even what qualifies as a mixed question).

149. *Loper Bright*, 603 U.S. at 394 (citing Bernard Schwartz, *Mixed Questions of Law and Fact and the Administrative Procedure Act*, 19 FORDHAM L. REV. 73 (1950)); *see also* Vermeule, *Neo-?*, *supra* note 13, at 107 (noting that the "lines between law, fact, and policy discretion are uncertain and unstable" and alluding to the "ongoing instability in practice of the distinction between so-called 'pure questions of law' and 'mixed questions of law and fact'").

150. *See* Rebecca S. Eisenberg, *A Functional Approach to Judicial Review of PTAB Rulings on Mixed Questions of Law and Fact*, 104 IOWA L. REV. 2387, 2392–95 (2019); Paul R. Gugliuzza, *Law, Fact, and Patent Validity*, 106 IOWA L. REV. 607, 613 (2021); Paul R. Gugliuzza, *Patent Law's Deference Paradox*, 106 MINN. L. REV. 1397, 1436–39 (2022).

151. *Loper Bright*, 603 U.S. at 379, 394–96 (2024); *see supra* Section II.D.

152. *Loper Bright*, 603 U.S. at 469 (Kagan, J., dissenting).

can be characterized as mixed questions of law and fact—particularly those that involve agency expertise and complex regulatory regimes—courts will in fact find that Congress delegated discretionary authority to the agency or will "respect" the agency's decision.[153] Either way, courts can easily give agencies a wide berth comparable to what they gave under *Chevron* Step Two (and can just as easily reject an agency interpretation comparable to what they had previously done under *Chevron* Step One).[154] The fact that many states and other common-law jurisdictions have long had a doctrine similar to *Loper Bright* provides further support for my claim that little need change on the ground.[155]

The question of what happens to cases involving mixed questions of law and fact under *Loper Bright* raises a deeper issue intertwined with the comparative competence of courts and agencies: what exactly does it mean to "interpret" law in cases involving mixed questions of law and fact, and who does that?[156] The Court's conception of the "interpretation of law"—and its determination that courts must have the last word on the interpretation of law—elides that important jurisprudential

153. In a recent post-*Loper Bright* case involving the interpretation of a complex Federal Power Act question, the D.C. Circuit both rejected the agency's interpretation of statutory language and yet simultaneously recognized that a mixed question of law and fact might properly be within the agency's bailiwick. After rejecting the agency's interpretation, the court nonetheless remanded to the agency to interpret the clause rather than decide the question itself "*because the application of the statutory text to the meaning of the Tariff may 'rest[] on factual premises within the agency's expertise*,'" Pac. Gas & Elec. Co. v. Fed. Energy Regul. Comm'n, 113 F.4th 943, 951 (D.C. Cir. 2024) (emphasis added) (quoting *Loper Bright*, 603 U.S. at 402); *see also id.* at 953–54 (Pan, J., concurring) (while setting forth a view that the "best" interpretation of the statute was to draw on a pre-1992 contract, determining that FERC would nonetheless "draw upon its expertise to interpret the contracts in question and would exercise its discretion to make necessary technical inquiries properly confided to FERC's judgment" (citation modified)); *see also* Seven Cnty. Infrastructure Coal. v. Eagle Cnty., 145 S. Ct. 1497, 1512 (2025) (treating NEPA's reference to a "detailed" Environmental Impact Statement ("EIS") as requiring deference to agency on what details to include in the EIS and characterizing that determination as a question of fact).

154. *Cf.* Merrill, *supra* note 68, at 231 ("[W]hether *Loper Bright* turns out to be a power grab or a new framework accommodating significant acceptance of agency interpretations probably depends more on the attitude of the judges than on the specific mechanics of the legal regime used in reviewing questions of law.").

155. The fact that what appears to be a majority of states, *see* Luke Phillips, Chevron *in the States? Not So Much*, 89 MISS. L.J. 313, 364 (2020), including California, *see* Yamaha Corp. of Am. v. State Bd. of Equalization, 960 P.2d 1031, 1034 (Cal. 1998), a state whose courts are not viewed as suspicious of administrative power, have a de novo review standard (or close cousin) suggests that, in practice, judges can comfortably consider comparative expertise concerns under *Loper Bright*. The Court's approach in *Loper Bright* also "aligns closely with the basic rule in most comparable jurisdictions [throughout the English-speaking legal world]," further suggesting that *Loper Bright* is compatible with a robust administrative state. Leonid Sirota & Edward Willis, *The End of* Chevron *Deference in Comparative Perspective*, YALE J. ON REGUL. NOTICE & COMMENT (Oct. 10, 2024), https://www.yalejreg.com/nc/the-end-of-chevron-deference-in-comparative-perspective-by-leonid-sirota-edward-willis/ [https://perma.cc/K6V7-ZDPJ].

156. I am indebted to Robert Post for this insight.

(and, in turn, institutional) question.[157] If we step back and take ourselves out of the world of administrative agencies for a moment, we can see that the category of mixed questions of law and fact is endemic in the "interpretation" of law. This point is implicit in Justice Kagan's query as to whether *Loper Bright* continues to allow deference to agencies in such cases, including cases involving the application of law to facts.[158] Take a run-of-the-mill negligence case: who decides whether a tort defendant has acted "reasonably"? Within the bounds set by a judge, the *jury* decides.[159] Perhaps we wouldn't call that "interpretation" of the legal concept of "reasonableness," but it is the application of law to fact. Juries do this all the time because the application of law to fact is something that factfinders do—and it can be characterized as a form of "interpreting" the law, since it involves determining the meaning of the law, albeit in a specific fact scenario.[160]

Importantly, the courts allocate decisionmaking authority between judges and juries based on a perceived sense of comparative competence, and this is no different in mixed questions of law and fact. Figuring out whether the question is one for the judge or for the jury amounts to determining whether the judge or jury is in a better position—based on their respective competences—to decide the question.[161] Indeed, even without a category of "mixed questions of law and fact," courts would still have to figure out the distinction between a "question of law" and a "question of fact," "a distinction that the Supreme Court itself has recognized as 'vexing' and 'elusive.'"[162]

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157. *Cf., e.g.*, Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded,* 112 CALIF. L. REV. 899, 937 (2024) ("Courts must often decide whether a broad enabling statute applies to a particular agency action, and that inquiry can be difficult because the statute is, *in that respect*, ambiguous.").

158. *See* 9C WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 2589 (3d ed. 2025) (equating "mixed questions of law and fact" with "legal inferences to be drawn from the facts" and "the application of law to the facts").

159. *See* Bernard Schwartz, *Mixed Questions of Law and Fact and the Administrative Procedure Act*, 19 FORDHAM L. REV. 73, 79 (1950).

160. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 53 (2012) (listing as the first fundamental principle of interpretation, so-named the "Interpretation Principle," that "[e]very application of a text to particular circumstances entails interpretation"); *see also* U.S. Bank Nat'l Ass'n *ex rel.* CWCapital Asset Mgmt. LLC v. Vill. At Lakeridge, LLC, 583 U.S. 387, 395–98 (2018); *see* 9C WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 2589 (3d ed. 2025); *cf.* Schwartz, *supra* note 159, at 85 ("Does not the application of a statutory term to a particular state of facts involve statutory interpretation within the meaning of [the APA]?"); *id.* (laying out the case for distinguishing between "interpretation" of a statute and "application" of a statute to particular facts). *But cf.* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 95–96 (2010) (arguing that applications of statutory text are acts of construction, not interpretation).

161. *Cf. infra* note 163 and accompanying text.

162. *See* Adam N. Steinman, *Appellate Courts and Civil Juries*, 2021 WIS. L. REV. 1, 2 (2021) (first quoting Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982) ("The Court has previously noted the vexing nature of the distinction between questions of fact and questions of law."); and then quoting Miller v. Fenton, 474 U.S. 104, 113 (1985) ("[T]he appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive.")).

Similarly, when appellate courts determine the standard for reviewing trial court decisions in mixed questions, the Supreme Court has explicitly drawn on comparative competence.[163] The majority's unwillingness to respond to Justice Kagan about mixed questions of law and fact may indicate an unwillingness to wade into the details of when a mixed question of law and fact will be treated as a legal question subject to the new de novo *Loper Bright* standard and when it will not. But just as the Court has trod carefully without pronouncements of absoluteness—and has understood the question to be one of comparative competence—in the context of appellate review of trial courts, we can expect the same here. The courts will have to figure out the line between "law" and "fact" on a case-by-case basis—undoubtedly using *Skidmore* "respect" and the "delegated discretionary authority" category to do it—much as they needed to figure out whether Congress spoke "directly" to an issue to determine whether to defer to a reasonable agency interpretation under *Chevron* Step Two.[164]

The "mixed question" category might be further subdivided into application of law to a particular set of adjudicative facts (e.g., whether a driver's actions were "reasonable" in a tort suit) and quasi-legislative questions (e.g., whether 90% carbon capture and storage is the "best system of emissions reduction" for carbon dioxide from existing coal-fired power plants that "the Administrator determines has been adequately demonstrated").[165] This distinction draws on Kenneth Culp Davis's famous dichotomy between adjudicative facts and legislative facts.[166] Thought of through the lens of comparative competence, courts might have

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163. *See CWCapital Asset Mgmt. LLC*, 583 U.S. at 395 (when determining whether to characterize a mixed question as one of law—and hence subject to de novo review by an appellate court—or fact—and thus subject to the "clearly erroneous" standard—the question to be asked is "What is the nature of the mixed question here and *which kind of court (bankruptcy or appellate) is better suited to resolve it*?" (emphasis added)); *see also* Salve Regina Coll. v. Russell, 499 U.S. 225, 233 (1991) ("Those circumstances in which Congress or this Court has articulated a standard of deference for appellate review of district-court determinations reflect *an accommodation of the respective institutional advantages of trial and appellate courts*." (emphasis added)).

164. To be fair here, courts often avoided that inquiry altogether, simply concluding that it didn't matter one way or the other, since the agency's interpretation was "reasonable." *See, e.g.*, Relentless v. U.S. Dep't of Com., 62 F.4th 621, 633–34 (1st Cir. 2023), *vacated and remanded sub nom.*, Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024), *and vacated sub nom.*, Relentless Inc. v. U.S. Dep't of Com., No. 21-1886, 2024 WL 3647769 (1st Cir. July 31, 2024). This abdication certainly did not endear itself to the *Loper Bright* majority. *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 384 (2024) ("In reaching [its] conclusion [upholding the agency's interpretation], the First Circuit stated that it was applying *Chevron*'s two-step framework. But it did not explain which aspects of its analysis were relevant to which of *Chevron*'s two steps. Similarly, it declined to decide whether the result was 'a product of *Chevron* step one or step two.'" (citations omitted)). The new doctrine under *Loper Bright* will indeed force courts to address the law/fact line more explicitly, but *Skidmore* "respect" and the "delegated discretionary authority" give them some tools to do that.

165. *See* Clean Air Act § 111, 42 U.S.C. § 7411. The question is before the courts right now. *See* West Virginia v. EPA, 145 S. Ct. 2 (2024) (mem).

166. *See* Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402–03 (1942); *see also* FED. R. EVID. 201(a)

greater competence at the former—that's what appellate courts do vis-à-vis trial court decisions all the time—than the latter, since the latter requires a more sophisticated ability to gather data or assess technological capabilities. So, even if one were to view *Loper Bright* as adopting Justice Roberts's dissent in *Hearst*,[167] *Loper Bright* continues to permit courts to give agencies plenty of leeway to decide mixed questions that depend on quasi-legislative inquiries without undue judicial interference.[168]

One final point on comparative competence. The ultimate question is whether it is better to have a court or an agency decide: each is a decisionmaking body, and each has its own characteristics.[169] Since most challenges to agency interpretation never make it anywhere near the Supreme Court—indeed, despite some specific statutes that vest jurisdiction in the courts of appeals, many APA cases are brought before a single federal district judge[170]—the institutional-choice question should focus on the agency compared with the average federal district judge. Unless there are specific reasons to think the agency is biased, the answer would usually favor the agency.[171] The agency has, as Justice Kagan points out, not just lawyers, but also scientists, engineers, economists, and other experts who understand the statute's underlying subject matter. And it has lawyers too. These lawyers are not only more familiar with the relevant statutes than the average federal judge but also more familiar with the intersection between those statutes and the facts on the ground—which is what "interpretation" of those statutes, as Justice Kagan rightly points out, ordinarily entails. Yes, it may be possible to convey *some* of that information, in an abbreviated fashion, to a judge through briefs and oral arguments,[172] but most federal district judges (unlike the Supreme Court, which controls its own docket) have scores, if not hundreds, of cases to decide every year.

(acknowledging the distinction). For a recent review of the extensive literature on this topic, see Haley N. Proctor, *Rethinking Legislative Facts*, 99 NOTRE DAME L. REV. 955, 957 n.6 (2024).

167. *See Loper Bright*, 603 U.S. at 431 (Gorsuch, J., concurring) (citing Justice Roberts's dissent in Gray v. Powell, 314 U.S. 402, 420–21 (1941), critiquing *Gray* and *Hearst*, and thereby implying that the Court was now rejecting the approach taken by the majority in those cases involving mixed questions of law and fact).

168. I am indebted to Nina Mendelson for the insight in this paragraph.

169. *See generally* NEIL KOMESAR, IMPERFECT ALTERNATIVES 150 (1994) (discussing characteristics of societal decisionmaking processes, although not administrative agencies). I may be framing things here through an unduly binary lens. In some circumstances, courts and agencies are in dialogue, together shaping the agency's ultimate action. I am indebted to Ed Willis for this point. To reiterate, though, courts generally do not "decide," because they do not implement policy. They simply have the power to stop agencies from acting. *See supra* note 143.

170. 5 U.S.C. § 702.

171. *See* William N. Eskridge, Jr., *Expanding* Chevron*'s Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 WIS. L. REV. 411, 420–23 (2013); *see also Loper Bright*, 603 U.S. at 449–50 (Kagan, J., dissenting) (arguing that agencies are better positioned than courts to interpret statutes in the course of implementing them because of agencies' expertise, experience, and political accountability); Sunstein & Vermeule, *supra* note 138, at 927; *cf.* Bernstein & Rodriguez, *supra* note 135, at 936–51.

172. *See supra* text accompanying note 142.

They lack not only the expertise to parse through complex statutory and regulatory schemes in the context of novel and complicated factual circumstances, but also the time to develop such expertise.[173]

Again, if one views *Loper Bright* as intending or likely to change things on the ground, the Court's failure to mention the fact that the lower courts will be implementing the new "delegated discretion" framework is significant—particularly significant when the percentage of legal challenges to administrative agency action that make their way to the Supreme Court is miniscule.[174] Justice Kagan argues that, "[i]n one fell swoop, the majority today gives itself exclusive power over every open issue . . . involving the meaning of regulatory law. . . . [T]he majority turns itself into the country's administrative czar."[175] But that's not quite right: even if we accept Justice Kagan's implicit claim that the decision will have a major impact—and, I hope by now I have convinced you that it won't—"the majority turns [*the lower federal courts*] into the country's administrative czar[s]"! [176] The Supreme Court will certainly not be able to police all of the federal courts.[177] And the Court is fully aware that, even if the decision leads to an uptick in challenges, outside of

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173. The D.C. Circuit is arguably different. The D.C. Circuit has long had a level of expertise in the interpretation of complex regulatory statutes that makes the comparative expertise balance between agencies and the D.C. Circuit different. Many civil law countries have an entire court structure with exclusive jurisdiction over cases involving administrative agency actions. *See* UWE KISCHEL, COMPARATIVE LAW 458–61 (Germany), 467–69 (France) (2019).

174. *See* Merrill, *supra* note 68, at 246 ("One of the costs of the Court's penchant for proceeding in the law-declaration mode [as opposed to a dispute-resolution mode] is that it loses sight of the need to develop doctrine that can be effectively applied at all levels of the judiciary."); *see also* Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1100 (1987) (writing when the Court had been hearing 150 merits cases per year, more than twice the current number, noting that "[n]o one suggests this number could be increased very much"); *cf.* Hammond & Walker, *supra* note 128 (manuscript at 5–6) ("The Supreme Court's attempts to bring about change in administrative law depend so much on how those changes are embraced and further developed in the lower courts."); *id.* at 38–40 (arguing that "more attention needs to be paid as to whether—and how—[a new doctrine] can be administrable in the lower courts and in the regulatory trenches"). For a related—and intriguing—idea of "hierarchically variable deference" that "lower courts should be more deferential to agencies than should higher courts," see Aaron-Andrew P. Bruhl, *Hierarchically Variable Deference to Agency Interpretations*, 89 NOTRE DAME L. REV. 727, 728 (2013); see also Richard J. Pierce, Jr., *The Future of Deference*, 84 GEO. WASH. L. REV. 1293, 1313–14 (2016); Scott Dodson, *Restoring* Chevron *Deference By Statute*, 76 DUKE L.J. (forthcoming 2026) (manuscript at 8), http://dx.doi.org/10.2139/ssrn.5001718 [https://perma.cc/2ZLU-39XE].

175. Loper Bright Enters. v. Raimondo, 603 U.S. 379, 450 (2024) (Kagan, J., dissenting).

176. *Id.*

177. *See* Strauss, *supra* note 174, at 1095 (at a time when the Court's merits docket was more than twice what it is now, noting that "the Court's awareness how infrequently it is able to review lower court decisions has led it to be tolerant, even approving, of lower court and party indiscipline in relation to existing law").

those statutes vesting exclusive jurisdiction in the D.C. Circuit,[178] *Loper Bright*'s biggest impact will be to further encourage the approach to forum selection that has become a hallmark of challenges to federal action over the past decade or more.[179] While the Supreme Court justices are undoubtedly aware that this sort of strategic forum selection has increased in recent years, that increase had already occurred under *Chevron*. *Loper Bright* does little institutionally to affect the debate about forum selection, and that debate is likely to play out—and has already begun to play out—elsewhere in doctrine.[180]

B. Comparative Capacity

"To the capacity of men there is a limit. May it not impair the quality of the work of the courts if this heavy task of reviewing questions of fact is assumed?"

- *St. Joseph Stockyards Co. v. United States*, 298 U.S. 38, 92 (1936) (Brandeis, J., dissenting)

Besides comparative competence, though, there is one other institutional factor that is likely to further dampen the likelihood that *Loper Bright* will serve as a stake in the heart of the administrative state: comparative capacity. Put simply, to understand why the effect of *Loper Bright* is likely to be minor, we need to notice one other important thing the Court has not changed: the dynamics of litigation on the ground. What do I mean by that? In short, I am referring to the most significant constraint on aggregate judicial decisionmaking, what Professor Coan calls "judicial capacity" ("the total volume of cases the [federal] court system is capable of

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178. *See, e.g.*, 42 U.S.C. § 7607(b)(1) (exclusive jurisdiction in D.C. Circuit for certain Clean Air Act cases).

179. *See* Merrill, *supra* note 68, at 246 ("[T]he new regime raises the prospect of . . . forum shopping to challenge agency interpretations . . . .").

180. I am thinking particularly about the debate over both vacatur and universal injunctions. *See* Trump v. CASA, Inc., 145 S. Ct. 2540, 2555 (2025) (concluding that universal injunctions are likely not authorized by Judiciary Act of 1789); *see also* Jeffrey Lubbers, *Universal Injunctions Are Severely Limited, But What About Universal Vacatur?*, YALE J. REGUL. NOTICE & COMMENT (July 5, 2025), https://www.yalejreg.com/nc/universal-injunctions-are-severely-limited-but-what-about-universal-vacatur-by-jeffrey-lubbers/ [https://perma.cc/LMV7-8C2] (last visited Aug. 2025). For commentary on both issues prior to *CASA*, see *District Court Reform: Nationwide Injunctions*, 137 HARV. L. REV. (DEVELOPMENTS IN THE LAW) 1701, 1714–15 (2024); Mila Sohoni, *The Past and Future of Universal Vacatur*, 133 YALE L.J. 2304, 2315–21 (2024). For more on the debate, see, for example, John C. Harrison, *Vacatur of Rules Under the Administrative Procedure Act*, 40 YALE J. ON REGUL. BULL. 119, 131–33 (Mar. 1, 2023), https://www.yalejreg.com/bulletin/vacatur-of-rules-under-the-administrative-procedure-act/ [https://perma.cc/SXA2-77U4]; Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO. WASH. L. REV. 1121, 1123–25 (2020); Ronald M. Levin, *The National Injunction and the Administrative Procedure Act*, REGUL. REV. (Sept. 18, 2018), https://www.theregreview.org/2018/09/18/levin-national-injunction-administrative-procedure-act/ [https://perma.cc/5DWQ-534J]; Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 464, 469 (2017); Howard M. Wasserman, *"Nationwide" Injunctions are Really "Universal" Injunctions and They Are Never Appropriate*, 22 LEWIS & CLARK L. REV. 335, 338–39 (2018); Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1068 (2018).

handling"[181]) but what one can restate slightly to refer to here as "*comparative* capacity" (the total volume of cases the federal court system is capable of handling *relative to* the total volume of federal agency actions that the federal administrative state is capable of producing).

First, *Loper Bright* has done nothing to diminish administrative capacity.[182] Agencies are interpreting law all the time as they implement—let's call it "administer" or, in a nod to Article II, "execute"—statutory law. The 2023 Federal Register was over 90,000 pages. That included approximately 3,000 rules promulgated under informal (notice-and-comment) rulemaking. Nothing in *Loper Bright* directly affects those numbers.[183] The decision might make agencies less willing to issue rules or take actions that could be challenged. So it's certainly possible that *Loper Bright* will reduce agency output. But nothing in the decision requires that they do so.[184] More importantly, the decision does not affect agencies' appropriations or strip agencies of any rulemaking or adjudicatory authority.[185]

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181. ANDREW COAN, RATIONING THE CONSTITUTION 4 (2019).

182. I use the phrase "administrative capacity" in much the way Professor Bednar does. *See generally* Nicholas Bednar, *Presidential Control and Administrative Capacity*, 77 STAN. L. REV. 823 (2025) (arguing that administrative capacity serves as a limit on presidential goals). Although the phrase has similar connotations to the phrase "state capacity," I do not mean to import the fuller implications of that latter concept. *See* Elissa Berwick & Fotini Christia, *State Capacity Redux: Integrating Classical and Experimental Contributions to an Enduring Debate*, 21 ANN. REV. POL. SCI. 71, 72 (2018). For a recent assessment of "state capacity" worldwide, see HELMUT K. ANHEIER, MARKUS LANG & EDWARD KNUDSEN, THE 2022 BERGGRUEN GOVERNANCE INDEX: TOWARD A NEW UNDERSTANDING OF GOVERNANCE EXECUTIVE SUMMARY 6, 9 (2022), https://cdn.sanity.io/files/9xbysn2u/production/1abfa01f732dbc4890f345e6204c0f4830a2f31d.pdf [https://perma.cc/T7MP-YQX7]; see also, for example, K. Sabeel Rahman, *Building the Government We Need: A Framework for Democratic State Capacity*, ROOSEVELT INST. (June 6, 2024), https://rooseveltinstitute.org/wp-content/uploads/2024/05/RI_Building-the-Government-We-Need_Report_062024.pdf [https://perma.cc/J9FV-KELB].

183. *Cf.* Coglianese & Walters, *supra* note 4, at 29 ("Agency rulemaking outputs have been remarkably stable over the last several decades, regardless of party control of the White House . . . ."); Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 922–23 (2013) (empirical survey of rulemaking from 1983 to 2003).

184. *Cf.* Nicholas R. Bednar & Kristin E. Hickman, Chevron*'s Inevitability*, 85 GEO. WASH. L. REV. 1392, 1443 (2017) ("Congress shows little inclination to curtail its habit of giving agencies expansive statutory authority to exercise policymaking discretion, and the courts appear equally disinclined to declare such power grants unconstitutional. So long as agencies are allowed such authority, *Chevron* deference—or something much like it—is likely inevitable."). If agencies believe the opinion constrains their power, they might in turn act on those beliefs—which would then lead to the opinion in fact serving as more of a constraint on their power. That is all the more reason for agencies to understand the limited scope of the changes occasioned by the *Loper Bright* Court's holding.

185. *Cf.* Orji & Hayes, *supra* note 4 ("The decision to overrule *Chevron* deference will not shrink federal or state bureaucracies, and it probably won't do much to rein in the regulatory apparatus."). This contrasts markedly with a case like *Jarkesy*. *See generally* Sec. & Exch. Comm'n v. Jarkesy, 603 U.S. 109 (2024) (by limiting agency adjudicatory authority and thereby requiring agencies to bring enforcement actions in courts, significantly increasing agency enforcement costs and thus directly reducing administrative capacity). Similarly, any

As a side point, it is certainly possible that the decision will assist the Trump Administration's deregulatory push. The Administration's February 2025 Executive Order 14219 ("EO 14219"), *Ensuring Lawful Governance and Implementing the President's "Department of Government Efficiency" Deregulatory Initiative*, which directs agencies to identify—among other things—"regulations that are based on anything other than the best reading of the underlying statutory authority or prohibition,"[186] is a clear reference to *Loper Bright*. But nothing about the decision itself affects the agency's capacity to deregulate. Any regulation that an agency identifies for rescission under EO 14219 could easily have been rescinded by the Administration without *Loper Bright* if it otherwise so chose. It will still have to go through notice-and-comment rulemaking, and the rescission will still be subject to the very same judicial oversight that it would have been prior to *Loper Bright*.[187] Importantly, it is the fact that the Trump Administration seeks to deregulate, and not *Loper Bright*, that will determine the volume of agency rescissions. Notwithstanding claims that EO 14219 might be seen as the President "enforc[ing]" *Loper Bright*,[188] there are not likely to be any regulations that the Administration will rescind that it could not have rescinded without *Loper Bright*. Any regulation that an agency finds pursuant to the EO 14219 mandate would have been vulnerable to rescission on policy grounds in any event.

Second, *Loper Bright* does not affect judicial capacity: it does not change the volume of petitions for review of agency action that the courts can decide, nor does it expedite the process by which courts will decide such petitions.[189] There are 670 federal trial judgeships and 179 federal appellate judgeships, and appellate judges generally sit in panels of three. The number of challenges to agency rules that these judges can decide is dwarfed by the number of rules.[190] Even if all federal

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decision to strip agency appropriations or authority would likewise impact administrative capacity.

186. Exec. Order No. 14,219, § 2(a)(iii), 90 Fed. Reg. 10583 (Feb. 25, 2025).

187. *See* JACK JONES, CHRIS MYKRANTZ & MAX SARINSKY, PREVENTING PUBLIC PARTICIPATION: THE TRUMP ADMINISTRATION'S MISUSE OF THE GOOD CAUSE EXCEPTION TO FAST-TRACK DEREGULATION 1–5 (2025), https://policyintegrity.org/publications/detail/preventing-public-participation [https://perma.cc/YU5A-GNQ5]; Reed Shaw, *Setting the Record Straight on the APA's "Good Cause" Exception*, YALE J. ON REGUL. NOTICE & COMMENT (May 16, 2025), https://www.yalejreg.com/nc/setting-the-record-straight-on-the-apas-good-cause-exception-by-reed-shaw/ [https://perma.cc/F75Q-WNJ8]. *But see* Eli Nachmany, *"Good Cause" to Deregulate*, YALE J. ON REGUL. NOTICE & COMMENT (Apr. 21, 2025) https://www.yalejreg.com/nc/good-cause-to-deregulate-by-eli-nachmany/ (arguing that, in the wake of *Loper Bright*, agencies may use the "good cause" exception to notice-and-comment rulemaking if an agency concludes that its previously adopted regulations were not based on a correct interpretation of law).

188. *See* Marie Sapirie, *Trump Unleashes* Loper Bright, FORBES (Mar. 2, 2025), https://www.forbes.com/sites/taxnotes/2025/03/02/trump-unleashes-loper-bright/ [https://perma.cc/9DG9-U53E] (characterizing the Executive Order as "The Chief Justice Made His Decision; Now Trump Will Enforce It").

189. *Cf.* Merrill, *supra* note 68, at 245–46 ("[T]he lower courts do not have the decisional capacity to engage in an exhaustive review of every administrative interpretation that comes before them.").

190. In the twelve-month period ending March 31, 2024, the federal courts of appeals terminated about 350 non-BIA (Bureau of Immigration Appeals cases, while

judges were to spend 100% of their time on review of agency actions, there isn't enough capacity to overturn even a small fraction of what agencies do.[191] As Professor Coan has noted, one constraint on judicial decisionmaking is that decisions on final judgments require a certain level of careful reasoning.[192]

Third, *Loper Bright* does not affect what I'll call aggregate legal capacity, the total volume of cases the legal profession is capable of handling—or, perhaps more relevantly, aggregate legal capacity to bring petitions for review of agency action. This is relevant because not only does judicial capacity constrain the impact of the decision, but so too does legal capacity. Now, this constraint will obviously affect different kinds of potential challengers differently. But despite the supposedly convulsive change in doctrinal law, it is difficult to see how the dynamics of litigation are likely to change much. Partners at top D.C. law firms charge on average, say, $1,500 to $3,000/hour. Very few challenges to an agency regulation are going to cost less than about $150,000, and most will be closer to, if not exceed, $1 million.[193] Moreover, challengers generally must have raised an issue before the agency, or their challenge will be barred.[194] Whatever *Loper Bright* has done, it has not decreased the cost of bringing a challenge to an agency action. To be sure, it is possible that *Loper Bright* will be treated as a signal that a challenge will have a

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important to individual claimants, are almost never challenges to an agency action affecting more than one or a small number of individuals) administrative agency appeals on the merits. In the federal district courts, there were about 900. U.S. Courts, *Federal Judicial Caseload Statistics 2024*, ADMIN. OFF. U.S. COURTS, https://www.uscourts.gov/data-news/reports/statistical-reports/federal-judicial-caseload-statistics/federal-judicial-caseload-statistics-2024 [https://perma.cc/N4F2-7FKA] (last visited Aug. 11, 2025). That includes *all* administrative agency appeals.

191. *Cf.* Merriman, *supra* note 5, at 862 (noting that "[f]ederal appeals courts are badly overloaded with work," that they "don't wish to look closer at administrative action" and that *Chevron* was a case-management tool to "quickly reach[] a consensus . . . in the ordinary run of cases").

192. *See* COAN, *supra* note 181, at 14–15 (2019) (describing the Court's "minimum professional standards of judging" that, at the Supreme Court level, "involves an elaborate briefing process, oral argument, internal deliberation, and public justification of the Court's decision—all of which are expensive and time-consuming"). Parenthetically, if the federal courts were to increase their use of artificial intelligence in the writing process, one can imagine expediting the process of decisionmaking, perhaps to the point at which judicial capacity expands significantly. Andrew Coan & Harry Surden, *Artificial Intelligence and Constitutional Interpretation*, 96 U. COLO. L. REV. 415, 481–84 (2025); *see* Adam Unikowsky, *In AI We Trust, Part II*, ADAM'S LEGAL NEWSL. (June 16, 2024), https://adamunikowsky.substack.com/p/in-ai-we-trust-part-ii [https://perma.cc/4XNF-3K72]. But nothing in *Loper Bright* encourages or increases the probability of that.

Just to clarify, I am not making a point here about the *relative* ability of courts and agencies to engage in reasoned decisionmaking, *see* Anya Bernstein, *Judicial Accountability*, 113 GEO. L.J. 651, 669–70 (2025), simply pointing out that the need to engage in reasoned decisionmaking constrains the decisional capacity of courts.

193. *Cf.* Thomas W. Merrill, *Does Public Choice Theory Justify Judicial Activism After All?*, 21 HARV. J.L. & PUB. POL'Y 219, 222–23 (1997).

194. *See* KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 17.8 (2019). Indeed, as a peripheral point, *Loper Bright* could result in an increase in demand (and if Econ 101 applies, increased billing rates) for administrative law specialists, particularly those in DC.

more sympathetic ear in a lower court than before.[195] But sophisticated parties—i.e., those that can afford high six- or seven-figure legal fees—have likely long known that sympathetic judges could be found to set aside agency actions, under either *Chevron* Step One or some other doctrine like the major questions doctrine. Nothing about *Loper Bright* changes that.

The strategic decision to seek review of an agency action requires a calculation. It will still depend on forum selection; it will still depend on the expected value of bringing the case; and nothing in *Loper Bright* changes that calculus.[196] Judges unsympathetic to agency action have long had—and in recent years, have had the Supreme Court's implicit blessing to use—*Chevron* Step One to reject an agency's interpretation. Thus, *Loper Bright* has done nothing to alleviate Justice Gorsuch's lament that "ordinary people . . . are the ones who suffer the worst kind of regulatory whiplash *Chevron* invites."[197] Again, it is true that agencies will need to characterize their interpretations as "best" or in ways that incorporate the idea of delegated discretionary authority. But that is largely a linguistic characterization, not a change requiring significant rethinking of what most agencies have largely been doing for quite some time.

CONCLUSION

Many have seen *Loper Bright* as either a power grab by the Supreme Court or as a necessary corrective to an administrative state run amok. It is neither. It is instead an expressive act, an assertion of analytic clarity for the proposition that courts must have the final word on all questions of "law." But the case makes equally clear that the contours of what constitutes the judicial role in reviewing agency actions need not, and likely will not, change from *Chevron*. And even if some readers see the case's doctrinal changes as significant, institutional factors—both comparative competence and comparative capacity—are likely to dampen any effects the doctrine will have on the overall relationship between courts and agencies. While the Court may be concerned about agencies engaging in self-interested behavior and assertive exercises of power, *Loper Bright* is completely consistent with a continued robust administrative state.

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195. *See* Sunstein, *supra* note 57, at 1907 (suggesting that *Loper Bright* "can and undoubtedly will be taken as an invitation to bring suit to challenge agency interpretations").

196. I am broadly assuming economic rationality of the potential litigants as in the classic Priest-Klein model. *See generally* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4 (1984) (modeling the determinants of whether to litigate versus settle based on "the expected costs to parties of favorable or adverse decisions, the information that parties possess about the likelihood of success at trial, and the direct costs of litigation and settlement"). When I refer to "the expected value of the case," though, I do mean to include potential non-pecuniary concerns. *See, e.g.*, FDA v. All. for Hippocratic Med., 602 U.S. 367, 386–90 (2024); Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1, 29 (2020). Likewise, when I referred in the previous paragraph to "high-six or seven figure legal fees," I don't preclude the possibility of pro bono representation that would be the equivalent in such fees.

197. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 438–39 (2024) (Gorsuch, J., concurring).