THE GREAT UNSETTLING: ADMINISTRATIVE GOVERNANCE AFTER *LOPER BRIGHT*

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*"*Chevron *is overruled." These three words surely captured more attention than any others in the U.S. Supreme Court's thirty-five-page opinion in* Loper Bright Enterprises v. Raimondo. *For forty years, the* Chevron *doctrine had been virtually synonymous with administrative law. Now that the Court has taken a step that many scholars thought unfathomable even just a few years ago, speculation abounds about the possible downstream impacts of* Loper Bright *on how lower courts will respond when reviewing agency action and on what agencies will be able to do in the future. The vast majority of early expert commentaries suggest major changes to the future of administrative governance, but a notable amount of similarly expert commentary points in the opposite direction. This Article aims to put this early prognostication into perspective. We explain why it is difficult at this time to know whether or how much* Loper Bright *will matter. Both as a legal text and an intervention into the complex web of institutional politics that constitutes administrative governance,* Loper Bright *contains ambiguities that significantly cloud the picture of the future. In fact, the decision might best be thought of as something of a Rorschach test inside a crystal ball: different people can see different things in it, especially when they try to envision what comes next. And what they see may reflect more of what they are primed to see by their own cultural or ideological predispositions than any underlying, confirmable reality. That is not to say that* Loper Bright *has not changed or will not change*

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administrative law. Nor is it to say that Loper Bright *will not have influential effects on the future practice of administrative governance. Rather, it is to say that predictions about the decision's impacts cannot be made with anything approaching precision or certitude. We know that* Loper Bright *has shaken up the legal landscape—much like we can feel an earthquake when it literally shakes up the ground beneath our feet. But just as with real earthquakes, it will take time to assess the full impacts of the Court's legal tremors—and on which particular structures. Rather than make any definitive predictions about* Loper Bright*'s unsettling consequences, lawyers and scholars alike would do well to be attentive to the multiple ways that* Loper Bright *may (or may not) generally shape the future of administrative governance. Here, we suggest some of those possible ways while also explaining why it is so difficult to predict* Loper Bright*'s precise impact on future administrative governance—a conclusion that may itself prove to be as unsettling as the overturning of a forty-year-old precedent.*

INTRODUCTION

"Chevron is overruled."[1] These three words in the Supreme Court's opinion in *Loper Bright Enterprises v. Raimondo*[2] probably came as a surprise to many lawyers and scholars, even those who follow or work in administrative law.[3] For

1. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

2. 144 S. Ct. 2244.

3. *See, e.g.*, Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. 1377, 1419 (2017) (postulating that "the Supreme Court is unlikely to abandon *Chevron* deference in its entirety any time soon"); Nathan Richardson, *Deference Is Dead (Long Live* Chevron*)*, 73 RUTGERS U. L. REV. 441, 445–46 (2021) (reasoning that *Chevron*'s overruling is "less likely, not more"); THOMAS W. MERRILL, THE *CHEVRON* DOCTRINE: ITS RISE AND FALL, AND THE

about forty years, the *Chevron* doctrine has been virtually synonymous with the field.[4] Admittedly, the Supreme Court had granted review in *Loper Bright* and its companion case of *Relentless, Inc. v. Department of Commerce*[5] to answer the precise question of whether *Chevron* should be overturned. And just as admittedly, it is plain that this Court has been willing, in other realms, to overturn longstanding, major precedents.[6] But just as the death of a chronically sick elderly relative still brings with it a certain harsh reality, if not a meaningful surprise, *Chevron*'s demise has brought with it a sense of stunning finality. Up until the Court wrote the three words appearing toward the end of its thirty-five-page opinion by which it formally interred *Chevron*, many observers believed it more likely that the Court would merely modify or clarify the longstanding administrative law super precedent rather than jettison it altogether.[7] To do otherwise, many believed, would be to disrupt significantly a set of deep, settled expectations and routines.[8] Of course, for the challengers in *Loper Bright*, that may well have been the point.[9]

FUTURE OF THE ADMINISTRATIVE STATE 7 (2022) [hereinafter MERRILL, THE *CHEVRON* DOCTRINE] ("A decision by the Court to overrule the *Chevron* doctrine seems unlikely.").

4. *See, e.g.*, Jonathan R. Siegel, *The Constitutional Case for* Chevron *Deference*, 71 VAND. L. REV. 937, 938, 955 (2018) (describing *Chevron* as an "icon of administrative law" and noting that it is the "most-cited administrative law case of all time," with over 5,000 citations in courts of appeals cases through 2018); ADRIAN VERMEULE, LAW'S ABNEGATION: FROM LAW'S EMPIRE TO THE ADMINISTRATIVE STATE 200 (2016) (describing *Chevron* as "the most famous doctrine in all of administrative law"). To be sure, although *Chevron* became "one of the most famous cases in administrative law," "it was not regarded that way when it was decided." Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253, 253 (2014) [hereinafter Merrill, *The Story of* Chevron].

5. 144 S. Ct. 325 (2023) (granting petition for certiorari and ordering the case to be argued in conjunction with *Loper Bright*).

6. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (overruling the constitutional right to abortion long protected by *Roe v. Wade*, 410 U.S. 113 (1973)); Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141 (2023) (overruling the constitutionality of affirmative action in higher education admissions, which had been approved by *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), and *Grutter v. Bollinger*, 539 U.S. 306 (2003)).

7. Richard Pierce, *Court's New* Chevron *Analysis Likely to Follow One of These Paths*, BLOOMBERG L. (Feb. 7, 2024, 4:30 AM), https://news.bloomberglaw.com/us-law-week/courts-new-chevron-analysis-likely-to-follow-one-of-these-paths [https://perma.cc/NV8P-V8JD] (citing Kisor v. Wilkie, 139 S. Ct. 2400 (2019)).

8. Kent H. Barnett & Christopher J. Walker, Chevron *and Stare Decisis*, 31 GEO. MASON L. REV. 475, 475 (2024) (providing that *Chevron* "is a bedrock precedent in administrative law, relied on by the Supreme Court and the lower federal courts thousands of times since *Chevron* was decided in 1984").

9. Lydia Wheeler, *Big Donors Back New Group to Fight 'Deep State' at Supreme Court*, BLOOMBERG L. (Jan. 26, 2024, 4:45 AM), https://news.bloomberglaw.com/us-law-

Now that the Supreme Court has taken the step perhaps few expected ever to see it take, the natural next question is what will happen. What kind of impacts, if any at all, will the decision have on the practicalities of administrative governance? In this Article, we aim to survey the possibilities and put some epistemic boundaries on the prognostication that has already begun.

We acknowledge that *Loper Bright* has dramatically shaken up legal discourse in administrative law. Speculation abounds among legal scholars and lawyers about the possible future impacts of the Court's decision, with the bulk of expert commentaries predicting at least some significant changes for administrative governance in the years ahead.[10] We also cannot help but note, and marvel at, the extensive popular attention the Court's decision has received—which is certainly unusual for administrative law decisions and which is also likely shaping public views about the Court's future role in government.[11] In these ways, *Loper Bright* has amounted to a great unsettling in administrative law and of broadly held perceptions about the role of the judiciary in American governance.[12]

But we also see *Loper Bright* as unsettling in another key respect: We cannot know, at least for some time, whether or how much *Loper Bright* will matter to what administrative agencies are able to deliver by way of public value.[13] How much, for instance, will *Loper Bright* affect the frequency with which agencies' actions are rejected by courts when they are litigated? How might *Loper Bright* affect agencies' ability or proclivity to respond proactively and effectively in the face of future public problems and needs? These questions

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week/big-donors-back-new-group-to-fight-deep-state-at-supreme-court [https://perma.cc/HUL6-URJV] (noting that the leaders of the New Civil Liberties Alliance, which helped "steer" the *Loper Bright* challenge, have the aim of "weakening the so-called administrative state" and reducing regulatory burdens on businesses).

10. *See infra* Part I and Appendix.

11. *See infra* notes 200–204 and accompanying text (reporting on media attention to *Chevron* and *Loper Bright*); *see also* Appendix.

12. We acknowledge that the term "great unsettling" has been used by others to describe a cultural and political turbulence afflicting contemporary life. *See, e.g.*, David Maraniss & Robert Samuels, *The Great Unsettling*, WASH. POST (Mar. 17, 2016), https://www.washingtonpost.com/politics/looking-for-america-the-great-unsettling/2016/03/17/e9cb3eaa-e544-11e5-bc08-3e03a5b41910_story.html [https://perma.cc/7MCK-KQXM]; Manfred B. Steger & Paul James, *Disjunctive Globalization in the Era of the Great Unsettling*, 37 THEORY CULTURE & SOC'Y 187 (2020). Our use of the term draws attention to ways that *Loper Bright* and other legal changes emanating from the Supreme Court may contribute to or be associated with these broader trends. *Cf.* REGULATION IN A TURBULENT ERA (Cary Coglianese & Daniel E. Walters eds., forthcoming 2025).

13. On "public value" generally, see MARK H. MOORE, CREATING PUBLIC VALUE: STRATEGIC MANAGEMENT IN GOVERNMENT (1995).

are unsettlingly unanswerable at this time for legal and empirical reasons.[14] Both as a legal text and as a structural intervention into complex institutional politics, *Loper Bright*'s internal ambiguities cloud the picture of the future. In fact, the decision is something like a Rorschach test inside a crystal ball: different people can see different things in it when they try to envision what comes next, and what they see may largely reflect what they want to see (or are predisposed to see) rather than some underlying reality.[15]

That is not to say that *Loper Bright* has not changed the law, nor is it to deny the decision's potential to influence future judicial decisions or the practice of administrative governance.[16] To the contrary, it seems likely that the *Loper Bright* decision, and its many uncertainties, will substantially change the way that the various actors involved in the ongoing game of administrative governance navigate legal risk.[17] But predictions about the decision's actual impacts cannot be made with anything approaching precision or certitude at this time.

Rather than make any definitive predictions about *Loper Bright*'s consequences, lawyers and legal scholars would do well to focus their attention on exploring the many institutional factors that make such predictions little more than shots in the dark and on cataloging possibilities rather than jumping to conclusions. This Article begins this project, explaining why it is so difficult to predict *Loper Bright*'s impact on agencies and laying out a range of possible effects that *Loper Bright* may have. We rely not just on legal analysis but also on core insights from several relevant domains of social science, including game theory, bureaucratic politics, punctuated equilibrium modeling, and cultural responses to risk. With the aid of these insights, it becomes possible at least to glimpse at the range of implications that *Loper Bright* might hold.

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14. In pointing to the difficulties in knowing what effects, if any, *Loper Bright* may have on administrative governance, we want to be clear that we are not taking the position that the effects of doctrinal changes can never be known. Our position is emphatically not one of legal or political nihilism but instead is one that realistically brings empirical complexities to the fore.

15. Interestingly, *Chevron* itself was likened to a Rorschach test ink blot because of the perception that judges could at will find ambiguity (or not find it), determining outcomes based on idiosyncratic factors. *See* Jack M. Beermann, Chevron *Is a Rorschach Test Ink Blot*, 32 J.L. & POL. 305 (2017). It may be that certain areas of the law—including deference doctrine—are prone to opinions that reduce to Rorschach tests. *See, e.g.*, Erik Luna, *The .22 Caliber Rorschach Test*, 39 HOU. L. REV. 53 (2002) (arguing that the Second Amendment is a Rorschach test); Joseph A. Grundfest, *We Must Never Forget That It Is an Inkblot We Are Expounding: Section 10(b) as Rorschach Test*, 29 LOY. L.A. L. REV. 41 (1995); Colleen McNamara, Iqbal *as Judicial Rorschach Test: Am Empirical Study of District Court Interpretation of* Ashcroft v. Iqbal, 105 NW. U. L. REV. 401 (2011).

16. *See infra* Part III (outlining four potential ways that *Loper Bright* might disrupt the status quo and initiate a reshuffling of power in the administrative process).

17. *See infra* Part II (outlining the "administrative governance game" and highlighting the ways that doctrinal shifts might alter the incentives of various players).

This Article proceeds in three parts. In Part I, we take stock of what *Loper Bright* said and how it has been read by a wide cross-section of observers, underscoring the Rorschach-test nature of the enterprise of predicting the decision's future impacts on administrative governance and, ultimately, on society. This first Part of this Article makes an important contribution by assembling, analyzing, and documenting the variation in early forecasts about *Loper Bright*'s effects. If it achieves nothing else, this Part establishes a historical baseline against which future study of the empirical effects of Loper Bright can be conducted in the years, if not decades, ahead.

In Part II, we identify a key source of the significant uncertainty that explains the varied forecasts presented in Part I and that shows why confident predictions are so elusive: *Loper Bright* unsettles a nearly forty-year-old equilibrium in how the "administrative governance game" has been played. Drawing on game theory and positive political theory, we explain how the administrative governance game involves many different players: lower courts, agencies, Congress, interest groups, and even voters. With a game involving so many players, each making interdependent choices, accurately forecasting the downstream effects of the Court's decision becomes exceedingly complex. Much will depend on what the next moves are—and how they are interpreted by other players. Part II thus offers a counterweight to the confidently expressed views that are being aired by scholars and pundits alike, as described in Part I. Appreciating the complex institutional environment into which *Loper Bright* has intervened counsels caution when predicting the broader impacts of the decision.

Of course, notwithstanding these epistemic limits on the post-*Loper Bright* administrative governance game, we acknowledge the substantial pressure—even need—for lawyers and scholars to make educated guesses about what comes next. *Loper Bright*'s rejection of a forty-year-old precedent that formed the bedrock of administrative law carries enormous symbolic resonance, which makes the impulse to hazard such guesses understandable if not inevitable. Drawing on punctuated equilibrium theory, we explain in Part III why it may at least be reasonable to expect that *Loper Bright* will *disrupt* the administrative governance game, even if precise predictions about institutional winners and losers are elusive at this time. We explain how *Chevron*'s overturning, like other significant disruptions to otherwise stable political equilibria, could lead to a period of considerable flux in how administrative governance operates in the United States—potentially a period that lasts years, if not even decades, before the administrative governance game returns to a steady equilibrium, whether one like that which preceded it or a new one altogether. We also supply an analytical framework, drawing on sociological work on the "myths of nature," for thinking about the likely magnitude of the recalibration of power and authority in the administrative

governance game. Our framework makes room for plausible disagreement and can help make sense of the divergence of expert opinion expressed in the wake of the decision. These diverging opinions about the disruptive potential of the decision might even be thought to represent varying "myths" of *Loper Bright* according to which the decision could make a huge difference, or a little one, with some views grounded more in law, others more in politics.

I. THE *LOPER BRIGHT* DECISION AND THE PREDICTION INDUSTRIAL COMPLEX

Within days of the Court's decision in *Loper Bright*, the overturning of *Chevron* produced an enormous outpouring of attention to the decision's expected future effects on administrative governance. To a degree more than any other administrative law decision in modern times, the *Loper Bright* decision not only captivated the immediate attention of lawyers and scholars in the field but also broke through into the mainstream of public discourse. Yet, as we show in this initial review of the divergent reactions to the Court's decision, there is no firm collective sense yet of precisely what *Loper Bright* did or of how it will matter for administrative governance.

A. From Chevron *to* Loper Bright

To understand at any level what *Loper Bright* might mean, it is first necessary to review what it replaced: the *Chevron* doctrine. The *Chevron* doctrine refers to what had become a canonical two-step framework that the Supreme Court first articulated in its 1984 decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[18] This decision had been one of the most widely cited within the field of administrative law,[19] and across its forty-year existence, it formed the centerpiece of a seemingly unending stream of articles published in law reviews[20] and myriad discussions in

18. 467 U.S. 837 (1984).

19. Peter M. Shane & Christopher J. Walker, Chevron *at 30: Looking Back and Looking Forward*, 83 FORDHAM L. REV. 475, 475 (2014) (describing *Chevron* as "the most-cited administrative law decision of all time"); Lauren Mattiuzzo, *Most-Cited U.S. Supreme Court Cases in HeinOnline: Part III*, HEINONLINE BLOG (Sept. 26, 2018), https://home.heinonline.org/blog/2018/09/most-cited-u-s-supreme-court-cases-in-heinonline-part-iii [https://perma.cc/5RSU-XRGP] (reporting *Chevron* as the seventh most-cited Supreme Court decision in legal scholarship). *See also supra* note 4 and accompanying text.

20. *See, e.g.*, Merrill, *The Story of* Chevron, *supra* note 4, at 254 (noting the "fascination academics have for *Chevron*"); Karen Petroski, *Does It Matter What We Say About Legal Interpretation?*, 43 MCGEORGE L. REV. 359, 383–84 (2012) (observing a "flood of scholarship on administrative law" with "*Chevron*-focused pieces seem[ing] to accrue citations more rapidly than

administrative law and "legislation and regulation" courses in law schools.[21]

The *Chevron* doctrine arose from a case challenging the U.S. Environmental Protection Agency's (EPA's) so-called bubble policy, under which the agency interpreted the Clean Air Act to allow the regulation of pollution on a plantwide basis rather than requiring the agency to regulate pollution at each smokestack or emissions point at industrial plants or facilities.[22] The bubble policy effectively allowed plants to avoid the need to seek separate permits for each smokestack or pipe when they sought to offset pollution at one part of a plant with a reduction of pollution elsewhere at the same plant.[23] As long as there was no net change, there was no need to get regulatory clearance.[24] The key statutory language that EPA interpreted—"stationary source"—was not expressly defined in the Clean Air Act.[25] Although EPA acknowledged that each "source" needed to meet permitted emissions limits, it argued that it had the discretion to choose to define a "source" as an entire industrial facility, as it did under the bubble policy, rather than each individual smokestack.[26] At the U.S. Court of Appeals for the District of Columbia Circuit, EPA lost.[27] This lower court held that the language "stationary source" referred to individual smokestacks and pipes, thus disallowing the bubble policy.[28]

The U.S. Supreme Court reversed the lower court.[29] In so doing, it laid out the basic doctrinal contours of judicial review of agency interpretations

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articles on other legal interpretation topics"). For an overview of the doctrine, its development, and the campaign against it, see MERRILL, THE *CHEVRON* DOCTRINE, *supra* note 3.

21. *See, e.g.*, Ethan J. Leib, *Adding Legislation Courses to the First-Year Curriculum*, 58 J. LEGAL EDUC. 166, 184–85 (2008) (discussing how professors teach the administrative law portions of "legislation and regulation" courses by focusing on a "basic introduction to administrative process and *Chevron* and its progeny"); Richardson, *supra* note 3, at 444–45 (2021) (noting that "*Chevron* . . . retains a central position in administrative law curricula").

22. *Chevron*, 467 U.S. at 840.

23. *See* Press Release, Env't Prot. Agency, Statement on the U.S. Supreme Court's Ruling of June 25th on EPA's "Bubble" Policy to Control Air Pollution (June 26, 1984), https://www.epa.gov/archive/epa/aboutepa/statement-us-supreme-courts-ruling-june-25th-epas-bubble-policy-control-air-pollution.html [https://perma.cc/46JS-TPCF] (explaining how Environmental Protection Agency's (EPA's) "bubble" policy allows a plant to decrease pollution from some facilities while increasing it from others, as long as the net emissions are equal to or less than the previous emissions).

24. 467 U.S. at 841–42.

25. *Id.* at 841.

26. *Id.* at 856–57.

27. *Id.* at 840–41.

28. *Id.* at 841–42.

29. *Id.* at 866.

of statutes that would apply for the next forty years.[30] Under the framework articulated in *Chevron*, when courts were asked to review an administrative agency's compliance with a statutory mandate or constraint, they were first supposed to ask at "Step One" whether the relevant statute was clear and unambiguous.[31] At this step, the reviewing court was "the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent" as determined by the court "employing traditional tools of statutory construction."[32] If, however, this exercise in statutory construction failed to produce a single, clear meaning of the statute, courts then were to proceed toward a "Step Two."[33] Once at Step Two, courts were obliged to defer to the agency's "permissible" or "reasonable" understanding of the statute's meaning.[34]

In broad terms, the *Chevron* Court identified two situations that would justify advancing the analysis from Step One to Step Two, where so-called *Chevron* deference applied. In the first situation, a reviewing court might determine that "Congress has explicitly left a gap for the agency to fill" and thus

30. For general background on this framework and the varying ways it was conceptualized, see Cary Coglianese, Chevron*'s Interstitial Steps*, 85 GEO. WASH. L. REV. 1339 (2017) [hereinafter Coglianese, Chevron*'s Interstitial Steps*] (detailing *Chevron*'s two steps and rounding out the picture with an account of the "*Chevron* staircase," which articulates the additional requirements the Court had articulated for deference to apply). It is worth noting that the *Chevron* doctrine's focus on *statutory* interpretation meant that it did not constrain judicial review of agency interpretations of previously promulgated regulations. For that kind of question, the courts have traditionally applied so-called *Seminole Rock* or *Auer* deference, which is in many ways similar to *Chevron* in requiring a deferential approach that credits agency interpretations in instances of regulatory ambiguity. *See* Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of* Auer, 84 U. CHI. L. REV. 297 (2017). In *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), the Court granted certiorari to resolve whether *Auer* deference should be overruled. Interestingly, the Court rejected that argument and retained *Auer* deference, with some modifications or clarifications, citing stare decisis as a key reason for not explicitly overturning the doctrine. *Id.* In the wake of *Loper Bright*, questions have emerged about whether *Kisor*'s retention of *Auer* can be reconciled with the Court's reasons for overturning *Chevron*. *See* Thomas E. Nielsen & Krista A. Stapleford, *What* Loper Bright *Might Portend for* Auer *Deference*, HARV. L. REV. BLOG (July 5, 2024), https://harvardlawreview.org/blog/2024/07/what-loper-bright-might-portend-for-auer-deference [https://perma.cc/A3PU-DZT4].

31. *Chevron*, 467 U.S. at 842–43.

32. *Id.* at 843 n.9.

33. *Id.* at 843.

34. *Id.* ("[I]f 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."); *id.* at 844 (noting that in cases of implicit as well as explicit delegations of authority to the agency to fill in gaps in statutes, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency").

created an "express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."[35] In the second situation, the "legislative delegation to an agency on a particular question is implicit rather than explicit."[36] In both of these situations, the courts were to afford agencies' statutory constructions "controlling weight" unless they were unreasonable: "[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[37]

Applying traditional tools of statutory interpretation to the word "source" in the Clean Air Act, the *Chevron* Court held that the meaning of the statutory text was unspecified and that Congress otherwise failed to evince a clear intent about either the plantwide or the individual smokestack understandings of "source."[38] Both of these understandings were also consistent with the purpose of the Clean Air Act.[39] In the face of the statute's ambiguity about the meaning of "source," the Court reached the conclusion that Congress had implicitly delegated to EPA the authority to give meaning to the term—within the confines of reasonableness.[40] It held that the bubble policy's plantwide understanding of "source" reflected a reasonable understanding of the term and that it fell within EPA's authority to adopt it.[41]

It is almost certain that Justice John Paul Stevens, the author of the opinion in *Chevron*, did not believe that *Chevron*'s two-step framework had changed anything about the preexisting law governing how courts reviewed agencies' interpretations of statutory provisions.[42] For decades prior to *Chevron*, numerous court decisions counseled a deference that was facially similar to the deference that *Chevron* spoke about.[43] One earlier Supreme Court decision, for example, held that "where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited" and hence the agency's understanding of the term "is to be accepted if it has 'warrant in the record' and a reasonable basis in law."[44]

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35. *Id.* at 843–44.
36. *Id.* at 844.
37. *Id.*
38. *Id.* at 861–62.
39. *Id.* at 844; *see also* 42 U.S.C. § 7401.
40. *Chevron*, 467 U.S. at 866.
41. *Id.* at 842.
42. Merrill, *The Story of* Chevron, *supra* note 4 at 255–56.
43. *See, e.g.*, Gray v. Powell, 314 U.S. 402 (1941); NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111 (1944). For a general discussion of the pre-*Chevron* caselaw and the original understanding of § 706 as incorporating this caselaw, see Ronald M. Levin, *The APA and the Assault on Deference*, 106 MINN. L. REV. 125 (2021).
44. *NLRB*, 322 U.S. at 131.

In the forty years since the Supreme Court decided *Chevron*, the Court took numerous opportunities to elaborate or refine the *Chevron* doctrine's applicability. It explained, for example, that *Chevron*'s obligatory deference did not apply to ambiguities in statutes like the Administrative Procedure Act (APA), where no designated agency is responsible for their implementation.[45] Even in instances where a specific agency had been delegated authority to implement a designated statute, *Chevron* deference only applied in instances where the agency had announced its understanding of the relevant statute in a final rulemaking or formal adjudication—not in guidance documents or other informal materials.[46] And under *Chevron*, an agency that had its understanding of a statute upheld by a court could subsequently alter its understanding, unless the prior court had expressly grounded its decision on a determination at Step One that the statute's meaning was clear.[47]

Even when *Chevron* deference was not obligatory, courts could always defer to the agency anyway, following an approach the Supreme Court outlined in the 1944 case of *Skidmore v. Swift & Co.*,[48] decided just two years before the APA's passage.[49] The *Skidmore* Court stated that "the rulings, interpretations and opinions" of agencies, "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."[50] The Court further advised lower courts that they might give "weight" to agency interpretations under several concrete circumstances, such as when the agency's position is marked by "thoroughness evident in its consideration," by the "validity of its reasoning," by "its consistency with earlier and later pronouncements," and by "all of those factors which give it the power to persuade."[51] Although *Skidmore*'s language is in some ways similar to *Chevron*'s, in practice the case came to stand for a conceptually distinct, *nonbinding* form of deference that could apply in cases where *Chevron* deference did not apply.[52] Whether agency interpretations went down the *Chevron* track or the

45. Metro. Stevedore Co. v. Rambo, 521 U.S. 121 (1997).

46. United States v. Mead Corp., 533 U.S. 218 (2001).

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

48. 323 U.S. 134 (1944).

49. Administrative Procedure Act (APA), Pub. L. No. 79-404, 60 Stat. 237 (1946).

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

51. *Id.*

52. *See* Peter L. Strauss, *"Deference" is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"* 112 COLUM. L. REV. 1143 (2012) (discussing *Chevron* and *Skidmore* and how they are conceptually distinct); *see also* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187 (2006) [hereinafter Sunstein, Chevron *Step Zero*]; Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833 (2000); Kristin E. Hickman & Aaron L. Nielson, *Narrowing* Chevron*'s Domain*, 70 DUKE L.J. 931 (2021).

Skidmore track, one thing was perfectly clear: when deferring to agencies, courts were not required or expected to engage in fully independent, or de novo, review of agency interpretations of their ambiguous statutes.[53]

This settled law all came under attack in *Loper Bright*.[54] In that case, a group of herring fishing companies challenged a rule promulgated by the National Marine Fisheries Service (NMFS) within the Department of Commerce.[55] That rule would have required fishing boat operators, rather than NMFS, to fund the onboarding of observers who would ensure compliance with regulations.[56] After the U.S. Court of Appeals for the District of Columbia Circuit and the U.S. Court of Appeals for the First Circuit upheld the NMFS rule as a reasonable interpretation of an ambiguous statutory scheme, citing *Chevron*,[57] the Supreme Court granted a petition for writ of certiorari on the question of whether to overrule *Chevron*.[58] Without answering the statutory question at the heart of the NMFS rule, the Court explicitly overruled *Chevron* and remanded to the lower court to decide the case using its "independent judgment."[59]

Chief Justice John Roberts's majority opinion in *Loper Bright* seems to rest on the premise that anything but a court's "independent judgment" is inconsistent with Section 706 of the APA, which provides that "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[60] The majority opinion first attempted to distinguish pre-*Chevron*

53. *See* Cass R. Sunstein, Chevron *as Law*, 107 GEO. L.J. 1613, 1640 (2019) (clarifying that, while courts exercise independent judgment at Step One of the doctrine, at Step Two that independent judgment has already done its work and deference can operate); Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235 (2007) (showing that most courts understood *Skidmore* as endorsing "sliding scale" deference rather than independent judgment). There were some cases from the pre-*Chevron* Era that endorsed de novo review of "pure questions of law," rather than "mixed questions of law and fact," but *Chevron* was widely understood to require deference with respect to the vast majority of agency statutory interpretations—perhaps owing to the difficulty of determining which interpretations were "pure questions of law" versus "mixed questions of law and fact."

54. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

55. *Id.* at 2248.

56. *Id.* at 2254–53.

57. Loper Bright Enters. v. Raimondo, 45 F.4th 359 (D.C. Cir. 2022); Relentless, Inc. v. Dep't of Com., 62 F.4th 621 (1st Cir. 2023).

58. *Loper Bright*, 144 S. Ct. at 2257.

59. *Id.* at 2273.

60. *Id.* at 2261 (citing 5 U.S.C. § 706 and noting that the "[APA] thus codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back

precedents endorsing deference from *Chevron* itself, claiming that the *Chevron* Court had authored a clean break from an earlier tradition that the majority perceived as having been one in which judges exercised their independent judgment, as allegedly required by the APA.[61] The majority saw *Chevron*'s obligatory Step Two deference to reasonable agency interpretations as being inconsistent with the APA's requirement that courts exercise independent judgment.[62] By contrast, the *Loper Bright* Court did allow for *Skidmore* deference, finding it compatible with independent judgment by the courts because it was not a binding form of deference but instead resulted from "factbound determinations" that a statute applied in a particular situation.[63]

After concluding that *Chevron* deference "cannot be squared with the APA,"[64] the *Loper Bright* Court then turned to the "only question left," which was "whether *stare decisis*, the doctrine governing judicial adherence to precedent, requires us to persist in the *Chevron* project."[65] The Court argued that *Chevron*'s "flaws were . . . apparent from the start, prompting this Court to revise its foundations and continually limit its application," making it both "misguided" and "unworkable."[66] *Chevron*'s threshold question of statutory "ambiguity"—that is, a determination that a "term … may have many different meanings for different judges"—was too "impressionistic and malleable" to "'stand as an every-day test for allocating' interpretive authority between courts and agencies."[67] Nor could it "foster meaningful reliance."[68] As such, the Court reasoned, *"Chevron* . . . has undermined the very 'rule of law' values that *stare decisis* exists to secure."[69]

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to *Marbury*: that courts decide legal questions by applying their own judgment"). The reference to *Marbury v. Madison*, 1 Cranch 137, 177 (1803), confuses the matter somewhat, as that case involved the constitutional duty of judges under Article III of the U.S. Constitution, not the *statutory* requirement contained in the APA. Justice Clarence Thomas separately concurred to make it clear that he believes that the Constitution requires independent judgment as well. *Loper Bright*, 144 S. Ct. at 2273 (Thomas, J., concurring).

61. *Loper Bright*, 144 S. Ct. at 2263 (noting that "[i]n the decades between the enactment of the APA and this Court's decision in *Chevron*, courts generally continued to review agency interpretations of the statutes they administer by independently examining each statute to determine its meaning," and concluding that the "deference that *Chevron* requires of courts reviewing agency action cannot be squared with the APA").

62. *Id.* at 2264–65.

63. *Id.* at 2259 (citing Gray v. Powell, 314 U.S. 402 (1941), and NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111 (1944), as examples of such factbound determinations).

64. *Id.* at 2263.

65. *Id.* at 2270.

66. *Id.*

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

68. *Id.* at 2272.

69. *Id.* (quoting Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 798 (2014)).

And just like that, *Chevron* was gone.[70]

The October 2023 Term will be remembered for *Loper Bright*'s overruling of *Chevron*, but in truth, the Term involved more than just *Loper Bright*. Several other cases affected federal administrative law, sometimes in ways that potentially interact with the interment of *Chevron*. In *Ohio v. Environmental Protection Agency*,[71] for example, the Court embraced a persnickety form of arbitrary and capricious review in holding that EPA failed to respond adequately to a highly technical comment about an alleged imperfection in the agency's interstate air pollution modeling.

In *Securities and Exchange Commission (SEC) v. Jarkesy*,[72] the Supreme Court affirmed the U.S. Court of Appeals for the Fifth Circuit's judgment that Congress violated the Seventh Amendment's jury trial right by giving the SEC the right to issue civil monetary penalties for violating securities fraud regulations following fact-finding conducted by in-house administrative tribunals rather than by a jury in a federal trial court. In doing so, the Court distinguished longstanding precedent that had upheld other civil monetary penalty schemes involving "no common law soil,"[73] but failed to assuage concerns about how much of the administrative adjudication infrastructure across the federal government remains intact.[74]

And in *Corner Post v. Board of Governors of the Federal Reserve*,[75] the Court threw open the courthouse doors to litigation seeking judicial review of agency action by effectively eliminating the general six-year statute of limitations for

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70. *Chevron* was not, of course, overruled without dissent. Justice Elena Kagan, joined by Justices Sonia Sotomayor and Ketanji Brown Jackson, not only rebutted the majority's legal analysis but also, apropos our focus in this Article on *Loper Bright*'s impacts, argued that the majority's decision would result in "disruptive" effects. *Id.* at 2310 (Kagan, J., dissenting). Kagan's dissent predicted that the majority's decision would "likely . . . produce large-scale disruption" and would "put[] courts at the apex of the administrative process as to every conceivable subject—because there are always gaps and ambiguities in regulatory statutes, and often of great import. . . . In every sphere of current or future federal regulation, expect courts from now on to play a commanding role." *Id.* at 2311.

71. 144 S. Ct. 2040 (2024).

72. 144 S. Ct. 2117 (2024).

73. *Id.* at 2137 (discussing Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442 (1977)).

74. Christopher J. Walker, *What* Jarkesy *Means for the Future of Agency Adjudication*, YALE J. ON REGUL.: NOTICE & COMMENT (June 27, 2024), https://www.yalejreg.com/nc/what-sec-v-jarkesy-means-for-the-future-of-agency-adjudication [https://perma.cc/H3S7-YJJJ] (arguing that there is "seemingly no limiting principle on [the] Seventh Amendment claim," and that the majority opinion attempts to "bury the precedent, especially in footnotes three and four").

75. 144 S. Ct. 2440 (2024).

bringing pre-enforcement challenges to regulations.[76] The Court held that the statute of limitations begins to run when the litigating party suffers an injury rather than when a rule is finalized, upending a longstanding assumption that finalization of the rule triggered the window for review.[77] Going forward, all newly formed entities that suffer an injury under the rule at the time they are formed would appear to have their own individual six-year period to challenge regulations, which, as a practical matter, might well ensure that some entity somewhere will always be able to challenge a federal regulation, even decades after the rule has been put in place.[78]

Together, the administrative law cases decided in 2024, *Loper Bright* included, communicate a strong signal that agency actions should be subjected to exacting scrutiny in the courts. The threads running through these decisions evince a deep skepticism about agency authority and a primal embrace of judicial power to oversee what agencies do.

B. Loper Bright *as a Rorschach Test*

Prior to *Loper Bright*, more administrative law scholarship had been written on the *Chevron* doctrine than probably any other topic or issue over the last forty years.[79] More will continue to be written about its aftermath. No doubt, part of the task facing the field of administrative law in the coming years will be figuring out what, precisely, *Loper Bright* means for the future as well as for the past. Yes, *Loper Bright* expressly overruled *Chevron*.[80] But beyond that, there remain numerous open questions that commentators are already debating. Perhaps not surprisingly, since commentators have not entirely agreed about what *Loper Bright* says courts should do, there is disagreement about how the doctrinal changes *Loper Bright* initiated will actually matter at the level of administrative decisionmaking.

Let us start with exactly what has taken the place of *Chevron* in the aftermath of *Loper Bright*. Notwithstanding the three words that overturned the Court's 1984 decision,[81] there remains plenty in the *Loper Bright* majority

76. *Id.*

77. *Id.* at 2452–53.

78. *Id.* at 2470 (Jackson, J., dissenting) ("The Court's baseless conclusion means that there is effectively no longer any limitations period for lawsuits that challenge agency regulations on their face. Allowing every new commercial entity to bring fresh facial challenges to long-existing regulations is profoundly destabilizing for both Government and businesses. It also allows well-heeled litigants to game the system by creating new entities or finding new plaintiffs whenever they blow past the statutory deadline.").

79. *See supra* notes 4, 19–20, 30, 52–53.

80. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

81. *See supra* note 1 and accompanying text.

opinion to cloud the matter. Open questions abound. Has the Court embraced "de novo" review of all statutory questions involving agency authority?[82] Or has it instead preserved a place for a different brand of deference, most closely associated with the *Skidmore* deference that already applied to agencies' less formal interpretations?[83] Has the Court blessed the possibility of a more deferential mode of review of comparatively express or open-ended delegations of authority?[84] In acknowledging that Congress can delegate authority to agencies, and that "courts must respect the delegation, while ensuring that the agency acts within it,"[85] has the *Loper Bright* Court allowed for part of that delegated authority to permit agencies to make reasonable judgments about how to act in the face of statutory silences or even ambiguities—essentially, *Chevron* in *Loper Bright* garb?[86]

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82. Moreover, how exactly courts should conduct such de novo review remains an open question that the Court has not addressed. *See* Abbe R. Gluck, *Overruling* Chevron *Without a Coherent Theory of Statutory Interpretation and the Court-Congress Relationship*, 62 HARV. J. ON LEGIS. SYMP. ED. 20 (2024).

83. 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) [hereinafter Walker, *What* Loper *Means for* Chevron] (noting that there are disagreements and that the "majority opinion is ambiguous"); *cf.* Robert Iafolla, *Courts Show Little Interest in* Skidmore *as a* Chevron *Alternative*, BLOOMBERG L. (July 29, 2024), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/bloomberg-law-news/BNA%2000000190-efef-dcce-adba-efffa3ce0001 [https://perma.cc/FXS9-NMNQ] (finding that in nineteen of the twenty lower court cases implementing *Loper Bright* in the month following the decision, judicial opinions did not even cite *Skidmore*, and the one court that did mention *Skidmore* did not follow it).

84. Adrian Vermeule, Chevron *by Any Other Name*, THE NEW DIG. (June 28, 2024), https://thenewdigest.substack.com/p/chevron-by-any-other-name [https://perma.cc/9AT5-4EA4] (pointing to a passage in *Loper Bright* that arguably still accommodates a judicial posture similar to *Chevron*). The passage in question reads as follows:

> In a case involving an agency, of course, the statute's meaning may well be that the agency is authorized to exercise a degree of discretion. . . . When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. The court fulfills that role by recognizing constitutional delegations, "fix[ing] the boundaries of [the] delegated authority," and ensuring the agency has engaged in "'reasoned decision making'" within those boundaries. By doing so, a court upholds the traditional conception of the judicial function that the APA adopts.

Loper Bright, 144 S. Ct. at 2263 (citations omitted); *see also* Donald L. R. Goodson, *Discretion Is Not (*Chevron*) Deference*, 62 HARV. J. ON LEGIS. SYMP. ED. 12, 16 (2024), https://journals.law.harvard.edu/jol/2024/09/24/discretion-is-not-chevron-deference [https://perma.cc/5Z3J-BVPC] (drawing a distinction between deference and discretion and arguing that many cases that might have been decided under *Chevron* could in fact be upheld under *Loper Bright* on a theory of delegated discretion).

85. *Loper Bright*, 144 S. Ct. at 2273.

86. Vermeule, *supra* note 84.

In addition to these questions about the precise standard of review that courts are supposed to observe, questions arise about the retroactive effects of overturning *Chevron*. The majority opinion contains a cryptic statement that, in "leav[ing] *Chevron* behind," "we do not call into question prior cases that relied on the *Chevron* framework."[87] It further states that the "holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory *stare decisis*."[88] These statements were probably meant to quell concerns that overruling *Chevron* would immediately overload the courts with challenges of agency actions. But will it actually "do the trick" in that regard?[89] Or will courts start to see (and entertain) a flood of new facial challenges to agency rules, perhaps especially as the Court's *Corner Post* decision allows newly formed litigants to find fresh ways to frame their legal arguments?[90] Perhaps the ultimate open question is this: Why is a guarantee of statutory stare decisis going forward worth more than the paper it is printed on? After all, was not *Chevron* itself subject to statutory stare decisis (and even a super strong version of it)?[91]

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87. *Loper Bright*, 144 S. Ct. at 2273.

88. *Id.*

89. Walker, *What* Loper *Means for* Chevron, *supra* note 83 ("I am not too confident this will do the trick, but time will tell."); *see also* Dan Farber, *Understanding* Loper*: The Grandfather Clause*, LEGAL PLANET (July 11, 2024), https://legal-planet.org/2024/07/11/understanding-loper-the-grandfather-clause [https://perma.cc/B4F6-ZWUG] (suggesting that a "specific regulation upheld by an earlier decision is protected by that previous decision," but that the "scope of protection" might vary if a regulation is, *inter alia*, amended); Aaron Baum, *How Much of the Regulatory State is Safe Post-*Loper Bright*?*, HARV. L. REV. BLOG (Dec. 20, 2024), https://harvardlawreview.org/blog/2024/12/how-much-of-the-regulatory-state-is-safe-post-loper-bright [https://perma.cc/42ZP-QPER] (discussing how courts have opportunities to interpret narrowly or broadly the Supreme Court's instructions about *Loper Bright*'s retroactive effects).

90. *Loper Bright*, 144 S. Ct. at 2310 (Kagan, J., dissenting) (expressing skepticism that the courts that are "motivated to overrule an old *Chevron*-based decision" will be constrained by the Court's admonition); *see also* Shay Dvoretszky, Parker Rider-Longmaid, Boris Bershteyn, Emily J. Kennedy & Steven Marcus, *Supreme Court Opens the Door to More Rule Challenges by Extending Accrual Date for APA Cases*, SKADDEN (July 9, 2024), https://www.skadden.com/insights/publications/2024/07/supreme-court-opens-the-door-to-more-rule-challenges [https://perma.cc/7EST-QMG6] (noting several ways that litigants might persuade a court that a new challenge merits a different outcome, the Court's caveat notwithstanding); Jonathan Remy Nash, Chevron *Stare Decisis in a Post-*Loper Bright *World*, IOWA L. REV. ONLINE (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4966351 [https://perma.cc/A4BU-YH6F] (highlighting the asymmetry that will result from giving stare decisis effect to some, but not all, pre-*Loper Bright* decisions).

91. *Loper Bright*, 144 S. Ct. at 2295 (Kagan, J., dissenting) (noting that *Chevron* itself was a statutory precedent entitled to a "supercharged version" of stare decisis).

Given these ambiguities of the *Loper Bright* decision, there has been, unsurprisingly, a great deal of variation in predictions about the way the decision might alter how government works. In the Appendix to this Article, we provide a list of more than one hundred op-eds, blog posts, and other commentaries on *Loper Bright* released *just in the first month following the decision*.[92] Many of the list's authors constitute a veritable "Who's Who" of the U.S. legal academy.[93] To this list of commentaries could be added, of course, numerous news stories about the decision (many of which contain reactions by lawyers and law professors),[94] as well as law firm statements,[95] newspaper

92. *See infra* Appendix. In compiling the list in the Appendix, we have sought to include only writings with a substantial focus on *Loper Bright*. Moreover, even though our list is confined to commentaries released within one month of *Loper Bright*, analysis of the decision and its implications continues unabated, as it most surely will for years, if not decades, to come. For examples of commentaries published beyond the one-month window following the decision, see Daniel E. Walters, *A New Era of Deference: From* Chevron *to* Loper Bright, CPI ANTITRUST CHRON. (Oct. 24, 2024), https://www.pymnts.com/cpi-posts/a-new-era-of-deference-from-chevron-to-loper-bright [https://perma.cc/66TB-X2ZS]; Stuart Shapiro, *Short-Term vs. Long-Term Effects*, REGUL., Fall 2024, [hereinafter Shapiro, *Short Term*], https://www.cato.org/regulation/fall-2024/short-term-vs-long-term-effects [https://perma.cc/K7FY-62XF]; Allison K. Hoffman, Lauren Hallice, Noah Stein & Rachael Totz, *Drilling Down on* Loper Bright *and Health Care Regulation*, REG. REV. (Nov. 4, 2024), https://www.theregreview.org/2024/11/04/hoffman-hallice-stein-basila-drilling-down-on-loper-bright-and-health-care-regulation [https://perma.cc/3JKB-4EQY]; Thomas W. Merrill, *The Demise of Deference—And the Rise of Delegation to Interpret?*, 138 HARV. L. REV. 227 (2024).

93. As indicated *supra* in note 92, we limited the entries in the Appendix to essays with a main—or at least significant—focus on *Loper Bright*. Additional scholars who would fall onto a proverbial Who's Who list have also commented at least briefly on the decision. *See, e.g.*, Laurence H. Tribe, *How the US Supreme Court Shredded the Constitution and What Can Be Done to Repair It*, GUARDIAN (July 8, 2024, 6:12 EDT), https://www.theguardian.com/commentisfree/article/2024/jul/08/us-supreme-court-presidential-immunity [https://perma.cc/WM4M-TR34] (noting in passing that the *Loper Bright* Court had "dismantled the administrative state").

94. *See, e.g.*, Adam Liptak, *Justices Limit Power of Federal Agencies, Imperiling an Array of Regulations*, N.Y. TIMES (June 28, 2024), https://www.nytimes.com/2024/06/28/us/supreme-court-chevron-ruling.html [https://perma.cc/P2GE-4HMX]; Ann E. Marimow & Justin Jouvenal, *Supreme Court Curbs Federal Agency Power, Overturning* Chevron *Precedent*, WASH. POST (June 28, 2024), https://www.washingtonpost.com/politics/2024/06/28/supreme-court-chevron-federal-agency-authority [https://perma.cc/DM4J-LZAL]; Brandon Lowrey, Chevron*'s Demise May Not Bring Deluge Courts Had Feared*, LAW360 (Sept. 20, 2024, 4:17 PM), https://www.law360.com/pulse/articles/1881111/chevron-s-demise-may-not-bring-deluge-courts-had-feared [https://perma.cc/X5CJ-U6M3].

95. For examples, see Paul Hemmersbaugh & Samantha Chaifetz, Chevron *Overruled: In* Loper Bright v. Raimondo, *the Supreme Court Reshapes the Regulatory Landscape*, DLA PIPER (June

editorials,[96] and a variety of podcasts and webinars[97]—not to mention comments on social media.[98]

Predictions about *Loper Bright*'s effects contained in these myriad sources exhibit wide variation. At one end of the spectrum, some commentators suggest that the Court's decision in *Loper Bright* will "fundamentally transform major aspects of the health, safety and well-being of most Americans,"[99] and

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28, 2024), https://www.dlapiper.com/en-us/insights/publications/2024/06/chevron-overruled-in-loper-bright-v-raimondo [https://perma.cc/N8AA-JBDF]; *"A Massive Shock to the Legal System": Supreme Court Supermajority Significantly Curtails Administrative Agency Authority in* Loper Bright *with Momentous Impact on Federal Tax System*, VINSON & ELKINS (July 1, 2024), https://www.velaw.com/insights/a-massive-shock-to-the-legal-system-supreme-court-supermajority-significantly-curtails-administrative-agency-authority-in-loper-bright-with-momentous-impact-on-federal-tax-system [https://perma.cc/LV4X-3A2T]; and Elisabeth Esposito, William McGrath, Michael Smith, Benjamin Markham, Rachel Rockwell & Kathryn Tipple, *Music's Off on the* Chevron *Two-Step: A Change of Tune for Natural Resources Law*, BROWNSTEIN (July 8, 2024), https://www.bhfs.com/insights/alerts-articles/2024/music-s-off-on-the-chevron-two-step-a-change-of-tune-for-natural-resources-law [https://perma.cc/4QUR-YXDK].

96. For examples, see Editorial Board, *Two Big Victories for Liberty at the Supreme Court*, WALL ST. J. (June 28, 2024, 5:50 PM), https://www.wsj.com/articles/supreme-court-chevron-deference-loper-bright-jan-6-fischer-d5958b01 [https://perma.cc/55VD-JWJ6]; Editorial Board, *The Supreme Court's Dangerous Power Grab*, BOSTON GLOBE (June 28, 2024, 2:47 PM), https://www.bostonglobe.com/2024/06/28/opinion/chevron-supreme-court-loper-raimondo [https://perma.cc/7WL4-3EPY]; Editorial Board, *Supreme Court's Power Grab Puts Ordinary Americans at Risk in Countless Ways*, CHI. SUN-TIMES (June 29, 2024, 7:01 AM), https://chicago.suntimes.com/democracy/2024/06/29/supreme-court-overturn-chevron-doctrine-power-grab-regulations-democracy-project-editorial [https://perma.cc/JBV4-KEKA]; and Editorial Board, *With or Without* Chevron*, Clearer Laws Are Essential*, BLOOMBERG (July 2, 2024, 8:00 AM), https://www.bloomberg.com/opinion/articles/2024-07-02/supreme-court-s-chevron-ruling-demands-clarity-from-congress [https://perma.cc/W79L-P6BA].

97. *See, e.g.*, Alan Z. Rozenshtein, Molly E. Reynolds, Bridget Dooling, Nick Bednar & Jen Patja, *The Supreme Court Takes the Bait:* Loper Bright *and the Future of* Chevron *Deference*, LAWFARE DAILY (July 12, 2024, 8:00 AM), https://www.lawfaremedia.org/article/lawfare-daily--the-supreme-court-takes-the-bait--loper-bright-and-the-future-of-chevron-deference [https://perma.cc/T9GL-TAVE] (podcast); Penn Program on Regulation, *What Are the Implications of the End of* Chevron *for U.S. Administrative Law?*, YOUTUBE (July 2, 2024), https://www.youtube.com/watch?v=pszALge4TYo [https://perma.cc/GV4S-KR3N] (webinar).

98. *See, e.g.*, @DanielEWalters_, X (June 28, 2024, 10:39 AM), https://x.com/DanielEWalters_/status/1806698855947260282 [https://perma.cc/F57P-CAP3] ("A prediction: we continue to have the same fights, just under the banner of whether something qualifies as an explicit/implicit delegation of authority. Plenty of room for lower courts to limit the impact of overturning Chevron by liberally construing the bounds of explicitness.").

99. 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

that the decision has "essentially deconstructed the administrative state."[100] Commentaries of this kind describe *Loper Bright* as "an earthquake that reorders US law" by "transfer[ring] a simply astonishing amount of authority away from democratically accountable officials" in the executive branch to unaccountable courts who are ideologically unrepresentative, at the moment at least.[101] *Loper Bright*, it is said, will be "substantially disruptive," especially if *Corner Post* allows litigants to challenge longstanding rules, even those "previously upheld under *Chevron*," simply by "form[ing] a new trade association, start[ing] a new corporation, or open[ing] a new store that is affected by the old regulations."[102] As a result, "[a]gency rules to protect the public's health and safety are much more likely to be overturned"[103]—and ultimately "government will function much worse."[104]

[https://perma.cc/8PYC-7Z9N]; *see also* Nicholas Bagley, *The Big Winners of This Supreme Court Term*, ATLANTIC (June 29, 2024), https://www.theatlantic.com/ideas/archive/2024/06/big-winners-supreme-court-term/678845 [https://perma.cc/2SRP-URMU] (arguing that the decision "upended" the field of administrative law); Steve Vladeck, *The Most Aggressive Restructuring of Government in Almost 90 Years*, CNN (July 2, 2024), https://www.cnn.com/2024/07/02/opinions/supreme-court-radically-restructures-government-vladeck/index.html [https://perma.cc/X2WD-A8FK] (suggesting that the opinion has "ominous long-term consequences for what it means to live in a democracy").

100. *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/Z8D2-2JYG].

101. Ian Millhiser, *The Supreme Court Just Made a Massive Power Grab It Will Come to Regret*, VOX (June 28, 2024, 3:20 PM), https://www.vox.com/scotus/357900/supreme-court-loper-bright-raimondo-chevron-power-grab [https://perma.cc/2QG6-AYEL].

102. Allison Zieve, *The Scope of Change: Not Only* Loper Bright*, but* Corner Post *Too*, YALE J. ON REGUL.: NOTICE & COMMENT (July 16, 2024), https://www.yalejreg.com/nc/the-scope-of-change-not-only-loper-bright-but-corner-post-too-by-allison-zieve [https://perma.cc/FC99-CA8D].

103. Erwin Chemerinsky, *The Supreme Court's Purely Ideological Reasoning Will Change Our Lives*, L.A. TIMES (June 28, 2024, 12:50 PM), https://www.latimes.com/opinion/story/2024-06-28/supreme-court-homelessness-chevron-grants-pass [https://perma.cc/MT9J-MQ6Z]; *see also* 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?utm_source=profile&utm_medium=reader2 [https://perma.cc/VUX3-HW4C] (predicting that the *Loper Bright* decision "will upend agency regulations").

104. Leonardo Cuello, *Supreme Court (Yet Again) Destroys Long-Standing Precedent in Another Power Grab: This Time Federal Agencies Greatly Weakened*, GEO. U. MCCOURT SCH. OF PUB. POL'Y (June 28, 2024), https://ccf.georgetown.edu/2024/06/28/supreme-court-yet-again-destroys-long-standing-precedent-in-another-power-grab-this-time-federal-agencies-greatly-weakened [https://perma.cc/TM3L-FM9X].

At the other end of the spectrum, another group of commentators suggest that *Loper Bright* will not matter very much at all. To them, the Court's opinion still leaves judges with "a fair amount of latitude to apply judicial deference concepts as they see fit, just as judges have done in the past."[105] As a result, its "changes may not be as profound as a surface-level inspection suggests."[106] One preeminent administrative law scholar even estimates that some agencies will see no more than a 10% increase in invalidations of their regulations.[107] Others have noted that "[a]gencies don't need *Chevron* deference to succeed in litigation and, in fact, have succeeded without it for years now."[108] As the *Loper Bright* Court itself noted, *Chevron* had not been relied

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105. Ronald M. Levin, *Opinion: The Real Significance of the Supreme Court's "*Chevron *Deference" Ruling*, CNN (July 2, 2024, 1:50 PM), https://amp.cnn.com/cnn/2024/07/02/opinions/supreme-court-chevron-deference-levin [https://perma.cc/5TJM-7HBZ]; Jonathan H. Adler, *From "Deference" to "Respect"—The Real Import of* Loper Bright, VOLOKH CONSPIRACY (July 3, 2024, 1:36 PM), https://reason.com/volokh/2024/07/03/from-deference-to-respect-the-real-import-of-loper-bright [https://perma.cc/P6QU-EV8K] ("[C]ount me among those who think the effects of the decision will be more modest than some portend."); Dan Farber, *Is the Sky Falling?* Chevron*,* Loper Bright*, and Judicial Deference*, LEGAL PLANET (July 1, 2024), https://legal-planet.org/2024/07/01/what-was-the-chevron-test-what-has-replaced-it [https://perma.cc/C7NV-JDQK] ("While the Court is moving in what I think is the wrong direction, we should not buy into the idea on both the Left and the Right that the Court will abolish the regulatory state.").

106. Nick Fromherz, *Professors, Don't Remove* Chevron *from Your Casebooks*, YALE J. ON REGUL.: NOTICE & COMMENT (July 11, 2024), https://www.yalejreg.com/nc/professors-dont-remove-chevron-from-your-casebooks-by-nick-fromherz [https://perma.cc/9JLZ-PV75].

107. Richard Pierce, Loper Bright Enterprises v. Raimondo*:* Chevron *is Dead; Long Live* Skidmore, GEO WASH. L. REV. ON THE DOCKET (July 8, 2024), https://www.gwlr.org/loper-bright-enterprises-v-raimondo-chevron-is-dead-long-live-skidmore [https://perma.cc/USR2-ZX4R]. *But see* 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/9T4D-3A44] (attributing this statistic to Richard Pierce, Jr. and suggesting that "[e]ven that estimate may be too high" and that the *Loper Bright* decision is "less than revolutionary").

108. Andrew C. Mergen & Sommer H. Engels, *The World Goes On: What's Next for the Agencies*, YALE J. ON REGUL.: NOTICE & COMMENT (July 12, 2024), https://www.yalejreg.com/nc/the-world-goes-on-whats-next-for-the-agencies-by-andrew-c-mergen-sommer-h-engles [https://perma.cc/WXV2-TAW5]. When judges are confronted with difficult statutory interpretation questions, they may naturally still be inclined to be persuaded by the government, even without *Chevron*. As David Strauss has speculated when considering the likely effects of the overruling of *Chevron*:

> I'm not sure it'll make that much difference. . . . So if you think, you're a district court judge or a Court of Appeals judge, you've got some complicated statute, you're not sure

upon by the Court for years.[109] Moreover, to the extent that the Court has diminished agency authority, this whittling away had already occurred due to other legal changes, such as the emergence of the major questions doctrine. As a result, some commentators predict that nothing much will change in the coming years due to *Loper Bright*; agencies will find themselves neither better nor worse off in court without *Chevron*.

Others have suggested something of a middle ground. The "decision could have significant ramifications for the practice of regulation, but perhaps not as dramatic as proponents or opponents suggest."[110] Agencies will need to make adjustments—some of them potentially significant—and they may not get as much leeway as they once did.[111] Still, "contrary to the hopes of some and fears of others, [*Loper Bright*] will not end the administrative state

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> you understand it. The agency has done something that looks pretty sensible and looks like they played it straight. And the agency obviously knows more about the statute than you do. And you're just trying to do the right thing. You don't have an agenda. The tendency for that judge will be to say to the clerk, let's go with the agency. It's not obviously wrong. I don't quite see what's going on. Let's go with the agency. . . . So to that extent, I think, my guess would be that there is less to *Loper Bright* than meets the eye.

Univ. of Chi. L. Sch., *Supreme Court Preview: 2024 Term*, YOUTUBE (Sept. 17, 2024), https://www.youtube.com/watch?v=S-dA5ULmDpE [https://perma.cc/FJV8-NTRJ] (statement of David Strauss).

109. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2269 (2024) ("This Court, for its part, has not deferred to an agency interpretation under *Chevron* since 2016."); *see also id.* at 2270 ("[*Chevron*'s] flaws were . . . apparent from the start, prompting this Court to revise its foundations and continually limit its application.").

110. Susan E. Dudley, *"*Chevron *is Overruled*," FORBES (July 1, 2024, 4:22 PM), https://www.forbes.com/sites/susandudley/2024/07/01/chevron-is-overruled [https://perma.cc/7DL6-XH78]; *see also* Eric Berger, *Is* Loper Bright *a Big Deal?*, DORF ON L. (July 1, 2024), https://www.dorfonlaw.org/2024/07/is-loper-bright-big-deal.html [https://perma.cc/H7S6-NWQT] (discussing reasons that *Loper Bright* might not matter very much, but also acknowledging that the decision has to be understood in a "larger context" in which there is a "concerted judicial project to weaken the administrative state"); Ilya Somin, *The Supreme Court's Decision Overruling* Chevron *is Important—But Less So Than You Might Think*, VOLOKH CONSPIRACY (June 28, 2024, 2:07 PM), https://reason.com/volokh/2024/06/28/the-supreme-courts-decision-overruling-chevron-is-important-but-less-so-than-you-might-think [https://perma.cc/JE7P-TDVF] (noting that it is an important decision but, "contrary to the hopes of some and fears of others, [the] ruling will not end the administrative state or even greatly reduce the amount of federal regulation").

111. Christopher J. Walker, *A World Without* Chevron*?*, L. & LIBERTY (May 22, 2024), https://lawliberty.org/forum/a-world-without-chevron [https://perma.cc/HL7T-8XLN] (collecting ways that courts, agencies, and Congress will have to adapt).

or even greatly reduce the amount of federal regulation."[112] Some in this camp have highlighted that the consequences—and any evaluation of them—will depend on the situation, as not all agency action is cut from the same cloth. Some agencies might be "largely captured by the industries they regulate," such that doing away with *Chevron* might actually make those agencies more likely to regulate than they were prior to *Chevron*.[113] Or perhaps the decision will actually serve as something of a bulwark against major regulatory change at certain agencies, especially if a president comes to office who wishes to undertake extreme shifts in longstanding policies.[114]

Obviously, not all of these commentators' opinions can be right. Some are in significant tension with each other—even to the point of being mutually exclusive. And yet, they all purport to belong in the realm of plausibility. It would appear that how one reads *Loper Bright* is much like how one responds to a Rorschach test: different observers look at the same opinion and yet see different meanings and varying consequences for the administrative state.[115]

This ambiguity should come as little surprise because *Chevron* itself had the qualities of a Rorschach test.[116] Despite its seemingly seductive simplicity of "just two easy steps,"[117] the doctrine gave courts considerable room for deciding what counted as clear statutory meaning at Step One as well as reasonableness at Step Two.[118] *Chevron*'s framework could be seen as calling for

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112. Somin, *supra* note 110.

113. Deborah A. Sivas, *Stanford's Deborah Sivas on SCOTUS*' Loper *Decision Overturning* Chevron *and the Impact on Environmental Law*, STAN. L. SCH.: SLS BLOGS (June 28, 2024), https://law.stanford.edu/2024/06/28/stanfords-deborah-sivas-on-scotus-loper-decision-overturning-chevrons-40-years-of-precedent-and-its-impact-on-environmental-law [https://perma.cc/464J-4CF7].

114. Somin, *supra* note 110 ("Liberals who lament *Chevron*'s demise may be happier about it if Donald Trump returns to power and his appointees try to use statutory ambiguities to advance his ends.").

115. In addition to our reading of the early commentaries listed in the Appendix, a review of a dozen administrative law and legislation casebook supplements from 2024 reveals variation in legal scholars' assessments of *Loper Bright* and its implications for administrative governance. Shalev Gad Roisman & Oren Tamir, *Pictures of a Revolution: Administrative Law in a Time of Change*, 123 MICH. L. REV. (forthcoming 2025).

116. Beermann, *supra* note 15.

117. Coglianese, Chevron*'s Interstitial Steps*, *supra* note 30, at 1342.

118. *Id.* at 1343 ("Statutory interpretation, especially in cases involving administrative discretion in construing legislation, has never been straightforward, and nothing in *Chevron* could ever have made it so."); Todd D. Rakoff, *Statutory Interpretation as a Multifarious Enterprise*, 104 NW. U. L. REV. 1559, 1567 (2010) (observing that "neither in theory nor in fact do alternative methods of statutory interpretation, by themselves, decide most cases of any difficulty").

extensive judicial decisionmaking on a series of "relevant questions of law"[119]—but it also came to be viewed by its critics as the epitome of abdication of judicial responsibility, as judges could quickly default to the agency's position whenever confronted with two contrasting arguments in court.

Perhaps this slipperiness made it easier for *Chevron* to become the bête noire of the conservative legal movement. *Chevron*'s opponents may have believed in their heart of hearts that it was advantageous to their interests to change the law to favor courts over agencies in disputes over statutory meaning because of the current makeup of the Supreme Court and *Chevron*'s symbolic cabining of the judicial role.[120] For them, perhaps *Chevron*'s overturning could be tantamount to catching the movement's "white whale," at least in symbolic terms—a statement of judicial supremacy at precisely the moment that the courts have tilted rightward.[121] Yet, while the symbolism of *Loper Bright* is surely important in its own right,[122] whether *Loper Bright* will matter (or to what degree it will matter) depends much on subjective interpretation of a complex of institutional, legal, and political factors. For reasons we elaborate in the next Part, it will be difficult to assess what impact *Loper Bright* will ultimately have on administrative governance. A Rorschach test is a Rorschach test because it has no intrinsically "correct" interpretation. The next Part elaborates on why that is also inevitably true when it comes to what can be said now about *Loper Bright*'s consequences for administrative governance.

II. *LOPER BRIGHT* AND THE COMPLEXITY OF THE ADMINISTRATIVE GOVERNANCE "GAME"

In this Part, we contend that, beyond the ambiguous nature of the majority opinion, which gives license to various possible readings, the simple fact is that *Loper Bright*'s impact will depend not only on how lower courts (and future Supreme Court decisions) resolve those ambiguities and implement

119. 5 U.S.C. § 706. Coglianese, Chevron*'s Interstitial Steps*, *supra* note 30, at 1387 (noting that *Chevron*'s doctrinal steps "call for judges to decide a series of relevant questions of law and, in so doing, to interpret statutory provisions. Judges confront questions they must answer at every turn"); *cf.* Jonathan R. Siegel, *The Constitutional Case for* Chevron *Deference*, 71 VAND. L. REV. 937 (2018).

120. Eric Berger, *Why Did Conservatives Change Their Tune on* Chevron*?*, DORF ON L. (July 3, 2024), https://www.dorfonlaw.org/2024/07/why-did-conservatives-change-their-tune.html [https://perma.cc/2ZXE-9RRB]; Daniel E. Walters, *Four Futures of* Chevron *Deference*, 31 GEO. MASON L. REV. 635 (2024); Gregory A. Elinson & Jonathan S. Gould, *The Politics of Deference*, 75 VAND. L. REV. 475 (2022); Craig Green, Chevron *Debates and the Constitutional Transformation of Administrative Law*, 88 GEO. WASH. L. REV. 654 (2020).

121. Shane, *supra* note 107.

122. *See infra* Part III.

Loper Bright, but also on how other institutions and actors respond. A central reason that forecasting *Loper Bright's* effects on administrative governance is difficult rests with the sheer complexity of what we call the "administrative governance game." By invoking the concept of a "game," we do not mean to trivialize the implications of the decision, which can matter very much to many individuals and institutions. Instead, we mean to refer to the well-established analytic framework of "game theory"—or the analysis of individual or organizational behavior as comprising an adaptive, dynamic equilibrium that reflects the goals, strategies, and constraints of decisionmakers in relationship with one another in a given political or institutional environment.[123]

The administrative process can be understood as a particularly intricate game involving many procedural steps and players.[124] If they are to play this game well, agency actors must take into account many other individuals and institutions with whom they are interacting and anticipate how to respond to their choices, including how these other actors will understand their legal options should these other actors expect that they might lose the game.

Most obviously, given the focus of the *Chevron* framework and the *Loper Bright* decision itself, the game involves judicial review of agency action, where courts decide whether individual agency actions exceed the agency's substantive statutory authority.[125] Although judicial review is never an

123. For general overviews of game theory, see DOUGLAS G. BAIRD, ROBERT H. GERTNER & RANDAL C. PICKER, GAME THEORY AND THE LAW (1998); and NOLAN MCCARTY & ADAM MEIROWITZ, POLITICAL GAME THEORY 79–82 (2012). For further applications of game theory to regulation, administrative law, and judicial review, see Emerson H. Tiller & Pablo T. Spiller, *Strategic Instruments: Legal Structure and Political Games in Administrative Law*, 15 J.L. ECON. & ORG. 349 (1999); Lee Epstein & Jack Knight, *Toward a Strategic Revolution in Judicial Politics: A Look Back, A Look Ahead,* 53 POL. RSCH. Q. 625 (2000); Matt Spitzer & Eric Talley, *Judicial Auditing*, 29 J. LEGAL STUD. 649 (2000); Jason Scott Johnston, *A Game Theoretic Analysis of Alternative Institutions for Regulatory Cost-Benefit Analysis*, 150 U. PA. L. REV. 1343 (2002); Cary Coglianese, Richard Zeckhauser & Edward Parson, *Seeking Truth for Power: Informational Strategy and Regulatory Policymaking*, 89 MINN. L. REV. 277 (2004); Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53 (2008); Yehonatan Givati, *Game Theory and the Structure of Administrative Law*, 81 U. CHI. L. REV. 481 (2014); Brian D. Libgober, *Strategic Proposals, Endogenous Comments, and Bias in Rulemaking*, 82 J. POL. 642 (2020); Sean P. Sullivan, *Powers, But How Much Power? Game Theory and the Nondelegation Principle*, 104 VA. L. REV. 1229 (2018); Alex Acs & Cary Coglianese, *Influence by Intimidation: Business Lobbying in the Regulatory Process*, 39 J.L. ECON. & ORG. 747 (2023).

124. *Cf.* David B. Spence, *Administrative Law and Agency Policymaking: Rethinking the Positive Theory of Political Control*, 14 YALE J. ON REGUL. 407 (1997).

125. *See generally* 5 U.S.C. § 706(2)(C).

inevitability,[126] it undoubtedly looms over much agency decisionmaking and action. Agencies always undertake action against the potential backdrop of judicial review.[127] Officials must make judgments about whether to take action at all in the face of litigation risk[128] and, if so, how far to push the envelope in their interpretations of their statutory authority.[129] They might also, at times, take strategic action to avoid judicial review.[130]

Judges and agencies are not the only players in the game, however. Outside groups, particularly business interests, often have a keen interest in administrative proceedings as well. They have numerous opportunities to

126. *See* Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1298 (1997) (finding that the challenge rate was about 26% between 1987 and 1991); Libby Dimenstein, Donald L. R. Goodson & Tyler Szeto, *Major Rules in the Courts*, YALE J. ON REGUL.: NOTICE & COMMENT (June 24, 2024), https://www.yalejreg.com/nc/analyzing-major-rules-in-the-courts-by-libby-dimenstein-donald-l-r-goodson-and-tyler-szeto [https://perma.cc/3VGA-ZB9S] (finding that the overall challenge rate for major rules is slightly over 20%, but noting that this rate "has increased over time").

127. *See, e.g.*, Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528 (2006) [hereinafter Stephenson, *The Strategic Substitution Effect*] (suggesting that agencies calibrate the level of procedural formality to offset the risk of substantive scrutiny by courts of agency statutory authority); Tiller & Spiller, *supra* note 123 (suggesting that agencies' choice of policymaking instrument can be used strategically to impose decision costs that insulate agencies from higher level review).

128. *See generally* Acs & Coglianese, *supra* note 123; Cary Coglianese & Daniel E. Walters, *Agenda-Setting in the Regulatory State: Theory and Evidence*, 68 ADMIN. L. REV. 865 (2016); Cass R. Sunstein & Adrian Vermeule, *The Law of 'Not Now': When Agencies Defer Decisions*, 103 GEO. L.J. 157 (2014).

129. Yehonatan Givati, *Strategic Statutory Interpretation by Administrative Agencies*, 12 AM. L. & ECON. REV. 95 (2010) (contending that agencies often face a strategic choice between risky and safe statutory interpretations and examining the role that deference and litigation costs play in incentivizing the different strategies).

130. Daniel J. Hemel, *Major Questions Avoidance and Anti-Avoidance*, 98 S. CAL. L. REV. (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4893190 [https://perma.cc/S7PH-3NYL] (articulating a taxonomy of strategies of avoidance that agencies can deploy to reduce the risk of their policies being labeled "major" and subjected to heightened scrutiny because of it); Acs & Coglianese, *supra* note 123 (showing that agencies' regulatory agendas can be affected by outside opposition by business groups); Jennifer Nou & Edward H. Stiglitz, *Regulatory Bundling*, 128 YALE L.J. 1174 (2019) (arguing that agencies make strategic choices about whether to bundle regulatory initiatives together); Jennifer Nou & Edward H. Stiglitz, *Strategic Rulemaking Disclosure*, 89 S. CAL. L. REV. 733 (2016) (explaining how agencies make strategic choices about the extent to which they disclose rulemaking initiatives while under development and how courts have little power to police this behavior).

participate in the process and influence outcomes.[131] Political principals—e.g., Congress and presidents (and their White House staffs, such as in the Office of Information and Regulatory Affairs)—are likewise involved in overseeing agency actions.[132] Political principals are, moreover, affected by voters' attitudes, which gives the electorate an indirect say in the administrative governance game.[133] In some (admittedly rare) instances, agency initiatives can become so controversial that the general public becomes highly aware and participates in "mass commenting" campaigns that have the potential to shape the dynamic of administrative policymaking.[134] The National Highway Traffic Safety Administration's experience in the 1970s imposing an ignition interlock requirement on automobiles—such that cars could not be started until vehicle occupants were buckled—illustrates how a widespread public backlash against administrative action can shape regulatory outcomes.[135] The Food and Drug Administration's efforts in the 1990s to bring tobacco products under its regulatory control also revealed well the complex dynamics involving voters—in that case, smokers—and Congress, the White House, the agency, and ultimately the courts.[136]

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131. Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128 (2006); *see also* Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943 (2006) (discussing studies showing the dominance of business participation in the rulemaking process); Reeve T. Bull, *Making the Administrative State 'Safe for Democracy': A Theoretical and Practical Analysis of Citizen Participation in Agency Decisionmaking*, 65 ADMIN. L. REV. 611 (2013).

132. Some of the classic works exploring the interactions between presidents, Congress, and administrative agencies from a rational choice or game theoretic perspective include: R. DOUGLAS ARNOLD, CONGRESS AND THE BUREAUCRACY: A THEORY OF INFLUENCE (1979); CONGRESS: STRUCTURE AND POLICY (Matthew D. McCubbins & Terry Sullivan eds., 1987); Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989); Arthur Lupia & Matthew D. McCubbins, *Designing Bureaucratic Accountability*, 57 L. & CONTEMP. PROBS. 91 (1994); Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 L. & CONTEMP. PROBS. 1 (1994). For a comprehensive history of presidential oversight of the regulatory process, see JOHN D. GRAHAM, REGULATORY REFORM FROM NIXON TO BIDEN: POLITICS, ECONOMICS, AND LAW (2024).

133. Stephen Ansolabehere & Shiro Kuriwaki, *Congressional Representation: Accountability from the Constituent's Perspective*, 66 AM. J. POL. SCI. 123 (2022); Brandice Canes-Wrone & Kenneth W. Shotts, *The Conditional Nature of Presidential Responsiveness to Public Opinion*, 48 AM. J. POL. SCI. 690 (2004).

134. Nina A. Mendelson, *Democracy, Rulemaking, and Outpourings of Comments*, REGUL. REV. (Dec. 20, 2021), https://www.theregreview.org/2021/12/20/mendelson-democracy-rulemaking-and-comments [https://perma.cc/3MPQ-6DPG].

135. JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY (1990).

136. A. LEE FRITSCHLER & CATHERINE E. RUDDER, SMOKING AND POLITICS: BUREAUCRACY CENTERED POLICYMAKING (6th ed. 2006); DAVID KESSLER, A QUESTION OF INTENT: A GREAT AMERICAN BATTLE WITH A DEADLY INDUSTRY (2001).

Even thinking of any of these actors as single players artificially simplifies the picture.[137] Congress, of course, is famously a "they" and not an "it."[138] Neither is a presidential administration reducible to the singular will of the President.[139] Courts are organized in a hierarchy, but most of the responsibility for handling cases is delegated to a band of lower courts dispersed around the country.[140] Increasingly, these lower courts exhibit a considerable degree of ideological division.

Agencies themselves are composed of different internal players, such as agency lawyers, scientific experts, and political appointees, who collaborate and compete for influence over agency initiatives.[141] The reality is that "bureaucracy is a complex and varied phenomenon."[142] The complex organizational politics of administrative agencies—affected by both internal and external factors—makes predicting their organizational behavior generally beyond reach. One of the most renowned political scientists ever to study bureaucratic organizations—the late James Q. Wilson—even noted toward the end of his career that, "[a]fter all these decades of wrestling with the subject, I have come to have grave doubts that anything worth calling 'organization theory' will ever exist. Theories will exist, but they will usually be so abstract or general as to explain rather little. Interesting explanations will exist, some even supported with facts, but these will be partial, place- and time-bound insights."[143]

Modeling the entire administrative governance game can be exceedingly difficult because the process has so many moving parts and complex interactions. But that does not mean that there is no such thing as the administrative

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137. Stephenson, *The Strategic Substitution Effect*, *supra* note 127, at 536.

138. Kenneth A. Shepsle, *Congress Is a 'They,' Not an 'It': Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992).

139. William F. West, *Presidential Leadership and Administrative Coordination: Examining the Theory of a Unified Executive*, 36 PRESIDENTIAL STUD. Q. 433 (2006); *see also* RICHARD E. NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN (1991).

140. Charles M. Cameron, Jeffrey A. Segal & Donald Songer, *Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions*, 94 AM. POL. SCI. REV. 101 (2000); Chad Westerland, Jeffrey A. Segal, Lee Epstein, Charles M. Cameron & Scott Comparato, *Strategic Defiance and Compliance in the U.S. Courts of Appeals*, 54 AM. J. POL. SCI. 891 (2010).

141. Thomas O. McGarity, *The Internal Structure of EPA Rulemaking*, 54 L. & CONTEMP. PROBS. 57 (1991); MARISSA MARTINO GOLDEN, WHAT MOTIVATES BUREAUCRATS? POLITICS AND ADMINISTRATION DURING THE REAGAN YEARS (2000).

142. JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 10 (1989).

143. *Id.* at xix.

governance game nor that the various players who participate in the administrative governance game had not previously reached a settlement or equilibrium that yielded relative stability for a period of time before *Loper Bright*. We think it evident that, in fact, there had been such an equilibrium for years. Agency rulemaking outputs have been remarkably stable over the last several decades, regardless of party control of the White House,[144] as have rates of vacatur in the courts.[145] All of this suggests a game that had been relatively stable and even predictable—albeit still quite complex.

It may be that part of what made the administrative governance game relatively stable was the *Chevron* doctrine. For supporters of the doctrine, as Justice Antonin Scalia had once been, one of *Chevron*'s selling points was that it provided a relatively consistent "background rule of law against which Congress [could] legislate,"[146] which in turn structured options and strategy at every subsequent level of the game all the way to judicial review. For this reason, *Chevron* may have reduced one source of potential gamesmanship, which was the risk that judges in different parts of the country would interpret statutes in divergent ways (even as *Chevron* introduced other opportunities for political dynamism, such as temporal changes in policy due to shifting presidential administrations).[147] Empirical studies of judicial applications of *Chevron* appear consistent with the idea that the doctrine may have made the

144. OFF. OF THE FED. REG., FEDERAL REGISTER PAGES PUBLISHED PER CATEGORY, 1936–2023 (2024), https://uploads.federalregister.gov/uploads/2024/01/03140627/2023_All_Category_Pages.pdf [https://perma.cc/8TKT-SDZ2] (reporting page counts in the *Federal Register*). This is not to say there is no variation—there is. *See* Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 894 (2013). But the variation exists within boundaries.

145. Dimenstein et al., *supra* note 126 (finding an overall 49% vacatur rate for major rules); David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 137 (2010) (finding agency action is vacated about one-third of the time regardless of standard of review). One exception to this general consistency came during the first Trump Administration. *See generally* Cary Coglianese & Daniel E. Walters, *Litigating EPA Rules: A Fifty-Year Retrospective of Environmental Rulemaking in the Courts*, 70 CASE W. RES. L. REV. 1007 (2020).

146. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517.

147. Barnett & Walker, *supra* note 8, at 476–77 (asserting that "*Chevron* reduces disagreements among federal courts over policy-laden judgments and thus promotes national uniformity" and that "[u]nder *Chevron*, an agency's nationwide policy implementation of a statute it administers is more likely to govern, as opposed to a patchwork scheme of potentially conflicting judicial interpretations across the federal courts of appeals with ideologically disparate panels providing their 'best readings' of the statute"); Daniel J. Hemel, *Flips and Splits in Administrative Law*, 74 DUKE L.J. (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4913656 [https://perma.cc/749Z-CGEE].

outcomes of judicial review at least somewhat more predictable than they otherwise would have been, at least in the lower courts.[148] In light of these dynamics, *Loper Bright*'s overturning of *Chevron* might render the extraordinarily complex administrative governance game even more complicated by eliminating some of *Chevron*'s ostensibly simplifying and delimiting devices.

Of course, in truth, even the game under *Chevron* was complex enough to be practically inscrutable. Although *Chevron* came to be viewed by many as the most important doctrine in administrative law and as a symbol of the ascendance of the administrative state, there is precious little evidence that this 1984 Supreme Court decision ever mattered much in terms of changing agency work at the ground level.[149] If it has been so difficult to discern whether *Chevron* itself made much of a difference to actual judicial outcomes or administrative work product, then it is reasonable to think that it will be similarly difficult to discern what difference *Loper Bright* will make in terms of

148. Kent Barnett, Christina L. Boyd & Christopher J. Walker, *Administrative Law's Political Dynamics*, 71 VAND. L. REV. 1463, 1463, 1468 (2019) (arguing that *Chevron* "has a powerful constraining effect on partisanship in judicial decisionmaking" in the lower courts—if not in the Supreme Court—and implying that removing *Chevron* might liberate judges to act more on naked ideological preferences); *see also* Mark J. Richards, Joseph L. Smith & Herbert M. Kritzer, *Does* Chevron *Matter?*, 28 L. & POL'Y 444, 445 (2006) (finding mixed evidence that *Chevron* altered the administrative law "jurisprudential regime"); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 825–26, 847 (2006) (finding that judges vary significantly in their application of *Chevron* depending on their ideology and on the composition of panels); Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1058 (finding that there was a statistically significant decrease in remands in the aftermath of the *Chevron* decision itself); Linda R. Cohen & Matthew L. Spitzer, *Solving the* Chevron *Puzzle*, 57 L. & CONTEMP. PROBS. 65, 68 (1994) (examining the claim that *Chevron* changed lower court behavior).

149. As one of the few treatments of the topic has stated, "almost no empirical work has studied the effect of *Chevron* on agencies themselves." Jonathan H. Choi, *Legal Analysis, Policy Analysis, and the Price of Deference: An Empirical Study of* Mayo *and* Chevron, 38 YALE J. ON REGUL. 818, 821 (2021). Exceptions are: Choi, *id.* (using a unique shift in the tax context to explore the impact of *Chevron* and finding that the adoption of *Chevron* led to the Department of Treasury engaging in more policy analysis and less statutory interpretation, but also investing more effort in procedure as the "price" of deference); Christopher J. Walker, Chevron *Inside the Regulatory State: An Empirical Assessment*, 83 FORDHAM L. REV. 703, 722–23 (2014) (finding mixed evidence from surveys of rule drafters about willingness to advance adventurous interpretations in light of the awareness of *Chevron*); and E. Donald Elliott, Chevron *Matters: How the* Chevron *Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 VILL. ENV'T. L.J. 1, 14 (2005) [hereinafter Elliott, Chevron *Matters*] (suggesting that *Chevron* likely induced an internal shift of power in agencies from agency lawyers to "agency experts").

agencies' work[150]—and for the same basic reason too, namely that both *Chevron* and *Loper Bright* are simple doctrinal "plays" in a complex, multi-player, multi-move game.

Consider, for example, some of the players and potential moves that they might make under the new *Loper Bright* regime. Each player will face the prospect (but by no means the certainty) of an altered set of incentives that may change their behavior, such as the following:

- *Agencies'* judgments about whether to pursue rules or other challengeable actions, and how far to "push the envelope" of statutory meaning, could change. If agencies have a "set point" of judicial losses they can tolerate (after all, why expend resources on activities that will only be struck down in court?), then they might be expected to lessen their investment in new rules or other challengeable activities, or in the "boldness" of these activities. A new equilibrium could be established whereby agency win-rates post-*Loper Bright* look the same as under *Chevron*, but this could be an artifact of agencies' more cautious adaptation to their new legal environment.
- *Within agencies*, there might be a shuffling of influence from those professional staff members with scientific or policy expertise to those with legal expertise, as statutory interpretation decisions made *by courts* may grow in importance and variability.[151] Lawyers will presumably have the best insights as to how to predict those decisions. No longer will agency policy experts necessarily be able to assume, in cases of generally worded statutes, that they need only find the best or preferred policy, with agency lawyers following behind to develop a reasonable argument in support of these policy positions. Instead, the agency lawyers may need to assume more primacy in agency decisionmaking, as they presumably will have the ability to claim that they are the agency officials who can best discern what the courts will find to be the "best reading" of the relevant statutory provisions.
- *Outside groups'* estimation of their chances of prevailing in a legal challenge could change—at least in the short term—and so they may be willing to file more challenges to agency action than they might have but for *Loper Bright*'s overruling of *Chevron* (and whatever symbolic

150. *See, e.g.*, Joseph L. Smith & Emerson H. Tiller, *The Strategy of Judging: Evidence from Administrative Law*, 31 J. LEGAL STUD. 61, 78 (2002) ("Overall, the courts in our study were no more likely to defer to the EPA after *Chevron* than before it."); Schuck & Elliott, *supra* note 148, at 1041 (finding an increase in affirmances of agency actions across all circuit courts in the six-month period after *Chevron*, but a decrease in affirmances at the D.C. Circuit, where many agency appeals are heard); *see also supra* notes 148–149 and accompanying text.

151. *See supra* note 149.

signal that overruling has sent).[152] Of course, it is not just conservative litigation groups that might conclude their prospects of prevailing in court have changed—so too might more progressive groups, who can be expected to seek out favorable courts of their own.[153]

- *Congress* could use its legislative powers to change Section 706 of the APA to codify *Chevron*. Soon after *Loper Bright* was handed down, legislation was introduced that would have had such an effect.[154] Congress might also one day be motivated by *Loper Bright* (and other decisions) to expand the federal judiciary. If the lower courts end up having more work to do following decisions such as *Loper Bright* and *Corner Post*, Congress might use these Supreme Court decisions as a rationale for expanding the number of judges in federal courthouses around the country, perhaps altering the ideological composition of circuit courts and their panels. Congress could even conceivably—however unlikely—one day take steps to expand the size of the Supreme Court, diluting the majority that overruled *Chevron* and effectively creating a new majority that could reinstate something like a deference doctrine. Other developments, such as term limits on Supreme Court justices, could lead to a changed composition of the Court at some point in the future. Less boldly, Congress might simply adopt clearer legislative language in the future or pass specific amendments to old legislation when new needs for agency action arise but when ambiguities exist in older statutes.[155]

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152. Josephine Rozzelle, *With* Chevron *Reversal, Supreme Court Paves Way for a 'Legal Earthquake*,' CNBC (July 10, 2024), https://www.cnbc.com/2024/07/10/supreme-court-post-chevron-legal-chaos.html [https://perma.cc/ZP7S-4MPV].

153. Daniel E. Walters, *Symmetry's Mandate: Constraining the Politicization of American Administrative Law*, 119 MICH. L. REV. 455, 514 (2020) (predicting that abandoning *Chevron* might open opportunities for progressive interests to argue that agencies violate statutes by underimplementing statutory mandates).

154. On August 1, 2024, Senator Ron Wyden introduced the Restoring Congressional Authority Act which aimed to "codify *Chevron* deference" by amending § 706 of the Administrative Procedure Act simply to provide that courts may grant relief to challengers "only if the interpretation by the agency of the covered provision was not reasonable." Restoring Congressional Authority Act, S. 4987, 118th Cong. (2024), https://www.congress.gov/118/bills/s4987/BILLS-118s4987is.pdf [https://perma.cc/2RJC-DBTN]. An earlier bill introduced in the House would have put in place a range of administrative law reforms, among which would have amended § 706 to codify *Chevron*. Stop Corporate Capture Act, H.R. 1507, 118th Cong. (2023), https://www.congress.gov/118/bills/hr1507/BILLS-118hr1507ih.pdf [https://perma.cc/NF8F-GYCF].

155. One thing seems rather clear: the overruling of *Chevron* appears unlikely to do much to increase the number of bills passed by Congress. This is so either because the real drivers

- *Presidents* might change the way they deploy strategies of "presidential administration" that some believe have encouraged the Court's recent pushback against agencies.[156] Perhaps it is unlikely, but presidents and their administrators could shift away from seeking to heighten the visibility of important political agenda items pursued through agency action. They might even shift their attention to pursuing policy change through the legislative arena, although the realities of divided government in a polarized era will generally make that pathway a difficult one to follow.
- *Voters* may engage with the administrative governance game in different ways if *Chevron*'s demise prompts public opinion responses and affects turnout in elections. These changes could affect who occupies the White House in years to come or could impact the incentives of Congress to adopt judicial reforms. It is not entirely implausible that, in close presidential elections in the future, the Supreme Court's posture toward regulation and other administrative actions might, at some point, have some effect on electoral outcomes. If reaction to the Court's positioning does influence these outcomes, that itself might have effects down the road on how courts approach cases reviewing agency action. If public opinion reaches a point where it reacts against what it sees as the effects of the overturning of *Chevron* and other decisions of the Roberts Court, then *Loper Bright*'s overturning of *Chevron* might have contributed to making future efforts at judiciary reform more likely, *ceteris paribus*. We have already seen public attitudes about the Court's legitimacy decline significantly in recent years.[157] It is possible, for example, that the political left will one day

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of legislative productivity do not include courts' doctrines or because too little deference by courts actually undercuts the incentives for legislatures to take action. *See* Daniel E. Walters, *Will* Loper Bright *Spur a Congressional Renaissance?* (Tex. A&M Univ. Sch. L. Legal Stud. Rsch., Working Paper), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4792884 [https://perma.cc/DP2R-ZBLG].

156. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2347 (2001); Paul J. Ray, *The Major Questions Doctrine: A Check on Presidential Administration*, 17 HARV. J.L. & PUB. POL'Y: PER CURIAM 1, 9 (2024); Jodi Short & Jed Shugerman, *Major Questions About Presidentialism: Untangling the "Chain of Dependence" Across Administrative Law*, 65 B.C. L. REV. 511 (2024).

157. *See, e.g.*, Joseph Copeland, *Favorable Views of Supreme Court Remain Near Historic Low*, PEW RSCH. CTR. (Aug. 8, 2024), https://www.pewresearch.org/short-reads/2024/08/08/favorable-views-of-supreme-court-remain-near-historic-low [https://perma.cc/DGN8-5YQM]; Benedict Vigers & Lydia Saad, *Americans Pass Judgment on Their Courts*, GALLUP (Dec. 17, 2024), https://news.gallup.com/poll/653897/americans-pass-judgment-courts.aspx [https://perma.cc/HX8V-7FUZ]; Ryan Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703, 1710 n.29 (2021) (offering multiple sources that point to the public's view of declining legitimacy in the Supreme Court).

make reforming the Supreme Court as effective a part of its political agenda as the political right has done for decades.

- *Lower courts* will have to apply *Loper Bright*'s general guidance to concrete cases. In doing so, they will enjoy considerable discretion in many cases, due to the limited institutional capacity of the Supreme Court to review each and every application with which a majority of the justices might disagree.[158] Lower courts will confront choices about how to proceed with the immense task of offering their own best reading of statutes that can be highly technical—and even "mind-numbing" in their complexity[159]—and that, as such, can call for specialized expertise to interpret.[160] As a result, lower courts could make *Loper Bright* less imposing in practice—or they could, of course, also amplify it beyond what even the Supreme Court anticipated.
- *The Supreme Court* itself may revisit the issue in the future. *Loper Bright* will hardly be the last word of the Court on issues involving statutory interpretation in administrative law cases. How the system adapts will likely be affected, in part, by how the Court itself acts in the future. And how the Court acts in the future may be a function of how the system adapts.

These are all plausible hypotheses of the range of effects that *Loper Bright* could have, and there are many more that we have not mentioned, including some that might be in tension with the ones we have suggested here. Complicating the matter further, each of these adjustments by players may depend on the adjustments other players make and the order in which they make them. For instance, whether lower courts step up the stringency of their review compared to a pre-*Loper Bright* baseline may depend on whether agencies beat them to the punch by changing the qualities of their actions to avoid scrutiny by courts.[161] This mutual dependence and contingency makes even the hypotheses above little more than genuine guesses.

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158. 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, 1121 (1987).

159. Am. Mining Cong. v. EPA, 824 F.2d 1177, 1189 (D.C. Cir. 1987).

160. *See* Sapna Kumar, *Scientific and Technical Expertise After* Loper Bright, 74 DUKE L.J. (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4939536 [https://perma.cc/BM6P-E3YJ].

161. Cohen & Spitzer, *supra* note 148, at 91 ("When the Supreme Court adjusts deference with a *Chevron*-type doctrine, many things may happen. . . . [F]ederal courts may adjust the way in which other aspects of administrative cases are reviewed. Further, administrative agencies may adjust their behavior by bringing different cases, pushing different rulemakings and altering their own statutory interpretations. The Supreme Court may adjust its review of lower federal courts by changing its certiorari practices. And, over the long run, Congress and the president may change their actions by writing statutes differently, changing oversight, and appointing different administrators.").

None of the changes by any players in the administrative governance game occur in a vacuum. It would take considerable effort and time to verify if any single one of the above hypotheses captures the reality of the post-*Loper Bright* administrative governance game and to attribute causal significance to *Loper Bright* itself. Complicating matters further will be actions taken by the second Trump Administration, which presumably could have more disjunctive effects on what agencies do than anything the Supreme Court might have induced by overruling *Chevron*.[162] With both *Loper Bright* and Donald Trump's reelection occurring within months of each other, sorting out the precise effects of one or the other on administrative governance may add to the challenges in drawing reliable empirical inferences. If agencies in the second Trump Administration are more tentative and avoid pushing the envelope when taking administrative action, will this be due to *Loper Bright* or the 2024 presidential election? Determining whether *Loper Bright* matters, or how it matters, will not simply be a matter of comparing judicial affirmance rates of agency actions taken before versus after the

162. Whether the actions the second Trump Administration pursues will be aided or impeded by the overruling of *Chevron* is one of the open empirical questions we have in mind in Parts II and III of this Article. *Compare* Chad Squitieri, *Trump's Agencies After* Chevron, AM. COMPASS (Dec. 9, 2024), https://americancompass.org/trumps-agencies-after-chevron [https://perma.cc/K994-ZAQJ] (arguing that Trump's agencies will have wide latitude to change policies despite *Loper Bright*), *with* Kate Ackley, *Trump's Push to Deregulate Faces Challenges in Post-*Chevron *Era*, BLOOMBERG L. (Dec. 8, 2024), https://news.bloomberglaw.com/daily-labor-report/trumps-push-to-deregulate-faces-challenges-in-post-chevron-era [https://perma.cc/6LG5-BRS6] (discussing ways that *Loper Bright* might limit the Trump deregulatory agenda). It is worth noting that at least two major advisors to the incoming Trump Administration have opined that *Loper Bright* might help the Administration in justifying the rescission of federal regulations. Elon Musk & Vivek Ramaswamy, *The DOGE Plan to Reform Government*, WALL ST. J. (Nov. 20, 2024, 12:33 PM), 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/4U5S-LQBP] (citing *Loper Bright* as one of two recent cases that "suggest that a plethora of current federal regulations exceed the authority Congress has granted under the law"). Their expectation that independent judicial judgment about the meaning of statutes would lead only to deregulatory results is an example of an asymmetrical approach many advocates and scholars have taken toward the effects of overruling *Chevron*. *See* Walters, *supra* note 153 (critiquing this asymmetry). It is just as plausible to think that, under the new *Loper Bright* approach, some judges will find that some failures to regulate pose conflicts with statutes, thereby requiring *more*, not less, regulation than Musk and Ramaswamy might prefer. *Id.*; *see also* Cass Sunstein, *Trump Initiatives Might Be Foiled by the Right's Defeat of* Chevron, WASH. POST (Nov. 25, 2024), https://www.washingtonpost.com/opinions/2024/11/25/chevron-right-supreme-court-trump [https://perma.cc/F7TA-V863].

decision.[163] Instead, it will require taking into account the many moving parts and mutual adjustments throughout the administrative game and, at a minimum, considering how they might affect both the numerators and denominators that factor into agency win rates in court.

III. PUNCTUATION, FLUX, AND UNCERTAINTY POST-*LOPER BRIGHT*

Although it will be difficult to know for sure what specific effects *Loper Bright* will have on the balance of power in the administrative governance game,[164] it seems safe to say that *Loper Bright* will have some generally destabilizing effect on the game, at least in the short run. As scholars of the policymaking process have noted, institutions can abruptly "shift from underreacting to overreacting to information," which can sometimes (but not all of the time) create "punctuations" that lead to rapid changes from one longstanding equilibrium to a new one.[165] If, as seems plausible, *Loper Bright* creates such a punctuation, it may jog the many players of the administrative governance game out of a general stasis that existed before *Loper Bright*, triggering some kind of "disjoint policy change."[166] Where the new equilibrium settles—and whether it will ultimately prove to be much different than it would have been in the absence of *Loper Bright*—is the pivotal, if vexing, question.

The outpouring of commentary detailed in Part I tends to reinforce the possibility that the U.S. governmental system is in one of those rare moments in its history when a stable equilibrium is rapidly being replaced, reconstituted, or at least reconsidered. The 2024 presidential election may well reinforce such realignment. But the question will be whether the Supreme Court's decisions in cases such as *Loper Bright* will contribute to a "high moment" of administrative law.[167]

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163. Cass R. Sunstein, *The Consequences of* Loper Bright, DUKE L.J. (forthcoming 2025) (manuscript at 1, 3), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4881501 [https://perma.cc/KZF2-QHK8].

164. *See* Part II. Again, though, despite these difficulties, we do not adopt the nihilistic conclusion that it is impossible ever to know whether doctrine can shape behavior in administrative governance. *See supra* note 14.

165. Bryan D. Jones & Frank R. Baumgartner, *From There to Here: Punctuated Equilibrium to the General Punctuation Thesis to a Theory of Government Information Processing*, 40 POL'Y STUD. J. 1, 7, 9 (2012). For a treatment of "equilibrium" as central to institutional analysis in law, see William N. Eskridge & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 28 (1994). For a discussion of administrative law in equilibrium, see Adrian Vermeule, *Portrait of an Equilibrium*, NEW RAMBLER (Mar. 4, 2015), https://newramblerreview.com/book-reviews/law/tocqueville-s-nightmare [https://perma.cc/QNK8-NE53].

166. Jones & Baumgartner, *supra* note 165, at 3–4, 7.

167. *Cf.* BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998).

Not every major decision of the Supreme Court, nor every major political development, serves as a punctuation accelerant—otherwise, punctuated equilibrium models would never have much equilibrium to them. There may be reasons to question whether *Loper Bright* is really the kind of event that will truly disrupt the administrative governance game enough to change it. For one thing, we have been here before. Judges and commentators predicted that *United States v. Mead Corp.*'s[168] creation of what many scholars have called a *Chevron* "Step Zero"—one that determined whether *Chevron* deference should apply—would lead to a revolution in administrative law.[169] But in retrospect, the changes that *Mead* wrought seem to have functioned more like incremental adjustments *within* a stable regime.[170]

Even the original handing down of *Chevron* itself seemed not to have created any major disruption to the administrative game. Although researchers have looked for the effects of *Chevron* on agencies' track records in the courts or on agencies' behavioral propensities, systematic empirical evidence of any major *Chevron* effect on the administrative governance game has proven to be scant if not entirely elusive.[171] If *Chevron* made little or no discernible difference in how agencies fared in litigation following its adoption, then perhaps, by extension, we could reasonably expect that overturning this decision will

168. 533 U.S. 218 (2001).

169. *Mead Corp.*, 533 U.S. at 239 (Scalia, J., dissenting) (arguing that creating an exception from *Chevron* deference was an "avulsive change" and predicting that "[w]e will be sorting out the consequences of the *Mead* doctrine . . . for years to come"); Lisa Schultz Bressman, *How "*Mead*" Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1444 (2005). On so-called Step Zero generally, see Sunstein, Chevron *Step Zero*, *supra* note 52 and Merrill & Hickman, *supra* note 52, at 836. For a contrary perspective about the use of "Step Zero" terminology, see Coglianese, Chevron*'s Interstitial Steps*, *supra* note 30, at 1367–74.

170. It might be that *legal scholars'* reaction to *Mead*—and specifically their adoption of the language of a "Step Zero"—did ultimately have some effect on *Chevron*'s viability, perhaps by making it more susceptible to the criticism of judicial abdication. *See* Cary Coglianese, *Did Step Zero Help Doom* Chevron*?*, REGUL. REV. (June 13, 2022), https://www.theregreview.org/2022/06/13/coglianese-did-step-zero-help-doom-chevron [https://perma.cc/ZK2X-F6YN]. Step One, recall, holds in plain, rule-of-law fashion that agencies must adhere to statutory constraints that are clearly discernible through traditional tools of statutory construction. If some step precedes Step One, then this suggests that judges might be permitted to abandon the rule of law. It also makes it easier to caricature *Chevron* deference as automatically following from any ambiguity in the statute. Notably, despite the "Step Zero" formulation entering into the academic lexicon surrounding *Chevron* as early as 2000, the first time the precise words "Step Zero" appeared in a *Chevron*-related opinion of the Supreme Court was in *Loper Bright* itself, twenty-four years later, in conjunction with the Court's criticism of *Chevron*. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2268–69 (2024); *see also id.* at 2287 (Gorsuch, J., concurring).

171. *See supra* notes 148–150.

make little or no difference as well. Is it possible that overturning *Chevron* will do little to disrupt the game if the handing down of *Chevron* itself never registered as much more than a blip in the first place?

We think that is an unlikely occurrence—if for no reason other than the intense and widespread attention that *Loper Bright* has received among lawyers, judges, legal scholars, politicians, and informed members of the public. The salience of the handing down of *Loper Bright* contrasts sharply with the original obscurity of the *Chevron* decision. But this does not necessarily mean that the disruption will yield some fundamental reshaping of the administrative state. *Loper Bright*'s unsettling of the administrative governance game's traditional equilibrium has almost certainly disturbed the status quo in some fashion—thereby opening at least the possibility of a genuine punctuation that will set off cascading mutual adjustments in the administrative governance game. But it is impossible at this time to specify the precise nature, magnitude, and form of this disturbance—or to know how long aftershocks might ripple through the administrative governance game. With more time, and then careful retrospective empirical analysis, it may be possible to see what effects *Loper Bright* may have wrought—as well as to analyze whether the administrative governance game has truly changed all that dramatically over the longer term.[172] At least until such analysis can be conducted, determinate predictions put forward by pundits and professors alike will likely be affected as much by the cultural or ideological lenses through which they view law and politics as by anything "objective" about the situation created by the Court's overturning of *Chevron*.

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172. For an early snapshot reviewing lower court cases applying *Loper Bright* in the six-month period following the decision, see Robert Kundis Craig, *The Impact of* Loper Bright v. Raimondo*: An Empirical Review of the First Six Months*, 109 MINN. L. REV. (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5077213 [https://perma.cc/TEG6-42D8]. Craig reports that a vast majority of cases in her sample relying on *Loper Bright* have purportedly ruled against agencies. *Id.* For purposes of drawing inferences about the effects of *Loper Bright*'s doctrinal change, the rate of agency losses by itself is not enough. An estimate of an appropriate counterfactual is required. We would also need to rule out potential confounders, such as the possible effect of the ideological dispositions of the judges who have made decisions. And, of course, it is possible that observations from this initial six-month period might not hold in the long run—or that any effects of *Loper Bright* might not hold equally across all substantive areas of law and administration. For a discussion of empirical analysis methods relevant to studying the effects of *Loper Bright*, see Cary Coglianese, *Empirical Analysis of Administrative Law*, 2002 U. ILL. L. REV. 1111 [hereinafter Coglianese, *Empirical Analysis*] and Cary Coglianese, *Evaluating Regulatory Performance*, 8 U. PA. J.L. & PUB. AFFS. 47 (2023). For a helpful discussion of what the longer-term effects of *Loper Bright* might be, as well as why the administrative governance game's equilibrium might settle back to what it was prior to *Loper Bright*, see Shapiro, *Short Term*, supra note 92.

To illustrate this point, in this Part we begin by drawing on sociological research that conceptualizes how observers often rely on cultural perceptions or "myths" about the resilience of other complex systems—such as those that make up the natural environment. We suggest that certain archetypal myths of resilience chart out plausible, but diverging, predictions about the nature of the punctuation we are experiencing with *Loper Bright*. These myths of *Loper Bright* go a long way towards explaining why there has been such a range of opinions in the "prediction industrial complex" described in Part I.[173] Notwithstanding our central point that forecasting the future of administrative governance after *Loper Bright* involves questions of belief more than knowledge, we conclude this final Part of this Article with our own modest hypothesis about the future. Specifically, we argue that *Loper Bright* has, if nothing else, significantly disturbed the status quo *symbolically* by taking aim at a core doctrinal feature of a longstanding equilibrium in administrative governance. That is another reason why—in addition to all the uncertainties that *Loper Bright* contains—we think the Court's decision represents a great unsettling in administrative law.

A. The Myths of Loper Bright

One is tempted to compare the position that administrative law scholars and practitioners find themselves in when trying to assess the disruptive potential of *Loper Bright* with the position of anyone, even experts, in trying to forecast the disruptive potential of new technologies, such as gene editing, nanotechnology, or artificial intelligence. In an important book unrelated to administrative law, sociologists Michiel Schwarz and Michael Thompson articulated a typology of four archetypes in cultural views about how people think pollution or other human activity might affect the ecological equilibria that sustain human life.[174] These archetypes—or "myths of nature," as Schwarz and Thompson called them—are illustrated in the four panels contained in Figure 1, which is intended to depict a cross-section of four different surfaces upon which a marble rests.

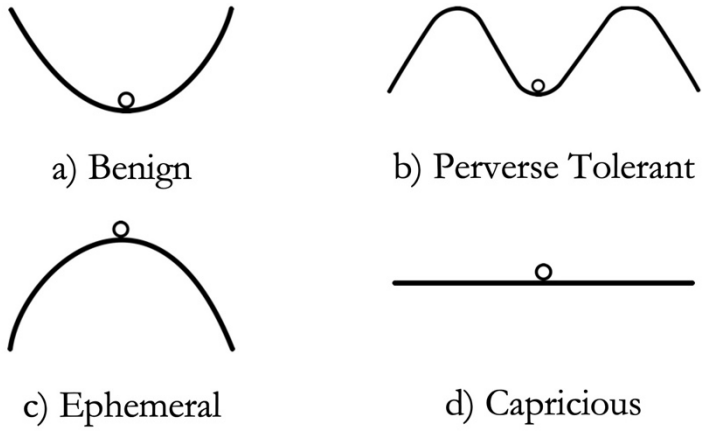
For Schwarz and Thompson, the marble's relationship with each surface represents the current environmental equilibrium needed to sustain human life.[175] (Think: the Earth.) An environmental disruption that shakes the surface might do little or nothing to shift where the marble settles out, as illustrated

173. *See supra* Part I.

174. MICHIEL SCHWARZ & MICHAEL THOMPSON, DIVIDED WE STAND: RE-DEFINING POLITICS, TECHNOLOGY AND SOCIAL CHOICE (1990). For a foundational discussion along similar lines, see MARY DOUGLAS & AARON WILDAVSKY, RISK AND CULTURE: AN ESSAY ON THE SELECTION OF TECHNOLOGICAL AND ENVIRONMENTAL DANGERS (1983).

175. SCHWARZ & THOMPSON, *supra* note 174.

Figure 1: The Myths of Nature



Source: SCHWARZ & THOMPSON (1990)

in panel 1.a, where nature is forgiving and benign. Or such a disruption might do nothing to the marble's ultimate settling within some bounds—panel 1.b, where nature is forgiving up to a point—but past a tipping point, the marble comes crashing down. Panel 1.c has the marble sitting precariously in a very sensitive equilibrium, where any slight disruption will cause the marble to come crashing down. Panel 1.d would appear not much better because any slight bump on the surface (e.g., a tabletop) leads to the marble going any which way it wants, with nothing to contain its movement (even if it does not lead to a precipitous crash). Whether one believes the marble is in one scenario or another will determine how one perceives the ecological effects of any oscillation created by the introduction of new chemicals or technologies—that is, the consequences of disturbing the present equilibrium. And whether one believes the marble is in one scenario or another will depend on background assumptions, heuristics, or cultural predispositions, not objectively provable facts. This is not to deny that an objective reality exists about how ecosystems respond to disruptive occurrences or how physiological systems respond to the exposure of certain chemicals, but rather to say that, for many questions about environmental risks, the reality can be out of reach in the here and now.

Myths about nature arise because we have only one Earth and because of the extreme complexity of natural systems. In much the same vein, we have one system of government in the United States—and, as suggested in Part II of this Article, the interactions between its many parts make it extremely

complex.[176] Due to the challenges of knowing what the precise consequences will be of the overturning of *Chevron*, a comparable set of myths will likely emerge about how *Loper Bright* will affect administrative governance. Some will see the administrative governance system as resilient to change and adaptable in the face of the Court's action unsettling forty years of administrative law—a position comparable to the "benign" myth illustrated by panel 1.a. Others will see administrative governance as resilient to a point ("perverse tolerant" in panel 1.b), although even this group may split on whether to view *Loper Bright* as the proverbial "last straw" that leads to significant impacts on administrative governance or, less ominously, as falling "within the bounds" of the system's tolerances. Still, other observers might see the administrative governance system as highly precarious, such that *Loper Bright* did not have to do too much to lead to major disruption (comparable to the "ephemeral" myth shown in panel 1.c). On this view, agencies may be perceived as highly skittish and risk-averse, and the overturning of *Chevron* will lead to a dramatic ossification, if not abandonment, of meaningful agency action.[177] A final group could very well take the perspective that *Loper Bright* provides more or less a random shock to the system that will be disruptive in a manner akin to the "capricious" myth represented by panel 1.d.

Much as with Schwarz and Thompson's myths of nature, how one reads *Loper Bright* and perceives its implications likely depends on one's background assumptions and predispositions. In the case of *Loper Bright*, these will be assumptions and predispositions about how law and politics factor into administrative governance. We thus offer our own four archetypes or "myths of *Loper Bright*" that depend on whether one sees law or politics as a primary determinant of judicial decisionmaking and administrative governance—and, further, on whether one sees *Loper Bright* as having effectuated much of a change in the law. These are "myths" not because none of them are true (or could be true) but rather because, like the myths of nature, they reflect dispositions that are deeply contestable. They draw on worldviews that

176. *See supra* Part II.

177. The notion that rulemaking had already become ossified is an idea that has long pervaded administrative law scholarship. *See, e.g.*, Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385–86 (1992). This notion has persisted even in the face of evidence to the contrary. Coglianese, *Empirical Analysis*, *supra* note 172; O'Connell, *supra* note 144, at 936; Jason Webb Yackee & Susan Webb Yackee, *Administrative Procedures and Bureaucratic Performance: Is Federal Rule-making "Ossified?,"* 20 J. PUB. ADMIN. RSCH. & THEORY 261, 262 (2010); Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414, 1421–22 (2012); Jason Webb Yackee & Susan Webb Yackee, *Procedural Constraints and Regulatory Ossification in the U.S. States*, REGUL. & GOVERNANCE 1 (2024), https://doi.org/10.1111/rego.12627 [https://perma.cc/N2Z2-B2YB].

shape or filter how new evidence is perceived and interpreted in the future. Scholars would do well to be aware of these myths of *Loper Bright* as they start to build a mosaic and draw conclusions from the bits and pieces of additional information that will emerge in the days and years to come.

Myth 1: Loper Bright *will not change much in administrative governance because it did little to change the law.*

If one is inclined to think that the law is what drives change throughout government, *Loper Bright* leaves room for reasonable disagreement about whether or how much the law really changed. As we explored in Part I.B, even though the *Loper Bright* Court said, "*Chevron* is overruled,"[178] it is nevertheless plausible to read *Loper Bright* as otherwise accepting basically what the law had always been, even under *Chevron*—namely that Congress can delegate authority to agencies to carry out statutes and make the necessary judgments, embedded in binding rules or adjudications, for such implementation.[179]

Chevron recognized that "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," and that "[s]uch legislative regulations are of controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[180] Yet *Chevron*'s famous two-step test also applied to implicit delegations.[181] *Loper Bright* took aim at how courts discovered implicit delegations while still accepting a view consistent with *Chevron*'s treatment of express delegations. *Loper Bright* most pointedly indicated that mere ambiguity in a statute was not sufficient to justify a court finding of an implicit delegation, but it did not entirely rule out a "best reading" of a statute that accommodates what might otherwise have been considered an implicit delegation.[182]

Loper Bright did not say where the line falls between a clearly permissible express delegation and a decidedly non-best reading of a purported implicit delegation, especially in the context of situations that necessarily will involve agencies exercising delegated authority. This line-drawing might well become, in time, just as rote a judicial exercise as anything under *Chevron*, and with no different effect, especially since many instances of what might

178. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

179. *See supra* Part I.B.

180. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

181. *Id.* at 844 (noting that "[s]ometimes the legislative delegation to an agency on a particular question is implicit").

182. *See* Vermeule, *supra* note 84; *see also* notes 60–63 and accompanying text.

otherwise be thought of as an implicit delegation could well be characterized as an express delegation whenever the implicit nature is drawn from explicit textual analysis.[183] One arguable reading of *Loper Bright* might be that, at most, it collapsed two categories of delegation into a single category framed around the question of whether Congress delegated to agencies the decision to clarify and apply the terms of a statute. Much now appears to hinge on a determination of a statute's delegation to the agency. But, of course, it always did.[184] On some legal readings, then, perhaps one myth of *Loper Bright* might be that it did not do much at all to change the law—and hence, it will do little to change administrative governance.

Myth 2: Loper Bright *will dramatically change administrative governance because it dramatically changed the law*.

At the same time, it is plausible—and even arguably the "best" reading of *Loper Bright*—that it did fundamentally change the law. After all, it did expressly overturn a forty-year-old precedent.[185] Even if one reads *Loper Bright* as containing the possibility that a court may permissibly find, in some circumstances, reason to conclude by implication rather than by express language that Congress intended to delegate to an agency the authority to construe a statute, the presumption surrounding such an implication has shifted. On this view, courts previously were to presume that general statutory delegations to agencies also necessarily included delegations to determine what ambiguous provisions in those statutes meant, which then meant that courts

183. *Loper Bright*, 144 S. Ct. at 2263 (likening expressly delegating language to other statutory language that "leaves agencies with flexibility," such as "appropriate" or "reasonable" (citing Michigan v. EPA, 576 U.S. 743, 752–53 (2014))).

184. Coglianese, Chevron*'s Interstitial Steps*, *supra* note 30. As the Court noted in *United States v. Mead*:

> Congress . . . may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap. Yet it can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which "Congress did not actually have an intent" as to a particular result. When circumstances implying such an expectation exist, a reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise, but is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable.

533 U.S. 218, 229 (2001) (citations omitted).

185. *Loper Bright*, 144 S. Ct. at 2273 ("*Chevron* is overruled.").

were obligated to defer to those agencies' reasonable interpretations.[186] Going forward, there is now the opposite presumption—and so a much higher hurdle exists to be surpassed, or a higher burden to be met, in overcoming the presumption and accepting an agency's reasonable approach. Owing to this shift in presumptions, many semantic ambiguities will be settled by courts rather than agencies in the years ahead, effectuating a substantial change in how administrative governance proceeds. At base, this myth of *Loper Bright* sees the Court's decision as effecting a consequential shift in the role of the judiciary and its relationship vis-à-vis agencies in cases involving questions of statutory authority.

Myth 3: Loper Bright *will dramatically change administrative governance but only because it dramatically signals an ideological shift in judicial politics*.

Another potential myth of *Loper Bright* stems less from any *legal* content or analysis of *Loper Bright* than from the *political* salience of its message. *Loper Bright*'s primary audience could be seen as lower court judges, who handle the bulk of challenges of agency rules. The Court has flexed its muscles and revealed how it plans to exercise its power over these lower courts, telling them that it expects them to scrutinize agency actions more closely.[187] *Loper Bright* could have this effect even if it did little to change the law (the premise underlying Myth 1). Adherents of Myth 3 may alternatively think that legal doctrine—even if changed—is not the real driver that explains judicial decisionmaking. Either way, *Loper Bright* could be seen as a powerful decision not because of the law but because of what it communicates about the Supreme Court's ideological posture toward agency action. Those attracted to this myth of *Loper Bright* see the Court's decision not in legal terms but in political ones. They see the Court signaling a dramatic unleashing of an ascendant conservative view throughout the court system that will necessarily render substantial agency action more difficult in the years ahead.

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186. Elliott, Chevron *Matters*, *supra* note 149, at 3.

187. In concluding its opinion, the *Loper Bright* Court admonished that:

> Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires. Careful attention to the judgment of the Executive Branch may help inform that inquiry. And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it. But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.

Loper Bright, 144 S. Ct. at 2273.

Along these lines, it is worth acknowledging that the judiciary that receives the Court's political signal from *Loper Bright* differs from the judiciary at the time *Chevron* was handed down. When *Chevron* was decided, the lower courts (and especially the U.S. Court of Appeals for the District of Columbia Circuit, which heard a large proportion of administrative law cases) skewed in favor of Democratic appointees who were generally more accepting of the role of agencies as organs of governmental power. To be sure, those judges had their own skepticism about agency power, particularly during the Reagan Administration when *Chevron* was decided. But now that the lower courts are filled with more Republican-appointed judges, and since other circuits (such as the Fifth Circuit) are becoming important venues for administrative law cases, the soil into which the seed of *Loper Bright* has fallen has changed. In an era with increased judicial polarization that tracks more or less the political polarization of our time, the signal sent by overturning *Chevron* could very well sway outcomes more than *Chevron* ever did when it was first handed down.[188] It is also much more likely today that litigants can find judges whose interpretations of statutes do not align with those of an agency. All in all, the political signaling effects of *Loper Bright*, in interaction with the more ideologically divided court system, means that there is a greater chance today of agencies losing in court, even independent of any view about how much doctrinal change *Loper Bright* has actually effectuated.

Myth 4: Loper Bright *may do little to change administrative governance because the shift in judicial politics that it signaled had already occurred.*

On the other hand, a political reading of *Loper Bright*'s effects might well lead to the conclusion that the decision itself will bring about little change—but precisely because politics had already done its work well before *Loper Bright* was decided. On this view, the decision to overrule *Chevron* will not on its own alter the partisan or ideological dynamic of the courts vis-à-vis agencies in any significant way. Some observers have suggested, for instance, that agency win rates were already being affected by a Supreme Court that has been taking a more muscular or skeptical posture toward agency authority, as well as by lower court judges willing to question agency decisions and agency interpretations of their statutes, such as by invoking the major

188. *See, e.g.*, Adam Bonica & Maya Sen, *Estimating Judicial Ideology*, 35 J. ECON. PERSPS. 97, 99 (2021) (noting that "ideological polarization within the federal courts has risen in the past few decades," and that this has resulted in "increasingly fractious opinions, indicating growing discord and conflict within the courts"); Lee Epstein, *Partisanship "All the Way Down" on the U.S. Supreme Court*, 51 PEPP. L. REV. 489, 501–02 (2024) (showing that the justices on the Roberts Court have become more sorted by partisanship).

questions doctrine.[189] Perhaps *Loper Bright* will itself have little effect because the real source of any increase in agency losses was already established before *Loper Bright* was ever handed down. And with another four years of a President Donald Trump or another future conservative president, the judiciary might change further to the point that, with or without *Loper Bright*, judges would be taking a deeply skeptical posture to agency action.

The question, again, is whether, with the overturning of *Chevron*, this skepticism will yield stronger anti-agency outcomes than it otherwise would have. Even if *Chevron* had remained in place, judges skeptical of agency power would have continued to have the ability at Step One to say that a statute was clear but in a way that did not comport with the agency's interpretation. They also would have had the continued ability at Step Two to declare that the agency's interpretation was unreasonable. They even would have had the ability never to reach Step Two and instead reach their own judgment about a statute's meaning in cases of statutory ambiguity.[190] It may be far from clear whether or to what extent the *Chevron* doctrine was a barrier to finding against an agency interpretation for those judges who possess a general aversion to agency power. Consequently, it is plausible to think of a myth that treats *Loper Bright*—even if it did effectuate a change in legal doctrine—as little more than window dressing.

B. A Middle Ground? Loper Bright*'s Symbolic Resonance*

Ultimately, it is very difficult to tell which of these myths resemble reality—that is why we refer to them as "myths." Part of why *Chevron* lost support was because there was room for myths about *Chevron* itself to proliferate—that is, both critics and supporters believed it to be extremely important

189. On the major questions doctrine, see Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 263 (2022); Thomas O. McGarity, *The Major Questions Wrecking Ball*, 41 VA. ENV'T L.J. 1, 3 (2023). We do note that some early reports have emerged of lower court judges citing *Loper Bright* in decisions that favor litigants challenging agency actions. Robert Iafolla, *GOP-Picked Judges Take Hard Line on Regulations Post-*Chevron, BLOOMBERG L. (Sept. 4, 2024), https://news.bloomberglaw.com/daily-labor-report/gop-picked-judges-take-hard-line-on-rules-after-chevrons-demise [https://perma.cc/HXE4-GZPH]; Eli Sanders, *A Supreme Court Justice Warned That a Ruling Would Cause "Large-Scale Disruption." The Effects Are Already Being Felt*, PROPUBLICA (Sept. 23, 2024), https://www.propublica.org/article/supreme-court-chevron-deference-loper-bright-guns-abortion-pending-cases [https://perma.cc/369D-X5U6]. It is too soon to conclude whether these decisions truly reflect any systemic trend. These citations to *Loper Bright*, after all, might well be superfluous, as the same outcomes may have occurred but under other proffered rationales.

190. Coglianese, Chevron*'s Interstitial Steps*, *supra* note 30.

despite the lack of clear evidence that it had been all that consequential.[191] Much like with the myths of nature, the myths surrounding *Loper Bright* can operate in such a way that they serve both to reflect and to reinforce each observer's own prior attitudes and beliefs.

What might tip the balance between a view that *Loper Bright* will make little difference and one that it will effectuate monumental change? We are inclined to think that, at a minimum, *Loper Bright*'s symbolic import will lead it to make much more of a difference than *Chevron* did in the first place. Symbols are not law, but they can hold great power to shape how the law is perceived, applied, and elaborated. Law more generally holds expressive value that can induce changed behavior even in the absence of formal sanction.[192] Symbols also matter greatly in politics.[193] As a result, whether one perceives administrative governance as shaped more by law or by politics, it seems that *Loper Bright* is likely to bring about a significant disequilibrium due to the symbolic resonance of its three key words: "*Chevron* is overruled."[194] Whether that disequilibrium eventually settles out on a new path may ultimately depend on how exactly the players in the administrative governance game perceive *Loper Bright* as a symbol.

Administrative law scholarship has room to acknowledge the role of symbolism in how we think about major cases. As Kristin Hickman has noted in the context of the moribund nondelegation doctrine, the Roberts Court may be particularly interested in a symbolic approach to reinforcing what it views as core separation of powers values.[195] *Loper Bright* might then be a rather self-conscious effort, in keeping with these patterns, to send a shot across the bow of the administrative state. In overturning *Chevron*, the Court has, if nothing else, clearly "expressed a mood."[196] Lower courts will, of course, not always know exactly what the Court's mood is, but they will know that it is

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191. *See supra* note 149 and accompanying text.

192. *See generally* RICHARD H. MCADAMS, THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS (2017) (laying out the case for how law can create behavioral change by coordinating beliefs). For a perceptive article applying the literature on expressive power to the *Loper Bright* decision, see Anuj C. Desai, Loper Bright *as Jurisprudence: Institutional Choice and the Expressive Value of Law*, (Univ. of Wis. Legal Stud. Rsch., Working Paper No. 1819, 2025) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5049030 [https://perma.cc/ET6L-2CZF].

193. MURRAY EDELMAN, THE SYMBOLIC USES OF POLITICS (1967); Joseph S. Nye, Jr., *Soft Power*, 80 FOREIGN POL'Y 153 (1990).

194. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

195. Kristin E. Hickman, *Nondelegation as Constitutional Symbolism*, 89 GEO. WASH. L. REV. 1079, 1133 (2021).

196. Vermeule, *supra* note 84 (using the oft-quoted phrase from Universal Camera Corp. v. Lab. Bd., 340 U.S. 474, 487 (1951)).

suspect of agency authority, and they may in the future be more likely to be primed themselves to view administrative actions with skepticism. Agencies, in turn, may perceive that their work product will be more likely to receive greater scrutiny in court, and they may therefore change the way they select and defend regulatory initiatives. It may be, in other words, that *Loper Bright*'s clear antipathy to *Chevron*, which rightly or wrongly came to be itself a symbol of the power of the administrative state, has sent a symbolic message to anybody listening in the administrative governance game that agencies should proceed with caution, at least for the time being. If the symbolic shock of *Loper Bright* is sufficiently motivating, it is reasonable to assume that there could be permanent adjustments triggered.

One important counterpoint worth considering is, again, that *Chevron* itself never appeared to have mattered as much as many thought it did. It was a remarkably little-known decision when it was handed down. Despite its obvious symbolic resonance over the decades, there is little empirical evidence that *Chevron* really altered the administrative governance game at the agency level at the time it was adopted.[197] Perhaps, over time, it did change the dynamic in the courts somewhat—at least in the lower courts[198]—but there is little more than anecdotal evidence that even slight changes in vacatur rates ever trickled down to affect the work product of agencies.[199] One might look at this track record and suggest that it is generally unlikely that *Loper Bright* will achieve anything of greater impact. If deference did not matter when it was "created" by *Chevron*, then perhaps it should not matter to lose it.

But even though *Chevron* and *Loper Bright* appear to be mirror images of each other—one announcing a doctrine of judicial deference, and the other, at a minimum, holding that such a doctrine is inconsistent with the APA—they are, in truth, not equally situated with respect to their symbolic impact. When *Chevron* was decided, the decision was not understood to change anything and flew under the radar even among administrative law experts.[200] When we search the Lexis "Major Newspapers" database for press coverage of *Chevron* in the month following the Court's decision, all we can find is a mention in a single article recapping the entire Court's term.[201] (Ironically,

197. *See supra* notes 148–150 and accompanying text (citing the few attempts to test whether *Chevron* altered certain characteristics of agency work).

198. *See id.* (reporting empirical evidence that shows a mixed bag of ideological and constrained behavior in the lower courts under the *Chevron* doctrine).

199. *See supra* note 149 and accompanying text.

200. Merrill, *The Story of* Chevron, *supra* note 4.

201. Linda Greenhouse, *Conservatives on Supreme Court Dominated Rulings of Latest Term*, N.Y. TIMES (July 8, 1984), https://www.nytimes.com/1984/07/08/us/conservatives-on-supreme-court-dominated-rulings-of-latest-term.html [https://perma.cc/9ZP4-QWDR].

this article cited *Chevron* as one of several decisions that showed how "conservatives on the Supreme Court dominated the term that just ended to a degree unmatched in the Court's recent history.")[202]

By contrast, *Loper Bright* has garnered extensive attention in the media. Using the same search parameters, we found sixty-four articles in major news outlets in the month following *Loper Bright*. A wider array of commentary can be found online, as indicated by the Appendix to this Article.[203] This extensive coverage of *Loper Bright* suggests that this latter decision has at least the potential to shape elite and lay audiences' perceptions of the status quo.[204] Moreover, if the basic principles of prospect theory apply—namely, that people are more concerned about losses than gains[205]—then the loss of the *Chevron* doctrine will likely register more among the players of the administrative governance game than any concomitant gain that the decision in *Chevron* might have provided in terms of agency authority or discretion.

It is worth reiterating that *Loper Bright*'s symbolic "signal" may be that much stronger because of the term in which it was decided. As noted in Part I.A, the Court decided in the same term several other administrative law cases that are united in expressing a valence opposed to agency authority.[206] Although the *Jarkesy* decision had nothing to do with judicial review of agency interpretation, it not only may limit opportunities for agency adjudications, but it also shows a willingness on the part of the Court's majority to invoke the U.S. Constitution to curb a common agency power.[207] Similarly, *Corner Post* will likely expand the sheer number of opportunities that parties have to litigate agency interpretations, which, perhaps in interaction with *Loper Bright*, likely means that more rules will be vulnerable to challenge.[208] Finally, the Court's stay of enforcement of a hyper-technical cross-state air pollution rule based on an arcane dispute about modeling in *Ohio v. EPA* suggests that the Court believes that certain agency rules should be more than just reasonable; they should be flyspecked if they expect to go into effect.[209] And, of course, the Court's October Term 2023 was only one of several recent consequential terms for administrative law that, together, seem to evince

202. *Id.*

203. *See infra* Appendix; *see also supra* notes 92–108.

204. *See supra* Part I.B (reporting reactions).

205. *See generally* Nicholas C. Barberis, *Thirty Years of Prospect Theory in Economics: A Review and Assessment*, 27 J. ECON. PERSPS. 173 (2013); Jack S. Levy, *An Introduction to Prospect Theory*, 13 POL. PSYCH. 171, 171, (1992).

206. *See supra* notes 71–78 and accompanying text.

207. *See* SEC v. Jarkesy, 144 S. Ct. 2117 (2024).

208. *See* Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 144 S. Ct. 2440 (2024).

209. *See* Ohio v. EPA, 144 S. Ct. 2040 (2024).

a clear antipathy to administrative agencies and, indeed, various institutions other than the courts.[210] As Jack Beermann has noted, *Loper Bright*'s signal "may interact with other recent anti-regulatory decisions," such as the major questions doctrine.[211]

Compare, then, the recent burst of anti-agency Supreme Court decisions to the far more mixed message sent by the Court in the years surrounding *Chevron*. Although the Court sent what can be seen as a pro-agency message in *Chevron* itself, just one year earlier, in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*,[212] it offered one of its strongest endorsements—before *Ohio v. EPA*, at least—of so-called hard look review. In *State Farm*, announcing what has become the canonical test under the arbitrary and capricious standard, the Court remanded the rulemaking of the National Highway Traffic Safety Administration for the agency's failure to give what the Court deemed to be adequate consideration to policy alternatives.[213] That same year, though, the Court handed down *Baltimore G. & E. Co. v. Natural Resources Defense Council*,[214] which upheld a Nuclear Regulatory Commission decision against an arbitrary and capricious challenge and held that courts should defer to agencies' expert judgment in matters involving cutting-edge science.[215] Of course, just four years before *Chevron*, the Court decided *Industrial Union Dept., AFL-CIO v. American Petroleum Institute* (the *Benzene Case*),[216] which some have pointed to as a precursor to the modern-day major questions doctrine.[217] The upshot is that *Chevron* emerged at a time

210. *See* Blake Emerson, *The Existential Challenge to the Administrative State*, 113 GEO. L.J. (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4759221 [https://perma.cc/QC9C-NX6A]; Nina A. Mendelson, *Tossing Sand in the Regulatory Gears: Hurdles to Policy Progress in the Supreme Court*, 62 HARV. J. ON LEG. SYMP. ED. 40 (2024), https://journals.law.harvard.edu/jol/2024/10/24/tossing-sand-in-the-regulatory-gears-hurdles-to-policy-progress-in-the-supreme-court [https://perma.cc/28V2-KG4Z]; Daniel T. Deacon & Leah M. Litman, *Two Takes on Administrative Change from the Roberts Court*, 62 HARV. J. ON LEGIS. 1 (2024), https://journals.law.harvard.edu/jol/2024/09/24/two-takes-on-administrative-change-from-the-roberts-court [https://perma.cc/E2U3-UJ97].

211. Jack M. Beermann, Chevron *Deference Is Dead, Long Live Deference*, 2023–2024 CATO SUP. CT. REV. 31, 33 (2024).

212. 463 U.S. 29 (1983).

213. *Id.*

214. 462 U.S. 87 (1983).

215. *Id.* at 103.

216. 448 U.S. 607 (1980).

217. Rachel Rothschild, *The Origins of the Major Questions Doctrine*, 100 IND. L.J. (forthcoming 2025); Cass R. Sunstein, *It All Started With* Benzene, 76 ADMIN. L. REV. 673, 674–75 (2024). The major questions doctrine has at times served as an exception to *Chevron* and at other times

when the Court seemed to be sending anything but a clear signal about agency power generally. What is strikingly distinctive about *Loper Bright* and the other cases decided in recent years is how aligned they are around a simple message: agency authority is to be viewed with suspicion.[218]

The signal sent by *Loper Bright* is not only clearer but far louder than *Chevron*'s ever was, as evidenced by the amplifying effects of the extensive media coverage and commentary in the legal academy and profession.[219] In the wake of silence in the immediate wake of *Chevron*, it took years for judges and scholars to start to recognize a *Chevron* "era."[220]

Although considerations of signal clarity and volume do not trigger any formal legal criteria for decisionmaking by lower courts, they do mean that, as a practical matter, the symbolic effects of *Loper Bright* appear to be strong ones. Not only will the symbolism of overruling *Chevron* resonate with lower court judges who are already primed to view agency action with skepticism,[221] but it will also plausibly motivate judges on the margins and, therefore, shape outcomes in ways we have not seen before.

To be sure, the precise contours of these outcomes are not certain, for the reasons we have elaborated in this Article. Furthermore, one only needs to look to the ossification debate in the administrative law literature, which raised a similar point about the symbolic import of hard look review,[222] even though systematic empirical evidence of ossification has been difficult to find,[223] to appreciate the difficulty of predicting specific shifts in the

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as a clear statement rule that requires Congress to speak with precision when it wishes to delegate authority to agencies to pursue major policy initiatives. *See* Daniel E. Walters, *The Major Questions Doctrine at the Boundaries of Interpretive Law*, 109 IOWA L. REV. 467–68 (2024).

218. This is not to deny that agencies have still prevailed before the current Supreme Court. In the same term as *Loper Bright*, the Court rejected a challenge to the constitutionality of the funding of the Consumer Financial Protection Bureau and it rejected on standing grounds a challenge to the Food and Drug Administration's authorization of mifepristone. Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., 144 S. Ct. 1474 (2024); FDA v. All. for Hippocratic Med., 144 S. Ct. 1540 (2024).

219. *See supra* Part I.B; *see also infra* Appendix.

220. *See* Merrill, *The Story of* Chevron, *supra* note 4, at 257.

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222. *See, e.g.*, MASHAW & HARFST, *supra* note 135, at 226, 228, 249; Richard J. Pierce, Jr., *Seven Ways to Deosssify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995); McGarity, *supra* note 177, at 1419.

223. *See supra* note 177.

administrative governance game.[224] Still, the "myth" of ossification may have been meaningful in its own right, and perhaps even self-fulfilling, to the extent that some agency lawyers internalized its symbolic resonance. And, as mentioned, myths about *Chevron*—such as that it was leading courts reflexively to validate almost any agency action—likely contributed to shaping the discourse that led to *Chevron*'s overruling. Much the same could happen with *Loper Bright* one day. Symbols can matter, even when we cannot fully predict with precision how or when they will.

CONCLUSION

Our core thesis—namely, that we will not know with any specificity what impact *Loper Bright* will have on administrative governance, at least for some time—might be seen as frustrating.[225] Scholars, lawyers, and students are drawn to administrative law because of the belief that it matters deeply. Yet here in the ashes of *Chevron*, we cannot say with any degree of precision or certainty what exactly will change, or even if, in the long run, much of anything will. The uncertainty might be seen as enough to make some administrative law scholars question what they are doing.

Our perspective is to embrace the uncertainty—recognizing it and thereby expressing care in what we conclude about *Loper Bright*'s effects. Moreover, just because the impacts of *Loper Bright* might be hard to document, this does not mean they will not be real. Indeed, *Loper Bright*'s symbolic resonance, which could punctuate the equilibrium of the administrative governance game as we have come to know it, may well foreshadow even substantial impacts in the years ahead. What the new equilibrium will look like—including whether it will ultimately be much different than the equilibrium in the years leading up to *Loper Bright*—is less clear than the probability that we will experience some disequilibrium. What a new equilibrium will look like will be influenced by many factors—and among those might well be the work of administrative law scholars, whether through their scholarship, engagement with administrative governance, or training of future lawyers who will go forth to be participants in the administrative governance game.

Our aim in highlighting the difficulty of prognostication in the aftermath of *Loper Bright*'s legal earthquake is thus not to abandon either legal analysis

224. Again, it could be because, when it came to the signal being sent, the message was mixed—as the Court simultaneously endorsed hard look review of agency policy choices and blessed deferential review of agency legal interpretations. *See supra* notes 212–214 and accompanying text.

225. *Cf.* Adam Grant, *If You're Sure How the Next Four Years Will Play Out, I Promise: You're Wrong*, N.Y. TIMES (Nov. 12, 2024), https://www.nytimes.com/2024/11/12/opinion/donald-trump-election.html [https://perma.cc/Y94H-WHPL].

or social science inquiry, any more than the difficulties in forecasting the effects of real earthquakes should lead seismologists, architects, and engineers to abandon their study of the effects of the Earth's tremors on our built environment. The key is to understand the complexities of the inquiry and to know what to look for. In this regard, the ideas, hypotheses, and questions we have put forth in this Article may help inform future empirical work that seeks to understand *Loper Bright*'s impact on the administrative governance game. By keeping their eyes wide open to their own background assumptions and predispositions, scholars may be better able to learn from this natural experiment about how law affects administrative action—and about when and how it does not. Whether *Loper Bright*'s effects are ultimately large or small, or a blessing or a curse, we can say with certitude that we live in an interesting but unsettling time for administrative law.

APPENDIX: COMMENTARIES IN THE IMMEDIATE AFTERMATH OF *LOPER BRIGHT*

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