THE CURTAIN FALLS ON *CHEVRON*: WILL THE *CHEVRON* TWO-STEP GIVE WAY TO A SIMPLER *LOPER BRIGHT*-LINE RULE?*

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Traditionally, administrative law cases don't make news. Instead, they make snooze. They can be exciting to a relatively small circle of "ad. law nerds," as we're affectionately called, but they're not the stuff of demonstrations outside the Supreme Court. Even casual Court observers can remember quite a few constitutional law decisions—on topics such as integration, criminal defendants' rights, voting rights and rules, abortion, marriage rights (I could go on)—that sparked anger and joy on different sides. Many of these led to demands for impeachment of Justices or restructuring of the Supreme Court by those who thought the Court got the matter wrong. But administrative law? Not so much.

Yet, against all odds, the Court's 1984 decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[1] not only became well-known in judicial and academic circles (it is, by far, the most written-about and most cited administrative law decision ever).[2] It also became a matter of public note, controversy, and partisan debate—something nominees for the Supreme Court were questioned about and pundits offered prescriptions for

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

[2] *See* Christopher J. Walker, *Most Cited Supreme Court Administrative Law Decisions*, YALE J. ON REGUL. NOTICE & COMMENT (Oct. 9, 2014), https://www.yalejreg.com/nc/most-cited-supreme-court-administrative-law-decisions-by-chris-walker.

altering, strengthening, or eliminating. This essay briefly recounts *Chevron*'s story, details how it ended, and anticipates what might come next.

I. *CHEVRON*'S BACKGROUND AND BEGINNING

Some cases are instantly notable and controversial. *Chevron* wasn't one of these cases. It was decided unanimously by six Justices (the missing Justices weren't absent for any reason connected to the essence of the decision). And nothing in the Court's twenty-seven-page opinion immediately suggested its future importance.[3]

The *Chevron* opinion focused almost exclusively on the details of a particular agency decision, scrutinizing the basis for the policy-driven framework through which the agency chose to implement one statutory requirement for regulating new or modified "stationary sources" of pollutants.[4] The central question was whether the law at issue (the Clean Air Act, or CAA) required the Environmental Protection Agency (EPA) to implement regulations that separately controlled emissions from each individual smokestack or permitted it to control emissions from an entire plant taken as a whole (an approach known as the "bubble" concept).[5] The details of that inquiry, however, have (for the most part) been roundly ignored. Instead, *Chevron* became famous for what it said about the terms for judicial review of administrators' decisions, a matter generally governed by the Administrative Procedure Act (APA)—a World War II-era law that sets ground rules for most federal agency procedures.[6]

The APA directs that "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret

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[3] *See, e.g.*, Gary S. Lawson & Stephen Kam, *Making Law Out of Nothing At All: The Origins of the* Chevron *Doctrine*, 65 ADMIN. L. REV. 1 (2013); Peter M. Shane & Christopher J. Walker, Chevron *at 30: Looking Back and Looking Forward*, 83 FORDHAM L. REV. 475, 477 (2014) ("When Justice Stevens, writing for the Court in 1984, articulated the *Chevron* two-step approach, at first blush it may have seemed like a fairly straightforward rule that would be easily administrable in the lower courts.").

[4] *See Chevron*, 467 U.S. at 859–66.

[5] The term came from imagining that the entire industrial plant site was covered by a plastic bubble with one hole at the top. The question, then, would be what emissions were permitted from all of the site's smokestacks taken together.

[6] The story of the *Chevron* decision, its apparent meaning to those who authored it, and its evolution to canonical status as a prescription for judicial review are well-chronicled and critically evaluated in many writings. For a particularly comprehensive and thoughtful account, see, e.g., THOMAS W. MERRILL, THE *CHEVRON* DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE (2022).

constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[7] It adds that courts reviewing agency action shall "hold unlawful and set aside . . . agency action . . . found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."[8] It also declares that courts should set aside agency actions found to be "arbitrary, capricious, [or] an abuse of discretion."[9] And it permits courts to overturn agency factfinding in many settings only if a court finds that the agency fact determinations are not supported by substantial evidence.[10]

The APA's standard for review of fact-finding and its instruction for review of exercises of discretion both imply that the law calls for a degree of judicial deference to agency decisions. The "substantial evidence" test means courts defer even when they might have made a different determination on some critical fact. So, too, limiting judicial reversal of other decisions to instances where a court finds arbitrariness, capriciousness, or abuse of discretion implies a recognition that the law commits discretion to agencies and requires judicial deference to them unless there are significant departures from standard exercises of discretion. The instruction respecting the meaning of statutes, however, doesn't include any limitation on judicial decisions, nor does the general statement that "the reviewing court shall decide all relevant questions of law [and] interpret constitutional and statutory provisions."[11]

The obvious reading of the statute, in keeping with the weight of pre-APA judicial decisions, is that courts don't defer on matters of law, including matters of interpretation, but they do defer on factfinding and matters of discretion.[12] Put differently, although APA directions for judicial review don't include the word "deference," the law plainly directs courts to give some degree of deference to agency decisions when statutes grant an agency *fact-finding* authority or discretion over *implementation* of a particular law but not to

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[7] 5 U.S.C. § 706.

[8] *Id.* § 706(2)(C).

[9] *Id.* § 706(2)(A).

[10] *See id.* § 706(2)(E).

[11] *Id.* § 706.

[12] *See, e.g.*, Burnet v. Chi. Portrait Co., 285 U.S. 1, 16 (1932) ("The court is not bound by an administrative construction, and if that construction is not uniform and consistent, it will be taken into ac[c]ount only to the extent that it is supported by valid reasons.") (citations omitted)). To be sure, some cases, notably *NLRB v. Hearst Pubs., Inc.*, 322 U.S. 111 (1944), showed a degree of deference to agency determinations, but they generally characterized those decisions as matters of "application" in contrast to matters of "interpretation": "[u]ndoubtedly questions of statutory interpretation . . . are for the courts to resolve." *Id.* at 130-31.

give deference to agency *interpretations* of law. In the main, fact-finding is self-defining. The line between implementation and interpretation, not so much.[13]

II. DANCING AROUND *CHEVRON*'S TWO-STEP

The decision in *Chevron* didn't directly rest on the APA, but it did involve review authorized by a law with almost identical provisions on judicial review (so it's fair to consider the case as if it involved review under the APA's terms). Yet the parameters for review were not the central issue argued to the Court or addressed in the Court's opinion.

The Court spent most of its time and energy examining how the EPA implemented one of several provisions in different sections of the CAA dealing with regulation of "a stationary source" of harmful emissions.[14] The Court approached the *Chevron* case as if the law gave the EPA discretion over implementation of the relevant CAA provision. On that assumption, the Court's task was simply to review the agency's exercise of discretion to assure that it did not transgress the limits of reasonableness that generally capture requirements to set aside actions that are arbitrary, capricious, or an abuse of discretion. And the Court's extended evaluation of the EPA's decision respecting regulation of the particular category of stationary-source emissions at issue seemed unexceptional. It emphasized the policy aspects of the controversy, the fit between policy considerations and expressions of congressional concern underlying the CAA, and the EPA decision's reasonableness in fitting those considerations to the circumstances of the regulation at issue.

At the same time, the very small amount of the *Chevron* opinion that explained—or, more accurately, suggested—how the Court approached *its* review function led to overlapping waves of confusion, enthusiasm, and outrage as agencies, judges, lawyers, and professors grappled with what a few passages and phrases in *Chevron* meant. In the course of two paragraphs and two important footnotes, *Chevron* declared that "the judiciary is the final authority on issues of statutory construction,"[15] and that if a court, "using traditional tools of statutory construction, finds that Congress had an

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[13] For discussion of the difference between these concepts, see, e.g., Ronald A. Cass, *Fixing Deference: Delegation, Discretion, and Deference Under Separated Powers*, 17 NYU J.L. & LIBERTY 1, 50–55 (2024); Lawrence B. Solum & Cass R. Sunstein, Chevron *as Construction*, 105 CORNELL L. REV. 1465, 1471–72 (2020).

[14] *See Chevron*, 467 U.S. at 859–66.

[15] *Id.* at 843 n.9.

intention on the precise question in issue, that intention . . . must be given effect."[16] On the other hand, if the reviewing court does not find a clear intention on the precise issue—if the court concludes that the statute is silent or ambiguous on that issue—*Chevron* directs that a court should only decide whether the agency administering the statute made a reasonable decision about the law's meaning.[17] This completes the *Chevron* Two-Step: (1) the court sees if the law has a clear meaning; if not, (2) the court asks if the agency's construction of the law is reasonable, a conclusion that mandates acceptance of the agency's position.

The way the opinion reads, however, isn't entirely in line with this vision of the *Chevron* Two-Step. Immediately after the statements cited above, the Court explained its view by quoting its decision a decade earlier in *Morton v. Ruiz*: "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."[18] This statement casts the agency as *implementing* the law, making the question not the propriety of an *interpretation* of law but of a policy choice on how to give it effect.

Yet the footnote that immediately precedes that statement instructs that courts should uphold an agency's reasonable "construction" of the law, even if it is not "the reading the court would have reached if the question initially had arisen in a judicial proceeding."[19] In other words, unlike the text, the note treats the agency as having primacy in the *interpretive* task. Adding to the confusion, later in the opinion, *Chevron* returns to the interpretation v. implementation distinction to underline its view of the court as deferring not to the agency as interpreter of law but as implementer within the ambit of a reasonable exercise of discretion—and only within bounds set by law as interpreted by the courts. *Chevron*'s final substantive explanation of its test declares:

> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail.[20]

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[16] *Id.*
[17] *Id.* at 843 n.11.
[18] *Id.* at 843 (quoting Morton v. Ruiz, 415 U.S. 199, 213 (1974)).
[19] *Id.* at 843 n.11.
[20] *Id.* at 866.

The specific phrases of *Chevron*'s directions on how courts should review agency actions administering laws and what those directions meant for court decisions—and, derivatively, agency actions—led to divergent readings of the decision. Putting the *Chevron* Two-Step into practice spawned a web of explanations, applications, exceptions, and a whole separate genre of academic commentary.[21] This outpouring of administrative law provided enough material to occupy a huge chunk of administrative law casebooks (83 pages of the most recent edition of Cass, Diver, Beermann & Mascott, for example).[22] Differences over what the decision said and how it applied became increasingly contentious. And, over forty years, *Chevron*'s relatively modest effort at articulating how the Court reviews agency decisions evolved into a public *cause célèbre*.

III. DEFINING *CHEVRON*'S MIS-STEP: *LOPER BRIGHT* IDEAS

After growing calls for the courts to clarify the framework for judicial review, including from some of the Justices,[23] the Supreme Court granted

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[21] *See*, *e.g.*, Kenneth A. Bamberger & Peter L. Strauss, Chevron*'s Two Steps*, 95 VA. L. REV. 611 (2009); Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779 (2010); Cary Coglianese, Chevron*'s Interstitial Steps*, 85 GEO. WASH. L. REV. 1339 (2017); Daniel J. Hemel & Aaron L. Nielson, Chevron *Step One-and-a-Half*, 84 U. CHI. L. REV. 757 (2017); Kristin E. Hickman & David Hahn, *Categorizing* Chevron, 81 OHIO ST. L.J. 611 (2020); Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597 (2009); Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"* 112 COLUM. L. REV. 1143 (2012); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187 (2006).

[22] RONALD A. CASS, COLIN S. DIVER, JACK M. BEERMANN & JENNIFER L. MASCOTT, ADMINISTRATIVE LAW: CASES AND MATERIALS 206–289 (Aspen Publ'g, 9th ed. 2024).

[23] By the time the Court granted cert. in *Loper Bright* to address the state of *Chevron*, Justices (past and present) Gorsuch, Kavanaugh, Kennedy, Scalia, and Thomas had expressed skepticism about the Court's *Chevron* jurisprudence, and others, including Justice Alito and Chief Justice Roberts, had objected to some major applications of *Chevron* deference. So too had many lower-court judges, *see* Solar Energy Indus. Ass'n v. Fed. Energy Reg'y Comm'n, 59 F.4th 1287, 1291–93 (D.C. Cir. 2023) (Walker, J., concurring in part and dissenting in part); BNSF Ry. Co. v. EEOC, 385 F. Supp. 3d 512, 522 n.9 (N.D. Tex. 2018) (O'Connor, J.), and administrative-law scholars, *see* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 989–90 (2017); Kent H. Barnett & Christopher J. Walker, Chevron *Step Two's Domain*, 93 NOTRE DAME L. REV. 1441 (2018); Beermann, *supra* note 21; Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of* Chevron*'s Step Two*, 2 ADMIN. L.J. AM. U. 255 (1988); Ronald A. Cass, *Is* Chevron*'s Game Worth the Candle? Burning Interpretation at Both Ends*, *in* LIBERTY'S NEMESIS: THE UNCHECKED EXPANSION OF THE STATE 57, 57–58 (Dean Reuter & John Yoo eds., Encounter Books 2016); Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature*

certiorari in two cases—*Loper Bright Enterprises v. Raimondo* and *Relentless, Inc. v. Department of Commerce*—strictly to resolve the question "what to do about *Chevron*?" Deciding the issue jointly under the *Loper Bright* heading, the Court announced that *Chevron* deference at its core was contrary to the underlying statutory provisions on review and to core constitutional rules as well.[24]

The Court's legal argument begins with a recapitulation of the Constitution's separated-powers framework—advancing a view that the Constitution itself limits the executive branch's ability to adjudicate, in particular by committing "the judicial power of the United States" to Article III courts.[25] Because interpretation of the law is a core component of the judicial power, Chief Justice John Roberts' opinion for the Court and both concurring opinions declare deference to agency interpretations of law inconsistent with the vesting clause of Article III as well as with our constitutional history.[26] Justice Neil Gorsuch's concurrence, although primarily focused on the issue of stare decisis, also explains *Chevron*'s tension with constitutional commands. His opinion emphasizes that requiring deference to administrators undermines the judiciary's independent authority and its obligation to "say what the law is" (in Chief Justice John Marshall's words).[27] He stresses that deference, thus, risks depriving the people of a critical protection against government manipulation of the law—a historically important consideration that was known to and noted by the Framers and provided a guiding principle for American law.[28] Justice Clarence Thomas adds in his concurrence that treating administrative action as a matter of choosing among policy options rather than giving precise meaning to the law does not improve *Chevron*'s constitutional standing. In Justice Thomas's view, it merely converts a problem of administrators unlawfully exercising *judicial* power to one of administrators unlawfully exercising *legislative* power.[29]

Review, 16 GEO. J.L. & PUB. POL'Y 103 (2018); Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197 (1991).

[24] *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

[25] *See id.* at 2257–58.

[26] *See id.* at 2257–60; *id.* at 2274–75 (Thomas, J., concurring); *id.* at 2277–79 (Gorsuch, J., concurring).

[27] *Id.* at 2275 (Gorsuch, J., concurring) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

[28] *See id.* at 2277–79 (Gorsuch, J., concurring).

[29] *See id.* at 2274–75 (Thomas, J., concurring).

While it acknowledges the importance of the constitutional framework to understanding limitations on what Congress *may* commit to agency discretion, *Loper Bright* focuses primarily on the terms of APA review—that is, on what Congress *did* commit to agencies and to courts—and that is where the analytical heavy lifting takes place. The Chief Justice's opinion for the Court takes pains to detail the history of judicial review of administrative actions, case law in the years leading up to adoption of the APA, the particular language and structure of the APA, and the original understanding of what the APA directed.[30] The opinion sums up the APA's posture on reviewing courts' duty regarding statutory interpretation this way:

> [W]hen 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 . . . 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 decisionmaking" within those boundaries.[31]

The Court then turns to address *Chevron* head-on, making clear from the outset that *Chevron* deference "cannot be squared with the APA."[32] The chief complaint is that deference on a matter of law "defies the command of the APA that 'the reviewing court'—not the agency whose action it reviews—is to 'decide *all* relevant questions of law' and 'interpret . . . statutory provisions.'"[33] Because, on this view, *Chevron* requires "binding" deference to the agency's reading of the law, it demands that judges "*ignore*, not follow," their view of the best interpretation of the law—the opposite of the APA's command.[34] *Chevron*'s presumption that ambiguity in the relevant law reflects a commitment of authority to the agency implementing the law to determine the law's scope is, in the *Loper Bright* Court's view, not merely a fiction, but a fiction that is contrary to both fact and reason.[35]

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[30] *See id.* at 2257–63 (majority opinion).

[31] *Id.* at 2263 (internal citations omitted) (first quoting Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 27 (1983); then quoting Michigan v. EPA, 576 U.S. 743, 752 (2015); and then citing Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins., 463 U.S. 29 (1983)).

[32] *Id.* at 2263.

[33] *Id.* at 2265 (quoting 5 U.S.C. § 706 (emphasis added)).

[34] *Id.*

[35] *See id.* at 2265–68.

Justice Elena Kagan, joined in dissent by Justices Sonia Sotomayor and Ketanji Brown Jackson, urges the Court to retain *Chevron*, or at least a version of *Chevron*.[36] In addition to lamenting the abandonment of *Chevron* as a violation of principles of stare decisis, Justice Kagan argues that *Chevron* deference is consistent with basic rules of statutory construction. She states that statutes invariably have gaps and ambiguities and that, where government regulation is concerned, Congress generally prefers that those gaps and ambiguities be resolved by agencies.[37] After all, the dissent stresses, these are the entities "Congress has charged with administering the statute," and they are run by the people who have expertise in the statute's functioning—on its own and in conjunction with other laws and regulations.[38] The expertise theme looms large in the dissent, overshadowing other considerations such as what it is reasonable to assume respecting legislative intent and legislative meaning. It's safe to say that the dissenters were not ready to throw in the towel on *Chevron* deference—and probably still haven't lost all hope of a resurrection.

IV. BEYOND *CHEVRON*: THE NEW CHOREOGRAPHY OF JUDICIAL REVIEW

Looking to the future requires further clarity on both doctrinal and practical issues, most of all what *Loper Bright*'s rule is and what the reaction to *Chevron*'s demise suggests about the shape of decisions to come.

The most difficult doctrinal issue is defining the limitations on what Congress may commit to agencies. *Loper Bright* plainly assumes substantial constitutional restrictions on the assignment of authority to agencies—not only of rulemaking authority, but of adjudication authority as well. The day before the Court issued *Loper Bright*, it issued its decision in *Securities and Exchange Commission v. Jarkesy*.[39] After *Jarkesy*, the scope of at least one constitutional restraint on agency adjudication is clear: there is a Seventh Amendment right to a jury trial in civil-penalty cases.

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[36] Justice Kagan's dissent includes both a spirited defense of *Chevron* deference and an interpretation of *Chevron* deference that incorporates a number of limitations on it. *See id.* at 2294–2311 (Kagan, J., dissenting).

[37] *See id.* at 2294–95.

[38] *Id.* at 2294.

[39] 144 S. Ct. 2117 (2024).

But the extent to which Congress may assign authority to agencies to determine the mechanisms for and terms of enforcing laws remains unclear.[40] The lack of clear boundaries in this arena may be traced in part to the Court's failure to clearly delineate public and private rights, and in part to the fact that the nondelegation doctrine appears to be in flux. The division between private and public rights affects the scope of authority the Court will tolerate assigning to administrators—the executive branch generally has leeway to affect public rights, but its power is more circumscribed where private rights are at issue. Despite its importance, that division has eluded bright-line articulation for a very long time.[41] Greater clarity on how courts will review agency actions also likely requires a clear—or, at least, clear-*ish*—demarcation of what discretion can be given to agencies to implement legal mandates without running afoul of nondelegation strictures. The Court has taken stabs at clarifying boundaries on delegation with its expanded embrace of a "major questions" doctrine, most notably in its 2022 *West Virginia v. Environmental Protection Agency* decision.[42] And a minority that could grow into a majority offered its roadmap for a reinvigorated nondelegation doctrine three years before that.[43] But bringing real clarity to this issue remains a significant task, and the difficulty of that task has even prevented some skeptics of agency

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[40] For discussion of the adjudicative side of this issue, see, for example, Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts under Article III*, 65 IND. L.J. 233 (1990); William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511 (2020); Richard H. Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988); John C. Harrison, *Public Rights, Private Privileges, and Article III*, 54 GA. L. REV. 143 (2019); Daniel J. Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 IND. L.J. 291(1990); Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559 (2007); Martin H. Redish, *Legislative Courts, Administrative Agencies, and the* Northern Pipeline *Decision*, 1983 DUKE L.J. 197. For broader treatment of the issue, including the rulemaking side, see, for example, Cass, *supra* note 133; Ilan Wurman, *Nonexclusive Functions and Separation of Powers Law*, 107 MINN. L. REV. 735 (2022).

[41] *See*, *e.g.*, Michael Collins & Ann Woolhandler, *The Public/Private Rights Critics*, 99 NOTRE DAME L. REV. (forthcoming 2024); Harrison, *supra* note 40.

[42] 142 S. Ct. 2587, 2607–14 (2022); *id.* at 2621–24 (Gorsuch, J., concurring); *see also* King v. Burwell, 576 U.S. 473, 497 (2015) ("Congress 'does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions.'") (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001)).

[43] *See* Gundy v. United States, 588 U.S. 128, 149–73 (2019) (Gorsuch, J., dissenting); *see also* U.S. Dep't of Transp. v. Ass'n of Am. R.R., 575 U.S. 43, 61 (Alito, J., concurring); *id.* at 74–76 (Thomas, J., concurring in judgment); Paul v. United States, 140 S. Ct. 342 (2019) (Kavanaugh, J., statement respecting denial of cert.); U.S. Telecomm. Ass'n v. Fed. Comms. Comm'n, 855 F.3d 381, 419–22 (D.C. Cir. 2016) (Kavanaugh, J., dissenting from denial of reh'g en banc).

discretion from supporting a meaningful, judicially enforced nondelegation doctrine.[44]

On the statutory side, *Loper Bright* established that the courts must decide what discretion Congress has given to an agency by statute to implement the law, and it also charged courts with enforcing the boundaries of that discretion. The dissenters staked out territory for continued resistance, effectively endorsing elimination of the boundary between implementation and interpretation. They see both tasks as broadly requiring the expertise of administrators, not the skills of judges.[45]

Staying on the track laid out by the majority in *Loper Bright* will require sharpening the Court's tools for identifying what language in what context mandates what degree of discretion for those charged with implementing the law. This is the hard work of interpretation without deference. As *Loper Bright* recognizes, some words on their face suggest that the law confers discretion. For example, the Communications Act of 1934 directs the FCC to allocate broadcast frequencies and take other regulatory actions as "the public interest, convenience, and necessity" require (a phrase used more than forty times in that law).[46] But other statutory instructions are less obvious commitments of discretion to agencies.

Finding ways to make the division of tasks simpler will be helpful to a *Chevron*-less regime for judicial review. After all, *Chevron*'s allure was its promise of an easier mechanism for courts policing complex regulatory constructs — which is what made the doctrine attractive to courts of appeal (the D.C. Circuit most of all) far more than to the Supreme Court.[47] The end of an assumption of discretion for agencies to expound the details of delegated regulatory authority doesn't end the incentives of courts and agencies to find ways of making each of their tasks easier. The durability of those incentives

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[44] *See*, *e.g.*, Mistretta v. United States, 488 U.S. 361, 415–17 (Scalia, J. dissenting). *But see* Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 VA. L. REV. 1035, 138–39 (2007); Cass, *supra* note 13, at 42–44; Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. & PUB. POL'Y 147, 193–96 (2017); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 328–30, 334 (2002); David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1224–28, 1240–41 (1985); *see also* Antonin Scalia, *A Note on the Benzene Case*, 4 REGUL. 25, 28 (July/Aug. 1980).

[45] *See Loper Bright*, 144 S. Ct. at 2310–11 (Kagan, J., dissenting).

[46] *See* Communications Act of 1943, Pub. L. No. 73-416, 48 Stat. 1064 (codified at 47 U.S.C. § 151 et seq.).

[47] *See*, *e.g.*, MERRILL, *supra* note 6; Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1 (2017).

probably is reflected in the relative constancy of the percentage of cases in which the government succeeds when agency actions are challenged, something observed in studies of pre- and post-*Chevron* decisions.[48] The percentage of cases won and lost, though, doesn't account for changes to the composition of cases brought or to the conformity of agency behavior to statutory commands.[49]

Substantively, *Loper Bright* moves the law in a good direction, making it more consistent with both constitutional command and statutory instructions. But it doesn't provide a simple, easily effectuated rubric for deciding cases challenging agency decisions as inconsistent with governing legal commands. Reverting to the Supreme Court's decision in *Skidmore v. Swift & Co.*[50] does not provide the same simplicity; "*Skidmore* deference" is an oxymoron, standing for the proposition that courts should "defer" when an agency's approach is persuasive as to the meaning of the law. Nor does *Loper Bright* dramatically alter the incentives members of Congress have for favoring ambiguous statutory language, or the incentives administrative officials have for favoring particular options in implementing laws. Moreover, it remains to be seen how the new *Chevron*-less approach to review fits with the acknowledged ability of Congress to grant authority to agencies to make decisions that are not subject to judicial review.[51]

How much the new, post-*Chevron* regime changes the way law works in practice remains an open question. Despite the dissenters' protests to the contrary, fear that *Loper Bright* will usher in a less regulator-friendly atmosphere really is the heart of their argument against abandonment of the *Chevron* Two-Step. From a legal standpoint, the effect on regulation isn't the right test,

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[48] *See*, *e.g.*, Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992) (finding little change from pre-*Chevron* to post-*Chevron* success rate for government and challengers); Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984 (finding relatively small and temporary increase in government success rate following *Chevron*).

[49] *See*, *e.g.*, Linda R. Cohen & Matthew L. Spitzer, *Solving the* Chevron *Puzzle*, 57 L. & CONTEMP. PROBS. 65 (1994) (explaining increase in agency willingness to argue for questionable legal authority in response to increased judicial deference); E. Donald Elliott, Chevron *Matters: How the* Chevron *Doctrine Redefined the Roles of Congress, Courts and Agencies in Administrative Law*, 16 VILL. ENV'T L.J. 1 (2005) (finding that the composition of *decisions* challenged changed following *Chevron*, with agencies pursuing more statutorily questionable approaches to implementing law, and finding that the composition of *cases* brought on appeal also changed to exclude challenges with lower chances of succeeding post-*Chevron*).

[50] 134 U.S. 134 (1944).

[51] *See*, *e.g.*, Heckler v. Chaney, 470 U.S. 821 (1985).

as that focus mixes policy and law in just the way that prompted complaints about *Chevron*. The better question is whether judicial review freed from *Chevron* yields a method of reviewing agency action that is both lawful and practically sustainable. Put differently, it is worth waiting to see if a new dance between agencies and Congress—and agencies and courts—emerges that better hews to the Constitution's divisions between making law and implementing it, and between implementing law and interpreting it. Even if this seems to be dancing around a strong conclusion, one might say give it a minuet—and remember, wherever lines are drawn, it takes two to tango, in life and in law.

Other Views:

- Cass R. Sunstein, *The Consequences of* Loper Bright (July 8, 2024) (unpublished manuscript), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4881501.
- Sapna Kumar, *Scientific and Technical Expertise After Loper Bright*, 74 DUKE L.J. (forthcoming 2025), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4939536.
- Ian Millhiser, *The Supreme Court Just Made a Massive Power Grab It Will Come to Regret*, VOX (June 28, 2024), https://www.vox.com/scotus/357900/supreme-court-loper-bright-raimondo-chevron-power-grab.