Lower Courts After *Loper Bright*

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Abstract. This Symposium contribution will offer a prediction: If Loper Bright Enterprises v. Raimondo *overrules or ousts* Chevron*, the decision may have less practical effect in the lower courts than we might expect. In most cases, reviewing courts will continue to ask whether the relevant statutory language has a clear meaning that precludes the agency's interpretation or requires another, using the same interpretive tools and methodologies that they have before. When courts find no clear meaning, they will ask whether the agency's interpretation should prevail in basically the same manner as they always have. The more specialized an interpretation, the more likely courts will be to agree with it. Although courts will not always give controlling weight to the agency's interpretation, they are still likely to do so when it matters most: when the interpretive dispute amounts to a policy disagreement. In such cases, judges may feel conflicted substituting their judgment for that of the agency, as both* Chevron *and* State Farm *have long warned against. They may begin treating agency interpretations as policy decisions and applying* State Farm*, rather than deciding the underlying questions themselves. Courts did not have to think much about the choice between* Chevron *and* State Farm *while both pointed toward deference, and they may have defaulted to* Chevron *whenever statutory language was involved. But after* Loper Bright*, courts will feel the weight of this choice. It may be the difference between de novo review and arbitrariness review, judicial judgment and judicial deference, and judicial responsibility and agency authority. If courts respond by using* State Farm*, they will moderate the effect of* Loper Bright *for any number of agency interpretations to which* Chevron *formerly applied.*

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Introduction

If *Loper Bright Enterprises v. Raimondo*[1] overrules or ousts *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*,[2] its "consequences will be enormous, and almost uniformly bad."[3] The decision will instantly destabilize federal law across all sectors of the national economy. It also will undo another longstanding precedent and reinforce the public's negative perception of the Court. These effects are certain, and they are reason enough not to dislodge a bedrock principle. Less certain are *Loper Bright*'s precise effects on judicial deference and agency authority. Those effects depend on the new rule that emerges, as to which Court-watchers can now only place bets. The rule may reemphasize a reviewing court's responsibility to decide all questions of law, replacing judicial deference to agency interpretations with de novo review, perhaps instructing courts to consult agency interpretations for guidance under certain conditions. The rule may reinforce a reviewing court's obligation to ensure that Congress has delegated the authority that the agency asserts, perhaps imposing a "clearer statement" rule—requiring Congress to delegate the asserted authority more expressly than courts have previously demanded. The rule may require more than a general grant of authority to implement a regulatory program plus legislative "silence" concerning a particular requirement that the agency chose for that purpose, as in *Loper Bright* itself.[4] This Article offers a prediction, or perhaps a hope: whatever rule *Loper Bright* announces or ushers in, the decision ultimately may have less practical effect in the lower courts than expected.

I. New Decision, Same Interpretive Tools and Methodologies

To begin, it is important to note that *Loper Bright* is unlikely to change how lower courts approach typical cases much at all. These cases involve the routine, often specialized questions that agencies decide in the normal course of implementing their statutes—which is to say, "ordinary

[1] 45 F.4th 359 (D.C. Cir. 2022), *cert. granted in part*, 143 S. Ct. 2429 (argued Jan. 17, 2024) (mem.). The Court granted certiorari in another case, which it consolidated with *Loper Bright*. Relentless, Inc. v. U.S. Dep't of Com., 62 F.4th 621 (1st Cir. 2023), *cert. granted in part*, 144 S. Ct. 325 (argued Jan. 17, 2024) (mem.).

[2] 467 U.S. 837 (1984).

[3] United States v. Mead Corp., 533 U.S. 218, 261 (2001) (Scalia, J., dissenting). This quote comes from Justice Antonin Scalia, predicting the practical effects of the "*Mead* doctrine," which he described as "replac[ing] the *Chevron* doctrine." *Id*. at 239.

[4] *Loper Bright*, 45 F.4th at 368 (quoting EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 774 (2015)).

questions."[5] In such cases, judges will search for the meaning of imprecise or broad statutory language no differently than they did before. They will examine the relevant statutory text, purpose, structure, and context using the same interpretive tools and methodologies that they always have.[6] Textualist judges will continue to excel at finding clear meaning, as Justice Antonin Scalia long ago remarked, or "clear enough" meaning, as Justice Neil Gorsuch has more recently said.[7] Textualism may be ascendant among lower courts as more proponents take the bench and others take their cue from the textualist majority on the Court. But any consequent decrease in judicial deference would occur without *Loper Bright*.

Loper Bright might instruct courts to begin every analysis by asking directly whether the agency has authority to decide a particular issue or reach a particular subject, and in that event, they will do so. But courts are likely to find that the agency has authority whenever the question of statutory interpretation is non-major and arises under imprecise or broad statutory language.[8] That is how congressional delegation works: Congress writes statutes that leave the details to the agency, even many important ones.[9] Moreover, courts may be uncertain how to answer the authority question other than through standard statutory interpretation. Courts will continue to reach for their interpretive tool kits to determine whether the agency's interpretation is authorized or whether the relevant statutory language precludes it or requires another.

The authority question might look different in cases that do not involve imprecise or broad language but rather legislative silence, such as in *Loper Bright*. The question there is whether the National Marine Fishery Service ("NMFS") has authority to require private fishing companies to pay

[5] *See* Lisa Schultz Bressman, *The Ordinary Questions Doctrine*, 93 GEO. WASH. L. REV. (forthcoming 2024) (manuscript at 2) (on file with author). In that article, I sketch and theorize a doctrinal approach for courts to use when reviewing agency interpretations of "ordinary questions" that arise under regulatory statutes.

[6] A leading empirical study of *Chevron* by Kent Barnett and Christopher Walker shows that circuit courts found clear meaning at step one in thirty percent of the cases they reviewed during the period from 2003–2013. Kent Barnett & Christoper J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 5–6 (2017).

[7] *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 ("One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists."); Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2074 (2018) ("[I]n light of all the textual and structural clues before us, we think it's clear enough that the term 'money' excludes 'stock,' leaving no ambiguity for the agency to fill.").

[8] I express no opinion here on the future of the major questions doctrine, except to say that I assume there will still be ordinary questions.

[9] *See* Biden v. Nebraska, 143 S. Ct. 2355, 2397 (2023) ("Congress delegates to agencies often and broadly.") (Kagan, J., dissenting).

the cost of carrying federal observers as monitors on their boats to enforce compliance with monitoring requirements.[10] Congress granted NMFS general authority to implement a monitoring program but did not speak to whether the agency could require fishing companies to pay the monitoring costs.[11] Although *Chevron* directs courts to consider "whether Congress has directly spoken to the precise question at issue,"[12] the analysis might be different when Congress has not said a word about the precise question at issue. But legislative silence cases are not run-of-the-mill *Chevron* cases.[13] In typical cases, courts are likely to stay the course.

When courts do not find a clear meaning for the relevant statutory language, they will decide if the agency's interpretation ought to prevail.[14] Courts will evaluate the agency's interpretation in broader view of statutory sources, including the text, purpose, structure, and context.[15] They will consider whether it reflects considered, informed judgment, including whether it was reached through a formalized process, has been consistently held, relies on expertise, and is well reasoned.[16] The more specialized the interpretation along these dimensions, the more likely the court will be to agree with it, as the Court suggested in *Skidmore v. Swift & Co*.[17] four decades before *Chevron*.[18]

These considerations are basically the same ones that courts have used at various steps under *Chevron* when determining whether that doctrine applies to the agency's interpretation (step zero), whether the relevant statutory language is clear or clear enough to unambiguously prohibit the agency's interpretation (step one), and whether the interpretation is reasonable (step two).[19] So the analysis and outcome will not look all that different. Of course, the level of deference will be

10 *See* Loper Bright Enters., Inc. v. Raimondo, 45 F.4th 359, 364 (D.C. Cir. 2022).

11 *Id.* at 365.

12 Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

13 Indeed, one might think a case like *Loper Bright* is not a *Chevron* case at all but a *State Farm* case, for reasons explained *infra* Part II.

14 *See Chevron*, 467 U.S. at 842–43. Barnett and Walker's empirical study of cases from 2003–2013 revealed that circuit courts found clear meaning less than one-third of the time. *See* Barnett & Walker, *supra* note 6, at 6 ("[C]ircuit courts resolved the matter at step one (i.e., the step at which courts ask whether Congress's intent was clear) 30.0% of the time."). When the courts found clear meaning, "agencies prevailed 39.0% of the time." *Id.*

15 City of Arlington v. FCC, 569 U.S. 290, 309–10 (2013) (Breyer, J., concurring in part).

16 *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); Barnett & Walker, *supra* note 6, at 5–6, 9 (finding that circuit courts considered these factors when applying *Skidmore*).

17 323 U.S. 134 (1944).

18 *Id.* at 140.

19 *See Chevron*, 467 U.S. at 842–43; United States v. Mead Corp., 533 U.S. 218, 229–31 (2001); Barnhart v. Walton, 535 U.S. 212, 218, 221 (2002).

different at the end. Under *Chevron*, courts accord controlling weight to agency interpretations of statutory ambiguities, rather than relying on the agency's interpretation in arriving at its own, as in *Skidmore*.[20] And the level of deference has proven consequential. Professors Kent Barnett and Christopher Walker found in their empirical study of federal circuit court opinions from 2003–2013 that "agency interpretations were significantly more likely to prevail under *Chevron* deference (77.4%) than *Skidmore* deference (56.0%), or, especially, de novo review (38.5%)."[21] The more interpretive control courts possess, the more likely they are to favor their judgment over the agency's judgment. Put simply, the level of deference matters to agency win rates.

The level of deference matters in another way. While any degree of deference prevents agencies from losing their interpretation in the short term, only *Chevron* deference prevents them from losing their interpretive authority over the contested statutory language in the long run. When a court "defers" to the agency under *Skidmore*, it gives the agency's interpretation the "power to persuade," not the power to "control."[22] The court decides the relevant question, not the agency.[23] The issue of which institution possesses interpretive authority does not matter that much to an agency when, for example, its interpretation is longstanding or unlikely to change.[24] In that case, a win is a win. But usually, the issue of interpretive authority does matter considerably. Agencies need the flexibility to modify, replace, or rescind their interpretations if underlying circumstances change, whether scientific, technical, economic, social, or political.[25] As Justice Scalia recognized, this flexibility is "the hallmark of the modern administrative state."[26] An agency that lacks interpretive authority is hamstrung by the court's statutory precedent.[27] If it seeks a

20 See *Chevron*, 467 U.S. at 843–44.

21 Barnett & Walker, *supra* note 6, at 6.

22 *See Skidmore*, 323 U.S. at 140. In this respect, Professor Peter Strauss has argued that the term "deference" is inaccurate and confusing. *See generally* Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call them "*Chevron *Space" and "*Skidmore *Weight,"* 112 COLUM. L. REV. 1143 (2012).

23 *See Mead*, 533 U.S. at 228.

24 *See* Barnett & Walker, *supra* note 6, at 8; Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 368–69 (1986) (observing that the precise degree of deference does not always matter because internal agency interpretations have their own oral history containing both past and current congressional views).

25 Stephen M. Johnson, *In Defense of the Short Cut*, 60 U. KAN. L. REV. 495, 504, 508, 547 (2012).

26 Scalia, *supra* note 7, at 516.

27 *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

new interpretation of the relevant statutory language in the future, it will have to take its chances of persuading a court to agree.

II. A Different Outlet for Judicial Deference and Agency Authority

But deference (of the controlling variety) is unlikely to disappear after *Loper Bright*, even if the Court shuts down *Chevron* and requires de novo review for questions of law. Judges may feel conflicted about deciding a question themselves, even with the agency's guidance, when deference matters most: when the interpretive dispute comes down to a policy disagreement.[28] These cases tend to have common features.[29] First, the relevant statutory language neither requires a particular interpretation nor prohibits the agency's choice.[30] In *Chevron*-speak, the statutory language is neither clear nor clear enough to preclude the agency's interpretation. Second, the agency's interpretation is policy-driven in a concrete sense.[31] For example, it involves evaluation of empirical studies or statistical data; fact finding based on experience with the statutory scheme; selection or application of technical decision-making methods; identification of discretionary factors relevant to the decision; or choice between or among policy options.[32] Third, the challenger disagrees with the agency as to one or more of these considerations.[33] Meanwhile, judges know that these are exactly the sort of considerations that courts normally do not review de novo.

Instead, courts usually review such considerations under a deferential standard—and not just because *Chevron* said so. They come right out of *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto Insurance Co.*[34] and related decisions, which admonish courts not to substitute their policy judgment for that of the agency.[35] *State Farm* is an elaboration of the arbitrary-and-capricious test for agency policy decisions in the

28 I make this argument in fuller form in *The Ordinary Questions Doctrine*, *supra* note 5.

29 *See id.* at 18–32 (collecting a sampling of D.C. Circuit cases).

30 *See, e.g.*, Pharm. Rsch. & Mfrs. of Am. v. FTC, 790 F.3d 198, 200 (D.C. Cir. 2015) ("Nothing in the plain meaning, context, or legislative history of the Act that unambiguously precludes the FTC from promulgating a rule . . . merely because the rule focuses on a specific industry that is the sole source of the problem being addressed.").

31 Bressman, *supra* note 5, at 16–17.

32 *Id.* at 18–26.

33 *Id.* at 26–29.

34 463 U.S. 29 (1983).

35 *See id.* at 43 ("The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency."). The Court has continued to reiterate this message in full force. *See, e.g.*, FCC v. Prometheus Radio Project, 141 S. Ct. 1150, 1158 (2021) (reinforcing *State Farm*'s admonition).

Administrative Procedure Act, and it establishes strong norms of judicial behavior, which *Chevron* essentially enforced for agency interpretations.[36] *Chevron* generally refers to those norms, counseling deference "[w]hen a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of an agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress."[37] It further states that "[t]he responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones."[38]

If *Chevron* is no longer available to enforce these norms for agency interpretations, judges may begin to consider, consciously or subconsciously, whether *State Farm* should step up. Put differently, judges in particular cases may begin to ask whether the agency interpretation at issue is more appropriately understood as a policy decision to which *State Farm* applies, and not an "interpretive" one to which any *Chevron* replacement applies. Until now, the choice between doctrinal regimes—*Chevron* versus *State Farm*—has not been in foreground. That's not to say that their relationship has been out of the picture. Judges have observed, and commentators have contended, that the two regimes are conceptually distinct: *Chevron* addresses questions of law while *State Farm* addresses questions of policy; *Chevron* addresses the substance of an agency interpretation while *State Farm* addresses the quality of the decision-making process; *Chevron* addresses the existence of agency authority while *State Farm* addresses the exercise of that authority, and more.[39] Courts and commentators also have focused on the related issue of the interaction between *Chevron* step two and *State Farm*.[40] This issue concerns the level of deference that applies once an agency interpretation gets to or past *Chevron* step two. It is not clear, for example, whether step two is identical to or different from *State Farm*.[41] If the two are the same, it is unclear whether step two precedes or incorporates *State Farm*.[42] But

36 *See* Bressman, *supra* note 5, at 15.

37 Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 866 (1984).

38 *Id.*

39 *See* Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1296 (1997) ("The habit of thinking about *Chevron* and arbitrariness review in separate conceptual boxes is deeply entrenched."); Catherine M. Sharkey, *Cutting in on the* Chevron *Two-Step*, 86 FORDHAM L. REV. 2359, 2378–79 (2018) (collecting examples demonstrating entrenchment, including cases, scholarship, and textbooks).

40 *See* Levin, *supra* note 39, at 1271–77.

41 *See id.*

42 Many leading administrative law scholars have discussed incorporating *State Farm* into *Chevron* step two, and most but not all recommend it. *See* Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 603–04 (2009) (describing approaches to reconciling

the doctrinal regime choice issue is different because it focuses on which standard, *Chevron* or *State Farm*, provides "the organizing framework" for judicial review of an agency interpretation in a particular case.[43] The agency or challenger's choice is not dispositive—the court gets to decide the applicable standard of review.[44]

How then have courts been deciding whether an agency interpretation should be routed to the statutory interpretation side or the statutory implementation side—or rather, whether to accept the parties' choice of the statutory interpretation lane? An impressionistic

Chevron step two and the arbitrary-and-capricious test); *Sharkey*, *supra* note 39, at 2385–88. Scholars studying this issue empirically in the circuit courts found "no consistent approach to the *Chevron*-*State Farm* interplay." *Id.* at 2389 (providing an analysis of D.C. Circuit cases from 2006–2016 citing both *Chevron* and *State Farm*); Kent Barnett & Christopher J. Walker, Chevron *Step Two's Domain*, 93 NOTRE DAME L. REV. 1441, 1464–68 (2018) (presenting an empirical study of circuit court decisions from 2003–2013 that referred to *Chevron*). Barnett and Walker also found that the Supreme Court has sent inconsistent signals on the relationship between *Chevron* step two and *State Farm*, endorsing or applying an arbitrary-and-capricious approach in several cases and a "hypertextualist approach" in several others, under which it imports statutory sources into step two and views them in a more purposive light. *Id.* at 1455–57, 1465.

[43] In an important article offering a purposive account of how agencies interpret their statutes, Professor Kevin Stack argues that once an agency's duty to implement its statute is properly understood, a "rationalized *State Farm* inquiry, not *Chevron*, should provide the organizing framework of judicial review" for agency interpretations. Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 NW. U. L. REV. 871, 923 (2015).

[44] *See* Baystate Franklin Med. Ctr. v. Azar, 950 F.3d 84, 91–92 (D.C. Cir. 2020) (analyzing agency interpretation under *Chevron* though the parties had not invoked *Chevron* because it understood the challenger as questioning the agency's authority to issue the interpretation at issue); Arent v. Shalala, 70 F.3d 610, 614–16 (D.C. Cir. 1995) (rejecting the characterization of the dispute as involving "review of an agency's construction of a statute" and applying only *State Farm* to an FDA rule defining circumstances constituting "substantial compliance" with labeling guidelines because "there [was] no question that the FDA had authority to define the circumstances" and "[t]he only issue . . . [was] whether the FDA's discharge of that authority was reasonable"); HARRY T. EDWARDS & LINDA A. ELLIOTT, FEDERAL STANDARDS OF REVIEW: REVIEW OF DISTRICT COURT DECISIONS AND AGENCY ACTIONS 275–76 (3d ed. 2018) ("The occasional analytical overlap between *Chevron* Step Two and arbitrary and capricious review can sometimes make it difficult to determine under which standard a case should be decided."); Sharkey, *supra* note 39, at 2360 (noting that "an agency [might] evade hard look review" under *State Farm* "by convincing a court that it is a *Chevron*, not *State Farm*, case"). *Cf.* Judulang v. Holder, 565 U.S. 42, 52, n. 7 (2011) (noting that the government sought review under *Chevron* step two rather than the arbitrary-and-capricious test and stating that the two are "the same, because under *Chevron* step two, [the question is] whether an agency interpretation is 'arbitrary or capricious in substance'"). When a reviewing court rejects how the agency understood the nature of its interpretation, it might feel obligated in certain circumstances to remand for reconsideration. *See* Daniel J. Hemel & Aaron L. Neilson, Chevron *Step One-and-a-Half*, 84 U. CHI. L. REV. 757, 760 (2017) (noting the D.C. Circuit practice of remanding if the agency mistakenly thought the relevant statutory language was clear, to give the agency an opportunity to exercise the policymaking authority it did not realize it had).

comparison of citation counts over the past forty years suggests that courts have not been deciding, instead they have been defaulting to *Chevron*. In other words, they have been far more likely to see, or accept the parties' characterization of, an agency interpretation as involving the exercise of interpretive authority rather than implementation authority. *Chevron* has been cited about twice as often as *State Farm*, even though they were decided one year apart, and both are cited a huge amount—around 18,500 to 9,000 citations, respectively.[45] Granted these counts may overstate the discrepancy because they reflect the total number of citations by federal courts, not the number of unique citations in opinions, and include successive decisions in the same case. Furthermore, there are better ways to get at the data on choice of doctrinal regime (*Chevron* versus *State Farm*, not *Chevron* versus other interpretive doctrines, such as *Skidmore*) than a superficial comparison of citation counts.[46] And there may be many explanations for the discrepancy. For example, courts invoke *Chevron* not only to assess the exercise of interpretive authority (parallel to *State Farm*'s focus on the exercise of policymaking authority), but also to answer the threshold question of whether the agency has the authority to interpret the relevant statutory language at all, or with the force of law.[47]

Nevertheless, the visual prompts some questions: To what extent have courts been, in a sense, overusing *Chevron*? *Chevron* is famous for recognizing that agency interpretations of ambiguous statutory language

[45] Data from LEXIS and Westlaw searches of federal court cases mentioning *Chevron* (Sept. 26, 2023, 9:38 AM) (LEXIS reporting 19,489 citations to *Chevron* and 9,704 citations to *State Farm*, and Westlaw reporting 17,448 citations to *Chevron* and 7,880 to *State Farm*).

[46] Barnett and Walker's study of circuit court cases from 2003–2013 shows that circuit courts chose *Chevron* considerably more often than *Skidmore* and de novo review, and furthermore, that the use of *Chevron* varied by circuit. Barnett & Walker, *supra* note 6, at 32–34. Their data may substantiate the claim that courts defaulted to *Chevron* or accepted without question the agency's choice of *Chevron*. *Cf.* Christopher J. Walker, Response, *How to Win the Deference Lottery,* 71 TEX. L. REV. 73 (2001) (discussing agencies' strategy in arguing for a different deference standard for their interpretations). The authors did not focus, however, on circuit courts' choice between *Chevron* and *State Farm* as organizational doctrinal regimes or capture cases in which the courts only cited *State Farm* and not *Chevron*. *See* Barnett & Walker, *supra* note 6, at 24–25 (noting that "we culled only those decisions in which courts invoked *Chevron* by name").

[47] This use of *Chevron* might show up in the data especially after 2000 when agency authority issues began to crystallize in cases like *Brown & Williamson* and *Mead*. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 155–56 (2000); United States v. Mead Corp., 533 U.S. 218, 236–37 (2001). Note, however, that while this use might help to explain the discrepancy in citations between *Chevron* and *State Farm*, it would not justify the discrepancy to the extent that *State Farm* might have been applied instead of *Chevron* in particular cases to address the statutory authority as part of the reasoned decision-making analysis. *See* Stack, *supra* note 43, at 922–23 (arguing that *State Farm* should be understood to encompass questions of statutory authority for agency interpretations to which *Chevron* typically has applied).

essentially are policy decisions.[48] To what extent have courts been defaulting to *Chevron* without pausing to consider whether an agency interpretation instead could—and furthermore, should—be understood as a policy decision to which *State Farm,* and not *Chevron,* applies? To what extent have courts been raising and applying *Chevron* in cases seeking review only under *State Farm*, just to be on the safe side? To what extent have they been applying both *Chevron* and *State Farm*, not because they thought both applied to a particular interpretation, but because they were unsure which applied?

It would be unsurprising to find evidence in lower court opinions of the latter two phenomena, *Chevron* hedging and *Chevron* hesitance, because agency interpretations and agency policy decisions are often flip sides of the same coin. Congress expects agencies to implement the language it writes, and then agencies interpret the language that they implement.[49] Thus, many agency decisions involve components of both interpretation and implementation and can be characterized as either for purposes of judicial review.[50] Given the nature of regulatory statutes and agency decisions thereunder, one might expect to see that courts have been applying both *Chevron* and *State Farm* in cases when *State Farm* alone might have sufficed.

It will be more difficult to document *Chevron* defaulting in lower court opinions because identifying that practice involves proving a negative. These are cases in which *State Farm* is not mentioned but might have applied instead of *Chevron*. It is reasonable to suspect, however, that *Chevron* defaulting has been the norm in ordinary agency interpretation cases.[51] *Chevron* exerted outsized influence in the administrative state, bossing its way to the front of the room.[52] Agencies had an incentive to

48 *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984).

49 *See* Lisa Schultz Bressman & Kevin M. Stack, Chevron *Is a Phoenix*, 74 VAND. L. REV. 465, 474–75 (2021) (noting that statutory language often depends for its meaning on agency implementation, which tracks how Congress writes such language).

50 *See* Bressman, *supra* note 5, at 39–40 (observing that a question of statutory interpretation that depends on agency policymaking for its resolution can be characterized either as a question of law or a question of policy for purposes of judicial review); Anya Bernstein, *Saying What the Law Is*, 48 LAW & SOC. INQUIRY 14, 16 (2023) (arguing that, from an ethnological perspective, the "language ideology" of offering agency interpretation and agency implementation as distinct categories presents a normative vision of social ordering not a natural or inherent one).

51 *See* Bressman & Stack, *supra* note 49, at 479–81 (referring to *Chevron* as the default and that *Chevron* eliminates much perceived need to apply *State Farm*).

52 I thank Kevin Stack for this description. *See* Bressman & Stack, *supra* note 49, at 482 (noting that *Chevron*, once decided, took on a life of its own in administrative law); Peter M. Shane & Christopher J. Walker, Foreword, Chevron *at 30: Looking Back and Looking Forward*, 83 FORDHAM L. REV. 475, 475 (2014) (recounting the immense impact of *Chevron*, three decades after it was decided); *see also* Christopher J. Walker, Chevron *Inside the Regulatory State: An Empirical Assessment*, 83

press it to the extent that it provided an easier path to deference than the "hard look" doctrine and *State Farm*.[53] Challengers could scarcely avoid it. The more courts applied *Chevron*, the more it became the organizing framework to apply whenever statutory language was involved.[54] If courts thought about doctrinal regime choice at all, they would have seen little downside in applying *Chevron* when both *Chevron* and *State Farm* pointed generally toward deference anyway.

After *Loper Bright*, how a court understands an agency interpretation may have great significance. It may be the difference between de novo and arbitrariness review, judicial judgment and judicial deference, and judicial responsibility and agency authority. Lower courts will feel the weight of this choice. Agencies make countless routine, often specialized policy decisions in the normal course of implementing their statutes, many of which take the form of interpretations because Congress has legislated in broad strokes.[55] Courts will decide whether they wish to assert authority over these interpretations.

While some judges will embrace this role, many may believe that second guessing basic agency policy judgments is still not their job. *Loper Bright* will likely send a strong message to courts about reclaiming their responsibility for questions of law. But it will not change the nature of existing regulatory statutes or the implementation issues that arise under them. Nor will it increase judicial resources to master complex statutory schemes, surmount voluminous records, or manage crowded dockets. As judges feel the tension, any who were in the habit of defaulting to *Chevron* may check their behavior. They may start treating ordinary agency interpretations as policy decisions, reviewing such interpretations under *State Farm* to avoid deciding the underlying policy questions themselves. They may do so even if the Court tells them that they can rely *Skidmore*-style on the agency's expertise to resolve the policy question because the concern is not just about institutional competence. And, if judges are honest about such interpretations, they would do so even when they disagree that the agency has made the best policy judgment.

The applicable doctrinal regime is not inevitable whenever statutory language is involved. It is a judicial policy choice in many instances, and particularly when an interpretive dispute comes down to a policy

FORDHAM L. REV. 703 (2014) (presenting an empirical assessment of *Chevron*'s impact in articles, opinions, and briefs in the several decades after it was decided).

53 *See* Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); Barnett & Walker, *supra* note 42, at 1464–68 (describing different approaches to *Chevron* step two in the federal circuit courts).

54 *See* Barnett & Walker, *supra* note 6, at 32–34.

55 *See* United States v. Mead Corp., 533 U.S. 218, 235–36 (2001).

disagreement. Lower courts will feel the pressure on the ground of *Loper Bright*. When prompted, they may gravitate toward a new norm.

III. Moderating the Practical Effect of *Loper Bright*

If courts respond to *Loper Bright* in this fashion, they will moderate its practical effect. Judicial deference will persist for any number of agency interpretations to which *Chevron* formerly applied, despite the new rule. The level of review may be more stringent than before in courts that maintained a more deferential approach under *Chevron* step two than *State Farm* (i.e., a free pass for the agency interpretation). Courts, including the Supreme Court, have been inconsistent in defining the relationship between the two, though many already appreciate that agency interpretations should not escape the requirement of reasoned decision making.[56] At least *Loper Bright* will motivate clarity on this issue, which is a virtue.

In addition to judicial deference for agency interpretations in particular cases, agency authority will persist for any future revisions. Under *State Farm*, the reviewing court does not claim authority to make the decision for the agency; it leaves authority with the agency, ensuring that the agency has made a reasoned decision within statutory limits.[57] So long as regulatory statutes exist, agencies need the leeway to update their decisions as circumstances change and to make new decisions carrying out their mandates. To be sure, they are unlikely to have the degree of certainty about their authority that *Chevron* deference provided.[58] Agency officials, as well as congressional drafters and White House officials, have long operated under the assumption that agencies, not courts, resolve ambiguities in regulatory statutes.[59] But while it is unclear what the transition will look like, the world will not stop turning because of *Loper Bright*.

Although doctrinal regime choice in the lower courts may work to moderate the effect of *Loper Bright*, the Court can dilute this outcome in a way not directly related to the decision but moving in the same

[56] *See* Barnett & Walker, *supra* note 42, at 1455–57, 1465.

[57] *See* Stack, *supra* note 43, at 922–23.

[58] The Supreme Court could provide a greater degree of certainty to agencies as well as lower courts and parties. *See* Bressman, *supra* note 5, at 17 (proposing an "ordinary questions doctrine" that would instruct courts to determine the appropriate standard of review by looking at the substance of the agency's interpretation for the policy considerations that *State Farm* tells them they should not review independently).

[59] *See* Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1049 (2015); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 910 (2013).

direction—it can intensify judicial review under the arbitrary-and-capricious test.[60] The Court has essentially left this test in the same place since it decided *State Farm* in 1983. In a 2020 iteration, *FCC v. Prometheus Radio Project*,[61] Justice Brett Kavanaugh, writing for a unanimous Court, reaffirmed that the test is "deferential, and a court may not substitute its judgment for that of the agency."[62] He emphasized that "[a] court simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision."[63]

Yet the Court has recently seemed to heighten its scrutiny of certain agency policy decisions. In *Department of Homeland Security v. Regents of University of California*,[64] the Court held that the Department of Homeland Security's decision under the Trump administration to rescind the Obama administration's Deferred Action for Childhood Arrivals ("DACA") program was arbitrary and capricious because the agency "failed to consider [two] conspicuous issues."[65] In *Department of Commerce v. New York*,[66] the Court remanded the Department of Commerce's decision under the Trump administration to reinstate a citizenship question on the 2020 census because the Secretary's stated rationale did "not match the Secretary's explanation for his decision."[67] Professor Benjamin Eidelson argues that these cases suggest a novel political "accountability-forcing" approach to judicial review, which "vindicate[s] democratic, political checks on the executive branch."[68]

At the same time, the cases themselves do not provide support for the general proposition that reviewing courts should crack down on presidential politics in agency decision making. They are extraordinary cases, involving agency decisions of great significance. In the DACA case, the Court, with Chief Justice John Roberts writing for himself and Justices Ruth Bader Ginsburg, Stephen Breyer, Sonya Sotomayor, and Elena

60 *See, e.g.*, Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (defining the arbitrary-and-capricious standard).

61 141 S. Ct. 1150 (2021).

62 *Id*. at 1158 (holding that the FCC's decision to repeal or modify several of its media ownership rules was not arbitrary and capricious).

63 *Id.*

64 140 S. Ct. 1891 (2020).

65 *Id*. at 1916.

66 139 S. Ct. 2551 (2019).

67 *Id*. at 2559.

68 Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748, 1752, 1758 (2021) (arguing that the Court has applied a novel "accountability-forcing" version of arbitrariness review that focuses on "ensuring robust political accountability" and "political neutrality of agency decisions").

Kagan, underscored as "true, particularly when so much is at stake," the notion that "the Government should turn square corners in dealing with the people."[69] In the census case, the Court, Chief Justice Roberts writing for the same coalition, noted the "unusual circumstances" involved.[70] Furthermore, it emphasized that "a court may not set aside an agency's policymaking decision solely because it might have been influenced by political considerations or prompted by an Administration's priorities."[71] But it refused to allow the Administration's priorities to distort the administrative process.[72] In extreme circumstances, the Court can be understood as pushing back on presidential control of agency decision making.

Viewed this way, the DACA and census cases are akin to two of the Court's major questions decisions: *FDA v. Brown & Williamson Tobacco Corp.*[73] and *West Virginia v. EPA*.[74] The cases involved highly significant issues, both generally and to the presidential administration in particular (addressing the cigarette smoking epidemic and the climate change crisis).[75] Their significance might have caused the administration to press for regulation that exceeded the boundaries of the agencies' existing authority. So, the Court pushed back. One might think about the two sets of cases together: in extraordinary circumstances, the Court will pay stricter attention to agency decisions as a check on presidential involvement. These circumstances are ones in which the risk of presidential over-reaching and arbitrariness is at its height. The similarity then raises a question of whether the approach on the *State Farm* side will remain limited to such decisions or will bleed over to everyday decisions, as many suspect the major questions doctrine will.

There is no reason to sound the alarm on the arbitrary-and-capricious test because there are many ways to account for the results in these cases. Furthermore, there is nothing ominous in suggesting that courts take seriously their responsibility to ensure that agencies engage in reasoned decision making, especially in high stakes cases. Still, those worried about *Loper Bright*'s impact on judicial review would be wise to keep a close eye on the arbitrary-and-capricious test. Lower courts will accord less judicial

69 *Regents of Univ. of Cal.*, 140 S. Ct. at 1909 (quoting St. Regis Paper Co. v. United States, 368 U.S. 208, 229 (1961) (Black, J., dissenting)).

70 *Dep't of Com. v. New York*, 139 S. Ct. at 2576.

71 *Id.* at 2573.

72 *Id.* at 2575.

73 529 U.S. 120 (2000).

74 142 S. Ct. 2587 (2022).

75 *See Brown & Williamson*, 529 U.S. at 125, 189–90 (Breyer, J., dissenting) (noting the severity of the crisis and the presidential ebb and flow that comes with the crisis); *see also West Virginia v. EPA*, 142 S. Ct. at 2618, 2626 (Gorsuch, J., concurring) (same).

deference to agency interpretations after *Loper Bright* if they are stuck between a rock and the hard look doctrine. Of course, there will be more judicial micromanagement of agency action across the board.

Conclusion

This Article does not intend to provide comfort about the future of the administrative state in the wake of *Loper Bright*. Rather, it focuses on the role of lower courts, which have a say in how the decision plays out in practice. But this essay only addresses judicial review. Courts do not call all the shots, and they will not determine how agencies, the White House, Congress, and private parties react to *Loper Bright* more broadly.

As for lower courts, they will likely conduct business as usual in the mine run of cases. They will determine whether the relevant statutory language has a congressionally specified meaning and whether the agency's interpretation should prevail. If judges want to short circuit congressional delegation and agency authority in the name of statutory interpretation, they will. They have always had the tools, and *Loper Bright* would just give them another. But courts may—and frankly should—still generally defer to the routine, often specialized interpretations that agencies make in the normal course of implementing their statutes. These interpretations can be characterized as policy decisions to which *State Farm* applies. Although courts might not have thought much about doctrinal regime choice while *Chevron* and *State Farm* both pointed in the same direction, they may begin to think about it before second guessing the sort of agency policy judgments that they normally do not review de novo or treat as mere guidance. If courts do step back in this way, judicial deference and agency authority will persist for lots of interpretations to which *Chevron* would have applied.