
The Meaning of “Silence”

Caroline Cecot*

*Abstract. In 1984, a unanimous Supreme Court agreed that “it matters not” for judicial purposes why Congress did not elaborate on some specific question of implementation; the Court will leave the resolution to reasonable agency interpretation so long as the question is within the scope of the agency’s authority. Based on more recent precedents, that broad proposition is no longer true. And in *Loper Bright Enterprises v. Raimondo*, the Court has the opportunity to further narrow the conditions under which courts might defer to an agency’s reasonable resolution.*

*This Article explores the potential consequence of narrowing the applicability of the Chevron doctrine so that it excludes the type of “silence” at issue in *Loper Bright*—namely, an inconsistent silence about some non-major issue related to implementing a statutory scheme—and instead allowing that silence to create an inference against the agency’s resolution. In *Loper Bright*, the silence is about who should pay for observers on domestic vessels, where Congress has specified payment structures for observers in other specific contexts. This Article argues that such silence can often be found or construed within statutes and an inference against the agency’s action in all such cases would be unjustifiable as a proxy for congressional intent or as an exercise of some legitimate judicial policy consideration, with significant consequences for regulatory policy. In fact, this option to “narrow” Chevron while raising a negative inference against agency action would be worse than overturning Chevron outright. The Article supports these arguments by exploring in detail the regulatory context of *Loper Bright* and the meaning of the “silence” at issue in the case.*

* Associate Professor of Law, George Mason University Antonin Scalia Law School. I am grateful to the C. Boyden Gray Center for the Study of the Administrative State and the *George Mason Law Review* for organizing and hosting the Symposium entitled “*Chevron* on Trial: The Supreme Court and the Future of Agency Authority and Expertise.” Thank you to Landon DeKay, Kaitlin Groundwater, and Ryan Spisak for excellent research assistance.

Introduction

In 1984, a unanimous Supreme Court affirmed the Reagan Administration's more flexible approach to balancing two relevant competing interests, pollution reduction and economic growth, in the face of Congress's silence on the precise question.¹ In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,² the Court acknowledged that Congress, intending to accommodate competing interests, might not specifically resolve every relevant question.³ The "silence" might be intentional—left for the agency due to the body's relative expertise or its relative lack of constituency pressure—or it might be inadvertent. But in any event, "[f]or judicial purposes, it matters not which of these things occurred," according to the Court.⁴ As long as Congress's delegation of policy-making responsibility is proper and the decision at issue is within the scope of that delegation of responsibility, the policy decision is for the agency to make subject to reasonableness. And the so-called *Chevron* doctrine was born.

But consensus behind the broad rationale that supported this doctrine of judicial deference to agency decision-making has already dissipated. While the Court has not changed the contours of permissible delegations to agencies, it has changed its view on what kinds of decisions are in the scope of these broad delegations when Congress is "silent" on some question.⁵ Most importantly, if the question is "major," the Court recently declared that congressional silence will *not* suffice to authorize an agency to decide how to accommodate recognized competing interests.⁶ After *West Virginia v. EPA*,⁷ Congress must either explicitly allow the agency to make the policy decision or decide the matter on its own.⁸ In the absence of express authority, the agency cannot decide such major questions.⁹ In other words, the meaning of congressional "silence" on a major question shifted from authorizing agency action to prohibiting it.

¹ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984). Justice Thurgood Marshall and Justice William Rehnquist did not participate in the decision, and Justice Sandra Day O'Connor recused herself after oral argument. *Id.* at 837.

² 467 U.S. 837 (1984).

³ *Id.* at 865.

⁴ *Id.*

⁵ *E.g.*, *West Virginia v. EPA*, 597 U.S. 697, 735 (2022).

⁶ *Id.* at 721–23, 735.

⁷ 597 U.S. 697 (2022).

⁸ *Id.* at 723.

⁹ *Id.* at 735.

In *Loper Bright Enterprises v. Raimondo*,¹⁰ the Court is considering whether to overrule *Chevron*, ending judicial deference outright, or to further narrow the application of *Chevron*.¹¹ The statutory context is fisheries management. The National Marine Fisheries Service (“NMFS”), acting as the delegee of the Secretary of Commerce, approved and implemented amendments to the Atlantic herring fishery management plan proposed by the New England Fishery Management Council pursuant to the Magnuson-Stevens Fishery Conservation and Management Act (“Magnuson-Stevens Act”).¹² The NMFS’s final regulations required domestic vessels to carry observers on certain fishing trips and, in some cases, to pay for the services of these observers.¹³ The question at the heart of the litigation is whether the agency is allowed to require the regulated industry to pay for these observers.¹⁴ In the Magnuson-Stevens Act, Congress expressly allows observers on domestic vessels, but it is “silent” about who pays for their services in that provision.¹⁵ Elsewhere in the statute, Congress expressly allows the North Pacific Fishery Management Council (“North Pacific Council”) to require observers and, at the same time, establish a system of reallocating payments to pay for the requirement.¹⁶ This situation gives rise to the specific request to narrow *Chevron* that the Court will consider: “that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.”¹⁷

This option of narrowing the applicability of *Chevron* builds on the Court’s history of narrowing or clarifying *Chevron* and other deference

¹⁰ 45 F.4th 359 (D.C. Cir. 2022), *cert. granted in part*, 143 S. Ct. 2429 (argued Jan. 17, 2024) (mem.).

¹¹ See *id.*; Brief for Petitioners at i, *Loper Bright Enters. v. Raimondo*, 143 S. Ct. 2429 (No. 22-451). The Court granted certiorari in *Relentless, Inc. v. U.S. Department of Commerce*, 144 S. Ct. 325 (argued Jan. 17, 2024) (mem.), on the same questions presented by the petition.

¹² Industry-Funded Monitoring, 85 Fed. Reg. 7414, 7414 (Feb. 7, 2020) (codified as amended at 50 C.F.R. pt. 648).

¹³ 50 C.F.R. § 648.11(m).

¹⁴ Brief for Petitioners, *supra* note 11, at i.

¹⁵ See 16 U.S.C. § 1853(b)(8).

¹⁶ *Id.* § 1862(a). There are two other provisions that contain “express” language about industry funding in the statute: authorization for councils to collect fees for management and enforcement activities, *id.* § 1853a(e), and requirements on foreign vessels to pay for observers, *id.* § 1821(h)(4). These are easier to distinguish because the contexts are entirely different. See *Loper Bright Enters., Inc. v. Raimondo*, 45 F.4th 359, 367–68 (D.C. Cir. 2022), *cert. granted in part sub nom.* *Loper Bright Enters. v. Raimondo*, 143 S. Ct. 2429 (argued Jan. 17, 2024) (mem.). I focus on Congress’s express authorization for the North Pacific Council to require industry to pay for observers on domestic vessels under a system of fees and whether this explicit authority to one council implies Congress’s intention to prohibit other councils from requiring the industry to pay for observers outright.

¹⁷ Brief for Petitioners, *supra* note 11, at i.

doctrines instead of overruling them, typically viewed as a compromise position. Several scholars have provided strong arguments in support of various other ways to narrow the application of *Chevron* and related doctrines.¹⁸ Adopting this option, then, might seem to be an attractive way to secure a majority of the Court and further constrain *Chevron* while not (yet) discarding it entirely.

This Article argues that this particular form of narrowing *Chevron*'s applicability is no compromise position at all—and, in fact, could be worse than overturning *Chevron* outright. The petitioners in *Loper Bright* argue for essentially two outcomes that should follow from identifying this kind of “silence” in a statute: the inapplicability of *Chevron* deference and an inference against the agency's action because, according to petitioners, both follow from “sensible rules of statutory interpretation.”¹⁹

First, this exception to *Chevron* is unlikely to be narrow. “Silence” on some non-major question that is expressly granted elsewhere in the statute is likely common and perhaps even inevitable due to Congress's relative lack of technical expertise, its desire to appeal to competing interests, and its iterative and dynamic decision-making and amendment process. Also, such an exception can be strategically deployed to reimagine any ambiguity about a non-major question as a “silence” given the lack of language that would resolve the ambiguity.

Second, allowing such “silences” to create an inference against agency authority would often go against actual congressional intent without justification and have significant consequences. By adopting this option, the Court would create a sort of “major questions doctrine” but available for “almost any questions” given the inherent manipulability of the test. The result would be worse than overturning *Chevron* outright, which would at least require courts to discern the actual or “best” meanings of any silences in different contexts without deploying any deference-destroying, inference-raising, and accuracy-challenged shortcuts.

The Article solidifies these arguments by focusing on the regulatory context of *Loper Bright*, which provides an illustrative example of what is at stake when courts cabin available regulatory options due to an inconsistent “silence” on some (non-major) issue.

Part I introduces the regulatory context of *Loper Bright*, that is, the problem of overfishing and the concerns and solutions reflected in the Magnuson-Stevens Act of 1976 and its subsequent amendments. In particular, it summarizes the history surrounding the adoption of the

¹⁸ See *infra* Part I.

¹⁹ See, e.g., Brief for Petitioners, *supra* note 11, at 17 (arguing for this option by stating that “silence is not consent for executive agencies to wield a controversial power that Congress has expressly conferred, only in narrow circumstances and subject to equally express limits, elsewhere in the statute” under “sensible rules of statutory interpretation”).

amendments that gave rise to the issue presented in this case: Congress’s “silence” regarding industry funding in one provision and the “express[] but narrow[]” grant of funding options elsewhere in the statute. It argues that a reasonable interpretation of the meaning of Congress’s silence (and perhaps the best interpretation, if there were no *Chevron* deference in play) is that Congress acted against a default assumption that the industry might have to pay to implement any necessary regulatory requirements meant to conserve fisheries. Part II argues more generally against the petitioners’ proposal for narrowing *Chevron* and raising a presumption against agency action. It argues that “silences” on issues can often be found or construed. Congress legislates against background assumptions or defaults, and it chooses whether to modify those assumptions or defaults when it makes decisions about an agency’s authority. This basis for narrowing *Chevron* could incentivize strategic framing of regulatory challenges, recharacterizing those background assumptions or defaults as “silences” that strip the agency of authority—the exact opposite result to congressional intent. It also argues that no legitimate judicial policy concerns could justify such a presumption. And unlike the reach of a similar no-action default articulated in *West Virginia v. EPA*, this one would not be limited to “major questions.” It would greatly increase Congress’s already difficult task of crafting useful legislation.

Instead, the Supreme Court should clarify that, under *Chevron*, the analysis for determining whether a relevant silence or ambiguity exists, and whether it reasonably encompasses an agency’s action, is a rigorous one. This clarification would be sufficient to prevent courts from reflexively upholding agency action in light of congressional silence when it is not warranted by the context. But even overruling *Chevron* outright would be more desirable because it would also avoid the arbitrary, costly, and lazy assumption against agency action where Congress is inconsistently “silent.” In that scenario, the Supreme Court should also remind courts to deploy longstanding tools of statutory interpretation, paying attention to the text and the context, to arrive at the best interpretation of such congressional “silence” in the particular case, without deploying an inaccurate shortcut.

I. Overfishing and “Silence”

In his famous article, *The Tragedy of the Commons*, Professor Garrett Hardin predicts that when there is no private ownership of a resource and no possibility of exclusion, users will overexploit the resource and bring “ruin to all.”²⁰ Hardin expressly points to the problem of overfishing as an

²⁰ Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244 (1968).

example of the kind of resource—an unregulated common-pool (or open-access) resource—that is likely to give rise to this tragedy.²¹ And according to Professor Shi-Ling Hsu, “open access fisheries have . . . borne out Hardin’s predictions the most faithfully.”²² Time and time again, the following pattern repeats:

First, a previously unexploited open access fishery is “discovered,” or somehow becomes the target of fishing, and the initial abundance of fish creates easy fishing conditions that provide large profits for the first entrants into the fishery. Second, this prospect of large profits attracts new boats that crowd the fishery. Lastly, the increase in fishermen results in a depleted fish stock, making fishing more and more difficult, until the fish stock completely collapses, in the meantime impoverishing the fishermen.²³

Hsu points to the example of the Pacific halibut fishery, which was initially unregulated and overexploited by U.S. and Canadian boats. He describes how, in 1924, the two countries created an international regulatory body that was meant to manage the fishery.²⁴ Its attempt, however, was a failure. Instead of setting any regulatory limits on catches, it limited halibut fishing to nine months of the year.²⁵ Subsequently, the two countries signed a new treaty that implemented binding catch limits, which finally restored the health of the fishery *and* the wealth of the fishermen.²⁶ Hsu specifically emphasizes this last point, that “[r]egulation was thus needed not only to save the Pacific halibut, but to save the halibut fishing industry.”²⁷

When Congress enacted the Magnuson-Stevens Act, it wanted to prevent these sorts of tragedies from occurring and re-occurring. In its findings, it acknowledged the reliance that many coastal areas place on fishery resources and the existence of overfishing that threatens those resources.²⁸ It also expressed its belief that “[a] national program for the conservation and management of the fishery resources of the United States is necessary to prevent overfishing, to rebuild overfished stocks, to

²¹ *Id.* at 1245 (“Professing to believe in the ‘inexhaustible resources of the oceans,’ [maritime nations] bring species after species of fish and whales closer to extinction.” (citation omitted)).

²² Shi-Ling Hsu, *What IS a Tragedy of the Commons? Overfishing and the Campaign Spending Problem*, 69 ALB. L. REV. 75, 101 (2006).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 101–05.

²⁷ *Id.* at 105.

²⁸ Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, § 2(a)(3), 90 Stat. 331, 332 (codified as amended at 16 U.S.C. § 1801(a)(3)). Congress renamed the law the Magnuson Fishery Conservation and Management Act in 1980. Pub. L. No. 96-561, § 238(a), 94 Stat. 3275, 3300. Congress renamed the law again in 1996, this time as the Magnuson-Stevens Fishery Conservation and Management Act. Pub. L. No. 104-208, § 211(a), 110 Stat. 3009, 3041.

insure conservation, . . . and to realize the full potential of the Nation’s fishery resources.”²⁹ But its first attempt to solve these issues was not its last attempt. Congress amended the Magnuson-Stevens Act several times, each time responding to significant factual changes about the nature of the industry overall or within specific fisheries.³⁰ This was the case with the 1990 amendments, which introduced the “type of silence” at issue in this litigation—silence in one provision as to who pays for domestic observers and, in another provision, an explicit funding plan for domestic observers within a specific region. This Part examines the context of Congress’s decision to include this language, focusing on facts (not any interpretations) revealed in the legislative history.

A. *The Magnuson-Stevens Act of 1976*

As originally enacted, the Magnuson-Stevens Act required foreign vessels to allow U.S. observers on board and to pay for the observers.³¹ At this time, foreign vessels dominated the fisheries that faced the greatest risks of overfishing, so despite being only required on foreign vessels, observers were gathering a significant amount of data on the health of the fisheries.³²

Meanwhile, for domestic vessels, the Act required regional fishery management councils to submit fishery management plans to the Secretary of Commerce that must contain, among other things, conservation and management measures that are “necessary and appropriate for the conservation and management of the fishery.”³³ The Act also specified a list of “discretionary provisions” that the plans may

²⁹ Fishery Conservation and Management Act § 2(a)(6); *see also* 16 U.S.C. § 1801(a)(6).

³⁰ *See, e.g., Magnuson Fishery Conservation and Management Act of 1976, Reauth.—Part II: Hearing on H.R. 2061 Before the Subcomm. on Fisheries and Wildlife Conservation and the Env’t of the H. Comm. on Merch. Marine and Fisheries*, 101st Cong. 3–4 (1989) [hereinafter *1990 Amendment Hearings*] (statement of Rep. Jon R. Miller) (discussing changes in the fishing industry that Congress should consider when amending the Magnuson Fishery Conservation and Management Act); Fishery Conservation Amendments of 1990, Pub. L. No. 101-627, 104 Stat. 4436 (1990) (amending the Fishery Conservation Act to reflect changes in the fishing industry).

³¹ *See* § 201(c)(2)(D), 90 Stat. at 338 (requiring “duly authorized United States observers [to] be permitted on board any such vessel and . . . the United States [to] be reimbursed for the cost of such observers”). Congress later amended subsection (c)(2)(D) to read that “all of the costs incurred incident to such stationing [of observers on foreign vessels], including the costs of data editing and entry and observer monitoring, be paid for, in accordance with such subsection, by the owner or operator of the vessel.” Act of Jan. 12, 1983, Pub. L. No. 97-453, § 2(a)(1), 96 Stat. 2481, 2481 (codified as amended at 16 U.S.C. § 1821(c)(2)(D)).

³² *See* § 2(a)(3), 90 Stat. at 332 (codified as amended at 16 U.S.C. § 1801(a)(3)); *1990 Amendment Hearings, supra* note 30, at 4 (statement of Rep. John R. Miller).

³³ § 303(a)(1)(A), 90 Stat. at 351 (codified as amended at 16 U.S.C. § 1853(a)(1)(A)).

contain, ending the list with a catch-all statement allowing the plans “[to] prescribe such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery.”³⁴ The regional councils were also allowed to prepare proposed regulations “deem[ed] necessary and appropriate to carry out any fishery management plan.”³⁵ The Secretary would then review the plans and any proposed regulations and decide whether to approve them.³⁶ Notably, whether within the list of required or discretionary provisions, the Act did not explicitly mention observers on *domestic* vessels. Again, due to the proliferation of foreign vessels, the councils generally had sufficient information to create plans for conserving fisheries under the Act.

Over time, however, the industry became more and more domestic, especially in certain parts of the United States. The lack of observers on these vessels threatened to create a huge data gap for regional councils. In the hearings leading up to its reauthorization and amendment of the Magnuson-Stevens Act, Congress received repeated testimony about this factual change in the makeup of the industry and the resulting data crisis.³⁷

B. *The 1990 Amendments*

The problem of inadequate data was especially acute for the fisheries under the authority of the North Pacific Council when it met in June 1989.³⁸ The Council had previously reported to the Secretary of Commerce that without an observer program it simply would not have enough data about the health of its fisheries to do its job and develop scientifically sound management plans.³⁹ At this time, the area covered by the Council

³⁴ *Id.* § 303(b)(7) (codified as amended at 16 U.S.C. § 1853(b)(14)).

³⁵ *Id.* § 303(c).

³⁶ *Id.* § 304(a)–(b).

³⁷ See, e.g., *1990 Amendment Hearings*, *supra* note 30, at 4 (statement of Rep. John R. Miller) (“We once relied on observers placed on foreign fishing and processing ships. Now that we are replacing these ships with American ships, we are no longer gathering data.”).

³⁸ This Council consists of the states of Alaska, Washington, and Oregon, with jurisdiction over fisheries in those areas. See 16 U.S.C. § 1852(a)(1)(G).

³⁹ Memorandum from Clarence G. Pautzke, Exec. Dir., N. Pac. Fishery Mgmt. Council, to the N. Pac. Fishery Mgmt. Council, Sci. & Stat. Comm. & Advisory Panel Members (Jan. 10, 1989), in N. PAC. FISHERY MGMT. COUNCIL, AGENDA: 85TH PLENARY SESSION attach. C-7 (Jan. 1989), <https://perma.cc/D7GE-LER3> (“[T]he North Pacific Fishery Management Council has concluded that the lack of observer data and oversight prevents the Council from meeting its obligations under the [Magnuson-Stevens Act] to prepare management plans”); N. PAC. FISHERY MGMT. COUNCIL, MINUTES: 87TH PLENARY SESSION 25–27 (June 1989), <https://perma.cc/5JL9-EQC4> (“Mr. Cotter pointed out that the Council has previously declared to the Secretary of Commerce that in the absence of an observer program the Council is unable to fulfill its obligations under the [Magnuson-Stevens Act].”).

went from being covered primarily by foreign vessels, with required observers collecting data on their catches, to primarily domestic vessels, with no observers and no data on their catches.⁴⁰

At its June 1989 meeting, the Council received a report from a committee it had formed to investigate solutions to its predicament.⁴¹ That Committee recommended bold action: (1) observers on all domestic vessels greater than 125 feet in length and on 30% of vessels less than 125 feet in length, with (2) funding for the program “provided by the vessel carrying the observer.”⁴² The 30% of smaller vessels that would have to carry an observer would be chosen each year by lottery.⁴³ During its discussion of the recommendation, the Council noted that “virtually every segment of the industry call[ed] for an observer program” recognizing that “in the absence of such a program the Council [would be] unable to manage the fisheries in the best interests of the industry and of the nation.”⁴⁴ The motion passed unanimously.⁴⁵

According to the meeting minutes, the issue of funding for the program generated some discussion. In response to other Council members’ concerns about it, one member suggested that industry representatives “should go to Congress asking for a special appropriation of 100% funding for the first year in order to get the program underway and a declining appropriation for the next two years, with the goal of having the program totally industry-funded by the fourth year.”⁴⁶

In August 1989, Congress held hearings in Seattle, Washington, and Anchorage, Alaska, to receive testimony about concerns it could address in its reauthorization and amendment of the Magnuson-Stevens Act.⁴⁷ And, as had been suggested, several Council members and industry representatives testified before Congress. The observer requirements came up during these hearings. All who testified, including industry representatives, expressed their support for requiring domestic vessels to carry observers.⁴⁸ In particular, no one objected to the permissibility of the

⁴⁰ See *1990 Amendment Hearings*, *supra* note 30, at 6 (statement of Rep. Jolene Unsoeld) (“The vast bottom fish resources in the North Pacific which were once largely exploited by foreign vessels are now almost exclusively ‘Americanized.’”).

⁴¹ N. PAC. FISHERY MGMT. COUNCIL, *supra* note 39, at 25 (“The Council received a report from the Data Gathering Committee.”).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 26.

⁴⁵ *Id.*

⁴⁶ *Id.* at 27.

⁴⁷ *1990 Amendment Hearings*, *supra* note 30.

⁴⁸ See, e.g., *id.* at 29 (statement of Edward Evans, Alaska Factory Trawlers Ass’n) (“I don’t think there is so much difference among the members of the industry, Mr. Miller. We certainly support the

Council's actions at the June meeting, either its decision to require observers on domestic vessels or its decision to require the industry to pay for the observers they carry.⁴⁹

Instead, in their testimonies, some industry representatives urged Congress to amend the Act to allow the North Pacific Council to use a different funding mechanism for observers on domestic vessels, one that in their view would be fairer.⁵⁰ These proposals ranged from wanting the costs to be more equally distributed among the industry to wanting taxpayers to bear some of the load.⁵¹

need for observers, and we think the level of observer coverage ought to be based on what the scientists say is necessary in order to manage the fisheries properly.”); *id.* at 33 (statement of Dr. William Aron, National Marine Fisheries Service) (“The industry understands this as well as—and I think there has been very broad support for an observer program.”); *id.* at 84 (statement of Kate Graham, Executive Director, United Fishermen of Alaska) (“We are extremely worried also about something that the North Pacific Council has already identified as a major concern, which is a lack of adequate data coming from the fishing fleet. They have said already that it is absolutely imperative that we get observers on those boats.”).

⁴⁹ For example, the General Counsel of Trident Seafoods Corporation testified before Congress as follows:

Trident does not believe it necessary that there be any major changes to the Magnuson Act during its reauthorization. The [North Pacific Council] . . . has done an exceptionally good job of conserving the fishery resources within their jurisdiction while promoting the development of the United States seafood industry. An example of how the [Council] is willing to undertake steps necessary for fishery conservation, at its last meeting the [Council] voted to adopt an amendment to its management plans which would require observers on all vessels over 125 feet in length and on thirty percent of the vessels under 125 feet. The costs of the observers will be borne by the vessels which carry them. We believe this demonstrates the strong conservation ethic of the [Council] and we support the [Council's] actions in this area.

Id. at 413. There were also proposals to *mandate* domestic observers unless a regional management council made a determination that they are not needed. Consider the following passage from a letter sent by Fred F. Zharoff of the Alaska State Legislature to Congressman Gerry E. Studds:

I support an amendment . . . that would require domestic groundfish operations to have mandatory observers on board, unless the regional management council makes an official determination they are not needed for specific fisheries. The cost of the observers should be borne by the industry as a cost of harvesting the resource.

Id. at 328.

⁵⁰ The original Act had provisions that appeared to limit the collection of user fees. *See* Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, § 304(d), 90 Stat. 331, 353 (codified as amended at 16 U.S.C. § 1824(c)) (“Such level [of fees] shall not exceed the administrative costs incurred by the Secretary in issuing such permits.”).

⁵¹ *See, e.g., 1990 Amendment Hearings, supra* note 30, at 29–30 (statement of Arni Thomson, Executive Director, Alaska Crab Coalition) (“[W]e support the industry-funding of the program. We would, of course, like to see the Government participate in some cost-sharing on it.”); *id.* at 365 (statement of Kate Graham, Executive Director, United Fishermen of Alaska) (“Require each vessel to

The first set of proposals were reactions to the fact that, under the North Pacific Council’s plan, 70% of smaller vessels each year would not have to carry or pay for observers at all. John Miller, a U.S. Representative from Washington, put it as follows: “If you are one of the 30%, you must pay the full cost of the observer, while the remaining 70% are getting a competitive advantage. We need the data. Observers will help us gather it. But we also need a new method of paying for observers which is fair.”⁵² Industry representatives agreed. A representative of the Fishing Vessel Owners’ Association explained that the Council “has taken a much needed and aggressive management approach to the loss of management and resource assessment information” by requiring observers, but that “[t]his cost will be paid by the individual vessel owners who are assigned observers” and “[t]he cost is very significant to smaller vessel[s].”⁵³ For this reason, the Association requested a provision that would allow “a fleet-wide assessment” of a raw fish tax that would be paid to a regional trust fund.⁵⁴ A representative of the United Fishermen of Alaska requested an amendment that would allow a “new funding mechanism” for all vessels “to pay a share of the costs of observers.”⁵⁵ And the executive director of the Bering Sea Fishermen’s Association, after pressing for “100% domestic observer coverage on the groundfish fisheries,” urged Congress to “address the problem of a funding mechanism statutorily” so that observer programs can “assure an equitable and fair method of paying for them.”⁵⁶

The second set of proposals requested an amendment that would require taxpayers to pay for some of the cost of domestic observers. For example, a representative from the Alaska Factory Trawlers Association put it as follows: “[T]hat is not to say that the industry is not willing to participate in a broad-based funding scheme that is fair . . . [But] I would not advocate a wholly industry funded program. I think the Federal Government ought to play a role in it.”⁵⁷ (A committee member then

pay for the observer it carries as a cost of doing business. . . . If 100% observer coverage is maintained, this will spread the costs throughout the fleet.”).

⁵² *Id.* at 4.

⁵³ *Id.* at 222 (statement of Ted Smits, Executive Director, North Pacific Fishing Vessel Owners’ Association).

⁵⁴ *Id.* at 222–23.

⁵⁵ *Id.* at 365 (statement of Kate Graham, Executive Director, United Fishermen of Alaska). In the alternative, the representative suggested a requirement for each vessel to pay for the observer it carries, which, if combined with 100% observer coverage, would also “spread the costs throughout the fleet.” *Id.*

⁵⁶ *Id.* at 430–31 (statement of Henry V.E. Mitchell, Executive Director, Bering Sea Fishermen’s Association).

⁵⁷ 1990 Amendment Hearings, *supra* note 30, at 29 (statement of Edward Evans, Alaska Factory Trawlers Association).

clarified, "Are you saying it should be part taxpayer-funded and part industry-funded?"⁵⁸ After the representative answered that this would be acceptable to the Association, the Chairman of the subcommittee, Gerry Studds, quipped, "At least half of that would be acceptable to the Congress."⁵⁹ The Executive Director of the Alaska Crab Coalition expressed a similar hope, stating, that although "we support the industry-funding of the program[,] [w]e would, of course, like to see the Government participate in some cost-sharing on it."⁶⁰ (He acknowledged, however, in light of the last exchange, that "we haven't seen that forthcoming from the Congress."⁶¹) The representative from the NMFS, meanwhile, reminded Congress about "the Administration's view on the budget" and the ongoing "budget crisis" that might prevent taxpayer funding, stressing instead that "there is strong interest in developing user charges to the greatest extent possible."⁶² (The representative was overall very sympathetic to the industry's desire for taxpayer funding, but ultimately reminded Congress that whether taxpayer funding should be available to them "is really the kind of issue Congress is charged with facing."⁶³)

In other words, in hearings leading up to the reauthorization of the Magnuson-Stevens Act, Congress learned about the growing importance of observers and about the North Pacific Council's amendment to its management plan, and, after receiving testimony about equity concerns among industry participants, it was asked to explicitly allow taxpayers to partially fund domestic observers.

When Congress finally reauthorized the Magnuson-Stevens Act in 1990, it made three changes relevant here. First, it expressly added the following finding: "The collection of reliable data is essential to the effective conservation, management, and scientific understanding of the fishery resources of the United States."⁶⁴ Second, it specified that fishery management plans may "require that observers be carried on board a vessel of the United States engaged in fishing for species that are subject to the plan, for the purpose of collecting data necessary for the conservation and management of the fishery."⁶⁵ And third, it responded to the specific equity concerns raised by those who would be subject to the

⁵⁸ *Id.* (statement of Rep. John R. Miller).

⁵⁹ *Id.*

⁶⁰ *Id.* (statement of Arni Thomson, Executive Director, Alaska Crab Coalition).

⁶¹ *Id.*

⁶² *Id.* at 33-34 (statement of Dr. William Aron, National Marine Fisheries Service).

⁶³ 1990 Amendment Hearings, *supra* note 30, at 34.

⁶⁴ Fishery Conservation Amendments of 1990, Pub. L. No. 101-627, § 101(a), 104 Stat. 4436, 4437 (codified as amended at 16 U.S.C. § 1801(a)(8)).

⁶⁵ *Id.* § 109(b), 104 Stat. at 4448 (codified as amended at 16 U.S.C. § 1853(b)(8)).

North Pacific Council’s plan. It added an entire section expressly allowing the North Pacific Council to require observers and establishing “a system of fees to pay for the costs of implementing the plan” which would “be fair and equitable to all participants in the fisheries under the jurisdiction of the Council.”⁶⁶ Despite being asked to do so, Congress did not expressly authorize any taxpayer funding for domestic observer programs.

C. *Implications of this “Silence”*

What is the meaning of the language that Congress adopted (and did not adopt) in the 1990 amendments to the Magnuson-Stevens Act? The petitioners argue that Congress intended to allow regional councils to require domestic observers that would have to be funded, *sub silentio*, by taxpayers.⁶⁷ We know this, they argue, because Congress explicitly adopted a narrow exception to taxpayer funding for the North Pacific Council when it required the establishment of a system of user fees.⁶⁸ This explanation would require us to believe the extraordinary idea that Congress, in a budget crisis, would silently commit taxpayer funds for domestic observers for all regional councils (and risking the collapse of fisheries if funds were not available), but deny such funds for the North Pacific industry that had expressly requested some relief.

There is an alternative explanation, and it is quite simple. The alternative is that Congress intended to make clear that regional councils may require domestic observers that would be funded by the industry if deemed “necessary and appropriate for the conservation and management of the fishery.”⁶⁹ And it allowed the North Pacific Council, upon explicit request of the industry, to collect user fees for observers that would “be fair and equitable to all participants in the fisheries under the jurisdiction of the Council.”⁷⁰ This explanation would require us to believe the unremarkable idea that Congress responded to the lobbying efforts of the North Pacific industry to allow them a modest change that would retain industry funding but enable equitable distribution of costs.

This second interpretation also aligns with the stakes—and makes sense of Congress’s decision to emphasize the importance of reliable data, gathered by observers, to the effective conservation and management of fisheries.⁷¹ It would be odd for Congress to have assumed that their

⁶⁶ *Id.* § 313(a)–(b), 104 Stat. at 4457.

⁶⁷ Brief for Petitioners, *supra* note 11, at 9–11.

⁶⁸ *Id.*

⁶⁹ *Id.* at 8 (quoting 16 U.S.C. § 1853(a)(1)(A)).

⁷⁰ 16 U.S.C. § 1862(b)(2)(B).

⁷¹ A representative from Greenpeace made the following statement at the hearings:

funding would remain uncertain in most cases, subject to the unpredictable availability of taxpayer funding. Fisheries would collapse.⁷² A more likely default assumption was that the industry would pay for observers as a cost of business if observers were deemed “necessary and appropriate” by a regional council. This default option would protect the fisheries while still allowing industry participants to go before Congress, like the North Pacific industry representatives, to request different solutions, whether user fees or partial taxpayer funding.

That said, this Article’s goal is not to persuade the reader that this latter interpretation of the statutory text is the “best” one in light of the context. Its goal is more modest. This Article highlights at least the plausibility of the second interpretation of the statutory text—the interpretation that Congress, acting against a default of industry funding for domestic observers, made an express (and minor) accommodation for the North Pacific industries that requested a more equitable distribution of industry payments. That interpretation would allow the New England Fishery Management Council to do exactly what it did in *Loper Bright*.

This is the modest goal because the petitioners’ argument is not just about denying *Chevron* deference to this type of silence. It is also an argument that this “type of silence” should raise an inference or presumption *against* the agency’s authority to act as it did.⁷³ In this case, however, expending effort to understand the context does not tend to support the petitioners’ arguments for deploying their shortcut here. In the next Part, this Article discusses how it is likely unwarranted in most contexts.

II. *Chevron*, “Silence,” and Inferences

Petitioners urge the Court to fashion a general rule that would make *Chevron* deference unavailable whenever a statute implicates “that type of

Observers provide timely data for the purpose of determining acceptable biological catch figures, setting total allowable catches, and modifying fishery management plans. Observer information would help to alleviate the all too common problem where a plan, based on the previous years’ surveys and data, is slow to respond to rapid fluctuations in stock sizes and mobility.

1990 Amendment Hearings, *supra* note 30, at 189 (statement of Alan Reichman, North Pacific Ocean Ecology Coordinator, Greenpeace).

⁷² For example, the cod fishery, under the New England Fisheries Management Council, collapsed in 2014 because the Council was slow to adopt the lower fishing quotas it had deemed necessary and appropriate. See Marianne Lavelle, *Collapse of New England’s Iconic Cod Tied to Climate Change*, SCIENCE (Oct. 29, 2015), <https://perma.cc/UHE2-SB4Z>.

⁷³ See Brief for Petitioners, *supra* note 11, at 45–46.

silence.”⁷⁴ In short, they argue that this type of silence is particularly incompatible with *Chevron* deference because it should lead to an inference *against* agency authority and not an inference *favoring* agency authority.⁷⁵ Petitioners explain that *Chevron* deference is akin to a substantive canon favoring agency action.⁷⁶ Citing then-Professor Amy Coney Barrett, they then argue that “[n]ot every substantive canon is legitimate,” and that “applying *Chevron* to statutory silence [and thereby inferring agency authority] falls on the illegitimate side of the dividing line by a sizable margin.”⁷⁷ According to petitioners, “the far more obvious inference from statutory silence is that Congress withheld a power from the agency, rather than handing it a blank check.”⁷⁸ In fact, petitioners argue that “construing *that* type of silence as an implicit delegation to an agency is wildly out-of-step with the sensible rules of statutory interpretation that this Court applies in other contexts.”⁷⁹ And in these cases, petitioners assert that “the only reasonable inference is that Congress withheld that power altogether.”⁸⁰ In other words, petitioners’ argument for “narrowing *Chevron*” is actually two-fold: (1) *Chevron* deference should not apply to an inconsistent silence about some non-major issues within a statute, and (2) this type of silence should raise an inference against the agency’s authority to act.⁸¹

There are many reasons that a Court might apply a substantive canon. It could use it to break a tie between two equally plausible interpretations, implicitly assuming that the canon is a good proxy for congressional intent, or, more controversially, it could use it to promote values or policies even when they conflict with actual congressional intent.⁸² First, this Part argues that this type of silence is not likely to be aligned closely

⁷⁴ *Id.* at 46.

⁷⁵ *Id.* at 45–46.

⁷⁶ *Id.* at 44.

⁷⁷ *Id.* (citing Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109 (2010)).

⁷⁸ *Id.*

⁷⁹ Brief for Petitioners, *supra* note 11, at 46.

⁸⁰ *Id.* (citing *Me. Lobstermen’s Ass’n. v. Nat’l Marine Fisheries Serv.*, 2023 WL 4036598, at *11 (D.C. Cir. June 16, 2023)).

⁸¹ See *Loper Bright Enters., Inc. v. Raimondo*, 45 F.4th 359, 366–67 (D.C. Cir. 2022), *cert. granted in part sub nom.* *Loper Bright Enters. v. Raimondo*, 143 S. Ct. 2429 (argued Jan. 17, 2024) (mem.) (identifying petitioners’ argument as the idea that the express discussion of industry funding in other sections “give[s] rise by negative implication to the inference that the Act unambiguously deprives the Service of authority to create additional industry-funded monitoring requirements”).

⁸² See Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 116–18 (2010). Justice Barrett ultimately concludes that a court should only employ a canon to reflect a policy choice when it is motivated by upholding “constitutional values.” See *id.* at 164.

with congressional intent to deny agency authority. In fact, this type of silence can often be construed out of any ambiguity. And it is especially unlikely to support an inference against agency authority when it is found in a provision that otherwise grants the agency broad authority to issue, for example, requirements it deems “appropriate” and “necessary.” Adopting an inference against the agency’s action, therefore, would be a misguided approach if the Court cares about aligning with congressional intent. And second, this Part argues that such an inference would not promote any constitutional values—or, really, any legitimate judicial values or policies. This Part also discusses why its adoption would likely have significant consequences, beyond the effect of the “major questions doctrine,” beyond other ways of narrowing *Chevron*, and beyond overruling *Chevron* entirely.

A. “Silence” and Inconsistency

First, denying *Chevron* deference and deploying an inference against agency action could not be justified as a good proxy for congressional intent in cases of “this type of silence.”⁸³ This type of silence, as described by petitioners, is “statutory silence [that] implicates a controversial power and . . . is in contradistinction to an express grant of the power elsewhere in the very same statute.”⁸⁴ This type of silence is fairly common and perhaps inevitable—or, more specifically, can strategically be found to exist in many cases. As the Court had recognized in *Chevron*, Congress’s relative lack of technical expertise, its desire to appeal to competing interests, and its iterative and dynamic decision-making and amendment process could all give rise to any number of details of implementation that Congress may, advertently or not, give to the agency to fill in while implementing the statute subject to Congress’s “major question” policy direction.⁸⁵

Some silences are ubiquitous because no statute could possibly cover all things, especially all possible non-major issues. Even supporters of more vigorous enforcement of a nondelegation doctrine recognize that Congress is allowed to authorize an agency to “fill up the details” of a

⁸³ The Court of Appeals for the D.C. Circuit also raised this general concern. *Loper Bright*, 45 F.4th at 366–67 (“This *expressio unius* reasoning, ‘when countervailed by a broad grant of authority contained within the same statutory scheme, . . . is a poor indicator of Congress’ intent.” (quoting *Adirondack Med. Ctr. v. Sebelius*, 740 F.3d 692, 697 (D.C. Cir. 2014))).

⁸⁴ Brief for Petitioners, *supra* note 11, at 45.

⁸⁵ See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984); *West Virginia v. EPA*, 597 U.S. 697, 732 (2022) (requiring Congress to clearly authorize agency action that would implicate “major questions”).

complex statutory scheme.⁸⁶ A rule that removes silences from *Chevron* applicability essentially eliminates *Chevron*. On its face, it would appear to leave issues related to “ambiguity” as available for *Chevron* deference. But there is no principled line between ambiguity and silence; any ambiguity can be restated as a silence. In other words, what makes a statutory term ambiguous—capable of having more than one interpretation—is the lack of some clarifying statement that would eliminate the ambiguity. Many creative litigants will find ways to reframe ambiguities as very specific (non-major) silences.

This argument is reminiscent of *City of Arlington v. FCC*,⁸⁷ where the Court rejected a limit on *Chevron*’s application to “an agency’s interpretation of a statutory ambiguity that concerns the scope of its regulatory authority (that is, its jurisdiction).”⁸⁸ Writing for the majority, Justice Antonin Scalia concluded that the distinction between an agency’s interpretation of jurisdictional and non-jurisdictional statutory provisions is “an empty distraction because every new application of a broad statutory term can be reframed as a questionable extension of the agency’s jurisdiction.”⁸⁹ In fact, “the distinction between ‘jurisdictional’ and ‘nonjurisdictional’ interpretations is a mirage,” according to the Court, because “[n]o matter how it is framed, the question a court faces when confronted with an agency’s interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority*.”⁹⁰ Instead of “carving out some arbitrary subset of such claims as ‘jurisdictional’” (a task that the Court called “unprincipled”), the Court just needs to determine, as always, “whether the agency has gone beyond what Congress has permitted it to do.”⁹¹

Is an *inconsistent* silence—the type of silence at issue here— any different? In other words, would eliminating *Chevron* in only such cases provide any principled limiting principle? Likely not. So-called *Chevron* questions are often about whether certain regulatory options are available (or not) to the agency given its statutory authorization. But Congress often does not expressly list options, tools, and criteria under every regulatory provision, relying at times on broad language that enables agencies to choose those that are “reasonable,” “appropriate,” or

⁸⁶ See, e.g., *Gundy v. United States*, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting) (“[W]e know that as long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to ‘fill up the details.’”).

⁸⁷ 569 U.S. 290 (2013).

⁸⁸ *Id.* at 293.

⁸⁹ *Id.* at 300.

⁹⁰ *Id.* at 297.

⁹¹ *Id.* at 298.

“necessary.”⁹² For other provisions, for unrelated reasons, it might be more explicit about available regulatory options, tools, or criteria—for example, when it amends a statute to deal with an emergency situation or salient issue.⁹³ The statutes we see are often a result of an iterative process of amendment, like the Magnuson-Stevens Act, which exacerbates this potential of creating some gaps or some inconsistencies even within one statute.

In fact, the *Chevron* case itself is a great example. When Congress enacted the Clean Air Act (“CAA”) in 1970, it established procedures under which the Environmental Protection Agency (“EPA”) would set national standards for ambient air quality for criteria pollutants and requirements for various control technologies at major new sources of air pollution, among other things, originally requiring all areas to attain these national standards within a few years.⁹⁴ That did not happen. In 1977, Congress amended the CAA to extend these deadlines and to recognize and deal with the reality that in some areas ambient air quality was much better than the national standard while in others areas it was much worse.⁹⁵ Congress created two programs: a program focused on the prevention of significant deterioration of air quality (“PSD”) for areas with air quality above national standards, protecting them from being polluted up to the national standard; and a program focused on “nonattainment areas,” requiring more stringent controls for new sources and offsetting emissions from existing sources.⁹⁶ At issue in the litigation was the EPA’s decision to allow states to define a relevant source as the entire plant (the “bubble concept”) as opposed to, say, a single smokestack.⁹⁷ The EPA’s definition of a source afforded regulated entities more flexibility in meeting requirements for offsetting emissions, while the alternative definition did not.⁹⁸ In the statute, Congress expressly defined a source in one provision in a way that would expressly allow the bubble concept—but that provision did not apply to the permit program for nonattainment areas.⁹⁹ In the provisions related to nonattainment areas, Congress was

⁹² See *Michigan v. EPA*, 576 U.S. 743, 751–52 (2015).

⁹³ See, e.g., Caroline Cecot, *Congress and Cost-Benefit Analysis*, 73 ADMIN. L. REV. 787 (2021) (evaluating situations when Congress explicitly allows, requires, or prohibits cost-benefit analysis).

⁹⁴ See generally Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676.

⁹⁵ See generally Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685.

⁹⁶ See *id.* §§ 160–78, 91 Stat. at 731–51; *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 840 (1984) (“The amended Clean Air Act required these ‘nonattainment’ States to establish a permit program regulating ‘new or modified major stationary sources’ of air pollution.”).

⁹⁷ *Chevron*, 467 U.S. at 840.

⁹⁸ *Id.*

⁹⁹ *Id.* at 851.

silent about the availability of the bubble concept.¹⁰⁰ Applying the petitioners’ presumption to *Chevron* itself would make *Chevron* deference unavailable in that case. Forcing a court to make the decision in that case, as the Court of Appeals for the D.C. Circuit had done, would force it to make a policy decision for or against the bubble concept by reference to its preference for one policy goal over another. Adopting petitioners’ proposal and reflexively denying the agency authority to implement the bubble concept based on inconsistent statutory silence would still import a policy decision but this time without explicit acknowledgment of it.

In some contexts, Congress might be vague because it wants to create more space for agency interpretation, and, in some contexts, it may be more explicit because it is responding to a more known or well-defined situation. Contextual factors can explain some inconsistencies, and courts should employ caution before making easy assumptions. In the Magnuson-Stevens Act, for example, this Article argues that Congress may have wanted to give the regional councils a lot of flexibility to take measures that were “necessary and appropriate for the conservation and management of the fishery.”¹⁰¹ And for the North Pacific Council, Congress was responding to a specific incident and request (not to mention lobbying).

In 2001, the Supreme Court tried to create a presumption similar to the one petitioners propose.¹⁰² In *Whitman v. American Trucking Ass’ns*,¹⁰³ the question was whether the EPA was allowed to use cost-benefit analysis or consider costs at all when setting ambient air quality standards.¹⁰⁴ The Court first recognized that “[n]owhere are the costs of achieving such a standard made part of that initial calculation.”¹⁰⁵ In other words, silence. But that’s not all. The Court also pointed out that “[o]ther provisions explicitly permitted or required economic costs to be taken into account in implementing the air quality standards.”¹⁰⁶ That is, it’s about a power that is expressly granted elsewhere in the same statute. The Court then concluded that the EPA did not have the authority to consider costs in the provision at issue, refusing “to find implicit in ambiguous sections of the CAA an authorization to consider costs that has elsewhere, and so often, been expressly granted.”¹⁰⁷ The petitioners, unsurprisingly, cite *American*

¹⁰⁰ *Id.*

¹⁰¹ Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, § 303(a)(1)(A), (b)(7), 90 Stat. 331, 351–52 (codified as amended at 16 U.S.C. § 1853(a)(1)(A), (b)(14)).

¹⁰² *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 467 (2001).

¹⁰³ 531 U.S. 457 (2001).

¹⁰⁴ *Id.* at 462.

¹⁰⁵ *Id.* at 465.

¹⁰⁶ *Id.* at 467.

¹⁰⁷ *Id.*

Trucking for their argument against *Chevron* and against agency authority.¹⁰⁸

But the Supreme Court's confidence in any reflexive presumption from this type of silence was short-lived. When a similar issue came up in 2009 under the Clean Water Act ("CWA") in *Entergy Corp. v. Riverkeeper, Inc.*,¹⁰⁹ the Court backtracked—or rather, appreciated the nuance that contextual factors can bring to bear when there exists this type of silence.¹¹⁰ The question was whether the EPA could use cost-benefit analysis to determine the "best technology" under one provision of CWA.¹¹¹ The provision never mentioned cost-benefit analysis, or even costs, at all. Other provisions of the CWA focusing on other standards, meanwhile, did explicitly authorize cost-benefit analysis. But, according to the Court, in *this* context, "[i]t is eminently reasonable to conclude that [this provision's] silence is meant to convey nothing more than a refusal to tie the agency's hands as to whether cost-benefit analysis should be used, and if so to what degree."¹¹² As for *American Trucking*, the *Entergy* Court simply states, "*American Trucking* thus stands for the rather unremarkable proposition that sometimes statutory silence, when viewed in context, is best interpreted as limiting agency discretion. For the reasons discussed earlier, [this provision's] silence cannot bear that interpretation."¹¹³ Like the petitioners in *Entergy*, the *Loper Bright* petitioners' allusion to *American Trucking* falls flat because of the importance of context.¹¹⁴

In short, any reflexive presumption against the agency's authority to use a tool "expressly but narrowly" authorized elsewhere in the statute would be a poor shortcut for getting at congressional intent. The only way to distinguish between whether the silence was meant to give the agency more discretion or whether the silence was meant to prohibit otherwise authorized options is by taking a close look at the relevant provisions, the context of the entire statute, and the historical context—traditional tools for understanding Congress's intent.

¹⁰⁸ Brief for Petitioners, *supra* note 11, at 45 ("If Congress 'does not . . . hide elephants in mouseholes,' *Whitman*, 531 U.S. at 468, it surely does not empower agencies to conjure elephants, or even mice, out of nothing at all.").

¹⁰⁹ 556 U.S. 208 (2009).

¹¹⁰ *See id.* at 222.

¹¹¹ *Id.* at 217.

¹¹² *Id.* at 222.

¹¹³ *Id.* at 223.

¹¹⁴ *See* Brief for Petitioners, *supra* note 11, at 45.

B. *Inference Against Authority*

Second, an inference against agency action in this context is also not supported by any legitimate imposition of judicial policy preferences. In her article, cited by petitioners, then-Professor Barrett argues that, when a canon is used to promote some value, its use by courts is legitimate only if the canon promotes “constitutional values” and if it is used to break ties among competing interpretations of statutory texts.¹¹⁵ When deployed in this way, the canon can be “a valuable tool for ensuring that political actors do not inadvertently cross constitutional lines or inadvertently exercise extraordinary constitutional powers,” disciplining Congress “to consider carefully the constitutional implications of its policies.”¹¹⁶ And its deployment is “relatively respectful” of legislative supremacy “because Congress can free itself of potentially offending interpretations by legislatively overriding them.”¹¹⁷ A qualifying canon “must be connected to a reasonably specific constitutional value” and “must actually promote the value it purports to protect.”¹¹⁸

The “major questions doctrine” is arguably a canon that is rationalized by such concerns¹¹⁹—and it is essentially the kind of canon the petitioners would like to see created for this type of silence. Whatever one might think of the “major questions doctrine,” its key feature is that it applies to *major* questions. Justice Neil Gorsuch, in his concurrence in *West Virginia v. EPA*, provides some guidelines for identifying such questions. It might be a “major question” when an agency claims the power to resolve a matter of great “political significance” or “earnest and profound debate across the country,” or when it seeks to regulate “a significant portion of the American economy,” or when it intrudes “into an area that is the particular domain of state law,” or when it asserts some new power based on old and vague statutory language.¹²⁰

No one argues that the question before the Court qualifies as a major question. The question is not one of great political significance or profound debate; it does not pertain to a large segment of the economy; it is an area of longstanding mutual regulatory authority; and, as discussed in Part I, this is not the first time the agency has wanted to use this authority when conditions require it.

¹¹⁵ Barrett, *supra* note 82, at 177–78.

¹¹⁶ *Id.* at 175.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 178.

¹¹⁹ *West Virginia v. EPA*, 597 U.S. 697, 735 (2022) (Gorsuch, J., concurring) (“Like many parallel clear-statement rules in our law, this one operates to protect foundational constitutional guarantees.”).

¹²⁰ *Id.* at 742–44, 747.

And that makes all the difference. When tying the “major questions doctrine” to the promotion of constitutional values, Justice Gorsuch quoted Chief Justice John Marshall as saying that “important subjects . . . must be entirely regulated by the legislature itself; even if Congress may leave the Executive ‘to act under such general provisions to fill up the details.’”¹²¹ In other words, requiring Congress to state clearly agency authority for major questions can be seen as promoting values that motivate the nondelegation doctrine. But nothing similar can be said for any presumption against agency authority to fill up the details of statutory provisions in a way it deems necessary when there is some “silence” about some detail in some provision. This inference would have no connection to any promotion of any constitutional values. It would be motivated by an extraconstitutional (and arguably illegitimate) policy preference to impose a far-reaching default against agency action without any basis in precedent.¹²²

In addition to being a poor proxy for congressional intent and motivated by potentially illegitimate policy preferences to override congressional intent, it would create a default that would be almost insurmountable by Congress. Of course, Congress can always override a court’s determination subject to constitutional limits. Under the “major questions doctrine,” for example, Congress can subsequently act to directly give an agency a “major” power, subject to guiding principles, and undo the Court’s presumption against agency authority.¹²³ But such affirmative action is costly. When it comes to major questions, however, it might be rational and desirable for Congress to use its scarce time and resources to act affirmatively if it disagrees with courts. Presumably, it would also not have to do this too frequently, as major questions should

¹²¹ *Id.* at 737.

¹²² In her article, then-Professor Barrett concludes that canons that promote judicial policy concerns that are not based on constitutional values are likely illegitimate. See Barrett, *supra* note 82, at 181–82. At the very least, though, adopting such canons would constitute a clear judicial power grab at the expense of the executive and the legislative branches. If there is some ambiguity in the statutory language and policy considerations could help mediate between one or more interpretations (such as pro-efficiency considerations or pro-fairness considerations), the *agency* should make the policy choice. This is, in fact, one of the rationales for the *Chevron* doctrine. See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984).

¹²³ Consider *FDA v. Brown & Williamson Tobacco Corporation*, 529 U.S. 120, 159–60 (2000), where the Supreme Court used the major questions doctrine to deny the FDA’s assertion of general jurisdiction over tobacco products. After this case, Congress (eventually) responded by enacting the Family Smoking Prevention and Tobacco Control Act, which granted the FDA the authority to regulate tobacco products. Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified as amended at 21 U.S.C. §§ 387–387v).

not often arise.¹²⁴ And going forward, there is hope that Congress could anticipate such major gaps in future statutes.

Under an “inconsistent silence” doctrine that presumes a lack of agency authority, decisions that go against congressional intent would be frequent, but Congress would not be as justified in using its scarce time and resources to fix or override these decisions. In addition, Congress would have a difficult time crafting legislation that would be foolproof against such a doctrine. Silence on a non-major detail of implementation is more likely to be related to Congress’s lack of expertise or technical knowledge—a common basis for giving an agency the authority to fill up details in the first place.¹²⁵

Even though these issues are not major, the consequences of this type of presumption against agency action could still be devastating. The fisheries context is a perfect example. The worst that will happen is that the fishery will collapse.

This is why this particular option for “narrowing *Chevron*” would be more extreme than overturning *Chevron* outright. Overturning *Chevron* would not be costless, as discussed in other Articles in this collection. But other doctrines could grapple with similar questions of authority, legitimacy, and expertise, and perhaps lead to similar conclusions about the “best” interpretations¹²⁶—though perhaps with less consistency across circuits and across judges.¹²⁷ But at least courts would do the time-consuming work of actually searching for the “best” interpretation without some ill-conceived and far-reaching presumption against authorization. And that work would, as discussed above, help courts distinguish between a silence like in *Chevron* (or, arguably, *Loper Bright*) from a silence that truly suggests congressional intent to deny the agency the authority it seeks.

¹²⁴ That said, courts might often be enticed to declare major questions. See Erin Webb, *Analysis: More Major Questions Doctrine Decisions Are Coming*, BLOOMBERG L. (Nov. 5, 2023, 9:00 PM), <https://perma.cc/Q5C9-9RTT> (charting increased usage of major questions doctrine since 2021).

¹²⁵ See Emily Hammond, *Finding a Place for Expertise After Loper Bright*, 31 GEO. MASON L. REV. 559, 572 (2024); see also Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733, 734 (2011).

¹²⁶ See Lisa Schultz Bressman, *Lower Courts After Loper Bright*, 31 GEO. MASON L. REV. 499, 504–05 (2024); see also Lisa Schultz Bressman & Kevin M. Stack, *Chevron is a Phoenix*, 74 VAND. L. REV. 465, 479 (2021).

¹²⁷ See Kent Barnett & Christopher J. Walker, *Chevron and Stare Decisis*, 31 GEO. MASON L. REV. 475, 493–94 (2024); see also Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1 (2017) (presenting the largest empirical study of *Chevron* in the circuit courts).

To be clear, other proposals for cabining *Chevron*, such as making the doctrine inapplicable in agency adjudications¹²⁸ or in immigration cases,¹²⁹ do not necessarily raise these concerns. Importantly, these distinctions—for example, whether a decision was in the context of an adjudication or whether a decision pertains to immigration—are relatively stable and easy to apply. In addition, the denial of *Chevron* deference does not necessarily raise any presumption against the agency’s decision or interpretation. And to the extent the Court would like to narrow *Chevron* based on case-specific factors that go to the scope of the agency’s decision-making authority or to the process of its decision-making, it can do so by reinvigorating and clarifying the inquiry at *Chevron*’s step two, where courts must evaluate whether the agency’s particular action was reasonable under the circumstances.¹³⁰ Indeed, scholars, myself included, have argued for such a change.¹³¹ The Court might even issue a general caution against assuming agency authority in every case of ambiguity or silence. This Article is not intended to discourage such moves.

Conclusion

In *Loper Bright*, the petitioners propose to “narrow” *Chevron* so that the deference doctrine is inapplicable to statutory silence on issues conceded to be non-major ones; in fact, the petitioners argue, in cases where the silence is inconsistent within the statute, the agency should be presumed to lack authority to act. Under *Chevron*, the assumption has been that agencies can generally make such non-major implementation decisions unless their decisions are unreasonable or otherwise impermissible. This Article has argued that this approach strikes the right balance, though it could perhaps use some clarification about the rigor of the inquiries at both of *Chevron*’s “steps.” But importantly, the Court

¹²⁸ See generally Kristin E. Hickman & Aaron L. Nielson, *Narrowing Chevron’s Domain*, 70 DUKE L.J. 931 (2021) (limiting *Chevron* deference to rulemaking).

¹²⁹ See, e.g., Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against Chevron Deference in Immigration Adjudication*, 70 DUKE L.J. 1197 (2021); Gabriel J. Chin, Nicholas Starkman & Steven Vong, *Chevron and Citizenship*, 52 U.C. DAVIS L. REV. 145 (2018); Brian G. Slocum, *The Immigration Rule of Lenity and Chevron Deference*, 17 GEO. IMMIGR. L.J. 515 (2003).

¹³⁰ See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 845 (1984).

¹³¹ See, e.g., Jonathan S. Masur & Eric A. Posner, *Chevronizing Around Cost-Benefit Analysis*, 70 DUKE L.J. 1109, 1148–51 (2021); Caroline Cecot, *Deregulatory Cost-Benefit Analysis and Regulatory Stability*, 68 DUKE L.J. 1593, 1646 (2019); Catherine M. Sharkey, *Cutting in on the Chevron Two-Step*, 86 FORDHAM L. REV. 2359, 2437–38 (2018); Cass R. Sunstein, *Cost-Benefit Analysis and Arbitrariness Review*, 41 HARV. ENV’T L. REV. 1, 40 (2017); Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1296 (1997); Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 138 (1994).

should not adopt the petitioners’ proposal that would narrow *Chevron* and import a presumption against agency action. The “type of silence” that would give rise to the presumption would be commonly found, amenable to being strategically construed from ambiguous language. And the resulting presumption would be a poor proxy for congressional intent, would not promote any legitimate constitutional values, and would create a virtually insurmountable obstacle for Congress to assert its legislative supremacy. This is no compromise position. The Court would do better to overrule *Chevron* entirely—or, better yet, clarify its application and the rigor of analysis under both of its steps.