

## LECTURE

# OUR *MARBURY*: *LOPER BRIGHT* AND THE ADMINISTRATIVE STATE

CASS R. SUNSTEIN<sup>†</sup>

### ABSTRACT

*Loper Bright, overruling Chevron, is unmistakably part of administrative law's current "Grand Narrative," which sees contemporary administrative agencies with suspicion, as a product of successive breaches of Article I, II, and III of the Constitution. The decision should be seen as our Marbury v. Madison—an effort to insist that it is emphatically the province and duty of the judicial department to say what the law is. But will the decision produce large changes? The answer depends, of course, on the meaning of both Chevron and Loper Bright. Under Chevron, courts hardly gave a blank check to agencies; on the contrary, they frequently invalidated agency interpretations of law. How much will invalidation rates rise? We cannot give a confident answer, in part (1) because Loper Bright retains Skidmore (which calls for respectful attention to agency interpretations); in part (2) because Loper Bright recognizes that Congress sometimes explicitly or implicitly delegates interpretive authority to agencies; and in part (3) because (and these must be counted as some of its effects) Loper Bright will (a) increase litigants' incentive to attack agency interpretations and (b) reduce agencies' incentive to adopt adventurous interpretations (though agencies may have other incentives to do that). Any numerical projection would be hazardous, but Loper Bright gives a clear signal, a green light to federal courts where Chevron gave a yellow light—which means that it is reasonable to predict a nontrivial increase in judicial invalidations (other things being equal). It is also safe to predict that in the near future, the combination of Loper Bright with increasing judicial skepticism about the administrative state will result in a nontrivial increase in invalidation of regulations designed to protect*

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<sup>†</sup> Robert Walmsley University Professor, Harvard Law School. I am grateful to Jack Goldsmith and Adrian Vermeule for valuable discussions, and especially to Vermeule for countless conversations on this topic; neither of them should be held responsible for my errors here. I am also grateful to Noah Feldman and Lawrence Solum for valuable comments on an earlier draft. Special thanks to Tascha Shahriari-Parsa for superb research assistance.

health, safety, and the environment. In the near future, Loper Bright will also lead to a significant increase in ideological divisions in the lower courts. Still, Loper Bright is our Marbury, and will, sooner rather than later, be seen as such in mounting conflicts between agencies and courts.

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## I. INFINITE JEST

Well, it happened. *Chevron*<sup>1</sup> is overruled.<sup>2</sup> Done. Gone. Put a fork in it. Alas, poor *Chevron*! I knew him, Horatio. A fellow of infinite jest, of most excellent fancy. He hath borne me on his back a thousand times.<sup>3</sup>

*Chevron*'s two-part framework has been jettisoned and replaced

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

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

3. Well, almost a thousand. I wrote or cowrote a ridiculously large number of papers engaging *Chevron*. The most *Chevron*-negative: Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV L. REV. 421 (1987). The most *Chevron*-positive: Cass R. Sunstein, *Beyond Marbury: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580 (2006). The most empirical: Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823 (2006). The most historical: Cass R. Sunstein, *Chevron As Law*, 107 GEO. L.J. 1613 (2019). The most *Loper Bright*-compatible: Lawrence B. Solum & Cass R. Sunstein, *Chevron As Construction*, 105 CORNELL L. REV. 1465 (2020). The most desperate: Cass R. Sunstein, *Zombie Chevron: A Celebration*, 82 OHIO ST. L.J. 565 (2021).

by “independent” judicial interpretation of law. More specifically, *Chevron* directed courts to ask two questions: (1) Did Congress directly decide the “precise question at issue”?<sup>4</sup> (2) If not, was the agency’s interpretation “permissible,”<sup>5</sup> which is to say, “reasonable”?<sup>6</sup> *Loper Bright* seems to direct courts instead to ask just one question: Is the agency’s interpretation consistent with law?<sup>7</sup> In asking that question, courts are permitted to give respectful attention to the agency’s view.<sup>8</sup> But they will not “defer” to that view.<sup>9</sup> Under the Administrative Procedure Act (“APA”),<sup>10</sup> questions of statutory interpretation are for courts.<sup>11</sup>

While this is the Court’s holding, *Loper Bright* repeatedly points to *Marbury v. Madison*.<sup>12</sup> As the *Loper Bright* Court saw things, § 706 of the APA “codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment.”<sup>13</sup> The Court emphasized that the APA “incorporates the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions.”<sup>14</sup> The Court put that understanding in the context of the separation of powers: “Indeed, the Framers crafted the

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4. *Chevron*, 467 U.S. at 842–43.

5. *Id.* at 843.

6. *Id.* at 844. I note parenthetically, and down here in the footnotes, that *Loper Bright* sits (umm, errr) uneasily with *Kisor v. Wilkie*, 588 U.S. 558 (2019), which is essentially identical to Justice Kagan’s dissenting opinion in *Loper Bright*. See *Kisor v. Wilkie*, 588 U.S. at 563–64, 569; *Loper Bright Enters.*, 603 U.S. at 449–50 (Kagan, J., dissenting). It would be awkward to overrule *Kisor*, just a few years after it was decided, but it is also awkward to maintain both *Loper Bright* and *Kisor*.

7. See *Loper Bright Enters.*, 603 U.S. at 391–92, 411. I say “seems to” because things are much more complicated, as we shall see shortly. See also Adrian Vermeule, *Chevron by Any Other Name*, SUBSTACK: THE NEW DIG. (June 28, 2024), <https://thenewdigest.substack.com/p/ch-evron-by-any-other-name> [<https://perma.cc/2435-CVTV>] (arguing that “everything that was done under *Chevron* can also be done under the rubric of independent judicial interpretation”).

8. See *Loper Bright Enters.*, 603 U.S. at 374 (explaining that an agency’s interpretation of a statute may be “informative” if it rests on factual premises within that agency’s subject matter expertise); *Skidmore v. Swift & Co.*, 323 U.S. 134, 138–40 (1944) (explaining that in resolving a question of statutory interpretation, agency views are “entitled to respect”).

9. See *Loper Bright Enters.*, 603 U.S. at 370, 372–73.

10. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

11. *Loper Bright Enters.*, 603 U.S. at 371 (citing 5 U.S.C. § 706).

12. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

13. *Loper Bright Enters.*, 603 U.S. at 371.

14. *Id.* at 394.

Constitution to ensure that federal judges could exercise judgment free from the influence of the political branches.”<sup>15</sup>

In this light, *Loper Bright* can easily be seen as our *Marbury*. It insists that in conflicts between the executive branch and the courts, it is emphatically the province and duty of the judicial department to say what the law is. Great cases are sometimes like novels or poems; their meaning is not static over time. They come to be understood in different ways from one decade to the next. That has certainly been true of *Marbury* and *Chevron*. It is likely to be true, I suggest, of *Loper Bright* as well. Indeed, the valence of *Loper Bright* in 2025 is already a bit different from the valence of the same ruling in 2024. In a year of intense conflicts between the executive branch and the courts, *Loper Bright* can easily be taken to lay down a marker: With respect to the interpretation of federal law, courts have primacy.

*Loper Bright* is unmistakably part of administrative law’s “Grand Narrative.”<sup>16</sup> According to the Grand Narrative, the Constitution creates three branches of government, not four, and the rise of the contemporary administrative state has produced a fourth. It is a constitutional embarrassment, or a kind of barnacle, because its existence signals successive breaches of Articles I, II, and III. The administrative state is a breach of Article I insofar as it exercises broad discretionary power and hence makes law.<sup>17</sup> It is a breach of Article II insofar as it exercises executive authority without the control of the president.<sup>18</sup> It is a breach of Article III insofar as it exercises

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15. *Id.* at 403. Note that Justice Thomas offered a detailed explanation of his view that *Chevron* is inconsistent with the separation of powers. As he put it, *Chevron* “curbs the judicial power afforded to courts, and simultaneously expands agencies’ executive power beyond constitutional limits.” *Id.* at 414 (Thomas, J., concurring). Justice Gorsuch spoke in similar terms: “*Chevron* deference runs against mainstream currents in our law regarding the separation of powers, due process, and centuries-old interpretive rules that fortify those constitutional commitments.” *Id.* at 12 (Gorsuch, J., concurring). As discussed below, the Court itself is best read to have rejected the constitutional attack on *Chevron*; the Court recognized that Congress can and sometimes does grant interpretive authority to agencies.

16. See Cass R. Sunstein, *Administrative Law’s Grand Narrative*, 77 ADMIN. L. REV. (forthcoming 2025).

17. See, e.g., Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002); Philip Hamburger, *Nondelegation Blues*, 91 GEO. WASH. L. REV. 1083 (2023); Richard A. Epstein, *Delegation of Powers: A Historical and Functional Analysis*, 24 CHAP. L. REV. 659 (2021); Aaron Gordon, *Nondelegation Misinformation: A Reply to the Skeptics*, 75 BAYLOR L. REV. 152 (2023); Philip Hamburger, *Delegating or Divesting?* 115 NW. U. L. REV. 88 (2020).

18. See, e.g., Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 HARV. L. REV. 1758 (2023); Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021 (2006). The Trump administration has embraced this view via

adjudicatory power and is given the authority to say what the law is.<sup>19</sup> The current Supreme Court is evidently impressed by the Grand Narrative; we might even say that the Court is in the grip of it. With its emphasis on constitutional fundamentals and *Marbury*, *Loper Bright* is strong evidence of the power of the Grand Narrative.

There is a great deal to be said about the Grand Narrative, about whether *Loper Bright* was correctly decided, and about whether the Court properly interpreted § 706. Short answer to the last question: It did not.<sup>20</sup> My focus here is on another question: What are the likely effects of the decision? I aim to offer not exactly an answer to that question, but an account of how to go about answering it. A large part of that account emphasizes what we do not know, and why we do not know it. Sometimes advances in knowledge come from understanding the limits of knowledge.

Still, some things are clear. *Chevron* was easily taken as a kind of counter-*Marbury* for the administrative state. *Loper Bright* is a counter-counter *Marbury*, or more simply, this generation's *Marbury*. For those who believe in the separation of powers, and who are concerned about executive overreach, that is a cause for celebration, even by those who did not think that *Chevron* was quite so bad.

## II. HISTORY IS RUN ONLY ONCE

Ideally, we would like to run history twice. Over some suitable period—say, 1990 to 2020, or 2024 to 2054—we might see how the world looks under *Chevron*, and also see how it looks under *Loper Bright*. We might find, for example, that agency interpretations of law are upheld 70 percent of the time in *Chevron* World, but 55 percent of the time in *Loper Bright* World. Or we might find that the Environmental Protection Agency has a validation rate of 55 percent in *Chevron* World, but a validation rate of 45 percent in *Loper Bright* World. If we do this right, we would be able to overcome relevant confounds (including selection effects, on which more below), and we might obtain a clear sense of the difference between the two worlds.

Because history is only run once, a projection of the effects of *Loper Bright* is much more challenging. Suppose that agency

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Executive Order. See Exec. Order No. 14,215, 90 Fed. Reg. 10447, 10447 (Feb. 18, 2025).

19. See, e.g., Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187 (2016).

20. In brief, the Court concluded that § 706 is inconsistent with *Chevron*, when an understanding of the text, in context, demonstrates that it is not. See Cass R. Sunstein, *Chevron As Law*, *supra* note 3.

interpretations were upheld 70 percent of the time from 2013 to 2023, and that they are upheld 55 percent of the time from 2025 to 2035. Is *Loper Bright* responsible for that 15 percent shift? Not necessarily. Perhaps agency interpretations were more reckless in the later period. Perhaps judges were more ideological in the former period (or the latter). Perhaps the high validation rate in the earlier period resulted from judicial receptivity to decisions of the Biden administration, and perhaps the lower rate in the latter period resulted from judicial skepticism about the decisions of the Trump administration. Perhaps the major questions doctrine<sup>21</sup> came to the fore in the latter period; perhaps that doctrine, and not *Loper Bright*, is responsible for the 15 percent shift. Before-and-after numbers tell us too little, and perhaps very little. To get ahead of the story, it would not be amazing if the Trump administration has a strong record in Court from 2025 to 2027, even under *Loper Bright*; the reason might be receptivity of the relevant judges to the regulations of the Trump administration, whether *Chevron* or *Loper Bright* is the law.

There is a further point. In any period that is not terribly short, there will be twists and turns in outcomes, regardless of whether the law is formally changed. We could imagine *Chevron* 1.0: an era in which the idea of deference was front and center, and in which agencies prevailed at an especially high rate. We could imagine *Chevron* 2.0: an era in which the idea of independent judicial judgment at Step One (animated by *Marbury*) was front and center, and in which agencies did not prevail at an especially high rate. We could easily imagine *Loper Bright* 1.0: an era in which the demise of *Chevron* greatly emboldened lower courts (with *Marbury* in mind), and in which agencies lost at an especially high rate. We could easily imagine *Loper Bright* 2.0, or a return of the repressed: an era in which the kinds of institutional judgments that animated *Chevron* returned to the judiciary, and in which various tools, made available by *Loper Bright*, led to a situation in which agencies prevail at an especially high rate. We could even imagine a *Loper Bright* 3.0: an era in which the various tools made available by *Loper Bright* led to a situation in which agencies prevail at a higher rate than they ever did under *Chevron*. Clio, the goddess of history, can be a prankster.

But let us back up a bit. It is obvious that under *Chevron*, agency

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21. See *West Virginia v. EPA*, 597 U.S. 697, 732 (2022) (defining the major questions doctrine).

interpretations of law did not always survive judicial review.<sup>22</sup> Often those interpretations were struck down under Step One; sometimes (not so often) they were struck down under Step Two.<sup>23</sup> Under *Loper Bright*, agency interpretations of law will not always fail judicial review. Sometimes courts will conclude that the agency's interpretation is simply correct. Sometimes courts will reach that conclusion after attending respectfully to the agency's justification for its decision (more below on this). Agencies have a strong interest in having their decisions upheld in court, which is one reason that they usually labor long and hard on the legal issues.

*Loper Bright* increases agencies' incentive to labor long and hard—though admittedly some agencies, and some administrations, take more legal risks than others, for reasons that are independent of *Chevron* and *Loper Bright*. Importantly, *Loper Bright* also gives greater authority to offices of general counsel within the various agencies, who will now be in a position to say, “This is the interpretation that courts will most likely uphold,” as opposed to, “You can interpret the statutory ambiguity in ways A, B, and C.”<sup>24</sup> *Loper Bright* shifts agency lawyers away from identifying policy spaces and toward offering point estimates.

### III. TWO REGIMES: ON DEFERENCE AND DELEGATION

But these points are too abstract. It is not possible to understand the effects of *Loper Bright* without getting clear on its meaning, and also on that of *Chevron*. Under *Chevron*, what counts as an ambiguity?<sup>25</sup> Suppose that a court believes, with 70 percent confidence, that the agency is wrong. Does the agency lose under Step One?<sup>26</sup> What

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22. See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 531–32 (2007) (holding EPA had statutory authority to regulate certain emissions despite EPA's argument that Congress assigned that authority to the Department of Transportation).

23. See Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 34–35 (2017).

24. See E. Donald Elliott, *Chevron Matters: How the Chevron Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 VILL. ENV'T L.J. 1, 11–12 (2005) (suggesting that *Chevron* shifted the role of agency lawyers from offering a “point estimate” to offering a “policy space”). *Loper Bright* takes us nearly back to point estimates—but not quite, for reasons sketched below.

25. See Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2121 (2016) (explaining that determining if a statute is ambiguous often involves a difficult calculus).

26. For data, see generally Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 832 (2006) (providing data regarding how often the Court finds ambiguity).

if the court's level of confidence is 60 percent, or 80 percent? If *Chevron* is taken to call for judicial invalidation if a court is 60 percent sure that the agency is wrong, *Loper Bright* will have much less of an impact than if *Chevron* is taken to call for judicial invalidation only if a court is 80 percent sure that the agency is wrong. It seems safe to say that over the years, the Supreme Court took an increasingly firm hand under both Step One and Step Two.<sup>27</sup> And what is the meaning of Step Two? If it calls for careful scrutiny of the agency's choice, the difference between *Chevron* and *Loper Bright* will not be so sharp.

And what, exactly, is the framework established by *Loper Bright*? The Court insisted on independent judicial review of legal questions under the APA; that is the central theme.<sup>28</sup> It is what we might call the music of *Loper Bright*, its chorus, its refrain, its *Marbury*-ness. At the same time, the Court qualified that central theme in various ways.

#### A. Skidmore, *Alive and Kicking*

First, the Court noted “that the informed judgment of the Executive Branch—especially in the form of an interpretation issued contemporaneously with the enactment of the statute—could be entitled to ‘great weight.’”<sup>29</sup> It warmly embraced *Skidmore v. Swift & Co.*,<sup>30</sup> which calls not for deference, but for respectful attention to the views of the relevant agency.<sup>31</sup> There the question before the Court was what counted as “waiting time” and what counted as “working time.”<sup>32</sup> The Court said this:

We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.<sup>33</sup>

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27. See, e.g., *Michigan v. EPA*, 576 U.S. 743 (2015).

28. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 394 (2024).

29. *Id.* at 388.

30. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

31. *Id.* at 140.

32. See *id.* at 136.

33. *Id.* at 140.

The Court ended up accepting the interpretation of the administrator, not because it was binding, and not because it deserved “deference,” but because it was reasonable and because it deserved to be given weight. After *Loper Bright*, it is safe to predict that this passage will be increasingly important (and often quoted). Consider in this light *Chevron* itself, where the EPA defined “source” to include a plant-wide “bubble.”<sup>34</sup> Under *Loper Bright*, the court is in the driver’s seat, but it might give “great weight” to the agency’s view, and so uphold it.<sup>35</sup> Is that the likely course for the future? Will *Chevron* cases be *Skidmore* cases, and come out favorably to the agency, much of the time? The answer might turn out to be “yes,” at least where technical issues are involved.

### B. Mixed Questions

Second, the Court preserved the idea, which it associated with *Gray v. Powell*<sup>36</sup> and *NLRB v. Hearst Publications*,<sup>37</sup> that deferential review is appropriate in cases that involve “factbound determinations.”<sup>38</sup> Consider the question whether newsboys qualify as employees within the meaning of the National Labor Relations Act (the issue in *Hearst*),<sup>39</sup> or whether a coal-burning railroad can count as a coal “producer” under the Bituminous Coal Act of 1937 (the issue in *Gray v. Powell*).<sup>40</sup> As the *Loper Bright* Court had it, pure questions of law are for judges (*Marbury* again). But it noted that under *Gray v. Powell* and *Hearst*, “a different approach should apply where application of a statutory term was sufficiently intertwined with the agency’s factfinding.”<sup>41</sup>

The *Loper Bright* Court was not unambivalent about that different approach, but it did not reject it.<sup>42</sup> It did signal the possibility that

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34. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 840 (1984).

35. There is a question about consistency over time. *Chevron* allowed departures. *See id.* at 857–58 (discussing how the EPA changed its understanding of the meaning of “source” under the Clean Air Act after a change in administration), *Nat’l Cable & Telecomms. Ass’n. v. Brand X Internet Servs.*, 545 U. S. 967, 981–82 (2005). It is much less clear that *Loper Bright* will allow departures, except perhaps in cases in which Congress has explicitly or implicitly given agencies discretion, as with terms like “appropriate” or “reasonable” (or “source”?).

36. *Gray v. Powell*, 314 U.S. 402 (1941).

37. *NLRB v. Hearst Publ’ns*, 322 U.S. 111 (1944).

38. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 370 (2024).

39. *Hearst*, 322 U.S. at 120.

40. *Powell*, 314 U.S. at 403.

41. *Loper Bright*, 603 U.S. at 389.

42. The very category of mixed questions raises puzzles. In my view, there is no such

Congress delegated relevant authority to the agency. As the Court had it, the *Hearst* decision recognized that Congress had “‘assigned primarily’ to the Board the task of marking a ‘definitive limitation around the [relevant] term,’” which was “employee.” That brings us to the question of delegation.

### C. Delegations

The most fundamental point is that the *Loper Bright* Court made it clear that Congress may have explicitly or implicitly granted interpretive authority to the agency—and that courts should respect that grant.<sup>43</sup> In so saying, the Court firmly (and crucially) rejected the view that Congress lacks the constitutional authority to grant interpretive<sup>44</sup> authority to agencies.<sup>45</sup> It follows that if Congress wants to direct courts to respect the exercise of discretion by agencies in giving content to open-ended terms, it can do so, consistent with *Marbury*. The Court said this:

In a case involving an agency, of course, the statute’s meaning may well be that the agency is authorized to exercise a degree of discretion. Congress has often enacted such statutes. For example, some statutes “expressly delegate[]” to an agency the authority to give meaning to a particular statutory term. Others empower an agency to prescribe rules to “fill up the details” of a statutory scheme, or to regulate subject to the limits imposed by a term or phrase that “leaves agencies with flexibility,” such as “appropriate” or “reasonable.”

When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the

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category. Any supposedly mixed question should be divided into two components: one involves fact, and the other involves law. Consider the question whether newsboys count as employees. There is a question of fact: What do newsboys do, in fact? Then there is a question of law: Do people who do what newsboys do count as employees, as a matter of law? There is no separate category of mixed questions.

43. For a brilliant discussion on this point, see Vermeule, *supra* note 7.

44. We can quibble over the word. Perhaps the Court is best understood to say that in deciding the meaning of a term like “reasonable” or “appropriate,” the agency is given the authority to make policy. Fine. That’s good enough. Note also that the Court recognized that there are constitutional constraints on Congress’ power of delegation. Those constraints should be understood to be those of Article I (the nondelegation doctrine), not Article III; if they were the latter, the whole discussion would make no sense.

45. That view is expressed in *Loper Bright* by Justice Thomas, see *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 414–15 (2024) (Thomas, J., concurring), and also Justice Gorsuch, see *id.* (Gorsuch, J., concurring) at 15–20, and is elaborated in Hamburger, *Chevron Bias*, *supra* note 19.

will of Congress subject to constitutional limits. The court fulfills that role by recognizing constitutional delegations . . . .<sup>46</sup>

There is a lot there. The Court should not be taken to be restoring *Chevron* through another route. Not at all. That would be an overstatement, and even worse, it would be a misstatement. The Court is emphatically not saying that courts should defer to agency interpretations of law. But it *is* saying that certain terms, such as “reasonable,” can be taken to be a delegation of authority to the agency. Might that be true of the word “source,” at issue in *Chevron* itself? Might it be true of the word “harm,” at issue in the *Sweet Home* case?<sup>47</sup> Might it be true of the word “significant,” central to regulation under the Occupational Safety and Health Act?<sup>48</sup> Might it be true of a significant assortment of cases previously decided under the *Chevron* framework?

The best answer to most of these questions is “no”; *Loper Bright* did not mean to suggest that ambiguous words are delegations. It said just the opposite. The idea of implicit delegation should probably be limited to broad terms (“appropriate” and “reasonable,” and perhaps “feasible” and “significant”). Still, these questions do not have obvious answers. The only point is that the effects of *Loper Bright* depend in part on the meaning of the quoted paragraph. We could easily imagine a future in which *Loper Bright* is taken to express a “mood,”<sup>49</sup> requiring courts to take significantly far more responsibility for statutory interpretation than some courts had taken in the past. In my view, that is likely. But we could also (if less easily) imagine a future in which *Loper Bright* allows, through (1) the retention of *Skidmore* and (2) the idea of implicit delegation, something not radically different from the regime of *Chevron* between (say) 2014 and 2024. If *every* agency interpretation is an occasion for *Skidmore* respect, and if *some* agency interpretations are a response to a delegation from Congress, then *Loper Bright* could lead courts to uphold a large number of agency interpretations. That is a possible future. Is it even imaginable that under *Loper Bright*, the validation rate will rise? It is. More on this to come.

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46. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 394–95 (2024) (internal citations omitted).

47. *Babbitt v. Sweet Home Chapter of Cmty. For a Great Or.*, 515 U.S. 687, 692 (1995).

48. *Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607, 655 (1980).

49. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951); *see Vermeule, supra* note 7.

#### D. Chevron Under Loper Bright

Turn specifically to *Chevron* itself, now to be decided under *Loper Bright*. Does the word “source” mean a plant-wide “bubble,” or does it mean a smokestack? You could stare at the word, in context, for a long time without knowing how to answer that question.<sup>50</sup> One way to resolve the case would be to see it as a rerun of *Skidmore*. The agency’s expertise, and the thoroughness of its consideration, might suggest that its view deserves “respect”—which means that the agency should prevail under *Loper Bright*. A challenge for this view is that the EPA’s plant-wide definition was not contemporaneous with enactment of the statute and was hardly long-standing; indeed, it represented a shift (during the Reagan administration) from a previous view (during the Carter administration). But perhaps *Skidmore* is nonetheless the right framework, and perhaps the agency should nonetheless prevail.

If so, would the agency’s view, once upheld, be frozen? Could a later administration choose a different view? These are crucial questions. The best reading of *Loper Bright* might well be that the court’s interpretation at Time One, informed by the agency, is indeed frozen, and that the agency may not change it at Time Two or Time Three.<sup>51</sup> If so, *Loper Bright* eliminates a major characteristic (virtue?<sup>52</sup>) of the *Chevron* regime, which is that different administrations could make policy shifts under ambiguous statutory terms, so long as those shifts did not defy congressional instructions. Perhaps shifts are now illicit, once a court has announced what the statute means.

But under *Loper Bright*, there is another way to approach that issue and *Chevron*, signaled above, and that way would allow shifts over time and across administrations. Perhaps the word “source,” undefined, is an implicit delegation to the EPA. Perhaps it is, in context, akin to the word “reasonable” and “appropriate.” If so, *Chevron* would come out the same way in 2025 as it did in 1984, and for this *Loper Bright*-compatible reason: Congress (implicitly) authorized the EPA to define “source” as it reasonably chose. If this is the post-*Loper Bright* understanding of how to approach *Chevron* itself, then agencies will win in a significant number of cases, and they may shift over time.

It is not at all clear that *Chevron* would be seen in this way, post-

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50. See Cass R. Sunstein, *Chevron Without Chevron*, 2018 SUP. CT. REV. 59 (2018).

51. If so, *Loper Bright* overrules *Brand X*—and it probably does.

52. See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514–15 (1989).

*Loper Bright*; the word “source” is less easily taken as a delegation than the word “reasonable.” *Chevron*-type cases would more naturally be taken as *Skidmore* cases. But finding an implicit delegation is not out of the question.

#### IV. THREE FACTORS

To think clearly about the effects of *Loper Bright*, we need to broaden the viewscreen. Whether a court will uphold an agency’s interpretation of law depends on number of factors, not just on deference rules. The latter rules matter, but they might be dominated by other factors. Three such factors are particularly important.

##### A. *Canons of Construction*

Canons of construction can be helpful or harmful to agencies, depending on what they are. Suppose that courts deploy the avoidance canon<sup>53</sup>; suppose too that an agency’s interpretation raises a serious constitutional question. If so, agencies would lose even under *Chevron*. So too, the canon against retroactivity,<sup>54</sup> the canon in favor of Native American tribes,<sup>55</sup> and the major questions doctrine<sup>56</sup> might lead to invalidation; they would likely trump *Chevron*, even if *Chevron* is or were in place. The simplest point is that a robust set of canons of construction, unfavorable to agencies, might produce a large number of invalidations even under *Chevron*. The slightly less simple point is that a robust set of canons of construction, favorable to agencies, might produce a large number of validations under *Chevron* or *Loper Bright*. So too, a robust set of canons, favorable to agencies, might produce a large number of validations even under *Loper Bright*.<sup>57</sup> Is that an

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53. See, e.g., *Kent v. Dulles*, 357 U.S. 116, 128–29 (1958).

54. See, e.g., *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (“Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.”).

55. See, e.g., *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1444–45 (D.C. Cir. 1988) (stating that “canons of construction applicable in Indian law” require that “[s]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit” (quoting another source)).

56. See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160–61 (2000); *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 594 U.S. 758, 764–65 (2021) (per curiam); *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 595 U.S. 109, 117 (2022) (per curiam); *West Virginia v. EPA*, 597 U.S. 697, 723 (2022).

57. It is noteworthy that current law does not seem to have any such canons! But if an agency is interpreting a statute so as to avoid a serious constitutional question, or to protect Native American tribes, or to avoid extraterritoriality, it could benefit from the applicable canon.

imaginable future? It is definitely imaginable, certainly over long time horizons.

*B. Textualism and Purposivism*

Textualists might be inclined to invalidate a large number of agency decisions; purposivists might be inclined to uphold a large number of agency decisions. The opposite might be true. We cannot know in the abstract whether one or another approach will lead to more or less in the way of invalidations. Everything depends on what statutes say, on what their purposes plausibly are plausibly taken to be, and on what agencies do. But it is fair to say that the choice of methodology can matter a great deal.

*C. Panel Composition: The Real World of Administrative Law*

We are now going to have to go into more unpleasant territory (and we might feel a little dirty there). Does the relevant panel consist of three Republican appointees? Three Democratic appointees? Two Republican appointees and one Democratic appointee? Two Democratic appointees and one Republican appointee?

Regrettably, the evidence shows that the answers to these questions matter a lot.<sup>58</sup> They might well matter far more than whether *Chevron* or *Loper Bright* is in place. Let us phrase it bluntly: *It is reasonable to think that under Chevron, a three-judge panel consisting of Republican appointees is more likely to invalidate an EPA interpretation of law unfavorable to industry than is a three-judge panel consisting of Democratic appointees operating under Loper Bright.* That is a long and complicated sentence, but the lesson should be plain. Under *Chevron*, there was plenty of room to strike down agency interpretations, and under *Loper Bright*, there is plenty of room to uphold them. Whether agency interpretations are upheld or struck down might well depend on something other than whether *Chevron* or *Loper Bright* provides the relevant framework. We can state the proposition more boldly: Whether agency interpretations are upheld

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58. Barnett & Walker, *supra* note 23, at 3; Kent Barnett, Christina L. Boyd & Christopher J. Walker, *The Politics of Selecting Chevron Deference*, 15 J. EMPIRICAL LEGAL STUD. 597, 597 (2018); Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2158 (1998); Kent Barnett, Christina L. Boyd & Christopher J. Walker, *Administrative Law's Political Dynamics*, 71 VAND. L. REV. 1463, 1468 (2018) (finding *Chevron* deference strongly constrains partisanship in judicial judgments); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 823 (2006).

or struck down might well depend more on the composition of an appellate panel than on whether *Chevron* or *Loper Bright* provides the relevant framework.

Let us be a bit more specific. Suppose that the Biden administration issues an environmental regulation that is challenged by industry as inconsistent with some provision of the Clean Air Act. Suppose the appellate panel consists of three Democratic appointees. The likelihood that the regulation will be upheld is significantly higher than if the panel consists of three Republican appointees.<sup>59</sup> Now suppose that the Trump administration issues an environmental regulation that is challenged by environmentalists as inconsistent with some provision of the Clean Air Act. Suppose the appellate panel consists of three Democratic appointees. The likelihood that the regulation will be struck down is significantly higher than if the panel consists of three Republican appointees. A great deal of the action, then, lies in the assignment of panel members, not in the applicability or the precise understanding of *Loper Bright*. A bit dirty, but true.

#### V. INVALIDATION RATES

It is certainly plausible to think that in coming years, the invalidation rate will be higher under *Loper Bright* than it would have been under *Chevron*. But if we find a validation rate of (say) 65 percent between 2013 and 2023, and a corresponding rate of 60 percent between 2025 and 2035, it is hard to draw clear or simple conclusions. Indeed, we would not know what to conclude if the invalidation rate *decreased* after *Loper Bright*.<sup>60</sup> That is because that a before-and-after accounting will not tell us what we need to know.

One reason involves selection effects. Consider litigators. Under *Chevron*, litigants should be less inclined to bring suit to challenge agency action than they would be under *Loper Bright*. The latter decision can and undoubtedly will be taken as an invitation to bring suit to challenge agency interpretations. “Come on in,” many lawyers will hear. It follows that a modest change in validation rates, or even no change in validation rates, would not mean that *Loper Bright* had

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59. See Miles & Sunstein, *supra* note 58.

60. Suppose that agencies lost a great deal under *Chevron* in some period between 2021 and 2024, because Biden administration regulations were struck down by Republican-appointed judges. Suppose that agencies won a great deal under *Loper Bright* between 2025 and 2028, because Trump administration regulations were upheld by Republican-appointed judges. Would that be even a little bit surprising?

no effect. If more suits are being brought, whatever change we observe would understate the effect of *Loper Bright*. A significant effect of the decision will be to increase the number of challenges to agency interpretations.

We should also expect selection effects on agencies themselves. Under *Chevron*, agencies should be expected to take risks that they would not take under *Loper Bright*. We do have to be careful here. Whether an agency will take a risk will depend on numerous factors, hardly limited to standards of judicial scrutiny. Any administration might decide to take big risks, perhaps because it has strong convictions, perhaps for political reasons. But other things being equal, *Loper Bright* should lead to an increase in caution. For this reason as well, it follows that a modest change in validation rates, or even no change in validation rates, would not mean that *Loper Bright* had no effect. Here again, whatever change we observe would understate the effect of *Loper Bright*.<sup>61</sup> An effect of the decision should be to produce more cautious interpretations on the part of agencies (other things being equal).

There are several studies of the effects of *Chevron*. They are the best empirical guides to the likely consequences of *Loper Bright*, but for the reasons hinted at thus far, the guidance they offer is quite limited. An important early study<sup>62</sup> found that after *Chevron*, agencies fared significantly better in court—not massively better, but significantly better. Professors Peter Elliott and Donald Schuck state that their “most important finding” is that over a period of twenty years, “the circuit courts are affirming agency decisions at a steadily increasing rate,” with “a rate that approximated 76% in 1984-85, and reached over 81% in 1985—just after *Chevron*.”<sup>63</sup> It is noteworthy that the rate increased steadily; Elliott and Schuck did not find a flat curve until *Chevron* and then a sudden shift upwards. But they did find that “[a]ffirmances increased by almost 15% after *Chevron*, and both remands and reversals declined by roughly 40%.”<sup>64</sup> Elliott and Schuck

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61. We do have to specify the relevant time horizon. It is reasonable to think that agencies would take more risks in the period between (say) 1990 and 2000, when *Chevron* was riding high, than in the period between 2020 and 2023, when *Chevron* seemed to be a zombie. For that reason, it is reasonable to doubt whether *Loper Bright* will have a large effect on agencies, which were already largely operating on the assumption that *Chevron* would not help them.

62. Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1037 (1990).

63. *Id.* at 1057.

64. *Id.* at 1058.

also found that some agencies showed higher post-*Chevron* validation rates than others, with a range of approximately 60 percent to 80 percent.<sup>65</sup>

Even bracketing the methodological questions (for example, sample size), we could read this evidence in different ways. *Chevron* might have given lower courts an immediate signal, a kind of yellow light for invalidation where they had previously seen green; perhaps courts received the signal. Or perhaps the composition of the courts changed, with a larger number of Reagan appointees, not inclined to strike down agency interpretations in the Reagan era. If so, *Chevron* did not drive the different numbers. Or perhaps litigators, for one or another reason, started to bring more or weaker cases. Public interest groups, alarmed by environmental and other decisions under the Reagan administration, might have decided to take more chances. If so, *Chevron* did not much matter. From the Elliott and Schuck data, we cannot draw confident conclusions about the effect of *Chevron*, or about what the data would look like if *Chevron* had never been decided.

Focusing on the Supreme Court, Professors William Eskridge and Lauren Baer found that rates of validations were similar regardless of whether *Chevron* (76.2 percent), *Skidmore* (73.5 percent), or de novo review (66.0 percent) was applied.<sup>66</sup> This is a striking and puzzling finding. It would be tempting to think that at least in the Supreme Court, the stated scope of review is essentially irrelevant: Justices follow their best understanding of the law, whatever the scope of review. Though that may be true, we should resist the temptation. One more time: The distribution of cases is not randomized. It might be that *Chevron* deference greatly matters, but that in *Chevron* cases, the agency interpretations, in the cases taken by the Supreme Court, were more adventurous than in the *Skidmore* cases, and that in the *Skidmore* cases, the agency interpretations were more adventurous than in the de novo cases. If agencies are affected by the prevailing standard of review, we would expect exactly that. Or it may be that everything depended on what cases the Court chose to hear, which is hardly a random sample. It follows that we cannot draw clear conclusions, from the Eskridge and Baer data, about the likely effects of *Loper Bright*.

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65. *Id.*

66. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1099 (2008).

Let us put it another way. Suppose we find that in the Supreme Court between 2025 and 2035, agencies win *Loper Bright* cases 85 percent of the time. Or suppose that we find that under *Loper Bright*, agencies win in the Court more than they ever did under *Chevron*. Should we conclude that *Loper Bright* is a great gift to agencies? Not necessarily. Perhaps the Court decided to take only those cases in which lower courts appeared to overreach in striking down agency interpretations of law. That would not be at all surprising.

The most comprehensive study, by Professors Kent Barnett and Christopher Walker and involving the courts of appeals, find that agency interpretations were significantly more likely to prevail under *Chevron* (77.4 percent) than under *Skidmore* (56.0 percent) or, especially, under de novo review (38.5 percent).<sup>67</sup> On its face, those findings seem to confirm standard understandings; they comport with expectations. It might be tempting to use them in support of the conclusion that *Loper Bright* will indeed lead to a downward shift in validations—perhaps in the vicinity of 21 percent, insofar as *Loper Bright* appears to retain (and shift to) *Skidmore*.

Perhaps so, but there are good reasons to hesitate before reaching that conclusion. Recall that *Loper Bright* both retains *Skidmore* and allows courts to find that Congress has delegated a degree of authority to agencies, which will vault an unknown percentage of cases into a framework closer to that of *Chevron*. Recall too that *Loper Bright* should be expected to encourage more suits attacking agency interpretations, which should be expected to lower the invalidation rate. Recall too that *Loper Bright* should be expected to induce more caution from agencies, which should also lower the invalidation rate. We do not know the magnitude of the various effects, which makes it hazardous to predict any shift as a result *Loper Bright*.

For Barnett and Walker, the most fundamental point has to do with an absence of randomization. Suppose that we observed, in a relevant period, validation rates of 75 percent in *Chevron* cases, *Skidmore* cases, and de novo cases. Or suppose instead that we observed, in that period, validation rates of 75 percent in *Chevron* cases, 50 percent in *Skidmore* cases, and 35 percent in de novo cases. What follows? Not a great deal. Agencies might have been relatively careless, or instead quite careful, in *Chevron* cases. Agencies might or might not have taken big risks in de novo cases. The *Chevron* cases

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67. Barnett & Walker, *supra* note 23, at 6.

might have involved politically contentious issues, and the *Skidmore* cases might not have involved such issues—or vice versa.

Because the findings in Barnett and Walker fit with so well with the doctrine at the time, and also fit with standard expectations, it would hardly be unreasonable to think that they tell us something important about the effects of *Chevron*. I tend to think that they do. To that extent, they strongly support the view that *Loper Bright* will lead to a decrease in validation rates, other things being equal. But that view is a matter of judgment; it is not compelled by the data.

## VI. POLITICS

I have noted that in *Chevron* cases, it has much mattered whether the panel consists of Republican or Democratic appointees, and also whether the agency's interpretation can be characterized as left-of-center or right-of-center.<sup>68</sup> In that sense, something like “politics” has been found to matter both on the Supreme Court and in the lower courts.<sup>69</sup> It is true that in this context as well, we do not have perfect randomization. But with respect to the Supreme Court and lower courts, the findings are much more than suggestive. If left-of-center Justices are far more likely to strike down agency decisions that are right-of-center than are right-of-center Justices, and if right-of-center Justices are far more likely to strike down agency decisions that are left-of-center than are left-of-center Justices, we would have to do some fancy footwork to explain that ideology does not matter. Or turn to the courts of appeals. Because assignment of cases is random, because the number of cases is so large, and because the behavior of Republican and Democratic appointees is so different and in the expected ways, we can be pretty confident that panel composition matters to judicial review of agency interpretations of law.

Does the shift from *Chevron* to *Loper Bright* matter on this count? That is, are we likely to see an increase, not necessarily in invalidation rates, but in the partisan splits among panels? The *Loper Bright* Court was not oblivious to this issue (even if its analysis was a bit lame):

Nor does a desire for the uniform construction of federal law justify *Chevron*. Given inconsistencies in how judges apply *Chevron*, it is unclear how much the doctrine as a whole (as opposed to its highly deferential second step) actually promotes such uniformity. In any

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68. Barnett, *Administrative Law's Political Dynamics*, *supra* note 58, at 1468.

69. See Miles & Sunstein, *supra* note 58, at 823.

event, there is little value in imposing a uniform interpretation of a statute if that interpretation is wrong. We see no reason to presume that Congress prefers uniformity for uniformity's sake over the correct interpretation of the laws it enacts.<sup>70</sup>

That answer is indeed a bit lame, because the evidence does indeed suggest that *Chevron* promoted uniformity, and because when and if judges disagree along partisan lines, we cannot exactly say that we are seeing “the correct interpretation of the laws.” Importantly, the best available research finds that in *Chevron* cases, the level of partisan division is far lower than in non-*Chevron* cases.<sup>71</sup> More specifically, Barnett et al. find that “the most liberal panels agree with conservative agency statutory interpretations only 18% of the time when they do not use *Chevron* deference but 51% when they do.” They also find that “the most conservative panels agree with liberal agency interpretations only 18% of the time without *Chevron* deference but 66% with it.” Those are staggeringly big differences.

To be sure, we can raise various questions about these data. While assignments are randomized, we do not have randomization between *Chevron* cases and non-*Chevron* cases. But it is singularly challenging to come up with a plausible explanation of why we should see much greater political divisions in non-*Chevron* cases than in *Chevron* cases. It is not at all challenging to suggest that because *Chevron* loaded the dice in favor of agencies, ideological differences between Republican and Democratic appointees would be compressed.

It therefore seems safe to predict that under *Loper Bright*, ideological differences within the courts of appeals will increase in cases involving agency interpretations of law. Those differences, compressed by *Chevron*, will decompress. By what margin? A good question. The numbers quoted above are suggestive.

## VII. THE GRAND NARRATIVE AND LIBERTARIAN ADMINISTRATIVE LAW

It is tempting to think that broadly speaking, *Chevron* was good for regulation and the regulatory state, and that *Loper Bright* is bad for regulation and the regulatory state. That temptation should be resisted. Things are much more complicated.

To be sure, it is not possible to mistake the ideological valence of

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70. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 403 (2024) (internal citation omitted).

71. See Barnett, *Administrative Law's Political Dynamics*, *supra* note 58, at 1468.

*Chevron* in recent years. Left-of-center lawyers and judges have tended to like it, and right-of-center lawyers and judges have tended to dislike it. We should see *Loper Bright* as part of a large array of rulings that show general skepticism about the constitutional status of the regulatory state and that seek, in the name of the Constitution, to constrain its discretion and its power.<sup>72</sup> *Loper Bright* is thus a leading exhibit in the rise (and rise) of the Grand Narrative and of libertarian administrative law, which can be found in all corners of existing doctrine, including the major questions doctrine,<sup>73</sup> the increased interest in the nondelegation doctrine,<sup>74</sup> the use of standing doctrine to discourage suits by regulatory beneficiaries,<sup>75</sup> the reluctance to review agency inaction, and the rise of fresh Article III and Seventh Amendment limits on agency power.<sup>76</sup>

*Loper Bright* is clearly a reflection of the power of the Grand Narrative, not least insofar as it is animated by *Marbury*. Libertarian administrative law, an impetus behind the Grand Narrative, is real, but its relationship to *Loper Bright* is not simple. *Chevron* was originally a right-of-center achievement.<sup>77</sup> The right liked it a lot, and the left disliked it a lot. The right saw *Chevron* as a way of disciplining judges (many of whom were left-of-center) and of empowering the executive branch (then in the hands of Republican presidents). Invoking *Marbury*, the left saw *Chevron* as a way of allowing underzealous or captured administrators to engage in deregulation, or weak regulation, without a sufficient check from judges, vindicating the law and speaking in the name of Congress.<sup>78</sup> *Chevron* itself was a case in point. It involved a kind of deregulation by the EPA, deplored by prominent environmental groups. *Chevron* told left-of-center judges: Hands off!

With respect to *Chevron*, the left and the right have flipped (and few people seem to have noticed). All this is a mystery in the sociology of American public law. One reason may be that in a certain period (2008 to 2016?), many people on the relevant right came to see

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72. See Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393 (2015); CASS R. SUNSTEIN & ADRIAN VERMEULE, *LAW AND LEVIATHAN 1* (2020).

73. See, e.g., *West Virginia v. EPA*, 597 U.S. 697, 723 (2022).

74. See, e.g., *Gundy v. United States*, 588 U.S. 128, 173–74 (2019) (Gorsuch, J., dissenting).

75. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561–62 (1992).

76. See, e.g., *SEC v. Jarkesy*, 603 U.S. 109, 169–70 (2024).

77. See Sunstein, *Chevron As Law*, *supra* note 3, at 1618.; see also Gregory A. Elinson & Jonathan S. Gould, *The Politics of Deference*, 75 VAND. L. REV. 475, 508 (2022) (explaining how “conservatives came to see that deference could be harnessed towards regulatory ends”).

78. See Sunstein, *Chevron As Law*, *supra* note 3, at 1618.

*Chevron* as a kind of gift, or blank check, to overzealous regulators, enabling them to go off on various larks of their own, unconstrained by acts of Congress. The Grand Narrative played a large role here, and so in particular did *Marbury*.

Another reason may be the rise of textualism, with which *Chevron* seemed to sit uncomfortably. By 2016 or so, *Chevron* seemed to be a serious problem to the relevant judges and Justices, and hardly a solution.<sup>79</sup> For their part, many people on the left came to see *Chevron* very much as the right did in the 1980s, as a way of empowering people with technical expertise and a degree of accountability, and of checking a judiciary that was sometimes driven by politics masquerading as law. *Loper Bright* ratified, and to some extent tracked, some of the arguments made against *Chevron*, principally by those on the left, in the 1980s.<sup>80</sup>

All this is to say that the consequences of *Loper Bright* for regulation and the regulatory state are less than self-evident. Under President Trump, or any Republican president, the decision could well be a problem for the executive branch, and a significant gift to the left. A Republican administration ought not to welcome *Loper Bright*, if its goal is to win in court. Under a Democratic president, by contrast, *Loper Bright* might be a significant gift to the right. It is reasonable to think that whether *Loper Bright* is a problem for regulation and the regulatory state depends less on its framework, and on the jettisoning of *Chevron*, than on the role of the major questions doctrine and on whether the judges and Justices who apply *Loper Bright* have a general antipathy to regulatory action. In other words, a judge can approve of *Loper Bright* without approving of libertarian administrative law, and a judge can approve of *Chevron* while thinking that libertarian administrative law is the greatest thing since sliced bread (or *Lochner v. New York*<sup>81</sup>).

Notwithstanding these points, it is clear that for better or for worse (in my view for worse<sup>82</sup>), *Loper Bright* is unlikely to be good for

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79. See generally Hamburger, *supra* note 19.

80. See, e.g., Cynthia Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989) (arguing that *Chevron* unbalanced the separation of powers by weakening the judicial role); Sunstein, *supra* note 3 (making an assortment of arguments suggesting that ambiguities should not be taken to be delegations). Was the latter author on the left? I suppose so.

81. *Lochner v. New York*, 198 U.S. 45 (1905).

82. See generally CASS R. SUNSTEIN, *THE COST-BENEFIT REVOLUTION* (2019) (defending the regulatory state so long as it seeks to increase social welfare and is informed by cost-benefit

regulation and the regulatory state, not only or mostly because it overrules *Chevron*, but because it licenses judges, opposed to regulation and the regulatory state, to strike down agency action—and because there are many such judges. Under President Trump, we ought not to expect a large number of aggressive regulations protecting health, safety, and the environment, which means that *Loper Bright* and the Grand Narrative will not coalesce into a series of judicial attacks on the administrative state (as they might have, and might eventually, under a Democratic president). But under President Trump, deregulatory initiatives might well run into trouble under *Loper Bright*, more so than they would have under *Chevron*, at least before Democratic-appointed presidents.

### VIII. YELLOW LIGHTS

Here is a pretty safe prediction: Because of *Loper Bright*, lower courts will, in the coming years, invalidate some nontrivial number of agency interpretations that they would have upheld under *Chevron*. The reason is that there is a real delta between *Chevron*'s framework, counseling deference in cases of ambiguity, and the *Loper Bright* Court's emphasis on *Marbury* and the need for independent judicial interpretation of law. This is so notwithstanding the *Loper Bright* Court's embrace of *Skidmore* "respect" and its clear recognition of explicit and implicit delegations. Judges who are disinclined to uphold agency interpretations—sometimes, alas, on ideological grounds—will feel strongly empowered by *Loper Bright*.

Nonetheless, we could imagine very different receptions of *Loper Bright* in the lower courts and indeed in the Supreme Court itself. On one end of the spectrum, some judges (and Justices) might be inclined to emphasize the idea of "respect" and the endorsement of *Skidmore*, and also the fact that in some number of cases, we might have an explicit or implicit delegation of policymaking (interpretive) discretion. Such judges (and Justices) might aim to recreate something not so radically different from the regime of *Chevron*. On the other end of the spectrum, some judges (and Justices) will be inclined to emphasize that *Skidmore* does not entail deference at all, and will be quite reluctant to find an explicit or implicit delegation. Such judges (and Justices) would create a radically different regime from that of *Chevron*. It makes sense to expect the latter view to be dominant in the

near future, but the day is young; *Loper Bright* is an infant.

For the moment, the Court has sent a strong signal, and it has expressed a mood. Lower courts will get the signal and understand the mood. For invalidations, *Chevron* was a yellow light. *Loper Bright* is a (bright) green light.

It is important and true that *Chevron* has not exactly been riding high in recent years, which means that the impact of *Loper Bright* should be expected to be less substantial than it would otherwise be. More fundamentally, it is vague to predict a “nontrivial” shift toward more invalidations. An increase in the invalidation rate of three percent or four percent, other things being equal,<sup>83</sup> would be surprisingly small. An increase of thirty percent or forty percent, other things being equal, would be shockingly large. Within those numbers, we might be able to come up with reasonable lower and upper bounds, but they would be both speculative and of limited value. Whether there will be some kind of identifiable “skew” in the application of *Loper Bright* (say, a skew against certain forms of regulation) will depend on the current and future composition of the federal judiciary. I have emphasized that the agencies overseen by a Democratic president, confronted by Republican appointees, would not be likely to fare well under *Loper Bright*, and that agencies overseen by a Republican president, confronted by Republican appointees, would be likely to fare far better under *Loper Bright*. Still, a yellow light is yellow, and a green light is green. Lower court judges are not colorblind.

It should be obvious that *Loper Bright* will be an unwelcome challenge for agencies, whether they are engaged in regulation or deregulation. And in an era in which the Grand Narrative is ascendent, *Loper Bright* is likely to be a significant part of an effort to weaken agency authority, perhaps especially when agencies intrude on traditional liberty and property interests.

But the broader lesson is the simplest. *Loper Bright* is our *Marbury*. Sooner rather than later, it will be seen as such during predictably intense conflicts between the executive branch and the federal judiciary.

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83. With that phrase, I am intending to bracket selection effects.