Mo AI, *Skidmore* Problems: Governing in Our *Loper Bright* Era

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Abstract: Chevron *is dead.* Skidmore *is dead-lettered. Long live* Loper Bright*. Under* Loper Bright Enterprises v. Raimondo, *judges have become the primary policymakers of the administrative state: required to determine the single, best, and only permissible interpretation of any ambiguous statute, no matter how complex, technical, or impenetrable, and without affording binding weight to the expert agencies Congress created. Although the majority repeatedly praised* Skidmore *as it overruled* Chevron *deference, its framework implicitly rejects* Skidmore's *central premise: that some cases of statutory interpretation warrant decisive weight to agency expertise. The majority's assurance that "Congress expects courts to handle technical statutory questions" and agencies have "no special competency" has no real historical or empirical basis.*

Loper Bright*'s coronation of judicial policymakers poses an incredible challenge for federal governance. As Justice Kagan's dissent emphasized, nowhere is the challenge clearer than in artificial intelligence (AI). Congress already struggles to regulate emerging technologies and drafts policy assuming agencies, not courts, will fill statutory gaps, make policy choices, and apply technical expertise. Courts, by contrast, have demonstrated immense difficulty applying Federal Rule 702 for expert evidence. In this* Loper Bright *era, where ambiguity triggers judicial primacy, any court can generate a binding, ossified construction of any statute, including those governing AI, regardless of whether the interpretation accounts for the technical complexities or evolving regulatory needs.*

Still, the other branches are not without any tools. Congress can codify Chevron *deference globally or in individual legislation. Agencies can defend their actions as fact-bound determinations of close, complex questions entitled to deference. Congress and the Executive Branch can expand reliance on soft law instruments like standards, certifications, and procurement requirements that shape behavior without formal rulemaking. And when rulemaking becomes too perilous, agencies can govern through*

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enforcement-first strategies and jawboning. Loper Bright *ultimately leaves the political branches with a choice: reassert policymaking authority or allow judicial "single best answers" to operate as national policy in fields where generalist courts inherently lack the tools to govern.*

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INTRODUCTION

"What rules are going to constrain the development of A.I.?"[1] This was the final question posed by Supreme Court Justice Kagan's dissent in *Loper*

[1] Loper Bright Enters. v. Raimondo, 603 U.S. 369, 479 (2024) (Kagan, J. dissenting).

Bright Enterprises v. Raimondo,[2] which overruled *Chevron v. Natural Resources Defense Council*[3] and the forty years of federal court deference to executive agency policymaking, known as *Chevron* deference. The *Loper Bright*[4] majority held that *Chevron*'s deference to an agency's interpretation violates the Administrative Procedure Act's requirement that courts independently determine statutory and legal questions.[5] Instead, under *Loper Bright*, judges are required to determine the single, best, and only permissible interpretation of any ambiguous statute, no matter how specialized the subject matter or how limited judicial expertise may be.[6] This Article argues that *Loper Bright*'s transformation of judges into final policymakers fundamentally undermines the administrative state's ability to govern, and that artificial intelligence ("AI") is the clearest case study of that failure.

As the Supreme Court has assumed this policymaking role, they have increasingly received the same criticism often directed at other Washington, D.C., policymakers. Within weeks of *Loper Bright*, lower court judges cited *Loper Bright* to block agency rules[7] designed to protect workers' rights[8] and LGBTQ rights.[9] More broadly, the Court's rulings on presidential immunity, executive authority, abortion, LGBTQ rights, and immigration, have placed

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[2] Id.

[3] 467 U.S. 837 (1984).

[4] Josh Blackman, And Don't Call It *Loper*: The Name of the Company is *Loper Bright Enterprises*, Volokh Conspiracy (June 30, 2024, at 20:55 ET), https://reason.com/volokh/2024/06/30/and-dont-call-it-loper/.

[5] *Loper Bright*, 603 U.S. at 396 ("The deference that *Chevron* requires of courts reviewing agency action cannot be squared with the APA."); id. at 412 ("*Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires."); see infra Subsection I.C.1 (discussing the majority overruling *Chevron*).

[6] See infra Subsection I.C.1 (discussing the *Loper Bright* majority opinion).

[7] Nate Raymond, Democrats Push US Senate Bill to Reverse Supreme Court Ruling Curbing Agency Power, Reuters (July 23, 2024, at 17:31 ET), https://www.reuters.com/legal/democrats-push-us-senate-bill-reverse-supreme-court-ruling-curbing-agency-power-2024-07-23/ (discussing six lower-court judges' citation of *Loper Bright* to block rules in the weeks following the decision).

[8] On the same day as the *Loper Bright* opinion was issued, Judge Sean Jordan of the Eastern District of Texas granted a preliminary injunction against the Department of Labor's overtime pay rule based on *Loper Bright*'s reasoning in Texas v. United States Dep't of Lab., 738 F. Supp. 3d 807, 812 (E.D. Tex. 2024), then later granted summary judgment against the Dept. of Labor and vacated the rule in Texas v. United States Dep't of Lab., 756 F. Supp. 3d 361, 399 (E.D. Tex. 2024); see also Daniel Wiessner, Texas Wins Court Block on Biden Overtime Pay Rule, Reuters (June 28, 2024, at 20:29 ET), https://www.reuters.com/legal/texas-wins-court-block-biden-overtime-pay-rule-2024-06-29/.

[9] Nate Raymond, Kansas Judge Blocks Biden's LGBTQ Student Protections in 4 More States, Reuters (July 3, 2024, 11:23 ET), https://www.reuters.com/legal/government/kansas-judge-blocks-bidens-lgbtq-student-protections-4-more-states-2024-07-03/ (discussing a decision issued four days after *Loper Bright*, blocking Department of Education's LGBTQ student protections based on *Loper Bright*); Kansas v. U.S. Dep't of Educ., 739 F. Supp. 3d 902 (D. Kan. 2024), *appeal dismissed per stipulation*, No. 24-3097, 2025 WL 1914861 (10th Cir. Mar. 13, 2025).

it front and center of national political debates. Today, the "public views the court as a right-leaning political institution"[10] and "Americans' confidence in [our] judicial system and courts dropped to a record low of 35%."[11] This is the backdrop against which *Loper Bright* is requiring judges to become policymakers.

This public dissatisfaction is compounded by doctrinal confusion. As Cary Coglianese and Daniel Walters observe, the decision triggered "an enormous outpouring of attention," but "there is no firm collective sense yet of precisely what *Loper Bright* did or of how it will matter."[12] In the first month following the decision, more than one hundred op-eds and scholarly commentaries sought to predict its effects,[13] forming what they describe as a "prediction industrial complex."[14] These early reactions fall into competing predictions ranging from "nothing much will change" to claims that the administrative state will be fundamentally reshaped in operation and ideology.[15] The divergence of these assessments reveals the uncertainty the Court unleashed: even core questions about *Loper Bright* remain subject to deep disagreement among legal scholars and practitioners.

Further, lower courts are uncertain about *Loper Bright*'s mandate. In *Bastias v. U.S. Attorney General*, the Eleventh Circuit issued a per curiam decision with three separate concurrences reflecting a complete lack of consensus over sixteen months after *Loper Bright*. Despite the Circuit's prior *Bastias* opinion being vacated and remanded by the Supreme Court specifically in light of *Loper Bright*, one judge held that they were still bound by a prior *Chevron*-based opinion, in part because *Loper Bright* stated that it did "not call into question prior cases that relied on the *Chevron* framework."[16] The second judge held that they were not bound by that prior

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[10] Jeffrey M. Jones, New High Say Supreme Court Is Too Conservative, Gallup (Oct. 1, 2025), https://news.gallup.com/poll/695759/new-high-say-supreme-court-too-conservative.aspx. (summarizing polling showing that 43% of Americans say Supreme Court is too conservative, 36% "about right"; that the Court's 42% job approval remains near record low, and that less than a majority trust the judicial branch for fourth straight year).

[11] Lindsay Whitehurst, Americans' Confidence in Judicial System Drops to Record Low, PBS News (Dec. 17, 2024, 10:42 ET), https://www.pbs.org/newshour/politics/americans-confidence-in-judicial-system-drops-to-record-low (discussing that the steep drop in trust is markedly different from other wealthy nations, and instead mimics countries that saw a return of military rule (Myanmar), civil war (Syria), and deep economic and political turmoil (Venezuela)).

[12] Cary Coglianese & Daniel Walters, The Great Unsettling: Administrative Governance After *Loper Bright*, 77 Admin. L. Rev. 1, 7 (2025).

[13] Id. at 18.

[14] Id. at 7, 39.

[15] Id. at 22, 18-23 (collecting published commentaries about the effects of *Loper Bright*).

[16] Bastias v. U.S. Att'y Gen., 158 F.4th 1188, 1194 (11th Cir. 2025) (Newsom, J., concurring) (per curiam) (quoting *Loper Bright*, 603 U.S. at 412, and concluding that the *Loper Bright* decision overruled *Chevron* but "did so only on a prospective basis").

opinion because *Loper Bright* expressly "overruled" *Chevron.*[17] The third judge concluded that "the question is far from settled."[18] Even within a three-judge panel, the meaning of *Loper Bright* is contested.

These political and doctrinal challenges are the backdrop for the specific problem this Article examines: the governance of AI. The U.S. has long needed to govern AI and its impact on American lives, yet has been incapable of doing so. In recent years, the U.S. Congress has held hearings assessing the effects of AI on everything from the criminal legal system,[19] data privacy,[20] Section 230[21] content moderation,[22] to antitrust law,[23] human rights,[24] children's mental health,[25] and child sexual exploitation online.[26] Yet no comprehensive federal legislation or regulation governs AI.[27] Instead, the Executive Branch is promoting "dismantl[ing]" what little AI

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[17] Id. at 1203 (Marcus, J. concurring).

[18] Id. at 1219 (Middlebrooks, J., concurring).

[19] AI in Criminal Investigations and Prosecutions: Hearing Before the Subcomm. on Crim. Just. and Counterterrorism of the S. Comm. on the Judiciary, 118th Cong. (2024), https://www.judiciary.senate.gov/committee-activity/hearings/ai-in-criminal-investigations-and-prosecutions.

[20] Legislative Solutions to Protect Kids Online and Ensure Americans' Data Privacy Rights: Hearing Before the Subcomm. on Com., Mfg., and Trade of the H. Energy and Com. Comm., 118th Cong. (2024), https://www.congress.gov/index.php/event/118th-congress/house-event/117146.

[21] Where Are We Now: Section 230 of the Communications Decency Act of 1996: Hearing Before the Subcomm. on Commc'ns and Tech. of the H. Energy and Com. Comm., 118th Cong. (2024), https://energycommerce.house.gov/events/communications-and-technology-subcommittee-hearing-where-are-we-now-section-230-of-the-communications-decency-act-of-1996.

[22] Preserving Free Speech and Reining in Big Tech Censorship: Hearing Before the Subcomm. on Commc'ns and Tech. of the H. Energy and Com. Comm., 118th Cong. (2023), https://energycommerce.house.gov/events/communications-and-technology-hearing-titled-preserving-free-speech-and-reining-in-big-tech-censorship.

[23] Reining in Dominant Digital Platforms: Restoring Competition to Our Digital Markets: Hearing Before the Subcomm. on Competition, Antitrust, and Consumer Rights of the S. Comm. on the Judiciary, 118th Cong. (2023), https://www.judiciary.senate.gov/committee-activity/hearings/reining-in-dominant-digital-platforms-restoring-competition-to-our-digital-markets.

[24] Artificial Intelligence and Human Rights: Hearing Before the Subcomm. on Hum. Rights and the Law of the S. Comm. on the Judiciary, 118th Cong. (2023), https://www.judiciary.senate.gov/committee-activity/hearings/artificial-intelligence-and-human-rights.

[25] Examining the Harm of AI Chatbots: Hearing Before the Subcomm. on Crime and Counterterrorism of the S. Comm. on the Judiciary, 119th Cong. (2025), https://www.judiciary.senate.gov/committee-activity/hearings/examining-the-harm-of-ai-chatbots.

[26] Big Tech and the Online Child Sexual Exploitation Crisis: Hearing Before the S. Comm. on the Judiciary, 118th Cong. (2024), https://www.judiciary.senate.gov/committee-activity/hearings/big-tech-and-the-online-child-sexual-exploitation-crisis.

[27] For a review of federal legislation and regulations governing AI, see AI Watch: Global Regulatory Tracker - United States, White & Case (Sept. 24, 2025), https://www.whitecase.com/insight-our-thinking/ai-watch-global-regulatory-tracker-united-states ("Currently, there is no comprehensive federal legislation or regulations in the US that regulate the development of AI or specifically prohibit or restrict their use.").

governance exists.[28] At the same time, Congress nearly passed legislation expressly prohibiting any state-level AI governance for ten years through null preemption,[29] leading to the White House stepping in to issue an Executive Order to preempt and challenge any state law that conflicts with White House AI policy.[30]

In the immediate aftermath of *Loper Bright*, commentators, including Justice Kagan, identified AI as the prime example of why courts alone cannot provide the necessary "flexible, future-proof" statutory meaning that emerging technologies require.[31] AI, with its rapid evolution and technical complexity, exposes the flaw in the *Loper Bright* majority's claim that courts have the ability to identify the single, best, and only permissible interpretation of any ambiguous statute. If *Loper Bright* forces courts to

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[28] Tom Wheeler, Trump's Executive Orders Politicize AI, Brookings (July 31, 2025), https://www.brookings.edu/articles/trumps-executive-orders-politicize-ai/ ("The Trump [AI policy initiative entitled *Winning the Race: America's AI Action Plan*] claims to 'dismantle unnecessary regulatory barriers' and 'achieve global dominance' in AI. But its vague and politicized mandates suggest the opposite."). This is especially true given that President Trump's Executive Order, Removing Barriers to American Leadership in Artificial Intelligence, Exec. Order 14179, 90 Fed. Reg. 8741 (Jan. 23, 2025), rescinded President Biden's Executive Order for the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence, Exec. Order No. 14110, 88 Fed. Reg. 75191 (Oct. 30, 2023).

[29] Chase DiFeliciantonio, Trump's Allies Wanted to Strip States' Powers on AI. It Backfired, Politico (July 2, 2025, at 10:00 ET), https://www.politico.com/news/2025/07/02/ai-regulation-trump-allies-state-powers-00428337.

[30] Exec. Order 14365, 90 Fed. Reg. 58499 (Dec. 11, 2025). The lawfulness of the Executive Order was immediately questioned. See Justin Papp, AI Order from Trump Might Be 'Illegal,' Democrats and Consumer Advocacy Groups Claim, CNBC (Dec. 12, 2025, at 14:31 ET), https://www.cnbc.com/2025/12/12/trumps-ai-order-democrats-consumers.html. For an earlier attempt, see Colin Wood, Defeated State AI Moratorium Finds New Life in Trump's AI Action Plan, StateScoop (July 23, 2025), https://statescoop.com/trump-ai-action-plan-state-moratorium/.

[31] Stacey Gray, Chevron Decision Will Impact Privacy and AI Regulations, Future of Privacy Forum (June 28, 2024), https://fpf.org/blog/chevron-decision-will-impact-privacy-and-ai-regulations/ ("In privacy and AI, fields in which technology and business practices are evolving rapidly, [*Loper Bright*] is especially important. Statutes must contain enough flexibility to remain effective over time, and inevitable ambiguities are likely to arise. . . . [A]s Congress grapples with passing a comprehensive privacy law, the decision adds a new challenge of ensuring flexible, future-proof language that simultaneously contains enough specificity to avoid as many ambiguities as possible—sure to be a unique challenge for technology regulation in years to come."); see Sara M. Baxenberg et al., The Supreme Court Overruled *Chevron*. What Comes Next For Telecommunications, Media, and Technology?, Wiley (July 1, 2024), https://www.wiley.law/alert-The-Supreme-Court-Overruled-Chevron-What-Comes-Next-For-Telecommunications-Media-and-Technology ("*Loper Bright* fundamentally changes the landscape of federal regulation. . . . [M]uch of the oral argument in *Loper Bright* centered on technologies like cryptocurrency, broadband, and artificial intelligence (AI). . . . [B]ecause these sectors are inherently dynamic[,] . . . [t]he nature of these technologies has often led Congress to lean heavily on sectoral agencies to fill in interpretive gaps—the precise kind of agency action that will no longer receive *Chevron* deference."); Yar R. Chaikovsky et al., *Chevron* Is Done — What Does Loper Mean for the PTAB and ITC?, White & Case (July 1, 2024), https://www.whitecase.com/insight-alert/chevron-done-what-does-loper-mean-ptab-and-itc ("[*Loper Bright*] will increase the opportunities for regulated companies to challenge agency rules . . . . The ruling also calls into question the powers courts will have to make judgments in the fields of science and tech (including A.I.).").

freeze the meaning of statutes regulating complex, emerging technologies that evolve daily, the consequences will be profound.

Part I traces the Supreme Court's eras of statutory interpretation—from *Skidmore*[32] to *Chevron*[33] to *Loper Bright*[34]—and explains how the *Loper Bright* majority not only overruled *Chevron* but also implicitly overruled *Skidmore*. It then examines Justice Kagan's dissent, which offers the most comprehensive critique of the majority's reasoning and uses AI to illustrate the institutional dangers of transforming courts into final policymakers.

Part II describes the governance problems created by *Loper Bright*'s judicial policymakers: Congress relies on agencies, not courts, to make policy choices; courts lack the institutional competence to resolve technical questions; Congress is unlikely to correct judicial policymaking; and the ubiquity of statutory ambiguity, especially for emerging technologies like AI, will ossify and balkanize outdated regulatory meaning.

Part III outlines how governance of AI is still possible, even in this *Loper Bright* era: Congress can codify *Chevron* deference into the APA or individual statutes; Congress and the Executive Branch can embrace soft law tools such as certifications, standards, and liability rules; and agencies can follow the *Loper Bright* majority's lead and defend their regulatory decisions as "fact-bound determinations," or, to avoid judicial review, agencies can rely solely on existing rules and informal efforts to encourage non-governmental actors to act.

I. WHO INTERPRETS STATUTES?

The key question for judicial review of agency legal decisions is: when a statute is ambiguous with respect to specific issues, should the courts defer to the executive branch's reasonable interpretation[35] or interpret the statute themselves?[36] This is a fundamental "who decides" question. This Part

[32] Skidmore v. Swift & Co., 323 U.S. 134 (1944).

[33] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984), *overruled by* Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024) ("[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").

[34] *Loper Bright*, 603 U.S. 369; see infra Subsection III.B.2 (discussing the *Chevron* majority opinion).

[35] Michael Herz, *Chevron* Is Dead; Long Live *Chevron*, 115 Colum. L. Rev. 1867, 1887 (2015) ("[Justice Stevens] ultimately accepted the EPA's views outright [as to the meaning of "source" under the Clean Air Act]." (citing *Chevron*, 467 U.S. at 843 n.9, 865)).

[36] For a review of the history behind judicial review of agency decisions, see Michael P. Healy, Reconciling Chevron, Mead, and the Review of Agency Discretion: Source of Law and the Standards of Judicial Review, 19 Geo. Mason L. Rev. 1, 4–25 (2011).

begins with a background of *Chevron*, the interpretive framework *Loper Bright* expressly overruled,[37] and *Skidmore*, the interpretive framework *Loper Bright* claims to have preserved but implicitly overruled.[38]

For the past forty years, *Chevron* held that as long as an agency used its proper executive authorities, processes, and powers, such as rulemaking and adjudication,[39] to implement an ambiguous statute, the agency's determination would be upheld as long as it was reasonable. In other words, as long as the agency was operating within its *Chevron* space, its interpretation would be upheld.[40] As much as the *Loper Bright* Court detested *Chevron*, it celebrated *Skidmore* as the landmark case where, as Justice Gorsuch's concurrence explained, "the Court returned to its time-worn path."[41] Under *Skidmore*, the courts are the interpreters, and agency interpretations are "not controlling upon the courts by reason of their authority," but offer "guidance," and at most have merely the "power to persuade."[42]

However, *Loper Bright* reveals the majority has not embraced *Skidmore*, but rather has adopted a much more judge-centered version of statutory interpretation.[43] To begin, the *Loper Bright* Court overturned *Chevron* specifically because it violated Section 706 of the APA,[44] not because of any

[37] See infra Section I.A.

[38] See infra Section I.B.

[39] See United States v. Mead Corp., 533 U.S. 218 (2001), for a summary of the characteristics of agency determinations that do and do not receive deference. Notice-and-comment rulemaking and formal adjudication typically get deference. Id. at 230. However, the fact that an interpretation "was not a product of such formal process does not alone, therefore, bar the application of *Chevron*." Id. at 231. In contrast, "'interpretations contained in policy statements, agency manuals, and enforcement guidelines' . . . are beyond the *Chevron* pale." Id. at 234 (quoting Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000)).

[40] Peter L. Strauss, "Deference" Is Too Confusing—Let's Call Them "*Chevron* Space" and "*Skidmore* Weight", 112 Colum. L. Rev. 1143, 1145 (2012).

[41] Loper Bright Enters. v. Raimondo, 603 U.S. 369, 431 (2024) (Gorsuch, J., concurring).

[42] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[43] See infra Section I.C.

[44] Administrative Procedure Act, 5 U.S.C. § 706 ("To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.").

constitutional concern.[45] According to the *Loper Bright* majority, Congress *does* have authority to grant interpretive authority to agencies.[46]

The *Loper Bright* majority embraced *Skidmore* as establishing the proper interpretive framework, not *Chevron*. However, while the majority explicitly "overruled" *Chevron*, it implicitly overruled[47] *Skidmore*.[48] In sum, the *Loper Bright* Court rejected *Skidmore*'s holding that courts ought to give weight to agency's interpretations and deference when they are reasonably interpreting ambiguous Congressional language. Under *Loper Bright*, judges are required to determine the single, best, and only permissible interpretation of any statute because "Congress expects courts to handle technical statutory questions"[49] and agencies have "no special competence" to answer them.[50]

Justice Kagan's dissent and questions at oral argument recognized the majority's intent and leveraged questions around AI to show that the judiciary is neither prepared, nor is it Congress's preferred branch, to answer ambiguous statutory questions.[51] She explained agencies have unique

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[45] See infra Subsection I.C.1; see also Cass R. Sunstein, Our Marbury: *Loper Bright* and the Administrative State, 74 Duke L.J. 1893, 1896 n.15 (2025) ("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."); Jack M. Beermann, *Chevron* Deference Is Dead, Long Live Deference, CATO Sup. Ct. Rev. 31, 43 (2024) ("But even in the discussion of *stare decisis*, the Court's primary basis for overruling *Chevron* remained its conclusion that *Chevron* was simply inconsistent with a governing statute.").

[46] Sunstein, supra note 45, at 1902 ("the *Loper Bright* Court also made it clear that Congress may have explicitly or implicitly granted interpretive authority to the agency – and that courts should respect that grant."). Some scholars like Jonathan Siegel argue that this delegation, even under the now-defunct *Chevron*, is explicitly constitutional; see also Jonathan R. Siegel, The Constitutional Case for "*Chevron*" Deference, 71 Vand. L. Rev. 937 (2018). For ways that Congress can leverage this analysis, see infra Sections III.A–B.

[47] See generally Bradley Scott Shannon, Overruled by Implication, 33 Seattle Univ. L. Rev. 151, 154 (2009) (explaining implicitly overruled opinions).

[48] See infra Subsection I.C.2. For a suggestion that *Skidmore* "may" be in trouble, see Beermann, supra note 45, at 50 ("First, the Court's rejection of *Chevron* may lead it and the lower courts to similarly reject the more deferential formulations of *Skidmore* deference. If the Court believes that judges can and should always arrive at a statute's best meaning, it is difficult to imagine that it would approve of an interpretation other than 'the reading the court would have reached.'"). But see Kristin Hickman, Anticipating a New Modern *Skidmore* Standard, 74 Duke L.J. Online 111, 130-34 (2025) (arguing that *Skidmore* survives and likely thrives under *Loper Bright*).

[49] Loper Bright Enters. v. Raimondo, 603 U.S. 369, 374 (2024). See also id. at 402 ("'[M]any statutory cases' call upon 'courts [to] interpret the mass of technical detail that is the ordinary diet of the law,' and courts did so without issue in agency cases before *Chevron*." (quoting Egelhoff v. Egelhoff, 532 U.S. 141, 161 (2001) (Breyer, J., dissenting))).

[50] Id. at 400.

[51] See infra Subsection I.C.3.

expertise,[52] that Congress values that expertise, [53] and that questions of law are often questions of policy.[54] Her concerns are worth heeding, not only given her position as a Supreme Court Justice, but because her perspective is justified by the research shown in Part II: Congress overwhelmingly expects agencies to resolve technical ambiguities and the judiciary has historically struggled to address technical legal issues without politicization, inconsistency, or ossification.

Where *Loper Bright* gives a new substantive basis to challenge regulations, the Supreme Court's decision three days later in *Corner Post* gave "every new entity in a regulated industry its own personal statute of limitations to challenge … regulations."[55] *Corner Post* held that a plaintiff's APA claim accrues six years from the date they suffer the injury from the agency's action, not the date the agency rule is finalized.[56] This part closes with a discussion of how a party can rely on a rule, benefit from a rule, and then once it is not in the party's favor, have the six years under *Corner Post* to attempt to invalidate it by arguing the agency lacks authority under *Loper Bright*.

A. Chevron*'s Space*

Chevron deference recognized agencies as the primary interpreters of statutory ambiguities. Under *Chevron*, courts would defer to agency rulemakings and adjudications that interpreted statutory ambiguities, so long as the interpretations were reasonable. Supreme Court decisions over the past forty years justified this perspective, explaining that Congress understood that the executive branch has the unique ability to develop long-term expertise and adapt to changing circumstances,[57] and therefore

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[52] *Loper Bright*, 603 U.S. at 456 (Kagan, J., dissenting) ("Agencies are staffed with 'experts in the field' who can bring their training and knowledge to bear on open statutory questions." (quoting Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984))).

[53] Id. at 457 (Kagan, J., dissenting) (Congress "value[s] the agency's experience with how a complex regulatory regime functions, and with what is needed to make it effective.").

[54] Id. (Kagan, J., dissenting).

[55] See infra Section I.D; Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys., 603 U.S. 799, 862 (2024) (Jackson, J., dissenting).

[56] *Corner Post*, 603 U.S. at 809 ("An APA plaintiff does not have a complete and present cause of action until she suffers an injury from final agency action, so the statute of limitations does not begin to run until she is injured."). Id. at 825 ("An APA claim does not accrue for purposes of § 2401(a)'s 6-year statute of limitations until the plaintiff is injured by final agency action.").

[57] See United States v. Mead Corp., 533 U.S. 218, 234 (2001) ("*Chevron* did nothing to eliminate *Skidmore*'s holding that an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires . . . ." (citing Skidmore, 323. U.S. 134, 139 (1944))).

delegated adjudicative and rulemaking power to executive agencies.[58] In short, Congress delegated to the Executive Branch limited Article I rulemaking powers and Article III adjudicative powers. Then, as long as the Executive Branch used those delegated powers properly, the court would respect those interpretations.[59]

Chevron consisted of two steps.[60] Step one asked whether the statute was ambiguous or not.[61] If the statute was not ambiguous, meaning Congress had clearly spoken, then the court interpreted the statute itself using the "traditional tools of statutory interpretation."[62] In other words, the court performed its traditional function of interpreting unambiguous statutes. When the statute was clear, the court was in no worse of a position than the agency to decide what the statute said. In short, if the statute was not ambiguous, the court decides.

If the statute was ambiguous, the court moved to step two, which asked whether the agency's interpretation of that ambiguity was reasonable. This was where the now-dead *Chevron* and now-dead-lettered *Skidmore*[63] lay, replaced by *Loper Bright*. Under *Chevron*, if the agency used its proper lawmaking authorities, processes, and powers, through rulemaking and adjudication,[64] then the agency's determination in the face of an ambiguous statute would be upheld as long as it was reasonable.[65] This was the heart of *Chevron* deference.

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[58] Id. at 227 (explaining that congressional "[d]elegation of [its] authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.").

[59] Id. at 226–27 ("We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.").

[60] See, e.g., Kenneth A. Bamburger & Peter L. Strauss, *Chevron*'s Two Steps, 95 Va. L. Rev. 611 (2009).

[61] See, e.g., Loper Bright Enters. v. Raimondo, 603 U.S. 369, 396-97 (2024) (describing *Chevron*'s "first step" as determining whether "'the statute [was] silent or ambiguous with respect to the specific issue' at hand") (quoting *Chevron*, 467 U.S. at 843); Id. at 436, 436 (Gorsuch, J., concurring) (describing a "*Chevron* ladder," mocking that "[t]hroughout its short life, this Court has been forced to supplement and revise *Chevron* so many times that no one can agree on how many 'steps' it requires, nor even what each of those 'steps' entails. Some suggest that the analysis begins with "step zero").

[62] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984).

[63] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (holding that when a court employs *Skidmore* deference, it follows the agency interpretation only to the extent the court is persuaded by the agency's interpretation).

[64] See supra note 44.

[65] *Chevron*, 467 U.S. at 844, ("a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."); see also Michael P. Healy, supra note 36, at 20 n.126 (explaining that the Supreme Court "analogize[d] step two of the *Chevron*

However, if the agency failed to properly use its lawmaking authorities, processes, and powers, then the agency's interpretation would not be automatically upheld. Instead, the court would apply *Skidmore*,[66] which despite the Supreme Court's claim in *Mead*,[67] is not a doctrine of deference, but a doctrine of persuasion. Under *Skidmore*, courts did interpret the ambiguous statute themselves, and the agency could at most hope to "persuade" the court.[68]

If the court found that Congress was silent or ambiguous, then *Chevron* required a deferential approach to an expert agency's reasonable interpretation.[69] Silence or ambiguity suggested that Congress wanted the agency, not the court, to take the first shot at resolving the statutory interpretation question. Courts were not to substitute their own judgment for that of the agency. Later cases, such as *Mead*, instructed courts to look closely at each situation of potential delegation by Congress to determine the type and amount of deference Congress intended.[70] As Professor Michael Herz explained:

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analysis to arbitrary and capricious review" when the Court, in *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001), stated that a court "is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable"); cf. 5 U.S.C. § 706(2) (declaring a reviewing court shall set aside agency action, findings, and conclusions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

[66] Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000) (holding that an agency's opinion letter, because it was not arrived at through formal adjudication or notice-and-comment rulemaking, was not entitled to *Chevron* deference but instead "'entitled to respect' under our decision in *Skidmore* but only to the extent that those interpretations have the 'power to persuade.'" (quoting *Skidmore*, 323 U.S. 134, 140 (1944)) (citing EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 256–58 (1991))).

[67] See *Mead*, 533 U.S. at 234 ("To agree with the Court of Appeals that Customs ruling letters do not fall within *Chevron* is not, however, to place them outside the pale of any deference whatever. *Chevron* did nothing to eliminate *Skidmore*'s holding that an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires . . . .").

[68] *Skidmore*, 323 U.S. at 140 ("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.").

[69] *Chevron*, 467 U.S. at 865 (1984) (justifying the deference to the agencies because they have "great expertise," as opposed to "[j]udges [who] are not experts").

[70] *Mead*, 533 U.S. at 226–27 ("We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of comparable congressional intent.").

> *Chevron* should not be seen as a revolutionary decision. It insists on respect for the delegation of policymaking authority to administrative agencies, but it preserves interpretive authority for courts. The question 'What should be done?' is for agencies. The question 'What did Congress do?' is for courts (although they should take seriously what agencies have to say on the matter).[71]

B. Skidmore*'s Weight*

According to the *Loper Bright* majority, *Skidmore* is now the primary interpretive framework, centering the courts, instead of agencies, as the interpreters of ambiguous statutory meaning. Executive branch agency rulemakings and adjudications are, "not controlling upon the courts by reason of their authority," but instead offer only "guidance," and at most have the "power to persuade."[72] Specifically, the *Skidmore* Court held that:

> We consider that the rulings, interpretations, and opinions of the [agency] 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.[73]

The *Skidmore* factors can be summarized as: (1) whether the contested issue implicates agency expertise, (2) whether the agency's interpretation is longstanding, (3) whether the interpretation was made after thorough consideration, (4) whether the interpretation is consistent with other agency pronouncements, and (5) whether the agency's reasoning is persuasive.[74]

Here, a court "fails to conform to its proper role if it fails to make its own independent judgment about the substance of the congressional enactment and instead simply accepts the agency's substantive view of the law or

[71] *Herz*, supra note 35, at 1871.
[72] *Skidmore*, 323 U.S. at 140.
[73] Id.
[74] Beermann, supra note 45, at 49 (citing *Skidmore*, 323 U.S. at 139–40).

focuses on the adequacy of the agency's decisionmaking process rather than the statute itself."[75]

But it is critical to understand that the *Skidmore* Court was willing to give "decisive weight to [agency] decisions and to interpretive regulations of the [agency] and of other bodies."[76] The question in *Skidmore* was simply not one that warranted that weight. The *Skidmore* Court performed its own statutory interpretation because of the facts presented, not as a general pronouncement for all cases. In *Skidmore*, Congress had not specified "what, if any, deference courts should pay to the Administrator's conclusions."[77] The factors above were stated only *after* the Court determined that the Administrator's lack of factual analysis limited the weight of the agency's conclusions.[78]

As explained by Professor Peter Strauss,[79] to understand *Skidmore*, one must understand two of its contemporaries: *United States v. American Trucking Associations* decided in 1940[80] and *NLRB v. Hearst Publication, Inc.* decided in 1944,[81] the same year as *Skidmore*. In *American Trucking*, the Supreme Court was asked, in part, to determine whether the Interstate Commerce Commission properly interpreted the meaning of "employees" in the Motor Carrier Act of 1935 when the Commission limited "employees" to those whose activities affect the safety of operation. The Court was faced with the question of how much weight to give agency statutory interpretation given *Marbury v. Madison*'s recognition of statutory interpretation being an "exclusively judicial function"[82]:

> [I]nterpretations [by responsible agencies] are entitled to great weight. This is peculiarly true here where the interpretations involve contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work

[75] Healy, supra note 36, at 47–48.

[76] *Skidmore*, 323 U.S. at 140.

[77] Id. at 139.

[78] Id. ("The rulings of this Administrator are not reached as a result of hearing adversary proceedings in which he finds facts from evidence and reaches conclusions of law from findings of fact.").

[79] Peter L. Strauss, In Search of *Skidmore*, 83 Fordham L. Rev. 789, 789–91 (2014).

[80] United States v. Am. Trucking Ass'ns, 310 U.S. 534 (1940).

[81] NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111 (1944).

[82] Strauss, supra note 79, at 789 (referencing the Supreme Court's opinion in *Am. Trucking Ass'ns.*, 310 U.S. at 544, as "reiterating the oft-cited proposition of *Marbury v. Madison*: 'The interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function.'"); see Marbury v. Madison, 1 Cranch 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

> efficiently and smoothly while they are yet untried and new. Furthermore, the Commission's interpretation gains much persuasiveness from the fact that it was the Commission which suggested the provisions' enactment to Congress.[83]

Professor Strauss observed that this passage reveals three reasons courts ought to credit an agency's interpretation: first, the agency may have special insight as the occasional drafter; second, the agency bears the responsibility for implementing the statutory scheme; and third, the agency has a "continuous and comprehensive" perspective on that scheme, one the courts see only sporadically and often in atypical cases.[84] The Court ultimately agreed that the Commission properly interpreted the meaning of "employee."[85]

In *Hearst*, the Supreme Court "took the further step of placing a question . . . of statutory interpretation *outside* the 'exclusively judicial function.'"[86] Here, again, the question was to define "employee," this time for the National Labor Relations Act. The Court found that there were some individuals who were employees, some who were not, and some fell into a third group which could be defined either way.[87] For this ambiguous third group, the Court recognized this was a policy question that Congress authorized the NLRB to answer.[88] The courts "remained responsible to oversee the legality and reasonableness of the Board's judgments, [but not to] substitute their own judgment."[89] In sum, for this ambiguous third group, "assigning meaning to 'employee' was a responsibility of the Board, not the courts."[90] As Strauss explained:

> *Skidmore* and *Hearst* combined to frame two propositions: first, that when courts are interpreting statutes, they may sometimes have reason to give weight to agency views; and second, that to the extent Congress empowers an agency to act using language of uncertain meaning, it may also empower the agency reasonably to determine that meaning within the resulting ambit of uncertainty, subject not to

[83] *Am. Trucking Ass'ns.*, 310 U.S. at 549 (internal quotation marks omitted) (citations omitted).
[84] Strauss, supra note 79, at 790.
[85] *Am. Trucking Ass'ns.*, 310 U.S. at 553.
[86] Strauss, supra note 79, at 790.
[87] NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 124–25 (1944).
[88] Strauss, supra note 79, at 790.
[89] Id. at 790–91.
[90] Id. at 791.

> judicial redetermination but to judicial oversight of its judgment for reasonableness.[91]

Under *Skidmore*, the court cannot do whatever it wants. Its role is to do what Congress wants. The court must interpret statutes consistent with congressional intent. Perhaps this is why the unanimous *Chevron* opinion was written by justices who "seemed to have no thought that they were doing anything momentous" as the opinion merely "universalized *Hearst*,"[92] *Skidmore*'s contemporary. However, in *United States v. Mead Corp.*,[93] Justice Scalia wrote a lonely and furious dissent—*Chevron*, he argued, had consigned *Skidmore* to the waste-bin of history. There was no room for a second proposition about deference; it had to be all (that is, *Chevron*, which he would have applied) or nothing. The *Skidmore* formulation, he argued, was just too weak, an invitation to judicial manipulation.[94]

Outside Justice Scalia's zealousness, *Skidmore* and *Chevron* have long coexisted in structuring judicial review and deference to agencies: "If one puts aside the verbal tussling over 'jurisdiction,' much if not all of the disagreement disappears."[95] But Justice Scalia's perspective eventually prevailed and by the time of the Supreme Court's decision in *City of Arlington v. FCC*,[96] the entire discussion of deference centered on *Chevron*, while "*Skidmore* and its many predecessors [had] disappeared."[97] Just as Justice Scalia's elevation of *Chevron* displaced *Skidmore*'s analysis, Chief Justice Roberts' overruling of *Chevron* in *Loper Bright*, displaced it for the final time.

C. Loper Bright*'s Single, Best Answer*

The *Loper Bright* era has begun. Exemplifying the vast breadth of the U.S. administrative state, *Loper Bright* began as a dispute about Atlantic herring fisherman. The case began when the Department of Commerce's National Marine Fisheries Service ("NMFS") acted[98] pursuant to the Magnuson-Stevens Fishery Conservation and Management Act of 1976

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[91] Id.
[92] Id. at 791–92.
[93] United States v. Mead Corp., 533 U.S. 218 (2001); see Strauss, supra note 79, at 792.
[94] Strauss, supra note 79, at 792.
[95] Id. at 796.
[96] City of Arlington v. FCC, 569 U.S. 290 (2013).
[97] Strauss, supra note 79, at 795.
[98] Magnuson-Stevens Fishery Conservation and Management Act Provisions, 85 Fed. Reg. 7414–01, (Feb. 7, 2020) (to be codified at 50 C.F.R. pt. 648).

("MSA").[99] A NMFS rule required fishermen in the Atlantic herring fishery to pay for federal agents, also called observers, to be on board fishing vessels to collect data and prevent overfishing.[100] NMFS had subsidized observers in the Atlantic herring fishery while requiring other fisheries to pay for their own observers.[101] Only after NMFS adopted a new rule in February 2020 requiring Atlantic herring fishermen to pay part of the cost of the observers was the rule challenged under the APA[102]—with that challenge being filed the same month the rule was promulgated.[103] It seems that *Chevron* posed no problem so long as the deference to agency rulemaking was to the fishermen's financial benefit.

Atlantic herring fishermen challenged the rule in two separate cases: Loper Bright Enterprises sued NMFS in the District of Columbia, with the case eventually reaching the U.S. Court of Appeals for the District of Columbia Circuit;[104] and Relentless, Inc. sued NMFS in the District of Rhode Island, with the case eventually reaching the U.S. Court of Appeals for the First Circuit.[105] In both circuits, the courts affirmed NMFS' authority to promulgate the rule. The D.C. Circuit held that the MSA was not "wholly unambiguous" as to NMFS' authority,[106] so "the court proceeded to *Chevron*'s second step and deferred to the agency's interpretation as a 'reasonable' construction of the MSA."[107] The First Circuit held that the "[a]gency's interpretation of its authority to require at-sea monitors who are paid for by owners of regulated vessels does not 'exceed[] the bounds of the permissible.'"[108] In other words, NMFS' interpretation of the MSA was permissibly within the statute's *Chevron* space. The Supreme Court, foreshadowing its ultimate opinion, refused to grant certiorari on the petitioners' direct question as to the "consistency of the Rule with the MSA,"[109] instead "grant[ing] certiorari in both cases, limited to the question whether *Chevron* should be overruled or clarified."[110]

[99] Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1891d.
[100] Loper Bright Enters. v. Raimondo, 603 U.S. 369, 380–82 (2024).
[101] Id.
[102] Magnuson-Stevens Fishery Conservation and Management Act Provisions, 85 Fed. Reg at 7414.
[103] *Loper Bright*, 603 U.S. at 382. Notably, the fishermen did not challenge the authority of NMFS when it was promulgating rules that wholly subsidized the observers.
[104] Loper Bright Enters. v. Raimondo, 45 F.4th 359 (D.C. Cir. 2022).
[105] Relentless, Inc. v. U.S. Dep't of Com., 62 F.4th 621 (1st Cir. 2023).
[106] *Loper Bright*, 45 F.4th at 368.
[107] *Loper Bright*, 603 U.S. at 382–83 (quoting *Loper Bright*, 45 F.4th at 370).
[108] *Relentless*, 62 F.4th at 633–34 (quoting Barnhart v. Walton, 535 U.S. 212, 218 (2002)).
[109] *Loper Bright*, 603 U.S. at 384 n.2.
[110] Id. at 384.

1. The Majority Overruled Chevron for Violating the APA

The *Loper Bright* Court made clear that the legal basis for overturning *Chevron* was its inconsistency with the APA,[111] not any alleged constitutional violations.[112] At first, the majority seemed to be walking down the path of citing *Marbury v. Madison* to hold that separation of powers forbids Congress from delegating any interpretive authority to executive branch agencies—a perspective which Justices Thomas and Gorsuch advocated.[113] The majority explained that Section 706 of the APA[114] "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."[115] Moreover, the APA "incorporates the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions."[116] "Indeed, the Framers crafted the Constitution to ensure that federal judges could exercise judgment free from the influence of the political branches."[117]

However, the Court reiterated that Congress *does* have authority to grant interpretive authority to agencies.[118] In theory, this allows the Court to be

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[111] Id. at 396 ("The deference that *Chevron* requires of courts reviewing agency action cannot be squared with the APA."); id. at 412 ("*Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires.").

[112] Sunstein, supra note 45, at 1896 n.15 (2025) ("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."); see also Beermann, supra note 45, at 43 ("But even in the discussion of stare decisis, the Court's primary basis for overruling *Chevron* remained its conclusion that Chevron was simply inconsistent with a governing statute [the APA]").

[113] Justices Thomas and Gorsuch joined the majority but wrote concurrences to express their belief that *Chevron* violated the Constitution. *Loper Bright*, 603 U.S. at 413–15 (Thomas, J., concurring) (stating that there is "a more fundamental problem: *Chevron* deference also violates our Constitution's separation of powers . . . Because the judicial power requires judges to exercise their independent judgment, the deference that *Chevron* requires contravenes Article III's mandate."); id. at 435 (Gorsuch, J., concurring) ("*Chevron*'s fiction has led us to a strange place. One where authorities long thought reserved for Article III are transferred to Article II . . . [*Chevron* was] 'a wrong turn.'") (internal citation omitted).

[114] 5 U.S.C. § 706 ("To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.").

[115] *Loper Bright*, 603 U.S. at 371.

[116] Id. at 394.

[117] Id. at 403 (citing The Federalist No. 78, at 522–525 (Alexander Hamilton) (Jacob Cooke, ed., 1961)).

[118] Cass R. Sunstein, The Separation of Powers is a They, Not an It, 48 Harv. J. L. & Pub. Pol'y 149, 169–70 (2025) ("Even more fundamentally, the *Loper Bright* Court also made it clear that Congress may have explicitly or implicitly granted interpretive authority to the agency – and that courts should respect that grant. In so saying, the Court firmly rejected the view that Congress lacks the constitutional authority

consistent with the allegedly-controlling *Skidmore* doctrine, where the *Skidmore* Court held that the legal significance of an agency's interpretation of a statute is determined by Congress in the statute.[119] In other words, Congress may directly define the deference that a court owes to an agency interpretation.[120] This also follows the Supreme Court's opinion in *American Trucking*, where the majority held that even the "exclusively judicial function" announced by *Marbury v. Madison* included "great weight" given to agencies.[121] As Professor Cass Sunstein explains, the *Loper Bright* Court "is saying that certain terms, such as 'reasonable,' can be taken to be a delegation of authority to the agency."[122] As the Court explained:

> 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 will of Congress subject to constitutional limits. The court fulfills that role by recognizing constitutional delegations . . . .[123]

to grant interpretive authority to agencies."). Some scholars like Jonathan Siegel argue that this delegation, even under the now-defunct *Chevron*, is explicitly constitutional. Siegel, supra note 46, at 941.

[119] Supra Section I.B.

[120] See Skidmore v. Swift & Co., 323 U.S. 134, 139 (1944) ("There is no statutory provision as to what, if any, deference courts should pay to the Administrator's conclusions.").

[121] United States v. Am. Trucking Ass'ns., 310 U.S. 534, 544, 549 (1940); see also Strauss, supra note 79, at 789–90 (emphasizing the relationship between *American Trucking* and *Marbury*, and summarizing how the *American Trucking* majority justified giving weight to agency views).

[122] Sunstein, supra note 45, at 1903.

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

So, while Congress may authorize agencies to interpret statutes, *Chevron*'s holding that there existed certain cases where courts were *required* to defer to agencies was, in the majority's view, an impermissible violation—not of the Constitution, but of Section 706 of the APA. The majority laid out a number of these statutory violations.

First, the majority writes that *Chevron* "defies the command of the APA that 'the reviewing court'—not the agency whose action it reviews—is to 'decide *all* relevant questions of law' and 'interpret . . . statutory provisions.'"[124] According to the majority, *Chevron* "requires a court to *ignore*, not follow, 'the reading the court would have reached' had it exercised its independent judgment as required by the APA."[125]

Second, the majority argued *Chevron* insists on too much "respect" for Executive Branch decisions.[126] The majority was frustrated by the "mechanical[] . . . *binding* deference to agency interpretations, including those that have been inconsistent over time."[127] The Court found its prior decision interpreting *Chevron* in *National Cable & Telecommunications Assn. v. Brand X Internet Services*, "still worse" and "antithe[tical]" to the APA.[128] Under *Brand X*, agency interpretations should not be overruled if their interpretations change over time as long as the interpretation is still reasonable.[129] To the *Loper Bright* majority, "the APA[] bars judges from disregarding that responsibility just because an Executive Branch agency views a statute differently."[130]

Third, the majority believed that "congressional intent" is a "fictional presumption . . . unmoored from the APA's demand that courts exercise independent judgment in construing statutes administered by agencies." [131] This all led to the majority's final words:

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[124] Id. at 372 (citing 5 U.S.C. § 706) (emphasis in original).

[125] Id. at 372 (quoting Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.11 (1984)) (emphasis in original).

[126] Id. at 399.

[127] Id. (emphasis in original).

[128] Id. ("Still worse, [*Brand X*] forces courts to do so even when a pre-existing judicial precedent holds that the statute means something else—unless the prior court happened to also say that the statute is 'unambiguous.' That regime is the antithesis of the time honored approach the APA prescribes. In fretting over the prospect of 'allowing' a judicial interpretation of a statute 'to override an agency's' in a dispute before a court, *Chevron* turns the statutory scheme for judicial review of agency action upside down." (citing Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005))).

[129] *Brand X*, 545 U.S. at 981 ("Agency inconsistency [alone] is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework. . . . For if the agency adequately explains the reasons for a reversal of policy, 'change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.'" (quoting Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 742 (1996))).

[130] *Loper Bright*, 603 U.S. at 412.

[131] Id. at 406.

> *Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires. Careful attention to the judgment of the Executive Branch may help inform that inquiry. And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it. But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.[132]

Before moving on to the effects of the majority's opinion regarding *Skidmore* and future cases, it is important to note that it is not entirely clear what the Court meant by "overruled." *Chevron*, the case, was about the EPA's interpretation of the Clean Air Act with respect to "bubble concepts" and "power plant sources." To overrule *Chevron*, the case and controversy, is to overrule that specific Clean Air Act regulation. As Professor Michael Herz explained, what the majority seems to be intending with its language is that the majority has "shifted or abandoned the interpretive technique adopted in a prior opinion," and it "is a little weird to call that 'overruling.'"[133]

Clearly the majority meant to overrule more than just the individual *Chevron* case; they meant to overrule its entire interpretive framework. But the majority also realized that to overrule the entire framework could potentially overrule every case relying on *Chevron* in step two. Raising the question: was the overruling prospective or retroactive?[134] The majority acknowledged this confusion and "insisted that cases decided under *Chevron* are still good law": [135]

> [W]e do not call into question prior cases that relied on the *Chevron* framework. . . . Mere reliance on *Chevron* cannot

[132] Id. at 412–13.

[133] Penn Program on Regulation, What Are the Implications of the End of *Chevron* for U.S. Administrative Law?, at 59:03-59:10 (YouTube, July 2, 2024), https://www.youtube.com/watch?v=pszALge4TYo.

[134] See, e.g., the confusion of the Eleventh Circuit in Bastias v. U.S. Att'y Gen., 158 F.4th 1188 (11th Cir. 2025), discussed supra.

[135] Beermann, supra note 45, at 46.

> constitute a 'special justification' for overruling such a holding, because to say a precedent relied on *Chevron* is, at best, 'just an argument that the precedent was wrongly decided[,]' . . . [which] is not enough to justify overruling a statutory precedent.[136]

The Court's feigned assurance raises more questions than it answers. On one hand, the explicit language of the majority leaves untouched the vast body of cases that applied *Chevron*'s framework, including those that never identified the "best" reading of a statute. On the other hand, "[i]t's not clear how this can be so, because in cases decided under *Chevron* step two, the reviewing court would not have determined the statute's best meaning," [137] and therefore, would not have complied with the *Loper Bright* holding. This reading of *Loper Bright* supports a party challenging any agency's statutory interpretation where the Court itself did not determine the statute's single, best interpretation—whether under *Chevron* step two or some other form of deference—because such a challenge rests not on "[m]ere reliance on *Chevron*,"[138] but on the absence of the judicial analysis *Loper Bright* now deems obligatory.[139] The result is forty years of *Chevron* precedent that is nominally 'good law' yet methodologically incompatible with *Loper Bright*, generating the very uncertainty the majority claims to avoid.

Early lower-court reactions have reflected precisely this confusion.[140] Faced with the majority's assurances, some courts may reasonably conclude that if prior *Chevron* cases must remain undisturbed, then the functional constraints *Chevron* imposed will persist as well, despite the Court's formal renunciation.[141] Far from providing clarity, *Loper Bright* risks years of doctrinal unraveling in courts, as judges and legal experts attempt to reconcile a mandatory "best reading" regime with a body of precedent built

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[136] *Loper Bright*, 603 U.S. at 412.
[137] Beermann, supra note 45, at 47.
[138] *Loper Bright*, 603 U.S. at 412.
[139] *Loper Bright*, 603 U.S. at 373 (explaining that courts can and must determine the "best reading" of the statute). Beermann, supra note 45, at 47 ("When confronted with a renewed attack on an agency's action approved years or even decades before under *Chevron* step two, lower courts may feel empowered to ask whether, under *Loper Bright*, the earlier court wrongly ignored the statute's 'best meaning' and deferred to an agency's second or third [or even fourth] best construction.").
[140] See, e.g., Bastias v. U.S. Att'y Gen., 158 F.4th 1188, 1219 (11th Cir. 2025) (concluding that as to whether *Chevron* has overruled prior decisions or not, "the question is far from settled.") (Middlebrooks, J., concurring).
[141] Id. at 1195 (concluding that the *Loper Bright* decision overruled *Chevron* but "did so only on a prospective basis") (Newsom, J., concurring).

on permissible ranges of meaning.[142] In this respect, *Loper Bright* may come to be remembered less for its formal rejection of *Chevron* than for the interpretive instability it created.

Ultimately, whatever doctrinal openings *Loper Bright* appears to create, its immediate practical consequences tell a different story: the decisions accomplished nothing for the named plaintiffs. After the *Loper Bright* Court reversed and remanded, Loper Bright Enterprises evaporated without further case history,[143] and the NMFS rule was upheld on remand in *Relentless Inc. v. Dept. of Commerce*.[144] The only thing truly overturned, then, was *Chevron*. The cases upended forty years of administrative law while leaving the NMFS rule, the alleged subject of the litigation,[145] entirely intact.

And notably, when the district court in *Relentless* reconsidered the rule on remand, it did not cite *Skidmore* a single time.[146] Even in the precise posture and case where the majority claimed *Skidmore* would continue to guide judicial review, the district court did not feel the need to apply *Skidmore*'s framework. In our *Loper Bright* era, the very litigation that ended *Chevron* confirms that *Skidmore* survives in name only.

2. *The Majority Implicitly Overruled Skidmore*

One framing of the *Loper Bright* majority opinion is: *Chevron* is dead, long live *Skidmore*.[147] To the majority, wherever *Chevron* was wrong, *Skidmore* was right. "Congress expects courts to handle technical statutory questions, and courts did so without issue in agency cases before *Chevron*. After all, [according to *Skidmore*] the reviewing court will go about its task with the agency's 'body of experience and informed judgment,' among other information, at its disposal."[148] While "[t]he deference that *Chevron* requires of courts reviewing agency action cannot be squared with the APA,"[149] *Skidmore* properly gave agencies only "the power to persuade" judicial

[142] See Coglianese & Walters, supra note 12, at 7 (2025) (explaining that *Loper Bright* triggered "an enormous outpouring of attention," but "no firm collective sense yet of precisely what *Loper Bright* did or of how it will matter.").

[143] No subsequent reported decision has been issued from the D.C. Circuit following the Supreme Court's remand.

[144] Relentless Inc. v. U.S. Dep't of Com., No. 20-cv-0108, 2025 WL 1939025 at *5 (D.R.I. July 15, 2025) (granting the Department of Commerce's Cross Motion for Summary Judgment and "conclud[ing] that the MSA authorizes the Final Rule.").

[145] *Loper Bright*, 603 U.S. at 384 n.2 (where the petitioners questioned "the consistency of the Rule with the MSA.").

[146] *Relentless Inc.*, 2025 WL 1939025.

[147] Inspired by the title of Professor Michael Herz's article, *Chevron* Is Dead; Long Live Chevron, 115 Colum. L. Rev. 1867 (2015).

[148] *Loper Bright*, 603 U.S. at 388 (citing Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944)).

[149] Id. at 396.

decision-making, not the "power to control,"[150] ensuring agencies provide "'*guidance*' consistent with the APA."[151] While *Skidmore* gave "'respect' . . . to Executive Branch interpretations, *Chevron* . . . demands that courts mechanically afford *binding* deference to agency interpretations."[152] Justice Gorsuch even celebrated *Skidmore* as the landmark case where "the Court returned to its time-worn path."[153]

In reality, however, when the majority explicitly "overruled" *Chevron*, they implicitly overruled[154] *Skidmore* as well.[155] The new *Loper Bright* framework is not merely implicitly inconsistent with *Skidmore*, it is also structurally incompatible with *Skidmore*'s explicit allowance for deference to agency interpretations.

Under *Loper Bright*, judges alone must divine the single, best, and only permissible interpretation of any statute. They should do so "no matter how impenetrable" the statute and regardless of whether they consult external perspectives because, in the majority's perspective, "Congress expects courts to handle technical statutory questions"[156] and agencies have "no special competenc[y]" to answer them.[157] Read together, these premises yield a blunt conclusion: if only judges can determine the best interpretation, and only the best interpretation is permissible, then only interpretations determined by judges are permissible.

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[150] Id. at 388 (citing *Skidmore*, 323 U.S. at 140).

[151] Id. at 394 (quoting *Skidmore*, 323 U.S. at 140).

[152] Id. at 399 (emphasis in original) (first citing *Skidmore*, 323 U.S. at 140, and then citing Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 863 (1984)).

[153] Id. at 431 (2024) (Gorsuch, J., concurring).

[154] Bradley Scott Shannon, Overruled by Implication, 33 Seattle Univ. L. Rev. 151, 154 (2009) (explaining implicitly overruled opinions, which occur because "no special language is necessary to overrule a prior decision; the simple existence of some later, irreconcilably inconsistent holding by the same court is sufficient. Indeed, it does not seem particularly important whether the later court intended to overrule its prior holding or whether it was even aware that it was doing so."); see also Steven G. Calabresi, Text vs. Precedent in Constitutional Law, 31 Harv. J. L. & Pub. Pol'y, 947, 953 (2008) (arguing that in *Brown v. Board of Education*, 347 U.S. 483 (1954), the Court implicitly overruled *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

[155] For a suggestion that *Skidmore* "may" also be in trouble, see Beermann, supra note 45, at 50 ("First, the Court's rejection of *Chevron* may lead it and the lower courts to similarly reject the more deferential formulations of *Skidmore* deference. If the Court believes that judges can and should always arrive at a statute's best meaning, it is difficult to imagine that it would approve of an interpretation other than 'the reading the court would have reached.'").

[156] *Loper Bright*, 603 U.S. at 400, 402 ("'[M]any statutory cases' call upon 'courts [to] interpret the mass of technical detail that is the ordinary diet of the law,' and courts did so without issue in agency cases before *Chevron*" (quoting Egelhoff v. Egelhoff, 532 U.S. 141, 161 (2001) (Breyer, J., dissenting))).

[157] *Loper Bright*, 603 U.S. at 400–01 ("Perhaps most fundamentally, *Chevron*'s presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do. The Framers, as noted, anticipated that courts would often confront statutory ambiguities and expected that courts would resolve them by exercising independent legal judgment.").

Not all commentators share this assessment. Some scholars have predicted that *Skidmore*'s domain will expand in *Chevron*'s absence. Professor Kristin Hickman suggests that agencies may achieve higher success rates under a revitalized *Skidmore*, particularly when courts review notice-and-comment rulemaking or formal adjudications.[158] Yet such predictions presuppose that courts will apply *Skidmore* faithfully—a presumption the *Loper Bright* framework's "single best answer" standard makes doubtful. Hickman herself has noted that *Loper Bright*'s emphasis on the "best reading" of a statute may tempt some judges to adopt Justice Kavanaugh's academic goal[159] of "leaving no role for *Skidmore*'s contextual factors to operate as an interpretive tool"[160]—an outcome this Article predicts. Still, she argues that "[n]othing about *Loper Bright* suggests that the Court intended anything nearly so sweeping, especially when one considers the Court's explicit endorsement of *Skidmore*."[161] Whether one shares Hickman's optimism or this Article's skepticism, the majority's own portrayal of *Skidmore* merits closer attention.

In overruling *Chevron*, the majority pointed to *Skidmore*'s contemporary decision in *Hearst* as an exception to the "deferential review" *Loper Bright* envisions.[162] In attempting to distinguish *Hearst*, the majority emphasized that just "two [years] after *Hearst*, Congress codified the opposite rule [in the APA]: the traditional understanding that *courts* must 'decide all relevant questions of law.'"[163] However, factually, the majority ignores that the 8-to-1 *Hearst* decision and the unanimous decision in *Skidmore* were decided by the same set of justices only 10 months apart. Legally, the Court ignores that *Skidmore* did not overrule or distinguish *Hearst*.[164] As Professor Strauss advised, the two decisions should be taken together.[165] The *Skidmore-Hearst* Court saw that even within the realm of *Marbury v. Madison*'s "exclusively judicial function," there did exist questions of statutory interpretation where

[158] See Hickman, supra note 48, at 132.

[159] See Brett M. Kavanaugh, Fixing Statutory Interpretation, 129 Harv. L. Rev. 2118, 2144 (2016).

[160] Hickman, supra note 48, at 129.

[161] Id. at 129.

[162] *Loper Bright*, 603 U.S. at 388–89 (2024) (citing Gray v. Powell, 314 U.S. 402 (1941); NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944)).

[163] *Loper Bright*, 603 U.S. at 390 (quoting 5 U.S.C. § 706) (emphasis in original); id. at 431 (stating that, prior to *Skidmore*, in cases like *Hearst*, "this Court toyed with a form of deference akin to *Chevron* . . . . But . . . even that limited experiment did not last." (citing Gray v. Powell, 314 U.S. 402, 411–12 (1941))); NLRB v. Hearst Publications, Inc., 322 U.S. 111, 131 (1944) (Gorsuch, J., concurring).

[164] Justice Kagan, in her dissent, further critiqued the majority's attempt to distinguish *Hearst* and *Gray*. See id. at 469–70 (Kagan, J., dissenting) (explaining that "[t]he majority has no way around those two noteworthy decisions.").

[165] See Strauss, supra note 79, at 791.

Congress had given policy authority to an agency and others where Congress did not.[166] The key principle was that the role of the Court was to act according to Congress's instructions.

Specifically, *Skidmore-Hearst* stands for two propositions: first, that there may be times where courts "have reason to give weight to agency views," and second, that when Congress's language is unclear, the agency's interpretation within that language, is "subject not to judicial redetermination but to judicial oversight of its judgment for reasonableness."[167] As *Skidmore* explained, there were cases where the Court, foreshadowing *Chevron*, had properly given "decisive weight to [agency] decisions."[168] Given the agreement between *Chevron* and *Skidmore*,[169] to overrule one is to overrule the other.

Beyond the link between *Chevron* and *Skidmore*, the *Loper Bright* framework for judicial review of agency interpretation is itself incompatible with *Skidmore*. First, the majority held that "no matter how impenetrable, . . . a single, best meaning" of a statute always exists and was "fixed at the time of enactment."[170] Thus, even where "congressional intent" is a "fictional presumption,"[171] the majority insists that "even if some judges might (or might not) consider the statute ambiguous, there is a best reading all the same . . . ."[172]

Second, courts have the option to value external expertise such as agencies (as explained by *Skidmore*), but the majority deems such consultation unnecessary and improper. Finishing the quoted sentence above: "[E]ven if some judges might (or might not) consider the statute ambiguous, there is a best reading all the same—'the reading the court would have reached' if no agency were involved."[173] Said differently, the "best reading"[174]—the "single, best meaning of a statute [that always exists, was]

[166] Id.
[167] Id.
[168] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).
[169] Strauss, supra note 79, at 796 ("If one puts aside the verbal tussling over 'jurisdiction,' much if not all of the disagreement [between *Skidmore* and *Chevron*] disappears.").
[170] Loper Bright Enters. v. Raimondo, 603 U.S. 369, 400 (2024) ("Courts instead understand that such statutes, no matter how impenetrable, do—in fact, must—have a single, best meaning. That is the whole point of having written statutes; 'every statute's meaning is fixed at the time of enactment.' So instead of declaring a particular party's reading 'permissible' in such a case, courts use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity." (quoting Wisconsin Central Ltd. v. United States, 585 U.S. 274, 284 (2018) (alteration in original))).
[171] Id. at 406.
[172] Id. at 400.
[173] Id. (quoting Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.11 (1984)).
[174] Id.

fixed at the time of enactment," "no matter how impenetrable" the text[175]—is, by the majority's definition, the reading the court reaches without the agency expertise. So, it is not just that courts need not value external expertise, but that the *Loper Bright* procedure for discerning a statute's meaning functions as a deliberately agency-free process.

The majority not only lifts up the courts as the sole, unique body able to interpret statutes, but also states explicitly that agencies have "no special competence" in statutory interpretation.[176] "Perhaps [*Chevron*'s] most fundamental[]" failing was its "misguided" "presumption" that agencies have "special competence in resolving statutory ambiguities."[177] Agencies do not. "Courts do." [178] The majority emphasizes that the Framers "anticipated . . . and expected that courts would resolve [ambiguities] by exercising *independent* legal judgment,"[179] and quotes *Chevron* approvingly that "[t]he judiciary is the *final authority* on issues of statutory construction."[180]

Possibly in response to Justice Kagan's dissent,[181] the majority dismisses concerns that ambiguities in technical matters are a reasonable basis to defer to agencies and their expertise. The majority counters that "even when an ambiguity happens to implicate a technical matter, it does not follow that Congress has taken the power to authoritatively interpret the statute from the courts and given it to the agency. Congress expects courts to handle technical statutory questions."[182]

The majority does attempt to soften this stance (like so many of their other stances) by asserting that, even though courts do not need to rely on others and their procedure explicitly devalues agency expertise, they "do not decide such questions blindly" as they have the benefit of "[t]he parties and *amici* . . . [who] are steeped in the subject matter."[183] Yet this position is difficult to reconcile: if, as the majority claimed, Congress's designated experts lack "special competence" in resolving technical questions, it is

[175] Id.

[176] Id. at 400–01 ("Perhaps most fundamentally, *Chevron*'s presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do. The Framers, as noted, anticipated that courts would often confront statutory ambiguities and expected that courts would resolve them by exercising independent legal judgment.").

[177] Id.

[178] Id.

[179] Id. (emphasis added).

[180] Id. (emphasis added) (quoting Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984)).

[181] See infra Subsection I.C.3.

[182] Loper Bright Enters. v. Raimondo, 603 U.S. 359, 402 (2024).

[183] Id.

unclear why the case-specific, episodic, adversarial, self-interested expertise of private litigants and amici should suffice.[184] In effect, the Court rejects the most sustained and institutional source of subject-matter insight while embracing more adversarial contributions, risking the privileging of well-resourced *amici* over the considered judgments of democratically-accountable experts.

The majority then offers an additional hedge, insisting that if a court's single, best reading is wrong, "Congress and the Executive Branch . . . are of course always free to act by revising the statute."[185] But this assurance only underscores the tension in the Court's reasoning: having insisted that judges alone can divine the statute's single, best, error-free meaning, the Court then shifts responsibility for correcting any judicial mistake onto the political branches. The result is an interpretive framework in which courts purport to be incapable of error, yet Congress and the Executive must bear the burden when errors inevitably arise. This repeats the Court's treatment of *Chevron*: a sweeping break with precedent followed by a disavowal of the practical consequences.

Third, the majority asserts that the judge-determined interpretation is not merely the "single, best" interpretation[186] but the only legally permissible interpretation of the statute[187]: "[I]f it is not the best, it is not permissible."[188] When read alongside the Court's earlier declaration that judges are the ones to identify the "single, best" interpretation,[189] the logical conclusion is clear: only interpretations offered by judges are permissible.[190]

In sum, the *Loper Bright* Court rejected *Skidmore*'s holding that courts ought to give weight to an agency's interpretations due to their expertise and deference to agencies when they are reasonably interpreting ambiguous Congressional language. In the *Loper Bright* era, judges are required to determine the single, best, and only permissible interpretation of any statute,

[184] Id. at 400; The flaw in the majority's view is exemplified by courts' inability to properly admit expert testimony. See infra Section II.B.

[185] *Loper Bright*, 603 U.S. at 403.

[186] Id. at 400 (stating that "statutes, no matter how impenetrable, do—in fact, must—have a single, best meaning. That is the whole point of having written statutes; 'every statute's meaning is fixed at the time of enactment.'" (alteration in original) (quoting Wisconsin Central Ltd. v. United States, 585 U.S. 274, 284 (2018))).

[187] Id. ("It therefore makes no sense to speak of a 'permissible' interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best. In the business of statutory interpretation, if it is not the best, it is not permissible.").

[188] Id.

[189] Id.

[190] Id. (explaining that "instead of declaring a particular party's reading 'permissible' in such a case, courts use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity.").

no matter how impenetrable, no matter whether they receive or weigh any external perspectives because "Congress expects courts to handle technical statutory questions"[191] and agencies have "no special competenc[y]" to answer them.[192] Where *Skidmore* deference includes factors like an agency's expertise, quality of consideration, and persuasiveness,[193] *Loper Bright* "deference" only occurs when an agency agrees with the court's single, best, and only permissible interpretation. In the end, the *Loper Bright* court inaugurated a new era of judicial policymakers, not judicial reviewers.

3. Justice Kagan's (AI) Dissent

Justice Kagan made *Loper Bright*'s stakes tangible by anchoring her critique in the real-world governance challenges posed by AI. During oral argument, she used AI as a case study to illustrate why Congress routinely leaves gaps for agencies, not courts, to fill, particularly when legislating in fast-moving, technically complex domains. Imagining Congress enacting a future AI statute,[194] she emphasized that legislators "can hardly see a week in the future" in such areas, let alone foresee the "countless factual situations" the statute must eventually govern.[195] When "normal techniques of legal interpretation have run out," she asked counsel, "what does Congress want": judges or agency experts "to decide those . . . policy-laden questions"?[196]

Justice Kagan underscored that Congress clearly wants agencies to decide. "Congress knows that this Court and lower courts are not competent" to decide the innumerable policy-laden questions AI will generate.[197] She explained that "[we, the Court,] don't even know what the questions are about AI, let alone the answers to them."[198] Agencies, by contrast, possess the subject-matter expertise and political accountability required to implement such legislation: they understand the relevant technology,

[191] Id. at 402 ("'[M]any statutory cases' call upon 'courts [to] interpret the mass of technical detail that is the ordinary diet of the law,' and courts did so without issue in agency cases before *Chevron*" (alterations in original) (quoting Egelhoff v. Egelhoff, 532 U.S. 141, 161 (2001) (Breyer, J., dissenting)) (citing *Loper Bright*, 603 U.S. at 443–46 (Gorsuch, J., concurring))).

[192] Id. at 400–01 ("Perhaps most fundamentally, *Chevron*'s presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do. The Framers, as noted, anticipated that courts would often confront statutory ambiguities and expected that courts would resolve them by exercising independent legal judgment.").

[193] Beermann, supra note 45, at 49 (citing Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944)).

[194] Transcript of Oral Argument at 43–44, Relentless, Inc. v. U.S. Dep't of Commerce, 603 U.S. 369 (2024) (No. 22-1219) [hereinafter Relentless Tr.].

[195] Id. at 45.

[196] Id. at 44–45.

[197] Id. at 46.

[198] Id. at 47.

conduct fact-finding, consult constituencies, and are supervised by an elected President.[199] "Congress wants . . . people who actually know about AI to decide those questions."[200] Thus, she argued, agency resolution of statutory ambiguity is not an anomaly but an institutional necessity, especially for emerging technologies like AI.[201] When counsel suggested that Justice Kagan was attempting to use the "trickier example" of AI, Kagan rejected that defense because AI "[is] a real example"[202]—an illustration of why generalist judges cannot realistically supply governing answers to all questions, especially for emerging technologies.

Justice Kagan formalized these concerns in her dissent, with Justices Jackson and Sotomayor joining. She wrote: "In every sphere of current or future federal regulation, expect courts from now on to play a commanding role."[203] She explained that *Chevron* asked a simple question: when Congress leaves an ambiguity in a statute, who does it expect to fill the gap: courts or agencies? In her view, Congress's answer is clear: agencies, not courts.[204]

Justice Kagan outlined three broad justifications for judicial deference to executive agencies' reasonable statutory interpretations. First, agencies have expertise that "courts could not hope to."[205] Invoking AI and other technical domains, she noted that "[t]he point is especially stark when the statute is of a 'scientific or technical nature.'"[206] Answering these types of questions requires more than just "consulting a dictionary."[207]

Second, Congress "value[s] the agency's experience with how a complex regulatory regime functions, and with what is needed to make it effective."[208] Even seemingly straightforward questions may have answers depending on decades of regulatory practice, nationwide effects, and institutional consequences. Justice Kagan referred to *Kisor v. Wilkie*,[209] where the question about the meaning of the term "geographic area" for adjusting Medicare reimbursement wage differences was susceptible to multiple

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[199] Id. at 46–47.
[200] Id.
[201] See id. at 45–46.
[202] Id. at 48.
[203] Loper Bright Enters. v. Raimondo, 603 U.S. 369, 479 (2024) (Kagan, J., dissenting).
[204] Id. at 454–55 (Kagan, J., dissenting); see also infra Section II.A.
[205] Id. at 456 (Kagan, J., dissenting) ("Agencies are staffed with 'experts in the field' who can bring their training and knowledge to bear on open statutory questions." (quoting Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 865 (1984))).
[206] Id. (plurality opinion) (quoting Kisor v. Wilkie, 588 U.S. 558, 571 (2019)).
[207] Id.
[208] Id. at 457.
[209] 588 U.S. 558 (2019).

meanings: could it be a multi-state region? A census tract? Before making a choice, a fact-finder should gather information, explore nationwide effects, survey how regulators have previously dealt with these issues, and confer with hospitals. "Congress knows the Department of Health and Human Services can do all those things—and that courts cannot."[210]

Congress's recognition of the value of agency expertise was well understood by the Supreme Court, which acknowledged the principle well before *Chevron*. In *Gray v. Powell*,[211] a 1941 case pre-dating *Chevron* and *Skidmore*, the Supreme Court deferred to the agency's construction of the term "producer" because "Congress . . . found it more efficient to delegate that function to those whose experience in a particular field gave promise of a better informed, more equitable adjustment of the conflicting interests."[212] The Court concluded that it was "not the province of a court" to "substitute its judgment for that of the [agency's]" devolving agencies into "mere fact finding bodies."[213]

Third, Kagan rejects the majority's claimed bright-line distinction between questions of law and questions of policy. "*Chevron*'s presumption reflects that resolving statutory ambiguities, as Congress well knows, is 'often more a question of policy than of law.' The task is less one of construing a text than of balancing competing goals and values."[214] Unlike generalist judges, agencies have constituencies, fact-finding abilities, and "are 'subject to the supervision of the President, who in turn answers to the public'"[215] and thus may incorporate "views of wise policy to inform its judgments."[216]

Justice Kagan summarized this view forcefully:

> [The majority is of the opinion that] 'agencies have no special competence' in filling gaps or resolving ambiguities in regulatory statutes; rather, '[c]ourts do.' Score one for self-confidence; maybe not so high for self-reflection or -knowledge. . . . [Courts are faced with questions like:] When does an alpha amino acid polymer qualify as a 'protein'? How distinct is 'distinct' for squirrel

[210] *Loper Bright*, 603 U.S. at 457 (Kagan, J., dissenting).
[211] 314 U.S. 402 (1941).
[212] Id. at 411–12.
[213] Id. at 412.
[214] *Loper Bright*, 603 U.S. at 457–58 (Kagan, J., dissenting) (quoting Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 696 (1991)).
[215] Id. at 458 (plurality opinion) (quoting Kisor v. Wilkie, 588 U.S. 558, 571–72 (2019)).
[216] Id. (quoting Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984)).

> populations? What size 'geographic area' will ensure appropriate hospital reimbursement? As between two equally feasible understandings of 'stationary source,' should one choose the one more protective of the environment or the one more favorable to economic growth? The idea that courts have 'special competence' in deciding such questions whereas agencies have 'no[ne]' is, if I may say, malarkey. Answering those questions right . . . . demands one or more of: subject-matter expertise, long engagement with a regulatory scheme, and policy choice. It is courts (not agencies) that 'have no special competence'—or even legitimacy—when those are the things a decision calls for.'[217]

Therefore, because these are questions of policy requiring a deep understanding of the implications of a choice far beyond dictionary definitions, it is obvious to Justice Kagan that *Chevron* articulated the proper presumption in favor of agencies. "[W]hen courts have decided that Congress has not [resolved a given issue], a choice arises. Absent a legislative directive, either the administering agency or a court must take the lead. And the matter is more fit for the agency."[218] These decisions are almost certain to involve subject-matter expertise, policy choices, and cost-benefit analyses—the exact types of judgments courts are not designed to make. Courts still "police[] the agency to ensure that it acts within the zone of reasonable options. But the court does not insert itself into an agency's expertise-driven, policy-laden functions."[219]

For Justice Kagan, AI is not a "trickier example"[220] warranting special treatment; it is precisely the type of statutory question that Congress expects judicial deference on in the first place. Statutory ambiguities in AI are no different than those defining "protein," "stationary source," or "geographic area." Each demands specialized knowledge, sustained engagement with a regulatory scheme, and a policy judgment. Courts lack all three. In Justice Kagan's view, *Loper Bright* discards the *Chevron* framework, which properly reflected the interpretive framework Congress relies upon, and replaces it with one in which judges claim sole authority to supply the "best"

[217] Id. at 460 (internal citation omitted).
[218] Id. at 459.
[219] Id. at 459–60.
[220] Relentless Tr. at 48.

answer to questions that they are not competent to answer. Although some have predicted *Skidmore* might expand in *Chevron*'s absence,[221] Justice Kagan's dissent exposes why the majority's "single, best answer" framework leaves little space for such deference and transforms courts into policymakers in precisely the areas, like AI, where Congress relies on expert agencies. But that structural shift does not stand alone. Three days post-*Loper Bright*, *Corner Post* removed a second guardrail by dramatically enlarging the window for attacking existing agency rules, ensuring that the judiciary's new policymaking power will be exercised not only prospectively but also across decades of settled regulatory law.

D. Corner Post*'s Personal Statute of Limitations*

The magnitude of *Loper Bright* is further amplified by the Supreme Court's decision three days later in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*.[222] By the same 6-3 political lines, the *Corner Post* majority held that plaintiffs challenging a federal rule under the APA have six years from the date they suffer the injury from the agency's rule, rather than six years from the date the rule was finalized.[223] Justice Jackson, joined by Justices Kagan and Sotomayor, dissented, warned that this new rule gave "every new entity in a regulated industry its own personal statute of limitations to challenge longstanding regulations" enabling "every new entity to challenge any and every rule that an agency has ever adopted."[224]

Although Justice Jackson framed the warning in terms of "new" entrants, the majority imposed no such limitation. A party may benefit from an agency ruling, rely on the rule for decades, but then once the rule is not in the organization's favor, claim an injury, and immediately seek to invalidate it. As Justice Jackson observed, *Loper Bright* and *Corner Post* must be read together to appreciate their reinforcing and "devastat[ing]" effects: a fixed statute of limitations provided one barrier to destabilizing settled regulatory frameworks; *Chevron*'s deference to agency's reasonable interpretations provided another.[225] "The Court has now eliminated both. Any new

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[221] Hickman, supra note 48, at 130.

[222] 603 U.S. 799 (2024).

[223] Id. at 809 (holding that "[a]n APA plaintiff does not have a complete and present cause of action until she suffers an injury from final agency action, so the statute of limitations does not begin to run until she is injured").

[224] Id. at 862–63 (Jackson, J., dissenting).

[225] Id. at 864–65 ("The tsunami of lawsuits against agencies that the Court's holdings in this case and *Loper Bright* have authorized has the potential to devastate the functioning of the Federal Government. Even more to the present point, that result simply cannot be what Congress intended when it enacted

objection to any old rule must be entertained and determined *de novo* by judges who can now apply their own unfettered judgment as to whether the rule should be voided."[226] The majority responded, as it did in *Loper Bright*, that if the majority's novel interpretation "is a poor fit for modern APA litigation, the solution is for Congress to enact a distinct statute of limitations for the APA."[227]

Taken together, *Loper Bright* and *Corner Post* mark a decisive reallocation of interpretive power from agencies to courts. By dismantling *Chevron*'s presumption of deference and expanding the window for parties to challenge longstanding regulations, the Court has invited more judicial policymaking in precisely the technical, policy-laden contexts where Congress has historically relied on agency expertise. The result is not merely a doctrinal shift but a structural shift that will test the capacity and the legitimacy of courts as primary arbiters of statutory meaning. Nowhere will these pressures be felt more acutely than in the governance of emerging technologies like AI, where rapid evolution, inherent ambiguity, and high-stake policies converge. This structural transformation sets the stage for Part II, which examines the governance problems that arise when courts, not expert agencies, become the primary policymakers in complex and evolving regulatory domains.

II. PROBLEMS FOR (AI) GOVERNANCE

Loper Bright crowned our new era of judicial policymakers. Because the power to interpret can improperly limit "the power to make a policy choice,"[228] requiring judges to determine the single, best, and only permissible interpretation of any statute, raises profound questions for all three branches. This Part identifies the structural governance failures that follow from *Loper Bright*'s interpretive framework and identifies how they

legislation that stood up and funded federal agencies and vested them with authority to set the ground rules for the individuals and entities that participate in our economy and our society.").

[226] Id. at 864.

[227] *Corner Post*, 603 U.S. at 825.

[228] Siegel, supra note 46, at 965 (citing Henry P. Monaghan, *Marbury* and the Administrative State, 83 Colum. L. Rev. 1, 6 (1983)); accord Herz, supra note 35, at 1909 (describing *Chevron* as "an appropriate allocation of [policy] decisionmaking responsibility among the three branches"); see also Bureau of Alcohol, Tobacco & Firearms v. Fed. Lab. Rels. Auth., 464 U.S. 89, 97 (1983) (cautioning courts to reject the "unauthorized assumption by an agency of *major policy decisions* properly made by Congress" (emphasis added) (quoting Am. Ship Bldg. Co. v. NLRB, 380 U.S. 300, 318 (1965))); William N. Eskridge, Jr., Overriding Supreme Court Statutory Interpretation Decisions, 101 Yale L.J. 331, 415 (1991) (finding empirical support that "the Court's role in American lawmaking is intrinsically political and not neutral and that other institutions should be aware of that reality").

undermine the federal government's ability to regulate—especially emerging technologies like AI.

The following five sections outline these problems. First, Congress wants agencies, not courts, to make policy choices. Second, courts are famously poor policymakers, especially on technical questions, as their infamous handling of expert evidence under Federal Rule of Evidence ("FRE") 702 demonstrates.[229] Third, Congress is unlikely to govern proactively in fast-moving technological fields, let alone correct judicial policy choices. Fourth, ambiguity, the prerequisite for judicial policymaking, can be found in virtually any statute, particularly for emerging technologies like AI. Fifth, and finally, requiring courts to provide a single, best statutory interpretation will ossify and balkanize incorrect and outdated interpretations. These decisions will transform early judicial guesses into binding national policy and widen interpretive circuit splits.

A. Congress Wants Agencies, Not Courts, to Make Policy

The *Loper Bright* Court repeatedly justified its holding that judges are obligated to determine the single, best, and only permissible interpretation of any statute based on one critical assumption: Section 706 of the APA was written this way because Congress wanted it this way. In the majority's words, "[t]he better presumption is therefore that Congress expects courts to do their ordinary job of interpreting statutes, with due respect for the views of the Executive Branch."[230] "Congress expects courts to handle technical statutory questions"[231] because agencies have "no special competence" to answer them.[232] But this assumption is both historically and empirically incorrect.

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[229] The Supreme Court's interpretation of Fed. R. Evid. 702 in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, *General Electric Co. v. Joiner*, and *Kumho Tire Co. v. Carmichael* demonstrates the point. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 598–600 (1993) (Rehnquist, C.J., concurring in part and dissenting in part) (doubting the administrability of the majority's generalized rule under Fed. R. Evid. 702); Gen. Elec. Co. v. Joiner, 522 U.S. 136, 147-50 (1997) (Breyer, J., concurring) (acknowledging the difficult task for judges to apply Fed. R. Evid. 702 in highly technical cases); Kumho Tire Co. v. Carmichael, 526 U.S. 137, 148, 151 (1999) (explaining that expert evidence is often "too complex" such that a distinction between types of scientific or technical knowledge is "difficult, if not impossible, for judges to administer"); see also David H. Kaye, How *Daubert* and Its Progeny Have Failed Criminalistics Evidence and a Few Things the Judiciary Could Do About It, 86 Fordham L. Rev. 1639, 1643–44, 1658 (2018) (explaining that lower federal courts continue to misapply *Daubert*); Brandon L. Garrett & M. Chris Fabricant, The Myth of the Reliability Test, 86 Fordham L. Rev. 1559, 1568 (2018) (same).

[230] Loper Bright Enters. v. Raimondo, 603 U.S. 369, 403 (2024).

[231] Id. at 402.

[232] Id. at 400.

Deference, in the context of statutory interpretation, is fundamentally a question of policymaking. Under *Chevron*, courts recognized that the executive branch was making a policy decision when interpreting an ambiguous statute. The court's main role was to make sure the executive branch was making reasonable interpretations: not arbitrary, not capricious, and not exceeding statutory boundaries. Whether they changed later or not, as long as the agency interpretations were within those limits, the *Chevron* space, the interpretation had to be upheld.[233] It is worth repeating that *Chevron*'s step two was not about interpretation or interpretive authority. Step two was about who decides. When courts applied step two, they did not treat the agency decision under review like an interpretation, they treated it like a policy judgment and reviewed it pursuant to the arbitrary-and-capricious test.

In this context, *Chevron* should be understood as a method of judicial self-regulation.[234] The federal judiciary "enjoys a constitutionally established monopoly on adjudication."[235] Courts have long stated their profound reluctance to being viewed as "making law."[236] Historically, there has been a "profound—but unspoken—uneasiness with the judicial power to create and apply the various interpretive rules in the first place."[237] In fact, the famous canons of construction, "provide at least a veneer of legitimacy by allowing judges to point to something other than their own personal preferences or intuitions to justify their decisions."[238] These canons are an essential veneer because for a court to make law would be for a court to violate the foundations of interbranch "comity."[239] As John Manning explained: "When the Court, in effect, tells a coordinate branch that it must do its business a different way . . . , it is imperative to anchor that instruction firmly in a source of higher law. Otherwise, it is not clear why the Court has any warrant to reform the legislative process."[240]

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[233] Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005).

[234] Herz, supra note 35, at 1877.

[235] Id. at 1874.

[236] Abbe R. Gluck & Lisa Schultz Bressman, Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I, 65 Stan. L. Rev. 901, 1018 (2013) (internal quotation marks omitted).

[237] Id.

[238] Id. at 1019.

[239] Robert Katzmann, *Madison Lecture* Statutes, 87 N.Y.U. L. Rev. 637, 670 (2012) ("When courts construe statutes in ways that respect what legislators consider their work product, the judiciary promotes comity with the first branch of government.").

[240] John F. Manning, Second-Generation Textualism, 98 Calif. L. Rev. 1287, 1306–07 (2010) (citation omitted) (explaining how the bicameralism and presentment clauses undermine the use of legislative history and places textualism "on firmer ground").

And yet, with *Loper Bright*, the Court may be exemplifying Justice Scalia's claim that the Supreme Court "seems incapable of admitting that some matters—*any* matters—are none of its business."[241] In just one year after *Loper Bright*, the Court's rulings on high-profile political and policy issues from presidential immunity and executive authority to abortion, LGBTQ rights, and immigration, contributed to the Supreme Court's approval dropping below forty percent for the first time. This is the largest partisan gap ever recorded: sixty-four points.[242]

With *Chevron* eliminated, what were previously lower political-legal stakes have now become high-stakes policymaking. When *Chevron* and *Skidmore* were both in effect, the stakes for the Court's interpretation were lower because an agency's subsequent use of its proper lawmaking authority could "supersede the court's [initial] legal interpretation."[243] Now, courts are not only the final arbiters of the single, best, and only permissible interpretation, but they are also the final policymakers—a role some judges openly embrace.

What is clear is that Congress does not want courts to be policymakers. In the most comprehensive study of 137 Congressional Committee and Legislative Counsels (congressional staffers with legal training),[244] Professors Gluck and Bressman found that ninety-nine percent of respondents "intend for agencies to fill ambiguities or gaps relating to more 'everyday' questions, such as the details of implementation" and ninety-three percent intend for them to fill "ambiguities or gaps relating to the agency's area of expertise."[245] The typical comment from staffers was: "'We

[241] Sosa v. Alvarez-Machain, 542 U.S. 692, 750 (2004) (Scalia, J., concurring in part and concurring in the judgment) (emphasis in original).

[242] Jeffrey M. Jones & Sarah Hogenboom-Jones, Record Party Gaps in Job Approval of Supreme Court, Congress, Gallup (Aug. 7, 2025), https://news.gallup.com/poll/693230/record-party-gaps-job-approval-supreme-court-congress.aspx (finding in a July 2025 survey that thirty-nine percent of Americans approved of the way the Supreme Court is handling its job; and among political groups, seventy-five percent of Republicans approved of it but only thirty-four percent of Independents and eleven percent of Democrats approved).

[243] Healy, supra note 36, at 48; see also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982–83 (2005) ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion. . . . Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction."); id. at 985 ("Before a judicial construction of a statute, whether contained in a precedent or not, may trump an agency's, the court must hold that the statute unambiguously requires the court's construction.").

[244] Gluck & Bressman, supra note 236, at 919–22.

[245] Id. at 1004–05 (summarizing the data in Figure 11).

are more likely to defer when an agency has technical expertise.'"[246] Specifically, the Congressional staffers "rejected the idea of courts as partners" in statutory interpretation.[247] "[R]espondents viewed Congress's primary interpretive relationship as one with *agencies*, not with courts. Indeed, they strongly resisted one of the major premises of most current interpretive theories: namely, that Congress is in some kind of dialogue with courts . . . ."[248] Not one respondent stated that they "intend to reserve interpretive authority only for courts."[249] To staffers, agencies should "fill textual gaps"[250] in their role as "everyday statutory interpreters;" making "no distinction" between agency "'implementation'" and "'interpretation.'"[251] To this end, respondents "resist[ed] the notion that Congress needs to grant agencies some 'extra' authority to interpret statutory ambiguities when the power to implement the statute already exists."[252]

In short, *Loper Bright* rests on an assumption about congressional intent that is squarely contradicted by the APA's own drafters in Congress who overwhelmingly expect agencies, not courts, to fill statutory gaps—especially on technical and implementation questions.

B. Courts Lack Competence to Be Policymakers, Especially for AI

The *Loper Bright* majority claimed that "delegating ultimate interpretive authority to agencies is simply not necessary to ensure that the resolution of statutory ambiguities is well informed by subject matter expertise."[253] The Court further claimed that "Congress expects courts to handle technical statutory questions"[254] because agencies have "no special competence" to answer them.[255] But if one looks for evidence of how (in)competently the judiciary may wield its interpretive authority over technical questions, one need look no further than the area where courts already serve as technical gatekeepers: the admissibility of expert evidence. Under Federal Rule of Evidence 702[256] and the Supreme Court's opinion in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, trial court judges are the gatekeepers

[246] Id. at 1004.
[247] Lisa Schultz Bressman & Abbe R. Gluck, Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II, 66 Stan. L. Rev. 725, 767 (2014).
[248] Id. at 765.
[249] Id. at 769–70.
[250] Id. at 770.
[251] Id. at 765.
[252] Id. at 770.
[253] Loper Bright Enters. v. Raimondo, 603 U.S. 369, 402–03 (2024).
[254] Id. at 402.
[255] Id. at 400–01.
[256] Fed. R. Evid. 702 (providing the criteria for expert testimony).

responsible for ensuring that expert evidence is offered only by qualified experts who can demonstrate that the proffered evidence is more likely reliable than not.[257] A review of Rule 702 practice reveals a judiciary fundamentally unable to properly resolve many of the technical questions already before them.

In practice, courts are failing to apply Rule 702 as intended or even as written.[258] Courts have "deviated from *Daubert* by altering or misapplying [its] framework for judging scientific validity," creating a "weakened or mutated" analysis stemming from psychological, sociological, and political limitations within the judiciary, including "disparities in resources" between parties, "lack of knowledge or scientific competence," "strong prior beliefs about validity," and general institutional conservatism.[259] Specifically, in criminal cases, "Rule 702 appears . . .to be rarely used in practice to test reliability and, when used, it tends to exclude defense witnesses."[260] In a review of 121 criminal cases where expert evidence was challenged, Michael Risinger found that the prosecution had its expert excluded in six out of sixty-seven cases (9%),[261] whereas the defense had its expert excluded in forty-four out of fifty-four cases (81%).[262] In civil cases, the *Daubert* standard has had a disparate impact on communities of color, reducing Black litigants' access to the legal system.[263] In an examination of 732 cases and 1,391 forensic examinations from the National Registry of Exonerations (including forensic disciplines like serology, forensic pathology, hair comparison, forensic medicine, seized drugs, latent prints, fire debris, DNA, and bitemark comparisons), 635 (87%) of the cases and 891 (64%) of the forensic examinations had errors admitted by courts.[264] In 491 (67%) cases

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[257] 509 U.S. 579, 589 (1993); see also, Gen. Elec. v. Joiner, 522 U.S. 136, 142 (1997); Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147 (1999).

[258] David E. Bernstein & Eric G. Lasker, Defending *Daubert*: It's Time to Amend Federal Rule of Evidence 702, 57 Wm. & Mary L. Rev. 1, 8–10 (2015) (describing judges as "ignor[ing]" amended Rule 702, a lack of consistency between and among judges, and being affected by "partisan" interests); see also Marc Canellas, Defending IEEE Software Standards in Federal Criminal Court, 54 Comput. & Soc'y 14 (2021) (describing how federal courts fundamentally misunderstand how to appropriately apply Rule 702 when assessing the reliability of software).

[259] Kaye, supra note 229, at 1649.

[260] Garrett & Fabricant, supra note 229, at 1581.

[261] D. Michael Risinger, Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?, 64 Alb. L. Rev. 99, 105 (2006).

[262] Id. at 106.

[263] Andrew W. Jurs & Scott DeVito, A Tale of Two *Dauberts*: Discriminatory Effects of Scientific Reliability Screening, 79 Ohio State L.J. 1107, 1140 (2018) ("Based on our analysis, *Daubert* gatekeeping does not act equally towards all claimants in the civil justice system, but instead acts disproportionately to limit access to justice for communities of color.").

[264] John Morgan, Wrongful Convictions and Claims of False or Misleading Forensic Evidence, 68 J. Forensic Sci. 908, 908–09, 919 (2023).

the "forensic case error contributed to the wrongful conviction."[265] In recent years, two of the nation's most prominent scientific advisory groups, the National Academy of Science in 2009[266] and President's Council of Advisors on Science and Technology (PCAST) in 2016[267], detailed the numerous ways in which unreliable forensic evidence has been admitted in criminal cases because judges failed to appropriately apply Rule 702. These examples reveal that broadly speaking, judges lack competence in technical evaluations and are unable to neutrally or effectively perform their gatekeeping role for expert evidence.

In 2023, because of the overwhelming issues with trial courts' ability to apply Rule 702, the Supreme Court took the significant step of amending Rule 702.[268] Judge Thomas Schroeder, the Chair of Judicial Conference's Rule 702 Subcommittee, wrote that too often "trial courts are not clear about what standard they are applying. Worse, some trial and appellate courts misstate and muddle the *admissibility* standard."[269] He also explained that trial courts have such difficulty with the basics of Rule 702 that when the Committee was discussing whether to add a preponderance of the evidence requirement explicitly to the text of Rule 702, both those in favor and against the addition justified their arguments on the trial courts' inability to perform their duties:

> The argument in favor construes the cases as evidence that a significant number of courts are simply misapplying Rule 702 and misstating the law. The argument against the amendment is that Rule 104(a) is a rule of general application and that Rule 702 should not be singled out for special treatment. Moreover, the Supreme Court has already made the point in *Daubert*, and the 2000 Advisory Committee note repeats it. Therefore, some say, the amendment would do no more than reinforce what has

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[265] Id. at 919.

[266] Comm. on Identifying the Needs of the Forensic Sci. Cmty., Nat'l Res. Council of the Nat'l Academies, Strengthening Forensic Science in the United States: A Path Forward 106–09 (2009).

[267] President's Council of Advisors on Sci. and Tech., Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods 5, 43, 142–44 (2016); see also Daniel J. Capra, Foreword: Symposium on Forensic Expert Testimony, *Daubert*, and Rule 702, 86 Fordham L. Rev. 1459, 1459–60 (2018) (describing the PCAST report as demonstrating "the problem of experts overstating their results").

[268] Fed. R. Evid. 702 advisory committee's notes on rules to 2023 amendment (explaining that courts made "rulings [that] are an incorrect application of Rules 702 and 104(a).")

[269] Thomas D. Schroeder, Toward a More Apparent Approach to Considering the Admission of Expert Testimony, 95 Notre Dame L. Rev. 2039 (2020).

> already been said. If courts are currently ignoring the Supreme Court and the 2000 amendments, is it likely they would follow a new amendment?[270]

In other words, advocates in favor of amending Rule 702 pointed to how often courts were misapplying and misstating Rule 702. Those against the amendment explained that applying Rule 702 should already be straightforward under Supreme Court precedent and that the misapplication shows that no amendment to the Rule's text could improve the courts' decision making.

The Committee Notes to the 2023 Amendment give a scathing review of trial courts' ability to interpret and understand technical evidence. First, the amendment added language that "the proponent [must] demonstrate to the court that it is more likely than not that" the expert's testimony is reliable.[271] Rule 104(a) already stated that a "court must decide . . . whether . . . evidence is admissible," and in 1987, the Supreme Court affirmed the well-established rule that such "admissibility" must be "established by a preponderance of proof," such that the "court will have found it more likely than not."[272] Nevertheless, Rule 702 had to make it explicit and risk negative implications of Rule 104(a)[273] because "many courts have held that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a)."[274]

In sum, the judiciary's application of Rule 702 had become so problematic that to some commentators "the amendments effectively overrule a significant body of case law that has misconstrued and misapplied

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[270] Id. at 2059 (citation omitted).

[271] Fed. R. Evid. 702.

[272] Fed. R. Evid. 104(a); Bourjaily v. United States, 483 U.S. 171, 175 (1987) ("We are therefore guided by our prior decisions regarding *admissibility* determinations that hinge on preliminary factual questions. We have traditionally required that these matters be established by a *preponderance of proof*. . . . The preponderance standard ensures that before admitting evidence, the court will have found it *more likely than not* that the technical issues and policy concerns addressed by the Federal Rules of Evidence have been afforded due consideration." (emphasis added)).

[273] Fed. R. Evid. 702 advisory committee's notes on rules to 2023 amendment ("There is no intent to raise any negative inference regarding the applicability of the Rule 104(a) standard of proof for other rules.").

[274] Id. (explaining further that this rule was made "necessary by the courts that have failed to apply correctly the reliability requirements of that rule").

Rule 702 for more than 20 years."[275] Yet the very safeguard the *Loper Bright* majority relied upon to prevent judicial errors—"[t]he parties and *amici* . . . [who] are steeped in the subject matter"[276]—was present in these cases too and did nothing to prevent widespread errors and wrongful convictions. These are the *Loper Bright* policymakers now charged with serving as the single, final, and only permissible interpreters of even the most technical statutes.

C. Congress Is Unlikely to Correct Judicial Policymaking

In *Loper Bright*, the majority assured readers that removing agencies from their role as primary gap-fillers would not deprive statutory interpretation of needed expertise. According to the majority, Congress "expects courts to do their ordinary job" in handling even the most technical questions, and if Congress disagrees, it can always "revis[e] the statute."[277] This confidence rests on a false premise: that Congress has both the capacity and the will to continually update statutory language in response to incorrect judicial interpretations. In reality, Congress rarely overrides judicial constructions, struggles to keep pace with rapid technological change, and often drafts with ambiguity precisely so agencies—not courts—can resolve complex, technical questions while insulating members of Congress from political blowback.

As Professor Kent Barnett summarized succinctly: "Although often deemed a contributor to ossification, Congress is less frequently mentioned as a problem solver for it."[278] Congress rarely overrides court's statutory interpretations, even the Supreme Court decisions of which it is clearly aware, and even less so of the lower court decisions of which it is unaware. For example, a review of Congressional overrides of Supreme Court statutory interpretation decisions from 1967 to 1990 showed that Congress had an "unimpressive knowledge of and response to the far more numerous lower federal court statutory interpretation decisions," especially as compared with the Supreme Court. And, even then, "its monitoring of Supreme Court statutory decisions yields few overrides" revealing "the significant power of the Court to read its own raw preferences into statutes

[275] Eric Lasker & Lawrence Ebner, Time For Courts, Attorneys To Use Amended Evidence Rule, Law360 (July 20, 2023, at 15:35 ET), https://www.law360.com/articles/1700336/time-for-courts-attorneys-to-use-amended-evidence-rule.

[276] Loper Bright Enters. v. Raimondo, 603 U.S. 369, 402 (2024).

[277] Id. at 403 ("And to the extent that Congress and the Executive Branch may disagree with how the courts have performed that job in a particular case, they are of course always free to act by revising the statute.").

[278] Kent H. Barnett, Codifying Chevmore, 90 N.Y.U. L. Rev. 1, 63 (2015).

without congressional override."[279] A more recent survey of Congressional staff from 2011 to 2012 similarly concluded that there is little evidence to support the theories of Congress being a "check" on judicial interpretations, or there being any meaningful "interbranch interpretive dialogue" between Congress and the courts.[280]

Empirical evidence supports this summary. Approximately 3,000 to 4,500 final agency rules are published each year.[281] Since 1975, no Congress has passed more than 713 laws in one year.[282] Moreover, that number is decreasing to the point where the 118th Congress, in session from January 2023 to January 2025, only enacted 274 pieces of legislation, and the 119th Congress, in session from January 2025 through February 2026, only enacted 79 pieces of legislation.[283] Broadly speaking, Congress may fail to enact laws as a result of a "lack of political will or an unwillingness to invest the necessary political capital and resources. Policymakers are also often reluctant to support new regulations for fear they will eliminate jobs and harm international competitiveness."[284] Policymakers are also mired in extraordinary partisanship.[285]

Focusing on technology, both the Legislative and Executive Branches face the "'pacing problem,' in which regulation is unable to keep pace with fast developing technologies."[286] The pacing problem has two elements:

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[279] William N. Eskridge, Jr., Overriding Supreme Court Statutory Interpretation Decisions, 101 Yale L.J. 331, 416 (1991).

[280] Gluck & Bressman, supra note 236, at 1018.

[281] Maeve P. Carey, Cong. Rsch. Serv., Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the Federal Register 1 (2019).

[282] Moira Warburton, Why Congress is Becoming Less Productive, Reuters (Mar. 12, 2024), https://www.reuters.com/graphics/USA-CONGRESS/PRODUCTIVITY/egpbabmkwvq/ (last visited Feb. 22, 2026).

[283] Statistics and Historical Comparison, GovTrack.us, https://www.govtrack.us/congress/bills/statistics (last visited Feb. 22, 2026).

[284] Gary E. Marchant & Carlos I. Gutierrez, Soft Law 2.0: An Agile and Effective Governance Approach for Artificial Intelligence, 24 Minn. J.L. Sci. & Tech. 375, 383 (2023).

[285] Drew DeSilver, The Polarization in Today's Congress Has Roots That Go Back Decades, Pew Rsch. Ctr. (Mar. 10, 2022), https://www.pewresearch.org/short-reads/2022/03/10/the-polarization-in-todays-congress-has-roots-that-go-back-decades/ ("Democrats and Republicans [in Congress] are farther apart ideologically today than at any time in the past 50 years."). The American people are similarly divided. See Megan Brenan, U.S. Political Parties Historically Polarized Ideologically, Gallup (Jan. 16, 2025), https://news.gallup.com/poll/655190/political-parties-historically-polarized-ideologically.aspx (summarizing surveys showing that Americans identifying as Republican reporting being very conservative or conservative, and Americans identifying as Democrats reporting being very liberal or liberal, is the "[m]ost [e]xtreme in 30 [y]ears").

[286] Marchant & Gutierrez, supra note 284, at 383; see also Gary E. Marchant, The Growing Gap Between Emerging Technologies and the Law, *in* 7 The Growing Gap Between Emerging Technologies and Legal-Ethical Oversight: The Pacing Problem 19, 22–23 (Gary E. Marchant et al. eds., 2011) [hereinafter Marchant, *Pacing*]; Gary E. Marchant, Governance of Emerging Technologies as a Wicked Problem, 73 Vand. L. Rev. 1861, 1862–63 (2020).

first, governments "are too slow to adopt regulations in the first instance," and, second, governments' inertia to keep the status quo.[287] "As a result, existing regulatory programs often become quickly outdated, especially for a rapidly moving technology like AI."[288] Agencies themselves "often lack adequate technical staff and expertise to quickly regulate a new emerging technology."[289] As Professor Gary Marchant and his colleagues explain, there are numerous "regulatory misfits" where agencies, attempting to keep up with advancing technology despite the lack of the requisite regulatory language, are "trying to fit a square peg into a round hole," such as the Federal Trade Commission regulating algorithmic bias or the Food and Drug Administration regulating "smart" medical devices.[290]

Congress is similarly shorthanded.[291] "[T]he role of expertise in the legislative process is at an all-time low . . . exacerbat[ing] deficiencies that are inherent to the legislative process."[292] The IEEE-USA Congressional Science and Technology Fellowship Program, which supported me as a Ph.D. engineer serving as a Congressional staffer, was created for exactly this reason.[293] Since 2018, no specific public laws have been enacted, despite recent hearings on some of the most fundamental and wide-reaching issues including data privacy,[294] Section 230[295] content moderation,[296] antitrust

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[287] Marchant & Gutierrez, supra note 284, at 383–84.

[288] Id. at 384.

[289] Id. at 381.

[290] Gary E. Marchant, Lucille Tournas & Carlos I. Gutierrez, Governing Emerging Technologies Through Soft Law: Lessons for Artificial Intelligence, 61 Jurimetrics 1, 7 (2020) ("For example, the primary regulatory statute for electronic communications in the United States is the Electronic Communications Privacy Act (ECPA), which was enacted in 1986 before email, the world wide web, and smart phones even existed. . . . Other AI issues are not covered by any existing regulatory authority or agency (e.g., technological unemployment or some of the autonomy concerns raised by AI systems).").

[291] Martha Kinsella & Maya Kornberg, Science-Poor Congress Needs More than Google Searches for Tech Legislation, Brennan Ctr. for Just. (Dec. 14, 2023), https://www.brennancenter.org/our-work/analysis-opinion/science-poor-congress-needs-more-google-searches-tech-legislation.

[292] Rachel E. Barkow, The Wholesale Problem with Congress: The Dangerous Decline of Expertise in the Legislative Process, 90 Fordham L. Rev. 1029, 1031 (2021) (citations omitted).

[293] IEEE-USA Government Fellowship Program, IEEE-USA, https://ieeeusa.org/public-policy/government-fellowships/ (last visited Feb. 22, 2026).

[294] Legislative Solutions to Protect Kids Online and Ensure Americans' Data Privacy Rights: Hearing Before the Subcomm. on Innovation, Data and Com. of the H. Energy and Com. Comm., 118th Cong. (2024), https://www.congress.gov/118/meeting/house/117146/documents/HHRG-118-IF17-Transcript-20240417.pdf.

[295] Where Are We Now: Section 230 of the Communications Decency Act of 1996: Hearing Before the Subcomm. on Commc'ns and Tech. of the H. Energy and Com. Comm., 118th Cong. (2024), https://www.congress.gov/118/meeting/house/117099/documents/HHRG-118-IF16-Transcript-20240411.pdf.

[296] Preserving Free Speech and Reining in Big Tech Censorship: Hearing Before the Subcomm. on Commc'ns and Tech. of the H. Energy and Com. Comm., 118th Cong. (2023), https://www.congress.gov/index.php/event/118th-congress/house-event/115561/text.

law,[297] human rights,[298] and child sexual exploitation online.[299] The only significant piece of technology regulation have been the forced sale of TikTok to U.S. investors[300] and requiring internet platforms to remove nonconsensual intimate images.[301] And, in December 2025, the White House issued an Executive Order claiming to preempt and challenge any state law that conflicts with White House AI policy, again bypassing Congress entirely.[302] These failures underscore Congress's fundamental incapacity to revise statutes at the pace or with the specificity that the *Loper Bright* majority presumes.

Given this legislative difficulty, it is no surprise that Congress relies on the deference it gives to agencies. In one of the first studies of legislative staffers, Professors Victoria Nourse and Jane Schacter found that "although staffers value legislative clarity, the pressures of time and compromise make ambiguity inevitable . . . ."[303] In the follow-up survey of staffers by Gluck and Bressman, ambiguity was shown to be a natural and intentional part of legislative drafting, where, among respondents, ambiguity was caused by a lack of time (92%), issue complexity (93%) and the need for consensus (99%).[304] Therefore, it was no surprise that over 90% of the legislative staffers surveyed relied on *Chevron* deference when drafting legislation,[305] and 91% "reported that one reason for statutory ambiguity is a desire to delegate decisionmaking to agencies."[306] Ambiguity, in other words, is not

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[297] Reining in Dominant Digital Platforms: Restoring Competition to Our Digital Markets: Hearing Before the Subcomm. on Competition, Antitrust, and Consumer Rts. of the S. Comm. on the Judiciary, 118th Cong. (2023), https://www.congress.gov/118/chrg/CHRG-118shrg53536/CHRG-118shrg53536.pdf.

[298] Artificial Intelligence and Human Rights: Hearing Before the Subcomm. on Hum. Rts. and the L. of the S. Comm. on the Judiciary, 118th Cong. (2023), https://www.judiciary.senate.gov/committee-activity/hearings/artificial-intelligence-and-human-rights.

[299] Big Tech and the Online Child Sexual Exploitation Crisis: Hearing Before the S. Comm. on the Judiciary, 118th Cong. (2024), https://www.congress.gov/event/118th-congress/senate-event/LC74366/text.

[300] Richard Lawler, The TikTok Deal is Done, Finally, The Verge (Jan. 22, 2026, 20:01 ET), https://www.theverge.com/tech/866437/tiktok-usds-bytedance-sale-oracle-mgx. However, for nearly a year after TikTok was required to be sold by its Chinese parent company or face a ban, neither had occurred. Lauren Feiner, Even the Lawmakers Behind the TikTok Ban Have No Idea What's Going On, The Verge (Nov. 17, 2025, at 11:10 ET), https://www.theverge.com/policy/822164/tiktok-deal-trump-china.

[301] Paresh Dave, Trump Signs Controversial Law Targeting Nonconsensual Sexual Content, Wired (May 19, 2025, at 15:29 ET) https://www.wired.com/story/take-it-down-act-law-passes/ (discussing warnings that the law could be transformed into a weapon of censorship).

[302] See sources cited supra note 30.

[303] Gluck & Bressman, supra note 236, at 916 (citing Victoria F. Nourse & Jane S. Schacter, The Politics of Legislative Drafting: A Congressional Case Study, 77 N.Y.U. L. Rev. 575 (2002)).

[304] Id. at 997.

[305] Id. at 941 (Figure 5); id. at 993 (Figure 10).

[306] Id. at 997.

a drafting failure; it is a drafting strategy that presumes agency implementation.

The assumption that Congress will routinely correct judicial errors ignores legislative reality. Congress drafts with the expectation that agencies, not courts, will fill statutory gaps, especially in technical domains. By discarding that arrangement, *Loper Bright* transforms courts into policymakers, precisely in the areas where Congress expects agencies to lead and where courts are least equipped to operate, such as AI.

D. Statutory Ambiguity Is Ubiquitous, Especially for AI

As Justice Kagan predicted, the *Loper Bright* era will be tested quickly by one of the most difficult regulatory challenges of our time: defining "artificial intelligence." Any AI regulation must draw a line between covered and not-covered systems. Yet experts, legislators, and agencies cannot agree on what counts as AI.[307] This ambiguity is not an outlier but the norm. And it is precisely the kind of problem *Loper Bright* now turns into high-stakes judicial policymaking, obligating courts to supply a single, best answer in a field defined by rapid change and contested expertise. As leading experts explain: "[A]ny regulation that purports to regulate all AI would need a bright-line definition that distinguishes AI applications that are subject to the regulation from non-AI software and products that are not regulated."[308] But "[t]he ambiguity and difficulty of precisely defining" AI will likely impede and complicate regulation.[309]

As identified by Justice Kagan,[310] this one question best characterizes the inevitable future of the *Loper Bright* holding: the frequent impossibility of a single, best, only permissible answer; the ease of challenging regulations; and the inevitable ossification and balkanization of definitions.

An illustrative example of AI's innate ambiguity can be found in the bipartisan Artificial Intelligence Research, Innovation and Accountability Act of 2024 ("AI Act"), introduced by Sens. John Thune, R-S.D., Amy Klobuchar, D-Minn., and other members of the Senate Commerce, Science and Transportation Committee.[311] This bill would have required both the National Institute of Standards and Technology ("NIST") and the Commerce

[307] See e.g., Pei Wang, On Defining Artificial Intelligence, 10 J. Artificial Gen. Intel. 1, 1 (2019) (explaining that "there is no widely accepted definition of Artificial Intelligence (AI)").

[308] Marchant & Gutierrez, supra note 284, at 380.

[309] Id.

[310] Relentless Tr. at 43–47.

[311] Artificial Intelligence Research, Innovation, and Accountability Act of 2023, S. 3312, 118th Cong. (2024) [hereinafter AI Research, Innovation, and Accountability Act].

Department to establish guidelines and a certification process for high and critical-impact AI systems.[312] If an organization deployed a "high-impact" AI system in violation of the AI Act[313], operated a covered internet platform using generative AI systems without notifying users[314] , or failed to submit transparency reports for "high-impact AI systems,"[315] the Secretary of Commerce would be authorized to impose a fine up to $300,000 (in some cases more). And if the Secretary deemed the violation intentional, the Secretary could prohibit the organization from deploying the critical-impact AI system entirely.[316] As introduced, the bill defined AI and generative AI as:

> ARTIFICIAL INTELLIGENCE SYSTEM.—The term "artificial intelligence system" means an engineered system that—
>
> > (A) generates outputs, such as content, predictions, recommendations, or decisions for a given set of human-defined objectives; and
> >
> > (B) is designed to operate with varying levels of adaptability and autonomy using machine and human-based inputs.
> >
> > GENERATIVE ARTIFICIAL INTELLIGENCE SYSTEM.—The term "generative artificial intelligence system" means an artificial intelligence system that generates novel data or content in a written, audio, or visual format.

Imagine that the AI Act was passed into law, and then based on this legislation, the Commerce Department proposed and finalized a rule interpreting Section 201(9) to mean that "generative AI system" includes large language models ("LLMs") which, in its simplest version, are

[312] Id. §§ 204, 207.
[313] Id. § 208.
[314] Id. § 202.
[315] Id. § 203.
[316] Id. § 208.

statistical models which can be asked and answer questions in text.[317] Then, a company called ClosedAI used a ChatGPT-like text-to-text LLM to generate text content but failed to notify its users and was fined by the Commerce Department under this statute. ClosedAI then challenged the fine, arguing that the AI Act did not authorize the Commerce Department to regulate LLMs like ChatGPT. ClosedAI's goal would be to convince a court that the statute contains ambiguity, requiring the court to determine the single, best definition under *Loper Bright*, in the hope that the court's new definition would exclude ChatGPT. Remember, per the *Loper Bright* majority, "Congress expects courts to handle technical statutory questions"[318] and agencies have "no special competence" to answer them.[319]

The Commerce Department would defend its rules by emphasizing its distinct expertise in AI as the home of the NIST, the de facto home of AI expertise in the Executive Branch.[320] It would explain that ChatGPT is so ubiquitous that it is the generic word for generative AI systems.[321] In fact, Sam Altman, the CEO of OpenAI, which developed ChatGPT, even provided testimony to the U.S. Senate Commerce Committee while the AI Act was being deliberated.[322] That ChatGPT is a generative AI system is, today, a common-sense observation, requiring no expertise at all.

In light of this, what could ClosedAI leverage to convince the court that this is an ambiguous statute? First, they could identify the reality that experts cannot agree on what AI is.[323] The only thing experts do agree on with respect to defining AI is that "there is no widely accepted definition of Artificial Intelligence (AI). Consequently, the term 'AI' has been used with

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[317] Murray Shanahan, Talking About Large Language Models, 67 Comm. of the ACM 68, 70-71 (2024), https://dl.acm.org/doi/10.1145/3624724.

[318] Loper Bright Enters. v. Raimondo, 603 U.S. 369, 402 (2024).

[319] Id. at 400–01.

[320] See, e.g., Center for AI Standards and Innovation, Nat'l Inst. of Standards & Tech., https://www.nist.gov/aisi (last visited Feb. 23, 2026) ("The Center for AI Standards and Innovation (CAISI) will serve as industry's primary point of contact within the U.S. government to facilitate testing and collaborative research related to harnessing and securing the potential of commercial AI systems.").

[321] See, e.g., Kyle Kirschner, Sam Altman hates the name ChatGPT, Bus. Insider (Dec. 7, 2023, 13:38 ET), https://www.businessinsider.com/sam-altman-hates-chatgpt-name-2023-12 (noting that Sam Altman, co-founder of OpenAI, has complained that "[ChatGPT] is a horrible name, but it may be too ubiquitous to ever change"). As of Feb. 1, 2026, ChatGPT.com was the sixth-most visited website in the world only behind google.com, youtube.com, facebook.com, instagram.com, and x.com. Chatgpt.com Website Analysis, SimilarWeb (Feb. 1, 2026), https://www.similarweb.com/website/chatgpt.com/.

[322] Cecilia Kang, OpenAI's Sam Altman Urges A.I. Regulation in Senate Hearing, N.Y. Times (May 16, 2023), https://www.nytimes.com/2023/05/16/technology/openai-altman-artificial-intelligence-regulation.html.

[323] Will Heaven, What Is AI?, MIT Tech. Rev. (July 10, 2024), https://www.technologyreview.com/2024/07/10/1094475/what-is-artificial-intelligence-ai-definitive-guide/.

many different senses, both within the field and outside it."[324] Legislators recognize this reality. In 2019, the U.S. passed the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which provided the first federal definitions of AI.[325] Yes, "definitions" plural. Per the Act, the term "artificial intelligence" includes five separate definitions which are at times conflicting, repetitive, and operate at varying levels of abstraction.[326] As the National Conference of State Legislators explained, everyone seems to have a different definition of AI: from U.S. states to major stakeholders worldwide.[327] Even the U.S. Government now has competing definitions with the passage of the U.S. National Artificial Intelligence Initiative Act of 2020.[328]

ClosedAI could further argue that ChatGPT, properly understood, is not following "human-defined objectives"[329] nor is it "generat[ing] novel" text[330]—taking it outside the scope of the Act. First, they could explain that in the context of "human-defined objectives," LLMs like ChatGPT are infamously uncontrollable as they rely on a mixture of randomness and training data. They often respond to the same prompts with different,

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[324] Wang, supra note 307, at 1.

[325] Pub. L. No. 115-232, § 238(g), 132 Stat. 1636 (2018) (codified at 10 U.S.C. § 4061 note).

[326] Id. ("[T]he term 'artificial intelligence' includes the following: (1) Any artificial system that performs tasks under varying and unpredictable circumstances without significant human oversight, or that can learn from experience and improve performance when exposed to data sets. (2) An artificial system developed in computer software, physical hardware, or other context that solves tasks requiring human-like perception, cognition, planning, learning, communication, or physical action. (3) An artificial system designed to think or act like a human, including cognitive architectures and neural networks. (4) A set of techniques, including machine learning, that is designed to approximate a cognitive task. (5) An artificial system designed to act rationally, including an intelligent software agent or embodied robot that achieves goals using perception, planning, reasoning, learning, communicating, decision making, and acting.").

[327] Erlinda Doherty, Susan Frederick & Heather Morton, Approaches to Regulating Artificial Intelligence: A Primer, Nat'l Conf. of State Legislatures (Aug. 10, 2023), https://www.ncsl.org/technology-and-communication/approaches-to-regulating-artificial-intelligence-a-primer ("Many organizations and individuals have sought to define AI but no consensus has emerged on a uniform meaning. The lack of an overarching definition is challenging to lawmakers as they seek to create a regulatory framework."); see also Madyson Fitzgerald, What Is Artificial Intelligence? Legislators Are Still Looking for a Definition, Stateline (Oct. 5, 2023), https://stateline.org/2023/10/05/what-is-artificial-intelligence-legislators-are-still-looking-for-a-definition/ (describing the different state definitions and the differing definitions among the European Union, Google, and the BSA Software Alliance).

[328] Compare the 2020 National Artificial Intelligence Initiative Act definition, "The term 'artificial intelligence' means a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments.", 15 U.S.C. § 9401(3), with the five definitions in the 2019 National Defense Authorization Act, supra note 326.

[329] AI Research, Innovation and Accountability Act, § 201(2)(A).

[330] Id. § 201(9).

unreasonable, weird, and inaccurate results.[331] While the public term for this is "hallucinations,"[332] the more accurate term is "bullshit" as these models are "designed to produce [media] that *looks* truth-apt without any actual concern for truth."[333] In 2023, this lack of human control was affirmed when the U.S. Copyright Office denied an artist copyright protections for AI-generated images because the artist did not control the AI outputs.[334] Ultimately, it is now well-documented that LLMs not only fail to be controlled by "human-defined objectives" but have an emergent objective of their own: to control the human. AI systems are learning to manipulate human behavior through tailormade persuasion[335] and flattery,[336] raising the alignment problem: the risk that we are training models not to reflect human values or truth, but to maximize engagement, profit, or influence.[337]

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[331] See, e.g., Diffusion Models: A Practical Guide, Scale (July 17, 2025), https://scale.com/guides/diffusion-models-guide (last visited Dec. 15, 2025) (showing the same prompt generating different images and explaining that "we don't yet know the true extent of [the diffusion models'] limitations"); Jason Koebler, Google Is Paying Reddit $60 Million for Fucksmith to Tell Its Users to Eat Glue, 404 Media (May 23, 2024), https://www.404media.co/google-is-paying-reddit-60-million-for-fucksmith-to-tell-its-users-to-eat-glue/ (when users asked Google Search what could make cheese stick on pizza, Google's AI-generated response said to "add about 1/8 cup of non-toxic glue" to the pizza sauce, which was copied from a Reddit user's comment from about eleven years ago); Brennan MacLean, Large Language Models are Weird, Brettonmaclean.com (Dec. 13, 2023), https://brettonmaclean.com/blog/2023-12-13-large-language-models-are-weird.html ("Whenever an LLM makes a mistake, we say that it's 'hallucinating,' but really we just mean that it hallucinated *incorrectly*. Technically, hallucinating is all LLM's do! These aren't search engines, they're neural network models trained on massive amounts of data. Unfortunately that data comes from the entire history of the internet, which is not exactly an institution of truth, order, and reason."); Faiz Surani & Daniel E. Ho, AI on Trial: Legal Models Hallucinate in 1 out of 6 (or More) Benchmarking Queries, Stanford University, Human-Centered Artificial Intelligence (May 23, 2024), https://hai.stanford.edu/news/ai-trial-legal-models-hallucinate-1-out-6-or-more-benchmarking-queries (describing a study showing that "the Lexis+ AI and Ask Practical Law AI systems produced incorrect information more than 17% of the time, while Westlaw's AI-Assisted Research hallucinated more than 34% of the time" (citing Varun Magesh et al., Hallucination-Free? Assessing the Reliability of Leading AI Legal Research Tools, 22 J. Empirical Legal Stud. 216 (2025))).

[332] See, e.g., Varun Magesh et al., Hallucination-Free? Assessing the Reliability of Leading AI Legal Research Tools, 22 J. Empirical Legal Stud. 216, 216 (2025); see also MacLean, supra note 331.

[333] Michael Townsen Hicks, James Humphries, and Joe Slater, ChatGPT is Bullshit, 26 Ethics & Info. Tech. 37, 37 (2024), https://doi.org/10.1007/s10676-024-09775-5.

[334] Richard Lawler, The US Copyright Office Says You Can't Copyright Midjourney AI-generated Images, The Verge (Feb. 22, 2023), https://www.theverge.com/2023/2/22/23611278/midjourney-ai-copyright-office-kristina-kashtanova.

[335] Vivian Ho, Reddit Slams 'Unethical Experiment' That Deployed Secret AI Bots in Forum, Wash. Post (Apr. 30, 2025), https://www.washingtonpost.com/technology/2025/04/30/reddit-ai-bot-university-zurich/; see also Guanxiong Huang & Sai Wang, Is Artificial Intelligence More Persuasive Than Humans? A Meta Analysis, 73 J. Comm. 552 (Aug. 9, 2023), https://academic.oup.com/joc/article-abstract/73/6/552/7240119?redirectedFrom=fulltext.

[336] Expanding On What We Missed with Sycophancy, OpenAI (May 2, 2025), https://openai.com/index/expanding-on-sycophancy/.

[337] Dario Amodei, The Urgency of Interpretability, DarioAmodei.com (Apr. 2025),

One of the best ways to understand an LLM like ChatGPT is that it is not "generat[ing] novel" text as the AI Act describes but acting as a "stochastic parrot"—probabilistically picking the next words without any sense of their meaning—as Emily Bender and her colleagues described:

> Text generated by an LM is not grounded in communicative intent, any model of the world, or any model of the reader's state of mind. It can't have been, because the training data never included sharing thoughts with a listener, nor does the machine have the ability to do that. This can seem counter-intuitive given the increasingly fluent qualities of automatically generated text, but we have to account for the fact that our perception of natural language text, regardless of how it was generated, is mediated by our own linguistic competence and our predisposition to interpret communicative acts as conveying coherent meaning and intent, whether or not they do. The problem is, if one side of the communication does not have meaning, then the comprehension of the implicit meaning is an illusion arising from our singular human understanding of language (independent of the model). Contrary to how it may seem when we observe its output, an LM is a system for haphazardly stitching together sequences of linguistic forms it has observed in its vast training data, according to probabilistic information about how they combine, but without any reference to meaning: a stochastic parrot.[338]

More technically, LLMs "learn a general pattern from a few examples in a prompt prefix, and to complete sequences in a way that conforms to that pattern."[339] So while the prompt may be "What is AI?," the question really being posted to the model is: Given the statistical distribution of words in the millions of articles and websites you have collected, what words are likely to follow the sequence: 'What is AI?'[340]

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https://www.darioamodei.com/post/the-urgency-of-interpretability (describing the "severity of . . . alignment risks").

[338] Emily M. Bender et al., On the Dangers of Stochastic Parrots: Can Language Models Be Too Big?, in Proceedings of the 2021 ACM Conference on Fairness, Accountability, and Transparency 610, 616–17 (Mar. 3, 2021), https://dl.acm.org/doi/10.1145/3442188.3445922 (internal citations omitted).

[339] Shanahan, supra note 317, at 76.

[340] Id.

To be fair, recent work has complicated this foundational understanding: LLMs have, in certain constrained domains such as mathematics, generated outputs that appear to exhibit structured reasoning while proving novel solutions.[341] These developments suggest emergent capabilities of LLMs which are more complex than the sum of their parts, even if they remain grounded in the model's underlying process of probabilistic sequence prediction rather than comprehension. For this reason, there is debate over whether LLMs are best understood as merely "glorified autocomplete."[342]

Moreover, recent litigation and disclosures reveal that while the text may seem "novel" to an individual user, ChatGPT was trained on countless copyrighted works.[343] Therefore, the text outputs are not so much novel, as much as they are a near word-for-word copy—failing the dictionary definition of "novel" as "new and not resembling something formerly known or used."[344]

As obvious as it may be that ChatGPT *is* generative AI, it is equally obvious that (1) there is innate ambiguity in the definition of AI or generative AI and (2) providing a single, final, only permissible definition of AI or generative AI is impossible. Among AI experts, AI is no different than Justice Stewart's famous description of obscenity: we know it when we see it.[345] As a group of AI experts explained: "Curiously, the lack of a precise, universally accepted definition of AI probably has helped the field to grow, blossom, and advance at an ever-accelerating pace. Practitioners,

[341] E.g., Konstantin Kakaes, The AI Revolution in Math Has Arrived, Quanta Magazine (Apr. 13, 2026) https://www.quantamagazine.org/the-ai-revolution-in-math-has-arrived-20260413/.

[342] Compare Joshua Rothman, Why the Godfather of A.I. Fears What He's Built, New Yorker (Nov. 13, 2023) https://www.newyorker.com/magazine/2023/11/20/geoffrey-hinton-profile-ai with Andrew Gelman, I Disagree with Geoff Hinton Regarding "Glorified Autocomplete," Stat. Modeling, Causal Inference, & Soc. Sci. (Nov. 18, 2023, at 09:55 ET) https://statmodeling.stat.columbia.edu/2023/11/18/i-disagree-with-geoff-hinton-regarding-glorified-autocomplete/.

[343] Michael M. Grynbaum & Ryan Mac, The Times Sues OpenAI and Microsoft Over A.I. Use of Copyrighted Work, N.Y. Times (Dec. 27, 2023), https://www.nytimes.com/2023/12/27/business/media/new-york-times-open-ai-microsoft-lawsuit.html (documenting the New York Times suing OpenAI and Microsoft for copyright infringement "over the unauthorized use of published work to train artificial intelligence technologies").

[344] Novel, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/novel (last visited Feb. 22, 2025); James J. Brudney & Lawrence Baum, Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras, 55 Wm. & Mary L. Rev. 483, 529 (2013).

[345] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description ["hard-core pornography"]; and perhaps I could never succeed in intelligibly doing so. But *I know it when I see it*, and the motion picture involved in this case is not that." (emphasis added)).

researchers, and developers of AI are instead guided by a rough sense of direction and an imperative to 'get on with it.'"[346]

But again, in our *Loper Bright* era, all a court needs is statutory ambiguity to take on the role of policymaker, and there is no question that any statutory definitions of AI, generative AI, or others will be ambiguous. Unlike the deference afforded under *Chevron* (and even under *Skidmore*), a court reading *Loper Bright* would now be required to define AI and generative AI. Each of the 677 federal district court judges, ninety-four federal judicial districts, or twelve federal circuits could be required to determine their own single, final AI definitions until the U.S. Supreme Court weighs in.[347] Therefore, while other agencies like the Environmental Protection Agency, Federal Aviation Administration, and the Food and Drug Administration may experience the "massive shock" that Justice Kagan described,[348] the effect on the governance of AI will not be a shock to an existing system, but a barrier to building any AI governance at all.

E. Judicial Policymaking Will Ossify and Balkanize Statutory Meaning

One of *Chevron*'s most significant virtues was its flexibility. By recognizing that statutory ambiguities remain open for ongoing agency clarification, *Chevron* allowed interpretations to evolve as circumstances, evidence, and policy priorities changed.[349] Under *Chevron*, courts did not freeze statutory meaning in their first encounter with a provision; instead, they acted as overseers ensuring the agency stayed within reasonable bounds. This dynamic "Chevron-space," defended by both scholars and Justice Scalia, enabled the law to adapt to new realities—a safeguard *Loper Bright* discarded.

The Supreme Court in *Brand X* rejected the idea that an agency should not receive deference from a court when its interpretation changed—as long as it was still a reasonable interpretation.[350] As Jonathan Siegel explained:

[346] Peter Stone et al., Artificial Intelligence and Life in 2030: One Hundred Year Study on Artificial Intelligence: Report of the 2015-2016 Study Panel 12 (Sept. 2016), http://ai100.stanford.edu/2016-report.

[347] United States District Court, Ballotpedia, https://ballotpedia.org/United_States_District_Court (last visited May 12, 2026).

[348] Loper Bright Enters. v. Raimondo, 603 U.S. 369, 471 (2024) (Kagan, J. dissenting).

[349] Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981–82 (2005).

[350] Id. ("[C]hange is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency must consider varying interpretations and the wisdom of its policy on a continuing basis, for example, in response to changed factual circumstances, or a change in administrations. That is no doubt why in *Chevron* itself, this Court deferred to an agency interpretation that was a recent reversal of agency policy." (first quoting Smiley v. Citibank, N.A., 517

"The power implicitly delegated to an agency by an ambiguous statute is not the power to interpret the statute, but the power to make a policy choice within the limits set by the possible meanings of the statute."[351] In this *Chevron* space, Congress had "command[ed] reviewing courts to act, not as deciders, but as overseers."[352]

Before *Loper Bright*, the Court viewed flexibility not as a constitutional defect, but as a virtue.[353] In the year before *Chevron*, the Supreme Court explained that it "fully recognize[d] that regulatory agencies do not establish rules of conduct to last forever, and that an agency must be given ample latitude to adapt their rules and policies to the demands of changing circumstances."[354] Flexibility was an accepted and expected feature of delegated policymaking.

As Professor Strauss later observed, not only may "[a]gencies operating within their judicially determined *Chevron* space may change their views from time to time" but "they are expected to vary in their views as changing circumstances warrant."[355] He noted that when "evidence had emerged of cigarette companies covertly manipulating the nicotine content of their products to induce addiction," agencies reasonably shifted their interpretations to address this new information.[356] This is precisely the kind of regulatory responsiveness that judicially-fixed meanings cannot accommodate.

Professor Strauss was not alone in his positive assessment of *Chevron's* flexibility. He was joined by *Chevron's* staunchest defender, Justice Scalia. Justice Scalia emphasized that the ability of agencies to change course was not a flaw but "one of [*Chevron's*] major advantages" because courts, by contrast, "resolve [ambiguities] for ever and ever."[357] Scalia continued that "if Congress is to delegate broadly, as modern times . . . demand," the delegee (agencies) must be able to "suit its actions to the times." This benefited the country by keeping policymakers politically accountable

U.S. 735, 742 (1996); and then quoting Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 863–64 (1984)) (internal quotation marks omitted) (citations omitted)).

351 Siegel, supra note 46, at 937.

352 Strauss, supra note 40, at 1173; see also Clark v. Sweeney, 607 U.S. 7, 9 (2025) (per curiam) ("To put it plainly, courts 'call balls and strikes'; they don't get a turn at bat." (quoting Lomax v. Ortiz-Marquez, 590 U.S. 595, 599 (2020))).

353 Strauss, supra note 40, at 1173.

354 Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983) (internal quotation marks omitted) (citations omitted).

355 Strauss, supra note 79, at 797.

356 Id.

357 Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 517 (1989).

through executive supervision and congressional oversight.[358] The elimination of *Chevron's* flexibility by *Loper Bright* has, therefore, rejected what Justice Scalia believed to be "one of the strongest indications that the *Chevron* approach is correct."[359]

In his dissent in *Mead*, Justice Scalia warned that without *Chevron*'s flexibility, there will be an "ossification of large portions of our statutory law."[360] He explained that when *Chevron* applies, ambiguity "create[s] a space" for "continuing agency discretion," allowing the meaning of a statute to adjust over time.[361] However, when courts eliminate this space, "ambiguity (and hence flexibility) will cease with the first judicial resolution" because "once the court has spoken, it becomes *unlawful* for the agency to take a contradictory position; the statute now *says* what the court has prescribed."[362] He warned that the results would be "positively bizarre," with statutes becoming rigid not due to congressional design, but merely because an agency did not act quickly enough through notice-and-comment rulemaking.[363]

Justice Scalia also emphasized that *Skidmore* cannot provide the needed flexibility because its "totality of the circumstances" test gives agencies only a vague and uncertain amount of respect.[364] In other words, even if *Skidmore* had survived in this *Loper Bright* era, it is no substitute for a doctrine that properly permits agencies the space to revise interpretations over time—a core source of flexibility that *Loper Bright* eliminated.

In *Loper Bright*, the Court did so by eliminating the *Chevron* space and the *Brand X* flexibility in agency interpretations. Professor Cass Sunstein hypothesized that this "might well be" the "best reading of *Loper Bright*."[365] But the *Loper Bright* majority went further, describing the *Brand X* doctrine allowing agencies to change interpretations as even "worse" than the

[358] Id. at 518.
[359] Id.
[360] United States v. Mead Corp., 533 U.S. 218, 247 (2001) (Scalia, J., dissenting).
[361] Id.
[362] Id.
[363] Id.
[364] Id. at 241, 247.
[365] Sunstein, supra note 45, at 1904 ("If so, would the agency's view 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. If so, *Loper Bright* eliminates a major characteristic (virtue?) 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.").

"binding deference" of *Chevron*.[366] Under *Loper Bright*, once a court announces the meaning of a statute at Time One, that meaning is frozen, and only new law passed through Congress may change it at Time Two or Three.[367] Reasonable shifts by agencies are now illicit.[368]

With the loss of flexibility, the ossification and balkanization that Justice Scalia feared now seems inevitable. Analysis has shown that agencies themselves mitigate balkanization because they promote nationwide uniformity across circuits and adjudicatory forums.[369] Justice Kagan's dissent explicitly called out the fact that compared with *Loper Bright*'s de novo review, the *Chevron* framework "foster[ed] *agreement* among judges" and had "a powerful constraining effect on partisanship in judicial decisionmaking."[370]

Rather than refuting this allegation, the *Loper Bright* majority embraced balkanization as a feature, not a bug:

> Nor does a desire for the uniform construction of federal law justify *Chevron*. . . . [T]here 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. [371]

By eliminating *Chevron*'s interpretive space and the *Brand X* principle that agencies may revise reasonable interpretations over time, *Loper Bright* replaces adaptive governance with frozen judicial pronouncements. In doing so, it invites the ossification and balkanization of statutory meaning across jurisdictions, exacerbates partisanship in judicial decision making, and denies agencies the very flexibility Congress expects them to exercise.

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[366] *Chevron* "demands that courts mechanically afford *binding* deference to agency interpretations, including those that have been inconsistent over time. Still worse, it forces courts to do so even when a pre-existing judicial precedent holds that the statute means something else—unless the prior court happened to also say that the statute is 'unambiguous.'" Loper Bright Enters. v. Raimondo, 603 U.S. 369, 399 (2024) (citations omitted).

[367] Sunstein, supra note 45, at 1904.

[368] See also, id ("Perhaps shifts are now illicit, once a court has announced what the statute means")

[369] Johnathan Mathiesen, Dr. Spitzlove or: How I Learned to Stop Worrying and Love "Balkanization," 2 Colum. Bus. L. Rev. 311, 313–14 (2006) (observing that the balkanization of securities regulation by states was mitigated because "state officials regulate securities in the shadow of *administrative* preemption by the SEC.").

[370] Loper Bright Enters. v. Raimondo, 603 U.S. 369, 474 (2024) (Kagan, J. dissenting) (internal quotation marks omitted) (citations omitted).

[371] Id. at 403.

This Part has shown that these structural defects—judicial policymaking, disregard for agency expertise, legislative incapacity, the ease of finding ambiguity, and the loss of interpretive adaptability—will combine to create profound governance challenges, especially for fast-moving and technically complex domains like AI. Part III will show how Congress and the Executive Branch, even in this *Loper Bright* era, retain tools to mitigate these risks and sustain effective governance should they decide to govern.

III. GOVERNING (AI) IN OUR *LOPER BRIGHT* ERA

Even in the face of the incredible difficulties that the *Loper Bright* decision will create for those governing our society, especially for technology like AI, policymakers and regulators are not without options. This Part outlines five strategies that remain available. The first two are uniquely legislative options. First, Congress can codify *Chevron* deference into the APA—a door left open by the *Loper Bright* majority who found *Chevron* violated the APA, not the Constitution. Second, requiring a lower legislative lift, Congress can codify *Chevron* deference into individual pieces of legislation or statutes. The third option is open to both Congress and the Executive Branch: soft law. While statutes are "hard law," "soft law" includes instruments or arrangements that are indirectly enforceable, from ethics committees to certifications, standards, and liability rules. However, aspects of soft law also depend on a party's desire to avoid the threat of hard law, which may or may not be a non-existent stick in our *Loper Bright* era. The last two options are solely for the Executive Branch. Option four would encourage agencies to follow the *Loper Bright* majority's lead and defend their regulatory decisions as "factbound determinations." Agencies could emphasize their everyday experience with a statute and demonstrate that the case is a complicated factual dispute. Lastly, agencies can avoid judicial review entirely by emphasizing that the existing rules are sufficient, avoiding additional rulemaking, and utilizing jawboning or informal government efforts to persuade non-governmental parties to take action.

A. Codifying Chevron *Deference into the APA*

Despite ending *Chevron* deference as a Court-adopted rule, the *Loper Bright* majority left the door open for Congress to codify *Chevron* deference by basing their decision solely on the APA violation. Before and after *Loper Bright*, Congress has been proposing legislation to codify *Chevron*, or alternatively, to codify the courts as the final arbiters of agency rulemaking, but none have been signed into law.[372] In 2017, Rep. John Ratcliffe (R-Tex.) proposed the Separation of Powers Restoration Act, which would have demanded that courts "decide de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions, and rules made by agencies."[373] In 2021, Rep. Pramila Jayapal (D-Wash.) introduced the *S*top Corporate Capture Act, which would amend Section 706 of the APA by adding, "If a statute that an agency administers is silent or ambiguous, and an agency has followed the procedures [regarding agency rulemaking and adjudications] in section 553 or 554 of this title, as applicable, a reviewing court shall defer to the agency's reasonable or permissible interpretation of that statute."[374] After the *Loper Bright* decision, several Democratic senators introduced a companion bill to the Stop Corporate Capture Act.[375] Senator Ron Wyden (D-Or.) also introduced a bill to codify *Chevron* called the Restoring Congressional Authority Act.[376]

There are objections to codifying *Chevron*, objections that Professor Barnett has explained and rejected.[377] First, objectors argue that codification presents separation-of-powers problems.[378] This perspective was advanced by Justices Thomas and Gorsuch in *Loper Bright* and the anti-*Chevron* plaintiffs in *Relentless*.[379] However, *Chevron* is not founded on constitutional requirements:[380]

[372] APA 706 has remained materially unchanged since its codification in 1966. Administrative Procedure Act, Pub. L. No. 89-554, § 706, 80 Stat. 378, 393 (1966) (codified at 5 U.S.C. § 706). See also, infra notes 373–76 (proposed legislation addressing *Chevron*, none of which have been signed into law).

[373] H.R. 76, 115th Cong. § 2 (2017).

[374] As proposed in Stop Corporate Capture Act, H.R. 6107, 117th Cong. § 11 (2021) (referring to 5 U.S.C. §§ 553, 554 regarding agency rule making and adjudications, respectively).

[375] S. 4749, 118th Cong. (2024).

[376] S. 4987, 118th Cong. (2024).

[377] Barnett, supra note 278, at 65–69.

[378] Id. at 66.

[379] Loper Bright Enters. v. Raimondo, 603 U.S. 369, 413 (2024) (Thomas, J., concurring); ("*Chevron* deference also violates our Constitution's separation of powers"); id. at 427 (Gorsuch, J., concurring) ("*Chevron* deference runs against mainstream currents in our law regarding the separation of powers"); Relentless Tr. at 3 ("First, Chevron violates the Constitution. Article III empowers judges to say what the law is . . . *Chevron* undermines that duty."); see also Richard W. Murphy, The Limits of Legislative Control over the "Hard-Look," 56 Admin. L. Rev. 1125, 1128 (2004) ("Arguably, it is implicit in the courts' core function of blocking arbitrary executive action that they, not Congress, must decide for themselves what minimum amount of effort their rationality review should require.").

[380] Thomas W. Merrill & Kristin E. Hickman, *Chevron*'s Domain, 89 Geo. L.J. 833, 864–67 (2001) (discussing the constitutional foundation for the *Chevron* doctrine); Jonathan R. Siegel, The Constitutional Case for "Chevron" Deference, 71 Vand. L. Rev. 937, 961 (2018) ("[T]he basic response to the critics is simple, already established in the scholarly literature, and already unanimously approved by the Supreme Court. Chevron deference is constitutionally permissible because it is merely a way of conceiving of what Congress is doing when it gives an agency ambiguous instructions. Permitting an

> Congress necessarily has the power to decide whether it seeks to delegate interpretive primacy upon courts or agencies by providing *Chevron* deference. . . . Moreover, because Congress generally has the greater power to preclude judicial review of administrative action (at least for public-rights cases), it should have the lesser power of establishing the intensity of judicial review that it grants, especially when it chooses between standards that the courts themselves created and routinely use.[381]

Second, objectors claim that such a deference regime is unlikely to affect judicial outcomes.[382] But evaluating the text of judicial decisions is not the same as evaluating the outcomes of those decisions. Empirical evidence on outcomes between the notionally more-deferential *Chevron* and less-deferential *Skidmore* is at best mixed,[383] suggesting agencies have similar rates of success (courts affirming agency actions) regardless of which standard is applied. However, that is possibly because rulemakers alter how aggressive they are willing to be depending on the amount of deference they expect to receive, "limiting the aggressiveness of their interpretations" when they expect that a court will apply *Skidmore*.[384] In other words, even if the rate of judicial decisions affirming agency interpretations does not change under *Loper Bright*, the scale and effect of agency interpretations may be fundamentally less aggressive—indirectly reducing the influence of the administrative state.

Third, objectors contend that *Chevron* codification will exacerbate regulatory capture where "courts limit their review and as industry accumulates more influence over the agency."[385] As noted previously, nothing in *Chevron* overrules the numerous independent reasons for a court to hold an agency's decision unlawful, such as it being arbitrary and

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agency to resolve such ambiguity is 'simply one way of recognizing a delegation of law-making authority.'") (quoting Henry P. Monaghan, Marbury and the Administrative State, 83 Colum. L. Rev. 1, 26 (1983)).

[381] Barnett, supra note 278, at 66.

[382] Id. at 66–67.

[383] Id.

[384] Id. at 68. See also Professor Bremer critiquing rulemaking agencies' adjustment in a similar way, saying that agencies should do the proper interpretation regardless of the review standard: Penn Program on Regulation, What Are the Implications of the End of Chevron for U.S. Administrative Law?, at 1:05:09–1:06:35 (YouTube, July 2, 2024), https://www.youtube.com/watch?v=pszALge4TYo.

[385] Barnett, supra note 278, at 69.

capricious.[386] Nor would codifying *Chevron* undermine the requirement that "agencies must do what Congress requires for *Chevron* to apply, such as satisfying procedural or participatory requirements."[387] The *Loper Bright* Court seemed to agree with this understanding: "When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits."[388]

B. Embedding Deference into Individual Statutes

If codifying *Chevron* into the APA is untenable, lawmakers can specify deference in individual legislation or statutes. The *Loper Bright* Court made it clear that courts should respect Congress's authority to grant interpretive authority to agencies.[389] Under *Skidmore*, the judgment about the legal significance of an agency's interpretation of a statute is determined by Congress in the statute itself.[390]

The question then becomes: how express must the delegation be? Must Congress explicitly state something like, "Anywhere this statute is silent or ambiguous, if an agency has followed the proper procedures, a reviewing court shall defer to the agency's reasonable or permissible interpretation of that statute"? While Professor Michael Herz suggested that these delegations may need to be express,[391] that may not be necessary.

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[386] 5 U.S.C. § 706(2) requires the reviewing court to "(2) hold unlawful and set aside agency action, findings, and conclusions found to be— (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law; (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court."

[387] Barnett, supra note 278, at 69.

[388] Loper Bright Enters. v. Raimondo, 603 U.S. 369, 395 (2024).

[389] Sunstein, supra note 45, at 1902 ("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. In so saying, the Court firmly (and crucially) rejected the view that Congress lacks the constitutional authority to grant interpretive authority to agencies. 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." (citing *Loper Bright*, 603 U.S. at 414–15 (2024) (Thomas, J., concurring) and id. at 429-35 (Gorsuch, J., concurring) (internal citations omitted)).

[390] Skidmore v. Swift & Co., 323 U.S. 134, 139 (1944) ("There is no statutory provision as to what, if any, deference courts should pay to the Administrator's conclusions.").

[391] Penn Program on Regulation, supra note 133, at 58:13.

First, the *Loper Bright* majority itself expressly stated that express delegation is sufficient but not necessary. The majority emphasized that statutes can authorize agency "discretion"; some statutes "expressly delegate" authority to agencies to define statutory terms, while other statutes empower agencies to "fill up the details" or to regulate as long as it is "appropriate" or "reasonable."[392] The majority continued: "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 [to] fix[] the boundaries of the delegated authority, and ensur[e] the agency has engaged in reasoned decisionmaking within those boundaries."[393] In this respect, *Loper Bright* reaffirms that Congress can, and routinely does, delegate interpretive authority to agencies explicitly and implicitly in ways that courts must uphold in conformance with their "judicial function [under] the APA."[394]

Leading scholars confirm the interpretation that delegation may be implicit, not just express. Professor Sunstein explains that this passage in *Loper Bright* "*is* saying that certain terms, such as 'reasonable,' can be taken to be a delegation of authority to the agency."[395] Professor Adrian Vermeule agrees on that specific interpretation, adding two additional points. First, he argues that "absent some special rule of clear statement, legal instruments may either speak expressly or by implication, so long as the ordinary meaning of the instrument, all things considered, is best read to so indicate."[396] In other words, "what a legislature may do explicitly, it may do implicitly. The foundation of that principle is sheer common sense."[397] Second, he explains that "to read *Loper* [*Bright*] to require that all delegations be express would threaten to swallow up the major questions doctrine, which requires (roughly speaking) that delegations must be express when, but only when, they authorize the agency to decide a question of major economic or political significance.[398] As Walter Johnson and Lucile Tournas explained prior to *Loper Bright*, the major questions doctrine is already

[392] *Loper Bright*, 603 U.S. at 394–95.
[393] Id. at 395 (internal quotation marks omitted) (citations omitted).
[394] Id.
[395] Sunstein, supra note 45, at 1903.
[396] Adrian Vermeule, Implied Delegations After *Loper*, Notice and Comment: A blog from the Yale J. on Reg. and ABA Section of Admin. L. & Reg. Prac. (July 9, 2024), https://www.yalejreg.com/nc/implied-delegations-after-loper-by-adrian-vermeule/.
[397] Id.
[398] Id.

likely to pose significant legal challenges and uncertainty for emerging technologies.[399]

Taken together, the *Loper Bright* majority and scholars reaffirm that Congress can and does delegate interpretive authority implicitly as well as explicitly. Narrowing valid delegations to only the express form would disregard that legislative choice, constrict agencies' ability to implement statutory schemes, and heighten the uncertainty the major questions doctrine already imposes on the governance of emerging technologies.

C. Categorizing Governance Actions as Factbound Determinations

While the *Loper Bright* Court, overruled *Chevron*'s deferential review of an agencies' interpretation of ambiguous statutes, it affirmed that agency's "factbound determinations like those at issue in *Gray* and *Hearst*" should still receive "deferential review" because those types of determinations did not "refashion the longstanding judicial approach to questions of law."[400] Justice Kagan, in her dissent, was skeptical of the majority's distinction between "pure legal questions" from the "mixed questions in *Gray* and *Hearst*, involving the application of a legal standard to a set of facts," noting that if the majority truly preserved deference for mixed questions, "that approach would preserve *Chevron* in a substantial part of its current domain."[401] Nevertheless, agencies now must embrace the majority's distinction and analogize their determinations to *Gray*, *Hearst*, and their progeny. So, to the extent courts will defer when law and facts are intertwined, these cases provide the blueprint.[402]

The *Loper Bright* majority did not define "factbound determinations" beyond referring to *Gray* and *Hearst*, even though those opinions do not

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[399] Walter G. Johnson & Lucille M. Tournas, The Major Questions Doctrine and the Threat to Regulating Emerging Technologies, 39 Santa Clara High Tech. J. 137, 169–73 (2022).

[400] Loper Bright Enters. v. Raimondo, 603 U.S. 369, 370 (2024)

[401] Id. at 469 (Kagan, J., dissenting).

[402] For examples of the Court using the same "factbound determinations" as they did in *Gray* and *Hearst*, see Sierra Club v. U.S. Dep't of the Interior, 899 F.3d 260, 293 (4th Cir. 2018) (finding the National Park Service's alleged "factbound determination" regarding a pipeline permit was arbitrary and capricious because "the agency decision [was] not accompanied by any explanation"); Telemundo de Puerto Rico, Inc. v. NLRB, 113 F.3d 270, 276 (1st Cir. 1997) (explaining that "[i]t is particularly in the close cases that judges, who are generalists, should respect the specialized knowledge of the Board and accede to its fact-bound determinations as long as they are rooted in the record."); Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (emphasizing that agencies "must examine the relevant data and articulate a satisfactory explanation for its action"); Universal Camera Corp. v. NLRB., 340 U.S. 474, 488 (1951) ("[E]ven as to matters not requiring expertise, a court may [not] displace the Board's choice between two fairly conflicting views . . .").

contain that term explicitly.[403] Perhaps one can derive a definition starting with the negative, as the Fourth Circuit in *Sierra Club* explained that they were reviewing a "factbound determination" under the "deferential 'arbitrary and capricious' standard set forth in [the Supreme Court's opinion in] *State Farm*."[404] While the term does not appear in *State Farm* either, the Supreme Court did hold that an agency's rulemaking qualifies and thus cannot be set aside if it "is rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute."[405] To do so, "the agency must examine the relevant data and articulate a satisfactory explanation for its action, including a 'rational connection between the facts found and the choice made.'"[406] The standard of review is "arbitrary and capricious," such that a court "will 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.'"[407] Ultimately, a "factbound determination" deserving deference is perhaps best understood as one that survives arbitrary-and-capricious review.

The question then is how to convince a court to see an agency's determination as "factbound" with a "rational connection between the facts found and the choice made"?[408] First, agencies should emphasize their "everyday experience in the administration of the statute," which was the Court's justification for deferring to the agency in *Hearst*.[409] For example,

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[403] *Loper Bright*, 603 U.S. at 389. The *Loper Bright* majority is not alone in not providing a definition. For example, the First Circuit referred to "factbound determinations" in *Telemundo de Puerto Rico, Inc.*, 113 F.3d at 276, citing *Universal Camera Corp.*, 340 U.S. at 488, which does not contain that term.

[404] *Sierra Club*, 899 F.3d at 293 ("We review NPS's factbound determination that the pipeline right-of-way is consistent with the purposes of the Parkway and the Park System under the deferential 'arbitrary and capricious' standard set forth in State Farm.") (citing *State Farm*, 463 U.S. at 43 and 5 U.S.C. § 706).

[405] *State Farm*, 463 U.S. at 42.

[406] Id. (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)); see also *Sierra Club*, 899 F.3d at 293 (describing that the "arbitrary and capricious" standard is met when "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise" (citing *Burlington Truck Lines*, 371 U.S. at 168)).

[407] *State Farm*, 463 U.S. at 43 (first quoting Bowman Transp. Inc. v. Arkansas-Best Freight Sys., 419 U.S. 281, 286 (1974), and then citing Camp v. Pitts, 411 U.S. 138, 142–43 (1973) (per curiam)); see also id. at 43–44 ("For purposes of these cases, it is also relevant that Congress required a record of the rulemaking proceedings to be compiled and submitted to a reviewing court, 15 U.S.C. § 1394, and intended that agency findings under the Act would be supported by substantial evidence on the record considered as a whole.") (citation omitted).

[408] Id. at 43 (quoting *Burlington Truck Lines*, 371 U.S. at 168).

[409] NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 130 (1944); see also Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951) (deferring to the NLRB and explaining that it is "one of those agencies

in *Gray*, the Court held that Congress had delegated this authority to the agency because the agency's "experience in [the] field gave promise of a better informed, more equitable adjustment of the conflicting interests."[410] Therefore, as the court explained, it is "not the province of a court" to "substitute its judgment" for the agency's.[411]

Second, agencies must emphasize that the agency's determination resolved a complicated factual dispute demanding their expert judgment in circumstances where many iterations are possible and subtle distinctions must be made. Courts have assessed questions such as whether workers are employees or supervisors;[412] whether a company is both a coal "producer and consumer;"[413] whether certain houseboats are "permanently moored floating vessels;"[414] and whether the permits for a pipeline that would affect views of scenic overlooks were inconsistent with a statute's "conservation purpose."[415]

Courts have long deferred to agencies in such complicated factual disputes, regardless of *Chevron* or *Loper Bright*. In *Universal Camera*, a pre-*Chevron* case, the Supreme Court explained that "even as to matters not requiring expertise a court [could] [not] displace the [administrative] Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*."[416] In two separate worker-classifications disputes, the First Circuit deferred to the NLRB determination because of the "myriad iterations of authority that are possible and the subtle distinctions that easily can be

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presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect").

[410] Gray v. Powell, 314 U.S. 402, 412 (1941).

[411] Id.

[412] See, e.g., *Hearst Publ'ns*, 322 U.S. at 113; *Universal Camera*, 340 U.S. at 476, 488; Telemundo de Puerto Rico, Inc. v. NLRB, 113 F.3d 270, 274 (1st Cir. 1997); Edward St. Daycare Ctr., Inc. v. NLRB, 189 F.3d 40, 52 (1st Cir. 1999).

[413] *Gray*, 314 U.S. at 403.

[414] United States v. Boyden, 696 F.2d 685, 688 (9th Cir. 1983) ("A review of the record shows there is a factual dispute which may be relevant to a determination whether the houseboats are 'permanently moored floating vessels.'"); accord United States v. Members of Est. of Boothby, 16 F.3d 19, 20–22 (1st Cir. 1994) (determining that whether "houseboats should be considered as stationary structures" under Section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403 was a question of fact, and holding that the Army Corps of Engineers' determination that the houseboats in question were stationary structures was not arbitrary and capricious).

[415] Sierra Club v. U.S. Dep't of the Interior, 899 F.3d 260, 266 (4th Cir. 2018).

[416] *Universal Camera*, 340 U.S. at 488.

drawn"[417] resulting in the "closeness"[418] of the decisions, afforded the Board "great deference."[419] As the First Circuit explained, "in the close cases . . . judges, who are generalists, should respect the specialized knowledge of the [agency] and accede to its factbound determinations as long as they are rooted in the record."[420] Of course, not every agency action qualifies. For example, the *State Farm* majority held that the National Highway Traffic Safety Administration acted arbitrarily and capriciously in revoking a requirement in a motor vehicle safety standard.[421] Together, these decisions reflect consistent judicial recognition that, in close and complex matters, the specialized judgment of an expert agency is best suited to resolve them.

What an agency should not do is pretty simple: an agency must not fail to justify its decision. In *Universal Camera*, the Court explained that a reviewing court is not required to uphold an agency decision when the supporting evidence is not "substantial."[422] In *Sierra Club*, the Fourth Circuit found the National Park Service's alleged "factbound determination"[423] regarding a pipeline permit was arbitrary and capricious because "the agency decision [was] not accompanied by any explanation, let alone a satisfactory one. Instead, the permit merely recite[d] that 'NPS ha[d] determined that the proposed use . . . [was] consistent with the use of these lands for Parkway purposes' and provide[d] no further elaboration."[424] A similar failure obligated the *Skidmore* Court to reject the Administrator's interpretation because the agency's rulings were "not reached as a result of hearing adversary proceedings in which he [found] facts from evidence and reache[d] conclusions of law from findings of fact."[425]

Even if having a "factbound determination" is not sufficient for an agency to receive deference, it is still relevant under *Skidmore* because "although an agency's interpretation of a statute 'cannot bind a court,' it may be especially informative 'to the extent it rests on factual premises within

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[417] *Telemundo*, 113 F.3d at 274.

[418] Edward St. Daycare Ctr., Inc. v. NLRB, 189 F.3d 40, 52 (1st Cir. 1999) ("The evidence supporting the [NLRB]'s decision is close, particularly on the status of the Head Teachers. This closeness makes deference to the Board especially appropriate.").

[419] *Telemundo*, 113 F.3d at 274.

[420] *Edward St. Daycare Ctr.*, 189 F.3d at 52 (quoting *Telemundo*, 113 F.3d at 276).

[421] Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 34 (1983).

[422] Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951). See also Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43 ("[W]e may not supply a reasoned basis for the agency's action that the agency itself has not given. We will, however, uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.") (citations omitted)).

[423] Sierra Club v. U.S. Dep't of the Interior, 899 F.3d 260, 293 (4th Cir. 2018).

[424] Id.

[425] Skidmore v. Swift & Co., 323 U.S. 134, 139 (1944).

[the agency's] expertise.'"[426] "Such expertise has always been one of the factors which may give an Executive Branch interpretation particular 'power to persuade, if lacking power to control.'"[427]

In short, "factbound determinations" remain a space where courts continue to recognize the limits of their institutional competence. When a decision turns on dense factual records, technical expertise, or close judgment calls, courts have long deferred to the specialized expertise of agencies rather than substituting generalist instincts. This principle remains even in the *Loper Bright* era. And applied to AI, this principle is essential. Regulating AI requires precisely the sort of fact-intensive, complex, context-dependent assessments of models, datasets, thresholds, and fitness that courts have repeatedly acknowledged they are ill-equipped to perform. While courts have addressed subtle distinctions between houseboats and vessels,[428] or supervisors and employees,[429] AI is extraordinarily complex.[430] Evaluating whether an AI system meets statutory requirements will inevitably involve the kind of close, expert judgment that agencies, not courts, are structured to provide.

D. Embracing Soft Law

It is easy to think that if agencies are unable to regulate through rulemakings and adjudications, then there is no way to govern. But there is another way. The fall of *Chevron* shifts the center of gravity from "hard law," like statutes and binding regulations,[431] to "soft law," the broad set of non-binding instruments that guide organizational behavior.[432] Soft law includes internal corporate mechanisms (boards, ethics officers),[433] external

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[426] Loper Bright Enters. v. Raimondo, 603 U.S. 369, 402 (2024) (quoting Bureau of Alcohol, Tobacco and Firearms v. Fed. Lab. Rels. Auth., 464 U.S. 89, 108 n.8 (1983)).

[427] Id. (quoting *Skidmore*, 323 U.S. at 140).

[428] See, e.g., United States v. Boyden, 696 F.2d 685, 688 (9th Cir. 1983) ("A review of the record shows there is a factual dispute which may be relevant to a determination whether the houseboats are 'permanently moored floating vessels.'"); United States v. Members of Est. of Boothby, 16 F.3d 19, 21–22 (1st Cir. 1994) (determining that whether "houseboats should be considered as stationary structures" under Section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403 was a question of fact, and holding that the Army Corps of Engineers' determination that the houseboats in question were stationary structures was not arbitrary and capricious).

[429] See, e.g., Edward St. Daycare Ctr., Inc. v. NLRB, 189 F.3d 40, 52 (1st Cir. 1999); Telemundo de Puerto Rico, Inc. v. NLRB, 113 F.3d 270, 274 (1st Cir. 1997).

[430] See supra Section II.D (discussing the complex, ambiguous, and changing nature of AI).

[431] Marchant & Gutierrez, supra note 284, at 379.

[432] Gary E. Marchant & Brad Allenby, Soft Law: New Tools for Governing Emerging Technologies, 73 Bull. of the Atomic Scientists 108, 112 (2017) (defining soft law as "instruments or arrangements that create substantive expectations that are not directly enforceable").

[433] Marchant, Tournas & Gutierrez, supra note 290, at 10–11 (these mechanisms can monitor compliance with soft law programs the organization has committed to).

signals (standards, certifications, and labeling regimes),[434] and multi-stakeholder arrangements developed by professional societies and industry groups.[435] These tools create expectations rather than enforceable obligations, yet they have become essential components of modern regulatory ecosystems, particularly in fast-moving technical domains.[436]

Soft law offers several advantages over hard law[437] in the post–*Loper Bright* era. First, it avoids the "delegation" problem, where agencies must act only within the powers statutorily delegated to them—statutes which, even if their only flaw was the passage of time, were necessarily drafted without awareness of the issues and technologies the public now faces.[438] Second, soft law mitigates the "pacing" problem, where static regulations struggle to keep up with the speed and development of technology,[439] often because of administrative requirements,[440] a lack of political will to invest political capital and resources, or the fear of its effect on jobs or international competitiveness.[441] Third, it bypasses the "volume"[442] and "coordination"[443] problems that plague hard law by allowing governance across industry boundaries without complex interagency processes. Finally, soft law's multi-stakeholder processes leverage expertise even when governments lack sufficient technical capacity, referred to as the "knowledge" problem.[444]

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[434] Id. at 11–16 ("Labels have often been used to indicate that a product conforms with a voluntary performance standard.").

[435] Id.

[436] Marchant & Allenby, supra note 432, at 112.

[437] Marchant, Tournas & Gutierrez, supra note 290, at 4–5.

[438] Id. at 7 ("Thus, using existing regulatory authority to govern AI is often like trying to fit a square peg into a round hole. Examples of such regulatory misfits include trying to regulate algorithmic bias under the Federal Trade Commission Act enacted in 1914, and regulating 'smart' medical devices using AI under the 1976 Medical Device Amendments to the Federal Food, Drug and Cosmetic Act. Other AI issues are not covered by any existing regulatory authority or agency (e.g., technological unemployment or some of the autonomy concerns raised by AI systems).") (citations omitted); see also id. ("For example, the primary regulatory statute for electronic communications in the United States is the Electronic Communications Privacy Act (ECPA), which was enacted in 1986 before email, the world wide web, and smart phones even existed.").

[439] Marchant, *Pacing*, supra note 286, at 22–23.

[440] Marchant & Gutierrez, supra note 284, at 383–84; see also Ryan Hagemann, Jennifer Huddleston Skees & Adam Thierer, Soft Law for Hard Problems: The Governance of Emerging Technologies in an Uncertain Future, 17 Colo. Tech. L.J. 37, 62–65 (2018) (explaining hard law's problem with "pace of action" because regulatory processes are typically rigid, bureaucratic, inflexible, and slow).

[441] Marchant & Gutierrez, supra note 284, at 383. Typically, it takes "some type of crisis" to enact new legislation. Marchant, Tournas & Gutierrez, supra note 290, at 7.

[442] Hagemann, Skees & Thierer, supra note 440, at 65–67.

[443] Id. at 68–69.

[444] Id. at 69–70; see Marchant & Gutierrez, supra note 284, at 381 ("Existing regulatory agencies often lack adequate technical staff and expertise to quickly regulate a new emerging technology."); see also Barkow, supra note 292, at 1031.

These advantages have generated bipartisan support for soft law. Scholars and policy advocates who view *Chevron*'s demise as a restoration of democratic accountability often champion soft law as the natural next step.[445] To them, "soft law policymaking is better than hard law regulatory mandates."[446] Supporters see promise in soft law's flexibility, speed,[447] competition,[448] and ability to incorporate diverse expertise through standards-setting organizations (SSOs) and industry associations operating beyond traditional jurisdictions and borders.[449] These traits are especially important for technologies like AI that are rapidly evolving, being developed and deployed globally, and have existing soft law foundations.[450] Ultimately, as Adam Thierer argues, in a world without *Chevron*, soft law is simply how the "game now is played."[451]

But where soft law benefits from being unconstrained by government bureaucracy, that absence is also the source of its limitations. Unlike hard law, soft law depends on voluntary adoption and lacks coercive

[445] Hagemann, Skees & Thierer., supra note 440, at 37 (describing this era as the "twilight of the traditional regulatory system"); id. at 129 ("soft law mechanisms—especially those which incorporate multistakeholder processes—offer the best opportunity to achieve the sort of democratic deliberation and rough policy consensus that hard law regimes were supposed to advance but have either failed to or face formidable obstacles going forward.").

[446] Adam D. Thierer, Why the End of *Chevron* Deference is Largely Meaningless for AI Policy, Part 2, Medium (July 2, 2024), https://medium.com/@AdamThierer/why-the-end-of-chevron-deference-is-largely-meaningless-for-ai-policy-part-2-ba9276bc272f (citing Adam D. Thierer, Soft Law in U.S. ICT Sectors: Four Case Studies, 61 Jurimetrics J. 79 (2020)) (last visited February 21, 2026).

[447] Carlos Ignacio Gutierrez, Gary Marchant & Lucille Tournas, Lessons for Artificial Intelligence from Historical Uses of Soft Law Governance, 61 Jurimetrics 133, 142–43 (2020); see Marchant & Allenby, supra note 432, at 113 ("Also, their informal nature makes them relatively easy to modify in response to changing circumstances.").

[448] Gutierrez, Marchant & Tournas, supra note 447, at 142 (discussing the natural competition between soft law programs for adoption, but also that there could be a "race to the bottom").

[449] Marchant, Tournas & Gutierrez, supra note 290, at 8 (rather than adversarial, hierarchical regulation, there is the possibility of stakeholder partnerships); see Marchant & Allenby, supra note 432, at 112–13; see also Gutierrez, Marchant, & Tournas, supra note 447, at 143–44.

[450] Marchant, Tournas & Gutierrez, supra note 290, at 7–8 (discussing that speed, flexibility, and global application are "important attribute[s] for rapidly evolving emerging technologies such as AI . . . . that is being developed, and applies, globally").

[451] Adam Thierer, What the Supreme Court Decisions This Week Mean for AI Policy, Medium (June 28, 2024), https://medium.com/@AdamThierer/what-the-supreme-court-decisions-this-week-mean-for-ai-policy-8d0375a3d9d9 ("Combine the fall of *Chevron* deference (via *Loper*) and the decision in the *Murthy* case earlier this week (greenlighting continued jawboning by public officials) and what you likely get for tech policymaking, and AI policy in particular, is an even more aggressive pivot by federal regulatory agencies towards the use of highly informal 'soft law' governance techniques. The game now is played with mechanisms like guidances, recommended best practices, agency 'enforcement discretion' notices, public-private workshops and other 'collaborations,' 'voluntary concessions,' multistakeholder working groups, and a whole hell of a lot more jawboning.").

enforcement.[452] High adoption (or "implementation") rates may not translate into meaningful behavioral change,[453] as soft law programs often struggle to "objectively determine [their] effectiveness,"[454] particularly where commitments are broad, aspirational, or unverifiable. This creates opportunities for "greenwashing" and "ethics washing,"[455] such as public commitments to responsible AI or safety practices that impose little real constraint. Soft law also lacks the transparency associated with formal rulemaking. The procedural safeguards that hard law imposes exist for a reason: to ensure participation, public justification, and accountability.[456] When those safeguards vanish, so can public trust.

Recent history underscores this risk. Failures such as the Boeing 737 Max and the Cambridge Analytica "fiascos" fueled a public "techlash" that seemed to "sour[] the public's tolerance for industry self-regulation."[457] Without independent verification or a credible threat of enforcement, even robust soft law programs may be perceived by the public as "self-serving and untrustworthy,"[458] and may not "reassure the public that a problem is being addressed" to the extent that hard law does.[459]

This exposes the deeper structural paradox in our *Loper Bright* era. Soft law is sustainable only when backed by the implicit threat of hard law. A systematic review of soft-law case studies[460] shows that the two external incentives[461] driving soft law implementation and effectiveness depend overwhelmingly on "the avoidance of punishment because of a hard-law threat."[462] These external incentives take two forms: (1) government warning systems, in which agencies signal new potential enforcement or regulation;[463] and (2) private actors preemptively adopting standards to ease

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[452] Marchant & Gutierrez, supra note 284, at 379–80 (noting that hard law benefits from "legal enforceability, backed by the power and resources of the government to investigate and prosecute regulatory violations").

[453] Gutierrez, Marchant & Tournas, supra note 447, at 146 (where behavioral change is measured through the term "effectiveness").

[454] Marchant, Tournas & Gutierrez, supra note 290, at 9.

[455] Id.

[456] Id. at 8 (". . . soft law enactments are able to avoid many of the procedural and bureaucratic impediments of government regulation, but those procedural and bureaucratic requirements are there for a reason—to promote the transparency of, and participation in, regulatory decision-making.").

[457] Id. at 9.

[458] Id.

[459] Marchant & Gutierrez, supra note 284, at 380.

[460] Gutierrez, Marchant & Tournas, supra note 447, at 136 (reviewing Thierer, supra note 446, at 111–12).

[461] Id. at 138–41 (the two internal incentives are obtaining an in-demand resources (such as research funding or reputational goodwill) and protecting an interest (such as safeguarding existing assets)).

[462] Id. at 136 (internal quotation marks omitted).

[463] Id.

society's concerns and delay binding regulation.[464] Soft law is a complement to hard law,"[465] not a substitute for it. Once the credible backdrop of binding regulation erodes, so does much of the force of soft law. *Loper Bright* therefore risks dismantling not only hard-law governance but also the enforcement ecosystem that makes soft law function and fill hard law's gaps.[466]

That is precisely what makes the current political environment troubling. The Executive Branch has signaled an intention to "dismantle" existing AI governance structures,[467] and Congress nearly imposed a decade-long moratorium on state-level AI regulation,[468] which the White House then proposed its own version of via Executive Order[469] (with questionable lawfulness).[470] As a result, for AI and many other areas, soft law may survive almost entirely as rhetoric, not governance.

There are still mechanisms for enforcing soft law. For example, standards-setting organizations, like the Institute for Electrical and Electronics Engineers ("IEEE") Standards Association,[471] continue to develop globally influential technical and ethical standards for AI system design, testing, deployment, and procurement.[472] IEEE and other

[464] Id. at 137–38.

[465] Id. at 145–46 (explaining that soft law can fill in gaps left by hard law and also "guide[] the future of hard law")

[466] Id. at 145.

[467] Tom Wheeler, Trump's Executive Orders Politicize AI, Brookings (July 31, 2025), https://www.brookings.edu/articles/trumps-executive-orders-politicize-ai/ ("The Trump [AI policy initiative, entitled Winning the Race: America's AI Action Plan] . . . claims to 'dismantle unnecessary regulatory barriers' and 'achieve global dominance' in AI. But its vague and politicized mandates suggest the opposite.").

[468] Colin Wood, Defeated State AI Moratorium Finds New Life in Trump's AI Action Plan, StateScoop (July 23, 2025), https://statescoop.com/trump-ai-action-plan-state-moratorium/.

[469] Exec. Order No. 14,365, 90 Fed. Reg. 58499, 58499–58500 (Dec. 11, 2025) (ordering the preparation of a "legislative recommendation establishing a uniform Federal policy framework for AI that preempts State AI laws that conflict with the policy set forth in this order" and specifying conditions for discretionary grant programs that would prohibit enforcement of state AI laws that conflict with the policy). See also The White House, A National Policy Framework for Artificial Intelligence 1, 4 (Mar. 20, 2026), https://www.whitehouse.gov/wp-content/uploads/2026/03/03.20.26-National-Policy-Framework-for-Artificial-Intelligence-Legislative-Recommendations.pdf (reiterating the White House's support for "preempt[ing] state AI laws").

[470] Papp, supra note 30.

[471] IEEE Standards Assoc., https://standards.ieee.org/ (last visited Mar. 26, 2026).

[472] See, e.g., IEEE Standards Assoc., IEEE GET Program for AI Ethics and Governance Standards, https://ieeexplore.ieee.org/browse/standards/get-program/page/series?id=93 (last visited Mar. 6, 2026) (discussing the P7000 series of standards specifically for AI ethics and governance (including transparency, data governance, and data privacy, among others); Software & Systems Engineering Standards Committee, IEEE 1012-2024, IEEE Standard for System, Software, and Hardware Verification and Validation, IEEE Standards Assoc. https://standards.ieee.org/ieee/1012/7324/ (last

professional societies maintain codes of conduct, offer certification regimes, and shape industry norms. These standards, codes of conduct, and norms can be enforced through government procurement requirements,[473] grant conditions,[474] scientific publication standards,[475] contractual[476] and supply chain requirements,[477] and licensing and professional discipline.[478] Moreover, soft law can aid liability determinations, even without binding regulations. Compliance with well-recognized standards can serve as evidence of reasonable care,[479] while insurers may require adherence to soft law frameworks as a condition of coverage.[480] This form of enforcement, through contractual, financial, professional, and reputational means, has the possibility of effective governance.

In sum, soft law remains necessary but insufficient. It is a partial solution that can complement but not replace the formal regulatory tools that *Loper Bright* overruled. Without credible hard law in reserve, soft law will struggle to provide durable governance writ large, especially in fast-moving domains like AI. But if, in this *Loper Bright* era, soft law is how the "game now is played," then those committed to effective governance must learn the rules, adapt their strategies, and play to win.

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visited Mar. 6, 2026) (the leading standard for verifying and validating hardware and software systems (including AI systems)); Social Implications of Technology Standards Committee, IEEE 3119-2025, IEEE Standard for the Procurement of Artificial Intelligence and Automated Decision Systems, IEEE Standards Assoc. https://standards.ieee.org/ieee/3119/10729/ (last visited Dec. 17, 2025) (standard for procuring AI systems). Many of these AI-specific standards were adopted as part of a broader vision for aligning the design of autonomous and intelligent systems with the ethics of human well-being. See Inst. of Elec. & Elecs. Eng'rs, Ethically Aligned Design: A Vision for Prioritizing Human Well-Being with Autonomous and Intelligent Systems, Version 2 (2017), https://standards.ieee.org/wp-content/uploads/import/documents/other/ead_v2.pdf.

[473] Lavi M. Ben Dor & Cary Coglianese, Procurement as AI Governance, 2 IEEE Trans. on Tech. & Soc. 192, 194 (2021).

[474] Marchant, Tournas & Gutierrez, supra note 290, at 14 ("For example, researchers funded by the National Institutes of Health (NIH) must comply with various guidelines that are not otherwise binding or enforceable on private entities, such as the NIH Recombinant DNA guidelines or the Common Rule for human subject protections.").

[475] Marchant & Allenby, supra note 432, at 112–13; Marchant, Tournas & Gutierrez, supra note 290, at 15 (explaining how imposing AI-related conditions on article acceptance can create constraints).

[476] Marchant & Allenby, supra note 432, at 112.

[477] Marchant, Tournas & Gutierrez, supra note 290, at 11 ("Business partners could require certification with applicable AI soft law programs by both upstream suppliers and downstream customers as a condition of doing business with that company.").

[478] Id. at 13.

[479] Id. at 16.

[480] Id. at 13.

E. Enforcement-First and Jawboning Instead of Rulemaking

Ultimately, agencies may increasingly decide to avoid rulemaking altogether and instead govern through "jawboning," the term for informal efforts to persuade organizations into action.[481] This strategy is best exemplified in the emerging technologies-space by the federal lawsuits between the Securities and Exchange Commission ("SEC") and Coinbase, "the largest crypto-asset trading platform in the United States."[482] In July 2022, Coinbase petitioned the SEC to use its notice-and-comment rulemaking procedures to establish new rules governing the crypto-asset community.[483] Coinbase argued that its services were "a paradigm shift from existing market practices, rendering many of the Commission rules that govern the offer, sale, trading, custody, and clearing of traditional assets both incomplete and unsuitable for securities in this market." [484] The subtext is that if the SEC needed to establish new rules for crypto-assets, it would be conceding that crypto-assets are "outside the scope of the SEC's [currently] delegated authority"[485] and, thus, vulnerable to challenge. The SEC likely understood this possibility and chose not to respond at all. In April 2023, Coinbase filed a writ of mandamus with the U.S. Circuit Court of Appeals for the Third Circuit to compel the SEC to respond.[486]

Ultimately, the SEC denied the rulemaking petition in December 2023.[487] In support, SEC Commission Chair Gary Gensler listed three reasons: "First, existing laws and regulations apply to the crypto securities markets. Second, the SEC addresses the crypto securities markets through rulemaking as well. Third, it is important to maintain Commission discretion in setting its own

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[481] Amy Howe, Justices Side With Biden Over Government's Influence on Social Media Content Moderation, SCOTUS Blog (June 26, 2024, at 00:00 ET), https://www.scotusblog.com/2024/06/justices-side-with-biden-over-governments-influence-on-social-media-content-moderation/.

[482] Sec. & Exch. Comm'n v. Coinbase, Inc., 726 F. Supp. 3d 260, 270 (S.D.N.Y. 2024). Other cases regarding cryptocurrencies include *Coinbase, Inc. v. Sec. & Exch. Comm'n*, 126 F.4th 175 (3d Cir. 2025); *Sec. & Exch. Comm'n v. Ripple Labs, Inc.*, 697 F. Supp. 3d 126 (S.D.N.Y. 2023); and *Sec. & Exch. Comm'n v. Terraform Labs Pte. Ltd.*, 684 F. Supp. 3d 170 (S.D.N.Y. 2023).

[483] Petition of Coinbase for Rulemaking for Digital Asset Securities Regulation 1 (Sec. & Exch. Comm'n July 21, 2022), https://www.sec.gov/files/rules/petitions/2022/petn4-789.pdf.

[484] Id.

[485] *Coinbase*, 726 F. Supp. 3d at 268 ("Coinbase reasons that the transactions executed and facilitated through its platform and related services do not qualify as 'securities,' and thus fall outside the scope of the SEC's delegated authority.").

[486] Martina Barash, Coinbase Presses Fight for Regulatory Clarity at Appellate Court, Bloomberg Law (Sept. 20, 2024, at 05:40 ET) https://news.bloomberglaw.com/litigation/coinbase-presses-fight-for-regulatory-clarity-at-appellate-court.

[487] Gary Gensler, Statement on the Denial of a Rulemaking Petition Submitted on Behalf of Coinbase Global, Inc., Sec. & Exch. Comm'n (Dec. 15, 2023) https://www.sec.gov/newsroom/speeches-statements/gensler-coinbase-petition-121523.

rulemaking priorities."[488] In other words, the SEC claimed it already possessed the authority and the expertise to regulate this novel technology and that its current rules already *do* regulate this technology. The cryptocurrency community has taken notice. The Crypto Council for Innovation argued that the "SEC's refusal to engage in substantive rulemaking perpetuates an unworkable regulatory black hole [because i]n lieu of traditional rulemaking, the SEC has focused its efforts on enforcement, [which have] more than *doubled on a per year basis*" from 2021 to 2023."[489]

Amidst this rulemaking dispute, the SEC filed a complaint in the Southern District of New York in June 2023 alleging that Coinbase was trading in "investment contracts" or "securities" which are governed by the SEC and, thus, within its existing regulatory authority.[490] Coinbase leveraged its "paradigm shift" language, countering that its "services d[id] not qualify as 'securities,' and thus f[e]ll outside the scope of the SEC's delegated authority."[491] Coinbase believed that the SEC ought to undertake new rulemaking if it wanted to regulate crypto-assets.[492] Coinbase's goal was clear: if its services are outside the regulatory agency's authority, they cannot be regulated.

Ultimately, District Court Judge Failla agreed with the SEC that Coinbase's crypto-assets were securities and within the SEC's regulatory authority.[493] She explained that although "the addition of the prefix 'crypto' to a commonly understood word like 'asset' may suggest a paradigm shift. . . . the challenged transactions fall comfortably within the framework that courts have used to identify securities for nearly eighty years."[494]

Notably, Judge Failla held that the SEC's actions did not implicate the major questions doctrine, which would require the agency to point to "clear congressional authorization in the extraordinary case where it claims the power to regulate a significant portion of the American economy that has vast economic and political significance."[495] In part, this was because "the SEC [was] asserting neither a 'transformative expansion in its regulatory

[488] Id.

[489] Brief for the Crypto Council for Innovation as Amicus Curiae in Support of Petitioner, Coinbase, Inc. v. Sec. & Exch. Comm'n, 126 F.4th 175 (3d Cir. 2024) (No. 23-3202) at 6, 9 (citation omitted).

[490] *Coinbase*, 726 F. Supp. 3d at 268.

[491] Id.

[492] Petition of Coinbase for Rulemaking for Digital Asset Securities Regulation, supra note 483.

[493] *Coinbase*, 726 F. Supp. 3d at 307.

[494] Id. at 268.

[495] Id. at 282–83 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) (internal quotation marks omitted)).

authority,' nor a 'highly consequential power beyond what Congress could reasonably be understood to have granted' it."[496] Therefore, the SEC's repeated statements that it was not doing anything new were critical to avoiding a very difficult major questions doctrine challenge.[497]

In addressing a similar question to the Coinbase case from the Third Circuit,[498] Judge Failla also held that the SEC did not need to engage in notice-and-comment rulemaking before bringing enforcement action against Coinbase.[499] Because the SEC was not attempting to "promulgate *new* regulatory authority . . . but rather [was] simply engaging in a fact-intensive application of an existing standard," the APA "d[id] not foreclose the SEC from bringing this enforcement action."[500]

In our *Loper Bright* era, agencies may be increasingly forced to confront choices like the one the SEC had to make with Coinbase: decline new rulemaking and steadfastly rely on existing rules to enforce and regulate or navigate the *Loper Bright* rulemaking thicket.

In addition to legal enforcement, agencies can still "jawbon[e].": "a term used to describe informal efforts by government officials to persuade someone outside the government to take action."[501] Putting *Loper Bright* together with a Supreme Court decision issued two days prior, *Murthy v. Missouri*,[502] certainly encourages jawboning. In *Murthy*, the U.S. Surgeon General, Vivek Murthy, issued a public health advisory that encouraged social media platforms to prevent COVID-19 misinformation "from taking hold," while the Centers for Disease Control and Prevention informed these platforms of COVID–19 misinformation trends and flagged example posts.[503] The plaintiff-states and five individuals alleged that the actions of these Executive Branch officials and agencies pressured platforms to violate their First Amendment speech rights.[504]

The *Murthy* majority held that the plaintiffs did not establish standing to seek an injunction against the Government.[505] The majority explained that

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[496] Id. at 283 (quoting West Virginia v. EPA, 597 U.S. 697, 724 (2022) (alteration in original)).
[497] See generally Johnson & Tournas, supra note 399.
[498] Coinbase, Inc. v. Sec. & Exch. Comm'n, 126 F.4th 175 (3d Cir. 2025) (holding that administrative law did not require the SEC to engage in rulemaking regarding cryptocurrency and that cryptocurrencies were not fundamentally different that existing securities, but that the SEC failed to provide sufficient explanation for denying Coinbase's rulemaking petition).
[499] See Sec. & Exch. Comm'n v. Coinbase, Inc., 726 F. Supp. 3d 260 (S.D.N.Y. 2024).
[500] Id.
[501] Howe, supra note 481.
[502] Murthy v. Missouri, 603 U.S. 43 (2024).
[503] Id. at 52.
[504] Id.
[505] Id. at 49–50.

the plaintiffs first failed to establish that the Government's pressure occurred "before" the platform took action,[506] and that they also failed to trace specific platform actions to specific Government actors' pressure.[507] In other words, the platforms had their own rules against these types of posts, and they were enforcing those rules prior to any alleged Government pressure. Although I have written "the Government" throughout this section, the *Murthy* Court held that the plaintiffs improperly did the same by relying on the Government "as a monolith," instead of specifying how *each* Government defendant coerced the platforms on the specific topics of *their* speech (e.g., COVID-19 or elections).[508]

What does this mean for AI? As Adam Thierer predicts:

> No longer will any AI-related agency policy effort contain the words "shall" or "must." Instead, the new language of tech policymaking will be "should consider" and "might want to." And sometimes it won't even be written down! It'll all just arrive in the form of speech by an agency administrator, commissioner, or via some agency workshop or working group.[509]

With *Loper Bright*, we have entered an era in which formal rulemaking becomes increasingly perilous, while informal persuasion becomes increasingly attractive. Codifying *Chevron*—whether in the APA or individual statutes—may restore some stability. And agencies can still frame complex decisions as "factbound determinations" to retain pockets of deference. Soft law, too, offers important complementary tools, though it cannot substitute hard law. But unless Congress acts, enforcement-first governance and jawboning may become the default modes of administrative action. And if, as Thierer puts it, this is how the "game now is played,"[510]

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[506] Id. at 60 (holding that even if government officials sometimes influenced content-moderation decisions, "the platforms moderated similar content long before any of the Government defendants engaged in the challenged conduct. In fact, the platforms, acting independently, had strengthened their pre-existing content-moderation policies before the Government defendants got involved").

[507] Id. at 62.

[508] Id. at 69.

[509] Thierer, supra note 451.

[510] Id. ("Combine the fall of *Chevron* deference (via *Loper*) and the decision in the *Murthy* case earlier this week (greenlighting continued jawboning by public officials) and what you likely get for tech policymaking, and AI policy in particular, is an even more aggressive pivot by federal regulatory agencies towards the use of highly informal 'soft law' governance techniques. The game now is played with mechanisms like guidances, recommended best practices, agency 'enforcement discretion' notices,

those seeking to govern emerging technologies—especially AI—must learn to govern effectively within this constrained, improvisational regulatory world.

CONCLUSION

Justice Kagan asked: "What rules are going to constrain the development of A.I.?"[511] In *Loper Bright*, the majority's answer is stark: *Whatever rules the courts decide*. *Chevron*'s delegation space is overruled. *Skidmore*'s persuasive weight is, in practice, erased. In their place stands a framework in which generalist judicial policymakers must supply the single, best, and only permissible interpretation of every ambiguous statute, regardless of agency expertise, without the ability to accommodate new facts, and without the speed or flexibility to revise judgments over time.

Justice Kagan dissented from the *Loper Bright* majority, predicting, as Justice Scalia did decades ago,[512] that judicial policymakers will ossify and balkanize incorrect, outdated interpretations of statutes. Congress is already barely capable of governing or correcting judicial policy choices. Ambiguity, the trigger for judges to become policymakers, is often built into legislation as the only way to survive the Congressional constraints of limited time, consensus building, and expertise. Recognizing this innate ambiguity, Congress wants agencies, not courts, to make policy choices, as courts are famously poor policymakers, especially on technical questions.

But *Loper Bright* is not the end of governance, only the end of our current model. Congress can codify *Chevron* deference through the APA or embed delegation into individual statutes. Agencies can defend complex decisions as "factbound determinations," invoking the longstanding recognition that certain complex, technical judgments fall within their institutional competence. Congress and agencies can strengthen and strategically deploy soft law (standards, certifications, procurement rules, and liability frameworks), even as such tools depend on the continued possibility of hard-law enforcement. And agencies can govern through enforcement-first strategies and jawboning.

The stakes are nowhere clearer than in the governance of AI. AI is not the "trickier example,"[513] it is the archetype. AI exposes the core flaw in the

public-private workshops and other 'collaborations,' 'voluntary concessions,' multistakeholder working groups, and a whole hell of a lot more jawboning.").

[511] Loper Bright Enters. v. Raimondo, 603 U.S. 369, 479 (2024) (Kagan, J., dissenting).

[512] See Scalia, supra note 357, at 517–18; see supra Section II.E.

[513] Relentless Tr. at 48.

Loper Bright majority's model: the belief that a single, static, judicially supplied interpretation can resolve policy questions that demand expertise, rapid updating, and sustained engagement with technological change. The same challenges that have animated deference in defining "employee," "working time," "stationary source," or "protein"[514] now appear in magnified forms in every question AI raises.

Loper Bright has given courts the final word. But it has also given the political branches a choice: reclaim policymaking authority or allow the judiciary's "single best answers" to govern in areas they are not equipped to navigate alone. If AI is the rule rather than the exception, then the future of federal governance depends on whether Congress and the Executive Branch effectively use the tools that remain.

[514] See supra Subsection I.C.3.