

CHEVRON'S LEGACY

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*[I]t was morning, and lo! now it is evening,
and nothing memorable is accomplished.*

— Henry David Thoreau¹

The writing was on the wall, though the ink was still fairly wet. A few years ago, scholars guessed that *Chevron*² would remain secure.³ Even in 2022, when the Court resolved a number of blockbuster administrative law cases without a glance at *Chevron*,⁴ it still seemed possible that the Court might decide to fine-tune administrative law doctrine in an “incremental[ist]” fashion.⁵

In June 2024, though, the Court in *Loper Bright Enterprises v. Raimondo*⁶ ended *Chevron*’s purgatory.⁷ How much of a shock to the system will *Loper Bright* prove to be? It is still too soon to gauge the on-the-ground difference.⁸ A look at the opinion reveals that *Loper Bright* contains both perils and possibilities for agencies. Under *Chevron*, judges disagreed over whether a statute was “clear,” and they could and did invalidate agency action when it ran against the statute’s “clear”

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¹ HENRY DAVID THOREAU, *WALDEN* 125 (The MacMillan Co. 1929) (1854).

² *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), *overruled by* *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024).

³ See, e.g., Adrian Vermeule, Response, *Neo-?*, 133 HARV. L. REV. F. 103, 105–06 (2020); THOMAS W. MERRILL, *THE CHEVRON DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE* 7 (2022) (“A decision by the Court to overrule the *Chevron* doctrine seems unlikely.”).

⁴ See Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 281–82 (2022).

⁵ Kristin E. Hickman, Response, *The Roberts Court’s Structural Incrementalism*, 136 HARV. L. REV. F. 75, 76–77 (2022).

⁶ 144 S. Ct. 2244 (2024).

⁷ *Id.* at 2273 (“*Chevron* is overruled.”).

⁸ Perhaps as good a guess as any is Professor Cass Sunstein’s. See Cass R. Sunstein, *The Consequences of Loper Bright*, 74 DUKE L.J. (forthcoming) (manuscript at 15), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4881501 [<https://perma.cc/4772-B6N9>] (“An increase in the invalidation rate of three percent or four percent, other things being equal, would be surprisingly small. An increase of thirty percent or forty percent, other things being equal, would be shockingly large. Within those numbers, we might be able to come up with reasonable lower and upper bounds, but they would be both speculative and of limited value.” (footnote omitted)).

meaning.⁹ Under *Loper Bright*, judges will disagree over what reading of the statute is “best,” and they can and will invalidate agency action when it runs against the statute’s “best” meaning.¹⁰ Under *Chevron*, statutory silences and ambiguities came to be treated as implicit delegations.¹¹ Under *Loper Bright*, a statute that does not spell out a delegation in pellucid terms may nonetheless qualify as a delegation of interpretive authority to an agency.¹² Under *Chevron*, agencies were often, but not always, given deference to their resolution of statutory ambiguities within their zones of expertise.¹³ Under *Loper Bright*, though the agency’s entitlement to deference is abolished,¹⁴ an agency’s interpretation will continue to receive “due respect” “to the extent it rests on factual premises within [the agency’s] expertise.”¹⁵

Observing these and other parallels, a number of commentators have predicted that from the ashes of *Chevron* deference there will rise, phoenix-like, a new regime in which agencies will continue to possess discretion,¹⁶ receive deference,¹⁷ and command respect.¹⁸ Professor Thomas Merrill likewise appears to anticipate a degree of resurgence in his erudite Comment, the title of which couples the “[d]emise of [d]eference” with the possibility of a “[r]ise of [d]elegation to [i]nterpret.”¹⁹ A crucial determinant, as Merrill points out, will be “just how broad[ly] or narrow[ly] the Court will tailor the category of delegations to agencies to

⁹ *Chevron*, 467 U.S. at 842.

¹⁰ *Loper Bright*, 144 S. Ct. at 2263.

¹¹ See *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 276–77 (2016) (“[W]here a statute leaves a ‘gap’ or is ‘ambiguous,’ we typically interpret it as granting the agency leeway to enact rules that are reasonable in light of the text, nature, and purpose of the statute.” (quoting *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001); *Chevron*, 467 U.S. at 843)).

¹² *Loper Bright*, 144 S. Ct. at 2263 & nn.5–6; see *infra* notes 27–39 and accompanying text.

¹³ *Chevron*, 467 U.S. at 844; see also *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740–41 (1996) (noting *Chevron*’s “presumption that Congress . . . understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows”).

¹⁴ See *Loper Bright*, 144 S. Ct. at 2261 (“Section 706 makes clear that agency interpretations of statutes . . . are *not* entitled to deference.”).

¹⁵ *Id.* at 2267 (alteration in original) (quoting *Bureau of Alcohol, Tobacco & Firearms v. Fed. Lab. Rels. Auth.*, 464 U.S. 89, 98 n.8 (1983)).

¹⁶ See Donald L.R. Goodson, *Discretion Is Not (Chevron) Deference*, 62 HARV. J. ON LEGIS. 12, 18 (2024) (“[*Loper Bright*] does not extend to unambiguously broad, open-ended terms or phrases that explicitly convey broad grants of authority to federal agencies.”).

¹⁷ See Jack M. Beermann, *Chevron Deference Is Dead, Long Live Deference*, 2023–2024 CATO SUP. CT. REV. 31, 47 (2024) (“[T]he *Loper Bright* opinion leaves room for judicial deference to agency statutory construction under the pre-APA and pre-*Chevron* factors that were summarized best in the Supreme Court’s *Skidmore* decision. And it remains to be seen whether *Loper Bright* signals the end of the agency flexibility that was built into the *Chevron* framework.”).

¹⁸ See Jonathan H. Adler, *From “Deference” to “Respect” — The Real Import of Loper Bright*, REASON: VOLOKH CONSPIRACY (July 3, 2024, 1:36 PM), <https://reason.com/volokh/2024/07/03/from-deference-to-respect-the-real-import-of-loper-bright> [https://perma.cc/4MYW-7WZ4] (reading *Loper Bright* as indicating a “shift from deference to respect”).

¹⁹ Thomas W. Merrill, *The Supreme Court, 2023 Term — Comment: The Demise of Deference — And the Rise of Delegation to Interpret?*, 138 HARV. L. REV. 227, 227 (2024).

interpret.”²⁰ But for reasons that Merrill carefully outlines, it is possible that *Loper Bright* could ultimately prove to be “a new framework accommodating significant acceptance of agency interpretations” rather than a “power grab” — at least in the hands of judges with the right “attitude.”²¹

Picking up where Merrill’s Comment leaves off, this Response looks at the forces that might shape *Loper Bright*’s future development. Some would warmly welcome a world in which *Loper Bright* proved to make only relatively modest inroads on the *Chevron* regime. Others, to put it mildly, would not. The sentiment underlying the former position is obvious and is set out at length in Justice Kagan’s searing dissent — if courts replace agencies as the primary interpreters of statutes, the quality and quantity of federal regulation will be corroded, and America will suffer for it.²² The sentiment underlying the latter position is also not hard to grasp: *Chevron* was unlawful, the overruling of *Chevron* must mean something, and *Loper Bright*’s shoulder-to-shoulder six-Justice majority could not have meant to permit the reemergence of anything resembling the *Chevron* regime.

This will be a dispute over the latent possibilities in the *Loper Bright* decision, and by the same token a dispute over *Chevron*’s legacy — over what, if any, legacy *Chevron* will be permitted to leave. The short-run impact of *Loper Bright* will depend on which side gains the upper hand in this dispute.

In the longer run, this abandoned landmark may prove to be pertinent in a different sense. An ancient principle of law and justice — namely, “you broke it, you own it”²³ — means that it is now incumbent

²⁰ *Id.* at 265 (“If the Court tailors this category narrowly, in addition to rejecting ambiguity as a type of implicit delegation, the Court will leave a relatively narrow sphere for agency flexibility. If the Court tailors the category broadly, it would give agencies significant flexibility, restoring a large part of the discretionary authority taken away with the overruling of *Chevron*.”).

²¹ *Id.* at 231; see also Adrian Vermeule, *The Deference Dilemma*, 31 GEO. MASON L. REV. 619, 634 (2024) (“What the Court takes away with one hand, it would give back with the other . . .”). Professor Adrian Vermeule, writing in advance of *Loper Bright*, argued that a decision that repackaged deference as delegation would allow the Court to reach a “nominal[]” reconciliation between two forces — the fact that truly nondeferential legal interpretation by judges is “pragmatically intolerable,” *id.* at 629–30, on the one hand, and the fact that the legitimacy of the administrative law depends “for both legal and cultural reasons,” *id.* at 630, on the existence of independent judicial review, on the other.

²² See *Loper Bright*, 144 S. Ct. at 2300–01 (Kagan, J., dissenting); *id.* at 2311 (“Today, the majority . . . gives courts the power to make all manner of scientific and technical judgments[and] . . . the power to make all manner of policy calls, including about how to weigh competing goods and values.”); see also *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2482 (2024) (Jackson, J., dissenting) (“At the end of a momentous Term, this much is clear: The tsunami of lawsuits against agencies that the Court’s holdings in [*Corner Post*] and *Loper Bright* have authorized has the potential to devastate the functioning of the Federal Government.”).

²³ Or, in the words of the prophecy given to the wounded Telephus by the oracle of Apollo, “your assailant will heal you.” Cf. T. A. CAVANAUGH, *HIPPOCRATES’ OATH AND ASCLEPIUS’ SNAKE*:

on the Roberts Court to ensure that the *Loper Bright* regime is judicially administrable, fair, and politically legitimate enough to take the place of the monumental precedent that it took it upon itself to demolish.²⁴ As we have recently witnessed, it is not easy to create a coordinating framework for governing court-agency contestation over law and policy. And as none other than Merrill has elsewhere taught us, the most promising place to look to understand how this feat might be accomplished is to learn from the saga of *Chevron*'s demise.²⁵ If those lessons are absorbed into the nascent *Loper Bright* regime, then that will be *Chevron*'s most enduring legacy.

Drawing on *Loper Bright* and on Merrill's Comment, Part I sets out how the *Loper Bright* framework in principle and in application has the potential to preserve dimensions of the realm of deference that *Chevron* once safeguarded. Anticipating resistance to this understanding of *Loper Bright*, this Part explains why *Loper Bright* should not be cabined to avoid recreating outcomes that echo or resemble *Chevron*. Part II looks to the road ahead. If the new *Loper Bright* regime is to succeed in transcending the kinds of problems that came to conquer *Chevron*, the Court must learn the lessons of *Chevron*'s fall. A brief conclusion follows.

I. THE AMBIVALENCE OF *LOPER BRIGHT*

Loper Bright will go down in the annals of administrative law as the case that bluntly overruled *Chevron*.²⁶ But *Loper Bright* contains noteworthy ambivalences that have the capacity to be developed in ways that could preserve to a significant extent the power of agencies to develop and interpret statutory schemes. Alongside that, *Loper Bright* eschews reliance on the Constitution and on nondelegation concerns — a fact that also has uncertain implications. These known unknowns will make *Loper Bright* into something like the rope in a game of tug-of-war between proponents and opponents of administrative power, with the

THE BIRTH OF THE MEDICAL PROFESSION 17 (2018) (translating the prophecy as “the wounder will heal”). For only slightly less apocryphal reasons, this principle is also sometimes called the “Pottery Barn rule.” William Safire, *If You Break It . . .*, N.Y. TIMES (Oct. 17, 2004), <https://www.nytimes.com/2004/10/17/magazine/if-you-break-it.html> [<https://perma.cc/FX2X-ZEGM>].

²⁴ This is the footnote, obligatory to the form, that says how often *Chevron* has been cited. See Gary Lawson, “*Then What?*”: A Framework for Life Without *Chevron*, 60 WAKE FOREST L. REV. (forthcoming 2025) (manuscript at 3), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4961745 [<https://perma.cc/PHS7-P4NX>] (noting that *Chevron* carried “more than 18,000 WESTLAW citations in court opinions and more than 22,000 WESTLAW citations in secondary literature”); see also Kent Barnett & Christopher J. Walker, *Chevron and Stare Decisis*, 31 GEO. MASON L. REV. 475, 477–78 (2024).

²⁵ MERRILL, *supra* note 3, at 274 (describing “the saga of the *Chevron* doctrine” as “an extended case study revealing the issues that are likely to come to the fore in managing any division of authority between courts and agencies in interpreting the law”).

²⁶ *Loper Bright*, 144 S. Ct. at 2273 (“*Chevron* is overruled.”). Notably, though, *Loper Bright* did not overrule *Chevron*'s “Clean Air Act holding,” *id.* See *infra* note 49.

two sides each pulling on the decision to support their preferred vision for how power should be allocated when courts review agency action. In this dispute, the impetus to read *Loper Bright* to avoid recreating *Chevron*-like results may exert significant force. This Part begins by explaining these points and ends by explaining why it misunderstands *Loper Bright* to treat it as rejecting *Chevron*-like results.

Let us begin by highlighting some key points about *Loper Bright*, many more of which are canvassed at length in Merrill's thorough Comment.²⁷ First, *Loper Bright* allows for delegation to agencies of considerable power. In a crucial passage of *Loper Bright*, the Court cited a number of statutes that it characterized either as "express[]" delegations or as statutes that authorize agencies to exercise discretion.²⁸ In the former category are laws that provide that a statutory term will be "give[n] meaning" by the agency.²⁹ In the latter category are statutes that allow agencies to flesh out the details of a statutory scheme and statutes that authorize agencies to take steps that they adjudge to be tailored to achieve hazily defined objectives.³⁰ None of the cited statutes use magic words ("with these words, I thee delegate . . ."). It is true that mere ambiguity is no longer sufficient to show that Congress has "delegate[d] discretionary authority to an agency."³¹ But a crystalline statement of the magic-words kind is not necessary either. And *Loper Bright* contemplates that agencies may be delegated "discretionary authority" to make policy judgments within the boundaries of the authority Congress has delegated to them.³² As Merrill underscores, "[t]his appears to preserve, at least in the context of express or implicit delegations, . . . a realm in which agencies have flexibility to adjust their interpretations over time."³³ Moreover, *Loper Bright* does more than just authorize courts to uphold agency action: it commands them to do so when those actions fall within the terms of a particular statute's delegation.³⁴

Second, the fact that an agency interpretation does not receive automatic or across-the-board deference does not denude it of influence.

²⁷ This Response assumes familiarity with both *Loper Bright* and Merrill's Comment.

²⁸ *Loper Bright*, 144 S. Ct. at 2263 (quoting *Batterton v. Francis*, 432 U.S. 416, 425 (1977)).

²⁹ *Id.* at 2263 & n.5.

³⁰ See *id.* at 2263 & n.6. These are the "fill up the details" statutes and the statutes that call for regulations that would secure flexible and open-ended statutory aims. *Id.* at 2263 (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825)).

³¹ *Id.* at 2263; see *id.* at 2265 (proclaiming that ambiguity is not a delegation); *id.* at 2267 (criticizing "*Chevron*'s broad rule" that "ambiguities of all stripes trigger deference").

³² *Id.* at 2263 ("When the best reading of a statute is that it delegates discretionary authority to an agency . . .").

³³ Merrill, *supra* note 19, at 265.

³⁴ *Loper Bright*, 144 S. Ct. at 2273 ("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.").

Repeatedly invoking *Skidmore v. Swift & Co.*,³⁵ the Court in *Loper Bright* instructed courts to be mindful of the agency's experience and its "informed judgment."³⁶ The opinion marks as "especially informative" agency interpretations that draw on "factual premises within [the agency's] expertise,"³⁷ and as "especially useful" those agency interpretations that "issued contemporaneously with the statute, and which have remained consistent over time."³⁸ If there is a hierarchical difference between "especially informative" and "especially useful" agency interpretations, *Loper Bright* does not appear to say so. Drawing on these "informative" and "useful" agency views, courts may thus conclude that the best reading of contestable statutory language aligns with the agency's interpretation of that language, even if the naked text of the statute would seem to point a novice reader in a different direction. As Merrill dryly hints, nothing much of substance may turn on whether one calls this "deference" or reasoning to the "best" interpretation, except that doing the former is liable to get you in hot water.³⁹

Third, the fact that the *Loper Bright* is (at most) a statutory holding is also noteworthy.⁴⁰ Though *Loper Bright* began by citing Article III and was peppered with references to *Marbury*,⁴¹ the decision is an interpretation of Section 706 of the APA rather than an application of the Constitution.⁴² That framing was helpful to the Court's rather muddled attempt to shore up the myriad past decisions — "undoubtedly thousands"⁴³ of them — in which courts have relied on *Chevron* to defer to agencies' reasonable interpretations of statutory ambiguities.⁴⁴ If the

³⁵ 323 U.S. 134 (1944).

³⁶ *Loper Bright*, 144 S. Ct. at 2267 ("In an agency case in particular, the court will go about its task with the agency's 'body of experience and informed judgment,' among other information, at its disposal. And 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 [the agency's] expertise.'") (alteration in original) (citation omitted) (quoting *Skidmore*, 323 U.S. at 140; Bureau of Alcohol, Tobacco & Firearms v. Fed. Lab. Rels. Auth., 464 U.S. 89, 98 n.8 (1983)); see also *id.* at 2262, 2265.

³⁷ *Id.* (quoting *Bureau of Alcohol, Tobacco & Firearms*, 464 U.S. at 98 n.8).

³⁸ *Id.* at 2262 (citing *Skidmore*, 323 U.S. at 140; *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 549 (2001)).

³⁹ Merrill, *supra* note 19, at 263 ("If the court concludes that these tools of statutory interpretation support the agency's interpretation, one could call this a form of 'deference' to the agency view. *Loper Bright* suggested that the preferred locution is that these interpretative tools may indicate to the court that the agency's interpretation is 'the best' interpretation." (citing *Loper Bright*, 144 S. Ct. at 2266)).

⁴⁰ *Loper Bright*, 144 S. Ct. at 2272–73. I say "at most" because, as Merrill notes, the Court's conclusion that *Chevron* is in conflict with Section 706 "rested on doubtful inferences from the APA, rather than from the text of the APA itself," and *Loper Bright* could equally be seen as "replacing one [federal] common law regime with another." Merrill, *supra* note 19, at 241.

⁴¹ See *Loper Bright*, 144 S. Ct. at 2257, 2261, 2271, 2273.

⁴² See *id.* at 2261; Merrill, *supra* note 19, at 235 (noting that "no constitutional infirmity was cited by the majority" concerning *Chevron*'s "rule of judicial method").

⁴³ Merrill, *supra* note 19, at 245 & n.150 ("There are undoubtedly thousands of lower court decisions affirming agency interpretations at step two.").

⁴⁴ *Loper Bright*, 144 S. Ct. at 2273 ("[W]e do not call into question prior cases that relied on the *Chevron* framework.").

Chevron framework were constitutionally infirm, then these past decisions would not just have been decided by a merely *wrong* methodology, but by an unconstitutional (or *really* wrong) methodology, which would increase their vulnerability going forward and amplify the disruption caused by *Loper Bright*.⁴⁵ Instead, *Loper Bright*, though it claimed to “leave *Chevron* behind,” granted these offspring of *Chevron* visas of uncertain duration to stay on in its brave new world of independent judicial judgment.⁴⁶ No Justice — not even Justice Thomas, who believes *Chevron* to be unconstitutional⁴⁷ — objected to this carve-out. Thus, *Loper Bright* is not just a “tombstone no one can miss,”⁴⁸ as Justice Gorsuch crowed, but is also thousands of missing tombstones.⁴⁹

Fourth, *Loper Bright*’s holding is noteworthy for its silence concerning nondelegation. *Chevron* was premised on the proposition that the delegation to an agency of the power to make legally binding rules and

⁴⁵ See Jonathan Remy Nash, *Chevron Stare Decisis in a Post-Loper Bright World*, IOWA L. REV. ONLINE (forthcoming) (manuscript at 1), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4966351 [<https://perma.cc/FCD2-KR24>] (noting that *Loper Bright*’s preservation of past holdings was an “attempt[] to minimize the substantial effect . . . on administrative law and governance” of *Chevron*’s overruling). I am grateful to Professor Daniel Deacon, Anton Metlitsky, and Hashim Mooppan for their thoughts on this point.

⁴⁶ *Loper Bright*, 144 S. Ct. at 2273.

⁴⁷ See *id.* at 2274 (Thomas, J., concurring) (“*Chevron* deference . . . violates our Constitution’s separation of powers . . .”).

⁴⁸ *Id.* at 2275 (Gorsuch, J., concurring) (“Today, the Court places a tombstone on *Chevron* no one can miss.”).

⁴⁹ The analysis in the stare decisis passage is odd. A decision that relied on the *Chevron* framework to uphold as reasonable an agency’s interpretation of a statutory ambiguity is not equivalent to a “statutory precedent” that is entitled to claim statutory stare decisis effect. See *id.* at 2273 (majority opinion). In such a decision — a step two decision — the court is ultimately deciding on the validity of the agency’s interpretation, not itself enunciating the meaning of the statute. See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 984 (2005). At most, such a decision is a determination that the statute in question is ambiguous. If that step one holding of ambiguity is today, in the Court’s telling, “subject to statutory *stare decisis* despite [the Court’s] change in interpretive methodology,” *Loper Bright*, 144 S. Ct. at 2273, then that puts strange bookends on what courts may now hold. Consider a case asking a court to hold that there is a “best reading” of the Clean Air Act even though, on this passage’s logic, the earlier holding that the Clean Air Act is ambiguous remains good law. It appears that such a court may decide that reading the Clean Air Act to mean X is the *best* reading, but it may *not* decide the statute *clearly means* X, for that would contravene the earlier holding of ambiguity. If *Loper Bright* actually meant to preserve *Chevron*-era holdings that “specific agency actions are lawful,” *id.* at 2273, as if those holdings somehow spoke to the statute (at step one) and not to the agency interpretation (at step two), then that would be both ironic and perverse. It would be ironic, for it would freeze into place earlier agency interpretations that were reasonable but not the “best,” which flies in the face of *Loper Bright*’s insistence that “[i]n the business of statutory interpretation, if it is not the best, it is not permissible,” *id.* at 2266. It would be perverse because the result would be to insulate to a greater extent pre-*Loper Bright* agency interpretations that were challenged and then sustained, relative to pre-*Loper Bright* agency interpretations that no one thought to challenge because they were more squarely in the zone of reasonable interpretation. I am grateful to Professors Zachary Clopton and Adam Zimmerman for their thoughts on this footnote.

to “make . . . policy choices” was legitimate.⁵⁰ The fact that *Chevron* allowed agencies to exert such authority over private rights and duties, over the governance of American society, was at the heart of the most fervent critiques of *Chevron*.⁵¹ Yet *Loper Bright* too is premised on the proposition that Congress can delegate the power to make legally binding rules and policies to agencies, even those of the sort that regulate private rights and liabilities in serious, far-reaching ways. In enumerating examples of statutes that authorize agencies “to exercise a degree of discretion”⁵² — and without hinting at any doubt concerning their constitutional validity — *Loper Bright* cited laws that allow agencies to specify which employees must get a minimum wage;⁵³ to require firms to report safety hazards to the government;⁵⁴ and to regulate pollution and power plants in accordance with an agency’s, not Congress’s, determination of what rules are “appropriate,” “necessary,” or needed to assure “protection of public health.”⁵⁵ The *Loper Bright* Court cited to a case and page⁵⁶ wherein the Court in 1977 had explained that when Congress has “expressly delegated” power to an agency, “the Secretary adopts regulations *with legislative effect*. A reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different manner.”⁵⁷ Evidently, the *Loper Bright* Court generally prefers to call this kind of thing an “authoriz[ation]” of the “exercise of . . . discretion”⁵⁸ or a “confer[ral]” of “discretionary

⁵⁰ *Chevron*, 467 U.S. at 865–66 (“[A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its judgments. . . . [I]t is entirely appropriate for this political branch[, i.e., the executive,] . . . to make such policy choices — resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.”).

⁵¹ See, e.g., *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 70–71 (2015) (Thomas, J., concurring in the judgment); *Michigan v. EPA*, 576 U.S. 743, 762 (2015) (Thomas J., concurring) (“[I]f we give the ‘force of law’ to agency pronouncements on matters of private conduct as to which ‘Congress did not actually have an intent,’ we permit a body other than Congress to perform a function that requires an exercise of the legislative power.” (citation omitted) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001)) (citing *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. at 88–89 (Thomas, J., concurring in the judgment))); PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 2–3, 377–78 (2014).

⁵² *Loper Bright*, 144 S. Ct. at 2263.

⁵³ See *id.* n.5 (citing 29 U.S.C. § 213(a)(15)) (provision delegating interpretive authority to Secretary of Labor).

⁵⁴ See *id.* (citing 42 U.S.C. § 5846(a)(2)) (provision delegating interpretive authority to Nuclear Regulatory Commission).

⁵⁵ See *id.* n.6 (citing 33 U.S.C. § 1312(a); 42 U.S.C. § 7412(n)(1)(A)) (provisions respectively instructing EPA to regulate effluent limitations and power plants).

⁵⁶ *Id.* at 2263 (citing *Batterton v. Francis*, 432 U.S. 416, 425 (1977)).

⁵⁷ *Batterton*, 432 U.S. at 425 (second emphasis added) (citing *Am. Tel. & Tel. Co. v. United States*, 299 U.S. 232, 235–237 (1936)).

⁵⁸ *Loper Bright*, 144 S. Ct. at 2263 (“[T]he statute’s meaning may well be that the agency is authorized to exercise a degree of discretion.”).

authority”⁵⁹ rather than to name it as a delegation of the power to make legally binding rules and set policy. But these citations are ones that any proponent of a reinvigorated nondelegation doctrine should shudder to read.⁶⁰

This docility on nondelegation is remarkable on at least two scores. Six years ago, the close-fought decision in *Gundy v. United States*⁶¹ and a separate statement from Justice Kavanaugh in *Paul v. United States*⁶² seemed to indicate that the Court was one tick away from a full return to the nondelegation doctrine’s “one good year” of 1935.⁶³ Yet in 2024, Justice Thomas wrote for himself alone in *Loper Bright* when he contended that the overruling of *Chevron* was a necessary corollary of the nondelegation doctrine.⁶⁴

The second and related point is that the *Loper Bright* Court’s implicit acceptance of the propriety of delegation extends a turn that became visible in the recent “quartet” of decisions setting out the new major questions doctrine.⁶⁵ The nondelegation doctrine was a “dog that didn’t bark” in those cases.⁶⁶ The incompatibility of the new major questions doctrine with a commitment to *nondelegation* was apparent at the time of those decisions to me⁶⁷ and also to Professor Merrill.⁶⁸

⁵⁹ *Id.* at 2268 (“That is not to say that Congress cannot or does not confer discretionary authority on agencies. Congress may do so, subject to constitutional limits, and it often has.”).

⁶⁰ *Cf.* *Michigan v. EPA*, 576 U.S. 743, 762 (2015) (Thomas, J., concurring) (claiming that one of the cited statutes, 42 U.S.C. § 7412, if read to allow the agency to choose which policy goals it wished to pursue, was a “potentially unconstitutional delegation[]”).

⁶¹ 139 S. Ct. 2116 (2019); *see id.* at 2133 (Gorsuch, J., dissenting); *id.* at 2130–31 (Alito, J., concurring in the judgment).

⁶² 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari).

⁶³ This is the footnote, obligatory to the form, which flags that Professor Cass Sunstein famously quipped that the nondelegation doctrine had “one good year.” Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000); *see A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541–42 (1935); *Pan. Refin. Co. v. Ryan*, 293 U.S. 388, 430 (1935). The year 1936 was also no slouch. *See Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (invalidating a delegation of power to private parties).

⁶⁴ *Loper Bright*, 144 S. Ct. at 2275 (Thomas, J., concurring) (contending that *Chevron* deference is unconstitutional because the exercise of policymaking authority by the Executive Branch “expands agencies’ power beyond the bounds of Article II” and “*Chevron* ‘permit[s] a body other than Congress to perform a function that requires an exercise of legislative power’” (alteration in original) (quoting *Michigan v. EPA*, 576 U.S. at 762 (Thomas, J., concurring))).

⁶⁵ *See* Sohoni, *supra* note 4, at 263 (describing the quartet).

⁶⁶ *Id.* at 267, 291–92 (noting that “the Court did not ground the quartet in nondelegation at all,” *id.* at 291, but rather honed the major questions doctrine into a tool that could perform at a retail level the most important work that the nondelegation doctrine would perform).

⁶⁷ *Id.* at 302 (“[I]t would be extremely strange — if the Court were committed to the view that the power to formulate binding rules for private parties cannot be delegated — for the Court to have said, as it did in a concluding dictum in the *EPA* case, that the authority to adopt a scheme like the Clean Power Plan ‘rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.’” (quoting *West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022) (emphasis added))).

⁶⁸ *See* Thomas W. Merrill, Essay, *The Major Questions Doctrine: Right Diagnosis, Wrong Remedy*, HOOVER INST. 2 (Nov. 13, 2023), <https://www.hoover.org/research/major-questions-doctrine-right-diagnosis-wrong-remedy> [https://perma.cc/2CG4-9SHV].

Indeed, I argued, the “best conceptual tether”⁶⁹ for the new major questions doctrine was the *opposite* of a commitment to nondelegation: it was the “*exclusive* delegation” principle that Congress *does* have the power to delegate, but that only Congress does.⁷⁰ The exclusive delegation principle, as Merrill has elsewhere explained, “preserve[s] . . . legislative supremacy,” but it “is enforced not by declaring a statute unconstitutional, but through ordinary statutory interpretation by reviewing courts.”⁷¹ The quartet’s enunciation of a clear statement rule for major questions would “make[] no sense” if the Court were committed to the view that Congress may not delegate legislative authority to the executive branch.⁷²

Loper Bright continued the quartet’s reticence concerning nondelegation as well as its implicit acceptance of exclusive delegation. As in the three cases in the major questions quartet lost by the government, the Court in *Loper Bright* “nowhere articulated or embraced the principle that agencies may not exercise legislative power or that Congress may not delegate legislative power — the ideas embraced by proponents of a more stringent nondelegation doctrine.”⁷³ Instead, the cases in the quartet — and now *Loper Bright* — “align better” with the exclusive delegation principle.⁷⁴ To put it more plainly, the *Loper Bright* Court in essence said, “Congress may delegate legislative power to agencies, those delegations may be either explicit or implicit, and in reviewing agency action, the duty of courts is to decide independently whether the agency is acting within the scope of that delegation.”⁷⁵ What *Loper Bright* did *not* say is, “Congress cannot delegate legislative power to agencies, and agency resolution of statutory ambiguities under *Chevron* amounts to the exercise of legislative power, so courts may not defer to agencies’ resolution of such ambiguities.” Five Justices in the majority could

⁶⁹ Sohoni, *supra* note 4, at 308.

⁷⁰ *Id.* at 306–07 (“[T]he theory in play may not really be the nondelegation doctrine at all but rather what Professor Thomas Merrill calls the *exclusive* delegation doctrine. . . . If the constitutional principle that is being enforced here is not *nondelegation*, but instead *exclusive* delegation, then that would explain all four cases in the quartet.”).

⁷¹ Merrill, *supra* note 68, at 9.

⁷² *Id.* at 5 (“[I]f Congress has exclusive authority to legislate, and cannot transfer this to another branch of government by giving it great discretionary power, it makes no sense to say Congress can transfer great discretionary authority by clearly authorizing the transfer.”).

⁷³ Sohoni, *supra* note 4, at 307.

⁷⁴ *Id.*

⁷⁵ See *Loper Bright*, 144 S. Ct. at 2263 (“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, ‘fix[ing] the boundaries of [the] delegated authority,’ and ensuring the agency has engaged in ‘‘reasoned decisionmaking’’ within those boundaries.” (alterations in original) (citations omitted) (quoting Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 27 (1983); *Michigan v. EPA*, 576 U.S. 743, 750 (2015))).

have, but did not, join Justice Thomas's opinion expressing exactly the latter thought.⁷⁶

The unspoken premise that delegation of legislative power is a legitimate tool that Congress may use, rather than an illicit third rail that must be avoided or forsworn, was, alas, just that — an unspoken premise, not a proposition writ plainly on the face of the *Loper Bright* decision. But it is there nonetheless. And it is another way in which *Loper Bright* may be understood as offering resources for *legitimizing* agency power, not just as a toolkit for cabinining or crushing it.

* * *

The cash value of all this ambivalence in *Loper Bright* is far from certain. Consider first the nondelegation doctrine. The Court may of course still be on the brink of reviving the nondelegation doctrine — nothing in *Loper Bright* does or could formally prevent such a holding from arriving six months from now or for that matter next week. Indeed, some may read the *Loper Bright* decision as *inviting* a nondelegation resurgence, because of its repeated and needless references to “constitutional limits” on delegation.⁷⁷ Still, it would be uncommonly silly for a Court that had just set out whole categories of statutes as exemplars of delegations to agencies that must be “respect[ed]” to turn around on a dime and categorically hold that delegation of legislative power was unlawful.⁷⁸

Consider next — while taking as constant the current state of nondelegation doctrine — how *Loper Bright* will affect judicial review of agency action. As just summarized, *Loper Bright* held that within the permissible constitutional bounds of delegation — which remain, as of this writing, the expansive parameters drawn by the intelligible principle test⁷⁹ — agencies have the authority to act within the scope of their delegated authority, even if they do so by making legally binding rules that affect important spheres of private conduct.⁸⁰ *Loper Bright* abolished the *Chevron*-era presumption that all statutory ambiguities qualify as implicit delegations.⁸¹ Jettisoned along with that has been the

⁷⁶ See *id.* at 2275 (Thomas, J., concurring). Notable for his decision not to join Justice Thomas was Justice Gorsuch, whose dissent in *Gundy* endorsed the revival of the nondelegation doctrine. See *Gundy v. United States*, 139 S. Ct. 2116, 2141–42 (2019) (Gorsuch, J., dissenting).

⁷⁷ See *Loper Bright*, 144 S. Ct. at 2263, 2268, 2273. In November 2024, the Court granted certiorari in two cases implicating the nondelegation doctrine, or at least the private nondelegation doctrine. See *SHLB Coal. v. Consumers' Rsch.*, No. 24-422, 2024 WL 4864037, at *1 (U.S. Nov. 22, 2024) (mem.); *FCC v. Consumers' Rsch.*, No. 24-354, 2024 WL 4864036, at *1 (U.S. Nov. 22, 2024) (mem.); Amy Howe, *Court Grants Challenge to FCC Subsidies over Nondelegation Doctrine*, SCOTUSBLOG (Nov. 22, 2024, 5:54 PM), <https://www.scotusblog.com/2024/11/court-grants-challenge-to-fcc-subsidies-over-nondelegation-doctrine> [<https://perma.cc/NZ8D-A9UC>].

⁷⁸ *Loper Bright*, 144 S. Ct. at 2263, 2268.

⁷⁹ *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

⁸⁰ See *supra* note 75 and accompanying text.

⁸¹ *Loper Bright*, 144 S. Ct. at 2265.

Chevron-era requirement that courts “defer” to agencies’ readings of ambiguous statutes.⁸² In their stead, however, is *Loper Bright*’s parting instruction: a new commandment to “respect the delegation,”⁸³ and the additional injunction that respect-worthy interpretations include those that are based on “factual premises within [the agency’s] expertise”⁸⁴ and those that are longstanding and contemporaneous with a statute’s enactment.⁸⁵ Altogether, then, the decision departs in important ways from the *Chevron* regime, but it still “contains several familiar elements”⁸⁶ that could be developed in a way that would underwrite significant agency power — much as *Chevron* did.

All this falls straight out of the opinion and much of it comports with Merrill’s assessment of it to boot.⁸⁷ Yet in some quarters alarm bells will ring at this reading of *Loper Bright*. To illustrate why, it is worth pausing on certain passages of Merrill’s Comment that — though they are Merrill’s good-faith assessments of *Loper Bright*’s meaning — could almost be called opinion-drafting advice for lower courts. In discussing an emphatic command of *Loper Bright* — its direction to courts to adopt “the best” interpretation of the statute⁸⁸ — Merrill emphasizes that judges “must avoid any suggestion that they are upholding the agency interpretation even though they do not regard it as the best,” but underscores the “striking[]” point that “if the court is persuaded that Congress has expressly or implicitly delegated authority to the agency to interpret the provision at issue, it may uphold the agency interpretation as reasonable even if the court thinks it would have ruled differently.”⁸⁹ Relatedly, in describing the court’s obligation to apply its “independent judgment” using the tools of interpretation authorized by *Loper Bright*, Merrill explains that “[i]f the court concludes that these tools of statutory interpretation support the agency’s interpretation, one could call this a form of ‘deference’ to the agency view,” but adds that “the preferred locution is that these interpretative tools may indicate to the court that the agency’s interpretation is ‘the best’ interpretation.”⁹⁰

⁸² *Id.* at 2261.

⁸³ *Id.* at 2273; *id.* at 2267 (alteration in original) (“Congress expects courts to do their ordinary job of interpreting statutes, with due respect for the views of the Executive Branch.”).

⁸⁴ *Id.* at 2267 (quoting *Bureau of Alcohol, Tobacco & Firearms v. Fed. Lab. Rels. Auth.*, 464 U.S. 89, 98 n.8 (1983)).

⁸⁵ *Id.* at 2262 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *Whitman v. Am. Trucking Ass’n, Inc.*, 531 U.S. 457, 549 (2001)).

⁸⁶ Merrill, *supra* note 19, at 271.

⁸⁷ For a nice explanation of this outcome from an external perspective, see generally Daniel E. Walters, *Four Futures of Chevron Deference*, 31 GEO. MASON L. REV. 635 (2024).

⁸⁸ *Loper Bright*, 144 S. Ct. at 2263.

⁸⁹ Merrill, *supra* note 19, at 263–64; *id.* at 264 (“So a court may be able to uphold agency interpretations on various grounds, as long as the court avoids saying the agency’s interpretation is ‘not the best.’”).

⁹⁰ *Id.* at 263 (citing *Loper Bright*, 144 S. Ct. at 2266).

Those who were opposed to *Chevron* deference will not take lying down a reading of *Loper Bright* that treats it as merely “restraining the use of the rhetoric of deference.”⁹¹ After all, courts do not overrule cases as monumental as *Chevron* for cosmetic purposes. As critics of *Chevron* will point out, *Loper Bright* held that the *Chevron* regime was unlawful and that it produced bad outcomes, and it overruled *Chevron* to cure that unlawfulness and prevent those bad outcomes. Ergo, *Loper Bright* should not be understood to allow the recreation of anything like the outcomes produced by the *Chevron* regime — no matter what “locution” or “rhetoric” those outcomes are couched in.

Indeed, complaints in this register are already being voiced. In a recent D.C. Circuit decision, the dissent accused the majority of “revert[ing] to a *Chevron*-like framework” by failing to adopt the “best interpretation,”⁹² while the majority’s rejoinder was to deny that its interpretation did any such thing.⁹³ Post-*Loper Bright* cases in which agencies prevail will predictably spur such accusations of *Chevron* “smuggl[ing]”⁹⁴ — the aim of which will be to urge judges to reject any understanding of *Loper Bright* that hints of reversion to *Chevron*.

In the already unfolding tug-of-war over the meaning of *Loper Bright*, that anti-circumvention reading of the decision may be seductive. But it is also wrong. Judges applying *Loper Bright* should not shy away from reaching *Chevron*-resembling outcomes.

The basic reason why is that to do so would misunderstand the aim and role of the *Loper Bright* decision. *Loper Bright* was not an instruction to courts to avoid *Chevron*-ish outcomes. Rather, *Loper Bright* was a self-conscious effort to craft a framework for judicial review of agency interpretation that will endure going forward. *Loper Bright* specifies a decisional process that requires judges to engage in independent interpretation of the metes and bounds of congressional delegations to

⁹¹ *Id.* To be clear, as Merrill elaborately explains, *Loper Bright*’s impact goes far beyond disciplining the rhetoric that courts use to describe their reasoning. *See id.* at 271 (“[*Loper Bright*] represents fundamental change. . . . The court is in charge, including in deciding when the agency can exercise discretion — that is, make policy.”).

⁹² *NextEra Energy Res., LLC v. Fed. Energy Regul. Comm’n*, 118 F.4th 361, 376 (D.C. Cir. 2024) (Rao, J., dissenting) (emphasis omitted). *NextEra Energy* implicated a pre-*Loper Bright* rule of “*Chevron*-like” deference to FERC’s interpretation of tariffs and contracts concerning energy generation. *See id.* at 368 (majority opinion). The majority bracketed whether that type of deference had survived *Loper Bright* because it concluded that FERC’s interpretation was “in fact correct.” *See id.* Judge Rao, in dissent, contended that the majority was deferring to FERC without admitting to doing so. *See* Haley Proctor, *D.C. Circuit Review: Reviewed — Is “Chevron-like” Precedent Overruled?*, YALE J. ON REGUL.: NOTICE & COMMENT (Oct. 7, 2024), <https://www.yalejreg.com/nc/d-c-circuit-review-reviewed-is-chevron-like-precedent-overruled> [https://perma.cc/P3S8-UWS6] (noting that the dissenting judge “also protested what she saw as a sub-silentio application of *Chevron* deference in the majority opinion”).

⁹³ *NextEra Energy Res.*, 118 F.4th at 371–72 (“These are bedrock principles of statutory construction. Our application of them here does not, as the dissent contends, smuggle into our analysis a ‘*Chevron*-like framework.’” (citation omitted) (quoting *id.* at 376 (Rao, J., dissenting))).

⁹⁴ *Id.* at 372.

agencies, on a statute-by-statute (or provision-by-provision) basis. But — and this is the critical point — *Loper Bright* is *formally agnostic as to the results of that decisional process*. It allows judges to conclude that the “best reading” of a statute is that Congress has given a great deal of power to an agency and that the agency has correctly used that power. The fact that such a conclusion also happens to be one that *Chevron* would have allowed had it not been overruled is not a reason to avoid it. On the contrary, that this new framework allows for significant agency authority over statutory meaning makes perfect sense: in a system premised on legislative supremacy, any responsible framework for resolving court-agency conflicts concerning legal interpretation will accept that Congress can legitimately choose to designate agencies, rather than courts, as the entities that will “give meaning” to statutes.⁹⁵

It is worth noting that, though it is not common, it is not unheard of for doctrine to “hydraulic[ally]” adapt to restore or preserve results earlier allowed by rejected precedents or disfavored doctrines when alternative legally valid pathways to those results are found.⁹⁶ Almost by definition, someone is going to be unhappy when that happens — namely, whichever coalition or interest group was powerful enough to muster enough support to get a certain case or doctrine rejected is not going to appreciate seeing the outcomes that were underwritten by the older case or doctrine get recreated or preserved at a later time by an alternative doctrinal pathway. But in various domains, examples appear of the regeneration or preservation of results that the Court’s earlier decisional case law had earlier placed out of bounds.⁹⁷

To pluck out one contemporary instance from a domain of law familiar to most readers, consider the evolution of personal jurisdiction doctrine. In the era that followed the 1945 decision in *International*

⁹⁵ *Loper Bright*, 144 S. Ct. at 2263 (“[S]ome 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.’” (second alteration in original) (footnotes omitted) (citations omitted) (quoting *Batterton v. Francis*, 432 U.S. 416, 425 (1977) (emphasis omitted); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825); *Michigan v. EPA*, 576 U.S. 743, 752 (2015)) (citing 29 U.S.C. § 213(a)(15); 33 U.S.C. § 1312(a); 42 U.S.C. § 7412(n)(1)(A)); *id.* nn.5–6 (enumerating a nonexhaustive list of statutes that empower agencies).

⁹⁶ See *Gundy v. United States*, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting) (“When one legal doctrine becomes unavailable to do its intended work, the hydraulic pressures of our constitutional system sometimes shift the responsibility to different doctrines.”).

⁹⁷ Indeed, the phenomenon of cyclical or “epicyclical” development is not confined to doctrine; it is an aspect of a broader pattern that is observable in legal theory writ large. Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819, 1842 (2016) (“Today’s originalism is the successor to last generation’s ‘interpretivism.’ Today’s CBA is the latest successor to versions of CBA dating back to the New Deal era. Both theories have older intellectual roots. A prescriptive legal theory may fade away . . . only to be reborn, years later, in a slightly revised and relabeled form. And then the impurification process starts again. Our life cycle theory is thus consonant with a larger *epicyclical* account of legal theory development.” (footnotes omitted)).

Shoe Co. v. Washington,⁹⁸ corporations were subject to general personal jurisdiction in states in which they had “continuous and systematic” presence.⁹⁹ Decades on, in 2014, the Court in *Daimler AG v. Bauman*¹⁰⁰ narrowed that category so that general personal jurisdiction over corporations existed only in states in which the corporation was headquartered or incorporated.¹⁰¹ In 2017, the Court defended the boundaries of that category in *Bristol-Myers Squibb Co. v. Superior Court*,¹⁰² in which it held that the court below had erred when it adopted a “sliding scale approach” to specific personal jurisdiction that allowed “extensive forum contacts that are unrelated to [the plaintiff’s] claims” to make it amenable to suit in the state.¹⁰³ Then, however, in 2021, came *Ford Motor Co. v. Montana Eighth Judicial District Court*,¹⁰⁴ in which the Court allowed personal jurisdiction over a pair of suits that were not directly connected to the company’s activities in the forum.¹⁰⁵ The *Ford* Court found that there was an “affiliation” between the forum and the suit sufficient to support specific personal jurisdiction¹⁰⁶ — almost as though there were a “sliding scale approach” to personal jurisdiction rather than a strict distinction between general personal jurisdiction and specific personal jurisdiction.¹⁰⁷ The upshot is that some suits that could no longer be brought on a general personal jurisdiction theory will now be able to proceed on a specific personal jurisdiction theory. This partial doctrinal snapback happened because, as Professor Zachary Clopton put it, “the relationship between general and specific jurisdiction” is such that “[i]f one is contracted, that is necessarily going to put pressure on the other to expand.”¹⁰⁸

A related phenomenon — doctrinal migration — may be found in the intertwined arcs of due process and First Amendment doctrine.

⁹⁸ 326 U.S. 310 (1945).

⁹⁹ *Id.* at 317; *see also* *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011).

¹⁰⁰ 571 U.S. 117 (2014).

¹⁰¹ *Id.* at 137–39.

¹⁰² 137 S. Ct. 1773 (2017).

¹⁰³ *Id.* at 1781; *cf.* *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1559 (2017) (“[I]n-state business . . . does not suffice to permit the assertion of general jurisdiction over claims . . . that are unrelated to any activity occurring in [the state].”).

¹⁰⁴ 141 S. Ct. 1017 (2021).

¹⁰⁵ *Id.* at 1031.

¹⁰⁶ *Id.* (quoting *Bristol-Myers Squibb*, 137 S. Ct. at 1780).

¹⁰⁷ *See* Brief for Petitioner at 30, *Ford Motor Co.*, 141 S. Ct. 1017 (No. 19-368) (“By holding causation unnecessary, the lower courts revived the sort of ‘sliding scale approach’ that *Bristol-Myers Squibb* rejected”); *see also* Allan Erbsen, *Personal Jurisdiction’s Moment of Opportunity: A Reform Blueprint for Originalists and Nonoriginalists*, 75 FLA. L. REV. 415, 458 (2023) (pointing out that “authorizing personal jurisdiction based on unrelated contacts would create a regime akin to what [*Bristol-Myers Squibb*] labeled ‘spurious’ general jurisdiction” (quoting *Bristol-Myers Squibb*, 137 S. Ct. at 1781)).

¹⁰⁸ *See* Marin K. Levy, Kevin Clermont, Zachary Clopton & Mila Sohoni, *Open Road? Ford Reroutes Personal Jurisdiction*, 105 JUDICATURE, no. 3, 2021, at 76, 78.

*Pierce v. Society of Sisters*¹⁰⁹ and *Meyer v. Nebraska*¹¹⁰ were initially based in liberty of contract.¹¹¹ They later were cast as First Amendment cases,¹¹² only to subsequently become relocated within the right of privacy protected by substantive due process.¹¹³ Tomorrow, if it becomes untenable to maintain that category of substantive due process,¹¹⁴ the cases may return again to the First Amendment. Other liberty of contract results have followed the same route of migration to the First Amendment's friendlier doctrinal climes.¹¹⁵ Likewise, the Due Process Clause "has become a refuge of sorts for constitutional principles that . . . would otherwise be homeless as a result of having been exiled from the provisions in which they may have originally been intended to reside."¹¹⁶

These examples of doctrinal recreation or preservation may be helpful to understanding *Chevron*, *Loper Bright*, and the relationship between them, which may similarly prove to be "hydraulic" in its dynamic. One way to say this is that there are overrulings and then there are overrulings. The overruling of *Chevron* was not like the overruling of, say, *Plessy*.¹¹⁷ *Chevron*'s overruling was not a root-and-branch rejection of administrative power the way that *Plessy*'s overruling was a rejection of *Plessy*'s poisonous premises. If courts seem to be smuggling *Chevron*-like concepts into their decisions, that is only because the Court did the same in *Loper Bright*. And insofar as *Loper Bright* in application proves to reprise dimensions of the *Chevron*-era landscape, that will be because *Loper Bright* contemplates those results. Some critics of *Chevron* will be disappointed if *Loper Bright* turns out not to be the death knell for administrative power. But "was-it-all-for-this"¹¹⁸ kind of thinking is not

¹⁰⁹ 268 U.S. 510 (1925).

¹¹⁰ 262 U.S. 390 (1923).

¹¹¹ See *id.* at 400; *Pierce*, 268 U.S. at 534–36.

¹¹² See *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

¹¹³ See *Roe v. Wade*, 410 U.S. 113, 152–53 (1973), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

¹¹⁴ But cf. *Dobbs*, 142 S. Ct. at 2277–78 (claiming that *Dobbs* does not "cast doubt on precedents that do not concern abortion").

¹¹⁵ See *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting) (contending that the majority had "weaponiz[ed] the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy"); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 591–92 (2011) (Breyer, J., dissenting). For a critique, see Alexander Tsesis, *The Free Speech Clause as a Deregulatory Tool*, 5 J. FREE SPEECH L. 381, 381 (2024) (arguing for a "more proportionate and less categorical approach" for First Amendment challenges to government regulations).

¹¹⁶ *Mallory v. Norfolk S. Ry. Co.*, 143 S. Ct. 2028, 2050 (2023) (Alito, J., concurring in part and concurring in the judgment).

¹¹⁷ *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹¹⁸ See Josh Hawley, *Was It All for This? The Failure of the Conservative Legal Movement*, PUB. DISCOURSE (June 16, 2020), <https://www.thepublicdiscourse.com/2020/06/65043> [https://perma.cc/FX6U-26PY] (lamenting that if the end result of the "fight[] for originalism and textualism" is *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), then the conservative legal movement has not "been fighting for very much").

the right way to think about legal decisionmaking in general, and it should carry no weight in how courts read *Loper Bright* in particular.

II. LEARNING FROM *CHEVRON*'S FALL

"The question before the Court," as Merrill noted, "was whether to institute a type of regime change."¹¹⁹ The term "regime change" is apt. *Loper Bright* is the Court's attempt to set out a durable new regime that would resolve court-agency conflicts concerning legal interpretation. As illustrated by the story of *Chevron*'s rise and fall, such regimes are subject to various pressures that "always and inevitably arise in calibrating the proper allocation of authority between agencies and courts to say what the law is."¹²⁰ These pressures may be either internal or external to the framework, and over time they can extract a toll. The longevity and resilience of the *Loper Bright* framework going forward is going to depend on whether it can succeed in navigating the kinds of strains that ultimately undermined *Chevron*. Following a path suggested in Merrill's other writings,¹²¹ this Part draws out lessons from *Chevron*'s demise and explains how they may bear on the nascent *Loper Bright* regime.

Begin by surveying the chief factors that caused *Chevron*'s collapse.¹²² A major one was the most obvious: *Chevron*'s promise of simplicity ultimately disintegrated. A "great strength" of the *Chevron* doctrine, at least as advertised, was that it set out a "simple and readily comprehensible formula" for allocating interpretive authority as between courts and agencies phrased in a "common vocabulary" that courts and agencies could easily grasp.¹²³ The quickly apparent weakness of the formula was that its two component questions — when is a statute clear, and when is an action reasonable? — were both highly malleable.¹²⁴ The additional refinements introduced by the Court to the *Chevron* test¹²⁵ transformed what began "as a relatively simple two-

¹¹⁹ Merrill, *supra* note 19, at 244.

¹²⁰ MERRILL, *supra* note 3, at 274.

¹²¹ See, e.g., *id.*

¹²² Other factors surely contributed. For example, the declining legislative capacity of Congress as a result of polarization and gridlock and the concomitant increase in presidentially driven policymaking by the executive branch increased the strain on the *Chevron* framework by forcing agencies to rely on old statutes to solve new problems. Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 7 (2014) ("Put most plainly, congressional dysfunction invites agencies and courts to do the work of updating statutes."). The broader methodological shift towards textualist or formalist modes of interpretation may have made courts less hospitable to doctrines that turn on the line between clarity and ambiguity, which is difficult to police on a consistent basis. See Merrill, *supra* note 19, at 259 n.240 (noting that Justice Kavanaugh's objection to doctrines triggered by ambiguity was likely a "pivotal factor" in *Loper Bright*'s overruling of *Chevron*).

¹²³ MERRILL, *supra* note 3, at 257.

¹²⁴ *Id.* at 258–59 (summarizing how the *Chevron* two-step came to conjoin "two indeterminate standards," *id.* at 259).

¹²⁵ See Merrill, *supra* note 19, at 251–54 (explaining various "[q]ualifications" to *Chevron* that emerged over the years).

step” into at least a “minuet,”¹²⁶ even if not a “dizzying breakdance.”¹²⁷ And the recent addition of the new major questions doctrine as a “canon of antideference” was the bale of hay that broke the camel’s back.¹²⁸

A second factor was that the *Chevron* doctrine came to be seen as, in a word, unfair.¹²⁹ The heart of the doctrine was that it did *not* provide a level playing field, but instead weighted the scales so that the agency would win if the statute was ambiguous and the agency’s interpretation got over the threshold of reasonableness.¹³⁰ This tilt, Professor Philip Hamburger charged, was a “systematic bias” that amounted to nothing less than a flat Fifth Amendment due process violation.¹³¹ As Merrill more mildly notes, the argument that *Chevron* was unfair “has some force, especially in the context of Justice Gorsuch’s favorite examples involving ‘ordinary people’ protesting against the action of a large impersonal bureaucracy.”¹³² A rule of agency deference that makes eminent sense in the context of regulating complex and technical scientific and industrial questions — the kinds of questions on which Justice Kagan focused¹³³ — appears in a different light when it also means that immigrants get deported and veterans lose their benefits — the kinds of questions on which Justice Gorsuch focused.¹³⁴ A deficit of fairness is also the basic thrust of the complaint that *Chevron* allowed too much leeway to agencies to change course and that it thereby played

¹²⁶ Mila Sohoni, *A Fuller Picture of Internal Morality*, YALE J. ON REGUL.: NOTICE & COMMENT (Apr. 14, 2021), <https://www.yalejreg.com/nc/law-leviathan-redeeming-the-administrative-state-part-03> [https://perma.cc/5MX3-5C8G] (“[T]he doctrines of judicial review of agency action . . . seem to be becoming less, not more, understandable. *Chevron* began its career as a relatively simple two-step. These days, it is more of a minuet.”).

¹²⁷ *Loper Bright*, 144 S. Ct. at 2271; cf. *id.* at 2309 (Kagan, J., dissenting) (“If that is the majority’s idea of a ‘dizzying breakdance,’ the majority needs to get out more.” (citation omitted) (quoting *id.* at 2271 (majority opinion))).

¹²⁸ William N. Eskridge, Jr. & John Ferejohn, *The APA as a Super-Statute: Deep Compromise and Judicial Review of Notice-and-Comment Rulemaking*, 98 NOTRE DAME L. REV. 1893, 1947 (2023); see also Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded*, 112 CALIF. L. REV. 899, 905 (2024) (noting that “[o]ver time,” the major questions doctrine evolved into “a freestanding exception to *Chevron*”).

¹²⁹ See *Loper Bright*, 144 S. Ct. at 2285 (Gorsuch, J., concurring).

¹³⁰ Merrill, *supra* note 19, at 242 (“In effect, if the statute is sufficiently ambiguous, the government wins, provided it can offer an interpretation a reasonable interpreter might adopt.”).

¹³¹ Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187, 1211 (2016). Justice Gorsuch cited Hamburger’s article in his concurring opinion. See *Loper Bright*, 144 S. Ct. at 2285 (Gorsuch, J., concurring).

¹³² Merrill, *supra* note 19, at 242–43 (quoting *Loper Bright*, 144 S. Ct. at 2288–89 (Gorsuch, J., concurring)).

¹³³ *Loper Bright*, 144 S. Ct. at 2296–97 (Kagan, J., dissenting).

¹³⁴ *Id.* at 2288–89 (Gorsuch, J., concurring). For scholarship highlighting the problems with *Chevron* in immigration, see generally Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against Chevron Deference in Immigration Adjudication*, 70 DUKE L.J. 1197 (2021), and Maureen A. Sweeney, *Enforcing/Protection: The Danger of Chevron in Refugee Act Cases*, 71 ADMIN. L. REV. 127 (2019).

havoc with settled expectations and “affirmatively destroy[ed]” reliance interests.¹³⁵

A third — and in pragmatic terms, perhaps the most important — factor in *Chevron*’s demise was a sharp change in “the politics of deference.”¹³⁶ *Chevron* started as a doctrine favored by conservatives because it was “thought to facilitate deregulatory initiatives by the Reagan and Bush Administrations.”¹³⁷ Conservative political opposition to *Chevron* gradually coalesced in the late 2000s and became pronounced after 2016.¹³⁸ By 2017, an “anti-administrativist[]” and wide-ranging “attack” on regulatory power was in full view.¹³⁹ Opponents of the administrative state drew support from “a well-funded network of libertarian paralegal institutions — think tanks, legal centers, and others — that have consistently urged both critiques of *Chevron* deference in particular and skepticism about the administrative state in general.”¹⁴⁰ By 2022, a number of individual opinions had issued from various Justices castigating *Chevron* deference,¹⁴¹ while others had seemed “at least skeptical of some of its applications.”¹⁴² And these critiques ultimately culminated in *Loper Bright*’s overruling of *Chevron*.

Last and in this case also least, there is a fourth factor that led to *Chevron*’s demise that is ironically minor in its significance relative to the others — the proposition that *Chevron* deference was incompatible with section 706 of the APA. The argument that *Chevron* deference is

¹³⁵ *Loper Bright*, 144 S. Ct. at 2272.

¹³⁶ See Gregory A. Elinson & Jonathan S. Gould, *The Politics of Deference*, 75 VAND. L. REV. 475 (2022) (charting a political history of *Chevron* deference); see also Craig Green, *Deconstructing the Administrative State: Chevron Debates and the Transformation of Constitutional Politics*, 101 B.U. L. REV. 619, 622 (2021) (“This remarkably new generation of anti-*Chevron* critiques is linked to personnel shifts in the judiciary and also to broader ideas about the ‘deconstruction of the administrative state.’” (quoting Ryan Teague Beckwith, *Read Steve Bannon and Reince Priebus’ Joint Interview at CPAC*, TIME (Feb. 23, 2017, 3:59 PM), <http://time.com/4681094/reince-priebus-stevebannon-cpac-interview-transcript> [<https://perma.cc/2HCE-Y5Y2>])).

¹³⁷ Merrill, *supra* note 19, at 230; see Walters, *supra* note 87, at 649–52 (explaining the turn as a result of the perception that the judiciary, rather than the presidency, was comparatively more favorable to conservatives).

¹³⁸ Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL’Y 103, 104–05 (2018); Merrill, *supra* note 19, at 230 (“Shortly after Justice Scalia’s death in 2016, perhaps in reaction to the Obama Administration’s use of aggressive administrative action to address the status of undocumented migrants and climate change, conservative commentary about *Chevron* turned sharply hostile.”); MERRILL, *supra* note 3, at 280 (noting that following Justice Scalia’s death, “a new school of thought, committed to the idea that judges have an unflagging obligation to ‘say what the law is,’ surged to the fore, and identified the *Chevron* doctrine as the enemy.”).

¹³⁹ See generally Gillian E. Metzger, *The Supreme Court, 2016 Term — Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 3, 7, 8–33 (2017) (mapping the history and resurgence of “anti-administrativism” and its political, judicial, and academic manifestations).

¹⁴⁰ Vermeule, *supra* note 21, at 628.

¹⁴¹ See Merrill, *supra* note 19, at 227 & n.10.

¹⁴² *Id.* at 231.

antithetical to the APA was late-breaking and flawed.¹⁴³ It was also, as Merrill notes, inconsistent with the Court's recent invention of the new major questions doctrine: because that doctrine "has no analog in pre-APA decisional law, . . . on the majority's reasoning in *Loper Bright*, . . . the major questions doctrine violates the APA."¹⁴⁴ The APA argument was the legal vehicle into which the other three factors were channeled and packaged, rather than a claim that on its own would have carried the day.

The first three, then, are the three real contributors to *Chevron*'s demise. First, its promise of simplicity crumbled. What began as a clean two-step test morphed into an intricate series of steps and exceptions. Second, critics came to see the doctrine as fundamentally unfair, both in its impact on certain cases affecting individuals and in its broader systemic consequences for predictability and reliance. Third, and perhaps most crucially, the politics around deference shifted dramatically. Conservatives, who once championed *Chevron* as a tool for deregulation, turned against it. This opposition gained support and momentum through a network of conservative legal institutions that systematically challenged both *Chevron* and the administrative state. Lastly, and of least importance, there was the legal argument that *Chevron* violated the APA. This belated claim had serious flaws, but it provided a convenient legal leading edge for all the other objections.

The lessons for *Loper Bright* follow from this diagnosis of the three key challenges that beset *Chevron* and ultimately triggered its demise: judicial administrability or "workability," fairness, and political legitimacy. Going forward, the Court must address all three if it hopes for its regime to prove more durable than *Chevron*.¹⁴⁵

First, the Court must ensure that *Loper Bright* is workable, in the sense of being clear and predictable. The *Loper Bright* Court's eagerness to lay out a full-throated case for dismantling and overturning *Chevron* came at a cost: it did not offer a clear roadmap for how courts should exercise their newly central power of independent legal judgment when evaluating various kinds of delegations and the extent of agency authority to act within those delegations. The lacunae in *Loper Bright* create the real risk that it will repeat *Chevron*'s trajectory by hurtling

¹⁴³ *Id.* at 241 ("[T]he conflict with the APA was recently discovered — indeed was announced only in *Loper Bright* itself — and rested on doubtful inferences from the APA, rather than from the text of the APA itself."); Ronald M. Levin, *The APA and the Assault on Deference*, 106 MINN. L. REV. 125, 181–83 (2021).

¹⁴⁴ Merrill, *supra* note 19, at 240; see also Eskridge & Ferejohn, *supra* note 128, at 1951 (noting that in the 1940s, the Office of Price Administration exercised vast regulatory powers over the American economy under the auspices of "[t]he broadest delegation of agency authority in American history," and yet the courts reviewing the office's actions did not invoke a clear statement rule or an antideference doctrine).

¹⁴⁵ No more need be said on the APA argument: *Loper Bright* is not likely to be assailed on the grounds that it is inconsistent with the APA because *Loper Bright* itself has effectively put the kibosh on that claim.

from “appealing simplicity”¹⁴⁶ to bewildering complexity. The Court noted disparagingly of *Chevron* that it “launched and sustained a cottage industry of scholars attempting to decipher its basis and meaning”;¹⁴⁷ but if that’s the test, *Loper Bright* is already failing, for a “cottage industry of scholars” has already emerged to analyze *Loper Bright*, and its business is booming.¹⁴⁸ This surge of academic attention is not because scholars have nothing better to do; it reflects genuine uncertainty about how the *Loper Bright* framework should operate in various legal domains and upon different types of agency pronouncements.¹⁴⁹ If *Loper Bright* is to avoid *Chevron*’s fate, the Court needs to provide clearer guidance about how *Loper Bright* should work in practice before new reticulated schemes of multi-step tests and doctrinal boxes rush in to fill the gaps.

A related concern is maintaining consistency across courts in review of agency action. The Court’s instruction to find the “single, best meaning”¹⁵⁰ of a statute was meant to sound straightforward, but that instruction must be implemented by hundreds of federal judges nationwide. As Merrill observes, “[i]t does not take a crystal ball to predict that” *Loper Bright*’s instruction “will cause legal disagreement to proliferate”¹⁵¹ as lower courts reach conflicting conclusions about statutory meaning and agency authority.¹⁵² That fragmentation will engender the same kinds of reliance and rule-of-law critiques that beset *Chevron*, unless the Court is able to introduce greater order into the analysis and do a better job of policing lower-court decisionmaking — perhaps by “dramatically expand[ing] its caseload.”¹⁵³

Second, the Court must ensure *Loper Bright* is applied fairly. Just as *Chevron* came to be criticized for unduly favoring government agencies, *Loper Bright* risks being used — at least in some judges’ hands —

¹⁴⁶ MERRILL, *supra* note 3, at 280.

¹⁴⁷ *Loper Bright*, 144 S. Ct. at 2270.

¹⁴⁸ See, e.g., *supra* notes 8, 16–19.

¹⁴⁹ See Merrill, *supra* note 19, at 264–71 (enumerating various questions that “*Loper Bright* leaves . . . unclear,” *id.* at 264, as well as “matters of pure speculation,” *id.* at 269, raised by the decision).

¹⁵⁰ *Loper Bright*, 144 S. Ct. at 2266.

¹⁵¹ Merrill, *supra* note 19, at 246.

¹⁵² *Id.* (“One of the costs of the Court’s penchant for proceeding in the law-declaration mode is that it loses sight of the need to develop doctrine that can be effectively applied at all levels of the judiciary.”).

¹⁵³ *Id.* Congress, if it is inclined to be useful, has a role to play here too. Expanding the statutory mechanisms for lotteries of challenges to rules or laying venue for such challenges in the District of Columbia would help to mitigate the impact of the uptick in nationwide injunctions, universal vacatur, and universal stays of rules that may result from *Loper Bright* and from the Court’s interpretation of the statute of limitations for challenging rules under the APA. See *Corner Post v. Bd. of Governors of the Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2448, 2460 (2024) (holding that an APA claim accrues when “the plaintiff is injured by [the] final agency action”). See generally Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO. WASH. L. REV. 1121, 1189 n.347 (2020) (noting options for legislative reforms to administrative law’s remedial regime).

as an automatic trump card for those challenging agency action. Yet the federal government, too, is entitled to a fair shake in federal courts. A just regime must allow agencies to prevail when they have the better reading of the statute. And the same framework should apply regardless of whether agencies seek to regulate or deregulate, for either regulation or deregulation may logically fall within or without the scope of power that Congress has delegated to an agency. This would actually represent an improvement over the recent post-quartet state of affairs, in which the new major questions doctrine had created an asymmetric landscape that made it harder to take new and major regulatory action but imposed frail constraints on major agency action that *deregulated*.¹⁵⁴

Finally, the Court should absorb the lesson that the political legitimacy of a framework matters a great deal. *Chevron*'s downfall was hastened by sustained conservative opposition that portrayed it as too deferential to unaccountable agencies. That criticism did not emerge in the immediate aftermath of *Chevron*, but instead coalesced many years on.¹⁵⁵ Similarly, over the long term if not immediately, *Loper Bright* will face the mirror-image risk: criticism from the left as a judicial power grab that illegitimately constrains congressional authority and democratic governance. That criticism will gain force if *Loper Bright* comes to be applied selectively, in a politically asymmetric fashion — that is to say, in a manner that sustains broad regulatory power when it is wielded by one political party but that routinely strikes it down in the hands of the other. Not much can usefully be said on this score: whether political opposition to *Loper Bright* ultimately takes root will depend on whether the Court decides to implement the *Loper Bright* framework responsibly and in an even-handed manner across administrations — or whether it chooses to simply let it be an illegitimate power grab.

CONCLUSION

Many feel about judicial deference to administrative agencies the way that Mark Twain felt about whiskey — that too much is barely enough. *Loper Bright* will certainly not slake that thirst. But the *Loper Bright* bottle may yet be half full. *Loper Bright* contains significant ambivalences that could allow it to preserve much of agencies' interpretive authority. Those who hope to read *Loper Bright* as a complete rejection of agency authority misunderstand the decision. The Court

¹⁵⁴ See Timothy Meyer & Ganesh Sitaraman, *The National Security Consequences of the Major Questions Doctrine*, 122 MICH. L. REV. 55, 69–70 (2023) (explaining why the major questions doctrine is far less likely to be applied to “economically or politically significant deregulatory actions,” *id.* at 70); cf. Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1088 (2023) (“The major questions doctrine . . . seems to embed de-regulatory preferences in the Court’s methods of statutory interpretation.”). *Loper Bright* did not reject the new major questions doctrine; still, the possibility exists that *Loper Bright* may come to subsume the major questions inquiry. See Merrill, *supra* note 19, at 270–71 (discussing this point).

¹⁵⁵ See *supra* notes 137–42 and accompanying text.

did not mandate a wholesale rejection of agency authority; it created a new framework for evaluating that authority.

With a great debt to Merrill's account of both *Chevron*'s "fall" and *Loper Bright*'s "rise,"¹⁵⁶ this Response has argued that the lasting success of this new framework will depend on its workability, its fairness, and its long-term political legitimacy. These elements, in turn, implicate a constellation of interconnected issues: methodological choices about statutory interpretation; the scope and strength of the nondelegation doctrine; the capacity of courts to reach principled, consistent results across ideological and geographical lines; whether the framework produces systematic patterns of winners and losers; and whether and from whom political pushback emerges to the new framework. Much will depend on how *Loper Bright* interacts with this broader landscape of administrative law and political economy as it evolves to a new equilibrium.¹⁵⁷

Managing these interlocking and shifting parts is no easy thing; each part affects and is affected by all the others. The gravity of this challenge makes the self-conscious nature of *Loper Bright*'s "regime change" all the more significant. In sharp contrast to the Court that decided *Chevron*,¹⁵⁸ the *Loper Bright* Court had in full view the enormous stakes of the task it chose to undertake. And that fact saddles it with the moral obligation of ensuring that the *Loper Bright* regime resists succumbing to the fissures and pressures that ultimately sunk its ill-starred predecessor. If the Court can absorb the lessons of *Chevron*'s demise as it develops the *Loper Bright* framework, then *Chevron*'s most lasting legacy will be the wisdom it left us in its passage.

¹⁵⁶ See MERRILL, *supra* note 3 (fall); Merrill, *supra* note 19 (rise).

¹⁵⁷ I am indebted to Professor Richard Fallon for his thoughts on this point.

¹⁵⁸ MERRILL, *supra* note 3, at 275, 279; *id.* at 280 ("The wonder of it all is that the Court that rendered this decision had utterly no intention of producing the *Chevron* doctrine.").