The Post-*Chevron* World

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GOVERNING FOR IMPACT

I. INTRODUCTION

In *Loper Bright Enterprises v. Raimondo*, the Supreme Court overruled the doctrine of *Chevron* deference. *Loper Bright* is just one in a series of decisions demonstrating the Supreme Court's deep hostility to responsive, effective governance. Nevertheless, the impact of the decision itself has been overstated. Rather than marking a sea change in administrative law, *Loper Bright* is better understood as a formal recognition of a shift that has already taken place. In effect, agencies have already been operating in a post-*Chevron* world for the past several years. It would therefore be a mistake to overcorrect by limiting their ambitions for regulations in the public interest.

For four decades, *Chevron* deference was a bedrock rule of administrative law. When a statute did not clearly answer a question, the reviewing court would defer to the agency's interpretation, as long as it was reasonable. Now, under *Loper Bright*, courts are to exercise their independent judgment in determining what a statute means.

Some journalists and commentators have suggested that overruling *Chevron* heralds the death of the administrative state — or, at least, severely curtails agencies' power to regulate. We respectfully disagree. *Loper Bright* does not override or undo any agency's statutory authority. It does not bar agencies from making rules. And it should not have any effect in the many situations in which agencies act based on a clear congressional authorization.

Loper Bright is freighted with symbolism about the influence industry groups and corporate interests wield and the Supreme Court's hostility to agencies, but the doctrinal shift it purports to enact — empowering unelected judges at the expense of expert, politically accountable agencies and Congress — has in many ways already been accomplished. That's because *Chevron* was not, at least recently, a genuine constraint on judges. The Supreme Court had hinted for years that judges could interpret statutes for themselves rather than deferring to agency views. The Court last applied *Chevron* in 2016. The federal government frequently waived or forfeited *Chevron* arguments in the Supreme Court. *Chevron*'s use in the lower courts was declining too. Besides, the doctrine was readily manipulable by a suitably motivated judge — and the rise in forum shopping has allowed plaintiffs to get in front of those judges more frequently. Beyond that, in recent years, the Supreme Court has created the major questions doctrine to block certain ambitious rules — and sidestep *Chevron* analysis in the process.

In short, in the years before *Loper Bright*, judges could easily ignore the *Chevron* doctrine if they wished. And on the other side of the ledger, *Loper Bright* leaves judges inclined to defer to agencies the leeway to do so — in effect, at least. As a practical matter, then, the administrative law landscape, though significantly more adverse to agency authority than it once was, has changed little on *Loper Bright*'s account.

Loper Bright's effects could be grave, however, if agencies heed the most alarmist reactions and decide it's not worth pursuing vital regulatory policies. Yes, the Supreme Court has sown

doubt about what types of agency action are permissible as a general matter. Just this term, the Court severely limited the scope of agencies' enforcement proceedings[1] and, perhaps most dire of all, opened the door to a flood of litigation over long-settled rules.[2] But responding to *Loper Bright* by backing down would hand victory to the opponents of good governance and turn fear over *Chevron*'s demise into a self-fulfilling prophecy. Instead of abandoning the millions of workers, families, and communities who depend on federal regulatory protections, agencies should continue to carefully develop and implement ambitious regulatory agendas — as they have in the face of growing judicial skepticism over the last several years. That work must continue alongside advocates' broader efforts to name and push back on the Supreme Court's destructive course.

The purpose of this issue brief is to help agency officials adapt to the post-*Chevron* era by clearly laying out what the opinion does and does not do and offer concrete suggestions on ways that agencies can improve the likelihood of rules withstanding judicial review in the face of ongoing anti-regulatory headwinds.

II. BACKGROUND

To understand what *Loper Bright* does (and doesn't) do, some legal background is important.

Agencies may do only what Congress authorizes them to do. Sometimes, Congress directs an agency to take a particular action. ("Cook scrambled eggs and toast.") Or Congress can grant an agency a measure of discretion — the power to choose a course of action within certain boundaries. ("Make a delicious breakfast.") Everyone agrees, though, that Congress's instructions must be followed. When the instructions are clear, determining whether an agency followed them is straightforward.

What to do, though, when Congress's instructions are not clear? It may have stayed silent on a question — a statutory "gap" — or given instructions that could be read in more ways than one — an "ambiguity." As Justice Kagan has asked, "Who should give content to a statute when Congress's instructions have run out?"[3]

In the famous *Chevron* case, a unanimous Supreme Court gave one answer to that question. It recognized that if Congress has "directly spoken to the precise question at issue," what it says goes.[4] But, the Court went on to say, when there is a statutory gap or ambiguity, a court

[1] *Secs. & Exch. Comm'n v. Jarkesy*, 144 S. Ct. 2117 (2024).
[2] *Corner Post, Inc. v. Bd. of Governors of the Fed. Res. Sys.*, 144 S. Ct. 2440 (2024).
[3] *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024), slip op. at 2 (Kagan, J., dissenting). All *Loper Bright* citations are to the slip opinion.
[4] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842–43 (1984).

should defer to — that is, accept — the agency's interpretation of the law, so long as that interpretation is reasonable.[5]

For many years, *Chevron* deference was uncontroversial. Indeed, Antonin Scalia was one of its most vocal champions.[6] Over time, though, it became a target for commercial and industrial interests — and, in turn, conservative justices — seeking to disempower agencies pursuing muscular agendas of protecting workers, consumers, and the environment. Over the decades, the Court introduced a series of "refinements" that limited and fractured the doctrine.[7] Most notable among these is the so-called "*Chevron* step zero," a confusing series of rules about *which* agency positions could get deference.[8] Another example is the notorious major questions doctrine, which originated as an exception to *Chevron* deference.[9]

As *Chevron* became more complicated and less powerful, its use fell off. The Supreme Court stopped applying *Chevron* deference in 2016,[10] and the federal government stopped asking for it there.[11] Lower courts, too, began to "bypass[]" *Chevron*.[12] At the same time, the Supreme Court gave lower courts a roadmap for avoiding *Chevron* altogether. *Chevron* itself specified that a court could defer only after it "employ[ed] the traditional tools of statutory construction" and found a statutory gap or ambiguity.[13] But recently, the Court emphasized that this command meant a court had to "exhaust *all* the 'traditional tools.'"[14] And by "empty[ing]" "the legal toolkit" in this way, "hard interpretive conundrums . . . [could] often be solved" without any need for deference.[15] In short, courts could avoid *Chevron* deference by simply declaring a statute unambiguous. And because "[o]ne judge might see ambiguity

[5] *Id.* at 843.
[6] *See, e.g.*, Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511 (1989); *NLRB v. United Food & Comm. Workers Union, Loc. 23, AFL-CIO*, 484 U.S. 112, 133 (1987) (Scalia, J., concurring).
[7] *Loper Bright* at 27.
[8] *See, e.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001).
[9] *See, e.g.*, *King v. Burwell*, 576 U.S. 473, 485–86 (2015).
[10] *Loper Bright* at 29; *Buffington v. McDonough*, 143 S. Ct. 14, 21 (2022) (Gorsuch, J., dissenting from denial of certiorari).
[11] *Buffington*, 143 S. Ct. at 21.
[12] *See Loper Bright* at 28 & n.7 ("[S]ome courts have simply bypassed *Chevron*, saying it makes no difference for one reason or another."); *Buffington*, 143 S. Ct. at 22 ("[T]he aggressive reading of *Chevron* has fallen more or less into desuetude — the government rarely invokes it, and courts even more rarely rely on it."); *see also* Libby Dimenstein, Donald L. R. Goodson, Tyler Szeto, *Major Rules in the Courts: An Empirical Study of Challenges to Federal Agencies' Major Rules* 48 (2024), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4819477 ("Over time, *Chevron* citations have decreased, as have instances in which courts actually defer to the issuing agency (i.e., accept the agency's reasonable interpretation of an ambiguous statute at *Chevron* step two).").
[13] *Chevron*, 467 U.S. at 843 n.9.
[14] *Kisor v. Wilkie*, 588 U.S. 558, 576 (2019) (emphasis added).
[15] *Id.*; *see also id.* at 632 (Kavanaugh, J., concurring in judgment) ("If a reviewing court employs all of the traditional tools of construction, the court will almost always reach a conclusion about the best interpretation of the regulation at issue. After doing so, the court then will have no need to adopt or defer to an agency's contrary interpretation. In other words, the footnote 9 principle, taken seriously, means that courts will have no reason or basis to put a thumb on the scale in favor of an agency when courts interpret agency regulations."); *id.* at 600 (Gorsuch, J., concurring in judgment) ("[E]very day, in courts throughout this country, judges manage with these traditional tools to reach conclusions about the meaning of statutes, rules of procedure, contracts, and the Constitution.").

everywhere" while "another might never encounter it," *Chevron* became essentially optional.[16] To that end, a recent analysis by the Institute for Policy Integrity found that judges appointed by Donald Trump cited *Chevron* significantly less frequently than other judges (28 percent of the time in cases challenging major rules, compared to 47–65 percent of the time for appointees of other presidents).[17] And the rise of forum shopping in administrative law cases made it easy for challengers to get before judges more likely to ignore *Chevron.*[18]

Enter *Loper Bright*, in which the Court officially rejected the *Chevron* doctrine, holding that courts must exercise their "independent judgment" in determining the meaning of statutes.[19] Under *Loper Bright*, if there is a question about whether an agency has the legal authority to take a particular action, the court — *not* the agency — supplies the answer.

But that isn't the end of the story. Even as *Loper Bright* dispensed with *Chevron*'s general presumption of deference, it explicitly stated that Congress retains the power to affirmatively delegate discretion to agencies.[20] So, a court may conclude that "the statute's meaning [is] that the agency is authorized to exercise a degree of discretion."[21] A statute contains such a delegation if, for instance, it (1) instructs an agency to define a particular term, (2) directs an agency to "fill up the details" of a statutory scheme, or (3) uses words like "appropriate" or "reasonable" that "leave[] agencies with flexibility."[22] When a court identifies such a delegation, its only job is to make sure that the agency has acted reasonably within the bounds of its discretion[23] — a inquiry similar to both the "hard look" review governed by cases like *State Farm*[24] and *Chevron*'s second step.

And even in other cases, *Loper Bright* reaffirmed that courts remain free to accept agencies' legal positions. Judges may "seek aid" in interpreting statutes from "those responsible for implementing [those] statutes."[25] Agency views on legal matters, which generally reflect "a body of experience and informed judgment," can be entitled to "great weight."[26] Courts applying this principle look to "the thoroughness evident in [the agency action's] consideration, the validity of its reasoning, its consistency with earlier and later

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[16] *Loper Bright* at 30 (citing Laurence Silberman, *Chevron — The Intersection of Law & Policy*, 58 Geo. Wash. L. Rev. 821, 822 (1990) (a judge of the D.C. Circuit observing that "one often encounters ambiguities"), and Raymond Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 Vand. L. Rev. En Banc 315, 323 (2017) (a judge of the Sixth Circuit recounting that "I personally have never had occasion to reach *Chevron*'s step two in any of my cases")).

[17] Dimenstein et al., *supra*, at 52 ("Controlling opinions authored by Trump appointees cited Chevron only 28.0% of the time — a much lower rate than their peers, who ranged from 46.8% to 65.2%. Of those opinions that did cite Chevron, none authored by a Trump appointee deferred to an agency's interpretation under step two.").

[18] *See* Stephen I. Vladeck, *Don't Let Republican "Judge Shoppers" Thwart the Will of Voters*, N.Y. Times (Feb. 5, 2023); Perry Stein, *The Justice Department's Fight Against Judge Shopping in Texas*, Wash. Post (Mar. 19, 2023).

[19] *Loper Bright* at 16.

[20] *Id.* at 17.

[21] *Id.* at 17.

[22] *Id.*

[23] *Id.* at 17–18.

[24] *Motor Veh. Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

[25] *Id.* at 16.

[26] *Id.* at 10 (quoting *Skidmore v. Swift & Co*, 323 U.S. 134, 139–40 (1944) and *United States v. Am. Trucking Ass'n*, 310 U.S. 534, 544 (1940)).

pronouncements, and all those factors which give the power to persuade, if lacking power to control."[27]

Putting it all together, *Loper Bright* says that courts interpret statutes for themselves, but, in doing so, they may find that Congress wishes for them to defer to the agency or that the agency's considered judgment carries weight.

III. ADVICE FOR POLICYMAKERS

Our view that *Loper Bright* functions mostly to formalize a prevailing regime years in the making should not be mistaken for complacency about the state of administrative law. Compared to ten or fifteen years ago, agencies face a judiciary much more willing to second-guess and ultimately invalidate their actions. As we outline below, agencies can and should take steps to better prepare their rules for today's more litigious rulemaking environment.

Our point is simply that these recommendations have not evolved much in the wake of *Loper Bright*. Instead, many of them represent best practices that have been relevant for several years now.[28]

Include detailed statutory analyses in final rule documents — and highlight statutorily conferred discretion where available.

As judicial scrutiny of administrative action has increased in intensity, agencies have internalized the importance of offering comprehensive legal justifications for their actions. Rule preambles allow the agency to elaborate on a statute's best reading free of the constraints of litigation. And since federal courts can uphold rules based only on an agency's contemporaneous reasoning,[29] thorough preambles allow agencies to furnish alternative and additional reasons for their actions. Just as important as justifying rules rigorously is doing so early — in notices of proposed rulemaking and proposed rules. That allows an agency the most time and space to identify and rebut counterarguments — and to solicit additional useful justifications from allies outside of government.

Further, in explicating their statutory authority within rulemaking documents, agencies should highlight instances in which statutes contain language that expressly or implicitly

[27] *Id.* (quoting *Skidmore*, 323 U.S. at 139–140). This is the so-called *Skidmore* doctrine.
[28] Several of these recommendations mirror those we made after the advent of the major questions doctrine. See Primer: The Major Questions Doctrine: Guidance for Policymakers 6–7, Governing for Impact (Nov. 2022), https://governingforimpact.org/wp-content/uploads/2022/11/MQD_Medium_templated_FINAL.pdf.
[29] *Dep't of Com. v. New York*, 588 U.S. 752, 780 (2019); *SEC v. Chenery Corp.*, 318 U.S. 80, 93–94 (1943).

confers sufficient discretion to agencies to justify a particular policy — a phenomenon that *Loper Bright* acknowledges can take at least three forms:

1. "[S]ome statutes expressly delegate to an agency the authority to give meaning to a particular statutory term."[30] As an example, the Court cited 42 U.S.C. § 5846(a)(2), which allows the Nuclear Regulatory Commission to "define[] by regulation" the term "substantial safety hazard."[31]

2. Other statutes "empower an agency to prescribe rules to fill up the details of a statutory scheme."[32] The Court pointed to 33 U.S.C. § 1312(a), which directs the EPA to set limitations on effluent discharges when, in its "judgment," water quality falls below a certain level.[33]

3. And many statutes employ "a term or phrase that leaves agencies with flexibility."[34] These terms and phrases are common in the U.S. Code: "appropriate," "reasonable," "necessary," "public interest," "substantial," and the like.[35]

Agencies should search out these kinds of delegations in their organic statutes, and use them as the basis for new rules when possible.

Analogize to past rulemakings under the same statutory authority

For two reasons, agencies should include detailed and comprehensive accounts of their rulemaking history in new final rule documents, and analogize the content, regulatory mechanisms, and impacts of those past rules to the current policy.

First, *Loper Bright* made clear that even in the absence of *Chevron*, the past "interpretations and opinions" of an agency "constitute a body of experience to which courts and litigants may properly resort for guidance."[36] Under this principle — known as the *Skidmore* doctrine — the "weight" accorded to an agency's view "depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, [and] *its consistency with earlier and later pronouncements*."[37] Other factors are relevant too, including whether an interpretation is "based upon more specialized experience and broader investigations and information than is

[30] *Loper Bright* at 17 (internal quotation marks and alteration omitted).
[31] *Id.* at 17 n.5. To continue the breakfast metaphor: "prepare a breakfast made up of dishes of your choosing."
[32] *Id.* at 17 (internal quotation marks omitted).
[33] *Id.* at 17 n.6. "Prepare meals as necessary."
[34] *Id.* at 17 (internal quotation marks omitted).
[35] *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2153 (2016) ("[C]ourts should still defer to agencies in cases involving statutes using broad and open-ended terms like 'reasonable,' 'appropriate,' 'feasible,' or 'practicable.' In those cases, courts should say that an agency may choose among reasonable options allowed by the text of the statute. In those circumstances, courts should be careful not to unduly second-guess the agency's choice of regulation.").
[36] *Skidmore*, 323 U.S. at 140; *Loper Bright* at 10.
[37] *Skidmore*, 323 U.S. at 140 (emphasis added).

likely to come to a judge in a particular case" (in other words, policy expertise and robust factual findings).[38]

Second, as we and others have argued, closely analogizing new rules to past regulatory efforts will strengthen the case for upholding them under the major questions doctrine ("MQD").[39] That's because courts must assess the "history and the breadth" of the authority asserted as one factor in determining whether a rule poses a major question,[40] which legal scholars have explained creates an "anti-novelty" regulatory bias.[41]

For both reasons, agencies should attempt to demonstrate in rulemaking documents that any new regulatory effort is similar to past exercises of agency authority. This could be done in various ways. Depending on the rule at issue, the agency might compare the regulatory mechanism used to show that the agency has regulated in this precise manner before. In other instances, it might be beneficial to demonstrate that the rule at issue is focused on the same legislative purpose as other rules promulgated under the same delegation of authority. Policymakers might also consider comparing the regulatory *effects* of new rules to the effects of previous regulations in order to show that the agency has used the same statutory authority in ways that have the same or greater economic significance.

Relatedly, in the event that commenters during the rulemaking process suggest a rule may run afoul of the MQD, agencies should rebut those claims at length in final rule documents. The Environmental Protection Agency's recent final rule on tailpipe emissions standards provides an excellent model of how to do so. It exhaustively documents regulatory antecedents and carefully explains how projected costs should or should not implicate the MQD.[42] Providing detailed quantitative and qualitative MQD analyses in a final rule has at least three benefits. First, as noted above, one way to rebut the "anti-novelty" prong of the MQD is to thoroughly analogize new standards and their projected impacts and costs to past standards, and agency staff are better positioned to undertake such a task in the rulemaking as opposed to in litigation.[43] Second, litigators are constrained by strict page limits for briefs, and so cannot devote much space to extensive MQD rebuttals; regulators face no such constraint in final rule documents, which can then be referenced in litigation as part of the administrative record. Third and finally, MQD rebuttals included in a final rule are likely to be accorded more respect by reviewing courts than the same arguments presented for the first time in litigation.[44]

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[38] *Id.* at 139.
[39] *See* Primer: The Major Questions Doctrine: Guidance for Policymakers, *supra*, at 6–7; Richard L. Revesz & Max Sarinsky, *Regulatory Antecedents and the Major Questions Doctrine*, 36 Geo. Env. L. Rev. 1 (2024).
[40] *West Virginia v. EPA*, 597 U.S. 697, 721 (2022).
[41] *See* Daniel Deacon & Leah Litman, *The New Major Questions Doctrine*, 109 Va. L. Rev. 1009 (2023).
[42] *See* Environmental Protection Agency, "Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles," 89 Fed. Reg. 27842, 27897 (Apr. 18, 2024); *see also* Environmental Protection Agency, "Response to Comments: Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles" 230–33 (Mar. 2024), https://www.epa.gov/system/files/documents/2024-03/420r24005.pdf.
[43] *See* Deacon & Litman, *supra*, at 49.
[44] Courts reviewing agency action are "ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record." *Dep't of Com. v. New York*, 588 U.S. 752, 755 (2019).

Where possible, characterize regulatory choices as fact-based policy decisions rather than matters of legal interpretation

Under *Loper Bright*, questions of law are reviewed *de novo*. But certain types of agency decisions are subject to far laxer review. Findings of fact are conclusive if "[]supported by substantial evidence."[45] And an agency's policy choices are upheld if they are "reasonable and reasonably explained."[46] *Loper Bright* emphasized these different standards of review. Clearly, then, agencies should frame their rules, when possible, as fact-based policy judgments rather than interpretations of their organic statutes.

For example, the Fish and Wildlife Service is required by the Endangered Species Act to designate "distinct population segment[s]" of endangered species.[47] Instead of issuing a dictum on the meaning of the term "distinct population segment" and regulating from there, the agency could emphasize the factual record establishing differences between relevant animal populations and then explain why those facts led it, in its expert judgment, to draw a particular distinction. Or consider the Medicare Act's directive that reimbursements to hospitals be adjusted to reflect wage differences across "geographic area[s]."[48] Cast in *Chevron* terms, fixing the meaning of "geographic area" could be an exercise in statutory interpretation — now a job for the court. Or, understood differently, choosing to index the rule, say, by city rather than by county is a policy choice — both cities and counties are "geographic area[s]" under the term's plain meaning. Choosing between permissible alternatives in this way remains the agency's job even under *Loper Bright.* And that choice, of course, can be intertwined with — and strengthened by — a factual record. Agencies should frame their rules to maximize the chances that a reviewing court will see its task as a deferential review of a policy choice rather than de novo review of a purely legal interpretation.

When implementing new statutes, understand that an agency's initial, contemporaneous interpretation appears to carry special weight

Another conclusion that flows from both *Loper Bright* and the Court's MQD decisions is that policymakers implementing new statutes should understand that their short-term regulatory decisions may carry exaggerated implications over the long run. That's because the Court has now repeatedly suggested that it is more inclined to defer to agency interpretations "issued contemporaneously with the enactment of a statute."[49]

As a result, preserving the broadest range of agency authority in the future might require adopting a maximalist interpretation from the get-go (or at least explicitly preserving the

[45] 5 U.S.C. § 706(2)(E).
[46] *FCC v. Prometheus Radio Proj.*, 592 U.S. 414, 423 (2021); *see also* 5 U.S.C. § 706(2)(A).
[47] 16 U.S.C. §§ 1532(16), 1533; *see also Loper Bright* at 5–6 (Kagan, J., dissenting).
[48] 42 U.S.C. § 1395ww(d)(3)(E)(i); *see also Loper Bright* at 6 (Kagan, J., dissenting)..
[49] *Loper Bright* at 10; *see also West Virginia*, 597 U.S. at 747 (Gorsuch, J., concurring) ("[a] 'contemporaneous' and long-held Executive Branch interpretation of a statute is entitled to some weight as evidence of the statute's original charge to an agency.").

argument that a given interpretation does not represent the extent of delegated authority under the statute). Policymakers tempted to moderate their initial interpretation of a new statute to evade political controversy in the short-term may believe that the agency can build a more robust regulatory regime atop that foundation down the road (presumably when political opposition has waned). It is important for agencies to recognize this strategy may prove untenable, and even inadvertently ossify an unduly confined view of new statutory language.

Include administrative severability clauses wherever possible.

In an era of aggressive judicial review, severability clauses are an essential defensive tool.[50] Courts, instead of striking down an entire regulation, may "sever" it, invalidating one portion while leaving the rest in effect. In deciding whether a regulation can be severed, courts determine whether (1) the agency intended for a regulation to be severable and (2) the regulation would function without the invalidated provision.[51] Therefore, as the Administrative Conference of the United States has recommended, agencies should use severability clauses whenever "an agency recognizes that some portions of its proposed rule are more likely to be challenged than others and that the remaining portions of the rule can and should function independently."[52]

Deploying a severability provision does not imply that an agency doubts a rule's lawfulness.[53] It merely acknowledges that a rule might be challenged and offers the agency's opinion about whether an adverse decision can be narrowly tailored. Waiting until litigation to raise the prospect of severability poses risks. According to the Administrative Conference, "courts may be less likely to agree with the agency if the issue of severability comes up for the first time in litigation because of the fundamental principle that agency policy is to be made, in the first instance, by the agency itself — not by courts, and not by agency counsel."[54] Another reason to include a severability clause in the text of the rule itself is that expert agency staff will have more time and space to explain the merits of severability compared to litigators under tight deadlines and page constraints.

The Administrative Conference offers guidelines for agencies that wish to incorporate administrative severability clauses into appropriate regulations. It suggests drafting rules so they are "divisible into independent portions."[55] Importantly, it also recommends that "the agency addresses the rationale for severability in the statements of basis and purpose accompanying the final rule" and that "the agency explains how specific portions of the rule

[50] See Reed Shaw & Peter M. Shane, Protecting Biden Administration Regulations from Regime Change and Skeptical Courts, Washington Monthly (Apr. 16, 2024)
[51] *See Davis Cnty. Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1455 (D.C. Cir. 1997).
[52] Administrative Conference of the United States, Severability in Agency Rulemaking 2 (Jun. 15, 2018), available at: https://www.acus.gov/sites/default/files/documents/recommendation-2018-2-severability%20in%20agency%20rulemaking.pdf
[53] Charles W. Tyler & E. Donald Elliott, *Administrative Severability Clauses*, 124 Yale L. J. 2286, 2319 (2015).
[54] Severability in Agency Rulemaking, *supra*, at 3 (internal quotation marks omitted).
[55] *Severability in Agency Rulemaking*, *supra*, at 4.

would operate independently."[56] This last recommendation stems from a D.C. Circuit case, *MD/DC/DE Broadcasters Ass'n v. F.C.C.* There, the court declined to defer to an administrative severability clause because, within the rulemaking record, the Federal Communications Commission had failed to explain how the surviving regulation could independently fulfill the agency's regulatory goals in the absence of the invalidated provision.[57]

IV. CONCLUSION

A lot has changed since *Chevron* was decided forty years ago. But the practical legal landscape for agencies seeking deference is not much different than it was a few months or even a few years ago. *Chevron* — especially in its later years — did not constrain all judges. Courts, of course, could apply *Chevron* deference. But judges not inclined to defer could use one of the *Chevron* doctrine's "byzantine set of preconditions and exceptions" as an off-ramp.[58] Or they could simply interpret statutes for themselves, avoiding deference by declaring the law unambiguous. Under *Loper Bright*, judges have that same choice: they may use their "independent judgment" about a statute's meaning or, in effect, defer.

The takeaway is not that agencies will have an easy time in court. Indeed, this issue brief has offered agency policymakers advice about how to regulate amidst a generally hostile judicial climate. The point is only that *Loper Bright* itself does not work much of a change.[59] And so the greatest threat posed by *Loper Bright* is cultural: the prospect of agencies overinterpreting the decision's gravity and deciding to not even attempt to protect American workers and families.

Looking beyond *Loper Bright*, there are many reasons to regulate aggressively in a tough environment. Ambitious regulation, even when invalidated in court, can provide secondary benefits. Sometimes, regulated entities will move to comply with a forthcoming rule — even if, months or years later, the rule is invalidated. And with the possibility looming that the Supreme Court might bar or restrict the lower courts' use of nationwide injunctions and universal relief, challenges to rules may not have the sweeping effect they commonly have now.[60] Finally, ambitious rules can have important political benefits — even when ultimately

[56] *Id.* at 2.
[57] 253 F.3d 732, 733–36 (D.C. Cir. 2001). For a more recent example, *see also Nasdaq Stock Mkt. LLC v. Sec. & Exch. Comm'n*, 38 F.4th 1126, 1145 (D.C. Cir. 2022).
[58] *Loper Bright* at 28.
[59] In fact, we suspect that some of this term's other administrative law decisions, for example, *Corner Post, Inc. v. Board of Governors*, may prove more consequential.
[60] *See, e.g., Labrador v. Poe*, 144 S. Ct. 921, 921–28 (2024) (Gorsuch, J., concurring). *But see Corner Post*, 2024 WL 3237691, at *14–23 (Kavanaugh, J., concurring). Recently, for instance, a district court preliminary enjoined the Department of Labor's Overtime Rule, but limited relief only to "the State of Texas, as an employer." *State of Texas v. Dep't of Labor*, 2024 WL 3240618, at *15 (June 28, 2024).

invalidated. They can set the terms of prominent public policy debate, and indicate how government can get good and important things done.