CHEVRON ON THE EVE OF *LOPER BRIGHT*

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ABSTRACT

Chevron is dead. What does this mean for judicial review of agency interpretations of statutes in the lower courts? Perhaps not much. Using new data of circuit court decisions from 2012 and 2022, this Essay examines how lower courts changed their decision-making as the Supreme Court became more skeptical of *Chevron* deference. This Essay finds that—contrary to the assertion of some justices—circuit courts had not stopped applying *Chevron* in the lead up to *Loper Bright*. Moreover, courts agreed with agency interpretations of statutes at similar rates in both 2012 and 2022.

Nevertheless, the data shows that the Supreme Court's skepticism toward administrative governance encouraged lower courts to change the reasoning behind their decisions. By 2022, circuit courts decided most cases at *Chevron* "step one." At the same time, agency win rates *increased* at step one. In 2012, circuit courts accepted the agencies' interpretations in 42.5% of disputes resolved at step one. By 2022, they accepted the agencies' interpretations in 67.3% of disputes resolved at step one.

These empirical results help answer two questions lurking after the Supreme Court's decision in *Loper Bright v. Raimondo*. First, why did the Supreme Court decide to overrule—rather than clarify—*Chevron*? From the lens of positive political theory, the results suggest that the Supreme Court was reassured that circuit courts would comply with its decision because the circuit courts decided a majority of cases using traditional tools of statutory interpretation. Second, how will *Loper Bright* influence judicial

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review of agency interpretations of statutes? The results suggest that agencies will continue to win at high rates in mundane cases but that harder cases may be decided based on the ideology of the judges.

TABLE OF CONTENTS

INTRODUCTION

For forty years, the doctrine governing judicial review of agency interpretations of law was quite deferential.[1] Courts reviewed agencies' interpretations of statutes under the two-step standard of review announced in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*.[2] At step one, the reviewing court asked whether the statute was ambiguous.[3] At step two, it asked whether the agency's interpretation was reasonable.[4] If the court concluded that the agency had issued a reasonable interpretation of an ambiguous statute, it deferred to the agency's interpretation.[5] However, this standard of review is no longer. In *Loper Bright v. Raimondo*, the Supreme Court declared that "*Chevron* is overruled."[6] This monumental shift has left commentators debating: How much change will *Loper Bright* bring to judicial review of agency interpretations of law?[7] Perhaps not much.

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[1] *See* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 30 (2017) (showing agency win rates under various standards of review).

[2] *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc. 467 U.S. 837, 842-44 (1984).

[3] *Id.* at 842-43.

[4] *Id.* at 843-45.

[5] *Id.*

[6] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

[7] *Compare, e.g.,* Adrian Vermeule, Chevron *By Any Other Name*, THE NEW DIG. (Jun. 28, 2024), https://thenewdigest.substack.com/p/chevron-by-any-other-name (arguing that *Loper Bright* did not fundamentally change judicial review), *with* Kristin E. Hickman, *Anticipating a New Modern* Skidmore *Standard*, U. MINN. L. SCH. LEGAL. STUD. RSCH. PAPER SERIES, 1, 3 (No. 24-37) (2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4941144 (predicting changes to *Skidmore* post-*Loper Bright*); Sapna Kumar, *Scientific and Technical Expertise after* Loper Bright, U. MINN. L. SCH. LEGAL. STUD. RSCH. PAPER SERIES, 1, 3-4 (No. 24-33) (2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4939536 (arguing that *Loper Bright*'s de-emphasis of scientific expertise will decrease the quality of judicial decision-making); Christopher J. Walker, *What Loper Bright Enterprises v. Raimondo Means for the Future of Chevron Deference*, YALE J. ON REGUL. (Jun. 28, 2024), https://www.yalejreg.com/nc/what-loper-bright-enterprises-v-raimondo-means-for-the-future-of-chevron-deference (suggesting that the Supreme Court embraced a *de novo* standard).

Even before the Supreme Court overruled *Chevron*, conservative justices had expressed immense skepticism toward the standard. The Supreme Court last deferred under *Chevron* in 2016.[8] In 2013, Chief Justice Roberts—alongside Justices Kennedy and Alito—sought to restrict *Chevron*'s scope in *City of Arlington v. FCC*.[9] Elsewhere, then-Judge Kavanaugh argued that the ambiguity-clarity distinction of *Chevron* step one made the doctrine unworkable.[10] Justice Gorsuch even treated *Chevron* as already deceased. In *Buffington v. McDonough*, he declared that *Chevron* "deserves a tombstone no one can miss," reasoning that lower courts "rarely rely upon it" anyway.[11] The conservative justices' disdain for *Chevron* reflected an overarching trend of administrative skepticism of the Court.[12]

The judicial hierarchy requires lower courts to react to the prevailing mood of the Supreme Court.[13] This Essay uses a new dataset of cases to explore how circuit courts applied *Chevron* as the Supreme Court became more skeptical of administrative governance. Although prior studies have considered *Chevron*'s

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[8] *See* Cuozzo Speed Techs. v. Com. For Intell. Prop., 579 U.S. 261, 280 (2016); *see also* Nathan Richardson, *Deference Is Dead (Long Live* Chevron*)*, 73 RUTGERS U. L. REV. 441, 489 (2021) (documenting Supreme Court decisions that could have applied *Chevron*).

[9] City of Arlington v. FCC, 569 U.S. 290, 312 (2013) (Roberts, C.J., dissenting); *see also* Kristin E. Hickman, *The (Perhaps) Unintended Consequences of* King v. Burwell, 2015 PEPP. L. REV. 51, 65-66 (describing Chief Justice Robert's desire to restrict *Chevron*'s scope).

[10] *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2136 (2016).

[11] *See* Buffington v. McDonough, 143 S. Ct. 14, 22 (Gorsuch, J., dissenting).

[12] *See generally* Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 2-3 (2017) (documenting the rise of anti-administrativism at the Supreme Court).

[13] *See generally* Ethan Bueno de Mesquita & Matthew Stephenson, *Informative Precedent and Intrajudicial Communication*, 96 AM. POL. SCI. REV. 755 (2002); Tonja Jacobi & Emerson H. Tiller, *Legal Doctrine and Political Control*, NW. PUB. L. & LEGAL THEORY RSCH. SERIES (No. 05-11) (2005), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=752284); McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CALIF. L. REV. 1631, 1632 (1995).

application,[14] I am unaware of any study that has quantitatively examined *Chevron*'s application in the period leading up to *Loper Bright*.[15]

This Essay offers three descriptive findings. First, circuit courts regularly applied *Chevron*, and agencies won at similar rates on the eve of *Loper Bright*.[16] Second, circuit courts shifted their analyses from *Chevron* step two to *Chevron* step one.[17] In other words, courts found ambiguity *less often* after the Supreme Court became more skeptical of *Chevron*. Third, and finally, agencies won at higher rates under *Chevron* step one after this shift.[18] Accordingly, judicial review still favors agencies even when courts resolve disputes using the traditional tools of statutory interpretation.

Part II examines several possible explanations for these trends. Although this Essay does not offer causal evidence of how Congress, agencies, and courts reacted to the Supreme Court's

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[14] For articles offering quantitative analysis of *Chevron*, *see generally* Kent Barnett et al., *The Politics of Selecting* Chevron *Deference*, 15 J. EMPIRICAL LEGAL. STUD. 597 (2018) [hereinafter Barnett et al., *The Politics of Selecting* Chevron *Deference*]; Kent Barnett et al., *Administrative Law's Political Dynamics*, 71 VAND. L. REV. 1463 (2018) [hereinafter Barnett et al., *Administrative Law's Political Dynamics*]; Barnett & Walker, *supra* note 1; William N. Eskridge & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L. REV. 1083 (2008); Orin S. Kerr, *Shedding Light on* Chevron: *An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REGUL. 1 (1998); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy?: An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. (2D SERIES) 1 (2006); Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984 (1990).

[15] *Cf.* Richard J. Pierce, Jr., *Is* Chevron *Deference Still Alive*?, THE REGUL. REV. (July 14, 2022), https://www.theregreview.org/2022/07/14/pierce-chevron-deference ("My expectation can only be confirmed or rebutted by an empirical study of circuit court opinions that are issued after the Court's opinions in *American Hospital Association* and *Empire Medical*.").

[16] *See infra* Part I.B.

[17] *See infra* Part I.C.

[18] *See infra* Part I.C.

skepticism, descriptive evidence supports or refutes several possibilities.

Part III uses the empirical results to address two questions that have emerged since *Loper Bright*. The first question asks: Why did the Supreme Court decide to overrule *Chevron* rather than clarify its application? This Essay answers this question using the lens of positive political theory. To overturn existing doctrine, the Supreme Court needs reassurances that lower courts will comply with their decisions.[19] The move toward robust statutory interpretation at *Chevron* step one provided that reassurance.

The second question asks: How will lower courts change their review of agency interpretations post-*Loper Bright*? The empirical results suggest that agencies will continue to win at high rates even when courts resolve disputes using traditional tools of statutory interpretation. Consequently, the pre-and post-*Loper Bright* worlds may look somewhat similar—at least in many rote cases involving agency interpretations of statutes. Nevertheless, scholars should avoid understating *Loper Bright*'s significance. Initial evidence suggests that the shift toward *Chevron* step one introduced higher levels of ideological decision-making. *Loper Bright*'s effect may be felt in the most politically sensitive cases or in cases where scientific expertise plays less of a role in the implementation of the statute.

Ultimately, this Essay is the start of a conversation—not the end. The questions posed are complicated. The results are not easily attributed to one or two phenomena. This Essay paves a path forward by offering insights that should inform future empirical research on *Loper Bright*'s impact.

I. SUPREME COURT SKEPTICISM AND *CHEVRON*

Over the last decade, the Roberts Court has demanded a greater role for courts in legal interpretation. In *Kisor v. Wilkie*, Justice Kagan clarified that a reviewing court should defer to an agency's interpretation of the law only if it finds the law "genuinely ambiguous" after "resort[ing] to all the standard tools

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[19] *See* McNollgast, *supra* note 13, at 1633

of interpretation."[20] In *SAS Institute v. Iancu*, Justice Gorsuch said that the Court had no reason to resort to *Chevron* deference because a reviewing court does not deploy *Chevron* unless it is "unable to discern Congress's meaning."[21] Likewise, in *Equivel-Quintana v. Sessions*, Justice Thomas concluded that the Court had "no need to resolve whether the rule of lenity or *Chevron* receives priority in this case because the statute, read in context, unambiguously forecloses the [agency's] interpretation. Therefore, neither the rule of lenity nor *Chevron* applies."[22]

Doctrinally, the Roberts Court's decisions comport with the language in *Chevron* itself. In footnote 9 of *Chevron*, the Supreme Court explained:

> The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, *employing traditional tools of statutory construction*, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.[23]

However, the Roberts Court's emphasis on the judicial role occurs in a context of administrative skepticism. Gillian Metzger has described the Roberts Court as "strong on rhetorical criticism of administrative government out of proportion to [its] bottom-line results[,] . . . oppose[d] [to] administration and bureaucracy," and in favor of "a greater role for the courts to defend individual liberty against the ever-expanding national state."[24]

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[20] Kisor v. Wilkie, 588 U.S. 558, 573 (2019). Justice Kagan's statement occurred in a case reviewing an agency's interpretation of its own regulations. Review of an agency's interpretation of its own regulations occurs under *Auer*—not *Chevron*. *See* Auer v. Robbins, 519 U.S. 452, 461 (1997).

[21] SAS Inst., Inc. v. Iancu, 584 U.S. 357, 369 (2018).

[22] Equivel-Quintana v. Sessions, 581 U.S. 385, 397-98 (2017).

[23] *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council Inc., 467 U.S. 837, 843 n.9 (1984) (emphasis added).

[24] Metzger, *supra* note 12, at 3.

Circuit courts perceived the change in mood. In one opinion, the Third Circuit acknowledged, "Multiple Supreme Court Justices have expressed skepticism towards *Chevron* and other theories of agency deference."[25] At least some judges acknowledged that the Supreme Court was sending a signal about how circuit courts apply *Chevron*. In a concurrence, Judge Newsom of the Eleventh Circuit wrote, "[T]he Supreme Court has taken pains to clarify that *Chevron* step one has teeth: We judges must actually do the hard work of statutory interpretation; we can't just skip ahead to step two."[26] Still, courts recognized that *Chevron* remained good law.[27] The central question is whether the Supreme Court's skepticism changed how lower courts approached review of agency interpretations of statutes before it announced its decision in *Loper Bright*.

A. Data and Methods

Whether circuit courts applied *Chevron* differently in the years leading up to *Loper Bright* presents an empirical question. Other scholars have studied the ways in which *Chevron* affected judicial review of agency statutory interpretations.[28] Unfortunately, the

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[25] Cellco P'ship v. White Deer Twp. Zoning Hearing Bd., 74 F.4th 96, 103 n.4 (3d Cir. 2023).

[26] Bastias v. U.S. Attorney General, 42 F.4th 1266, 1277 (11th Cir. 2022) (Newsom, J., concurring).

[27] *See, e.g.*, Huntington Ingalls, Inc. v. Off. of Workers' Comp. Programs, 70 F.4th 245, 252 n.2 (5th Cir. 2023) ("Although '*Chevron* has become something of the-precedent-who-must-not-be-named,' it is the law 'until and unless it is overruled by our highest court.' " (quoting Mex. Gulf Fishing Co. v. U.S. Dep't of Com., 60 F.4th 956, 963 n.3 (5th Cir. 2023)); Alonso-Juarez v. Garland, 80 F.4th 1039, 1054 n.8 (9th Cir. 2023) ("Although the future of the *Chevron* doctrine is uncertain, the doctrine remains good law for now." (citation omitted)); Flores-Vasquez v. Garland, 80 F.4th 921, 930 n.1 (3d Cir. 2023) (Baker, J., dissenting) ("I acknowledge that *Chevron* may not be long for this jurisprudential world. Nevertheless, at least for now, *Chevron* is with us and binding." (citation omitted)).

[28] *See generally* Barnett, et al., *The Politics of Selecting* Chevron *Deference*, *supra* note 14; Barnett, et al., *Administrative Law's Political Dynamics*, *supra* note 14; Barnett & Walker, *supra* note 1; Kerr, *supra* note 14;

most comprehensive study of *Chevron* in the circuit courts is limited to cases decided before December 31, 2013.[29] The Supreme Court arguably expanded *Chevron*'s scope in 2013,[30] and last deferred under *Chevron* in 2016.[31] Questions surrounding *Chevron*'s vitality truly emerged around the time of Justice Gorsuch's appointment.[32] Accordingly, existing studies do not shed light on how the Supreme Court's skepticism changed circuit court decision-making.

The goal of this study is to compare applications of *Chevron* before and after the rise in Supreme Court skepticism. To do this, I examine circuit court cases decided in two years: 2012 and 2022. I selected 2022 as the final date because the Supreme Court granted certiorari in *Loper Bright* in 2023.[33] *Loper Bright*'s pendency may have changed the ways in which circuit courts engaged with *Chevron*, which would bias the results.[34] I selected 2012 as the first date for two reasons. First, the Supreme Court

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Miles & Sunstein, *supra* note 14; Mark J. Richards et al., *Does* Chevron *Matter*, 28 L. & POL'Y 8240 (2006); Schuck & Elliott, *supra* note 14.

[29] Barnett & Walker, *supra* note 1, at 21.

[30] *See* City of Arlington v. FCC, 569 U.S. 290, 297-301 (2013) (holding that *Chevron* applies to an agency's interpretation of its own statutory jurisdiction).

[31] *See* Cuozzo Speed Techs., LLC v. Lee, 579 U.S. 261, 280 (2016).

[32] *See* Nicholas R. Bednar, *The Winter of Discontent: A Circumscribed* Chevron, 45 MITCHELL HAMLINE L. REV. 393, 406-10 (2019) (documenting skepticism among Supreme Court justices). Uneasiness surrounding *Chevron* began before Justice Gorsuch's appointment. In *Perez v. Mortgage Bankers Ass'n.*, Justice Scalia expressed concerns that the Supreme Court's deference doctrines did not align with the Administrative Procedure Act. Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 110-11 (2015) (Scalia, J., concurring). Congress had proposed legislation seeking to "overturn" *Chevron*. *See* Separation of Powers Restoration Act, H.R. 4768, 114th Cong. (2d Sess. 2016).

[33] *See* Loper Bright Enters. v. Raimondo, 143 S. Ct. 2429 (2023) (No. 22-451) (Mem.).

[34] *See, e.g.*, Alonso-Juarez v. Garland, 80 F.4th 1039, 1054 n.8 (9th Cir. 2023) ("Although the future of the *Chevron* doctrine is uncertain, the doctrine remains good law for now." (citation omitted)); Cellco P'ship v. White Deer Twp. Zoning Hearing Bd., 74 F.4th 96, 103 n.4 (3d Cir. 2023) ("Multiple Supreme Court Justices have expressed skepticism towards *Chevron* and other theories of agency deference. And it has granted certiorari to address the continued viability of *Chevron* in the October 2023 Term." (citations omitted)).

had not yet decided *City of Arlington v. FCC*, wherein Chief Justice Roberts expressed some discomfort with the breadth of *Chevron*'s scope.[35] Second, Kent Barnett and Christopher Walker's comprehensive study of *Chevron* in the circuit courts ended in 2013. The overlap in our studies allows me to benchmark the 2012 results against their findings.[36] Future studies will benefit from a more comprehensive timeframe that allows for deeper analysis of the pre-and post-*Loper Bright* eras.

To assemble a dataset, I searched Westlaw for all published circuit court opinions that cited *Chevron*, *Skidmore*, and other prominent Supreme Court cases involving judicial review of agency interpretations of statutes.[37] I include *Skidmore* because it was an alternative standard to *Chevron* in cases where the agency did not act with the force of law.[38] When *Skidmore* applied, the reviewing court weighed "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to

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[35] City of Arlington v. FCC, 569 U.S. 290, 312 (2013) (Roberts, C.J., dissenting).

[36] Barnett & Walker, *supra* note 1, at 21.

[37] For the 2012 cases, I performed the following searches: adv: ("467 U.S. 837" OR "533 U.S. 218") & DA(aft 01-01-2012 & bef 01-01-2013); adv: ("323 U.S. 134") & DA(aft 01-01-2012 & bef 01-01-2013); and adv: (chevron /p interp! and "(agency)") & DA(aft 01-01-2012 & bef 01-01-2013). For the 2022 cases, I performed the following searches: adv: ("467 U.S. 837" OR "533 U.S. 218") & DA(aft 01-01-2022 & bef 01-01-2023); adv: ("323 U.S. 134") & DA(aft 01-01-2022 & bef 01-01-2023); and adv: (chevron /p interp! and "(agency)") & DA(aft 01-01-2022 & bef 01-01-2023). These searches returned 431 unique cases. The search results were downloaded as a set of comma-separated files. These files were merged in R, and duplicate and unpublished entries were removed. The results include both published and unpublished decisions.

[38] *See* United States v. Mead Corp., 533 U.S. 218, 221 (2001); *see also* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

control."[39] Empirically, *Skidmore* was a weaker form of deference relative to *Chevron*.[40]

The dataset includes cases from all thirteen circuit courts of appeals.[41] A wide array of federal agencies appears in the dataset, including the Environmental Protection Agency, the Department of Justice, and the Federal Communications Commission.

Like other studies of *Chevron*, the dataset suffers from several limitations.[42] First, the study excludes cases where the court failed to cite one of the relevant cases but invoked a *Chevron*-like standard. Second, the study does not capture cases where the court engaged in some form of *de novo* review without citing one of the searched cases. This is because identifying and coding all circuit court cases invoking *de novo* review would prove cumbersome and challenging. Third, the study does not examine cases decided by the U.S. district courts. Although the district courts did apply *Chevron* with some frequency,[43] the courts of appeals often reviewed significant decisions involving *Chevron*.[44] Accordingly, the results only describe the change to *Chevron*'s application in the circuit courts. Fourth, I excluded the few en banc decisions in the dataset because introducing more judges may change the strategic nature of judicial decision-making.[45]

Each observation in the dataset is a court's review of an agency's interpretation. An individual case may appear more than

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

[40] *See* Barnett & Walker, *supra* note 1, at 35 (finding that agencies won 56% of disputes in which *Skidmore* applied and 77.4% of disputes in which *Chevron* applied).

[41] The cases break down by circuit as follows: 1st (n: 11), 2nd (n: 27), 3rd (n: 21), 4th (n: 18), 5th (n: 22), 6th (n:15), 7th (n: 15), 8th (n: 10), 9th (n: 50), 10th (n: 11), 11th (n: 17), D.C. Circuit (n: 53), and Federal Circuit (n: 24).

[42] *See* Barnett & Walker, *supra* note 1, at 21-27 (offering a thorough explanation of the limitations of studying *Chevron* in the circuit courts).

[43] *See, e.g.*, City of Columbus v. Cochran, 523 F. Supp. 3d 731, 744-45 (D. Md. 2021); Rawers v. United States, 488 F. Supp. 3d 1059, 1112-14 (D.N.M. 2020); Wildearth Guardians v. U.S. Forest Serv., 668 F. Supp. 2d 1314, 1325-26 (D.N.M. 2009).

[44] *See* Barnett & Walker, *supra* note 1, at 25.

[45] Tom S. Clark, *A Principal-Agent Theory of En Banc Review*, 25 J.L., ECON., & ORG. 55, 62-64 (2008).

once in the dataset if the court reviewed multiple interpretations of a statute.[46] Whenever possible, I coded the standard of review (i.e., *Chevron* or *Skidmore*) invoked by the court. This proved difficult in some cases. Sometimes, courts cite *Chevron* but claim that they "have no need to invoke any rule of deference" because the statute is clear.[47] This reasoning is consistent with *Chevron* step one. So long as the court cited *Chevron* and explained that the statute was "clear" or "unambiguous," I coded the standard of review as *Chevron*. Regardless of the standard of review, I coded whether the court agreed with the agency's interpretation of the statute.

For cases that invoked *Chevron*, I coded whether the court concluded its analysis at *Chevron* step one or *Chevron* step two. If the court indicated that the plain language of the statute was "clear" or "unambiguous," I coded the case as concluding at *Chevron* step one. In some cases, the court determined that the statute was clear but held, in the alternative, that the agency's interpretation was reasonable at *Chevron* step two. Like Barnett and Walker, I coded these cases as having concluded at *Chevron* step one.[48] In addition, some courts acknowledged the applicability of *Chevron* but did not decide how *Chevron* applied because traditional tools of statutory interpretation demonstrated that the agency adopted the "best" interpretation.[49] These cases skip the question of whether the statute is "clear" or "ambiguous," such that the agency would be capable of changing its interpretation in a later case. Since these cases were not always

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[46] *See*, *e.g.*, Veteran Warriors, Inc. v. Sec'y. of Veteran Affairs, 29 F.4th 1320 (Fed. Cir. 2022); Ass'n of Priv. Sector Colls. & Univs. v. Duncan, 681 F.3d 427 (D.C. Cir. 2012).

[47] *See, e.g.*, Mack Trucks, Inc. v. EPA, 682 F.3d 87, 92 (D.C. Cir. 2012).

[48] *See* Barnett & Walker, *supra* note, 1; *see, e.g.*, Air Transp. Ass'n of Am., Inc. v. U.S. Dep't of Agric. 37 F.4th 667, 675 (D.C. Cir. 2022) ("[E]ven if the statute were ambiguous, APHIS's interpretation of the statute is reasonable, and Appellants' challenge of the application of both fees would fail at *Chevron* Step Two as well.").

[49] *See, e.g.*, Nicely v. United States, 23 F.4th 1364, 1368 (Fed. Cir. 2022) ("We conclude that the best interpretation of § 1552(a)(1) is the interpretation the BNCR adopted, so we need not decide whether or how the *Chevron* framework applies here.").

easy to disentangle from those finding "clarity," I code them as having concluded at *Chevron* step one.

Finally, I coded which president appointed the author of the majority opinion for each case to the circuit court of appeals.[50] The appointing president serves as a rough proxy of the judge's ideology.[51] I explore the possible influence of ideology in Part II.[52]

B. Chevron*'s Application and Overall Acceptance Rates*

Did the circuit courts continue to apply *Chevron* despite the Supreme Court's skepticism? Justice Gorsuch's statement in *Buffington* contributed to a perception that lower courts had stopped applying *Chevron*.[53] Indeed, *Loper Bright* justified abandoning *Chevron* because of "its inconsistent application by the lower courts," describing the doctrine as a "decaying husk with bold pretentions."[54] If true, we should observe significantly fewer cases invoking *Chevron* as the standard of review in 2022 than in 2012.

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[50] In several cases, the majority author is a U.S. District Court judge. In these cases, I used the president who appointed the author to the District Court. I also noted whether a case was decided per curiam because the majority opinions in these cases do not have an identifiable author.

[51] *See* CHARLES M. CAMERON & JONATHAN P. KASTELLEC, MAKING THE SUPREME COURT: THE POLITICS OF APPOINTMENTS, 1930-2020, at 306-08 (2023) (showing ideological trends among Supreme Court nominees).

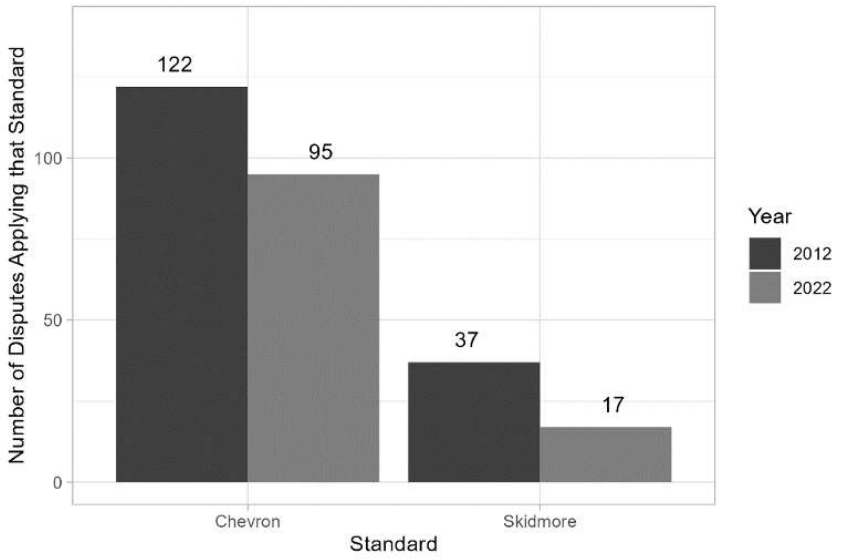
[52] *See infra* Part II.

[53] *See* Buffington v. McDonough, 143 S. Ct. 14, 21 (2022) (Gorsuch, J., dissenting); Jory Heckman, *Agencies 'knew this was coming.' What does—and doesn't—change after Supreme Court's Chevron ruling*, FED. NEWS NETWORK (July 8, 2024, 6:55 PM), https://federalnewsnetwork.com/agency-oversight/2024/07/agencies-knew-this-was-coming-what-does-and-doesnt-change-after-supreme-courts-chevron-ruling ("[L]ower courts were already citing *Chevron* less in their decisions before the Supreme Court's landmark decision."). *But see* Isaiah McKinney, *The Chevron Ball Ended at Midnight, but the Circuits are Still Two-Stepping by Themselves*, YALE J. ON REGUL. (Dec. 18, 2022), https://www.yalejreg.com/nc/chevron-ended.

[54] *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2272 (2024).

Figure 1 shows the number of interpretations reviewed under *Chevron* and *Skidmore* in 2012 and 2022.[55] In 2012, the courts of appeals applied *Chevron* to 122 interpretations. Courts applied *Chevron* in fewer cases in 2022. This decline, however, does not reach statistical significance.[56]

FIGURE 1: FREQUENCY OF *CHEVRON* AND *SKIDMORE*



Changes to the circuit courts' dockets may best explain why we observe a mild decrease in the number of cases invoking *Chevron*. Since 2013, the number of U.S.-involved civil appeals has decreased by 15.5%, and the number of administrative agency appeals has decreased by 30.8%.[57] Correspondingly, the number

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[55] All analyses run in the R statistical program.

[56] A t-test returns a p-value of 0.88, which is insignificant at the standard 0.05 threshold. For a basic understanding of the t-test, see generally KOSUKE IMAI, QUANTITATIVE SOCIAL SCIENCE: AN INTRODUCTION 339-41 (2017).

[57] Federal Judicial Caseload Statistics 2022, U.S. COURTS, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2022 (last visited July 26, 2024).

of interpretations reviewed under *Chevron* declined by 22.1% from 2012 to 2022.[58] This decline is commensurate with changes in the number of administrative cases reviewed by the circuit courts. Of course, it is impossible to know the universe of cases in which courts could have applied *Chevron* but chose not to. If the number of cases in which *Chevron* may have applied *increased* from 2012 to 2022, then (theoretically) the decline in *Chevron*'s application may still be significant. However, the composition of the circuit courts' dockets suggests that there were likely *fewer* cases to which *Chevron* applied.

The evidence suggests that courts felt comfortable invoking *Chevron* despite the Supreme Court's skepticism. Perhaps, however, they increased the scrutiny with which they reviewed agency interpretations of statutes. If so, we should observe a decline in agency win rates between 2012 and 2022.

Overall, courts agreed with 68.7% of agency interpretations of statutes regardless of which standard they applied.[59] This is consistent with prior studies. William Eskridge and Lauren Baer's study of standards of review at the Supreme Court found that agencies won in 68.3% of cases decided between 1984 and 2006.[60] Barnett and Walker found that circuit courts agreed with the agency's interpretation in 71.4% of cases decided between 2003 and 2013.[61] The difference in the overall win rate between 2012 and 2022 is statistically insignificant (2012: 67.4%; 2022: 70.9%).[62]

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[58] This is the rate of change between 2022 and 2012:

$$\left(\frac{122-95}{122}\right) \times 100 = 22.1\%$$

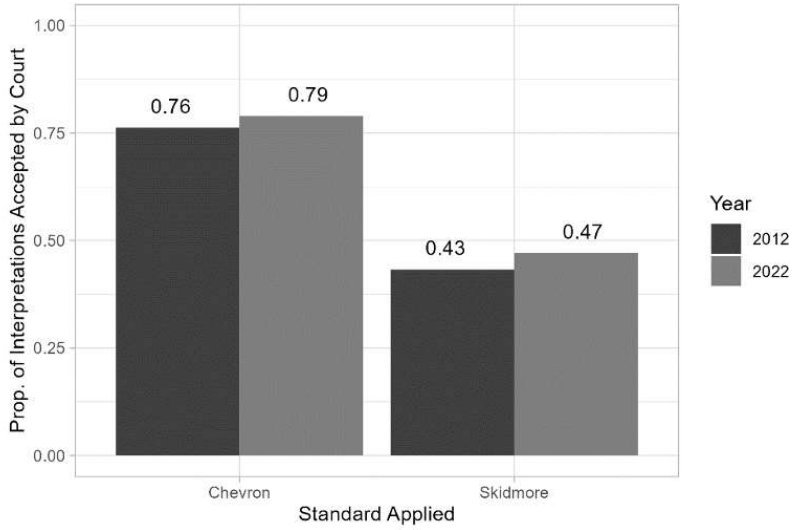
[59] This statistic includes cases from both 2012 and 2022.

[60] Eskridge & Baer, *supra* note 14, at 1100.

[61] Barnett & Walker, *supra* note 1, at 28.

[62] A t-test returns a p-value of 0.60, which is insignificant at the standard 0.05 threshold.

FIGURE 2: PROPORTION OF DISPUTES WHERE THE MAJORITY ACCEPTED THE AGENCY'S INTERPRETATION



As one would expect, however, win rates vary depending on which standard of review the court applied. Figure 2 shows the proportion of disputes where the court accepted the agency's interpretation. In 2012, circuit courts accepted the agency's interpretation in 76.2% of disputes where *Chevron* applied. This is consistent with Barnett and Walker's finding that circuit courts accepted the agency's interpretation in 77.4% of disputes.[63] Notably, agency win rates did not decrease between 2012 and 2022. In 2022, circuit courts accepted the agency's interpretation in 78.9% of disputes where *Chevron* applied.

In both years, *Skidmore* proved significantly less deferential than *Chevron*. This difference is consistent with prior studies.[64] The observed win rates under *Skidmore*, however, are lower than those of other studies. Barnett and Walker found that courts

[63] Barnett & Walker, *supra* note 1, at 30.

[64] *See id.*; Eskridge & Baer, *supra* note 14, at 1142-43; Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1275-76 (2007).

accepted the agency's interpretation in 56% of cases in which they invoked *Skidmore*.[65] Kristin Hickman and Matthew Kreuger found a slightly higher rate of 60.4%.[66] Nevertheless, I hesitate to make any meaningful statements about the rate of deference under *Skidmore*. The number of cases that invoked *Skidmore* as the standard of review was quite low (n: 53), which makes it difficult to discern the source of the variation. The addition or subtraction of a single case in a year would change the win rate by multiple percentage points.

The Supreme Court's skepticism did not change *Chevron*'s potency. At first glance, Justice Gorsuch's assertion in *Buffington* appears misplaced.[67] Courts have continued to invoke *Chevron* when reviewing agency interpretations of statutes. When *Chevron* applied, agencies won at similar rates in 2012 and 2022. At a high level, the Supreme Court's skepticism appears to have had no influence on lower court decision-making, yet it may have changed circuit court reasoning.

C. The Change at Chevron *Step One*

The Supreme Court's skepticism changed neither the frequency of *Chevron*'s application nor the rate at which agencies won interpretive disputes. Yet, circuit courts understood that the Supreme Court expected a more robust inquiry at *Chevron* step one.[68] In effect, the Court wanted lower courts to abandon "reflexive" or "mechanical" deference.[69] "Reflexive deference" describes situations where the court declares a statute "ambiguous" without using the traditional tools of statutory interpretation to

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[65] Barnett & Walker, *supra*, note 1, at 6.

[66] Hickman & Krueger, *supra* note 64, at 1275.

[67] *See* Buffington v. McDonough, 143 S. Ct. 14, 22 (2022) (Gorsuch, J., dissenting).

[68] *See* Bastias v. U.S. Att'y Gen., 42 F.4th 1266, 1276-77 (11th Cir. 2022) (Newsom, J., concurring).

[69] *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2265 (2024) ("*Chevron* insists on much more. It demands that courts mechanically afford *binding* deference to agency interpretations, including those that have been inconsistent over time.").

determine the boundaries of the agency's authority.[70] Circuit courts may have changed the way in which they applied *Chevron*'s two steps even if the agency ultimately won at similar rates.

FIGURE 3: PROPORTION OF CASES ENDING AT EACH OF *CHEVRON*'S STEPS

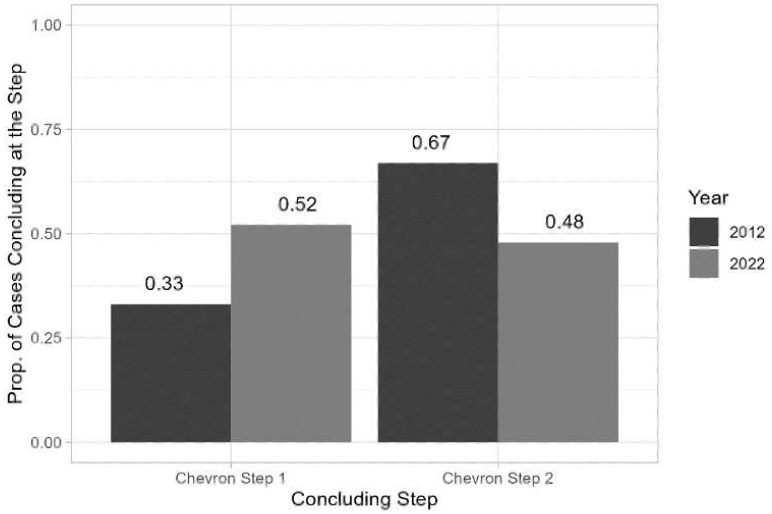

Figure 3 shows the proportion of disputes where the court ended its review at *Chevron* step one or step two. In 2012, courts concluded their analyses at *Chevron* step one in 40 disputes (32.8%). They ended their analyses at step two in 81 disputes (66.4%).[71] Substantively, courts most often concluded that the statute was ambiguous and proceeded to ask whether the agency had adopted a "reasonable" interpretation of the statute. These rates are comparable to those found in other studies. From 2003 to

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[70] *Cf.* Kevin O. Leske, *A New Split in the* Rock*: Reflexive Deference Under* Stinson *or Cabined Deference Under* Kisor?, 74 ADMIN. L. REV. 761, 779 (2022) (defining reflexive deference in the context of an agency's interpretation of its own regulations).

[71] The 0.8% of unaccounted cases represent cases where it was impossible to determine whether the court had concluded its analysis at step one or step two.

2013, Barnett and Walker found that courts decided 30.0% of *Chevron* disputes at step one and 70.0% of *Chevron* disputes at step two.[72]

A noticeable shift occurred by 2022. In 2022, courts concluded their analyses at *Chevron* step one in 49 disputes (51.6%). They ended their analyses at step two in 45 disputes (47.4%). There is a statistically significant change in the application of *Chevron* step one from 2012 to 2022.[73]

Lower courts appear to have listened to the Supreme Court's demand for more robust statutory interpretation. Doctrinally, *Chevron* step one always encouraged courts to use traditional tools of statutory interpretation to decide whether the statute was clear or ambiguous.[74] The rise in cases concluding at *Chevron* step one suggests that lower courts more often used these tools to decide the disputes before them.

Yet this finding presents a puzzle. Commentators have long assumed that reflexive deference inflated agency win rates under *Chevron*.[75] Ambiguity allowed agencies to stretch the meaning of statutes beyond their plain meaning.[76] If courts adopted a more robust interpretive analysis, it stands to reason that agencies would have lost more cases. Indeed, Barnett and Walker found that agencies won only 39.0% of cases in which the court concluded its analysis at *Chevron* step one.[77] We might expect that the expansion of *Chevron* step one would decrease agency win rates; however, Figure 2 shows that agencies won at similar rates in both 2012 and 2022.

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[72] Barnett & Walker, *supra* note 1, at 6.

[73] A t-test returns a p-value of 0.005, which is significant at the standard 0.05 threshold.

[74] *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.10-11 (1984) (citations omitted); *see also* AKM LLC d.b.a Volks Constructors v. Sec'y of Labor, 675 F.3d 752, 765 (D.C. Cir. 2012) (Brown, J., concurring) ("Too often, we reflexively defer whenever an administrative agency claims statutory ambiguity, but this is not our charge.").

[75] Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 784 (2010).

[76] *See id.*; Kavanaugh, *supra* note 10, at 2150-51.

[77] Barnett & Walker, *supra* note 1, at 35.

FIGURE 4: PROPORTION OF AGENCY WINS BY *CHEVRON* STEP

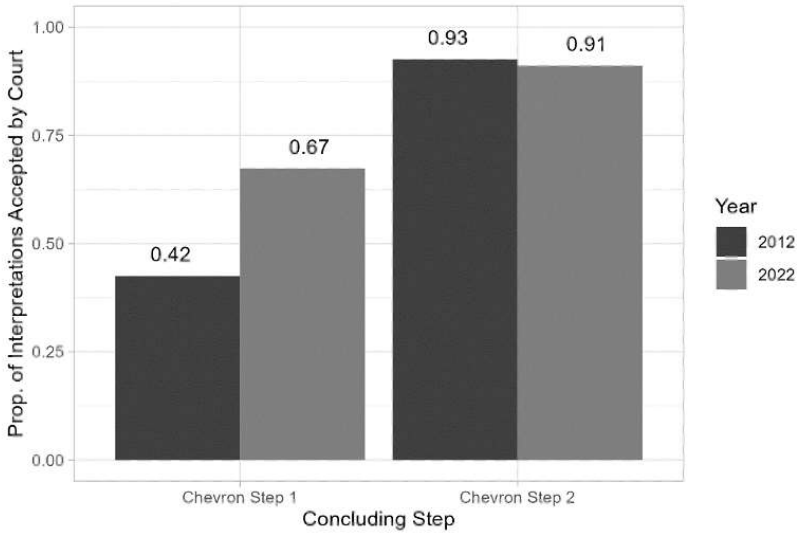

Figure 4 breaks down the proportion of interpretations accepted by the court at each step. In 2012, courts concluding their analyses at *Chevron* step one accepted the agency's interpretation in 42.5% of cases, which is similar to the rate found by Barnett and Walker.[78] Surprisingly, as the frequency of step one decisions increased, agency win rates *increased* under *Chevron* step one. In 2022, the court accepted the agency's interpretation in 67.3% of disputes concluded at step one. The move toward *Chevron* step one did not decrease agency win rates as many expected.

Of course, aggregate data may hide nuanced differences across agencies or areas of law. Walker and Barnett demonstrated that different agencies and different areas of law received *Chevron* deference at different rates.[79] The data for this Essay contains too few cases in any given area of law to draw meaningful

[78] *See id.*
[79] *See id.* at 50-54.

inferences.[80] Future studies may uncover heterogeneous effects that help to explain these results.

Courts responded to Supreme Court skepticism by concluding their analyses more often at *Chevron* step one. The rise in *Chevron* step one, however, did not correspond to a commensurate decline in agency win rates. Agencies won more often at *Chevron* step one as the Supreme Court became more skeptical of *Chevron*. Part II offers various explanations for why this trend may have emerged. Part III explains what these results tell us about how lower courts may approach *Loper Bright*'s call for reviewing courts to exercise their independent judgment in finding the "single, best meaning" of the statute.[81]

II. WHY DID AGENCIES WIN MORE AT *CHEVRON* STEP ONE?

One difficulty of studying the relationship between the Executive and the Judiciary is that cases do not randomly appear on the court's docket.[82] Instead, various actors make strategic decisions that lead to the court's final opinion. Congress writes a statute. The agency interprets the statute during implementation. A litigant—unhappy with the outcome of the administrative process—challenges the agency's interpretation in federal court. Finally, the federal court decides whether the agency adopted a permissible interpretation of the statute. Changes in the behavior of Congress, agencies, litigants, or the courts could have contributed to the results observed in Part I.

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[80] For example, although the data includes thirty-one environmental law disputes, only nine of those cases were decided at *Chevron* step one. Immigration law appeared most often in the dataset, with eighty-one disputes. Removing these cases from the dataset does not meaningfully change the results. Excluding these immigration law cases, courts concluding their analyses at *Chevron* step one accepted the agency's interpretation in 52.2% of 2012 decisions. In 2022, courts concluding their analyses at *Chevron* step one accepted the agency's interpretation in 73.7% of cases.

[81] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2266-70 (2024).

[82] *See* Jonathan P. Kastellec & Jeffrey R. Lax, *Case Selection and the Study of Judicial Politics*, 51 J. EMPIRICAL LEGAL STUD. 407, 407-08 (2008).

This Part offers several plausible theories that may explain the results. I explore how three different actors may have reacted to the Supreme Court's skepticism: Congress, agencies, and the courts. First, Congress may have responded to the Supreme Court's skepticism by writing clearer statutes. Second, agencies may have changed the types of actions they pursued and how they justified those actions in court. Third, the composition of the circuit courts may have changed, or the circuit courts may have changed their approach to *Chevron* to avoid reversal by the Supreme Court. I do not offer any causal evidence that one possibility better explains the trend than the others. However, I do offer some descriptive evidence and initial reactions as to which explanations seem most plausible.

A. Congressional Behavior

In their preeminent study, Abbe Gluck and Lisa Bressman concluded that Congress was aware of *Chevron* and that *Chevron* informed how Congress drafted statutes.[83] Moreover, at least some evidence exists that Congress responds to changes at the Supreme Court.[84] Indeed, some have posited that overturning *Chevron* will change how Congress interacts with both courts and agencies.[85] Supreme Court skepticism may have kickstarted this process earlier than expected. Therefore, one plausible explanation for the results in Part I is that Congress changed the way it drafted statutes in response to Supreme Court skepticism.

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[83] *See* Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 993-96 (2013).

[84] *See, e.g.*, Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMP. L. REV. 425, 439-50 (1992).

[85] *See* Gus Hurwitz, *An Equilibrium–Adjustment Theory of Current Trends in Administrative Law*, TRUTH ON THE MARKET (June 25, 2024), https://truthonthemarket.com/2024/06/25/an-equilibrium-adjustment-theory-of-current-trends-in-administrative-law.

Some empirical work supports the proposition that Congress has increased the specificity of regulatory statutes.[86] Research by Sean Farhang showed that statutes have grown longer and more specific since at least 1987.[87] Farhang explained that Congress intentionally enacts more specific statutes when it provides opportunities for litigation.[88] Given that this trend began shortly after the Supreme Court's decision in *Chevron*,[89] it is unlikely that the rise in statutory specificity was caused by the Roberts Court's skepticism toward administrative governance. Whether the Roberts Court's skepticism accelerated the rise of statutory specificity remains an open question.

Nevertheless, as statutes become increasingly specific and clear, courts have fewer occasions to find ambiguity in the statutes interpreted by agencies and, therefore, conclude their analyses more often at *Chevron* step one. The data does not include a measure of legislative specificity, and, therefore, it is difficult to untangle what effect—if any—this trend had on the results. Agencies draw their authority from statutes of different eras, and judicial review does not uniformly concern Congress's latest enactments.[90] Anecdotally, many cases decided in both 2012 and 2022 concern older statutes, such as the Perishable Agricultural Commodities Act of 1930 and the Higher Education Act of 1965, where we may expect to observe less specificity on average.[91] The

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[86] Sean Farhang, *Legislative Capacity & Administrative Power Under Divided Polarization*, 150 DAEDALUS 49, 53 (2021) [hereinafter Farhang, *Legislative Capacity*]; Sean Farhang, *Legislating for Litigation: Delegation, Public Policy, and Democracy*, 106 CAL. L. REV. 1529, 1570-98 (2018) [hereinafter Farhang, *Legislating for Litigation*].

[87] *See* Farhang, *Legislative Capacity*, *supra* note 86, at 53.

[88] *See* Farhang, *Legislating for Litigation*, *supra* note 86, at 1595.

[89] *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) (*Chevron* decided in 1984).

[90] *See* Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931, 1936 (2020) ("[B]road congressional delegations of authority at one time period become a source of authority for agencies to take later action that could no longer receive legislative support or that was not adequately contemplated, let alone considered, at the time of enactment.").

[91] *See, e.g.*, Perfectly Fresh Farms, Inc. v. U.S. Dep't of Agric., 692 F.3d 960, 963 (9th Cir. 2012) (citing Perishable Agriculture Commodities Act, 7

mix of old and new statutes raises questions about the marginal effect that greater specificity in newer statutes would have across these two periods.

While increased specificity would influence the frequency with which courts concluded their analyses at *Chevron* step one, it is less clear why this trend would have influenced agency win rates. Hypothetically, if agencies comply with statutory clarity at a fixed rate, they will win and lose cases at a similar rate. Growing win rates at step one likely come from either the agency or the courts. Agencies may have increased their compliance with statutory commands, courts may have changed the application of *Chevron* step one, or both.

B. Agency Behavior

The existing empirical literature demonstrates that agencies respond to changes in the lower courts. I consider two possible ways that agencies may have changed the application of *Chevron*: (1) a reduction in executive overreach and (2) a shift toward statutory arguments during litigation.

1. Reduction in Executive Overreach

One possibility is that Supreme Court skepticism discouraged executive overreach. By executive overreach, I mean the willingness of administrative agencies to exceed the scope of their

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U.S.C. §§ 499a-499t (1930)); Ames Constr. Inc. v. Fed. Mine Safety & Health Rev. Comm'n, 676 F.3d 1109, 1110 (D.C. Cir. 2012) (citing Federal Mine Safety and Health Act, Pub. L. No. 95-164, 91 Stat. 1290 (1977) (codified at 30 U.S.C.. §§ 801-966.)); Horne v. U.S. Dep't of Agric., 673 F.3d 1071, 1073 (9th Cir. 2012) (citing Agricultural Marketing Agreement Act, Pub. L. No. 75-137, 50 Stat. 246 (1937) (codified as amended at 7 U.S.C. §§ 671-674)); Association of Priv. Sector Colls. & Univs. v. Duncan, 681 F.3d 427, 433 (D.C. Cir. 2012) (citing Higher Education Act, Pub. L. No. 89-329, 79 Stat. 1219, 123-254 (1965)); San Francisco Herring Ass'n v. U.S. Dep't of Interior, 33 F.4th 1146, 1148 (9th Cir. 2022) (citing Golden Gate National Recreation Area Act, Pub. L. No. 92-589, 86 Stat. 1299 (1972) (codified at 16 U.S.C. §§ 460bb-460bb-5)); KenAmerican Res., Inc. v. U.S. Sec'y of Lab., 33 F.4th 884, 887 (6th Cir. 2022) (citing Federal Mine Safety and Health Act, 30 U.S.C. §§ 801-966 (1977)).

statutory authority.[92] If agencies only took actions that were *clearly* authorized by statute, courts would have naturally concluded the *Chevron* analysis more often at step one while simultaneously affirming the agency's action.

There are several reasons to doubt this explanation. Empirical studies of the correlation between court decisions and executive action find mixed results. Some studies find that agencies change their behavior in response to changes at the courts; other studies find minimal effects.[93] In a study of the Environmental Protection Agency's rulemakings, Wendy Wagner concluded that "the courts' precedent and remands do not appear to exert much of an impact on agency decision making and in some cases seem to be effectively ignored."[94] At a minimum, whether trends in the judiciary influence agency behavior seems to depend on the agency and the types of decisions it makes.

Anecdotally, the Biden Administration adopted broad interpretations of existing statutes to pursue its policy agenda. The Centers for Disease Control promulgated an eviction moratorium based on the Public Health Service Act's authorization to "make and enforce such regulations as . . . are necessary to prevent the introduction, transmission, or spread of communicable diseases."[95]

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[92] *See* Lee Epstein & Eric A. Posner, *The Decline of Supreme Court Deference to the President*, 166 U. PA. L. REV. 829, 830-55 (2018).

[93] *Compare* Brandice Canes-Wrone, *Bureaucratic Decisions and the Composition of the Lower Courts*, 47 AM. J. POL. SCI. 205, 210 (2003) (finding that district court ideology influences Army Corps of Engineer's permitting decisions); Robert M. Howard & David C. Nixon, *Regional Court Influence Over Bureaucratic Policymaking: Courts, Ideological Preferences, and the Internal Revenue Service*, 55 POL. RSCH. Q. 907, 916-17 (2002) (finding that district court ideology influences who the IRS audits), *with* Epstein & Posner, *supra* note 92, at 851 (finding no correlation between declining deference and executive order issuance).

[94] Wendy Wagner, *Revisiting the Impact of Judicial Review on Agency Rulemakings: An Empirical Investigation*, 53 WM. & MARY L. REV. 1717, 1722-23 (2012).

[95] *See* 42 U.S.C. § 264(a) (authorizing public-health regulations); Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55292 (Sept. 4, 2020) (prohibiting evictions by landlords during the COVID-19 Pandemic).

The Department of Education used its authority to "waive or modify any statutory or regulatory provision applicable to [federal student loans]" to forgive an estimated $430 billion in student loans.[96] Although the Supreme Court struck down both actions,[97] its general skepticism toward administrative governance did not deter the Biden Administration from pursuing these broad interpretations in the first place.

This is not to suggest that agencies always seek to stretch the meaning of statutes beyond their natural meaning. As one agency attorney told Cristina Rodríguez and Anya Bernstein, "[O]ur job was not to make policy. . . . We were trying to figure out, could you read the statute this way? . . . [W]hat's the best interpretation?"[98] One agency rule drafter told Christopher Walker, "I generally try to make a rule conform with a statute as much as possible. If the statute has gaps, I rely on my agency's technical expertise for the best, most reasonable way to fill them."[99] Still, the president and political appointees occasionally press agencies to adopt policies with high litigation risk.[100] Litigation is reserved for the interpretations where the agency is most likely to have stretched its authority.

2. Changes to Litigation Strategy

Another plausible explanation is that agencies changed the *reasoning* offered for their actions. Jonathan Choi showed that the extension of *Chevron* to the Department of the Treasury's regulations caused the Treasury to rely less on statutory

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[96] *See* 20 U.S.C. § 1098bb(a)(1) (authorizing the Secretary of Education to waive student loan requirements); Federal Student Aid Programs, 87 Fed. Reg. 61512 (Oct. 12, 2022).

[97] *See* Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs., 594 U.S. 758, 766 (2021); *see also* Biden v. Nebraska, 600 U.S. 477, 494 (2023).

[98] Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 YALE L.J. 1600, 1634 (2023).

[99] Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1062 (2015).

[100] *See* Bernstein & Rodríguez, *supra* note 98, at 1633-34 n.115.

interpretation and more on policy arguments during rulemaking.[101] Rising skepticism at the Supreme Court may have encouraged the reverse. Agencies may have begun to rely more heavily on statutory arguments than policy arguments. During litigation, agencies may have taken the position that their statutes were "clear" to increase the likelihood that the reviewing court would adopt their arguments.

Anecdotal evidence supports this theory. During the Trump Administration, some agencies began to "waive" *Chevron* deference to discourage the court from applying it.[102] After *Loper Bright*, Caroline Wolverton—former senior trial counsel for the Department of Justice's Federal Programs branch—told reporters, "Agencies knew this was coming, the government knew this was coming. They have been moving away from relying on ambiguities in statutes."[103] She went on to say that government attorneys do not make "many arguments that courts should be deferring to agencies in their interpretations of statutes."[104]

Presented with arguments that *Chevron* should not apply or that the statute was "clear," lower courts may have preferred to decide the case using traditional tools of statutory interpretation. At least some courts resisted the temptation to follow the agency's lead. Several cases described the choice of whether and how to apply *Chevron* as reserved for courts.[105] Circuit courts also set aside agency actions as arbitrary and capricious for erroneously

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[101] Jonathan H. Choi, *Legal Analysis, Policy Analysis, and the Price of Deference: An Empirical Study of* Mayo *and* Chevron, 38 YALE J. ON REGUL. 818, 849-51 (2021).

[102] *See Waiving* Chevron *Deference*, 132 HARV. L. REV. 1520, 1522 (2019).

[103] *See* Heckman, *supra* note 53.

[104] *See id*.

[105] *See* Amaya v. Rosen, 986 F.3d 424, 430 (4th Cir. 2021) ("[S]tandards of review cannot be waived and . . . *Chevron* deference is such a standard of review."); SoundExchange, Inc. v. Copyright Royalty Bd., 904 F.3d 41, 54 (D.C. Cir. 2018) ("We do not anticipate agencies would reference the *Chevron* framework by name in the course of their own decisionmaking: *Chevron* is a standard of *judicial* review, not of *agency* action.").

concluding that the statute was clear.[106] Nevertheless, an agency's assertion that the statute was clear would have shaped the arguments before the court and may have made the court less likely to find ambiguity.

C. Circuit Court Behavior

One final explanation for the results is that something in the circuit courts changed. Again, I consider two possible explanations. First, the composition of the circuit courts may have changed such that the circuit court judges possessed a similar level of administrative skepticism as the Supreme Court. This would reflect an attitudinal model of judicial decision-making.[107] Second, circuit court judges may have adjusted their application of *Chevron* based on a perception that the doctrine itself had changed. This would reflect a legal model or hierarchical model of judicial decision-making.[108]

1. An Attitudinal Explanation

Some scholars believe that a judge's ideological attitudes and values drive their decisions.[109] The Supreme Court's increased skepticism of administrative governance is a product, in part, of the Trump Administration's choice of appointments.[110] Administrative skepticism served as a litmus test for judicial appointments during the Trump Administration.[111] Then-Judges Gorsuch and Kavanaugh drew the attention of the Trump Administration for their skepticism toward *Chevron* and

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[106] *See* Daniel J. Hemel & Aaron L. Nielson, Chevron *Step One-and-a-Half*, 84 U. CHI. L. REV. 757, 765-66 (2017) (listing cases).

[107] *See* Jeffrey A. Segal et al., *Decision Making on the U.S. Courts of Appeals, in* CONTEMPLATING COURTS, 227, 231-32, (Lee Epstein ed., 1995).

[108] *See id.* at 230, 232-35.

[109] *See id.* at 231.

[110] *Cf.* Jeremy W. Peters, *Trump's New Judicial Litmus Test: Shrinking 'the Administrative State,'* N.Y. TIMES (Mar. 26, 2018), https://www.nytimes.com/2018/03/26/us/politics/trump-judges-courts-administrative-state.html.

[111] *See id.*

administrative action more generally.[112] If a parallel trend emerged in circuit court appointments, then the circuit court's willingness to conclude their analyses at *Chevron* step one may not have been a reaction to the Supreme Court's skepticism. Instead, it may have resulted from the simultaneous appointment of administrative skeptics to the Supreme Court and circuit courts.

The dataset offers a preliminary test of this theory. By examining which judges concluded their analyses at *Chevron* step one, we can see if judges appointed by President Trump were more likely than other judges to conclude their analyses at *Chevron* step one. I categorize the interpretive disputes decided at *Chevron* step one by the appointing president of the majority author. This assumes that presidents appoint judges based on their ideological alignment.[113] In other words, Democratic presidents prefer to appoint liberal judges, and Republican presidents prefer to appoint conservative judges. I also group judges into three categories: (1) Trump Appointees, (2) Other Republican Appointees, and (3) Democratic Appointees.

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[112] *See* THOMAS W. MERRILL, THE *CHEVRON* DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE 7 (2022).

[113] CHARLES M. CAMERON & JONATHAN P. KASTELLEC, *supra* note 51, at 88-92.

TABLE 1: DISPUTES ENDING AT *CHEVRON* STEP ONE BY APPOINTING PRESIDENT OF THE MAJORITY AUTHOR

Appointing President	Decisions Ending at Step One (2012)	Agency Wins at Step One (2012)	Decisions Ending at Step One (2022)	Agency Wins at Step One (2022)
Johnson (1)	0 (0.0%)	–	–	–
Nixon (0)	–	–	–	–
Ford (1)	0 (0.0%)	–	–	–
Carter (7)	2 (33.3%)	1 (50.0%)	1 (100%)	1 (100%)
Reagan (27)	3 (16.7%)	1 (33.3%)	6 (66.7%)	3 (50.0%)
Bush I (15)	2 (25.0%)	1 (50.0%)	2 (28.6%)	2 (100%)
Clinton (60)	12 (29.3%)	4 (33.3%)	9 (47.4%)	8 (88.9%)
Bush II (44)	11 (40.7%)	5 (45.5%)	5 (29.4%)	2 (40.0%)
Obama (33)	6 (42.9%)	2 (33.3%)	14 (73.7%)	12 (85.7%)
Trump (17)	–	–	10 (58.8%)	4 (40.0%)
Biden (1)	–	–	1 (100%)	0 (0.0%)
Trump (17)	–	–	10 (58.8%)	4 (40.0%)
GOP (87)	16 (30.2%)	7 (43.8%)	13 (38.2%)	7 (53.8%)
Dem. (102)	20 (32.3%)	7 (35.0%)	25 (62.5%)	21 (84.0%)

Note: The number next to each president corresponds to the number of Chevron disputes decided by that set of appointees. The category of "GOP" judges includes all judges appointed by Republican presidents except those appointed by President Trump.

Table 1 reports the results. In 2012, judges appointed by Democratic and Republican presidents were equally likely to conclude their analyses at *Chevron* step one. By 2022, most judges were more likely to conclude their analyses at *Chevron* step one—regardless of the appointing president.[114] Judges appointed by President Trump do not appear particularly unique in this regard. Although Trump appointees are more likely to conclude their analysis at step one compared to other Republican appointees,

[114] The exception to this trend is found in judges appointed by President George W. Bush. In 2012, judges appointed by President Bush concluded their analysis at *Chevron* step one in 40.7% of disputes. In 2022, judges appointed by President Bush concluded their analysis at *Chevron* step one in 29.4% of disputes. Given the relatively small number of cases each year, it is difficult to know whether this is a meaningful trend.

the largest shifts are observed among judges appointed by Presidents Reagan and Obama. Neither ideology nor the changing composition of the courts fully explains the shift toward *Chevron* step one because we observe a similar trend for both Republican and Democratic appointees.

In terms of outcomes, the data suggests that Trump appointees (40.0% of disputes) and Republican appointees (53.8% of disputes) sided with the agency far less than Democratic appointees (84.0% of disputes) at *Chevron* step one. This is consistent with Kent Barnett, Christina Boyd, and Christopher Walker's finding that liberal panels agree more often with the agency's interpretation at *Chevron* step one.[115] Yet, in the aggregate, *Chevron* had a measurable effect on constraining ideological decision-making.[116] Their results raise concerns that the shift toward *Chevron* step one permitted greater influence of ideology in judicial decision-making.

2. A Legal and Hierarchical Explanation

Perhaps the simplest explanation is that circuit court judges felt meaningfully constrained by the Supreme Court and its legal decisions. A legal model of judicial decision-making theorizes that circuit courts seek to faithfully apply the law as described in the Constitution, statutes, and the Supreme Court.[117] A hierarchical model of judicial decision-making suggests that the circuit courts often comply with Supreme Court precedent to avoid reversal.[118] Ethan Bueno de Mequita and Matthew Stephenson argued that the Supreme Court uses lines of precedent to send signals to lower courts about how a particular doctrine should apply.[119] By 2022, circuit courts understood that the Supreme Court expected more robust engagement with the traditional tools of statutory

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[115] *See* Barnett et al., *Administrative Law's Political Dynamics*, *supra* note 14, at 1518.

[116] *See id.* at 1524.

[117] *See* Segal et al., *supra* note 107, at 230.

[118] *See id.* at 233-34.

[119] de Mesquita & Stephenson, *supra* note 13, at 764.

interpretation at *Chevron* step one. This pressure may have encouraged courts to change step one's operation.

What might that change have looked like from a doctrinal perspective? Traditionally, a court concluded its analysis at *Chevron* step one when the statute was clear or unambiguous.[120] The *Chevron* opinion itself explained, "The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."[121] Even if the agency adopted the best interpretation of the statute, the court would move to *Chevron* step two upon finding some degree of ambiguity. Many of the 2022 cases still use "clarity" as the threshold inquiry for *Chevron* step two.[122]

Other step one decisions, however, simply suggest that the agency had identified the best interpretation of the statute, and, therefore, the court would reach the same result with or without *Chevron*. For example, in *Guedes v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, the D.C. Circuit concluded that "the Bureau offered the best construction of the statute" and refused to "wad[e] into the subsidiary questions that the *Chevron* analysis poses."[123] The court later stated:

> To be sure, the Bureau's interpretation is not the only possible interpretation of the statute. But most importantly, the task before us is to find the best interpretation of the statute, which does not mean that it is the only "permissible" or reasonable interpretation.[124]

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[120] *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

[121] *Id.* at 843 n.11.

[122] *See, e.g.*, Bauer v. Fed. Deposit Ins. Corp., 38 F.4th 1114, 1122 n.2 (D.C. Cir. 2022); Garvey v. Admin. Rev. Bd., 56 F.4th 110, 121 (D.C. Cir. 2022).

[123] *See* Guedes v. Bureau of Alcohol, Tobacco, Firearms, and Explosives, 45 F.4th 306, 313 (D.C. Cir. 2022).

[124] *Id.* at 322.

In *Nicely v. United States*, the Federal Circuit concluded that the Board for Correction of Naval Records adopted the "best interpretation" of the statute, and, therefore, the Court had no reason to "decide whether or how the *Chevron* framework applies."[125] However, these cases often left open the question of whether the statute had sufficient ambiguity to allow the agency to change its interpretation in the future.

These examples suggest that some judges only resorted to *Chevron* step two when it made a difference in the outcome of the case. These judges shifted their conception of *Chevron* as a standard of review to something more akin to a substantive canon.[126] "Deference" was only necessary in cases where it would change the outcome of the case after the application of traditional tools of statutory interpretation. Accordingly, some *Chevron* step one cases do not reflect a finding of statutory "clarity". They simply decided that the agency's interpretation was the best interpretation of the statute regardless of whether any ambiguity existed.

* * *

The rise in *Chevron* step one decisions likely reflected several co-existent phenomena. Congress had steadily increased the specificity with which it drafted regulatory statutes over the last forty years. At the same time, the Supreme Court had encouraged lower courts to engage in a more robust inquiry at *Chevron* step one and to decide whether the statute was clear or ambiguous after exhausting the traditional tools of interpretation. Agencies anticipated shifts in judicial review by making stronger *Chevron* step one arguments during litigation. In turn, circuit court judges concluded their analyses more often at *Chevron* step one by expanding the analysis to include cases where the agency had identified the best interpretation of the statute.

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[125] *See* Nicely v. United States, 23 F.4th 1364, 1368 (Fed. Cir. 2022).

[126] *See* Linda Jellum, *What is Chevron? American Hospital Association v. Becerra Tells Us Leaving No Ambiguity*, YALE J. ON REGUL. (June 19, 2022), https://www.yalejreg.com/nc/what-is-chevron.

III. IMPLICATIONS

The empirical results tell us where we have been. Where are we going? This final part offers two insights into the current state of administrative law. First, the results help to explain why the Supreme Court chose this moment to overturn *Chevron*. Second, they provide important insights into how lower courts may respond to the Supreme Court's decision in *Loper Bright*.

A. The Decision to "Overrule" Chevron

Everyone expected the Supreme Court to change *Chevron* in some form or another. Yet, it had a choice. Why did the Supreme Court decide to overrule—rather than clarify—*Chevron*? From the standpoint of positive political theory, the empirical results suggest that the Supreme Court felt comfortable that the lower courts would comply with the *Loper Bright* decision because they were already deciding most cases on statutory interpretation grounds.

In fashioning doctrine, the Supreme Court behaves strategically. The justices have preferences over legal policy,[127] but the realization of those preferences depends on the willingness of lower courts to comply with the Court's decisions and precedents. Lee Epstein and Jack Knight argued that the ability of the justices to achieve their goals "depends on a consideration of the preferences of other actors, the choices they expect others to make, and the institutional context in which they act."[128] Noncompliance threatens the Supreme Court's legitimacy and results in decisions that the justices themselves would not reach. While the Supreme Court has the authority to review individual decisions, its capacity limits the number of cases it may review during a given term.

Standards of review behave as instruments of control over the lower courts.[129] We can think of standards as creating a "space" in

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[127] *See* CAMERON & KASTELLEC, *supra* note 51, at 306-08.

[128] LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 10 (1998).

[129] de Mesquita & Stephenson, *supra* note 13; Jacobi & Tiller, *supra* note 13 at 1, 6; McNollgast, *supra* note 13, at 1632, 1635-36.

which a reviewing court may permissibly operate. When a lower court controversially applies the standard, it risks reversal.

Lower courts affect the development of standards in two primary ways. First, as McNollgast described, if the Supreme Court anticipates high levels of non-compliance, it is forced to provide *greater* discretion (i.e., more space) because it lacks the capacity to review all cases of non-compliance.[130] At first glance, this appears unintuitive. Yet expanding the "space" of permissible decisions allows the Court to focus its attention on the most egregious instances of noncompliance.[131] If the composition of the lower courts changes in such a way that the lower courts and the Supreme Court have closer preferences, then the level of noncompliance decreases. This affords the Supreme Court the opportunity to shrink the doctrinal space to its preferred state.

Second, lower courts play a significant role in shaping new standards of review because doctrine is noisy. The lower courts decide more cases than the Supreme Court, and, therefore, they play a significant role in shaping how a given doctrine will apply in future cases. As Martha Davis and Steven Childress observed, "[S]tandards of review become confused because reviewing judges, like the rest of us, respond differently to new situations."[132] Ethan Bueno de Mesquita and Matthew Stephenson demonstrated that the Supreme Court can often obtain better compliance from the lower courts by gently modifying existing standards instead of outright overruling them.[133] Applying the same doctrine across multiple cases provides the lower courts with more information about what constitutes a permissible or impermissible decision. Accordingly, Bueno de Mesquita and Stephenson predicted that "[s]tandards . . . will be characterized by more constant, but gradual, substantive change but will be overturned outright less often."[134]

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[130] McNollgast, *supra* note 13, at 1645-47.

[131] *Id.* at 1645-47, 1675.

[132] Martha S. Davis & Stevan Alan Childress, *Standards of Review in Criminal Appeals: Fifth Circuit Illustration and Analysis*, 60 TUL. L. REV. 461, 561 (1986).

[133] de Mesquita & Stephenson, *supra* note 13, at 764-65.

[134] *Id.* at 765 (alteration in original).

In theory, overruling *Chevron* presented two significant risks for the Supreme Court. First, judges who favor administrative governance may have continued to apply some form of deference. *Chevron* enjoyed broad application because its amorphous nature allowed any judge to see what they wanted in the doctrine.[135] Judges never quite agreed on *Chevron*'s scope or application. In his famous *Duke Law Journal* article, Justice Scalia raised the central question for *Chevron* step one: "[H]ow clear is clear[?]"[136] Over twenty years later, then-Judge Kavanaugh remarked, "[I]f the interpretation is at least 65-35 clear, then I will call it clear . . . I think a few of my colleagues apply more of a 90-10 rule, at least in certain cases."[137] McNollgast would predict that shrinking the doctrinal space risked increasing noncompliance among the lower courts unless the lower courts had preferences similar to the Supreme Court.[138]

Second, overruling *Chevron* would provide lower courts with a significant opportunity to shape its replacement. The Court experienced this with *Chevron* itself. None of the justices viewed *Chevron* as a landmark decision.[139] The *Chevron* standard took hold because the D.C. Circuit developed an expansive, deferential standard from two paragraphs in the *Chevron* opinion. Over time, the Supreme Court responded by incrementally clarifying *Chevron* as Bueno de Mesquita and Stephenson predicted.[140] Theoretically, the Supreme Court could have taken a similar approach in *Loper Bright*. Bueno de Mesquita and Stephenson would predict that the

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[135] Nicholas R. Bednar & Kristin E. Hickman, Chevron's *Inevitability*, 85 GEO. WASH. L. REV. 1392, 1418-40 (2017).

[136] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 (alteration in original).

[137] *See* Kavanaugh, *supra* note 10, at 2137 (alteration in original).

[138] McNollgast, *supra* note 13, at 1645-47.

[139] Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, *in* ADMINISTRATIVE LAW STORIES 399, 417 (Peter L. Strauss ed., 2005).

[140] *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 226-27 (2001) (addressing when *Chevron* applies); Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005) (addressing *Chevron*'s application in cases where a court had previously interpreted the statute).

Supreme Court would clarify *Chevron* only if its clarification would move case outcomes closer to the Justices' preferences.

The pattern in the lower courts alleviated fears of noncompliance. *Loper Bright* commands judges to exercise their independent judgment by using the traditional tools of statutory interpretation.[141] By 2022, most *Chevron* cases were decided using traditional tools of statutory interpretation. *Chevron*'s application often mirrored the Supreme Court's preference for a more robust interpretive inquiry. Likewise, the Supreme Court had no reason to expect that the lower courts would shape *Loper Bright* in ways that undermine its preferences. *Loper Bright* contains strong rhetoric that commands reviewing courts to find the "single, best meaning" of the statute.[142] The empirical record shows that most lower court judges—of all ideological leanings—had been applying *Chevron* in this way. The best way for the Supreme Court to bring the remaining judges into compliance was to abolish *Chevron* rather than clarify it.

B. How Will Loper Bright *Change Judicial Review?*

Loper Bright stands for the proposition that courts should arrive at the "best reading" of the statute using traditional tools of statutory interpretation without concern for the agency's preferred interpretation.[143] Yet courts should accord "respect" to the executive branch where appropriate.[144] After emphasizing the need for independent judgment, the Supreme Court offered these guiding principles for when a reviewing court should accord respect:

> [T]he statute's meaning may well be that the agency is authorized to exercise a degree of discretion. Congress has often enacted such statutes. For example, some statutes "expressly delegate[ ]" to an agency the authority to give meaning to a particular statutory term. Others

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[141] *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).
[142] *Id.* at 2266.
[143] *Id.* at 2273.
[144] *Id.* at 2267.

> 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."[145]

The Supreme Court's whipsawing between the language of "independent judgment" and "respect" leaves considerable questions about how circuit courts will apply *Loper Bright* in future cases.[146] One can read the Court as imposing *de novo* review.[147] Alternatively, one can read the quoted paragraph as embracing something similar to *Chevron*.[148] A more modest reading suggests the persistence of *Skidmore* review.[149] The empirical results provide some evidence of how circuit courts may decide cases going forward.

1. Agency Win Will Continue to Win Mundane Cases

The results demonstrate that agency win rates remain high even when courts employ traditional tools of statutory interpretation. Prior to *Loper Bright*, circuit courts were already deciding most cases at *Chevron* step one. Despite the change to judicial reasoning, courts agreed with agencies' interpretations of statutes at high rates (67.3%). Many of these outcomes would have been the same regardless of whether the court applied *Chevron* or *Loper Bright*—especially when the court acknowledged that the agency had adopted the best interpretation of the statute. In sum, many judges had adjusted their decision-making to conform to the post-*Chevron* world.

Agency success at *Chevron* step one is unsurprising. Other empirical research suggests that agencies strive to identify the best meaning of the statute in most cases. Agencies and the

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[145] *Id.* at 2263 (citations omitted).

[146] *Cf. id*. at 2265.

[147] *See* Walker, *supra* note 7.

[148] *See* Vermeule, *supra* note 7.

[149] *See* Kristin E. Hickman, *Anticipating a New Modern* Skidmore *Standard*, U. MINN. L. SCH. LEGAL. STUD. RSCH. PAPER SERIES, 1, 3 (No. 24-37) (2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4941144.

Department of Justice assess litigation risk when adopting new interpretations and prefer interpretations that best implement the statutory regime enacted by Congress.[150] The results suggest that agencies accomplish this objective in most cases.

Admittedly, we do not know how cases decided at *Chevron* step two would have fared under *Loper Bright*. In some of these cases, *Chevron* may not have been outcome-determinative. Courts may have concluded their analyses at *Chevron* step two because, although the agency adopted the best meaning of the statute, the statute was ultimately ambiguous. In other cases, however, the court may have concluded that the agency's interpretation was "reasonable" but not necessarily the best interpretation.

We should be cautious in suggesting that *Loper Bright* will have no impact. The dataset provides no method for distinguishing mundane cases from hard cases. Many questions of statutory interpretation involve rote implementation that would come out the same under any standard of review. In other cases, however, agencies pursue expansive interpretations of their statutes for political reasons. Many of these cases involve complex or controversial policy decisions. These hard cases are where *Loper Bright* may have the greatest impact. Future research should focus on explaining the variation observed in this set of cases.

2. The "Hard Cases"

One of *Chevron*'s virtues was that it tempered the influence of political ideology in judicial decision-making. As the *Chevron* court acknowledged, "Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences."[151] Conservative judges were more likely to defer to liberal interpretations when they applied *Chevron*, and liberal judges were more likely to defer to conservative interpretations when they

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[150] Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 YALE L.J. 1600, 1635-36 (2023); Walker, *supra* note 99, at 1062.

[151] Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984).

applied *Chevron*.[152] *Loper Bright* leaves open the question of how courts will reconcile the need to exercise their independent judgment with judicial restraint.

The results raise concerns that *Loper Bright*'s emphasis on independent judgment threatens to introduce a greater level of partisanship into judicial decision-making. In the era of administrative skepticism, judges appointed by Democratic presidents reached different conclusions at *Chevron* step one than judges appointed by Republican presidents.

Disagreements over interpretive methods and tools provide plenty of space for judges to influence outcomes. As then-Judge Brett Kavanaugh acknowledged, "[T]here can be serious incentives and pressures—often subconscious—for judges to find textual ambiguity or clarity in certain cases" because the judge wants the agency to reach a decision that "accords better with the judge's sense of reason, justice or policy."[153] Judges may subconsciously decide that certain sets of tools, such as legislative history, should supersede other tools because the first set of tools attains the judge's desired outcome. Because *Loper Bright* leaves considerably less space for judges to "respect" agency interpretations, these ideological disagreements may play a greater role in judicial decision-making than at *Chevron*'s height.

In other cases, however, a lack of expertise—rather than ideology—may encourage courts to simply parrot the agency's interpretive analysis.[154] Judges are generalists who are not steeped in the intricate details of the statutory framework. As Kristin Hickman and I explained:

> [M]erely telling courts to decide cases for themselves and not read too much into statutory gaps is unlikely to eliminate judicial deference to agency interpretations of law. When faced with two competing, seemingly

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[152] Barnett et al., *Administrative Law's Political Dynamics*, *supra* note 14, at 1500.

[153] Kavanaugh, *supra* note 10, at 2140.

[154] Nicholas R. Bednar & Kristin E. Hickman, Chevron*'s Inevitability*, 85 GEO. WASH. L. REV. 1392, 1455 (2017).

> reasonable interpretations of a statute, and when traditional tools of statutory construction fail to provide a clear answer, many judges will be inclined simply to side with the agency charged by Congress with administering the statute. . . . Without [*Chevron*], courts in such circumstances may very well still side with the agency but with less transparency, justifying their decisions using whatever interpretive tools the agency suggested in its brief—even if that reasoning did not persuade the court that the agency's interpretation really was superior.[155]

We should be careful to avoid suggesting that *Loper Bright* will result in more consistent applications of law. At least some of the empirical evidence suggests that judges appointed by different presidents approached *Chevron* step one differently. There is no reason to believe that *Loper Bright* will change this dynamic. Purposivists and textualists will continue to draw on different tools of interpretation to decide what the statute means. *Loper Bright* has not resolved these disagreements.

CONCLUSION

The growth in administrative skepticism at the Supreme Court changed judicial review of agencies' interpretations of statutes. These changes provide evidence for how circuit courts may respond to *Loper Bright* in the coming years. In many respects, the Supreme Court's skepticism encouraged the circuit courts to use the type of interpretive reasoning prescribed by *Loper Bright*. Consequently, the Supreme Court's skepticism—not *Loper Bright* itself—may be the causal mechanism that best explains changes to judicial review of agency interpretations of statutes. Despite this change, agencies continued to win at relatively high rates. Yet initial results raise concerns that *Loper Bright* may result in more ideological reasoning, especially in politically contentious cases. Future empirical work will need to engage with the pre-*Loper*

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[155] *Id.* at 1460.

Bright era to fully understand whether it had a meaningful impact of judicial review.