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TWO TAKES ON ADMINISTRATIVE CHANGE FROM THE ROBERTS COURT

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I. INTRODUCTION

In *Loper Bright Enterprises v. Raimondo*,[1] the Supreme Court finally did what many long hoped (or feared) it would do: overrule *Chevron v. Natural Resources Defense Council*.[2] *Chevron* instructed courts to defer to an agency's interpretation of an ambiguous statutory provision, provided the interpretation was reasonable.[3] *Chevron*, according to Justice Kagan, had "served as a cornerstone of administrative law" and "the warp and woof of modern government, supporting regulatory efforts of all kinds—to name a few, keeping air and water clean, food and drugs safe, and financial markets honest."[4] Not surprisingly, statutes governing such matters contain quite a number of ambiguities. Under *Chevron*, agencies could rely on their expertise and policy views to resolve them. Under the new regime ushered in by *Loper Bright*, courts will resolve ambiguities by determining what the "best" interpretation of the statute is.[5]

In many respects, *Loper Bright* was consistent with emergent patterns in the Roberts Court's jurisprudence. As Justice Kagan wrote in her dissent, "it is impossible to pretend that today's decision is a one-off, in either its treatment of agencies or its treatment of precedent."[6] *Loper Bright*, like many Roberts Court decisions, illustrated "the Court's resolve to roll back agency authority, despite

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[1] 144 S. Ct. 2244 (2024).
[2] 467 U.S. 837 (1984), *overruled by* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).
[3] *See Chevron*, 467 U.S. 837.
[4] *Loper Bright*, 144 S. Ct. at 2294 (Kagan, J., dissenting).
[5] *Loper Bright* contains two possible caveats—it notes that Congress can delegate policymaking discretion to agencies (rather than legal determinations) and that courts may continue to apply a version of *Skidmore* deference to agencies' interpretations of statutes. *See Loper Bright*, 144 S. Ct. at 2258–60, 2264–65.
[6] *Loper Bright*, 144 S. Ct. at 2311 (Kagan, J., dissenting).

congressional direction to the contrary."[7] The day before *Loper Bright*, for example, the Court issued a decision holding that the Seventh Amendment prohibited the Securities and Exchange Commission (SEC) from levying civil penalties for securities fraud using the agency's internal adjudicative processes.[8] It also issued a decision pausing enforcement of the Environmental Protection Agency's (EPA) Good Neighbor Rule—designed to combat interstate pollution—by deploying an aggressive form of arbitrary-and-capricious review.[9] *Loper Bright* also continued the Roberts Court's pattern of overruling precedent, either formally in an opinion, or effectively doing so by artificially narrowing or cabining previous cases.[10]

But in at least one respect, *Loper Bright* marked a departure from a throughline in some of the Roberts Court's other decisions. In overruling *Chevron*, the Court displayed open skepticism and even hostility to the notion that regulatory agencies could change their interpretations of ambiguous statutory provisions from presidential administration to presidential administration based on differing policy views. Yet in the Court's presidential removal cases, the Court has insisted that Presidents must have the power to remove agency heads to facilitate the President's ability to influence agencies' policy positions and reverse positions with which the new President disagrees. That puts these two lines of decisions in tension with one another: whereas in the removal cases, the Court views itself as ensuring that a President holds broad influence over an agency's policy positions, *Loper Bright* restricts the degree to which agencies can adapt based on the views of the President. This essay outlines this tension before surveying some possible ways to resolve it.

II. TWO ATTITUDES TOWARD CHANGING AGENCY VIEWS

This Part contrasts the Court's skeptical posture toward policy-driven regulatory change in *Loper Bright* with the Court's insistence, in the removal cases, that Presidents enjoy unfettered authority to remove agency officials so that they may maintain influence over policy. In the former context, the Court evinced considerable hostility toward agencies altering their positions in response to changes in administration; in the latter cases, the Court suggested that agencies changing positions across different presidential administrations is a natural and even affirmatively desirable component of democracy and electoral accountability.

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[7] *Id.*

[8] SEC v. Jarkesy, 144 S. Ct. 2117 (2024). For criticism about how *Jarkesy* and other decisions effectively generate a new substantive due process doctrine based on freewheeling notions of liberty that is being used to refashion the institutions of the administrative state, see Leah M. Litman, *The New Substantive Due Process*, 103 TEX. L. REV. __ (forthcoming 2025).

[9] Ohio v. EPA, 144 S. Ct. 2040 (2024).

[10] *See e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022); Edwards v. Vannoy, 593 U.S. 255 (2021); Knick v. Twp. of Scott, 588 U.S. 180 (2019); Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 585 U.S. 878 (2018); *Jarkesy*, 144 S. Ct. at 2117; Students for Fair Admissions, Inc. v. Presidents & Fellows of Harvard Coll., 600 U.S. 181 (2023); Kennedy v. Bremerton Sch. Dist., 597 U.S. 507 (2022).

A. The End of Chevron

Chevron was the foundational doctrine governing the interpretation of statutes administered by federal agencies. Under *Chevron*, if a court applied the traditional tools of statutory interpretation and concluded that a statute was ambiguous on some point, the court would defer to the agency's reasonable resolution of that ambiguity.[11] There were various caveats or exceptions to this rule, such as the major questions doctrine, as well as limitations on the kind of agency determinations that received deference.[12]

Chevron itself involved an interpretive "flip flop" concerning the Clean Air Act. The Reagan EPA had taken the position that the phrase "stationary source" could be interpreted in a somewhat looser way than it had been read by prior administrations, with the effect that some sources of pollution would not be as stringently regulated as before.[13] In blessing the EPA's new interpretation, the Court wrote that an agency's initial interpretation "is not instantly carved in stone."[14] And in fact, many early supporters of *Chevron* were conservatives eager to roll back what they perceived as regulatory excess by prior Presidents.[15] After it took hold, *Chevron* structured the relationship between Congress, courts, and agencies for nearly four decades.

But especially over the last eight or so years, the Supreme Court has evinced increasing skepticism of *Chevron*, often by declining to rely on it or by announcing exceptions to it.[16] These efforts culminated in the Court's 2024 decision in *Loper Bright Enterprises v. Raimondo*, which formally overruled *Chevron* and directed courts to render their own best interpretation of statutes administered by agencies, regardless of how ambiguous the statute in question may be.[17] The Court provided two caveats. First, it stated that with respect to some statutes—including those using truly open-ended words such as "appropriate" or "reasonable"—the "best" interpretation of the statute may be that the agency is "authorized to exercise a degree of discretion."[18] Second, the Court appeared to endorse the approach taken in *Skidmore v. Swift*,[19] under which agencies' proffered interpretations are to be given "respect" to the extent they shed light on statutory meaning.[20] Importantly,

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[11] *See* Chevron v. Nat'l Defs. Res. Council, 467 U.S. 837, 842–43 (1984).
[12] *See* West Virginia v. EPA, 597 U.S. 697 (2022); United States v. Mead Corp., 533 U.S. 218 (2001). For criticisms of these exceptions, see Lisa Schultz Bressman, *How "Mead" Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005), and Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009 (2023).
[13] *See Chevron*, 467 U.S. at 839–40.
[14] *Id.* at 863.
[15] *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1087 (2008) (reporting that, after *Chevron*, "[a]lmost immediately, Reagan Administration officials and appointees proclaimed a '*Chevron* Revolution'").
[16] *See* Deacon & Litman, *supra* note 12, at 1019–20.
[17] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).
[18] *Id.* at 2263.
[19] 323 U.S. 134 (1944).
[20] *See Loper Bright*, 144 S. Ct. at 2259–65.

and as discussed further below, *Skidmore* gives less weight to agency interpretations that are inconsistent with the agency's prior views.[21]

One important consequence of overruling *Chevron* is that agencies will be much more constrained in their ability to change policy from one administration to the next. Because *Chevron* was based on the view that resolving statutory ambiguity involves an act of policymaking discretion, agencies were allowed to update or alter their interpretations based on their views on public policy.[22] And even when courts deemed an agency's interpretation to be reasonable, that did not bar subsequent agency officials from reinterpreting the statute in a different way, provided that the new interpretation was also reasonable.[23] Not so under *Loper Bright*. Now courts are in charge of all questions of statutory interpretation. And once a court renders its "best" interpretation, the agency is stuck with that interpretation indefinitely, absent a congressional amendment or subsequent judicial decision reversing the earlier one.

In overruling *Chevron*, the Court both understood that consequence and celebrated it. During the oral arguments in the *Chevron* cases, the Republican-appointed Justices repeatedly expressed concern that *Chevron* allowed agencies to flip back and forth between positions across different presidential administrations. Justice Kavanaugh evoked this idea in explaining why *Skidmore* deference might be justified even though *Chevron* is not. During oral argument, he observed that "[a] big difference between *Skidmore* and *Chevron* -- there are others -- is, when the agency changes position every four years, that's going to still get *Chevron* deference, but *Skidmore*, with respect to that interpretation, would drop out because it's not been a consistent and contemporaneous -- consistent from the contemporaneous understanding of the statute."[24] Justice Kavanaugh also described *Chevron* as "usher[ing] in shocks to the system every four or eight years when a new administration comes in, whether it's communications law or securities law or competition law or environmental law, and goes from pillar to post[.]"[25] Justice Gorsuch raised similar concerns,[26] calling *Chevron* a "recipe for instability" and "a recipe for anti-reliance."[27] Echoing the Justices' complaints, the advocate

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[21] *Id.* at 2259.

[22] *See, e.g.*, Verizon v. FCC, 740 F.3d 623, 636 (D.C. Cir. 2014) ("[S]o long as an agency 'adequately explains the reasons for a reversal of policy,' its new interpretation of a statute [is not to be] be rejected simply because it is new").

[23] *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982–83 (2005).

[24] Transcript of Oral Argument at 39–40, *Loper Bright,* 144 S. Ct. 2244 (No. 22-451).

[25] Transcript of Oral Argument at 96–97, Relentless, Inc. v. Dep't of Com., 144 S. Ct. 315 (2024) (No. 22-1219). *See also id.* at 97–98 ("I think they're doing it because they have disagreement with the policy of the prior administration and they're using what Chevron gives them and what they can't get through Congress to do it themselves, self-help").

[26] *Id.* at 23–24 (Justice Gorsuch: "And I'm struck on that score by the Brand X case, which involved broadband, in which this Court said, okay, agency, you automatically win with respect to one interpretation of the Bush administration, I believe it was, and then, of course, the next administration came back and proposed an opposite rule. MR. MARTINEZ: Right. JUSTICE GORSUCH: And then the next administration came back and flipped it back closer to the first. And as I understand it, the present Administration is thinking about going back").

[27] *Id.* at 93–94.

challenging *Chevron* described it as "a reliance-destroying doctrine because it facilitates agency flip-flopping."[28]

These kinds of concerns were not completely new. Both in the *Chevron* context and outside of it, various Justices had previously expressed disquiet with the executive branch changing positions after the inauguration of a new President.[29] And, not surprisingly, the same kind of complaint made its way into the Court's opinion in *Loper Bright*. There, after explaining why *Chevron* was wrongly decided, the Court proceeded to explain why the doctrine of stare decisis did not compel the Court to retain *Chevron*. "Rather than safeguarding reliance interests," the Chief Justice wrote, "*Chevron* affirmatively destroys them."[30] That is so, the majority explained, because "[u]nder *Chevron*, a statutory ambiguity … becomes a license authorizing an agency to change positions as much as it likes."[31]

That the Court intended to clamp down on agencies changing their positions also came through in the Court's description of the *Skidmore*-based approach the Court seemed to endorse in place of *Chevron*. *Skidmore* has come to be associated with numerous factors that courts use to judge the amount of respect due an agency's interpretation.[32] In *Loper Bright*, the Court appeared especially eager to emphasize three: the interpretation's consistency with prior agency views, its longstandingness, and whether or not it was issued contemporaneously with the statute in question. In sharing its understanding of how courts traditionally review agency interpretations, the Court stressed that "respect" for an agency's interpretation "was thought especially warranted when an Executive Branch interpretation was issued roughly contemporaneously with enactment of the statute and *remained consistent over time*."[33] Later on, the Court came back to the same theme: "[I]nterpretations issued contemporaneously with the statute at issue, and

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[28] Oral Argument at 5, *Loper Bright,* 144 S. Ct. 2244 (No. 22-451). *See also id.* at 22–23 ("But that absolutely makes clear that, you know, this is a reliance-destroying doctrine. And, frankly, if you said that Chevron is over and all of those step two cases that were decided are going to have stare decisis effect because of the level of generality point I made, you would be giving new stability to the law. It would be improving stability. And that's an important distinction from Kisor. In Kisor -- you know, the Kisor doctrine -- the Auer doctrine, rather, never had its Brand X moment where this Court made clear that the agency could flip 180 degrees. And, indeed, in Kisor itself, it suggested the opposite. But, here, with Chevron, we know this is a -- a reliance-destroying doctrine"); *id.* at 24–25 (similar).

[29] *See* Cristina M. Rodríguez, *Foreword: Regime Change*, 135 HARV. L. REV. 1 (2021) (documenting such concerns and exploring the tension between them and democratic values); *see also* Buffington v. McDonough, 143 S. Ct. 14, 20 (2022) (Gorsuch, J., dissenting from denial of certiorari) ("When the law's meaning is never liquidated by a final independent judicial decision, when executive agents can at any time replace one reasonable interpretation with another, individuals can never be sure of their legal rights and duties").

[30] *Loper Bright*, 144 S. Ct. at 2272.

[31] *Id.*

[32] *See generally* Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235 (2007).

[33] *Loper Bright*, 144 S. Ct. at 2247 (emphasis added).

which have remained consistent over time, may be especially useful in determining the statute's meaning."[34]

B. Presidential Removal

This section contrasts the Court's antipathy toward administrative agencies changing positions in the context of *Chevron* with the Court's acceptance of the same in recent decisions on presidential removal authority. In the course of explaining why presidents generally must have the power to remove the heads of administrative agencies, the Court has emphasized agencies' discretionary authority and the President's right to control the exercise of such authority, including by directing agencies to change their positions. Indeed, the Court has insisted on presidential control over agencies *precisely to enable control sufficient to ensure agencies will change positions based on the views of the current President*. And it has linked electorally driven changes in agencies' positions to various constitutional values including democracy and accountability.

Some of these themes appeared in Justice Scalia's dissenting opinion in *Morrison v. Olson*,[35] which is often depicted as foundational in removal debates. In that dissent, Justice Scalia spun out a parade of horribles that might result from upholding the independent counsel statute at issue in *Morrison*. That statute allowed a prosecutor who was not removable at will by the president or the attorney general to investigate and bring charges against members of the executive branch, among other individuals. The parade of horribles Scalia identified resulted from the fact that, with respect to such prosecutors, "there would be no one accountable to the public."[36] For Scalia, that threatened to undermine a key safeguard "the Founders envisioned when they established a single Chief Executive accountable to the people: th[at] blame can be assigned to someone who can be punished."[37]

That people retain power to punish a chief executive for the decisions of their subordinates is, in this view, key to electoral accountability—if voters disagree with decisions made by subordinate officials, they know to blame the president and can vote her out of office. The story necessarily assumes a decisionmaking space in which subordinate officials could arrive at several different decisions within the bounds of the law. In order for the prospect of electoral punishment to be an important safeguard, officials must have made a *choice* which voters can evaluate and approve or disapprove via the ballot box. Moreover, if and when voters punish the president for such choices (by voting her out of office), it must be because they favor someone else inclined to select subordinates who would make different choices—i.e., people who would alter the positions of their predecessors.

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[34] *Id.* at 2262. This standard of review channels the antinovelty elements of the major questions doctrine and the Court's constitutional interpretation in separation of powers cases. *See* Deacon & Litman, *supra* note 12, at 1069–82; Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1407–08 (2017).

[35] 487 U.S. 654 (1988).

[36] *Id.* at 731 (Scalia, J., dissenting).

[37] *Id.*

In *Free Enterprise Fund v. Public Company Accounting Oversight Board*,[38] the Court kicked off a trend of tightening the President's control over the administrative state. That case similarly centered on agencies' ability to reach different conclusions based on the policy views of the President.[39] Echoing Justice Scalia, the majority quoted Alexander Hamilton, writing that "[w]ithout a clear and effective chain of command, the public cannot 'determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.'"[40] Subsequent passages in the opinion underscored that presidents possess the power to remove agency heads precisely to allow presidents to force subordinates to do the President's policy bidding. The majority opined that "[t]he President has been given the power to oversee executive officers; he is not limited, as in Harry Truman's lament, to 'persuad[ing]' his unelected subordinates 'to do what they ought to do without persuasion.'"[41] The Court added: "Congress cannot reduce the Chief Magistrate to a cajoler-in-chief."[42]

Here too, the Court's insistence that the President must be able to dictate policy outcomes seems to envision the possibility—and the desirability—of presidentially directed policy changes by administrative agencies. The briefing in *Free Enterprise Fund* made the links more explicit, connecting the need for presidential removal to the possibility that elections might force agencies to change policy. The opening brief for the parties challenging the statutory protection from removal argued that "[t]he people can remain sovereign only if they know which branch to hold responsible for unpopular or ineffective government action and policies, and only if they are able to correct those problems through periodic elections."[43] It is important, the brief continued, for "the people" to know who is responsible for executing the laws (and other executive tasks) so that they "would be able to overturn unpopular execution through the ballot box."[44] The brief underscored the need for the President to have the "power to ensure that the laws are exercised" in ways "consistent with his enforcement or financial policies."[45] The reply brief echoed similar themes.[46]

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[38] 561 U.S. 477 (2010).
[39] *See id*.
[40] *Id.* at 498 (quoting THE FEDERALIST No. 70, at 476 (Alexander Hamilton) (Jacob Cooke ed., 1961)).
[41] *Id.* at 501–02 (responding to dissent by Breyer, J., 561 U.S. at 524).
[42] *Id.* at 502.
[43] Brief for Petitioners at 13, *Free Enter.*, 561 U.S. 477 (No. 08-861).
[44] *Id*. at 13–14.
[45] *Id*. at 40.
[46] *See* Reply Brief at 1, *Free Enter.*, 561 U.S. 477 (No. 08-861) ("The Board clearly runs afoul of these foundational purposes and this precedent because the democratically accountable President concededly has no direct influence over the Board"); *id.* at 4 ("By so dramatically limiting the group of principal officers who must be appointed through the confirmation process, Respondents' analysis eviscerates the Framers' purpose of ensuring 'political accountability relative to important Government assignments'"); *id.* at 8–9 ("Thus, the President can easily perform his constitutionally assigned functions by directing the inferior officers through a chain of command, just as a general's ability to control a major is not affected because his orders are conveyed through a colonel. But

Seila Law LLC v. Consumer Financial Protection Bureau[47] (CFPB) doubled down on this reasoning.[48] *Seila* identified the CFPB Director's five-year term as uniquely problematic because it could impede the President's ability to influence the policy and direction of the agency. As the Court stated: "Some Presidents may not have any opportunity to shape its leadership and thereby influence its activities."[49] The Court explained, echoing a line of questioning from Justice Kavanaugh at oral argument,[50] that "an unlucky President might get elected on a consumer-protection platform and enter office only to find herself saddled with a holdover Director from the competing political party who is dead set against that agenda."[51] Rather than accept that possibility, the Court emphasized the importance of a mechanism to "bring the agency in line with the President's preferred policies."[52] Similar themes ran through oral argument and the briefing, where justices and parties stressed the necessity of protecting a president's ability to bring agencies in line with the President's policy preferences in order to ensure a responsive and accountable government.[53]

Seila Law thus stands in sharp contrast to *Loper Bright*. While the former celebrated Presidents' ability to force changes by agencies, in *Loper Bright* the

since, unlike with his alter egos, the President has no power to command the SEC to follow his personnel or policy preferences, he obviously cannot engage in such chain-of-command supervision of the Board through the SEC").

[47] 140 S. Ct. 2183 (2020).

[48] *See* Transcript of Oral Argument at 75*, Seila L.*, 140 S. Ct. 2183 (No. 19-7) (Justice Kavanaugh: "The next President in 2021 or 2025 or whenever will have to deal with a CFPB director appointed by the prior President potentially for his or her whole term without being able -- given your answer to Justice Alito -- being able to do anything about that difference in policy").

[49] *Seila L.*, 140 S. Ct. at 2204 (2020).

[50] *See* Transcript of Oral Argument at 36, *Seila L.*, 140 S. Ct. 2183 (No. 19-7) (Justice Kavanaugh: "[H]ow much does it matter that the tenure of the single director continues into the next President's term? Because I think that's when the problem really reveals itself, that the next President is going to have to deal for his or her whole term, potentially, with a CFPB director appointed by this President and will not be able to supervise or direct that person, even if that President has a wildly different conception of consumer financial protection?); *id.* at 53–54 ("And here's -- on the different in kind, just how this will play out if you were to win, it's really the next President who's going to face the issue, because a -- the head of this agency will go at least three or four years into the next President's term, and the next President might have a completely different conception of consumer financial regulatory issues yet will be able to do nothing about it").

[51] *Seila L.*, 140 S. Ct. at 2204 (emphasis omitted).

[52] *Id.*

[53] *See* Transcript of Oral Argument at 36, *Seila L.*, 140 S. Ct. 2183 (No. 19-7) (Justice Kavanaugh invoking presidents who may have "wildly different conceptions of consumer financial protection"); *id.* at 53–54 (similar); *id.* at 61 (Justice Alito imagining a president who says "I want to remove you because I think you are too pro-consumer and you're hurting the economy, or you are not sufficiently protecting consumer interests"); *see also* Brief for Petitioner at 28, *Seila L.*, 140 S. Ct. 2183 (No. 19-7) (arguing that "[t]he President possesses far less ability to control the single director of the CFPB," and thereby "retain policy influence," compared to heads of multi-member commissions); Reply Brief for the Respondent at 1, *Seila L.*, 140 S. Ct. 2183 (No. 19-7) ("[Unrestricted removal authority] ensures that the Executive Branch is responsible to the Chief Executive, who is ultimately responsible to the people").

Court was keen to limit agencies' ability to change their positions based on the views of a new President.

III. EXPLANATIONS

As the above synthesis suggests, the Court has adopted very different orientations toward agencies changing positions in response to switches in presidential administrations. In the *Chevron* context, the Court treated agencies changing positions based on the policy views of the President as a problem. In the context of presidential removal authority, however, the Court has sought to secure presidential control because the Court perceives it as important that a President be able to bring agencies in line with the President's views.

This Part briefly considers three possible explanations for the Court's seemingly different attitude toward administrative change. The first is simply that the Court has a selective commitment to democratic control and democracy. The second is that the Court might be comfortable with change that occurs through the exercise of the executive's enforcement discretion, which is presumably unaffected by *Loper Bright*, but not change that occurs through the issuance of new regulations. It concludes that neither of these two explanations adequately resolve the tension displayed by the Court's cases. A third possibility—that the Court envisions regulatory change occurring solely through the kinds of express or quasi-express delegations referenced in *Loper Bright*—remains, but is difficult to assess at this point.

A. Selective Commitment to Democracy

One possible explanation for the Court's different attitude toward agency change would be that the Court has, at best, a selective commitment to democracy. In the presidential removal cases, the Court seems to view democracy as a virtue—a way to ensure that unpopular policies and officials are subject to disapproval, and a way to ensure that democratically elected officials can influence administrative policy. In the *Chevron* line of cases, however, the Court seems to view democracy as a vice—a difficult and painful cost to regulated parties that is to be avoided.

There are more than a few recent examples of Supreme Court decisions that have been criticized on the ground that they impede democracy, meaning the ability of popular majorities to govern, with all voters capable of casting meaningful votes.[54] The Court invalidated a key provision of the Voting Rights Act, with the effect of invalidating the preclearance process of the Voting Rights Act.[55] It narrowly construed another provision of the Voting Rights Act in ways that makes it difficult to challenge preconditions to voting.[56] It has made it difficult to establish constitutional challenges to districting maps that dilute the power of minority

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[54] *See generally* Nicholas O. Stephanopoulos, *The Anti*-Carolene *Court*, 2019 SUP. CT. REV. 111 (2019); Melissa Murray & Katherine Shaw, Dobbs *and Democracy*, 137 HARV. L. REV. 728 (2024).
[55] Shelby Cnty. v. Holder, 570 U.S. 529 (2013). For criticism, *see generally* Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207 (2016).
[56] *See* Brnovich v. Democratic Nat'l Comm., 594 U.S. 647 (2021). For criticism, *see* Leah M. Litman, *Hey Stephen*, 120 MICH. L. REV. 1109, 1120, 1123 (2022).

voters.[57] It has held open the possibility of embracing some version of the independent state legislature theory, which would allow federal courts to override state executive and judicial decisions that expand voting opportunities.[58] It has held partisan gerrymandering nonjusticiable.[59] The list goes on. And of course, this jurisprudence has developed at a time when numerous elected Republican officials have expressed doubts about democracy as such.[60] In that light, perhaps the removal cases are simply an exception to the Court's generally weak commitment to ensuring democratic control. Or, the cases reveal the Court's selective concern for democracy.

Scholars have also detected a selective commitment to democracy within individual cases and between other related areas of law. For example, Melissa Murray and Katherine Shaw have argued that the Court's opinion in *Dobbs v. Jackson Women's Health Organization* is internally inconsistent and wavering in its commitment to democracy.[61] There, the Court emphasized the importance of democracy when insisting that state legislatures be given free rein to regulate and restrict abortion. But the Court discounted the anti-democratic features of those very same state legislatures, features brought about through partisan gerrymandering and enabled by the Court's own decisions. Murray has also explored the Court's selective commitment to democracy in the Court's cases on guns and abortion, where the Court has restricted legislatures' power vis-à-vis guns but expanded their power with respect to abortion.[62]

Returning to the administrative-law context: If the Court is indeed being selective in its commitment to facilitating democratic control, the question remains—what, if anything, might be put forward to explain such selectivity, i.e., when the Court favors democracy and when it does not? Perhaps some kinds of agency-driven changes are better than others, and the Court means to facilitate democratic control in those areas alone. We turn to such possible explanations next.

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[57] *See* Abbott v. Perez, 583 U.S. 1088 (2018); Alexander v. South Carolina Conf. of the NAACP, 602 U.S. ---- (2024).

[58] Moore v. Harper, 600 U.S. 1 (2023). For elaboration, *see* Leah M. Litman & Katherine Shaw, *The 'Bounds' of* Moore: Pluralism and State Judicial Review, 133 YALE L.J. F. 881 (2024).

[59] *See* Rucho v. Common Cause, 588 U.S. 684 (2019).

[60] *See, e.g.*, Glenn Thrush, *'We're not a democracy,' says Mike Lee, a Republican senator. That's a good thing, he adds*, N.Y. Times (Oct. 8, 2020), https://www.nytimes.com/2020/10/08/us/elections/mike-lee-democracy.html [https://perma.cc/84DL-MJ63]; Zach Beauchamp, *Sen. Mike Lee's tweets against "democracy," explained*, Vox (Oct. 8, 2020), https://www.vox.com/policy-and-politics/21507713/mike-lee-democracy-republic-trump-2020 [https://perma.cc/DVP8-AHC6].

[61] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022); Murray et al., *supra* note 54, at 729.

[62] *See* Melissa Murray, *Children of Men: The Roberts Court's Jurisprudence of Masculinity*, 60 HOUS. L. REV. 799 (2023). Judge Wilkinson had previously written that the Court's Second Amendment decision in Heller v. District of Columbia, 554 U.S. 570 (2008), was the conservative equivalent of Roe v. Wade, 410 U.S. 113 (1973). *See* J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 254 (2009).

B. Regulation vs. Enforcement Discretion

The second possible explanation for the Court's wavering stance toward democratic control of administration is that the *Chevron* cases view changes brought about through the promulgation of binding regulations as problematic, whereas the presidential removal cases mean to celebrate administrative change brought about through the exercise of agencies' enforcement discretion, i.e., agencies' power to set enforcement priorities or decline to enforce the law in particular circumstances. That is, perhaps the Court abandoned *Chevron* because *Chevron* allowed agencies to effect change via regulation, which the Court thinks is uniquely bad as far as stability and reliance go. But the Court in the removal cases does not think the same is true for changes in enforcement policies—and those are the changes the Court has in mind in the removal cases when it celebrates presidential control as a way to change agency policy.

The removal cases, however, do not suggest an exclusive focus on presidentially directed changes to enforcement policies, rather than regulations. Indeed, in the removal cases, the Court has emphasized that the agencies under review have significant regulatory powers as well as enforcement authority—all while emphasizing the necessity of presidents' ability to bring agencies in line through directing change.[63] So when the Court has waxed poetic about the importance of facilitating policy-based changes in these agencies, it has been in the context of agencies exercising their regulatory—and not just enforcement—powers.

Nor is it clear that the Court is, or should be, more comfortable with enforcement-based changes than regulation-driven ones, or that enforcement-based changes would be less destabilizing than rule-driven ones. The Court divided evenly over the lawfulness of the Deferred Action for Parents of Americans and Lawful Permanent Residents program, an Obama-era initiative rooted in the executive's enforcement discretion.[64] And changes that occur through regulation may better serve rule-of-law-type values, and better effectuate accountability and democracy, than changes rooted in enforcement discretion.[65]

C. Policymaking vs. Interpretation

A third possibility brings us back to *Loper Bright*'s suggestion that agencies will still retain discretion—including, presumably, the ability to change positions—where the best interpretation of the statute in question grants agencies a range of choices.[66] In other words, the Court appears to envision that courts will set the statutory boundaries that constrain agencies' decisionmaking, but that in some cases those boundaries will be broad enough to sustain a variety of policy outcomes.

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[63] *See, e.g.*, *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2193 (2020) ("Congress authorized the CFPB to implement that broad standard (and the 18 pre-existing statutes placed under the agency's purview) through binding regulations").

[64] *See* United States v. Texas, 579 U.S. 547 (2016).

[65] *See* Daniel T. Deacon, Note, *Deregulation Through Nonenforcement*, 85 N.Y.U. L. REV. 795 (2010).

[66] *See supra* note 18 and accompanying text.

Perhaps it is in such cases, where Congress has, for example, expressly invested an agency with some policymaking discretion to specify applicable requirements, that the Court imagines the President will be able to effect change. In overruling *Chevron*, the Court may mean to condemn only such agency changes that are "interpretive" in character—where the agency appears to be taking a different position about the meaning of some statute.

This potential explanation is difficult to assess at this point in part because the Court's effort to demarcate the boundaries between permissible exercises of *policymaking* discretion and impermissible attempts to alter statutes' *meaning* was brief and under-developed.[67] In *Loper Bright*, the Court merely observed that overruling *Chevron* "is not to say that Congress cannot or does not confer discretionary authority on agencies."[68] The Court did not elaborate on how to determine when agencies have been invested with discretionary policymaking authority by Congress. It did say that such authority may be indicated by the use of broad words like "appropriate," but it may also soon find that Congress's use of such language is constitutionally suspect under the nondelegation doctrine.[69]

The statutory delegation to the CFPB expressly mentioned by *Seila Law* illustrates some of the difficulties courts will confront.[70] The Consumer Financial Protection Act specifically authorizes the CFPB to "prescribe rules . . . identifying as unlawful unfair, deceptive, or abusive acts or practices" in connection with certain financial transactions.[71] In some ways, that delegation resembles a classic open-ended grant of discretionary authority. But this Court in particular may also be likely to say that each of the words used—"unfair," "deceptive," and "abusive"—have interpretive edges that limit the universe of actions that agencies can classify as, for example, deceptive. *Loper Bright* instructs courts to determine such boundaries using their independent judgment. How judges are to confront cases of this nature remains an open question. We doubt, as a predictive matter, that our current Supreme Court will allow the lower courts to drive a truck through *Loper Bright*'s exceptions. What is clear even now, however, is that *Loper Bright* leaves agencies significantly less discretion to adapt their rules based on the views of the current administration.

Finally, any explanation that suggests agencies have authority to change directions in areas of discretionary policymaking but not interpretation will of course not be satisfying to those who reasonably view the interpretation of statutes as calling for some degree of policymaking, at least when the statute's text is susceptible to different meanings. As Justice Kagan wrote in her *Loper Bright*

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[67] For a more extensive academic effort, *see* Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852 (2020).
[68] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2268 (2024).
[69] *See* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 285–89 (2021) (documenting resurgence of nondelegation ideas in the Court's jurisprudence).
[70] *See* Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2193 (2020).
[71] 12 U.S.C. § 5531(b).

dissent, "*Chevron*'s presumption reflects that resolving statutory ambiguities, as Congress well knows, is 'often more a question of policy than of law.'"[72]

IV. CONCLUSION

This piece has focused on the differing attitudes the Court has displayed toward administrative change in the Court's opinion overruling *Chevron* and in its decisions on presidential removal authority. There are, of course, important similarities between the two lines of cases. Both sets of cases reallocate decisionmaking authority between Congress, courts, and agencies in ways that give more authority to the courts. The presidential removal cases allow courts to second guess Congress's decisions about how to structure administrative bodies, and the decision to overrule *Chevron* transfers power from those decisionmaking bodies to the courts. But it is still worth considering why the Court seems to have taken such different approaches to the prospect of administrative change caused by changeover in control of the presidency.

[72] *Loper Bright*, 144 S. Ct. at 2299 (Kagan, J., dissenting) (quoting Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 696 (1991)); *id.* ("The task is less one of construing a text than of balancing competing goals and values. Consider the statutory directive to achieve 'substantial restoration of the [Grand Canyon's] natural quiet.' Someone is going to have to decide exactly what that statute means for air traffic over the canyon. How many flights, in what places and at what times, are consistent with restoring enough natural quiet on the ground? That is a policy trade-off of a kind familiar to agencies—but peculiarly unsuited to judges").