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ARTICLES

REGULATORY SETTLEMENT, STARE DECISIS, AND *LOPER BRIGHT*

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In Loper Bright v. Raimondo*, the Supreme Court adopted and deployed a particular narrative about agency action in support of overruling* Chevron*: Agencies reverse their own statutory interpretations "as much as [they] like[]," creating pervasive instability in the law, thereby destroying private reliance interests. Based on a study of two decades of agency regulations affirmed by the D.C. Circuit under* Chevron*, we show how infrequently agencies reversed their interpretive positions. Our study suggests that the Court's regulatory "whiplash" narrative is overstated and that there is an underappreciated institutional settlement for notice-and-comment rules under* Chevron*. Identifying this regulatory settlement is important not only to correct the record but because it sheds light on a pressing question raised by* Loper Bright*: How much stare decisis effect should courts give to prior judicial decisions that affirmed an agency interpretation in reliance on* Chevron*? Our study reveals the true risks to legal stability that would come from courts re-interpreting the relevant statutory language and reversing previously upheld regulations. Courts therefore should have an extraordinary justification for overruling or avoiding precedent that affirmed an agency regulation under* Chevron*. In addition, our study provides guidance to courts on another significant issue after* Loper Bright*: How much respect should they give under* Skidmore *to regulations that amend the agency's prior regulations in some respect? Although we find that agencies rarely reversed their interpretive positions under* Chevron*, we also find that they did revise their regulations in routine ways, as a necessary part of informed rulemaking. Our study suggests that courts should not treat any agency regulatory change as proving the Court's whiplash narrative and as presumptively ousting amended regulations from judicial consideration and respect.*

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INTRODUCTION

How frequently do agencies reverse themselves? According to the Supreme Court, the answer is quite a bit. In *Loper Bright Enterprises v. Raimondo*,[1] the Court embraced the view that *Chevron*[2] created conditions under which agencies freely reverse their positions, thereby "affirmatively destroy[ing]" reliance interests and creating "an eternal fog of uncertainty."[3] Justice Neil Gorsuch introduced this idea when he was a judge on the Court of Appeals for the Tenth Circuit, suggesting that *Chevron* facilitates the agency "revers[ing] its current view 180 degrees anytime based merely on the shift of political winds."[4] Justice Gorsuch repeated the argument after he joined the Supreme Court, mostly with little success in persuading the majority until *Loper Bright*.[5] That

[1] 144 S. Ct. 2244 (2024).

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

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

[4] Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring).

[5] *See, e.g.*, Kisor v. Wilkie, 139 S. Ct. 2400, 2438 (2019) (Gorsuch, J., concurring) (suggesting that deference doctrine of Auer v. Robbins, 519 U.S. 452 (1997), law is unstable, determined by political actors and the shifting winds of popular opinion in ways that only the well-heeled

decision marked the triumph of Justice Gorsuch's narrative, as he made clear in his lengthy concurrence: *Chevron* invited agency "whiplash."[6]

The extent to which agencies reversed their own interpretive positions under *Chevron* was an important question leading up to *Loper Bright*. If regulatory law constantly vacillated from one interpretive position to another under *Chevron*—from yes, federal law authorizes "net-neutrality" regulation to no, it does not, for example—there were considerable reasons for concern.[7] Such volatility would deter private investment and hinder the ability of regulatory stakeholders to plan their affairs. It would upset the reliance interests of ordinary individuals. It would also undermine the capacity of regulatory law to serve basic rule-of-law functions, such as notice and predictability.

Even though *Chevron* is gone, the concern for the stability of regulatory law is not. That concern affects the answer to a pressing question raised in *Loper Bright*: How much stare decisis effect should courts give to judicial decisions that upheld agency action relying on *Chevron*? The Court offered reassurance that "[t]he holdings of those cases that specific agency actions are lawful . . . are still subject to statutory *stare decisis*," and the mere fact that those cases relied on *Chevron* does not constitute a "special justification" for overruling them.[8] Justice Elena Kagan, in dissent, was unconvinced. She warned that *Loper Bright* would open the door to courts reversing such decisions, creating a "jolt to the legal system."[9] *Loper Bright* thus not only took a side on the question of *Chevron*'s effect on regulatory stability but possibly opened that question for every prior decision that upheld agency action in reliance on *Chevron*.[10]

Missing from these assertions of regulatory (in)stability is something critical: an empirical investigation of regulatory law under

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are in a good position to predict); Buffington v. McDonough, 143 S. Ct. 14, 20–21 (2022) (Gorsuch, J., dissenting) (directly arguing that *Chevron* should be abandoned because it undermines fair notice of the law); *see also infra* text accompanying notes 39–57 (examining the development of Justice Gorsuch's critique).

6 *Loper Bright*, 144 S. Ct. at 2288 (Gorsuch, J., concurring).

7 *See In re* MCP No. 185, 124 F.4th 993, 1000 (6th Cir. 2025) (describing the vacillations and reversing the 2024 Safeguarding and Securing the Open Internet Order from the Federal Communications Commission (FCC)).

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

9 *Id.* at 2310 (Kagan, J., dissenting).

10 Justice Kagan also observed that *Loper Bright* called into question regulations that were long settled but had yet to be challenged. *See id.* at 2310. As we note below, the same term the Court decided *Loper Bright* it also held that a claim does not accrue for the purposes of the APA's statute of limitations until a party is injured, allowing any new entity to challenge the validity of any regulation within six years of its injury caused by that regulation, even if the regulation itself has been in effect for decades. *See* Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys., 144 S. Ct. 2440, 2448–49 (2024).

Chevron. In this Article, we ask a simple empirical question and trace its implications for judicial review of agency action. Focusing on regulations that were upheld in the D.C. Circuit under *Chevron* step two in a twenty-year period (2004–2024), we ask: How frequently did agencies reverse their regulations once upheld under *Chevron*? The whiplash narrative asserts that *Chevron* facilitates agencies reversing their positions "180 degrees" and "as much as [they] like[]."[11] If that is true, then one might expect to see that, even though their regulations had been upheld under *Chevron*—or, according to the narrative, especially because they had been upheld under *Chevron*—agencies would reverse them. Indeed, the whiplash narrative suggests that high-profile reversals, such as the net neutrality flip-flop, are representative of the main run, or at least a sizeable portion, of agency regulatory activity under *Chevron*. In this way, the whiplash narrative views agency action as a function of presidential or self-serving agency priorities, and *Chevron* as effectively preventing courts from intervening to stabilize the law.[12]

Our empirical investigation suggests a different account of regulatory law under *Chevron*: Congress delegates; agencies issue regulations through notice-and-comment rulemaking; and, once those regulations are upheld by courts under *Chevron* (step two), agencies rarely reverse their interpretive positions in subsequent notice-and-comment rulemaking. Instead, agencies revise their regulations relatively modestly and incrementally as part of informed rulemaking.[13] Such amendments arise because factual circumstances are not static, so

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[11] Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring); *Loper Bright*, 144 S. Ct. at 2272.

[12] The whiplash narrative might raise a more general concern about the connection between *Chevron* and agency reversals. On this view, *Chevron* was problematic simply because it gave agencies the latitude to change their interpretive positions, thus destabilizing the law and upsetting private reliance interests—regardless of whether any court had been given the opportunity to intervene and stabilize the law. If that is the concern, it might be worth investigating the extent to which agencies reversed their interpretive positions even as to regulations that were never subjected to judicial review under *Chevron*. Our study does not investigate this possibility. Rather, as explained in more detail below, we investigate the extent to which agencies reversed their interpretive positions once they received judicial assurance of their authority to do so—that is, once a court had affirmed their interpretations under *Chevron* step two. This method provides a targeted way to study the connection between *Chevron* and interpretive reversals. *See infra* text accompanying note 97. In addition, it captures the affront to judicial review and the APA on which the whiplash narrative seems to fixate: A court had occasion to stabilize the law in the context of a case but failed to precisely because of *Chevron*.

[13] *See, e.g.*, Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983) (explaining an agency is not required to "establish rules of conduct to last forever," but rather "must be given ample latitude to 'adapt [its] rules and policies to the demands of changing circumstances'" (first quoting Am. Trucking Ass'ns, Inc. v. Atchison, Topeka, & Santa Fe Ry. Co., 387 U.S. 397, 416 (1967); and then quoting *In re* Permian Basin Area Rate Cases, 390 U.S. 747, 784 (1968))).

the assumptions and predictions that agencies make in their regulations are not static. In addition, they arise because agencies confront novel applications and learn from experience, as well as provide clarifications and correct technical errors. Agencies therefore issue amendments to their regulations quite often but rarely flip or reverse their interpretive positions once those positions have been affirmed.[14]

Far from a story about judicial affirmance under *Chevron* as a license and trigger for agencies to reverse their interpretations, our study suggests that such affirmance functioned as a ratification that created a *regulatory settlement* in which agencies rarely reversed their interpretive positions. Once a court affirmed a regulation under *Chevron*, the interpretive position effectively came to rest thereafter. Our study thus reveals an account of regulatory law as a multi-branch equilibrium that is more consistent with the conceptualization of law offered by William Eskridge and Philip Frickey in their article *Law as Equilibrium*[15] than that suggested by the whiplash narrative.

Our findings have immediate practical significance well beyond setting the record straight. To begin with, they bear directly on the pressing question following *Loper Bright* of the stare decisis effect of prior decisions that relied on *Chevron* to uphold agency actions. In *Loper Bright*, the stare decisis issues created by overruling *Chevron* were addressed primarily in terms of the private reliance interests on the decades-old precedent itself,[16] or the private reliance interests on regulations that are now newly subject to judicial reversal.[17] We show there are even larger stakes. The decisions that upheld agency interpretations in our study overwhelmingly reflect a stable, three-branch regulatory settlement. In view of this settlement, courts should be especially reluctant to overrule those decisions or depart from the agency interpretations they affirmed.

Our findings also have implications for how courts apply *Skidmore*[18] to review agency regulations after *Loper Bright*. The whiplash narrative paints a dark picture of agency regulatory change and therefore invites courts to view any revision an agency makes to a regulation as suspect and ineligible for respect under *Skidmore*. Our study suggests that courts should not approach agency regulations with a presumption of

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14 *See infra* Section II.A (defining "reversal" for purposes of the study presented herein).

15 William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 28 (1994) (arguing law results from settlement among competing institutions, each with authority to trump decisions of the others).

16 *See Loper Bright*, 144 S. Ct. at 2272 (explaining how *Chevron* inherently made it difficult for courts or other actors to "plan around agency action").

17 *See id.* at 2310 (Kagan, J., dissenting) (noting that private parties have ordered their affairs around rules now subject to challenge).

18 Skidmore v. Swift & Co., 323 U.S. 134 (1944).

agency inconsistency and legal instability whenever they change, in any respect, a previous regulation. Rather, courts should appreciate that agency regulatory change often is a routine part of informed rulemaking and accord regulations respect when they are the product of agency expertise and experience.

By questioning the empirical basis of the whiplash narrative, we do not deny that there have been significant, high-profile agency reversals on issues of national importance—on communications policy (the net-neutrality reversals from the Federal Communications Commission (FCC)),[19] environmental policy (the Clean Power Plan issue and repeal from the Environmental Protection Agency (EPA)),[20] and on immigration (the Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) issue and attempted rollbacks).[21] Our study suggests, however, that those high-profile, politically salient reversals have not been representative of the landscape of agency regulatory law; we argue, moreover, focus on those examples misleads. A handful of such reversals may have been a reason for re-evaluating *Chevron*. But they do not justify carrying forward the picture of agencies as flip-floppers and regulatory law as persistently unstable.

Nor are we blind to President Donald Trump's efforts in his second administration to assert an unprecedented level of control over agency policy.[22] He has made clear that he seeks the reversal via repeal of many routine agency regulations, and he may have some success.[23] But if he

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19 *See In re* MCP No. 185, 124 F.4th 993 (6th Cir. 2025).

20 *See* American Lung Ass'n v. Env't Prot. Agency, 985 F.3d 914 (D.C. Cir. 2021).

21 Dep't of Homeland Sec. v. Regents, 140 S. Ct. 1891, 1901–03 (2020) (recounting the creating of DACA, in June 2012 in a memorandum issued by Secretary Napolitano of the Department of Homeland Security (DHS), and the announcement of DACA, in a November 2014 memorandum issued by Secretary Johnson of DHS, and then orders in President Trump's first administration to repeal DAPA, in a July 2017 order issued by the DHS, and to rescind DACA, through a September 2017 order from Attorney General Sessions to DHS Secretary Elaine Duke, and Secretary Duke's next-day order terminating DACA).

22 *See, e.g.*, Exec. Order No. 14,215, 90 Fed. Reg. 10447, 10447 (Feb. 18, 2025) (subjecting independent agencies to the Office of Information and Regulatory Affairs regulatory review process).

23 *See* Exec. Order No. 14,192, 90 Fed. Reg. 9065, 9065 (Jan. 31, 2025) (requiring "new incremental costs associated with new regulations" to be "offset by the elimination of existing costs associated with at least 10 prior regulations"); Exec. Order No. 14,264, 90 Fed. Reg. 15619, 15619 (Apr. 9, 2025) (ordering the repeal of the Department of Energy's regulation defining "showerhead" for purposes of energy conservation); *see also* Lisa Friedman, *By Redefining 'Harm,' Agencies Aim to End Longstanding Wildlife Protections*, N.Y. Times (Apr. 17, 2025), https://www.nytimes.com/2025/04/16/climate/trump-endangered-species-act-harm.html [https://perma.cc/TJ6E-SRQH] (describing a proposed Trump administration

does, it will not be because *Chevron*, now-overruled, facilitated prior agency reversals. Moreover, if the repeals his administration makes are upheld in court, our study provides a baseline against which his administration's actions could be evaluated.

Our investigation builds upon several strains in the scholarly literature pre-*Loper Bright*. The whiplash narrative asserts that agencies have wide legal latitude to reverse their positions as they see fit. In response to the suggestion that agencies act on a "whim," particularly at the direction of the presidential administration, William Buzbee has carefully illustrated the scope of legal constraints, especially those flowing from arbitrariness review, on such behavior.[24] Buzbee's concern is the legal (and practical) constraints on agency regulatory change rather than evaluating how frequently agency reversals occurred under *Chevron*.[25]

In their important empirical article, Wendy Wagner, William West, Thomas McGarity, and Lisa Peters study how frequently agencies amend and revise their regulations.[26] Contradicting the assumption that the publication of a final rule is the end of a regulatory life cycle, they show that agencies frequently revise and amend their "parent" regulations.[27] Unlike our study, theirs is not focused on how many revisions made to regulations constitute reversals in the sense implied by the whiplash narrative.

The closest scholarship to the particular question we address is a thoughtful essay by Richard Pierce in which he argues that *Chevron* was no longer justifiable given the increased political division in Congress and the Presidency.[28] He focuses on the high-profile reversals earlier

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rule to "effectively eliminate a crucial protection in the half-century-old Endangered Species Act by redefining a single word: harm").

[24] *See generally* William W. Buzbee, *The Tethered President: Consistency and Contingency in Administrative Law*, 98 B.U. L. Rev. 1357 (2018) (explicating the many constraints of reasoned decisionmaking on agency policy changes).

[25] Buzbee's article also collects much of the literature on agency consistency, including other legal constraints and the ossification of agency rulemaking. *See id.* at 1360, 1371–73. After Loper Bright, scholars have taken a renewed interest in the status of agency change. *See, e.g.*, Daniel T. Deacon, *Statutory Liquidation*, 77 Admin. L. Rev. 504, 518–20, 530–34 (2025) (discussing agency change as departing from past agency practice that "liquidated" the statute's meaning); Daniel T. Deacon & Leah M. Litman, *Two Takes on Administrative Change from the Roberts Court*, 62 Harv. J. Legis. 1, 3–6 (2024) (evaluating the Roberts Court's posture toward regulatory change); Nina A. Mendelson, *Tossing Sand in the Regulatory Gears: Hurdles to Policy Progress in the Supreme Court*, 62 Harv. J. Legis. 40, 50–55 (2024) (assessing the Supreme Court's treatment of regulatory change).

[26] Wendy Wagner, William West, Thomas McGarity & Lisa Peters, *Dynamic Rulemaking*, 92 N.Y.U. L. Rev. 183 (2017).

[27] *Id.* at 189, 201.

[28] *See* Richard J. Pierce, Jr., *The Combination of* Chevron *and Political Polarity Has Awful Effects*, 70 Duke L.J. Online 91, 96–97 (2021). Pierce notes that he had long defended

mentioned and the fact that the political parties have relatively fixed positions on many issues; he views those reversals and prospects of others as sufficient reason to abandon *Chevron*.[29] Pierce is not focused on the frequency of agency reversals under *Chevron*, however, and does not engage in an empirical investigation of that issue; to our knowledge, ours is the first study to do so.

This Article proceeds in three parts. Part I describes the rise of the regulatory whiplash narrative and the Court's deployment of it in *Loper Bright*. Part II presents the results of a study of two decades of D.C. Circuit cases that looks for instances of agency reversals under *Chevron* and finds very few. Part III addresses the implications of this study. The study reveals that affirmance under *Chevron* resulted in a stable equilibrium or "regulatory settlement," at least following affirmance in the D.C. Circuit. It also allows us to identify with more precision the reliance interests that have arisen under *Chevron*. We then use this picture of agency regulation to address the pressing question of stare decisis and the fate of prior precedent that relied on *Chevron*. Finally, we offer thoughts about the relationship between agency regulatory change and judicial review under *Skidmore*.

I
The Rise and Deployment of the Regulatory Whiplash Narrative

Over the past decade, a powerful narrative about agency power has taken root and been adopted by the Supreme Court. This narrative has three basic elements. First, it posits that agencies have the power to reverse their actions, and interpretations of the statutes on which they are based, at any time. Second, this power of reversal is not just a theoretical possibility, but something that agencies do with some frequency. Third, in light of this power and practice of reversal, private parties face pervasive uncertainty about their legal obligations. According to this narrative—which we call the *regulatory whiplash narrative*, adopting the terminology of its main architect, Justice Neil Gorsuch—the power and practice of agency reversal creates a host of reliance and rule of law problems, which are especially acute for ordinary people, as contrasted with sophisticated parties. It deprives regulatory law of stability and predictability, thereby undermining reliance interests as well as fundamental due process ideas of notice.

Chevron, but in light of political polarization, had come to view it as a source of unjustified regulatory instability. *See id.* at 92.

[29] *See id.* at 96–103 (discussing "flip-flopping" agency interpretations in the context of net neutrality, the Affordable Care Act, clean power, and DACA and DAPA).

Each element of the regulatory whiplash narrative makes a different type of claim. The first element is a descriptive claim *about the law*: Agencies have the legal power to reverse their own legal positions at any time. Proponents of the narrative frequently blame the *Chevron* doctrine for facilitating that asserted legal power. The second element is a descriptive claim *about what agencies do*: Agencies reverse their own actions—and the interpretations on which they rely—with some frequency. The third element is a claim *about how private parties understand agency action*: The chance of an agency reversal provides a strong reason to refrain from relying on regulatory law or understand that they should have only modest temporal expectations about the longevity of any agency's position. The second and third claims are related: Reliance interests (and discounting of investments) are not undermined by a power that only exists in theory—reliance interests are imperiled only if agencies in fact reverse themselves with some perceived frequency. In other words, to affect private party behavior, the prospect of agency reversal must be credible.

This Part briefly traces the rise of the regulatory whiplash narrative, with Justice Gorsuch as its most prominent advocate, and then shows that it was subsequently adopted by the Supreme Court in support of overruling *Chevron*.

A. The Rise of the Regulatory Whiplash Narrative

In the past decade, Justice Gorsuch has been the chief proponent of the regulatory whiplash narrative. In prominent decisions before he joined the Supreme Court, and then in a sequence of dissents and concurrences while on the Court, Justice Gorsuch repeatedly expounded and elaborated on the regulatory whiplash narrative as a basis to challenge *Chevron* and other doctrines that grant deference to agencies.

Then-Judge Gorsuch's concurring opinion in *Gutierrez-Brizuela v. Lynch* is widely viewed as his first robust critique of *Chevron* in rule-of-law and separation-of-power terms. As William Buzbee describes Gorsuch's opinion in *Gutierez-Brizuela*, "The claimed risk of day-to-day vacillation is a repeated theme."[30] In that case, an immigrant relied on an

[30] Buzbee, *supra* note 24, at 1370. In his excellent article, Buzbee frames the pre-*Loper Bright* narrative as a "whim" theory, drawing on Gorsuch's characterization when he was a judge on the Tenth Circuit. Buzbee details this narrative in relation to the President's capacity to control and reverse agency interpretations at will. *See id.* at 1368–72. He identifies constraints on the capacity of agencies to reverse their decisions, many rooted in administrative law. *See id.* at 1390–1416. We discuss a neighboring idea, focused on the legal instability that agencies purportedly cause by reversing their own interpretive positions, not only in response to presidential whim but their own self-interest—the regulatory "whiplash"

interpretation of the immigration law to stay in the country, which the Bureau of Immigration Affairs (BIA) subsequently changed.[31] Justice Gorsuch read BIA's change in policy as exemplary of a vast array of agency reversals that can come seemingly at any time. He asserted that, under *Chevron*, regulatory stakeholders "must always remain alert to the possibility that the agency will reverse its current view 180 degrees anytime based merely on the shift of political winds and *still* prevail."[32] Gorsuch posited that "an agency can enact a new rule of general applicability affecting huge swaths of the national economy one day and reverse itself the next,"[33] and concluded that *Chevron* deference allows "agencies to upset the settled expectations of the people by changing policy direction depending on the agency's mood at the moment."[34]

In *Gutierrez-Brizuela*, Justice Gorsuch was not only making a descriptive claim about the law—*Chevron* gives agencies the power to reverse themselves day after day. He was also making a claim that the asserted reversal power creates pervasive uncertainty (parties "must always remain alert"). But a theoretical power to reverse only creates that level of uncertainty if agencies do reverse themselves with sufficient frequency that parties begin to expect them. The reason is that both the regulated parties and the public form expectations based not only, or even most importantly, on what the law might permit but the actual practice of the relevant actors. Arguably, the fact that *Chevron* allows room for agencies to reverse their interpretive positions could create some degree of legal uncertainty, especially in light of a few high-profile reversals. But to create uncertainty across the horizon of regulatory law and particularly among ordinary people, reversals must be happening with some frequency. Accordingly, Justice Gorsuch's whiplash claim implies that reversals were happening with sufficient frequency to undermine private reliance interests.

While the *Gutierrez-Brizuela* case involved an agency reversal, Justice Gorsuch did not marshal any other evidence to demonstrate that these kinds of reversals are common or widespread. He treated the BIA reversal as emblematic of a vast set of unidentified agency reversals. Nor was he particularly clear about the forms of agency action that create the problems he identified. Was he saying that the BIA creates persistent legal uncertainty and upsets private reliance interests

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that agencies create, as Gorsuch called it after he joined the Supreme Court. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2288 (2024) (Gorsuch, J., concurring). This Section explains the elements of this "regulatory whiplash" narrative.

31 Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1144–45 (10th Cir. 2016).

32 *Id.* at 1152.

33 *Id.* at 1154.

34 *Id.* at 1158.

whenever it reverses a position in an adjudication involving ordinary people? Was he addressing agency interpretations that reverse prior judicial interpretations and apply retroactively to the prior conduct of ordinary people, as in the case?[35] What if an agency reverses a position in a notice-and-comment rule, which applies generally and prospectively, or in a guidance document, which contains best practices for agency officials to follow? He appeared to be sweeping in any interpretive change regardless of form.[36]

Once Justice Gorsuch was elevated to the Supreme Court, he amplified and reiterated the core claims of his narrative. These themes emerged in his separate opinion in *Kisor v. Wilkie*, arguing for the reversal of *Auer*, under which courts defer to agency interpretation of their own regulations unless they are clearly erroneous or inconsistent with the regulation,[37] and in his separate opinion in *West Virginia v. EPA*, arguing against the constitutionality of congressional delegation of lawmaking power to agencies.[38] But his claims got their fullest expression on the Court in relation to *Chevron*, beginning with his opinion dissenting from the denial of a petition for certiorari in *Buffington v. McDonough*.[39]

The *Buffington* case involved a veteran who received disability benefits as a matter of course after he returned home from his first tour of active duty but not upon return from after his second tour of duty, because he was unaware of a new rule that the Department of Veterans Affairs (VA) had issued while he was on his second tour that required veterans to request reinstatement of their benefits.[40] The Court of Appeals for Veterans Claims denied Buffington's claim.[41] The Federal Circuit applied *Chevron*, finding that "Congress has not 'directly spoken to the precise question at issue,'" that is, whether the Secretary of Veterans Affairs may predicate the effective date for

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35 *See id.* at 1144–45.

36 *See* Buzbee, *supra* note 24, at 1370 (observing that then-Judge Gorsuch "relies on cases and case language with little attention to the underlying agency procedural mode or which framework and presumptions apply in which settings").

37 Kisor v. Wilkie, 139 S. Ct. 2400, 2438 (2019) (Gorsuch, J., concurring) (suggesting that under the doctrine expressed in Auer v. Robbins, 519 U.S. 452 (1997), those who are not well-heeled "are left always a little unsure what the law is, at the mercy of political actors and the shifting winds of popular opinion, and without the chance for a fair hearing before a neutral judge").

38 West Virginia v. EPA, 142 S. Ct. 2587, 2618 (2022) (Gorsuch, J., concurring) ("Stability would be lost, with vast numbers of laws changing with every new presidential administration. Rather than embody a wide social consensus and input from minority voices, laws would more often bear the support only of the party currently in power.").

39 Buffington v. McDonough, 143 S. Ct. 14 (2022).

40 *See* Buffington v. McDonough, 7 F.4th 1361, 1363 (Fed. Cir. 2021).

41 Buffington v. Wilkie, 31 Vet. App. 293 (2019), *aff'd sub nom*, Buffington v. McDonough, 7 F.4th 1361 (Fed. Cir. 2021), *cert. denied*, 143 S. Ct. 14 (2022).

the recommencement of benefits on the date of the veteran's claim.[42] It therefore deferred to the VA's rule.[43]

The veteran filed a petition for certiorari, which the Supreme Court denied.[44] Justice Gorsuch dissented from the denial because, in his view, the Federal Circuit had "[o]verread[] *Chevron*" and failed to interpret the statute independently.[45] He argued vociferously against "a broad reading of *Chevron*."[46] For one thing, he wrote, such a reading "encourages executive officials to write ever more ambitious rules on the strength of ever thinner statutory terms, all in the hope that some later court will find their work to be at least marginally reasonable."[47] For another, it permits new administrations to "undo the ambitious work of their predecessors and proceed in the opposite direction with equal zeal."[48] Justice Gorsuch further speculated that the agency had changed its rules to lighten its officials' workload, regardless of the effect on veterans: "Some time ago, the VA promulgated a rule . . . providing that a veteran's disability benefits 'may be resumed the day following [his] release from active duty,'" and then "agency officials proceeded to revise their rules anyway to place new burdens on veterans and make their own jobs easier."[49]

Justice Gorsuch then expanded on his claim that the agency's capacity to reverse itself, seemingly at its own choosing, undermines the rule of law. He wrote, "When the law's meaning is never liquidated by a final independent judicial decision . . . individuals can never be sure of their legal rights and duties. Instead, they are left to guess what some executive official might 'reasonably' decree" at any given time.[50] In this respect, "[f]air notice gives way to vast uncertainty."[51]

Furthermore, according to Justice Gorsuch, such uncertainty is felt most by "ordinary Americans," who do not have the experience or legal team to manage the enormous number of ever-changing agency regulations.[52] While "the powerful and wealthy can plan for and predict future regulatory changes" and "lobby agencies for new rules that

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42 *Buffington*, 7 F.4th at 1366 (quoting Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984)).

43 *Id.* at 1367.

44 Buffington v. McDonough, 143 S. Ct. 14 (2022).

45 *Id.* at 19 (Gorsuch, J., dissenting).

46 *Id.* at 18.

47 *Id.* at 20.

48 *Id.*

49 *Id.* (alteration in original) (quoting 26 Fed. Reg. 1599 (Feb. 24, 1961) (codified at 38 C.F.R. pt. 3)).

50 *Id.*

51 *Id.*

52 *Id.* at 21.

match their preferences," Justice Gorsuch continued, "it is ordinary individuals who are unexpectedly caught in the whipsaw of all the rule changes a broad reading of *Chevron* invites."[53] He pointed to the veteran Buffington as an example, deprived of benefits "[n]ot because of any change in law, only a change in an agency's view."[54] He listed others who "have found themselves facing similar fates—including retirees who depend on federal social security benefits, immigrants hoping to win lawful admission to this country, and those who seek federal health care benefits promised by law."[55]

The basic claims that Justice Gorsuch was making were virtually the same as those he asserted as a judge on the Tenth Circuit—that *Chevron* gives agencies the power to flip-flop, they do flip-flop, and, in so doing, they create worrisome legal uncertainty. The difference is that Justice Gorsuch was now making those claims beyond the context of agency adjudications and specifically as to agency rules. But in the reiteration of these points, from *Guiterrez-Brizuela* on the Tenth Circuit in 2016 to his *Buffington* dissent in 2022, there is no increased precision about the pervasiveness of agency reversals. Nor is there increased precision about whether there is a difference between agency reversals in adjudications as opposed to rulemakings, or in the nature of the reliance interests at stake. Agency actions continued to be treated as falling into one large bucket.

The regulatory whiplash narrative was also embraced outside of the courts as a reason to overrule *Chevron*. Shortly before the Court decided *Loper Bright*, Professor Richard Pierce, a preeminent administrative law scholar, provided a thoughtful exposition. After having been a defender of the *Chevron* doctrine for many years, Pierce argued that the increasing political polarization in U.S. politics "makes *Chevron*, as originally envisioned, a source of extreme instability in our legal system."[56]

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53 *Id.* at 20–21.

54 *Id.* at 21.

55 *Id.* The cases Gorsuch cites do not involve "a change in an agency's view" as in *Buffington*, but individuals facing "similar fates." *See* Lambert v. Saul, 980 F.3d 1266, 1268 (9th Cir. 2020) (upholding an agency rule reversing a judicial precedent consistent with Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005)); Valent v. Comm'r of Soc. Sec., 918 F.3d. 516, 525 (6th Cir. 2019) (Kethledge, J., dissenting) (giving deference to the agency rule even though the dissent argues it is too unclear to give notice); Gonzalez v. U.S. Att'y Gen., 820 F.3d 399, 403–06 (11th Cir. 2016) (per curiam) (declining to review incremental, case-by-case decisionmaking by the Board of Immigration Appeals (BIA)); Padilla-Caldera v. Holder, 637 F.3d 1140, 1142 (10th Cir. 2011) (upholding a BIA decision responding to a judicial decision).

56 Pierce, *supra* note 28, at 92.

To make the case, Pierce discussed several high-profile agency reversals. Perhaps the paradigm is the FCC's repeated reversals on "net neutrality"—that is, whether to categorize internet carriers as "information service" providers or as "telecommunications service" providers, the latter of which are subject to more extensive FCC regulation. As Pierce observed, Democratic Presidents have supported more extensive regulation, Republicans have opposed it, and the FCC has reversed course, tracking these changes in administration, four times in fifteen years.[57] The uncertainty that this vacillation has created discourages investment. Investors, Pierce explained, "discount any potential return on investment significantly if they foresee a substantial risk that they will not be able to earn an adequate return . . . because of the risk that the government will change its policies."[58]

Pierce highlighted several other high-profile reversals, including on the merits of the Affordable Care Act, immigration enforcement for those who came to the U.S. as children (DACA) and their parents (DAPA), and the EPA's Clean Power Plan rule.[59] As to each of these major policy reversals, Pierce observed that the uncertainty created by these vacillations undermined the capacity for businesses to make hundreds of billions of dollars of investments and for families, in the case of DACA and DAPA, to plan their lives.[60] For Pierce, these significant reversals in high-profile and important policy areas, combined with the entrenched, opposing policy preferences of Democrats and Republicans on many issues, illustrated the severity of the problem and were reason enough to abandon *Chevron*.[61]

B. The Regulatory Whiplash Narrative Wins the Court

In *Loper Bright*, the Supreme Court embraced the regulatory whiplash narrative as a description of how the law works and how agencies behave under *Chevron*.[62] As to how *Chevron* works, the Court, with Chief Justice Roberts writing for the majority, said that *Chevron* "demands that courts mechanically afford *binding* deference to agency interpretations, including those that have been inconsistent over

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57 *Id.* at 97–98.

58 *Id.* at 99; *see also* Jonathan Masur, *Judicial Deference and the Credibility of Agency Commitments*, 60 VAND. L. REV. 1021, 1043 (2007) ("[I]f an administrative agency cannot commit to a particular set of regulations, regulated industries may refrain from making investments or taking other actions whose value is contingent on the existence of that regulatory regime.").

59 *See* Pierce, *supra* note 28, at 99–102.

60 *See id.* at 101–03.

61 *See id.* at 103.

62 *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2265 (2024).

time."[63] The Court continued, "it forces courts to do so even when a pre-existing judicial precedent holds that the statute means something else—unless the prior court happened to also say that the statute is 'unambiguous.'"[64] As to how agencies behave, the Court discussed private reliance interests in stark terms and endorsed the idea that, under *Chevron*, agencies were free to vacillate and reverse themselves, seemingly at any time:

> Rather than safeguarding reliance interests, *Chevron* affirmatively destroys them. Under *Chevron*, a statutory ambiguity, no matter why it is there, becomes a license authorizing an agency to change positions as much as it likes, with "[u]nexplained inconsistency" being "at most . . . a reason for holding an interpretation to be . . . arbitrary and capricious." But statutory ambiguity, as we have explained, is not a reliable indicator of actual delegation of discretionary authority to agencies. *Chevron* thus allows agencies to change course even when Congress has given them no power to do so. By its sheer breadth, *Chevron* fosters unwarranted instability in the law, leaving those attempting to plan around agency action in an eternal fog of uncertainty.
>
> *Chevron* accordingly has undermined the very "rule of law" values that *stare decisis* exists to secure.[65]

Justice Gorsuch wrote a separate concurrence in which he elaborated on his regulatory whiplash objection to *Chevron*.[66] He reached further back in history than he had in *Buffington*, tracing the promise of certainty and fair notice in the law to Blackstone.[67] But under *Chevron*, he stated, the rules were different because "[t]he reasonable bureaucrat always wins," and "because the reasonable bureaucrat may change his mind year-to-year and election-to-election, the people can never know with certainty what new 'interpretations' might be used against them."[68] Gorsuch remarked dramatically that this "'fluid' approach to statutory interpretation is 'as much a trap for the innocent as the ancient laws of Caligula,' which were posted so high up on the walls and in print so small that ordinary people could never be sure what they required."[69]

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63 *Id.*

64 *Id.* (quoting Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005)).

65 *Id.* at 2272 (citations omitted) (first quoting *Brand X*, 545 U.S. at 981; and then quoting Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 798 (2014)).

66 *See id.* at 2275 (Gorsuch, J., concurring).

67 *Id.* at 2276.

68 *Id.* at 2285.

69 *Id.* at 2285–86 (quoting United States v. Cardiff, 344 U.S. 174, 176 (1952)).

He then reprised the discussion of reliance and uncertainty, picking up where he left off in *Buffington*. Whereas judicial interpretation protects reliance interests "by fixing the meaning of the law," he said that "*Chevron* deference engenders constant uncertainty and convulsive change even when the statute at issue itself remains unchanged."[70] He expressed particular concern for "ordinary people" who cannot protect their interests with lawyers or lobbyists unlike "[s]ophisticated entities" and therefore "suffer the worst kind of regulatory whiplash *Chevron* invites."[71]

Neither the Court nor Justice Gorsuch offered empirical evidence of the agency behavior that so worries them, other than pointing to a set of high-profile policy reversals. The Court may have believed, as Richard Pierce argues, that even a few high-profile reversals, such as the FCC's net neutrality order, are sufficient to deter investment and reliance on the law across the regulatory state.[72] But the Court's narrative—building on Gorsuch's view—neither rests on nor is restricted to this view. It suggests an assumption about the persistence of agency reversals beyond the context of a few high-profile issues: Agency reversals under *Chevron* occurred with enough regularity to create "constant uncertainty and convulsive change," thereby upsetting private reliance interests.[73] To evaluate this assumption, we need to know more about the frequency of regulatory reversals under *Chevron*.

II
Investigating Agency Regulatory Reversals

No study, to our knowledge, has examined the rate at which agencies reversed their positions when *Chevron* was in place. Examining the rate of regulatory reversal after an affirmance under *Chevron* step two is an illuminating way to evaluate claims of the whiplash narrative. A step two affirmance tells the agency that the statute is ambiguous, and thus that the agency

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70 *Id.* at 2288. As an example of the uncertainty, Gorsuch turned to a case of ongoing political football: *Brand X* and the FCC's regulation of broadband internet services. In *Brand X*, as he described the decision, the Court upheld the "rule adopted by the administration of President George W. Bush because it was premised on a 'reasonable' interpretation of the statute." *Id.* When the Obama administration had the ball, it "rescinded the rule and replaced it with another." *Id.* Then, "during President Donald J. Trump's administration, officials replaced that rule with a different one," and this was "all before President Joseph R. Biden, Jr.'s administration declared its intention to reverse course for yet a fourth time." *Id.* Gorsuch noted that "[e]ach time, the government claimed its new rule was just as 'reasonable' as the last." *Id.*

71 *Id.*

72 *See* Pierce, *supra* note 28, at 99.

73 *Loper Bright*, 144 S. Ct. at 2288 (Gorsuch, J., concurring).

has authority to choose a different interpretation and even to reverse its interpretation. If *Chevron* facilitates agency reversals, as the whiplash narrative suggests, then a particularly prominent domain in which reversals would appear are cases where the agency's authority to take a different interpretive position has already been found—that is, in cases in which the agency's position has been affirmed under *Chevron* step two. Our study examines the fate of notice-and-comment regulations affirmed by the D.C. Circuit between 2004 and 2024 under *Chevron*. After a brief discussion of the literature on agency regulatory revisions, this Part discusses our methodological choices and findings.

A. Scholarship on Agency Regulatory Change

Under well-established principles of administrative law, determining whether the agency has the power to reverse its regulations depends first and foremost on the agency's statutory authority under its enabling act.[74] Although statutes are often broad enough to authorize two opposite or conflicting rules, that is not always the case. *Massachusetts v. EPA* provides a prominent illustration.[75] The EPA in President George W. Bush's administration denied a petition for rulemaking that requested the agency to regulate global greenhouse gases (GHG), in part on the ground that the agency lacked statutory authority to do so under the Clean Air Act.[76] The denial reversed the agency's prior position on the authority issue.[77] The Court rejected the EPA's reversal on the ground that "statutory text forecloses EPA's" revised reading.[78] Statutes constrain some reversals.

Even when a change is within an agency's statutory authority, there are constraints that administrative law doctrine and procedure impose on the exercise of that authority. Perhaps foremost, the arbitrary and capricious standard of judicial review in the Administrative Procedure Act requires that the agency have "good reasons" to support a reversal of policy; when the agency's position conflicts with prior factual findings, or there are significant reliance interests on the prior policy, the agency's action must be accompanied by a "more detailed justification than what

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74 *See, e.g.*, Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979) ("[T]he exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes.").

75 549 U.S. 497 (2007).

76 *Id.* at 510–11.

77 *See id.* (noting that the EPA had "already confirmed that it had the power to regulate carbon dioxide" and that the EPA had "reiterated this position to a congressional committee just two weeks before the rulemaking petition was filed").

78 *Id.* at 528.

would suffice for a new policy created on a blank slate."[79] Here too, courts scrutinize agencies' exercise of power to reverse their regulations. In the denial of the petition for rulemaking in *Massachusetts v. EPA*, for instance, the EPA took the view in the alternative that even if it had authority to regulate GHGs under the Clean Air Act, it would decline to do so.[80] The Supreme Court rejected the EPA's explanation of its decision to reverse course because it "offered a laundry list of reasons not to regulate" as opposed to reaching its decision based on obligatory statutory criteria.[81] Arbitrariness review constrains an agency's ability to pivot.

Scholars have addressed how doctrinal and procedural requirements affect the ability of agencies to issue regulations, which implicitly affects their ability to revise their regulations. Many have argued that the demanding duties of explanation and reasoning imposed by arbitrariness review, in combination with a cluster of analysis requirements imposed by Presidents and statutes, thwart agencies' agility in issuing regulations.[82] This idea—that the scope of burdens on agency rulemaking unduly constrains their ability to regulate—is known as ossification.[83] For some, ossification is viewed as a problem; it inhibits the production of needed regulations.[84] For others, the difficulty of agency rulemaking "enables agencies to more credibly commit to regulatory programs" because regulated parties know how difficult it is for agencies to change its significant regulations—thus, ossification "acts as a commitment mechanism" that provides a basis for investment.[85] Although agencies face constraints in exercising their power to change their regulations, empirical studies of the rates of rulemaking do not support the view that process requirements create less rulemaking. The rates of rulemaking have remained relatively constant over the past several decades, even as process and analysis requirements have grown.[86]

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79 FCC v. Fox Television Stations, Inc., 556 U.S. 502, 503, 515 (2009).

80 *See Massachusetts*, 549 U.S. at 527–28.

81 *Id.* at 533.

82 *See* Buzbee, *supra* note 24, at 1370–75 (collecting sources addressing the effect of reasoned decisionmaking and other requirements on the rate of rulemaking). As noted earlier, Buzbee discusses the constraints on agency change specifically in the context of *Chevron*. *See id.* at 1364–65.

83 *See* Aaron L. Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. 85, 102 (2018) (describing the ossification thesis).

84 *See, e.g.*, Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414, 1434–35 (2012) (summarizing the argument for the elimination of OMB cost-benefit review on ossification grounds).

85 Nielson, *supra* note 83, at 116.

86 *See* Cary Coglianese & Daniel E. Walters, *The Great Unsettling: Administrative Governance After* Loper Bright, 77 ADMIN. L. REV. 1, 29 & n.144 (2025) (summarizing several

Other scholars have studied directly how often and in which ways agencies revise their regulations. Most notable is the work of Wendy Wagner, William West, Thomas McGarity, and Lisa Peter.[87] Examining rulemaking within particular programs at the EPA, Occupational Safety and Health Administration (OSHA), and the FCC, Wagner, West, McGarity, and Peters find that a majority of rules in their study were revised at least once, and many multiple times.[88] Their initial set of 183 original ("parent") rules yielded 462 revised rules over a multi-decade period.[89] Two-thirds of these revisions were in procedural forms used for small corrections and non-controversial technical amendments, such as direct final rules or interim final rules.[90] These are forms that are not intended for, and are unlikely to be used for, substantive changes or reversals of agency rules. One-third of the revisions observed were issued through notice-and-comment rulemaking,[91] which the study characterizes as "relatively significant additions, modifications, or other changes to the prior rule," at least in comparison to minor corrections and technical amendments.[92]

Notwithstanding the importance of the Wagner study on the subject of agency regulatory change, the authors did not identify which, if any, of the revisions they viewed as significant would count as "reversals"—the issue that interests us—because that was not their focus.[93] Our study examines reversals directly and in a particular context. Specifically, we look at how many of the revisions agencies make to their rules after judicial affirmance under *Chevron* are reversals, as opposed to the routine specifications, corrections, and responses to new information that the Wagner study identified and we would expect of agencies in carrying out their statutory programs.

B. Study: Scope and Method

Our research had two stages. First, we identified the set of agency regulations issued through notice-and-comment rulemaking that were upheld under *Chevron*'s second step by the D.C. Circuit between 2004–2024. Second, we examined

studies finding the page counts of the Federal Register have remained relatively the same over the years).

87 Wagner et al., *supra* note 26.

88 *See id.* at 189 (reporting most of the 182 rules in the sample were amended or revised at least once and many revised multiple times over decades, with 462 revisions total).

89 *Id.* at 203.

90 *Id.* at 211.

91 *Id.*

92 *Id.* at 206.

93 *See supra* notes 26–27 and accompanying text.

the subsequent regulatory history to determine whether the agency later reversed those previously upheld regulations.

1. Stage One

We selected regulations challenged between 2004–2024 because that time period covered four changes in presidential administrations, from President George W. Bush's second term through the administrations of Presidents Obama, Trump (45), and Biden. By covering this range of time, we sought to allow time for agency reversals to occur. In view of the complexity of *Chevron* and the various ways in which courts applied it, we restricted our efforts to cases in the D.C. Circuit, a prominent court of appeals that has a large docket of rulemaking cases and applied *Chevron* frequently.[94]

We chose to focus on notice-and-comment regulations for four reasons. First, notice-and-comment regulations are the premier form of lawmaking by agencies; agencies make more binding and generally applicable law through the notice-and-comment process than any other form.[95] Second and related, the existing empirical work on agency regulatory change has focused on notice-and-comment regulations. Third, the whiplash narrative in *Loper Bright* is directed in large part to notice-and-comment regulations. Fourth, the fate of previously upheld notice-and-comment regulations is a significant issue following *Loper Bright*. To be sure, agencies interpret their enabling statutes through other procedural formats, and reversals in adjudication were a particular concern for Justice Gorsuch because of their impact on the reliance interests of ordinary people.[96] Still, because rulemaking is such an important point of reference for the whiplash narrative, an empirical examination limited to rulemaking sheds light on the basis for the narrative.

We sought to identify all cases in which the D.C. Circuit upheld an agency regulation under *Chevron*'s second step.[97] We focused on *Chevron* affirmances of regulations for two main reasons. First, the whiplash narrative posits that *Chevron* facilitates agency reversals

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[94] *See* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 46 fig.8 (2017) (noting that the D.C. Circuit applied *Chevron* 307 times between 2003–2013, more often than any other circuit).

[95] *See* Todd Phillips, *A Change of Policy: Promoting Agency Policymaking by Adjudication*, 73 ADMIN. L. REV. 495, 510–16 (2021) (discussing the rise of and preference for rulemaking over formal adjudication for issuing generally applicable policy).

[96] *See, e.g.*, Gutierrez-Brizuela v. Lynch, 834 F.3d 1142 (10th Cir. 2016) (reviewing an agency reversal in the context of an adjudication).

[97] Using Westlaw, we searched for "Chevron" in D.C. Circuit decisions in our time frame, January 1, 2004–January 1, 2024. We then read those decisions to determine whether the D.C. Circuit found that an agency interpretation in a regulation issued through the notice-and-comment process was entitled to deference under *Chevron* step two.

presumably based on the idea that *Chevron* invites agencies to treat statutory ambiguities as invitations to reverse course. By focusing on *Chevron* affirmances at step two, we can test the frequency of reversals when it has been confirmed by a court that the statute is ambiguous and thus the agency would be free to reverse itself. Second, decisions that upheld agency action in reliance on *Chevron* are precisely the set of cases nationwide that may be subject to re-litigation following *Loper Bright*.[98] One could take a different approach to measuring agency reversals of regulations. For instance, one might seek to determine how many regulations issued in a particular period, or by a particular agency at a particular period, end up getting reversed by the agency irrespective of judicial review. While that could be a useful inquiry, our selection of regulations enables us to focus directly on the relationship between judicial affirmance under *Chevron* step two and agency reversals.

It is worth highlighting some nuances we discovered in the judicial decisions we identified. Some decisions reviewed an interpretation under *Chevron* as well as the arbitrary and capricious test of the APA. If a decision upheld the interpretation under *Chevron* step two—in other words, if there was a *Chevron* step two "holding" that the court might point to in future decisions or the agency might reference in future regulations—but the decision remanded the interpretation as arbitrary and capricious, we included it in our *Chevron* step two data set. Likewise, if the decision affirmed an interpretation under *Chevron* step two and remanded the regulation with respect to an unrelated issue or issues, we included the decision in our data set. Some decisions involved more than one affirmed interpretation, and when they did, we considered whether the agency reversed any of the interpretations. As a result, the set of regulations that moved to our stage two included regulations in which the D.C. Circuit affirmed an agency's interpretation under *Chevron* step two regardless of whether the regulation as a whole was upheld or remanded on other grounds.

2. *Stage Two*

Once we had identified the set of decisions in which the D.C. Circuit affirmed an agency's interpretation under *Chevron* step two (even if the D.C. Circuit found other issues with the regulation as a whole), we proceeded to evaluate the subsequent treatment of those regulations by the agency ("subsequent regulatory history"). We first located the regulation, identifying its name, date of issuance, and

[98] *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) (addressing the status of prior judicial decisions that relied on *Chevron*).

Federal Register citation. We then looked up those regulations by Federal Register citation in ProQuest, examining their subsequent regulatory history. Our research assistants performed the initial review, and then we independently reviewed each regulatory history, resolving discrepancies in our determinations afterwards. As we reviewed the subsequent regulatory history, we examined the types of amendments and revisions that agencies made to their regulations.

C. Study: Findings

1. Regulations Affirmed Under Chevron *Step Two*

During our period of observation, we found ninety-six decisions in which the D.C. Circuit reviewed and affirmed an agency interpretation under *Chevron* step two. These ninety-six decisions identified the set of regulations that we evaluated in Stage Two of our study to determine if the agency reversed the affirmed interpretation. We were only interested in decisions in which the D.C. Circuit affirmed an agency's interpretation under *Chevron* step two, and not at step one, because a court has only endorsed the agency's authority to change an interpretation if the court determines that the statute is ambiguous. As mentioned above, when a decision affirmed more than one agency interpretation under *Chevron* step two, we examined whether the agency reversed any of those interpretations—thus, the number of decisions (ninety-six) included in our data set understates the number of affirmed interpretations that we examined for reversal.

2. Primary Finding: Reversals

Our primary finding is that our data set contained only three agency reversals—that is, within our data, there were only three rules affirmed by the D.C. Circuit under *Chevron* step two that were subsequently reversed by the agency.

We define a reversal as the adoption of an interpretation by the agency that is wholly inconsistent with the prior interpretation. The interpretive reversals on net neutrality provide an example. As we describe in greater detail below, under the communications statutes administered by the FCC, the categories of "information service" and "telecommunications service" are mutually exclusive; the FCC has different powers with respect to providers of these two different types of services.[99] The FCC first interpreted "information services"

[99] *In re* MCP No. 185, 124 F.4th 993, 999 (6th Cir. 2025) (noting that providers of "information service" are not subject to common carrier regulations).

to include providers of internet broadband services.[100] It then shifted direction, rescinded its prior rule, issued a new rule that interpreted "telecommunications services" to include those same broadband services; that new interpretation allowed the agency more regulatory authority over broadband providers.[101] We treat that change—and changes from one interpretation to another wholly inconsistent interpretation (from A to B)—as a reversal.

The most prominent examples offered to support the whiplash narrative concern this kind of change. For Justice Gorsuch and the Court in *Loper Bright*, the primary whiplash concern was that *Chevron* facilitated agencies "revers[ing] its current view 180 degrees anytime based merely on the shift of political winds."[102] That is exactly the concern Justice Gorsuch raises in dissent from the denial of certiorari in *Buffington v. McDonough*. At issue in *Buffington* was a Department of Veterans Affairs rule that changed a prior rule automatically reinstating benefits once a veteran returns from a second tour to one requiring the beneficiary to request reinstatement upon return.[103] Justice Gorsuch saw this action as a reversal, and we agree.[104]

Note, however, that the VA's new rule counts as a reversal under our definition because benefits under the statute either restart automatically or they do not. Justice Gorsuch focused on private reliance interests: Veterans had an expectation that benefits would restart automatically, which the agency thwarted by switching the rule, and the consequences were harsh.[105] We do not disagree, but we do not define reversals based on the scope of their impact on private reliance interests. In general, the two are related: A reversal of an interpretation is the sort of revision likely to have a significant effect on private reliance interests. But any amendment to a rule might have an impact on private reliance interests to some degree. Though reversals may be a good proxy for changes that have a significant impact on reliance interests, we do not define them

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100 *See id.* at 997 (describing the history of the FCC's net neutrality regulations).

101 *See id.* (describing this history).

102 Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2015) (Gorsuch, J., concurring).

103 *See* Buffington v. Wilkie, 31 Vet. App. 293, 299–300 (2019), *aff'd sub nom*, Buffington v. McDonough, 7 F.4th 1361 (Fed. Cir. 2021), *cert. denied*, 143 S. Ct. 14 (2022).

104 *See Buffington*, 143 S. Ct. at 20 (Gorsuch, J., dissenting) (describing this as a reversal away from a rule consistent with Congressional instructions). Congress made clear in the statute that a veteran cannot receive both disability pay and active service payments, but it was silent on "when or under what conditions compensation recommences once a disabled veteran leaves active service." *Buffington*, 7 F.4th at 1365.

105 *See Buffington*, 143 S. Ct. at 19 (Gorsuch, J., dissenting) (discussing how individuals are disadvantaged by an overreading of *Chevron* as it runs contrary to principles such as lenity and ambiguity favoring the individual).

in terms of the effect of the change but in terms of the nature of the change—that is, the adoption of a wholly inconsistent interpretive or legal position.[106]

Our definition means that a reversal is not *any* departure from the terms of the original rule. This is an important limitation. For instance, as we note below, agencies frequently change the effective dates of their rules for reasons having to do with regulated parties' preparedness or other transition costs. Where the substance of the rule is unchanged but the effective date changes, is the amendment a reversal? An initial January effective date is inconsistent with a revised May effective date because the effective date cannot be both January and May. But so long as that change is a matter of policy, unrelated to the agency's interpretive position about the meaning of its authorizing statute, that change is not a reversal as we define them.

Because we focus on wholly inconsistent legal interpretations, some consequential changes will not count as reversals. It is commonplace, for instance, for an agency to have a consistent legal standard, but to determine, based on new evidence, that a regulated subject or activity no longer meets or violates that standard.[107] Changes in the application of a legal standard may arise in enforcement, but such changes also appear in regulations. For instance, as discussed below, the U.S. Fish and Wildlife Service (USFWS) listed the gray wolf on the Endangered Species List, partially delisted the gray wolf in certain states, delisted it more broadly in the country, and then fully relisted it.[108] These actions are flip-flops on the degree of protection afforded the gray wolf under the Endangered Species Act. But they are not reversals of the interpretation that USFWS issued, and the D.C. Circuit affirmed under *Chevron*, midway through the story: Under that interpretation, USFWS had authority to partially delist a fully listed species in one state or area of the country where the population was rebounding, assuming certain conditions were met.[109] With respect to the gray wolf, the agency did

106 *See* Pierce, *supra* note 28, at 96–103 (describing the effects of high-profile reversals); *see also* Daniel J. Hemel, *Flips and Splits in Administrative Law*, 74 Duke L.J. 1703, 1719–37 (2025) (noting the effects of agency flip-flops).

107 *See* Wagner et al., *supra* note 26, at 229–40 (describing the types of changes that agencies make to their regulations, including "incremental policy development," "policy clarification and change," and "adaptation to environmental changes").

108 *See* Michael Bartholomew, *Delisting: The Gray Wolf's Battle Against Removal from the Endangered Species List*, Geo. Env't L. Rev. Blog (Mar. 4, 2019), https://www.law.georgetown.edu/environmental-law-review/blog/delisting-the-gray-wolfs-battle-against-removal-from-the-endangered-species-list [https://perma.cc/KY82-93KM] (discussing the back and forth on the status of the gray wolf under the Endangered Species Act).

109 *See* Humane Soc'y of the U.S. v. Zinke, 865 F.3d 585, 600–07 (D.C. Cir. 2017) (holding that the Department could partially delist a species).

not disclaim or contradict its authority under the statute to partially delist a species. Rather, it made a series of policy decisions in light of new facts, and those decisions affected the status of the gray wolf.[110] In distinguishing changes to legal interpretations from other types of changes, our definition is consistent with how Margaret Lemos and Deborah Widiss evaluate reversals or flip-flops in their study of the U.S. Solicitor General.[111]

Applying this definition of reversals, we found three reversals in our data—that is, three instances in which an agency reversed an interpretation that had been affirmed under *Chevron* step two by the D.C. Circuit. The first is one we expected to find because it is well known: the FCC's reversal on net neutrality. This reversal followed the D.C. Circuit's decision in *Mozilla Corp. v. FCC*.[112] In *Mozilla*, the D.C. Circuit affirmed the FCC's 2018 classification under the Telecommunications Act of broadband internet service as an "information service."[113] Because the FCC lacks authority to prohibit a provider of "information service" from controlling user access to the internet, by, for example, varying speeds or blocking connections to third-party websites, it could not impose "net neutrality" on internet broadband service providers.[114] In 2024, the FCC shifted course. It rescinded the 2018 rule and reclassified broadband internet service as a "telecommunications service."[115] The FCC has authority to regulate "telecommunications service" providers as common carriers and thus to impose a "net neutrality" requirement.[116] As noted above, these two classifications—"information service" and "telecommunications service"—are wholly inconsistent interpretive positions because these classifications trigger different regulatory powers of the FCC. As a result, this change is a reversal; indeed, it is one

110 *See* Erin H. Ward, Cong. Rsch. Serv., R46184, The Gray Wolf Under the Endangered Species Act (ESA): A Case Study in Listing and Delisting Challenges 8–25 (2020) (detailing the history of the gray wolf under the Endangered Species Act).

111 *See* Margaret H. Lemos & Deborah A. Widiss, *The Solicitor General, Consistency, and Credibility*, 100 Notre Dame L. Rev. 621, 646 (2025) ("Because we're interested in changes in the government's arguments about legal meaning, we want to bracket cases involving shifts in how an agency seeks to implement an existing legal command—or put differently, changes in agency *policy*.").

112 940 F.3d 1 (D.C. Cir. 2019).

113 *Id.* at 17–18.

114 *In re* MCP No. 185, 124 F.4th 993, 999 (6th Cir. 2025) (noting that providers of "information service" are not subject to common carrier regulations).

115 *See id.* at 997 (describing the FCC's 2024 order, Safeguarding and Securing the Open Internet; Restoring Internet Freedom, 89 Fed. Reg. 45404 (May 22, 2024) (codified at 47 C.F.R. pts. 8, 20)).

116 *Id.* at 999 (noting providers of "telecommunications services" are subject to common carrier regulations).

of the paradigmatic reversals invoked by proponents of the whiplash narrative and critics of *Chevron*.[117]

The second reversal involves the Department of Labor's (DOL) Intermediate Bodies Rule under the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), which requires certain labor unions to submit annual financial reports.[118] An intermediate labor body is a labor organization that is subordinate to a national or international labor organization; such bodies are often comprised solely of public sector local labor unions not otherwise covered by the LMRDA.[119] In 2003, the DOL under the George W. Bush administration determined that an intermediate body constituted a "labor organization . . . deemed to be engaged in an industry affecting commerce."[120] Before this rule, an intermediate body was subject to the LMRDA only if it included at least one local labor union representing private sector employees.[121] In *Alabama Education Ass'n v. Chao*, the D.C. Circuit found that the statute was ambiguous and therefore the DOL had authority under *Chevron* to define "labor organization."[122] In 2010, the Obama administration issued a rule reversing the interpretation upheld in *Alabama Education Ass'n v. Chao*, and reverting to the DOL's pre-2003 position, which it said better aligned with the LMRDA's text and focus on private sector employees.[123] Then, in 2019, the Trump administration proposed to reverse again and reinstate the 2003 interpretation, pointing to changes in the public sector market that increased the need for accountability of intermediate bodies; it never issued a final rule.[124]

The third reversal concerns the Department of Education's Gainful Employment Rule, which requires educational institutions receiving federal student aid under the Higher Education Act (HEA) to provide

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117 *See, e.g.*, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2288 (2024) (Gorsuch, J., concurring) (invoking the FCC's net neutrality reversals as basis for overruling *Chevron*).

118 *See* Order Rescinding Form T-1 and Requiring or Modifying Subsidiary Organization Reporting, 75 Fed. Reg. 74936 (Dec. 1, 2010) (codified at 29 C.F.R. pt. 403).

119 *See id.* at 74944 (defining intermediate labor organizations and their relationship to LMRDA).

120 Alabama Educ. Ass'n v. Chao, 455 F.3d 386, 389–90 (D.C. Cir. 2006).

121 *See id.* at 390–91 (describing prior status of intermediate labor organizations under the LMRDA and prior DOL regulations); 75 Fed. Reg. 74939 (same).

122 The D.C. Circuit found, however, that the agency had failed to provide a "reasoned analysis" for its change in position. *See id.* at 397. The DOL issued the missing analysis in response to the D.C. Circuit's decision, and the district court upheld the interpretation in 2008. *See* Alabama Educ. Ass'n v. Chao, 539 F. Supp. 2d 378 (D.D.C. 2008), *clarified on denial of reconsideration*, 595 F. Supp. 2d 93 (D.D.C. 2009).

123 *See* Order Rescinding Form T-1, 75 Fed. Reg. at 74936; *see also id.* at 74946 (noting how the 2003 construction was "fundamentally flawed" for various textual and historical reasons).

124 *See* Labor Organization Annual Financial Reports: Coverage of Intermediate Bodies, 84 Fed. Reg. 68842 (proposed Dec. 17, 2019).

a "program of training to prepare students for gainful employment in a recognized occupation," so that students are in a position to repay their federal loans.[125] The rule, originally issued in 2011 and reissued in 2014, applies to nearly all degree programs at for-profit institutions and all non-degree programs at nonprofit institutions, including public colleges and universities, and establishes debt metrics for determining whether a school prepares students for "gainful" employment—beyond simply preparing them for a paying job.[126] In *Ass'n of Private Sector Colleges and Universities v. Duncan*, the D.C. Circuit found the statutory provision ambiguous and affirmed the rule under *Chevron*.[127] In 2019, the Trump administration rescinded the rule, eliminating the debt metrics and associated reporting requirements.[128] In 2023, the Biden administration reinstated the rule.[129]

We discuss the implications of our primary finding—that we found three reversals—in Part III.

3. Secondary Findings: Other Amendments

Our secondary finding is that the majority of rules affirmed under *Chevron* step two in our data set were amended by the agencies that issued them, but they were not amended in ways that constituted a reversal.

In addition to including three reversals, our data set contained many rules that were not subsequently revised at all and many rules that were revised in ways that were not reversals.[130] We coded the rules as follows: (1) no subsequent revisions; (2) technical corrections; (3) revised dates; (4) revised paperwork requirements (such as record-keeping or information-gathering requirements); (5) clarifications; (6) amendments to aspects of the rule unrelated to the affirmed interpretation; (7) new or revised applications of the affirmed interpretation based on new

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125 *See* Program Integrity: Gainful Employment, 79 Fed. Reg. 64890 (Oct. 31, 2014) (codified at 34 C.F.R. pts. 600, 668) (providing background on the Gainful Employment Rule and defining eligible institutions).

126 *See id.*

127 640 F. App'x 5, 7–8 (D.C. Cir. 2016).

128 *See* Program Integrity: Gainful Employment, 84 Fed. Reg. 31392 (July 1, 2019) (codified at 34 C.F.R. pts. 600, 668).

129 *See* Financial Value Transparency and Gainful Employment, 88 Fed. Reg. 70004 (Oct. 10, 2023) (codified at 34 C.F.R. pts. 600, 668).

130 Our data contained certain revisions that were not of interest to us as a group. First, we saw many fact-based approvals that agencies made under existing law, mainly EPA State Implementation Plan approvals. Second, we saw some revisions that were made in direct response to a new statute or judicial decision. These revisions were mandated by the relevant statute or judicial decision, and hence, even if reversals, were not attributable to agency discretion following an affirmance under *Chevron*.

facts or policy decisions; (8) additional considerations or factors not inconsistent with the affirmed interpretation; and (9) reversals. Some amendments fit within more than one of the categories (2)–(8), and some rules were amended multiple times or in multiple ways. We did not tally the total number of amendments across multiple rules for two reasons. First, the Wagner study already provides good evidence that agencies frequently amend their rules, and while our results are consistent with the Wagner study, it was not our goal to replicate that study but to identify the frequency of agency reversals. Second, we do not believe the total number of amendments in our data set is a useful figure given that some amendments included many changes and others did not. Similarly, we did not tally the total number of amendments within categories because some amendments fit in multiple categories. Observationally, the bulk of the amendments in our data set fell into category (6), amendments to aspects of the rule unrelated to the affirmed interpretation.

Although we do not tally the total number of amendments, we do think it is worth providing examples and further descriptions of the different types of amendments we observed. Though these examples are representative of the categories we identify, they are not necessarily the most obvious or cleanest illustrations we could have selected from our data set. That is intentional; we chose these particular examples in an effort to reveal some of the inevitable judgment involved in characterizing revisions that are not reversals.

Technical corrections. Technical corrections are minor, non-substantive amendments. One example involved the Securities and Exchange Commission's (SEC) "Regulation A-Plus," which recognized a new class of securities exempt from federal registration requirements and defined the "qualified purchasers" of such securities who were also exempt from certain state registration requirements.[131] In *Lindeen v. SEC*, the D.C. Circuit deferred to the agency's definition of "qualified purchasers" of securities issued under the "Regulation A-Plus" exemption.[132] Thereafter, the SEC made a series of subsequent amendments to the rule, including one in 2017 that revised the rule "to reflect name changes of certain exchanges referenced in the Rule."[133] This amendment, updating the names of certain exchanges, was a technical correction unrelated to the interpretation of "qualified purchasers" that the D.C. Circuit upheld in in *Lindeen v. SEC*.

131 *See* Lindeen v. SEC, 825 F.3d 646, 655–57 (D.C. Cir. 2016).

132 *See id.*

133 *See* Covered Securities Pursuant to Section 18 of the Securities Act of 1933, 82 Fed. Reg. 50059, 50059 (Oct. 30, 2017) (codified at 17 C.F.R. pt. 230).

Revised dates. These amendments delayed the effective date of a rule or the date for compliance with a rule.[134] The delays were unrelated to the interpretive positions the D.C. Circuit had previously upheld in the agency's rule.

Revised paperwork requirements. The SEC's amendments to its "Regulation A-Plus" also reflect this type of change. In 2018, the SEC issued a rule that adopted modernized property disclosure requirements for certain registrants, making the disclosures more comprehensive.[135] This amendment updated existing disclosure requirements and was unrelated to the interpretation upheld in *Lindeen v. SEC*.

Clarifications. An example followed the D.C. Circuit's 2015 decision in *Council for Urological Interests v. Burwell*, which upheld a rule issued by the Department of Health and Human Services (HHS) defining an "entity furnishing designated health services" for purposes of the limitation on physician self-referrals under the Medicare and Medicaid Acts to include joint ventures in which a physician participates.[136] This rule was part of broader physician self-referral regulations, and, in 2020, HHS issued a rule that "provides critically necessary guidance for physicians and health care providers and suppliers whose financial relationships are governed by the physician self-referral statute and regulations."[137] The rule affirmed and clarified existing policies for all covered individuals and entities, including joint ventures.[138]

Amendments to aspects of the rule unrelated to the affirmed interpretation. An example again relates to the SEC's "Regulation A-Plus." In 2019, the SEC issued a rule that deemed compliance with the reporting requirements for the exemption to meet the reporting requirements of Regulation A; in 2021, the SEC issued a rule that increased the maximum offering amount under the regulation from $50 million to $75 million.[139] But the SEC did not in either instance

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134 *See, e.g.*, Flightcrew Member Duty and Rest Requirements; Technical Correction, 78 Fed. Reg. 11090 (Feb. 15, 2013) (codified at 14 C.F.R. pts. 117, 119, 121) (correcting effective date of rule); Institutional Eligibility Under the Higher Education Act of 1965, as Amended; Delay of Implementation Date, 79 Fed. Reg. 35692 (June 24, 2014) (codified at 24 C.F.R. pt. 600) (delaying implementation date).

135 *See* Modernization of Property Disclosures for Mining Registrants, 83 Fed. Reg. 66344 (Dec. 26, 2018) (codified at 17 C.F.R. pts. 229, 230, 239, 249).

136 790 F.3d 212 (D.C. Cir. 2015).

137 Medicare Program; Modernizing and Clarifying the Physician Self-Referral Regulations, 85 Fed. Reg. 77492, 77492 (Dec. 2, 2020) (codified at 42 C.F.R. pt. 411).

138 *See id.* (stating that the rule "establishes exceptions to the physician self-referral law for certain value-based compensation arrangements between or among physicians, providers, and suppliers," among other new exceptions and amendments to existing exceptions).

139 *See* Conditional Small Issues Exemption Under the Securities Act of 1933 (Regulation A), 84 Fed. Reg. 520, 520 (Jan. 31, 2019) (codified at 17 C.F.R. pts. 230, 239) (providing that "entities meeting the reporting requirements of the Exchange Act will be deemed to have

address or undermine the definition of "qualified purchasers" upheld by the D.C. Circuit.

Changes in application of the affirmed interpretation based on new facts or policy decisions. In 2017, in *Humane Society of the United States v. Zinke*, the D.C. Circuit affirmed a U.S. Fish and Wildlife Service (USFWS) rule that removed the gray wolf from the federal endangered species list in nine states; in this rule, the USFWS interpreted the Endangered Species Act as permitting it to delist a partial population within a fully listed species.[140] In 2020, the USFWS concluded that gray wolf populations in all lower forty-eight states, except for the Mexican wolf, were sufficiently robust to delist them, but in 2023, it added the species back on the list in most of the states in response to a district court order.[141] On a conventional understanding, this may look like a reversal: The status of the gray wolf went from on the list of endangered species, to partially on the list, to mostly off, to back on the list. But these vacillations did not follow from a changed interpretation of the statute (or the regulation). Indeed, the USFWS continued to exercise the partial delisting authority that the D.C. Circuit affirmed. What changed was the protection of the gray wolf in the country based on the USFWS's fact- and policy-based evaluation of its existing populations.[142]

Put another way, the change in status of the gray wolf does not determine the reversal question. The change does not amount to a

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met the reporting requirements of Regulation A"); Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets, 86 Fed. Reg. 3496, 3533 (Jan. 14, 2021) (codified at 17 C.F.R. pts. 227, 229, 230, 239, 240, 249, 270, 274) (adopting amendments that included increasing the maximum offering amount under Tier 2 of Regulation A from $50 million to $75 million).

140 865 F.3d 585, 597–600 (D.C. Cir. 2017). In this case, the D.C. Circuit also affirmed under *Chevron* another USFWS interpretation in the rule. *See id.* at 603–07 (finding USFWS's definition of the "range" of a species as its current range at the time of population evaluation rather than its historical range to be reasonable). In another case involving the gray wolf, the D.C. Circuit affirmed a USFWS interpretation that defined the state "regulatory mechanisms" required for the protection of delisted species to include non-binding state policies in addition to state laws. *See* Defs. of Wildlife v. Zinke, 849 F.3d 1077, 1079 (D.C. Cir. 2017).

141 *See* Endangered and Threatened Wildlife and Plants; Removing the Gray Wolf (*Canis Lupus*) from the List of Endangered and Threatened Wildlife, 85 Fed. Reg. 69778 (Nov. 3, 2020) (codified at 50 C.F.R. pt. 17) (removing the gray wolf from the threatened or endangered species list); Endangered and Threatened Wildlife and Plants; Reinstatement of Endangered Species Act Protections for the Gray Wolf (*Canis Lupus*) in Compliance with Court Order, 88 Fed. Reg. 75506 (Nov. 3, 2023) (codified at 50 C.F.R. pt. 17) (reinstating the gray wolf on the threatened or endangered species list following a court order).

142 *See* Reinstatement of Endangered Species Act Protections for the Gray Wolf (*Canis Lupus*) in Compliance with Court Order, 88 Fed. Reg. at 75506–07 (noting that several parties challenged the agencies' evaluations of the wolf populations). For another case challenging the USFWS's delisting, see Defs. of Wildlife v. U.S. Fish & Wildlife Serv., 584 F. Supp. 3d 812 (N.D. Cal. 2022).

reversal because the agency did not disclaim its authority to partially delist the gray wolf (or any species), so long as it has a fact- or policy-related reason to do so. This example is therefore unlike the classic reversal discussed above—net neutrality, which involved the question whether internet service is an "information service" or a "telecommunications service." Internet service can be only one or the other for purposes of regulation under the Telecommunications Act. By contrast, under the Endangered Species Act, a regulated species either can or cannot be partially delisted; that is the interpretation that the D.C. Circuit affirmed. If the USFWS had reversed the interpretation that the gray wolf, or any threatened species, could be partially delisted, that would amount to a reversal. But that was not the case.

Elaborations or refinements not inconsistent with the affirmed interpretation. Agencies issued amendments that elaborated or refined an affirmed interpretive position in some way. We did not find very many amendments in this category because most amendments in our data set did not change the affirmed interpretation directly. Some of the amendments in this category complemented the affirmed interpretation, for example one specifying a means of compliance with the original rule.[143] But some presented closer calls. These involved revised procedures, exceptions, or special requirements,[144] which might be considered reversals, depending on how they are viewed: A revised procedure can be seen as a different procedure; an exception can be seen as a partial repeal; a special requirement can be seen as a substitute requirement. We did not categorize the amendments in this category as reversals because they were not wholly inconsistent with the affirmed interpretation. Indeed, the affirmed interpretation remained, even though refinements were made. In this respect, these amendments

143 *See* Kornman v. SEC, 592 F.3d 173, 176 (D.C. Cir. 2010) (upholding SEC rule allowing for summary disposition motions); Amendments to the Commission's Rules of Practice, 81 Fed. Reg. 50212, 50224 (July 29, 2016) (codified at 17 C.F.R. pt. 201) (allowing for three types of dispositive motions); Env't Def., Inc. v. EPA, 509 F.3d 553, 560 (D.C. Cir. 2007) (upholding EPA interpretation of a provision in the Clean Air Act as applying to regional environmental "hot spots" and not local ones); Transportation Conformity Rule Amendments to Implement Provisions Contained in the 2005 Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), 73 Fed. Reg. 4420, 4420 (Jan. 24, 2008) (codified at 40 C.F.R. pts. 51, 93) (allowing Department of Transportation to make categorical hot spot determinations).

144 *See* Fed. Express Corp. v. Dep't of Transp., 434 F.3d 597, 598 (D.C. Cir. 2006) (upholding Department of Transportation's Cost Savings Rule, requiring deduction of cost savings from air cargo carriers' compensation claims for losses incurred in the wake of the September 11 terrorist attacks); Procedures for Compensation of Air Carriers, 68 Fed. Reg. 44455, 44457 (July 29, 2003) (codified at 14 C.F.R. pt. 330) (making revisions to make the process more efficient, setting a compensation floor, and creating a special set-aside for small air cargo carriers).

were not like the one in *Buffington v. Wilkie*, which is a reversal under our definition because federal benefits either reactivate automatically upon a veteran's return from a second tour of duty, or the veteran must request reactivation.[145] Nor were they like the amendment in *Loper Bright*, which we would also classify as a reversal because either the government pays the fee to have federal officials monitor the activity of herring fishing boats while at sea in a certain region, or the affected fishery pays.[146]

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In sum, our data reveal that agency regulations affirmed by the D.C. Circuit under *Chevron* step two from 2004–2024 did change frequently, but they rarely reversed the legal interpretation that the D.C. Circuit affirmed. In addition, our data illustrate the sort of amendments agencies make to regulations that contain affirmed interpretations. The next Part contends that our study has significant implications not only for the understanding of regulatory law prior to *Loper Bright* but for the treatment of agency regulations after *Loper Bright*.

III
Implications

Our study shows that once affirmed under *Chevron*, agencies rarely reversed their interpretive positions, at least with respect to regulations reviewed by the D.C. Circuit. Accordingly, it suggests the whiplash narrative is not a complete or apt description of regulatory law writ large under *Chevron*—that is, across the landscape of regulation, agency interpretations did not flip-flop with the frequency or regularity that the whiplash narrative implies. Furthermore, our study suggests that there is a better account: one of regulatory settlement. This Part introduces the regulatory settlement account and explains why it is important. The relative stability of regulatory law under *Chevron* affects the two pressing issues for judicial review created when the Court overruled *Chevron*. The first is the status of prior judicial decisions that relied on *Chevron*—the issue of stare decisis. The second is the degree of respect courts owe under *Skidmore* to agency regulations that change—the issue of agency regulatory change.

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[145] 31 Vet. App. 293, 296 (2019), *aff'd sub nom.* Buffington v. McDonough, 7 F.4th 1361 (Fed. Cir. 2021), *cert. denied*, 143 S. Ct. 14 (2022).

[146] *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2254–55 (2024) (describing the federal fishery monitoring program).

A. Regulatory Settlement Under Chevron

The whiplash narrative posits that *Chevron* freed agencies to reverse their interpretive positions at will and that agencies reversed themselves often enough to create pervasive legal instability and to imperil private reliance interests. For some, even a few high-profile instances of whiplash might have sufficed as justification to overrule *Chevron*.[147] But the implication of the whiplash narrative is that these few high-profile reversals were not outliers, but rather they were representative of agency behavior more generally. Our study directly contradicts that implication. In our data, we observed three reversals of agency interpretations affirmed under *Chevron*. That finding undercuts the suggestion that agencies were continually reversing their interpretations or that flip-flopping is an apt generalization of agency behavior following a judicial affirmance under *Chevron*. On the contrary, these agency interpretations basically came to rest. To be sure, agencies continued to revise and amend their regulations, consistent with the findings of the Wagner study. Yet, they rarely reversed their judicially ratified legal interpretations. In this sense, the regulation at issue in *Chevron* itself was representative of the agency behavior we observed: Since the Court affirmed the EPA's "bubble" interpretation of stationary source in 1984, the EPA has not formally rescinded its bubble policy interpretation.[148]

Once the misimpression of regulatory law under *Chevron* is cleared away, a different account emerges. Our study suggests that regulatory law during this period can be understood as reflecting an underappreciated stable equilibrium. In their 1994 Foreword to the *Harvard Law Review*, *Law as Equilibrium*, Eskridge and Frickey conceptualize law as the product of interbranch interaction—"an equilibrium, a state of balance among competing forces or institutions."[149] As they observe, Congress legislates, subject to presidential approval; agencies implement statutes in ways that can advance or disregard the legislative design; and the courts can endorse or overturn a Congress-President consensus through

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147 The view is taken, for instance, by Richard Pierce. *See* Pierce, *supra* note 28 at 96–103 (arguing that *Chevron* was no longer justified because it allowed notable high-profile agency flip-flops).

148 Bubble policy is the underpinning of cap-and-trade policy, which is a common modern pollution control strategy. *See* Charles Halvorson, *Deflated Dreams: The EPA's Bubble Policy and the Politics of Uncertainty in Regulatory Reform*, 93 Bus. Hist. Rev. 25, 46–49 (2019). Bubble policy itself is no longer in use, having given way to newer approaches, but it is still listed as part of EPA history on the agency's website. *Bubble Policy*, U.S. Env't Prot. Agency (July 31, 2024), https://www.epa.gov/history/bubble-policy [https://perma.cc/3266-DCQV].

149 Eskridge & Frickey, *supra* note 15, at 28.

constitutional interpretation, statutory interpretation, or administrative review of agency action.[150] Knowing "what the law 'is'" thus requires understanding the override power and practices of each institution.[151] In this model, a stable equilibrium—and thus stable law—occurs "when no implementing institution is able to interpose a new view without being overridden by another institution."[152]

One of the insights of Eskridge and Frickey's Foreword is the move away from the formalist identification of "law" with the official products issued by each of these institutions—the products that are the focus of law school classes and legal briefs. Because the law issued by each institution may be overridden or thwarted by the other institution, each institution's statement of the law—whether a congressional bill delegating power to an agency, an agency regulation, or a judicial declaration—is functionally provisional. It moves from provisional to stable when no other institution exercises its override or thwarting power. So, the law upon which businesses and other private and public institutions rely to organize plans and investments is that which persists in the interbranch interaction—that is, an institutional settlement.

In the decades prior to *Loper Bright*, as Cary Coglianese and Daniel Walters highlight, the volume of agencies' regulatory outputs had been very consistent, as was the rate of judicial reversal of those outputs.[153] These findings begin to suggest that agencies and courts had reached a settled pattern of interaction. Our empirical study reveals an equilibrium, not just in terms of agency regulatory outputs and judicial reversal rates, but the full inter-branch sequence through which a stable settlement on regulatory law emerges. It shows that an interbranch interaction—the delegation by Congress of rulemaking power to the agency, and the exercise of that power by the agency—results in remarkable legal stability once the agency's interpretation has been upheld by a federal court of appeals. Affirmation by a court of appeals (again, assuming the D.C. Circuit is representative in this respect) ratifies the Congress-Executive interbranch interaction. At one level, this result should not be all that surprising: Judicial affirmance is the culmination of a three-branch interaction.

The regulatory settlement we observe makes sense from the perspective of each actor. For the agency, issuing a regulation is generally a costly, carefully vetted form of action. Once an interpretation reflected in a regulation has been affirmed by a court of appeals, the

150 *Id.* at 30.
151 *Id.* at 31.
152 *Id.* at 32.
153 Coglianese & Walters, *supra* note 86, at 29.

agency will have little incentive of its own to revisit that interpretation, unless it becomes unworkable or obsolete due to changes in underlying scientific, technological, economic, or behavioral assumptions. Congress has generally shown little interest in overriding regulations, much less regulations that have been judicially affirmed.[154] For an affirmed regulation, that leaves only the President as a possible overrider. It will be exceedingly rare for a President to prompt withdrawal of a regulation for policy reasons if issued by their own administration and subject to vetting by OIRA, and presumably even more rare when the regulation has been upheld in court. So, it is only in presidential transition from one party to another that Presidents will have an incentive to reverse agency interpretations. If Presidents tried to reverse agency regulations once affirmed, our study suggests that they were rarely effective in doing so. Again, that is not to minimize the instances of presidential whiplash we have seen, or the reliance interests they imperiled. It is to keep those instances in proper context. From a descriptive perspective, they are departures from the settlement norm and not the basis for an instability norm.

B. Stare Decisis and Prior Cases That Relied on Chevron

A proper understanding of regulatory law under *Chevron* is important not just to correct past misconceptions but to resolve pressing questions for judicial review going forward. The first question is: To what extent does statutory stare decisis apply to prior cases that relied on *Chevron* to uphold agency action? Although the Court raised this question in *Loper Bright*, it is particularly urgent because of another decision reached the same term, *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, which effectively eliminated the statute of limitations for challenges to the validity of regulations.[155] As a result, any newly formed entity can challenge the validity of regulations, even regulations issued more than six years ago.

The Court in *Loper Bright* provided assurance that statutory stare decisis applies to prior cases that relied on *Chevron*, stating that it was "not call[ing] into question" those cases and that "[t]he holdings of those cases that specific agency actions are lawful . . . are still subject to

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[154] *See* Kevin M. Stack, *Rule-Making Regimes in the Modern State*, *in* The Oxford Handbook of Comparative Administrative Law 552, 564–65 (Peter Cane, Herwig C. H. Hofmann, Eric C. Ip & Peter L. Lindseth eds., 2020) (discussing how infrequently Congress pushes back against rulemaking decisions).

[155] 144 S. Ct. 2440, 2452–53 (2024) (holding that the statute of limitations begins to run from time of injury).

statutory *stare decisis* despite our change in interpretive methodology."[156] Furthermore, the Court stated that mere reliance on *Chevron* is not a "special justification" for overruling precedent.[157] This statement is fine, as far as it goes. Our study—and the regulatory settlement picture it suggests—provides a special justification for *honoring* prior cases that relied on *Chevron*.

The general basis for stare decisis—the pragmatic principle that courts generally should respect precedent—is to enable parties to rely on judicial decisions and protect their settled expectations.[158] The Court has long maintained a "super-strong" rule of stare decisis for statutory precedent, constraining courts from overruling such precedent for the additional reason that Congress can correct an erroneous judicial interpretation.[159] In this sense, statutory stare decisis protects the relationship between the coequal branches: Courts should not risk overruling an interpretation that Congress has acquiesced in. But stare decisis has never been an absolute rule in any context because courts may find a "special justification" for overruling precedent, despite the need for predictability and stability, including that the prior decision has proved unworkable over time or is poorly reasoned.[160]

Our study suggests that courts should be especially hesitant to overrule precedent that relied on *Chevron* to uphold agency interpretations in the rulemaking context. In these cases, the court's blessing had the effect of quieting legal apprehension of the interpretation in the regulation. Courts should be reluctant to upset regulatory settlements because they create legal predictability and

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156 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024); *see* Jonathan Remy Nash, Chevron *Stare Decisis in a Post*-Loper Bright *World*, 110 Iowa L. Rev. Online 180, 189–201 (2025) (discussing some complexities of giving stare decisis effect to *Chevron* precedent).

157 *Id.*

158 *See generally* Randy J. Kozel, Settled Versus Right: A Theory of Precedent (2017) (explaining the rationales of stare decisis and developing a theory of precedent to increase stability and reduce ideological variance in rulings). For a discussion of the importance of stare decisis, see Kimble v. Marvel Ent., LLC, 576 U.S. 446, 455 (2015) (describing stare decisis as "a foundation stone of the rule of law" (quoting Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 798 (2014))); Glen Staszewski, *Precedent and Disagreement*, 116 Mich. L. Rev. 1019, 1019 (2018) (stating that stare decisis is widely regarded as "one of the defining features of the American legal system").

159 *See* Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 Geo. Wash. L. Rev. 317, 317 (2005) (describing statutory stare decisis as having "special force" because of legislative supremacy and the belief that Congress is responsible for making statutory policy (quoting Patterson v. McLean Credit Union 491 U.S. 164, 172 (1989))).

160 *See* Dickerson v. United States, 530 U.S. 428, 443 (2000) (noting that Supreme Court precedent has long required a "special justification" to depart from precedent (quoting United States v. Int'l Bus. Machs. Corp., 517 U.S. 843, 856 (1996))); Payne v. Tennessee, 501 U.S. 808, 828 (1991) (observing that "[*s*]*tare decisis* is not an inexorable command").

certainty, thereby promoting investment and securing reliance by private parties—the very values that stare decisis serves. Furthermore, courts should be especially reluctant to overrule such settlements for institutional reasons. When courts overrule precedent that establishes a regulatory settlement, they become initiators of legal change and sources of legal instability. As first-movers, they require the other branches to react, and to forge a new settlement. Justice Kagan, dissenting in *Loper Bright*, recognized the "jolt to the legal system" and the private reliance interests at stake in overruling prior decisions that relied on *Chevron*.[161] But even she did not appreciate the full institutional costs.[162] There may be some circumstances in which upsetting legal stability and requiring the elected branches to respond is appropriate. The point here is that those circumstances should not arise routinely. A court should have an extraordinary justification for disrupting an inter-branch settlement.

The regulatory settlement justification for honoring decisions that relied on *Chevron* also has especially strong implications for the application of statutory stare decisis in the lower courts, a question Justice Amy Coney Barrett addressed when she was an academic. She argued that a super-strong rule of statutory stare decisis should not apply to courts of appeals' own precedent in contrast to Supreme Court precedent.[163] She focused on the institutional justification for such a rule, namely that Congress can correct erroneous judicial interpretations and therefore courts need not and should not correct their own statutory precedent.[164] She argued that this justification applies with less force to court of appeals decisions because Congress is less likely to be aware of such precedent, let alone correct it when erroneous.[165]

In view of our study and the regulatory settlement account it suggests, there is an argument that lower courts should be even more hesitant to overturn their own precedent than the Supreme Court should be with respect to its precedent.[166] When a single three-judge panel (or even a single circuit sitting en banc) overrules its own precedent, it is unilaterally changing the law, and, in many cases, its changes will not be subject to further review in Congress or by the Supreme Court.

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161 *Loper Bright*, 144 S. Ct. at 2310 (Kagan, J., dissenting) (quoting Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2316 (2022) (Roberts, C.J., concurring in the judgment)).

162 *See* Hemel, *supra* note 106, at 1719–31 (discussing how regulatory uncertainty may cause costs to regulated parties).

163 *See* Barrett, *supra* note 159, at 318.

164 *See id.* at 330–31.

165 *See id.* at 335.

166 *See* Ohio v. Becerra, 87 F.4th 759, 770 (6th Cir. 2023) (noting that, despite the uncertainty in the *Chevron* two-step in the years leading up to *Loper Bright*, the role of a court of appeals is to follow directly applicable precedent until the Supreme Court decides to overrule it).

While Congress has the power to engage in oversight of the underlying agency regulations, Congress does not routinely monitor, much less devote its time to overriding, lower court decisions, as Justice Barrett argues.[167] And it is also unlikely that the Supreme Court will review any given case for the purpose of correcting the error of the court of appeals below, especially given the sheer volume of cases that relied on *Chevron*.[168] As a result, lower court reversals of statutory precedents can have destabilizing effects on the law that are difficult to correct.[169]

Although our study and regulatory stability account support a strong rule of stare decisis for prior decisions that relied on *Chevron*, there is reason for concern that lower court judges will allow the few visible instances of regulatory whiplash that did occur under *Chevron* to suggest the opposite. A decision in the Sixth Circuit provides an illustration. *In re MCP No. 185*, a three-judge panel reversed and remanded the most recent of the FCC's net neutrality rules based on its own reinterpretation of the statutory language.[170] The court invoked the whiplash narrative: "This order," the court recounted "issued during the Biden administration undoes the order issued during the first Trump administration, which undid the order issued during the Obama administration, which undid orders issued during the Bush and Clinton administrations."[171] Quoting Justice Gorsuch's lament "that '*Chevron* deference engender[ed] constant uncertainty and convulsive change even when the statute itself remains unchanged,'"[172] the court stated, "[a]pplying *Loper Bright* means we can end the FCC's vacillations."[173]

As opposed to "end[ing] the FCC's vacillations" by affirming the FCC's most recent order, the court reinterpreted the statutory language, reversed, and remanded to the agency. Thus, it changed the law one more time, even though the FCC no longer had the interpretive latitude to flip the interpretation again. More striking was the extent to which—and the way in which—the court avoided stare decisis. The Supreme Court had previously upheld the agency's interpretation of the relevant

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167 *See* Barrett, *supra* note 159, at 335.

168 *See* Hemel, *supra* note 106, at 1707 (noting that under *Loper Bright* many circuit splits will endure for decades, and many will never be resolved by the Supreme Court).

169 For an argument that *Loper Bright* will increase the number of circuit splits and reduce the number of agency "flips" or reversals—and an analysis of the tradeoffs between flips and splits—see Hemel, *supra* note 106, at 1707.

170 124 F.4th 993, 997–98 (6th Cir. 2025).

171 *Id.* at 1000.

172 *Id.* (alteration in original) (quoting Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2288 (2024) (Gorsuch, J., concurring)).

173 *Id.*

statutory language in the context of an earlier order.[174] Quoting *Loper Bright*, the court regarded itself as bound only by the Court's prior holding that the "specific agency actions are lawful," and the case in front of it involved a different FCC order.[175] It therefore understood itself as unconstrained in reinterpreting the relevant statutory language. That choice—to look only at whether the agency action is the same—opens the door to judicial reinterpretation of statutory language in *any* case whenever a regulation has been amended. In other words, the narrow way in which the *Mozilla* court understood its stare decisis obligation in the context of an agency reversal may now affect how it understands that obligation in cases involving a routine agency revision. And it may affect its understanding in cases involving its own precedent rather than Supreme Court precedent.[176] Furthermore, courts outside the Sixth Circuit may or may not follow suit, which raises another set of predictability and stability issues after *Loper Bright*.[177]

To summarize: examining how frequently agencies reverse their interpretations after judicial affirmance under *Chevron* reveals important dimensions of the stare decisis problem following *Loper Bright*. More specifically, it reveals the scope of the regulatory settlements that judicial affirmance produces and thus the scope of private reliance interests as well as institutional considerations that are implicated if courts overrule (or evade) *Chevron* precedent. Our study and account of regulatory law therefore provide support for a strong rule of stare decisis. Courts should have an extraordinary justification for overruling or avoiding prior judicial decisions that upheld agency regulations under *Chevron*. They should not fixate on the specific agency action upheld in prior decision as reason to reinterpret the relevant statutory language. If genuinely interested in rule of law and institutional values, they should resist becoming the agents of regulatory change.

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174 *See id.* at 1002–03 (rejecting Supreme Court's construction of the same statutory terms in Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 975 (2005)).

175 *Id.* at 1002.

176 *See* Ohio v. Becerra, 87 F.4th 759, 770 (6th Cir. 2023) (questioning whether it was still bound by *Chevron* despite the doctrine's uncertainty, but ultimately deferring to existing Supreme Court precedent under *Chevron*).

177 *Cf.* Lopez Bartolo v. Garland, No. 23-1578, slip op. at 5 (9th Cir. Jan. 6, 2025) (quoting *Loper Bright* and finding that it is bound by the holding in its own precedent); Siqueira v. U.S. Att'y Gen., No. 23-13710, slip op. at 4–5 (11th Cir. Oct. 28, 2024) (quoting *Loper Bright* and declining to disturb its own precedent because not requested by the parties). The Sixth Circuit appears to be taking the lead among the circuit courts in reading *Loper Bright* narrowly and against agency action. *See, e.g.*, Moctezuma-Reyes v. Garland, 124 F.4th 416, 420–21 (6th Cir. 2024) (declining to the find that the phrase "exceptional and extremely unusual hardship" in an immigration statute, 8 U.S.C. § 1229b(b)(1)(d), is one that delegates discretionary interpretive authority to Board of Immigrations Appeals under *Loper Bright*).

C. *Agency Regulatory Change and* Skidmore

Another pressing question after *Loper Bright* is the degree of respect that courts should accord to agency regulations under *Skidmore* when such regulations have changed in some respect from previous versions. *Skidmore* treats "consistency with earlier and later pronouncements" as relevant to determining whether an agency interpretation is entitled to persuasive weight.[178] The Court in *Loper Bright* emphasized this aspect of *Skidmore*, writing that "interpretations . . . which have remained consistent over time[] may be especially useful in determining the statute's meaning."[179] Our study, in addition to revealing few reversals of the sort that motivate the whiplash narrative, confirmed that agencies frequently amend their regulations in other ways: in light of changed assumptions, predictions, policies, or simply to address new issues. Such amendments are not problematic per se; to the contrary, they are consistent with agencies being responsive to the circumstances in which their regulations operate, and making incremental adjustments as needed as part of informed rulemaking.

Our concern is that the whiplash narrative will invite courts to regard *any* agency regulatory change as presumptively suspect under *Skidmore*, ousting the agency's action from judicial respect. At the most basic level, the whiplash narrative is hostile to regulatory change.[180] Furthermore, it does not make fine-grain distinctions between legal change and routine fact- or policy-based change, which *Chevron* for so long swept together.[181] If the whiplash narrative is not constrained, courts may reflexively regard any inconsistency with prior regulations as "a huge *Skidmore* minus."[182]

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178 Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

179 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2262 (2024).

180 *See* Lemos & Widiss, *supra* note 111, at 627 (noting *Loper Bright*'s "hostility to regulatory reform").

181 *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 863–64 (1984) (noting that "the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis"); Lisa Schultz Bressman, *Lower Courts After* Loper Bright, 31 Geo. Mason L. Rev. 499, 505–08 (2024) (explaining that courts did not have to focus on the choice between *Chevron*, which applied to agency interpretations, and the arbitrary and capricious standard, which applies to agency policy decisions, because both pointed in the direction of judicial deference); Lisa Schultz Bressman, *Foreword: The Ordinary Questions Doctrine*, 92 Geo. Wash. L. Rev. 985, 988–89 (2024) ("Under *Chevron*, courts did not need to decide how to characterize mixed questions [of law and policy] because the doctrine provided its own approach, instructing them to treat agency interpretations as presenting questions of policy, so long as the relevant statutory language was ambiguous.").

182 *See* Lemos & Widiss, *supra* note 111, at 627 ("As consummate Supreme Court litigator (and former SG) Paul Clement put it during the oral argument in *Loper Bright*, 'Flip-flopping is a huge *Skidmore* minus.'").

Such an outcome would be unfortunate. First, it is not required by *Skidmore*. While *Skidmore* rewards the consistency of long-held agency interpretations, it contains a host of other factors for courts to consider in determining whether an agency's views are the product of expertise and experience and thus worthy of respect.[183] Second, this approach would treat any agency amendment as an interpretive reversal. That ignores the fact that part of an agency's job—and a core reason for delegation to executive branch actors—is to promote flexibility and responsiveness in the face of changed circumstances. Third, it creates unnecessary tension with arbitrary and capricious review under the APA. The Supreme Court has long recognized and recently reiterated that the arbitrary and capricious standard permits agency flexibility and responsiveness to changed circumstances.[184] It is one thing for courts to consider the effect of a regulatory change on private reliance interests (a factor that the agency is required to consider in the rulemaking process under arbitrariness review),[185] but quite another to assume that any regulatory change necessarily causes legal instability and defeats private reliance interests, thus ousting a regulation from judicial respect if reviewed under *Skidmore*.

Conclusion

In *Loper Bright*, the Supreme Court embraced a picture of agencies as reversing their interpretations continually and convulsively, and of *Chevron* as facilitating that legal instability. But the whiplash narrative, which the Court deployed as part of its justification for overruling *Chevron*, neglects the legal stability that judicial affirmance under *Chevron* creates. Our study shows that once the D.C. Circuit affirmed an agency's interpretive position under *Chevron*, agencies rarely reversed themselves—and the high-salience reversals that anchor the whiplash narrative were not representative of regulatory law under *Chevron*, at least not in our twenty-year sample. The whiplash narrative, by implying that these flip-flops occurred with some regularity, understates the stare

183 *See Skidmore*, 323 U.S. at 140 ("The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.").

184 *See* FDA v. Wages & White Lion Invs., LLC, 145 S. Ct. 898, 916–17 (2025) (endorsing and clarifying the "change-in-position doctrine" that has long existed under arbitrary and capricious review).

185 *See, e.g.*, Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 221–22 (2016) ("In explaining its changed position, an agency must also be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" (quoting FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009))).

decisis protection that courts should accord to prior decisions that affirmed agency interpretations in reliance on *Chevron*. Instead, it invites courts to overrule or avoid such decisions and reinterpret the relevant statutory language whenever an agency has changed a regulation in any respect from a prior version. Our study supports a strong stare decisis rule: Courts should have an extraordinary justification to upset the regulatory settlements their prior decisions have created, to protect both the private reliance interests and the institutional values at stake.

More generally, the whiplash narrative offers courts a dark lens through which to view agency regulatory change when reviewing regulations under *Skidmore*. *Skidmore* makes consistency a factor in determining whether an agency interpretation merits judicial respect. Meanwhile, the narrative portrays agency regulatory change as suspect, opening the possibility that any regulatory change will oust an agency interpretation from judicial respect. Our study indicates that the revisions agencies made to their regulations, even when they had the opportunity to reverse them wholesale, tended to be the sorts of routine fact- and policy-based determinations that we would expect and want an agency engaging in informed rulemaking to make. For the same reason, they are the sorts of determinations courts should expect and regard with respect when reviewing regulations under *Skidmore*.

Most generally, our image of agencies matters. Our study suggests that the whiplash narrative presents a misleading picture of agencies as perpetual flip-floppers, reversing their legal interpretations 180 degrees if given the leeway. This picture has the potential to promote legal instability and distort judicial review going forward, though it should not.