



The End of *Chevron* Deference and the Disability Community: New Obstacles to Advocacy and Wellbeing

Executive Summary

For decades, *Chevron* deference was a central legal standard in administrative law. It required courts to defer to federal agencies' interpretations of the law when it is vague. *Chevron* helped to ensure that experts working in the agencies, dedicated civil servants, could play an appropriate role in implementing public policy. This legal framework provided a stable understanding of rights and obligations for regulated entities- from universities and factories to businesses as small as a self-employed long-haul trucker- as well as to the public. Recently, the Supreme Court ended the use of *Chevron* deference. See *Loper Bright Enters. v. Raimondo*, Nos. 22-451, 22-1219, 2024 U.S. LEXIS 2882, *3-10 (June 28, 2024). Going forward, federal courts will evaluate regulations more critically. As a result, business and ideological interests are likely to bring litigation to strike down federal regulations they oppose. This will affect everything from consumer protection to racial equity to medical care.

The Court's post-*Chevron* approach to administrative law will result in substantial harm to marginalized people, including people with disabilities. It will exacerbate social problems – from climate change to student debt burdens – that disproportionately affect those who are already struggling. The end of *Chevron* deference will also steer the Supreme Court deeper into the culture wars, positioning it to make decisions that will damage its credibility and further weaken it. While the disability community retains many tools for asserting its rights, a legal standard that allows unaccountable elected judges significant leeway to interfere with public policy is a detrimental development for disabled people and most of society.



The Autistic Self Advocacy Network seeks to advance the principles of the disability rights movement with regard to autism. ASAN believes that the goal of autism advocacy should be a world in which autistic people enjoy equal access, rights, and opportunities. We work to empower autistic people across the world to take control of our own lives and the future of our common community, and seek to organize the autistic community to ensure our voices are heard in the national conversation about us. Nothing About Us, Without Us!

Public Agencies Touch Every Facet of American Life

Public agencies have played a quiet but substantial role in daily life for decades. Agencies hold a unique position in the governmental structure. The Constitution divides federal power between the three branches of government. Congress is authorized to make laws.¹ The Executive Branch – under the President – enforces laws Congress creates. One tool it can use to enforce laws is crafting regulations.² To produce regulations, a public agency must always make some decisions about what a statute means so that it can determine what content will need to be in the regulation for it to enforce the law on which it is based. Federal courts interpret the law and the Constitution.³ When Congress disapproves of how the Supreme Court has interpreted laws it passes- called statutes- it can usually create a statute to override the Court’s action.⁴ Each branch is designed to be limited by the others, as people who shaped the Constitution feared that any one branch becoming unaccountable would lead to abuses against the people.⁵

Because lawmaking authority is vested in Congress, the Executive Branch is not able to make laws independently. Agencies can only create regulations where Congress allows it. In some situations, this means Congress has included language in a statute that instructs one or more public agencies to make regulations implementing the law, but Congress has not had to expressly permit or command an agency to make regulations for it to be able to do so. For many years, Congress has passed statutes that necessitate implementing regulations from a public agency. When that happens, the agency must undertake a specific process established in the Administrative Procedures Act (APA), to create regulations that have the force of law. *See* 5 U.S.C.S. § 553. Agencies have also undertaken rulemaking of their own accord. The resulting regulations have the force of law. They fill in the details of broad, sweeping statutes. Congress often deliberately leaves room for agencies to make regulations.⁶ Still, if Congress disapproves of an agency’s rulemaking, it can override regulations with a statute because it has final say in the lawmaking process.

This is where federal law most often touches everyday life. Federal regulations protect the public from contaminated food, keep medications safe and effective, promote public health, ensure the reliable transportation of people and goods, maintain economic stability, and guard against dangerous workplace conditions.⁷ Regulations touch virtually every person and industry. They contain anti-discrimination protections for marginalized people, including the disability community. Federal administrative law has an enormous impact on the lives of disabled people from the cradle to the grave because agencies are tasked with addressing civil rights issues in K-12 education, higher education, employment,

1 *See* U.S. Const. art. I.

2 *See* U.S. Const. art. II.

3 *See* U.S. Const. art. III; *see also* *Marbury v. Madison*, 5 U.S. 137 (1803).

4 *See* *Allen v. Milligan*, 599 U.S. 1, 42 (2023) (“Unlike with constitutional precedents, Congress and the President may enact new legislation to alter statutory precedents such as *Gingles*.”).

5 *See* The Federalist No. 47, 249 (James Madison) (George Carey and James McClellan ed., 2001) (“The accumulation of all powers, legislative, executive, and judiciary, in the same hands... may justly be pronounced the very definition of tyranny.”).

6 *See* Detroit Regional Chamber, *Business Impact: Supreme Court Ruling to End ‘Chevron’ Doctrine, Shifts Federal Regulations From Agencies to Courts*, (Jul. 1, 2024) <https://www.detroitchamber.com/business-impact-supreme-court-ruling-to-end-chevron-doctrine-shifts-federal-regulations-from-agencies-to-courts/> (“An example... would be with IRS guidance that taxpayers have long relied on. Many statutes from Congress are only sentences long, charging the IRS to promulgate and implement rules... Now, any promulgation from the IRS or Treasury is more open to challenges.”).

7 *See* Coral Davenport, Christina Jewett, Alan Rappeport, Margot Sanger-Katz, Noam Scheiber and Noah Weiland, *Here’s What the Court’s Chevron Ruling Could Mean in Everyday Terms*, N.Y. Times, Jun 28, 2024, <https://www.nytimes.com/2024/06/28/us/politics/chevron-deference-decision-meaning.html> (“‘If Americans are worried about their drinking water, their health, their retirement account, discrimination on the job, if they fly on a plane, drive a car, if they... breathe the air — all of these day-to-day activities are run through... federal agency regulations,’ said Lisa Heinzerling, an expert in administrative law at Georgetown University. ‘And this decision now means that more of those regulations could be struck down by the courts.’”); *see also* Alan Ferguson, *SCOTUS overturns Chevron deference: What does it mean for OSHA?*, Safety + Health (Jul. 1, 2024), <https://www.safetyandhealthmagazine.com/articles/25625-scotus-overturns-chevron-deference-what-does-it-mean-for-osa>.

federal benefits, and health care.⁸ Many federal statutes promoting disability rights use somewhat general terms because Congress meant for them to cover so many areas of life.⁹ It would be difficult to capture every granular detail of Congress' intent in a statute as vast in its ambition, for example, as the ADA, which offered large numbers of people freedoms and opportunities they had never previously experienced.

Regulations contain, and protect, these details. They are where the specific requirements for everything from doorway widths to service animal access exists. Recently, the disability community has had several significant regulatory victories. These have made access rights and nondiscrimination protections more clear and enforceable in settings where they have not always been honored, including in all aspects of child rearing touched by state child protective service agencies, medical diagnostic equipment, and state and local governments' online content. One new regulation important to the disability community supports enforcement of the civil rights protections for people who use home and community based services (HCBS). This will give people who need support day-to-day much more ability to insist on ordering their lives in the ways of their choosing. From regulations authorized by Section 504 of the Rehabilitation Act dating to the 1970s to these new additions, federal regulations offer essential protections for the rights and wellbeing of people with disabilities.

When disabled people experience discrimination, the presence of these regulations often makes vindicating those rights simpler and faster than it would be otherwise. When someone who has encountered discriminatory conduct can show that a regulation clarifies that the particular harm they experienced violates the statute, the party that discriminated against them is more likely to be willing to resolve the issue quickly. Where attorneys become involved, a regulation that makes it clear that a violation of the statute took place if the factual allegations are true, lawyers for the party that engaged in discrimination will more often advise their client that prompt settlement is the best resolution. This reduces the number of situations where there is enough uncertainty about the rights and obligations of parties to a dispute that litigation- during which courts will not always require the party that may have engaged in discrimination to do what the disabled person asks- is the only way to clarify them. In this way, regulations sometimes lead to people being able to exercise their rights years earlier than they otherwise could or from being unable to do so at all given society-wide issues with access to legal representation.¹⁰ All federal regulations- including the ones on whose protections disabled people across the country have built their lives- are now facing a more challenging legal environment because of a change of legal standard that recently came about through the Supreme Court.

Chevron Deference

Federal regulations can face court challenges. For years, a legal standard called "*Chevron* deference" was integral to these disputes. It was in one of these challenges that *Chevron* deference came to be, created in a Supreme Court decision about how to evaluate the extent of agencies' regulatory authority. *See Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984) (On whether a statute allowing the Environmental Protection Agency to regulate air pollution authorized a particular industrial regulation.). Because agencies can only create law where Congress allows, litigation in administrative law is often about whether the authority Congress gave the agency extends far enough to permit a specific regulatory requirement. A court that finds that an agency exceeded its mandate from Congress will strike down the regulation at issue. *See* 5 U.S.C.S. § 553 (2).

⁸ *See* U.S. Department of Education, <https://www.ed.gov/> (last visited Jul. 13, 2024); *see also* U.S. Equal Employment Opportunity Comm'n, <https://www.eeoc.gov/> (last visited Jul. 11, 2024); U.S. Social Security Administration, <https://www.ssa.gov/> (last visited Jul. 11, 2024); U.S. Food and Drug Administration, <https://www.fda.gov/> (last visited Jul. 11, 2024).

⁹ For example, the language prohibiting employment discrimination in the ADA is broad. *See* 42 U.S.C.S. § 12112(a) ("No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."). The statute leaves significant room for specifics. If much of this infill did not happen through regulation, more of it would have to take place through the costly, time-consuming process of litigation.

¹⁰ *See Backdrop: The Access to Justice Crisis*, National Coalition for a Civil Right to Counsel, <http://civilrighttocounsel.org/about/history> (last visited Jul. 18, 2024) ("Every year, millions of low-income people throughout the United States struggle through serious, complex civil legal disputes without the help of a lawyer. Most low-income households find private counsel unaffordable and free legal aid unavailable due to the high demand and limited time and resources of legal aid programs.")

For this reason, the outcome of such cases often comes down to what a court decides about the meaning of a word or phrase in the statute that allegedly authorized the regulation.¹¹ Because the test the court uses to determine the meaning of the language at the center of the dispute affects the court's decision about the meaning, tests play a substantial role in shaping the result of the case. Public agencies create many kinds of written materials, but courts applied *Chevron* deference to regulations agencies created through the process outlined in the APA. In using this legal standard, they considered two things: whether "Congress has directly spoken to the precise question at issue" and "whether the agency's answer is based on a permissible construction of the statute." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984). The first criterion was about whether the agency had authority to make regulations at all. Because Congress is the ultimate authority over lawmaking, agencies cannot override Congress. Where Congress has made an unambiguous rule about a particular subject or issue, agencies do not have room to act. For this reason, courts would hold that an agency had overstepped the bounds of its power and overturn its regulations when the agency made regulations that exceeded or opposed what Congress had chosen to require. However, if the court agreed that Congress had not already addressed the subject of the regulation at issue- that Congress had left an opening in which the agency could work- it would move on to the second criterion. This meant evaluating the regulation itself.¹² If the regulation the agency had made was a reasonable reading of the statute, the court would accept them.

For forty years, the original core of *Chevron* Deference- what came to be called the *Chevron* two-step- was the linchpin of determining whether an agency interpretation of a statute- and the regulations based on its interpretation- were permissible.¹³ Over time, the Supreme Court made alterations to *Chevron* deference. It emphasized that authority from Congress was necessary for a public agency to create valid regulations and that any documents agencies create without using the process outlined in the APA do not have the force of law.¹⁴ The Court also limited *Chevron* deference with the major questions doctrine.¹⁵ This reduced agencies' ability to tackle particularly weighty issues without explicit Congressional authorization to do so.¹⁶ Even with its later restrictions, this framework let federal agencies make reasonable regulations in "statutory gaps" with a reasonable degree of discretion.. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). Provided that courts agreed that the agency had done what was required under both the APA and *Chevron* deference, regulations withstood court challenges. This may have allowed agencies to be more ambitious in crafting regulations. It likely also deterred some legal challenges to regulations where prospective litigants and their attorneys believed that courts would probably apply *Chevron* deference and find that the discretion it afforded to the agency in question had a good chance of leading to the regulation being upheld.

Chevron deference struck a workable balance of power between branches of government. It allowed Congress to rely on the agency staff and their centuries of combined experience with specific subject matter. However, it did not permit

¹¹ See, e.g. *Barnhart v. Walton*, 535 U.S. 212, 214 (2002) (Supreme Court upheld Social Security rule because "The Agency's reading of the term 'inability' is reasonable.") (quoting 42 U.S.C.S. § 423(d)(1)(A); 42 U.S.C.S. § 1382c(a)(3)(A)).

¹² See *Id.*

¹³ See *Id.*

¹⁴ See *United States v. Mead Corp.*, 533 U.S. 218 (2001).

¹⁵ See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) ("Deference under *Chevron* to an agency... is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps... In extraordinary cases [implicating "major questions"], however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.") (citations omitted); see also *West Virginia v. EPA*, 597 U.S. 697, 721 (2022) ("... precedent teaches that there are extraordinary cases... in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority.") (citations omitted).

¹⁶ See *Ala. Ass'n of Realtors v. HHS*, 594 U.S. 758, 764 (2021) ("We expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast 'economic and political significance.' That is exactly the kind of power that the CDC claims here. At least 80% of the country... falls within the moratorium... the issues at stake are not merely financial. The moratorium intrudes into an area that is the particular domain of state law...") (quoting *Utility Air Regulatory Group v. EPA*, 573 U. S. 302, 324 (2014) (quoting *Brown & Williamson*, 529 U. S. at 160 (2000))) (citations omitted).

agencies to defy Congress' authority because Congress retained its power to negate agency regulations by statute.¹⁷ Congress was aware of *Chevron* deference and could have replaced it with another legal standard if enough members had been inclined to do so.¹⁸ Congress considered the idea but never did.¹⁹ Federal courts also retained the ability to strike down unlawful regulations. Courts could assess the validity of regulations without wading into policy decisions outside the scope of most legal professionals' knowledge. *Chevron* deference offered predictability to agencies, courts, litigants, and regulated entities.²⁰ Evidence suggests that it reduced the effect of judges' ideological persuasions on the decisions they made about the legality of public agencies' regulations.²¹ In this way, it made the law more consistent and supported the traditional roles of each branch of government in a regulatory landscape much more complex than that of the early republic.

The End of Chevron

On June 28, 2024, the Supreme Court overturned *Chevron* and ended the use of *Chevron* deference as a legal standard. See *Loper*, 2024 U.S. LEXIS 2882, *1 (“*Chevron* is overruled.”). Courts will no longer defer to agencies' understanding of ambiguous provisions in the statutes they enforce under most circumstances. This decision was released within days of two others on administrative law. These also weaken the powers of agencies in various ways, reducing their ability to serve the public.²² The Supreme Court acknowledged that it heard *Loper*—a case about environmental protection in commercial fishing—for the purpose of ending *Chevron* deference. See *Id.* (“The Court granted certiorari in these cases limited to the question whether *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, should be overruled or clarified.”).

The court broke along ideological lines. Chief Justice Roberts wrote the majority opinion. Justices Alito, Barrett, Gorsuch, Kavanaugh, and Thomas—signed on. In explaining the Court's rejection of *Chevron* deference, Chief Justice Roberts makes various arguments about it violating the APA, having constitutional problems, and breaking from historical

17 See Kent Barnett and Christopher J. Walker, *Chevron and Stare Decisis*, 31 Geo. Mason L. Rev. 475, 477 (2024) (“...*stare decisis* should apply when the Court has otherwise addressed concerns over the challenged doctrine. In recent years, the Court's approach to *Chevron* has already mitigated the concerns that the *Loper Bright* and *Relentless*... raise. The Court has instructed lower courts to take *Chevron* step one seriously... It has suggested that *Chevron* step two should be a meaningful check on unreasonableness... And, of course, the major questions doctrine precludes *Chevron* deference... when an agency seeks to regulate certain major policy questions without clear congressional authorization.”).

18 See *Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 456 (2015) (“...*stare decisis* carries enhanced force when a decision... interprets a statute. Then, unlike in a constitutional case, critics of our ruling can take their objections across the street, and Congress can correct any mistake it sees.”); see also ADA Amendments Act, Pub. L. No. 110-325, 122 Stat. 3553 (2008) (Congress passed legislation to repair the ADA after various court decisions narrowed its applicability in ways Congress had not intended.).

19 See Connor Raso, *Congress may tell courts to ignore regulatory agencies' reasoning, but will it matter?*, Brookings (Jan. 27, 2017), <https://www.brookings.edu/articles/congress-may-tell-courts-to-ignore-regulatory-agencies-reasoning-but-will-it-matter/> (On an occasion when Congress considered ending *Chevron* deference. The legislation never passed.).

20 See *Supreme Court Appears Poised To Overrule Chevron Deference in Judicial Power Grab*, Center for American Progress, <https://www.americanprogress.org/article/supreme-court-appears-poised-to-overrule-chevron-deference-in-judicial-power-grab/> (Jan. 17, 2024) (Noting the over 19,000 cases relying on *Chevron* as of writing).

21 See Barnett and Walker, *supra* at 477 (“... the findings from our study underscore another... overlooked cost of eliminating *Chevron*: judges' policy preferences would play a larger role in review of agency statutory interpretations. Our empirical work demonstrates that *Chevron* has, to a substantial degree, succeeded in removing judges from policy decisions that Congress has delegated to agencies.”); see also Kent Barnett, Christina L. Boyd, and Christopher J. Walker, *Administrative Law's Political Dynamics*, 71 Vand. L. Rev. 1463, 1465 (2018) (“Contrary to prior, more limited studies, we find that legal doctrine (i.e., *Chevron* deference) has a powerful constraining effect on partisanship in judicial decisionmaking. To be sure, we still find some statistically significant results as to partisan influence. But the overall picture provides compelling evidence that the *Chevron* Court's objective to reduce partisan judicial decisionmaking has been quite effective.”); Nicholas R. Bednar, *What to do about Chevron--Nothing*, 72 Vand. L. Rev. En Banc 151 (2019).

22 See *SEC v. Jarkesy*, 219 L.Ed.2d 650 (U.S. 2024) (Ending the SEC's longstanding practice of internally adjudicating securities fraud issues where the SEC seeks to impose monetary penalties on the accused.); see also *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsv. Sys.*, No. 22-1008, 2024 U.S. LEXIS 2885 (July 1, 2024) (Giving regulated entities more time to sue agencies regulating them over the effects of regulations).

tradition by usurping federal courts' role in interpreting the law.²³ The majority also suggests that *Chevron* deference was too complex for courts to administer because the concept of ambiguity is somewhat subjective.²⁴ The opinion does not address the way in which courts and other stakeholders found *Chevron* serviceable enough for decades of use in resolving disputes and preventing them by setting clear expectations for stakeholders. The Supreme Court could have reached these conclusions at any point in the forty years when *Chevron* deference was in use, but it did not until this decision. Chief Justice Roberts describes *Skidmore* deference- a more complex and subjective legal standard- favorably and emphasizes that courts should afford some weight to agencies' assessment of facts but not law.²⁵ The majority seems confident facts and law can be easily separated in the sometimes-technical subject matter of federal regulations and that courts will be capable of handling details well outside of the scope of the average legal professional's training, providing little support for this assertion.²⁶

Overturning *Chevron* forced the majority to reckon with *stare decisis*, a centuries-old concept underpinning the entire legal system.²⁷ *Stare decisis* is a legal principle that instructs courts not to casually discard rulings from older cases.²⁸ It prevents courts from making abrupt changes in the legal rights and obligations of people, private organizations, and the government.²⁹ This makes it possible to predict the legal consequences of a proposed course of action and plan accordingly. The majority in *Loper* shows a willingness to break with this tradition reminiscent of what the same Justices displayed in overturning the federal right to abortion.³⁰

23 See *Id.*; see also *Loper*, 2024 U.S. LEXIS 2882, *3-10.

24 See *Id.* at *14.

25 See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (While the original core of *Chevron* deference called on courts deciding the validity of a federal regulation to answer two yes-or-no questions, *Skidmore* deference requires them to consider “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.”); see also *Loper*, 2024 U.S. LEXIS 2882 at *11-12.

26 See *Loper*, 2024 U.S. LEXIS 2882 at *47 (Congress created many statutes that contained ambiguities during the life of *Chevron* deference and must have expected that courts would apply *Chevron* deference to those ambiguities, generally leaving decision-making to subject matter experts. However, the majority asserts that “...even when an ambiguity happens to implicate a technical matter, it does not follow that Congress has taken the power to authoritatively interpret the statute from the courts and given it to the agency. Congress expects courts to handle technical statutory questions.”).

27 See Morgan Johnson, Note, *Conservative Stare Decisis on the Roberts Court: A Jurisprudence of Doubt*, 55 U.C. Davis L. Rev. 1953, 1955 (2022) (“*Stare decisis* is a core principle of the American legal system, one older than the Constitution itself.”); see also Sabrina J. Rodriguez, Comment, *It's Time to Turn The Tide: The Supreme Court Must Moderate its Stare Decisis Approach Before It's Too Late for Cases like Plyer*, 26 SCHOLAR 51, 54 (“*Stare decisis* is “...the judicial doctrine requiring courts to stand by precedent in order to promote consistent development of legal principles, foster reliance on judicial decisions, and promulgate the integrity of the judicial process...”).

28 See Note, *The Thrust and Parry of Stare Decisis in the Roberts Court*, 137 Harv. L. Rev. 684, 685 (2023) (“A conventional understanding of *stare decisis* as a firm tenet of fidelity would dictate that judges follow precedent in edge cases; under a weak *stare decisis*, the edge cases risk turning into toss-ups.”).

29 See Joseph A. Greenaway, Jr., *Reflections on Stare Decisis* (2023) (“*Stare decisis* is the backbone of the method by which we... practice law... precedents build on each other. Changes in the path of the law are... akin to an ocean liner changing course... We all appreciate the principle... according to the Latin: ‘To stand by decided cases to uphold precedents to maintain former adjudications.’ The definition... is so foundational... that my colleagues and I... rarely discuss it... It is so engrained in our collective psyches that we just do it.”).

30 See *Loper*, 2024 U.S. LEXIS 2882 at *54 (“and the *stare decisis* considerations most relevant here— ...all weigh in favor of letting *Chevron* go.”) (quoting *Knick v. Township of Scott*, 588 U. S. 180, 203 (2019) (quoting *Janus v. State, County, and Municipal Employees*, 585 U. S. 878, 917 (2018))); but see *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022) (Another recent Supreme Court case overturning long-settled precedent in which the Court's conservative bloc found reason to depart from *stare decisis*.); see also Rodriguez, *supra* at 54 (“*Dobbs*... forms part of a broader pattern with the potential to undermine our remaining unenumerated constitutional rights... The Supreme Court's modern approach to *stare decisis* - the judicial doctrine requiring courts to stand by precedent in order to promote consistent development of legal principles, foster reliance on judicial decisions, and promulgate the integrity of the judicial process - establishes a trajectory where decisions may be swayed by personal preferences, disregarding the foundational values upheld by *stare decisis*.”).

Loper presents a sea change for agencies, those they regulate, and federal courts. However, the opinion explains that this decision does not invalidate cases decided on the basis of *Chevron* deference.³¹ While the opinion suggests that the limitations placed on *Chevron* over the years mean the practical impact of *Loper* will be minimal, this holding implicitly acknowledges the scale of *Chevron* deference’s role in administrative law.³² Despite the conservative bloc’s openness to overturning long-decided cases, it is unwilling to bring about the chaos that placing the validity of every one of forty years of decisions based on *Chevron* deference in immediate doubt would cause.

The decision has raised concerns among pro-democracy, climate justice, and civil rights groups.³³ Justice Kagan— who authored the dissent supported by the rest of the liberal bloc— seems to share these advocates’ unease.³⁴ The dissent denounces the idea that *Chevron* deference was incompatible with federal courts’ constitutional mandate to interpret the law.³⁵ Justice Kagan also expressed concern about the decision’s departure from *stare decisis*.³⁶ There is reason to share the dissenting justices’ concern that courts may not be the entities intended by Congress- or best-equipped- to make the policy decisions this will entail.³⁷

Effects of the End of *Chevron*

The effects of this change in administrative law will take decades to play out, but a number of developments significant to marginalized people, including people with disabilities, will likely flow from *Loper*. Although the Court left decisions based on *Chevron* deference intact, *Loper* will spark litigation as those subject to regulations- including private organiza-

31 See *Loper*, 2024 U.S. LEXIS 2882 at *60-61 (“By doing so, however, we do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory *stare decisis* despite our change in interpretive methodology.”) (citing *CBOCS West, Inc. v. Humphries*, 553 U. S. 442, 457 (2008)).

32 See *Id.* at *58 (“At this point, all that remains of *Chevron* is a decaying husk with bold pretensions.”).

33 See Ann E. Marimow and Justin Jouvenal, *Supreme Court curbs federal agency power; overturning Chevron precedent*, Washington Post (Jun. 28, 2024), <https://www.washingtonpost.com/politics/2024/06/28/supreme-court-chevron-federal-agency-authority/> (“Sambhav Sankar, a vice president at Earthjustice, said... the court’s decision ‘threatens the legitimacy of hundreds of regulations that keep us safe, protect our homes and environment, and create a level playing field for businesses to compete on.’”); see also Jeff Turrentine, *The Supreme Court Ends Chevron Deference—What Now?*, Natural Resources Defense Council (Jun. 28, 2024), <https://www.nrdc.org/stories/what-happens-if-supreme-court-ends-chevron-deference> (“The decision has profound consequences, not only for the country’s rule of law but also for how agencies—such as those protecting the public against everything from pollution and contaminated food to workplace hazards and rising drug prices—are able to function.”); Jael Holzman and Jillian Goodman, *How the Supreme Court Just Changed Climate Law, According to 9 Lawyers*, Heatmap (Jul. 2, 2024), <https://heatmap.news/climate/supreme-court-loper-corner-post> (“The only common thread is the seeming desire of the court to aggrandize the power of the courts.”).

34 See *Loper*, 2024 U.S. LEXIS 2882 at *112-113 (Kagan, J., dissenting) (“It has been applied in thousands of judicial decisions. It has become part of the warp and woof of modern government, supporting regulatory efforts of all kinds—to name a few, keeping air and water clean, food and drugs safe, and financial markets honest.”).

35 See *Id.* at *112 (“Under *Chevron*, a court uses all its normal interpretive tools to determine whether Congress has spoken to an issue. If the court finds Congress has done so, that is the end of the matter... But if the court finds, at the end of its interpretive work, that Congress has left an ambiguity or gap, then a choice must be made. Who should give content to a statute when Congress’s instructions have run out? Should it be a court? Or should it be the agency Congress has charged with administering the statute? The answer *Chevron* gives is that it should usually be the agency, within the bounds of reasonableness.”).

36 See *Id.* at *116 (“...*Chevron* is entitled to the supercharged version of that doctrine because Congress could always overrule the decision, and because so many governmental and private actors have relied on it for so long... But the majority... barely tries to advance the usual factors this Court invokes for overruling precedent. Its justification comes down, in the end, to this: Courts must have more say over regulation... The majority... grasps for power”) (quoting *Kisor v. Wilkie*, 588 U. S. 558, 588 (2019)).

37 See *Id.* at *113-114 (“Some interpretive issues arising in the regulatory context involve scientific or technical subject matter. Agencies have expertise in those areas; courts do not. Some demand a detailed understanding of complex and interdependent regulatory programs. Agencies know those programs inside-out; again, courts do not. And some present policy choices, including trade-offs between competing goods. Agencies report to a President, who in turn answers to the public for his policy calls; courts have no such accountability and no proper basis for making policy.”).

tions with profit or ideological motives but also entities like states- seek to overturn regulations they oppose.³⁸ It is likely that this decision will be used to advance the wealth of business interests and the wishes of extremists at the expense of ordinary Americans, especially marginalized people.

a. Legal Outcomes

In *Loper*, the Court unabashedly expands its authority over granular details of public policy.³⁹ The decision signals an interventionist court that is interested in further weakening public agencies.⁴⁰ For this reason and due to the change in legal standards, *Loper* will alter litigants' actual and perceived likelihood of success in challenging regulations.⁴¹ Regulated entities will be emboldened to bring challenges. Under a legal standard less favorable to agencies, they will more often be successful. The majority in *Loper* embraces *Skidmore* deference, which gives less discretion to agencies and leaves more decision-making to courts, as the standard for assessing the permissibility of federal regulation.⁴² Because *Skidmore* deference relies on a multifactorial test that is more subjective than *Chevron* deference's two steps, *Loper* will expand the judicial role in policy decisions.⁴³

The majority also emphasizes timing. The Court suggests that it will give more weight to longstanding agency interpretations of statutes, especially interpretations dating to around the time the statute became law.⁴⁴ This will make it difficult for changing administrations to reinterpret statutes with new regulations. It especially endangers new regulations expanding anti-discrimination protections for marginalized groups based on older statutes.⁴⁵ Even accepting without

³⁸ See Sean Marotta, Hogan Lovells, and Danielle Desaulniers Stempel, *Five Things Companies Can Do Now That Chevron Deference Is Dead*, Bloomberg Law (Jun. 28, 2024), <https://news.bloomberglaw.com/us-law-week/five-things-companies-can-do-now-that-chevron-deference-is-dead> (“...it’s not entirely clear what [the Supreme Court’s statement that cases relying on *Chevron* will be afforded *stare decisis*] actually means. At its narrowest, it simply means that parties can’t seek to reopen a particular case decided under *Chevron* just because it was decided under *Chevron*. But what if the... question arises in a new context? What if the agency changes position on an interpretation previously blessed under *Chevron*?”).

³⁹ See *Loper*, 2024 U.S. LEXIS 2882 at *115 (Kagan, J., dissenting) (“In one fell swoop, the majority today gives itself exclusive power over every open issue—no matter how expertise-driven or policy-laden—involving the meaning of regulatory law. As if it did not have enough on its plate, the majority turns itself into the country’s administrative czar.”).

⁴⁰ See *Jarkesy*, 219 L.Ed.2d 650; see also *Corner Post*, 2024 U.S. LEXIS 2885.

⁴¹ See Chad Landmon, *Open the Floodgates: The Potential Impact on Litigation Against FDA if the Supreme Court Reverses or Curtails Chevron Deference*, 74 Food Drug L.J. 358, 370 (2019) (“Courts have upheld agency decisions in fifty-five percent to seventy-one percent of cases under *Skidmore*, whereas courts have upheld agency decisions in sixty-four percent to eighty-one percent of cases under *Chevron*.”); see also William D. Goren, *Loper Bright, Grants Pass, and Jarkesy Decided by the Supreme Court*, Understanding the ADA (Jun. 29, 2024), <https://www.understandingtheada.com/blog/2024/06/29/loper-bright-grants-pass-jarkesy-supreme-court/> (“Look for administrative law to be a growth industry for lawyers going forward. You can expect a lot more regulatory challenges to final regulations...”).

⁴² See *Loper*, 2024 U.S. LEXIS 2882 at *3-4 (quoting *United States v. American Trucking Assns., Inc.*, 310 U. S. 534, 544 (1940); *Skidmore*, 323 U. S. 134, 140 (1944)).

⁴³ See *Id.* at *28-29.

⁴⁴ See *Id.* at 2 (“Such respect was thought especially warranted when an Executive Branch interpretation was issued roughly contemporaneously with enactment of the statute and remained consistent over time.”).

⁴⁵ See, e.g. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33474 (Jul. 2, 2024) (To be codified at 34 C.F.R. § 106. Regulation contains new and significant protections for LGBTQIA students on the basis of the well-established Title IX.); but see Barnes & Thornburg, LLP, *supra* (So far, the regulation is enjoined by court order in at least fourteen states. This will make it difficult for the U.S. Department of Education to implement the regulation even in states not covered by the injunctions.). One state where federal litigation over whether the regulation will be enforced is ongoing is Kansas. There, the court invoked *Loper* in reaching its decision to grant a preliminary injunction that stops implementation in that state while the litigation goes forward. See *Kansas v. United States Dep’t of Educ.*, No. 24-4041-JWB, 2024 U.S. Dist. LEXIS 116479, at *26-27 (D. Kan. 2024) (quoting *Loper*, 2024 U.S. LEXIS 2882); see also Memorandum and Order, No. 4:24-cv-00636-RWS (Jul. 1, 2024), <https://storage.courtlistener.com/recap/gov.uscourts.moed.211802/gov.uscourts.moed.211802.36.o.pdf> (Because of this order for supplemental briefing in response to *Loper*, something similar may soon take place in the Title IX litigation involving Arkansas, Missouri, Iowa, Nebraska, North Dakota, and South Dakota.).

qualification the opinion's assertions that *Chevron's* influence has declined in recent years and that reliance on it does not solely invalidate a decision, *Loper* demonstrates, again, that the Court is willing to overturn settled precedent.⁴⁶

The concurrences by Justices Thomas and Gorsuch suggest some members of the Court would go further than the *Loper* opinion. Justice Thomas indicated that he believes that *Chevron* deference impinged on the boundaries the Constitution sets between the authority of the three branches of government.⁴⁷ Consistent with his past jurisprudence, his concurrence shows suspicion of the constitutionality of much of the role of the administrative state.⁴⁸ In his concurrence, Justice Gorsuch expresses further concern about *Chevron* deference usurping the role of the judiciary.⁴⁹ He then expands on the majority's departure from traditional conceptions of *stare decisis*.⁵⁰ Justice Gorsuch chose a timeframe for legal tradition that excluded the forty years of jurisprudence based on the case the majority sought to overturn.⁵¹ Both parts of his concurrence send concerning signals. There are justices on the Court who are interested in further upending settled law, more drastically weakening the agencies, altering relationships between the branches of government, and undermining *stare decisis*- the principle that has allowed individuals and organizations to predict the legal consequences of their behavior for centuries. If the balance of power on the Court continues to shift, things suggested in concurrences today may take legal effect in the future.

b. Practical Consequences

Abandoning *Chevron* deference- for *Skidmore* or something like it- will change American governance and society in ways that will be beneficial to large companies and ideological extremists. This shift will often be subtle but normally to the detriment of ordinary people, especially marginalized groups. Taking the Court at its word, many of the regulations most important to the disability community are among some of the least vulnerable to legal challenge under the new legal standard. However, *Loper* will be a source of significant harm to many marginalized populations that heavily overlap with disability. This is especially true for the LGBTQIA community, which has already seen its prospects in ongoing litigation over updated protections in Title IX regulations worsen. It is increasingly uncertain whether those protections will ever be fully implemented.⁵²

⁴⁶ See Isaiah McKinney, *The Chevron Ball Ended at Midnight, but the Circuits are Still Two-Stepping by Themselves*, Notice & Comment (Dec. 18, 2022), https://www.yalejreg.com/nc/chevron-ended/#_ftnref5 (Although it is true that the Supreme Court had not used *Chevron* deference for some time prior to overturning it, lower courts continued to rely on it frequently.); see also Christina Pazzanese, *'Chevron deference' faces existential test Jody Freeman pinpoints key question in case before SCOTUS: 'Who decides when laws aren't clear — courts or agencies?'*, Harvard Gazette (Jan. 16, 2024), <https://news.harvard.edu/gazette/story/2024/01/chevron-deference-faces-existential-test/> (“*Chevron* does not matter much to the Supreme Court, which largely ignores it. But it does matter to the lower courts, which continue to use its two-step test to manage a flood of litigation challenging agency interpretations of every kind, from the most general to the most intricate.”).

⁴⁷ See *Loper*, 2024 U.S. LEXIS 2882 at 63 (Thomas, J., concurring) (“I write separately to underscore a more fundamental problem: *Chevron* deference also violates our Constitution’s separation of powers...”).

⁴⁸ See *Id.* at 66 (“No matter the gloss put on it, *Chevron* expands agencies’ power beyond the bounds of Article II by permitting them to exercise powers reserved to [Congress].”).

⁴⁹ See *Id.* at 93-94 (Gorsuch, J., concurring).

⁵⁰ See *Id.* at 81-82.

⁵¹ See *Id.* at 89 (“To the extent proper respect for precedent demands, as it always has, special respect for longstanding and mainstream decisions, *Chevron* scores badly. It represented not a continuation of a long line of decisions but a break from them. Worse, it did not merely depart from our precedents. More nearly, *Chevron* defied them.”).

⁵² See *New Title IX Regulations Enjoined In Four More States In Decision With Likely Nationwide Effects*, Barnes & Thornburg, LLP (Jul. 10, 2024), <https://btlaw.com/en/insights/alerts/2024/new-title-ix-regulations-enjoined-in-four-more-states-in-decision-with-likely-nationwide-effects>.

As the dissent notes, the decision in *Loper* injects uncertainty into federal law.⁵³ Both the greater likelihood of judicial intervention in the details of public policy under *Skidmore* deference and this decision's indication that the Court is deemphasizing *stare decisis* raise challenges for stakeholders making plans or evaluating existing ones and attorneys advising clients. Because this decision shows that the Court will intervene in policy matters, *Loper* is an invitation to challenge regulations to anyone who thinks their cause would fare well under the majority's ideological bent. This is likely to mean an increase in administrative law litigation and forum shopping—bringing a case in a specific court because of perceptions that the judges favor a litigant's ideology.⁵⁴ It is possible that this will worsen backlogged dockets in places.⁵⁵ At times, judges will do an admirable job of learning technical subject matter. Some decisions, however, may contain questionable factual assessments.⁵⁶ Such cases will create poor outcomes in practice.

Loper encourages two groups of prospective litigants. Business interests seeking higher profits under weaker regulatory schemes have strong incentives to try to overturn regulations.⁵⁷ Ideological interests bent on attacking anti-discrimination protections for marginalized people or forcing unpopular ways of life on the majority of Americans will also take advantage of a standard of review less deferential to agencies. Regulations in health care may be vulnerable to both groups depending on the circumstances.⁵⁸ In this way, *Loper* is an opportunity for bad actors with resources to see how far they can advance their goals through the federal courts. Marginalized people, including disabled people, will suffer as a result.

53 See *Id.* at 153 (Kagan, J., dissenting) (“Courts motivated to overrule an old Chevron-based decision can always come up with something... All a court need do is look to today’s opinion to see how it is done.”).

54 See Seyfarth, *The Chevron Doctrine is Dead. Long Live the Administrative State.* (Jun. 28, 2024), <https://www.seyfarth.com/news-insights/chevron-is-dead-long-live-the-administrative-state.html> (“We expect regulated entities to bring new (and potentially far reaching) challenges to longstanding rules that are premised only on statutory ambiguity.”).

55 See Merritt McAlister, Adalberto Jordán and Kimberly J. Mueller, *What Can Be Done About Backlogs?*, 102 *Judicature* 2 (2023) (On the problem of backlogs in the federal courts.).

56 Turrentine, *supra* (“Now the Supreme Court has reopened the door for federal judges to decide how executive-branch agencies should go about their daily business whenever Congress has used ambiguous language, which, it should be noted, isn’t always unintentional. Sometimes Congress is purposefully inexplicit in order to give the subject-area experts space to decide how best to implement a regulation.”); see also Amicus Brief of the American Association for the Advancement of Science, the American Society for Pharmacology and Experimental Therapeutics, and the Ecological Society of America at 11, *Loper*, 2024 U.S. LEXIS 2882 (“Specially-competent fact developers have the means to stay current and address dynamic technologies and science in ways courts cannot.”).

57 See Thomas H. Barnard, Marisa Rosen Dorough, and McKenna S. Cloud, *Chevron Deference Discarded: SCOTUS Decision in Fisheries Cases Leaves Administrative Law Reeling*, Baker Donelson (Jun. 28, 2024), <https://www.bakerdonelson.com/chevron-deference-discarded-scotus-decision-in-fisheries-cases-leaves-administrative-law-reeling> (“If you are currently burdened by restrictive agency interpretations, have been denied permits or authorizations, or find yourself at a competitive disadvantage based on agency action, this shift could provide new avenues for legal recourse.”); see also Varu Chilakamarri, Mark Ruge, David R. Fine, Tre A. Holloway, and Falco A. Muscante, *The End of Chevron Deference: What the Supreme Court’s Ruling in Loper Bright Means for the Regulated Community*, K&L Gates (Jun. 28, 2024), <https://www.klgates.com/The-End-of-Chevron-Deference-What-the-Supreme-Courts-Ruling-in-Loper-Bright-Means-for-the-Regulated-Community-6-28-2024> (“This new interpretative methodology... allow[s] regulated entities to offer interpretations to resolve statutory ambiguities—interpretations which may now be given greater weight. It empowers regulated entities to challenge agency decisions with reasoned arguments and allows courts to play a more active role in scrutinizing federal regulations.”).

58 See Suhasini Ravi, *What the Supreme Court’s Rulings on Chevron in Loper Bright Enterprises and Relentless Could Mean for Health Care*, O’Neill Institute for National and Global Health Law (Oct. 31, 2023), <https://oneill.law.georgetown.edu/what-the-supreme-courts-rulings-on-chevron-in-loper-bright-enterprises-and-relentless-could-mean-for-health-care/> (“...the central issue in these cases — overruling the *Chevron* doctrine — will have an enormous negative impact on how agencies function and effectively implement legislation that addresses health policies.”); see also McKenna S. Cloud and Thomas H. Barnard, *What the Supreme Court’s “Chevron Deference” Ruling Could Mean for Health Care Law*, Baker Donelson (Jun. 25, 2024), <https://www.bakerdonelson.com/what-the-supreme-courts-chevron-deference-ruling-could-mean-for-health-care-law> (“The *Chevron* ruling could ultimately result in a plethora of litigation challenging federal rules and regulations governing health care. A ruling that... overturns *Chevron*... could provide a path for parties to challenge an agency’s prior rulemakings to the extent they were based on interpretations of ambiguous statutes.”); Landmon, *supra* at 371 (“Although FDA would likely be seen as persuasive, particularly on scientific matters, *Skidmore* deference might provide a platform from which FDA-regulated industries can more effectively attack... decisions by FDA. If a developer can demonstrate that FDA’s decision deviated from prior practices, FDA’s persuasiveness would likely be diminished.”).

The consequences will probably include environmental damage and diminished workplace safety standards. This will predominantly affect people of color and people living on low incomes.⁵⁹ Damage to net neutrality may make it more difficult for the marginalized people to organize.⁶⁰ If regulatory anti-discrimination protections are overturned, that will make many aspects of life more difficult for groups including people of color, women, anyone seeking reproductive care, and LGBTQIA persons.⁶¹ Racial equity, student loan forgiveness, the rights of transgender people, and reproductive freedom are likely to face some of the most aggressive attacks.⁶² If consumer protections geared toward protecting people living on low incomes do not survive legal challenges under the newly-adopted standard, that will affect a similar population.⁶³ Likewise, *Loper* will likely inspire litigation against agency action to limit climate change.⁶⁴ This may have

59 See Occupational Health and Safety Administration, *Adding Inequality to Injury: The Costs of Failing to Protect Workers on the Job*, 5 (2015) (“Lower wage workers... disproportionately bear the burden of occupational injuries and illnesses. Many lower-wage jobs (defined as jobs whose median wages do not raise a family of four above the poverty line) are also high-hazard jobs, and low-wage workers are injured on the job at a disproportionate rate.”); see also Commonwealth of Massachusetts, *Injury and Exposure to Violence*, Population Data Stories (last visited Jul. 12, 2024), <https://www.mass.gov/info-details/injury-and-exposure-to-violence#:~:text=There%20is%20extensive%20evidence%20that,structural%20racism%20and%20other%20factors> (“There is extensive evidence that the burden of work-related injuries and illnesses (WRIL) is not borne equally and that immigrants and people of color are disproportionately employed in more dangerous jobs, a consequence of structural racism... In the U.S., either Black or Hispanic workers, or both, are over-represented in all ten of the most common ‘high-risk’ jobs, occupations that have WRIL rates at twice the national average.”)(citations omitted); U.S. Environmental Protection Agency, *EPA Report Shows Disproportionate Impacts of Climate Change on Socially Vulnerable Populations in the United States* (Sept. 2, 2021), <https://www.epa.gov/newsreleases/epa-report-shows-disproportionate-impacts-climate-change-socially-vulnerable> (“...the most severe harms from climate change fall disproportionately upon underserved communities who are least able to prepare for, and recover from, heat waves, poor air quality, flooding, and other impacts.”).

60 See Shiva Stella, *Supreme Court Decision in Loper Jeopardizes Net Neutrality, All Consumer Protections*, Public Knowledge (Jun. 28, 2024), <https://publicknowledge.org/supreme-court-decision-in-loper-jeopardizes-net-neutrality-all-consumer-protections/>; see also Blake E. Reid, *Loper Bright and the Impending Brand X / Net Neutrality Admin Law Demolition Derby Apocalypse* (Jun. 28, 2024), <https://blakereid.org/loper-bright-and-the-impending-brand-x-net-neutrality-admin-law-demolition-derby-apocalypse/>.

61 See Center for American Progress, *Ending Chevron Deference Impacts on Civil Rights*, (Jan. 10, 2024), <https://www.americanprogress.org/wp-content/uploads/sites/2/2024/01/Civil-Rights-1.pdf>; see also Ian Lopez, *Transgender Health Protections Rule Halted by Federal Judge*, Bloomberg Law (Jul. 3, 2024), <https://news.bloomberglaw.com/health-law-and-business/transgender-health-protections-from-hhs-halted-by-federal-judge>; Jocelyn Frye, *National Partnership Condemns Supreme Court’s Chevron Decision that will Harm Women, Families and the Nation*, National Partnership for Women and Families (Jun. 28, 2024), https://nationalpartnership.org/news_post/national-partnership-condemns-supreme-courts-chevron-decision-that-will-harm-women-families-nation/; *Texas v. Becerra*, No. 6:24-CV-211-JDK, 2024 WL 3297147, at *6 (E.D. Tex. July 3, 2024) and see *Tennessee v. Becerra*, No. 1:24CV161-LG-BWR, 2024 WL 3283887, at *7 (S.D. Miss. July 3, 2024). (District court decisions enjoining regulations under the Affordable Care Act that protect access to gender affirming care.); Aneesha Pappy, *District Court Preliminarily Blocks Section 1557 of the Affordable Care Act, Preventing Enforcement of Non-Discrimination Healthcare Protections for LGBTQ+ Americans Nationwide*, Human Rights Campaign (Jul. 3, 2024), <https://www.hrc.org/press-releases/district-court-preliminarily-blocks-section-1557-of-the-affordable-care-act-preventing-enforcement-of-non-discrimination-healthcare-protections-for-lgbtq-americans-nationwide> (“Without enforcement of Section 1557 against discrimination based on gender identity, health care providers who receive federal funding may be encouraged to discriminate and deny coverage, limiting, and under some circumstances, denying critical access to necessary medical services for patients in need.”).

62 See *Public Health Groups Urge Fifth Circuit Court of Appeals to Prevent Discrimination Against LGBTQ+ Patients*, American Cancer Society (Jan. 8, 2024), <https://www.fightcancer.org/releases/public-health-groups-urge-fifth-circuit-court-appeals-prevent-discrimination-against-lgbtq>; see also *Civil Rights Regulations in the Crosshairs: A Primer on the Supreme Court Hearing in Loper Bright Enterprises v. Raimondo*, The Leadership Conference on Civil and Human Rights (Jan. 16, 2024), <https://civilrights.org/blog/civil-rights-regulations-in-the-crosshairs/>; Adam S. Minsky, *Student Loan Forgiveness And IDR Plans In Jeopardy After New Supreme Court Decision*, Forbes (Jun. 28, 2024), <https://www.forbes.com/sites/adamminsky/2024/06/28/student-loan-forgiveness-and-idr-plans-in-serious-danger-after-new-supreme-court-decision/>.

63 See, e.g. Stacy Cowley and Emily Flitter, *Banks Stand to Benefit From the Supreme Court Decision on the Chevron Doctrine*, N.Y. Times (Jun. 28, 2024), <https://www.nytimes.com/2024/06/28/us/politics/banks-lobbyists-chevron.html> (“One recent action that may now be ripe for a challenge is the bureau’s decision that Buy Now, Pay Later lenders are credit card providers, giving buyers a right to dispute charges and demand refunds.”).

64 See Hunter W. Collins, *West Virginia’s “Major Questions” and the Silent Disappearance of the Chevron Doctrine*, 60 San Diego L. Rev. 777, 807 (“If the Supreme Court overturns the doctrine... there will be tremendous changes in the ability of the federal government to effectively regulate, oversee, and enforce its laws. Such a change would result in, among other things, major implications for the Biden Administration’s ‘efforts to tackle major issues such as climate change via regulation.’”) (quoting Josh Gerstein & Alex Guillén, *Supreme Court Move Could Spell Doom for Power of Federal Regulators*, Politico (May 1, 2023, 1:26 PM), <https://www.politico.com/news/2023/05/01/supreme-court-chevron-doctrine-climate-change-00094670> [<https://perma.cc/9TD4-HTHG>]).

a human cost in death, bodily injury, and impoverishing property damage in intensifying natural disasters. The victims will disproportionately be disabled people, older adults, and people of color.⁶⁵

People with disabilities have some of the more secure civil rights protections in this altered legal landscape. This is partly due to a number of crucial protections for disability rights being unaffected, as they are statutory or stem from court cases that were not decided on the basis of *Chevron* deference, including the most critical precedent for HCBS.⁶⁶ Regulatory protections for this community are somewhat less jeopardized than many other regulations because many of the relevant regulations have strong statutory backing in the form of explicit instructions from Congress requiring public agencies to regulate based on them, and a number were created, at least in their initial forms, not long after their underlying statutes.⁶⁷ Particularly in lower courts, most of which are behaving far more in line with American legal tradition and democratic norms than the Supreme Court, these regulations will not feel the most severe effects of *Loper*.

However, the disability community will face distinct harms.⁶⁸

While the disability community is unlikely to lose entire rules- or sets of regulations meant to enforce a particular law, regulations will be gnawed around the edges. No individual bite courts take from regulations protecting the disability community will affect all of its members, but many of these new holes in regulatory protections will be catastrophic for some number of people who are counting on federal regulations in high-stakes situations including health care access, interactions with child protective services, and keeping or losing a job. Two kinds of regulation are most likely to be challenged: those that have become politicized and controversial and those where compliance is relatively expensive. The damage is likely to be particularly severe where cases reach the Supreme Court.

Loper's effects may be particularly significant in health care.⁶⁹ Advocates have already expressed concern about the effect *Loper* will have on areas as diverse as public health, curbing bad conduct by health insurers, and health provision under Medicaid, all of which are important to the disability community. *Loper* can be expected to make society less accessible in general, perhaps at a basic, physical level given the role of federal regulations in building access. Multiply marginalized disabled people will fare the worst, particularly those who are part of communities that will bear the brunt of *Loper*'s

65 See *Our Insights*, McKinsey Institute for Black Economic Mobility (last visited Jul. 12, 2024), <https://www.mckinsey.com/bem/our-insights/impacts-of-climate-change-on-black-populations-in-the-united-states>; see also *Disability in a Time of Climate Disaster*, Harvard University Center for the Environment (Jan. 19, 2023), <https://environment.harvard.edu/news/disability-time-climate-disaster#:~:text=Harvard%20Law%20Today%3A%20What%20are,heatwaves%2C%20hurricanes%2C%20and%20ofloods.> (“Persons with disabilities are two to four times more likely to die or be injured in climate emergencies including heatwaves, hurricanes, and floods.”); *Climate Change and the Health of Older Adults*, U.S. Environmental Protection Agency (last visited Jul. 12, 2024), <https://epa.gov/climateimpacts/climate-change-and-health-older-adults#:~:text=Older%20adults%20are%20more%20likely,can%20worsen%20their%20existing%20illnesses.&text=Many%20older%20adults%20have%20limited,after%20an%20extreme%20weather%20event.>

66 See, e.g. 29 U.S.C.S. § 705 (5) (*The definition of “competitive integrated employment” under the Rehabilitation Act, crucial to the movement among people with disabilities, especially those with intellectual and developmental disabilities, to demand real work for real pay, is written into statute.*); see also *Olmstead v. L. C. by Zimring*, 527 U.S. 581, 597-98 (1999) (The Supreme Court case that is the origin and heart of the legal mandate for home and community based services instead of institutions nationwide was decided in reliance on the clear language of the statute and, though discussed, did not rely on a related regulation. The Court declined to apply *Chevron* deference to that regulation, saying that it was unnecessary because the relevant agency’s interpretation of the underlying statute would pass muster under *Skidmore* deference. *Loper* does not throw this decision into question..) (*citing Chevron*, 467 U.S. 837, 844, 81) (*quoting Bragdon v. Abbott*, 524 U.S. 624, 642 (1998) (*quoting Skidmore*, 323 U.S. 134, 139-140)).

67 See, e.g. 29 U.S.C.S. § 794 (a) (“No otherwise qualified individual with a disability in the United States, as defined in section 7(20) [29 USCS § 705(20)], shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance... The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978.”).

68 See Jess Davidson, AAPD Statement on Supreme Court Decision Involving Regulatory Power in *Loper Bright Enterprises v. Raimondo* (Jul. 2, 2024), <https://www.aapd.com/loper-scotus-statement/> (“In ending the use of the *Chevron* deference, the Supreme Court has weakened the ability of federal agencies to implement federal rules and regulations to correct inequities that result from complex policy issues. The American Association of People with Disabilities decries this devastating outcome, which will cut across every policy area and will especially negatively impact marginalized and multiply-marginalized Americans, including disabled people.”).

69 See *National Health Groups Urge Supreme Court to Protect Executive Agencies’ Authority in Case of Loper Bright Enterprises v. Raimondo*, American Heart Association (Sept. 22, 2023) (<https://newsroom.heart.org/news/national-health-groups-urge-supreme-court-to-protect-executive-agencies-authority-in-case-of-loper-bright-enterprises-v-raimondo>).

impact on workplace safety, equality for LGBTQIA people, and environmental regulation. People with disabilities will also experience this decision's society-wide effects.

In the long run, agencies will be less ambitious in rulemaking outside of situations where Congress has laid out the details of what they are permitted to do in such clear terms that there is little room for courts to act.⁷⁰ They are likely to avoid wasted work by keeping regulatory changes modest and more uncontroversial. *Loper* may discourage agencies from promoting civil rights, limiting advocates' opportunities to make gains through the administrative state such as several important, recent rules for the foreseeable future. This will mean representatives of the disability community and other marginalized groups seeking more policy change through Congress, which poses challenges given that Congress' productivity is at historic lows.⁷¹

Policy decisions courts make in response to legal challenges to regulations will be hard to prevent through advocacy. Federal judges with lifetime appointments are less susceptible to public pressure than elected officials and agency staff who report to them. Accountability was one of the rationales for *Chevron* deference.⁷² In its absence, advocates for people with disabilities and other marginalized groups will face an expansion of the least democratic form of federal policy making. Larger organizations representing these groups will need to plan for the possibility of future litigation when they submit public comments in the rulemaking process, devoting time to legal arguments about the proposed regulations representing a reading of the underlying statute that should survive *Skidmore* deference at the expense of sharing factual expertise.⁷³ Private citizens without legal training and advocacy organizations too small to have an attorney on staff may not be equipped to make these kinds of arguments and may see the utility of their comments diminish.

The Supreme Court's credibility will weaken. Its approval rating is already at historic lows.⁷⁴ Recently, it has faced reputational damage at its own hands as the conduct of some justices has come to light.⁷⁵ It now abandons a standard that has reduced the impact of judges' ideological persuasions in favor of one that allows more judicial tinkering with public policy of broad applicability. It has moved these decisions from the accountability of elected members of Congress and agencies that answer to an elected president to the realm of appointed judges. As the Court wades deeper into the culture wars, making itself the arbiter of the country's most contentious issues, it will appear increasingly captured by extremist

⁷⁰ See Thomas G. Saunders, Catherine M.A. Carroll, Ari Holtzblatt, Kevin Lamb, Daniel S. Volchok, and Kelly P. Dunbar, *With Chevron Gone What Comes Next?* Wilmer Hale (Jun. 29, 2024), <https://www.wilmerhale.com/en/insights/client-alerts/20240628-with-chevron-gone-what-comes-next>

("This is a significant change in the law... it will empower courts to decide more disputes and increase the risk to the Executive Branch that its interpretations will be rejected. The ruling is likely to embolden parties to turn to the courts when they disagree with an agency and make it harder for regulated parties to rely on agency interpretations. The ruling may also discourage some changes in position between administrations, because once a statute has been interpreted by the courts, there will be less leeway for new administrations to go in a different direction."); see also Beth Neitzel, *The end of Chevron? - What Would it Mean for Lower Courts, Federal Agencies, and Regulated Industry*, Foley Hoag (Jan. 19, 2024), <https://foleyhoag.com/news-and-insights/publications/alerts-and-updates/2024/january/the-end-of-chevron-what-it-would-mean-for-lower-courts-federal-agencies-and-regulated-industry/> ("With only feeble *Skidmore* deference to fall back on, government agencies are likely to lose more often in challenges to agency rulemakings and other agency actions...if the Court overturns *Chevron*, agency rules upheld in the past at *Chevron* step two may be vulnerable to attack, *stare decisis* or no...").

⁷¹ See Moira Warburton and Ally J. Levine, *Why Congress is Becoming Less Productive*, Reuters (Mar. 12, 2024), <https://www.reuters.com/graphics/USA-CONGRESS/PRODUCTIVITY/egpbabmkwvq/>.

⁷² See Kathryn M. Baldwin, Note, *Endangered Deference: Separation of Powers and Judicial Review of Agency Interpretation*, 92 St. John's L. Rev. 91, 107-108 (2018) ("In *Chevron*, the Court emphasized the necessity of allowing agencies and administrators who are beholden to the President, an officer elected by the entire country, to make policies... If the electorate is dissatisfied with the way the [*108] President and agency develop policies, the Court conscientiously chose deference to prioritize political accountability, something that federal judges with lifetime appointments lack by design. Interpretation is an inherently political task, as it affects substantive policy outcomes.").

⁷³ See Marotta, Lovells, and Stempel, *supra* ("Comment letters can no longer rely on policy arguments... agencies—and, in turn, commenters—must pay closer attention to things like dictionary definitions, plain meaning, canons of interpretation, statutory structure, and (in some courts) legislative intent. Comment letters that raise these kinds of arguments will be more useful to agencies and more advantageous in future litigation.").

⁷⁴ See Christine Zhu, *Supreme Court faces continued strong disapproval, poll shows*, Politico (Feb. 21, 2024), <https://www.politico.com/news/2024/02/21/supreme-court-approval-poll-00142437>.

⁷⁵ See Friends of the Court, ProPublica (last accessed Jul. 12, 2024), <https://www.propublica.org/series/supreme-court-scotus>.

ideology and big business.⁷⁶ Public faith in its adherence to its constitutional role and rule of law will continue to decline. The erosion of the Court's credibility will corrode American democracy, and calls for court reform may continue to intensify.⁷⁷

Conclusion

Despite the *Loper* majority's efforts to downplay the effects of discarding the decades-old central legal standard of an area of law that touches every person in the United States, there has been widespread recognition of the decisions' significance from supporters and detractors alike.⁷⁸ The full scope of how the end of *Chevron* deference will change society is unknowable today, but the impact of *Loper* is already beginning to unfold in disturbing ways, including attacks on the rights of LGBTQIA people.⁷⁹ The changes this will bring about will be pervasive given the expansive role of administrative law. A small minority in American society- ideological extremists who wish to impose their will on others and the very wealthy- will thrive under this kind of jurisprudence.

Those already struggling will experience further harm. People of color, LGBTQIA people, people seeking reproductive health care, and disabled persons will bear the brunt of the impact. Multiply marginalized people will see intersectional obstacles to their health, safety, dignity, and upward mobility expand. Advocates for equity and civil rights will find their work more difficult. The Supreme Court will continue to face increasing public mistrust. The decision in *Loper* is a significant milestone in the decline of American democracy and rule of law. It will be remembered as a turning point, predominantly for the worse.

That said, many of the disability community's most existentially essential civil rights protections are among the less likely to be annihilated in the aftermath of *Loper*. Disabled people have a long history of survival and resilience in adverse conditions. Advocates will continue to demand expansions of the rights and full participation of people with disabilities. The disability rights legal community will pursue those objectives through litigation. Attorneys who find themselves addressing these issues can count on the full support of practitioners who have made this their life's work to help them achieve good outcomes and minimize the risk of setting damaging precedent. Advocates for disabled people will face new obstacles going forward but are well prepared to meet these challenges.

⁷⁶ See Maxine Joselow, *What the Supreme Court Chevron decision means for environmental rules*, Washington Post (Jun. 28, 2024), <https://www.washingtonpost.com/climate-environment/2024/06/28/supreme-court-chevron-environmental-rules/> (“David Doniger, senior strategic director of the climate and clean energy program at the Natural Resources Defense Council... said the ruling released Friday could prevent agencies from using older environmental laws to tackle newer environmental problems — such as climate change...”).

⁷⁷ See, e.g. Perry Bacon, Jr., *Expand the Supreme Court. And weaken it.*, Washington Post (Jul. 10, 2024) <https://www.washingtonpost.com/opinions/2024/07/10/scotus-reforms-expand-justices-supermajority/> (One example among a growing number of calls for an overhaul of the Supreme Court.); see also Tyler Pager and Michael Scherer, *Biden set to announce support for major Supreme Court changes*, Washington Post (Jul. 16, 2024), <https://www.washingtonpost.com/politics/2024/07/16/biden-supreme-court-reforms/> (“President Biden is finalizing plans to endorse major changes to the Supreme Court in the coming weeks, including proposals for legislation to establish term limits for the justices and an enforceable ethics code, according to two people briefed on the plans.”).

⁷⁸ See Sullivan Celebrates Supreme Court Decision Ending ‘Chevron Deference’, Dan Sullivan United States Senator for Alaska (Jun. 28, 2024), <https://www.sullivan.senate.gov/newsroom/press-releases/sullivan-celebrates-supreme-court-decision-ending-chevron-deference/>; see also Meghan Bartels, *A Supreme Court Ruling May Make It Harder for Government Agencies to Use Good Science*, Scientific American (Jun. 25, 2024), <https://www.scientificamerican.com/article/supreme-courts-chevron-deference-decision-could-make-science-based/> (Expressing concern before the release of the decision); Michael Tsai, Hirono, Schatz decry Supreme Court decision on Chevron doctrine, Spectrum News (Jun. 29, 2024), <https://spectrumlocalnews.com/hi/hawaii/news/2024/06/28/hirono--schatz-decry-supreme-court-decision-on-chevron-doctrine> (Senators Hirono and Schatz of Hawaii “...lambasted the U.S. Supreme Court’s decision in *Loper Bright Enterprises v. Raimondo*...”); Goren, *supra* (“This decision puts just about everything up in the air.”).

⁷⁹ See Lopez, *supra* (“Discrimination protections for transgender health care were blocked Wednesday by a federal judge in Mississippi while a lawsuit over their legality plays out. The nationwide stay... blocks the US Department of Health and Human Services from enforcing its view that Section 1557 of the Affordable Care Act entitles people to civil rights protections over their gender identity or sexual orientation.”); see also Ranking Member Cassidy Urges Federal Agencies to Comply with SCOTUS Overturning of Chevron Deference, U.S. Senate Committee on Health, Education, Labor, and Pensions (Jul. 1, 2024), <https://www.help.senate.gov/ranking/newsroom/press/ranking-member-cassidy-orders-federal-agencies-to-comply-with-scotus-overturning-of-chevron-deference>.