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The *Rutgers Journal of Law and Public Policy* (ISSN 1934-3736) is published two times per year by students of the Rutgers School of Law – Camden, located at 217 North Fifth Street, Camden, NJ 08102.

The views expressed in the *Rutgers Journal of Law & Public Policy* are those of the authors and not necessarily of the *Rutgers Journal of Law & Public Policy* or the Rutgers School of Law – Camden.

Form: Citations conform to The Bluebook: A Uniform System of Citation (21st ed. 2021).

Please cite the Rutgers Journal of Law & Public Policy as 22 RUTGERS J.L. & PUB. POL'Y __ (2025).

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Paper or disk submissions should be directed to *Rutgers Journal of Law & Public Policy*, Rutgers University School of Law – Camden, 217 North Fifth Street, Camden, New Jersey 08102.

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Internet Address: The *Rutgers Journal of Law & Public Policy* website is located at <http://www.rutgerspolicyjournal.org>.

RUTGERS
JOURNAL OF LAW & PUBLIC POLICY

VOLUME 22

SPRING 2025

ISSUE 2

CURRENT ISSUES
IN PUBLIC POLICY

© 2025 by Rutgers University School of Law – Camden
ISSN 1934-3736



LOPER BRIGHT AND THE ASSAULT ON EXPERTISE

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INTRODUCTION

For decades, *Chevron* deference provided a strong, reliable, and predictable foundation upon which federal administrative agencies could deploy their expertise to address public policy problems.² During this period of tremendous technological change,³ federal administrative agencies tackled a wide range of regulatory issues under the *Chevron* framework.⁴ Federal agencies could move forward boldly in this era, confident in their roles as “conveners” within the public policy system.⁵ Indeed, when federal agencies were at the height of their power,⁶ the legislative branch appeared to have become more polarized and less effective.⁷ Federal administrative agencies simply could not wait for ineffective elected

² *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.* 467 U.S. 837 (1984).

³ See SARA BAASE & TIMOTHY M. HENRY, *A GIFT OF FIRE: SOCIAL, LEGAL, AND ETHICAL ISSUES FOR COMPUTING TECHNOLOGY* 1-26 (5th ed. 2018) (describing the “pace of change” in technology over the past few decades and its impact on society).

⁴ “That rule has formed the backdrop against which Congress, courts, and agencies- as well as the regulated public- all have operated for decades. . . . It has become part of the warp and woof of modern government, supporting regulatory efforts of all kinds. . . .” *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 449 (2024) (Kagan, J. dissenting).

⁵ A “convener” is someone who helps build relationships across boundaries. See Iteke van Hille et al., *Navigating Tensions in a Cross-sector Social Partnership: How a Convener Drives Change for Sustainability*, 26 CORP. SOC. RESP. & ENV'T MGMT. 317, 317 (2023) (describing individual “convener” characteristics in “Cross-sector social partnerships”). The author uses the term “convener” at the organizational level of analysis. Under *Chevron* deference, administrative agencies held relative power within the policy ecosystem and operated as “conveners,” connecting stakeholders through advisory committee management and rulemaking processes.

⁶ See generally Linda D. Jellum, *The Impact of the Rise and Fall of Chevron on the Executive's Power to Make and Interpret Law*, 44 LOY. U. CHI. L. J. 141 (2012) (explaining how *Chevron* increased the power of administrative agencies to make law).

⁷ Stephen Ansolabehere et al., *What Has Congress Done?*, in *GOVERNING IN A POLARIZED AGE: ELECTIONS, PARTIES, AND POLITICAL REPRESENTATION IN AMERICA* 243-246 (Alan S. Gerber & Eric Schickler, eds., 2017).

representatives to update statutory authorities to keep up with technological changes and societal needs.

Against this background, *Loper Bright* upended *Chevron* deference by declaring it incompatible with the statutory text of the Administrative Procedure Act.⁸ At first glance, *Loper Bright* seems a reasonable return to the plain language of the APA. It may be tempting to treat the overturning of *Chevron* deference as merely a minor change in administrative law practice. After all, *Skidmore* deference likely remains in place.⁹ When viewed solely through a legal lens, *Loper Bright* is like that Jenga piece you thought was so important.¹⁰ You avoided removing the piece until forced, and when you did you were pleasantly surprised to see the game structure still standing.¹¹

The main thesis of this article, however, is that attorneys view *Loper Bright* solely through a legal lens at their own risk. From a wider perspective of public administration and public policy,¹² the *Loper Bright* decision is just one salvo in a broad

⁸ *Loper Bright*, 603 U.S. at 371.

⁹ *Skidmore* deference allows, but does not require, federal judges to defer to agency interpretations of statutes based on past agency practice and other factors. “The weight of [agency] 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.” *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

¹⁰ *Jenga*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Jenga> (last visited Feb. 23, 2025).

¹¹ Although the U.S. Supreme Court overruled *Chevron* deference in *Loper Bright*, the overall structure of administrative law remains, including *Skidmore* deference and other laws and policies. *See generally Skidmore*, 323 U.S. 134 (1944); Administrative Procedure Act, 5 U.S.C. §§ 551-559 (2024); Federal Advisory Committee Act (FACA), 5 U.S.C. §1001-1014 (2024); Freedom of Information Act, 5 U.S.C. § 552 (2024).

¹² Public administration is the study and practice of administering laws and authority, through bureaucratic organization and “task differentiation, specialization, *expertise*, and/or professionalism.” H. GEORGE FREDERICKSON ET AL., *THE PUBLIC ADMINISTRATION THEORY PRIMER 2* (Westview Press, 2nd ed. 2012) (emphasis added). Frederickson et al.’s characterization of public administration is noteworthy for how it describes expertise as necessary to administer authority for the benefit of society. “Public policy” is “whatever

assault on expertise as a value. When viewed from this perspective, the issue is not what remains of judicial deference post-*Loper Bright*. Rather, the issue is how multi-sector policy actors, including attorneys, can adjust their advocacy for a world in which expertise is no longer the coin of the public policy realm.

This article proceeds as follows. Part I provides a concise overview of *Chevron* deference and how *Loper Bright* overrules the same. Part I orients the reader to the main cases which spark the broader ideas of the article. Part II draws upon the legal, public policy, and public administration literature to explain the concept of expertise and its role within the policy process. Part III argues that *Loper Bright* is one part of the assault on expertise. *Loper Bright* must be understood in the context of *West Virginia v. E.P.A.*,¹³ and other attacks on expertise within the media and the court of public opinion.

Part IV analyzes the impact of the assault on expertise on various policy actors. Based on their research, training, and experience, the author suggests how the relative power of certain institutional actors has shifted post-*Loper Bright*, and how these actors may attempt to counterbalance these changes in power. Part V offers broader implications for theory and practice at the intersection of law and public administration.

The author holds two main assumptions based on their teaching, research, and practice, and these assumptions inform this article. First, the author views law and public policy as separate but overlapping fields. Public policy is not a subset of law, but neither is law a subset of public policy.¹⁴ This worldview places attorneys and the practice of law within a

governments choose to do or not to do." THOMAS R. DYE, UNDERSTANDING PUBLIC POLICY, 1 (10th ed. 2002).

¹³ *West Virginia v. E.P.A.*, 597 U.S. 697 (2022).

¹⁴ For a more thorough explanation of the author's position on the relationship of law and public policy, see Brian K. McNamara, *Advancing Policy Advocacy: A Policy Process Approach*, 47 NOVA L. REV. 343, 351-53 (2023).

broader public policy ecosystem.¹⁵ This perspective also means that attorneys do not hold a privileged place within public policy systems. To be sure, attorneys have unique skills which make them well-suited for public policy work, but attorneys must build coalitions and leverage networks just as non-attorney policy advocates.

Second, the author views expertise as an important check on other powers within the United States federal government. Just as the judiciary checks the executive and legislative branches with judicial review,¹⁶ the legislative checks the judiciary and executive with impeachment authority,¹⁷ expertise checks the undisciplined decision-maker. In other words, expertise increases the likelihood that policy proposals receive their due consideration and minimizes poor societal outcomes from rushed and misinformed policy solutions.¹⁸

For this article, the author defines expertise as any knowledge relevant to policy discussions within a policy ecosystem. The author defines expertise broadly for two reasons. First, expertise in public administration and policy can

¹⁵ The author uses “policy ecosystem” in this article because this term accurately captures public policy actors as a complex network of shifting power and relationships. The term “policy ecosystem” is not the author’s—one may see this term in other informal sources. See *Public Policy Ecosystem Maps*, MIT POL’Y LAB, <https://policylab.mit.edu/publicpolicymaps/> (last visited Feb. 23, 2025). For this article, “policy ecosystem” is roughly analogous to the term “policy arena.” See McNamara, *supra* note 14, at 344. “Policy ecosystem,” however, more accurately captures the dynamic relationships between various policy actors than “policy arena.”

¹⁶ See *Marbury v. Madison*, 5 U.S. 137 (1803); *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).

¹⁷ See U.S. CONST. art. I, § 2.

¹⁸ See COLLINS ET AL., *THE OXFORD HANDBOOK OF EXPERTISE AND DEMOCRATIC POLITICS*, 60 (Gil Eyal & Thomas Medvetz, eds. 2023). The authors advance a similar argument about scientific expertise as a check not within the U.S. federal system, but as a broader check against populism in democratic societies. “The role of scientific expertise in democracy. . . is to contribute to the network of checks and balances needed to resist slipping, under the pressure of events, into more authoritarian styles of rule.” Their argument aligns with this article’s claim that devaluing expertise opens the door for ideology instead of expertise to dominate public policymaking.

be procedural or substantive expertise. Indeed, policy ecosystems require their actors collectively to hold procedural and substantive expertise. Procedural expertise refers to knowledge about how to connect the policy actors and how to coordinate discussions between stakeholders. Substantive expertise relates to the subject matter of the policy. For example, within the water pollution policy ecosystem, substantive expertise would include relevant technical and scientific knowledge about biology and chemistry.

Second, expertise rests primarily, but not exclusively, within administrative agencies. Administrative agencies must also marshal expertise from outside their agencies as part of the policy process. This can include obtaining a proper saturation of comments during notice-and-comment rulemaking.¹⁹ It can also include leveraging federal advisory committees to provide input on policy issues.²⁰ Although *Loper Bright* addresses agency interpretation of their own statutes, this article will also address how the case may impact how federal agencies leverage external expertise to inform public policy.

As this article concludes, the greatest danger of *Loper Bright* is not the overruling of *Chevron* deference in federal litigation. Rather, the danger is that, as part of a broader assault on expertise, *Loper Bright* and other attacks have opened the door for ideology to trump technical proficiency in the policy process. Without expertise as a check on hasty decision-makers, public policy is more open to the ideological whims of the most powerful policy actors for any given policy issue.

¹⁹ Under the Administrative Procedure Act, 5 U.S.C. § 553 (2024), agencies engage in notice and comment rulemaking. Under this process, agencies propose a rule, collect public comments on the proposal, and then consider the comments when developing the final rule.

²⁰ See Federal Advisory Committee Act (FACA), 5 U.S.C. §1001 (2024). Under the FACA, agencies appoint private sector stakeholders to advise the agency on public policy issues within the stakeholders' expertise.

I. CHEVRON AND LOPER BRIGHT

Loper Bright explicitly overruled the Supreme Court's command in *Chevron v. Natural Resources Defense Council* for federal judges to defer to permissible agency interpretations of an agency's own statute.²¹ What became known as *Chevron* deference was a two-step inquiry. First, was the statutory language "ambiguous?" If yes, courts then inquired whether the agency interpretation was based on a "permissible" reading of the statute. If the answer to the second question was yes, then the courts deferred to the agency interpretation of the statute.²²

Chevron deference served as the foundation for decades of administrative practice.²³ There were three major benefits to *Chevron* deference. First, expert bureaucrats had the top cover to address existing policy problems. To be sure, the law required agencies to seek stakeholder input on proposed regulations. But agencies did not need to seek legislative permission to proceed with regulatory projects that were both required for society and arguably within the agency's authority. Second, agencies could proceed boldly in addressing emergent technological issues. Finally, this deference framework arguably relieved the judiciary and the legislature of the burden to become policy experts for any given issue.²⁴ Judges could focus on judging. Legislators could focus on legislation, while retaining oversight of agencies and the ability to override problematic regulations by statute.

Critics, however, believed that *Chevron* deference tipped the scales inappropriately toward unelected bureaucrats.²⁵ A

²¹ *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024).

²² *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842-45 (1984).

²³ See Commemoration, *Thirty Years of Chevron v. NRDC and the Administrative Law Review: A Letter from the Executive Board*, 66 ADMIN. L. REV. 235 (2014).

²⁴ "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." *Loper Bright*, 603 U.S. at 449 (2024) (Kagan, J., dissenting).

²⁵ See Jeffrey M. Suprenant, *Pulling the Reins on Chevron*, 65 LOY. L. REV. 399 (2019) (Comment) (critiquing *Chevron* as propping up the administrative state).

groundswell of support for reviewing *Chevron* gained traction.²⁶ Ultimately, the U.S. Supreme Court granted certiorari and consolidated two cases directly challenging *Chevron* deference.²⁷

Loper Bright was a challenge to a National Marine Fisheries Service ("NMFS") interpretation of an agency statute. Federal fisheries law imposes catch quotas for many fisheries, including the Atlantic Herring fishery. Federal law also requires observers on board certain vessels to help monitor quotas.²⁸ The NMFS administrator interpreted the controlling statute to allow NMFS to place the cost of the observer upon the industry itself.²⁹ A fishing industry member objected to this determination and directly challenged the *Chevron* framework itself.³⁰

The Court held for the fishing industry interests and directly overturned *Chevron*. Primarily, the Court held that the Administration Procedure Act preserves the judiciary's sole function to determine the meaning of law, and *Chevron* deference, which allows for agency interpretation of law, does not align with the text of the Administrative Procedure Act.³¹ Although the Court acknowledged the decades of practice under *Chevron*, the Court would not perpetuate what it believed to be a legal error under the principle of *stare decisis*.³² The majority implicitly framed the relevant expertise as knowledge in statutory construction.³³

Justice Kagan's dissent framed the Court's opinion as dismissive toward agency expertise. In her view, *Chevron*

²⁶ See Kristine E. Hickman & Aaron L. Nielson, *Narrowing Chevron's Domain*, 70 DUKE L.J. 931 (2021); see generally Jonathan R. Siegel, *The Constitutional Case for Chevron Deference*, 71 VAND. L. REV. 937 (2018).

²⁷ See *Relentless, Inc. v. Dep't of Com.*, 144 S. Ct. 325 (2023), cert. granted in part; *Loper Bright Enters. v. Raimondo*, 143 S. Ct. 2429 (2023) cert. granted in part.

²⁸ *Loper Bright*, 603 U.S. at 380-81 (2024).

²⁹ *Id.* at 382.

³⁰ *Id.* at 382-84.

³¹ See *id.* at 396.

³² *Id.* at 407-09.

³³ See *Id.* at 396.

deference reflected the reality of public policymaking. Congress intended for agencies to interpret ambiguous statutes.³⁴ In fact, agencies did not usurp the judiciary by making legal determinations because the agency determinations were actually policy determinations based on agency expertise.³⁵

By directly overturning *Chevron* deference, the Court dismissed and minimized the agency technical expertise necessarily to fill in statutory ambiguities. The Federal judiciary no longer must defer to permissible agency interpretation of ambiguous statutes. To be sure, *Loper Bright* does not prohibit deference and endorses *Skidmore* as a framework for optional deference.³⁶ However, *Loper Bright* opens the door for federal judges, even those without substantive and relevant policy expertise, to substitute their own policy judgments over the experienced and expert determinations of administrative agencies.

II. LITERATURE REVIEW

Although it is important to understand *Loper Bright's* legal implications, such a perspective is insufficient in considering the case's public policy impacts for three major reasons. First, law does not operate in a vacuum. The decision to bring a lawsuit in the first instance depends upon law's relationship to society at large. At some point, a policy actor from outside the legal system decides to commence a legal process to obtain a desired policy output through the courts.³⁷ Second, the policy ecosystem consists of both attorneys and non-attorneys, and law does not explain the behavior of all participants. Finally, a legal perspective neither explains nor predicts the behavior of non-legal policy actors throughout all stages of the temporal policy process. By virtue of their training,

³⁴ *Loper Bright*, 603 U.S. at 449-50 (Kagan, J. dissenting).

³⁵ *Id.*

³⁶ *See id.* at 371 (majority opinion).

³⁷ *See* Emery G. Lee III, *Policy Windows on the U.S. Courts of Appeal*, 24 JUST. Sys. J. 301-323 (2003) (applying John W. Kingdon's policy streams to appellate courts).

attorneys tend to focus primarily on the decision-making stages of the policy process.³⁸

Attorneys are just one category of actors within the broader public policy ecosystem. The exact number of policy actors and their occupations may vary depending on the policy issue, but they include both institutional and individual actors with varying levels of substantive expertise. For example, the maritime policy ecosystem includes interrelated actors at the international, nation-state, and regional levels. At the international level, the International Maritime Organization,³⁹ flag state administrations,⁴⁰ and industry and public interest advocacy groups wield significant influence.⁴¹ At the national level within the United States, the major players include unions,⁴² congressional oversight committees,⁴³ administrative

³⁸ For a more thorough explanation of the author's position on this issue, see McNamara, *supra* note 14, at 345.

³⁹ INT'L MAR. ORG., <https://www.imo.org/> (last visited Feb. 23, 2025).

⁴⁰ Flag state administrators ensure that vessels flying their nation's flag comply with international standards. Z. Oya Ozcayir, *The Use of Port State Control in Maritime Industry and Application of the Paris MOU*, 14 OCEAN & COASTAL L.J. 201 (2009). In the United States, the U.S. Coast Guard is the flag state administration. *Flag State Control Division (CG-CVC-4)*, U.S. COAST GUARD, <https://www.dco.uscg.mil/Our-Organization/Assistant-Commandant-for-Prevention-Policy-CG-5P/Inspections-Compliance-CG-5PC-/Commercial-Vessel-Compliance/Flag-State-Control-Division/> (last visited Feb. 23, 2025).

⁴¹ For example, the Clean Shipping Coalition advances environmental perspectives at the International Maritime Organization. CLEAN SHIPPING COAL., <https://cleanshipping.org/> (last visited Feb. 23, 2025).

⁴² SEAFARERS INT'L UNION, <https://www.seafarers.org/> (last visited Feb. 23, 2025).

⁴³ *E.g.*, U.S. SENATE COMM. ON COM., SCI., & TRANSP., <https://www.commerce.senate.gov/> (last visited Feb. 23, 2025).

agencies,⁴⁴ advisory committees,⁴⁵ industry organizations,⁴⁶ and their respective attorneys. At the local or port level, state pilotage regulators,⁴⁷ port administrators,⁴⁸ and state or local law enforcement actors help shape public policy.⁴⁹ The policy actors interact dynamically and constantly up, down, and across governmental levels and industry sectors to set issues on the policy agenda and work through potential solutions.

Two predominant public policy models, which the author did not study in law school, are the policy process model,⁵⁰ and Kingdon's policy streams model.⁵¹ Intellectual models aspire to "describe," "explain," or "predict" behavior.⁵² These two policy models are not perfect, but, in the author's experience, they help individual actors, including attorneys, understand how to orient themselves within a policy ecosystem.

The policy process model envisions public policy creation as somewhat linear. Under this model, public policy proceeds in an orderly fashion from problem identification to policy formulation, decision-making, implementation, and evaluation.⁵³ Many actors can be involved in the early and late

⁴⁴ *E.g.*, FED. MAR. COMM'N, <https://www.fmc.gov/> (last visited Feb. 23, 2025).

⁴⁵ *E.g.*, *National Offshore Safety Advisory Committee*, U.S. COAST GUARD, <https://www.dco.uscg.mil/Our-Organization/Assistant-Commandant-for-Prevention-Policy-CG-5P/Commercial-Regulations-standards-CG-5PS/Office-of-Operating-and-Environmental-Standards/vfos/NOSAC/> (last visited Feb. 23, 2025).

⁴⁶ *E.g.*, THE AM. WATERWAYS OPERATORS, <https://www.americanwaterways.com/about> (last visited Feb. 23, 2025).

⁴⁷ *E.g.*, NEW ORLEANS BATON ROUGE S.S. PILOTS ASS'N, <https://neworleansbatonrougepilots.com/> (last accessed Feb 23, 2025).

⁴⁸ Such as U.S. Coast Guard Captains of the Port. *See* 33 C.F.R. §6.01-3 (2025).

⁴⁹ *E.g.*, LA. DEP'T OF WILDLIFE & FISHERIES, <https://www.wlf.louisiana.gov/> (last visited Feb. 23, 2025).

⁵⁰ MICHAEL HOWLETT ET AL., *STUDYING PUBLIC POLICY: POLICY CYCLES & POLICY SUBSYSTEMS* (3d ed. 2009).

⁵¹ JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* (2d ed. 2014).

⁵² FREDERICKSON ET AL., *supra* note 13, at 5.

⁵³ *See* HOWLETT ET AL., *supra* note 50 (explaining the various stages and labeling them as the "policy cycle").

stages of the process, but usually the public sector holds a monopoly over the decision-making stage.⁵⁴

Kingdon's policy streams theory originally developed to address the agenda setting stage of the policy process, but the model is useful to conceptualize the roles of individual actors at any stage of policy. Under Kingdon's model, policy ideas exist in three independent streams, the "problems," "policy," and "politics" streams.⁵⁵ Policy windows open when the three streams converge. Windows can open during regular intervals and unplanned events,⁵⁶ or they can open when "policy entrepreneurs" work to cross the streams.⁵⁷

Many, but not all, policy actors in any given ecosystem work in the public sector. Public administration is an applied field for leadership and management in the public sector and in other organizations with a public purpose.⁵⁸ Public administration differentiates itself from business administration with its focus on normative values rather than shareholder value.⁵⁹ Practitioners typically study public

⁵⁴ *Id.* at 140.

⁵⁵ Brian K. McNamara & John C. Morris, *Crossing the Bar to Cross the Streams: Kingdon's "Policy Streams" Applied to Vessel Status in Admiralty*, 19 LOY. MAR. L.J. 1, 9-10 (2020).

The problem stream involves the policymaking agenda, or in other words, the perception that certain problems require governmental action. The policy stream involves the range of policy proposals, backed by policy specialists or policy entrepreneurs, available in the political system at any one time. The politics stream involves the composition and incentives of the relevant policymakers as well as the broader political context.

Id. at 10 (citing Emery, *supra* note 37, at 305.).

⁵⁶ KINGDON, *supra* note 57, at 203.

⁵⁷ See *id.* at 179-81 (explaining that "policy entrepreneurs" hold special skill or passion for an issue and develop the capacity to connect stakeholders for their policy issue).

⁵⁸ See Donald F. Kettl, *Public Administration: The State of the Field*, in POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE II 407-428 (Ada W. Finifter ed., 1993) (describing the various labels for what is known as public administration and conceding that the field is "fragmented").

⁵⁹ See DAVID H. ROSENBLOOM & ROBERT S. KRAVCHUK, PUBLIC ADMINISTRATION: UNDERSTANDING MANAGEMENT, POLITICS, AND LAW IN THE PUBLIC SECTOR 5-13 (6th

administration in a graduate school,⁶⁰ and they train to operate in individual organizations,⁶¹ and collaboratively across sectors.⁶² The four “pillars” of public administration are “efficiency, effectiveness, economy,” and “social equity.”⁶³ Public administration considers law to be one of its foundational fields,⁶⁴ and indeed at least one author describes public administration as “running the Constitution.”⁶⁵

The politics-administration dichotomy informs the field of public administration.⁶⁶ Under this concept, scholars recognize that elected officials oversee an apolitical public administration staff. This framework provides an intellectual foundation for reconciling the growth of the administrative bureaucracy with the U.S. Constitution.⁶⁷ In other words,

ed. 2005) (differentiating public administration from business administration).

⁶⁰ Typically obtaining a Masters of Public Administration or Masters of Public Policy degree. *MPA/MPP Degrees*, NASPAA, <https://www.naspaa.org/resources/why-public-service-degree/mpampp-degrees> (last visited Feb 23, 2025).

⁶¹ See FREDERICKSON ET AL., *supra* note 12, at 101-102 (describing Luther Gulick’s list of public administrator responsibilities within hierarchical organizations).

⁶² See Madeleine McNamara, *Starting to Untangle the Web of Cooperation, Coordination, and Collaboration: A Framework for Public Managers*, 35 INT’L J. PUB. ADMIN. 389 (2012) (distinguishing management practices in various horizontal cross-sector organizational relationships).

⁶³ Erick Stokan et al., *Fifty Years as the Fourth Pillar of Public Administration: A Polycentric Extension of the Social Equity Framework*, 101 PUB. ADMIN. 1427, 1428 (2023).

⁶⁴ See Gillian E. Metzger, *Administrative Law, Public Administration, and the Administrative Conference of the United States*, 83 GEO. WASH. L. REV. 1517, 1530-31 (2015); Bradley E. Wright, *Public Administration as an Interdisciplinary Field: Assessing its Relationship with the Fields of Law, Management, and Political Science*, 71 PUB. ADMIN. REV. 96, 96 (2011).

⁶⁵ Robert K. Christensen, *Running the Constitution: Framing Public Administration*, 32 PUB. PERFORMANCE & MGMT. REV. 604, 604 (2009).

⁶⁶ FREDERICKSON ET AL., *supra* note 12, at 15-20.

⁶⁷ For a legal perspective on the administrative state’s legitimacy, see Cynthia R. Farina, *The “Chief Executive” and the Quiet Constitutional Revolution*, 49 ADMIN. L. REV. 179 (1997) (discussing and critiquing the predominant theories that the administrative state’s legitimacy flows from the Chief Executive).

unelected bureaucrats are not directly accountable to the public. However, these bureaucrats develop deep expertise in their policy fields, and are accountable for performance to the elected and appointed officials above them in the public sector organizational chart. In this way, human resources controls ensure bureaucrats implement policy aligned with their elected and appointed supervisors. Because the bureaucracy implements policy in accordance with political will, the public can hold the elected officials accountable for public policy with which they disagree.

One main point of this paper is that bureaucratic expertise serves as a de facto additional check within our traditional federal checks and balances.⁶⁸ Bureaucratic expertise carries out this check in at least three ways. First, procedural expertise ensures the federal government captures necessary stakeholder and community input during the policy formulation phase.⁶⁹ Second, bureaucratic experts develop relationships and social capital with policy actors in other sectors and with legislative oversight staff.⁷⁰ This relational expertise ensures lines of communication remain open through changes in federal administrations or when unanticipated events open policy windows, and in turn these relationships ensure that policy actors are aware of potential policy proposals. Third, substantive bureaucratic expertise provides a check on ideological influence within the policy process. Expert

⁶⁸ See Harry Collins et al., *The Third Wave and Populism: Scientific Expertise as a Check and Balance*, in THE OXFORD HANDBOOK OF EXPERTISE AND DEMOCRATIC POLITICS 52, 60 (Gil Eyal & Thomas Medvetz eds., 2023) (discussing expertise as a check on “populism”).

⁶⁹ Federal expert bureaucrats coordinate public comment review during notice-and-comment rulemaking under the Administrative Procedure Act, 5 U.S.C. § 553(b) (2024), and manage relationships with their advisory committees under the Federal Advisory Committee Act (FACA), 5 U.S.C. § 1001(2) (2024).

⁷⁰ “Social capital” can be defined loosely as “trust” that develops during collaborative engagements as well as an important “initial input” for successful collaboration. Cheryl L. Wagner & Maria E. Fernandez-Gimenez, *Effects of Community-Based Collaborative Group Characteristics on Social Capital*, 44 ENV'T MGMT. 632, 632-33 (2009).

bureaucrats filter policy proposals based on their own extensive experience. Expert review helps ensure well-considered and viable policy proposals reach decision-makers.

Expertise is central to the study and practice of public administration, but how does expertise operate at the boundary of law and public administration? Public administration and law are related fields.⁷¹ Szypszak notes that many early public administration scholars considered law to be “foundational” to the field of public administration.⁷² Public administration and law continue this close relationship today in two ways: the fields overlap in their subject matter and share a concern for the relationship between theory and practice.⁷³ In addition to the overlap in subject matter, public administration scholarship draws upon legal scholarship and vice versa across the overlapping boundary between the fields.

Expertise features in the study of public administration and law and is an “exemplary case”⁷⁴ of a cross-disciplinary topic because of its frequent mention in the scholarly literature. The legal literature, however, is beginning to recognize limitations inherent in the “rational-instrumental” approach to expertise which supported *Chevron* deference. Specifically, the “rational-instrumental” approach does not account for the internal workings of bureaucratic agencies.⁷⁵ Another limitation of the legal literature’s examination of expertise lies in

⁷¹ Metzger, *supra* note 64, at 1517-18; see also Bradley E. Wright, *Public Administration as an Interdisciplinary Field: Assessing its Relationship with the Fields of Law, Management, and Political Science*, 71 PUB. ADMIN. REV. 96 (2011).

⁷² Charles A. Szypszak, *Teaching Law in Public Affairs Education: Synthesizing Political Theory, Decision Making, and Responsibility*, 17 J. PUB. AFF. EDUC. 483, 483-85 (2011).

⁷³ See Catharine A. MacKinnon, *From Practice to Theory, or What is a White Woman Anyway?*, 4 YALE J. L. & FEMINISM 13 (1991).

⁷⁴ See Franziska Wallmeier et al., *Knowledge Construction in Public Administration: A Discourse Analysis of Public Value*, 79 PUB. ADMIN. REV. 488, 488-90 (2018).

⁷⁵ Sidney Shapiro et al., *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 WAKE FOREST L. REV. 463, 464-65, 467 (2012).

inconsistent use of terms and definitions that have settled usage within the public administration literature.⁷⁶

The issue of expertise is relevant to law and public policy because of recent calls within public administration scholarship for a renewed focus on law,⁷⁷ and within legal scholarship for an “enlightened” understanding of public administration.⁷⁸

There is a rich literature on the topic of expertise in modern public administration. Scholars in the field approach expertise from a variety of perspectives. From the perspective of the politics/administration dichotomy, this author argues that expertise is related both to knowledge and efficiency. The implication is that the political leaders themselves cannot carry their own directives into practice due to a lack of resources, time, and substantive knowledge.⁷⁹ In this sense, expertise is both expertise as to process and expertise as to technical knowledge.⁸⁰

“Classical organizational theorists”⁸¹ focus on structure in large part to capture expertise in the most efficient manner possible. In “bureaucracies,” “decisions are to be based on technical expertise”.⁸² The early strand of literature, led by Frederick W. Taylor’s *Scientific Management*,⁸³ focuses on expertise and efficiency and identifying the “one best way” to

⁷⁶ *Id.*

⁷⁷ Stephanie Newbold, *Toward a Constitutional School for American Public Administration*, 70 PUB. ADMIN. REV. 538, 539-40 (2010); Christensen, *supra* note 65, at 605 (2009); Laurence E. Lynn, Jr., *Restoring the Rule of Law to Public Administration: What Frank Goodnow Got Right and Leonard White Didn't*, 69 PUB. ADMIN. REV. 803, 803-04 (2009).

⁷⁸ See generally Metzger, *supra* note 64; see also Shapiro et al., *supra* note 75, at 465.

⁷⁹ James H. Svara, *Beyond Dichotomy: Dwight Waldo and the Intertwined Politics-Administration Relationship*, 68 PUB. ADMIN. REV. 46 (2008).

⁸⁰ See Lawrence B. Mohr, *Authority in Organizations: On the Reconciliation of Democracy and Expertise*, 4 J. PUB. ADMIN. RSCH. THEORY 49 (1994).

⁸¹ *Id.* at 50-51.

⁸² Thomas H. Hammond & Gary J. Miller, *A Social Choice Perspective on Expertise and Authority in Organizations*, 29 AM. J. POL. SCI. 1, 1 (1985) (discussing FREDERICK W. TAYLOR, *THE PRINCIPLES OF SCIENTIFIC MANAGEMENT* (Norton 1967) (1911)).

⁸³ Mohr, *supra* note 80, at 51 (1994).

accomplish tasks, although this approach was “softened” by Barnard and others.⁸⁴

The early discussions on expertise focused on the concept from a management perspective, but public administration draws on multiple foundational disciplines, including law.⁸⁵ Christensen argues that the “early pull” of the field “from law to management” resulted in the exclusion of law from such modern scholarly movements including “New Public Management/privatization and performance-centered models of administration.”⁸⁶ Law appears to serve as a surrogate for that bundle of values that separates public administration from business administration and that gives public administration its essential character.⁸⁷ For public administration scholarship, there does not appear to be a single inflection point, related to the concept of expertise, driving renewed focus on public law. However, there appears to be greater scholarly interest in law beginning in the 1990s, which may align with the New Public Management and Reinventing Government movements and those movements’ exclusion of law.

Legal scholarship discusses expertise in terms of judicial deference to agency determinations or interpretations of statutes, regulations, and agency policy. Federal courts will give different levels of deference to agency interpretations in different contexts,⁸⁸ but the most famous type of deference, was the *Chevron* deference overruled by *Loper Bright*.

The underlying policy rationale for *Chevron* deference was that the agency possesses greater expertise than the courts to interpret statutes within their mission areas. One may think that the judiciary deferred to agencies because the judiciary

⁸⁴ *Id.*

⁸⁵ Christensen, *supra* note 71, at 605.

⁸⁶ *Id.*

⁸⁷ Charles R. Wise, *Public Administration is Constitutional and Legitimate*, 53 PUB. ADMIN. REV. 257, 260 (1993); Hal G. Rainey et al., *Comparing Public and Private Organizations*, 36 PUB. ADMIN. REV. 233 (1976).

⁸⁸ Richard J. Pierce Jr. & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 ADMIN. L. REV. 515, 515-520 (2011).

views agency expertise as a source of authority. However, the prevailing view in legal scholarship is judicial deference to agency determinations is based on democratic accountability. From a structural perspective, courts defer to agencies so that the politically accountable administration can be responsible for the determination, not that the agency expertise serves as a source of authority and legitimacy for the interpretation itself.⁸⁹

Shapiro is the strongest voice of a group of legal scholars who critique the dominant view that Shapiro calls the “rational-instrumental” approach, or the “outside-in” accountability.⁹⁰ Shapiro and others believe that this legal focus on structure misses the mark by ignoring the realities of how agencies make policy internal to the organization. Shapiro and others do not view *Chevron* deference as a sign that the law respects public administration. Rather, Shapiro and others believe the dominant view to be that the law “distrusts” administration.⁹¹ For legal scholars, *Chevron* and its focus on institutionalism appears to be an inflection point that drives calls for greater alignment with public administration.

This emerging strand of legal scholarship calls for an “enlightened” understanding of public administration. The scholarship champions an approach that acknowledges the realities of internal workings of agencies from the “inside-out” perspective.⁹² This new approach appears to recognize expertise as a source of legitimacy on its own terms. The implication is that the legal academy needs to recognize public administration as more than the rote interpretation and execution of statutes.⁹³

This author submits that one challenge to greater understanding of public administration in the legal academy is the misunderstanding of social science terminology. Terms such

⁸⁹ Shapiro et al., *supra* note 75, at 463-70.

⁹⁰ *Id.* at 483.

⁹¹ Sidney Shapiro & Elizabeth Fisher, *Chevron and the Legitimacy of “Expert” Public Administration*, 22 WM. & MARY BILL RTS. J. 465, 496 (2013).

⁹² Shapiro et al., *supra* note 75, at 479-81, 483-87..

⁹³ Sidney A. Shapiro, *Law, Expertise, and Rulemaking Legitimacy: Revisiting the Reformation*, 49 ENV'T. LAW 661 (2019).

as “paradigm,” “qualitative,” and “scientific” have generally accepted definitions within social sciences.⁹⁴ Legal scholars do not always use these terms in the same way as public administration scholars.⁹⁵ Words have meaning, and imprecise use of social science terms in legal scholarship limits the transferability of concepts between public administration and law.

Chevron's demise and the assault on expertise offer opportunities for scholars and practitioners to build a stronger bridge between the fields of public administration and law. First, as discussed above, public administration scholars and legal scholars should use terminology consistently in their research. Second, public administration programs should refocus their attention on law as a foundational field for the study of public administration.⁹⁶

Finally, to promote mutual understanding between the two fields, scholars should research knowledge construction and knowledge exchange between the two fields. In other words, what are the processes for the diffusion of legal concepts into the theory and practice of public administration, and vice versa? If public administration and legal scholars embark on this venture together, this proposed line of scholarship will have the secondary benefit of promoting a common research methodology between the fields. Discourse analysis and content analysis would be appropriate approaches for the study of texts in this endeavor, and the work of Wallmeier et al. in knowledge construction in public administration would serve as a model for this line of research.⁹⁷

⁹⁴ See generally JONATHAN W. MOSES & TORBJORN. L. KNUTSEN, *WAYS OF KNOWING: COMPETING METHODOLOGIES IN SOCIAL AND POLITICAL RESEARCH* (2007); THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (3D ED. 1996); KINGDON, *supra* note 51.

⁹⁵ See Shapiro et al., *supra* note 75.

⁹⁶ Szypszak, *supra* note 72, at 483.

⁹⁷ Wallmeier et al., *supra* note 74.

III. THE ASSAULT ON EXPERTISE

This Part argues that policy practitioners should not view *Loper Bright* in isolation. Rather, the case is part of a broader assault on expertise with significant consequences for policy practice. This Part begins by analyzing *Loper Bright* and *West Virginia*,⁹⁸ which, taken together, weaken the power of federal administrative agencies to solve policy problems through their expertise. It continues by examining other assaults on expertise, including the recent and ongoing purge of the federal civil service workforce.

A. *Loper Bright* and *West Virginia v. E.P.A.*

Loper Bright is not the only appellate case to devalue agency expertise. Two years prior, the U.S. Supreme Court invoked the major questions doctrine (“MQD”) to invalidate an Obama-era Clean Power Rule in *West Virginia v. E.P.A.*⁹⁹ The MQD means “administrative agencies must be able to point to clear congressional authorization when they claim the power to make decisions of vast economic and political significance.”¹⁰⁰

With *Loper Bright* and *West Virginia*, the Court sends three clear signals to administrative agencies regarding their expertise. First, legitimacy no longer flows from agency expertise. Agency expertise may remain persuasive but is not authoritative. Second, although Congress may be ineffective,¹⁰¹ agencies use their expertise to get ahead of Congress on policy issues at their own peril. To the extent that agencies interpret existing statutes in new ways to address emergent technology or to address social justice issues, the new interpretations may cut against *Skidmore* deference. Additionally, agencies might run afoul of the MQD by interpreting regulations consistently

⁹⁸ *West Virginia v. E.P.A.*, 597 U.S. 697 (2022).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 735 (Gorsuch, J., concurring) (internal quotations and citations omitted).

¹⁰¹ Ansolabehere et al., *supra* note 7, at 243-46.

but applying that interpretation to a rulemaking project on a much larger scope or scale than the interpretation has been used in the past. Either way, agency expertise alone is no longer a license to respond independently to policy problems.

B. Broader Societal Attacks on Expertise

The appellate cases described above are just some examples of a much broader assault on administrative expertise. First, certain actors have recently disparaged the federal administrative bureaucracy as the “Deep State.”¹⁰² The implication, of course, is that unelected expert bureaucrats drive public policy based on their own personal agendas, rather than working diligently and professionally to implement the directives of elected and appointed officials working above them. The secondary implication is that expert bureaucrats operate based on a partisan political ideology.¹⁰³ These attacks encourage the public to question expertise as a public service value.

Second, the federal government recently purged many probationary civil service employees.¹⁰⁴ These actions, ostensibly to improve efficiency, likely will have the practical effect of breaking the knowledge and expertise diffusion chain from one generation of public servants to the next. To be sure, promoting government efficiency is a legitimate executive branch action, which can include reducing the workforce to cut costs. Much remains to be seen, however, whether these cuts will drive actual improvements in efficiency and effectiveness in public service delivery.

¹⁰² Jon D. Michaels, *The American Deep State*, 93 NOTRE DAME L. REV. 1653, 1653 (2018).

¹⁰³ See *id.*

¹⁰⁴ Courtney Rozen, *Trump's Mass Firings of Federal Workers Spread Chaos Nationwide*, BLOOMBERG L. (Feb. 24, 2025, 10:10 AM), <https://news.bloomberglaw.com/daily-labor-report/trumps-mass-firings-of-federal-workers-spread-chaos-nationwide>.

Third, the federal government canceled the Presidential Management Fellowship Program.¹⁰⁵ This program provides a pathway for aspiring public servants to enter the federal government directly from school. When combined with the purge of probationary employees, the effect is not just to remove existing expertise from the pipeline, but to break the chain of mentoring and knowledge diffusion within the federal government.

Fourth, the Chief Executive has attempted to reorganize independent agencies under direct Presidential control.¹⁰⁶ These agencies customarily provide specialized expert service or enforcement for the public benefit. Their leaders typically serve staggered terms designed to insulate their expertise from changes in presidential administrations and ensure continuity of service no matter the political affiliation of the political party controlling the White House.¹⁰⁷

Finally, the federal government recently purged several federal advisory committees of all their members.¹⁰⁸ Many of these committees advised the government on particularly sensitive technology policy issues.¹⁰⁹ Notably, these committees exist to provide agencies with the benefit of independent external expertise.

¹⁰⁵ Exec. Order No. 14217, 90 Fed. Reg. 10577 (2025)

¹⁰⁶ Exec. Order No. 14215, 90 Fed. Reg. 10447 (2025).

¹⁰⁷ See Ashley Lopez, *Trump Wants More Power over Agencies. Experts Worry About Campaign Finance Regulators*, NPR (Feb. 20, 2025, 2:54 PM), <https://www.npr.org/2025/02/20/nx-s1-5302704/trump-power-independent-federal-election-commission>.

¹⁰⁸ A.J. Vicens & Raphael Satter, *US DHS Fires Outside Advisers, Sources Say China Probe Disrupted*, REUTERS (Jan. 21, 2025, 8:17 PM), <https://www.reuters.com/world/us/us-department-homeland-security-firing-all-advisory-committee-members-letter-2025-01-21/>.

¹⁰⁹ Such as the National Offshore Safety Advisory Committee, which advises the U.S. Coast Guard, in part, on offshore cybersecurity issues. *National Offshore Safety Advisory Committee*, *supra* note 45.

IV. PRACTICAL IMPLICATIONS

A. A Paradigm Shift- Power Away from Administrative Agencies

A paradigm is a generally accepted set of beliefs within a field. Previously, public policy rested on a foundation of expertise. To be sure, political leadership directed the focus and emphasis of policy. But apolitical administrative agencies operated at the center of policy ecosystems, leveraging their procedural and substantive expertise to facilitate public policy. However, *Loper Bright*, *West Virginia*, and the broader assault on expertise have created a paradigm shift.¹¹⁰ This post-expertise era dismisses and devalues expertise within the public policy ecosystems. Expertise no longer holds inherent authority and legitimacy, due to changes in legal structures or the emergent public perception that expert bureaucrats lack democratic legitimacy to facilitate solutions to public problems.

B. Impact on Policy Actors

Part III, above, explains how many different actors occupy the policy ecosystem to effect public policy. How, then, should the various actors adjust their policy advocacy to account for the post-expertise paradigm shift? This sub-part analyzes how various institutional actors can adjust their public policy work to maintain their institutional power or to take advantage of the shift in power dynamics post-*Loper Bright*. This subpart addresses institutional actors and then briefly offers suggestions for attorneys working in the public and private sectors.

¹¹⁰ See KUHN, *supra* note 94, at 23 (defining paradigm generally as a set core of beliefs in academic fields that shift dramatically at an inflection point representing a new understanding of beliefs).

1. Administrative Agencies

Administrative agencies have lost relative policy power and influence post-*Loper Bright*. Agencies may respond to this loss of power by bolstering their chances of judicial deference, avoiding the rulemaking process entirely, or working closely with Congress to amend their statutory authority. A combination of these efforts may help an agency retain its influence in the policy process.

There are three major ways agencies may bolster their chances of judicial deference to controversial regulations. First, agencies must prioritize precise and detailed administrative records justifying their agency actions.¹¹¹ Although administrative records have always been important to support agency positions, after *Loper Bright* the judiciary might draw a significant negative inference from any gaps or weaknesses in an administrative record.

Second, agencies must pay closer attention to public comments during the notice-and-comment rulemaking process.¹¹² Close evaluation of public comments from a variety of stakeholders, and a detailed response to those comments in the final rule, may inoculate an agency from a charge that the final rule is merely a pre-determined course of action. For particularly complex rules, agencies may wish to use the supplemental notice of proposed rulemaking process.¹¹³

Third, agencies should increase their reliance on their advisory committees to provide non-binding recommendations prior to entering the rulemaking process. Duly constituted

¹¹¹ See Todd S. Aagaard, *Factual Premises of Statutory Interpretation in Agency Review Cases*, 77 GEO. WASH. L. REV. 366, 377, 382 (2009) (describing several issues related to administrative records in challenges to agency action).

¹¹² 5 U.S.C. § 553 (2024).

¹¹³ For example, the U. S. Coast Guard may issue a supplemental notice of proposed rulemaking ("SNPRM") if "a proposed rule has been substantially changed from the original notice of proposed rulemaking." The SNPRM "provides an opportunity for additional comment." Supplemental Notice of Proposed Rulemaking, 33 C.F.R. § 1.05-40 (2025).

advisory committees provide important stakeholder perspective on the relative importance of different regulatory projects. Authentic and thorough engagement with an advisory committee creates a strong record that a rule is not only necessary but has prior buy-in from regulated entities.

Agencies may also mitigate *Loper Bright's* impacts by avoiding the rulemaking process entirely. Policy letters and interpretive statements require neither public input nor transparency but effectively compel compliance from regulated entities. When used appropriately, these tools serve as de facto regulations, although they bypass the procedural guardrails intended to facilitate stakeholder input and may be challenged.¹¹⁴

Finally, administrative agencies may simply ask Congress for statutory clarity in their authorities. *Loper Bright* and *West Virginia* do not prohibit agencies from acting within their expertise, but functionally prevent agencies from getting too far in front of Congress when doing so. One major critique of *Loper Bright* is it treats the rulemaking process as completely siloed from the legislative process. But Congress and agencies do not make music like Bernie Taupin and Elton John, with Congress writing the lyrics alone and passing them off to agencies to create the score.¹¹⁵ In practice, Congress and agencies work closely together. In the author's experience,

¹¹⁴ Perhaps the most well-known recent example of a policy letter is from the Department of Education. Dep't of Educ., Civ. Rts. Off., Policy Letter on Title VII Discrimination After *SFFA v. Harvard* (Feb. 14, 2025), <https://www.ed.gov/media/document/dear-colleague-letter-sffa-v-harvard-109506.pdf>. With this letter, the Trump Administration attempted to coerce compliance from various schools and universities to pull back on Diversity, Equity, and Inclusion efforts based on an expansive interpretation of existing law. Much remains to be seen how this effort will play out in practice or in the courts.

¹¹⁵ Bernie Taupin is the lyricist for many of Elton John's songs. Bernie Taupin usually writes lyrics and then passes them to Elton John to compose music for those lyrics with minimal additional interaction. Jim Farber, *Bernie Taupin is Still Standing*, *VULTURE* (Sept. 17, 2023), <https://www.vulture.com/article/bernie-taupin-in-conversation.html>.

Congress seeks agency input and comment before adjusting statutory authority.¹¹⁶

2. The Chief Executive

At first glance, *Loper Bright* and the assault on expertise may appear to weaken the Chief Executive along with their administrative agencies. However, the President may still issue Executive Orders to carry out their agenda. Executive Orders carry the force of law and do not require public comment. Federal courts may also give more deference to Executive Orders under the theory that the President holds elected office, and therefore is more directly accountable to the public for unpopular Executive Orders. After *Loper Bright*, Executive Orders remain a valuable tool to consolidate executive branch power in the policy process.

3. Congress

The author offers that Congress has neither lost nor gained relative power through the assault on expertise. However, the new paradigm places greater responsibility upon Congress to exercise the power it holds. Congress may no longer passively wait for administrative agencies to leverage their own expertise to solve policy problems. In this new era, Congress likely needs to exercise more active oversight authority. In the alternative, Congress may delegate authority more explicitly for agencies either to interpret their own statutes or to tackle novel policy issues. Neither *Loper Bright* nor the Major Questions Doctrine prohibit Congress from allowing agencies to lean forward to solve policy problems, but Congress must be clear in its delegations.

¹¹⁶ Jarrod Shobe, *Agencies as Legislator: An Empirical Study of the Role of Agencies in the Legislative Process*, 85 GEO. WASH. L. REV. 451, 455 (2017).

4. Industry

Loper Bright and the assault on expertise have increased the relative power of industry in the policy process. The author argues that the overruling of *Chevron* deference and the Supreme Court's approval of the MQD have handed industry de facto veto power over novel agency regulations. In addition to challenging regulations on major questions doctrine grounds, industry can take two major actions to consolidate its new strength in the policy process.

First, industry should continue to seek seats on federal advisory committees. Agencies might be more tentative now in advancing novel regulations, particularly those dealing with emergent technology. For these policy issues, industry may hold greater expertise than the agencies themselves. Through advisory committee participation, industry can drive agency action and regulatory projects by exploiting the expertise differential between the private sector and agencies.

Second, industry should provide thorough and detailed comments to any agency rulemaking that drives significant changes in a regulatory space. Although such comments will require resources to create, these comments may provide a strong warning to agencies that they are treading into MQD territory or otherwise risk adverse judicial rulings on their proposed actions. Conversely, strong industry support of favorable, but novel, regulation, may help the agency develop the record it needs to withstand judicial scrutiny.

5. Nonprofit Sector

Nonprofit advocacy groups have lost some relative public policy power after *Loper Bright*. These groups should adjust their advocacy in two major ways to retain their influence. First, these advocates should provide more frequent and detailed comments on proposed federal rules. As with industry stakeholders, advocacy groups have an interest in creating a strong administrative record for or against proposed rules.

Second, nonprofit advocacy groups should focus their agenda setting efforts away from the federal administrative agencies and more toward federal legislative, international, and state-level efforts. At the federal level, legislative advocacy may yield more certain results because of agencies' reduced power to craft novel and innovative rules that align with advocates' preferred positions. International advocacy may also provide more return on investment in today's environment, especially when international treaties are well-entrenched in the policy landscape for the nonprofit advocates' policy issues. Within the United States, state-level administrative advocacy may also yield positive results.

6. Attorneys

Although *Loper Bright* is part of a broader paradigm shift in public policy, this shift opens opportunities for attorneys to add value in new ways for their clients. Attorneys traditionally focus on building and arguing cases at the decision-making stage of the policy process. Attorneys should broaden their perspective and view themselves as "policy entrepreneurs" across all stages of the policy process.¹¹⁷ With expertise now devalued in the policy process, coalition building across sectors and industries may become just as important as technical knowledge about a given policy issue. The best attorneys will develop strong networks not just within the legal profession, but throughout their clients' industries.

For private sector attorneys, this means forgoing some billable hours to build true relationships with clients and a deep understanding of their needs. Keep up with the public policy affecting your industry. Regularly advise your clients of upcoming legislative oversight hearings and agency rulemakings. Zealously advocate for public policy positions just as you would for their interests in the courtroom or at the negotiation table.

¹¹⁷ See generally KINGDON, *supra* note 51, at 179.

For public sector attorneys, this means reaching across sectors to build relationships with the private bar. To be sure, the federal standards of conduct may place some limits on how you interact with private sector attorneys,¹¹⁸ but they do not prohibit professional relationships. Also, get to know your regulators and how they perceive the current regulatory structure. Agency bureaucrats will provide you with important information on regulatory gaps and industry perspective you may not get from private counsel.

V. BROADER IMPLICATIONS

As Part IV stated, the post-expertise era represents a “paradigm shift” for law and public policy. This paradigm shift will have implications not just for policy actors within the ecosystem, but also for theory building at the intersection of law, public administration, and public policy. This Part analyzes a non-exhaustive list of topics and issues in the post-expertise era.

First, to what extent will ideology run rampant in the policy process? Expertise ultimately serves as a pragmatic check on undisciplined decision-makers. In a policy system which values expertise, public policy proceeds incrementally. To be sure, a change in federal executive administrations always brings policy changes. However, these changes typically are predictable, with advance notice for the regulated community to provide comments to rulemakings or to engage in legislative advocacy as a new administration shapes its agenda. When expertise is valued, public policy is like a large, but stable, commercial maritime vessel in the open ocean. When the vessel rolls to port (or left), for example, it only heels over a few degrees. The physical forces on the vessel then cause the vessel to return upright and heel over just a few degrees to starboard

¹¹⁸ For example, most federal public sector attorneys must follow Standards of Ethical Conduct for Employees of the Executive Branch. *See* 5 C.F.R. § 2635 (2025).

(right). The vessel's movements are smooth and predictable, not too far left or not too far right.

In the absence of expertise, however, there is no check on hasty public policy decisions. As institutional policy actors seek end-around approaches that require no public notice or input, ideology may trump expertise as the dominant force in the policy process. Coalition-building, professional networks, and mass communications strategies become more important than technical expertise when decision-makers eschew linear policy formulation for quick and easy policy solutions. Public policy in the post-expertise era is no longer an inherently stable vessel. Without effort from policy actors to offset the degradation of expertise, the vessel heels over dangerously and cannot maintain a steady course and speed. Indeed, if ideology flows unimpeded into public policy spaces the vessel of public policy may heel over one direction and never recover to its fully upright position.

The assault on expertise also has implications for the "Rule of Law." When the Rule of Law exists in society, this means laws and rules exist, and that society is willing to follow those laws and rules.¹¹⁹ In other words, society is bound together by a culture of legal compliance. The public accedes to the rule of law because the public perceives the system to be legitimate. Expertise is one driver of legitimacy in law and public policy. When society perceives laws to be technically proficient, either in their substance, their process, or both, then the public is more likely to follow those laws. When society views the system as legitimate, then public policy is seen as a regular push and pull of competing interests, with the opportunity to engage the system to advocate for change when necessary.

Without expertise as a source of legitimacy, however, society might be less likely to view public policy as legitimate. Those who object to a given policy may view it as illegitimate or

¹¹⁹ See Monika Zalnieriute et al., *The Rule of Law "By Design?"*, 95 TUL. L. REV. 1063, 1067-68 (2021) (noting that the legal academy describes "the rule of law" as "one of the most iconic and prominent social values." When the rule of law exists, then citizens feel bound by the law and the "legal system" itself "is free from certain threats").

substantive grounds, procedural grounds, or both. Substantively, those who oppose policy may perceive it lacks the proper technical foundation. Procedurally, those who oppose policy may perceive it as illegitimate because there appears to be no way to participate meaningfully in any process to overturn the existing policy.

The assault on expertise may also have significant implications for the role of law as a source of values in society.¹²⁰ The U.S. Constitution,¹²¹ court decisions,¹²² and many administrative law statutes inject values of fairness, equality, and transparency into our public policy process.¹²³ Taken together, these laws and values presume the existence of a functioning bureaucracy with the procedural expertise to facilitate stakeholder input and the substantive expertise to conduct meaningful review of the stakeholder input as a basis for policy recommendations to a decision maker.

The assault on expertise may impact the role of law as a source of values in two main ways. First, without institutional bureaucratic expertise to facilitate policy formulation, competing policy proposals are more likely to reach decision-makers without being tested through community or stakeholder engagement. The result may be more top-down policy directives that fail to address community needs. Second, a greater use of non-deliberative policy tools such as interpretive guidance and policy letters, rather than

¹²⁰ These values include equal protection and due process, social equity, and transparency. U.S. CONST. amend. V, XIV; H. George Frederickson, *Public Administration and Social Equity*, 50 PUB. ADMIN. REV. 228 (1990); Lisa B. Amsler, *Collaborative Governance: Integrating Management, Politics, and Law*, 76 PUB. ADMIN. REV. 700, 704 (2016) (“administrative law reflects six key public values: those commonly addressed in the literature—accountability, efficiency, effectiveness, transparency, participation—but also collaboration.”).

¹²¹ U.S. CONST. amends. V, XIV.

¹²² See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (declaring “separate but equal” segregation by race unconstitutional in public schools).

¹²³ See, e.g., Administrative Procedure Act, 5 U.S.C. § 551; Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2024); Federal Advisory Committee Act, 5 U.S.C. § 1001.

rulemaking, will force those who oppose policy to constantly play defense. Opponents may not be willing or able to commit the resources necessary to challenge these policy tools through federal lawsuits. Therefore, the courts might be less likely to judge the validity of policy outputs in the post-expertise era.

The assault on expertise also holds implications for the policy process model and Kingdon's policy streams model. Devaluation of expertise in the policy process may impact how policy actors work within each stage and how the stages relate to each other. The author offers that the post-expertise era may impact the models in three main ways. First, policy may move more quickly from the agenda setting stage to the policy output stage within the policy process model. To the extent that decision-makers devalue expertise, they may be more likely to bypass stakeholder input. Second, and by reference to Kingdon's policy streams model, policy actors must be more attuned to policy windows opening in irregular ways. For example, in this new era, social media posts may open policy windows just as powerfully as regular election cycles or scheduled oversight committee hearings. Finally, policy entrepreneurs may hold more relative power in the post-expertise era. To the extent that policy moves much more quickly from idea to implementation, policy entrepreneur skills may become more important than substantive policy expertise, because entrepreneurs can leverage networks to coordinate rapid policy efforts.

VI. LIMITATIONS AND CONCLUSION

The author acknowledges three major limitations to this article. First, this article admittedly focuses on and critiques recent conservative action. This article, however, is not intended to be a political statement. The purpose of this article is to highlight impacts on public policy arising out of the general assault on expertise. To the extent that the assault on expertise erodes normative guardrails in our public policy system, the loss of those guardrails exposes the system to ideological influence from any political perspective.

Second, this article focuses on U.S. federal law to the relative exclusion of state law and policy. The legal and public administration academics tend to focus on federal law and practice, and it is a valid question whether this general approach best serves students and the fields. With that said, the author perceives the assault on expertise as primarily a federal issue. States may have different legal structures in place that preserve expertise, and state public policy ecosystems may therefore be shielded to a large degree from the federal assault on expertise.

Finally, this article represents the author's informed hypotheses about how the assault on expertise will impact law and public policy. This article, however, like most legal scholarship, is normative rather than empirical. The author encourages law and public administration scholars to test the claims in this article through empirical testing and research.

In conclusion, when viewed solely through a legal lens *Loper Bright* might seem no more than a slight shift in the law of judicial deference. After all, the Supreme Court does not forbid judicial deference to agency interpretations of their own statutes, and *Skidmore*¹²⁴ deference likely remains in place for now. But such a perspective misses the bigger picture. *Loper Bright*, *West Virginia*, and other appellate cases suggest the current conservative U.S. Supreme Court devalues expertise. Law, of course, reflects society, and these rulings align with a broader public attack on expertise. From the demonization of the apolitical civil service, to the recent purge of federal civil service employees, to broad firings of Department of Homeland Security advisory committee members, we may view *Loper Bright* as just one part of a broader assault on expertise with significance beyond the courtroom and into the policy process.

This assault on expertise has significant implications for the practice and theory of law, public administration, and public policy. At a broad level, the culling of expertise opens the door for unchecked ideology to drive public policy. This paradigm shift in the policy ecosystem has recalibrated the relative power and influence of both institutional and individual policy actors.

¹²⁴ *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

In the post-expertise era, institutional and individual policy actors must adjust their strategies either to solidify their new relative strength or to offset their loss of relative power.

For attorneys, the post-expertise era places a premium on coalition-building and proactive lawyering throughout the policy process. Although lawyers will always possess unique skill and license to guide clients through the decision-making phase of public policy, the speed of policy development and implementation may increase. Attorneys must broaden their vision and skills to help their clients shape policy from agenda setting through the program evaluation stages. In short, attorneys must become “policy entrepreneurs.”¹²⁵

For legal scholars, the post-expertise era offers the opportunity to study the role of law, and indeed the Rule of Law, in a hollowed-out administrative state. For example, how do Constitutional principles inject value into the policy process when decision-makers avoid using deliberative and transparent policy tools? How does the loss of collective career knowledge at institutions such as the Department of Justice impact civil rights litigation and enforcement? These are just two of the many important research questions the legal, public administration, and public policy academies should address together in the coming years.

In summary, *Loper Bright* is but one example of a broader assault on expertise with implications for the practice of law and public policy. As scholars and practitioners, we must acknowledge the post-expertise era is upon us. Pragmatic research and practice will help us identify how policy ecosystems work differently in this new era and how we can preserve normative values in the practice of law and public policy.

¹²⁵ KINGDON, *supra* note 51.