

FISHING FOR ANSWERS: RETHINKING DEFERENCE FOR STATE AGRICULTURAL AND ENVIRONMENTAL AGENCIES FOLLOWING *LOPER BRIGHT*

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INTRODUCTION

The legal battleground for environmental and agricultural policy has fundamentally changed in the wake of a major shift in federal administrative law. This change has the potential to either provide relief or to introduce unpredictability in agricultural and environmental rulings across the country. The change resulted in a federal legal landscape where agencies no longer have the final say in interpreting ambiguous laws. *Alt v. EPA* highlights the important role that deference can play in the outcome of litigation, which is why the states are now at a crossroads when it comes to their own agency deference standards.¹

Lois Alt was a poultry farmer in West Virginia.² Her chicken farm ran several thousand birds in eight poultry confinement houses.³ Because of the number of animals on her farm, Alt's operation was considered a concentrated animal feeding operation (CAFO).⁴ On her CAFO, Alt implemented manure management procedures to reduce exposure to precipitation on her farm.⁵ However, despite these efforts, particles of manure and litter were tracked and spilled.⁶ Further, dust—composed of manure, litter, and dander—and some feathers were blown by ventilation fans and settled on the farmyard ground.⁷ Precipitation eventually came into contact with these particles, causing these materials to runoff across a neighboring pasture and into Mudlick Run—a water of the United States.⁸

In 2011, the Environmental Protection Agency (EPA) accused Alt of violating the Clean Water Act (CWA).⁹ The EPA claimed that Alt violated the CWA by failing to obtain a National Pollutant Discharge Elimination System (NPDES) permit.¹⁰ Supposedly, Alt needed an NPDES permit for the rainwater

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1. *Alt v. EPA*, 979 F. Supp. 2d 701 (N.D. W. Va. 2013).

2. *Id.* at 704.

3. *Id.*

4. *Id.* The EPA defines a large poultry CAFO as an animal operation exceeding 30,000 or more laying hens or broilers with a liquid manure system, 125,000 or more other chickens or 82,000 or more laying hens with a dry manure system. See *Regulatory Definitions of Large CAFOs, Medium CAFO, and Small CAFOs*, EPA (Aug. 2015), https://www.epa.gov/sites/default/files/2015-08/documents/sector_table.pdf [<https://perma.cc/JK3E-EXX5>].

5. *Alt*, 979 F. Supp. 2d at 704.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at 705.

10. *Id.*

runoff that allegedly carried dust, feathers, and manure from her farm into nearby Mudlick Run.¹¹ The Findings of Violation and Order of Compliance issued by the EPA threatened civil penalties of up to \$37,500 per day of violation, mentioned criminal action could be initiated against Alt, and ordered her to apply for an NPDES permit.¹² In response, Alt filed suit.¹³

At the heart of this case was the question of “whether the litter found on Ms. Alt’s farmyard that could be picked up by rainwater, washed two hundred yards across a grassy cow pasture and discharged into a creek . . . is exempted from liability under the agricultural stormwater exception to the definition of a point source.”¹⁴

The language of the CWA was “ambiguous as to whether CAFO discharges could ever constitute agricultural stormwater.”¹⁵ This ambiguity triggered the EPA to file a plea for *Chevron* deference.¹⁶ *Chevron* deference gives deference to an agency’s interpretation of a statute if the intent of Congress was ambiguous on the specific issue and if the agency’s interpretation was reasonable or permissible.¹⁷ Ultimately, after conducting a *Chevron* deference analysis, the federal district court found that the EPA’s interpretation of the “agricultural stormwater exemption” was not afforded *Chevron* deference because Congress had not defined the term and the EPA had not yet promulgated specific regulations to interpret it.¹⁸ Therefore, *Chevron* deference did not apply, and Alt did not have to obtain an NPDES permit.¹⁹

On the other hand, if the district court had determined the EPA’s interpretation to be reasonable, the Agency would have won. But now, under new law handed down by the United States Supreme Court, would a reasonable interpretation in this case have been enough to result in the Agency’s victory? The answer remains unknown, but the question certainly shines a spotlight on the impact that removing deference will have on future litigation following *Loper Bright Enterprises v. Raimondo*.²⁰

On June 28, 2024, in *Loper Bright*,²¹ the United States Supreme Court handed down a historic decision that overturned *Chevron*,²² a forty-year-old

11. *Id.*

12. *Id.*

13. *Id.* at 703.

14. *Id.* at 706.

15. *Id.* at 709 (quoting *Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 507 (2d Cir. 2005)) (internal quotations omitted).

16. *Id.* at 713.

17. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

18. *Alt*, 979 F. Supp. 2d at 712.

19. *Id.* at 712, 715.

20. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).

21. *Id.*

22. *Chevron*, 467 U.S. at 837.

precedent-setting case.²³ *Chevron* has been used as a legal test for judges when evaluating a federal agency's statutory authority.²⁴ However, in *Loper Bright*, the Court held that courts "may not defer to an agency interpretation of the law simply because a statute is ambiguous."²⁵

So, now that the United States Supreme Court has done away with *Chevron* deference on a federal level, how should the states proceed from here?

Although the holding from *Loper Bright* only applies to federal agencies, states have already begun reevaluating their own deference doctrines.²⁶ Some states even made changes to their deference doctrines before the *Loper Bright* decision was handed down by the Supreme Court.²⁷ Although agency deference is still the standard in a majority of the states, there is a strong trend of states disfavoring *Chevron*-type frameworks.²⁸ Disfavoring doctrines of deference has been illustrated not only by state supreme courts, but also by state legislatures who have adopted bills that substantially change the administrative review process.²⁹

For example, Indiana's House Enrolled Act (HEA) 1003, which went into effect on July 1, 2024, exemplifies the growing movement against *Chevron*-type frameworks.³⁰ HEA 1003 is an action by the Indiana Legislature regarding agency deference.³¹ Essentially, HEA 1003 accomplishes the same outcome as *Loper Bright*, but on the state level.³²

HEA 1003 amended Indiana Code Section 4-21.5-5-11³³ to state, "[t]he court shall decide all questions of law, including any interpretation of a federal or state constitutional provision, state statute, or agency rule, *without deference* to any previous interpretation made by the agency."³⁴ This statutory amendment gives environmental appeals a "new look" in the state of Indiana.³⁵ Courts will now have more leeway on judicial review, which is advantageous for parties

23. Brigit Rollins, *Supreme Court Overturns Long-Standing "Chevron" Doctrine*, NAT'L AGRIC. L. CTR. (July 2, 2024), <https://nationalaglawcenter.org/supreme-court-overturns-long-standing-chevron-doctrine/> [<https://perma.cc/ZRM3-K63U>].

24. *Id.*

25. *Loper Bright*, 603 U.S. at 413.

26. Martha Kinsella & Benjamin Lerude, *Judicial Deference to Agency Expertise in the States*, STATE CT. REP. (June 28, 2024), <https://statecourtreport.org/our-work/analysis-opinion/judicial-deference-agency-expertise-states> [<https://perma.cc/H9VQ-Y6Z5>].

27. *Id.*

28. *See id.*

29. *Id.*

30. H.E.A. 1003, 123d Gen. Assemb., 2d Sess. (Ind. 2024).

31. *Id.*

32. *Id.*

33. IND. CODE § 4-21.5-5-11(b) (2024).

34. *Id.* (emphasis added).

35. Brianna J. Schroeder, *No Deference to the Agency? Environmental Appeals in Indiana have Changed*, JANZEN SCHROEDER AGRIC. L.: SCHROEDER AGRIC. L. BLOG (Mar. 20, 2024), <https://www.aglaw.us/schroeder-ag-law-blog/2024/3/19/environmental-appeals-just-changed> [<https://perma.cc/3VZQ-PNWX>].

who were not favored by an agency in a previous interpretation but disadvantageous for those who prevailed under an agency's decision.³⁶

For instance, a farmer who was granted a permit for a CAFO by the Indiana Department of Environmental Management (IDEM) may be less likely to prevail in an action brought by a third party to challenge the permit.³⁷ Depending on the argument behind the challenge, the Office of Administrative Law Proceedings (OALP) or a court may not agree with IDEM's interpretation of an ambiguous statute governing CAFOs.³⁸ In such a case, no deference would be afforded to IDEM, and the court may revoke the permit granted to the farmer.³⁹ This type of decision potentially poses a great risk to agricultural and environmental industries because it leaves the door wide open for judges to make rulings on highly technical decisions that may not be within their wheelhouse. However, by removing agency deference, Indiana may work to restore the balance of power between the branches and ensure its agencies aren't engaging in abusive lawmaking by using ambiguous language in a statute.

While Indiana no longer affords deference to state agencies on questions of law,⁴⁰ in other states many of the judicial or legislative changes to the administrative review process have not resulted in the death of agency deference entirely.⁴¹ Rather states adopted standards that equate to something in between *Chevron*⁴² and *Loper Bright*⁴³ doctrines. Among these standards are "Appreciable Deference for Agency Expertise" and "Due Weight for Agency Interpretations."⁴⁴

These standards mean that courts will not apply robust deference to an agency determination.⁴⁵ However, they will also not entirely disregard an agency's position on a statute or regulation.⁴⁶ Under the due weight for agency interpretation standard, courts consider and assign appropriate weight to an agency's interpretation of the law based on the agency's specialized knowledge and experience in that area.⁴⁷ However, courts are not required to fully defer to an agency's interpretation solely because it is reasonable under a given statute.⁴⁸

In practice, this balanced approach may be the most effective framework for handling agency deference, particularly when handling highly technical issues like those that arise in agricultural and environmental law. By applying the due

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. See IND. CODE § 4-21.5-5-11(b) (2024).

41. Kinsella & Lerude, *supra* note 26.

42. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

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

44. Kinsella & Lerude, *supra* note 26.

45. *Id.*

46. *Id.*

47. *Id.*; see also *Loper Bright*, 603 U.S. at 374 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

48. Kinsella & Lerude, *supra* note 26.

weight for agency interpretation standard, courts can draw on agency expertise to inform their decisions while still retaining the ultimate power of interpretation.⁴⁹

This Note argues that state courts in all fifty states should adopt a due weight for agency interpretation standard when dealing with challenges to agency decisions involving agricultural and environmental law. Part I focuses on what exactly deference is: first, it explains *Chevron* deference; second, it explains other deference standards that remain in effect and influence state standards. Part II addresses the Court's reasoning behind overturning *Chevron* in the *Loper Bright* case. Part III examines the deference standards implemented by each state: substantial deference, appreciable deference for agency expertise, due weight for agency interpretations, and no deference. Part IV discusses the outcomes arising from the demise of *Chevron* and what states may encounter if they follow suit: first, it outlines the positive results; second, it analyzes the negative by-products consequentially associated with a no deference standard. Finally, Part V argues that due weight for agency interpretation is the best deference standard available to strike the balance between upholding the constitutional powers of the branches and minimizing the consequences that emerge because of a no deference standard.

Although changes to administrative law appear procedural on their face because it governs the policies and processes that agencies follow, such changes may impact substantive law in a multitude of ways. Overturning *Chevron* poses major questions regarding deference. Thus, states have an important duty to carefully consider these questions. The states should evaluate the impact that replicating a *Loper Bright* decision may have on their agencies and citizens. Finally, states should consider adopting a due weight for agency interpretation standard to balance the pros and cons of a *Loper Bright* doctrine—particularly in the highly complex areas of agricultural and environmental law.

I. WHAT IS *CHEVRON* DEFERENCE?

Chevron deference guided federal courts in administrative review for decades.⁵⁰ This standard was adopted by a majority of the states to guide their own courts when making determinations involving agency interpretations of a statute.⁵¹ Furthermore, most states still have this standard in place today.⁵² Although *Chevron* is old law in federal courts, its principles are still very much alive in state courts. Therefore, it is important to understand how this standard works in action to adequately address whether states should change their agency deference standards.

49. *Id.*

50. Rollins, *supra* note 23.

51. Kinsella & Lerude, *supra* note 26.

52. *Id.*

A. Chevron 101

Prior to *Loper Bright*, *Chevron* deference was the two-part test articulated by the Supreme Court and applied by federal judges when determining whether to give latitude to agencies interpreting statutes that they administer.⁵³ In *Chevron*, the EPA promulgated a rule interpreting the term “stationary source” from the 1977 Amendment to the Clean Air Act (CAA).⁵⁴ This rule allowed states to adopt a plantwide definition of the term which could then include a “bubble” policy.⁵⁵ The “bubble” policy allowed plants that contained several pollution-emitting devices to install or modify equipment without a permit if the change did not increase total emissions for the plant.⁵⁶ All pollution-emitting devices within the same industrial grouping were contained within the same “bubble.”⁵⁷

Upon considering the EPA’s interpretation, the Court held, “the EPA’s definition of the term [stationary] ‘source’ is a permissible construction of the statute[.]”⁵⁸ With this opinion, the Court developed a two-step process to apply *Chevron* deference.⁵⁹ When reviewing an agency’s interpretation of a statute that it administers, the court must address two questions:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.⁶⁰

Thus, in the case of ambiguity, under *Chevron*, courts had to defer to an agency’s interpretation of a statute so long as the interpretation was reasonable.⁶¹ If the agency’s interpretation was deemed unreasonable, then a court could overturn an agency’s decision by substituting its own judgment to

53. Jeff Turrentine, *The Supreme Court Ends Chevron Deference—What Now?*, NAT. RES. DEF. COUNCIL (June 28, 2024), <https://www.nrdc.org/stories/what-happens-if-supreme-court-ends-chevron-deference> [<https://perma.cc/Q2CL-3PGU>].

54. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 840 (1984).

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 866.

59. *Id.* at 842–43.

60. *Id.*

61. *Id.* at 844 (“In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”).

determine the best interpretation of the statute.⁶² However, under *Loper Bright*, *Chevron* deference is no longer afforded to federal agencies.⁶³ Courts will no longer adopt an agency's interpretation of a statutory provision just because it is reasonable.⁶⁴ Rather, courts will now use their own construction of a statutory provision when interpreting ambiguous language.⁶⁵ Nevertheless, *Chevron*-type doctrines are still alive in many states.⁶⁶ But what about other types of deference? Where do they stand after *Loper Bright*?

B. Other Types of Deference

Chevron is not the only type of deference that has made an impact on administrative law over the years; there are other types of deference commonly referred to when dealing with agency actions. Federal courts have “often deferred to agencies’ reasonable readings of genuinely ambiguous regulations.”⁶⁷ This deference is called *Auer* deference, or sometimes *Seminole Rock* deference.⁶⁸ *Auer* deference was reconsidered by the Court in *Kisor v. Wilkie* in 2019.⁶⁹

In *Kisor*, a veteran of the United States Marine Corps was denied benefits for posttraumatic stress disorder by the Department of Veterans Affairs (VA).⁷⁰ The veteran sought VA review of his previously denied claim and reopened the denial by submitting new materials that were not originally associated with his file.⁷¹ However, the VA did not retroactively grant the veteran relief under the regulation because it found that the new materials did not qualify as “relevant” for the purposes of the section under which he could obtain retroactive relief.⁷² According to the VA, to be “relevant,” the records must “go to the reason for the denial” of the first application.⁷³ Ultimately, the question became whether courts should continue to give deference to an agency’s reasonable reading of its own genuinely ambiguous regulations.⁷⁴

The Court upheld *Auer* deference but reinforced its limits.⁷⁵ There is “a presumption that Congress would generally want the agency to play the primary

62. *Id.*

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

64. *Id.*

65. *Id.* at 413 (“But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.”).

66. Kinsella & Lerude, *supra* note 26.

67. *Kisor v. Wilkie*, 588 U.S. 558, 563 (2019).

68. *Id.*; *see Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

69. 588 U.S. at 563.

70. *Id.* at 564.

71. *Id.*

72. *Id.* at 565.

73. *Id.*

74. *Id.*

75. *Id.* at 563.

role in resolving regulatory ambiguities” because an agency that drafted the regulation would be equipped to interpret the technical matters at issue.⁷⁶ Nevertheless, *Auer* deference does not apply in all cases and is unwarranted “when a court concludes that an interpretation does not reflect an agency’s authoritative, expertise-based, ‘fair [, or] considered judgment.’”⁷⁷ Therefore, *Auer* deference is “cabined in its scope” because an interpretation of an ambiguous regulation must “implicate [the agency’s] substantive expertise” and be reasonable to invoke the presumption.⁷⁸ If the reasons for the presumption do not apply, then no deference should be afforded, but the agency’s reading may still be considered for its “power to persuade” under *Skidmore* deference.⁷⁹

Skidmore deference is the recognition that “the well-reasoned views of the agencies implementing a statute ‘constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance[.]’”⁸⁰ The Court found: “The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”⁸¹ This standard “provides that an agency’s rulings, interpretations, and opinions are not controlling on courts,” but they can sway a court’s decision when interpreting the language of a statute.⁸² *Skidmore*, more so than *Auer*, appears to be on more stable grounds with the courts as it was positively discussed by the Court in *Loper Bright*.⁸³ Due weight for agency interpretation, as discussed in the Introduction of this Note,⁸⁴ is a standard similar to *Skidmore* deference and has been adopted by several states in recent years as *Chevron*-type standards have begun to fall.⁸⁵

Skidmore and *Auer* deference are still good law, but following *Loper Bright*, their future remains uncertain.⁸⁶ While *Chevron*, *Auer*, and *Skidmore* deference standards are only applicable to federal law, these standards have molded the

76. *Id.* at 569–71.

77. *Id.* at 573.

78. *Id.* at 563–64, 577.

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

80. *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001).

81. *Skidmore*, 323 U.S. at 140.

82. *Skidmore Deference: Agency Actions Without the Force of Law*, BLOOMBERG L.: PRAC. GUIDANCE, <https://www.bloomberglaw.com/document/X7RFJ404000000> [https://perma.cc/57VB-8N7C].

83. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 476 (2024) (Kagan, J., dissenting).

84. See *supra* text accompanying notes 47–48.

85. Kinsella & Lerude, *supra* note 26.

86. Robert Iafolla, *Courts Show Little Interest in Skidmore as a Chevron Alternative*, BLOOMBERG L. (July 29, 2024, at 5:05 EDT), https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/X9B5CMSO000000?bna_news_filter=daily-labor-report#cite [https://perma.cc/E242-MTC9]; see also Sean Lyness, *Chevron Deference’s Demise Suggests Auer Won’t Last Much Longer*, BLOOMBERG L. (July 10, 2024, at 4:30 EDT), <https://www.bloomberglaw.com/product/blaw/bloomberglawnews/daily-labor-report/XFM41148000000> [https://perma.cc/E4QC-8XJE].

approaches of the states to their individual deference afforded to their state agencies.⁸⁷ These standards have been mimicked and amended by the states to create a diverse landscape of administrative law across the country.⁸⁸ Therefore, it can only be expected that a monumental decision like *Loper Bright* will call for change in the states.

II. OVERVIEW OF *LOPER BRIGHT* AND THE OVERTURNING OF *CHEVRON*

A. *Loper Bright* Decision by the United States Supreme Court

In *Loper Bright*, a group of commercial fishermen sued the National Marine Fisheries Service (NMFS) when NMFS implemented a rule that required the fishermen to pay for at-sea monitoring programs.⁸⁹ The program would cost the fishermen \$710 per day.⁹⁰ The Magnuson-Stevens Fishery Conservation and Management Act of 1976 (MSA) provided a provision that required “‘one or more observers be carried on board’ domestic vessels ‘for the purpose of collecting data necessary for the conservation and management of the fishery.’”⁹¹ The fishermen argued that the MSA did not permit NMFS to create an industry-funded monitoring requirement.⁹²

The District Court and Court of Appeals granted summary judgment for NMFS based on its reasonable interpretation of the authority granted by the MSA.⁹³ The lower courts relied on *Chevron* deference as the authority to support their decision.⁹⁴ The District Court “concluded that the MSA authorized the Rule, but noted that even if these petitioners’ ‘arguments were enough to raise an ambiguity in the statutory text,’ deference to the agency’s interpretation would be warranted under *Chevron*.”⁹⁵ The Court of Appeals affirmed, but unlike the District Court, it proceeded to the second step of *Chevron* because there was “some question” regarding Congress’s intent.⁹⁶

Despite the lower courts’ decisions, the Supreme Court held that “[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the [Administrative Procedure Act (APA)] requires.”⁹⁷ The decision was a 6-3 ruling with the plurality opinion delivered by Chief Justice Roberts.⁹⁸ The opinion hinged on constitutional

87. Kinsella & Lerude, *supra* note 26.

88. *Id.*

89. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 381 (2024).

90. *Id.* at 382.

91. *Id.* at 381.

92. *Id.* at 382.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* (citation omitted).

97. *Id.* at 412.

98. *Id.*; Rollins, *supra* note 23.

arguments and the Framers' intent. It was the vision of the Framers "that the final 'interpretation of the laws' would be 'the proper and peculiar province of the courts.'"⁹⁹

Further, the Court cited to *Marbury v. Madison*, a foundational case that established judicial review, to reiterate that it is the duty of the judiciary "to say what the law is."¹⁰⁰ So, a court may not defer to an agency interpretation just because a statute is ambiguous; the court must make its own determination.¹⁰¹ Thus, the Court overruled *Chevron*, and the forty-year-old standard is no longer good law.¹⁰² This major decision has the potential to impact many areas of the law, but particularly the highly technical areas of agricultural and environmental law.

*B. Impact of the Decision on Federal Agricultural and
Environmental Agencies*

Agency deference has a rich history in cases involving agriculture and the environment. In fact, *Chevron* was ultimately a case about environmental regulations.¹⁰³ So, it will not come as a surprise when these stark changes to administrative review have a rippling impact on the future of agricultural and environmental laws across the country.

Agriculture and the environment in the United States are greatly "affected by regulatory decisions, actions, and interpretations issued by federal agencies."¹⁰⁴ The United States Department of Agriculture (USDA) Natural Resources Conservation Service makes determinations in regard to wetlands.¹⁰⁵ The EPA issues notices of violations of the CWA.¹⁰⁶ The Food and Drug Administration and the USDA Food Safety Inspection Service issue food safety rules.¹⁰⁷ The Department of Labor issues trucking regulations that impact the agricultural industry.¹⁰⁸ And the USDA Risk Management Agency makes determinations governing federal crop insurance.¹⁰⁹ These examples are just a few places in which agency interpretation can and has come into play; thus, a

99. THE FEDERALIST NO. 78, at 525 (Alexander Hamilton) (J. Cooke ed., 1961).

100. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

101. Rollins, *supra* note 23.

102. *Loper Bright*, 603 U.S. at 369.

103. Brad Lubben, *What Does Supreme Court Chevron Doctrine Ruling Mean for Ag?*, U. OF NEB.—LINCOLN CTR. FOR AGRIC. PROFITABILITY (July 26, 2024), <https://cap.unl.edu/policy-legal/what-does-supreme-court-chevron-doctrine-ruling-mean-ag> [https://perma.cc/M5VV-A84A].

104. Andrew Varcoe, *U.S. Agriculture & Deference to Federal Agency Decision-making: Recent & Emerging Issues*, NAT'L AGRIC. L. CTR., at 1:57 (Apr. 26, 2019), <https://nationalaglawcenter.org/webinars/deferencedefense/> [https://perma.cc/SY2S-LQCX].

105. *See* 16 U.S.C. § 3822.

106. *See* 33 U.S.C. § 1251.

107. *See* 21 U.S.C. § 601.

108. *See* 49 U.S.C. § 5333.

109. *See* 7 U.S.C. § 1503.

removal of agency deference could result in some major changes by shifting interpretative authority back to the judiciary.¹¹⁰

Chevron deference precedent is responsible for creating regulations in the areas of agriculture, water, climate, air, and other environmental matters.¹¹¹ These regulations were created under statutes drafted by Congress that did not elaborate on the fine details because Congress intended to punt those decisions to the agencies.¹¹² As a result, *Chevron* deference became a “favorite tool” of the agencies.¹¹³ Now, with *Chevron* gone, agricultural and environmental policy drafting and implementation will likely experience a great change.

Before *Loper Bright*, individuals who challenged agency action typically had to face the reality that agency action was commonly given considerable deference by courts.¹¹⁴ Under *Chevron* deference, agencies prevailed in approximately 70 percent of legal challenges.¹¹⁵ The elimination of *Chevron* in *Loper Bright* is expected to decrease this success rate, as the removal of deference may make challenges to agency actions more likely to succeed.¹¹⁶ While the Supreme Court has rendered its decision on deference and the impacts of its decision have begun to play out on the federal level, deference standards amongst the states are not so final.

III. DEFERENCE STANDARDS AMONGST THE STATES

A. Substantial Deference

The battles over deference standards in administrative law have already begun and will continue to unfold in “state capitols, state courts, and state ballot boxes.”¹¹⁷ *Chevron* deference is officially dead at the federal level following *Loper Bright*.¹¹⁸ However, the doctrine of deference at the state level has certainly not seen its end.¹¹⁹ Currently, there are four deference standards that are followed by the states.¹²⁰ Substantial deference is, in most cases, the state

110. Varcoe, *supra* note 104, at 27:58.

111. Jesse Klein, *What the Supreme Court’s Chevron decision means for agriculture*, AGRIC. DIVE (July 3, 2024), <https://www.agriculturedive.com/news/chevron-doctrine-explainer-agriculture/720533/> [<https://perma.cc/9E6Z-G2GY>].

112. *Id.*

113. *Id.*

114. Varcoe, *supra* note 104, at 2:10.

115. Turrentine, *supra* note 53.

116. *Id.*

117. GianCarlo Canaparo & Caleb Sampson, *Chevron in the States: Where Is Deference Still in Effect, and How Can States Eliminate It?*, FEDERALIST SOC’Y (Oct. 3, 2024), <https://fedsoc.org/commentary/fedsoc-blog/chevron-in-the-states-where-is-deference-still-in-effect-and-how-can-states-eliminate-it> [<https://perma.cc/4PGJ-8M42>].

118. *Id.*

119. *Id.*

120. Kinsella & Lerude, *supra* note 26.

equivalent to *Chevron* deference.¹²¹ Most states still follow a substantial deference standard.¹²²

However, the tests that dictate when substantial deference should be applied vary amongst the states. Many states defer to agency interpretation in the face of statutory ambiguity, like the two-step approach in *Chevron*.¹²³ But some states adopted deferential standards before *Chevron* had even been decided.¹²⁴

B. Appreciable Deference for Agency Expertise

In appreciable deference jurisdictions, “courts defer to agency expertise when interpreting technical language, while applying a less deferential standard to evaluate agency interpretations of general statutory terms.”¹²⁵ For example, when a decision involves evaluating scientific and technical data, courts in Missouri defer to agency expertise.¹²⁶ In Arizona, although courts no longer afford deference to their state agencies, the state has codified an exception that follows the appreciable deference standard.¹²⁷ This exception allows for courts to give deference to agencies for appeals that relate to healthcare and utility regulation.¹²⁸ Further, some states give more deference to longstanding agency interpretation and less to newer interpretations.¹²⁹ Other states afford more deference when an agency has been expressly granted the discretion to interpret the law through legislation.¹³⁰

C. Due Weight for Agency Interpretations

In jurisdictions that follow the standard of due weight for agency interpretations, courts “acknowledge that agency interpretations of a statute may be helpful in judicial review and tend to give them ‘due weight,’ recognizing their persuasive power.”¹³¹ This standard reflects *Skidmore* deference, which gives weight to agency action based on the agency’s thoroughness of consideration of the legal question.¹³² And for the states who are considering adopting this due weight for agency interpretation standard, *Skidmore* deference appears to be in good graces with the Supreme Court.¹³³

121. Canaparo & Sampson, *supra* note 117.

122. Kinsella & Lerude, *supra* note 26.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 402 (2024).

Chief Justice Roberts states in his majority opinion in *Loper Bright*, “courts may—as they have from the start—seek aid from the interpretations of those responsible for implementing particular statutes.”¹³⁴ He goes on to discuss the value that such interpretations can offer to the courts and litigants when it comes to determining the statute’s meaning.¹³⁵ Yet he emphasizes the traditional understanding of the judicial function; a function in which courts must exercise independent judgment in determining the meaning of the statutory provisions.¹³⁶ Essentially, in *Loper Bright*, the Court reinforces *Skidmore* deference as a judicial review principle.

Due weight for agency interpretation is a standard that can allow state courts to comply with their traditional judicial function while leaning on agency experts for help (just like federal courts may use *Skidmore* deference for that same purpose). The due weight for agency interpretation standard gives state agencies “the power to persuade.”¹³⁷ The more “technical complexity, procedural rigor, and adherence to legislative intent” an interpretation has, the more persuasive that interpretation will be to the court.¹³⁸ Therefore, an agency’s interpretation of a law is more likely to be upheld when the agency has carefully considered the legal question at hand.¹³⁹

D. No Deference

States that follow a no deference standard have “abolished judicial deference to agency expertise.”¹⁴⁰ Some of these states never had substantial deference to begin with, but other states used to have substantial deference standards in place.¹⁴¹ The death to deference in these states has arose through judicial opinion, statute, and constitutional amendment.¹⁴² Due to the *Loper Bright* decision, it is conceivable that the number of states who rid themselves of agency deference entirely will only continue to increase.¹⁴³ However, states should question whether getting rid of agency deference entirely is an appropriate step or whether due weight for agency interpretation is a more compliant standard for highly technical issues presented in agricultural and environmental law.

134. *Id.* at 394.

135. *Id.*

136. *Id.*

137. Kinsella & Lerude, *supra* note 26.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *See id.*

IV. THE PROS AND CONS OF OVERTURNING *CHEVRON* AND STATES REMOVING DEFERENCE

A. Pros

Overturing *Chevron* and states following suit by adopting a no deference or lesser deference standard will result in a few significant benefits. First, removing deference brings back into balance the power allotted to the branches.¹⁴⁴ Article III is interpreted to vest in the courts the power to interpret the law.¹⁴⁵ The primary reasoning used by the Court in *Loper Bright* is that the power “to say what the law is” lies with the courts.¹⁴⁶ Agency interpretation violates the separation of powers by shifting the power of statutory interpretation to executive agencies and away from the judiciary.¹⁴⁷ If the states choose to abolish substantial deference to their state agencies, then they will prioritize checks and balances.

Second, state supreme court rulings, statutes, and amendments that do away with agency deference will likely result in an easier action for challengers.¹⁴⁸ Under a substantial deference standard, when a law is ambiguous courts must defer to agency interpretation.¹⁴⁹ So, unless a challenger is able to prove that the law unambiguously supports their argument or that the agency’s interpretation is unreasonable, the court will be required to side with the agency. This creates an unequal consideration of arguments from the parties by the courts. By getting rid of substantial deference, the court is able to listen to the parties’ arguments and make its own interpretation of the law without interference from the agency.

Third, there will be a greater push towards clear and unambiguous statutory drafting. The ruling in *Loper Bright* highlights the need for “more precise legislative drafting and reduces broad grants of interpretive power to agencies.”¹⁵⁰ Overturning deference should lead to statutes that provide explicit grants of authority to agencies by Congress and the state legislatures.¹⁵¹ These decisions should encourage a greater amount of communication between the executive and legislative branches to produce statutes that clearly provide direction to state agencies. Clarity as a cornerstone of statutory drafting should

144. See, e.g., Michael Blumenthal et al., *The End of Chevron Deference: What Does It Mean, and What Comes Next?*, A.B.A. BUS. L. TODAY (Aug. 16, 2024), https://www.americanbar.org/groups/business_law/resources/business-law-today/2024-august/end-chevron-deference-what-does-it-mean-what-comes-next/ [<https://perma.cc/7DC3-FYL6>].

145. *Id.*

146. Rollins, *supra* note 23.

147. Canaparo & Sampson, *supra* note 117.

148. Schroeder, *supra* note 35.

149. Kinsella & Lerude, *supra* note 26.

150. Sterling Miller, *What in-house lawyers should know about the overturned Chevron doctrine*, THOMPSON REUTERS (July 17, 2024), <https://legal.thomsonreuters.com/blog/what-in-house-lawyers-should-know-about-the-overturned-chevron-doctrine/> [<https://perma.cc/E8HU-CQCL>].

151. *Id.*

eventually decrease the number of challenges brought against state agencies as well.

B. Cons

Such a monumental decision cannot go without some consequences, however. First, without deference there will be an inconsistent application of regulations throughout the country. Federal district courts and circuit courts across the United States do not always come to the same conclusions.¹⁵² These varying conclusions on statutory interpretation will result in an inconsistent application of the law.¹⁵³

If the states follow the Supreme Court's lead and abolish agency deference entirely, then the same issue applies to the state courts. The various levels of the judiciary within a state may not agree on the interpretation of the law. Therefore, trial courts across a state may implement varying interpretations of a state law, which undermines equal treatment under the law and will create problems with consistent enforcement.

Second, there will likely be a greater influx of cases into the court system. The inconsistent application of the law across the country and within the states will result in more issues needing to be decided by the courts of last resort.¹⁵⁴ Further, as actions have become more challenger friendly, it may be more likely for challengers to bring an action against an agency when such challenge may not have been brought under a substantial deference standard. Specifically, for agriculture, farmers will have less bureaucracy from agencies to contend with but will likely have to face more in-court litigation when appealing agency action.¹⁵⁵

Third, the end of *Chevron* and the absence of agency deference standards in states will likely result in forum shopping.¹⁵⁶ "Plaintiffs hostile to an agency's particular statutory interpretation or final rule will most likely seek out sympathetic courts, whereas those seeking to uphold an agency's decision will look for courts traditionally more deferential to the Executive Branch."¹⁵⁷ This undermines the standard of fairness and judicial efficiency that the court system is designed to uphold.

Fourth, the judicial branch will be required to interpret and decide hyper-technical questions. In Justice Kagan's dissenting opinion in *Loper Bright* she stated, "[s]ome interpretive issues arising in the regulatory context involve scientific or technical subject matter. Agencies have expertise in those areas; courts do not."¹⁵⁸ Moreover, "[a]gencies know those programs inside-out; again,

152. See, e.g., Blumenthal et al., *supra* note 144.

153. *Id.*

154. *Id.*

155. Klein, *supra* note 111.

156. Blumenthal et al., *supra* note 144.

157. *Id.*

158. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 449 (2024) (Kagan, J., dissenting).

courts do not.”¹⁵⁹ Simply put, Courts do not know nearly as much about a statute’s subject matter as the agency that enforces it.¹⁶⁰ This lack of expertise in the courts will pose major problems for industries whose statutory and regulatory laws involve increasingly complex terms and ideas.

V. ANALYSIS ARGUING FOR DUE WEIGHT FOR AGENCY INTERPRETATION IN AGRICULTURAL AND ENVIRONMENTAL LAW

States should adopt the standard of due weight for agency interpretation in administrative challenges involving agricultural and environmental agencies. The due weight for agency interpretation standard will strike the balance between a no deference standard and a substantial deference standard.¹⁶¹ Further, this standard will bridge the gap between the concerns with substantial deference voiced in Chief Justice Roberts’s opinion, and the concerns with no deference illustrated in Justice Kagan’s opinion in *Loper Bright*.¹⁶²

The due weight for agency interpretation standard still brings back into balance the powers of the branches by giving interpretation back to the courts.¹⁶³ This standard gives the courts the full power to interpret laws, which upholds the principle of judicial review given to the courts by the Constitution.¹⁶⁴ The due weight standard complies with the majority’s key point that:

[E]ven 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. “[M]any statutory cases” call upon “courts [to] interpret the mass of technical detail that is the ordinary diet of the law,” . . . and courts did so without issue in agency cases before *Chevron*.¹⁶⁵

The due weight for agency interpretation standard respects that Congress expects courts to handle technical statutory questions, while still allowing courts to utilize state agencies to help answer these questions. The due weight for agency interpretation standard recognizes that “[a]gencies are staffed with

159. *Id.*

160. *Id.* at 456.

161. *See generally* Tetra Tech EC, Inc. v. Wis Dep’t of Revenue, 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21.

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

163. Kinsella & Lerude, *supra* note 26.

164. *Loper Bright*, 603 U.S. at 369–70.

165. *Id.* at 402 (quoting *Egelhoff v. Egelhoff*, 532 U.S. 141, 161 (2001) (Breyer, J., dissenting)).

‘experts in the field’ who can bring their training and knowledge to bear on open statutory questions.”¹⁶⁶

Chief Justice Roberts further discusses the importance of compliance with the APA.¹⁶⁷ The APA was enacted by Congress in 1946 to strengthen the balance of powers.¹⁶⁸ The Act was intended as a “check upon” agencies engaged in lawmaking within their offices.¹⁶⁹ Section 706 of the APA directs that the courts, not agencies, shall be the ones to decide all questions of law, engage in statutory interpretation, and determine the meaning of an agency action.¹⁷⁰ Thus, it is the responsibility of the courts “to decide whether the law means what the agency says.”¹⁷¹

This concept presents an even greater reason for many states to consider adopting a standard other than substantial deference to their agencies. All states have a statute that governs their administrative processes.¹⁷² Many of the states have modeled their own Administrative Procedure Act on the federal APA.¹⁷³ Therefore, considering the Supreme Court’s reasoning behind overturning *Chevron* to comply with the APA, a state whose own APA mirrors the federal one may be drawn to overturn agency deference and adopt another standard.

For example, it is likely that agency deference will be a vehemently contested issue in the Texas judiciary following *Loper Bright*.¹⁷⁴ Although Texas has never adopted or rejected a deference doctrine like *Chevron*,¹⁷⁵ its Supreme Court has held that an agency’s interpretation of a statute it is charged with enforcing is to be given deference if the language of the statute is ambiguous, and if the agency’s interpretation is reasonable.¹⁷⁶ The Texas Administrative Procedures Act (Texas APA) requires *de novo* review or review under the substantial evidence rule when reviewing state agency action.¹⁷⁷ But the Texas APA does not call for deference to an agency’s interpretation when

166. *Id.* at 456 (Kagan, J., dissenting) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984)).

167. *Id.* at 393–94 (majority opinion).

168. *Id.* at 391.

169. *Id.* (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 644 (1950)).

170. *Id.* (quoting 5 U.S.C. § 706).

171. *Id.* at 392 (quoting *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 109 (2015) (Scalia, J., concurring in judgment)).

172. See, e.g., Von Wooding, *State Administrative Procedures Acts: Scope, Procedures, and Impact*, COUNS. STACK (June 22, 2024), <https://blog.counselstack.com/state-administrative-procedures-acts-scope-procedures-and-impact/> [<https://perma.cc/C2ML-5MPH>].

173. *Id.*

174. Lauren Morgan Fincher & Cole Hutchinson, *Locke Lord QuickStudy: Ramifications for Texas State Agencies After Overturning of Chevron Deference*, LOCKE LORD LLP (July 8, 2024), <https://www.troutman.com/insights/locke-lord-quickstudy-ramifications-for-texas-state-agencies-after-overturning-of-chevron-deference.html> [<https://perma.cc/5JCU-V875>].

175. *Id.*

176. *R.R. Comm’n of Tex. v. Tex. Citizens for a Safe Future & Clear Water*, 336 S.W.3d 619, 629 (Tex. 2011).

177. *Kidd v. Tex. Pub. Util. Comm’n*, 481 S.W.3d 388, 392 (Tex. App. 2015); see also Fincher & Hutchinson, *supra* note 174.

actions are called into question.¹⁷⁸ Therefore, Texas's highest court potentially faces the same conflict as the United States Supreme Court did in the fishermen's case. In the aftermath of *Loper Bright*, Texas courts will need to reconcile this position on agency deference with the recent Supreme Court ruling.¹⁷⁹ One way the state could do so would be to adopt the due weight for agency interpretations standard.

This standard, by mirroring *Skidmore*, will allow state courts to "go about its task with the agency's 'body of experience and informed judgment,' among other information, at its disposal."¹⁸⁰ However, the court itself will be the one to make the final ruling on the interpretation of the statute's meaning.¹⁸¹ Therefore, a court, by affording due weight for agency interpretation, may make informed decisions utilizing agency expertise without being bound by an agency's prior interpretation.¹⁸²

The State of Wisconsin has held that administrative agencies' conclusions of law are afforded no deference,¹⁸³ but the agencies are entitled to due weight.¹⁸⁴ This ruling came in 2018¹⁸⁵—long before *Loper Bright*—perhaps foreshadowing a movement of change in administrative law in the years to come. In *Tetra Tech EC, Inc. v. Wisconsin Department of Revenue*, the case that set the state's precedent on agency deference, the Wisconsin Department of Revenue imposed a tax on Tetra Tech and Lower Fox River Remediation, contractors for environmental remediation.¹⁸⁶ The tax was imposed because of the contractors' "processing" of river sediments into waste sludge, reusable sand, and water."¹⁸⁷ The contractors petitioned the Department of Revenue for a redetermination of the assessed taxes on their services.¹⁸⁸ The Department subsequently denied the petition.¹⁸⁹ After exhausting their administrative remedies, the contractors filed a petition for judicial review, requesting the circuit court to set aside a ruling and order that subjected them to sales and use taxes.¹⁹⁰

Tetra Tech turns on the statutory interpretation of the term "processing" under the applicable Wisconsin statute.¹⁹¹ The statute applies a tax to a number

178. Fincher & Hutchinson, *supra* note 174.

179. *Id.*

180. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 374 (2024) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

181. *Id.*

182. *Id.*

183. *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 2018 WI 75, ¶ 3, 382 Wis. 2d 496, 510, 914 N.W.2d 21, 28.

184. *Id.* ¶ 78.

185. *Id.* ¶ 1.

186. *Id.*

187. *Id.*

188. *Id.* ¶ 6.

189. *Id.*

190. *Id.* ¶ 7.

191. *Id.*

of services, including “processing . . . of tangible personal property or items, property, or goods . . . for a consideration for consumers who furnish directly or indirectly the materials used in the . . . processing”¹⁹² However, “processing” is not a term defined by the statute.¹⁹³ The key question was whether “processing,” under the meaning of the statute, included the dewatering and desanding of the dredged sediment.¹⁹⁴ The Department of Revenue argued that the service was included under “processing,” while the contractors argued that the service was not encompassed by the term and was not taxable under the statute.¹⁹⁵

Ultimately, the Wisconsin Tax Appeals Commission, the Wisconsin Court of Appeals, and the Wisconsin Supreme Court all came to the same conclusion: the activity constituted processing.¹⁹⁶ Yet, the Supreme Court, in affirming the lower court’s decision, used its opinion as an opportunity to end the state’s practice of deferring to administrative agencies’ interpretations of statutes that they enforce.¹⁹⁷

The court found that an agency should not expect statutory directive alone to strengthen its argument when addressed by the court.¹⁹⁸ Rather, “[t]he agency should be prepared to explain how its experience, technical competence, and specialized knowledge give its view of the law a significance or perspective unique amongst the parties, and why that background should make the agency’s view of the law more persuasive than others.”¹⁹⁹ Thus, in considering the persuasive value of the state agencies’ interpretations, the court opted for a due weight agency interpretation standard.²⁰⁰ Giving “due weight” to an agency gives respectful consideration to its views while ensuring that courts may still exercise independent judgement with regard to questions of law.²⁰¹

As previously discussed by this Note in relation to *Alt v. EPA*,²⁰² *Tetra Tech* highlights the impact agency deference can have on a decision. The Wisconsin Supreme Court recognized that administrative agencies can offer insight into the matters that they are responsible for.²⁰³ However, the court emphasized that questions of law lie within the judgement of the courts.²⁰⁴ Therefore, the due weight standard for agency interpretation presents a lesser threat to the balance of powers while still giving appropriate consideration to the agencies’ reasoned

192. Wis. Stat. § 77.52(2)(a)(11) (2024).

193. Wis. Stat. § 77.52 (2024).

194. *Tetra Tech*, 2018 WI 75, ¶ 6.

195. *Id.* ¶¶ 1, 6.

196. *Id.* ¶¶ 6–7.

197. *Id.* ¶ 3.

198. *Id.* ¶ 79.

199. *Id.* ¶ 77.

200. *Id.* ¶ 78.

201. *Id.*

202. See *supra* text accompanying notes 14–20.

203. *Tetra Tech*, 2018 WI 75, ¶ 3.

204. *Id.* ¶ 12.

and knowledgeable views.²⁰⁵ “‘Due weight’ is a matter of persuasion, not deference,” and such persuasion stems from the agencies’ “special competence” when it comes to matters of which they enforce.²⁰⁶

Moreover, the majority opinion in *Loper Bright* states, “*Chevron*’s presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do.”²⁰⁷ Although it is true that agencies may not have a “special competence” when it comes to interpreting legal terms of art and that such interpretation lies firmly in the courts purview, it is not true that agencies do not have “special competence” in interpreting technical language.²⁰⁸ For example, a judge certainly does not know more than a state agency when it comes to interpreting the intricate language of permit requirements for a CAFO or enforcing appropriate pesticide application based off the weather.²⁰⁹ Thus, the due weight for agency interpretation standard allows courts to refer to agencies when it comes to areas in which the courts may not have “special competence.”

One example that impacts agriculture and the environment is the interpretation of ambiguous, technical terms from the Endangered Species Act, by either an agency or a court.²¹⁰ “Deciding when one squirrel population is ‘distinct’ from another (and thus warrants protection) requires knowing about species more than it does consulting a dictionary.”²¹¹ Although a court could make this determination, it may take much more time and resources for a judge to make the determination versus an agency expert.²¹² In giving due weight for agency interpretation in this case, a court should be able to make informed decisions about the meaning of the term “distinct” with less time and resources expended than if due weight was not given.

Another example involves the dispute in *Chevron* itself. As Justice Kagan discusses in her dissent, the CAA required states to mandate permits for the modification or construction of “stationary sources.”²¹³ Understanding what a stationary source is does not necessarily fall within a typical judge’s knowledge base. Although a judge could make such a determination, the due weight for agency interpretation standard will increase judicial efficiency and ensures more consistent outcomes if a singular definition is referenced.²¹⁴

The ESA and the CAA are two examples of how deference standards can impact agriculture and the environment on the federal level. These statutory interpretation challenges only continue on the state level, which is why it is so

205. *Id.* ¶ 78.

206. *Id.*

207. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400–01 (2024).

208. *Id.* at 460 (Kagan, J., dissenting).

209. *Id.*

210. *Id.* at 452–53.

211. *Id.*

212. *Id.*

213. *Id.* at 441 (Gorsuch, J., concurring).

214. *Id.* at 456 (Kagan, J., dissenting).

important for states to consider adopting a due weight for agency interpretation standard—especially for agricultural and environmental agencies.

Additionally, a potential benefit that could arise from overturning *Chevron* and abolishing substantial deference within the states is the push toward clear and unambiguous statutory drafting.²¹⁵ However, “Congress knows that it does not—in fact cannot—write perfectly complete regulatory statutes.”²¹⁶ Inevitably there will be ambiguities within the law.²¹⁷ These ambiguities will have to be resolved by another entity, and there will be gaps that must be filled in order to create a law that can work within an agency.²¹⁸

In applying the due weight for agency interpretation standard, courts will be able to tap into agency knowledge when making decisions arising in the regulatory context that involve scientific or technical subject matter.²¹⁹ In contrast, if states were to adopt a no deference standard instead of the due weight standard, states courts could not so easily rely on agency expertise as they would be required to make their own “independent judgment.”²²⁰

Therefore, due weight for agency interpretation, a lower standard of deference to agencies,²²¹ for agricultural and environmental agencies will still allow for courts to make their own interpretations while still being able to rely on agencies to provide expert advice²²² on technical and complex subject matter that dictate farming operations, environmental protection programs, food safety, and many other facets of the law that impact agriculture and the environment.

CONCLUSION

The landscape of administrative law has undergone major changes within the past few years. This is a trend that can certainly be expected to continue as it is likely that the Supreme Court’s decision in *Loper Bright* will have a rippling effect throughout the states. And while most states still have a substantial deference standard, this could likely change.

As states begin to consider or reconsider their standards of agency deference in the wake of the Supreme Court’s decision in *Loper Bright*, it is important that each state recognize the potential impact that overturning agency deference may have on their state laws that deal with highly technical language. Particularly, statutes that deal with complex pieces of legislation in the agricultural and environmental space will be affected by a change in how courts may consider agency deference.

215. Miller, *supra* note 150.

216. *Loper Bright*, 603 U.S. at 449 (Kagan, J., dissenting).

217. *Id.*

218. *Id.*

219. *Tetra Tech EC, Inc. v. Wis. Dep’t of Revenue*, 2018 WI 75, ¶ 11, 382 Wis. 2d 496, 516, 914 N.W.2d 21, 31.

220. *Id.* ¶ 59.

221. See, e.g., Kinsella & Lerude, *supra* note 26.

222. *Tetra Tech*, 2018 WI 75, ¶ 11.

While overturning agency deference can certainly result in positive outcomes, such as fewer overall regulations for farmers, this decision could also create major challenges for agriculture and the environment. If a court misinterprets a highly technical term, or if they interpret that term to mean something that the industry does not take it to mean, then there could be substantial ramifications in agricultural and environmental law. Therefore, as state legislatures propose amendments and statutes and state supreme courts consider questions of whether agency deference should be allowed, it would be wise to consider adopting the due weight for agency interpretation standard rather than fully upholding substantial deference or ending agency deference altogether.

Due weight for agency interpretation is a standard that results in a happy medium for both the executive and the judicial branches while protecting those individuals who are ultimately impacted by the laws that are being interpreted. Due weight for agency interpretation will allow for a better system of checks and balances than the substantial deference standard on one hand. And, on the other hand, this standard will help to avoid the cons of the no deference standard, such as inconsistent application of the law, an influx of cases into the judicial system, forum shopping, and other consequences of the judiciary deciding hyper-technical questions.