Judicial Activism and *Loper Bright*

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October 2026

When the U.S. Supreme Court formally overturned the *Chevron* deference doctrine in *Loper Bright Enterprises v. Raimondo*, conventional wisdom held that the resulting impact on judicial review would be primarily "deregulatory" in nature. While not necessarily incorrect, the real significance of *Loper Bright* is more complicated — and one that has troubling implications for the future of U.S. democracy.

Properly understood, the primary effect of *Loper Bright* was to transfer a massive amount of power from the more democratically accountable branches — the executive and the legislative — to the judiciary. This transfer is especially noteworthy given that it comes at a time when the judicial branch is already under scrutiny for engaging in judicial activism — that is, using decisions as vehicles for advancing individual judges' policy preferences. The prospect of judges assuming greater policymaking authority through such doctrines as *Loper Bright* threatens to profoundly destabilize the separation of powers and system of checks and balances our constitutional framework relies upon to guard against tyranny.

This article examines whether and to what extent the judicial review framework that *Loper Bright* creates may already be providing a vehicle for judicial activism. Drawing from a database of 83 cases decided during the 14 months after the Supreme Court handed down *Loper Bright*, a troubling picture seems to be emerging. While the limited data prevents us from drawing firm conclusions at this point, it is possible to identify predictable patterns that suggest that judges are resolving cases that appear to align with their policy preferences.

The *Loper Bright* Framework

In a previous article, we documented the emerging analytical framework that courts have begun developing in applying *Loper Bright* to review agency assertions of statutory

authority for their regulatory and other administrative actions. To recap this framework briefly:

- Step 1: Determine whether statutory *stare decisis* governs the case. If so, resolve the case accordingly. If not, move to Step 2.

- Step 2: Determine whether the disputed term is unambiguous. If so, resolve the case accordingly. If not, move to Step 3.

- Step 3: Determine if the best reading of the disputed ambiguous term is that it confers discretion to the agency. If so, resolve the case accordingly. If not, move to Step 4.

- Step 4: Determine if the agency's interpretation of a disputed ambiguous term matches the court's best reading. The court may account for the *Skidmore* respect factors in making this determination.

We were then able to determine how courts were ultimately resolving cases based on these analytical steps.

Drawing from this analysis, one of our key findings was that there were identifiable patterns in how a reviewing court framed the determinative issue within this emerging framework — that is, the step in the analytical framework at which the case was resolved — and the substantive outcome in the case. For instance, if a reviewing judge determined that the disputed term was "unambiguous," then they nearly always rejected the agency's reading of that term. Alternatively, if a reviewing judge applied *de novo* review and determined that the single best reading of a term was that it reflected a congressional intention to confer discretion, then they nearly always upheld the agency's reading of that term.

This finding is significant because the dividing line between the steps comprising the *Loper Bright* framework are not entirely clearcut. Instead, judges retain considerable latitude in how they frame the dispositive issue under the *Loper Bright* framework. This implies that judges, if sufficiently motivated to do so, can engineer their analysis to produce results that align with their policy preferences within the confines of this framework. If a judge has a strong policy preference for a challenged rule, they can determine that the best reading of a disputed term is that it confers discretion on the rulemaking agency, thereby making it easier for them to uphold the agency's interpretation. If, however, a judge holds strong ideological opposition to the rule, they

can determine that the disputed term is unambiguous, making rejection of the agency's interpretation much easier.

Note that this analysis from the previous article was based on a review of 91 total cases. For the judicial activism analysis described below, we excluded 8 of those 91 cases. We excluded the five cases resolved on the basis of statutory *stare decisis* (Step 1 in the framework) since this analysis is sufficiently clearcut to leave little room for judicial manipulation. We excluded another two cases because they were decided by federal magistrate judges, who are not appointed by the president. We excluded one more because it upheld a prior agency interpretation that was based on *Skidmore* respect and thus functions similarly to statutory *stare decisis*.

A Vehicle for Judicial Activism

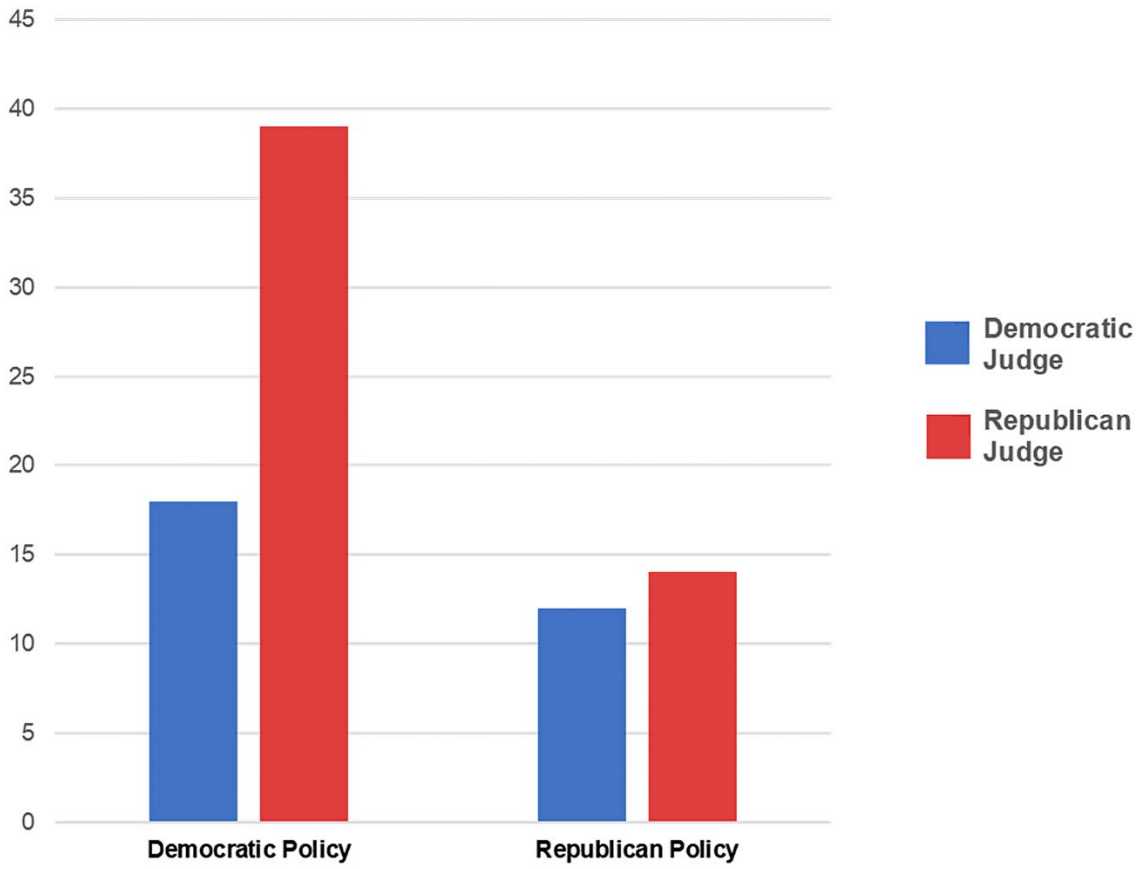
As noted above, our prior article identified distinctive patterns in how cases were resolved based on the analytical step the reviewing judge treated as determinative. In this article, we seek to discern whether these patterns correlated in predictable ways with the political affiliation of two key actors involved: the reviewing judge and agency responsible for the disputed interpretation.

To do so, we coded the judge who authored the opinion in the case as Democratic or Republican based upon the president who appointed them. (This is why our analysis excluded cases decided by magistrate judges, as noted above.) We also coded the interpretation of the disputed term as Democratic or Republican based upon the president's political party at the time the interpretation was *first made*. Thus, for example, we might code an interpretation as Republican if it was first made during the Reagan administration, even if the case arises from a dispute over a Biden administration rule that incorporated that interpretation.

Forum Shopping

It goes without saying that judges cannot engage in judicial activism unless they have the opportunity to do so. The phenomenon of forum shopping — or the deliberate attempt by litigants to have their cases heard by judges likely to be sympathetic to their arguments — helps to provide a steady supply of opportunities. To be sure, given that forum shopping takes place in nearly all litigation contexts, it would not be surprising to find that it occurs in *Loper Bright* cases as well. Still, our analysis sought to test whether forum shopping occurs in *Loper Bright* cases since this would indicate that litigants perceive *Loper Bright* as a vehicle for advancing judicial activism.

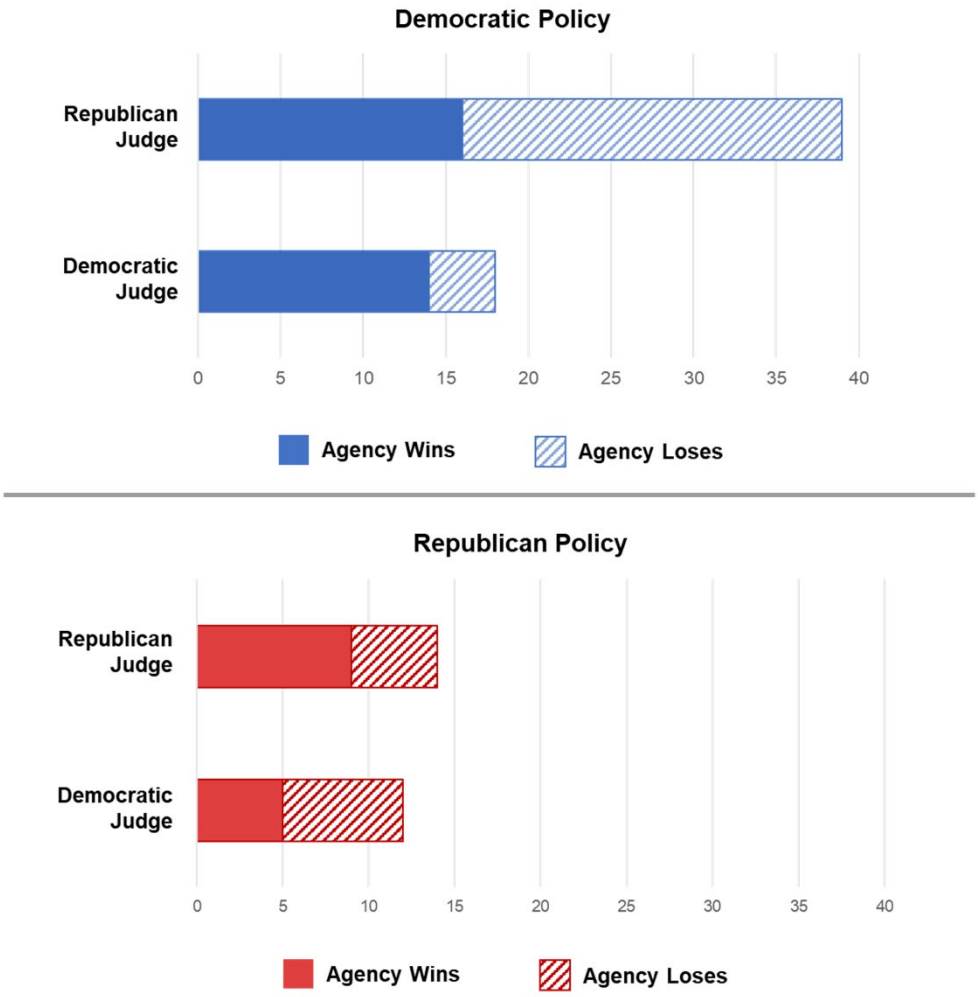
Our data suggested that litigants in these cases did engage in forum shopping. Of the 83 cases, 39 (47%) involved a Republican judge reviewing a Democratic interpretation. In contrast, only 18 cases (22%) involved a Democratic judge reviewing a Democratic interpretation. Notably, we did not find evidence of forum shopping for challenges of Republican interpretations: Republican judges were actually more likely to decide these cases (14, or 17% of the total) than Democratic judges (12, or 12% of the total).



To be sure, the ultimate selection of judges to hear particular cases is nearly always subject to some element of chance, which, of course, limits how successful forum shopping can be. These limits, though, make the high rate of Republican judges reviewing Democratic interpretations all the more striking, especially given that Republicans currently represent only 44 percent of the total number of federal judges. These results indicate that forum shopping, instead of pure chance, explained to some degree the patterns in the identities of the judges hearing these cases.

The uncomfortable fact is that judicial activism is now commonplace among federal cases of any import. As such, it would not be remarkable to find this pattern to hold for cases decided under the *Loper Bright* framework.

Nevertheless, to establish an initial baseline, we assessed whether the political identity of the reviewing judge correlated with the political identity of the disputed interpretation. We found that it did. Using the *Loper Bright* framework, Republican judges upheld Republican interpretations 64% of the time (9 wins out of 14 total cases), while Democratic judges only did so 42% of the time (5 wins out of 7 total cases). The reverse was also true: Democratic judges upheld Democratic interpretations more frequently (78% of the time; 14 wins out of 18 total cases) than did Republican judges (41% of the time; 16 wins out of 23 total cases). To put these results in context, our first article found that courts upheld agency interpretations 57% of the time.



Next, we set out to understand whether the *Loper Bright* framework itself was being manipulated to be consistent with judicial activism. As explained above, a reviewing court is most likely to reject an agency interpretation if it determines that the meaning of the disputed term is unambiguous. On the flipside, reviewing courts are most likely to uphold an agency interpretation if they construe the disputed term as conferring discretion.

Thus, if *Loper Bright* does function as a tool of judicial activism, we would expect a judge confronted with a policy from the opposite party to construe a disputed term as being unambiguous (thereby making it easier for the judge to reject the agency's interpretation) more frequently than as conferring discretion. If, however, a judge is confronted with a policy from their own party, we would expect the opposite: The judge would be more likely to construe the disputed term as conferring discretion (thereby making it easier for the judge to uphold the agency's interpretation) than as being unambiguous.

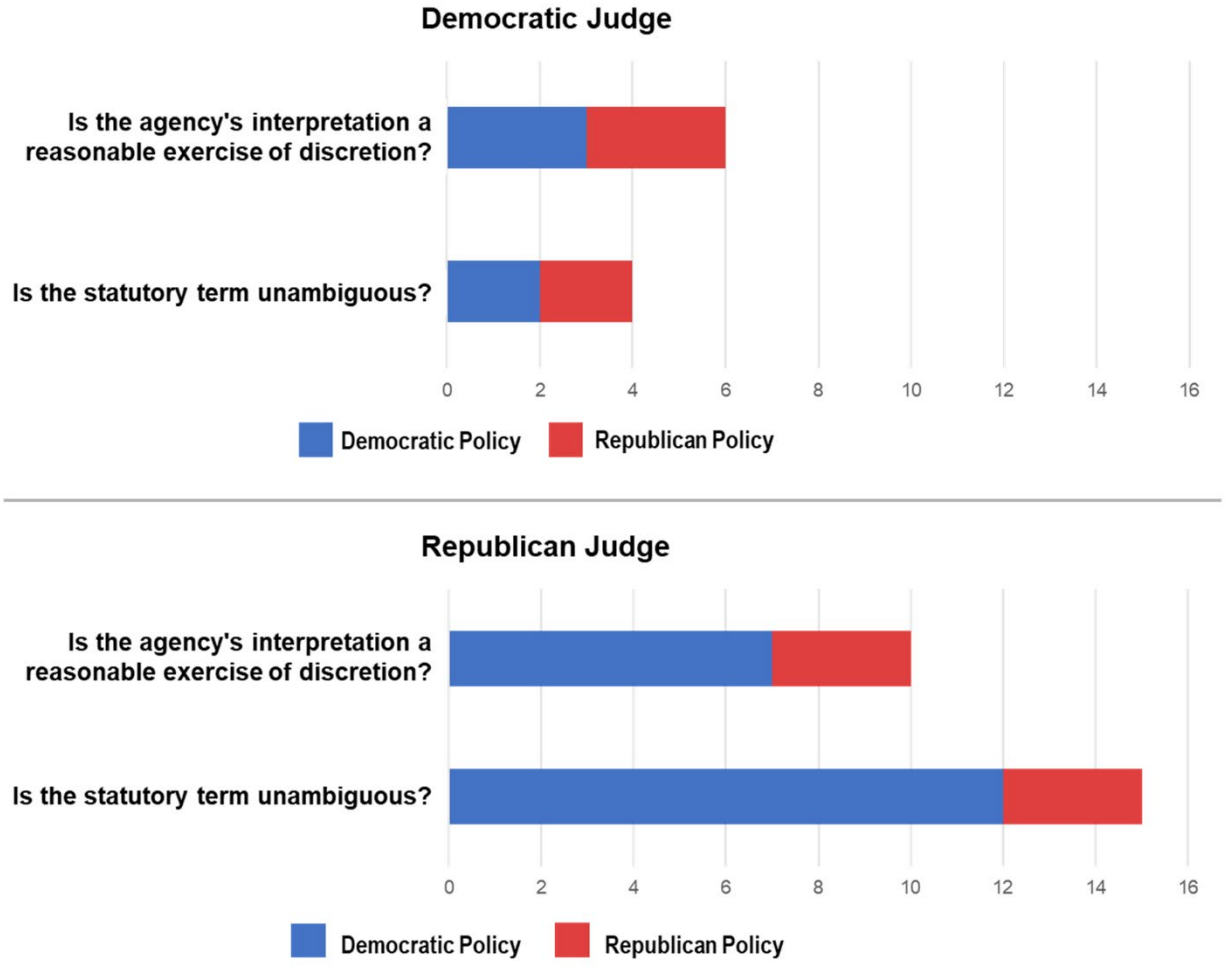
Our data suggest that this pattern partially holds for Republican judges. Of the 39 cases involving a Republican judge reviewing a Democratic interpretation, the judge framed the disputed term as being unambiguous 12 times (31% of the total). In contrast, Republican judges construed the disputed term as conferring discretion 7 times (18% of the total) in such cases.

Republican judges did not seem to engage in the expected strategic behavior when confronted with cases involving a Republican interpretation, however. Of these 14 cases, the judge construed the disputed term as conferring discretion only 3 times (21% of the total). Significantly, this was the same number of times the judge framed the term as being unambiguous (3 times, or 21% of the total).

Similarly, this pattern only partially held for Democratic judges. Of the 12 cases involving Democratic judges reviewing Republican interpretations, the Democratic judge ultimately framed the disputed term as unambiguous only 2 times (17% of total). Surprisingly, the Democratic judge was slightly more likely to construe the disputed term in these cases as conferring discretion (3 times, or 25% of the total).

Democratic judges did appear to behave more strategically in cases involving Democratic interpretations, however. Out of 18 such cases, they construed the disputed term as conferring discretion 3 times (17% of total). This occurred slightly more frequently than instances in which the Democratic judge framed the disputed term as being unambiguous (2 times, or 11% of the total). Although these numbers are

insufficient to reach any firm conclusions, they provide a benchmark against which to monitor judicial behavior moving forward.



Case Studies

The case of *American Health Care Association v. Kennedy*, decided by district court judge Matthew Kacsmaryk, illustrates how potentially manipulable the dividing lines in the *Loper Bright* analytical framework can be. The case arose from an industry challenge to a Biden administration regulation that required Medicaid- and Medicare-governed nursing facilities to maintain a registered nurse on site 24 hours a day, seven days a week. The underlying statute mandated that these facilities "use the services of a registered professional nurse for at least 8 consecutive hours a day, 7 days a week." Elsewhere, the statute empowers the head of the agency to issue "other requirements relating to the health and safety of residents or relating to the physical facilities thereof as [he or she] may find necessary." The Biden administration read the "at least"

language in conjunction with the general rulemaking provision as supplying the authority for its rulemaking.

Kacsmaryk rejected this argument. Instead, he concluded that the authorizing statute was unambiguous — that is, capable of only one reasonable interpretation — in setting the floor for registered nursing staffing at no more than 8 hours. Thus, he struck down the Biden rule as exceeding the agency's legal authority. This ruling is particularly noteworthy because Judge Kacsmaryk is one of the most controversial Trump judicial nominees due to his track record of engaging in aggressive judicial activism.

Another judge, however, could have just as easily found this same provision to be ambiguous as to whether it was intended to establish a maximum floor. Indeed, applying *de novo* review, a judge might have determined that the best reading of this provision is that it was intended to establish a minimum floor, and that the agency could thus mandate requirements beyond it consistent with the separate general rulemaking authority.

The case of *FDIC v. Bank of America*, decided by district court judge Loren AliKhan, provides another illustration of the potential susceptibility of the *Loper Bright* framework to strategic use by judges. That case arose from an enforcement action brought by the Federal Deposit Insurance Corporation (FDIC) against Bank of America for failing to pay its required premium for the Deposit Insurance Fund meant to protect the stability of the banking system in the event of major financial crises. A 2011 rule issued by the FDIC during the Obama administration dictates the manner in which premium amounts for individual financial institutions are calculated. (Given that the FDIC was technically an independent agency at the time, one may fairly question whether this rule relies on a Democratic interpretation for the purposes of this analysis.)

Bank of America argued that the statutory provision that authorized the rule was unambiguous in requiring the FDIC to consider only certain factors designed to ensure that the Deposit Insurance Fund would have sufficient reserves to cover an institution's failure-related losses. It argued that the 2011 rule exceeded that authority by accounting for various policy factors beyond that rote calculation. AliKhan rejected this argument, finding instead that rather than being unambiguous, the provision was best read as conferring substantial discretion to the FDIC in how to calculate financial institutions' premiums for the Deposit Insurance Fund. In reaching this conclusion, she highlighted the fact that the provision empowered the agency to consider "any other factors the [FDIC] determines are relevant to assessing" the probability that a given financial institution will require loss-related coverage from the fund. For AliKhan, the factors

included in the 2011 rule were all reasonable applications of the discretion conferred to the FDIC.

As with *American Health Care Association* above, it is easy to imagine a more conservative judge (Kacsmaryk, for example) reaching a different outcome in this case. They might have agreed with Bank of America that the unambiguous meaning of the provision was to create a strict formula for calculating loss-related risks for different kinds of financial institutions.

Discussion

There can be little question that *Loper Bright* will function to concentrate greater power in the hands of the federal judiciary. Indeed, as the majority in that case made clear, bringing about this shift was entirely the point. In their view, it was necessary to overturn the *Chevron* deference doctrine because it had conferred too much power on executive branch agencies at the expense of the judiciary.

The question then becomes whether this shift will further exacerbate the risks of judicial activism that already threaten to destabilize our constitutional order. The analysis described above provides some preliminary evidence of this danger, indicating that federal judges have already begun to use the Loper *Bright* framework as a vehicle for judicial activism.

To be sure, the available evidence did not always support the expected patterns of strategic behavior by judges, and, for others, the available evidence was far from conclusive. But, rather than undermine the case that *Loper Bright* raises legitimate concerns about judicial activism, these results may be attributable to several confounding factors. To begin with, the database underlying our analysis comprised only 83 cases. Given the large number of endpoints under consideration, the effect of these data limitations would be particularly pronounced, as one or two outlier cases could be sufficient to change the outcome of individual analyses.

Another factor is that our database of cases covers the earliest days of the new *Loper Bright* regime. During this period, judges would have only begun progressing along the learning curve for this new analytical framework — familiarizing themselves with its individual analytical steps and discovering how to deploy any flexibilities those steps might contain. Over time, we can expect patterns of results to settle into more clearly defined equilibria as judges — particularly those with more activist tendencies — become more adept at manipulating the *Loper Bright* framework to achieve ideological ends.

Lastly, even some of the more superficially counterintuitive results from our analysis turn out to make some sense upon closer reflection. For instance, Republican judges were notably reluctant to construe Republican interpretations of disputed terms as conferring discretion, even though doing so would make it easier for them to uphold those interpretations. Yet, this stance would be consistent with conservatives' longstanding opposition to the *Chevron* deference doctrine, which they long criticized as affording agencies too much discretion. Instead, these judges seemed to prefer to resolve these cases using *de novo* review, doing so 8 times out of the 14 cases involving a Republican judge confronted cases involving a Republican interpretation (57% of the total). Among these eight cases, the agency interpretation still had a particularly high win rate of 63% (five wins). Put differently, *de novo* review seemed to provide Republican judges with an adequate alternative means for achieving their ideological ends.

Similarly, Democratic judges were also notably reluctant to frame disputed terms involving Republican interpretations as being unambiguous, even though doing so would make it easier for them to reject those interpretations. In this case, liberals' stronger support for the *Chevron* deference doctrine might explain this stance. Indeed, as a result of this stance, Democratic judges are likely to be particularly suspicious of arguments that a given term is unambiguous — an inquiry that largely tracks with the first step of *Chevron*'s analytical framework. That is because, prior to *Loper Bright*, many conservatives began calling on judges to try to short-circuit the *Chevron* deference doctrine by taking a more aggressive stance in finding that disputed terms were unambiguous (thereby foreclosing the second step of *Chevron*'s analytical framework, which is where deference to agency interpretations came into play). In contrast, Democratic judges likely perceive that a way to short-circuit the *Loper Bright* framework — or at least to mitigate its anti-regulatory effects — would be to avoid making determinations that a disputed term is unambiguous as much as possible.

Again, instead of framing disputed terms involving Republican interpretations as being unambiguous, Democratic judges seemed to prefer to resolve these cases at the *de novo* review step of the *Loper Bright* framework. Democratic judges represent 7 of the possible 12 cases at this step (58% of the total). Among these cases, the Republican interpretations still had a particularly low win rate of 29% (two wins). In other words, Democratic judges still seemed to be able to achieve their preferred ideological results through the alternative means of *de novo* review.

Conclusion

This analysis of 83 cases applying the *Loper Bright* analytical framework over the course of its initial 14 months has found preliminary evidence suggesting the framework is aggravating the problem of judicial activism. Specifically, we found evidence suggesting that:

- Litigants were engaging in forum shopping in *Loper Bright* cases;
- An overall pattern of judicial activism prevailed in *Loper Bright* cases; and
- Judges might be engineering their application of the *Loper Bright* analytical framework to achieve results that appeared consistent with their ideological preferences.

As noted above, these findings are preliminary due to such constraints as data limitations and other contextual factors. Nonetheless, our assessment provides an initial analytical framework to measure and assess *Loper Bright* application in the lower courts. By continuing to monitor and evaluate additional cases, we expect to get a clearer picture of the effects that its analytical review framework is having in individual cases — and on the stability of our tripartite system of government more broadly.