Loper Bright Enterprises v. Raimondo and the Future of Agency Interpretations of Law

December 31, 2024

Congressional Research Service
https://crsreports.congress.gov
R48320

CRS REPORT
Prepared for Members and
Committees of Congress

Congressional Research Service
Informing the legislative debate since 1914

SUMMARY

R48320

December 31, 2024

Benjamin M. Barczewski
Legislative Attorney

Loper Bright Enterprises v. Raimondo and the Future of Agency Interpretations of Law

"*Chevron* is overruled": On June 28, 2024, the Supreme Court overruled the *Chevron* framework in *Loper Bright Enterprises v. Raimondo*, holding that the *Chevron* framework violated Section 706 of the Administrative Procedure Act (APA). The *Chevron* framework required courts to defer to reasonable agency interpretations of ambiguous statutes. In its place, the Court directed the judiciary to exercise its independent judgment to determine the meaning of federal statutes.

The *Chevron* framework was named for the case that articulated it, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* For four decades, the *Chevron* case, and the framework that grew out of it, was one of the foundational decisions in administrative law, governing the relationship between agencies and courts in matters of statutory interpretation and acting as a backdrop against which Congress has legislated. The *Chevron* framework typically applied if Congress had given an agency the general authority to make rules with the force of law. If a court determined that *Chevron* governed its analysis, at step one it would determine whether Congress directly addressed the precise issue before the court. If the statute was clear on its face with respect to the issue before the court, the court was to implement Congress's stated intent. If the court concluded instead that a statute was silent or ambiguous with respect to the specific issue, the court then proceeded to *Chevron*'s second step. At step two, courts were required to defer to an agency's reasonable interpretation of the statute regardless of whether the court would adopt that interpretation on its own were it to have reviewed the statute without the benefit of the agency's interpretation. The *Chevron* framework rested on several related assumptions, including that (1) statutory ambiguity indicates a congressional delegation of interpretive authority, (2) agencies have more expertise than courts do to interpret the statutes they administer, and (3) agencies are politically accountable and therefore have more claim to make policy than courts do.

The APA's Section 706, the Court held in *Loper*, codified existing judicial review practice at the time of its enactment in 1946. Recounting a long line of cases going back to the beginning of the 19th century, the Court explained that the federal courts always understood their role as the final arbiters of the meaning of statutes. Given this history, the Court took specific aim at *Chevron*'s first presumption—that statutory ambiguities indicate implicit delegation of interpretive authority to an agency. This presumption, the Court held, violated the APA's "unremarkable yet elemental proposition … that courts decide legal questions by applying their own judgment." Despite the Court's direction that courts are obligated to exercise their independent legal judgment, the Court emphasized several times that the executive branch's views on the meaning of a statute should be given "weight" or "respect" under certain circumstances outlined by the 1944 Supreme Court case *Skidmore v. Swift & Co*. The Court's emphasis on the judiciary's role to render independent legal judgment on the best meaning of a statute, moreover, does not preclude a court from concluding that a particular statute has vested the agency with discretion. Where Congress has vested an agency with delegated authority, courts must still ensure that the agency has stayed within "the boundaries of the delegated authority and … the agency has engaged in 'reasoned decisionmaking' within those boundaries."

Exactly how Congress, the executive branch, and the judiciary will react to the *Loper* decision is still an open question. In broad terms, *Loper* will likely have a much greater effect in the lower courts than at the Supreme Court, as the Supreme Court did not defer to an agency interpretation under *Chevron* since 2016. The lower courts, however, relied on the framework until the day *Chevron* was overruled. Whether agencies will lose more cases before the courts is another open question. Some evidence of the effect of *Chevron* on the lower courts indicates that overruling *Chevron* may depress agency successes in the lower courts where an agency interpretation of law is at issue. Nonetheless, in the absence of *Chevron*, courts may rely more heavily on *Skidmore* weight or find more readily that statutes delegate authority to agencies, thereby limiting agency losses in court. Further, *Chevron* did not apply to all agency actions—only to agency interpretations of statutes. Exercises of statutorily delegated policy discretion are (and will continue to be) reviewed under the APA's deferential arbitrary and capricious standard.

The extent to which *Loper* will affect the way agencies regulate and Congress legislates is yet to be seen. The *Loper* decision does not legally bind the executive branch or Congress—it directs *courts* how to resolve cases of statutory interpretation. *Loper* will likely have an indirect effect on each branch, however. Agencies may respond to *Loper* by drafting their interpretations to better mirror the way courts interpret statutes and limit expansive interpretations of the statutes they administer. Congress may respond by drafting more specific statutes, codifying *Chevron* or *Loper*, or using more express delegations in statutes.

Contents

Figures

Contacts

Introduction

On June 28, 2024, the Supreme Court overruled the *Chevron* framework in a pair of cases, *Loper Bright Enterprises v. Raimondo* and *Relentless Inc. v. Department of Commerce* (collectively *Loper*).[1] The *Chevron* framework—named for the case that articulated it, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*—required federal courts to defer to federal agencies' reasonable interpretations of ambiguous statutory provisions the agencies administer.[2]

For four decades, the *Chevron* case, and the framework that grew out of it, has been one of the foundational decisions in administrative law, governing the relationship between agencies and courts in matters of statutory interpretation and acting as a backdrop against which Congress has legislated. As one legal scholar put it: *Chevron* "is the most talked about, most written about, most cited administrative law decision of the Supreme Court. Ever."[3] For the past decade or so, however, *Chevron* had come under increasing fire from some corners of the federal judiciary and legal academia.[4] Once cited often and approvingly by a majority of Supreme Court Justices, *Chevron* fell into desuetude at the Court.[5] Over the past several terms, the Court has declined to apply or even cite *Chevron* in cases where it may once have governed.[6] Other methods of statutory interpretation, such as the major questions doctrine, appear to have displaced *Chevron*, at least in some instances.[7] *Chevron*'s absence at the Court has not gone unnoticed, with several Justices commenting on *Chevron*'s absence as evidence that it should be overruled.[8]

Against this backdrop, the Court explicitly overruled the *Chevron* framework, holding that it violates Section 706 of the Administrative Procedure Act (APA).[9] For cases that fall within the ambit of the APA, Section 706 requires courts reviewing agency actions to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[10] The majority held that the APA's command required courts to exercise their own independent judgment on the meaning of federal statutes, but *Chevron* required courts to defer to reasonable agency interpretations of ambiguous statutes.[11] That deference requirement, the Court held, abdicated the judiciary's foundational function to

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

[2] 467 U.S. 837, 843 (1984), *overruled by* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

[3] Ronald A. Cass, *Chevron—Complicated, Start to Finish*, 23 FEDERALIST SOC'Y REV. 265, 265 (2022).

[4] *See* Pereira v. Sessions, 585 U.S. 198, 221 (2018) (Alito, J., dissenting) (writing that *Chevron* is now an "increasingly maligned precedent" that the Court feels comfortable "simply ignoring"); Buffington v. McDonough, 143 S. Ct. 14, 22 (2022) (Gorsuch, J., dissenting from denial of certiorari) (arguing that that *Chevron* "deserves a tombstone no one can miss."). Prior to being appointed to the Supreme Court, Justice Kavanaugh raised concerns that *Chevron* was conceptually muddled, while Chief Justice Roberts had suggested that *Chevron* should be significantly narrowed. *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2136 (2016); City of Arlington v. FCC, 569 U.S. 290, 323–27 (2013) (Roberts, C.J., dissenting) (advancing a narrower theory of *Chevron*). For a survey of academic literature criticizing *Chevron* deference, see Christopher J. Walker, *Attacking* Auer *and* Chevron: *A Literature Review*, 16 GEO. J.L. & PUB. POL. 103 (2018).

[5] *See* Kristin E. Hickman & Aaron L. Nielson, *Narrowing Chevron's Domain*, 70 DUKE L. J. 931, 1000 (2021).

[6] *See Loper*, 144 S. Ct. at 2271 (stating that the Court has not deferred under *Chevron* since 2016).

[7] *See Buffington*, 143 S. Ct. at 22 (Gorsuch, J., dissenting from denial of certiorari); CRS Legal Sidebar LSB11084, *Clear Statement Rules, Textualism, and the Administrative State*, by Benjamin M. Barczewski and Valerie C. Brannon (2023); CRS In Focus IF12077, *The Major Questions Doctrine*, by Kate R. Bowers (2022).

[8] *See, e.g.*, *Buffington*, 143 S. Ct. at 22 (Gorsuch, J., dissenting from denial of certiorari); Pereira v. Sessions, 585 U.S. 198, 221–22 (2018) (Alito, J., dissenting).

[9] *Loper*, 144 S. Ct. at 2263.

[10] 5 U.S.C. § 706(2).

[11] *Loper*, 144 S. Ct. at 2266.

"say what the law is."[12] Although the petitioners in *Loper* also challenged the *Chevron* framework on constitutional grounds, the majority's opinion did not address those arguments.[13]

The *Chevron* Framework

The *Chevron* framework required a court to defer to an executive agency's interpretation of an ambiguous statute that it administers so long as the agency's interpretation was reasonable.[14] The framework's namesake 1984 Supreme Court case, *Chevron U.S.A. v. Natural Resources Defense Council*, set out a two-step process for determining whether a court must defer to an agency's statutory interpretation.[15]

The *Chevron* framework typically applied if Congress had given an agency the general authority to make rules with the force of law.[16] If a court determined that *Chevron* applied, at step one it would use the traditional tools of statutory construction to determine whether Congress directly addressed the precise issue before the court.[17] If the statute was clear on its face with respect to the issue before the court, the court was to implement Congress's stated intent.[18] If the court concluded instead that a statute was silent or ambiguous with respect to the specific issue, the court then proceeded to *Chevron*'s second step.[19] At step two, a court was required to defer to an agency's reasonable interpretation of the statute regardless of whether the court would adopt that interpretation on its own were it to have reviewed the statute without the benefit of an agency's interpretation.[20] The *Chevron* framework rested on several related assumptions, including that (1) statutory ambiguity indicates a congressional delegation of interpretive authority, (2) agencies have more expertise than courts do to interpret the statutes they administer, and (3) agencies are politically accountable and therefore have more claim to make policy than courts do.[21]

The *Loper* Decision

The Supreme Court's decision to overrule the *Chevron* framework relied exclusively on Section 706 of the APA. The APA generally governs judicial review of agency actions.[22] Section 706 of the APA states "the reviewing court shall decide all relevant questions of law."[23]

[12] *Id.* at 2257 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

[13] Brief for Petitioners at 24, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024) (No. 22-451).

[14] *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

[15] *Id.*

[16] *See* United States v. Mead Corp., 533 U.S. 218, 226–27 (2001).

[17] *Chevron*, 467 U.S. at 843 n.9.

[18] *Id.*

[19] *Id.* at 843.

[20] *Id.* at 844–45, 865–66.

[21] *Id.* Justice Scalia later expressed another justification for *Chevron* deference, rooted in the history of federal court review of agency action before passage of the federal question jurisdiction statute in 1875. *See* United States v. Mead Corp., 533 U.S. 218, 241–42 (2001) (Scalia, J., concurring) (asserting that the *Chevron* decision "was in accord with the origins of federal-court judicial review," because a court would issue "the prerogative writ of mandamus" only if the executive officer "was acting plainly beyond the scope of his authority.").

[22] 5 U.S.C. §§ 701–706.

[23] *Id.* § 706.

Judicial Practice Before Enactment of the APA

Section 706, the Supreme Court held, codified existing judicial review practice at the time of its enactment in 1946.[24] Recounting a long line of cases going back to the beginning of the 19th century, the Court explained that the federal courts always understood their role to be the final arbiters of the meaning of statutes.[25] The Court began by quoting the now famous statement from the seminal 1803 case *Marbury v. Madison* that "it is emphatically the province and duty of the judicial department to say what the law is."[26] Although *Marbury* embodied the "Framers' understanding" of the role of the federal judiciary, the judiciary also historically "accorded due respect" to the views of the executive branch entrusted with administering a statute.[27] That respect was "especially warranted" where the executive branch's interpretation was roughly contemporaneous with the enactment of the statute.[28] Agency interpretations that warranted judicial respect, however, "could inform … but did not supersede" the judgment of a court on a question of law.[29]

The Court acknowledged that it appeared that some cases decided before the enactment of the APA had applied various deference doctrines. Those cases, however, as understood by the Court, did not shift the foundational role of the courts, nor did they apply anything like the deference required under *Chevron*.[30] In a pair of pre-APA cases from the 1940s, *National Labor Relations Board (NLRB) v. Hearst Publications, Inc.*[31] and *Gray v. Powell*,[32] the Court applied what the *Loper* majority called "deferential review"—but only insofar as Congress had empowered the agency to determine the meaning of the statute.[33] In *Hearst Publications*, for example, the Court deferred to the NLRB's determination that newsboys were "employees" within the meaning of the National Labor Relations Act.[34] Deeming the newsboys (who were actually adult men) "employees" provided them the opportunity to engage in collective bargaining with their employer, Hearst Publications.[35] The Court concluded that the task of defining *employee* was "assigned primarily to the agency created by Congress to administer the Act."[36] The NLRB, the Court held, had "[e]veryday experience in administering the statute" and "familiarity with the circumstances and backgrounds of employment relationships in various industries."[37]

---

[24] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2261 (2024).

[25] *Id.* at 2257–60.

[26] *Id.* at 2257 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

[27] *Id.* The Court cited another of its early nineteenth-century cases, *Edwards' Lessee v. Darby*, for the proposition that from the very beginning of the Republic, courts accorded contemporaneous executive branch interpretations of "doubtful and ambiguous law ... very great respect." 25 U.S. (12 Wheat.) 206, 210 (1827) ("In the construction of a doubtful and ambiguous law, the cotemporaneous [sic] construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect.")

[28] *Loper*, 144 S. Ct. at 2258.

[29] *Id.*

[30] *Id.* at 2259.

[31] 322 U.S. 111 (1944).

[32] 314 U.S. 402 (1941).

[33] *Loper*, 144 S. Ct. at 2259.

[34] *Hearst Publications*, 322 U.S. at 129–30.

[35] *Id.* at 113–14.

[36] *Id.* at 130.

[37] *Id.* "In making [the NLRB's] determinations as to the facts in these matters conclusive, if supported by evidence, Congress entrusted to it primarily the decision whether the evidence establishes the material facts. Hence in reviewing (continued...)

Gray was decided under similar circumstances. In that case, the Supreme Court found that Congress had "specifically granted the agency the authority to" determine whether a coal-burning railroad with contracts with several coal mines was a coal "producer" pursuant to the Bituminous Coal Act of 1937. The *Gray* Court held "[w]here as here a determination has been left to an administrative body, this delegation will be respected and the administrative conclusion left untouched."[38]

The *Loper* majority reasoned that *Hearst Publications* and *Gray* are examples of deferential review "where application of a statutory term was sufficiently intertwined with the agency's factfinding" rather than evidence that the Court had adopted generally applicable *Chevron*-like deference doctrines prior to the enactment of the APA.[39] *Gray* and *Hearst Publications*, in the Court's reasoning, were examples of an adjudication-like action of applying a statutory term to the particular facts before it.[40] As a result, these cases, according to the Court, did not depart from the general rule at the time of the enactment of the APA that pure questions of law were to be answered by the courts—not agencies.[41]

The APA and *Chevron*'s Presumptions

Given this history, the Supreme Court took specific aim at *Chevron*'s first presumption—that statutory ambiguities indicate implicit delegation of interpretive authority to an agency.[42] This presumption, the Court held, violated the APA's "unremarkable, yet elemental proposition … dating back to *Marbury*: that courts decide legal questions by applying their own judgment."[43] The majority explained that presumptions can be salutary but only where they approximate reality.[44] *Chevron*'s presumption, the Court explained, does not approximate reality, "because '[a]n ambiguity is simply not a delegation of law-interpreting power. *Chevron* confuses the two.'"[45] Instead, the Court held that, when confronted with a statutory ambiguity, a court should not defer to an agency's interpretation but instead should do its "ordinary job of interpreting statutes, with due respect for the views of the Executive Branch."[46]

---

the Board's ultimate conclusions, it is not the court's function to substitute its own inferences of fact for the Board's, when the latter have support in the record." *Id.* (citing NLRB v. Nev. Consol. Copper Corp. 316 U.S. 105 (1942)).

[38] *Gray v. Powell*, 314 U.S. 402, 412 (1941).

[39] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2260 (2024).

[40] *See id.* at 2259–60.

[41] *Id.* In *The* Chevron *Doctrine: Its Rise and Fall, and the Future of the Administrative State*, Professor Thomas Merrill notes that one way to read *Hearst Publications* and similar cases is that the Court engaged in deferential review where the agency was engaged in applying the law to the facts before it (e.g., is a particular entity covered by a statutory term?)—not pure legal analysis. THOMAS W. MERRILL, THE CHEVRON DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE 39 (2022) [hereinafter THE CHEVRON DOCTRINE]. This view aligns squarely with the majority in *Loper*. 144 S. Ct. at 2259 (calling the agency actions in *Hearst Publications* and *Gray* "factbound"). If that is what in fact the Court was doing in *Hearst Publications* and *Gray*, then those cases do not necessarily stand for the proposition that the Court was engaged in something like a proto-*Chevron* analysis prior to the enactment of the APA. Nonetheless, Professor Merrill explains that *Hearst Publications* can also be understood to be an early instantiation of one of *Chevron*'s core assumptions—that ambiguities are implicit delegations of interpretive authority. THE CHEVRON DOCTRINE 39-40.

[42] *Loper*, 144 S. Ct. at 2265.

[43] *Id.* at 2261.

[44] *Id.* at 2265.

[45] *Id.* (quoting Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 445 (1989)).

[46] *Id.* at 2267.

By sweeping away one of *Chevron*'s core assumptions about delegation, the majority declared that ambiguities in statutes pose questions of law, not questions of policy.[47] In holding that the judiciary, not agencies, is to resolve statutory ambiguities, the majority explained that the Framers understood "the complexity of objects … the imperfection of the human faculties, and the simple fact that no language is so copious as to supply words and phrases for every complex idea," yet they still expected politically insulated judges to exercise independent legal judgment in resolving statutory ambiguities.[48]

Statutory Interpretation Under *Loper*

While the Supreme Court acknowledged that ambiguities in statutes surely exist, the majority held that a statute's meaning was fixed at the time of enactment, permitting one and only one interpretation of the statute.[49] The majority reasoned that poorly drafted, complex, or technical statutes are no different than statutes with clear or obvious meanings—they both have meanings fixed at the time of enactment that a court is obligated to give effect to.[50] According to the majority, a court's job is to find this single "best" meaning by applying the "traditional tools of statutory construction."[51] Courts apply these tools to resolve any potential ambiguity so that the law does not "run out" or leave a "gap" for agencies to fill.[52] The Court itself did not list which tools it believes are included in the traditional tools of statutory construction.[53] Methods of statutory interpretation and how *Loper* may interact with them will be discussed in more detail below.[54]

Regardless of the methods a court uses to interpret a statute, the Court was confident that the judiciary was up to the task of determining the best meaning of any statute. "Resolution of statutory ambiguities," the Court explained, "involves legal interpretation. That task does not suddenly become policymaking just because a court has an 'agency to fall back on.'"[55] The majority stressed that courts resolve statutory ambiguities all the time when reviewing statutes that has agencies have not yet interpreted or in cases where agencies are not involved.[56] In the Court's view, the legal nature of questions of statutory interpretation do not change just because an agency happens to be involved.[57] By characterizing the resolution of statutory ambiguities as a question of law, the Court swept away another one of *Chevron*'s presumptions—that ambiguities call for agency expertise.[58] In light of the majority's reasoning, there is no role for agency

[47] *Id.* at 2267–68.

[48] *Id.* at 2266 (quoting THE FEDERALIST NO. 37, at 236 (J. Madison) (J. Cooke ed. 1961).

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *See id.* Similarly, while the Court suggested in *Chevron* itself that courts should use "traditional tools of statutory construction" at step one, it did not elaborate on what those tools are. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984).

[54] *See infra* "The De Novo Standard of Review, Methods of Statutory Interpretation, and Statutory Ambiguity." For a longer discussion of statutory interpretation, see CRS Report R45153, *Statutory Interpretation: Theories, Tools, and Trends*, by Valerie C. Brannon (2023).

[55] *Loper*, 144 S. Ct. at 2268 (quoting Kisor v. Wilkie, 588 U.S. 558, 575 (2019)).

[56] *Id.* at 2266.

[57] *Id.*

[58] *Id.* at 2268.

expertise to play in interpreting a statute because courts—not agencies—are experts in statutory interpretation.[59]

Application of the *Skidmore* Standard

Despite the Supreme Court's direction that courts are obligated to exercise their independent legal judgment, the majority emphasized several times that the executive branch's views on the meaning of a statute should be given "weight" or "respect" under certain circumstances.[60] As the Court explained, the views of the executive branch may, in the words of the 1944 Supreme Court case *Skidmore v. Swift & Co.*, have the "power to persuade, if lacking the power to control."[61]

Prior to *Loper*, *Skidmore* primarily applied to agency interpretations that were not eligible to be evaluated under the *Chevron* framework.[62] The majority's frequent reference to *Skidmore* and use of language from that decision suggest that, going forward, the Court may expect lower courts to look to *Skidmore* to guide their consideration of agencies' preferred interpretations of ambiguous statutes. *Skidmore* does not require courts to defer to agencies but permits courts to give weight or respect to agency interpretations that the court considers persuasive.[63] The *Skidmore* case itself laid out a list of factors for courts to consider when determining whether an agency's interpretation commands the "power to persuade."[64] Under *Skidmore*,

> the rulings, interpretations and opinions of [an agency], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. 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.[65]

Skidmore has received far less attention from the courts than *Chevron* has and may need additional development by the courts to refine its application. How courts might apply *Skidmore* after *Loper* is discussed below.[66]

Delegations to Agencies and Statutory Interpretation

The Loper Court's emphasis on the judiciary's role to render independent legal judgment on the best meaning of a statute does not preclude a court from deciding that a statute's best meaning is that "the agency is authorized to exercise a degree of discretion."[67] The majority identified two forms of delegation in particular.

---

[59] *Id.*

[60] *Id.* at 2265 (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

[61] *Id.* at 2267 (quoting *Skidmore*, 323 U.S. at 140).

[62] Kristen E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1245–46 (2007), (summarizing the evolution of the *Skidmore* doctrine).

[63] *See Skidmore*, 323 U.S. at 140.

[64] *Id.*

[65] *Id.*

[66] *See infra* "Skidmore Weight."

[67] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2263 (2024).

Express Delegations

This discretion, the Court explained, could be provided by an express delegation to an agency from Congress to interpret a particular statutory term or phrase.[68] The Court cited several statutes where Congress has expressly delegated interpretive authority to an agency.[69] For instance, the Court cited a provision of the Fair Labor Standards Act, which states in relevant part:

> [A]ny employee employed on a casual basis in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (*as such terms are defined and delimited by regulations of the Secretary*).[70]

According to the Court in *Loper*, the phrase *as such terms are defined and delimited by regulations of the Secretary* indicates that Congress delegated authority to the agency to define the terms referenced in that statutory provision. The Court's requirement that courts give effect to a statute's best meaning accordingly requires a court to respect Congress's explicit choice of which branch—executive or judicial—has the authority to render a final and binding interpretation of a statutory provision.[71]

Delegations of Policy "Flexibility"[72]

In addition to expressly delegating interpretive authority to an agency to interpret a particular word or phrase, the Court also identified instances where Congress has delegated authority to an agency using terms or phrases "that '[leave] agencies with flexibility.'"[73] The Court identified terms such as *appropriate* and *reasonable* as indications that Congress has delegated flexibility to the agency to make policy within "the boundaries of the delegated authority."[74] The Court cited additional examples of statutory language that delegates this kind of flexibility.[75] For instance, the Court referred to the Clean Air Act, which states: "The Administrator shall regulate [power plants] … *if the Administrator finds such regulation is appropriate and necessary*."[76] In instances where such language is used, the majority reasoned that a court's role is to "ensur[e] the agency has engaged in 'reasoned decisionmaking' within [statutory] boundaries."[77]

---

[68] *Id.*

[69] *Id.* at 2263 nn.5–6.

[70] 29 U.S.C. § 213(a)(15) (emphasis added).

[71] *See Loper*, 144 S. Ct. at 2263.

[72] The Court identified another category where Congress delegates authority to an agency. The Court identified it as authority for an agency to "prescribe rules to 'fill up the details'" of a statutory scheme. *Id.* (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825)).

[73] *Id.* (quoting Michigan v. EPA, 576 U.S. 743, 752 (2015)).

[74] *Id.*

[75] *Id.*

[76] *Id.* at 2263 n.6 (citing 42 U.S.C. § 7412(n)(1)(A)) (emphasis added).

[77] *Id.* at 2263 (quoting Michigan, 576 U.S. at 750). The Court's reference to "reasoned decisionmaking" may be a nod to a court's role in reviewing an agency's discretionary policy decisions, findings of fact, and exercise of its technical expertise under the APA's arbitrary and capricious standard of review. *See id.*; 5 U.S.C. § 706(2); Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 43 (1983). Under that standard, which will be discussed in more detail below, an agency must show that its decision was reasonable give the facts before it. *State Farm*, 463 U.S. at 43.

Stare Decisis and Cases Decided at *Chevron* Step Two

Although the Supreme Court overruled *Chevron*, it appears to have preserved the holdings in cases that were decided pursuant to the *Chevron* framework prior to *Loper*.[78] In the briefing of the case and during oral argument, the litigants and some of the Justices discussed the fate of cases decided at *Chevron* step two.[79] As explained above, at *Chevron* step two, a court must defer to an agency's reasonable interpretation of an ambiguous statute.[80] In such a case, a court has not made a specific ruling on what the statute means—it has left that determination to an agency in light of the court's finding at step one that the statute is ambiguous.[81] At oral argument, some of the Justices questioned the litigants about whether these step two decisions would still be considered binding if *Chevron* were overruled.[82] Counsel for the petitioners argued that overruling *Chevron* would not disturb these cases because what the court had found at step two was that an agency's interpretation was "lawful."[83] The Court appears to have adopted this argument in its opinion, holding that "we do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are *lawful*—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory stare decisis despite our change in interpretive methodology."[84] Despite the Court's holding, questions are likely to remain about what circumstances allow a court to overrule a past decision in favor of an agency based on the application of step two of *Chevron*. That issue is taken up in more detail below.[85]

The Dissent

The dissent, penned by Justice Kagan and joined by Justices Sotomayor and Jackson (the latter only with respect to the *Relentless* case),[86] defended the *Chevron* framework on grounds that largely track those that supported the continued application of *Chevron* for the past four decades.[87] *Chevron*, Justice Kagan wrote, is part of the "warp and woof of modern government" and "reflects what Congress would want": politically accountable expert agencies—not judges—making policy.[88] Justice Kagan, providing examples, explained that regulatory statutes often contain ambiguities or gaps (sometimes purposefully so) that cannot be resolved without the exercise of some kind of policymaking expertise that the courts simply do not have.[89] Justice Kagan reasoned that statutes with such ambiguities or gaps have not fixed any "best" meaning at

[78] *Loper*, 144 S. Ct. at 2273.

[79] *See* Brief for Respondents at 31, Loper Bright Enters. v. Raimondo, 143 S. Ct. 2244 (2024) (No. 22-451); Transcript of Oral Argument at 59–61, Relentless, Inc. v. Dep't of Commerce, 144 S. Ct. 2244 (2024) (No. 22-1219).

[80] *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844–45 (1984).

[81] *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs. 545 U.S. 967, 982 (2005) (holding "only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction").

[82] Transcript of Oral Argument at 59:8-61:7, Relentless, Inc. v. Dep't of Commerce, 144 S. Ct. 2244 (2024) (No. 22-1219).

[83] *Id.*

[84] *Loper*, 144 S. Ct. at 2273.

[85] *See infra* "Further Litigation: Prior Chevron Cases."

[86] Justice Jackson recused herself from Loper Bright Enters. v. Raimondo, 143 S. Ct. 2429 (2023), because she was on the panel that decided Loper Bright Enters. v. Raimondo, 45 F.4th 359, 363 (D.C. Cir. 2022), *cert. granted in part*, 143 S. Ct. 2429 (2023).

[87] *Loper*, 144 S. Ct. at 2294 (Kagan, J., dissenting).

[88] *Id.*

[89] *Id.* at 2296–97.

the time of enactment, and accordingly a court using the tools of statutory construction may find multiple possible readings for which the statute provides no rule of decision for a court to choose one over another.[90]

The judiciary's role, Justice Kagan articulated, is only to ensure that an agency's interpretation is a reasonable one, which ensures that courts stay out of policymaking.[91] This limited role for courts, Justice Kagan stressed, is one of judicial "humility," recognizing that agencies have a better claim to democratic legitimacy and more expertise in making policy than courts do.[92] In other words, she explained, "agencies often know things about a statute's subject matter that courts could not hope to."[93] Courts, Justice Kagan explained, can "muddle through" when asked to determine the meaning of an ambiguous statute, but, compared to an agency that Congress has entrusted to administer a statute that may deal with technical subjects such as wildlife regulation or medical drugs and devices, it is reasonable to believe that Congress would prefer the agency to have interpretive authority.[94]

Implications for the Federal Judiciary

As with the *Chevron* framework, the *Loper* decision is legally binding only on the judiciary: It sets out the proper methodology that courts must use for determining the meaning of a federal statute where an agency has also provided its own interpretation.[95] The *Loper* decision, however, will likely affect the Supreme Court differently than it will the lower courts. The Supreme Court has largely avoided applying the *Chevron* framework since 2016, while the lower courts, bound by precedent to apply *Chevron*, were applying the framework regularly until the Court handed down its *Loper* decision.[96]

The lower courts will also be called to address some of the questions left open by the *Loper* decision. Over the coming years, courts may address how they are to engage in statutory interpretation,[97] whether and how the *Skidmore* standard applies to agency interpretations of statutes,[98] how to evaluate delegations of discretion from Congress to agencies,[99] and *Loper*'s interaction with other doctrines such as the major questions doctrine and *Auer* deference, which applies to an agency's interpretation of its own ambiguous regulations.[100]

[90] *Id.* at 2297.

[91] *Id.*

[92] *Id.* at 2295.

[93] *Id.* at 2298.

[94] *Id.*

[95] *Id.* at 2273 (majority opinion) (holding that *courts* are no longer permitted to apply the *Chevron* framework).

[96] *Id.* at 2271–72 (citing William Eskridge & Lauren Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations From* Chevron *to* Hamdan, 96 GEO. L. J. 1083, 1125 (2008)) ("we have avoided deferring under *Chevron* since 2016. That trend is nothing new; for decades, we have often declined to invoke *Chevron* even in those cases where it might appear to be applicable."); Isaiah McKinney, *The Chevron Ball Ended at Midnight, but the Circuits are Still Two-Stepping by Themselves*, NOTICE & COMMENT, YALE J. ON REGUL. BLOG (Dec. 18, 2022), https://www.yalejreg.com/nc/chevron-ended/ (studying the application of the *Chevron* framework in the lower courts in 2020 and 2021).

[97] *See infra* "Methods of Statutory Interpretation."

[98] *See infra* "Skidmore Weight."

[99] *See infra* "Delegations from Congress."

[100] *See infra* "Relationship with other Doctrines of Judicial Review."

The Supreme Court

Between 2016 and its decision in *Loper* in 2024, the Court did not defer to agency interpretations under *Chevron* and often did not even mention the framework in cases where it would have once governed.[101] Even prior to the past decade, scholars had identified a trend that the Court was relying less on *Chevron* than might be expected.[102] From roughly the mid-1980s to the mid-2000s, studies found that the Supreme Court applied *Chevron* to about one-quarter[103] to one-third[104] of cases where an agency interpretation was at issue. Even where the Court applied *Chevron*, various studies found that the application of *Chevron* had little effect on the outcome of the case. A 2008 study, for instance, found that agencies prevailed about 76% of the time when the Court applied *Chevron*—similar to agencies' litigation successes in cases where the Court did not apply *Chevron*.[105]

Another study that analyzed cases decided between 1984 and 1990 (i.e., just after the Court decided the *Chevron* case) found similarly that the Court applied *Chevron* in only about one-third of cases to which it would have been applicable.[106] The same study found that despite *Chevron*'s "agency friendly" reputation, agencies had a lower litigation success rate when the Court applied *Chevron* than when it did not.[107] These studies indicate that, at least at the Supreme Court, *Chevron* may not have had a significant impact on the outcome of cases. Put another way by one pair of scholars, "The Court's questionable loyalty to *Chevron* suggests that the doctrine is not meant to discipline Supreme Court decisionmaking. Instead, the doctrine may better serve to control lower courts and provide nationwide uniformity."[108] This difference between the use of *Chevron* at the Supreme Court and in the lower courts has led some to claim that there was a "*Chevron* Supreme and a *Chevron* Regular."[109] Partially in light of this history at the Court, the majority in *Loper* dubbed *Chevron* a "decaying husk" with little practical reason for keeping it.[110]

Overruling *Chevron* may ultimately have little effect on the way the Court approaches questions of statutory interpretation that involve agencies. Rather than applying or even citing *Chevron*, the Court has often engaged in what is known as *de novo* review of statutory text. *De novo* literally means "anew" in Latin and, as applied to the judicial context, means that a reviewing court analyzes the meaning of statutory text without deference to an agency.[111] This type of review reflects the approach the Court in *Loper* directs courts to apply as the proper approach to statutory

[101] *Loper*, 144 S. Ct. at 2271–72.

[102] *See* William Eskridge & Lauren Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations From* Chevron *to* Hamdan, 96 GEO. L. J. 1083, 1125 (2008); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L. J. 969, 982 (1992).

[103] William Eskridge & Lauren Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations From* Chevron *to* Hamdan, 96 GEO. L. J. 1083, 1125 (2008).

[104] Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L. J. 969, 982 (1992).

[105] William Eskridge & Lauren Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations From* Chevron *to* Hamdan, 96 GEO. L. J. 1083, 1099 (2008).

[106] Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L. J. 969, 981–84 (1992).

[107] *Id.* at 984.

[108] Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 18 (2017).

[109] *Id.* at 6.

[110] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2272 (2024).

[111] Isaiah McKinney, *The Chevron Ball Ended at Midnight, but the Circuits are Still Two-Stepping by Themselves*, NOTICE & COMMENT, YALE J. ON REGUL. BLOG (Dec. 18, 2022), https://www.yalejreg.com/nc/chevron-ended; *De novo*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("When a court engages in de novo review of a legal issue, it makes an independent determination without deference to any earlier analysis about the matter.").

interpretation.[112] Overruling *Chevron*, accordingly, may have little impact on the outcome of cases at the Court, as the Court began engaging in *de novo* review well before it overruled *Chevron*.[113]

The Lower Courts

Overruling *Chevron* may have a larger impact on the lower courts. Until the day *Loper* was decided, the lower courts were applying the *Chevron* framework regularly.[114] According to legal scholars, *Chevron* was cited by the federal courts roughly 18,000 times in the four decades of its existence, making it the most-cited administrative law decision of all time and one of the most cited cases in history.[115] A 2017 study that evaluated more than 1,300 courts of appeals cases from 2003 to 2013—the largest study of courts of appeals decisions that refer to *Chevron*—found that the courts of appeals on average applied *Chevron* in close to three-quarters of cases addressing agency interpretations.[116] A subsequent study that surveyed federal appellate cases from 2020 to 2021 revealed that courts of appeals continued to apply *Chevron* at similar rates as those founds in the 2017 study.[117] In the more recent study, federal courts of appeals applied *Chevron* in close to 85% of cases where agency interpretation was at issue.[118] Thus, unlike the Supreme Court, the lower courts continued to apply *Chevron* in nearly all of the cases in which it would have applied prior to *Loper*.[119]

Loper instructs courts to apply their independent legal judgment in determining the best interpretation of statutes in light of any respect or weight given to agency interpretation under the *Skidmore* standard.[120] In other words, *Loper* instructs courts to engage in *de novo* review of questions of statutory interpretation involving agencies potentially tempered by the *Skidmore* standard.[121] Lower courts are familiar with the *de novo* standard. It is the standard that has traditionally been applied to questions of law where no agency had rendered an interpretation.[122] After *Loper*, that same standard will apply in statutory interpretation cases where *Chevron* would

[112] *Loper*, 144 S. Ct. at 2266.

[113] Kristen E. Hickman & Aaron L. Nielson. *Narrowing* Chevron*'s Domain*, 70 DUKE L.J. 931, 934 (2021) (noting "At a minimum, the Justices seem more willing to find clarity using traditional tools of statutory interpretation, thereby avoiding Chevron deference altogether."); *see, e.g.*, Becerra v. Empire Health Foundation, 597 U.S. 424, 434 (2022) (resolving the case without mentioning *Chevron*); Am. Hosp. Ass'n v. Becerra, 596 U.S. 724, 734 (2022) (same); Epic Sys. Corp. v. Lewis, 584 U.S. 497, 520–21 (2018) (holding that where a statute is clear after application of tools of statutory construction *Chevron* does not apply).

[114] *See, e.g.*, Soumah v. Collett, No. TDC-23-2473, 2024 WL 3201096, at *7 (D. Md. Jun. 26, 2024); Associated Gen. Contractors of Am. v. DOL, No. 5:23-CV-0272-C, 2024 WL 3635540, at *11 (N.D. Tex. Jun. 24, 2024).

[115] Ronald A. Cass, *Chevron—Complicated, Start to Finish*, 23 FEDERALIST SOC'Y REV. 265, 265 (2022); Christopher J. Walker, *Most Cited Supreme Court Administrative Law Decisions*, NOTICE & COMMENT, YALE J. ON REGUL. BLOG (Oct. 9, 2014), https://www.yalejreg.com/nc/most-cited-supreme-court-administrative-law-decisions-by-chris-walker/.

[116] Barnett & Walker, *supra* note 108, at 5.

[117] McKinney, *supra* note 111.

[118] *Id.*

[119] *Id.*; Barnett & Walker, *supra* note 108, at 29.

[120] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2265 (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

[121] *Id.*

[122] *See* Pierce v. Underwood, 487 U.S. 552, 558 (1988) (noting that questions of law are traditionally reviewable *de novo*).

have once governed.[123] The shift from *Chevron* to a *de novo* standard may affect the outcome of those cases.

According to the 2017 study, in general, agencies were significantly more likely to prevail in the lower courts when a court applied the *Chevron* framework (77.4%)—even if the court decided that the statute was unambiguous and did not defer to the agency's interpretation—than when a court applied *Skidmore* (56.0%) or no deference regime whatsoever (38.5%).[124] Given these data, it is possible that overruling *Chevron* will, in the aggregate, diminish the chances that agencies will prevail in federal court in cases where questions of statutory interpretation arise.[125] Several factors may moderate that trend. According to the 2017 study authors, "courts could be strategically choosing deference regimes that more easily allow them to reach an outcome that matches their policy preferences."[126] In other words, some courts may have applied the *Chevron* framework in cases where the agencies were likely to prevail anyway and did not apply the framework where they believed that the agencies were not likely to win.

Agencies may also change their behavior to accommodate the courts' new standard of review.[127] A 2014 study indicated that agency rule drafters may adopt less "aggressive" interpretations of statutes when they did not expect *Chevron* to apply.[128]

The *Loper* decision itself also recognizes that in certain circumstances, agencies' interpretations should be given "great weight" or "respect" pursuant to *Skidmore*.[129] The Court also recognized that in some cases, the best reading of a statute is that Congress delegated discretion to the agency—not the courts.[130] How the lower courts implement these principles from the *Loper* decision is yet to be seen. Nonetheless, they provide courts with the option to adopt an agency's interpretation under appropriate circumstances or determine that a statute has delegated the authority to resolve the statutory interpretation question to the agency.

The Court's citation to other pre-APA cases (such as *Hearst Publications*) that, in the Court's view, formed the traditional understanding of judicial review codified in Section 706 may also signal approval of the lower courts engaging in deferential review where an agency's

[123] *Loper*, 144 S. Ct. at 2266.

[124] Barnett & Walker, *supra* note 108, at 30. These aggregate averages disguise significant variation in outcomes across different federal circuit courts of appeals, different agencies, and different subject matters. For example, the D.C. Circuit led the way in applying *Chevron*, relying on it in approximately 89% of cases that concerned agency interpretations of a statute, while the Sixth Circuit applied *Chevron* in 61% of cases involving agency interpretation. *Id.* at 44. Courts of appeals applied *Chevron* at high rates (75%-100%) to cases involving telecommunications, Indian affairs, and pensions, and courts deferred to agencies under *Chevron* at similar rates (83%-92%) in those same subject matter areas. *Id.* at 50, 54. Conversely, courts applied *Chevron* less frequently (52%-67%) in cases involving housing, tax law, and employment. *Id.* at 50. Furthermore, even when the courts applied *Chevron* in this latter group of cases, win rates for agencies were comparatively low (69%-81%). *Id.* at 54. Somewhat surprisingly, some agencies, such as the Federal Trade Commission, had a *higher* litigation success rate when courts did not apply *Chevron*. *Id.* at 54. Overruling *Chevron* will likely have differing effects within different circuits and across different agencies.

[125] *See generally* Robert Lafolla, *GOP-Picked Judges Take Hard Line on Regulations Post*-Chevron, BLOOMBERG LAW (Sep. 4, 2024), https://news.bloomberglaw.com/daily-labor-report/gop-picked-judges-take-hard-line-on-rules-after-chevrons-demise (finding that out of 26 cases decided after *Loper* agencies won only 4).

[126] Barnett & Walker, *supra* note 108, at 32.

[127] For a more detailed discussion, see *infra* "Implications for Executive Branch Agencies."

[128] Christopher J. Walker, Chevron *Inside the Regulatory State: An Empirical Assessment*, 83 FORDHAM L. REV. 703, 724 (2014).

[129] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2265 (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

[130] *Id.* at 2263.

interpretation is particularly fact-bound.[131] *Skidmore*, statutory delegations, and mixed questions of law and fact are discussed in more detail below.[132]

Some scholars have contended that *Chevron* may have saved lower courts time by permitting them to engage in meaningful review without having to start from scratch interpreting complex statutory regimes.[133] In the absence of the *Chevron* framework, it is possible that lower courts might turn to other doctrines that serve a similar function as *Chevron*.[134] Two of those doctrines—*Skidmore* and congressional delegations—are addressed in more detail below.[135]

The *De Novo* Standard of Review, Methods of Statutory Interpretation, and Statutory Ambiguity

Scholars have described judicial standards of review as a continuum with independent judgment or *de novo* review on one end and *Chevron* deference at the other.[136] The *Loper* decision fits this model, holding that a court applying the *de novo* review standard is required to exercise its independent judgment to determine the best interpretation of a federal statute.[137] Under the *de novo* standard of review, an agency receives no deference whatsoever.[138]

The *de novo* standard of review typically refers to the methods courts apply to independently determine the meanings of statutes. The Supreme Court in *Loper* (as well as *Chevron*) called these methods the "traditional tools of statutory construction."[139] The Court's reference to "traditional tools," however, masks significant debate over which methods of statutory interpretation are included in a court's traditional toolkit.[140] While the Court used this same phrase in *Chevron*, the importance of particular interpretive methods has changed since *Chevron*

[131] *Id.* at 2259, 2263.

[132] *See infra* "Policy Discretion, Mixed Questions of Law and Fact, and Arbitrary and Capricious Review;" "Skidmore Weight;" "Delegations from Congress."

[133] *See* Barnett & Walker, *supra* note 108, at 71; Thomas W. Merrill, *Response: Chevron's Ghost Rides Again*, 103 B.U. L. REV. 1717, 1738 (2023); Gary Lawson, *The Ghosts of Chevron Present and Future*, 103 B.U. L. REV. 1647, 1709 (2023).

[134] *See* Lisa Schultz Bressman, *Lower Courts After* Loper Bright, 31 GEO. MASON L. REV. 499, 504 (2024) (arguing "deference (of the controlling variety) is unlikely to disappear after *Loper Bright*").

[135] *See infra* "Skidmore Weight;" "Delegations from Congress."

[136] *See, e.g.*, Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 453–54 & n.10 (1989); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 971 & n.6 (1992).

[137] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2266 (2024).

[138] *See, e.g.*, Salve Regina College v. Russell, 499 U.S. 225, 238 (1991); Adams Fruit Co., Inc. v. Barrett, 494 U.S. 638, 650 (1990) (holding that the Court would not defer to an agency's interpretation of a judicial review provision); Denis v. Att'y Gen. of United States., 633 F.3d 201, 207–08 (3d Cir. 2011) (contrasting *Chevron* deference with *de novo* review).

[139] *Loper*, 144 S. Ct. at 2266; *see also* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 843 n.9 (1984); Am. Hosp. Assoc. v. Becerra, 596 U.S. 724, 739 (2022).

[140] *See, e.g.*, THE CHEVRON DOCTRINE, *supra* note 41, at 110 (explaining that use of legislative history "was the most obvious point of disagreement" over what tools are included in the traditional toolkit); Bostock v. Clayton Cty, 590 U.S. 644, 654–63 (2020) (explaining that the Court "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment"); *id.* at 685 (Alito, J., dissenting) (calling the majority's statutory analysis "a pirate ship ... sail[ing] under a textualist flag" but not adhering to textualist principles). *Compare* West Virginia v. EPA, 597 U.S. 697, 736 (2022) (Gorsuch, J., concurring) (endorsing the use of some clear statement rules such as the major questions doctrine as tools of statutory interpretation) *with* Biden v. Nebraska, 600 U.S. 477, 507 (2023) (Barrett, J. concurring) (noting that she "takes seriously" the claim that the major questions doctrine—described by Justice Gorsuch as a clear statement rule—is "inconsistent with textualism").

was decided.[141] Most notably, when *Chevron* was decided, the statutory interpretation method known as *textualism*—which primarily focuses on the text of a law rather than legislative purpose or prevailing societal values—was not as widely adopted by the federal courts as it is currently.[142] It is unlikely that courts will return to pre-*Chevron* methods of statutory interpretation regardless of the Court's consistent reference to "traditional tools" of statutory interpretation.

Methods of Statutory Interpretation

The *Chevron* Court referred to the "traditional tools" of statutory interpretation in its discussion of how a court should engage in a *Chevron* step one analysis (i.e., to determine whether a statute is clear). As a result, a court's step one analysis in many ways mirrored how courts approached statutory interpretation as a general matter outside of the *Chevron* framework. Sweeping away the *Chevron* framework did not inaugurate a new approach to statutory interpretation: The methods the courts had been using at step one of *Chevron* and in cases where *Chevron* did not apply at all will continue to apply to cases in which agency interpretations of law are at issue. How courts approach statutory interpretation may accordingly shed light on how courts will approach legal challenges to agency interpretations of statutes after *Loper*.

Despite some convergence toward a focus on the text of a statute over the past four decades,[143] there remains significant current debate among judges and scholars over the proper methods of statutory interpretation.[144] There are different theories of statutory interpretation, and each interpretive school has a distinct view of which tools courts should appropriately deploy when they seek to discern statutory meaning.[145] Some studies suggest that many judges do not subscribe to any particular method of statutory interpretation, instead using different methods in different

[141] *See* William N. Eskridge, et al., *Textualism's Defining Moment*, 123 COLUM. L. REV. 1611, 1612–26 (2023) (discussing the modern textualist revolution that began in earnest with Justice Scalia); John F. Manning, *Second-Generation Textualism*, 98 CAL. L. REV. 1287, 1287–98 (discussing the rise of textualism in the 1980s). *Compare* J.W. Bateson Co. v. United States ex rel. Bd. of Trs. of the Nat'l Automatic Sprinkler Indus. Pension Fund, 434 U.S. 586, 591 (1978) (concluding that "the authoritative Committee Reports" "leave[] no room for doubt about Congress' intent") *with* Epic Sys. Corp. v. Lewis, 584 U.S. 497, 523 (2018) (holding "legislative history is not the law. 'It is the business of Congress to sum up its own debates in its legislation,' and once it enacts a statute 'we do not inquire what the legislature meant; we ask only what the statute means.'" (quoting Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 396 (1951) (Jackson, J., concurring)). In fact, the Court in *Chevron* engaged in an extensive review of the legislative history of the Clean Air Act—the statute at issue in *Chevron*. *Chevron*, 467 U.S. at 851–53.

[142] *See generally* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 Colum. L. Rev. 1, 24 (2006) (discussing the origins of modern textualism in the 1980s and 1990s); William N. Eskridge, et al., *Textualism's Defining Moment* 123 Colum. L. Rev. 1611, 1611–16 (2023) (identifying earlier statutory interpretation methods and dubbing modern textualism "clearly ascendant and will remain so for the foreseeable future").

[143] Jeffrey A. Pojanowski, *Statutes in Common Law Courts*, 91 Tex. L. Rev. 479, 480 (2013) ("The dust from the Thirty Years' statutory interpretation wars may have settled and, while textualism has not won an unconditional surrender in the Supreme Court, it appears to have gained substantial territory before its truce with purposivism."); John F. Manning, *What Divides Textualists from Purposivists?*, 106 Colum. L. Rev. 70, 75 (2006) ("I argue here that textualism and purposivism do in fact share more conceptual common ground than textualists (myself included) have sometimes emphasized. Nonetheless, salient differences remain.... ").

[144] *See supra* note 140 and accompanying text.

[145] *See* CRS Report R45153, *Statutory Interpretation: Theories, Tools, and Trends*, by Valerie C. Brannon (2023) (discussing various approaches to statutory interpretation); *see also* Lisa Shultz Bressman, Chevron*'s Mistake*, 58 DUKE L.J. 549, 551 (2009) ("In applying *Chevron*, courts rely heavily on the dominant theories of statutory interpretation: intentionalism, purposivism, or textualism."). *See generally* John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 424 (2005) ("[W]hereas intentionalists believe that legislatures have coherent and identifiable but *unexpressed* policy intentions, textualists believe that the only meaningful collective legislative intentions are those reflected in the *public meaning* of the final statutory text.").

contexts.[146] Nonetheless, many (if not most) courts start their statutory interpretation analyses with the statutory text.[147] Moreover, there are several variants of textualism applied throughout the federal judiciary.[148] Many, however, share some common assumptions, such as that the words of a statute read in context are the best evidence of the meaning of the statute and that a court can identify the best meaning by resorting to rules of grammar and syntax, context, and canons of construction.[149]

A focus on text has consequences for which methods of statutory interpretation are considered valid. For example, judges who consider themselves textualists may discount the value of legislative history as poor evidence of the meaning of a statute because legislative history was not enacted through the legislative process as the text of the statute was.[150] They may turn to legislative history only when a court cannot resolve the meaning of a statute using other approaches or as a second order justification for an interpretation derived using more textualist methods.[151] Textualists may also turn to legislative history not as objective evidence of congressional intent but as evidence of ordinary meaning (i.e., how Congress used a statutory term).[152] Textualists are sometimes skeptical of methods of interpretation that impose judges'

[146] *See, e.g.*, Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298 (2018); James J. Brudney & Lawrence Baum, *Protean Statutory Interpretation in the Courts of Appeals*, 58 WM. & MARY L. REV. 681 (2017); Daniel M. Schneider, *Empirical Research on Judicial Reasoning: Statutory Interpretation in Federal Tax Cases*, 31 N.M. L. REV. 325, 338–51 (2001); Aaron-Andrew P. Bruhl, *Statutory Interpretation and the Rest of the Iceberg: Divergences between the Lower Federal Courts and the Supreme Court*, 68 DUKE L. J. 1, 56 (2018).

[147] *See, e.g.*, Merit Mgmt. Grp., LP v. FTI Consulting, Inc., 583 U.S. 366, 378 (2018) ("Our analysis beings with the text ... and we look to both 'the language itself and the specific context in which that language is used.'" (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997)); United States v. Magassouba, 544 F.3d 387, 404 (2d Cir. 2008) (laying out the traditional hierarchy of statutory interpretation tools, starting with plain text and context, and moving to canons of construction if the plain text is found to be ambiguous, and finally resorting to legislative history only if after the application of canons of construction the statute is still unclear); CGM, LLC v. BellSouth Telecomms, Inc., 664 F.3d 46, 53–54 (4th Cir. 2011) (quoting Graden v. Conexant Systems Inc., 496 F.3d 291, 295 (4th Cir. 2007)) ("We employ the usual tools of statutory interpretation. We look first at the text of the statute and then, if ambiguous, to other indicia of congressional intent such as the legislative history.").

[148] *See* William N. Eskridge, et al., *Textualism's Defining Moment*, 123 COLUM. L. REV. 1611, 1616–23 (2023) (summarizing debates among modern textualists).

[149] *See generally* Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 348 (2005); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 71, 91–92 (2006); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2119, 2135 (2016). Tools of statutory construction that focus on determining legislative intent have become somewhat more controversial since *Chevron* was decided but are sometimes still deployed. *Compare, e.g.*, Babbitt v. Sweet Home Chapter of Cmtys. for a Great Oregon, 515 U.S. 687, 698 (1995) ("[T]he broad purpose of the ESA supports the Secretary's decision to extend protection against activities that cause the precise harms Congress enacted the statute to avoid."); *with id.* at 726 (Scalia, J., dissenting) ("Deduction from the 'broad purpose' of a statute begs the question if it is used to decide by what *means* (and hence to what *length*) Congress pursued that purpose; to get the right answer to that question there is no substitute for the hard job (or, in this case, the quite simple one) of reading the whole text.").

[150] *See* Nelson, *supra* note 149, at 393–94.

[151] *See supra* note 147; *see also* Fischer v. United States, 144 S. Ct. 2176, 2186 (2024) (turning to "the history" of a criminal law provision to support the Court's textual analysis of a catchall phrase); Snyder v. United States 144 S. Ct. 1947, 1955 (2024) (turning to enactment history to support the Court's evaluation of the text of a bribery statute); *Astrue*, 566 U.S. at 553 (2012) (considering prior version of statute); INS v. Cardoza-Fonseca, 480 U.S. 421, 436–37, 441–42 (1987) (reviewing congressional record and rejection of Senate version of bill); THE CHEVRON DOCTRINE, *supra* note 41, at 108; *see also Cardoza-Fonseca*, 480 U.S. at 453 (Scalia, J., concurring) (disapproving of majority's use of legislative history because courts "are not free to replace [clear statutory language] with an unenacted legislative intent"). The *Chevron* decision itself, however, relied heavily on legislative history in coming to its conclusion about the meaning of the Clean Air Act. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 851–53 (1984).

[152] Bostock v. Clayton Cnty., 590 U.S. 644, 674–75 (2020) ("To ferret out such shifts in linguistic usage or subtle (continued...)

substantive values on the meaning of the text, such as clear statement rules or other substantive canons of construction.[153] As noted above, however, many judges take a more eclectic approach to statutory interpretation and may deploy these tools of interpretation at different times or in different ways.

In addition, some of the Supreme Court's more recent decisions have appeared to use older tools of statutory construction that were commonly used prior to *Chevron*. It was common prior to *Chevron* for courts to look to long-standing agency practice as evidence of a statute's meaning.[154] After *Chevron* was decided, there was some dispute over whether courts should continue to do so as part of the *Chevron* framework.[155] While the Court never entirely stopped referring to past agency practice,[156] more recently, the Court has appeared to rely on it more often.[157] The Court in *Loper* appeared to explicitly endorse past agency practice as an appropriate tool of statutory interpretation.[158] In *Loper*, for instance, the Court interpreted Section 706 of the APA by relying in part on the Department of Justice's long-standing interpretation of Section 706 set forth in a 1947 manual.[159] The *Loper* Court explicitly justified its use of past agency practice by citing *Skidmore*,[160] which identified a number of indicia to which a court may look to determine the persuasiveness of an agency's interpretation. Some of those indicia include the consistency of an agency's interpretation and whether the interpretation was issued contemporaneously with the

distinctions between literal and ordinary meaning, this Court has sometimes consulted the understandings of the law's drafters as some (not always conclusive) evidence."); Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2262 (2024) ("The text of the APA means what it says. And a look at its history if anything only underscores that plain meaning.").

[153] *See* CRS Legal Sidebar LSB11084, *Clear Statement Rules, Textualism, and the Administrative State*, by Benjamin M. Barczewski and Valerie C. Brannon (2023). A *substantive canon of construction* is a judicial presumption for or against certain outcomes in a case. *Id.* A *clear statement rule* is a type of substantive canon that represents a judicial presumption that courts should not interpret a statute a certain way unless Congress made a "clear statement" requiring that outcome. *Id.*

[154] THE CHEVRON DOCTRINE, *supra* note 41, at 34–37; Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 938 (2017).

[155] THE CHEVRON DOCTRINE, *supra* note 41, at 34–45, 134–37. Explicit reference to longstanding agency interpretations was somewhat rare post-*Chevron*. *See id.* at 137–38; *Cardoza-Fonseca*, 480 U.S. at 434–35; Barnhart v. Walton, 535 U.S. 212, 219–20 (2002); NLRB v. United Food & Com. Workers Union, 484 U.S. 112, 124 n.20 (1987); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 984–85, 1018–22 (1992) (finding in a study of the Court's opinions citing *Chevron* between 1984 and 2006 that the Court referred to the long-standing nature of an interpretation less often after *Chevron*). Justice Scalia took issue with the Court's reliance on past agency practice, arguing that after *Chevron* inquiries into past agency practice is "a relic of pre-*Chevron* days." *Barnhart*, 535 U.S. at 226 (Scalia, J., concurring in part and concurring in the judgment).

[156] *See, e.g.*, *Barnhart*, 535 U.S. 212, 219–20 (2002) (noting the agency's interpretation was "longstanding"); Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs 531 U.S. 159, 168 (2001) (looking to agency's original interpretation of a federal statute); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 145–46 (2000) (looking to prior agency interpretations of the governing statute, as announced in congressional hearings).

[157] *See, e.g.*, West Virginia v. EPA, 597 U.S. 697, 726–27 (2022) (turning to EPA's long-standing interpretation of a provision of the Clean Air Act as evidence of statutory meaning); Biden v. Nebraska, 600 U.S. 477, 497 (2023) (surveying the Department of Education's interpretation of a statute over time as evidence of the statute's meaning); Am. Hosp. Assoc. v. Becerra, 596 U.S. 724, 729 (2022) (noting that the Department of Health and Human Services consistently relied an interpretation of the Medicare Act for decades); Nat'l Fed. of Indep. Bus. v. Occupational Safety and Health Admin., 595 U.S. 109, 119–20 (2022) (noting the novelty of the agency's interpretation of a statute in finding that it lacked the authority it claimed); THE CHEVRON DOCTRINE, *supra* note 41, at 34–45 (discussing the prevalence of the Court resorting to past agency practice in the decades prior to *Chevron*).

[158] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2262 (2024) (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); United States v. Am. Trucking Ass'ns, 310 U.S. 534, 549 (1940)) ("[I]nterpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning.").

[159] *Id.* (citing Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act 108 (1947)).

[160] *Id.*

statute.[161] *Skidmore* predated the APA by two years and, in the Court's view, forms part of the general background norms of judicial review that were codified in Section 706 of the APA.[162]

Statutory Ambiguity

Related to the broader debates in the legal community over the proper methods of statutory interpretation, the majority and the dissent in *Loper* split over whether statutory ambiguity could still exist even after the application of the traditional tools of statutory interpretation. The existence of statutory ambiguity was a central assumption of the *Chevron* framework.[163] *Chevron*'s first step required a court to apply the traditional tools of statutory construction to determine whether the statute at issue was clear or ambiguous.[164] The implicit assumption in the *Chevron* framework was that there would be some statutes that, even after the application of all the generally accepted methods of statutory interpretation, may not yield clear answers. In these situations, the *Loper* dissent argued that "Congress's instructions have run out."[165] The choice between different reasonable interpretations of an ambiguous statute was, according to the dissent's view, more akin to policy than to law.[166] Where statutory ambiguity existed, the Court in *Chevron* determined that the judiciary should stay out of making policy.[167] Accordingly, the APA's charge that courts "decide all relevant questions of law" did not conflict with *Chevron* on this account, because instances where courts deferred were not questions of law.[168]

The *Loper* Court rejected the claim that statutory ambiguity implies an absence of law.[169] For the majority, law never "run[s] out."[170] Questions of the meaning of a statute are, for the *Loper* Court, always questions of law susceptible to resolution by the application of the tools of statutory interpretation.[171] "[S]tatutes, no matter how impenetrable, do—*in fact, must*—have a single, best meaning" that is "fixed at the time of enactment."[172] In *Loper* the Court left unsaid which tools

[161] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("We consider that the rulings, interpretations and opinions of the Administrator under [the Fair Labor Standards] Act ... constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. 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.").

[162] *Loper*, 144 S. Ct. at 2262, 2265.

[163] *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984). During the four decades between *Chevron* and *Loper*, judges and scholars often debated how clear a statute needed to be in order for a court to resolve the case at step one of *Chevron* or move to step two. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L. J. 511, 520 ("Here, of course, is the chink in *Chevron*'s armor—the ambiguity that prevents it from being an absolutely clear guide to future judicial decisions (though still a better one than what it supplanted). How clear is clear?"); Jeffrey A. Pojanowski, *Without Deference*, 81 MO. L. REV. 1075, 1082 (2016) (noting "lurking questions about how hard courts ought to work before deciding whether a statute is clear"); Kavanaugh, *supra* note 149, at 2138; Ryan D. Doerfler, *How Clear is Clear?*, 109 VA. L. REV. 651 (2023). The question in *Loper*, however, shifted from how to identify statutory ambiguity to whether statutory ambiguity even exists after the application of the tools of statutory interpretation. *Loper*, 144 S. Ct. at 2266.

[164] *Chevron*, 467 U.S. at 842–43.

[165] *Loper*, 144 S. Ct. at 2294 (Kagan, J., dissenting).

[166] *Id.*

[167] *Chevron*, 467 U.S. at 865–66; *see also* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2373 (2001) (arguing the "*Chevron* deference rule had its deepest roots in a conception of agencies as instruments of the President" and is best justified as ensuring that policymaking functions track political accountability).

[168] *Loper*, 144 S. Ct. at 2302 (Kagan, J., dissenting).

[169] *Id.* at 2266–68.

[170] *Id.* at 2266.

[171] *Id.*

[172] *Id.* (emphasis added).

produce the most persuasive evidence of statutory meaning—for example, the text of the statute, statutory purposes, or legislative history.[173] It is likely, given the views of a majority of Justices expressed in other opinions, that they would consider themselves textualists.[174] Although textualists typically focus on what is within the four corners of the statute, modern textualists also take into account certain types of "context."[175] Context can be as narrow as the context in which a contested word or phrase is used in the statute itself[176] or as broad as general constitutional norms.[177] Falling somewhere between those two poles, statutory structure,[178] enactment history[179] and prior judicial precedent[180] can also supply "context" for the meaning of a statute. Judges and scholars, however, debate the proper use of context, including how widely courts should look for context and under what circumstances some forms of context should be used.[181]

Regardless of which evidence is used to determine the meaning of a statute, the Court's statement that a statute's meaning (however determined) is fixed at a particular time—the time of enactment—implies that post-enactment policy considerations by, for example, agency personnel implementing the statute (as happened under *Chevron*) and possibly by courts interpreting the statute may be inappropriate as a means to provide meaning to a statute. If this reading of the *Loper* decision is correct, it may call into question certain tools of statutory construction (e.g., substantive canons of construction) that themselves are triggered by ambiguity and impose post-enactment and extratextual value choices on a statute's text.[182]

In a footnote in her dissent, Justice Kagan took up this issue, arguing that the majority's view that *Chevron* was based on an erroneous presumption when a court identified an ambiguity may call into question other presumptions that are likewise triggered by "a congressional lack of

[173] *See id.*

[174] Bostock v. Clayton County, 590 U.S. 644, 654 (2020) ("This court normally interprets a statute in accord with the ordinary public meaning of its terms.... "); Food Mktg. Inst. v. Argus Leader Media, 588 U.S. 427, 436 (2019) ("In statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself."); Kevin Tobia, et al. *Statutory Interpretation from the Outside*, 122 COLUM. L. REV. 213, 216 (2022) (noting that a majority of Supreme Court justices adhere to textualist principles).

[175] *See, e.g.*, Biden v. Nebraska, 600 U.S. 477, 511–12 (2023) (Barrett, J., concurring) (discussing the importance of "context" in textualist statutory interpretation methodology).

[176] *See* Brown v. United States, 602 U.S. 101, 112 (2024) (relying in part on the provisions surrounding the contested term as evidence of its meaning); John Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2457 (2003).

[177] Snyder v. United States, 603 U.S. 1, 13 (2024) (holding that notions of federalism point in favor of a particular interpretation of a statute); *see also Biden*, 600 U.S. at 515 (Barrett, J., concurring) (arguing that the major questions doctrine "makes eminent sense in light of our constitutional structure, which is itself part of the legal context").

[178] *See, e.g.*, Becerra v. Empire Health Found., 597 U.S. 424, 434 (holding that the structure of the Medicare Act supported the agency's interpretation); *Snyder*, 603 U.S. at 12 (relying in part on statutory structure as evidence of statutory meaning).

[179] *See, e.g.*, Becerra v. San Carlos Apache Tribe, 602 U.S. 222, 238 (2024) (recounting the enactment history of the contested provision of the statute and relying on it in part as evidence of statutory meaning); *Snyder*, 603 U.S. at 12 ("[T]he statutory history ... reinforces [our] textual analysis.").

[180] *See, e.g.*, *Brown*, 602 U.S. at 111–12 (relying in part on prior judicial precedent to determine the meaning of a statute).

[181] *See, e.g.*, William N. Eskridge, et al., *Textualism's Defining Moment*, 123 COLUM. L. REV. 1611, 1660 (2023) (surveying disputes among textualists about the proper use of "context").

[182] *See, e.g.*, Iancu v. Brunetti, 588 U.S. 388, 397 (2019) (holding that the constitutional avoidance canon applies only where a statute is found to be ambiguous); Richlin Sec. Serv. Co. v. Chertoff, 553 U.S. 571, 590 (2008) (holding that the Court need not apply the sovereign immunity canon because the statute was not ambiguous); South Carolina v. Catawba Indian Tribe, Inc. 476 U.S. 498, 506 (1986) (holding that an ambiguity in a statute must exist before the court resorts to the Indian canon); Hassett v. Welch, 303 U.S. 303, 314 (1938) ("Resort is had to canons of constructions as an aid in ascertaining the intent of the Legislature.... The matter is, we think, involved in sufficient ambiguity to warrant our seeking such aid.").

direction."[183] In Justice Kagan's view, like *Chevron*, these presumptions both rely on identifying a statutory gap or ambiguity and impose post-enactment values on the meaning of a statute.[184] The majority's skepticism of the existence of ambiguity as a trigger for *Chevron* may prompt courts to revisit some of these other presumptions.[185]

Whether and to what extent lower courts embrace the Court's view of statutory ambiguity is yet to be seen. The Court's skepticism of the existence of ambiguity, if taken at face value by the lower courts, may have implications for how courts approach statutory interpretation in general and which tools of statutory construction are considered applicable in particular. For instance, as described above, substantive canons are triggered only by ambiguity.[186] Substantive canons are judicial presumptions that impose certain substantive values on the outcome of a case.[187] Unlike semantic canons, substantive canons are not derived from general assumptions about how ordinary speakers use English or how Congress uses statutory terms.[188] For instance, the federalism canons serve to preserve the federal-state balance, requiring Congress to make a clear statement before intruding on state authority.[189] As a result, substantive canons are viewed by certain judges with some trepidation because they impose judicial values that may not be represented in the text of the statute.[190]

Moreover, the application of *Skidmore* and other deference doctrines such as *Auer* deference, which are discussed in more detail below, may also be affected by the Court's skepticism of ambiguity.[191] *Skidmore*, like some canons of construction, has often been applied where a court is unable, after using the tools of statutory construction, to resolve a question of statutory

[183] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2297 n.1 (2024) (Kagan, J., dissenting) (quoting Boechler v. Commissioner, 596 U.S. 199, 203 (2022)) (citing to the presumption against extraterritoriality, the presumption against retroactivity, the presumption against implied repeal, and the "(so far unnamed) presumption against treating a procedural requirement as 'jurisdictional'"); *see also* Abbe R. Gluck, *Overruling Chevron Without a Coherent Theory of Statutory Interpretation and the Court-Congress Relationship*, 62 HARV. J. ON LEG. 20 (2024) (arguing that *Loper* calls into question many tools of statutory construction that rely on ambiguity as a trigger and a presumption about congressional intent).

[184] *Loper*, 144 S. Ct. at 2297.

[185] One potential way courts could respond is along the lines suggested by then-Judge Kavanaugh. Kavanaugh, *supra* note 4, at 2144. Prior to joining the Court, then-Judge Kavanaugh wrote that, rather than determining whether a statute is clear or ambiguous, a court should identify the "best reading" of a statute. *Id.* Once the best reading has been identified, the court "can apply—openly and honestly—any substantive canons (such as plain statement rules of the absurdity doctrine) that may justify departure from the text." *Id.*

[186] *See id*.

[187] *See* Barczewski & Brannon, *supra* note 153 (discussing clear statement rules and substantive canons of construction).

[188] CRS Report R45153, *Statutory Interpretation: Theories, Tools, and Trends*, by Valerie C. Brannon (2023).

[189] *Id.* at 57.

[190] Biden v. Nebraska, 600 U.S. 477, 507–08 (2023) (Barrett, J. concurring) (discussing reactions to substantive canons); Barczewski & Brannon, *supra* note 153 (discussing the reaction some textualist judges and scholars have to substantive canons); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 110 (explaining that substantive canons "pose[] a significant problem" for textualists); Robert A. Katzmann, JUDGING STATUTES 52 (2014) ("[W]iping out legislative history, in the face of empirical evidence that Congress views it as essential in understanding its meaning, leaves us largely with a canon-based interpretive regime that may not only fail to reflect the reality of the legislative process, but may also undermine the constitutional understanding that Congress's statutemaking should be respected as a democratic principle."); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 870 (1992) (arguing legislative history is more accessible than are the canons to give notice of statutory meaning).

[191] *See infra*, "*Auer* (*Kisor*) Deference."

meaning.[192] The same goes for *Auer* deference.[193] Like *Chevron*, *Auer* deference applies only where a court first identifies an ambiguity.[194] Thus, if it is not possible for ambiguity to exist after applying the traditional tools, *Skidmore* and *Auer* deference would never come into play. Whether these doctrines and tools of statutory construction will play a significant role or even persist in future cases is unclear.

It is possible to read the *Loper* majority's view more modestly. The Supreme Court stressed that courts should "*use every tool* at their disposal to determine the best reading of the statute."[195] Tools such as substantive canons, *Auer*, and *Skidmore* can help resolve statutory ambiguities and at least superficially appear to fit within the majority's view that questions about the meaning of statutes should be resolved through legal means.[196] Under this view, the Court was simply reiterating that questions of the meaning of law are legal questions to be resolved by *any* means peculiar to courts.[197] This more modest view stands in some tension with the Court's description of a statute as having a "single best" meaning "fixed at the time of enactment."[198]

Skidmore Weight

The Supreme Court cited *Skidmore* several times in the *Loper* decision.[199] The Court's frequent invocation of *Skidmore* appears to endorse courts' consideration of agency practice as potential evidence of the best meaning of a statute.[200]

Prior to *Loper*, *Chevron* deference applied only to an interpretation that had been issued by an agency that possessed statutorily delegated authority to regulate with the force of law and used that delegated authority to announce its interpretation.[201] Interpretations advanced in non-legally binding forms—such as guidance documents, policy statements, or interpretive rules—were not eligible for *Chevron* deference.[202] In the 2001 case *United States v. Mead*, the Supreme Court held

[192] Hickman & Krueger, *supra* note 62, at 1254–55 (2007) (noting that courts typically find statutes to be ambiguous or less than clear before turning to *Skidmore*). The Court in *Loper* cited favorably to *Skidmore* as a potential tool to resolve statutory ambiguity but did not address under what circumstances a court should resort to *Skidmore*. Given its statements about ambiguity, it is not clear how much of a rule *Skidmore* will play in future cases. Some lower court cases decided after *Loper* appear to embrace the view that *Skidmore* applies only if the court cannot determine the meaning of statute by other means. *See infra*, "Post-Loper Applications of Skidmore."

[193] *See* Kisor v. Wilkie, 588 U.S. 558, 573 ("[T]he possibility of deference can arise only if a regulation is genuinely ambiguous.").

[194] *Id.*

[195] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2266 (2024).

[196] *Id.* at 2266–68. At least one commentator has taken a similar view of the Court's statements in *Loper*. *See* Charles F. Capps, *Does the Law Ever Run Out?*, 100 NOTRE DAME L. REV. (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4908863. Some scholars have classified deference doctrines as canons of statutory construction rather than binding precedent. Connor N. Raso & William N. Eskridge, Jr., Chevron *as a Canon, Not a Precedent: an Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1765 (2010).

[197] *See Loper*, 144 S. Ct. at 2266–68.

[198] *Id.* at 2266.

[199] *Id.* at 2259, 2262, 2265, 2267.

[200] *See id.* at 2267 (holding agency "expertise has always been one of the factors which may give an Executive Branch interpretation particular 'power to persuade, if lacking power to control.'" (quoting Skidmore v. Swift & Co. 323 U.S. 134, 140 (1944))).

[201] United States v. Mead Corp., 533 U.S. 218, 234 (2001).

[202] *Id.*

that even where an agency interpretation, because of its lack of the force of law, was ineligible for *Chevron*, it may be eligible to be evaluated pursuant to *Skidmore*.[203]

Chevron and subsequent cases refining its application, such as *Mead*, accordingly created a two-tiered standard of review for agency interpretations.[204] Agency interpretations that carried the force of law were eligible for evaluation under *Chevron*, while every other interpretation by an agency was potentially eligible for treatment pursuant to *Skidmore*.[205] By overruling *Chevron*, *Loper* collapsed this two-tiered system into a single standard of review, with the option for courts to evaluate an agency's interpretation pursuant to *Skidmore* where appropriate.[206] As a result, any agency interpretation is now potentially eligible to be evaluated under *Skidmore*, although, given the Court's statements regarding ambiguity, it is not clear how much of a role *Skidmore* will play in the future.[207]

Skidmore is considered to be less deferential than *Chevron* is.[208] Just how deferential *Skidmore* is, however, has been the subject of some debate.[209] The Court in *Mead*, for example, described *Skidmore* as providing "some deference"[210] to agency interpretations, though not "the same deference as [interpretations] that derive from the exercise of delegated lawmaking powers."[211] At bottom, unlike *Chevron*, *Skidmore* is understood to permit—but not require—a court to adopt an agency's interpretation.[212] *Skidmore* provided a framework through which a court might give special consideration to an agency's interpretation.[213]

It is still not entirely clear whether application of *Skidmore* post-*Loper* will resemble the courts' application of *Skidmore* during the time of *Chevron*. Only a relatively small number of cases have addressed *Skidmore* post-*Loper*. Moreover, prior to *Loper*, *Skidmore* typically applied only to agency interpretations that did not carry the force of law. In practice, this scope meant that most agency interpretations evaluated pursuant to *Skidmore* were not promulgated through notice and comment rulemaking and as a result may have lacked the thorough explanations that accompany

---

[203] *Id.*

[204] *Id.*; Thomas W. Merrill & Kristen E. Hickman, Chevron's *Domain*, 89 GEORGETOWN L.J. 833, 863 (2001) (discussing the continued existence of *Skidmore* as a default deference doctrine when *Chevron* did not apply); Peter L. Strauss, *"Deference" is too Confusing—Let's Call them "*Chevron *Space" and "*Skidmore *Weight"*, 112 COLUM. L. REV. 1143, 1146 (2012) (identifying the different circumstances in which *Chevron* and *Skidmore* applied).

[205] *See Mead*, 533 U.S. at 234; Christensen v. Harris County, 529 U.S. 576, 586–88 (2000).

[206] *See Loper*, 144 S. Ct. at 2267.

[207] *See id. See also supra*, "Statutory Ambiguity." At least one scholar has argued that *Loper*, by doing away with *Mead*'s focus on agency procedures as a threshold to being eligible to be evaluated under the *Chevron* framework, may open the door to courts paying "due respect" to "a type of specialized lawyerly expertise that comes with extensive executive branch experience, such that agency legal briefs, ... can still warrant special respect in court." Adam Crews, *Navigating the New* Loper Bright *Regime*, 34 WIDENER COMMONWEALTH L. REV. 41, 64–65 (2024).

[208] *Mead*, 533 U.S. at 234–35; Merrill, *supra* note 204, at 860–63. *But see* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L. J. 1083, 1099 (2008) (finding between 1983 and 2005 agencies won 76.2% of cases when the Supreme Court applied *Chevron* and 73.5% when the Court applied *Skidmore*).

[209] Hickman & Krueger, *supra* note 62, at 1251 (noting that some have argued that *Skidmore* requires nothing more than "independent judgment," while others have argued that *Skidmore* is "a type of deference that varies in extent from case to case on a sliding scale").

[210] *Mead*, 533 U.S. at 227.

[211] Martin v. Occupational Safety and Health Review Comm'n, 499 U.S. 144, 157 (1991).

[212] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2267 (2024) ("Such expertise has always been one of the factors which may give an Executive Branch interpretation particular 'power to persuade, if lacking power to control.'" (quoting Skidmore v. Swift & Co. 323 U.S. 134, 140 (1944))).

[213] Strauss, *supra* note 204, at 1145 ("'*Skidmore* weight' addresses the possibility that an agency's view on a given statutory question may in itself warrant respect by judges who themselves have ultimate interpretive authority.")

agency actions promulgated through notice and comment. By making all agency interpretations potentially eligible for treatment under *Skidmore*, an agency's chance of prevailing in court on its preferred statutory interpretation may increase compared to win rates under *Skidmore* prior to *Loper*. This could be true because some number of interpretations promulgated through notice and comment rulemaking will likely include more thorough explanations of agencies' positions.[214] Nonetheless, empirical analyses of *Skidmore*'s effect on the outcome of cases and how courts applied it prior to *Loper* may provide clues as to what the application of *Skidmore* may look like in the years to come.

Analyses of *Skidmore* Pre-*Loper*

The way courts applied *Skidmore* before *Loper* may help illuminate how courts might approach *Skidmore* going forward. As an initial matter, *Skidmore* has received far less attention from the courts in the past decades than did *Chevron* and may need additional development by the courts to refine its application. Nonetheless, scholars studying judicial approaches to *Skidmore* were able to identify certain trends in its application. A 2007 study of cases applying *Skidmore* prior to the *Loper* decision identified significant variability in the ways in which courts applied *Skidmore*.[215] The study identified two conceptions of *Skidmore*.[216] In one conception—dubbed the "independent judgment conception"—the *Skidmore* standard evaluates an interpretation as persuasive on its merits or its rightness.[217] This view tends to discount *Skidmore*'s contextual factors, such as the long-standing nature of the interpretation.[218] "In effect, [under this view] *Skidmore* directs courts to treat the agency's view just as it would the view of any litigant."[219]

The Court's decision in *Christensen v. Harris County* exemplifies the independent judgment conception.[220] In that case, the Court was called on to evaluate a Department of Labor (DOL) interpretation of the Fair Labor Standards Act.[221] Although the Court found the statute silent on the question at hand, it began with an independent evaluation of the statute's text to find the "better" reading of the statute.[222] The Court's conclusion ran counter to the agency's

[214] *See* Kristin E. Hickman, *Anticipating a New Modern* Skidmore *Standard*, DUKE LAW JOURNAL ONLINE 10–11 (forthcoming 2025) (predicting that agency win rates under *Skidmore* in challenges to their rulemakings may approach the win rates agencies enjoyed under *Chevron*).

[215] Hickman & Krueger, *supra* note 62, at 1251–52. Additionally, empirical analyses prior to *Loper* confirm that *Skidmore* results in less deference (measured by agency win rates) than *Chevron* did. In a different study of more than 1,000 published decisions of the federal courts of appeals decided between 2003 and 2013, the authors found that agency interpretations prevailed 77.4% of the time when a court applied *Chevron* but only 56% of the time when a court applied *Skidmore*. Barnett & Walker, *supra* note 108, at 5–6. As with *Chevron*, agencies prevailed at different rates under *Skidmore* in different circuits. For example, agencies only won 25% of the time in the Tenth Circuit, 50% of the time in the Sixth and Ninth Circuits, and 100% of the time in D.C. and Eighth Circuits. *Id.* at 44 n.228. The study authors note that their findings on win rates in agency rule challenges under *Skidmore* are in line with earlier studies of the application of *Skidmore*. *Id.* at 31, n.178. Earlier studies found affirmance rates of 55.1% in 1965, 60.6% in 1975, and 60.4% in 2001 to 2005. *Id.* (citing Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 84 (2011)). It should be noted, however, that the sample size for cases only applying *Skidmore* is small and accordingly may skew to the extremes in certain instances. *Id.* at 44 n.228.

[216] Hickman & Krueger, *supra* note 62, at 1252–55.

[217] *Id.* at 1252.

[218] *Id.* 1253.

[219] *Id.*

[220] *Id.*; Christensen v. Harris County, 529 U.S. 576, 583 (2000).

[221] *Christensen*, 529 at 578–79.

[222] *Id.* at 582–86.

interpretation.[223] Only then did the Court turn to *Skidmore*.[224] In applying *Skidmore*, the Court ignored *Skidmore*'s contextual factors, finding the agency's interpretation "unpersuasive" compared with its own interpretation.[225]

There is some question as to whether the independent judgment conception differs from finding that a statute has a clear meaning.[226] Some see the independent judgment conception as amounting to a court finding the statute clear.[227] In these cases, *Skidmore* takes on a subordinate role to other tools of statutory interpretation rather than extending respect.[228] The 2007 study found that the independent judgment conception represented the minority view in the lower courts, with 18.9% of the cases evaluated applying *Skidmore* in this way.[229]

The 2007 study identified a second approach it dubbed the "sliding-scale conception."[230] Under this view, application of *Skidmore* yields varying degrees of deference (or weight) to an agency's interpretation based on a court's evaluation of *Skidmore*'s contextual factors.[231] "The sliding-scale model … counsels special consideration of agency interpretations that courts do not necessarily afford to the views of other litigants."[232] Describing this approach, the Supreme Court explained that *Skidmore* "has produced a spectrum of judicial responses, from great respect on one end to near indifference at the other."[233] What differentiates it from the independent judgment conception is that, although applying the sliding-scale approach may result in a court giving little to no weight to an agency interpretation, the court treats the agency's interpretation as at least potentially deserving of greater respect than that of an ordinary litigant after evaluating *Skidmore*'s contextual factors.[234] The 2007 study found that the sliding-scale conception was by far the most commonly used by the lower courts, accounting for 74.5% of all the uses of *Skidmore* in the study.[235] While it was the most commonly applied approach to *Skidmore* in the 2007 study, the study authors noted that the Supreme Court had "not offered firm rules" for the application of *Skidmore* or provided an exhaustive list of factors for courts to consider in applying *Skidmore*.[236]

---

[223] *Id.*

[224] *Id.* at 587.

[225] *Id.*

[226] Hickman & Krueger, *supra* note 62, at 1254 (discussing differing views of *Skidmore*).

[227] *Id.*

[228] *Id.*

[229] *Id.* at 1271. The independent judgment conception may have had greater purchase at the Supreme Court. *See, e.g.*, *Christensen*, 529 U.S. at 587; Yates v. Hendon, 541 U.S. 1, 17–18 (2004) (finding agency guidance document "accords" with the Court's interpretation of the statute based on other methods); Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 448–50 (2003) (finding the agency's interpretation the same as the Court's only after engaging in its own statutory interpretation). As noted above, the Supreme Court has, in general, been far less deferential to agency interpretations than the lower courts have. *See* William Eskridge & Lauren Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations From* Chevron *to* Hamdan, 96 GEO. L. J. 1083, 1099 (2008).

[230] Hickman & Krueger, *supra* note 62, at 1255.

[231] *Id.* at 1255–56.

[232] *Id.* at 1256.

[233] United States v. Mead Corp., 533 U.S. 218, 228 (2001) (citing Aluminum Co. of Am. v. Central Lincoln Peoples' Util. Dist., 467 U.S. 380, 389–390 (1984)).

[234] Hickman & Krueger, *supra* note 62, at 1255.

[235] *Id.* at 1271.

[236] *Id.* at 1257. The study authors identified a number of different factors that courts used in their *Skidmore* analyses: thoroughness, formality, validity, consistency, agency expertise, longevity, and contemporaneity. *Id.* at 1281–91. As (continued...)

Post-*Loper* Applications of *Skidmore*

As of December 2024, there are only a handful of cases addressing the application of *Skidmore* since the *Loper* decision.[237] In an early post-*Loper* example of the independent judgment approach, the U.S. Court of Appeals for the Fifth Circuit in *Restaurant Law Center v. Department of Labor* held that although courts should carefully consider long-standing and contemporaneous interpretations, those considerations never have "the power to control."[238] Rather, the court found that the statute clearly resolved the case and that *Skidmore*'s contextual factors could not outweigh the clear text of the statute.[239] The court's approach is consistent with the application of *Skidmore* prior to *Loper*.[240] Nevertheless, the number of cases applying the principles set out in *Loper* is still quite small. It may take some time before trends in the application of *Skidmore* can be identified.

Conversely, a handful of cases decided after July 2024 appear to have approached the application of *Skidmore* akin to the sliding-scale approach discussed above. In these cases, the courts, although not always ruling in favor of the agencies, engaged with the *Skidmore* indicia of persuasiveness as a way to measure the weight the agencies' interpretations should be given. In one case, the federal district court for the Northern District of Ohio found that a DOL regulation had the "power to persuade" based largely on its thoroughness and validity.[241] The court found the regulation was the product of "thorough consideration" during the notice and comment process and that the "reasoning behind the regulation is valid."[242] In another case from the U.S. Court of Appeals for the Eleventh Circuit, the court found another DOL interpretation "persuasive" because of its consistency over time.[243] DOL, the court found, had maintained the same interpretation of the Fair Labor Standards Act for 80 years.[244] Neither case, however, addressed whether a court must find the statute ambiguous before turning to *Skidmore*'s contextual factors.

---

noted above, prior to *Chevron*, courts reviewing agency interpretations would often give weight to long-standing and contemporaneous interpretations. *See* THE CHEVRON DOCTRINE, *supra* note 41, at 134–37. Prior to *Chevron*, courts also sometimes looked to whether Congress had reenacted the relevant statute after the agency had adopted an interpretation of the statute. *See, e.g.*, United States v. Cerecedo Hermanos, 209 U.S. 337, 339 (1908) ("[T]he re-enactment by Congress, without change, of a statute, which had previously received long continued executive construction, is an adoption by Congress of such construction."); *see also* Kristin E. Hickman, *Anticipating a New Modern* Skidmore *Standard*, DUKE LAW JOURNAL ONLINE at 6 (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4941144 (discussing *Skidmore* factors).

[237] In an evaluation of the first twenty cases citing *Loper*, one media source found that only one cited *Skidmore* and only to hold that *Skidmore* did not apply. Robert LaFolla, *Courts Show Little Interest in* Skidmore *as a* Chevron *Alternative*, BLOOMBERG LAW (Jul. 29, 2024), https://news.bloomberglaw.com/daily-labor-report/courts-show-little-interest-in-skidmore-as-a-chevron-alternative.

[238] 120 F.4th 163, 174 (5th Cir. 2024) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

[239] *Id.*

[240] *See* Kristin E. Hickman, *Anticipating a New Modern* Skidmore *Standard*, DUKE LAW JOURNAL ONLINE at 8 (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4941144 (noting that in addition to the Fifth Circuit, the U.S. Courts of Appeals for the Second, Third, Eighth, Ninth, Federal, and D.C. Circuits have all held that *Skidmore* applies when interpreting an ambiguous statute).

[241] Harding v. Steak N Shake, Inc. No. 1:21-cv-1212, 2024 WL 3833341, at *8 (N.D. Ohio Aug. 15, 2024).

[242] *Id.*

[243] Perez v. Owl, Inc., 110 F.4th 1296, 1307 (11th Cir. 2024).

[244] *Id.* Other notable cases where *Skidmore* was discussed include Gonzales & Gonzales Bonds & Ins. Agency, Inc. v. DHS, 107 F.4th 1064, 1085 (9th Cir. 2024) (Johnstone, J., concurring) (arguing that the Department of Homeland Security's interpretation of the Vacancies Reform Act is persuasive because it was "thorough, reasoned, and consistent"); In re MCP No. 185, No. 24-7000, 2024 WL 3650468, at *6 (6th Cir. Aug. 1, 2024) (Sutton, C.J., concurring) (arguing that the Federal Communications Commission's interpretation of "common carrier" to include (continued...)

The U.S. Court of Appeals for the Ninth Circuit has also begun applying *Skidmore*. In an appeal decided in September 2024, a panel of the Ninth Circuit applied *Skidmore* in what appears to be a highly deferential way.[245] The appeal arose from a decision of the Bureau of Immigration Appeals (BIA) interpreting the meaning of *crimes involving moral turpitude* found in the Immigration and Nationality Act.[246] The Ninth Circuit concluded that BIA's interpretation was "entitled to" *Skidmore* deference.[247] The court concluded that BIA's interpretation was entitled to "deference" because it was "thorough and well-reasoned," "consistent with judicial precedent," and "consistent with the generic definition of theft."[248] The court did not determine whether BIA's interpretation was the best interpretation as the Supreme Court directed in *Loper*, nor did the court engage in its own statutory analysis.[249] The Ninth Circuit's decision was announced in a reported decision, which will have binding effect on future Ninth Circuit panels and the district courts within the geographic bounds of the Ninth Circuit. It is not clear whether the Ninth Circuit's more deferential approach to *Skidmore* will be applied in future cases. More broadly, it will take some time for any trends to emerge in how the courts are (or are not) applying *Skidmore*.

Delegations from Congress

Following *Loper*, the judiciary will also confront questions about whether and to what extent Congress has delegated authority to an agency. If the primary question courts faced applying the *Chevron* framework was whether the statute was ambiguous, one of the most important questions courts will face under *Loper* is whether Congress delegated authority to the agency to resolve the question at issue in the case. As the Supreme Court held in *Loper*, "[i]n a case involving an agency, of course, the statute's meaning may well be that the agency is authorized to exercise a degree of discretion."[250]

As discussed previously, the Court in *Loper* laid out a handful of examples to illustrate where Congress had delegated certain powers to an agency. In one set of examples, the Court pointed to statutes that expressly delegated to agencies the power to define statutory terms.[251] In another set of examples, the Court cited statutes that delegated discretionary regulatory authority to agencies.[252] In a third category, the Court explained that Congress sometimes delegates to agencies the authority to "fill up the details" of statutory schemes.[253] The Court appears to have treated these categories as illustrative, not intending to furnish an exhaustive list of ways in which Congress might delegate authority to an agency.[254]

The Court left open whether delegations must be express or whether courts could recognize implied delegations. At least one commentator has argued that the best understanding of the Court's opinion is that although the Court did away with *Chevron*'s general presumption that ambiguities are delegations of interpretive authority, it did not state that all delegations must be

internet service providers under the Telecommunications Act was not entitled to respect because its interpretation was inconsistent across different presidential Administrations).

[245] Lopez v. Garland, 116 F.4th 1032 (9th Cir. 2024).

[246] *Id.* at 1037 (citing 8 U.S.C. § 1227(a)(2)(A)(ii)).

[247] *Id.* at 1041.

[248] *Id.* at 1040–41.

[249] *Id.*

[250] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2263 (2024).

[251] *Id.* at 2263 n.5.

[252] *Id.* at 2263 n.6.

[253] *Id.* at 2263 (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825)).

[254] *See id.*

express.[255] For example, this commentator argued, delegations to "fill up the details" "might be discerned not from express delegation, but simply from Congress leaving essential details incompletely specified."[256] To read *Loper* to require express delegations would, this argument goes, cut against a background principle of statutory interpretation that holds that "what a legislature may do explicitly, it may do implicitly."[257] Whether and to what extent courts will recognize implicit delegations is yet to be seen. Post-*Loper* decision and as of the time of this writing, few courts have addressed the delegation issue in any depth.[258]

More fundamentally, in light of the Court's discussion of congressional delegations, some have questioned whether the *Loper* decision changed much at all. One law professor has argued that the Court's acknowledgement that courts must continue to respect statutory delegations from Congress has "recreated" *Chevron* "under a different label: '*Loper Bright* delegation.'"[259] Others have argued that something like *Chevron* deference may be inevitable.[260] One reason that *Chevron* likely took on such an important role in the lower courts is the differential capacity of the Supreme Court and the lower federal courts to engage in independent review of statutory interpretations advanced by agencies. While the Supreme Court hears roughly 75 cases per year—a handful of which involve agency interpretations of law—each lower court might handle thousands of cases per year.[261] Some contended that *Chevron* saved lower courts time by permitting them to engage in meaningful statutory review without having to start from scratch.[262] Removing this tool, some argue, will add to the already heavy burden of the federal courts.[263] That additional burden may create an incentive for the lower courts to apply *Loper* in ways that

[255] Adrian Vermeule, *Implied Delegations After Loper*, YALE J. ON REG.: NOTICE AND COMMENT BLOG (Jul. 9, 2024), https://www.yalejreg.com/nc/implied-delegations-after-loper-by-adrian-vermeule/.

[256] *Id.*

[257] *Id.*

[258] A decision by the U.S. Court of Appeals for the Fifth Circuit evaluated a claim by the Department of Health and Human Services (HHS) that the No Surprises Act delegated authority to the agency to prescribe a standard of review for a system of arbitration created by the statute, but the court rejected the government's position. Tex. Med. Ass'n, v. HHS, 110 F.4th 762, 775 (5th Cir. 2024). The court held that Congress explicitly left how to weigh certain statutory factors to the individual arbitrators—not to HHS. *Id.* HHS, accordingly, lacked the authority to issue a regulation creating a standard of review directing arbitrators to assign certain weights to statutory factors. *Id.* at 776.

[259] Adrian Vermeule, *Chevron by Any Other Name*, THE NEW DIGEST (Jun. 28, 2024), https://thenewdigest.substack.com/p/chevron-by-any-other-name; Adrian Vermeule, *The Deference Dilemma*, 31 GEO. MASON L. REV. 619, 630 (2024) (arguing prior to the *Loper* decision that the Court might overrule *Chevron* and replace it with some kind of evaluation of delegation on a case-by-case basis). For Professor Vermeule, *Chevron* step two cases can just be reconceptualized as *Loper* delegation cases without losing much in translation. "That is, cases that used to be labeled as 'deference to reasonable agency interpretations of ambiguous statutes' will now be called 'independent judicial interpretation that identifies a single best answer, an answer that consists of a delegation of discretionary authority to agencies within a given range.'" Adrian Vermeule, *Chevron by Any Other Name*, THE NEW DIGEST (Jun. 28, 2024) https://thenewdigest.substack.com/p/chevron-by-any-other-name.

[260] *See* Nicholas R. Bednar & Kristin E. Hickman, Chevron's *Inevitability*, 85 GEO. WASH. L. REV. 1392, 1458 (2017) (arguing at the time that something like *Loper* delegation might take hold were *Chevron* overruled).

[261] U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS (2022), https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2022 (last visited Dec. 19, 2024).

[262] *See* Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 71 (2017); Thomas W. Merrill, *Response: Chevron's Ghost Rides Again*, 103 B.U. L. Rev. 1717, 1738 (2023); Gary Lawson, *The Ghosts of Chevron Present and Future*, 103 B.U. L. REV. 1647, 1709 (2023).

[263] Brief of Professor Thomas W. Merrill as Amicus Curiae in Support of Neither Party at 27, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024) (No. 22-541).

recreate something like *Chevron*, such as identifying statutory delegations or finding interpretations that are persuasive under *Skidmore* (discussed above).[264]

Policy Discretion, Mixed Questions of Law and Fact, and Arbitrary and Capricious Review

Even when courts determine that the best reading of a statute is that Congress delegated the relevant question to the agency to resolve, courts will still play a role. As the Supreme Court in *Loper* explained, courts must still ensure that the agency has stayed within "the boundaries of the delegated authority and … the agency has engaged in 'reasoned decisionmaking' within those boundaries."[265] The Court's reference to "reasoned decisionmaking" and subsequent citation to *Motor Vehicles Manufacturers Association v. State Farm Mutual Automobile Insurance Co.* appears to indicate that the Court expects that where a court determines that the best reading of a statute is that Congress delegated the issue to the agency, the court should evaluate the reasonableness of the agency's action pursuant to the APA's arbitrary and capricious review standard.[266]

Section 706 of the APA defines the scope of judicial review of final agency actions.[267] In addition to providing the standard of review for questions of law, which formed the basis of the Court's decision in *Loper*, the APA also provides that a reviewing court "shall hold unlawful and set aside agency action, findings, and conclusions" that violate any of the six standards in Section 706.[268] One of the mostly commonly invoked standards is the arbitrary and capricious standard, which requires agencies when exercising discretionary policymaking authority to do so in a reasonable way.[269]

The *State Farm* decision is credited with defining the arbitrary and capricious standard of review in Section 706 of the APA—sometimes referred to as "hard look" review.[270] In now often-cited language, the Court held that, to survive judicial scrutiny under the arbitrary and capricious standard, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[271] Elaborating on this standard, the Court explained that, among other things, "an agency rule would be arbitrary and capricious" if the agency's explanation of its action "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[272] The arbitrary

[264] *See, e.g.*, Lisa Schultz Bressman, *Lower Courts After Loper Bright*, 31 GEO MASON L. REV. 500, 504–05 (2024) (arguing that if *Chevron* is overturned, lower courts may resort to other doctrines that approximate the *Chevron* framework).

[265] *Id.* at 2265 (quoting Henry Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 27 (1983); Michigan v. EPA, 576 U.S. 743, 750 (2015); Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983)).

[266] *See id.*

[267] *See* 5 U.S.C. § 706.

[268] *Id.* § 706(2)(A)-(F).

[269] *Id.* § 706(2)(A); *State Farm*, 463 U.S. at 43.

[270] *See, e.g.*, Kristin E. Hickman & Richard J. Pierce, Jr., ADMINISTRATIVE LAW TREATISE § 11.3 (7th ed. 2024) (referring to the *State Farm* standard as "hard look review"); Long Island Head Start Child Dev. Servs. v. NLRB, 460 F.3d 254, 257 (2d Cir. 2006) (referring to the standard set out in *State Farm* as the "'hard look' standard"); N.W. Env't Def. Ctr. v. Bonneville Power Admin., 477 F.3d 668, 687 n.15 (9th Cir. 2007) (referring to the arbitrary and capricious standard as the "hard look" standard); Panhandle E. Pipe Line Co. v. FERC, 890 F.2d 435, 439 (D.C. Cir. 1989) (same).

[271] *State Farm*, 463 U.S. at 43 (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)).

[272] *Id.*

and capricious standard is deferential to agency policy choices.[273] The Court in *State Farm* held that a court may not use the arbitrary and capricious standard to substitute its judgment for that of the agency's.[274] So long as the agency's decision is a reasonable one, even if the court would prefer a different policy, it must be upheld.[275]

The *Loper* decision did not disturb the arbitrary and capricious review standard announced in *State Farm*.[276] *Chevron*, and by extension *Loper*, applied only to agency interpretations of law, not to exercises of an agency's discretionary policymaking authority.[277] That policymaking authority has traditionally been evaluated pursuant to the arbitrary and capricious review standard—it is not a question of statutory interpretation.[278] As the Court in *State Farm* indicated, the arbitrary and capricious standard is generally (although not always) applicable when an agency applies its expertise to evaluate facts and form a policy from that evaluation.[279] A classic example of an agency action subject to arbitrary and capricious review is the Environmental Protection Agency's (EPA's) regulation of ambient air quality that "in the judgment of the Administrator … [is] requisite to protect the public health."[280]

As the Court recognized in *Loper*, determining whether an agency acting pursuant to a statutory delegation of the type noted above acted unlawfully entails two inquiries—whether the agency acted within the scope of the delegation and whether the agency's decision is reasonable (i.e., is not arbitrary and capricious).[281] Although the first inquiry focuses on statutory meaning, and thus is subject to *de novo* review, the determination of statutory meaning does not dictate the agency's policy outcome—it only serves to set the parameters of the agency's decision.[282] The agency's ultimate decision would appear to be subject only to a reasonableness analysis.[283]

Along these lines, some legal scholars have argued that courts will continue their tradition of respecting agencies' assessments of data, collection of facts, and choices among competing policy options. In other words, these scholars argue, courts are likely to treat questions of statutory interpretation that "turn on facts about the world, non-legal, technical expertise, and judgments about policy priorities, and likely outcomes" "as questions of policy judgment subject to standard

[273] *Id.* ("The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency."). *But see* Ohio v. EPA, 603 U.S. 279, 293–94 (2024) (finding EPA's Good Neighbor Plan likely to be arbitrary and capricious for not responding in a reasonable way to comments submitted during the notice and comment period).

[274] *State Farm*, 463 U.S. at 43.

[275] *Id.*; FCC v. Prometheus Radio Project, 592 U.S. 414, 423 (2021) ("A court simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision."). Prior to *Loper*, *Chevron*'s step two reasonableness analysis was often associated with the APA's arbitrary and capricious standard. *See* Judulang v. Holder 565 U.S. 42, 52 n.7 (2011) (equating *Chevron*'s second step with the arbitrary and capricious standard).

[276] *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2263 (citing favorably to cases applying the arbitrary and capricious standard).

[277] *See, e.g.*, *Judulang*, 565 U.S. at 52 n.7.

[278] *See* Hickman & Pierce, *supra* note 270, at § 11.7 (discussing the differences and overlap between *Chevron* and *State Farm*).

[279] *State Farm*, 463 U.S. at 43.

[280] 42 U.S.C. § 7409(b); *see, e.g.*, Mississippi v. EPA, 744 F.3d 1344, 1357 (2013) (applying the arbitrary and capricious standard to a challenge to EPA's determination to lower the National Ambient Air Quality Standard for ozone).

[281] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2265 (2024).

[282] *See id.*

[283] *See id.*

arbitrary-and-capricious review."[284] The upshot for agency actions that a court determines are subject to the arbitrary and capricious review standard is that those actions will be reviewed under a standard often understood to be similar to deference under *Chevron*.[285]

Nonetheless, the distinction between agency decisions that are "factbound" or mixed questions of law and fact and decisions regarding pure statutory interpretation is murky.[286] The Court has not set out a bright-line rule for how to differentiate between the two.[287] The *Chevron* case itself provides a useful example to illustrate the difficulty that courts may have in determining whether a case presents a question of law application or a "naked question of law."[288] The *Chevron* case concerned a provision of the Clean Air Act that authorizes EPA to regulate "stationary sources" of pollution.[289] The Court treated the case as one of statutory interpretation—about what *stationary source* means—ultimately creating the *Chevron* two-step framework to resolve that question.[290] Some have argued that *Chevron* could have been decided on grounds similar to those in *Hearst Publications*, where the Court treated the meaning of *employee* as a policy determination informed by the agency's application of its expertise to its findings of fact.[291] The regulation challenged in *Chevron* does not just provide an interpretation of *stationary sources* but engages with various factual scenarios regarding ownership of different facilities, geographical distribution of facilities, and third-party industrial classifications of sources.[292] In many ways, this argument goes, EPA's regulation at issue in *Chevron* is an example of the agency exercising authority delegated to it by Congress through the application of its factfinding abilities and expertise.[293]

There are important differences between *Hearst Publications* and *Chevron* that may partly explain the different approaches the Court took in each case. *Hearst Publications*, like *Gray*, was

[284] Jeffery A. Pojanowski, *Without Deference*, 81 MO. L. REV. 1075, 1086–87 (2016).

[285] *See* Judulang v. Holder 565 U.S. 42, 52 n.7 (2011) (equating *Chevron*'s second step with the arbitrary and capricious standard).

[286] *See, e.g.*, Bressman, *supra* note 134, at 8–9; Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1, 23 (1985) (observing generally that it is often difficult to identify questions of law and mixed questions of law and fact); Bernard Schwartz, *Mixed Questions of Law and Fact and the Administrative Procedure Act*, 19 FORDHAM L. REV. 73, 73–74 (1950) (discussing the difficulty of clearly identifying the law/fact distinction); Thompson v. Keohane, 516 U.S. 99, 110–11 (1995) (calling the fact/law distinction "slippery"). At times, courts have engaged in both statutory interpretation and analysis and arbitrary and capricious review. For example, in *Michigan v. EPA*, the Supreme Court evaluated EPA's determination that it need not consider costs when deciding to regulate certain air pollutants under both the *Chevron* framework and the arbitrary and capricious standard. 576 U.S. 743, 750–51. The provision of the Clean Air Act at issue in *Michigan* empowered EPA to regulate when it found it to be "appropriate and necessary." *Id.* at 748. The Court held that "EPA strayed far beyond" the bounds of reasonableness under *Chevron* step two and that, under its arbitrary and capricious review, "it was unreasonable for EPA to read [the Clean Air Act] to mean that cost is irrelevant to the initial decision to regulate power plants." *Id.* at 751, 759. *See also, e.g.*, Arent v. Shalala, 70 F.3d 610, 614–15 (applying arbitrary and capricious standard to review Food and Drug Administration determination regarding regulated entities' compliance with a federal statute); *id.* at 619 (Wald, J., concurring) (arguing for the application of *Chevron*).

[287] *See* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 980–81 (2017) (noting that the Court has sent "mixed signals" on how to review mixed questions of law and fact).

[288] Packard Motor Car Co. v. NLRB, 330 U.S. 485, 493 (1947) ("We are not at liberty to be governed by those policy considerations in deciding the naked question of law whether the Board is now, in this case, acting within the terms of the statute."); *see* Chevron U.S.A. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

[289] *Chevron*, 467 U.S. at 840.

[290] *Id.* at 843.

[291] *See* John F. Duffy, Chevron, *De Novo*: *Delegation, Not Deference*, 31 GEO. MASON L. REV. 541, 548–49 (2024).

[292] *Id.* (quoting 40 C.F.R. § 51.18(j)(1)(i)–(ii) (1983)).

[293] *Id.* ("[I]t is hard to imagine all these complex distinctions and their interrelationships can somehow be teased out of the two-word statutory phrase 'stationary sources.'").

an appeal from an agency adjudication. That is, it was an appeal from a decision the agency made applying the relevant statute to a particular party before it. *Chevron*, however, was a challenge to a rulemaking. EPA's regulation in *Chevron* was generally applicable to any entity that fell within the sweep of the regulation. It was not directed at determining whether a particular facility was a "stationary source." Agency adjudications may lend themselves more easily to being categorized as presenting mixed questions of law and fact, because, by their nature, agency adjudications apply law to the particular facts presented by the party or parties before the agency. Regulations, although often based on factual determinations, are not typically directed at particular sets of facts connected to particular parties.[294] Nonetheless, the Court in *Loper* did not make this distinction and appears to have endorsed the approach the Court took in *Hearst Publications* and *Gray* as useful in informing the proper standard of review for mixed questions of law and fact regardless of the form of agency action.[295]

Because of the similarity between *Chevron* step two and the arbitrary and capricious standard, the Court had little incentive to explicitly define which issues should be reviewed under the *Chevron* framework and which should be evaluated under the arbitrary and capricious standard.[296] Now that questions of law will be reviewed *de novo*, while exercises of policy discretion and mixed questions of law and fact will continue to be evaluated under the deferential arbitrary and capricious review standard, the Court may find reason to provide additional guidance on this issue.[297] Unless and until the Court refines its approach to differentiating these two spheres, it may be hard to predict whether any specific agency action will be reviewed under the *de novo* standard of review or the more deferential arbitrary and capricious standard.

Relationship with other Doctrines of Judicial Review

Major Questions Doctrine

Overruling *Chevron* has raised questions in the legal community over whether the major questions doctrine is still viable. For some, by overruling *Chevron*, the Supreme Court undermined the purpose of the major questions doctrine, while for others, it may still serve an independent purpose regardless of the existence of the *Chevron* framework.

The major questions doctrine requires an agency to point to clear congressional authorization if it seeks to regulate on an issue of great "economic and political significance."[298] The Supreme Court first referred to the major questions doctrine by name in a 2022 decision, but the doctrine has its roots in scattered cases over many years.[299]

---

[294] The APA provides for a class of regulations known as regulations of "particular applicability." 5 U.S.C. § 551(4). Although technically considered regulations, regulations of particular applicability in many ways resemble agency "orders" that are the products of agency adjudications. 5 U.S.C. § 551(6), (7). Orders, however, typically have immediate effect, while regulations, particular or otherwise, have "future effect." 5 U.S.C. § 551(4); Yesler Terrace Comty. Council v. Cisneros, 37 F.3d 442, 448 (9th Cir. 1994).

[295] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2258 (2024).

[296] *See* Judulang v. Holder 565 U.S. 42, 52 n.7 (2011) (equating *Chevron*'s second step with the arbitrary and capricious standard); *see also* Pharm. Research & Mfrs. of Am. v. FTC, 790 F.3d 198, 207–12 (D.C. Cir. 2016) (analyzing a challenge under both *Chevron* and arbitrary and capricious review).

[297] *See* Pojanowski, *supra* note 284, at 1087 (predicting that if *Chevron* were overruled, the distinction between questions of law and questions of policy would be "reestablish[ed]").

[298] West Virginia v. EPA, 597 U.S. 697, 721 (2022).

[299] *See, e.g.*, FDA v. Brown & Williamson, 529 U.S. 120, 159–60; Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001); Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014); King v. Burwell, 576 U.S. 473, 485–86 (2015); (continued...)

Until recently, the major questions doctrine was closely associated with the *Chevron* framework and was often invoked as a part of the *Chevron* framework.[300] The major questions doctrine rests on a determination by the Court that one of the core assumptions that supported *Chevron* deference—that Congress intended the agency to resolve the statutory ambiguity—was no longer tenable.[301] Where major questions are at stake, the Court has said, "there may be reason to hesitate before concluding that Congress … intended" to delegate resolution of that question to the agency.[302]

Further, while some cases suggested that the major questions doctrine might have been part of the *Chevron* analysis, the Court's approach has not been consistent. Initially, the Court invoked this concern while applying *Chevron*[303] to justify concluding that under the two-part test, the Court should not defer to the agency's construction of the statute.[304] The Court then shifted its approach slightly, holding that the fact that an agency interpretation implicates a major question renders the *Chevron* framework of review inapplicable.[305] In its most recent major questions cases, the Court has invoked the doctrine without resort to *Chevron* at all, suggesting that the more recent version of the doctrine operated as a principle of statutory interpretation independently from the *Chevron* framework.[306] In *Loper*, the Court reiterated that "*Chevron* does not apply if the question at issue is one of 'deep economic and political significance.'"[307]

The Court made this statement in the context of a discussion of the "many refinements" the Court has made to *Chevron* in an attempt to "match *Chevron*'s presumption" regarding implicit legislative delegation "to reality."[308] The Court identified the major questions doctrine among these "many refinements."[309] Given these statements, the majority in *Loper* seemed to understand

---

Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758, 764 (2021) (per curiam); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 595 U.S. 109, 119 (2022) (per curiam).

[300] *See, e.g.*, City of Arlington v. FCC, 569 U.S. 290, 303 (2013) (describing major questions cases as applications of *Chevron*); Massachusetts v. EPA, 549 U.S. 497, 531 (2007) (invoking the major questions doctrine during *Chevron* step one); Utility Air Regulatory Group v. EPA, 573 U.S. 302, 324 (2014) (invoking the major questions doctrine during *Chevron* step two).

[301] *See, e.g.*, *West Virginia*, 597 U.S. at 723 ("[I]n certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there." (quoting *UARG*, 573 U.S. at 324)); King v. Burwell, 576 U.S. 473, 485–86 (2015).

[302] *West Virginia*, 597 U.S. at 768 (Kagan, J., dissenting) (quoting *Brown & Williamson*, 529 U.S. at 159).

[303] *See City of Arlington*, 569 U.S. at 303 (describing major-questions cases as applications of *Chevron*).

[304] *E.g.*, *Massachusetts*, 549 U.S. at 531 (invoking the major questions doctrine during *Chevron* step one); *UARG*, 573 U.S. at 324 (invoking the major questions doctrine during *Chevron* step two).

[305] *See King*, 576 U.S. at 485–86 (holding that *Chevron* was inapplicable and instead invoking the major questions doctrine); Gonzales v. Oregon, 546 U.S. 243, 267 (2006) (invoking the major questions doctrine during step zero inquiry).

[306] *See, e.g.*, Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 504 U.S. 758, 764 (2021) (per curiam) (applying the major questions doctrine without mentioning *Chevron*); *Nat'l Fed'n of Indep. Bus.*, 595 U.S. at 112 (per curiam) (same); *West Virginia*, 597 U.S. at 697 (same); Biden v. Nebraska, 600 U.S. 477, 501 (2023) (same). For a more detailed discussion of the Court's recent major questions cases, *see* CRS In Focus IF12077, *The Major Questions Doctrine*, by Kate R. Bowers (2022); CRS Legal Sidebar LSB10791, *Supreme Court Addresses Major Questions Doctrine and EPA's Regulation of Greenhouse Gas Emissions*, by Kate R. Bowers (2022).

[307] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2269 (2024) (quoting *King*, 576 U.S. at 486).

[308] *Id.* at 2268.

[309] *Id.* at 2269. On this point the Court explained, "We have instead expected Congress to delegate such authority expressly if at all, for extraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s].'" *Id.* at 2269 (quoting *King*, 576 U.S. at 486; *West Virginia*, 597 U.S. at 723). Prior to *Loper* some commentators argued that both the *Chevron* step zero doctrine and the major questions doctrine serve to align *Chevron* deference more closely with those situations in which Congress has actually delegated to agencies the (continued...)

the major questions doctrine as a response to *Chevron*.[310] With *Chevron* overruled, some have questioned whether the major questions doctrine should be retained. One commentator has argued that now that *Chevron* is gone, there is no longer reason to apply the major questions doctrine to depart from applying ordinary textualist methods of statutory interpretation.[311] The Court's approach to statutory interpretation in *Loper* may support this argument. The major questions doctrine applies where a statute is less than clear,[312] but if courts, following *Loper*, find the single best meaning of a statute, then the major questions doctrine may not come into play, because there is no question what the meaning of the statute is.[313]

The *Loper* opinion also provides reason to believe that the major questions doctrine may be preserved. As already discussed, the opinion recognizes that Congress sometimes delegates to agencies the authority to regulate pursuant to broad terms such as *reasonable* and *appropriate*.[314] The Court explained that in those situations, a court's job is twofold: ensure that the agency has stayed within the bounds of the statutory delegation and come to its decision through "reasoned decisionmaking."[315] It is in fulfilling this first duty where courts might turn to the major questions doctrine. Broad grants of regulatory power subject to statutory limits such as "reasonable" may give rise to questions over how much authority Congress delegated to the agency at the outer margins of the agency's statutory authority. Were an agency to rely on a broad (but not specific) grant of power to regulate something of "vast economic and political significance,"[316] the major questions doctrine might play a role in resolving the case.

For instance, in the 2023 Supreme Court decision in *Biden v. Nebraska*, the Court held that the Department of Education's plan to cancel hundreds of billions of dollars of student loans was a major question and that the agency could not point to clear congressional authorization for such a plan.[317] At issue in that case was a provision of the Health and Economic Recovery Omnibus Emergency Solutions Act (HEROES Act) that authorizes the Secretary of Education to "waive or modify any statutory or regulatory provisions" applicable to certain student loan programs.[318] The

authority to interpret particular statutory provisions. *See, e.g.*, Jonathan H. Adler, *Restoring* Chevron*'s Domain*, 81 MO. L. REV. 983, 99–94 (2016).

[310] *See Loper*, 144 S. Ct. at 2269. Justice Kagan's dissent in *West Virginia v. EPA* points to the history of the doctrine to make a similar point that the doctrine served only as an offramp from the *Chevron* framework. *West Virginia*, 597 U.S. at 769–70 (Kagan, J., dissenting); *see also*, *Loper*, 144 S. Ct. at 2309 (Kagan, J., dissenting).

[311] Jamie Conrad, *Looks Like We Don't Need the Major Questions Doctrine Anymore*, NOTICE & COMMENT, YALE J. ON REGUL. BLOG (Jul. 3, 2024), https://www.yalejreg.com/nc/looks-like-we-dont-need-the-major-questions-doctrine-any-more-by-jamie-conrad/. Professor Richard Pierce makes a similar argument, noting that the Court has sufficient tools to police agencies through *de novo* review of questions of law and a possibly new heightened version of arbitrary and capricious review applied in *Ohio v. EPA*. Richard J. Pierce, Jr., *Two Neglected Effects of* Loper Bright, THE REGULATORY REVIEW (Jul. 1, 2024), https://www.theregreview.org/2024/07/01/pierce-two-neglected-effects-of-loper-bright/.

[312] *See West Virginia*, 597 U.S. at 732 (requiring "clear" congressional authorization to regulate a major question).

[313] *See Loper*, 144 S. Ct. at 2266.

[314] *Id.* at 2263.

[315] *Id.*

[316] *West Virginia*, 597 U.S. at 716, 719.

[317] 600 U.S. 477, 501 (2023). The Court's major questions analysis came *after* the Court found that "the statutory text alone precludes the Secretary's program." *Id.* at 506 n.9. Nonetheless, the Court explained that its major questions analysis provided an additional ground to support its conclusion. *Id.* That the Court engaged in a major questions analysis after it determined that, upon a *de novo* review of the statute, the text alone did not authorize the loan forgiveness plan may indicate that even where ordinary means of statutory interpretation reveal a best meaning, the major questions doctrine may still play a role.

[318] *Id.* at 494 (quoting 20 U.S.C. § 1098bb(a)(1)). For more information on this case and the HEROES Act in general, (continued...)

Court called the magnitude of the loan cancellation "staggering by any measure" and held that the plan was of the kind of politically and economically significant actions that mark a major question.[319] As such, the Court held, "it is 'highly unlikely that Congress' authorized such a sweeping loan cancellation program 'through such a subtle device as permission to "modify."'"[320] To come to this conclusion, the Court relied, in part, on the Secretary's past uses of the HEROES Act.[321] The Court surveyed the Secretary's past invocations of power to waive or modify student loans and explained that past waivers were "modest and narrow in scope."[322] These modest and narrow uses of the waive or modify authority, the Court reasoned, supported the Court's view that Congress likely did not delegate the authority to cancel student loans generally.[323]

Although *Nebraska* was decided prior to *Loper*, it may provide an insight into where the major questions doctrine may still play a role—instances where agencies acting under broad, but not specific, statutory authorizations attempt to regulate in a novel way that a court finds to be economically or politically significant.

Auer (*Kisor*) Deference

Overruling *Chevron* has also raised questions about the viability of other deference doctrines, such as *Auer* deference.[324] *Auer* deference closely mirrors *Chevron* but applies to an agency's reasonable interpretations of its own ambiguous *regulations*.[325] This form of deference originated in a 1945 Supreme Court case *Bowles v. Seminole Rock & Sand Co.*, which concerned the proper interpretation of a maximum price regulation issued by the Office of Price Administration.[326] o determine the proper interpretation of the regulation, the Court explained that it "must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt."[327] Where that is the case, "[t]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."[328] It is this formulation that later found its way into the 1997 Supreme Court case authored by Justice Scalia, *Auer v. Robbins*, from which the deference doctrine takes its name.[329]

---

see CRS Legal Sidebar LSB10997, *Supreme Court Invalidates Student Loan Cancellation Policy Under the HEROES Act*, by Edward C. Liu and Sean M. Stiff (2023); CRS Report R47505, *Student Loan Cancellation Under the HEROES Act*, by Edward C. Liu and Sean M. Stiff (2023).

[319] *Nebraska*, 600 U.S. at 502.

[320] *Id.* at 496 (quoting MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 231 (1994)).

[321] *Id.* at 495.

[322] *Id.* at 501. One of the contextual factors courts look to in applying *Skidmore* is the consistency of the agency's interpretation over time. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

[323] *Nebraska*, 600 U.S. at 502.

[324] *See* Cass R. Sunstein, *The Consequences of* Loper Bright, 2 n.6 (Harv. Pub. L. Working Paper, Paper No. 24-29), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4881501 (noting that *Auer* deference sits "uneasily" with *Loper*); Anthony G. Amsterdam and James S. Liebman, Loper Bright *and the Great Writ (with Appendices)*, COLUM. HUMAN RIGHTS L. REV. (forthcoming Feb. 2025) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4991093 (questioning whether federal court deference to state court interpretations of the U.S. Constitution in *habeas corpus* cases will continue after *Loper*).

[325] Auer v. Robbins, 519 U.S. 452, 461 (1997) (citing Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359, (1989)).

[326] 325 U.S. 410, 414 (1945).

[327] *Id.*

[328] *Id.*

[329] *See Auer*, 519 U.S. at 461.

In addition to mirroring *Chevron*'s structure, *Auer* also shares a similar foundation. The Court explained that it "presume[s] that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers."[330] As with *Chevron*, the Court assumed that Congress would have wanted the agency rather than a court resolving ambiguities because of an agency's "unique expertise and policymaking prerogatives," ability to conduct investigations, and political accountability.[331]

In 2019 the Supreme Court revisited—and on some accounts narrowed—*Auer* deference in *Kisor v. Wilkie*.[332] The petitioners asked the Court to overrule *Auer*, but in an opinion written by Justice Kagan, the Court "restate[d]" and "somewhat expand[ed]" on the principles governing the application of *Auer*.[333] The Court acknowledged that it had at times sent mixed signals regarding how to apply *Auer*, may have inadvertently suggested that deference was "reflexive," and in some cases had applied it "without significant analysis of the … regulation."[334]

The Supreme Court took the opportunity to remind lower courts that they should not be too quick to find ambiguity in a regulation. "[T]he possibility of deference can arise only if a regulation is genuinely ambiguous. And when we use that term, we mean it—genuinely ambiguous."[335] "The core theory of *Auer*," the Court held, "is that sometimes the law runs out."[336] Courts must first resort to all of the "traditional tools of construction" before declaring a regulation ambiguous.[337] A court "cannot waive the ambiguity flag just because it found the regulation impenetrable on first read."[338] The Court stressed that a court must use every tool—including the text, structure, history, and purpose of the regulation—before determining that there is no single right answer.[339]

Even after a court finds a regulation ambiguous, the Court clarified that not all reasonable interpretations "are entitled to deference."[340] *Auer*, like *Chevron*, presumes that Congress would want an agency rather than a court to resolve ambiguities in regulations, but the Court stressed that "such a presumption cannot always hold."[341] The Court then went on to provide an illustrative list of factors that indicate that deference is appropriate.[342] The interpretation must represent the agency's official position, implicate its substantive expertise, and be the product of "fair and considered judgment."[343] In the Court's view, if these guardrails are properly observed, *Auer* deference "often" does not apply.[344]

---

[330] Martin v. Occupational Safety and Health Rev. Comm'n, 499 U.S. 144, 151 (1991) (citing Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 566, 568 (1980)).

[331] *Id.*; Kisor v. Wilkie, 588 U.S. 558, 571–72 (2019).

[332] 588 U.S. at 573; Peter L. Strauss, *Kisor, Gundy, Mead Chevron, Skidmore, Hearst*, NOTICE & COMMENT, YALE J. ON REGUL. BLOG (Jul. 16, 2019) https://www.yalejreg.com/nc/kisor-gundy-mead-chevron-skidmore-hearst-by-peter-strauss/ (*Kisor* "distinctly constrain[ed]" the reach of *Auer*).

[333] *Kisor*, 588 U.S. at 574.

[334] *Id.*

[335] *Id.* at 573.

[336] *Id.* at 575.

[337] *Id.* 575 (quoting Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843, n.9 (1984)).

[338] *Id.*

[339] *Id.*

[340] *Id.* at 573.

[341] *Id.* at 576.

[342] *Id.* at 577–79.

[343] *Id.* at 578–79 (quoting Auer v. Robbins, 519 U.S. 452, 462 (1997)).

[344] *Id.* at 580.

Despite *Kisor*'s refinement of *Auer*, its continued viability after *Loper* is a serious question. The *Loper* decision rested on an interpretation of Section 706 of the APA.[345] That same provision of the APA directing courts to "decide all relevant questions of law" applies equally to challenges to agency interpretations of their own regulations.[346] Professor Cass Sunstein has observed that "*Loper Bright* sits (umm, errr) uneasily with *Kisor*."[347] The *Kisor* opinion itself, he notes, is "essentially identical" to Justice Kagan's dissent in *Loper*.[348] It would, in his estimation, be "awkward" to revisit *Kisor* so soon after it was decided but equally awkward for the Court to preserve *Auer* deference.[349] That awkwardness stems primarily from the similarities between the presumptions underpinning *Chevron* that the *Loper* decision swept away and those that underpin *Auer*—that in many cases Congress would have wanted agencies to resolve ambiguities in their own regulations.[350] If the presumption that statutory ambiguities are implicit delegations of interpretive authority violates Section 706 of the APA, then it is possible that the same presumption for regulations also violates the APA. Whether the Court takes up this issue in the future, however, is an open question.[351]

Further Litigation: Prior *Chevron* Cases

Although the Supreme Court overruled *Chevron*, it appears to have preserved the holdings in cases that were decided pursuant to the *Chevron* framework prior to *Loper*.[352] In the briefing of the case and during oral argument, the litigants and some of the Justices discussed the fate of cases decided at *Chevron* step two.[353] As explained above, at *Chevron* step two, a court must defer to an agency's reasonable interpretation of an ambiguous statute.[354] In such a case, a court has not made a specific ruling on what the statute means—it has left that determination to an agency in light of the court's finding at step one that the statute is ambiguous.[355] At oral argument, some of the Justices questioned the litigants about whether these step two decisions would still be considered binding if *Chevron* were overruled.[356] Counsel for the petitioners argued that overruling *Chevron* would not disturb these cases, because what the court had found at step two

[345] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2265 (2024).

[346] *See* 5 U.S.C. § 706.

[347] Sunstein, *supra* note 324, at 2 n.6.

[348] *Id.*

[349] *Id.*

[350] *Compare Kisor*, 588 U.S. at 576 ("[W]e give *Auer* deference because we presume, for a set of reasons relating to the comparative attributes of courts and agencies, that Congress would have wanted us to."), *with Loper*, 144 S. Ct. at 2265 (Ambiguity does not "necessarily reflect a congressional intent that an agency, as opposed to a court, resolve the resulting interpretive question.").

[351] In a decision of the U.S. Court of Appeals for the Fourth Circuit issued shortly after *Loper*, the court recognized that *Loper* "calls into question the viability of *Auer* deference," but because *Loper* addressed only agency interpretations of federal statutes—not regulations—the court would apply *Auer*. United States v. Boler, 115 F.4th 316, at 322 n.4 (4th Cir. Aug. 23, 2024) (amended Oct. 8, 2024).

[352] *Loper*, 144 S. Ct. at 2273.

[353] *See* Brief for Respondents at 31, Loper Bright Enters. v. Raimondo, 143 S. Ct. 2244 (2024) (No. 22-541); Transcript of Oral Argument at 59:8-61:7, Relentless, Inc. v. Dep't of Commerce, 144 S. Ct. 2244 (2024) (No. 22-1219).

[354] Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc. 467 U.S. 837, 843–44 (1984).

[355] Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005) (citing *Chevron*, 467 U.S. 843-44 (Allowing "a judicial precedent to foreclose an agency from interpreting an ambiguous statute, as the Court of Appeals assumed it could, would allow a court's interpretation to override an agency's. *Chevron*'s premise is that it is for agencies, not courts, to fill statutory gaps.").

[356] Transcript of Oral Argument at 59:8-61:7, Relentless, Inc. v. Dep't of Commerce, 144 S. Ct. 2244 (2024) (22-1219).

was that an agency's interpretation was "lawful."[357] The Court appears to have adopted this argument in its opinion, holding that "we do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory stare decisis despite our change in interpretive methodology."[358]

The Court held that its decision to overturn *Chevron* is not itself a reason to overturn a prior case finding an agency's interpretation "lawful" pursuant to step two of *Chevron*.[359] Rather, litigants will have to make an additional showing that the older decision should be overturned on other grounds.[360] The *Loper* majority did not elaborate on what that additional showing could or should be.[361] It is possible that the additional showing could be that the agency's interpretation of the statute upheld in the prior case as "reasonable" under step two of *Chevron* is at variance with the present-day court's view of the "best" interpretation of that statute.

Despite the Court's holding, questions are likely to remain regarding the circumstances in which a court can overturn a prior decision that rested on application of *Chevron*'s second step. For instance, the *Loper* case leaves open the question of what exactly a court decided at step two of *Chevron*.[362] If, as has been commonly understood, a decision in favor of the agency at step two simply means that the agency chose one of the multiple possible reasonable interpretations of an ambiguous statute, then that decision may have little binding effect on a future court considering whether the agency's interpretation is the single best interpretation of the statute.[363] The Court in *Loper*, however, described decisions pursuant to step two as finding the agency's interpretation "lawful."[364] Accordingly, it may be the case that the Supreme Court was signaling to the lower courts that a decision at step two should be taken as more than just determining that an agency interpretation is a "reasonable" one.[365] Instead, the Court's use of the term *lawful* could be read to instruct lower courts to interpret prior decisions upholding agency interpretations at step two such that a court's prior decision carries more precedential weight than might otherwise be accorded a decision finding an agency interpretation reasonable. Although the U.S. Court of Appeals for the

[357] *Id.*

[358] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

[359] *Id.*

[360] *Id.*

[361] *See id.*

[362] *Compare id.* (holding cases decided at step two determining that the agency interpretation was "lawful"), *with* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005) (quoting Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 740–41 (1996)) ("*Chevron* established a 'presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.'").

[363] *See Brand X*, 545 U.S. at 982; NLRB v. Viola Industries-Elevator Division, Inc., 979 F.2d 1384 1391–92 (10th Cir. 1992) (en banc) (finding that prior decisions were based on a judicial determination that the agency's construction was reasonable and as a result applied the *Chevron* framework); Hickman & Pierce, *supra* note 270, at § 3.6; Emily Bremer, Brand X *is Right There in* Chevron, NOTICE & COMMENT, YALE J. ON REGUL. BLOG (Feb. 16, 2024), https://www.yalejreg.com/nc/brand-x-is-right-there-in-chevron/; Jonathan Remy Nash, Chevron Stare Decisis *in a Post*-Loper Bright *World*, Iowa L. Rev. Online 5 (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4966351 (noting that a decision upholding an agency decision at step two recognizes the that an agency can choose among a range of potentially reasonable interpretations of a statute).

[364] *Loper*, 144 S. Ct. at 2273.

[365] *See id.*

Sixth Circuit (Sixth Circuit) has confronted this issue,[366] it will likely be some time before there is enough case law to identify trends in how the lower courts are resolving this issue.

Loper does not address whether an agency retains the ability to change its interpretation of a statute that a court found to be ambiguous under *Chevron*. Finding a statute ambiguous under *Chevron* brought with it the assumption that Congress had implicitly delegated interpretive authority to the agency to resolve that ambiguity. *Loper* swept that assumption away as in conflict with Section 706 of the APA, holding that a statute has a fixed meaning at the time of enactment. As a practical matter, an agency likely could still change an interpretation upheld under step two and may choose to do so where the agency believes a different interpretation would better align with the best meaning of the statute. It is not clear how courts would evaluate this situation. The Sixth Circuit, for example, has suggested that *Loper* implicitly overruled *Brand X* and that agencies no longer have any authority to change their interpretations.[367]

The Process of Relitigating Prior *Chevron* Cases

One significant consideration in assessing the practical effect of the Court's holding that *Loper* is not a reason to overrule prior cases relying on *Chevron* is whether a future court is bound by a prior case that relied on *Chevron* and, if it is, whether that court has the authority to overrule the prior case. As discussed in more detail below, the geographic jurisdiction and the hierarchy of the federal courts and the Supreme Court's decision in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*[368] may provide additional opportunities to challenge regulations upheld under *Chevron* step two. New challenges brought in a circuit that does not have any precedent on point will not be bound by circuit precedent from other courts of appeals. Further, decisions of the federal district courts are not precedential and accordingly do not bind future courts' decisions. As a result, although the *Loper* Court's holding regarding the precedential value of prior *Chevron* cases may limit certain challenges, the scope of the Court's holding does not reach all prior *Chevron* cases.

Geographic Jurisdiction of the Federal Courts

A decision by a federal court of appeals is binding precedent only for federal district courts within the geographic jurisdiction of the relevant court of appeals and future panels of the same circuit court of appeals.[369] There are 12 geographic federal courts of appeals in the United States (see **Figure 1** below).

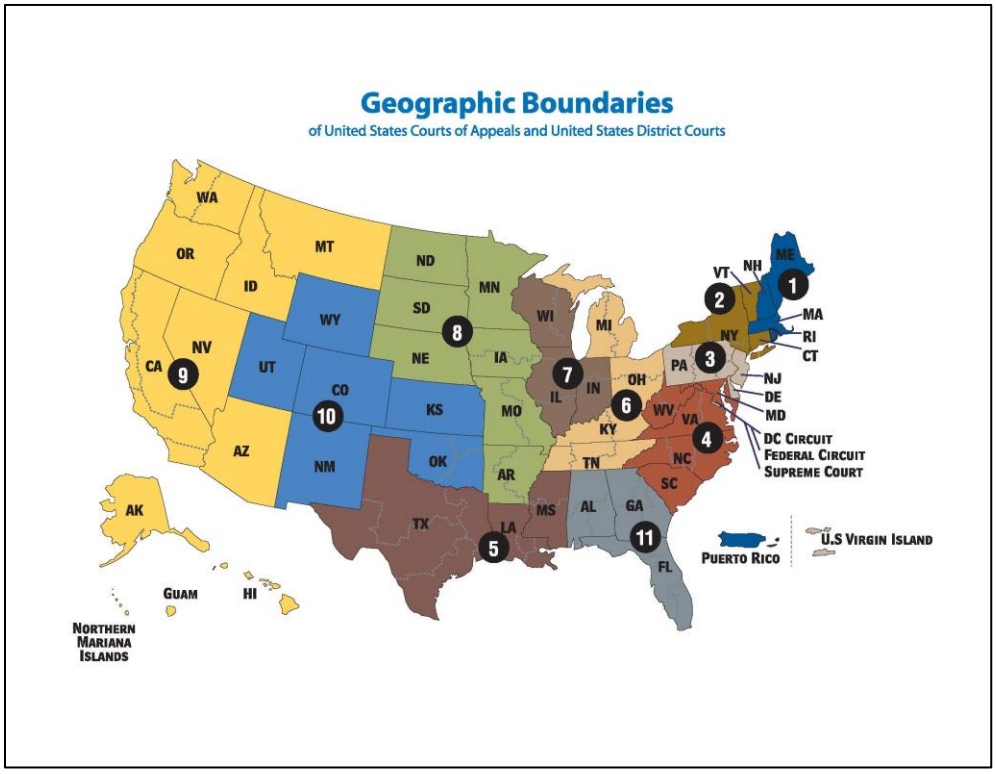
[366] Tennessee v. Becerra, 117 F.4th 348 (6th Cir. Aug. 26, 2024). *Tennessee v. Becerra* will be discussed in more detail below. *See infra*, "*Tennessee v. Becerra*: *Stare Decisis* and *Loper* Applied."

[367] *See* Mazariegos-Rodas v. Garland, ___ F.4th ___, No. 21-4064, 2024 WL 4986390 (6th Cir. Dec. 5, 2024). The case may present a unique set of facts, which may limit its future applicability. In the case, BIA changed its approach to adjudicating certain asylum claims. *Id.* The court held that after *Loper*, an agency could no longer change its interpretation of a statute after a court had previously found the agency's interpretation unlawful. *Id.* at *12. The prior cases finding BIA's approach unlawful, however, did not rely on *Chevron*, much less *uphold* BIA's approach under *Chevron* step two. *See id.* (citing Bi Xia Qu v. Holder, 618 F.3d 602 (6th Cir. 2010); Al-Ghorbani v. Holder, 585 F.3d 980 (6th Cir. 2009)). It is possible that the Sixth Circuit in *Mazariegos-Rodas* in fact faced an instance of agency nonacquiescence, whereby the agency declined to follow the Sixth Circuit's prior caselaw. *See* CRS Report R47882, *Agency Nonacquiescence: An Overview of Constitutional and Practical Considerations*, by Benjamin M. Barczewski (2023).

[368] 603 U.S. 799 (2024).

[369] *See* Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485, 488–89 (1900) (holding that a decision of another circuit "persuades; but it does not command").

Figure 1. Geographic Boundaries of the Federal Courts



Source: ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, https://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf (last visited Dec. 20, 2024).

Notes: District court boundaries are delineated by gray lines within state boundaries. The U.S. Court of Appeals for the D.C. Circuit's geographical jurisdiction covers only the District of Columbia, but because many D.C. Circuit cases involve the federal government, decisions of the D.C. Circuit often bind agencies nationwide. Additionally, the U.S. Court of Appeals for the Federal Circuit has nationwide jurisdiction but can hear appeals on only a limited number of subjects.

If a plaintiff challenges a regulation in a jurisdiction that has not previously rendered a decision evaluating the regulation, then that court would not be bound by any precedent regarding the legality of the regulation. Decisions by courts in other jurisdictions regarding the legality of the regulation may be persuasive authority, but they would not control the outcome of the new case.[370] The *Loper* decision did not address this scenario, likely because decisions from one court of appeals have never been thought to be binding on decisions of its sister courts of appeals.[371] The *Loper* decision does not change that basic fact of the federal judiciary.[372]

[370] *See, e.g.*, Owens *ex rel*. Owens v. Lott, 372 F.3d 267, 279–80 (4th Cir. 2004) (holding that where there is no controlling precedent, the court may look to cases from other jurisdictions for "persuasive authority").

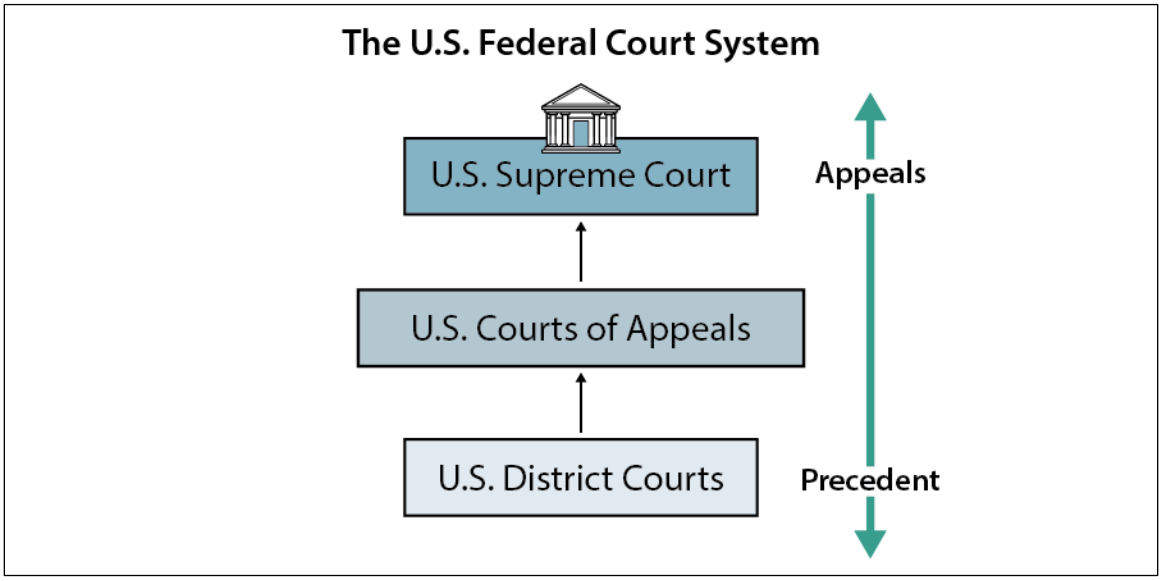
[371] *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024); *see, e.g.*, Haberle Crystal Springs Brewing Co. v. Clarke, 30 F.2d 219, 222 (2d Cir. 1929), *rev'd on other grounds*, 280 U.S. 384 (1930).

[372] The discretion afforded each circuit means that appellate courts sometimes reach different conclusions on the same issue of federal law, causing a "split" that in some cases Congress or the Supreme Court may resolve. *See, e.g.*, CRS Legal Sidebar LSB11246, *Congressional Court Watcher: Circuit Splits from October 2024*, by Michael John Garcia (2024).

Hierarchy of the Federal Courts

Even where a new challenge is brought in a jurisdiction that has already found an agency's interpretation to be reasonable under step two of *Chevron*, the court in which the challenge is brought may not have the authority to overturn the prior decision.[373] The binding nature of precedent flows down the hierarchy of a court system. Decisions made by higher courts, such as the Supreme Court, are binding on lower courts—federal courts of appeals and district courts.[374] A corollary is that lower courts have no authority to overturn binding precedent decided by a higher court.[375]

Figure 2. Hierarchy of the Federal Court System



Source: CRS.

A district court's decision has no precedential value—that is, it binds only the parties to the case but not future decisions of other district courts.[376] District courts also have no power to overturn a decision of the court of appeals.[377] A three-judge-panel of a court of appeals has no authority to overturn a decision of a prior three-judge panel.[378] A circuit court can overturn its own precedent

[373] *See, e.g.*, 13 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3506 (4th ed. 2023).

[374] *See, e.g.*, 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE - CIVIL § 134.02 (2024).

[375] *See, e.g.*, Gilead Cmty, Servs., Inc. v. Town of Cromwell, 112 F.4th 93, 100 (2d Cir. 2024) (quoting United States v. Peguero, 34 F.4th 143, 158 (2d Cir. 2022) ("Our precedent is 'binding authority from which we cannot deviate,' unless and until it is "overruled either by an en banc panel of our Court or by the Supreme Court.").

[376] Threadgill v. Armstrong World Indus., 928 F.2d 1366, 1371 (3d Cir. 1991) (collecting cases).

[377] Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 430 n.10 (1996) (noting that if there is a standard that all district court judges follow, it must come from the relevant court of appeals or the Supreme Court).

[378] *See, e.g.*, Hart v. Massanari, 266 F.3d 1155, 1170 (9th Cir. 2001); Winslow v. FERC, 587 F.3d 1133, 1135 (D.C. Cir, 2009); 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 134.02[1][a](2024); Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 824 (1994); Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOK. L. REV. 685, 721 n.91 (2000) (noting each circuit has adopted the rule that prior decisions are binding on future decisions of the same court).

through a special circuit court procedure known as a *rehearing en banc*.[379] A rehearing en banc is a hearing before a larger panel of appellate judges. In smaller circuits, all active judges on the court of appeals participate in en banc proceedings, while in larger circuits a subset of active judges may participate.[380] Rehearings en banc are discretionary, meaning that, unless the judges of the circuit vote to hear an appeal en banc, the only way to overturn a decision of the court of appeals is to seek review by the Supreme Court.[381]

Precedential weight, to the extent any attaches, attaches only to published opinions. Not all decisions by the federal courts are published, meaning not all appear in the official reports of the decisions of the federal courts. The judges who author the opinions decide which decisions should be published. Unpublished decisions of the federal courts of appeals are not binding and may be treated only as persuasive authority.[382]

The upshot for prior cases decided at *Chevron* step two is that cases decided by district courts or cases decided through unpublished opinions of courts of appeals have no precedential value. Accordingly, because they do not bind future courts analyzing the same agency interpretations, the *Loper* Court's pronouncement regarding prior *Chevron* cases likely does not apply in those situations. A case that was decided through a published opinion of a court of appeals may be considered binding precedent within the relevant circuit. Few courts have addressed the Supreme Court's direction to treat prior *Chevron* cases as binding precedent. The Sixth Circuit provided an early example of how a court might analyze this issue after *Loper* in *Tennessee v. Becerra*.

Tennessee v. Becerra: *Stare Decisis* and Loper Applied

In 2021, the Department of Health and Human Services (HHS) promulgated a regulation requiring federal grant recipients under Title X of Public Health Service Act (PHSA) to offer neutral, nondirective counseling and referrals for abortions to patients who request it.[383] Tennessee, a Title X grant recipient, challenged the regulation, arguing, among other things, that the requirement violates Section 1008 of the PHSA.[384] The Sixth Circuit affirmed the federal district court's denial of Tennessee's motion for a preliminary injunction to stop the enforcement of the Title X regulation.[385] In affirming the district court's denial, the court addressed the

[379] FED. R. APP. P. 35 (providing for en banc procedure). There is some variation across the circuits in how they implement binding precedent within their own circuits. Henry J. Dickman, *Conflicts of Precedent*, 106 VA. L. REV. 1345, 1355 (2020). While all circuits provide for en banc review to revisit circuit precedent, some circuits have adopted additional mechanisms for overturning circuit precedent. The First Circuit, for example, permits a panel to overrule the decision of a prior panel in the "exceedingly infrequent situation" where "non-binding but compelling caselaw convinces us to abandon it." AER Advisors Inc. v. Fidelity Brokerage Servs., LLC, 921 F.3d 282, 293 (1st Cir. 2019). The D.C. Circuit permits a panel to overrule a prior panel decision without a full en banc hearing if the panel circulates a draft of the opinion to all active judges and they unanimously agree to overrule circuit precedent. U.S. CT. OF APP. FOR THE D.C. CIR., POLICY STATEMENT ON EN BANC ENDORSEMENT OF PANEL DECISIONS (IRONS FOOTNOTE) 1 (Jan. 17, 1996), https://www.cadc.uscourts.gov/sites/cadc/files/rules-IRONS.PDF.

[380] 9TH CIR. R. 35.3 (en banc panel consists of the chief judge and ten additional randomly selected judges); 2D CIR. R. 35.1 (en banc panel consists of all active judges).

[381] FED. R. APP. P. 35(a) ("A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered.").

[382] *See, e.g.*, United States v. Torres-Jamie, 821 F.3d 577, 582 (5th Cir. 2016); D.C. CIR. R. 36(e)(2) ("a panel's decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition.").

[383] Tennessee v. Becerra, 117 F.4th 348, 355–56 (6th Cir. Aug. 26, 2024) (citing Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services, 86 Fed. Reg. 56144 (Oct. 7, 2021)).

[384] *Id.* at 357.

[385] *Id.* at 370.

precedential value of two prior cases—one a Supreme Court case and another a prior Sixth Circuit case—that had held that Section 1008 was ambiguous and deferred to HHS's earlier interpretations of that section of the PHSA.[386] In addition, the prior Sixth Circuit case addressed the same 2021 regulation at issue in *Becerra*.[387] As a result, the Sixth Circuit had already found HHS's interpretation "lawful" under step two of *Chevron*.[388]

In light of *Loper*, Tennessee disputed whether these two prior cases had precedential effect.[389] Relying on *Loper*, the court held that "it forecloses new challenges based on specific agency actions that were already resolved via *Chevron* deference analysis."[390] *Loper*, the court held, opens the door only to new challenges to agency interpretations that have not yet been adjudicated.[391] Arguing, as Tennessee did, that *Loper* abrogated the precedential effect of the two prior cases, the court reasoned, would just be making an argument that the prior cases were wrongly decided.[392] *Loper* explicitly held, however, that argument is "not enough to justify overruling a statutory precedent."[393]

The Sixth Circuit's opinion is one of the first, if not the first, decision from a federal court of appeals addressing the precedential effect of a prior case decided pursuant to *Chevron* step two. As such, it is difficult to say whether other courts will approach the issue in the same way. For instance, *Loper* held that reliance on *Chevron* is not by itself enough to justify overruling prior precedent, but the Sixth Circuit in *Becerra* found that Tennessee did not present any other argument to the court other than that prior precedent relied on *Chevron*. Accordingly, it is unclear how courts may treat overruling prior precedent if presented with arguments that go beyond those made in *Becerra*.

Interactions with Corner Post, Inc. v. Board of Governors of the Federal Reserve System

Several days after the Supreme Court issued its *Loper* opinion, it issued an opinion in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*.[394] The opinion addressed the statute of limitations for a claim brought against the government pursuant to the APA.[395] The APA itself has no statute of limitations, but Section 2401(a) of Title 28 provides a general statute of limitations for civil claims brought against the United States.[396] Section 2401(a) requires plaintiffs to bring suit "within six years after the right of action first accrues."[397]

[386] *Id.* at 362–63 (citing Ohio v. Becerra, 87 F.4th 759, 770–75 (6th Cir. 2023); Rust v. Sullivan, 500 U.S. 173, 187 (1991)).

[387] *Ohio*, 87 F.4th at 770–75.

[388] *Tennessee*, 117 F.4th at 362–63.

[389] *Id.* at 363.

[390] *Id*.

[391] *Id.*

[392] *Id.*

[393] *Id.* at 364 (quoting Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024)).

[394] 603 U.S. 799 (2024). For more information, see CRS Legal Sidebar LSB11197, *Corner Post and the Statute of Limitations for Administrative Procedure Act Claims*, by Benjamin M. Barczewski and Jonathan M. Gaffney (2024).

[395] *Corner Post*, 603 U.S. at 804.

[396] *See* 5 U.S.C. §§ 701–706; 28 U.S.C. § 2401(a) ("[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.").

[397] 28 U.S.C. § 2401(a).

The Court held that a claim accrues when a plaintiff is first injured by a final agency action.[398] The Court's decision was a departure from decades of caselaw that had determined that, for the purposes of Section 2401(a), a claim accrues on the date the agency action becomes final for all plaintiffs.[399]

The import of the shift in interpretation of Section 2401(a) is best illustrated by the facts of the *Corner Post* case itself. Corner Post is a truckstop and convenience store located in North Dakota.[400] It opened for business in 2018.[401] Corner Post accepts credit cards for payment and as a result is required to pay an "interchange fee" to the bank that issued the credit card.[402] In 2011, the Federal Reserve, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, issued a regulation that set a maximum interchange fee that banks could charge to retailers.[403] Corner Post joined a suit against the Federal Reserve in 2021, challenging the Federal Reserve's regulation as allowing higher fees than permitted by Dodd-Frank.[404] Under then-prevailing caselaw in a majority of the federal circuit courts of appeals, a cause of action challenging the legality of the Federal Reserve's regulation accrued for any and all plaintiffs the date the regulation became final (2011) and expired six years later (2017), effectively barring Corner Post's suit.[405] Under the Supreme Court's interpretation of Section 2401(a), however, Corner Post's claim did not accrue until it was injured by the regulation (e.g., when it paid the first interchange fee).[406] That means that Corner Post's claim did not expire until six years after that initial injury—possibly sometime in 2024.[407]

Plaintiffs that are newly injured by older regulations (for example, by entering a regulated market) will now be able to challenge those regulations so long as they bring suit within six years of first being injured by the regulations. As a result, *Corner Post* may permit parties that did not exist at the time an agency took an action interpreting a statute to challenge that interpretation. That is true where a court had already found an agency interpretation reasonable under step two of *Chevron* or where the agency action was never challenged in court. *Corner Post* may, accordingly, lead to more agency interpretations being litigated under the principles set out in *Loper*.

Implications for Executive Branch Agencies

Neither the *Chevron* framework nor *Loper* applies directly to agencies; they direct how courts are to interpret a statute when an agency has issued its own interpretation.[408] Relatedly, *Chevron* did not give—and *Loper* did not take away—an agency's ability to interpret the statutes that it administers. When Congress vests an agency with regulatory authority, an agency will necessarily

[398] *Corner Post*, 603 U.S. at 808.

[399] *Id.* at 806 (identifying six circuits that held that the statute of limitations begins to run from the date the agency action became final); Barczewski, *supra* note 394 (identifying nine circuits that held that the statute of limitations began to run from the date the agency action became final).

[400] *Corner Post*, 144 S. Ct. at 805.

[401] *Id.*

[402] *Id.*

[403] *Id.*

[404] *Id.* at 806.

[405] *See id*.

[406] *Id.* at 813.

[407] *See id.* at 825.

[408] *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2266 (2024); Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 841–42 (1984).

interpret the provisions of that statute when it takes action pursuant to the statute. *Loper* changed which branch of the federal government—the judiciary or the executive—will have the final say about what the statute means when an agency's interpretation is challenged in court.[409] Where an agency's interpretation is never challenged in court, the agency will likely be the first and only interpreter of the statute.

That context does not mean that *Loper* will not have significant indirect effects on how agencies interpret statutes. As the lower courts resolve some of the questions left open by the *Loper* decision through case-by-case adjudication, agencies will likely shift their behavior in light of trends that emerge from the lower courts applying *Loper* and subject to their own particular success before the courts.

By its own terms, *Chevron* did not purport to instruct *agencies* how they should interpret the statutes that they administer.[410] Although the framework announced by *Chevron* was not binding on agencies, according to at least one study, it did have an effect on how agencies interpreted the statutes they administer. In a 2014 survey of agency personnel engaged in drafting regulations, approximately 43% of respondents agreed or strongly agreed (10% strongly agreed; 33% agreed) "that their agencies would be more aggressive in their interpretive practices" if they knew or strongly believed that a particular statutory interpretation would be entitled to *Chevron* deference.[411] Another 40% somewhat agreed.[412] Similarly, one commentator described *Chevron*'s effect as encouraging agencies to be "more adventurous" in interpreting statutes.[413]

Like the *Chevron* framework, *Loper*'s requirement to apply the traditional tools of statutory construction is directed at the courts; it does not directly bind or apply to agencies.[414] Nonetheless, as with *Chevron*, it is likely that *Loper* will have an indirect effect on agencies as the lower courts adjudicate more and more agency interpretations. By overruling *Chevron*, *Loper* may cause agencies to be more cautious in their interpretations. In the same 2014 study, when agency rule drafters were asked if they would be less aggressive in their interpretive practices if *Chevron* did not apply, roughly the same proportions strongly agreed (7%), agreed (31%), and somewhat agreed (45%).[415]

In addition to becoming more cautious in their interpretations, interpretations may also become more legalistic. In a 2005 essay, Donald Elliott, EPA's general counsel under President George H. W. Bush, explained that *Chevron* shifted power away from agency lawyers to other professionals within agencies.[416] Prior to *Chevron*, Elliott observed, agency lawyers exercised significant authority within agencies through the interpretation of the agencies' statutes.[417] In his telling, the predominant view of the courts prior to *Chevron* was that a statute had a single "best meaning" and it was an agency lawyer's job to identify the best meaning through the application of specialized legal means.[418] In this account, *Chevron* shifted how courts approach the meaning of statutes and, as a result, shifted the relative power of lawyers and other professionals within

[409] *Loper*, 144 S. Ct. at 2266.

[410] *Chevron*, 467 U.S. at 841–42.

[411] Walker, *supra* note 128, at 722–23.

[412] *Id.*

[413] E. Donald Elliott, Chevron *Matters: How the* Chevron *Doctrine Refined the Roles of Congress, Courts, and Agencies in Environmental Law*, 16 VILL. L. REV. 1, 3 (2005).

[414] *Loper*, 144 S. Ct. at 2266.

[415] Walker, *supra* note 128, at 724.

[416] Elliott, *supra* note 413, at 2.

[417] *Id.* at 11.

[418] *Id.*

agencies.[419] While *Chevron* was in place, agency lawyers attempted to describe the permissible range of discretion created by ambiguous statutory terms.[420] Agency policymakers would then select one of the permissible interpretations to adopt.[421] The shift to *Chevron* led to a policymaking dialogue within agencies over what policy an agency should adopt and why that was not possible prior to *Chevron*.[422] It is too early to tell whether overruling *Chevron* will result in the balance of power within agencies shifting back to lawyers. It is possible that, as the lower courts apply *Loper* in more and more cases, agencies may begin to rely more on agency lawyers to apply the specialized tools of statutory interpretation to identify the best meanings of statutes to increase their chances of prevailing in court.[423]

Overruling *Chevron* will also result in reifying interpretations of statutes such that agencies will no longer be able to change their interpretations without legislative intervention. The *Chevron* framework rested on a presumption that an ambiguity was an implicit delegation of interpretive authority to the agency to resolve that ambiguity.[424] One consequence of this assumption was that, where a court found an ambiguity, a court had no power to determine what the meaning of the statute was—that was for the agency.[425] As a result, even where a court had reviewed the statute, if it had determined that the statute was ambiguous, the agency could change its interpretation in the future.[426] So long as the new interpretation was reasonable, a court would be bound to defer to the agency's interpretation.[427] The *Chevron* decision itself recognized the policy discretion that attended ambiguous statutory provisions.[428] In a 2005 case captioned *National Cable & Telecommunications Association v. Brand X Internet Services*, the Supreme Court explicitly confirmed this consequence of *Chevron*.[429] The Court held that in light of *Chevron*, "only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction."[430]

The policy space or discretion that statutory ambiguity provided to agencies under *Chevron* was one factor the Court identified in *Loper* as a reason to overrule *Chevron*.[431] The *Loper* majority explained, "Under *Chevron*, a statutory ambiguity, no matter why it is there, becomes a license authorizing an agency to change positions as much as it likes, with 'unexplained inconsistency' being 'at most a reason for holding an interpretation to be arbitrary and capricious.'"[432] Except where Congress has delegated interpretive authority to an agency to interpret the statutory provisions at issue, *Loper* likely forecloses an agency's ability to change its interpretation after a

[419] *Id.* at 11–12.

[420] *Id.*

[421] *Id.*

[422] *Id.* at 12.

[423] *See supra* "The De Novo Standard of Review, Methods of Statutory Interpretation, and Statutory Ambiguity."

[424] Chevron U.S.A., Inc. v. Nat. Resources Def. Council, Inc., 467 U.S. 837, 841–42 (1984).

[425] *Id.*; Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005). *See also* Strauss, *supra* note 204, at 1145 ("*Chevron* space denotes the area within which an administrative agency has been statutorily empowered to act in a manner that creates legal obligations or constraints—that is, its delegated or allocated authority.").

[426] *Brand X*, 545 U.S. at 982.

[427] *Id.*

[428] *Chevron*, 467 U.S. at 841–44.

[429] 545 U.S. 967, 982 (2005).

[430] *Id.*

[431] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2272 (2024).

[432] *Id.*

court has determined the best meaning of a statute.[433] The *Loper* decision held that a statute has a single meaning fixed at the time of enactment.[434] Where a court has identified that meaning, there is no policy space within which an agency has discretion to choose among different reasonable interpretations.[435]

Loper also held that sometimes the single best meaning fixed at the time of enactment was that Congress delegated interpretive authority to an agency to define certain statutory terms.[436] In these circumstances, agency interpretations may be subject to only a reasonableness standard similar to *Chevron*'s second step.[437] Under these conditions it may be possible for an agency to change its interpretation even after the agency's interpretation was litigated. In that scenario, a court has fulfilled its duty to "say what the law is" by determining that the best meaning of the statute is that Congress vested the agency with discretion to define particular terms or phrases so long as it exercises that discretion reasonably.[438] As a corollary, although the agency may be able to change its interpretation of the statute, it has no power to adopt an interpretation that conflicts with the court's determination that the statute vests the agency with interpretive authority.[439]

Considerations for Congress

The *Loper* decision was based on an interpretation of the APA, not the Constitution. *Loper*, accordingly, did not diminish Congress's constitutional lawmaking authority. Put another way, *Loper* does not direct Congress to legislate in any particular way—it directs *courts* how to resolve cases of statutory interpretation. Because *Loper* does not directly bind Congress, whether *Loper* will affect how Congress legislates is still an open question.

Legislative Productivity

The *Loper* decision may affect Congress's approach to legislation in an indirect way. Courts and commentators argued that while *Chevron* was in place, Congress often legislated with it in mind.[440] That is, Congress may have made the same assumption that the *Chevron* decision made—that ambiguous terms in a statute would be interpreted by the relevant agency, not a court. The *Loper* decision disposed of that assumption when it held that *Chevron*'s general presumption about statutory ambiguity violated the APA.

Prior to the Court's decision in *Loper*, some had argued that Congress's assumption that courts would grant agencies deference pursuant to *Chevron* reduced Congress's incentive to pass new legislation—sometimes called "congressional abdication."[441] Proponents of this argument,

[433] *See id.* at 2266 ("In the business of statutory interpretation, if it is not the best, it is not permissible.").

[434] *Id.*

[435] *See id.* ("Courts instead understand that such statutes, no matter how impenetrable, do—in fact, must—have a single, best meaning.").

[436] *Id.* at 2263.

[437] *Id.* (citing Michigan v. EPA, 576 U.S. 743, 750 (2015)).

[438] *See id.*

[439] *See id.*

[440] *See, e.g.*, Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (1989); City of Arlington v. FCC, 569 U.S. 290, 296 (2013).

[441] Daniel E. Walters, *Will* Loper Bright *Spur a Congressional Renaissance?* (Tex. A&M Univ. Sch. of L. Legal Studies Rsch. Paper, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4792884; *see also* Richard J. Pierce, Jr., *Delegation, Time, and Congressional Capacity: A Response to Adler and Walker*, 105 IOWA L. REV. ONLINE 1, 12 (continued...)

including the petitioners in *Loper*, argued that because *Chevron* permitted agencies to change their interpretations of ambiguous statutes, Congress may not have thought it necessary to provide additional statutory authority for agencies to address new or unforeseen circumstances.[442] At oral argument, the petitioners argued that overruling *Chevron* would prompt Congress to limit using vague terms and take the lead in deciding questions of policy through an increase in legislation.[443] As of fall 2024, there is little data at the federal level regarding how overruling *Chevron* may change legislative drafting.

A 2024 study of state legislatures' reactions to the varying deference regimes at play in different state courts may shed some light on how Congress might react.[444] The study used variations among different states' judicial deference doctrines and variations of the same state's judicial deference doctrine across time and compared them to "legislative productivity" in state legislatures.[445] It found that differences in deference doctrines had almost no effect on legislative activity.[446] To the extent that judicial deference had any effect, some evidence indicated that legislatures produced more statutory text and used more definitions while also relying on explicit delegations and vague and precatory terms.[447] The study noted that these results were a "mixed bag, sometimes aiding legislatures' efforts to produce high-quality legislation and sometimes impeding it."[448] The study itself cautions that data from states may not translate directly to Congress and that a focus on all legislative output from state legislatures might miss important effects from deference or the absence of it that might appear only in certain types of legislation.[449]

Legislative Specificity

Regardless of the experience of state legislatures, Congress has a number of options to respond to *Loper*. Congress could respond as the petitioners in *Loper* argued that it might—by drafting statutes with more specificity and fewer vague or ambiguous terms.[450] As noted above, *Loper* does not require any particular congressional response, but after *Loper*, where litigation occurs between an agency and a private party regarding the meaning of a statute, a court rather than an agency will determine the meaning of the statute. If Congress does not want a court to have the power to resolve vague or ambiguous statutory text, Congress could choose to draft statutes with more specificity, effectively choosing the policy it prefers rather than leaving the judiciary to interpret a vague or ambiguous term.

(2020); Adam White, *Constitutional Government After Chevron?*, LAW & LIBERTY (May 1, 2024), https://lawliberty.org/forum/constitutional-government-after-chevron/; Justin Walker, *The Kavanaugh Court and the* Schechter-*to*-Chevron *Spectrum: How the New Supreme Court Will Make the Administrative State More Democratically Accountable*, 95 IND. L.J. 923, 926–27 (2020).

[442] White, supra note 441; Transcript of Oral Argument at 25–26, Loper Bright Enters. v. Raimondo, 143 S. Ct. 2244 (2024) (No. 22-541). Some scholars have characterized this argument regarding *Chevron* as part of broader claims about congressional decline. Walters, *supra* note 441; *see also* Beau Baumann, *Americana Administrative Law*, 111 GEO. L.J. 465 (2023).

[443] Transcript of Oral Argument at 25–26, Loper Bright Enters. v. Raimondo, 143 S. Ct. 2244 (2024) (No. 22-541).

[444] Walters, *supra* note 441.

[445] *Id.* at 5.

[446] *Id.* at 29–30.

[447] *Id.* at 29.

[448] *Id.* at 30.

[449] *Id.* at 30–31.

[450] Transcript of Oral Argument at 25–26, Loper Bright Enters. v. Raimondo, 143 S. Ct. 2244 (2024) (No. 22-541).

Some have argued that Congress currently lacks the institutional capacity to draft statutes with more specificity.[451] The House Committee on Administration held a hearing less than a month after the Court issued the *Loper* opinion seeking input on how *Loper* might change how Congress operates.[452] While the witnesses disagreed on a number of issues, they all agreed that were Congress to want to draft more specific statutes or increase oversight of agency rulemaking in response to *Loper*, it would need to increase the quantity and quality of congressional staff.[453]

Codifying *Chevron* or *Loper*

Congress could also respond by codifying some form of deference either for all agencies or for specific agencies or specific agency actions. As noted above, the *Loper* decision rested on an interpretation of the APA. As a result, Congress retains the authority to amend the APA to require courts to defer to agency interpretations of federal law or to enact stand-alone statutes that apply to some agencies but not others. For example, in 2023, the Stop Corporate Capture Act was introduced in the House.[454] The bill would amend Section 706 of the APA to codify a version of *Chevron* deference. A companion bill was introduced in the Senate in July 2024.[455]

Codifying *Chevron* may raise constitutional concerns for some Justices. Justices Thomas and Gorsuch have both written publicly that they believe *Chevron* deference violates Article III of the Constitution.[456] Article III, their argument goes, requires that courts have the final word on the meaning of federal law.[457] *Chevron*, however, shifted the authority to render final binding interpretations of federal law to agencies under certain circumstances.[458] That shift, they believe, violates Article III's command as declared by the Court in *Marbury v. Madison* to "say what the law is."[459] The petitioners' appeal to the Court in the *Loper* case was built around the Article III argument.[460] Although the Court ultimately rested its decision on an interpretation of the APA, the Court referred back to 19th-century cases interpreting Article III to support its finding that the APA rendered in statute the traditional role of the courts to "say what the law is."[461] Thus, although the Court declined to decide the case on constitutional grounds, its decision was influenced by Article III cases that pre-dated the APA.[462]

---

[451] *Congress in a Post-*Chevron *World: Hearing Before the Comm. on H. Admin*, 118th Cong. (2024).

[452] *Id.*

[453] *E.g.*, *id.* at 21 (statement of Satya Thallam, Senior Vice President of Government Affairs, Americans for Responsible Innovation and Senior Fellow, Foundation for American Innovation), 50 (statement of Josh Chafetz, Agnes Williams Sesquicentennial Professor of Law and Politics, Georgetown University Law Center).

[454] Stop Corporate Capture Act, H.R. 1507, 118th Cong. § 12 (2023). In addition to codifying deference, the Stop Corporate Capture Act would amend a number of other provisions in the APA, including amending 5 U.S.C. § 553 to create new disclosure requirements for commenters participating in the public comment period of the informal rulemaking process. *Id.* § 4.

[455] Stop Corporate Capture Act, S. 4749, 118th Cong. § 12 (2024).

[456] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) (Thomas, J., concurring); Buffington v. McDonough, 143 S. Ct. 14, 22 (2022) (Gorsuch, J., dissenting from denial of certiorari); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

[457] *Loper*, 144 S. Ct. at 2274 (Thomas, J., concurring).

[458] *Id.*

[459] *Id.*; *Buffington*, 143 S. Ct. at 18 (Gorsuch, J., dissenting from denial of certiorari).

[460] *See, e.g.*, Brief for Petitioners at 24, Loper Bright Enters. v. Raimondo, 143 S. Ct. 2429 (2023) (No. 22-541).

[461] *Loper*, 144 S. Ct. at 2257.

[462] *See id.* at 2257-58. Prior to the *Loper* decision, there was a rich scholarly debate regarding the constitutionality of *Chevron*. *See, e.g.*, Evan J. Criddle, Chevron*'s Consensus*, 88 B. U. L. REV. 1271, 1283–91 (2008) (surveying these (continued...)

Conversely, Congress could also codify the *Loper* decision. By basing its decision on the meaning of the APA, the *Loper* decision essentially fixed the meaning of Section 706. Were Congress to want to reinforce *Loper*'s holding and potentially limit the effect were the Court to overrule *Loper*, it could amend the APA to explicitly bar the application of any kind of deference doctrine for cases brought pursuant to the APA. Prior to the *Loper* decision, the House had introduced the Separation of Powers Restoration Act (SOPRA) in the 106th[463], 107th[464], and 114th-118th Congresses.[465] SOPRA would amend Section 706 of the APA to require courts to apply *de novo* review to questions of law raised in cases brought pursuant to the APA.[466] Were it enacted prior to the *Loper* decision, it would have prevented courts from deferring to agency interpretations pursuant to *Chevron*—at least for cases brought pursuant to the APA. If SOPRA were enacted now, it would likely reinforce the *Loper* decision and prevent deference from applying to cases brought pursuant to the APA if the Court overrules *Loper* in the future.

Congress could also amend other judicial review statutes. Although the APA is the most prominent judicial review statute, the Administrative Conference of the United States has identified more than 600 other statutes that provide for judicial review of certain agency actions.[467] Many of those statutes do not include text similar to the language on which the Supreme Court based its decision in *Loper*.[468] Whether the Court's decision in *Loper*, which was based on an interpretation of the APA, extends to other judicial review provisions is an open question. Congress may wish to amend other non-APA judicial review provisions to either ensure that the *Loper* decision applies to judicial review conducted under those statutes or to codify deference for cases brought under those statutes.

arguments); Kent Barnett, *How* Chevron *Deference Fits into Article III*, 89 GEO. WASH. L. REV. 1143, 1174 (2021); Ilan Wurman, *The Specification Power*, 168 U. PA. L. REV. 689, 693–95 (2020); Jonathan R. Siegel, *The Constitutional Case for* Chevron *Deference*, 71 VAND. L. REV. 937, 941–42, 963, 982 (2018); Aditya Bamzai, Marbury v. Madison *and the Concept of Judicial Deference*, 81 MO. L. REV. 1057 (2016); Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 783 (2010). This debate will likely continue after the *Loper* decision but could shift its focus to whether Congress could codify *Chevron* deference or something similar to it.

[463] H.R. 2655, 106th Cong. (1999).

[464] H.R. 864, 107th Cong. (2001).

[465] H.R. 29, 114th Cong. (2015); H.R. 4768, 114th Cong. (2016); H.R. 7895, 116th Cong. (2020); H.R. 76, 115th Cong. (2017); H.R. 1927, 116th Cong. (2019); H.R. 3494, 117th Cong. (2021); H.R. 288, 118th Cong. (2023); H.R. 464, 118th Cong. (2023).

[466] H.R. 288, 118th Cong. § 2 (2023).

[467] JONATHAN R. SIEGEL, THE ACUS SOURCEBOOK OF FEDERAL JUDICIAL REVIEW STATUTES, https://www.acus.gov/sites/default/files/documents/ACUS-Sourcebook-of-Federal-Judicial-Review-Statutes.pdf (last visited Dec. 19, 2024).

[468] *See, e.g.*, 28 U.S.C. § 2343 ("The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity" of final order of certain agencies); 49 U.S.C. § 46110(c) ("the court has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration to conduct further proceedings."); 15 U.S.C. § 21(c).

Delegations to Agencies

Another potential congressional response to *Loper* is the use of different drafting techniques to delegate certain authority to agencies. As noted above, the Supreme Court in *Loper* recognized that Congress retains the authority to craft delegations of authority by statute that can empower agencies to interpret statutory terms or exercise discretionary authority.[469] The Court cited phrases such as *as determined by the Secretary* to indicate where Congress has empowered an agency, rather than a court, to render final and binding interpretations of particular terms or phrases.[470] Similarly, the Court cited phrases such as *the Administrator shall regulate if the Administrator finds such regulation appropriate and necessary* as delegations from Congress to an agency of policy discretion that the courts may not second-guess unless the agency exercises its discretion unreasonably.[471] Congress can use these drafting techniques to tailor the type and scope of delegation to an agency to ensure that the agency is able to exercise whatever authority Congress intends it to have. As the Court explained in *Loper*, a court's job when faced with a statutory delegation is to ensure that the agency has not exceeded the boundaries of the delegation and ensure that it exercises its delegated authority reasonably.[472]

Author Information

Benjamin M. Barczewski
Legislative Attorney

Disclaimer

[469] *Loper*, 144 S. Ct. at 2263.

[470] *Id.* at 2263 n.5.

[471] *Id.* at 2263 n.6.

[472] *Id.* at 2263.