Center for Applied Environmental Law and Policy

Administrative Law After *Loper Bright Enterprises v. Raimondo*

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Introduction

Delegation of regulatory authority from Congress to federal agencies is a foundational principle of modern government. Congress often tasks agencies to address complex problems, and lawmakers combine broad and specific terms to identify the scope of an agency's authority in effectuating the purpose of a statute. Even when Congress is most precise, the terms in a statute may have multiple possible readings.

For four decades, federal courts relied on the *Chevron* doctrine[1] to guide their approach in determining whether to defer to an agency's interpretation of a statute. According to *Chevron*, the first step for a reviewing court was determining whether a statute "directly spoke[]" to the precise statutory question at issue.[2] If so, that was the end of the inquiry. If the court concluded that the statute was ambiguous or silent at the second step, *Chevron* instructed courts to defer to permissible agency interpretations. Because courts consider ambiguous statutory language so often, *Chevron* became a central principle of modern administrative law and is among the most frequently cited federal cases.

In *Loper Bright Enterprises v. Raimondo* and its companion case, *Relentless, Inc. v. Department of Commerce* (collectively referred to as *Loper Bright*),[3] the Supreme Court concluded that the forty-year-old *Chevron* doctrine, specifically *Chevron* step two, violated the judicial review provisions of the Administrative Procedure Act (APA). According to the *Loper Bright* majority, the reviewing court must determine the single, "best" reading of a statute. While allowing room

[1] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).
[2] *Id.* at 842.
[3] 144 S. Ct. 2244 (2024). The slip opinion is available at https://www.supremecourt.gov/opinions/23pdf/22-451_7m58.pdf.

to respect an agency's persuasive statutory interpretation, the majority held that the APA prohibits a reviewing court from deferring to an agency interpretation with which the court disagrees.[4] *Loper Bright* also requires courts to police the boundaries of agency authority and agencies to act within those boundaries to reasonably exercise their discretion when implementing statutes.

Although this may seem like a sea change, the *Loper Bright* majority importantly recognized that: (1) delegations of discretionary authority to agencies via statute remain lawful; (2) Congress "often"[5] delegates considerable discretionary authority to agencies in statutes; and (3) where the APA standards of review of an agency action govern, courts review an agency's exercise of discretion, policymaking, and factual determinations with deference, meaning that a court should not substitute its judgment for an agency's reasonable, record-supported choices. The majority also indicated that, despite eliminating *Chevron* deference, cases relying on the now-rejected methodology are not specifically overturned.

The Court left many questions unresolved. *Chevron* was a response to a longstanding challenge for courts in addressing statutory ambiguity and silence when reviewing agency actions taken to carry out a statute's instructions and purpose. Overturning *Chevron* does not make it any easier to determine the "best" reading of statutory language, nor is it entirely clear when courts should respect an agency's interpretation or even the amount of respect due in any particular case. Even more complicated is the amount of discretion a court's best reading will leave for an agency to do its job or how that discretion dovetails with the Court's recently announced major questions doctrine (MQD). In sum, lower courts, agencies, and litigants will struggle through the application of *Loper Bright* for years to come, and the resulting uncertainty will likely unleash a large volume of cases in which litigants use the decision to challenge new and existing federal regulations.

There are many reasons to critique *Loper Bright*. This white paper leaves the critiques to others. The focus here is on exploring the near-term implications for administrative law and providing initial guidance for litigators defending agency actions. The paper begins with an overview of *Loper Bright*'s holding and methodology. Part II highlights the crucial differences between discretion and *Chevron* deference. Part III explores the ongoing role of agency discretion in the aftermath of *Loper Bright*. Part IV considers the impact of *Loper Bright* on the MQD. The paper concludes in Part V with a discussion of *Loper Bright*'s implications for past cases that relied on *Chevron*.

I. *Loper Bright* Holding and Methodology

In 1976, Congress enacted the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). The National Marine Fisheries Service (NMFS) has authority under the Act to implement a comprehensive fishery management program for designated coastal waters.[6] Regional fishery management councils can propose plans and amendments to NMFS,

[4] *Id.* at 2273 ("[C]ourts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.").
[5] *Id.* at 2263.
[6] *Id.* at 2254–55 (discussing the Magnuson-Stevens Act).

including measures that are "necessary and appropriate" for conservation and management of the fishery.[7]

NMFS approved a regional plan amendment that required independent monitors to be on board some fishing trips, with costs borne by the fishing companies. Loper Bright Enterprises and other fishing companies challenged the amendment, arguing that NMFS exceeded its statutory authority in implementing the monitoring requirements. Lower courts ruled in favor of the government, citing the *Chevron* doctrine. The Supreme Court granted certiorari and overturned the lower courts' decisions.

Despite discussing Article III of the Constitution, separation-of-powers principles, and the judicial branch's "traditional" role as interpreter of laws in *Loper Bright*, the majority's holding is limited to statutory interpretation rather than the Constitution.[8] The Court eliminated *Chevron* deference as inconsistent with the judicial review provision of the APA, which requires "the reviewing court [to] decide all relevant questions of law."[9] The majority interpreted this provision to require courts to exercise independent judgment to determine a single, "best" reading of statutory provisions, ambiguous or not, using every tool at their disposal.

In exercising independent judgment to discern the best reading of statutory language, however, a reviewing court can "seek aid from the interpretations of those responsible for implementing particular statutes."[10] "Such interpretations 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance' consistent with the APA."[11] Although agency judgments are not binding, a court can afford them "respect" or weight,"[12] depending on factors identified in the 1944 case *Skidmore v. Swift & Co.*:[13] (1) the "thoroughness evident in its consideration"; (2) the "validity of its reasoning"; (3) "its consistency with earlier and later pronouncements"; and (4) "all those factors which give it power to persuade[.]"[14]

The *Loper Bright* majority's rule for interpreting statutes administered by agencies is therefore relatively simple: courts must determine the best reading using all available tools of interpretation, with room for non-binding respect to agency interpretations under *Skidmore* as one of the tools. *Loper Bright*'s implementation, however, will be much more complicated. Lower courts will likely struggle to discern a single, best reading of an ambiguous statute without considerable conflict and will almost certainly diverge in determining whether and how much to apply *Skidmore* respect.

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[7] *Id.* (citing 16 U.S.C. § 1853).
[8] The fact that no member of the Court joined Justice Thomas's concurrence, which argues that "*Chevron* deference also violates our Constitution's separation of powers," *id.* at 2274 (Thomas, J., concurring), confirms the limited nature of the majority's holding.
[9] 5 U.S.C. § 706.
[10] *Loper Bright*, 144 S. Ct. at 2262.
[11] *Id.* at 2262 (citing *Skidmore v, Swift & Co.*, 323 U.S. 134, 140 (1944)); *see also id.* at 2251 (similar).
[12] *See, e.g.*, *id.* at 2252 ("And although an agency's interpretation of a statute 'cannot bind a court,' it may be especially informative 'to the extent it rests on factual premises within [the agency's] expertise.'" (citation omitted)).
[13] 323 U.S. 134 (1944).
[14] *Loper Bright*, 144 S. Ct. at 2249–50 (citing *Skidmore*, 323 U.S. at 140); *see also id.* at 2262 ("[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." (citation omitted)).

The majority notes that Congress "often" lawfully delegates a degree of discretion to agencies and even provides examples of seemingly broad discretion.[15] Where such a delegation has occurred, the majority describes a reviewing court's role in two phases. First, a court interprets the law under the methodology set out in *Loper Bright* to determine the bounds of the agency's discretionary authority: "When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits."[16] Where an agency acts outside of those boundaries, then the action is invalid.[17]

Second, where the agency has acted within the boundaries of its discretionary authority, the reviewing court moves to an analysis in which it is no longer interpreting the law to determine a best meaning. Here, the court is reviewing the overall action (often under the APA) to determine whether the action is reasonable and supported by the record, which is a less probing inquiry, i.e., "ensuring the agency has engaged in 'reasoned decisionmaking' within those [discretionary] boundaries."[18] This is consistent with the Court's other statements about the APA, specifically that courts *must* defer to agency policymaking and fact-finding under the standards of review in 5 U.S.C. § 706(2),[19] and with the Court's approach in *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*,[20] and its progeny.

II. Distinguishing Between Discretion and (*Chevron*) Deference to Better Understand *Loper Bright*

The majority opinion in *Loper Bright* draws a clear line between:

- **Discretion**: Whether Congress has delegated to an agency a specific choice, judgment, or "power of free decision or latitude of choice within certain legal bounds"[21] as embedded in the APA and other statutes, such that a reviewing court generally should not second-guess the agency's discretionary choice; and

- ***Chevron* Deference**: Whether a reviewing court submits to an agency's permissible interpretation of the meaning of ambiguous words or silence in a statutory provision, including the agency's interpretation of the scope of its discretionary authority.

The concept of agency discretion is a cornerstone of the APA. If, for example, Congress has delegated *unreviewable* discretion to an agency to take certain actions, then a reviewing court cannot sit in judgment of that agency's discretionary action *at all*, not even under the APA

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[15] *Id.* at 2263.
[16] *Id.*
[17] *See* 5 U.S.C. § 706(2)(A) ("The reviewing court shall[] . . . hold unlawful and set aside agency action, findings, and conclusions found to be[] . . . an abuse of discretion, or otherwise not in accordance with law[.]").
[18] *Loper Bright*, 144 S. Ct. at 2263 (citations omitted).
[19] *See id.* at 2262.
[20] 463 U.S. 29, 43 (1983).
[21] Donald Goodson, *Discretion Is Not* (Chevron) *Deference*, HARV. J. ON LEGIS. (forthcoming 2024) (manuscript at 3) (quoting MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 357 (11th ed. 2014)), https://ssrn.com/abstract=4879800.

arbitrary-and-capricious standard.[22] While such broad grants of authority are admittedly rare in light of the presumption of reviewability of agency action,[23] the example illustrates that the APA reflects principles of agency law, including some instances where the agent (agency) has discretion to make choices on its own without seeking approval from the principal (Congress).

More commonly, agents are delegated discretion to act within bounds set by the principal for certain types of decisions. This concept is reflected in a key component of the APA standard of review: whether the action is "an abuse of discretion, or otherwise not in accordance with law."[24] Recognizing that there is a sliding scale from unfettered to very limited discretion depending on the terms, context, and purpose of a statute, a central aspect of APA judicial review is determining the scope of the agency's discretion and whether the agency has acted within the bounds of the discretion. If it has, and its action was reasonable and supported by the record, then the action generally should be upheld.

Discretion is distinct from the concept of deference associated with *Chevron*. Determining the scope of discretion involves an inquiry into whether Congress has empowered an agency to make a specific choice or set of choices that a reviewing court should not disturb. *Chevron* allowed an agency to offer an interpretation of an ambiguous statutory provision or statutory silence, called on a reviewing court to determine if the agency's interpretation was permissible, and if so, instructed the court to refrain from following its own preferred reading by deferring to the agency.

In light of this distinction and the *Loper Bright* majority opinion, litigants defending agency actions should, as appropriate, seek to demonstrate that the best reading of a statute supports broad agency discretion and that the agency acted within the scope of its discretion when it took the challenged action, often meriting only arbitrary-and-capricious review of the overall action.

III. Discretionary Authority After *Loper Bright*

The *Loper Bright* majority explicitly recognized that Congress can delegate discretionary authority to administrative agencies, subject to constitutional limitations, such as the non-delegation doctrine. Though the bounds of an agency's discretionary authority will be based on a court's determination of the best reading of the statute employing all the tools of statutory interpretation, including potential *Skidmore* respect, the majority said little else specific to this inquiry. The majority also sent mixed signals regarding whether ambiguous language can support a delegation of discretionary authority.[25] Litigants defending agency action can reasonably

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[22] *See* JONATHON N. GAFFNEY, CONG. RSCH. SERV., LSB10558, JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT (APA) 2 (2020) ("[T]he APA prohibits review of actions 'committed to agency discretion by law.' This exception is 'quite narrow[]' and the Supreme Court has confined it to 'those rare circumstances where the relevant statute 'is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" (citations omitted)).

[23] *See, e.g.*, *Sackett v. EPA*, 566 U.S. 120, 128 (2012) (concluding that the APA "creates a 'presumption favoring judicial review of administrative action[]'" (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984)).

[24] 5 U.S.C. § 706(2)(A).

[25] *Compare Loper Bright*, 144 S. Ct. 2244, 2272 (2024) (cautioning that "statutory ambiguity[] . . . is not a reliable indicator of actual delegation of discretionary authority to agencies"), *with id.* at 2266 ("The very point of the

conclude that whether statutory language is characterized as ambiguous or plain is not as important to the *Loper Bright* majority as is determining the scope of an agency's discretionary authority under the best reading.[26]

The questions the Court left open magnify the importance of the relative clarity it offered with three specific example categories of delegations of discretionary authority. Notably, though, the Court did not foreclose others, which comports with scholarly arguments that examples of grants of discretionary authority should not be considered exhaustive.[27]

First, the majority recognized that "some statutes 'expressly delegate[]' to an agency the authority to give meaning to a particular statutory term."[28] All of the majority's examples include express delegations of authority for an agency to define terms, which may indicate that this type of delegation will have to be clearer than others in the statutory text.[29]

Second, the majority noted that Congress may "empower an agency to prescribe rules to 'fill up the details' of a statutory scheme," citing *Wayman v. Southard*, issued in 1825.[30] While *Wayman* indicated that certain subjects "must be entirely regulated by the legislature itself," it held that Congress could "certainly delegate to others[] powers which the legislature may rightfully exercise."[31] Neither *Loper Bright* nor *Wayman* addresses whether the nature of the delegation (express or not) plays any role in this example, leaving open the possibility that less-than-express terms could suffice in a best reading. Of the majority's three example categories, this is the least defined, especially given the age of *Wayman*.

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traditional tools of statutory construction . . . is to resolve statutory ambiguities. *That is no less true when the ambiguity is about the scope of an agency's own power* . . . ." (emphasis added)).

[26] Indeed, the majority opinion views efforts to determine whether language is ambiguous as a fool's errand. *See id.* at 2266 (observing that, "even if some judges might (or might not) consider the statute ambiguous, there is a best reading all the same"), 2252 ("[T]he concept of ambiguity has always evaded meaningful definition."), 2270 ("One judge might see ambiguity everywhere; another might never encounter it." (citations omitted)), 2271 (concluding that "four decades of judicial experience attempting to identify ambiguity under *Chevron*[]" only "reveals the futility of the exercise").

[27] *See* Goodson, *supra* note 21, at 5–6 (summarizing Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2153 (2016) (book review), and *Kisor v. Wilkie*, 588 U.S. 558, 631 (2019) (Kavanaugh, J., concurring)).

[28] *Loper Bright*, 144 S. Ct. at 2263 (citing *Batterton v. Francis*, 432 U.S. 416, 425 (1977)).

[29] *See Batterton*, 432 U.S. at 425 ("Unlike the statutory term in Title II, however, Congress in § 407(a) expressly *delegated* to the Secretary the power to prescribe standards for determining what constitutes 'unemployment' for purposes of AFDC-UF eligibility."); *Loper Bright*, 144 S. Ct. at 2263 n.5:

> *See, e.g.,* 29 U.S.C. §213(a)(15) (exempting from provisions of the Fair Labor Standards Act "any 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*)" (emphasis added)); 42 U.S.C. §5846(a)(2) (requiring notification to Nuclear Regulatory Commission when a facility or activity licensed or regulated pursuant to the Atomic Energy Act "contains a defect which could create a substantial safety hazard, *as defined by regulations which the Commission shall promulgate*" (emphasis added)).

[30] 23 U.S. 1, 10 (1825); *Loper Bright*, 144 S. Ct. at 2263 (citing *Wayman* as 10 Wheat. 1, 43 (1825)).

[31] *Wayman*, 23 U.S. at 43.

Third, the majority recognized that Congress can empower agencies "to regulate subject to the limits imposed by a term or phrase that 'leaves agencies with flexibility,' such as 'appropriate' or 'reasonable.'"[32] Justice Kavanaugh also identified "feasible" or "practicable" as similar terms of flexibility in a 2016 article,[33] as well as his later concurrence in *Kisor v. Wilkie*.[34] The other *Loper Bright* examples include a statutory provision that requires an agency to act when an administrator determines in their judgment that a failure to act would interfere with the "protection of public health" and "public water supply."[35] Other examples likely fall within this category.[36] Such "broad" and "capacious"[37] terms

- "naturally and traditionally include[] consideration of all relevant factors";[38]
- "reflect[] an intentional effort to confer the flexibility necessary" to adapt to "changing circumstances and scientific developments";[39] and
- can "appl[y] in situations not expressly anticipated by Congress," which "does not demonstrate ambiguity it demonstrates breadth."[40]

Accordingly, the use of these and similar terms in a statutory provision supports a well-established and typically broad degree of discretionary authority for an agency.

Litigants defending agency action may wish to exercise caution when advocating for discretion beyond these example categories. To be sure, the *Loper Bright* majority acknowledged that the APA generally requires courts to defer to agencies' reasonable and supported policymaking and fact-finding,[41] noting that "[i]t is reasonable to assume that Congress intends to leave policymaking to political actors."[42] While this language is useful, litigants defending agency actions should be wary of arguing for deference based only on the *general* policymaking authority of agencies. This authority may be no broader than the majority's three example categories of delegations of discretionary authority discussed above. Indeed, the majority

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[32] *Loper Bright*, 144 S. Ct. at 2263 (citing Michigan v. EPA, 576 U.S. 743, 752 (2015)).
[33] Kavanaugh, *supra* note 27, at 2153. Justice Kavanaugh posited that, when agencies act within the bounds of these discretionary terms, "[c]ourts should defer to the agency, just as they do when conducting deferential arbitrary and capricious review under the related reasoned decisionmaking principle of *State Farm*." *Id.* at 2154 (referring to Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983)).
[34] 588 U.S. 558, 632 (2019) (Kavanaugh, J., concurring) (explaining that "[t]hose kind of terms afford agencies broad policy discretion, and courts allow an agency to reasonably exercise its discretion to choose among the options allowed by the text").
[35] *Loper Bright*, 144 S. Ct. at 2263 n.6 (citing 33 U.S.C. §1312(a)) (further citation omitted); *see also, e.g.*, NAACP v. Fed. Power Comm'n, 425 U.S. 662, 669 (1976) ("Thus, in order to give content and meaning to the words 'public interest' as used in the Power and Gas Acts, it is necessary to look to the purposes for which the Acts were adopted."); SEC v. Chenery Corp., 318 U.S. 80, 94 (1943) ("It is not for us to determine independently what is 'detrimental to the public interest or the interest of investors or consumers' or 'fair or equitable' within the meaning of . . . the Public Utility Holding Company Act of 1935.").
[36] *See, e.g.*, Perkins v. Bergland, 608 F.2d 803, 906 (9th Cir. 1979) (explaining that "such terms as 'that (which) will best meet the needs of the American people' . . . 'breathe[] discretion at every pore'" (quoting Strickland v. Morton, 519 F.2d 467, 469 (9th Cir. 1979))).
[37] Goodson, *supra* note 21, at 2.
[38] Michigan v. EPA, 576 U.S. 743, 752 (2015).
[39] Massachusetts v. EPA, 549 U.S. 497, 532 (2007).
[40] Pa. Dep't of Corrs. v. Yeskey, 524 U.S. 206, 212 (1998).
[41] *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2262 (2024) (citing 5 U.S.C. § 706(2)).
[42] *Id.* at 2268.

repeatedly signaled that, in its view, the general deference afforded to agency policymaking should not be equated with discretion to interpret statutes,[43] at least absent a best reading demonstrating otherwise. And although the majority spoke favorably of prior opinions recognizing general agency authority to make conclusive findings of fact,[44] pure questions of fact when implementing statutes are rare.[45] Accordingly, when advocating for the best reading of a statute, deference to agency fact-finding may be strongest where an agency has well-established discretion to apply statutory terms based on its findings,[46] or where respect is justified by the *Skidmore* factors.[47]

IV. The Major Questions Doctrine After *Loper Bright*

The Supreme Court has been inconsistent about the relationship between the MQD and *Chevron*. Among the Supreme Court cases now incorporated into the MQD lineage,[48] some discuss the MQD factors in the context of *Chevron's* analysis,[49] some reject *Chevron's* application, and some are silent on the question. Furthermore, when the Court has considered the MQD factors in the context of *Chevron*, it has been inconsistent about whether the MQD applies at *Chevron* step one or step two.

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[43] *See id.* at 2251 (rejecting the notion that "resolving statutory ambiguities can involve policymaking best left to political actors, rather than courts" as a justification for *Chevron*), 2267–68:

> The view that interpretation of ambiguous statutory provisions amounts to policymaking suited for political actors rather than courts is especially mistaken, for it rests on a profound misconception of the judicial role. . . . [R]esolution of statutory ambiguities involves legal interpretation. That task does not suddenly become policymaking just because a court has an 'agency to fall back on.' *Kisor*, 588 U. S., at 575, 139 S. Ct. 2400, 204 L. Ed. 2d 841 (opinion of the Court). Courts interpret statutes, no matter the context, based on the traditional tools of statutory construction, not individual policy preferences.

[44] *Loper Bright*, 144 S. Ct. at 2248 (citing St. Joseph Stock Yard Co. v. United States, 298 U.S. 38, 51 (1936)).
[45] *Loper Bright*, 144 S. Ct. at 2306 ("[T]he universe of mixed questions swamps that of pure legal ones." (citation omitted)) (Kagan, J., dissenting).
[46] Consider the majority's discission of two cases from the 1940s: "On occasion, to be sure, the Court applied deferential review upon concluding that a particular statute *empowered an agency to decide how a broad statutory term applied to specific facts found by the agency*." *Loper Bright*, 144 S. Ct. at 2249 (emphasis added).
[47] *See id.* at 2267 ("And although an agency's interpretation of a statute 'cannot bind a court,' it may be especially informative 'to the extent it rests on factual premises within [the agency's] expertise.'" (citation omitted)).
[48] The Court first formally identified the MQD, including previous cases from which the doctrine is derived, in 2022. *See* West Virginia v. EPA, 597 U.S. 697, 721–25, 740–45 (2022) (discussing Ala. Ass'n of Realtors v. DHHS, 141 S. Ct. 2485 (2021) (per curiam); King v. Burwell, 576 U.S. 473 (2015); Util. Air Reg. Grp. v. EPA, 573 U.S. 302, 332 (2014); Gonzales v. Oregon, 546 U.S. 243 (2006); Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000); MCI Telecomms. Corp. v. AT&T, 512 U.S. 218 (1994)).
[49] On its face, the MQD is limited to "extraordinary cases . . . in which the history and the breadth of the authority that the agency has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer" the authority for the challenged regulation absent "clear congressional authorization." *West Virginia*, 597 U.S. at 721–23. Scholars have translated this into three main inquires: (1) is the agency action under review "novel," "unprecedented," or "unheralded"; (2) does the agency action transform the scope of the agency's authority; and (3) is the agency action one of "vast economic and political significance"? THOMAS W. MERRILL, THE MAJOR QUESTIONS DOCTRINE: RIGHT DIAGNOSIS, WRONG REMEDY, STANFORD UNIVERSITY, THE HOOVER INSTITUTION CENTER FOR REVITALIZING AMERICAN INSTITUTIONS 3 (2023) (citations omitted), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=5215&context=faculty_scholarship.

Despite eliminating *Chevron* deference, *Loper Bright* does not clarify the relationship. The majority opinion includes only one explicit discussion, noting the "refinements" the Court has made to address the challenges created by the *Chevron* framework. There, the majority explains that *Chevron* did "not apply if the question at issue is one of deep economic and political significance,"[50] characterizing the MQD as a "substantive" hurdle to the possible application of *Chevron* deference.[51] This passage confirms that the two doctrines are related, but the relationship remains undefined.

Although *Loper Bright* does not specify the ongoing role of the MQD following *Loper Bright*, the majority's logic, including its explicit elimination of *Chevron* deference, suggests that the refinements developed in response to *Chevron* are now unnecessary as governing principles. This is particularly true given the significant overlap between the role of the relatively new MQD and the justification for *Loper Bright*. Both aim to cabin agency interpretation of ambiguous statutory language, and both are rooted in the premise that courts should exercise independent judgment, although they approach the inquiry from different angles and differ slightly. *Loper Bright* instructs courts to determine the best reading of a statute with room to respect agency interpretations and recognizes that the best reading "often" evidences a degree of discretionary authority for the agency, making no mention of the MQD's heightened clarity requirement or any clear statement rule. Counterintuitively, the MQD inquiry focuses on factors beyond the authorizing statute, such as consideration of the economic and political significance of a regulation, and in the "extraordinary" circumstances when the MQD applies, the doctrine instructs courts to apply a higher degree of scrutiny to determine whether Congress "clearly" authorized the agency action. Ultimately, both doctrines require courts to determine whether an agency has authority for the challenged action.

If, after *Loper Bright*, courts are responsible for determining the *best* interpretation of ambiguous statutory language and will not automatically defer to permissible agency interpretations of such language, interpretations that a court considers to be merely "colorable" or "plausible" likely will not suffice,[52] rendering the consideration of MQD factors irrelevant. For example, the "majorness" of an agency action should be irrelevant to the inquiry. After *Loper Bright*, the statute's best reading either allows the action or not. There should be no work left for the MQD.[53]

Nonetheless, *Loper Bright*'s indeterminate approach to the role of the MQD incentivizes litigants challenging agency rules to raise the doctrine as a distinct legal argument—even where those litigants must acknowledge a significant delegation of discretionary authority—and some lower

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[50] *Loper Bright*, 144 S. Ct. at 2269 (internal quotations to King v. Burwell, 576 U.S. 473, 486 (2015), omitted).
[51] *Id.*
[52] *West Virginia*, 597 U.S. at 722, 723, 735.
[53] In *Biden v. Nebraska*, Justice Barrett's concurrence grapples with the same question ("So what work is the major questions doctrine doing in these cases?") and concludes that the MQD "serves as an interpretive tool reflecting 'common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.'" 600 U.S. 477, 511 (2023) (Barrett, J. concurring) (citation omitted). While those challenging agency actions will likely rely on this language to continue raising the MQD, the *Loper Bright* majority's requirement of a best reading using all tools of interpretation to determine the scope of agency authority in all cases—whether they involve agency action or not—should eliminate the need to consider the extra-textual MQD factors.

courts will continue citing the MQD in decisions.[54] Even as lower courts conclude that *Loper Bright* functionally overturns or renders irrelevant the MQD as a distinct doctrine,[55] the MQD line of cases are difficult to parse,[56] relatively recent, generally remain good law, and—appropriate or not—will likely persist in many regulatory challenges.

Litigants defending agency actions will therefore need to argue that the best reading of the statute provides the agency with discretionary authority for the challenged action, including *Skidmore* respect if appropriate, *and* be prepared to respond to opponents' MQD arguments by demonstrating that the action does not trigger the MQD or its factors.

V. *Loper Bright*'s Implications for Decisions Relying on *Chevron*

While the interpretive framework set forth in *Loper Bright* will naturally apply in future challenges to agency action, the majority importantly "d[id] not call into question prior cases that relied on the *Chevron* framework," which remain "subject to statutory" stare decisis "despite [a] change in methodology."[57] Indeed, "[m]ere reliance on *Chevron* cannot constitute a 'special justification' for overruling such a holding, because to say a precedent relied on *Chevron* is, at best, just an argument that the precedent was wrongly decided.'"[58] These statements provide sound reasons to take the majority at its word on stare decisis in *Loper Bright*.

The Court's historical stare decisis doctrine provides further support. "Stare decisis applies with special force to questions of statutory construction. Although courts have power to overrule their decisions and change their interpretations, they do so for only the most compelling reasons—but almost never when the previous decision has been repeatedly followed [or] has long been acquiesced in."[59] In fact, the Court has already confronted the situation where an interpretive methodology changed (increased reliance on textualism) and declined to revisit a past decision relying on the old approach.[60] Reopening settled law with each change in interpretive methodology would defeat the "legal stability that [those methodologies] seek and upon which the rule of law demands."[61] And such reopening would result in scenarios where the undoing of any one decision could open the floodgates for re-litigation of already settled cases.[62] Decisions

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[54] *See, e.g.*, Kansas v. U.S. Dep't of Educ., 5:24-cv-04041, 2024 U.S. Dist. LEXIS 116479, at *26–42 (D. Kans. July 2, 2024) (concluding that *Loper Bright* and the MQD each justify granting a preliminary injunction).
[55] *See, e.g.*, Kovac v. Wray, No. 23-10284, 2024 U.S. App. LEXIS 17938, at *25 (5th Cir. July 22, 2024) (concluding that the court need "not reach the issue of whether the major questions doctrine applies in this case" because the court had already concluded that the statute provided authority for the challenged action).
[56] *See generally*, *e.g.*, Austin Piatt & Damonta D. Morgan, *The Three Major Questions Doctrines*, 2024 WIS. L. REV. FORWARD 19 (2024); Cass R. Sunstein, *Two Justifications for the Major Questions Doctrine*, 76 FLA. L. REV. 251 (2024) (contrasting Justice Gorsuch's concurrence in *West Virginia* with Justice Barrett's concurrence in *Nebraska* and noting that each may lead to different outcomes in specific cases).
[57] *Loper Bright*, 144 S. Ct. at 2253 (internal quotation marks and citations omitted). The Court even left intact the underlying holding of *Chevron* regarding the definition of a "stationary source" under the Clean Air Act. *See id*.
[58] *Id.*
[59] BRYAN GARNER, NEIL GORSUCH, BRETT KAVANAUGH, ET AL., THE LAW OF JUDICIAL PRECEDENT 333 (2016).
[60] CBOCS West, Inc. v. Humphries, 553 U.S. 442, 457 (2008).
[61] *Id.*
[62] *See* John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 139 (2008) ("To overturn a decision settling one such matter simply because we might believe that decision is no longer 'right' would inevitably reflect a willingness to reconsider others. And that willingness could itself threaten to substitute disruption, confusion, and uncertainty for necessary legal stability.").

about what a statute means, regardless of the methodology used, are subject to strong stare decisis particularly because Congress could correct any mistaken interpretation of the courts.[63] A reviewing court therefore will not upset settled interpretations even if it agrees that the prior interpretation was wrong.[64]

Despite the *Loper Bright* majority's language and these precedents, litigants challenging agency actions in courts bound by stare decisis principles will likely argue that cases relying on *Chevron*, especially step two, should be revisited or overturned.[65] They should largely fail, as courts will overturn a statutory interpretation "only in the rarest circumstances" where the prior decision was clearly wrong and there has not been significant reliance on the decision.[66] To succeed, litigants challenging agency action will likely need to demonstrate that a reviewing court reflexively deferred to a plainly incorrect agency interpretation of ambiguous language *and* that the interpretation has not induced significant reliance interests. The Court has recognized a few such situations, including where "statutory and doctrinal underpinnings . . . have . . . eroded over time," rendering an interpretation "unworkable,"[67] or where a prior decision creates "confusion" or presents "a direct obstacle to the realization of important objectives embodied in other laws."[68] In most cases, a prior decision upholding an agency's *Chevron*-based statutory interpretation should not be "unworkable," but there could be edge cases in which recently upheld interpretations based on *Chevron* prove difficult to apply in practice, and these cases might present the necessary unworkability or confusion to merit reconsideration.

In sum, the Court has laid out reasons to adhere to prior decisions relying on *Chevron*, such as protecting stability, the rule of law, and reliance interests, as well as preserving Congress's prerogative to address court rulings with which it disagrees. While claims of unworkability, confusion, and lack of uniformity should fail, there likely will be scenarios where some courts entertain such arguments, and litigants defending agency actions should be prepared to demand the "superpowered form of" stare decisis for statutory precedents.[69]

Conclusion

The Supreme Court's elimination of the forty-year-old *Chevron* doctrine upended a foundational principle of modern administrative law invoked in tens of thousands of cases. Beyond eliminating *Chevron* deference, however, *Loper Bright* provides only minimal guidance to lower courts confronting the problems that *Chevron* sought to address in reviewing agency actions: interpreting statutory ambiguity and silence. Although *Loper Bright* instructs courts to determine

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[63] *See, e.g.*, Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 274 (2014) ("Congress may overturn or modify any aspect of our interpretations of the reliance requirement . . . ."); Global-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754, 765 (2011) ("Nor has Congress seen fit to alter [the statute's] intent requirement in the nearly half a century since [the precedent] was decided."); *John R. Sand & Gravel Co.*, 552 U.S. at 139 ("Congress has long acquiesced in the interpretation we have given."); Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989) ("Congress remains free to alter what we have done.").

[64] *See, e.g.*, Ill. Brick Co. v. Illinois, 431 U.S. 720, 736–37 (1977).

[65] This white paper does not address situations where litigants challenging agency action establish venue in a court lacking a controlling case relying on *Chevron*. In those cases, stare decisis would not apply.

[66] Hubbard v. United States, 514 U.S. 695, 713 (1995).

[67] Kimble v. Marvel Entm't, LLC, 576 U.S. 446, 458 (2015).

[68] *Patterson*, 491 U.S. at 173.

[69] *Kimble*, 576 U.S. at 458.

the best reading of a statute, the majority reinforces a number of important principles: courts should use all tools of statutory interpretation when determining the best reading; agency interpretations can continue to inform a reviewing court's analysis; Congress often delegates considerable discretion to federal agencies; where the APA governs, delegations of fact-finding and policymaking authority are subject to deferential standards of review; and principles of statutory stare decisis apply to past cases relying on *Chevron* deference. Litigants defending agency actions should therefore be prepared to apply these principles to influence the evolution of *Loper Bright* in lower courts.