West Virginia Law Review
Forthcoming Vol. 128 (2025)

Litigating Loper Bright:

Interpretive Challenges and Solutions for the Post-Chevron Era

Eric R. Bolinder[1]

Abstract

This article arrives at a critical juncture in Administrative Law and comprehensively answers two burning questions about Loper Bright Enterprises v. Raimondo, the case that overturned Chevron deference. First, what did Loper Bright change about review of agency action? Second, how should lower courts implement the decision? This paper engages a first-of-its-kind, exhaustive review of the major circuit court decisions citing Loper Bright and analyzes how influential judges, scholars, and justices have characterized the impact of the decision. The article defines what role Skidmore "deference" and the major questions doctrine should play in judicial review—while seriously questioning the long-term viability of the latter.

Using this study and foundational administrative law methodologies, I propose a three-step formulation on how judges should tackle statutory interpretation and related constitutional issues in the post-Chevron era. This approach will be helpful to courts, academics, and litigants because it is simple enough to quickly understand but contains the depth necessary to engage some of the hardest textual challenges.

This paper also soundly rebuts the argument made by influential scholars that Loper Bright is simply a rebranded Chevron that does not mark a significant change in administrative law. The article engages directly with these scholars and, through its analytical proposal, stands as a rebuke of this criticism—showing, through both real-world and hypothetical application, just how significantly Loper Bright changed things.

Finally, the article proposes that if Congress responds to the decision by expanding its grants of discretionary authority to agencies, the Supreme Court will have no choice but to both revive a robust non-delegation doctrine and more broadly apply void for vagueness to civil cases.

---

[1] Assistant Professor of Law, Liberty University School of Law. I argued *Loper Bright* at the D.C. Circuit and was part of the litigation team from the Complaint through the Supreme Court's decision. Thank you to Annaclare Censoni for her excellent research assistance.

Table of Contents

Article

I. Introduction

The Supreme Court's decision in Loper Bright Enterprises v. Raimondo marked a pivotal shift in administrative law, dismantling the *Chevron* deference framework and reshaping the balance of power between Congress, the courts, and executive branch agencies.[2] For decades, courts would often defer to agency interpretations of law in hard cases. With *Loper Bright*, the court has overturned this model, returning statutory interpretation back to the judiciary and charging courts to determine the "single, best meaning" of statutory text.[3]

This sharp change in administrative law created significant interpretive challenges for lower courts evaluating congressional grants of agency power. This paper, which includes the first exhaustive review of post-*Loper Bright* Circuit Court decisions, presents a three-step framework any court can use in implementing the decision, including how to tackle challenging textual issues. Using the illustration of a sandbox, this article proposes that courts ask:

- First, did Congress explicitly grant any authority, no matter how broad or narrow, for the agency to perform the challenged action? If the answer is no, we stop here—the case is over. **Did Congress create a sandbox?**
- Second, if Congress did expressly grant any authority, what is the breadth of that authority? Does this authority include capacious terms or a grant of discretionary policymaking authority? **How big is the sandbox?**
- Third, is the grant of authority the court determined from the statutory text constitutionally permissible? If no, we stop here too. **Is the sandbox too broad or undefined?**

Once the court determines the statutes bounds for the agency, the court then assesses whether the agency is within them or not. **Is all or a part of the agency's action in the sandbox?**

This paper explains each step—relying on recent court decisions, scholarship, and commentary by judges and justices—to guide what should be a straightforward analysis for most cases. It discusses what tools, methods, and opportunities are available for courts to come to the "single, best meaning" of a

---

[2] Loper Bright Enterprises v. Raimondo, 603 U.S. 369, 412 (2024) ("*Chevron* is overruled") [hereinafter "*Loper Bright*"]; Chevron U.S.A. Inc., v. Nat'l Res. Def. Council, 467 U.S. 837, 842–43 (1984).

[3] *Loper Bright*, 603 U.S. at 400.

statute at each step of the process. And it sets clear guidelines for when and how courts should find that Congress has given an agency policymaking discretion. (This is, of course, what courts did in *every other case not involving an agency* before *Loper Bright* was decided.[4])

For the first step, the inquiry is generally straightforward. Agencies are, after all, "creatures of Congress,"[5] and "an agency literally has no power to act . . . unless and until Congress confers power upon it."[6] Did Congress grant the agency authority to act at all? And put more directly: did Congress give the agency any authority to take this action?

The second step is more difficult. There, the court must decide how broadly Congress delegated the agency power. Some statutes will be challenging, particularly when Congress used a capacious statutory term or included an express grant of agency policymaking discretion. But as many lower court decisions since *Loper Bright* reflect, judges have ample textual tools available to deal with these difficult legislative passages.

The third step is critical but will rarely end a case. There, courts must ask whether Congress's delegation of authority is either too vague or too broad. This article proposes that the Supreme Court may need to revive a robust non-delegation doctrine and more broadly apply the void for vagueness doctrine to civil lawsuits. The sandbox cannot be of infinite size, swallowing all the legislative powers of Congress. There must be clear, defined, and reasonable limits.

This paper also directly rebuts a popular academic critique: that *Loper Bright* is symbolic and simply rebrands *Chevron* as delegation, returning virtually the same deferential standard to the courts.[7] These commenters point to language in *Loper Bright*—and some extracurricular comments by a Supreme Court justice—about how courts must recognize when agencies have broad policymaking discretion.

---

[4] *Id*. at 373 ("when courts confront statutory ambiguities in cases that do not involve agency interpretations or delegations of authority, they are not somehow relieved of their obligation to independently interpret the statutes.").

[5] City of Arlington, Tex. v. Fed. Commc'n Comm'n, 569 U.S. 290, 317 (2013) (Roberts, C.J., dissenting) (citing and quoting Louisiana Pub. Serv. Comm'n v. Fed. Commc'n Comm'n, 476 U.S. 355, 374 (1986)).

[6] *Id*.

[7] *E.g.*, Adrian Vermeule, *The Old Regime and the Loper Bright Revolution* (HARV. PUB. L., Working Paper 25-02, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5049347; Jonathan Adler, *Justice Kavanaugh Warns Against Over-Reading Loper Bright Decision*, VOLOKH CONSPIRACY (Sept. 27, 2024, 8:35 AM), https://reason.com/volokh/2024/09/27/justice-kavanaugh-warns-against-over-reading-loper-bright-decision/.

But these arguments are wrong for two reasons. First, they miss a key point of *Loper Bright*: before, courts would defer to agencies' own construction of the limits of their policymaking discretion. Acting rationally, agencies would draw the bounds of this discretion as broadly as needed to accomplish whatever their goals were. Courts would happily defer; the statute's plain text needn't be bothered.

Second, *Loper Bright* grants deference to policymaking discretion in only limited statutory circumstances. The agency must invoke a capacious statutory term *combined* with an express delegation of policymaking authority. If Congress has not granted the agency discretion—by using a term like "within the Secretary's judgment"—then the agency, as a creature of statute, has none. When the Supreme Court said, "*Chevron* is overruled[,]" it clearly meant "*Chevron* is overruled."[8]

Significant questions remain on how to slot existing doctrines and precedents into the *Loper Bright* methodology, such as when to use *Skidmore* "deference" and if the major questions doctrine still means anything.

Skidmore[9] is a case that calls for courts give "respect" to an agency's contemporaneous and continuous interpretation of statutes.[10] But respect is "just that[,]" respect.[11] The Supreme Court favorably cited it in *Loper Bright*, and lower courts have responded by employing it when necessary. But it only applies when there has *been* a contemporaneous or continuous interpretation of a statute. And even then, courts *optionally* rely on that interpretation to the extent it is "persuasive"—if it contrasts with the plain text of the statute, it is of no persuasive use at all.

And what about the major questions doctrine? This article submits that the doctrine's long-term viability is in serious doubt, but courts still can (and should) use it until the Supreme Court speaks differently. Noting lower courts vary on treating it as a descriptive or substantive canon—I argue it is substantive—I define where in my three-step analysis judges should employ the doctrine. And I caution courts to, if possible, avoid the doctrine's use altogether as descriptive canons and plain text are far more helpful. Because the doctrine is simply a half-hearted feint towards non-delegation, it sits within our analysis as a "non-delegation circuit breaker"—when in need of constitution avoidance, flip the switch.

I concede that not every case will be easy using my three-step analysis, and there will be interpretive challenges that may force the court to revive the

---

[8] *Id*. at 412.
[9] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).
[10] *Loper Bright* at 370.
[11] *Id*. at 387.

nondelegation doctrine or void for vagueness. Walking through a series of hypotheticals, from one extreme to another, I propose how courts should deal with some of these questions—and where future study is needed.

I finish with a plea: for Congress to do its job and get back to legislating. To the extent courts are facing frustratingly vague statutory text, the legislature must step in to clarify and correct legislation.

II. *Loper Bright* overruled *Chevron* (really).

You might read the title of this section and think, "well, obviously." The Supreme Court said: "*Chevron* is overruled."[12] And the Court talked at length[13] about why *Chevron* was "unworkable[,]" "fundamentally misguided," and a "judicial invention that required judges to disregard their statutory duties."[14] It recounted how much *Chevron* vexed lower courts and litigants alike: "[T]he concept of ambiguity has always evaded meaningful definition . . . . One judge might see ambiguity everywhere; another might never encounter it."[15] The analytical approach and case review of this paper stands as a rebuke to any claim that *Chevron* was not overruled: the Court found *Chevron* to be unworkable, unsupportable, and unsustainable.

A quick recap—before *Loper Bright*, courts reviewing challenges to agency action engaged a two-step analysis.[16] First, they would ask if Congress had "directly spoken to the precise question at issue. If the intent of Congress [was] clear, that is the end of the matter."[17] This was because "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[18] But if "congress [had] not directly addressed the precise question at issue" and the "statute is silent or ambiguous" then the court must defer to the agency, so long as its "answer is based on a permissible construction of the statute[.]"[19] Courts increasingly relied

---

[12] *Id*. at 412.
[13] I have written a more in-depth summary of the case background, its facts, details of the Court's holding elsewhere. *See* Eric Bolinder*, Fishing for Justice: The Legal and Moral Case for Loper Bright*, 19 LIBERTY UNIV. L. REV. 357 (2024).
[14] *Loper Bright*, 603 U.S. at 375, 407, 411.
[15] *Id*. at 408 ("Compare L. Silberman, *Chevron—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 822 (1990), with R. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 VAND. L. REV. 315, 323 (2017)."). I am indebted to the late Judge Silberman, who was more than just a highly-respected judge, but also a devoted teacher—and my Administrative Law professor.
[16] Chevron U.S.A. Inc., v. Nat'l Res. Def. Council, 467 U.S. 837, 842–43 (1984).
[17] *Id*.
[18] *Id.*
[19] *Id*. at 843.

on this deferential standard through the decades,[20] and the addition of new steps and threshold questions turned the doctrine into a "dizzying breakdance."[21] *Loper Bright* finally overturned *Chevron*, charging courts to find a statute's "single, best meaning."[22]

But for some, this has not been enough. Professor Adrian Vermeule writes that *Loper Bright* is just a "relabeled version of *Chevron*."[23] He contests that "[w]hen judges identify the 'best reading' of the statute, that best reading might itself just be that an explicit or implicit congressional delegation of such authority to the agency has occurred."[24] This he says, will now just be *Loper Bright* "delegation" and "[c]ases that used to be labeled as [deference] 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.'"[25]

Vermeule concentrates on the difference (or lack thereof, in his view) between how the court treats implied vs. express delegations.[26] He concedes that the "Court does not expressly say that the relevant delegations can themselves be implied rather than express. But the structure of its discussion suggests that even after *Loper Bright*, implied delegations have the same status as express ones." Essentially, Vermeule cautions against reading that "all delegations [must] be express[,]" which would "swallow" the major questions doctrine.[27]

Vermeule notes, as do others supporting some version of his view,[28] Justice Kavanaugh's comments at a recent Catholic University School of Law event:

> [D]on't over-read Loper Bright, oftentimes Congress will grant a broad authorization to an executive agency. So it's really important as a neutral umpire to respect the line that Congress has drawn, when it's granted broad authorization, not to unduly hinder the executive

---

[20] *See generally* Eric Bolinder, *Fishing for Justice: The Legal and Moral Case for Loper Bright*, LIBERTY UNIVERSITY LAW. REV.: Vol. 19: Iss. 2, Article 2 (2024).
[21] *Loper Bright*, 603 U.S. at 410.
[22] *Id*. at 400.
[23] Adrian Vermeule, *Chevron By Any Other Name*, THE NEW DIGEST (Jun. 28, 2024), https://thenewdigest.substack.com/p/chevron-by-any-other-name.
[24] *Id*.
[25] *Id*.
[26] Adrian Vermeule, *The Old Regime and the Loper Bright Revolution* at 12 (HARV. PUB. L., Working Paper 25-02, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5049347.
[27] *Id*. at 13.
[28] Jonathan Adler, *Justice Kavanaugh Warns Against Over-Reading Loper Bright Decision*, VOLOKH CONSPIRACY (Sept. 27, 2024, 8:35 AM), https://reason.com/volokh/2024/09/27/justice-kavanaugh-warns-against-over-reading-loper-bright-decision/.

> branch when performing its congressional authorized functions, but at the same time not allowing the executive branch, as it could with Chevron in its toolkit, to go beyond the congressional authorization.[29]

Professor Vermeule and Justice Kavanaugh are of course right, under current law, Congress may give broad delegations of policymaking authority that agencies must play in. Courts will be more deferential policing agency behavior within the boundaries of that authority. But here's the kicker: as I'll establish below, *courts* will now interpret where Congress set those boundaries, using the best, single reading of the statutory text. Before *Loper Bright*, courts would have deferred to the *agency's* viewpoint on the boundaries. Thus, those that must play within the boundaries also set them. If I get to set where the three-point line will be when I'm shooting, rest assured I'll put it directly next to the basket.

One need look no further than the D.C. Circuit opinion in *Loper Bright* itself.[30] Was this case about scientific expertise in setting policy? No. It was a *question of law*—statutory authority.[31] Did Congress give the agency the ability to charge fishermen for at-sea monitors, or did it not? As I wrote elsewhere, "Despite an engagement with the statute, its context, and all the available canons, the court threw its hands up and chose deference."[32] *Loper Bright* was not a question of whether an agency was playing nicely within its congressionally-delegated boundaries. It was a question of what those boundaries were, and, at the lower court, the D.C. Circuit freely gave the agency the ability to set them.[33] To no surprise of anyone, the agency's definition easily encompassed its stated policy preference: billing industry for at-sea monitors.[34]

Consider that the pre-*Loper Bright* Supreme Court not only deferred to agencies on what statutes allowed them to do, but also to the agencies setting *their own jurisdiction*.[35] As the *City of Arlington* Court noted, in an opinion by Justice Scalia, this was a longtime and pervasive Supreme Court precedent: "The U.S. Reports are shot through with applications of *Chevron* to agencies' constructions of

---

[29] Vermeule, *The Old Regime and the Loper Bright Revolution* at 14 (quoting Transcript, A Conversation with Brett Kavanaugh, CATH. U. OF AM. (Sept. 26, 2024), https://cit.catholic.edu/a conversation-with-brett-kavanaugh-transcript/).
[30] Loper Bright Enters. v. Raimondo, 45 F.4th 359 (D.C. Cir. 2022), *vacated* 603 U.S. 369 (2024).
[31] *Id*. at 365 ("Appellants contend the Act permits the Service to require at-sea monitors but prohibits any industry-funded monitoring programs beyond three circumstances.").
[32] Fishing for Justice at 368.
[33] *Loper Bright Enters*. at 370 ("The Service's interpretation of the Act is therefore owed deference at Chevron Step Two.").
[34] *Id*.
[35] City of Arlington, Tex. v. Fed. Commc'n Comm'n, 569 U.S. 290 (2013).

the scope of their own jurisdiction."[36] As the Court there wrote, "where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow."[37] If you're a rational agency trying to exercise as much power as possible, where would you draw the line? In his dissent, Chief Justice Roberts warned that the accumulation of all three branches of government "in the same hands is not an occasional or isolated exception to the constitutional plan; it is central feature of modern American government."[38] *Chevron* was thus "a powerful weapon in the agency's regulatory arsenal."[39] The majority's result, then, gives agencies power "to decide when Congress has given them that power."[40] He concludes, though admittedly only applying it to jurisdictional concerns, that the Court's "task is to fix the boundaries of delegated authority . . . that is not a task we can delegate to the agency."[41] Now, thanks to *Loper Bright*, this is the law of the land not just on jurisdiction, but *all* interpretations of statute.

Courts abdicating their constitutional duties was an endemic problem.[42] For decades, judges shirked their responsibility to interpret and police the boundaries Congress is setting, happy to let agencies construct their own sandboxes, checking only the most outrageous abuse of power. In fairness to Professor Vermeule's point, this happened most often with implicit delegations of authority, but even those implicit delegations must have outward textual barriers, no matter how "express" the language is. Agencies are "creatures of Congress" that "'literally [have] no power to act . . . unless and until Congress confers power upon [them].'"[43] Implicit or explicit, but not tacit.

Professor Vermeule makes much of Justice Kavanaugh's recent comments.[44] But I do think Justice Kavanaugh's statements, the language in *Loper*

---

[36] *Id*. at 303; 304 (internal citations omitted) ("We have afforded *Chevron* deference to the Commerce Department's determination that its authority to seek antidumping duties extended to uranium imported under contracts for enrichment services . . . to the Interstate Commerce Commission's view that courts, not the Commission, possessed 'initial jurisdiction with respect to the award of reparations' for unreasonable shipping charges . . . and to the Army Corps of Engineers' assertion that its permitting authority over discharges into 'waters of the United States' extended to 'freshwater wetlands' adjacent to covered waters[.] We have even deferred to the FCC's assertion that its broad regulatory authority extends to pre-empting conflicting state rules.")
[37] *Id*. at 1874.
[38] *Id*. at 313 (Roberts, C.J., dissenting).
[39] *Id*. at 314.
[40] *Id*. at 315.
[41] *Id*. at 327.
[42] Loper Bright Enters. v. Raimondo, 603 U.S. 369, 414 (2024).
[43] *City of Arlington, Tex.* at 317 (Roberts, C.J., dissenting) (citing and quoting Louisiana Pub. Serv. Comm'n v. Fed. Commc'n Comm'n, 476 U.S. 355, 374 (1986)).
[44] *See supra* at § II.

Bright, and the case I make at length below—*Loper* changed things—are all reconcilable. Yes; Congress may delegate broad policymaking authority. And yes; It does this with some frequency. But there are limits to that breadth, whether implicitly or explicitly, and it is up to a court to determine and police the limits Congress intended (or, if Congress has gone too far, strike the law down altogether). But before, the courts would simply look to the agency to set their own limits, deferring to all but the most absurd construction. Or, even worse, courts would find congressionally-granted discretion where the statute said *nothing*—silence, coupled with a capacious term, granting broad powers.[45] In one recent case, analyzed in detail *infra*, Judge Thapar makes an obvious but (apparently) necessary point in the wake of this conversation.[46]

> [Express] language conferring discretion on the agency is critical: If broad language alone triggered deference, we'd unwittingly return to construing less than precise words as implicit delegations to the agency that warrant deference. That can't be right. The case that declared "Chevron is overruled" didn't quietly reinstitute it.[47]

Chevron was "overruled."[48] The question now is what to do with it. Before we can dive into the steps and methods courts should use to analyze statutory grants of authority post-*Loper Bright*, we need to discuss at least one tool in the "toolkit,"[49] and whether any others were modified.

III. *Skidmore* is an optional canon of statutory construction.

Following *Loper Bright*, courts need not consider *Skidmore* in every case, nor are they required to defer to the agency's interpretation when courts invoke it. First, we will look at what *Loper Bright* had to say about *Skidmore*. Then, we'll study what this means in practice, including a survey of how courts have employed *Skidmore* in the months since *Loper Bright*.

---

[45] *See, e.g.*, Loper Bright Enters., Inc. v. Raimondo, 45 F.4th 359, 379 (Walker, J., dissenting) ("It is hard to believe that, when Congress decided to explicitly allow industry-funding for observers in one way (fees) in one place (the North Pacific), it also decided to silently allow all fisheries to fund observers in any other way they choose.").

[46] I wonder if Judge Thapar has been reading the same literature.

[47] Moctezuma-Reyes v. Garland, 124 F.4th 416, 420 (6th Cir. 2024) (internal citations and quotations removed).

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

[49] Kisor v. Wilkie, 588 U.S. 588, 575 (2019) ("And before concluding that a rule is genuinely ambiguous, a court must exhaust all the "traditional tools" of construction.").

a. *Loper Bright* lays out a simple method for using *Skidmore*.

Loper Bright first invoked *Skidmore v. Swift & Company* (and its foundational cases) [50] when running through its history of deference, articulating the familiar standard of giving "great weight" to the judgment of the Executive branch.[51]

> "The weight of such a judgment in a particular case," the [*Skidmore*] Court observed, would "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."[52]

When interpreting statutes, court should "seek aid from the interpretations of those responsible for implementing particular statutes."[53] This is because agencies have a "body of experience and informed judgment." The Court is clear that his agency's interpretation "'cannot bind a court'" and is just merely "informative 'to the extent it rests on factual premises within [the agency's] expertise."[54] Because, of course, "interpretive issues in connection with a regulatory scheme 'may fall more naturally into a judge's bailiwick' than an agency's."[55] So the correct posture for any court looking to these agency interpretations is their "power to persuade, if lacking power to control."[56]

But the Court is careful to reaffirm the gatekeeping necessary to invoke any sort of *Skidmore* assistance.[57] In order for an agency's "interpretations and opinions" to be helpful, they must be 1) "made in pursuance of official duty," 2) "based up on .. specialized experience," 3) "constitute a body of experience and informed judgment."[58] And the "weight" of any agency assistance is judged on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements" and any other factors giving it

---

[50] *E.g.*, *Loper Bright*, 603 U.S. at 370 (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).
[51] Id. (citing United States v. American Trucking Assns., Inc., 310 U.S. 534, 544 (1940)).
[52] *Id*. (quoting *Skidmore*, 323 U.S. at 140).
[53] *Id*. at 371 (quoting *Skidmore*, 323 U.S. at 140).
[54] Id. at 374 (quoting Bureau of Alcohol, Tobacco & Firearms v. FLRA, 464 U.S. 89, 98 (1983)).
[55] *Id* at 373–374 (quoting *Kisor*, 588 U.S. at 578).
[56] *Id*. at 370 (quoting *Skidmore*, 323 U.S. at 140).
[57] I resist calling it "*Skidmore* deference," because the Court is abundantly clear that courts should not ever "defer" to an agency interpretation of statute, but simply "respect" it. *But see* David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, CHI. SUP. CT. REV., 2001 SCTR 20, 227 n. 98 (2001). Justice Kagan has long believed *Skidmore* doesn't mean much, implying in 2001 that *Skidmore* may only amount to "a court saying 'we will defer to the agency if we believe the agency is right.'" *Id*.
[58] *Id*. at 388 (citing *Skidmore* 323 U.S. at 139–140).

"power to persuade."[59] The Court later sums it up like this: agency "interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning."[60]

This is straightforward. *Skidmore* is a contemporaneous and continuous canon that asks two questions: 1) is the interpretation before the Court now the same the agency had when the law was passed? And 2) has the agency held this interpretation consistently throughout time? *Skidmore's* "power to persuade" is at its apex when an agency adopted an interpretation soon after the President signed the law and when the agency has maintained this interpretation consistently over time. It is at its nadir when an agency has shifted its view of the law throughout history, especially if that is inconsistent with its original interpretation.[61]

Some of the background public policy here is easy to discern. First, on contemporaneousness, courts have long recognized that agencies often play a part in the congressional drafting process.[62] Courts thus give an agency's instant interpretations "'the most respectful consideration'" as the agency officials were "'usually able men and masters of the subject,' who may well have drafted the laws at issue."[63] As such, these individuals may have the best, most instant knowledge on the meaning of the text the moment it comes out.[64]

Second, historic variability in agency's interpretation of text counsels that the agency's guidance is largely unhelpful. Such wobbling indicates a lack of experience, expertise, or an agency satisfied with changing the interpretation of a statute whenever it needs.[65] This variability also creates all sorts of reliance interest issues, as agencies can "change course even when Congress has given them no power to do so" thus "leaving those attempting to plan around agency action in an eternal fog of uncertainty."[66] This is one of the many reasons *Chevron* was, at its core, a reliance-destroying doctrine. It did not promote "reliance by fixing the

---

[59] *Id*. (citing *Skidmore* 323 U.S. at 140).
[60] *Id*. at 394 (citing *Skidmore*, 323 U.S. at 140; *American Trucking Assns.*, 310 U.S. at 549).
[61] *See, e.g.*, *Loper Bright* at 410–11 (citing Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005)); In re MCP No. 185, 124 F.4th 993, 1000, 1011 (6th Cir. 2025).
[62] *Loper Bright* at 386 (citing Dickson v. Wilkinson, 40 U.S. 141, 161 (1841)).
[63] *Loper Bright* at 370 (quoting United States v. Moore, 95 U.S. 760, 763)).
[64] But this does not mean they always have it right. Read below for more.
[65] *See, e.g.*, In Re MCP No. 185, 124 F.4th at 1000 (noting how the meaning of a statute changed each time a new administration, and thus political persuasion, came to power in Washington.)
[66] *Loper Bright*, 603 U.S. at 411.

means of the law," but it instead "engender[ed] constant uncertainty and convulsive change even when the statute at issue itself remains unchanged."[67]

Despite all this, the Court is quite clear: "'Respect,' though, is just that. The views of the Executive Branch could inform the judgment of the judiciary, but did not supersede it."[68] Courts are not liberty to "surrender, or to waive" their judicial function.[69] If the agency's interpretation, no matter how contemporaneous or historically significant, differs from the "single, best meaning"[70] of the statute, then the Court must fulfill its "province and duty . . . to say what the law is."[71] So, presume Congress passes a statute that says, "The EPA shall promulgate regulations requiring emission-limiting devices on the smokestacks of coal plants, and coal plants only." On day one of the regulation, the EPA promulgates a rule mandating such devices on smokestacks not just of coal plants, but of gas-fired plants too, interpreting the statute to give it "broad authority" to extend to "not just coal, but coal-like plants." It maintains this interpretation for 30 years, with no one having the sense to bring a challenge. But a newly incorporated gas-fired plant brings a lawsuit, saying the EPA's regulation and interpretation violates the plain text of the statute, one should expect the EPA to invoke *Skidmore*. It will point out, correctly, according to this hypothetical, that the EPA has both a contemporaneous and a consistent interpretation of the statute, and thus the reviewing court should afford "great respect" to the EPA's construction.

But the court should not do so. Even if the court finds that the EPA was "thorough . . . in its consideration" and supplied ample "reasoning" with "consistency" and all the other factors, it has one big problem.[72] The plain text. It says one thing, quite clearly, and the EPA says something different, even if it has pages of reasoned decisionmaking to back up some implied power grant. It, therefore, lacks the "power to persuade," and the court should quickly disregard the EPA's viewpoint. And this is why I resist calling it *Skidmore* "deference" and instead cabin it as a "respect" canon of construction. The text controls. If the text is unclear, we use *Skidmore* like any other canon.

b. *Skidmore* should be used only when appropriate.

This raises the question then: where should *Skidmore* sit with all the other canons of construction? This paper is not intended to address the long-running

---

[67] *Id*. at 438 (Gorsuch, J., concurring).
[68] *Id*. at 386 (quoting *Decatur*, 14 Pet. at 515).
[69] *Id*. (quoting *United States v. Dickson*, 15 Pet. 141, 16 (1841)).
[70] *Id*. at 400.
[71] *Id*. at 385 (quoting Marbury v. Madison, 1 Cranch 137, 177 (1803)).
[72] *Id*. at 412–13

debate on the purpose, priority, and efficacy of canons.[73] But if courts are going to employ plain text analysis (and thus the canons) to interpret statutes—as I think they should—then we should assign *Skidmore* a place among those canons.

i. Justice Breyer's questions on *Loper Bright's* long-term effect simply push us towards *Skidmore* as canon.

In a recent law article, Justice Stephen Breyer wondered if the Court would ultimately return to the standard he articulated in *Barnhart v. Walton*.[74] Writing for the Court, Justice Breyer created a multi-factor threshold test[75] to invoking *Chevron* deference. Before concluding that Chevron was the "appropriate legal lens through which to view the legality of the Agency['s] interpretation," the Court considered "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time."[76]

In a piece worth a full read, Justice Breyer ponders this and other factors, questioning the impact *Loper Bright* may not have on the regulatory world, but on textualism and originalism itself. He says that, "[o]n the one hand, the decision might empower textualist judges to invalidate an array of agency actions under the auspices of discerning a statute's plain meaning."[77] But on the other, he questions if it "could invite a return to the approach embodied in *Hearst*, *Packard*, and *Barnhardt*."[78] Ultimately, though, it appears that Justice Breyer is just invoking broad, *Skidmore*-like principles. Of course, *Skidmore* is nothing new—it was still used whenever an agency's action failed a *Mead*-analysis[79] and was thus not entitled to *Chevron* deference.[80] And, respectfully, looking at Justice Breyer's

---

[73] *See, e.g.*, Stephen Breyer, Pragmatism or Textualism, 138 HARV. L. REV. 717 (2025); Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed, 3 Vanderbilt Law Review 395 (1950) (*available at* https://scholarship.law.vanderbilt.edu/vlr/vol3/iss3/4).

[74] Stephen Breyer, Pragmatism or Textualism, 138 HARV. L. REV. 717 (2025) (citing 535 U.S. at 214–15).

[75] Perhaps no Justice in our nation's history is more famous for multi-factor tests than Justice Breyer.

[76] *Id*. at 761.

[77] *Id*. at 762.

[78] *Id*. at 764.

[79] *United States v. Mead*, 533 U.S. 218, 234 (2001). This case created a *Chevron* Step Zero, which asked whether Congress granted authority for "rulemaking with force of law[,]" and, if not, the challenged action is "beyond the *Chevron* pale." *Id*.

[80] Breyer at 765 ("*Skidmore* nonetheless retains legal vitality.") (quoting Christensen v. Harris County, 529 U.S. 576 (2000) (Breyer, J., dissenting)).

analysis in the block-quote above, he appears to just be describing *Skidmore*. The difference now, though, is that *Skidmore* just sits alongside the other canons.

ii. The lower courts since *Loper Bright* apply *Skidmore* like any normal canon, with no special solicitude.

In *Moctezuma-Reyes*, discussed *infra* in further detail, Judge Amul Thapar declined to invoke *Skidmore* deference when interpreting a statute (and declining to defer to the agency's construction). Judge Jane Stranch, concurring, criticizes him for this: "*Loper Bright* instructs us to treat the statutory interpretations of agencies as especially informative and persuasive."[81] She notes that in failing to invoke the canon, the majority had "impermissibly conduct[ed] its own independent statutory interpretation without any discussion of longstanding agency precedent."[82] What Judge Stanch appears to be saying is that when *Skidmore* is available, and all the threshold limitations are met, the Supreme Court has "instructed" (mandated) the courts to consider it. For his part, Judge Thapar responds that the Court simply held that an "agency's longstanding interpretation of a statute may be especially informative," and that this "*observation* is *not* a mandate to look to or defer to the agency's interpretation."[83] That the court was able to come to a conclusion through "its own independent statutory interpretation is not impermissible."[84]

So here, we can see the early battle lines: is *Skidmore* required, or is it just an "available tool?" And before we even have this discussion, we need to meet all the threshold steps for invoking *Skidmore*. In many (and perhaps most) cases, *Skidmore* simply won't be available. Consider that in *Loper Bright* on remand (which is still awaiting a decision), the government did not invoke *Skidmore*.[85] Why? Likely because there has *not* been a historically consistent interpretation of that statute.

In *In Re No. 185*, the Sixth Circuit does not mention *Skidmore* by name, but it does briefly (and I mean briefly) invoke the contemporaneous portion of it: "the FCC's contemporaneous interpretations—which *Loper Bright* says 'may be especially useful in determining the statute's meaning' . . . track this original

---

[81] *Moctezuma-Reyes*, 124 F.4th at 424–25 (Stanch, J., concurring) (citations and internal quotations omitted).
[82] *Id*. at 425.
[83] *Id*. at 422–23 (majority opinion).
[84] *Id*. at 423 (cleaned up).
[85] Br. of Appellant at 14 n.4, Loper Bright Enters. v. Raimondo (D.C. Cir. Sep. 25, 2024) ("The government foregoes any explicit request for Skidmore deference. It also fails to explain how its understanding of its authority was either 'issued contemporaneously' with the Act or is long-standing.")

understanding[.]"[86] Of course, as we've already discussed, the FCC's variability in interpreting the statute over time harm any reliance on the continuous part.

With little exception, court after court appears to be treating *Skidmore* as an optional canon, up for use with any other canon. Judge John Nalbandian recently wrote that "*Skidmore* deference is, strictly speaking a misnomer."[87] This is because deference "involves one interpreter yielding or submitting to another interpreter's views."[88] He noted that *Skidmore* is simply "sort of a restatement of the canon stretching back into English common law that longstanding, consistent expositions of a law by political actors deserved some weight, even considerable weight."[89] Judge Nalbandian would put an agency's invocation of *Skidmore* alongside "*any* litigant's reasoning and how compelling it is."[90] He cited several scholars, including Professor Vermeule, who called it "the attitude of any minimally sensible decisionmaker, who listens to any relevant arguments of well-informed parties when deciding what to do."[91]

Judge Nalbandian then made an important point: "*Skidmore* respect thus roughly tracks how we consider the interpretations of other circuit courts."[92] He likened it to any other persuasive authority. And then he said what I think is most important: Courts should "tackle statutory interpretations" straight on with their "traditional judicial toolkit. Which includes, of course, consulting the expertise of parties." A canon—or even just a method of taking argument—like any other.

One example of an early application comes from the Ninth Circuit, which remarked that "we *may* look to agency interpretations for guidance, but do not defer to the agency."[93] With "may," the Circuit, like several other courts, views *Skidmore* as optional.[94] Here, the Circuit was construing whether certain offenses constitute "crimes involving moral turpitude" that would subject a noncitizen to removal.[95]

---

[86] *In re MCP*, 124 F.4th at 1011.
[87] Dayton Power & Light Co. v. Fed. Energy Reg. Comm'n, 126 F.4th 1107, 1135 (6th Cir. 2025) (Nalbandian, J., concurring).
[88] *Id*.
[89] *Id*. (citing Aditya Bamzai, The Origins of Judicial Deference to Executive Interpretation, 126 YALE L.J. 908, 933–938, 979 (2017)).
[90] *Id*.
[91] *Id*. (citing Adrian Vermeule, Deference and Due Process, 129 HARV. L. REV. 1890, 1901 (2016).
[92] *Id*. at 1137.
[93] Lopez v. Garland, 116 F.4th 1032, 1036 (9th Cir. 2024) (citing *Loper Bright*, 144 S. Ct. at 2266–67; *Skidmore*, 323 U.S. at 140).
[94] *See, e.g.*, Murillo-Chavez v. Bondi, 2025 WL 481473, at *7 (9th Cir. Feb. 13, 2025) ("may give those interpretations the 'power to persuade'"); Molina-Diaz v. Bondi, 2025 WL 540828, at *4 (4th Cir. Feb 19, 2025); Shamrock Building Materials, Inc. v. United States, 119 F.4th 1346, 1355 (Fed. Cir. 2024) (declining to extend *Skidmore* to an agency's prior administrative rulings);
[95] *Id*.

Their job was to "evaluate the statute independently under *Skidmore*, giving 'due respect' but not binding deference to the agency's interpretation."[96] Echoing what we read from Justice Breyer before, the Ninth Circuit, citing its recent but pre-*Loper Bright* precedent, held that "[t]he deference given to an agency action may range from great respect to near indifference, depending on the degree of the agency's care, its consistency, formality, and relative expertness and . . . the persuasiveness of the agency's position."[97]

To determine whether the Board of Immigration Appeals ("BIA") was due such "deference," (as the Circuit called it), the *Lopez* court evaluated the BIA's recent precedent in an opinion interpreting the statute.[98] While it noted that the current interpretation is "inconsistent with 'earlier . . . pronouncements,' [citing *Skidmore*], the BIA carefully explained why the revised interpretation is nonetheless consistent with the agency's longstanding distinction[,]" which also dovetails with the Ninth Circuit's own interpretation of the statute.[99] It held that the BIA's decision is "thorough and well-reasoned . . . [and] consistent with judicial precedent."[100] Among other things, it is also "consistent with the generic definition of theft that has been adopted for other purposes by the Supreme Court and the Model Penal Code."[101]

"Given" all this, the Circuit thus holds, the BIA's prior decision is "entitled to '*Skidmore* deference.'"[102] But what does that mean, exactly? It's longstanding; it's persuasive; it accords with other textual interpretations; it's consistent with caselaw. Thus, persuaded by this, the court exercised its "independent evaluation of the statute" and "concluded that as applied," the BIA's interpretation is the correct one.[103] Not to belabor the point, but in construing a separate provision of the statute later in the decision, the Circuit similarly concludes that given "the *plain words of the statute*, we not only agree with the BIA's application . . . and afford it *Skidmore* deference, but also *independently conclude, based on our own statutory analysis*," that the BIA's application of the statute is correct.[104]

In sum, the Ninth Circuit here—despite repeatedly calling it "deference" and making a formalistic pronouncement invoking it—just used *Skidmore* as a

---

[96] *Id*. at 1039.
[97] *Id*. (citing and quoting Bax v. Doctors Med. Ctr. Of Modesto, Inc., 52 F.4th 858, 872 (9th Cir. 2022)).
[98] *Id*. at 1039–40.
[99] *Id*. at 1040.
[100] *Id*.
[101] *Id*.
[102] *Id*. at 1041.
[103] *Id*.
[104] *Id*. at 1044.

persuasive canon to reach its *own, independent* interpretation of the text. To highlight this point, the partial concurrence in the case, which agrees that the BIA gets "*Skidmore* deference," would have come to a slightly different interpretation of the text.[105] Just like application of all canons to difficult statutory texts can sometimes lead to judges disagreeing on the "single, best meaning," so too with *Skidmore*.

Finally, the Eighth Circuit recently issued an opinion affirming and expanding a preliminary injunction on the Biden Administration's last effort to effect loan forgiveness, the Saving on a Valuable Education Program ("SAVE").[106] After considering the statutory text—more on that below—the court noted the federal government's argument that its "unchanged position" that it had statutory authority to enact the program.[107] While noting that *Loper Bright* permitted courts to give respect to such contemporaneous and continuous interpretations of statute, the Eighth Circuit declined to do so, as the "agency's consistently wrong interpretation cannot rewrite the statute's text to change its meaning."[108] *Skidmore* "deference" or "respect" or whatever a court may want to call it can *never* override the statute's plain text meaning.

iii. Treating Skidmore as a helpful canon has a long history.

Using *Skidmore* as a canon, while returning to the pre-*Chevron* world, is not novel. It's just the way things used to be, and the way things ought to be. As Professor Bamzai covered in his historical overview of the march of deference, the contemporaneous canon is a longstanding interpretive principle: "*contemporanea expositio est optima et fortissima in lege*"--or ''a contemporaneous exposition is the best and most powerful in law.'"[109] He states this rule has "deep-rooted origins" tracing back to the "fifteenth century."[110] And our Constitution's framers recognized it—Edward Coke, Professor Bamzai recounts, explained that

> "[g]reat regard . . . in construing a statute, to be paid to the construction which the sages of the law, who lived about the time, or soon after it was made, put upon it; because they were best able

---

[105] *Id*. at 1047 (Sanchez, J., concurring in part and dissenting in part).
[106] Missouri v. Trump, 128 F.4th 979, 985 (8th Cir. 2025).
[107] *Id*. at 994.
[108] *Id*.
[109] Aditya Bamzai, The Origins of Judicial Deference to Executive Interpretation, 126 YALE L.J. 908, 933–34 (2017).
[110] *Id*.

> to judge of the intention of the makers at the time when the law was made."[111]

Likewise, Professor Bamzai discusses "*optimus interpres legum consuetudo*, or 'usage is the best interpreter of laws.'"[112] He says this "had equally deep-rooted origins" dating bad to the "third century."[113] And it too has been "routinely applied by courts."[114] As "'long usage is a just medium to expound it by'—because 'the meaning of things spoken or written must be, as it hath constantly been receiv'd to be by common acceptation."[115] And these canons continued their significance straight through America's founding. "Madison and Hamilton adopted the proposed solutions to the problems of legal ambiguity advocated by seventeenth- and eighteenth-century legal theorists."[116] Critically for this paper, they "stressed, in other words, the role of custom and contemporaneity in construing" parts of the Constitution "that may be otherwise susceptible to a range of permissible interpretations."[117] Professor Bamzai's exhaustive history of these canons and how they've been applied, which I will not simply repeat here, should be a helpful guide to courts as they seek to "re-learn"[118] how to apply these canons in a post-*Chevron* world.

Think about *ejusdem generis*. It is a useful canon—one the Supreme Court often employs.[119] But *when* do courts use it? The whole point of the canon is to help understand "general or collective term[s] at the end of a list."[120] You wouldn't use this canon if there were no list—or even a list with no catchall at the end. And if the plain text is clear, you probably wouldn't use it at all. The same goes for *Skidmore*: you use it only when you need to, and when the contextual clues are there to fully activate it.

In conclusion, *Skidmore* should be treated as a dual-faceted contemporaneous and continuous canon of construction, alongside every other canon, if it is helpful and persuasive to a reviewing court. It is not, by any stretch of the imagination, an exercise of deference. And it is not mandatory. If it does not

---

[111] *Id*. (citing 2 Fortunatus Dwarris, A General Treatise on Statutes 562 (2d ed. 1848)).
[112] *Id*. at 937.
[113] *Id*. at 937 (citation omitted).
[114] *Id*.
[115] *Id*. (citation omitted).
[116] *Id*. at 940 (citation omitted).
[117] *Id*.
[118] Though how much they need to "re-learn" is up for debate, as *Skidmore* was still alive and well in cases that failed to get past *Chevron* Step Zero (*Mead*).
[119] *E.g.*, Fischer v. United States, 603 U.S. 480, 487 (2024); Harrington v. Purdue Pharma, 603 U.S. 204, 218 (2024); Yates v. United States, 574 U.S. 528, 545 (2015).
[120] *Fischer*, 603 U.S. at 487 (cleaned up).

help a court, or if a court can divine the "single, best meaning" of the text with ease, then courts are under no obligation to use it.

IV. *Loper Bright* gave the lower courts clear guidelines.

There will be interpretive challenges with *Loper Bright*. But they are neither insurmountable nor without guidance from the Supreme Court. The first is how to classify what type of congressionally-delegated authority is present in a given case. Is it broad, policymaking authority, lending the agency wide discretion? (And if so, what sort of review should the court give on exercise of that discretion?). Or is it a specific statutory term that Congress intended to have one effect, and the agency must implement that effect, going no further?

Loper itself lays out the approach on how to analyze any grants of authority. Is it easy? Of course not. Statutory and constitutional interpretation rarely is. But are the steps clear? Yes, and courts should follow them. As *Loper Bright* recognized:

> In 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. Congress has often enacted such statutes. For example, some statutes "expressly delegate[ ]" to an agency the authority to give meaning to a particular statutory term.[121]

Let's look at *Batterton*, the case the Court is quoting above, where the statute there "expressly delegated to the Secretary the power" to define what "unemployment means."[122] Therefore, "Congress entrusts to the Secretary . . . the primary responsibility for interpreting a statutory term."[123] But it can still be "set aside if the Secretary exceeded his statutory authority" (or if it's arbitrary and capricious).[124] If the Secretary were to define unemployment to mean, for example, being fully employed but taking a day off from time to time, that would likely exceed the statutory mandate. But as it stands now, the Secretary has "flexibility,"[125] not unlimited power. *Loper Bright* notes two other statutory grants of authority—one that says "as such terms are defined and delimited by regulations of the

---

[121] *Loper Bright*, 603 U.S. at 394–95 (quoting Batterton v. Francis, 432 U.S. 416, 425, (1977) (emphasis deleted)).
[122] *Batterton*, 432 U.S. at 416, 425 (1977).
[123] *Id*.
[124] *Id*.
[125] *Id*. at 430.

Secretary[,]" and another that reads "as defined by regulations which the commission shall promulgate."[126]

The Court continued to another example.

> Others empower an agency to prescribe rules to "fill up the details" of a statutory scheme, *Wayman v. Southard*, 10 Wheat. 1, 43, 6 L.Ed. 253 (1825), or to regulate subject to the limits imposed by a term or phrase that "leaves agencies with flexibility," *Michigan v. EPA*, 576 U.S. 743, 752, 135 S.Ct. 2699, 192 L.Ed.2d 674 (2015), such as "appropriate" or "reasonable."[127]

Michigan famously interpreted a statutory "appropriate and necessary clause."[128] Justice Scalia, writing for the majority, quipped that "[o]ne does not need to open up a dictionary to realize the capaciousness of that phrase."[129] But the Court still found limitations on the agency, such as the requirement that it carries with it a requirement to consider "cost."[130] Justice Scalia reasoned that "[r]ead naturally in the present context, the phrase 'appropriate and necessary' requires at least some attention to cost."[131] He conceded that in some cases "appropriate and necessary does not encompass cost. But this is not one of them."[132] Analyzing the statutory text and context, he found an outer limit on what the agency could do with "appropriate and necessary." One may protest here, saying Justice Scalia was just doing a *State Farm* analysis,[133] but, really, he was defining the outer limits of an otherwise capacious term. The agency had to consider cost, and it failed to take a hard look at it. Like before, the Court cites a couple more exemplary statutory phrases—the first says, "[w]henever, *in the judgment* of the [EPA] Administrator[,]" and another, "if the *Administrator finds such regulation* is appropriate and necessary."[134]

As we see in the examples above, the Court does not simply defer when there is capacious language, it instead "fix[es] the boundaries of [the] delegated authority" and then ensures the agency action is properly "within those

---

[126] *Loper Bright* at 395 n.5 (quoting 29 U.S.C. § 213(a)(15); 42 U.S.C. § 5846(a)(2)).
[127] *Loper Bright*, 603 U.S. at 394–95.
[128] Michigan v. EPA, 576 U.S. 743, 752 (2015).
[129] *Id*.
[130] *Id*. at 752.
[131] *Id*. at 752.
[132] *Id*.
[133] *Id.* (citing Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983).
[134] *Loper Bright* at 395 n.6 (quoting 33 U.S.C. § 1312(a); 42 U.S.C. § 7412(n)(1)(A)).

boundaries."[135] As one commenter notes, "*Loper Bright* was not an instruction to courts to avoid *Chevron*-ish outcomes. Rather, *Loper Bright*, was a self-conscious effort to craft a framework for judicial review of agency interpretation that will endure going forward."[136]

Using the above language, and a study of Circuit cases discussed below, I discovered a three-step test for any court to follow when applying *Loper Bright*.[137] I say "discovered," because I did not create this. This is what the Supreme Court established and what lower courts faithfully implementing the decision have used. But it is a simple way to approach the issue, with a few sub-questions in each that the courts need to ask.

- First, did Congress explicitly grant any authority, no matter how broad or narrow, for the agency to perform the challenged action? If the answer is no, we stop here—the case is over.
- Second, if Congress did expressly grant any authority, what is the breadth of that authority?
    - Did Congress give a narrow grant, with a specific statutory term?
    - Or did Congress grant broader policymaking discretion or implied authority?
- Third, is the grant of authority the court determined from the statutory text constitutionally permissible? If no, we stop here too.
    - Is it too vague, leaving the court completely unable to draw the bounds?
    - Is it too broad, implication the non-delegation doctrine

With the above three step analysis, the court will draw the sandbox of congressionally-delegated authority. It then must answer the question of whether all or part of the agency's behavior—whatever is being challenged in the case—is within that sandbox. If the answer is yes, then the court can move on to whatever other forms of review are necessary—such as doing a *State Farm* analysis or a substantial evidence test, if it's a case that calls for it.[138] But the court cannot do this until it has verified the agency is acting within the statutory bounds.

---

[135] *Id*. at 396 (citations omitted).
[136] Mila Sohoni, *Chevron's Legacy*, 138 HARV. L. REV. F. 66, 78 (2025).
[137] *See id*. ("*Loper Bright* specifies a decisional process that requires judges to engage in independent interpretation of the metes and bounds of congressional delegations[.]").
[138] *See infra* at § IV(d).

a. Step One: did Congress expressly grant any authority?

No matter how broad or narrow, did Congress give the agency *any* authority at all to take the challenged action?

i. Implied delegations have a smaller breadth.

Before we dive into this question, we need to answer a key question: does it matter if a grant of authority is implicit or explicit? No—and that question should not be treated as a threshold question that sends courts a different analytical path. Simply put, I do not see a significant methodological difference between analysis of an implicit or explicit grant of authority, assuming we are all using the same definition of "implicit." What many call an "implicit grant of authority" seems to me to really mean "an extrastatutory extension of agency power." To the extent that "implied grant of authority" is to mean anything in the lawful sense, it must be "a clear grant of authority, but the broad language allowing a constrained range of authority to implement the statutory command." And, accordingly, an express grant is "a clear grant of authority with discrete, clear language." Both are questions of scope, not different types of power.

ii. There must be explicit, textual authority.

Agencies only exist and have power to the extent Congress permits. No further. So first, consider whether there's any grant of authority to agency at all—does it "literally" have any power to act? If Congress has not given the agency the power, then it does not have the power. Again, this is not new. And this was strengthened in *Loper Bright*. "*Chevron* cannot be reconciled with the APA by presuming that statutory ambiguities are implicit delegations to agencies."[139] As the Court continued, "statutory ambiguity, as we have explained, is not a reliable indicator of actual delegation of discretionary authority to agencies."[140] And this is a key—before, courts would *defer* to the agency's interpretation of any "statutory ambiguity" to find an "actual delegation" of authority to an agency.[141] They will no longer.

In his dissent that led to the *Loper Bright* cert grant, Judge Walker wrote "Congress's silence on a given issue does not automatically create such ambiguity or give an agency carte blanche to speak in Congress's place. In fact, all else equal, *silence indicates a lack of authority*."[142] As Judge Walker recounts, the D.C. Circuit

---

[139] Loper Bright Enterprises v. Raimondo, 603 U.S. 369, 373 (2024)
[140] *Id*. at 411.
[141] *Id*.
[142] Loper Bright Enterprises, Inc. v. Raimondo, 45 F.4th 359, 374 (D.C. Cir. 2022), *vacated and remanded* Loper Bright Enterprises v. Raimondo, 603 U.S. 369, (2024) (citations omitted).

has been clear on this over the years, writing that "mere ambiguity in a statute is not evidence of a congressional delegation of authority"[143] and "the failure of Congress to use 'Thou Shalt Not' language doesn't create a statutory ambiguity of the sort that triggers *Chevron* deference."[144] In sum, "statutory silence simply leaves that lack of authority untouched."[145] What we must resist, then, is animating a mute space in a statute with whatever the agency deems fit, then calling it an "implied authority." If the agency cannot directly tie its action directly to an explicit grant of authority in the text, then it is acting *ultra vires*.

And Justice Kavanaugh, the origin of the quote that launched a thousand delegation ships, himself was clear on this when he was Judge Kavanaugh on the D.C. Circuit on a case where the agency seemed "to suggest that the agency may take an action . . . so long as Congress has not *prohibited* the agency action in question."[146] As he states, this "theory has it backwards as a matter of basic separation of powers and administrative law. The [agency] may only take an action that Congress has *authorized*."[147] In that case, which dealt with the ability of the FCC to mandate opt-out notices on solicited fax ads, the answer to Judge Kavanaugh was clear that Congress had not authorized it and thus "that is all we need to know to resolve this case."[148]

iii. Congress must clearly grant broad, discretionary authority.

And second, the breadth of that grant: the agency may only go as far as Congress said. In the same vein, courts must police those boundaries themselves, not deferring to an agency's construction of its own four walls.

Again, this is historically routine. A district court, relying on *Loper Bright*, made the obvious but crucial observation that the "role of an administrative agency is to do as told by Congress, not to do what the agency thinks it should do."[149] As that court noted, decades ago, the D.C. Circuit wrote that "the question to be answered is 'not what the [agency] thinks it should do but what Congress has said it can do" and, therefore, "we must begin with the words of the statute creating [the

---

[143] Hearth, Patio & Barbecue Association v. United States Department of Energy, 706 F.3d 499, 504 (D.C. Cir. 2013).
[144] United States Telecom Association v. Fed. Commc'n Comm'n, 359 F.3d 554, 566 (D.C. Cir. 2004).
[145] *Id*. at 566.
[146] Bais Yaakov of Spring Valley v. Fed. Commc'n Comm'n, 852 F.3d 1078, 1082 (D.C. Cir. 2017).
[147] *Id*.
[148] *Id*.
[149] Ryan, LLC v. Fed. Trade Comm'n, No. 3:24-CV-00986-E, 2024 WL 3879954, at *12 (N.D. Tex. Aug. 20, 2024)

agency] and delineating its powers."[150] And the Fifth Circuit likewise wrote that, "[I]f Congress has granted only limited powers to the agency, and the regulation bears little kinship to the rulemaking authority expressed by statute, the validity of the regulation is suspect."[151]

Probably the most exemplary post-*Loper Bright* case on this is Moctezuma-Reyes v. Garland.[152] A Mexican citizen subject to a U.S. deportation order challenged a Board of Immigration Appeals ("BIA") decision finding him ineligible for discretionary cancellation of the order.[153] At the center of the case was the meaning of a statutory term: "exceptional and extremely unusual hardship."[154]

Judge Thapar starts with a rather obvious but necessary conclusion: "[t]he meaning of 'exceptional and extremely unusual hardship' is a purely legal question . . . [s]o normally we resolve its meaning on our own."[155] But Judge Thapar wonders, as many other commenters have recently, if he should "nevertheless defer to the BIA on the legal meaning" of the statutory phrase.[156] He asks because "the Supreme Court has instructed has that occasionally the best reading of a particular statute will reveal that congress expressly and explicitly delegated discretion to the agency" and thus courts must "defer to the agency's exercise of its discretion."[157] (Note, by the way, that he never uses the words "implicit" or "implicitly.") For example, he notes that Congress might use "broad, flexible standards like 'appropriate' or 'reasonable'" and that the agency may exercise its "judgment" and "find" that the standards have been met.[158]

So surely here, the argument goes, with a term as broad and capacious as "extremely and unusual hardship," Congress must have intended for the agency to "fill up the gaps" with broad authority, and Judge Thapar should simply defer to the agency's construction of the statute as an exercise in policymaking—*Chevron* Step Two under another name.

Not so fast. For a court to defer to agency policymaking authority, Congress needed to *clearly give* the agency such authority. Courts cannot simply construe "less than precise words as implicit delegations to the agency that warrant

---

[150] Nat'l Petroleum Refiners Ass'n v. Fed. Trade Comm'n, 482 F.2d 672, 674–75 (D.C. Cir. 1973).
[151] Cent. Forwarding, Inc. v. I.C.C., 698 F.2d 1266, 1272 (5th Cir. 1983)
[152] Moctezuma-Reyes v. Garland, 124 F. 4th 416, 419 (6th Cir. 2024). We will revisit this case several times below.
[153] *Id*.
[154] *Id*. at 420.
[155] *Id*. at 420 (citing *Loper Bright*, 144 U.S. at 144) (other citation and quotation omitted).
[156] *Id*.
[157] *Id*.
[158] *Id*.

deference."[159] If this were the case, then the "case that declared '*Chevron* is overruled'" would simply have "quietly reinstate[d] it."[160]

So how are we to know when there's a delegation and when there isn't? Well, this part is easy: is it in the text? Judge Thapar looked at all the statutes the Supreme Court cited in *Loper Bright* "as examples of delegations."[161] He found that every single one did not "have *only* broad language."[162] It had something else: "words that expressly empower the agency to exercise judgment."[163] For example, the "Court cited a provision of the Clean Water Act empowering the EPA to establish pollution limits that '*in its judgment*' protect 'public health.'"[164] And in the case of the BIA, Judge Thapar found nothing in the statute "vesting" it "with discretion to determine the meaning" of the broad statutory term.[165] While the statute *does* expressly give discretion elsewhere, it does not do so here.[166] Thus, "BIA has no discretion to define this standard."[167] The bottom line: the courts, without deferring to the agency, need to "independently assess the meaning" of a statutory term.[168]

iv. Analogies from the law of agency are a helpful guide.

Finally, we can borrow from the law of agency to understand the nature of implied grants of authority. Justice Amy Coney Barrett famously did this in her concurrence in *Biden v. Nebraska*, where she defended the major questions doctrine as a textual canon.[169] As Justice Barrett notes, "[w]hen an agent acts on behalf of a principal she "has actual authority to take action designated or implied in the

---

[159] *Id*.
[160] *Id*. (quoting *Loper Bright*, 144 S.Ct. at 2273.
[161] *Id*.
[162] *Id*. (emphasis added).
[163] *Id*.
[164] *Id*. (citing *Loper Bright*, 144 S. Ct. at 2263 n.6) (emphasis added). Judge Thapar also cites a Clean Air Act provision that directed "the EPA to regulate power plants 'if the Administrator finds such regulation is appropriate and necessary.'" *Id*.
[165] *Id*.
[166] *Id*. at 421.
[167] *Id*.
[168] *Id*. An objection at this point may be: aren't you just describing Chevron Step Zero—the *Mead* test? No. *Mead* served as a gatekeeping function for agencies to access Chevron deference. Agencies could only get deference if Congress had granted them the ability to make rules carrying the force of law—and only when they were within the bounds of that box. Otherwise, they got no deferential review at all. This is something quite different: it's asking if the agency has an express delegation to make policy within certain bounds and then if the agency is playing within those bounds. It is not deferring to the agency on matters of law.
[169] For further discussion of the current place of the major questions doctrine, *see infra* at § V.

principal's manifestations to the agent . . as the agent reasonably understands [those] manifestations."[170]

Peering into the Third Restatement of Agency itself, the commentary notes that when "a principal has given an agent a detailed verbal articulation of the agent's authority"—like Congress with a statute—"and the principal's language does not itself admit of real doubts or uncertainty"—say, an express command—"the agent must decide what to do at the time the agent takes action."[171] And just like *any* so-called "implied grant of authority," the "agent's belief must be *grounded in a manifestation of the principal*, including but not limited to the principal's written or spoken words."[172] This is precisely how we should look at delegations of agency authority. If the agency cannot point back at a "manifestation of" Congress, the principal, in its written words, the statute, then the agency has no power at all. And once that express language is there, the test is one of reasonableness, which "is determined from the viewpoint of a reasonable person in the agent's situation under all of the circumstances of which the agent has notice."[173] What is the "viewpoint of a reasonable person" we use in the law? That's a judge, interpreting the statute using all the tools of statutory construction and ruling what the law means—and thus affirming or rejecting the agency's view of how it should act. Obviously, agency law is not a perfect analogy for statutory grants of authority, but, like Justice Barrett thinks, it is a helpful perspective to look at delegations of authority.

b. Step Two: what are the fixed bounds of agency authority?

If Congress has created bounds for an agency to operate in—by combining an express delegation with a capacious term—then the Courts need to interpret precisely where those bounds lie. This is much like the first step, where it is a pure question of law, and the agency gets no deference. Regardless of how capacious a statutory term may be, courts still need to come to a single, best meaning.[174] Now,

---

[170] *Biden v. Nebraska*, 600 U.S. 512 (Barrett, J., concurring) (citing Restatement (Third) Of Agency § 2.02 (2006)).
[171] Restatement (Third) Of Agency § 2.02 (2006) (comment c. Rationale).
[172] *Id*.
[173] *Id*. (commentary e. Agent's reasonable understanding of principal's manifestation).
[174] Mila Sohoni, *Chevron's Legacy*, 138 HARV. L. REV. F. 66, 79 (2025) (*Loper Bright* "allows judges to conclude that the 'best reading' of a statute is that Congress has given a great deal of power to an agency and that the agency has correctly used that power . . . . [T]hat this new framework allows for significant agency authority over statutory meaning makes perfect sense: in a system premised on legislative supremacy, any responsible framework for resolving court-agency conflicts concerning legal interpretation will accept that Congress can legitimately choose to designate agencies, rather than courts, as the entities that will 'give meaning' to statutes.").

that single best meaning may contain a broad range of objects the agency may regulate, but it is limited.

To do so, courts should employ many of the same tools from Step One (indeed, the analysis on Steps One and Two may often merge). Look at the delegation itself: is it a word that seemingly grants the agency discretion? For example, terms like "the agency shall determine" or "in the discretion of the Secretary" or "as defined by the Administrator, using the best available science." And then look at the other statutory terms themselves and see how much breadth is in them. The term "property,"[175] for example, may contain a much broader range of items than, say, "polychlorinated biphenyls,"[176] which necessarily covers a more limited group.

In a very recent case, the Supreme Court affirmed the model I have here.[177] There, the Court, in an awkwardly split decision, but with a majority on all points, interpreted a provision of the Clean Water Act. First, the Court addressed what the word "limitations" means in 13 U.S.C. § 1311. Applying canons of construction, the Court (with eight justices joining) finds that use of "effluent" in one statutory provision, but omitting it in one that follows, means that Congress meant both "effluent limitations" and any other "limitations," generally, that fit the statute's purpose.[178]

More interestingly, with only five justices on board, the Court tackled interpreting the following terms:

> "any more stringent *limitation*" that is "necessary to *meet*" certain "water quality standards" that are imposed under state law "or any other federal law or regulation"; and "any more stringent *limitation*" that is "required to *implement* any applicable water quality standard established pursuant to this chapter."[179]

The Court then ticks through the terms, starting with the word "limitation[,]" noting that it "is sometimes used in a looser sense, but our task is to ascertain *what the term means in the specific context in question*."[180] In other words, this is a capacious term—the plain ordinary meaning of "limitation" could be anything—but courts need to set the outer bounds of its meaning (and thus EPA's

---

[175] *See infra* at § IV(b).
[176] 15 U.S.C. 2605(e).
[177] City & Cnty. of San Francisco, California v. Env't Prot. Agency, No. 23-753, 2025 WL 676441, at *7 (U.S. Mar. 4, 2025) [hereinafter "*San Francisco*"].
[178] *Id*. at *7–8.
[179] *Id*. at *7.
[180] *Id*. (emphasis added).

authority) using the text itself.[181] To do so, the court takes "into account the way in which the term is used in the two preceding statutory subsections" and it is "therefore natural presume that the term has a similar meaning" here.[182] The Court then goes onto do a similar analysis—which I will spare you from here—for a variety of other statutory terms to draw the boundaries of the sandbox.[183]

But the Majority concludes with something that is worth noting in pushing back against the idea that *Chevron* still lives: "the EPA cites guidance it issued in 1995, but Congress did not codify that guidance, and we are not obligated to accept administrative guidance that conflicts with the statutory language it purports to implement."[184] The Court isn't in the business of deferring to agency interpretations anymore.[185]

Take, as another example, Van Look v. Department of the Treasury, a post-*Loper Bright* Fifth Circuit decision.[186] There, the Circuit was interpreting a statute that empowered the President to "block . . . *any* property in which any foreign country or a national thereof has any interest."[187] The question for the court was whether certain cryptocurrency technology called "immutable smart contracts (the lines of privacy-enabling software code)"[188] counted as "property" and were thus subject to government control under the International Emergency Economic Powers Act ("IEEPA").[189] Judge Don Willett, writing for the Circuit, engaged in an exhaustive look at the term "property," invoking its plain, ordinary meaning and seeking help from the briefs, dictionaries, William Blackstone, and the Supreme Court.[190] Pre-*Loper Bright*, one can easily imagine how a court would approach this. A reviewing court could drum up some generic definition of the word property—much like the dictionary definitions Judge Willett uses. It would then call the term ambiguous, especially as applied to new technology. Then, it may

---

[181] *Id*.
[182] *Id*.
[183] *Id*.
[184] *Id*. at *12 (citing Loper Bright Enterprises v. Raimondo, 603 U. S. 369 (2024)).
[185] One may point to the dissent, which, on a textual basis, sharply disagrees on how the Majority interprets "limitation" and other statutory terms, as an argument that a deference-model would have been better to get a consistent interpretation. *Id*. at *12-13 (Barrett, J., dissenting). But courts, even the Supreme Court, are going to disagree on statutory interpretation from time to time. It is up to Congress, *see infra* at § VII, to speak as clear as it can.
[186] 122 F.4th 549 (5th Cir. 2024).
[187] *Id*. at 553–54.
[188] This author will not even attempt to explain what this means, nor could he if he wanted. Just know it's a cutting-edge technology that is arguably property, according to the government.
[189] *Id*. at 553–54.
[190] *Id*. at 563–65.

reference some greater good of agencies needing to respond to the times. Finally, it would defer to the agency's "expertise" on cryptocurrency technology.

There's one problem here, though. While property *is* a capacious term, it must mean *something*. "IEEPA grants the President *broad* power to regulate a *variety* of economic transactions, but its language is *not limitless*."[191] It can't simply mean whatever an agency imagines in its bureaucratic mind. There is an outer limit to the sandbox—the court must determine where Congress drew that limit. And just because a technology is *new* doesn't mean it's automatically regulated. It is only regulated if that was Congress's intent. And it's perfectly reasonable to say something *entirely new* isn't affected by an *old* statute (though many times it could be). As Judge Willett says, "Perhaps Congress will update IEEPA . . . to target modern technologies like crypto-mixing software."[192] But it hasn't.

So instead of simply gesturing at the term "property" and deferring to the agency, Judge Willett did the hard work. He concluded that to legally be "property," something must be ownable.[193] And thus, the "immutable smart contracts at issue in this appeal are not property because they are not capable of being owned."[194] He concludes with the obvious point: novel problems call for novel legislation. The court's role is to "uphold the statutory bargain struck (or mis-struck) by Congress, not tinker with it."[195] Judges must resist agency "invitation to judicial lawmaking—revising Congress's handiwork under the guise of interpreting it. Legislating is Congress's job—and Congress's alone."[196]

For an example of a court finding broad authority agency policymaking, look to Mayfield v. United States Department of Labor.[197] Judge Jennifer Elrod started the same place we do: finding that the agency has "an uncontroverted, explicit delegation of authority" and then moves through our analysis, determining "whether the Rule is within the outer boundaries of that delegation."[198] She began with the terms of the explicit delegation: "define and delimit" a certain exemption."[199] Judge Elrod found that, here, DOL had the ability to "define . . . what it means to work in an executive, administrative, or professional capacity."[200] This makes sense, because "a definition can rely on multiple types of

[191] *Id*. at 571 (emphasis added).
[192] *Id*. at 554.
[193] *Id*. at 564–65.
[194] *Id*. at 565.
[195] *Id*. at 571.
[196] *Id*.
[197] 117 F.4th 611 (5th Cir. 2024).
[198] *Id*. at 617 (citing *Loper Bright*, 144 S. Ct. at 2268).
[199] *Id*. (cleaned up).
[200] *Id*. at 618.

characteristics."[201] She used the example of the word "bachelor," which can denote both marital status, unmarried, and sex, a man.[202] In promulgating this rule, the agency "set a limit on what is otherwise defined by the text" and thus "its action is within the scope of its authority."[203] But this case makes, again, an "important point: adding an additional characteristic is consistent with the power to define and delimit, *but that power is not unbounded*."[204] If something had "no rational relationship to the text and structure of the statute[, it] would raise serious questions. And so would a characteristic that differs so broadly in scope from the original that it effectively replaces it."[205] So here, Judge Elrod found an explicit delegation, held it was broad, drew the sandbox, and decided the agency was playing in the right boundaries.[206]

Finally, again we can turn to the Eighth Circuit's holding on student loan authority in *Missouri v. Trump*.[207] There, the Circuit needed to interpret whether student loan repayment statutes permitted the Secretary of Education to promulgate a rule forgiving student loans. The Court identified two statutory-created plans. The first, Income Based Repayment ("IBR"), caps the monthly payments of borrowers suffering a "partial financial hardship."[208] After twenty-five years of qualifying payments, the Secretary "shall repay or cancel any outstanding balance of principal and interest due."[209] In IBR, Congress spoke clearly and created a statutory right for loan forgiveness, so long as the borrower fulfilled all requirements of the program.

The Biden Administration, however, used a different type of plan, called Income-Contingent Repayment ("ICR"), to propose its latest loan forgiveness scheme.[210] While ICR plans have been around for a while, the one challenged in this case would cancel "outstanding balances after 120 months of payments" for any borrower whose outstanding balance was "less than or equal to $12,000."[211] The plan also made changes to certain repayment caps and methods.[212] In analyzing

---

[201] *Id*.
[202] *Id*.
[203] *Id*.
[204] *Id*. at 618–19 (emphasis added).
[205] *Id*. at 618–19.
[206] This case also (seemingly) wondered if *Skidmore* really should mean anything, but concluded that, if it does, it would help DOL here, as DOL had "consistently issued minimum salary rules for over eighty years." *Id*. at 619–620.
[207] Missouri v. Trump, 128 F.4th 979, 985 (8th Cir. 2025).
[208] *Id*. at 985–86.
[209] *Id*. at 986 (quoting 20 U.S.C. § 1098e(b)(7)).
[210] *Id*. at 986–87.
[211] *Id*. at 987.
[212] *Id*.

whether the plan was statutorily authorized, the Court invoked *Loper Bright*, among other cases, and sought to "deploy its full interpretative toolkit" to find out if "the text is clear."[213] The relevant statutory text permitted the Secretary to offer ICR plans "with varying annual repayment amounts based on the income of the borrower, paid over an extended period of time prescribed by the Secretary, not to exceed 25 years."[214]

So, as we can see, the court was faced with an express grant of statutory authority that used broad and capacious language. But it was not without limit, and the Circuit had plenty of tools available to it to draw the limits of that authority. Using all the tools of statutory construction—leveraging dictionaries, analyzing plain language, and studying statutory context—the Circuit found a grant of authority to forgive loans nowhere in the ICR provisions of the statute.[215] And Congress had spoken clearly when it wanted to create a loan forgiveness program in IBR by "explicitly stating the Secretary should cancel, discharge, repay, or assume the remaining unpaid balance."[216] And the "statutory text enabling the creation of an ICR plan provides no comparable language."[217] The court drew lines around what powers Congress delegated to the Secretary for ICR plans—and found that the SAVE Plan's loan forgiveness was outside that sandbox.[218]

c. Step Three: is the grant constitutionally permissible?

Here be dragons.[219] If an agency action passes all the steps above, there is one last threshold to cross: did Congress overstep when it gave the agency this authority? There are two primary constitutional objections challengers can give to broad or unclear delegations of agency authority: 1) the non-delegation doctrine; and 2) void for vagueness.

i. The non-delegation doctrine may be necessary.

This paper is not the place to fully develop an argument and test for the non-delegation doctrine. By the time this hits publication, the Supreme Court may do

---

[213] *Id*. at 991 (quotations and citations omitted).
[214] *Id*. (citing 20 U.S.C. § 1087e(d)(1)(D)).
[215] *Id*. at 993 ("Indeed, we would expect some qualifier if partial repayment was contemplated, and Congress provided none . . . . This language reaffirms the default understanding of full repayment.").
[216] *Id*. at 994.
[217] *Id*.
[218] *Id*.
[219] National Geographic, Here Be Dragons, https://education.nationalgeographic.org/resource/here-be-dragons/.

that for me.[220] But that seems unlikely.[221] While I believe there are at least five votes on the Court to fully revive the non-delegation doctrine, I am less confident there are five justices who agree on *how* to do that. The outcome in *Consumers Research* will either be a punt on mootness or, if the Court does reach the merits, cabined to the private non-delegation doctrine.[222] An important step, but far short of a full-throated non-delegation doctrine.

That said, if Congress behaves badly—and it certainly may[223]—the Court will need to confront the non-delegation problem if *Loper Bright* is to have lasting effect. I will explore more in my hypotheticals below but consider a quick example here. Suppose Congress passes a statute that says: "The EPA Administrator may, in her complete and full discretion, promulgate any rule she deems necessary to promote or diminish—whichever she chooses—coal producing power plants in the United States." While this is an extreme example, and very much a "I know it when I see it"[224] type of non-delegation, one can imagine legislators uninterested in attaching their names to risky policies simply giving broader express delegations to agencies.

For the sake of completeness, I will take a quick look at the *en banc* Fifth Circuit decision in *Consumers' Research*. [225] There, the Circuit agreed that the underlying statutory term "violates the Legislative Vesting Clause."[226] The court's main gripe was that Congress granted the FCC the power to tax, but supplied "no

---

[220] Federal Commc'ns Comm'n v. Consumers' Research, No. 22-60008 (cert granted Nov. 22, 2024).
[221] And, indeed, if it does come to pass that the Supreme Court ducks a full-throated non-delegation, I plan to write a follow-up paper assessing how that should interact with the post-*Loper Bright* world.
[222] *See* Consumers' Research v. Fed. Commc'n Comm'n, 109 F.4th 743, 768 (5th Cir. 2024) ("even if FCC's delegation could be constitutionally justified, FCC may have violated the Legislative Vesting Clause by delegating government power to private entities without express congressional authorization.").
[223] *See* Eric Bolinder, Fishing for Justice, LIBERTY L. REV. 391 ("Either way, it's a win for the congresswoman: she can either sew outrage or claim credit. She never has to put her name to the actual policy and, thus, can never be held politically accountable for it."); Transcript of Oral Argument at 25, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024) (No. 22-451) ("roughly half of the people in Congress at any given point are going to have their friends in the executive branch. So their
choice on a controversial issue is compromise and forge a long-term solution at the cost of maybe getting a primary challenger or, instead, just call up your buddy, who used to be your co-staffer, in the executive branch now and have him give everything on your wish list based on a broad statutory term.")
[224] Jacobellis v. State of Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).
[225] Consumers' Rsch. Cause Based Commerce, Inc. v. Fed. Commc'n Comm'n, 109 F.4th 743 (5th Cir. 2024).
[226] *Id*. at 778.

principle at all" on how to implement this power.[227] It held that Congress used "a lot of words, but [the words] amount to a concept . . . so amorphous that congress's instruction . . . amounts to a suggest that the FCC exact as much tax revenue . . . as FCC thinks is good."[228] The Supreme Court's consistent approval of broad delegations "varies with context."[229] For the purposes of our hypotheticals below, this is all we need.

ii. Void for Vagueness doctrine could play a part.

Like the above, I hope to fully unpack how the Void for Vagueness doctrine could apply in a future paper. But I want to briefly note that courts could employ this when dealing with truly vague, ambiguous, or unintelligible language. Such language would not necessarily be an unconstitutional delegation of authority—it is easy to imagine, as my example above shows, many explicit, clear, and unconstitutionally broad delegations of authority—but language the court is hopelessly lost to make sense of. While void for vagueness is often thought of in the criminal context, it could apply in the civil context too,[230] even if courts are generally reluctant to do that.[231]

As the Court held, admittedly in a criminal case, the void for vagueness doctrine is "a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is reasonable or not."[232] One district court recently recognized this as an overlap of "the principles underlying the doctrines of vagueness and nondelegation[.]"[233] And as Justice Gorsuch noted when concurring in *Dimaya*, "vague laws risk allowing judges to assume legislative power. Vague laws also threaten to transfer legislative power to

---

[227] *Id*. 760.
[228] *Id*. (citing Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 339–40 (2002)).
[229] *Id*. at 763 (citing and quoting *Am. Trucking*, 531 U.S. at 475, 121 S.Ct. 903 ("[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."); *J.W. Hampton*, 276 U.S. at 406, 48 S.Ct. 348 ("In determining what [Congress] may do in seeking assistance from another branch, the extent and character of that assistence [*sic*] must be fixed according to common sense and the inherent necessities of the governmental co-ordination."); *Loving*, 517 U.S. at 768, 116 S.Ct. 1737 (noting the general rule that "*a constitutional power* implies a power of delegation of authority under *it* sufficient to effect *its* purposes" (emphasis added)) (quoting *Lichter v. United States*, 334 U.S. 742, 778, 68 S.Ct. 1294, 92 L.Ed. 1694 (1948)); *Lichter*, 334 U.S. at 778–79, 68 S.Ct. 1294 (suggesting Congress may delegate its war powers more broadly); *Panama Refin.*, 293 U.S. at 422, 55 S.Ct. 241 (same)).
[230] *See, e.g.*, Griffin v. Bryant, 30 F. Supp. 3d 1139, 1170 (D.N.M. 2014) ("The void-for-vagueness doctrine applies in civil cases as well as criminal ones.").
[231] *Id*. ("The void-for-vagueness doctrine operates in much reduced force outside of its core area of application, criminal law.")
[232] Sessions v. Dimaya, 584 U.S. 148, 156 (2018).
[233] Oregon Assoc. of Hosp. and Health Sys. v. Oregon, 734 F.Supp. 3d 1139, 1162 (D. Ore. 2024).

police and prosecutors, leaving to them the job of shaping a vague statute's contours through their enforcement decisions."[234] So revival of "void for vagueness" on regulatory enactments stands as an option, though weaker and less likely than non-delegation.

d. Is the agency within the bounds of the statute?

Once the lines of the sandbox are drawn, the reviewing court has a simpler task: is the agency's action, or at least part of it, if it's severable, sitting in the sandbox? If it is not, whatever part of it (or the whole) that is outside the sandbox must be held as without statutory authorization or *ultra vires*.

But if the court does find the agency properly sitting in the sandbox, its evaluation does not stop there. For the purpose of this paper, I will focus on when courts should engage *State Farm* review, though at times an organic statute may call for a different standard of review, like substantial evidence.[235] The reason I spend time on this here, a paper about base grants of statutory authority, not methods of review, is to caution courts and warn litigants that they must set the strictures of the statute—and the single, best meaning of its terms—first, and *then* go to *State Farm* review.

This is critical because *State Farm* review is far more deferential than a *Loper Bright* statutory review.[236] At this stage of review, the court analyzes if the agency examined "the relevant data and articulate[d] a satisfactory explanation for its actions including a rational connection between the facts found and the choice made."[237] In doing so, the court "is not to substitute its judgment for that of the agency[,]" and instead must determine whether the agency made "a clear error of judgment."[238] In making this determination, courts consider

> if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider to an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies: We may not supply a reasoned basis for the

---

[234] *Id*. at 1227–28 (Gorsuch, J., concurring); *see also Oregon* at 1162 (quoting the same).
[235] *See* 5 U.S.C. § 706(2)(E).
[236] *See* Fed. Commc'n Comm'n v. Prometheus Radio Proj., 592 U.S. 414, 423 (2021) ("The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained. Judicial review under that standard is deferential[.]").
[237] *State Farm*, 462 U.S. at 43.
[238] *Id*.

> agency's action that the agency itself has not given. We will, however, uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.[239]

The temptation for courts worried about disrupting agency decisionmaking, likely at the urging of government counsel, will be to merge the analysis under *Loper Bright* with the analysis of *State Farm*. Something akin to, "the statute has a broad delegation to the agency for decisionmaking, so really this is a *State Farm*, not a *Loper Bright*, case." But that would be wrong—and would risk transforming *Loper Bright* back to a deference regime under another name, albeit with a smaller reach. As we see in my analysis above, even in delegations of broad decisionmaking powers to agencies, the courts must still draw the line. To recap, the court draws the sandbox, makes sure the size of the sandbox is constitutionally permissible, determines whether the agency is sitting in the sandbox, and then, finally, if the agency has provided a good reason for what decisions it makes.

I simply write this to make the break clear and significant, because the level of discretion changes dramatically. A recent Third Circuit case lays this out plainly in its standards section. First, the court notes that it must "decide all relevant questions of law" and this it has "plenary review over legal question[s.]."[240] Second, "[a]s for the arbitrary and capricious challenge, *however*, the Court's review is both narrow and deferential."[241] That's the clean break. I understand this is an obvious point of law and a natural and correct reading of the APA, but do worry that government attorneys and courts that follow them may try to meld the two together.

V. The major questions doctrine is a non-delegation circuit breaker.

Where, exactly, does the major questions doctrine fit in after *Loper Bright*? I propose that it fits right after our step two—as a "non-delegation circuit breaker." In case of non-delegation emergency, courts can break glass, invoke the major questions doctrine, and avoid a thorny constitutional issue. That said, I urge courts to avoid this if possible—go to the plain text and unload the descriptive canons.

One of the issues with the Major Questions Doctrine as a canon is that no one is quite sure what it is. "[W]hether the doctrine is one interpretive tool among many or a clear-statement rule is the subject of ongoing debate."[242] Circuit courts remain confused: "There is some uncertainty over whether we should apply this doctrine as a substantive clear-statement rule, or as a purely linguistic canon of

---

[239] *Id* (internal citations and quotations omitted).
[240] 2025 WL 325750, at *3 (3d Cir. Jan. 29, 2025).
[241] *Id*.
[242] Mayfield v. U.S. Dep't of Labor, 117 F.4th 611, 616 (5th Cir. 2024).

construction[.]"[243] If you believe it to be a linguistic or descriptive canon, as Justice Barrett does,[244] then you may argue it belongs in Steps One and Two of our analysis, right alongside *Skidmore* and the other canons of construction. But if you believe it to be a substantive or normative canon,[245] then it slots in at Step Three—the same place we evaluate the constitutional bounds of an agency delegation.[246]

a. Circuit courts have split on how and where to implement the doctrine.

First, a look at how courts have been grappling with the issue.[247]

The Sixth Circuit

The Sixth Circuit's recent decision in In Re MCP v. Federal Communications Commission ("FCC") set aside the FCC's "open internet" order.[248] It is difficult to imagine a more major question than so-called "net neutrality" regulations, which seek to control how information travels over the internet.[249] These regulations could affect billions (perhaps trillions?) of dollars of

---

[243] Restaurant Law Ctr. v. U.S. Dep't of Labor, 120 F.4th 163, 174 n.9 (internal citations and quotations omitted).

[244] Nebraska v. Biden, 600 U.S. 482, 510 (2023) (Barrett, J., concurring) ("Seen in this light, the major questions doctrine is a tool for discerning—not departing from—the text's most natural interpretation."); *West Virginia*, 597 U.S. at 735 (Gorsuch, J., concurring) ("Like many parallel clear-statement rules in our law, this one operates to protect foundational constitutional guarantees.").

[245] *Id*. (citing, *e.g.*, C. Sunstein, There Are Two "Major Questions" Doctrines, 73 Admin. L. Rev. 475, 483–484 (2021) (asserting that recent cases apply the major questions doctrine as "a nondelegation canon"); L. Heinzerling, The Power Canons, 58 Wm. & Mary L. Rev. 1933, 1946–1948 (2017) (describing the major questions doctrine as a "normative" canon that "is both a presumption against certain kinds of agency interpretations and an instruction to Congress").

[246] A full treatment of this is beyond the scope of this paper, but to disclose any bias that may infect my analysis: I believe the major questions doctrine is a substantive canon flying under a descriptive flag. It's a feint towards the non-delegation doctrine—going halfway and carving out an arbitrary stop for only "major" political and economic questions. But for any regulated entity facing the end of its livelihood—say, for example, fishermen—those questions are "major" to them too. If Congress has not spoken, then Congress has not spoken, regardless of the breadth of the issue.

[247] As of the time of this writing, a Westlaw search of cases that cite *Loper Bright* and also include the terms "Major Questions" returns 12 results in the Circuit Courts of Appeals. A separate search, which simply looks for any cite of West Virginia v. EPA after June 28, 2024 (the date *Loper Bright* was decided), returns 33 Courts of Appeals opinions. The disparity reflects both courts that cited *West Virginia* for its standing analysis (thus not MQD) and courts that simply rejected MQD out of hand. For the sake of this article, I will focus on the few cases among the 12 that cite both *Loper Bright* and invoke the major questions doctrine *and* grapple with issues relevant to this paper. That's just a few circuits, so far.

[248] In re MCP No. 185, 124 F.4th 993, 1013 (6th Cir. 2025) [hereinafter "*In re MCP*"].

[249] *Id*. at 997.

economic activity and have been a hot-button political issue for years.[250] The idea that the FCC has the power to impose huge, costly rules on the internet is both a major political *and* economic issue.[251] If the major questions doctrine means anything, surely it must apply to regulations with this broad a reach.

When Jeff Wall, arguing that the latest iteration of net neutrality regulations were unlawful, got up to argue that they violate the major questions doctrine, a strange thing happened. The Court implied it wasn't interested in hearing about that.

> Counsel, Jeff Wall: Both sides here agree on one thing. Internet access is a hugely significant part of American life and one of the nation's most important industries. Simply put subjecting that entire industry to public utility style regulation presents a major question as a panel of this court already concluded. The Commission claims authority that for decades no one thought it had and that Congress has consistently refused to give it. **That's exactly what the major questions doctrine –**[252]

Note the "—." Mr. Wall was quickly cut off:

> Judge Kethledge: I'll just tell you up front, I'm much more interested in what the words mean this morning then a doctrine which you know makes us look to something other than what the words mean. I mean we could talk about that later maybe but speaking for myself I'm going to be pretty impatient till we actually talk about the words.
>
> Judge Griffin: I also have a question of the major questions doctrine, post chevron. I see the Supreme Court as establishing the doctrine to counter Chevron and I recognize the Supreme Court has not

---

[250] *See, e.g.*, *id*. at 998 ("Broadband is the Internet's lynchpin. It enables our access to and usage of the Internet, acting as an international superhighway that rapidly transports requests for and receipt of electronic data from one point to another and back again. Whether from a push of a button on a computer, a smart TV remote, or a virtual keyboard on a mobile device, consumers instantly, reliably, and seamlessly experience the Internet[.]").

[251] *Id*. at 1000–01 (quoting *In re MCP No. 185*, 2024 WL 3650468, at *1, *5 (6th Cir. Aug. 1, 2024)) ("In the panel's view, whether Broadband Internet Service Providers are Title II common carriers and subject to net-neutrality policies is 'likely a major question requiring clear congressional authorization,' and the Communications Act 'likely does not plainly authorize the Commission to resolve this signal question.'")

[252] Transcript of Oral Argument, In re MCP No. 185, 124 F.4th 993 (6th Cir. 2025) (prepared by and on file with author).

> abrogated the doctrine post Chevron but does it make any sense to apply it post Chevron?[253]

What followed was a colloquy on whether the major questions doctrine is still viable at all.[254] While the Sixth Circuit did not definitely say in its opinion whether it felt that was the case, it did do something that shocked many observers—this author included—it declined to use the major questions doctrine. The Circuit wrote that "we see no need to address whether the major questions doctrine also bars the FCC's action here."[255] Why? Because the Circuit concluded "that the FCC's reading is inconsistent with the plain language of the Communications Act."[256] So, at least from this panel's perspective, if the plain text answers the question, we don't need to appeal to the major questions doctrine at all. This isn't all that remarkable—it is the threshold question asked of many canons. But it's a shift, not only within that Circuit, but within *that very case itself*, on how (at least this panel of) the Sixth Circuit has viewed where it applies.

The Fifth Circuit

Contrast this to how the Fifth Circuit approached the major questions doctrine in *Mayfield*, a case we already discussed above.[257] There, the Circuit treated the canon as a *threshold* question, analyzing it first *before* moving onto *Loper Bright*. "Having determined that the major questions doctrine is apply, we turn to "whether the challenged action exceeds "statutory authority."[258] Obviously, this is the opposite of what the Sixth Circuit did. But consider a *different* Fifth Circuit opinion, *Restaurant Law Center*, where one litigant asked to invoke the major questions doctrine, but the Circuit declined as "it is not necessary to our ultimate holding[,]"[259] which was based on the "plain text" of the statute.[260]

Perhaps the msot authoritative look at how the Fifth Circuit fits the major questions doctrine in is an *en banc* decision in *Alliance for Fair Board Recruitment*, which analyzed SEC diversity disclosure rules for companies listed on stock exchanges.[261] The posture here is awkward as the Circuit was reviewing (and agreed with) a challenge that an SEC finding was arbitrary and capricious, rather

---

[253] *Id*.
[254] *Id*.
[255] *In re MCP* at 1009.
[256] *Id*.
[257] Mayfield v. United States Dep't of Labor, 117 F.4th 611 (5th Cir 2024).
[258] *Id*. at 617
[259] *Restaurant Law Ctr.*, 120 F.4th 163, 174 n.9.
[260] *Id*. at 174 ("We are not persuaded that the 80/20 standard, however longstanding, can defeat the FLSA's plain text.").
[261] All. for Fair Bd. Recruitment v. SEC, 125 F.4th 159, 164 (5th Cir. 2024).

than simply outside the bounds of the statutory text. But to do that arbitrary and capricious analysis, the court first needed to determine what the statute required.

So, first, it went through an evaluation of what the organic statute did, finding it granted certain authority to the SEC to require disclosure from companies listed on the stock market, but this was limited to the statute's purpose and thus "disclosure of any and all information about listed companies" is *not* something the agency can require.[262] In further analysis, for example, it defined what "Congress meant by a 'free and open market[,]'" concluding that it meant a "free and open market for securities transactions."[263] After setting all the proper bounds of the statute, the court concluded that the SEC "failed to justify its finding that the Board Diversity Proposal is related to the purpose of the public interest provision."[264]

Presumably, the *en banc* court could have stopped there. But it didn't, reasoning that the "major questions doctrine confirms our interpretation of the statute's ordinary meaning."[265] The court took pains to "explain the doctrine[,]" noting it "is as old as the administrative state itself."[266] Parsing through the history of the doctrine, the court concludes that major questions "rests on the principle that administrative agencies have no independent constitutional provenance."[267]

And thus, as agencies are "'creatures of statute'" that "'possess only the authority that Congress has provided[,]'" then when exercising vast economic and regulatory powers, agencies must "point to 'clear congressional authorization for the power [they] claim[.]'"[268] To translate what the court just said: this is a substantive canon with roots in separation of powers principles. It then found that this case *was* a major question, as the rules "come close to regulating the entire economy[,]" and the "political significance is likewise staggering[,]" and finally, the "SEC's proposed exercise of power is novel, too."[269] To keep making the point that it was employing this as a substantive canon, the Circuit argues the SEC's action here intrudes "'into an area that is the particular domain of state law[.]'"[270]

---

[262] *Id*. at 169.
[263] *Id*. at 177 (citing *Loper Bright*, 603 U.S. at 369).
[264] *Id*. at 180.
[265] *Id*. at 180.
[266] *Id*. at 180 (citing Louis J. Capozzi III, The Past and Future of the Major Questions Doctrine, 84 OHIO ST. L.J. 191, 196–226 (2023)).
[267] *Id*. at 181.
[268] *Id*. at 181 (quoting NFIB v. OSHA, 595 U.S. 109, 117 (2022); *West Virginia*, 597 U.S. at 723–724).
[269] *Id*. at 181.
[270] *Id*. at 182 (quoting Ala. Ass'n of Realtors v. DHHS, 594 U.S. 758, 764 (2001)).

But perhaps this approach to the major questions doctrine comes on unsure footing—the decision came over a sharp dissent from eight judges on the court.[271] The dissent notes that "for good reason, petitioners themselves abandoned [the major questions] argument at the en banc stage . . . this is not a major questions case."[272] It cites *Mayfield*, which I've already discussed above, for its acknowledgement that whether the doctrine is an interpretive or clear-statement rule is up for debate.[273]

The Eighth Circuit

In the SAVE litigation case, the Eighth Circuit only briefly mentioned it at the end of its lengthy statutory analysis.[274] It simply noted that "the major questions doctrine informs our analysis[,]" reasoning that "Congress would have provided clear signs if it authorized such significant power[.]"[275] That's it. That's the entirety of the Circuit's major questions doctrine analysis. It's hard to draw firm conclusions from this, but it's fair to imply the Eighth Circuit didn't feel the canon was necessary at all and simply threw it in at the end for safekeeping.

The D.C. Circuit

In *Save Jobs USA*, the D.C. Circuit applied a straightforward horizontal stare decisis analysis and affirmed the lower court.[276] But Judge Walker—who dissented in the Circuit's *Loper Bright* decision[277]—addressed an argument by the appellant that the prior precedent is nonbinding due to its failure to address the major questions doctrine. While Judge Walker quickly disposes of that argument, he did write that like "a dictionary, or expressio unius, or the extraterritoriality canon, the major questions doctrine is a tool of statutory interpretation."[278] And "[t]hat's true whether you think it's a linguistic canon, or a substantive canon with a constitutional basis safeguarding the separation of powers, or both."[279] But ultimately, the point of the canon is "simple—to help courts figure out what a statute means."[280]

---

[271] *Id*. at 185 (Higginson, J., dissenting).
[272] *Id*. at 188 n.4 (cleaned up).
[273] *Id*.
[274] *Id*. at 996.
[275] *Id*.
[276] Save Jobs USA v. DHS, Office of General Counsel, 111 F.4th 76 (D.C. Cir. 2024).
[277] Loper Bright Enters., Inc. v. Raimondo, 45 F.4th 359, 373 (Walker, J., dissenting) ("Agencies are creatures of Congress, so they have no authority apart from what Congress bestows.").
[278] *Save Jobs USA*, 111 F.4th at 80.
[279] *Id*. (citations omitted).
[280] *Id*.

b. The major questions doctrine settles in at Step Three.

So how do we answer our two threshold questions: 1) does the major questions doctrine still mean anything, and 2) where in my *Loper Bright* analysis should it go?

To the first question, the short answer is: yes, it still means something. The Supreme Court did not overrule or otherwise vitiate it in *Loper Bright*, and the Circuit courts continue to use it. But my longer answer is a more nuanced: it is still there for now, but I would not be surprised to see reliance on it fade away. If courts always seek to get to the "single, best meaning" of the statute using the traditional canons of statutory construction, it feels like the major questions doctrine should be one of the last on the list. It is not purely descriptive (to the extent the circuits are struggling with this, evidence points to them viewing it as a substantive canon)—there is a constitutional norm lurking under the surface.[281]

Which leads directly to the second question: I believe the major questions doctrine should be treated as a "non-delegation circuit breaker." Put differently: break glass in case of constitutional avoidance. Treating it as a case-wide threshold question, as some of the circuits above have done, is wrong. Get to the plain text first and, if the court is feeling non-delegation tensions, look to the *substantive* basis of the non-delegation doctrine. That makes it slot in as a first question of Step Three of our analysis. Textualists should *always* prefer descriptive canons if they can resolve the question before the court: what is the plain, ordinary meaning of the text.[282] That's not to say substantive canons aren't useful—I don't want to throw the baby out with the bathwater—just that they should only be employed if needed.

But what if a judge or a Circuit is convinced by Justice Barrett that it is a descriptive canon—should that change where it goes? This creates tension. I cannot slot it in as a "circuit breaker" if it is just a means to describe the plain text. So in such a case, it should sit within Steps One and Two of our analysis. But I do not

---

[281] *See, e.g.*, Brian G. Slocum & Kevin Tobia, 137 HARV. L. REV. F. 70, 107 (2023) (The major questions doctrine, "as it is currently operationalized, appears less promising as a valid linguistic canon.").

[282] Some commenters suggest a step further: that substantive canons are *never* appropriate in a textual analysis—if textualists are to remain faithful. I am not willing to take that leap, but I do slot them behind descriptive in priority. *See* Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 HARV. L. REV. 515, 517 (2023) ("But if, as textualists hold, a court's job in a statutory case is 'to apply, not amend, the work of the People's representatives,' how can [substantive canons] ever be appropriate?"). For more on this debate, read the response to Eidelson and Stephenson's paper: Brian G. Slocum & Kevin Tobia, 137 HARV. L. REV. F. 70 (2023) (arguing "textualists need not abandon all substantive canons" by reconciling "some substantive canons with textualism — namely by recognizing that those canons are also linguistic.").

think this is how it will play out in practice (instant evidence notwithstanding), particularly in the circuits composed of self-described textualists and originalists. And the more progressive circuits may too avoid it, as they have a more expansive view of agency authority.

VI. Hypothetical applications of this model.

I have intimated throughout this paper that there are future tensions, particularly if Congress behaves badly, that require more study if *Loper Bright* is to mean something. To set the stage for these and call for scholarship or court decisions addressing them, I will run through a few hypothetical scenarios.

a. An easy one: express delegation with clear statutory bounds.

Here's an easy one. Suppose Congress passes a statute that says: "The purpose of this statute is to reduce pollution output by the coal industry. The EPA may, in its discretion and using the best available science, require between one and four scrubbers on each smoke stack in a coal plant." Assume all the terms—smoke stack, coal plant, scrubbers, etc.—are clearly elsewhere in the statute. If the EPA requires five scrubbers, a reviewing court can look at the text and see that the EPA is outside of its statutory bounds. If it requires four scrubbers, the reviewing court can see both an express grant of authority and clear statutory bounds. Hold there is a sandbox, draw the sandbox, and find that EPA is within the sandbox.

None of this is to say the EPA is in the clear if it requires anything between one and four; it still needs to survive a *State Farm* hard look analysis to determine whether the EPA's regulatory authority is arbitrary and capricious. But it's on solid statutory footing.

b. Slightly harder: capacious term, but no discretionary grant.

Let's up the difficulty a bit. Suppose Congress passes a statute that says: "The purpose of this statute is to reduce pollution output by the coal industry. The EPA shall, using the best available science, require as many scrubbers on each smoke stack in a coal plant as are necessary to lead to reasonable pollution mitigation." The EPA requires one trillion scrubbers per smokestack, effectively ending the coal industry. Coal companies sue. The court could take several approaches. It could find that the statute gives the EPA the authority to require an unlimited number of scrubbers and then move onto an arbitrary and capricious analysis where it would, presumably, find that the EPA has failed to give a reasoned analysis on why this complies with the statute.

Or it could stop short of that, and I think it should, and interpret what Congress meant. Look at the word reasonable: what did Congress intend the plain, ordinary of that word to be? The court could use canons of construction, pulling out

dictionaries, uses of the word elsewhere in the statute, and define the plain text meaning. In no stretch would someone call "one trillion scrubbers" as "necessary to reasonably mitigate pollution." Thus, the EPA is outside the bounds of the statute, and the court can stop there.

Finally, the Court could employ the major questions doctrine, saying if Congress meant to grant a power so broad—the ability to outlaw the coal industry[283]—it would have clearly said so. But there's no need to do this. The word "reasonable" means "reasonable" and the EPA is outside of that boundary. And the statute itself says "mitigate" not "eliminate." Could this somewhat merge with an arbitrary and capricious analysis? One could certainly make the same arguments at that step, but there's no need to get there—this is an interpretation of statutory authority.

c. Even harder—soften the facts.

I stacked the deck with a "one trillion scrubbers" example. What if, instead, the EPA requires 30 scrubbers—something the coal companies could possibly afford, but that go well beyond what the companies allege is reasonable. What is a court to do then? First, is there an express grant of authority for the EPA to require scrubbers? Yes. Second, what are the boundaries? The facts of this hypo require the court to draw a much clearer boundary than before. Perhaps statutory context provides the solution; but presume the court exhausts all the canons of construction and cannot come to a precise answer—something as clean as "between one and four." This will likely be the case most of the time. It simply needs to use the text to define how many scrubbers "using the best available science" are "necessary" to "reasonably" mitigate pollution. For example, it could conclude that reasonably required is "a number of scrubbers that reduces pollution but maintains the viability of the coal industry (mitigate, not eliminate)." It will then need to do a factual analysis to figure out if thirty is within or outside of those bounds.

d. What if we slot the discretionary grant *back* in?

What if we combine the two hypos from above, for something like this: "The EPA Administrator may require a reasonable amount of scrubbers that she, in her discretion, believes is required for each smoke stack in a coal plant to mitigate pollution." The EPA then requires 100 scrubbers—not an absurd number like a trillion, but enough to significantly imperil the coal industry. Here, invoking Judge Thapar's analysis, we have both a capacious term *and* an express grant of discretion. But there are no other limits set in the statute. This is more difficult. The court has two options. It can either say the administrator has unlimited authority,

[283] The close analogy of the facts here to *West Virginia* is purposeful!

and the court cannot intrude on what "she, in her discretion, believes" is required. That, see the example directly below, raises serious constitutional concerns. Or the court can grant the policymaker broad discretion but still drawing some sort of box. Here, the court can again draw on the word "mitigate" and "reasonable," both terms that, even with the discretionary grant, draw a box. But that box is certainly larger than the example immediately above.

e. But what if Congress gives the EPA unbounded authority?

In our last iteration, imagine the statute is one sentence: "The EPA Administrator may, in her full discretion, require as many scrubbers on a coal plant's smoke stack as she decides, up to an unlimited threshold, with absolutely no limitations." The EPA requires one trillion scrubbers. First step, does the statute contain an express grant of authority to the EPA? Yes. Second step, does the statute have clear bounds? Also yes—between zero and infinity. And the language of "reasonable" and "mitigate" is gone. Third step, is this constitutionality permissible? This is one of those "know it when you see it" non-delegation cases. Congress has completely given away its ability to legislate on a matter to the EPA, including implicit authority to completely end an entire industry—which the EPA exercised. (And the major questions doctrine is of no help: Congress spoke quite clearly.)

VII. Do not let Congress off the hook.

As we see above, lower courts will face some interpretive challenges when dealing with overly vague or broad congressional delegations of power to agencies. While I think the tools are there for courts to decide them, including hitting the "non-delegation" or "void for vagueness" buttons, critics should not let Congress off the hook. That body is where "all legislative powers . . . shall be vested[.]"[284] If courts are continually dealing with problems of confusing or vague legislation, then perhaps Congress should do a better job of speaking clearly when it legislates.

Some may protest that this is impossible—Congress, particularly in recent years, features gridlock, not collaborative lawmaking. This is true. But *Chevron* in many ways contributed to this. Why should Congress step up to do anything—and possibly draw political fire—when it can simply create vague language, knowing courts will defer to whatever the executive branch decides? And perhaps congressional pay, staff pay, and overall staff budgets should be increased to account for the increased technical knowledge needed for lawmaking.

---

[284] U.S. Const. Art I, § 1.

But do not forget vertical federalism too. As James Madison once said, "the government of the United States is a definite government, confined to specific objects. It is not like state governments, whose powers are more general."[285] The federal government wasn't intended to regulate *every aspect* of individuals' lives. Some things must be left to the more general, less limited, and localized state legislature.

VIII. Conclusion

Loper Bright was a fundamental recalibration of administrative law that decisively eliminated *Chevron's* deference regime. The argument that *Loper Bright* changed little is misguided, as courts now need to create strict boundaries for agency power before deferring to an agency's discretionary policymaking choices. This is a stark contrast to the regime envisioned by *Chevron*, where agencies set their *own* limits of authority. But because *Loper Bright* is such a radical change to judicial review of agency authority, courts will face uncertainty and interpretive challenges.

As this paper showed, *Loper Bright* created a simple and reliable three-step framework for courts. First, courts must ask if Congress gave a delegation of authority to the agency at all. Agencies are creatures of statute. So are their powers. But for the action of Congress, agencies lack any authority. Second, courts must interpret how broadly Congress drew the limits of agency authority. Will this present some interpretative challenges? Of course. The law is hard. But with all the canons of construction, courts have the tools they need to divine the "single, best meaning" of any statute.

One of these is *Skidmore*. But this is just a tool like any other tool. It does not exist as a new deference regime, and it gets no special solicitude over other canons of construction. And before courts can even tap *Skidmore*, they need to ask three threshold questions. Did the agency adopt this interpretation soon after the statute was enacted? Did it maintain this interpretation continuously through the years? And is this interpretation persuasive—does it accord with the plain text?

Third, courts need to determine whether the congressional grant of agency authority is constitutionally permissible. This paper offered that two doctrines may become necessary if Congress has used statutory language that is either too broad

---

[285] James Madison, Debate On th Memorial of the Relief Committee of Baltimore, for the Relief of St. Domingo Refugees, U.S. H. Rep. (Jan. 10, 1794), *available at* constitution.org/1-Constitution/je/je4_cong_deb_14.htm.

or vague. The first is the revival of a robust non-delegation doctrine. And the second is applying void for vagueness more broadly to civil cases.

And this is where the major questions doctrine, to the extent it is still a viable methodology, kicks in. It is a non-delegation circuit breaker—a tool for the avoidance of difficult constitutional questions. But circuit courts have struggled with whether to cabin it as a substantive or a linguistic canon. Given that most see it as the former—and I agree—it should slot in at step three of our approach. But I seriously question if courts will continue to use it. Conservative circuits will look to plain text meaning, which often means there's no need for major questions. And progressive circuits, which generally have a more expansive view of agency authority, will likewise want to avoid it.

Chevron was overruled. If *Loper Bright* were simply rebranded deference, courts would neither be facing interpretive challenges nor would they need to adopt a fresh (but correct) regime of statutory interpretation. Courts have all the tools they need to engage the post-*Chevron* era. They just need to use them.