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A New Age Dawns on First Street: The Supreme Court's Use of *Loper Bright* During the October 2024 Term

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RYAN P. MULVEY & MICHAEL PEPSON

A New Age Dawns on First Street: The Supreme Court's Use of *Loper Bright* During the October 2024 Term

ABSTRACT

This Article analyzes the impact of the Supreme Court's landmark decision in *Loper Bright Enterprises v. Raimondo*, which overruled *Chevron* deference and redefined judicial review of legal questions in the administrative-law context. Specifically, the Authors explore how the Court operationalized *Loper Bright* throughout the October 2024 Term to emphasize the importance of independent, de novo review, as well as the robust use of traditional canons of statutory interpretation to reach the original public meaning of statutes. The Article also explores the implications of the Court's recent use of *Loper Bright* for related doctrines like so-called "Skidmore deference," the major questions doctrine, and nondelegation principles. Looking forward, attention is given to unresolved questions—including those before the Court in the October 2025 Term—on such issues as statutory stare decisis and the future of other deference doctrines.

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ARTICLE

A NEW AGE DAWNS ON FIRST STREET: THE SUPREME COURT'S
USE OF *LOPER BRIGHT* DURING THE OCTOBER 2024 TERM

Ryan P. Mulvey[†] & Michael Pepson[†]

I. INTRODUCTION

The Supreme Court's historic overruling of *Chevron* deference in *Loper Bright Enterprises v. Raimondo* marked a tremendous moment in the history of administrative law.¹ Yet the decision left many methodological and doctrinal questions unresolved in its immediate wake: Is a court's "independent judgment"² about the "best reading"³ of the law equivalent to *de novo* review? How, exactly, should judges exercise "independent judgment?" To what degree should agency interpretations, while not "controlling," be given "weight" as part of a court's "due respect"⁴ to the views of the Executive Branch? How are courts to use *Loper Bright* in policing Congress's delegations of discretionary regulatory authority? And what is the universe of *Chevron*-era precedent entitled to statutory *stare decisis* protection?

Although many of these questions have yet to be definitively answered, the Supreme Court's use of *Loper Bright* during the October 2024 Term does provide some preliminary indication of where the law is heading. For starters,

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¹ See *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 377 (2024) (overruling the *Chevron* doctrine and holding that judges must exercise their own judgment in statutory interpretation rather than deferring to agency statutory interpretations).

² *Id.* at 412 (noting that in overturning *Chevron*, courts must now exercise their "independent judgment" in interpreting agency regulations).

³ See *id.* at 400 (noting that a court's role is to determine the "best reading" of a statute in resolving ambiguities).

⁴ See *id.* at 385 (explaining that courts are to give "due respect" to the executive branch's interpretations of federal law).

the Court has clarified that *Loper Bright* entails de novo review⁵—something that some commentators, and even courts, had called into question. The Court has also confirmed that judges ought to be in the business of faithfully applying the traditional canons of interpretation to reach and enforce the original public meaning of the law as part of their exercise of the judicial function.⁶ As for “due respect” for Executive Branch practice, the Court has signaled this is accomplished through application of the interpretive canons of contemporaneity (*contemporanea expositio*) and consistent usage (*interpres consuetudo*).⁷ The provenance of these canons is well established as they both predate the modern administrative state and its keystone precedents like *Skidmore*⁸ and *Chevron*.⁹ And in a somewhat unexpected move, the Court thrust *Loper Bright*, along with the major questions doctrine, to the forefront of its approach to addressing nondelegation concerns.¹⁰ At least for the near future—or until the Court revisits the intelligible principle standard or private nondelegation doctrine—*Loper Bright* is poised to play an important role in ensuring that Congress has not improperly delegated power to agencies and that agencies are abiding by the terms of lawful delegations.

There are also interesting cases on the horizon that will involve the application of *Loper Bright* and undoubtedly build on these recent

⁵ See *Seven Cnty. Infrastructure Coal v. Eagle County*, 605 U.S. 168, 179 (2025) (“As a general matter, when an agency interprets a statute, judicial review of the agency’s interpretation is *de novo*.”).

⁶ See *McLaughlin Chiropractic Assocs., Inc. v. McKesson Corp.* 606 U.S. 146, 155 (2025) (relying on “ordinary principles” of statutory interpretation); *Medina v. Planned Parenthood S. Atl.*, 606 U.S. 357, 395 (2025) (Thomas, J., concurring) (“[T]he answer to that question turns on how ordinary readers would have understood the phrase.”).

⁷ See *infra* Section III.C.

⁸ See generally *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (establishing the *Skidmore* deference standard by which courts evaluate the persuasiveness of agency interpretations to determine how much deference to give agency interpretations when construing ambiguous statutes and regulations).

⁹ See *McLaughlin Chiropractic Assocs., Inc.*, 606 U.S. at 155 (relying on “ordinary principles” of statutory interpretation); *Medina*, 606 U.S. at 395 (Thomas, J., concurring) (“[T]he answer to that question turns on how ordinary readers would have understood the phrase.”).

¹⁰ See *infra* Section III.D.

developments. Among the cases the Court GVR'd¹¹ this past Term, some present important questions about the future of agency-specific, *Chevron*-like deference doctrines, while others implicate important methodological points about the mechanics of statutory interpretation.¹² And still more are in the pipeline. The Court may have a chance, for example, to provide further guidance on what *State Farm* “hard look” review is meant to look like post-*Chevron*, or whether *Loper Bright*'s promise of statutory stare decisis will be strong enough to keep forty years of *Chevron* Step-Two case law settled.¹³

The methodology of this Article is straightforward. Part II describes the *Chevron* deference doctrine and the central holding of *Loper Bright*, which overturned *Chevron*.¹⁴ Careful attention is given to the constitutional framing of the *Loper Bright* decision and the interplay of those constitutional principles with the proper meaning of section 706 of the Administrative Procedure Act (APA),¹⁵ the important clarifications given by the Court with regard to the “respect” due to the views of the Executive Branch, and the way courts ought to handle review of agency action authorized by broad delegations of discretionary regulatory power. Part III then provides a thematic overview of the decisions from the October 2024 Term and how *Loper Bright* featured in each case.¹⁶ The Court's decisions are not addressed in chronological order but are instead intertwined with the broader discussion of their implications for appreciating the impact of *Loper Bright*. Majority opinions, concurrences, and dissents are all considered. Finally, Part IV provides a preview of unresolved questions and cases percolating up through the lower courts, including those that may find their way to the Court in the October 2026 Term.¹⁷

¹¹ “GVR” refers to instances when the Supreme Court “grants certiorari,’ ‘vacates’ the decision below and ‘remands’ a case to the lower court without hearing oral argument or deciding the case on the merits.” *Glossary of Supreme Court Terms*, SCOTUSBLOG, <https://www.scotusblog.com/glossary-of-legal-terms> (on file with the Liberty Law Review) (last visited Feb. 22, 2026).

¹² See *infra* Part IV.

¹³ See *infra* Part IV.

¹⁴ See *infra* Part II.

¹⁵ See 5 U.S.C. § 706.

¹⁶ See *infra* Part III.

¹⁷ See *infra* Part IV.

II. THE *LOPER BRIGHT* DECISION – FAREWELL TO *CHEVRON* DEFERENCE

Section 706 of the APA instructs courts, when reviewing agency action, to “decide all relevant questions of law.”¹⁸ The precise meaning and import of this seemingly simple directive has been a source of significant debate for decades. Judges, lawyers, and academics alike have disputed what, exactly, it means for a court to “decide” a “question of law.” For the longest time—roughly forty years—the Supreme Court took the general view that “deciding” a question of law meant deferring to the view of the Executive Branch. This was the infamous doctrine of “*Chevron* deference,” which drew its name from the Court’s 1984 decision, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*¹⁹

Although it is beyond the scope of this Article to delve into the facts and holding of *Chevron*, a brief overview may be helpful. The *Chevron* case involved a challenge to the Environmental Protection Agency’s (EPA) interpretation of the Clean Air Act (CAA), as well as the agency’s regulatory implementation of the CAA’s permitting scheme for “new or modified major stationary sources” of air pollution.²⁰ The EPA, driven by the Reagan Administration’s deregulatory agenda, developed the so-called “bubble concept” policy,²¹ which proposed to treat all pollution-emitting devices across a single energy plant as a single “stationary source.”²² That approach had the practical effect of limiting the CAA’s stringent permitting requirements.²³ Existing plants could modify or install new pollution-emitting devices, at least so long as they did not increase overall emissions

¹⁸ § 706.

¹⁹ See generally *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (holding that agency interpretations of statutes and regulations be granted judicial deference so long as those agency interpretations are reasonable), *overruled by Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).

²⁰ *Id.* at 839–40; see also 42 U.S.C. § 7502(c)(5) (requiring permits for “new or modified stationary sources”).

²¹ *Bubble Policy*, EPA (Nov. 6, 2025), <https://www.epa.gov/history/bubble-policy> (on file with the Liberty Law Review).

²² See generally Requirements for Preparation, Adoption, and Submittal of Implemental Plans and Approval and Promulgation of Implementation Plans, 46 Fed. Reg. 50766 (Oct. 14, 1981) (to be codified at 40 C.F.R. pts. 51, 52) (defining stationary source and outlining a “plantwide” bubble concept policy).

²³ *Chevron*, 467 U.S. at 840.

within the “bubble” comprising the plant, understood as one “industrial grouping.”²⁴

The Supreme Court upheld the EPA’s interpretation of the CAA, concluding its interpretation of “stationary source” was permissible.²⁵ Although the Court’s holding about the legality of the “bubble concept” regulation was (and remains) important for purposes of understanding the specific terms of the CAA, *Chevron’s* broader significance—and why it became so seriously contested over time—rested on the Court’s explanation of how judges ought to approach statutory construction in the administrative-law context.²⁶ *Chevron*, in this respect, was not really about the meaning of the CAA, or even Congress’s policy intentions for the EPA’s regulatory authority, but rather about the art and science of judging.²⁷ The *Chevron* Court explained:

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

²⁴ *Id.*

²⁵ *See id.* at 845 (“Based on the examination of the legislation and its history[,] . . . we agree with the Court of Appeals that Congress did not have a specific intention on the applicability of the bubble concept . . . and conclude that the EPA’s use of that concept here is a reasonable policy choice for the agency to make.”).

²⁶ *Id.* at 842–44.

²⁷ *See id.* (explaining the judicial framework for analyzing statutory ambiguities when an agency has defined the ambiguous term or terms).

answer is based on a permissible construction of the statute.²⁸

This two-part framework—popularly known as *Chevron* “Step One” and “Step Two”—obliged judges, in instances of textual ambiguity, to defer to agencies’ interpretations of the law. In fact, that requirement for deference was explicit: “[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”²⁹

The *Chevron* Court’s justification for judicial deference was multivarious but principally depended on an underlying assumption that proper implementation of a statute required the “formulation of policy” by agencies to fill “gap[s] left, implicitly or explicitly, by Congress.”³⁰ These “gaps”—identified as ambiguities or silences in the law—functioned as delegations of regulatory authority, which foreclosed stringent review beyond ensuring agency action was not “arbitrary, capricious, or manifestly contrary to the statute.”³¹ Yet this presumption about the nature of Congress’s legislating, and its implications for statutory interpretation, was entirely unique to administrative law; judges in every other context, such as civil litigation between non-government parties, would not be so constrained in resolving legal interpretive disputes.

The justification for *Chevron* deference was always deeply problematic, or at least seriously contested, on both statutory³² and constitutional grounds,³³

²⁸ *Id.* at 842–43 (footnotes omitted).

²⁹ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984), *overruled by* *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024); *see id.* at 843 n.11 (“The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.”).

³⁰ *Id.* at 843 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).

³¹ *Id.* at 843–44.

³² *See infra* note 40.

³³ *See, e.g., Valent v. Comm’r of Soc. Sec.*, 918 F.3d 516, 524 (6th Cir. 2019) (Kethledge, J., dissenting) (“In every case where an Article III court defers to the Executive’s interpretation of a statute under *Chevron*, our constitutional separation of powers is surely disordered.”); *see also County of Maui v. Haw. Wildlife Fund*, 590 U.S. 165, 194 (2020) (Thomas, J., dissenting) (“[D]eference under [*Chevron*] likely conflicts with the Vesting Clauses of the Constitution.”)

as well as practical ones.³⁴ Consider, for example, the notion that an omission in statutory text can be best read as an “express delegation.”³⁵ How might a reviewing court distinguish silence that delegates power—whether express or implied—and silence that is simply silence? Congress’s intent, in many cases, could be especially difficult to adduce. On the statutory front, it was unclear how the *Chevron* Court’s vision of deference could ever be reconciled with section 706’s express direction that a reviewing court “decide all relevant questions of law.”³⁶ To be sure, the CAA’s judicial-review provisions displace the APA’s general provisions, including the latter’s standard of review.³⁷ For that reason, Justice Stevens never cited section 706.³⁸ Yet, *Chevron* deference as a methodological approach still came to pervade *all* administrative law, regardless of the specific organic statutes at issue. *Chevron*’s perpetuation as the default approach to the judicial handling of legal disputes was therefore always atextually grounded.³⁹ As Justice Scalia once aptly observed, the Supreme Court, “[h]eedless of the original design of the APA,” proceeded in the wake of *Chevron* to “develop[] an elaborate law of deference to agencies’

(citation omitted) (collecting cases)); Philip A. Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187, 1212 (2016) (arguing *Chevron* requires “precommitment” in favor of an agency’s “judgments about the law”); Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 791 (2010) (noting that “the Supreme Court ha[s] also declared that ‘[t]he interpretation of the meaning of statutes . . . is exclusively a judicial function’” (quoting *United States v. Am. Trucking Ass’n*s, 310 U.S. 534, 544 (1940))).

³⁴ There is prodigious literature addressing the infirmities of *Chevron*’s reasoning and its adverse practical impacts. See, e.g., Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 33–34 (2017); Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 VAND. L. REV. EN BANC 315, 323 (2017); Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REGUL. 1, 30 (1998).

³⁵ *Chevron*, 467 U.S. at 843–44.

³⁶ 5 U.S.C. § 706.

³⁷ See 42 U.S.C. § 7607(d)(9); see also *id.* § 7607(d)(1) (“The provisions of . . . section 706 of title 5 . . . shall not, except as expressly provided . . . apply to actions” challenging rulemakings under the CAA).

³⁸ See *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001); see generally *Chevron*, 467 U.S. 837 (providing for a two-step analysis when interpreting the ambiguity of a statute that an agency carries out).

³⁹ See *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 398 (2024) (“Neither *Chevron* nor any subsequent decision of this Court attempted to reconcile its framework with the APA.”).

interpretations of statutes and regulations” that necessarily entailed abdication of the judicial function in favor of “agencies . . . authoritatively resolv[ing] ambiguities in statutes.”⁴⁰

With *Loper Bright Enterprises v. Raimondo*, the Supreme Court finally put *Chevron* deference to rest, answering Justice Gorsuch’s call to erect a “tombstone no one can miss” for that misguided doctrine.⁴¹ “*Chevron* is overruled.”⁴² For those who had found the constitutional and statutory objections to *Chevron* persuasive, *Loper Bright* represented a return to a proper ordering of our constitutional system, a move to restoring the separation of powers—where legislators write the law and judges provide definitive judgments about its meaning.⁴³ Certainly, the constitutional atmospherics of *Loper Bright* were hard to miss.

Although *Loper Bright* was ostensibly about the proper meaning of section 706—and the incompatibility of deference with a statutory direction that courts provide their independent, best reading of the law—Chief Justice Roberts began his analysis by expounding on the constitutional foundations of the Article III power.⁴⁴ The drafters of the Constitution, he explained, “envisioned that the final ‘interpretation of the laws’ would be ‘the proper and peculiar province of the courts.’”⁴⁵ And those final interpretations would be offered independently of the coordinate branches of government, that is, without legislative or executive encroachment on the judicial function.⁴⁶ *Loper Bright* clarifies how these basic constitutional presuppositions about

⁴⁰ *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 109–10 (2015) (Scalia, J., concurring) (emphasis added). Justice Scalia’s criticism was even more blunt in *United States v. Mead Corporation*: “There is some question whether *Chevron* was faithful to the text of the [APA], which it did not even bother to cite.” *Mead Corp.*, 533 U.S. at 241 (Scalia, J., dissenting).

⁴¹ *Buffington v. McDonough*, 143 S. Ct. 14, 22 (2022) (mem.) (Gorsuch, J., dissenting from denial of certiorari).

⁴² *Loper Bright Enters.*, 603 U.S. at 412.

⁴³ See, e.g., Ryan P. Mulvey, *Restoring the Constitution’s Separation of Powers: Chevron’s Demise and the Promise of Loper Bright*, AMS. FOR PROSPERITY FOUND. (Sep. 17, 2025), <https://americansforprosperityfoundation.org/loper-bright/restoring-the-constitutions-separation-of-powers-chevrons-demise-and-the-promise-of-loper-bright> (on file with the Liberty Law Review).

⁴⁴ *Loper Bright Enters.*, 603 U.S. at 384–85.

⁴⁵ *Id.* at 385 (quoting THE FEDERALIST NO. 78 (Alexander Hamilton)).

⁴⁶ *Id.* (“[T]he Framers structured the Constitution to allow judges to exercise that judgment independent of influence from the political branches.”).

the proper role of judges provide the dispositive framework through which to understand Congress's design of the APA and, specifically, its decision to require a "reviewing court" under section 706 to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."⁴⁷ As the Chief Justice described, "[t]he APA . . . codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury v. Madison*: that courts decide legal questions by applying their own judgment," even in cases "involving ambiguous laws."⁴⁸

The APA's requirement (confirmed by *Loper Bright*) that a judge provide his or her independent judgment about the best reading of a statute does not, however, foreclose courts from considering—or affording "respect" to—the Executive Branch's interpretation of the law. Indeed, a "traditional understanding of the judicial function" must account for judges "seek[ing] aid from . . . those responsible for implementing particular statutes."⁴⁹ Agency interpretations can "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance," especially when those interpretations have been "issued contemporaneously with the statute at issue" and "have remained consistent over time,"⁵⁰ or when they "rest[] on factual premises within [the agency's] expertise."⁵¹ But "respect" is "just that," and cannot displace a court's best judgment of legal meaning.⁵² An agency's reading of the law, no matter how venerable and

⁴⁷ 5 U.S.C. § 706.

⁴⁸ *Loper Bright Enters.*, 603 U.S. at 391–92; *see id.* at 392–93 ("Section 706 makes clear that agency interpretations of statutes—like agency interpretations of the Constitution—are *not* entitled to deference. . . . The text of the APA means what it says. And a look at its history if anything only underscores that plain meaning.").

⁴⁹ *Id.* at 394.

⁵⁰ *Id.* (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

⁵¹ *Id.* at 402 (quoting *Bureau of Alcohol, Tobacco & Firearms v. Fed. Lab. Rels. Auth.*, 464 U.S. 89, 98 n.8 (1983)).

⁵² *Id.* at 386 ("The views of the Executive Branch could inform the judgment of the Judiciary, but did not supersede it. Whatever respect an Executive Branch interpretation was due, a judge 'certainly would not be bound to adopt the construction given by the head of a department.' . . . Otherwise, judicial judgment would not be independent at all." (quoting *Decatur v. Paulding*, 39 U.S. 497, 515 (1840))). *See Skidmore*, 323 U.S. at 139 (reasoning that policies "made in pursuance of official duty" are "based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case").

longstanding, must always be subordinated to the ordinary meaning of the statutory text, as discerned by an Article III court.⁵³

The *Loper Bright* Court also acknowledged that sometimes a “statute’s meaning may well be that the agency is authorized to exercise a degree of discretion.”⁵⁴ Congress might direct an agency to define a “particular statutory term,” “prescribe rules to ‘fill up the details’ of a statutory scheme,” or “regulate subject to the limits imposed by a term or phrase that ‘leaves agencies with flexibility.’”⁵⁵ In these cases, judicial review shifts to “hard look” review under the APA’s arbitrary-and-capricious standard.⁵⁶ The judge is no longer tasked with independently determining the *meaning* of the law, but is instead responsible for ensuring an agency has acted reasonably *within the limits* of its delegated regulatory authority.

This seeming exception to the *Loper Bright* standard for cases involving delegations of discretionary power should not be understood as a back-door reintroduction of *Chevron*. Judicial recognition of Congress’s statutory delegations of policymaking authority is itself a judgment about the meaning of the law—one that ought to be made without special solicitude for an agency’s understanding of its own jurisdiction.⁵⁷ *Loper Bright* clearly anticipates meaningful review of the “outer statutory boundaries” of Congress’s delegations to “ensure that agencies exercise their discretion consistent with the APA.”⁵⁸ Judges retain responsibility for identifying those delegations, assessing their constitutionality, defining their limits, and ensuring that agency action within those boundaries is neither arbitrary nor capricious.⁵⁹ That said, *Loper Bright*’s treatment of such delegations remains a source of ongoing litigation and raises important doctrinal questions.

⁵³ *Loper Bright Enters.*, 603 U.S. at 412–13.

⁵⁴ *Id.* at 394.

⁵⁵ *Id.* at 394–95 (citation omitted) (first quoting *Wayman v. Southard*, 23 U.S. 1, 43 (1825); and then quoting *Michigan v. EPA*, 576 U.S. 743, 752 (2015)).

⁵⁶ *Id.* at 395 (citing *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

⁵⁷ *See id.* at 401 (“The very point of the traditional tools of statutory construction—the tools courts use every day—is to resolve statutory ambiguities. That is no less true when the ambiguity is about the scope of an agency’s own power—perhaps the occasion on which abdication in favor of the agency is *least* appropriate.”).

⁵⁸ *Id.* at 404.

⁵⁹ *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 395–96 (2024).

III. *LOPER BRIGHT* DURING THE OCTOBER 2024 TERM – MAJOR THEMES AND LESSONS

There are many interesting insights to glean from the Supreme Court’s use of *Loper Bright* during the past 2024 Term, including its appearances in the Justices’ concurring and dissenting opinions. *First*, as discussed in Section III.A, in *Seven County Infrastructure Coalition v. Eagle County*, the Court explicitly clarified that *Loper Bright* and the APA require de novo review of questions of law in cases involving agencies, thus elucidating the dichotomy between rigorous, de novo review of an agency’s interpretation of a statute (a legal question) and more deferential review of agency actions that fall within the range of discretion Congress has properly granted to an agency.⁶⁰ *Second*, as addressed in Section III.B, multiple decisions from the 2024 Term provide insight into what de novo review will look like in a post-*Loper Bright* world, underscoring the primacy of textualist interpretive tools—namely, the traditional canons of interpretation—in ascertaining the single best meaning of the law, as fixed at the time of enactment.⁶¹ *Third*, Section III.C posits that revival of a robust “*Skidmore* deference” doctrine to replace *Chevron* is unlikely and that *Skidmore* “respect” will instead involve straightforward application of the *contemporanea expositio* and *interpres consuetudo* canons—two traditional canons of interpretation that fit comfortably with the de novo review paradigm required under *Loper Bright*.⁶² *Fourth*, and finally, Section III.D examines how *Loper Bright* intersects with the major question and nondelegation doctrines and what preliminary insights might be drawn from the opinions in *FCC v. Consumers’ Research* on that point.⁶³

A. *Clarifying the Loper Bright Standard – De Novo Review*

In *Seven County Infrastructure Coalition v. Eagle County*, a case concerning judicial review of environmental impact statements (EIS) under the National Environmental Policy Act (NEPA), the Supreme Court confirmed that *Loper Bright*’s independent, best-judgment standard triggers de novo review: “As a general matter, when an agency interprets a statute,

⁶⁰ See *infra* Section III.A.

⁶¹ See *infra* Section III.B.

⁶² See *infra* Section III.C.

⁶³ See *infra* Section III.D.

judicial review of the agency's interpretation is *de novo*.”⁶⁴ The *Seven County* majority comprised the five conservative members of the Court, with Justice Gorsuch recused, while the three progressive justices filed a concurring opinion.⁶⁵

Specificity about whether section 706 prescribes *de novo* review was intriguingly absent from *Loper Bright* itself. If anything, Chief Justice Roberts appeared to go out of his way to avoid using the phrase “*de novo*.” That move was particularly curious given Justice Kagan's insistence, in her dissent, that section 706 does not “prescribe a *de novo* standard,” let alone “*any* standard of review for construing statutes.”⁶⁶ The Chief Justice retorted in a footnote that, while “Section 706 does not say expressly that courts are to decide legal questions using ‘a *de novo* standard of review[,]’”⁶⁷—an obvious concession, given the presence of the phrase “trial *de novo*” in section 706(2)(F)⁶⁸—“some things ‘go without saying,’” an allusion perhaps to historical judicial practice and the separation-of-powers principles that informed Congress's codification of the APA.⁶⁹

⁶⁴ *Seven Cnty. Infrastructure Coal. v. Eagle County*, 605 U.S. 168, 179 (2025); see Michael Pepson, *Seven County v. Eagle County: The Supreme Court Provides Guidance on How Loper Bright and State Farm Review Coexist*, AMS. FOR PROSPERITY FOUND. (May 30, 2025), <https://americansforprosperityfoundation.org/loper-bright/seven-county-v-eagle-county-the-supreme-court-provides-guidance-on-how-loper-bright-and-state-farm-review-coexist> (on file with the Liberty Law Review).

⁶⁵ See *Seven Cnty. Infrastructure Coal.*, 605 U.S. at 170.

⁶⁶ *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 463 (2024) (Kagan, J., dissenting) (citing *Kisor v. Wilkie*, 588 U.S. 558, 581 (2019) (plurality opinion)). Specifically, Justice Kagan implied that deference to an agency's interpretation was not meaningfully distinguishable from straightforward *de novo* review, at least for purposes of section 706, because in each instance a reviewing court still “decide[s]” a “relevant question[] of law.” *Id.* (alteration in original); see *id.* at 464 (“Section 706 neither mandates nor forbids *Chevron*-style deference.”). The only difference between *de novo* review and *Chevron*, in Justice Kagan's mind, seemed to be whether a court “starts from scratch” (*de novo*) or begins with examining the reasonableness of the agency's position (*Chevron* deference). *Id.* at 463.

⁶⁷ *Id.* at 392 n.4 (majority opinion) (citation omitted).

⁶⁸ 5 U.S.C. § 706(2)(F) (A court shall “hold unlawful and set aside agency action, findings, and conclusions . . . unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court.”).

⁶⁹ *Loper Bright Enters.*, 603 U.S. at 392 n.4 (quoting *Bond v. United States*, 572 U.S. 844, 857 (2014)). But see *id.* at 464 n.3 (Kagan, J., dissenting) (“But why? What extra-textual considerations force us to read Section 706 the majority's way?”).

Chief Justice Roberts’s hesitancy in *Loper Bright* had real consequences. Immediately after *Loper Bright* was decided, some commentators speculated whether the end of *Chevron*, and its replacement with *Loper Bright*’s “due respect,” left some wiggle room for judges to treat agency interpretations of law as dispositive, at least in certain cases.⁷⁰ *Loper Bright*’s repeated references to “*Skidmore* deference”—without any unpacking of what *Skidmore* might mean in a post-*Chevron* environment⁷¹—fueled academic curiosity in this regard.⁷² In *Lopez v. Garland*, a Ninth Circuit panel even took the view that “*Skidmore* deference” was the intended replacement for *Chevron*, rather than *de novo* review, describing its “task . . . [as] evaluat[ing] the statute independently under *Skidmore*, giving ‘due respect,’ but not binding deference to the agency’s interpretation.”⁷³ The *Lopez* court thus traded *Chevron*’s two-step methodology for *Skidmore*’s multi-factor approach and retained an emphasis on starting with the agency’s interpretation rather than the plain meaning of the statutory text.⁷⁴ That move entailed, at best, a misreading of *Loper Bright*; at worst, it was an intentional reframing that distorted the Supreme Court’s acknowledgment that judges may only afford “respect” to legal interpretations devised by administrative agencies.

⁷⁰ See, e.g., Jonathan Adler, *From “Deference” to “Respect” – The Real Import of Loper Bright*, REASON: VOLOKH CONSPIRACY (July 3, 2024), <https://reason.com/volokh/2024/07/03/from-deference-to-respect-the-real-import-of-loper-bright> (on file with the Liberty Law Review).

⁷¹ See, e.g., *Loper Bright Enters.*, 603 U.S. at 394, 399, 402 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). In *Skidmore*, the Supreme Court delineated factors to help identify persuasive agency interpretations that might have “weight” in resolving questions of law. *Skidmore*, 323 U.S. at 140. Agency “interpretations and opinions,” when “made in pursuance of official duty” and “based upon . . . specialized experience,” can “constitute[] a body of experience and informed judgment to which courts . . . may properly resort for guidance.” *Id.* at 139–40. These factors include “the validity of [an agency’s] reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” *Id.* at 140.

⁷² See, e.g., Kristin E. Hickman, *Anticipating a New Modern Skidmore Standard*, 74 DUKE L.J. ONLINE 111, 125–34 (2025); Bernard W. Bell, *Loper Bright: Resurrecting Skidmore in a New Era*, 55 SETON HALL L. REV. 1577, 1588–89, 1591 (2025).

⁷³ *Lopez v. Garland*, 116 F.4th 1032, 1039 (9th Cir. 2024) (quoting *Loper Bright Enters.*, 603 U.S. at 401–03).

⁷⁴ *Id.*

Again, the *Lopez* court erred by equating *Skidmore*-style deference with “independent evaluation” of the law, yet without any attempt to engage in textual analysis (including use of the traditional canons of construction), as would be expected under de novo review.⁷⁵ In a striking dissent from the Ninth Circuit’s denial of rehearing en banc, Judge Patrick Bumatay argued the *Lopez* panel majority had taken “the extraordinary step of resurrecting *Chevron*” by “favor[ing] agency deference” over the “best reading of the statute.”⁷⁶

[T]he panel “asked the wrong question” by starting with whether the [agency’s] interpretation was “entitled to respect.” . . . [T]he right question . . . always is, “what’s the best reading of the statute?” Even if an interpretation is thorough, well-reasoned, and consistent with some authorities, that doesn’t mean it’s the best one. . . . [T]he panel abdicated the judicial role and just applied *Chevron* deference by another name. Whatever “respect” we give executive agencies under *Loper Bright*, it can’t be a deference indistinguishable from *Chevron*.⁷⁷

Hopefully, *Seven County*’s clarification that de novo review is synonymous with the *Loper Bright* standard will prevent other courts of appeals from falling into the same error as the Ninth Circuit.

In addition to clarifying that section 706 and *Loper Bright* require de novo review for questions of law, *Seven County* helpfully distinguished such review from the appropriate level of scrutiny given to agency action expressly authorized by a delegation of discretionary authority.⁷⁸ In his opinion for the majority, Justice Kavanaugh emphasized that NEPA, which is a “purely procedural statute,” “simply requires an agency to prepare an [EIS]” but otherwise imposes no “substantive roadblock” to “infrastructure

⁷⁵ See *id.* at 1041.

⁷⁶ *Lopez v. Bondi*, 151 F.4th 1196, 1198, 1202 (9th Cir. 2025) (Bumatay, J., dissenting from denial of reh’g en banc).

⁷⁷ *Id.* at 1198 (quoting Brief for Amici Curiae Professors Michael Kagan & Christopher J. Walker In Support of Petitioner’s Petition for Panel Rehearing or Rehearing En Banc at 14, *Lopez*, 116 F.4th 1032 (No. 23-870)).

⁷⁸ *Seven Cnty. Infrastructure Coal. v. Eagle County*, 605 U.S. 168, 179–81 (2025).

projects . . . built, funded, or approved by the [f]ederal [g]overnment.”⁷⁹ When a party challenges the legal adequacy of an EIS, a court does not undertake de novo review but instead limits itself to asking whether the EIS “was reasonable and reasonably explained.”⁸⁰ In doing so, the court must “afford substantial deference to the agency.”⁸¹ As Justice Kavanaugh explained:

In practice, judicial deference in NEPA cases can take several forms. For example, NEPA says that the EIS should be “detailed.” Of course, the meaning of “detailed” is a question of law to be decided by a court. But what details need to be included in any given EIS? For the most part, that question does not turn on the meaning of “detailed”—instead “it involves primarily issues of fact.” The agency is better equipped to assess what facts are relevant to the agency’s own decision than a court is. As a result, “agencies determine whether *and to what extent* to prepare an EIS based on the usefulness of any new potential information to the decisionmaking process.” So the question of whether a particular report is detailed enough in a particular case itself requires the exercise of agency discretion—which should not be excessively second-guessed by a court.⁸²

⁷⁹ *Id.* at 172–73; *id.* at 180 (“Under NEPA, an agency’s only obligation is to prepare an adequate report. ‘NEPA requires no more.’” (quoting *Strycker’s Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 228 (1980))); *id.* at 185 (“The bedrock principle of judicial review in NEPA cases can be stated in a word: Deference.”).

⁸⁰ *Id.* at 180 (first citing *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); and then citing *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021)); *see id.* (“Because an EIS is only one input into an agency’s decision and does not itself require any particular substantive outcome, the adequacy of an EIS is relevant only to the question of whether an agency’s final decision . . . was reasonably explained.”).

⁸¹ *Id.*

⁸² *Id.* at 180–81 (citations omitted) (first quoting 42 U.S.C. § 4332(2)(C); then quoting *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377 (1989); and then quoting *Dep’t of Transp. v. Public Citizen*, 541 U.S. 752, 767 (2004)) (citing *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 391–92 (2024)).

In other words, while the meaning of a statutory term—such as “detailed” in NEPA—remains a legal question left to the independent, best judgment of a court, disputes over what kinds of details are actually included in any given EIS must be left to the agency’s discretion, assuming the agency has otherwise acted within the bounds of its authority. The inclusion or omission of particular “details” is a fact-bound matter that does not depend on the legal meaning of any statutory term.⁸³

Justice Kavanaugh’s theory of deference in cases involving substantive delegations of discretionary authority is unsurprising given his arguments elsewhere that “a judge can engage in appropriately rigorous scrutiny of an agency’s statutory interpretation”—as would be required by *Loper Bright*—“and simultaneously be very deferential to an agency’s policy choices within the discretion granted to it by the statute.”⁸⁴ Moreover, that view is entirely consistent with *Loper Bright*. The difficulty, however, lies in ensuring that courts carefully distinguish between pure questions of law—or, more specifically, questions about the scope of an agency’s regulatory authority or its decision to construe a statutory term in a particular way—and whether the agency has stayed within the boundaries of its delegated authority in taking any given action.⁸⁵

That potential confusion has already reared its head in *Loper Bright* on remand at the D.C. Circuit,⁸⁶ as well as in the district court’s decision on

⁸³ See *id.*

⁸⁴ Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2154 (2016); see *id.* (“But in cases where an agency is instead interpreting a specific statutory term or phrase, courts should determine whether the agency’s interpretation is the best reading of the statutory text. Judges are trained to do that, and it can be done in a neutral and impartial manner in most cases.”).

⁸⁵ See, e.g., Eric R. Bolinder, *Dodging Chevron’s Redux: The Proper Place for State Farm Arbitrary and Capricious Review*, 24 GEO. J.L. & PUB. POL’Y 1, 28 (2026) (“Courts must resist the urge to merge their *de novo* analysis of lawfulness with their deferential analysis of arbitrariness. These are two different steps, happen at two different points in the analysis, and have two wildly different standards.”).

⁸⁶ See Dan McLaughlin, *Why Is Pam Bondi’s Justice Department Still Fighting Loper Bright?*, NAT’L REV. (June 18, 2025), <https://www.nationalreview.com/corner/why-is-pam-bondis-justice-department-still-fighting-loper-bright> (on file with the Liberty Law Review); see also Dan McLaughlin, *Justice Department in Talks to Settle Loper Bright*, NAT’L REV. (July 18, 2025), <https://www.nationalreview.com/corner/justice-department-in-talks-to-settle>

remand in *Loper Bright*'s companion case, *Relentless Inc. v. Department of Commerce*.⁸⁷ These developments are perhaps unsurprising. There is a fine (yet vital) distinction between determining whether an industry-funded monitoring requirement qualifies as a permissible compliance cost inherent to “carry[ing]” an observer onboard a regulated fishing vessel,⁸⁸ or a discretionary “necessary and appropriate” management measure authorized by the Magnuson-Stevens Act,⁸⁹ and whether the National Marine Fisheries Services arbitrarily and capriciously included such a requirement in the Atlantic herring fishery management plan. That distinction has always been at the heart of *Loper Bright* and *Relentless Inc.*, but even before the end of *Chevron* deference, it was one the government and courts tended to elide.⁹⁰

B. How to Give the Law Meaning – The Canons of Interpretation

Seven County clarified that *Loper Bright* requires de novo review.⁹¹ But how, exactly, should that review be undertaken? What tools do judges have

loper-bright (on file with the Liberty Law Review) (discussing the Justice Department's continued defense of the regulation at issue in *Loper Bright*); Defendants-Appellees' Rule 28(j) Notice of Supplemental Authority at 1–2, *Loper Bright Enters. Inc. v. Lutnick*, No. 21-5166 (D.C. Cir. June 10, 2025), <https://causeofaction.org/wp-content/uploads/2025/06/Loper-Bright-Remand-Seven-County-28j-Letters.pdf> (on file with the Liberty Law Review) (detailing the Justice Department's argument in favor of the regulation at issue in *Loper Bright* using the *Seven County* decision); Plaintiffs-Appellants' Response to Defendants-Appellees' Rule 28(j) Notice at 1–2, *Loper Bright Enters. v. Lutnick*, No. 21-5166 (D.C. Cir. June 11, 2025), <https://causeofaction.org/wp-content/uploads/2025/06/Loper-Bright-Remand-Seven-County-28j-Letters.pdf> (on file with the Liberty Law Review) (detailing the plaintiffs-appellants' argument that the *Seven County* decision “offers no new guidance” as to the question of law at issue in *Loper Bright*, which is “a question subject to *de novo* review without special solicitude for the agency's view”).

⁸⁷ *Relentless Inc. v. U.S. Dep't of Com.*, No. 20-108 WES, 2025 U.S. Dist. LEXIS 134285, at *10–11 (D.R.I. July 15, 2025) (“[The Magnuson-Stevens Act], in no uncertain terms, delegates to NMFS a large degree of discretionary authority. . . . This Court and the *Relentless I* court have already reviewed the Final Rule and found that it reflects reasoned decisionmaking and does not cross the boundaries specified by the MSA”), *appeal filed*, No. 25-1845 (1st Cir. Sep. 11, 2025).

⁸⁸ 16 U.S.C. § 1853(b)(8).

⁸⁹ *Id.* § 1853(b)(14); *Relentless Inc.*, 2025 U.S. Dist. LEXIS 134285, at *2.

⁹⁰ *Relentless Inc.*, 2025 U.S. Dist. LEXIS 134285, at *10–12; Plaintiffs-Appellants' Response to Defendants-Appellees' Rule 28(j) Notice, *supra* note 86, at 1–2.

⁹¹ *See supra* Section III.A.

for discovering the meaning of a statute? *Loper Bright* provided minimal detail on this front. The Court did explain that “[w]hen the meaning of a statute [is] at issue, the judicial role [is] to ‘interpret the act of Congress, in order to ascertain the rights of the parties,’”⁹² while still affording “respect” to the views of the Executive.⁹³ When addressing how courts might reach the “single, best meaning” of a statute, the majority also pointed to the “traditional tools of statutory construction,” but without further elaboration.⁹⁴ Justice Gorsuch, in concurrence, fleshed all this out somewhat, tying the use of a court’s interpretive tools to the broader goal of identifying the original meaning of the law:

Traditionally[,] . . . courts have sought to construe statutes as a reasonable reader would ‘when the law was made.’ Today, some call this ‘textualism.’ But really it’s a very old idea, one that constrains judges to a lawfinding rather than lawmaking role by focusing their work on the statutory text, its linguistic context, and various canons of construction. In that way, textualism serves as an essential guardian of the due process promise of fair notice. If a judge could discard an old meaning and assign a new one to a law’s terms, all without any legislative revision, how could people ever be sure of the rules that bind them?⁹⁵

This excerpt neatly encapsulates the process of conducting *de novo* review, as anticipated by *Loper Bright*. The canons of interpretation are the principal means for judges to provide independent judgment as to the single, best interpretation of the law as fixed at the time of enactment and evidenced by public meaning. Two cases from the past Term confirm as much.

⁹² *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 385 (2024) (quoting *Decatur v. Paulding*, 39 U.S. 497, 515 (1840)).

⁹³ *Id.*

⁹⁴ *See id.* at 400–01; *id.* at 403 (“Courts interpret statutes, no matter the context, based on the traditional tools of statutory construction, not individual policy preferences.”).

⁹⁵ *Id.* at 433–34 (Gorsuch, J., concurring) (citations omitted) (first quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *59; then citing *United States v. Fisher*, 6 U.S. 358, 386 (1805); and then citing *New Prime Inc. v. Oliveira*, 586 U.S. 105, 113 (2019)).

The first case is *McLaughlin Chiropractic Associates, Inc. v. McKesson Corp.*⁹⁶ *McLaughlin* concerned the proper interpretation of the phrase “telephone facsimile machine” under the Telephone Consumer Protection Act of 1991 and the intersection of judicial responsibility for construing that law with the Hobbs Act’s requirement that final orders of the Federal Communications Commission in the enforcement context be reviewable only in the courts of appeals.⁹⁷ The Supreme Court’s clarification that district courts ought to “independently determine for [themselves] whether the agency’s interpretation of a statute is correct,” including in enforcement proceedings,⁹⁸ is independently significant. But *McLaughlin* is equally noteworthy for the Court’s reiteration that the interpretive process requires application of “ordinary principles of statutory interpretation.”⁹⁹ These principles encapsulate “presumptions about what an intelligently produced text conveys,” given semantic content, syntax and grammar, and context.¹⁰⁰

Second, in *Medina v. Planned Parenthood South Atlantic*, Justice Thomas cited *Loper Bright* in concurrence to stress that judges ought to “interpret statutes at the time of their enactment,” that is, according to “how ordinary readers would have understood” them when first passed into law.¹⁰¹ *Medina* involved a class action section 1983 lawsuit against the director of the South Carolina Department of Health and Human Services.¹⁰² Planned Parenthood alleged that the director had deprived patients of a federal statutory right to access qualified medical providers after prohibiting Planned Parenthood clinics from continuing their participation in the state’s Medicaid program

⁹⁶ *McLaughlin Chiropractic Assocs., Inc. v. McKesson Corp.* 606 U.S. 146, 146 (2025).

⁹⁷ *See id.* at 149–50, 153.

⁹⁸ *Id.* at 155. The Court reached that conclusion based, in large part, on the default presumption of the availability of judicial review, “absent congressional indication otherwise.” *Id.* at 157.

⁹⁹ *Id.* at 155; *see generally* Dan McLaughlin, *Supreme Court on Loper Bright: Yeah, We Meant It*, NAT’L REV. (June 20, 2025), <https://www.nationalreview.com/corner/supreme-court-on-loper-bright-yeah-we-meant-it> (on file with the Liberty Law Review) (summarizing the *McLaughlin* case).

¹⁰⁰ ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 51 (2012).

¹⁰¹ *Medina v. Planned Parenthood S. Atl.*, 606 U.S. 357, 395 (2025) (Thomas, J., concurring) (citing *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400 (2024)).

¹⁰² *Medina*, 606 U.S. at 365 (majority opinion).

due to the provision of abortion services.¹⁰³ In an opinion written by Justice Gorsuch, the Court held the Medicaid Act, as a spending statute, did not create the kind of “right” that, under the Civil Rights Act, can give rise to a section 1983 lawsuit.¹⁰⁴ Justice Thomas wrote separately to call for the Court to “reassess § 1983’s bounds” altogether, “including its application in the spending context and [the Court’s] understanding of the ‘rights’ enforceable” thereunder.¹⁰⁵ In this respect, *Loper Bright* was particularly relevant because it was used to argue that statutory terms—including “rights, privileges or immunities” in the Civil Rights Act—must be interpreted according to their contemporary meaning or, here, as understood in 1871.¹⁰⁶

C. *The Unlikely Revival of a Robust Skidmore Deference Doctrine*

The implication of cases like *Seven County*, *McLaughlin*, and *Medina* vis-à-vis the “respect” that ought to be accorded to agency interpretations of law should be clear. There can be no serious revival of “*Skidmore* deference.” *Chevron* is gone, and it is quite unlikely to be revived in the way imagined by the Ninth Circuit in *Lopez*.¹⁰⁷ The manner in which a court might permissibly consider an agency’s interpretation under *Loper Bright* cannot be conceptualized as “deference” that hinges on logical consistency or even persuasive force, as suggested by *Skidmore*.¹⁰⁸ But neither can it be a “respect”¹⁰⁹ given for its own sake due to esteem for the dignity of a coordinate branch of government. Consideration of an agency’s interpretations must instead be subordinated to the overriding goal of elucidating the original public meaning of the legal text.¹¹⁰

¹⁰³ See *id.* at 364–65.

¹⁰⁴ See *id.* at 376–80.

¹⁰⁵ *Id.* at 386 (Thomas, J., concurring).

¹⁰⁶ See *id.* at 395 (quoting Michael G. Collins, “*Economic Rights*,” *Implied Constitutional Actions, and the Scope of Section 1983*, 77 GEO. L.J. 1493, 1505 (1989) (“[I]t seems more than likely that contemporaneous readers would have understood those terms more narrowly than our current § 1983 doctrine does. For example, such readers presumably would have read § 1983 in light of its Reconstruction era context, especially given that the provision’s “rights, privileges or immunities” language suggestively echoed the fourteenth amendment’s “privileges or immunities” clause.”)).

¹⁰⁷ See *supra* notes 73–77 and accompanying text.

¹⁰⁸ See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

¹⁰⁹ See *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 386 (2024).

¹¹⁰ See *id.* at 400–01.

“Respect,” therefore, requires concrete application of the canons of construction, such as the *contemporanea expositio* and *interpres consuetudo* canons.¹¹¹ These canons reflect the reality that agencies, as principal executors of the law, might have special insight into the law’s original meaning.¹¹² But, again, that insight only has persuasive power to the extent it provides evidence of what the law meant at the time of enactment.¹¹³ Although the Latin names for these canons did not make it into any opinions this past Term, the principles they refer to did. For example, in *Bondi v. Vanderstok*—a decision that witnessed the progressive justices join a near-unanimous majority—the Supreme Court quoted *Loper Bright* before expounding that “the contemporary and consistent views of a coordinate branch of government can provide evidence of the law’s meaning.”¹¹⁴

The *Vanderstok* case involved a facial, pre-enforcement challenge to the Bureau of Alcohol, Tobacco, Firearms, and Explosives’ (ATF) expansion of its regulations under the Gun Control Act of 1968 (GCA) to cover a broader range of gun-related products, such as unfinished frames, receivers, and gun-parts kits.¹¹⁵ Justice Gorsuch, who wrote the opinion, believed it significant that the ATF had “consistently interpreted . . . [the GCA] to reach some

¹¹¹ See Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 *YALE L. J.* 908, 987–88 (2017).

¹¹² *Loper Bright Enters.*, 603 U.S. at 386. Agencies are often involved in drafting legislation they are charged with implementing and may even submit proposed language to Congress for consideration. *Loper Bright* alluded to this as a practical reason for respectfully considering an agency’s contemporaneous interpretation as probative of statutory meaning. *See id.*

¹¹³ See Bamzai, *supra* note 111, at 987–88 (“Under the traditional approach, a court would ‘respect’—or, to use modern parlance, ‘defer to’—an agency’s interpretation of a statute if and only if that interpretation reflected a customary or contemporaneous practice under the statute. To put the point slightly differently, the *contemporanea expositio* and *interpres consuetudo* canons were considered part and parcel of de novo review.”).

¹¹⁴ *Bondi v. Vanderstok*, 604 U.S. 458, 481 (2025) (quoting *Loper Bright Enters.*, 603 U.S. at 394); *see generally* Cindy Crawford, *SCOTUS Relies on Loper Bright to Uphold ATF Rule Interpreting the Gun Control Act to Reach Kits in Bondi v. Vanderstok*, *AMS. FOR PROSPERITY FOUND.* (Mar. 26, 2025), <https://americansforprosperityfoundation.org/loper-bright/scotus-relies-on-loper-bright-to-uphold-atf-rule-interpreting-the-gun-control-act-to-reach-kits-in-bondi-v-vanderstock> (on file with the Liberty Law Review) (discussing the *Vanderstok* decision).

¹¹⁵ *Vanderstok*, 604 U.S. at 462, 464–66.

unfinished frames and receivers.”¹¹⁶ Given that historical interpretation, Justice Gorsuch saw the challenged rule as merely expanding the ATF’s regulatory reach to cover a greater variety of items that could already have been targeted under the original scope of the GCA.¹¹⁷ Justice Thomas dissented, rejecting not so much the relevance of the *contemporanea expositio* and *interpres consuetudo* canons but rather Justice Gorsuch’s conclusions.¹¹⁸ For Justice Thomas, the ATF rule not only reflected an expanded regulatory definition but also an entirely novel approach to understanding whether any given object was “clearly identifiable” as a “firearm” subject to the GCA.¹¹⁹ That is, for him, the record before the Court did not evince the ATF’s consistency with its original understanding of federal gun laws.¹²⁰

In *Kennedy v. Braidwood Management, Inc.*, the Supreme Court reiterated the same general principle that “considered and consistent Executive Branch practice—which began contemporaneously with enactment of the statute . . . buttresses the ordinary meaning and natural interpretation of the term” under review.¹²¹ *Kennedy* presented a constitutional challenge under the Appointments Clause to the structure of the Preventive Services Task Force (Task Force), a component of the Department of Health and Human Services (HHS) responsible for making recommendations about preventative healthcare services required to be covered under the Affordable Care Act.¹²² One of the arguments before the Court concerned whether the agency head—the Secretary of Health and Human Services and, previously, his delegate—had been vested with proper appointment authority, such that Task Force members could function as inferior officers.¹²³ Among other things, the

¹¹⁶ *Id.* at 480.

¹¹⁷ *Id.* at 484.

¹¹⁸ *See id.* at 491 (Thomas, J., dissenting) (“ATF recently changed course . . . promulgat[ing] a rule redefining [and broadening] ‘firearm,’ ‘frame,’ and ‘receiver.’” (citation omitted)).

¹¹⁹ *Id.*

¹²⁰ *See id.* at 491, 500–01 (“The Rule’s definitions of ‘frame’ and ‘receiver’ also contravene ordinary meaning by allowing ATF to classify objects as frames or receivers based on criteria other than the object’s physical characteristics.”).

¹²¹ *Kennedy v. Braidwood Mgmt., Inc.*, 606 U.S. 748, 783 (2025).

¹²² *Id.* at 753–54 (citing 42 U.S.C. § 299b-4(a)(1)).

¹²³ *Id.* at 754.

parties disagreed whether the phrase “shall convene” was synonymous with “shall appoint.”¹²⁴

The Court ultimately held that “Congress need not use magic words to confer appointment authority,” and the “power to ‘convene’ is naturally read to include the power to appoint in this specific context.”¹²⁵ Relevant here, though, the Court also recognized how “the Executive Branch’s actions for the last 26 years, since the 1999 codification of the Task Force, have reflected that straightforward interpretation of the statute.”¹²⁶ HHS had always understood the power to convene to function as the power to appoint.¹²⁷ Justice Thomas dissented, objecting that the Court was relying on an agency practice that arose *before* enactment of the ACA when the Task Force still served a purely advisory role.¹²⁸ For Justice Thomas, when the ACA “brought the Appointments Clause into the picture” by turning “the Task Force into an ‘independent’ standing body of officers with a detailed list of duties and the authority to issue recommendations with the force of law,” not only did it “displace[] any appointment authority that might otherwise have been *implicit* in the . . . power to ‘convene,’” but more importantly, it reset the clock for the agency developing an interpretation of the law that would be deserving of “respect” under *Loper Bright*.¹²⁹ HHS’s older practice could “shed[] no light on whether the . . . convening power [now, post-ACA] constitutes an express vesting of appointment authority that overcomes the constitutional default.”¹³⁰

¹²⁴ See *id.* at 770; § 299b-4(a)(1) (“The Director shall convene an independent Preventive Services Task Force . . . to be composed of individuals with appropriate expertise.”).

¹²⁵ *Kennedy*, 606 U.S. at 780–81.

¹²⁶ *Id.* at 782–83 (“That considered and consistent Executive Branch practice—which began contemporaneously with enactment of the statute codifying the Task Force in 1999—buttresses the ordinary meaning and natural interpretation of the term ‘convene’ in the statute.” (first citing *Loper Bright Enters. v. Raimondo*, 604 U.S. 369, 394 (2024); and then citing *Bondi v. Vanderstok*, 604 U.S. 458, 477–80 (2025))).

¹²⁷ See *id.*

¹²⁸ See *id.* at 816 (Thomas, J., dissenting).

¹²⁹ *Id.* (citing § 299b-4(a)).

¹³⁰ *Id.* at 816 n.9 (“The [agency’s] practice thus sheds no light on whether the Director’s convening power constitutes an express vesting of appointment authority that overcomes the constitutional default. And, surely this Court did not overrule *Chevron* . . . only to defer to concededly unlawful executive action.”).

Taken together, the Court's use of *Loper Bright* in *Vanderstok* and *Kennedy* provides insight into how the canons of interpretation should be used by judges to determine the meaning of a statute. They specifically show how the canons of contemporaneity and consistent usage might be applied to test the persuasive force of an agency's interpretation of the law.¹³¹ This is how "respect" for the views of the Executive Branch should proceed post-*Loper Bright*, contrary to the predictions of some that a robust neo-*Skidmore* deference might take hold.¹³² At the same time, *Vanderstok* and *Kennedy* show that de novo review and application of the canons does not always ensure a particular result. Judges weigh evidence differently, and they make their own conclusions of what the law means; reasonable minds can disagree. Justice Thomas, in both *Vanderstok* and *Kennedy*, accepted the principal force of the *contemporanea expositio* and *interpretes consuetudo* canons—but he did not believe they cut the same way as the majority held in application.¹³³

Brief mention should be made of two other cases this past Term where *Loper Bright* was cited as part of the Court's recognition of the limits of the sort of "respect" that can (or should) be given to Executive Branch practice and agency interpretations. First, in *City & County of San Francisco v. EPA*, Justice Alito noted judges "are not obligated to accept administrative guidance that conflicts with the statutory language it purports to implement," especially when that guidance is "inconsistent" with other agency positions.¹³⁴ The *San Francisco* case involved a challenge to the EPA's issuance of pollution-discharge permits that contained generic prohibitions on certain discharges without any applicable standards.¹³⁵ The Court held

¹³¹ See Ryan P. Mulvey, *No Signs of a Skidmore Revival at the Supreme Court*, AMS. FOR PROSPERITY FOUND. (July 17, 2025), <https://americansforprosperityfoundation.org/loper-bright/no-signs-of-a-skidmore-revival-at-the-supreme-court> (on file with the Liberty Law Review).

¹³² *Id.* But see, e.g., Cass Sunstein, *Our Marbury: Loper Bright and the Administrative State*, 74 DUKE L.J. 1893, 1900–01 (2025) ("After *Loper Bright*, it is safe to predict that [*Skidmore*] will be increasingly important (and often quoted).").

¹³³ In fact, Justice Thomas has long recognized the usefulness of these canons, even before *Loper Bright*, and analogized them to the principle of liquidation. See, e.g., *Baldwin v. United States*, 589 U.S. 1231, 1235–36 (2020) (Thomas, J., dissenting from denial of certiorari).

¹³⁴ *City & County of San Francisco v. EPA*, 604 U.S. 334, 354–55 (2025) (citing *Loper Bright Enters., v. Raimondo*, 603 U.S. 369, (2024)).

¹³⁵ See *id.* at 337–39.

such permitting went beyond the EPA's statutory authority under the Clean Water Act.¹³⁶ More to the point, the EPA's subregulatory guidance had no persuasive force that could overcome the plain meaning of the law.¹³⁷ Although there were hints of the old multi-factor *Skidmore* test in *San Francisco*, insofar as the Court seemed to express incredulity that guidance might rise to the same level as a regulation in terms of memorializing an agency's interpretation of the law, the more obvious lesson is that text always takes priority, and inconsistent agency practice can be damning.

The second case, *Velázquez v. Bondi*, dealt with the calculation of order-of-removal and voluntary-departure deadlines under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and whether such deadlines can be extended to the next business day when they fall on a weekend or legal holiday.¹³⁸ In the Court's broader consideration of the presumption of consistent usage, it held that, in all contexts, the term "days" should be given a specialized meaning rather than its ordinary sense.¹³⁹ Thus, deadlines would automatically extend when falling outside the business week.¹⁴⁰ The Court based its conclusion, in part, on the government "conced[ing] [that] the term 'days' is best read in light of pre-existing regulatory practice" and "administrative construction."¹⁴¹ Justice Alito—this time, in dissent—protested, arguing "the mere fact that the Government believes that . . . filing deadlines should extend when they land on a weekend or holiday does not bind" a court, particularly when an agency's position is merely reflected in a "concession" in the government's reply brief and when a court has otherwise been "selective" in its willingness to consider claimed practices.¹⁴² Much like *San Francisco*, then, *Velázquez* provides some clue to

¹³⁶ *Id.* at 339.

¹³⁷ *See id.* at 346–48.

¹³⁸ *Velázquez v. Bondi*, 604 U.S. 712, 714, 722, 726 (2025).

¹³⁹ *Id.* at 725–26. The Court also heeded the presumption that Congress "adopts a new law against the backdrop of a 'longstanding administrative construction,'" such as the common specialized meaning of "days" in a legal setting. *Id.* at 725 (quoting *Haig v. Agee*, 453 U.S. 280, 297–98 (1981)).

¹⁴⁰ *Id.* at 731.

¹⁴¹ *Id.* at 726 (citation omitted).

¹⁴² *Id.* at 754–55 (Alito, J., dissenting); *see id.* at 755 ("The Court eagerly adopts the Government's interpretation of the filing provisions but rejects the Government's position regarding the voluntary departure provision.").

just how far “respect” for the Executive Branch might extend, and how there is no unanimity among the justices on this point.

D. Loper Bright, *Major Questions, and Nondelegation*

Loper Bright surfaced again on the last day of the 2024 Term in *FCC v. Consumers’ Research*, a case involving nondelegation and private nondelegation challenges to section 254 of the 1996 Telecommunications Act.¹⁴³ Section 254 established the Universal Service Fund (USF)—a telecommunications social-welfare program funded by a charge known as the “Contribution Factor.”¹⁴⁴ This charge is passed on to consumers, appearing on phone bills as the “Universal Service Fund fee.”¹⁴⁵ During the *Chevron* era, numerous courts construed section 254 to grant the Federal Communications Commission (FCC) broad discretion to administer the program and set the Contribution Factor.¹⁴⁶ But shortly after *Loper Bright* was decided, the en banc Fifth Circuit held, inter alia, that section 254 likely violated the nondelegation doctrine under the current “intelligible principle”

¹⁴³ *FCC v. Consumers’ Rsch.*, 606 U.S. 656, 664, 692 (2025); *id.* at 714–15 (Gorsuch, J., dissenting).

¹⁴⁴ See 47 U.S.C. §§ 254(b)–(d); see also 47 C.F.R. § 54.709(a) (2026) (federal regulation empowered by 47 U.S.C. § 254). The FCC has re-delegated its authority over the USF to the Universal Service Administrative Company (USAC). See 47 C.F.R. § 54.701(a) (2026). This private entity calculates the Contribution Factor and, for all practical purposes, decides the rate at which the carriers—and, by extension, the public—are taxed. See 47 C.F.R. § 54.709(a)(3). The USF “is a social welfare subsidy program that benefits certain consumers . . . by imposing taxes on other consumers.” Ronald J. Krotoszynski, Jr., *Reconsidering the Nondelegation Doctrine: Universal Service, the Power to Tax, and the Ratification Doctrine*, 80 IND. L.J. 239, 278 (2005).

¹⁴⁵ Motion to Dismiss at 13, *Consumers’ Research v. FCC*, 109 F.4th 743 (5th Cir. 2024) (No. 22-600008), *rev’d*, 606 U.S. 656 (2025).

¹⁴⁶ *E.g.*, *Rural Cellular Ass’n & Universal Serv. for Am. Coal. v. FCC*, 685 F.3d 1083, 1092–93 (D.C. Cir. 2012); *Tex. Off. of Pub. Util. Couns. v. FCC*, 265 F.3d 313, 321 (5th Cir. 2001) (Section 254(b) uses “lofty and expansive language” to announce seven “aspirational” principles, “reflect[ing] congressional intent to delegate difficult policy choices to the Commission’s discretion” (quoting *Tex. Off. of Pub. Util. Couns. v. FCC*, 183 F.3d 393, 421 (5th Cir. 1999))); *Qwest Corp. v. FCC*, 258 F.3d 1191, 1199–200 (10th Cir. 2001); *Tex. Off. of Pub. Util. Couns.*, 183 F.3d at 411–12; see also *Consumers’ Rsch. v. FCC*, 88 F.4th 917, 930 (11th Cir. 2023) (Newsom, J., concurring) (“Section 254 gives the FCC only the faintest, most vacuous guidance about how to exercise its authority.”).

test,¹⁴⁷ as it effectively granted the FCC standardless—and thus limitless—power.¹⁴⁸

The Supreme Court reversed, rejecting the Fifth Circuit’s interpretation in favor of a substantially narrower construction.¹⁴⁹ Although Section 254 does not set a numerical cap on the amount of money the FCC may demand, the majority read “the word ‘sufficient’” in Section 254 to “set[] a floor and a ceiling alike,” limiting the agency’s power to raise revenue to fund the USF.¹⁵⁰ Invoking constitutional avoidance principles, the majority further bounded the FCC’s discretion by reading subsection 254(b) to impose mandatory conditions, as opposed to merely aspirational principles.¹⁵¹ In the majority’s view, the petitioner and dissenting justices “read Section 254 extravagantly, the better to create a constitutional problem” in contravention of the principle that “[s]tatutes (including regulatory statutes) should be read, if possible, to comport with the Constitution, not to contradict it.”¹⁵²

Justice Kagan’s majority opinion, Justice Kavanaugh’s solo concurrence, and Justice Gorsuch’s dissent (joined by Justices Thomas and Alito) each

¹⁴⁷ *Consumers’ Rsch.*, 109 F.4th at 756, 759–67. The Fifth Circuit also concluded the FCC’s subdelegation of authority to USAC to set the Contribution Factor likely violated the private nondelegation doctrine and that it “need not definitively answer either delegation question” because “the combination of Congress’s broad delegation to FCC and FCC’s subdelegation to private entities certainly amounts to a constitutional violation.” *Id.* at 756.

¹⁴⁸ *See id.* at 767 (describing section 254 as “a hollow shell that Congress created for FCC to fill—so amorphous that no reviewing court could ever possibly invalidate any FCC action taken in its name”).

¹⁴⁹ *See Consumers’ Rsch.*, 606 U.S. at 679–91. The Court also rejected Consumers’ Research’s private nondelegation challenge and the Fifth Circuit’s “combination” theory of unconstitutionality. *See id.* at 692–98. However, the majority did not reach whether sections 254(c)(3) and (h)(2) violate the nondelegation doctrine. *See id.* at 687 n.9; *id.* at 747 (Gorsuch, J., dissenting).

¹⁵⁰ *Id.* at 681 (majority opinion).

¹⁵¹ *See id.* at 687–91.

¹⁵² *Id.* at 690–91. This approach is in tension with the Court’s other case law suggesting that neither courts nor agencies may artificially narrow a statute’s scope to avoid invalidation under the nondelegation doctrine. *See, e.g., Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 677–78 (2020); *see also Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001) (“We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute.”).

invoke *Loper Bright*,¹⁵³ providing at least three takeaways. First, both the majority and the dissent in *Consumers' Research* cite *Loper Bright* for the proposition that, while courts may give due respect to agency interpretations under certain circumstances, the judiciary must always independently determine what the law means.¹⁵⁴ That point has been a common refrain throughout the past Term. When discussing the Solicitor General's assertion at oral argument "that each of the criteria" set forth in section 254(c)(1) "has to be met," the majority emphasized that, "[i]n any event, and yet more important, we must 'exercise [our] independent judgment in deciding' what power Congress has conferred."¹⁵⁵ Justice Gorsuch, in dissent, responded by suggesting the Solicitor General's "novel reading of subsections (b) and (c)" was at odds with the FCC's longstanding construction of section 254.¹⁵⁶ He did not take issue, however, with the majority's assertion that, under *Loper Bright*, "[c]ourts must exercise independent judgment when interpreting the law."¹⁵⁷ Also, quoting *Loper Bright*, Justice Gorsuch suggested the majority's reliance on the Solicitor General's interpretation at oral argument as further support for its narrowing construction missed the mark because "[t]raditionally, . . . th[e] Court has accorded special respect not to advocacy from the podium, but to a coordinate branch's 'consistent' and 'contemporaneous construction' of a law."¹⁵⁸ In the dissent's view, "the FCC's historic understanding of [Section] 254" as setting forth principles, as opposed to requirements, "is the only one the statute's language tolerates."¹⁵⁹

¹⁵³ See *Consumers' Rsch.*, 606 U.S. at 686 (quoting *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024)); *id.* at 705 (Kavanaugh, J., concurring) (citing *Loper Bright Enters.*, 603 U.S. at 394–96); *id.* at 711 (Gorsuch, J., dissenting) (quoting *Loper Bright Enters.*, 603 U.S. at 425).

¹⁵⁴ See *id.* at 688 (majority opinion); *id.* at 730 n.12. (Gorsuch, J., dissenting).

¹⁵⁵ *Id.* at 688 (majority opinion) (alteration in original) (quoting *Loper Bright Enters.*, 603 U.S. at 412).

¹⁵⁶ See *id.* at 729–30, nn.11–12 (Gorsuch, J., dissenting).

¹⁵⁷ *Id.* at 730 n.12 (citing *Loper Bright Enters.*, 603 U.S. at 394).

¹⁵⁸ *Id.* (quoting *Loper Bright Enters.*, 603 U.S. at 386). This is yet another example of *Loper Bright*'s explication of the principle that an agency's longstanding and contemporaneous interpretation of a statute can provide evidence of statutory meaning weaving its way into the Court's post-*Chevron* jurisprudence.

¹⁵⁹ *FCC v. Consumers' Rsch.*, 606 U.S. 656, 730 n.12 (2025).

Second, as in *Kousisis v. United States*,¹⁶⁰ Justice Gorsuch's dissent in *Consumers' Research* cites his scholarly remarks in *Loper Bright* on the question of stare decisis and the danger of overreading dicta and stray remarks in past precedent.¹⁶¹ Quoting his *Loper Bright* concurrence, Justice Gorsuch expressed the view that, because *Consumers' Research* "sits unmoored from surrounding law," he had "reason to hope its approach will not stand the test of time."¹⁶² Time will indeed tell whether Justice Gorsuch's views on stare decisis and his dicta, as expressed in his concurrence in *Loper*

¹⁶⁰ *Kousisis v. United States*, 605 U.S. 114, 156 (2025) (Gorsuch, J., concurring in part) ("If there is any good news when it comes to the Court's footnote, it may be this: That digression is dicta addressing a question well 'beyond the case.' . . . Try as it might, the Court cannot 'transmute dictum into decision by waving a wand and uttering the word 'hold.' . . . And nothing in today's decision can bind this Court in a future case where the difference between the two rules actually matters." (citations omitted) (first quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 399–400 (1821); and then quoting *United States v. Rubin*, 609 F.2d 51, 69 n.2 (2d. Cir. 1979) (Friendly, J., concurring))).

¹⁶¹ See *Loper Bright Enters.*, 603 U.S. at 416–48 (Gorsuch, J., concurring). Specifically, in *Loper Bright*, Justice Gorsuch explained:

[W]hen judges reach a decision in our adversarial system, they render a judgment based only on the factual record and legal arguments the parties at hand have chosen to develop. A later court assessing a past decision must therefore appreciate the possibility that different facts and different legal arguments may dictate a different outcome. They must appreciate, too, that, like anyone else, judges are "innately digressive," and their opinions may sometimes offer stray asides about a wider topic that may sound nearly like legislative commands. Often, enterprising counsel seek to exploit such statements to maximum effect. But while these digressions may sometimes contain valuable counsel, they remain "vapours and fumes of law," and cannot "control the judgment in a subsequent suit."

Id. at 426 (citations omitted) (quoting *Cohens*, 19 U.S. at 416).

¹⁶² *Consumers' Rsch.*, 606 U.S. at 711 (Gorsuch, J., dissenting) (quoting *Loper Bright Enters.*, 603 U.S. at 425 (Gorsuch, J., concurring)). Justice Gorsuch also cast a cautionary note against overreading precedent this past Term in *Nuclear Regulatory Commission v. Texas*, warning that D.C. Circuit dicta on challenges to agency intervention regulations may be ripe for jurisprudential course correction in a post-*Chevron* deference environment. See *Nuclear Regul. Comm'n v. Texas*, 605 U.S. 665, 711–12, 712 n.4 (2025) (Gorsuch, J., dissenting).

Bright, gain traction¹⁶³ and whether *Consumers' Research* is a one-off or portends a definitive shift away from revival of the nondelegation doctrine.¹⁶⁴

Third, and perhaps most significantly, *Consumers' Research* places *Loper Bright*'s impact on administrative law in a broader constitutional context. At least four justices appear to view *Loper Bright*'s restoration of de novo review of Executive Branch statutory interpretations, coupled with the reemergence of the major questions doctrine *qua* clear-statement rule, as "mitigating" separation-of-powers problems with statutes granting the Executive broad powers and discretion, and policing constitutional boundaries.¹⁶⁵ The non-governmental petitioners in *Consumers' Research* pointed to *Loper Bright* and the major questions doctrine as reasons why the Court need not revive the nondelegation doctrine.¹⁶⁶ Justice Kavanaugh, in his solo concurrence, seemed sympathetic to that suggestion. He noted the Supreme Court's lax nondelegation precedent "has historically not packed much punch in constricting Congress's authority to delegate."¹⁶⁷ But he expressed the view that "many of the broader structural concerns about expansive delegations have been substantially mitigated by this Court's recent case law in related areas—in particular (i) the Court's rejection of so-called *Chevron* deference and (ii) the Court's application of the major questions canon of statutory interpretation."¹⁶⁸ Citing the portion of *Loper Bright* that instructs how courts should ensure the Executive Branch stays within guardrails on its authority

¹⁶³ At least one lower court opinion has drawn from Justice Gorsuch's concurrence in *Loper Bright* on this point. *E.g.*, *Stein v. Kaiser Found. Health Plan, Inc.*, 115 F.4th 1244, 1253 (9th Cir. 2024) (Forrest, J., concurring) (quoting *Loper Bright Enters.*, 603 U.S. at 426 (Gorsuch, J., concurring)).

¹⁶⁴ See *Allstates Refractory Contractors, LLC v. Su*, 144 S. Ct. 2490, 2491 (2024) (Thomas, J., dissenting from denial of certiorari) (noting, as of 2024, that "[a]t least five Justices have already expressed an interest in reconsidering this Court's approach to Congress's delegations of legislative power").

¹⁶⁵ Compare *Consumers' Rsch.*, 606 U.S. at 705 (Kavanaugh, J., concurring) (viewing *Loper Bright*'s holding as mitigating separation-of-powers issues), with *id.* at 745 (Gorsuch, J., dissenting) (viewing *Loper Bright*'s holding as mitigating separation-of-powers issues).

¹⁶⁶ See Brief for Petitioners Competitive Carriers Association et al., at 30–31, *Consumers' Rsch.*, 606 U.S. 656 (No. 24-354).

¹⁶⁷ *Consumers' Rsch.*, 606 U.S. at 705 (Kavanaugh, J., concurring); see also Brief for Petitioners SHLB Coalition et al. at 26, *Consumers' Rsch.*, 606 U.S. 656 (No. 24-354).

¹⁶⁸ *Consumers' Rsch.*, 606 U.S. at 705 (citing *Paul v. United States*, 589 U.S. 1087, 1087 (2019) (Kavanaugh, J., concurring respecting denial of certiorari)).

set by Congress, Justice Kavanaugh further elaborated that “the President’s actions when implementing legislation are constrained—namely, by the scope of Congress’s authorization and by any restrictions set forth in that statutory text.”¹⁶⁹ Although lamenting the Court’s failure to meaningfully enforce the Constitution’s bar against Congress transferring its exclusive legislative powers to other entities, Justice Gorsuch’s dissent echoes Justice Kavanaugh’s concurrence on these points, describing “the major questions doctrine and de novo review of statutory terms” as “other tools” the Court can use to “mitigate[] its failure to police legislative delegations.”¹⁷⁰

Consumers’ Research may also suggest that, unless and until the Supreme Court is willing to revive the nondelegation doctrine, *Loper Bright*, together with the clear-statement version of the major questions doctrine, as articulated in *West Virginia v. EPA*,¹⁷¹ will play an outsized role in policing constitutional boundaries on agency authority, particularly in cases raising nondelegation concerns.¹⁷² In this way, the major questions doctrine has

¹⁶⁹ *Id.* (emphasis omitted) (citing *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 394–96 (2024)). Justice Kavanaugh added that the major questions doctrine provides an additional backstop against executive overreach:

On top of [*Loper Bright*], when interpreting a statute and determining the limits of the statutory text, courts presume that Congress, in the domestic sphere, has not delegated authority to the President to issue major rules—that is, rules of great political and economic significance—unless Congress clearly says as much.

Id. at 705–06 (citing *West Virginia v. EPA*, 597 U.S. 697, 721–24 (2022)).

¹⁷⁰ *Id.* at 745 (Gorsuch, J., concurring); *Cf. Gundy v. United States*, 588 U.S. 128, 166–67 (2019) (Gorsuch, J., dissenting) (“When one legal doctrine becomes unavailable to do its intended work, the hydraulic pressures of our constitutional system sometimes shift the responsibility to different doctrines.”).

¹⁷¹ See *West Virginia*, 597 U.S. at 723–35; *id.* at 742 n.8 (Gorsuch, J., concurring) (“[O]ur precedents have usually applied the doctrine as a clear-statement rule, and the Court today confirms that is the proper way to apply it.”); Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L.J. 191, 216 (2023) (“The Court resolved the dispute between the traditional and the revisionist major questions doctrines in favor of the former during the 2021 Term. The Court applied the traditional clear-statement rule in three cases, culminating in a landmark decision in *West Virginia*.”).

¹⁷² Professor Christopher Walker has suggested that “[p]erhaps the biggest takeaway” from *Consumers’ Research* “is that the Supreme Court’s interest in reinvigorating the nondelegation

continuing vitality after *Loper Bright* and can no longer be understood as a mere exception to (or, more cynically, a way to dodge) *Chevron* deference.¹⁷³

IV. LOOKING FORWARD – UNRESOLVED QUESTIONS COMING SOON TO THE COURT

In the current 2025 Term and beyond, the Supreme Court has further opportunities to give shape to its landmark decision in *Loper Bright* and clarify lingering questions about the decision’s meaning and how it should be applied by lower courts. The following discussion is an illustrative—but by no means exhaustive—sketch of some of those opportunities.

On the merits docket, with *Urias-Orellana v. Bondi*,¹⁷⁴ the Court had the opportunity to grapple with how *Loper Bright* applies in the immigration-law context to asylum-eligibility determinations under the Immigration and Nationality Act (INA).¹⁷⁵ In *Urias-Orellana*, the First Circuit had reviewed for substantial evidence whether petitioners suffered “persecution” within the meaning of the INA.¹⁷⁶ Petitioners argued in their merits brief that “*Loper Bright* reinforces that federal courts must review de novo the BIA’s [Board of

doctrine seems to be losing steam,” positing that *Loper Bright* and the major questions doctrine may have “address[ed] the majority’s concerns about excessive congressional delegation.” Christopher J. Walker, *What FCC v. Consumers’ Research Means for the Future of the Nondelegation Doctrine*, YALE J. ON REGUL.: NOTICE & COMMENT (July 28, 2025), <https://www.yalejreg.com/nc/what-fcc-v-consumers-research-means-for-the-future-of-the-nondelegation-doctrine> (on file with the Liberty University Law Review). Walker’s “best guess . . . is that *Loper Bright* de novo review and the major questions doctrine likely address almost all of the current majority’s concerns about broad statutory delegations.” *Id.* Another possibility is that *Consumers’ Research* has “left open the possibility of reviving the nondelegation doctrine to require greater statutory specificity in particular legislative areas such as criminal law.” Nicolas Elliott-Smith, *Crimes Without Law: Administrative Crimes and the Nondelegation Doctrine*, 115 J. CRIM. L. & CRIMINOLOGY 429, 485 (2025).

¹⁷³ See generally Cass R. Sunstein, *There Are Two “Major Questions” Doctrines*, 73 ADMIN. L. REV. 475 (2021) (discussing two versions of the doctrine that existed before *West Virginia v. EPA*).

¹⁷⁴ See generally *Urias-Orellana v. Bondi*, 145 S. Ct. 2842 (2025) (granting certiorari).

¹⁷⁵ The question presented is “[w]hether a federal court of appeals must defer to the BIA’s judgment that a given set of undisputed facts does not demonstrate mistreatment severe enough to constitute ‘persecution’ under 8 U.S.C. § 1101(a)(42).” Petition for a Writ of Certiorari at i, *Urias-Orellana v. Bondi*, No. 24-777, 2026 U.S. LEXIS 1194 (Mar. 4, 2026).

¹⁷⁶ See *Urias-Orellana v. Garland*, 121 F.4th 327, 335 (1st Cir. 2024), *aff’d sub nom.*, *Urias-Orellana v. Bondi*, No. 24-777, 2026 U.S. LEXIS 1194 (Mar. 4, 2026).

Immigration Appeals] determinations about whether a given set of undisputed facts constitutes persecution under the law,” suggesting the INA—like the APA—does not expressly delegate interpretive power and thus, “under *Loper Bright*, federal courts must not give *Chevron*-like deference to the BIA’s construction of the term ‘persecution.’”¹⁷⁷ Unlike the express delegations of interpretive discretion to agencies contemplated in *Loper Bright*,¹⁷⁸ the definitional provision of the INA at issue in *Urias-Orellana* gives no affirmative textual indication that Congress wanted the BIA’s decision as to whether a given set of facts rises to the level of “persecution” (as used in the statutory definition of “refugee”) to receive deference as a matter of law—as opposed to the deference owed the BIA’s pure factual findings.¹⁷⁹ The case thus potentially presented the Court with an opportunity to clarify the extent to which express delegations of interpretive discretion are required after *Loper Bright*. In the wake of oral argument, however, it seemed less likely the Court would take up that opportunity.¹⁸⁰ And in a unanimous decision, the Court declined to reach that broader *Loper Bright* question, instead ruling against the petitioner and concluding substantial evidence review applied based on the INA’s specific review scheme.¹⁸¹

Another important *Loper Bright*-implementation question that began to percolate up to the Court in the 2025 Term, and which will need to be

¹⁷⁷ See Brief for Petitioners at 23–24, *Urias-Orellana*, 2026 U.S. LEXIS 1194 (No. 27-777).

¹⁷⁸ See *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 394–95, 395 nn.5–6 (2024) (providing examples of delegations of discretion to agencies); see also *Moctezuma-Reyes v. Garland*, 124 F.4th 416, 420 (6th Cir. 2024) (noting “the actual statutes that *Loper Bright* cited as examples of delegations that may call for deference don’t only have broad language. They pair that language with words that expressly empower the agency to exercise judgment.”).

¹⁷⁹ See § 1101(a)(42) (statutory definition of “refugee” using “because of persecution or a well-founded fear of persecution” standard).

¹⁸⁰ See generally Transcript of Oral Argument, *Urias-Orellana*, 2026 U.S. LEXIS 1194 (No. 27-777) (*Loper Bright* did not come up in oral argument). Indeed, the government conceded at oral argument that “if there’s some dispute about what the [statutory] term ‘persecution’ means as a matter of law, . . . a court can resolve that de novo.” *Id.* at 48.

¹⁸¹ See *Urias-Orellana*, 2026 U.S. LEXIS 1194, at *16. In a footnote, the Court reasoned that it “need not address petitioners’ argument” that under *Loper Bright* de novo review applied. *Id.* at n.6 (citation omitted). *Loper Bright* “is not applicable ‘when a particular statute’ mandates deferential review or otherwise ‘delegates authority to an agency consistent with constitutional limits.’” *Id.* (quoting *Loper Bright Enters.*, 603 U.S. at 413).

resolved at some point anyway, is the scope of statutory stare decisis afforded to *Chevron*-era precedents. In *Loper Bright*, when jettisoning *Chevron*, the Chief Justice noted an important caveat: the Court’s ruling did “not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful—including the [CAA] holding of *Chevron* itself—are still subject to statutory stare decisis despite the Court’s change in interpretive methodology.”¹⁸²

The proper scope of statutory stare decisis for cases decided under the now-repudiated *Chevron* doctrine has caused significant confusion in the lower courts.¹⁸³ To date, courts have reached differing conclusions on whether the Chief Justice’s passage refers to specific *agency decisions* upheld under *Chevron* or, alternatively, *legal interpretations* upheld under *Chevron*.¹⁸⁴ In other words, does statutory stare decisis travel with the specific

¹⁸² *Loper Bright Enters.*, 603 U.S. at 376 (citing *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 457 (2008)).

¹⁸³ See Jonathan Remy Nash, *Chevron Stare Decisis in a Post-Loper Bright World*, 110 IOWA L. REV. ONLINE 180, 198–99, 199 n.86 (2025).

¹⁸⁴ See *Bastias v. U.S. Att’y Gen.*, 158 F.4th 1188, 1194–95 (11th Cir. 2025) (Newsom, J., concurring) (noting that “circuits have expressed divergent views about what sorts of [*Chevron*-era] ‘holdings’ the Supreme Court meant to preserve” in *Loper Bright*). See, e.g., *Ohio Telecom Ass’n v. FCC (In re MCP No. 185)*, 124 F.4th 993, 1002–03 (6th Cir. 2025); *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 801 F. Supp. 3d 1151, 1178–80 (D. Mont. 2025); *United States v. Trumbull*, 114 F.4th 1114, 1125 (9th Cir. 2024) (Bea, J., concurring in judgment); *Tennessee v. Becerra*, 131 F.4th 350, 373–74 (6th Cir. 2025) (Kethledge, J., dissenting in part and concurring in part), *vacating as moot sub nom.*, *Tennessee v. Kennedy*, No. 25-162, 2026 U.S. LEXIS 465 (Jan. 20, 2026); *Lake Region Healthcare Corp. v. Becerra*, 113 F.4th 1002, 1007 (D.C. Cir. 2024) (declining to defer to agency’s interpretation under *Loper Bright*); *Bernardo-De La Cruz v. Garland*, 114 F.4th 883, 890 (7th Cir. 2024) (finding that the statute in question fell within the agency’s dedicated authority). *But see Becerra*, 131 F.4th at 366 (“[A] ‘specific agency action’ attaches to an agency’s particular construction of a statute.” (citing *Loper Bright Enters.*, 603 U.S. at 376)); *United Nat. Foods, Inc. v. NLRB*, 138 F.4th 937, 946 (5th Cir. 2025) (stare decisis applies to judicial precedent upholding the agency’s statutory interpretation); *Chavez v. Bondi*, 134 F.4th 207, 213 (4th Cir. 2025) (“*Loper Bright* doesn’t wipe away the results of our prior decisions deferring to the Board’s reasonable interpretations of what constitutes a crime involving moral turpitude.”); *Lopez v. Garland*, 116 F.4th 1032, 1045 (9th Cir. 2024) (deferring to an earlier decision that relied on *Chevron*); *DOL v. Americare Healthcare Servs., LLC*, 762 F. Supp. 3d 666, 684–85 (S.D. Ohio 2025) (similar), *aff’d*, No. 25-3128, 2026 U.S. App. LEXIS 9440 (6th Cir. Apr. 1, 2026); *Moctezuma-Reyes v. Garland*, 124

agency decision that was under challenge or with the agency's interpretation of the statute that was used to justify the same decision? Yet another emerging wrinkle is whether *Loper Bright*'s discussion of stare decisis only applies to the Supreme Court's *Chevron*-era precedent—as opposed to circuit precedent, too—thus allowing lower courts broader leeway to revisit their own *Chevron*-era precedent.¹⁸⁵

Unsurprisingly, all these issues are beginning to make their way into certiorari petitions. The petition in *Tennessee v. Kennedy* is one early example.¹⁸⁶ The State petitioner primarily asked the Supreme Court to vacate the Sixth Circuit's divided panel decision in *Tennessee v. Becerra*¹⁸⁷ and to remand with instructions to dismiss the case as moot under *United States v. Munsingwear* because there is no longer a live case or controversy.¹⁸⁸ But Tennessee sought this relief because the panel majority took an incredibly broad view of statutory stare decisis for *Chevron*-era decisions, having concluded that “a ‘specific agency action’ attaches to an agency’s particular construction of a statute” for *Loper Bright* statutory stare decisis purposes.¹⁸⁹ As Judge Kethledge warned in dissent, under this reasoning, “*Chevron* lives on in perpetuity as to any statute that the Supreme Court has ever deemed ambiguous under that doctrine.”¹⁹⁰ The Supreme Court GVR'd the petition, as requested by the parties.¹⁹¹

F.4th 416, 424 (6th Cir. 2024) (Stranch, J., concurring in judgment) (“*Loper Bright* held that prior cases applying *Chevron* deference to agencies’ statutory interpretations remain authoritative precedent.” (citing *Loper Bright Enters.*, 603 U.S. at 369)).

¹⁸⁵ See *Lopez v. Bondi*, 151 F.4th 1196, 1208 (9th Cir. 2025) (Bumatay, J., dissenting from denial of reh’g en banc) (arguing that “Ninth Circuit precedent that relies on *Chevron* to defer to an agency’s interpretation of the law is ‘clearly irreconcilable’ with *Loper Bright*” and that *Loper Bright*'s discussion of statutory stare decisis was limited to “its own precedent and clarifies that it was not overruling its own prior agency deference precedents in one fell swoop” (citation omitted)).

¹⁸⁶ Petition for a Writ of Certiorari at 10–11, 13, *Kennedy*, 2026 U.S. LEXIS 465 (No. 25-162).

¹⁸⁷ *Id.* at i.

¹⁸⁸ *Id.* In its response, the government agreed that vacatur under *Munsingwear* is appropriate because the case is moot. See Brief for Respondents at 9–10, *Kennedy*, 2026 U.S. LEXIS 465 (No. 25-162).

¹⁸⁹ See *Becerra*, 131 F.4th at 366 (citing *Loper Bright Enters.*, 603 U.S. at 376).

¹⁹⁰ *Id.* at 374 (Kethledge, J., dissenting in part and concurring in the judgment in part).

¹⁹¹ See *Kennedy*, 2026 U.S. LEXIS 465, at *1.

Had the petitioner sought Supreme Court review of the Ninth Circuit's decision in *Lopez v. Bondi*—which concluded that *Chevron*-era precedent remains binding so long as the agency does not change its interpretation of the statute—that case could have also teed up the statutory stare decisis question.¹⁹² Judge Bumatay, joined by Judges Ikuta and Collins, in dissent from denial of rehearing en banc, suggested “the panel misread *Loper Bright* to preclude three-judge panels from revisiting circuit precedent based on the now-defunct *Chevron* doctrine.”¹⁹³ In his view, “*Loper Bright*'s statement about ‘prior cases’ refers to [the Supreme Court's] prior cases—not” circuit precedent.¹⁹⁴ And, as already addressed, Judge Bumatay expressed concern that “the panel's declaration that only a new agency interpretation permits [courts] to revisit *Chevron*-based precedent lets the Executive Branch—not the courts—dictate the interpretation of the law” and in this way “resurrects *Chevron*.”¹⁹⁵

Some of the cases the Court GVR'd after *Loper Bright* also returned to the Supreme Court this Term. For example, United Natural Foods sought Supreme Court review in *United Natural Foods, Inc. v. NLRB*.¹⁹⁶ In an earlier

¹⁹² *Lopez v. Garland*, 116 F.4th 1032, 1045 (9th Cir. 2024).

¹⁹³ *Lopez v. Bondi*, 151 F.4th 1196, 1198 (9th Cir. 2025) (Bumatay, J., dissenting from denial of reh'g en banc). Judge Bumatay also argued that “*Lopez* conflicts with *Loper Bright*” by “favor[ing] agency deference rather than the best reading of the statute” and granting “agency deference even without any statutory ambiguity.” *Id.* at 1202.

¹⁹⁴ *Id.* at 1208.

¹⁹⁵ *Id.*

¹⁹⁶ See generally Petition for Writ of Certiorari, *United Nat. Foods, Inc. v. NLRB*, No. 25-369, 2026 U.S. LEXIS 410 (Sep. 25, 2025) (petitioning for certiorari). The first question presented is “[w]hether *Loper Bright* . . . permits a court to (a) accept an agency's reasonable construction of a statute without exhausting all relevant tools to find the single, best meaning or (b) give precedential weight to decisions affording deference under *Chevron* . . . when the court evaluates different agency action.” *Id.* at i. After *Loper Bright*, there remained some question about how its holding would apply to the National Labor Relations Board. See generally Alexander T. MacDonald, *Is Deference to the NLRB Finally Over?*, FEDERALIST SOC'Y: FEDSOC BLOG (July 9, 2025), <https://fedsoc.org/commentary/fedsoc-blog/is-deference-to-the-nlrp-finally-over-what-loper-bright-started-a-concurring-opinion-in-consumers-research-may-have-finished> (on file with the Liberty Law Review). Most courts confronting this question have concluded that, post-*Loper Bright*, the NLRB's interpretations of the National Labor Relations Act do not receive deference. See *NLRB v. Starbucks Corp.*, 159 F.4th 455, 478 (6th Cir. 2025) (“[W]e do not defer to the NLRB's interpretation of the NLRA, but exercise

decision, a divided Fifth Circuit panel relied on *Chevron* deference to uphold the authority of the National Labor Relations Board's (NLRB) General Counsel to unilaterally dismiss an administrative complaint after a party had filed for summary judgment, concluding the National Labor Relations Act (NLRA) was ambiguous on that point.¹⁹⁷ Shortly after issuing its opinion in *Loper Bright*, the Supreme Court granted United Natural Foods' certiorari petition, vacated the Fifth Circuit's judgment, and remanded for reconsideration in light of *Loper Bright*.¹⁹⁸ Even though the panel majority initially acknowledged that "one can reasonably argue that under a de novo interpretation of the NLRA, the General Counsel might not have discretion to withdraw a complaint after a motion for summary judgment has been filed" on remand,¹⁹⁹ the same divided panel ruled once more in favor of the agency.²⁰⁰ Judge Oldham again dissented, suggesting "further consideration" was an empty formality. . . . Same reasoning, same result, different day."²⁰¹ In his view, "that result conflict[s] with *Loper Bright* and the Supreme Court's GVR order."²⁰² The Court denied United Natural Foods's certiorari petition, leaving these questions for another day.²⁰³

The D.C. Circuit's divided panel decision in *Solar Energy Industry Ass'n v. Federal Energy Regulatory Commission* followed a similar pattern.²⁰⁴ The first

independent judgment in deciding whether an agency acted within its statutory authority.' Of the sister circuits that have addressed this issue [post-*Loper Bright*], virtually all do likewise." (citation omitted) (quoting *Rieth-Riley Constr. Co. v. NLRB*, 114 F.4th 519, 528 (6th Cir. 2024)). But the question is not yet settled. See *Alaris Health at Boulevard E. v. NLRB*, 123 F.4th 107, 121 (3d Cir. 2024) ("[W]e need not decide whether deference to the Board's designation of mandatory bargaining subjects under the Act survives the Supreme Court's rejection of *Chevron* deference in *Loper Bright*."); see also *Home Depot U.S.A., Inc. v. NLRB*, 158 F.4th 910, 920 (8th Cir. 2025) (similar).

¹⁹⁷ *United Nat. Foods, Inc. v. NLRB*, 66 F.4th 536, 543, 545, 548 (5th Cir. 2023), *vacated*, 144 S. Ct. 2708 (2024).

¹⁹⁸ *United Nat. Foods, Inc. v. NLRB*, 144 S. Ct. 2708, 2708 (2024).

¹⁹⁹ *United Nat. Foods, Inc.*, 66 F.4th at 545.

²⁰⁰ *United Nat. Foods, Inc. v. NLRB*, 138 F.4th 937, 948 (5th Cir. 2025).

²⁰¹ *Id.* at 953 (Oldham, J., dissenting).

²⁰² *Id.*

²⁰³ See *United Nat. Foods, Inc. v. NLRB*, No. 25-369, 2026 U.S. LEXIS 410, at *1 (Jan. 12, 2026).

²⁰⁴ *Solar Energy Indus. Ass'n v. Fed. Energy Regul. Comm'n*, 154 F.4th 863, 863 (D.C. Cir. 2025).

time around, the panel majority granted *Chevron* deference to the Federal Energy Regulatory Commission's (FERC) interpretation of the Public Utility Regulatory Policies Act of 1978 based on statutory silence.²⁰⁵ Judge Walker dissented, describing the majority's approach as *Chevron* maximalism.²⁰⁶ After the Supreme Court vacated the judgment and remanded in light of *Loper Bright*, the same divided D.C. Circuit panel reached an identical result.²⁰⁷ Judge Walker again dissented, writing that "[d]espite its plea for *Chevron* deference, FERC was wrong before, and now that *Chevron* deference is verboten, FERC remains wrong today."²⁰⁸

Finally, in *Bastias v. U.S. Attorney General*, the Eleventh Circuit likewise reached the same bottom-line result the second time around after the Supreme Court GVR'd in light of *Loper Bright*.²⁰⁹ In a brief per curiam decision, the panel again accepted the BIA's interpretation of the INA.²¹⁰ But each of the three judges on the panel wrote separately to explain their rationale for doing so.²¹¹ Judge Newsom observed that *Loper Bright*'s stare decisis passage "has vexed the lower courts,"²¹² describing it as "[h]ardly perfectly pellucid."²¹³ In his view, the *Loper Bright* Court's discussion of *Chevron*-era precedent protected by statutory stare decisis "was referring not . . . only to a court's case-specific application of a judicially approved agency interpretation to a particular set of facts, but rather, and more broadly, to that court's antecedent determination that the agency's reading of the governing statute was 'lawful.'"²¹⁴ Judge Marcus parted ways with Judge Newsom on this point, writing that this "theory risks saying too much

²⁰⁵ See *Solar Energy Indus. Ass'n v. Fed. Energy Regul. Comm'n*, 59 F.4th 1287, 1291–94 (D.C. Cir. 2023), vacated sub nom., *Edison Elec. Inst. v. Fed. Energy Regul. Comm'n*, 144 S. Ct. 2705 (2024).

²⁰⁶ *Solar Energy Indus. Ass'n*, 59 F.4th at 1297–98 (Walker, J., concurring in part and dissenting in part).

²⁰⁷ *Solar Energy Indus. Ass'n*, 154 F.4th at 865.

²⁰⁸ *Id.* at 878–79 (Walker, J., concurring in part and dissenting in part).

²⁰⁹ See *Bastias v. U.S. Att'y Gen.*, 158 F.4th 1188, 1189–91 (11th Cir. 2025) (per curiam).

²¹⁰ See *id.*

²¹¹ See *id.* at 1191 (Newsom, J., concurring in the judgment); *id.* at 1201 (Marcus, J., concurring in the judgment); *id.* at 1218 (Middlebrooks, J., concurring in the judgment).

²¹² *Id.* at 1194 (Newsom, J., concurring in the judgment).

²¹³ *Id.* at 1195.

²¹⁴ *Id.* at 1195–96 (quoting *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024)).

and taking *Loper Bright* too far, enabling *Chevron*, which is now a dead letter, to continue to cast a long shadow over our understanding of prior decisions.”²¹⁵ Ultimately, *Bastias* is yet another prime example of the challenges courts now face dealing with *Chevron*-era precedent post-*Loper Bright*. Judge Newsom even suggested that *Bastias* should be reheard en banc to allow the full Eleventh Circuit to address how *Loper Bright*’s statutory stare decisis passage “interacts—if at all—with [the Eleventh Circuit’s] own prior-panel-precedent rule” and how to “deal with *Chevron*-era precedents on a going-forward basis.”²¹⁶

It remains to be seen whether other petitions that were GVR’d in light of *Loper Bright* follow a similar pattern or if some of those cases come out differently on remand without the agency getting the benefit of judicial deference to its statutory interpretation.

Looking forward to *Loper Bright* implementation issues that might make it to the Court’s merits docket in the 2026 Term, yet another emerging question is the extent to which the demise of *Chevron* deference impacts other deference doctrines, such as *Auer* deference (which allows courts to defer to agency interpretations of their own regulations) and *Stinson* deference (which teaches that courts should defer to Sentencing Commission commentary on federal sentencing guidelines).²¹⁷

²¹⁵ *Bastias v. U.S. Att’y Gen.*, 158 F.4th 1188, 1209 (11th Cir. 2025) (Marcus, J., concurring in the judgment).

²¹⁶ *Id.* at 1201 (Newsom, J., concurring in the judgment). Rehearing en banc was denied, and the Supreme Court will have an opportunity to weigh in should Mr. Bastias seek certiorari. See *Bastias v. U.S. Att’y Gen.*, No. 21-11416, 2026 U.S. App. LEXIS 1479, at *2 (11th Cir. Jan. 20, 2026) (per curiam).

²¹⁷ See generally Michael Pepson, *Sixth Circuit Highlights Loper Bright’s Impact on Other Deference Regimes*, AMS. FOR PROSPERITY FOUND. (Jan. 30, 2026), <https://americansforprosperityfoundation.org/loper-bright/sixth-circuit-highlights-loper-brights-impact-on-other-deference-regimes/> (on file with the Liberty Law Review). Indeed, as of March 13, 2026, the petition in *Poore v. United States*, No. 25-227 (U.S., docketed Aug. 27, 2025), has been relisted five times, suggesting that there is at least some interest on the Court in addressing this issue. *Poore v. United States*, SCOTUSBLOG, <https://www.scotusblog.com/cases/case-files/poore-v-united-states/> (last visited Mar. 13, 2026). The petition in *Poore* presents the question “whether the limits on agency deference announced in *Kisor* and *Loper Bright* constrain the deference courts may accord the Sentencing Commission’s interpretation of its own rules via commentary.” Petition for Writ of Certiorari at i, *Poore v. United States*, No. 25-227 (U.S., filed Aug. 25, 2025).

V. CONCLUSION

Loper Bright Enterprises v. Raimondo marked a watershed moment in the evolution of federal administrative law. With its overruling of *Chevron* deference, the Supreme Court took an important first step to restoring Article III courts' preeminent role in interpreting the law. The October 2024 Term and the Court's use of *Loper Bright* in its recent decisions, emphasizes the durability of the shift away from deference toward independent, de novo review and the robust application of the traditional canons of construction to discern the original public meaning of the law. And that post-*Loper Bright* shift is not merely theoretical; it is reshaping the contours of judicial oversight, agency discretion, and the boundaries of delegation.

Aside from issues of statutory construction and deference, the demise of *Chevron* and the rise of *Loper Bright* over the past Term may have important implications for the future of the major questions doctrine, as well as the Court's approach to nondelegation. While some questions remain unresolved—particularly regarding stare decisis and the treatment of *Chevron*-era precedents—the Court's repeated and consistent reliance on *Loper Bright* signals a commitment to a more originalist understanding of the judicial role under Article III. The immediate impact of this tendency will be within the context of administrative law, but it may have broader significance. Finally, looking ahead, the lower courts and litigants will continue to grapple with the practical implications of *Loper Bright*, especially as cases arise in various regulatory areas or challenge related doctrines.