Chevron Stare Decisis in a Post-*Loper Bright* World

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ABSTRACT: In its June 2024 decision in Loper Bright Enterprises v. Raimondo, *the Supreme Court jettisoned the longstanding* Chevron *doctrine, which had directed courts to defer to agencies' reasonable interpretations of ambiguous statutes. The* Loper Bright *Court attempted to minimize the substantial effect this change would have on administrative law and governance by declaring that "[t]he holdings" of cases that relied on the* Chevron *test to conclude "that specific agency actions are lawful . . . are still subject to statutory* stare decisis *despite our change in interpretive methodology." But there are two problems with* Chevron stare decisis. *First,* Chevron stare decisis *is an ambiguous concept. Second, leaving to the side the cases where the result would be no different under* Loper Bright, Chevron stare decisis *is deeply problematic. Providing* stare decisis *effect to pre-*Loper Bright *decisions would leave some agencies, but not others, with discretion to choose among reasonable interpretations, or lock in* Chevron*-era interpretations that are not the best interpretations, as* Loper Bright *directs. These outcomes will have a deleterious effect on judicial legitimacy and democratic accountability.*

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INTRODUCTION

In June 2024, the Supreme Court upended decades of administrative law by overruling its 1984 holding in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.[1] *Chevron* had established a two-step test that called for courts to defer to reasonable agency interpretations of statutes in the face of ambiguity.[2] But, in *Loper Bright Enterprises v. Raimondo*,[3] the Court declared that "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority."[4]

Commentators have spilled considerable ink debating the advisability of jettisoning *Chevron*.[5] But what about cases that had already been decided under the then-binding *Chevron* test? Here, the *Loper Bright* Court offered the assurance that overruling *Chevron* "do[es] not call into question prior cases that relied on the *Chevron* framework."[6] The Court declared that "[t]he holdings" of cases that relied on the *Chevron* test to conclude "that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory *stare decisis* despite our change in interpretive methodology."[7]

But, despite the seeming simplicity with which the Court cloaked its declaration about *Chevron stare decisis*, sound, serious questions attend its

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1. *See generally* Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984).

2. *See id.* at 842–45.

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

4. *Id.* at 412.

5. For just a smattering of the literature on both sides (which began long before *Chevron* was actually overruled), compare, for example, Michael Herz, Chevron *Is Dead; Long Live* Chevron, 115 COLUM. L. REV. 1867, 1909 (2015) ("*Chevron* is an appropriate allocation of decisionmaking responsibility among the three branches, relying on the judiciary to enforce congressional decisions, but protecting agency authority and discretion where Congress has left the decision to the executive. Long may it reign."); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 193–203 (1998) (setting out inconsistencies between *Chevron* and the Administrative Procedure Act); 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, 841–43 (2010) (arguing for overruling *Chevron*); Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 919–1000 (2017) (arguing that *Chevron* deference is consistent with neither pre-administrative state forms of executive branch deference nor the Administrative Procedure Act); *see also* Lisa Schultz Bressman, Chevron*'s Mistake*, 58 DUKE L.J. 549, 553 (2009) (lauding *Chevron* for "recogniz[ing]" factors that Congress considers in deciding whether to delegate authority to an agency, but noting that *Chevron* is "mistake[n] i[n] failing to make those factors central to its doctrinal inquiry").

I take no position here on the merits of overruling *Chevron*. I take it as a given and ask what role *stare decisis* can and should play.

6. *Loper Bright*, 603 U.S. at 412.

7. *Id.*

implementation.[8] To see this, one needs to consider how the *Chevron* test operated, and in particular how it generated holdings that agency actions were lawful—the supposed predicate for *stare decisis* effect. First, the *Chevron* test asked a court to determine first whether the statute under which an agency was invoking authority was ambiguous.[9] If the statute was not ambiguous, then the agency was bound by the unambiguous meaning of the statute.[10] If it was ambiguous, however, then the court next had to defer to any *reasonable* interpretation of the statute offered by the agency.[11] It thus is clear that a holding that an agency's interpretation was "lawful" under *Chevron* could have come about because either (i) the agency interpretation was vindicated at step one, or (ii) the agency interpretation survived step two.[12]

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8. Professor Cass Sunstein noted the potential for confusion over *stare decisis* were *Chevron* to be overruled. He listed among the "hard questions" that would arise: "Would the overruling of *Chevron* be prospective only? What would that even mean? What would happen to the countless regulations that have been upheld under the *Chevron* framework?" Cass R. Sunstein, Chevron *as Law*, 107 GEO. L.J. 1613, 1670 (2019). He elucidated:

> Suppose that *Chevron* were overruled, period, so that all agency interpretations of statutes, since 1984, would be subject to review under a new framework. Some number—perhaps thousands—have been upheld, and would be newly vulnerable. Some other number—certainly thousands—were never challenged, in part because doing so would be difficult under *Chevron*; they too would be newly vulnerable. Would the many regulations upheld by some federal court, under the *Chevron* framework, be suddenly subject to invalidation? That would seem preposterous. It might be tempting, in response, to say that *Chevron* would be overruled prospectively. That would of course be highly irregular. And what would it even mean? Would regulations developed and issued in (say) 1999, 2009, and 2019, with reference to *Chevron*, be reviewed under some not-*Chevron*? Would only regulations developed and issued after the date of the decision overruling *Chevron* be subject to not-*Chevron*? That would also be highly irregular. There are no obviously good alternatives here.
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> To be sure, the problem might be soluble. Perhaps the issue could be settled by taking not-*Chevron* in the same way that *Chevron* itself was taken in 1984. In that year, *Chevron* was not taken to call for a reassessment of judicial rulings upholding or invalidating agency rules under the pre-*Chevron* framework. For that reason, *Chevron* was not disruptive when issued. The problem is that at that time, *Chevron* was far less a break from precedent than not-*Chevron* would obviously be. Still, it might be possible for the Court to make clear that overruling *Chevron* is not meant to open up previous decisions made under the *Chevron* framework. But the question could turn out to be messy.

Cass R. Sunstein, *Zombie* Chevron*: A Celebration*, 82 OHIO ST. L.J. 565, 573–74 (2021) [hereinafter Sunstein, *Zombie* Chevron].

9. Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 842 (1984).

10. *Id.* at 842–43.

11. *Id.* at 843–44.

12. There would have been no holding that an agency interpretation was lawful—and therefore no statutory *stare decisis* under the terms of *Loper Bright*—if either (i) the holding was that the statute in question was unambiguous and inconsistent with the proffered agency interpretation, or (ii) the holding was that the statute was ambiguous but the proffered agency interpretation was unreasonable and/or impermissible.

Applying *stare decisis* to a holding validating an agency interpretation at step one does no work. A holding that concluded under *Chevron*'s first step—that a statute was unambiguous—would necessarily lead the court simply to interpret that unambiguous statute and to confirm that the agency action was consistent with that interpretation. A holding under *Chevron* step one entailed no deference, and thus would yield exactly the same result as under the new test the Court adopted in *Loper Bright*. In other words, *Chevron* step one holdings likely might survive *Loper Bright*, but that pedigree would be quite of no import at all.

Chevron stare decisis would have real bite in the step-two context, where the court held an agency interpretation to be reasonable and permissible. But what exactly would *stare decisis* mandate there, and how would it work? On one hand, it seems unlikely that the Court meant that a holding that a "specific agency action[] [is] lawful"[13] necessarily locks in that agency to that particular interpretation. Were that the case, then the "new" precedential value of the case would sweep far beyond the case holding's scope under *Chevron* itself. After all, *Chevron* doctrine specifically contemplates agency freedom to choose among reasonable and permissible interpretations. And *Chevron* itself called for agencies to contemplate that what is reasonable might evolve over time.[14]

On the other hand, *Chevron stare decisis* could preserve some agency discretion to choose among reasonable statutory interpretations. But how much range should be preserved? There are no fewer than three possibilities. *Stare decisis* could (i) insulate the entire pre-*Loper Bright* decision by providing the agency access to the entire range of reasonably possible interpretations, (ii) provide the agency with the choice between the interpretation previously upheld as lawful and the best interpretation (i.e., the interpretation that *Loper Bright* would otherwise mandate), or (iii) allow the agency to choose any reasonable interpretation *between* the interpretation previously upheld as lawful and the best interpretation.

From the foregoing, one can see that *Chevron stare decisis* will be problematic in several ways. First, considerable uncertainty attends *Loper Bright*'s declaration of *Chevron* statutory *stare decisis*. And the scope of this lack of clarity will grow significantly if lower courts seek a mandate to preserve *their own* pre-*Loper Bright* precedents under *Chevron*.[15]

Second, none of these possibilities seems entirely consonant with the *Loper Bright*'s description of *stare decisis* preserving holdings that an interpretation was "lawful." On one hand, locking in a *Chevron*-era interpretation goes beyond a holding that that interpretation was "lawful." On the other hand, preserving agency discretion over some range of permissible

13. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412 (2024).

14. *Chevron*, 467 U.S. at 863–64 (holding that agencies "must consider varying interpretations and the wisdom of its policy on a continuing basis").

15. *See infra* notes 85–86 and accompanying text; *see also* Sunstein, *Zombie* Chevron, *supra* note 8, at 574 (describing where decisions made under the *Chevron* framework were left undisturbed, "conflicts among the courts of appeals would undoubtedly proliferate").

interpretations seems to amount to retaining some measure (if not all) of the *Chevron* test itself in some cases, which seems categorically different from what the *Loper Bright* Court was suggesting. Indeed, it seems removed from the "statutory" *stare decisis* that it described. In short, the Supreme Court seems to have given little thought to exactly how the "statutory stare decisis" it announced would play out in practice.

Third, whichever version of *Chevron stare decisis* winds up prevailing, it will have a deleterious effect on judicial legitimacy and democratic accountability. It is difficult to justify judicial action that sanctions agency discretion with respect to some governance decisions and not others. On the democratic accountability front, a system that preserves agency discretion in some settings and not others will be opaque to the public; that lack of transparency will confound the public's efforts to hold decisionmakers accountable for the actions over which they actually have authority.

These insights demonstrate why *stare decisis* is more challenging for *Chevron* methodology than for other methodologies that have been replaced. *Chevron* is a methodology that—if an interpretation is validated at step two—necessarily recognizes the possibility of a number (or a range) of other possible interpretations. By contrast, the methodology that displaced and replaced *Chevron*—as set out in *Loper Bright*—authorizes a single interpretation. Coexistence is much more difficult in this setting.

This Essay proceeds as follows. Part I elucidates the *Chevron* test and then describes how *Loper Bright* has now displaced it. Part II hones in on the *Loper Bright* Court's assertion that cases decided under the *Chevron* regime survive *Loper Bright*. It questions the viability of that claim, and it highlights the deleterious effects on judicial legitimacy and democratic accountability that flow from *Chevron stare decisis*. A short conclusion follows.

I. THE RISE AND FALL OF THE *CHEVRON* TEST

In this Part, I explore the rise and fall of the *Chevron* test. I first describe in some detail the *Chevron* case itself. Next, I briefly highlight the vast influence of the *Chevron* test over the four decades that it held sway. Finally, I turn to *Loper Bright*'s rejection of *Chevron* at least prospectively.

A. THE CHEVRON *CASE*

When the *Chevron* case reached the Supreme Court, the test for whether and when courts should defer to agency interpretations of statutes was hardly a model of clarity.[16] There is scholarship suggesting that the Court did not fully appreciate the import of its opinion in the case, and indeed that the Justices deciding the case did not think they were breaking new ground.[17]

16. *See* Jonathan Remy Nash, *When Is Legal Methodology Binding?*, 109 IOWA L. REV. 739, 765–66 (2024).

17. *See* Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253, 266–76 (2014).

Nevertheless, the test that emerged from *Chevron* proved momentous and affected administrative law for decades to come.[18]

The *Chevron* case itself raised a question of agency interpretation under the Clean Air Act:[19] whether the statutory term "stationary source"[20] necessarily meant a single smokestack as the U.S. Environmental Protection Agency ("EPA") under President Jimmy Carter had interpreted it, or whether the EPA's use of a bubble concept—interpreting all smokestacks at a single plant to constitute a "stationary source"—under President Ronald Reagan was valid.[21]

The *Chevron* Court upheld the validity of the Reagan EPA's interpretation.[22] In so doing, the Court set out the test that courts generally should undertake when confronted with an agency interpretation of a

18. *See id.* at 276–77; *infra* note 39 and accompanying text.

19. 42 U.S.C. §§ 7401–7675 (2018).

20. *Id.* § 7411(a)(3) (defining "stationary source" as "any building, structure, facility, or installation which emits or may emit any air pollutant").

21. The import of the interpretive question in *Chevron* was substantial but is obscured by the complex statutory scheme. The Clean Air Act requires each state to develop an implementation plan that will bring the state into compliance with various Act requirements. *See id.* § 7410. The Act imposes additional requirements for areas of a state that are in "nonattainment"—that is, for areas where ambient air quality falls below minimal levels for health and welfare established by the federal government. *See id.* § 7502(a). In particular, the Act requires the issuance of "permits for the construction and operation of new or modified major stationary sources anywhere in [a] nonattainment area." *Id.* § 7502(c)(5).

The Act directs that, for a new pollution-emitting major "stationary source" to obtain a permit, the source must obtain "sufficient offsetting emissions reductions" such that the total emissions after the source enters operation make "reasonable further progress" toward attainment with appropriate pollution levels. *Id.* § 7503(a)(1)(A); *see id.* § 7501(1) (defining "reasonable further progress"). The Act imposes the same requirement on "modified sources." *See id.* § 7503(a)(1)(A). The Act defines a "modification" as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." *Id.* § 7411(a)(4); *see id.* § 7501(4) ("The terms 'modifications' and 'modified' mean the same as the term 'modification' as used in section 111(a)(4) of this title."). In other words, somewhat counterintuitively, a modification does not occur—and thus the additional requirements do not inhere—unless the physical change at a plant results in an increase in pollution levels. Following the introduction of attainment area restrictions under the Clean Air Act Amendments of 1977, the Carter administration EPA interpreted the term "stationary source" to mean that each smokestack qualified as a separate stationary source. Thus, if increased pollution levels accompanied the renovation of a smokestack, then that smokestack was subject to increased regulation, including the need to obtain offsetting pollution reductions. The EPA under the administration of President Reagan, however, sought to interpret "stationary source" to include all smokestacks at a single plant, i.e., as though all stacks at the plant were within a single pollution-emitting "bubble." *See* Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 840 (1984). This interpretation would allow an actor to renovate one smokestack and offset any emission increases from that stack with reductions at another stack at the same plant. In other words, more renovations of existing facilities could be undertaken without triggering so-called "new source review." For explication, see Jonathan Remy Nash & Richard L. Revesz, *Grandfathering and Environmental Regulation: The Law and Economics of New Source Review*, 101 NW. U. L. REV. 1677, 1681–708 (2007).

22. *Chevron*, 467 U.S. at 866.

statutory provision. The test the Court announced consisted expressly of "two questions."[23] The "first" question "always" is "whether Congress has directly spoken to the precise question at issue."[24] If the answer at *Chevron* step one is that "the intent of Congress is clear," and so "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[25] But if the answer at step one is instead that "the statute is silent or ambiguous with respect to the specific issue," then "the question for the court is whether the agency's answer is based on a permissible construction of the statute."[26] If the agency interpretation is permissible, then the court must defer to it; "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[27]

Applying this framework to the case then before the Court, the six Justices hearing the *Chevron* case unanimously upheld the agency's interpretation as a valid one.[28] With respect to step one of the test it had just announced, the Court found that "Congress did not have a specific intention on the applicability of the bubble concept" in this context.[29] On the second step, the Court found that Congress in the 1977 amendments to the Clean Air Act had recognized the competing concerns of economics and environmental improvement,[30] and that the agency's interpretation

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23. *Id.* at 842.

24. *Id.*

25. *Id.* at 842–43.

26. *Id.* at 843. The Court emphasized that the reason (if any) behind the ambiguity should not matter to a court's calculus:

> Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred.

Id. at 865.

27. *Id.* at 844.

28. "Justice Marshall and Justice Rehnquist took no part in the consideration or decision of these cases," and Justice O'Connor took no part in their decision. *Id.* at 866. The *Chevron* case was thus decided by the minimum quorum necessary for the Supreme Court to act. *See* 28 U.S.C. § 1 (2018) (setting the quorum of the Supreme Court at six Justices).

The *Loper Bright* Court disparaged the *Chevron* decision as having been "decided [] by a bare quorum of six Justices." Loper Bright Enters. v. Raimondo, 603 U.S. 369, 396 (2024). For critique of this as a justification for overruling *Chevron*, see Jonathan R. Nash, *The Court Overruled 'Chevron.' Did That Put Other Supreme Court Cases at Risk?*, DAILY REP. (July 15, 2024, 4:09 PM), https://www.law.com/dailyreportonline/2024/07/15/the-court-overruled-chevron-did-that-put-other-supreme-court-cases-at-risk [https://perma.cc/GH8S-QRCN].

29. *Chevron*, 467 U.S. at 845.

30. *See, e.g.*, *id.* at 851 (noting that "[t]he legislative history of the portion of the 1977 Amendments dealing with nonattainment areas . . . plainly disclose[s] that in the permit program

"accommodate[d] progress in reducing air pollution with economic growth."[31] Since the EPA's use of the bubble concept constituted "a reasonable policy choice for the agency to make," the courts had to defer to it as valid.[32]

B. THE CHEVRON *TEST'S HEYDAY*

The *Chevron* test remained robust for four decades. In 2001, the Court's decision in *United States v. Mead*[33] enlarged the test by adding what most people today call "*Chevron* step zero."[34] Before embarking on the traditional *Chevron* test, a court should ask whether "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[35] If so, then *Chevron*'s two-step test applies.[36] If not, then the agency interpretation may be entitled to respect under the test of *Skidmore v. Swift & Co.*[37] to the extent that it has sufficient "power to persuade."[38] That said, even as amended by *Mead*, the core *Chevron* test remained intact.

Congress sought to accommodate the conflict between the economic interest in permitting capital improvements to continue and the environmental interest in improving air quality").

31. *Id.* at 865–66 ("The Administrator's interpretation represents a reasonable accommodation of manifestly competing interests.").

32. *Id.* at 845.

33. *See generally* United States v. Mead Corp., 533 U.S. 218 (2001).

34. *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 836 (2001) (describing a "'step zero' in the *Chevron* doctrine" as consisting of "inquiry that must be made in deciding whether courts should turn to the *Chevron* framework at all, as opposed to the *Skidmore* framework or deciding the interpretational issue de novo"). For discussion, see, for example, Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 194 (2006).

35. *Mead*, 533 U.S. at 226–27.

36. *Id.* The *Mead* Court elucidated:

> It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force. Thus, the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication. That said, and as significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure [] does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded.

Id. at 230–31 (footnotes omitted) (citations omitted).

37. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

38. *Mead*, 533 U.S. at 235 (quoting *Skidmore*, 323 U.S. at 140). The *Skidmore* Court explained: "The weight of [the] judgment [of an administrative agency] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140.

Over the years, courts applied *Chevron* at a remarkable rate. Its relatively recent vintage notwithstanding, the case is now one of the most cited Supreme Court cases of all time.[39]

C. *THE END OF THE* CHEVRON *TEST*

Over the course of the last decade, the Supreme Court rarely cited *Chevron* and never relied on it to decide a case.[40] This was a harbinger of things to come.

Loper Bright closed the door on the *Chevron* test once and for all. The *Chevron* doctrine, the *Loper Bright* Court held, "defies the command of the APA that 'the reviewing court'—not the agency whose action it reviews—is to 'decide *all* relevant questions of law' and 'interpret . . . statutory provisions.'"[41] Moreover, the Court held, the *Chevron* test neither reflected practical reality nor made sense as a matter of policy. It "makes no sense," the Court explained, "to speak of a 'permissible' interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best. In the business of statutory interpretation, if it is not the best, it is not permissible."[42] The Court derided the *Chevron* test as "misguided" because it assigned to agencies the power to interpret statutes. But "agencies have no special competence in resolving statutory ambiguities"; "[c]ourts do."[43]

The *Loper Bright* Court also addressed the argument that *stare decisis* required retention of the *Chevron* test. Here, the Court mostly emphasized that *Chevron* doctrine was poorly reasoned and unworkable,[44] two factors that the Court has deployed in the past to justify moving beyond existing

39. *See* Kent Barnett & Christopher J. Walker, Chevron *and Stare Decisis*, 31 GEO. MASON L. REV. 475, 477–78 (2024) (noting that *Chevron* "has been cited in almost 100,000 documents in [Westlaw's] databases, including in more than 18,000 federal court decisions," and that the decision "remains the most cited administrative law decision of all time, including in approximately seventy Supreme Court decisions." (footnote omitted)); Lawrence B. Solum, *Disaggregating* Chevron, 82 OHIO ST. L.J. 249, 251 (2021) ("[*Chevron*] is widely regarded as the most important administrative law decision in the history of the United States."); Merrill, *supra* note 17, at 254–55 (presenting statistics as of 2014); Christopher J. Walker, Chevron *Inside the Regulatory State: An Empirical Assessment*, 83 FORDHAM L. REV. 703, 703 (2014) ("For three decades, scholars (as well as courts and litigants) have written thousands of articles (and opinions and briefs) concerning the impact of *Chevron* . . . .").

40. *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 444 (2024) (Gorsuch, J., concurring) ("Despite repeated invitations, [the Supreme Court] has not applied *Chevron* deference since 2016."); Nathan Richardson, *Deference is Dead (Long Live* Chevron*)*, 73 RUTGERS U. L. REV. 441, 485, 487 (2021) (noting that "the Court cites *Chevron* much less than it used to," and that "[i]n only one of [] fifteen" cases before the Court between 2015 and 2019 "did the Court defer to the agency's interpretation").

41. *Loper Bright*, 603 U.S. at 398 (quoting 5 U.S.C. § 706) (emphasis added by the *Loper Bright* Court).

42. *Id.* at 400.

43. *Id.* at 400–01.

44. *Id.* at 407; *see id.* at 407–12.

precedent.[45] But, along the way, the Court sought to assuage concerns that disposing of the *Chevron* doctrine would introduce massive uncertainty and undermine reliance interests, explaining that its holding did "not call into question prior cases that relied on the *Chevron* framework."[46] Instead, the Court emphasized, "[t]he holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory *stare decisis* despite our change in interpretive methodology."[47]

The Court noted that its decision in *Loper Bright* did not eliminate agency authority or court respect for agency positions. It indicated that courts should continue to give *Skidmore* respect to agency positions in appropriate cases.[48] It also noted that its decision should not be read to preclude Congress from (expressly) granting agencies discretionary authority to act.[49] In the end, though, the *Loper Bright* Court saw the *Chevron* doctrine as "prevent[ing]" judges from "judging."[50] Jettisoning *Chevron*, in the majority's view, restored judges to their proper role.

II. CHALLENGES TO AFFORDING *STARE DECISIS* TO CASES DECIDED UNDER THE *CHEVRON* TEST

In this Part, I explore the challenges arising out of the Supreme Court's assertion that pre-*Loper Bright* holdings upholding agency interpretations as lawful will enjoy *stare decisis* precedential status. I first draw out the challenges. After that, I offer some theoretical commentary about why these challenges arise in this context and not in others.

A. SEEING THE CHALLENGES

While it overruled the *Chevron* doctrine, the *Loper Bright* Court purported to retain as "statutory stare decisis" the holdings in cases "that specific agency actions are lawful[,] including the Clean Air Act holding of *Chevron* itself."[51] In this Part, I explain why this pledge is easy to declare, but ambiguous and unworkable in practice.[52]

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45. *See, e.g.*, Knick v. Twp. of Scott, Pa., 588 U.S. 180, 203 (2019); Payne v. Tennessee, 501 U.S. 808, 827–30 (1991).

46. *Loper Bright*, 603 U.S. at 412.

47. *Id.*

48. *Id.* at 402.

49. *Id.* at 404.

50. *Id.*

51. *Id.* at 412. Notably, as Professor Mila Sohoni has observed, "No Justice—not even Justice Thomas, who believes *Chevron* to be unconstitutional—objected to this carve-out." Mila Sohoni, Chevron*'s Legacy*, 138 HARV. L. REV. F. 66, 72 (2025) (footnote omitted).

52. The carve-out for existing *Chevron* precedents may have other consequences as well. *See* Eli Nachmany, *Deference Undisturbed*, 101 NOTRE DAME L. REV. (forthcoming 2025) (manuscript at 41) (on file with author) (noting that preservation of *Chevron* holdings may create incentive for an agency to stick with an existing regulation even if it would prefer another regulation, if the

Let us begin with part of the *stare decisis* argument that does no work. A case that is resolved at *Chevron* step one can only declare an agency action lawful if the agency interpretation aligns with the unambiguous meaning of the statute. However, if the statute in question is indeed so unambiguous that the court found that it satisfied *Chevron* step one's standard, then surely the interpretation of the statute that the court reached would be identical to the interpretation that the court would reach after *Loper Bright*. Thus, such a holding would persist after *Loper Bright* regardless of any position the Court might take on *stare decisis*. The *Chevron* pedigree would be of no moment at all.

The *Loper Bright* Court's declaration about *stare decisis* therefore will only have bite in cases that upheld agency action after reaching *Chevron* step two. However, there is considerable ambiguity as to exactly what *stare decisis* would require in that context. Moreover, whichever of the possibilities would in fact be borne out, the result would be problematic. To begin, a court determination that *Chevron* step one did not resolve the case would necessarily mean that the statute in question had an ambiguity relevant to the agency's claimed interpretation. This ambiguity in turns gives rise to a range within which an agency could validly exercise its discretion to interpret the statute and fill the gap created by the ambiguity. As long as the agency could justify its interpretation on appropriate policy grounds, the agency's interpretation would be valid under *Chevron*, provided that the interpretation did not exceed the interpretive range generated by the ambiguity. And, conversely, even if an agency could offer a convincing policy justification for its interpretation, the *Chevron* test would fall that interpretation if it lay outside that interpretive range.[53]

Professors Matthew Stephenson and Adrian Vermeule describe the range of agency discretion to which the ambiguity gives rise—they put it as the "range of interpretations that are sufficiently plausible that the court would view them as reasonable, though not ideal"—as the "zone of ambiguity."[54] They suggest a visual representation of that zone viewing the set of all possible interpretations as a unidimensional space.[55] Figure 1 here provides a visual representation of the zone of ambiguity.

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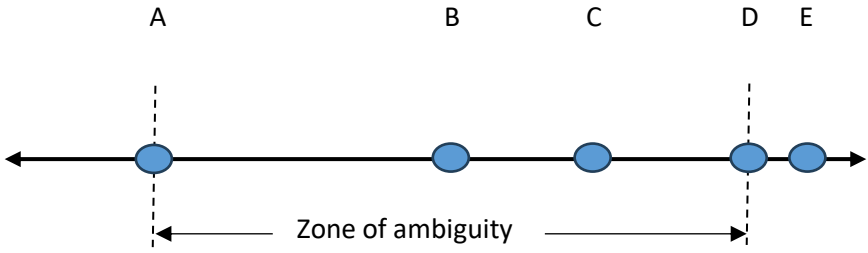
new regulation might be more susceptible to judicial challenge and the existing regulation is not too distant from the agency's preferred policy).

53. *See, e.g.*, MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 233–34 (1994) (explaining that, while the Court had "considerable sympathy" for the agency's policy arguments, "our estimations, and the Commission's estimations, of desirable policy cannot alter the meaning of the federal Communications Act of 1934"). It is open to debate whether *MCI* was a step-one or step-two *Chevron* case. *See* Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent "Major Questions" Doctrine*, 49 CONN. L. REV. 355, 364–65 (2016). I see *MCI* as a step-two case; the Court concluded that ambiguity in the statutory term "modify" was insufficiently broad to validate the Federal Communications Commission's interpretation of the Federal Communications Act. *See MCI*, 512 U.S. at 225–34.

54. Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 601 (2009).

55. *See id.*

Figure 1: The *Chevron* test and the zone of ambiguity.



In Figure 1, point B represents the interpretation of the statute that "[t]he statutory language, read in light of the traditional tools of statutory construction, will suggest to the reviewing court" is the "'best' interpretation of the statute."[56] Point B, in other words, is the interpretation of the statute that (unless *stare decisis* applies to preserve a pre-*Loper Bright* holding) a court will adopt under *Loper Bright*. The zone of ambiguity—which necessarily includes point B—extends from point A to point D.[57] Point C represents an interpretation that, if properly justified by the agency, would have passed muster under the *Chevron* test, while point E represents what would have been an impermissible agency interpretation.

With this visual representation of *Chevron* in mind, let us turn to consider exactly which aspects of pre-*Loper Bright* holdings the Court envisions *stare decisis* as preserving. A holding under the *Chevron* regime that an agency interpretation was "lawful" corresponds to a conclusion that the agency's interpretation fell within the zone of ambiguity—i.e., looking back at Figure 1, that the point lies between points A and D (inclusive). What, then, does it mean to say that that conclusion survives the *Chevron* test's demise?

One possibility is that, after *Loper Bright*, the interpretation that the Supreme Court previously found to be "lawful" is now locked in.[58] That interpretation, in other words, supplants the best interpretation at which the Court would otherwise arrive and that *Loper Bright* otherwise would mandate.

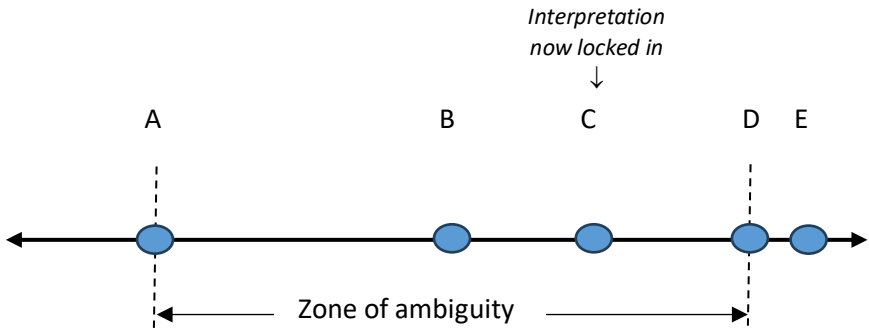
56. *See id.* at 602.

57. *See id.*

58. I refer here to holdings at which the Supreme Court itself previously arrived under *Chevron*. I discuss below the possibility that lower court holdings under *Chevron* could also enjoy *stare decisis* preservation. *See infra* notes 85–86 and accompanying text. But the analysis, and choice of ranges, would be similar.

In terms of Figure 1, if the Court earlier found the agency's interpretation at point C to be lawful, then that interpretation would control in perpetuity. This possibility—call it "*Loper Bright* lock-in"—is represented in Figure 2.[59]

Figure 2: The *Chevron* test and the zone of ambiguity, with pre-*Loper Bright* interpretation locked in.



Loper Bright lock-in, however, seems unlikely to be what the Court envisioned and is in any event unwise. It is a precedent on steroids. After all, up until *Loper Bright*, the decision of the Court merely—as the *Loper Bright* Court itself put it—found the agency interpretation to be "lawful," not mandatory. And *Chevron* itself called for agencies to "consider varying interpretations and the wisdom of [their] policy on a continuing basis."[60] Why, then, should statutory *stare decisis* lock in such an interpretation? Indeed, why should it preclude the best interpretation—that is, the interpretation at point B—that *Loper Bright* would otherwise mandate? And why should an interpretation that was lawful ascend to permanency just because a case in which it was challenged happened to be one that reached the Supreme Court?

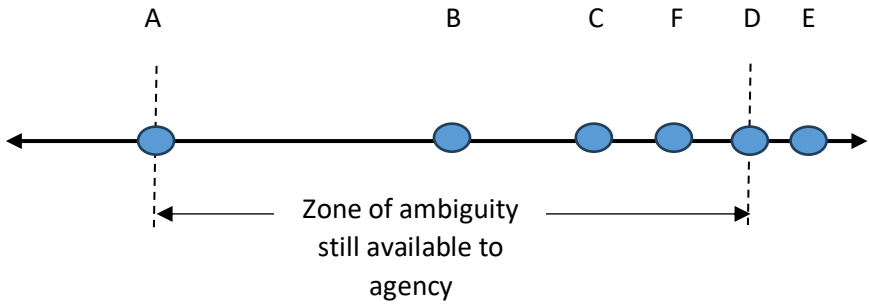
Consider now another version of *stare decisis* in *Loper Bright*'s wake. Under this version—call it "full *Chevron* preservation"—an agency that has received a ruling from the Supreme Court that its interpretation of a statute was lawful remains free going forward to invoke any other interpretation that the *Chevron* test would have authorized, i.e., free to invoke any interpretation with the zone of ambiguity. Thus, for example, as depicted in Figure 3, had the Court upheld interpretation C as lawful before *Loper Bright*, the agency would be free to abandon that interpretation in favor of interpretation F, even though

59. Figure 2 and the figures below continue to build on Professors Stephenson and Vermeule's graphical interpretation to *Chevron*. *See supra* notes 54–55 and accompanying text.

60. Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 863–64 (1984).

interpretation F lies farther away from the "best" interpretation (that *Loper Bright* would otherwise mandate) than interpretation C. Essentially this understanding means that, the Court having validated an agency interpretation of a statute as lawful under *Chevron*, the *Chevron* framework will continue to govern the agency's freedom to interpret that statute in perpetuity.

Figure 3: The *Chevron* test with the zone of ambiguity still available to the agency post-*Loper Bright*.

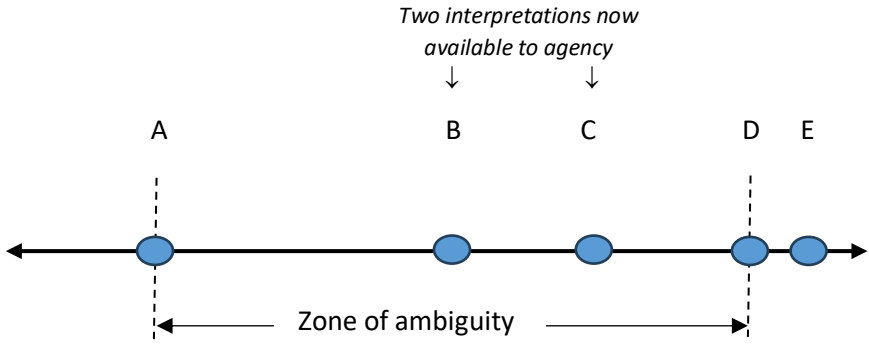


Full *Chevron* discretion preservation also seems an unlikely candidate for interpreting *Loper Bright*. The Supreme Court's statement in *Loper Bright* was that "holdings . . . that specific agency actions are lawful . . . are still subject to statutory *stare decisis*."[61] That is a far cry from saying—as this version of *stare decisis* would—that the holdings about the application of the *Chevron* test were subject to *stare decisis*. Indeed, the Court specifically noted that *Chevron* would enjoy statutory *stare decisis*—but only for its "Clean Air Act holding."[62]

Other possibilities of *stare decisis*—call them "*Chevron* option preservation" versions of *stare decisis*—involve more limited versions of *Chevron* deference surviving after *Loper Bright*. Like full *Chevron* preservation, they are highly impractical. One version would allow the agency to either stick with interpretation C (that the Court validated in a pre-*Loper Bright* case), or to switch to interpretation B (the "best" interpretation). This is reflected in Figure 4. But why should an agency be unable to opt for interpretations that are closer to the best interpretation than interpretation C (i.e., between B and C)?

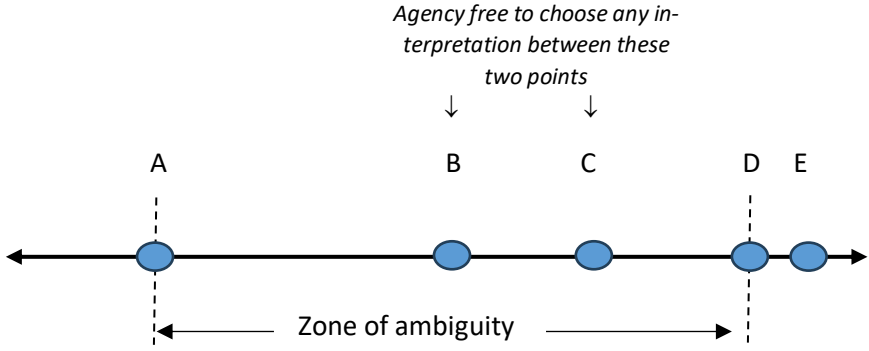
61. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412 (2024).
62. *Id.*

Figure 4: Agency free to choose between the interpretation under *Loper Bright* (point B) and the pre-*Loper Bright* interpretation (point C).



A fourth, broader version of *Chevron* option preservation would remedy that problem: It would allow an agency to either (i) stick with interpretation C, or (ii) switch to interpretation B *or* any point in between. This is shown in Figure 5.[63]

Figure 5: Agency free to choose any point between the interpretation under *Loper Bright* (point B) and the pre-*Loper Bright* interpretation (point C).



63. Yet another possibility—broader still—would allow the agency to select not only any point between interpretations B and C, but also any point on the other side of interpretation B out to a point the same distance from point B but in the other direction. The logic here rests on the notion—common in economics and political science—that policies that are equidistant from a preferred policy—here point B—are equally preferable. *See, e.g.*, Timothy R. Johnson, James F. Spriggs II & Paul J. Wahlbeck, *Passing and Strategic Voting on the U.S. Supreme Court*, 39 L. & SOC'Y REV. 349, 361 (2005). One can argue that, by validating interpretation C as lawful, the Supreme Court implicitly also approved of interpretations on the other side of B, out to point C.

The plethora of possibilities for what discretion *stare decisis* would continue to vest in agencies—as set out in Figures 2 through 5—highlights the uncertainty inherent in *Chevron stare decisis*. And there is yet more uncertainty to be found in cases that were decided under the *Chevron* regime but with ambiguity—sometimes even affirmatively-expressed ambiguity—as to which step of *Chevron* generated the outcome.[64]

Consider the Supreme Court's decision in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*.[65] There, the Court upheld a Department of the Interior interpretation of a provision of the Endangered Species Act. The Court went through an extensive *Chevron* analysis,[66] noting along the way several times that the agency's interpretation was "reasonable" and "permissible"[67]—seemingly a clear statement that the case was decided under *Chevron*'s step two. But, along the way, the Court stated: "We need not decide whether the statutory definition of 'take' compels the Secretary's interpretation of 'harm,' because our conclusions that Congress did not unambiguously manifest its intent to adopt respondents' view and that the Secretary's interpretation is reasonable suffice to decide this case."[68] In other words, the *Sweet Home* Court hedged whether in fact the agency interpretation aligned with the unambiguous wording of the statute—a decision that would lie under *Chevron* step one. Assuming, then, that *Sweet Home* enjoys *stare decisis* status—which under *Loper Bright* it presumably does, since either way the

64. Conflation of steps one and two is a common enough concurrence for empiricists analyzing *Chevron* to have taken note. See, for example, Jason J. Czarnezki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the* Chevron *Doctrine in Environmental Law*, 79 U. COLO. L. REV. 767, 786 n.110 (2008), where Professor Czarnezki explains:

> Where a court exhibited conflation of *Chevron* steps one and two, the case was coded as having been solely decided under step one, unless the court explicitly invoked "step two," resulting in the cases being coded as considering both steps. Where a court addressed step two only in arguendo, both steps were included in the dataset, unless the agency action was reversed in which case the decision was coded as being decided solely under step one.

65. *See generally* Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687 (1995).

66. *See id.* at 697–708.

67. *Id.* at 697 ("The text of the Act provides three reasons for concluding that the Secretary's interpretation is reasonable."); *id.* at 698 ("A reluctance to treat statutory terms as surplusage supports the reasonableness of the Secretary's interpretation."); *id.* at 703 ("The latitude the ESA gives the Secretary in enforcing the statute, together with the degree of regulatory expertise necessary to its enforcement, establishes that we owe some degree of deference to the Secretary's reasonable interpretation."); *id.* at 704 ("Our conclusion that the Secretary's definition of 'harm' rests on a permissible construction of the ESA gains further support from the legislative history of the statute."); *id.* at 706 ("We do not believe the Senate's unelaborated disavowal of the provision in [a draft Senate bill] undermines the reasonableness of the more moderate habitat protection in the Secretary's 'harm' regulation.").

68. *Id.* at 703.

Court upheld the agency's interpretation as lawful—if the agency in future were to try to reinterpret the statute, the courts would have to confront the question of which step actually justifies the Court's ruling in *Sweet Home*. If the answer is step one, then the holding of *Sweet Home* survives but does no work. But if indeed the result in *Sweet Home* rests on step two, then one would back to the question we discussed earlier: how much discretion does *Chevron stare decisis* preserve post-*Loper Bright*? In other words, the ambiguity that already inheres in *Chevron stare decisis* is even larger in this setting.

Looking beyond ambiguity—which would presumably be resolved eventually by the Supreme Court—whatever the option upon which the Supreme Court ultimately settled (with the exception of the option that locks in the interpretation that was upheld pre-*Loper Bright*) would preserve at least some measure of agency discretion in the wake of pre-*Loper Bright* decisions. And agency discretion in those cases would stand in stark contrast to the fealty to statutory language that those same agencies would have to observe with respect to other statutory provisions, and that other agencies would have to observe in general, under *Loper Bright*. The discussion above raises questions about how well each variant squares with the holdings under *Chevron* that *stare decisis* is presumably designed to preserve. The next Section offers a more theoretical take on the problematic nature of preserving agency discretion in some circumstances and not others.

B. THEORIZING THE CHALLENGES

With the problems inherent in preserving pre-*Loper Bright* holdings on the lawfulness of agency interpretations exposed, I turn to consideration of theoretical explanations for the problems. The theoretical discussion sheds light on why these problems arises in this methodological setting and not others.

It is hardly novel that the Supreme Court would, concomitant with changing a methodological approach, acknowledge the preservation—on statutory *stare decisis* grounds—of holdings that predate that change. For example, consider the Court's approach to determining whether a statute of limitations governing actions against the federal government should be seen as jurisdictional or open to equitable tolling. Historically, the Court took an approach to such questions that was, in the Court's own words, "ad hoc."[69] Then, in its 1990 decision in *Irwin v. Department of Veterans Affairs*, the Court announced that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States" (with Congress free to "provide otherwise if it wishes to do so").[70] Yet, even after *Irwin*, the Court has, based on decisions that predate *Irwin*, on statutory *stare decisis* grounds, continued to disallow equitable tolling

69. Irwin v. Dep't of Veterans Affs., 498 U.S. 89, 95 (1990).

70. *Id.* at 95–96.

of limitations periods against the government, even absent any clear legislative to the contrary.[71]

Consider as well the Court's approach to determining whether a federal regulatory statute includes an implied private right of action in the face of evolving doctrine. In 1964, with purposivist statutory interpretation holding sway, the Supreme Court held in *J.I. Case Co. v. Borak*[72] that section 14(a) of the Securities Exchange Act of 1934[73] includes an implied right to sue for damages, as well as injunctive relief.[74] It rested its conclusion on the fact that protection of investors was "among [the statute's] chief purposes"; that, the Court reasoned, "certainly implies the availability of judicial relief where necessary to achieve that result."[75] Then, in the 1975 case of *Cort v. Ash*,[76] the Court built upon its holding in *Borak* to assemble a multifactor balancing test—focused on legislative purpose—to determine whether a statute includes an implied private right of action.[77] But in the late 1970s and 1980s, with the Court tilting away from purposivism and toward textualism, the Court instead declared that "what must ultimately be determined is whether Congress intended to create the private remedy asserted."[78] Nevertheless, the Court

71. *See* John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 136–37 (2008) (recognizing as "true, as petitioner points out, that in *Irwin* . . . we adopted 'a more general rule' to replace our prior ad hoc approach for determining whether a Government-related statute of limitations is subject to equitable tolling," finding that a long line of earlier cases justified finding the statute there at issue as jurisdictional). Professor Erin Morrow Hawley positions *John R. Sand* as an application of statutory *stare decisis* against an even broader methodological change instituted by the Court on the question of whether a statutory procedural requirement is jurisdictional—such that failure to comply with it must result in case dismissal—or merely a sub-jurisdictional claim-processing requirement. Abandoning the approach the Court had taken to such questions that was "less than meticulous," Arbaugh v. Y & H Corp., 546 U.S. 500, 511 (2006), the Court in 2006 adopted a rule that saw a procedural requirement as jurisdictional only by virtue of a clear statement by Congress, *see id.* at 515–16. Professor Hawley describes *John R. Sand* as a "procedural requirements case decided on stare decisis grounds" rather than under the clear statement rule. Erin Morrow Hawley, *The Supreme Court's Quiet Revolution: Redefining the Meaning of Jurisdiction*, 56 WM. & MARY L. REV. 2027, 2052 (2015); *see id.* at 2052–54.

72. *See generally* J. I. Case Co. v. Borak, 377 U.S. 426 (1964).

73. 15 U.S.C. § 78n(a) (2018).

74. *Borak*, 377 U.S. at 431–33.

75. *Id.* at 432.

76. *See generally* Cort v. Ash, 422 U.S. 66 (1975).

77. *See id.* at 78. The factors were:

> First, is the plaintiff 'one of the class for whose especial benefit the statute was enacted[]' . . .—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id.

78. Transamerica Mortg. Advisors, Inc. v. Lewis, 444 U.S. 11, 15–16 (1979).

expressly declined to overrule *Borak* itself; the private right of action it recognized survives as a matter of *stare decisis*.[79]

Moreover, even under the new, more limited approach to implied private rights of action, the Court has occasionally fallen back to its earlier approach with respect to statutes enacted when that approach was dominant.[80] Although the Court has since rejected the premise that the older approach *necessarily* applies when analyzing older statutes,[81] still those holdings remain on the books as well.[82]

A moment's reflection confirms that the surviving precedents in these regimes are largely unproblematic. Apart from the possible objection of like cases—really just "somewhat alike cases"—being treated differently—there is no substantial issue with some statutes of limitations, but not some others, being subject to equitable tolling, just as there is no substantial issue with plaintiffs being able to invoke an implied private right of action under some statutes but not others. Indeed, such a scenario can arise at times simply because a legal regime is more ad hoc, or when shifting majorities take the Court in different directions from case to case.

Contrast that with the scenario arising out of the Court's *stare decisis* declaration in *Loper Bright*. Some agencies will have discretion to choose among statutory interpretations while other agencies will not, and indeed each agency will have that discretion only with respect to some provisions and not others. Or, under an alternate reading of the Court's mandate, some agencies will be stuck with (or able to benefit from) an interpretation of a statute that an earlier iteration of the agency validated, while other agencies—and indeed all agencies with respect to other statutory provisions—will have to pay heed to the best meaning of statutes. This degree of disuniformity goes well beyond the relative minor disuniformity in the contexts discussed just above. The nub of the issue is that the now-discarded *Chevron* regime sanctioned, and indeed explicitly encouraged, judicial discretion across a range of possible outcomes, whereas the now-ascendant *Loper Bright* approach privileges a unitary outcome. Other scenarios involve mixing particular outcomes in particular settings. Mixing discretion and multiple outcomes in some settings with unitary outcomes in other settings is far more problematic.

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79. Touche Ross & Co. v. Redington, 442 U.S. 560, 577 (1979) ("We do not now question the actual holding [in *Borak*], but we decline to read the opinion so broadly that virtually every provision of the securities Acts gives rise to an implied private cause of action.").

80. *See* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 391–94 (1982).

81. *See* Alexander v. Sandoval, 532 U.S. 275, 287–88 (2001).

82. Though not a matter of statutory *stare decisis*, an analogy may nevertheless be found in the Court's treatment of *Bivens* causes of action. The Court recognized a private right of action to collect damages for certain constitutional violations in 1974, when the lenient approach to recognizing implied private rights of action prevailed. *See generally* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). The Court has since imported its more restrictive approach to private rights of action to the *Bivens* setting. But, in so doing, it has directed only that courts be hesitant to expand *Bivens* actions to new settings. *See, e.g.*, Hernandez v. Mesa, 589 U.S. 93, 102 (2020). It has not overruled existing precedent recognizing the availability of *Bivens* actions.

Nor can it be said that this problematic disuniformity will be sharply cabined or minor. While the Court has not decided a huge number of cases under the *Chevron* test (and none over the last several years[83]), still it stands to reason that cases that reach the Court may involve settings of great moment.

And that disuniformity will be greater still to the extent that federal courts of appeals also preserve their pre-*Loper Bright* cases upholding agency interpretations as lawful. The Supreme Court's description of the scope of statutory *stare decisis* is not limited to holdings issued by the Supreme Court. To be sure, lower court decisions are subject to review by the Supreme Court (which now would presumably apply the *Loper Bright* standard)[84], and so lower courts may on their own decide to overturn earlier precedent grounded in *Chevron*. That said, federal courts of appeals have on occasion followed similar invitations by the Court to preserve their own precedent.[85] Indeed, to date, at least one court of appeals has indicated that its own *Chevron*-era precedent survives *Loper Bright*.[86]

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83. *See supra* note 40 and accompanying text.

84. *But cf. Curran*, 456 U.S. at 391–94 (holding that, despite the new, more limited approach to implied private rights of action, falling back to its earlier approach with respect to a statute enacted when that approach was dominant).

85. *See* Marley v. United States, 567 F.3d 1030, 1035–36 (9th Cir. 2009) (noting the Court's decision in *John. R. Sand* to look to its precedent rather than be irretrievably bound by *Irwin*, and that "[w]e, too, can find the answer in our own preceden.t"), *overruled by* Kwai Fun Wong v. Beebe, 732 F.3d 1030, 1045 (9th Cir. 2013) (en banc) (finding the *John R. Sand* exception unavailable because "there is no *Supreme Court* precedent on the question." (emphasis added)). In reaching its conclusion that only preexisting *Supreme Court* precedent could survive the Court decision adopting a new methodology, the en banc Ninth Circuit in *Kwai Fun Wong* cited a statement by Justice Ginsburg in a concurring opinion. *See* Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 173–74 (2010) (Ginsburg, J., concurring in part and concurring in the judgment) ("[I]n *Bowles* [*v. Russell*, 551 U.S. 205 (2007)] and *John R. Sand & Gravel Co.* . . . we relied on longstanding decisions of *this Court* typing the relevant prescriptions 'jurisdictional.'"). But Justice Ginsburg was writing for herself and two Justices who joined her opinion against a five-Justice majority (with Justice Sotomayor not having participated in the consideration or decision of the case). Moreover, Justice Ginsburg was responding to an argument *before the Supreme Court* that the jurisdictional nature of a statute of limitations could be established *by lower-court precedent*. It is one thing for the Supreme Court to conclude, as Justice Ginsburg argued that it should, that lower-court precedent does not bind *it* in the face of a methodological change; it is quite another thing for the Court to conclude that *lower courts* should not look to preexisting *lower-court* precedent. *See* Baroque Timber Indus. (Zhogshan) Co. v. United States, 865 F. Supp. 2d 1300, 1308 n.12 (C.I.T. 2012) (acknowledging the statement in Justice Ginsburg's concurring opinion but nevertheless concluding that "we are bound by the precedential opinions of the Court of Appeals" that predate the Supreme Court's methodological change on the question of whether a limitations period is jurisdictional).

86. *See* Lopez v. Garland, 116 F.4th 1032, 1045 (9th Cir. 2024) ("*Szonyi* [*v. Whitaker*, 915 F.3d 1228 (9th Cir. 2019),] remains precedential authority which binds us. And, although *Szonyi* relied on *Chevron*, the Supreme Court has instructed that *Loper Bright Enterprises* does not 'call into question prior cases that relied on the *Chevron* framework.'" (quoting Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412 (2024)); Murillo-Chavez v. Bondi, 128 F.4th 1076, 1087 (9th Cir. Feb. 13, 2025) ("Our holdings 'that *specific* agency actions are lawful' were not overruled by *Loper Bright* simply because they relied on *Chevron*." (quoting *Loper Bright*, 603 U.S. at 412)). *See also* Chavez v. Bondi, 134 F.4th 207, 213 (4th Cir. 2025) (noting, though apparently in dicta, that "*Loper Bright* doesn't wipe away the results of our prior decisions deferring to the[Board of

The glaring disuniformity that *Chevron* statutory *stare decisis* will generate is likely to have a deleterious effect on the legitimacy of both the court system and the executive branch. One aspect of judicial legitimacy is the expectation that like cases will be decided similarly.[87] A system that, upon a methodological shift, preserves certain pre-shift holdings can be justified—as practice shows—even though outcomes will differ. But the intermingling of the *Loper Bright* methodology with *Chevron* holdings that find agency interpretations to be lawful is of a different order: *Chevron* is a methodology that—if an interpretation is validated at step two—necessarily validates a number (or a range) of other possible interpretations, while the methodology that displaced and replaced Chevron—as set out in *Loper Bright*—authorizes a single interpretation. Coexistence is much more difficult in this setting, where there is not just a difference in outcomes, but a difference in the number—or indeed the nature—of possible outcomes.[88]

Immigration Appeals'] reasonable interpretations of what constitutes a crime involving moral turpitude").

The Sixth Circuit has been more ambivalent about whether its *Chevron*-era precedent survives *Loper Bright*. In *Moctezuma-Reyes v. Garland*, 124 F.4th 416 (6th Cir. 2024), the majority asserted that "we haven't skirted *Loper Bright*'s instruction" since "[o]ur *Chevron*-era precedents here remain standing." *Id.* at 422. At the same time, the majority said it had resolved the case by following *Loper Bright*'s directive "to carry out our judicial duty to say what the law is, even when agencies are involved," *id.*, thus leaving unclear the extent to which the prior circuit precedent had a role in the court's resolution of the issue now. Judge Jane Stranch concurred in the court's judgment on the ground that some Sixth Circuit precedent "are authoritative precedent" on the question of statutory interpretation there at issue, and that "the Court in *Loper Bright* expressly disclaimed any intention to upend such precedent." *Id.* at 424 (Stranch, J., concurring in the judgment).

A subsequent Sixth Circuit case was similarly ambiguous. In *Tennessee v. Becerra*, 131 F.4th 350, (6th Cir. 2025), the court noted that the *Loper Bright* Court left "[u]nremarked upon was whether statutory stare decisis includes Circuit court precedent." *Id.* at 365. The court then reasoned that, "[r]egardless of whether [a Sixth Circuit *Chevron*-era case on point] binds us, . . . we find its conclusion . . . persuasive." *Id.*

The Eleventh Circuit has also noted the issue but remained unclear as to whether circuit *Chevron*-era precedent survives *Loper Bright*. In *Siqueira v. U.S. Att'y Gen.*, No. 23-13710, 2024 WL 4590031 (11th Cir. Oct. 28, 2024), the court quoted *Loper Bright*'s assertion that the Court "did 'not call into question prior cases that relied on the *Chevron* framework.'" *Id.* at *2. The court then stated: "Because the parties have not asked us to disturb prior [Board of Immigration Appeals] and 11th Circuit interpretations . . . , we decline to do so here." *Id.* The two statements seem inconsistent, at least as it pertains to Eleventh Circuit precedent. After all, if a *Chevron*-era Eleventh Circuit case remains binding, then an Eleventh Circuit panel could not overrule it; that would require action by the court en banc. On the other hand, perhaps the *Siqueira* court meant to preclude the petitioners from raising the issue in a petition for en banc review.

87. *See* H. L. A. HART, THE CONCEPT OF LAW 159 (2d ed. 1994) ("[J]ustice is traditionally thought of as maintaining or restoring a *balance* or *proportion*, and its leading precept is often formulated as '[t]reat like cases alike'; though we need to add to the latter 'and treat different cases differently'.").

88. Just as the extent to which cases are seen to be "alike" will vary based on the scope of the "categories of likeness," *see* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 596 (1987), so too will the extent to which the treatment of cases will be seen as "alike" will depend upon similar choices of categorization. That said, it seems clear that two cases that generate two different unitary outcomes are likely not as different as two cases, one of which generates a unitary outcome and the other a range of possible outcomes.

Democratic accountability is also likely to suffer under a regime of *Chevron* statutory *stare decisis*. The Supreme Court explained in *New York v. United States*[89] that "where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished."[90] By analogy, so too might it be that allowing different agencies to have different levels of discretion with respect to implicit grants of authority could confuse the public, and adversely affect the ability of the public to hold actors democratically accountable.

CONCLUSION

In this Essay, I have highlighted problems with the *Loper Bright* Court's accordance of *stare decisis* to *Chevron*-era holdings that an agency interpretation is lawful. The Court in *Loper Bright* seems to have announced *Chevron stare decisis* without having thought much (if at all) about how *stare decisis* would work in this context or the ramifications of it. The extent of *stare decisis* in this context is highly ambiguous. Moreover, whatever form it takes, the inconsistency that ongoing agency discretion in some contexts but not others introduce is problematic. It will have deleterious effects on judicial legitimacy and on democratic accountability. It seems that the more prudent course would be to render decisions under *Chevron* to be fair game for reconsideration after *Loper Bright*.

89. *See generally* New York v. United States, 505 U.S. 144 (1992).
90. *Id.* at 168.