DEFERENCE UNDISTURBED

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The Supreme Court's departure from Chevron *deference threatened to upend the administrative state. To mitigate the consequences of its opinion in* Loper Bright Enterprises v. Raimondo*, the Court established that all existing decisions that relied on* Chevron *deference would get "statutory stare decisis." That prevents the re-litigation—at least to some extent—of regulations that were previously upheld under* Chevron. *But attaching "statutory stare decisis" to these decisions makes little sense. These cases do not stand for "statutory precedents," despite the Court's characterization of them as such. A precedent that applied* Chevron *to uphold a regulation is not a statutory ruling—it is a determination about a regulation's validity under the Administrative Procedure Act. To be sure, a loose form of statutory interpretation was a step along the path to that determination of validity. But a* Chevron*-deference-grounded decision is not a conclusion about a statute's meaning. And the distinction between statutory stare decisis and regulatory stare decisis has important implications for agency flexibility to depart from regulations that have been upheld under* Chevron *in the past, notwithstanding the statutory stare decisis paragraph in* Loper Bright. *Going forward, agencies have the flexibility to depart from regulations that courts have upheld under* Chevron. *But an agency, at a later time, cannot reinstate the old regulation and claim stare decisis. This flexibility and these limits inhered in* Chevron*'s framework, and they remain after* Loper Bright.

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INTRODUCTION

In *Loper Bright Enterprises v. Raimondo*, the Supreme Court declared that "*Chevron* is overruled."[1] But *Chevron* is not overruled. The actual holding of *Chevron* was that a 1981 regulation of the Environmental Protection Agency (EPA) was lawful.[2] And by its own terms, *Loper Bright* explicitly preserved this holding. True, *Loper Bright* instructed that courts should defer no longer to reasonable agency interpretations of ambiguous statutes.[3] And that principle, known as "*Chevron* deference," was most closely associated with the Court's 1984 opinion in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* But the opinion in *Loper Bright* instructed courts to give statutory stare decisis weight to the holdings of prior cases that applied *Chevron* deference.[4] That includes *Chevron* itself because the Court reached its result in *Chevron* by applying so-called *Chevron* deference. In preserving these *Chevron*-grounded holdings, the Court offered a muddled approach to statutory stare decisis in administrative law cases. This approach appears to be driven more by pragmatism than formalism.

One paragraph in *Loper Bright* looms large. The Court explained that its departure from *Chevron* deference as a rule of interpretation would "not call into question prior cases that relied on the *Chevron* framework."[5] The Court described "[t]he holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself"—as "still subject to statutory *stare decisis* despite [the Court's] change in interpretive methodology."[6] In so doing, the Court recast the *Chevron* caselaw as constituting "statutory precedent[s]."[7] But that very label is inconsistent with how the Court described the holdings of these cases: "that specific agency actions are lawful."[8] The distinction matters because it could affect the flexibility that agencies have in the future to change course from regulations that did not constitute the best readings of the statutes at issue.

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1 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) (referring to *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), *overruled by*, *Loper Bright*, 144 S. Ct. 2244).

2 *See Chevron*, 467 U.S. at 866. The Reagan-era regulation at issue in *Chevron* defined a "source" of pollution as an entire plant, rather than an individual piece of process equipment within the plant. Requirements for Preparation, Adoption and Submittal of Implementation Plans and Approval and Promulgation of Implementation Plans, 46 Fed. Reg. 50766, 50767 (Oct. 14, 1981) (to be codified at 40 C.F.R. pts. 51–52).

3 *Loper Bright*, 144 S. Ct. at 2273.

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

In the *Chevron* era, agencies often promulgated regulations based on contestable interpretations of statutes. When courts applied *Chevron* deference to uphold these regulations, they were not reaching statutory holdings. Rather, these cases reached *regulatory* holdings. The holdings of these cases are that the regulations are lawful, not that the agencies' statutory interpretations are necessarily correct. *Chevron* rested on the idea that a regulation could be valid so long as the agency's interpretation was one of multiple possible understandings of the statute.[9] The courts in these cases were not interpreting the statute for the statute's sake; their rulings often explicitly acknowledged that the best reading of the statute was not the one that the agency had chosen.[10] But when the question was whether the agency had violated the Administrative Procedure Act (APA)—or some other, similar review statute—in promulgating (and enforcing) a given regulation, *Chevron* dictated that a less-than-perfect interpretation of the agency's underlying statutory authority was not necessarily grounds to set aside the regulation.[11]

This statutory stare decisis paragraph in *Loper Bright* may be the most important one in the case—aside from the actual discussion of the new rule of interpretation that the Court articulated therein. Some feared that departing from *Chevron* deference would open up countless regulations to relitigation if prior courts had applied *Chevron* to turn away legal challenges to those regulations. Indeed, the Court's recent decision in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System* would have amplified this risk.[12] At oral argument in *Loper Bright*, Justice Barrett seemed to be the Justice in the eventual majority who was most worried about the destabilizing effect that this result could have on the regulatory state.[13] And she was not alone.[14] Thus, the inclusion of the statutory stare decisis paragraph seemingly addressed these fears and established limits on the backward-looking effects of *Loper Bright*.

The preservation of *Chevron*-grounded holdings was not the only discussion of stare decisis in *Loper Bright*. The Court also analyzed the stare decisis weight of *Chevron*'s rule of interpretation.[15] This stare

9 *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 866 (1984), *overruled by*, *Loper Bright*, 144 S. Ct. 2244.

10 *See* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 71 (2017).

11 *See Chevron*, 467 U.S. at 866.

12 *See* Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 144 S. Ct. 2440 (2024).

13 *See infra* notes 81–82 and accompanying text.

14 *See infra* note 83 and accompanying text.

15 *Loper Bright*, 144 S. Ct. at 2270–73.

decisis question—whether the Court should preserve the rule of interpretation—was distinct from the question of what to do with prior *Chevron* cases. The Court threaded this needle by foreswearing *Chevron* deference while keeping many prior *Chevron* rulings in place.[16] When this Article refers to "the statutory stare decisis paragraph" in *Loper Bright*, it is describing the paragraph of the opinion that keeps prior *Chevron*-based holdings in place; it is not describing the Court's lengthier discussion of why *Chevron*'s interpretive methodology was not entitled to stare decisis.

The stare decisis paragraph may head off a substantial amount of litigation over longstanding regulations that courts have upheld under a now-defunct legal framework. But discerning the scope—and the limits—of the paragraph will have other, far-reaching implications. The Court's holding in *Loper Bright* itself is not entirely clear. The case, like the Court's 2022 decision in *West Virginia v. EPA*,[17] appears to be most important for the methodology of statutory interpretation that it espouses (rather than for a particular application of that methodology). The extent to which lower courts must follow that rule of interpretation is perhaps open to debate—at least in theory, if not in practice. Moreover, if an agency decides to change course and promulgate a new regulation that replaces an older rule that had been upheld under *Chevron*, the Court's opinion suggests multiple potential paths for a court to follow in reviewing a challenge to the new rule.[18] But what happens if the agency, at a later time, returns to the old rule? And what to make of the precedential weight of lower-court *Chevron* cases after *Loper Bright*? These and other puzzles could shape the future of administrative law.

Part I analyzes the run-up to the stare decisis paragraph. The debate about *Chevron* and stare decisis played a minor yet important role in conversations about departing from *Chevron* deference. Once the Court granted certiorari in *Loper Bright*, the urgency of these discussions ramped up. An amicus brief by Kent Barnett and Chris Walker framed the issue by taking the position that *Chevron* was entitled to stare decisis weight.[19] Moreover, the oral argument in *Loper Bright* suggested that at least one Justice—Justice Barrett—was concerned about the destabilizing effects of eliminating *Chevron* deference if the Court reopened prior *Chevron* cases.[20] After distinguishing between the two stare decisis questions on the table in *Loper Bright*, this Part considers

16 *Id.* at 2273.

17 West Virginia v. EPA, 142 S. Ct. 2587 (2022).

18 *See infra* Section II.C.

19 Brief of Law Professors Kent Barnett and Christopher J. Walker as Amici Curiae in Support of Neither Party, *Loper Bright*, 144 S. Ct. 2244 (Nos. 22-451, 22-1219).

20 *See infra* note 81 and accompanying text.

what the Court attempted to avoid in practice by including the stare decisis paragraph in the *Loper Bright* opinion.

Part II reflects on the internal inconsistency of the Court's stare decisis paragraph. This Part distinguishes between statutory holdings and regulatory holdings, focusing on the meaning of precedent in administrative law. In an APA case decided at *Chevron* Step Two, the agency's statutory interpretation constituted one of its justifications for the regulation that it issues. If that interpretation exceeded the boundaries of the statute, then the reviewing court could have set aside the regulation. But the question in these cases was not whether the agency's interpretation was right or wrong. That question was whether the regulation was lawful. And *Chevron* meant only that a regulation could be lawful even if an agency did not have the best reading of the statute. Courts should read prior *Chevron* cases in this way. The holdings apply only to particular agency actions—and the agency is free to change course going forward if it determines that its underlying interpretation of the statute was not the best one.

Also, a regulation that was previously upheld under *Chevron* is not fully immune from other sorts of challenges. Different arguments, calling on other interpretive deficiencies or pointing out separate issues with a given regulation, still could require a court to set aside the regulation at issue. For example, a prior *Chevron* case may have settled—as to a particular regulation—the question whether one aspect of an agency's statutory interpretation was correct enough to uphold the regulation. But that does not prevent a future litigant from challenging the regulation on the grounds that the regulation was arbitrary. Moreover, just because a regulation was sufficiently compliant (under *Chevron*'s framework) with one part of a statute does not mean that the other aspects of the agency's legal interpretation were necessarily correct. These limitations on *Loper Bright*'s discussion of stare decisis could become especially important in light of the Supreme Court's other decision in *Corner Post, Inc. v. Board of Governors.*[21] Courts and litigants thus should take care to understand the sweep of prior *Chevron* precedents.

Part III considers the implications of this approach to *Loper Bright*'s stare decisis paragraph. Begin with the obvious: If a court has ruled that an agency's regulation is valid because the agency's statutory interpretation was entitled to deference under *Chevron*, then that regulation is not vulnerable to challenge on the same grounds in any court that sees the ruling as binding precedent. Suppose, however, that the agency changes the regulation at a later time. If someone challenged

21 *See* Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 144 S. Ct. 2440 (2024).

the new regulation, a court could not invoke stare decisis to rule that this new regulation is invalid merely because it advances a different interpretation than the agency did in the prior regulation upheld under *Chevron* Step Two. The validity of the old regulation, not the correctness of its underlying interpretation, was the holding of the prior case at *Chevron* Step Two.[22] Now, suppose that the agency comes back and promulgates a new regulation that is identical to the original, upheld-under-*Chevron* regulation. Unlike the original regulation, this new regulation is now vulnerable to challenge, because it is a different regulation, and the holding of the prior case was simply that the original regulation was valid. Faced with a new regulation, the court would interpret the underlying statute with fresh eyes. This Part also contemplates whether the government can waive the "statutory stare decisis" effect of prior *Chevron*-grounded rulings (implicating a familiar debate about "*Chevron* waiver") and the power of Congress to abrogate the statutory stare decisis paragraph.

I. MANAGING THE AFTERMATH OF *CHEVRON*'S DEMISE

Prior to *Loper Bright*, calls to "overrule *Chevron*" had become a rallying cry for the conservative legal movement.[23] For the most part, conservative commentators did not actually want the Supreme Court to overrule the holding of *Chevron*—a case in which the Court upheld a Clean Air Act deregulatory action by the Reagan administration's EPA.[24] Rather, "overrule *Chevron*" was a shorthand for departing from the interpretive framework that *Chevron* laid out: deference to reasonable agency interpretations of ambiguous statutory text.

But departing from *Chevron* deference was not so simple. In the lead-up to *Loper Bright*, *Chevron* had become one of the most cited cases of all time.[25] Many of those cases involved courts deferring to agency

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22 *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984), *overruled by*, *Loper Bright*, 144 S. Ct. 2244.

23 *See, e.g.*, Philip Hamburger, Chevron *Bias,* 84 GEO. WASH. L. REV. 1187, 1197 (2016); Michael B. Rappaport, Chevron *and Originalism: Why* Chevron *Deference Cannot Be Grounded in the Original Meaning of the Administrative Procedure Act,* 57 WAKE FOREST L. REV. 1281, 1284 (2022); Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law,* 10 N.Y.U. J.L. & LIBERTY 475, 478 (2016).

24 *See, e.g.*, Ginsburg & Menashi, *supra* note 23, at 498 (arguing that the *Chevron* doctrine, not *Chevron* holding, conflicts with the Administrative Procedures Act); Rappaport, *supra* note 23, at 1323 (same).

25 For methodology, see Lauren Mattiuzzo, *Most-Cited U.S. Supreme Court Cases in HeinOnline: Part III,* HEINONLINE: BLOG (Sep. 26, 2018), https://home.heinonline.org/blog/2018/09/most-cited-u-s-supreme-court-cases-in-heinonline-part-iii/ [https://perma.cc/D9DM-4WYN]. As of November 7, 2025, *Chevron* is number sixty-nine on the list of most-cited Supreme Court decisions, having been cited in over 16,000 cases. HEINONLINE: U.S.

interpretations and, in the process, upholding regulations as lawful.[26] Naturally, some wondered: If the Court turned away from *Chevron* deference, what would become of all of those regulations? Additionally, understanding *Chevron* as a rule of interpretation (rather than a regulatory holding about a Clean Air Act regulation) raised a separate question: Is the rule of interpretation *itself* entitled to stare decisis weight? As the prospect of eliminating *Chevron* became real, these questions took on an outsized importance. Indeed, Justice Barrett—who would eventually be in the majority in *Loper Bright*—gave voice to these concerns at *Loper Bright*'s oral argument.[27] And in the *Loper Bright* opinion, the Court took care to address these stare decisis issues.

This Part recounts the path from *Chevron* to *Loper Bright*. It begins by reviewing the exact nature of the decision in *Chevron*—and what the actual holding of the case was. As the years went on, one of the arguments in favor of retaining *Chevron* deference centered on purported stare decisis issues with departing from *Chevron*'s framework. This Part zooms into that debate, which became more urgent after the Court granted certiorari in *Loper Bright*. This Part focuses in particular on two events related to *Loper Bright*: (1) the filing of an amicus brief by Barnett and Walker, and (2) oral argument in the case. This Part concludes by reviewing how the Court in *Loper Bright* dealt with the stare decisis issues that the case presented.

A. To "Overrule" Chevron

Chevron deference was a doctrine that courts applied when interpreting statutes in cases involving challenges to regulations. *Chevron* itself, by contrast, was a Reagan-era case involving a challenge to a specific EPA regulation.[28] Although conservatives initially favored *Chevron* deference, the doctrine fell out of favor. Jurists and scholars raised statutory, constitutional, and normative objections to the *Chevron* doctrine.[29] As *Chevron* remained on the books, however, one of the more potent rebuttals to these arguments was the idea of stare decisis—the notion that courts should adhere to their precedents. The stare decisis debate played a small, but significant, role in the *Chevron* debate.

In *Chevron*, the Supreme Court reviewed the consistency of an EPA rule with the statutory authority that the rule claimed: the Clean

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SUPREME COURT LIBRARY, + "U.S. Reports" + "*", 37,077 results (Nov. 7, 2025) (on file with the Notre Dame Law Review) (sorted by "Number of Times Cited by Cases").

26 *See* Barnett & Walker, *supra* note 10, at 6 (summarizing large empirical study that shows that agency interpretation prevails more often when *Chevron* deference is applied).

27 *See infra* note 81 and accompanying text.

28 Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 839–40 (1984), *overruled by*, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

29 *See supra* note 23 and accompanying text.

Air Act.[30] By way of background, the Act (and subsequent amendments to the Act) imposed certain emissions limitations on "stationary sources"—i.e., "sources of air pollution, like power plants and smelters," that were fixed in one place—through a variety of programs.[31] States played a role in implementing some of these programs.[32] And for stationary sources, the statute imposed stricter emissions limitations when a firm constructed a "new" stationary source instead of modifying an "existing" stationary source.[33] For that reason, businesses favored a definition of the term "stationary source" that would encompass entire power plants, rather than a definition that saw each individual apparatus within the plant as its own stationary source.[34] That way, whenever a power plant installed a new emitter of pollution (such as an individual smokestack) within the broader plant, it could evade the stricter limitations for "new" sources. The logic was that the plant, not the individual smokestack, was the "source" under the statute. After Ronald Reagan was elected President, the EPA promulgated a regulation that gave flexibility to the states to take this approach to the term "stationary source"—an approach known as the "bubble concept."[35]

The Natural Resources Defense Council, an environmental advocacy group, challenged this regulation in federal court.[36] Then-Judge Ruth Bader Ginsburg, writing for a unanimous panel of D.C. Circuit judges, set aside the EPA's regulation.[37] Judge Ginsburg observed that the regulation represented the "EPA chang[ing] its definition of source," and she acknowledged that circuit precedent prevented the court from "writ[ing] on a clean slate" in reviewing the EPA's changed interpretation.[38] As Judge Ginsburg saw it, "the central issue" in the case was "whether EPA's discretion under the Clean Air Act is sufficiently broad to allow it to apply the bubble concept to the [relevant]

30 *Chevron*, 467 U.S. at 839–40.

31 Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253, 258, 257–58 (2014).

32 *See id.* at 262 (describing the Plan Requirements for Nonattainment Areas under the 1977 Amendments to the Clean Air Act).

33 *See id.* at 258.

34 *See id.* at 258–59.

35 *See* Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans, 46 Fed. Reg. 16280, 16280 (Mar. 12, 1981) (to be codified at 40 C.F.R. pts. 51–52).

36 *See* Nat. Res. Def. Council, Inc. v. Gorsuch, 685 F.2d 718 (D.C. Cir. 1982), *rev'd sub nom.*, Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984), *overruled by*, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

37 *See id.* at 728.

38 *Id.* at 720.

program."[39] Synthesizing prior D.C. Circuit precedents, Judge Ginsburg concluded that the circuit's caselaw did not allow the adoption of the bubble concept.[40] Thus, the court vacated the EPA's regulations from October 1981.[41]

The Supreme Court reversed. In *Chevron*, that meant that the Court reversed the D.C. Circuit's vacatur of the regulations.[42] The upshot was that the EPA's regulations stayed in place. At the end of its opinion, the Court stated: "We hold that the EPA's definition of the term 'source' is a permissible construction of the statute which seeks to accommodate progress in reducing air pollution with economic growth."[43] When the Court used the word "permissible," it meant that the interpretation of the statute was good enough to save the regulation from challenge under the APA—not that it was necessarily the best reading of the law.[44] In justifying its holding, the Court articulated a methodological approach that would become controversial. The Court's reasoning for its decision in *Chevron* was that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[45] Concluding that "the EPA's use of [the bubble] concept . . . [was] a reasonable policy choice for the agency to make," the Court—unbound by D.C. Circuit precedents—determined that the EPA regulations at issue were valid.[46]

That mode of analysis seemed to contravene the text of section 706 of the APA, which provides that "the reviewing court shall decide all relevant questions of law" in regulatory challenges.[47] The *Chevron* decision did not mention section 706 of the APA, and the objection that *Chevron* deference was inconsistent with section 706 of the APA became one of the most important arguments against the *Chevron* framework.[48] But the lack of engagement with section 706 makes sense

39 *Id.* at 725.

40 *See id.* at 728 (discussing *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979) (per curiam) and *ASARCO Inc. v. EPA*, 578 F.2d 319 (D.C. Cir. 1978)).

41 *Id.*

42 Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 866 (1984), *overruled by*, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

43 *Id.*

44 *See id.* at 843, 866.

45 *Id.* at 843.

46 *See id.* at 845.

47 5 U.S.C. § 706 (2024). The idea is that *Chevron* deference means that the agency, as opposed to the court, decides the relevant question of law.

48 *See, e.g.*, John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 118 (1998).

when one realizes that *Chevron* "was not decided under the APA."[49] Rather, the Court in *Chevron* would have been applying the special judicial review provision of the Clean Air Act, which did not require the reviewing court to "decide all relevant questions of law."[50] Nevertheless, courts—including the Supreme Court—seized on the two-step framework set forth in *Chevron* and applied it in cases governed by section 706 of the APA: Begin by ascertaining whether the statutory meaning was clear (Step One), then defer to a reasonable agency interpretation if not (Step Two).[51] This application of *Chevron*'s framework in APA cases came to be known as the *Chevron* doctrine, with "deference" to agency interpretations coming at *Chevron* Step Two.[52]

Decades later, the actual holding of the original *Chevron* case was not the controversial part of the Court's opinion. Nor was the Court's apparent understanding of the Clean Air Act's judicial review provision. Rather, commentators debated the underlying reasoning of the deference doctrine that grew out of *Chevron*—with a special emphasis on its consistency with section 706 of the APA.[53] But when skeptics of that reasoning argued for a different approach to judicial review of agency statutory interpretation, they were not asking for the Court to "overrule" *Chevron*.[54] As Cass Sunstein has explained, "the technically correct term would be 'reject the framework of'; no one is suggesting that the Court should reconsider the actual holding of *Chevron*, which

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49 Jack M. Beermann, Chevron *Is a Rorschach Test Ink Blot*, 32 J.L. & POL. 305, 308 (2017).

50 5 U.S.C. § 706 (2024); *see* 42 U.S.C. § 7607(e) (2018); *see also* Beermann, *supra* note 49, at 308 ("[T]he [*Chevron*] decision was not precedent for construing the APA, especially since APA § 706 contains the words 'the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action' when the Clean Air Act provision governing *Chevron* did not contain those words. Even if *Chevron*, whatever it decided, correctly construed the Clean Air Act, it did not construe the APA's judicial review section on review of statutory provisions." (footnotes omitted) (quoting 5 U.S.C. § 706 (2024))). Before this Article went to print, a dissenting opinion in the D.C. Circuit made this same point. *See* Hospital Menonita de Guayama, Inc. v. NLRB, 183 F.4th 745, 759 n.2 (D.C. Cir. 2026) (Randolph, J., dissenting) ("[S]ection 706 of the APA did not apply to judicial review of the EPA rule at issue in *Chevron*.").

51 *See* THOMAS W. MERRILL, THE *CHEVRON* DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE 93 (2022).

52 *See id.* at 71.

53 *Compare, e.g.*, Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 987 (2017) (describing the interpretive framework of *Chevron* as inconsistent with section 706 of the APA—without mentioning the regulatory holding of the case), *with* Cass R. Sunstein, Chevron *Is Not Inconsistent with the APA*, YALE J. ON REGUL.: NOTICE & COMMENT (Sep. 16, 2020), https://www.yalejreg.com/nc/chevron-is-not-inconsistent-with-the-apa-by-cass-r-sunstein/ [https://perma.cc/L9GS-LYLV] (advocating the opposite position).

54 *See, e.g.*, Cass R. Sunstein, Chevron *as Law*, 107 GEO. L.J. 1613, 1621 (2019).

would be necessary for the decision to be overruled."[55] One might opine that the grafting of the *Chevron* framework onto section 706 of the APA was a poorly reasoned move, but that is not the same thing as saying that the underlying case was itself wrongly decided.

B. Grappling with Stare Decisis

In 2023, the Supreme Court granted certiorari in a case—*Loper Bright Enterprises v. Raimondo*—presenting the question "[w]hether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency."[56] The petitioners in *Loper Bright*, however, did not seek an overruling of *Chevron*'s holding.[57] Nor did they desire a departure from the *Chevron* Court's interpretation of the Clean Air Act's special judicial review provision.[58] The *Loper Bright* case involved a different regulation that a different agency (the National Marine Fisheries Service (NMFS)) had promulgated pursuant to a different statute (the Magnuson-Stevens Fishery Conservation and Management Act (MSA))—with judicial review essentially governed by section 706 of the APA.[59] Thus, the petitioners wanted the Court to end the practice of judicial deference to agency interpretations of ambiguous statutes in APA cases. The lower court in *Loper Bright* had relied on *Chevron*'s framework when ruling for the agency, and the petitioners wanted the Supreme Court to rule that this framework was no longer appropriate.[60]

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55 *Id.* at 1621 n.23.

56 Petition for Writ of Certiorari at i–ii, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024) (Nos. 22-451-22-1219); *see* Loper Bright Enters. v. Raimondo, 143 S. Ct. 2429 (2023) (mem.) (granting petition for certiorari).

57 Petition for Writ of Certiorari, *supra* note 56, at i–ii.

58 *Id.*

59 *See Loper Bright*, 144 S. Ct. at 2256. In a fun bit of trivia, *Loper Bright* shared something in common with *Chevron*: Judicial review in neither case was governed directly by section 706 of the APA. *See supra* notes 49–50 and accompanying text. The judicial review provision of the Magnuson-Stevens Act is closer to section 706 than the Clean Air Act—it provides that "[r]egulations promulgated by the Secretary [of Commerce] under this chapter . . . shall be subject to judicial review to the extent authorized by, and in accordance with, [the APA]," and it clarifies that "the appropriate court shall only set aside any such regulation or action on a ground specified in section 706(2)(A), (B), (C), or (D) of [the APA]." 16 U.S.C. § 1855(f) (2018). Still, the Court—in interpreting section 706 of the APA in *Loper Bright*—needed to acknowledge that the petitioners had "challenged the Rule under the MSA, which incorporates the [APA]." *Loper Bright*, 144 S. Ct. at 2256 (citation omitted) (citing 16 U.S.C. § 1855(f)).

60 *See* Loper Bright Enters. v. Raimondo, 45 F.4th 359, 370 (D.C. Cir. 2022), *vacated*, 144 S. Ct. 2244; Petition for Writ of Certiorari, *supra* note 56, at i–ii.

By the time that the Court granted the petition in *Loper Bright*, *Chevron*'s framework had been around for nearly forty years (and possibly more). Indeed, Justice Stevens (the author of the *Chevron* opinion in 1984) "famously believed that *Chevron* merely applied current law and did not change anything."[61] Either way, *Chevron* deference had become a core element of the practice of administrative law. Research indicated that Congress had relied on *Chevron*'s framework in drafting statutes.[62] Scores of precedential federal court decisions had applied *Chevron*'s reasoning to reject challenges to agency rules.[63] And agencies had issued numerous regulations based on those agencies' understanding of the scope of judicial review with respect to their underlying interpretations.[64]

Naturally, amid the arguments about *Chevron*'s merits, some came to *Chevron*'s defense by arguing that the Court should maintain the *Chevron* framework because of stare decisis. Most notably, Barnett and Walker took the position that *Chevron*, "a bedrock precedent in administrative law," had come to represent an interpretation of section 706 of the APA for which "the pull of statutory stare decisis [was] too strong to overcome."[65] The two synthesized this argument in an amicus brief before the Court in *Loper Bright*.[66] Given that the *Chevron* decision involved the Clean Air Act's judicial review provision, Barnett and Walker appeared to be referring to *Chevron* as a shorthand for the longstanding judicial approach to section 706 of the APA—even if *Chevron* itself did not formally establish that approach.[67]

Stare decisis is a Latin phrase meaning "to stand by things decided."[68] It represents "[t]he doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation."[69] As the Supreme Court has observed, "[*s*]*tare decisis* is not an inexorable command."[70] But stare decisis in statutory

61 Isaiah McKinney, *The Many Heads of the* Chevron *Hydra:* Chevron*'s Revolutionary Evolution Between 1984 and 2023*, 99 N.D. L. REV. 253, 255 (2024).

62 *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons* (pt. 1), 65 STAN. L. REV. 901, 993–94 (2013).

63 *See* Barnett & Walker, *supra* note 10, at 6.

64 *See* Kent Barnett & Christopher J. Walker, Chevron *and Stare Decisis*, 31 GEO. MASON L. REV. 475, 483 (2024).

65 *Id.* at 476.

66 *See generally* Brief of Law Professors Kent Barnett and Christopher J. Walker as Amici Curiae in Support of Neither Party, *supra* note 19.

67 *See id.* at 5 ("Although the *Chevron* decision itself famously does not refer to the APA, it has long since been understood as a judicially created doctrine designed to implement Section 706 of the APA.").

68 *Stare Decisis*, BLACK'S LAW DICTIONARY (12th ed. 2024).

69 *Id.*

70 Payne v. Tennessee, 501 U.S. 808, 828 (1991).

cases—i.e., the idea that courts should not depart from prior interpretations of statutes—has "special force," particularly at the Supreme Court.[71] Justice Barrett has argued that this practice flows "from the principle of legislative supremacy—the belief that Congress, rather than the Supreme Court, bears primary responsibility for shaping policy through statutory law."[72] Thus, to the extent that *Chevron* constituted an interpretation of section 706 of the APA, stare decisis would have been particularly strong.

Not all agreed that the *Chevron* doctrine represented a statutory precedent that was entitled to stare decisis. Concurring in *Perez v. Mortgage Bankers Ass'n*, Justice Thomas stated that "[a]lthough the Court has appeared to treat . . . agency deference regimes as precedents entitled to *stare decisis* effect, some scholars have noted that they might instead be classified as interpretive tools. Such tools might not be entitled to such effect."[73] Here, the idea is that *Chevron* deference constitutes a methodological approach to interpreting statutes in regulatory cases. That methodology is relevant only insofar as it supplies the reasoning for a decision about a regulation's congruence with the underlying statute. The reasoning is not the point of the decision—the determination about the regulation's validity is. That is why, for example, courts adhere to the Supreme Court's determination in *Griswold v. Connecticut* that a constitutional "zone of privacy" establishes a right to purchase and use contraceptives,[74] but they do not feel the need to

71 Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 317 (2005) (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071).

72 *Id.*

73 Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 114 n.1 (2015) (Thomas, J., concurring in judgment) (citing CALEB NELSON, STATUTORY INTERPRETATION 701 (2011)); *see also* Connor N. Raso & William N. Eskridge, Jr., Chevron *as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1731–32 (2010) (noting that some had argued that it was "far from clear that *Chevron* is or should be treated as a precedent entitled to stare decisis effect"). In a separate context, the Supreme Court has observed that "[r]evisiting precedent is particularly appropriate where . . . a departure would not upset expectations, *the precedent consists of a judge-made rule* that was recently adopted to improve the operation of the courts, and experience has pointed up the precedent's shortcomings." Pearson v. Callahan, 555 U.S. 223, 233 (2009) (emphasis added); *see also* Ramos v. Louisiana, 140 S. Ct. 1390, 1413 n.2 (2020) (Kavanaugh, J., concurring in part) ("The Court's precedents . . . pronouncing the Court's own interpretive methods and principles typically do not fall within that category of stringent statutory *stare decisis*."); Anita S. Krishnakumar, *Textualism and Statutory Precedents*, 104 VA. L. REV. 157, 186 (2018) (noting "[t]he distinction between text-parsing statutory interpretation and implementation tests").

74 *See* Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

apply in other constitutional cases "the penumbral reasoning in which Justice Douglas's opinion for the Court grounded it."[75]

Naturally, this argument has broad implications. Some scholars have taken the position that interpretive methodologies "are not binding on the Supreme Court or even on lower courts."[76] That would suggest that *Chevron* deference never qualified for stare decisis—only its ultimate holding (that the EPA's regulation was valid) did. Yet, as one commentator pointed out, some have "treat[ed] *Chevron* and *Auer* as the only exception to the rule that methodological decisions are not binding."[77] This commentator challenged that hypothesis by concluding that "these cases [were] proof of the rule, not the exception to it."[78]

To understand how *Chevron* worked within the context of stare decisis, consider that a typical *Chevron* case had three layers of decisions:

(1) The regulation is valid, because . . . .
(2) The agency's interpretation of the statute is permissible for the court's present purposes (APA review), and that is dispositive because . . . .

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75 Chad M. Oldfather, *Methodological Stare Decisis and Constitutional Interpretation*, *in* PRECEDENT IN THE UNITED STATES SUPREME COURT 135, 136 & n.2 (Christopher J. Peters ed., 2013).

76 Philip P. Frickey, *Interpretive-Regime Change*, 38 LOY. L.A. L. REV. 1971, 1976 (2005); *see also* Aaron-Andrew P. Bruhl, *Communicating the Canons: How Lower Courts React When the Supreme Court Changes the Rules of Statutory Interpretation*, 100 MINN. L. REV. 481, 488 (2015) ("The Court's methodological inconsistency arises, then, not just from pluralism and disagreement but also from its inability or unwillingness to give ordinary *stare decisis* effect to questions of interpretive methodology. The Court regards a particular case as authoritatively resolving a particular question—e.g., is a houseboat a 'vessel' within the meaning of a certain statute?—but the Court does not, or at least not to the same degree, regard that case as settling various questions of interpretive approach that might arise along the way—e.g., whether meaning is fixed at the time of enactment or can evolve in light of current needs, whether judges should adhere more to legislative purposes or dictionary definitions, which dictionary is preferred, and so on."); Evan J. Criddle & Glen Staszewski, *Against Methodological Stare Decisis*, 102 GEO. L.J. 1573, 1576–77 (2014) ("Despite widespread support for the doctrine of stare decisis on *substantive statutory issues*, federal courts generally do not give stare decisis effect to their *methodological decisions* in statutory interpretation cases."); Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 389 (2005) ("[T]he Court's actual cases make clear that when the Court issues opinions interpreting statutes, stare decisis effect attaches to the ultimate holding as to the meaning of the particular statute interpreted, but not to general methodological pronouncements, no matter how apparently firm.").

77 Christopher J. Baldacci, Note, *The Common Law of Interpretation*, 108 VA. L. REV. 1243, 1266 (2022); *see also infra* note 108 (discussing the related-yet-distinct doctrine of *Auer* deference).

78 Baldacci, *supra* note 77, at 1266.

(3) Courts adjudicating these kinds of challenges defer to reasonable agency interpretations of ambiguous statutory provisions.

No one would argue against attaching stare decisis effect to No. 1—once a court concludes that a specific regulation is valid, that determination is binding in future cases involving that particular regulation. Yet the stare decisis effect of No. 2, to the extent that it qualifies for stare decisis (given that it is not the holding of the case), is unclear: The court is not confirming that the agency's interpretation is correct—only that it is reasonable. Either way, the question arises about stare decisis and No. 3; already multiple layers removed from the holding, this methodological framework merely supplies the approach that the court should take in reviewing a challenge to a regulation. It is a form of reasoning, not a freestanding holding.

The Barnett and Walker amicus brief argued for stare decisis based in part on No. 1 and in part on No. 3. Along with arguing that "*Chevron* ha[d] come to be understood as a judicial interpretation of the Administrative Procedure Act" as opposed to an ordinary methodological approach, Barnett and Walker submitted that "the federal courts have relied on [*Chevron*] in thousands of cases" and that "Congress has legislated against that *Chevron* backdrop."[79] The reliance point went to No. 1—Barnett and Walker seemed to be suggesting that departing from *Chevron* could open up thousands of judicially-upheld regulations to challenge. Other scholars raised alarm bells about the "disruptive potential" of departing from *Chevron*.[80] (Meanwhile, Barnett and Walker's congressional backdrop point appeared to implicate No. 3 and implicitly favored the use of stare decisis for interpretive methodologies.)

Justice Barrett championed Barnett and Walker's concerns in part at oral argument in *Loper Bright*. Citing the Solicitor General's concerns that "litigants will be lining up for cases that were decided under step two to seek to reopen challenges to the agency's interpretation," Justice Barrett asked the challengers: "What do you have to say about the disruptive consequences of overruling?"[81] Paul Clement—the

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79 *See* Brief of Law Professors Kent Barnett and Christopher J. Walker as Amici Curiae in Support of Neither Party, *supra* note 19, at 2.

80 *See, e.g.*, Aaron-Andrew P. Bruhl, *What Would Happen to All of the Prior* Chevron *Cases in a Non-*Chevron *World?*, YALE J. ON REGUL.: NOTICE & COMMENT (Oct. 16, 2023), https://www.yalejreg.com/nc/what-would-happen-to-all-of-the-prior-chevron-cases-in-a-non-chevron-world-by-aaron-andrew-p-bruhl/ [https://perma.cc/KA89-D2FX].

81 Transcript of Oral Argument at 20, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024) (Nos. 22-451, 22-1219); *see also* Christopher J. Walker, *What* Loper Bright Enterprises v. Raimondo *Means for the Future of* Chevron *Deference*, YALE J. ON REGUL.: NOTICE & COMMENT (June 28, 2024), https://www.yalejreg.com/nc/what-loper-bright-enterprises-v-raimondo-means-for-the-future-of-chevron-deference/ [https://perma.cc/W65G-MU8E]

attorney for Loper Bright Enterprises—responded that the Court had, in other contexts, "moved away dramatically from certain methods of interpretation . . . . But that didn't mean that every decision that was decided in the bad old days was overruled ipso facto."[82] Justice Kagan drove the point home; she commented that "there's even more reason not to reverse [*Chevron*] because there have been 70 Supreme Court decisions relying on *Chevron* [and] . . . 17,000 lower court decisions relying on *Chevron*."[83]

C. *What Happened in* Loper Bright

In *Loper Bright*, the Supreme Court departed from the *Chevron* framework. In so doing, the Court articulated a new standard for judicial review of agency interpretations of law: no more deference to administrative agencies. But the Court was careful to specify the reach of its ruling. The *Loper Bright* opinion established that "prior cases that relied on the *Chevron* framework" should not be disturbed.[84] To be sure, the Court explained that stare decisis could not save the *Chevron* framework.[85] Nevertheless, the Court's inclusion of the "prior cases" paragraph appeared to blunt the prospect of challengers relitigating regulations that courts had previously upheld under *Chevron*.

Loper Bright was nominally about a rule that the NMFS promulgated pursuant to the MSA.[86] The case arose out of a challenge to a NMFS rule that required fishing vessels to pay for government-certified monitors on their boats.[87] The statute was silent on who needed to pay for the monitors, and NMFS interpreted this silence as an ambiguity justifying the agency in pinning the responsibility on private industry (rather than having the government bear the cost).[88] When vessel owners challenged the rule, the government claimed *Chevron* deference for its interpretation, and the D.C. Circuit rejected the challenge based on an explicit application of *Chevron*.[89] But the actual holding of the D.C. Circuit in its *Loper Bright* opinion was not that courts should defer under *Chevron* to reasonable agency interpretations of ambiguous

("[O]ne of the biggest concerns expressed at oral argument was that overruling *Chevron* would open the litigation floodgates to challenge hundreds of prior agency statutory interpretations upheld by courts under *Chevron*.").

82 Transcript of Oral Argument, *supra* note 81, at 21.

83 *Id.* at 35.

84 *Loper Bright*, 144 S. Ct. at 2273.

85 *See id.* at 2270–73.

86 *See id.* at 2255.

87 *Id.* at 2255–56.

88 *See id.* at 2255.

89 *See* Loper Bright Enters. v. Raimondo, 45 F.4th 359, 370 (D.C. Cir. 2022), *vacated*, 144 S. Ct. 2244 (2024).

statutory provisions. Nor was it that NMFS's "interpretation of the Act to allow industry-funded monitoring was reasonable."[90] Those threshold determinations constituted the court's reasoning. Instead, the D.C. Circuit's holding was that the Service's regulation was valid in the face of an APA challenge to the regulation's consistency with law.[91] The fishers appealed from this ruling.

The Supreme Court granted review, but it limited the Question Presented to the following: "Whether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency."[92] The Court did not grant another question that the fishers asked: "Whether, under a proper application of *Chevron*, the MSA implicitly grants NMFS the power to force domestic vessels to pay the salaries of the monitors they must carry."[93] Thus, the Court's review had very little to do with the merits of the particular agency's actual interpretation in the case.

The Court's opinion reflected this circumscribed review. Chief Justice Roberts's opinion discussed the underlying regulatory issue that framed the case,[94] but the Court's analysis focused exclusively on the broader methodological issue of how to review agency statutory interpretation. The opinion began by mentioning the Court's "decision in *Chevron*" and the doctrine of review that it heralded; the Court framed the question as "whether that *doctrine* should be overruled."[95] But in the end, the Court declared that "*Chevron* is overruled," using *Chevron* (and not "doctrine") as the noun.[96] The NMFS regulation was discussed as background, but the case had very little to do with the regulation itself.

The whole process resembled the following sort of case: A legislature enacts a bill banning vehicles from entering a certain park. During the debate in the legislature, the bill's lead sponsor states, "Of course, the bill would not apply in the case of an emergency if an ambulance enters a park." After the law's enactment, a hospital dispatches an ambulance to rescue a man experiencing a medical episode in the park. The ambulance enters the park. The government pursues a fine from

90 *Id.*

91 *See id.* at 371.

92 Petition for Writ of Certiorari, *supra* note 56, at i–ii; *see also* Loper Bright Enters. v. Raimondo, 143 S. Ct. 2429 (2023) (mem.) (granting certiorari "limited to Question 2 presented by the petition").

93 Petition for Writ of Certiorari, *supra* note 56, at i.

94 *Loper Bright*, 144 S. Ct. at 2254–55.

95 *Id.* at 2254 (emphasis added).

96 *Id.* at 2273.

the hospital for violating the no-vehicles-in-the-park law. The hospital resists, arguing that the law does not apply in this situation. Adjudicating the dispute, a court determines that, when interpreting a law, legislative history is dispositive. Citing the statement of the bill's lead sponsor about emergency exceptions, the court rules for the hospital. The government appeals—and its appeal presents the question whether a court must instead start with the text of the statute (and not the legislative history) when interpreting a law.[97]

The hypothetical question on appeal in the vehicles case has nothing to do with the underlying interpretation. Indeed, the appellate court could rule in favor of the government and the government could still lose on remand because other principles of interpretation—like the rule of lenity, for example—counsel in favor of ruling for the hospital even when starting with the text.

Stepping back a bit: In *Loper Bright*, the question whether to defer to reasonable agency interpretations of ambiguous statutes was ancillary to the question whether NMFS's interpretation of the MSA was reasonable. And that question was itself ancillary to the ultimate issue: whether the court should "set aside" the regulation under the APA.[98] The difficulty with these cases is that section 706 of the APA provides a framework for review ("the reviewing court shall decide all relevant questions of law"), provides a reason for why a regulation might be legally deficient (the agency action is "not in accordance with law"), and specifies what a court is supposed to do when a regulation is inconsistent with the underlying statute ("hold unlawful and set aside [the] agency action").[99] So, the regulatory challenge is governed by section 706. But in determining whether a litigant can maintain such a challenge under section 706, the court must look to the particular statute that underlies the regulation in question. The case is really about the regulation's validity (and whether to "set" it "aside"—whatever that means[100]); the consistency of the agency's interpretation with the relevant statute was merely an input at *Chevron* Step Two.

With these background principles in mind, consider how the Court contended with stare decisis in *Loper Bright*. To start, the Court explained that stare decisis was not a strong enough reason to carry on

97 This hypothetical is based loosely on the "vehicles in the park" problem famously presented by H.L.A. Hart. *See* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958).

98 5 U.S.C. § 706(2) (2024).

99 *See id.* § 706.

100 For a robust debate on the meaning of "set aside" in APA section 706, compare John Harrison, *Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies*, 37 YALE J. ON REGUL. BULL. 37, 42–46 (2020), with Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO. WASH. L. REV. 1121, 1162–73 (2020).

the deferential framework to which *Chevron* had given rise.[101] The Court applied the usual stare decisis factors to *Chevron*—quality of the precedent's reasoning, workability, and reliance—but it analyzed these factors as though the case's core holding was that courts should defer to reasonable agency interpretations of law.[102] It was not. Rather, the case's core holding was that the EPA bubble-concept regulation was valid.[103] The *Loper Bright* Court criticized the *Chevron* opinion for failing to "grapple[] with the APA,"[104] but (as discussed earlier) *Chevron* was not even an APA case.

After presenting the case against stare decisis for *Chevron* deference (the methodology, not the APA holding), the Court laid down a marker: "[W]e do not call into question prior cases that relied on the *Chevron* framework."[105] The Court explained: "The holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory *stare decisis* despite our change in interpretive methodology."[106] As the Court put it, "[m]ere reliance on *Chevron* cannot constitute a 'special justification' for overruling such a holding, because to say a precedent relied on *Chevron* is, at best, 'just an argument that the precedent was wrongly decided.' That is not enough to justify overruling a statutory precedent."[107] The Court thus framed "holdings . . . that specific agency actions are lawful" as "statutory precedent[s]."[108]

For the careful observer who read the Barnett and Walker amicus brief, grappled with the government's warnings about the scores of *Chevron*-based precedents on the books, and listened to Justice Barrett at oral argument, this paragraph was not a surprise. But the way that the Court worded this paragraph was eye-opening. Statutory stare decisis—the idea that "specific interpretations of statutory provisions

101 *See Loper Bright*, 144 S. Ct at 2270–73.

102 *See id.*; *see also* Walker, *supra* note 81 ("On *stare decisis*, the Chief Justice deftly frame[d] [*Chevron*] as a judge-made doctrine that is in conflict with the plain text of the APA, such that we are not dealing with statutory *stare decisis* but a much weaker form of precedential weight.").

103 *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 866 (1984), *overruled by*, *Loper Bright*, 144 S. Ct. 2244.

104 *See Loper Bright*, 144 S. Ct. at 2270.

105 *Id.* at 2273.

106 *Id.*

107 *Id.* (quoting Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 266 (2014)).

108 *Id.* This approach tracks with one that Justice Gorsuch posited in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), which centered on the doctrine of *Auer* deference (a *Chevron* deference-like rule for reviewing agency interpretations of their own regulations). *See id.* at 2444 (Gorsuch, J., concurring in judgment) (contrasting the stare decisis weight accorded to "*Auer*'s narrow holding about the meaning of the regulation at issue in that case" and "the specific holdings in other cases where [the] Court has applied *Auer* deference" with "*Auer*'s broader deference framework").

receive a unique, elevated form of deference going forward"[109]—applies to judicial resolution of "questions of statutory construction."[110] The Court thus appeared to instruct that APA section 706 "holdings . . . that specific agency actions are lawful" are statutory holdings.[111] That description may conflate two separate types of holdings: regulatory holdings and statutory holdings.

To be sure, this paragraph will discourage litigants in practice from challenging regulations that courts—especially the Supreme Court—have upheld under *Chevron*.[112] To the extent that individual Justices (perhaps Justice Barrett) worried about *Loper Bright* having a destabilizing effect on the regulatory state by opening up challenges on previously upheld regulations, this paragraph appears to have been aimed at mollifying those concerns. At the least, the Court appears unwilling to revisit the seventy or so decisions in which it relied on *Chevron* to uphold a regulation.[113] *Chevron* itself is one of those cases, and for that reason, *Loper Bright* does not actually overrule or overturn *Chevron*.[114] And as to whether the Court's "statutory stare decisis" language applies to the scores of lower court opinions: The answer is unclear—especially in light of the fact that Justice Barrett has argued that lower courts should not follow the Supreme Court's practice of statutory stare decisis at all.[115] In the end, although the Court's *Loper Bright* ruling appears contemplated only to be prospective, the language of its statutory stare decisis paragraph offers some hints about the limits of the Court's opinion in cases involving regulations previously upheld under *Chevron*.

II. REGULATORY—NOT STATUTORY—STARE DECISIS

The stare decisis paragraph in *Loper Bright* was perhaps a necessary inclusion in the opinion to hold the majority together. But the wording of the paragraph raises more questions than it answers. The Supreme Court took great pains to prevent its *Loper Bright* opinion from calling prior *Chevron*-grounded cases into question. To protect these decisions, the Court called upon statutory stare decisis as its shield. As the Court put it, "[t]he holdings of [prior cases that relied on the *Chevron* framework] that specific agency actions are lawful . . . are still subject

109 Randy J. Kozel, *Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis*, 97 TEX. L. REV. 1125, 1125 (2019).

110 BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 333 (2016).

111 *See Loper Bright*, 144 S. Ct. at 2273.

112 *But see* Walker, *supra* note 81 ("I am not too confident this [paragraph] will do the trick, but time will tell.").

113 *See* Barnett & Walker, *supra* note 64, at 477–78.

114 *See Loper Bright*, 144 S. Ct. at 2273.

115 *See* Barrett, *supra* note 71, at 318.

to statutory *stare decisis* despite [the Court's] change in interpretive methodology."[116] But statutory stare decisis is a curious basis for safeguarding the regulatory-validity holdings of APA cases.

The Court rested its statutory stare decisis discussion on a principle that has had some relevance as textualism has become the leading methodological approach in statutory interpretation: Statutory holdings do not lose their precedential weight due to changes in interpretive methodology.[117] As the Court appears to see it, *Chevron*-grounded precedents are like statutory precedents in which a court reached the wrong result because it took the wrong methodological tack—e.g., elevating legislative history over the plain text of a law. Thus, affording "statutory stare decisis" to the *Chevron*-grounded holdings is a way of saying that these cases rested on interpretations—however incorrect—of statutes. The problem is that the point of these cases was not statutory interpretation; rather, in each of these cases, a relaxed form of "statutory interpretation" was a step along the path toward answering the ultimate question of whether a given regulation passed muster under the APA.

This Part considers the nature of APA cases and illuminates the role that *Chevron* played in adjudication of APA challenges. Statutory stare decisis preserves statutory holdings. The Supreme Court describes *Chevron*-grounded precedents as statutory holdings, but that description misses an important final step in these cases. In the end, a court relying on *Chevron* to decide an APA challenge was not asking what a statute meant; it was asking whether a regulation was valid. Statutory interpretation was relevant to that determination in a subset of APA cases, and *Chevron* deference helped to guide the courts' respective adjudicative journeys. But once one understands the "statutory interpretation" part of an APA case as a mere waystation along the path toward deciding the ultimate question ("Should the court set aside the regulation?"), the Court's statutory stare decisis paragraph appears incongruent. Moreover, because a challenge to an agency's interpretation of the law is merely one avenue available to a litigant under the APA, the statutory stare decisis paragraph does not foreclose a host of other challenges to regulations that courts have previously upheld at *Chevron* Step Two.

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116 *Loper Bright*, 144 S. Ct. at 2273.
117 *See id.* (citing CBOCS W., Inc. v. Humphries, 553 U.S. 442, 457 (2008)).

A. *Stare Decisis in an Era of Methodological Change*

Over the last several decades, textualism has taken center stage at the Supreme Court in cases involving statutory interpretation.[118] As one scholar explains, "textualism is a method of statutory interpretation that aims to identify the plain meaning of a statute's text—that is, the simple, basic, obvious meaning."[119] Textualism was not always the prevailing interpretive methodology in statutory cases. And this methodological shift has had a real impact on the result in many cases. But as textualism has gained a foothold, the Court has taken great care to emphasize that a change in prevailing interpretive methodology is not a sufficient reason to overcome the strength of statutory stare decisis.[120] This approach has the practical effect of preventing the switch to textualism from upending scores of settled statutory precedents. This limited impact on prior cases has lowered the cost of shifting from an out-of-favor methodology—e.g., purposivism—to textualism.

Loper Bright is, in part, a story about changes in statutory interpretation at the Supreme Court. Walker—noted earlier for his stare decisis-inspired opposition to eliminating *Chevron* deference—has observed that conservatives initially supported *Chevron* deference.[121] Leading the way was then-Judge (and eventually Justice) Scalia—a venerated figure in the conservative legal movement.[122] Perhaps Justice Scalia's greatest legacy is his support for textualism as the correct method of interpreting statutes.[123] This support reflected his deep commitment to clear rules for government actors—in the case of textualism, judges—to follow.[124] And in *Chevron* deference, Justice Scalia saw another "background rule of law"—one "against which Congress [could] legislate."[125] To Justice Scalia, *Chevron* deference was a way to "permit needed flexibility, and appropriate political participation, in

118 *See generally* Jennifer L. Mascott & Eli Nachmany, *Answered by Text*, 48 HARV. J.L. & PUB. POL'Y 33 (2025) (discussing statutory interpretation in recent Supreme Court cases).

119 Krishnakumar, *supra* note 73, at 204.

120 *See, e.g.*, *Loper Bright*, 144 S. Ct. at 2273.

121 *See* THE FEDERALIST SOCIETY, Loper Bright *and the Next Steps for* Chevron *Deference at the Supreme Court*, at 14:56 (YouTube, Oct. 19, 2023), https://www.youtube.com/watch?v=C5bo8e023vU [https://perma.cc/2GG6-MMGE] (describing the origins of conservative backing of *Chevron* deference).

122 *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 838 (2001).

123 *See generally* Diarmuid F. O'Scannlain, Remarks, *"We Are All Textualists Now": The Legacy of Justice Antonin Scalia*, 91 ST. JOHN'S L. REV. 303 (2017).

124 *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1183 (1989).

125 Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517.

the administrative process."[126] That was especially appealing to conservatives, who had come by then "to see courts—and, in particular, the liberal-controlled D.C. Circuit—as a 'roadblock' to White House [deregulatory] initiatives" during the Reagan administration.[127] And at the same time as he was touting *Chevron* deference, Justice Scalia was criticizing the courts for failing to adhere to the text of the statutes that they were charged with interpreting.[128]

Chevron deference may make sense if one does not trust courts to do statutory interpretation correctly. Faced with a choice between courts adopting nontextualist readings of statutory authority and agencies adapting their interpretations of their own authorities in response to presidential elections, one can be forgiven if she opts for the latter. At worst, such an approach at least "respects democratic accountability"[129] without necessarily losing the benefits of correct interpretations. But as the judiciary became more textualist, particularly at the court of final review,[130] a statutory interpretation hawk might have concluded that the benefits of *Chevron* deference no longer outweighed the costs.[131] Relatedly, *Chevron* deference itself became less relevant—"the ascent of textualism as a dominant methodology of statutory interpretation over the past generation [meant] that judges [were] more likely to find statutes unambiguous and less likely to defer to agencies—even if *Chevron* [had] survive[d]."[132]

126 *Id.*

127 Gregory A. Elinson & Jonathan S. Gould, *The Politics of Deference*, 75 VAND. L. REV. 475, 509 (2022).

128 *See* Chase Wathen, Note, *Textualism Today: Scalia's Legacy and His Lasting Philosophy*, 76 U. MIA. L. REV. 864, 867 (2022).

129 Sunstein, *supra* note 54, at 1626.

130 *See* Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 HARV. L. REV. 515, 516 (2023) ("A majority of the Justices [on the U.S. Supreme Court] today are self-described textualists.").

131 The rise in political polarization did not help matters, either. Richard Pierce, a one-time defender of *Chevron* deference, came to oppose *Chevron*'s rule as "[p]olitical polarity combined with *Chevron* [created] . . . radical changes in the meaning of numerous laws every few years." Richard J. Pierce, Jr., *The Combination of* Chevron *and Political Polarity Has Awful Effects*, 70 DUKE L.J. ONLINE 91, 92 (2021) (citing the example of the FCC changing its interpretation of a particular statute four times in fifteen years); *see also* Eugene Scalia, Chevron *Deference Was Fun While It Lasted*, WALL ST. J. (Jan. 9, 2024, at 17:46 ET), https://www.wsj.com/articles/chevron-deference-was-fun-while-it-lasted-legal-scotus-partisan-regulation-changes-bddbfe27 [https://perma.cc/7FMW-8H75] ("A doctrine meant to give power to experts ended up promoting partisan lurches in policy instead."); Aaron L Nielson, *Deconstruction (Not Destruction)*, DAEDALUS, Summer 2021, at 143, 148 (criticizing "zig-zagging regulation").

132 Elinson & Gould, *supra* note 127, at 550. To take one notable example, self-described textualist Judge Kethledge wrote in 2017 (after nearly a decade on the Sixth Circuit) that he had "never yet had occasion to find a statute ambiguous" and thus "never had occasion to reach *Chevron*'s step two in any of [his] cases." Raymond M. Kethledge, *Ambiguities*

The shift to textualism was not ignorant of the potential disruption that it could cause. Famously, Justice Scalia inaugurated a "textualist revolution"[133] that "reshaped statutory interpretation."[134] But revolutions can be disruptive—especially in a field like statutory interpretation in which judges do not write on a blank slate. And in practice, changing the prevailing interpretive methodology could require courts to reach different interpretations in cases that they had already decided. The Supreme Court, however, had a solution that was consistent with the strong weight that it ordinarily accords to statutory precedents. In *CBOCS West, Inc. v. Humphries*, the Court explained that changes in interpretive methodology cannot "justify reexamination of well-established prior law."[135] The Court in *CBOCS West* took the position that "[p]rinciples of *stare decisis* . . . demand respect for precedent whether judicial methods of interpretation change or stay the same."[136]

The Court's experience with this principle has demonstrated the idea's practical impact: lowering the cost of methodological change. Jonathan Remy Nash identifies two examples of how this principle has manifested in real cases. First, Nash cites the Court's shift, in a 1990 case, to a rebuttable presumption of equitable tolling in suits against the United States.[137] As Nash reports, the Court in subsequent cases has adhered—as a matter of statutory stare decisis—to prior precedents that had not applied the presumption and had disallowed equitable tolling in certain statutory contexts.[138] Second, Nash shows how this approach works with textualism in particular. Nash explains that when the Court took a more text-based tack to the question of whether a statute includes an implied private right of action, it did not disturb prior holdings that relied on the old framework (which focused on legislative purpose in contradistinction to text).[139]

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and Agency Cases: Reflections After (Almost) Ten Years on the Bench, 70 VAND. L. REV. EN BANC 315, 320, 323 (2017). Moreover, as the Supreme Court became more textualist, it began to resolve agency cases on a consistent basis without resorting to *Chevron* deference. *See* Eli Nachmany, *SCOTUS Demonstrates Why We No Longer Need* Chevron *Deference*, NEWSWEEK (July 6, 2022, at 06:00 ET), https://www.newsweek.com/scotus-demonstrates-why-we-no-longer-need-chevron-deference-opinion-1721130 [https://perma.cc/N5NV-SPVM] (describing the Court's phenomenon of ignoring *Chevron* in the years leading up to *Loper Bright*).

133 William Baude, *The 2023 Scalia Lecture: Beyond Textualism?*, 46 HARV. J.L. & PUB. POL'Y 1331, 1334 (2023).

134 Jonathan R. Siegel, *The Legacy of Justice Scalia and His Textualist Ideal*, 85 GEO. WASH. L. REV. 857, 858 (2017).

135 CBOCS W., Inc. v. Humphries, 553 U.S. 442, 457 (2008).

136 *Id.*

137 *See* Jonathan Remy Nash, Chevron *Stare Decisis in a Post-*Loper Bright *World*, 110 IOWA L. REV. ONLINE 180, 196 (2025) (discussing *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990)).

138 *See id.* at 196–97.

139 *See id.* at 197–98.

This approach lowers the cost of shifting from one methodological framework to another. Whatever the merits or demerits of a methodological change, the Court's "preservation—on statutory *stare decisis* grounds—of holdings that predate that change"[140] allows jurists and litigants to isolate their consideration of the change to those merits and demerits. True, this approach may introduce some inconsistency into the way that similar statutes are interpreted. But preserving prior statutory precedents allows courts to prevent methodological change from disrupting settled law (and the reliance interests that settlement has generated). This nondisruption would be attractive to a jurist who prioritizes stability—and it lowers the costs of getting the methodological questions right for future cases.

B. Statutory Stare Decisis in APA Cases

Nondisruption seems to have been the Court's objective when it added the statutory stare decisis paragraph to *Loper Bright* and cited *CBOCS West*. Indeed, the Court likely desired that its departure from *Chevron* deference come at the lowest possible cost to the law's stability. The paragraph thus represents an attempt to minimize the relitigation of regulations that courts have upheld previously. But the terminology that the Court used—"statutory stare decisis"—is a questionable fit for prior applications of *Chevron* deference. That is because these precedents are not statutory holdings. The statutory-interpretation element of a prior *Chevron*-deference precedent is not the same as a statutory holding—both because the ultimate question in the case would have involved a given regulation's validity under the APA and because the prior court at *Chevron* Step Two would not have concluded that the best reading of the underlying statute was necessarily the one that the agency had proffered. Nor, under *Chevron*, did it need to be. But recasting these decisions as statutory precedents raises some difficult questions.

Setting aside this Article's issues with the wording of the statutory stare decisis paragraph in *Loper Bright*, the Court's purpose was clear: protect settled decisions. The first question that one might have asked in the wake of *Loper Bright* was whether the Court had declared open season on regulations that had previously been upheld at *Chevron* Step Two. That was a consequential question, and it was one that piqued at least Justice Barrett's interest (as the oral argument demonstrated). Without the statutory stare decisis paragraph, the Court might have inaugurated a new, chaotic era of regulatory litigation—forcing courts to revisit a substantial number of regulations that agencies, legislators,

140 *Id.* at 196.

regulated entities, and everyday Americans had understood to be valid. At the Supreme Court alone, *Chevron* had been cited "in approximately seventy . . . decisions."[141] And in the lower courts, reopening prior *Chevron*-grounded precedents could have meant the relitigation of thousands of cases.[142] The point of *Loper Bright* was to change a wrongheaded approach to judicial review of agency statutory interpretations in APA cases, and the Court appears to have seen the reopening of prior *Chevron* cases (and the resulting destabilization) as a potentially unhappy consequence of this needed change. For that reason, the Court did what it usually does when it worries about a methodological change unsettling the law: declare that the change would not upset prior precedents that relied on the old methodology.

But the Court's wording was confusing. In borrowing the *CBOCS West* approach from the universe of statutory stare decisis cases, the Court in *Loper Bright* seemed to situate prior *Chevron*-grounded precedents themselves in that universe as well. They do not belong there. The Court acknowledged that "[t]he holdings of those cases" were that "agency actions are lawful," not that the agency's particular statutory interpretation was correct.[143] But even that sentence is puzzling. In it, the Court describes "the Clean Air Act holding of *Chevron* itself,"[144] yet this could mean two things. One possibility is that the *Loper Bright* Court is talking about the *Chevron* Court's ultimate holding that the Reagan administration's "bubble concept" regulation was valid in light of the Clean Air Act's judicial review provision.[145] Because *Chevron* was not an APA case, the *Chevron* Court's conclusion that the regulation was valid was technically a "Clean Air Act holding." Yet there is another possibility that seems to make more sense in the context of the opinion—even if not in the context of administrative law more generally. In referring to the "Clean Air Act holding" of *Chevron*, the *Loper Bright* Court could be referencing the *Chevron* Court's determination that the Reagan-era regulation constituted a permissible interpretation of the Clean Air Act for purposes of judicial review.[146] Yet allowing that an agency's interpretation is "permissible" for these purposes is not the same as holding that the agency's interpretation is correct.

What does "statutory stare decisis" mean in this latter context? All that the *Chevron* Court determined was that the agency's interpretation

141 Barnett & Walker, *supra* note 64, at 478.

142 *See id.* at 477–78.

143 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

144 *Id.*

145 Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 840, 842 (1984), *overruled by*, *Loper Bright*, 144 S. Ct. 2244.

146 *Id.* at 866.

of the Clean Air Act was "permissible."[147] This determination carried the implicit premise that other interpretations could also be permissible. That is because the meaningfulness of an interpretation's being "permissible" requires one to work within the now-discarded *Chevron* framework: Regulations grounded in permissible interpretations survive APA review. But the "permissible" determination is different from a true statutory holding, in which a court reaches a conclusion about the one true meaning of a given statute. The Court's language obscures the exact nature of the "holding" in an APA case.

Nash hypothesizes four possibilities for what this paragraph means. First, "the interpretation that the Supreme Court previously found to be 'lawful' is now locked in."[148] Second, "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."[149] Third, the agency can either stick with the interpretation underlying the regulation that the Court previously upheld or switch to the best interpretation of the statute.[150] Fourth, the agency can stick with that initial interpretation or switch to any interpretation that is closer to the best interpretation of the statute (up to and including that "best" interpretation).[151]

Nash pours cold water on the third interpretation of the statutory stare decisis paragraph,[152] even though that interpretation seems to be the closest approximation of what the Court was trying to do there.[153] Nevertheless, Nash's dichotomy is downstream from the inconsistency between "statutory stare decisis" and APA holdings. In future cases, courts will parse the meaning—and applicability—of the paragraph. Part III offers some thoughts on what that might look like. But the Court's invocation of statutory stare decisis for APA holdings does something else: It misrepresents what courts were doing when they applied *Chevron* deference.

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147 *Id.*

148 Nash, *supra* note137, at 191.

149 *Id.* at 192.

150 *See id.* at 193.

151 *See id.* at 194.

152 *See id.* at 193–94 (asking why an agency should not be able to revise the regulation to get closer to the best interpretation, even if not reaching the best interpretation—as Nash's fourth proposed possibility would allow).

153 *See infra* Section III.A.

C. *Available Avenues for Upsetting* Chevron-*Grounded Precedents*

The Court's decision in *Loper Bright* does not foreclose every possible challenge to a regulation that a court has upheld previously under *Chevron*. The Court's decision in *Corner Post*—issued shortly after *Loper Bright* came down—amplifies the importance of this fact. This Part discusses two areas where questions remain. First, courts will need to delineate the scope of possible APA challenges that a litigant can raise against a regulation that a prior court has upheld under *Chevron*. Second, lower courts will need to determine the applicability of the statutory stare decisis paragraph to their work. The answers to these questions will go a long way toward determining how successful the Court will be at achieving its apparent goal of preventing widespread regulatory destabilization.

1. New Possibilities After *Corner Post*

Loper Bright was not the only major administrative law case that the Supreme Court decided in October Term 2023. In addition to departing from *Chevron* deference, the Court issued a consequential ruling about the statute of limitations for APA lawsuits. The Court's opinion in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System* clarified that many longstanding regulations remain open to facial APA challenge by the right plaintiff.[154] The opinion's interpretation of the APA is particularly important when considered in conjunction with *Loper Bright*. And understanding the interaction between *Corner Post* and the statutory stare decisis paragraph in *Loper Bright* offers some hints about how plaintiffs in agency cases might relitigate regulations that have been upheld previously under *Chevron*. At bottom, even a longstanding regulation could be vulnerable to legal challenge if the regulation injures a new potential plaintiff—in some cases, even if once upheld under *Chevron*.

Corner Post did not garner quite as much fanfare as *Loper Bright*, but it was nevertheless a critical case. The debate about *Chevron* deference is a debate about the merits in APA cases—it defines the framework for ascertaining whether a regulation is consistent with the underlying statute. By contrast, *Corner Post* concerned justiciability. Statutes of limitation establish the time period within which a litigant may bring a given cause of action. For lawsuits against the United States, the default limitations period is six years.[155] The question in *Corner Post* was whether, in an APA lawsuit bringing a facial challenge to a

154 *See* Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 144 S. Ct. 2440, 2450 (2024).

155 *See* 28 U.S.C. § 2401(a) (2018).

rule, this six-year period began to run after the promulgation of a rule or after an individual plaintiff was aggrieved by the rule.[156] In other words: When does an APA claim "accrue"?[157]

The Court concluded that "[a] claim accrues when the plaintiff has the right to assert it in court—and in the case of the APA, that is when the plaintiff is injured by final agency action."[158] Before *Corner Post*, the majority position was that a facial claim accrued as soon as a rule was issued—and expired after six years from that date.[159] Thus, in several circuits, "a person's right to sue a federal agency may [have been] time-barred before it exist[ed]."[160] To be sure, this position may have had some practical benefits; it arguably promoted stability by setting an end date for when a regulation could be subject to a facial challenge under the APA. Dissenting in *Corner Post*, Justice Jackson lamented that the Court's decision meant that "there is effectively no longer any limitations period for lawsuits that challenge agency regulations on their face."[161] But the Court, in a majority opinion by Justice Barrett, explained that the statute required this result.[162]

To be sure, *Corner Post* did not change course for as-applied challenges. For cases brought by entities regulated directly by given rules, courts long have acknowledged that statutes of limitations for as-applied APA challenges to those rules begin to run when the government attempts to enforce those regulations against those entities.[163] *Corner Post* required the Court to evaluate the question of a facial challenge because the rule in question did not directly regulate the plaintiff in the case: Corner Post, Inc.[164] As the majority explained, "Corner Post is a truckstop and convenience store located in Watford City, North Dakota," that "accepts debit cards as a form of payment."[165] It challenged a rule regulating the fees that banks could charge on transactions involving these debit cards.[166] But because "Corner Post is not a bank regulated by the rule," its only option as "[a]n unregulated

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156 *See Corner Post*, 144 S. Ct. at 2447–48.

157 *Id.*

158 *Id.* at 2448.

159 *See* John Kendrick, *(Un)Limiting Administrative Review:* Wind River*, Section 2401(A), and the Right to Challenge Federal Agencies*, 103 VA. L. REV. 157, 158–59 (2017).

160 *Id.*

161 *Corner Post*, 144 S. Ct. at 2470 (Jackson, J., dissenting).

162 *See id.* at 2450 (majority opinion).

163 *See* BENJAMIN M. BARCZEWSKI & JONATHAN M. GAFFNEY, CONG. RSCH. SERV., LSB11197, *CORNER POST* AND THE STATUTE OF LIMITATIONS FOR ADMINISTRATIVE PROCEDURE ACT CLAIMS 3 (2024).

164 *See Corner Post*, 144 S. Ct. at 2460 (Kavanaugh, J., concurring).

165 *Id.* at 2448 (majority opinion).

166 *See id.*

plaintiff" was to bring a facial challenge seeking vacatur of the rule.[167] And because Corner Post was not incorporated until 2017 and did not come into business until 2018, the statute of limitations had already expired for the rule in question, which was issued in 2011, by the time that Corner Post could sue.[168] By allowing Corner Post's lawsuit to proceed, the Court opened up older regulations for challenge by a substantial number of new potential plaintiffs: newly formed entities whom a longstanding regulation has harmed somehow.

Now, imagine a world in which the Court decided *Corner Post* but did not include the statutory stare decisis paragraph in *Loper Bright*. Had the Court gone a step further in *Loper Bright* and affirmatively disavowed any analogy to the stare decisis effect of prior statutory precedents in light of methodological change, *Corner Post* could have opened up a large number of *Chevron*-grounded precedents to challenge if the right plaintiffs materialized. Some may say that this would have been a good result; clearing the books of regulations in excess of statutory authority is perhaps a worthy goal. Yet countervailing interests—such as reliance and stability—undoubtedly exist.

Importantly, the Court *did* include the statutory stare decisis paragraph—and its inclusion may have assuaged any policy concerns that the majority might have had about the rule that it announced in *Corner Post*. Justice Barrett's response to Justice Jackson's dissent may illustrate this point. The dissent had expressed concerns about the policy consequences of the Court's opinions in *Corner Post* and *Loper Bright* taken together. On this subject, Justice Jackson warned that the combination of *Corner Post* and *Loper Bright* would "devastate the functioning of the Federal Government."[169] Justice Barrett, writing for the majority, replied that this concern was unfounded. Justice Barrett mused that "[p]erhaps the dissent believes that the Code of Federal Regulations is full of substantively illegal regulations vulnerable to meritorious challenges; or perhaps it believes that meritless challenges will flood federal courts that are too incompetent to reject them."[170] Dismissing these concerns, Justice Barrett stated that the majority had "more

167 *Id.* at 2460 (Kavanaugh, J., concurring). Justice Kavanaugh's concurrence made a strong case for the availability of vacatur in APA cases—adding another voice to the pro-vacatur side of the ongoing debate. *See id.; supra* note 100; *see also* Eli Nachmany, *Vacatur as Complete Relief*, 2024–2025 CATO SUP. CT. REV. 77 (2025) (situating a more-recent Supreme Court case, *Diamond Alternative Energy, LLC v. EPA*, 145 S. Ct. 2121 (2025), as another example of this phenomenon).

168 *See Corner Post*, 144 S. Ct. at 2448.

169 *Id.* at 2482 (Jackson, J., dissenting). The dissent charged that *Corner Post*, combined with *Loper Bright*, would create a situation in which "every legal claim conceived of in [the forty years since *Chevron* was decided]—and before—[could] possibly be brought before courts newly unleashed from the constraints of any such deference." *Id.*

170 *Id.* at 2459–60 (majority opinion).

confidence in both the Executive Branch and the Judiciary."[171] One possible explanation for Justice Barrett's confidence in this assertion is the existence of the statutory stare decisis paragraph in *Loper Bright*. Even if the *Code of Federal Regulations* is full of illegal regulations or courts are too incompetent to reject challenges to lawful regulations, the paragraph establishes limits on relitigation of a substantial amount of settled law.

The upshot of *Corner Post* is that a plaintiff now can bring a facial APA challenge to a regulation that has been on the books for many years—assuming that the plaintiff itself has suffered the claim-accruing injury within six years of the lawsuit's initiation. The extension of the potentially unlimited statute of limitations to facial challenges could open up a whole new universe of potential plaintiffs who can bring APA challenges to old regulations on the grounds that agencies have exceeded their respective statutory authorities in promulgating those rules. And now, after *Loper Bright*, the agency defendants in these cases cannot claim *Chevron* deference. Yet the statutory stare decisis paragraph in *Loper Bright* prevents at least some regulations from being challenged, at least on certain grounds. And the *Corner Post* majority seems implicitly to hang its hat on this paragraph when responding to the dissent's policy concerns.

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171 *Id.* at 2460. This response from Justice Barrett to Justice Jackson in *Corner Post* could have been a rejoinder to a Justice who sought unsuccessfully to include the statutory stare decisis paragraph in *Loper Bright*. One could dismiss the paragraph as betraying a belief either "that the Code of Federal Regulations is full of substantively illegal regulations vulnerable to meritorious challenges" or "that meritless challenges will flood federal courts that are too incompetent to reject them." *Id.* at 2459–60. And Nash criticizes the "disuniformity" that will result from privileging those regulations that happened serendipitously to have been litigated in the past and upheld under *Chevron*. *See* Nash, *supra* note 137, at 199–200 (asserting that this "glaring disuniformity . . . is likely to have a deleterious effect on the legitimacy of both the court system and the executive branch," *id.* at 200). But the Court's decision to carve out *Chevron* Step Two-grounded precedents from future challenges makes some sense, even if the challenges would be meritorious. The existence of a precedent—a prior judicial determination that actually determined validity—elevates the regulation to the status of one upon which individuals and entities are justified to develop reliance interests. The presence of such a precedent does not mean that the regulation is per se immune from any future challenges, *see infra* Section II.C.2, but the Court's decision to give special weight to actual precedents is consistent with its longstanding approach. *See* Kimble v. Marvel Ent., LLC, 576 U.S. 446, 455 (2015) (explaining that one goal of the Supreme Court's stare decisis doctrine is the fostering of "reliance on judicial decisions" (quoting Payne v. Tennessee, 501 U. S. 808, 827 (1991)); *cf.* Kisor v. Wilkie, 139 S. Ct. 2400, 2444 (2019) (Gorsuch, J., concurring in judgment) ("In contrast to precedents that fix the meaning of *particular* statutes and generate reliance interests in the process, the *Auer* doctrine is an abstract default rule of interpretive methodology that settles nothing of its own force.").

2. The Narrow Reach of the Statutory Stare Decisis Paragraph

The statutory stare decisis paragraph of *Loper Bright* was specific: For "prior cases that relied on the *Chevron* framework," the Court explained that "[t]he holdings of those cases *that specific agency actions are lawful* . . . are still subject to statutory *stare decisis*."[172] In describing those holdings, the Court appeared to be referring to the particular statutory determinations underlying the APA holdings in the cases—e.g., that the bubble concept was a permissible reading of the Clean Air Act for purposes of judicial review of the regulation. If that is correct, then the statutory stare decisis paragraph does not foreclose a raft of other kinds of APA challenges to regulations that courts have previously upheld under *Chevron*. These include challenges to other aspects of the agency's interpretation of the statute and arguments that the regulation is arbitrary and capricious. Additionally, if read closely, the statutory stare decisis paragraph appears to contemplate challenges to regulations that have been previously upheld under *Chevron*, on the same grounds as the originally rejected challenge, so long as the reason for the new challenge is not the decision in *Loper Bright*.

The APA establishes several justifications for a court to "set aside" a regulation. One such justification is the subject of the deference debate: The agency action is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right"—"or otherwise not in accordance with law."[173] This Article describes review of an agency action under this statutory provision as "review of law." In contrast, another justification for setting aside a regulation is that it is "arbitrary" or "capricious."[174] This Article describes this sort of review as "review of policy and process." Taking the Court at its word, the statutory stare decisis paragraph closes off relitigation of the validity of regulations that were previously upheld under *Chevron*—insofar as the relitigation presents the court with the same "review of law" argument that the

172 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) (emphasis added). Because some cases decided under the *Chevron* framework reached their result at *Chevron* Step One—and therefore represent judicial determinations that the statute is not only clear but also susceptible of just one meaning—courts evaluating prior *Chevron*-grounded precedents will need to determine whether the case was decided at Step One or Step Two. This inquiry is similar to the one that cropped up after the Supreme Court decided *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005). *See* Note, *Implementing* Brand X*: What Counts as a Step One Holding?*, 119 HARV. L. REV. 1532, 1532 (2006) ("Courts implementing *Brand X* face two challenging inquiries. The first is a question of interpretation: did the earlier court assert that its construction of a statutory provision was the only reasonable one? The second is a question of authority: was this assertion a holding? Positive answers to both questions yield a 'Step One holding,' a binding judicial decision that a particular interpretation is the only reasonable one." (footnotes omitted)).

173 5 U.S.C. § 706(2)(A), (C) (2024).

174 *Id.* § 706(2)(A).

Chevron-applying court rejected. But that limitation is narrower than it may appear at first glance. The original argument against the agency's interpretation may have focused on one part of the regulation, but a regulation can be inconsistent with its underlying statute for multiple reasons. Moreover, upholding a regulation under *Chevron* says nothing about whether that regulation is arbitrary or capricious.

The two types of review have important differences. In the "review of law" context, a court is only looking at whether the text of the regulation is consistent with the text of the statute. In the post-*Loper Bright* era, that review is rigorous, and it proceeds with no deference to the agency. But in the "review of policy and process" context, answering the question whether a regulation is "arbitrary and capricious" entails a multifaceted inquiry. Agency action can fail the "arbitrary and capricious" test for numerous reasons. To name a few: The agency failed to consider public comments when finalizing the rule,[175] the agency did not consider reasonable alternatives to its chosen course of regulation,[176] or the final rule was not a logical outgrowth of the proposed rule.[177] The list goes on—and the vitality of the test somewhat depends on the prevailing mood at the Supreme Court.[178]

Suppose that Congress passed a law in 2009 providing that "all law schools must pay law student research assistants at least $25.00 per hour with certain fringe benefits." This hypothetical law delegates enforcement authority to the U.S. Department of Labor and endows the Department with rulemaking authority. The Department issues a

175 *See* Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 96, 100 (2015).

176 *See* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1912–13 (2020).

177 *See* Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 174 (2007).

178 An early conception of arbitrary-and-capricious review had been described as "hard look" review, demanding that the agency take a "hard look" at the problem, but "the phrase subsequently evolved to connote the rigorous standard of judicial review applied to increasingly utilized informal rulemaking proceedings." Nat'l Lime Ass'n v. EPA, 627 F.2d 416, 451 n.126 (D.C. Cir. 1980). With several important exceptions, the Supreme Court largely abandoned "hard look" review for what Jacob Gersen and Adrian Vermeule called "thin rationality review"—from October Term 1982 to the publication of Gersen and Vermeule's article in 2016, the Court ruled in favor of agencies in arbitrary-and-capricious challenges in ninety-two percent of cases. *See* Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355, 1358 (2016). In recent years, the Court has suggested that a more robust conception of arbitrary-and-capricious review may be back. *See, e.g.*, Ohio v. EPA, 144 S. Ct. 2040, 2053 (2024); *Regents*, 140 S. Ct. at 1912–13. *But see* FCC v. Prometheus Radio Project, 141 S. Ct. 1150, 1158 (2021) ("The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained. Judicial review under that standard is deferential, and a court may not substitute its own policy judgment for that of the agency. A court simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision.").

proposed rule that same year, providing that the term "law student" applies only to J.D. candidates and that "certain fringe benefits" does not include childcare. A consortium of law professors submits a public comment, explaining that excluding LLM candidates from the definition of "law students" would be inconsistent with the Department's longstanding practice of recognizing LLMs as law students in other contexts. The Department finalizes the rule in 2010 as it had drafted it in the initial notice.

As soon as the rule is finalized, State Law School begins paying its J.D. candidate research assistants $25.00 per hour but does not offer childcare benefits. Of course, the rule is not enforced directly against law students, so a law student whose compensation was affected by the rule could not bring an as-applied challenge under the APA. Rather, a student would have to bring a facial challenge. So, a J.D. candidate research assistant (who has a child) at State Law School brings such a challenge, arguing that the rule contravenes the statute because it expressly disclaims the responsibility of a law school to provide childcare benefits to its research assistants. The case makes its way up to the Supreme Court, where the Court defers under *Chevron* to the agency's interpretation of the ambiguous term "certain fringe benefits" as excluding childcare. The upshot of the case is that the Labor Department's regulation is not set aside under the APA. This decision is handed down in 2011. Then, fast forward to 2024: The Court decides *Loper Bright* and includes the statutory stare decisis paragraph.

Come 2026, a current LLM candidate at State Law School brings a facial APA challenge to the rule.[179] She makes two claims. First, she argues that the regulation is inconsistent with the statute because an LLM candidate is a "law student." Second, she argues that the regulation was arbitrary and capricious because the agency failed to consider the law professors' comment about the Department's inconsistency with its longstanding practice. The Department cites the statutory stare decisis paragraph and argues that the challenge must fail because the Supreme Court has already upheld the regulation under *Chevron*. What result?

The statutory stare decisis paragraph appears to be a shorthand for saying two things simultaneously. To start, the statutory interpretation element of a prior *Chevron* Step Two decision—a prior court's conclusion that the agency interpretation at issue was permissible—is protected by stare decisis. Additionally, however, the *Chevron* framework that gives meaning to that permissibility determination is also given

179 *Corner Post* allows this challenge. *See supra* Section II.C.1. The LLM candidate, who was not injured by the rule's exclusion of LLMs, at least until she herself matriculated to State Law School as an LLM candidate, suffered an injury when she became an LLM candidate—not when the rule was issued.

stare decisis protection as to that part of the regulation. For a court engaging in de novo judicial review of the agency's interpretation, the fact that an agency's interpretation is "permissible" is legally insignificant. So, in addition to according "statutory stare decisis" to the statutory interpretation element of the prior decision, a court must accept that—as to the specific interpretive question at issue in the prior litigation—a regulation can be valid under the APA if the agency's underlying interpretation is a "permissible" one.

On this understanding of the statutory stare decisis paragraph, the LLM candidate's lawsuit can proceed. The statutory interpretation element of the original decision spoke only to the consistency of "no childcare" with "certain fringe benefits." It said nothing about the consistency of "only J.D. candidates" with "law students." Thus, what the *Loper Bright* Court would describe as the statutory "holding" of the prior decision was that the agency's "no childcare" interpretation was a permissible reading of what the term "certain fringe benefits" did and did not include. Because the LLM issue concerns a different interpretive question, *Loper Bright* statutory stare decisis does not apply. Additionally, because the prior decision was a "review of law" ruling, statutory stare decisis does not preclude the LLM candidate's arbitrary-and-capricious challenge, which involves review of the agency's process of reasoned decision making.[180]

Finally, the statutory stare decisis paragraph suggests the possibility of challenging the same aspect of the agency's originally upheld interpretation, notwithstanding the prior court's upholding under *Chevron*. The Court acknowledged that overcoming stare decisis requires "a 'special justification'"—especially important in the statutory stare decisis context.[181] That is not the same thing as saying that a prior statutory precedent is impossible to overrule. Instead, the court must point to some justification for the overruling other than a belief "that the precedent was wrongly decided."[182] And in *Loper Bright*, the Court explained that "to say a precedent relied on *Chevron* is, at best, 'just an argument that the precedent was wrongly decided.' That is not enough to justify overruling a statutory precedent."[183] Yet this explanation does

180 A potential secondary issue is whether the LLM candidate can bring an arbitrary-and-capricious challenge—especially one based on a failure to respond to a comment—if she herself did not participate in the notice-and-comment process. This Article takes no position on the question.

181 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) (quoting Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 266 (2014)).

182 *Halliburton*, 573 U.S. at 266.

183 *Loper Bright*, 144 S. Ct. at 2273 (citation omitted) (quoting *Halliburton*, 573 U.S. at 266).

not foreclose the possible existence of some other special justification for overruling a *Chevron*-grounded precedent.

The Supreme Court has noted that "[i]n cases where statutory precedents have been overruled, the primary reason for the Court's shift in position has been the intervening development of the law, through either the growth of judicial doctrine or further action taken by Congress."[184] In particular, the Court pointed to instances "[w]here such changes have removed or weakened the conceptual underpinnings from the prior decision, or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies."[185] For the court reviewing the once-upheld regulation's consistency with the statute for purposes of a new challenge, the statutory stare decisis paragraph in *Loper Bright* suggests that the court must apply the *Chevron* framework again—thus, the question for the court will be whether the agency's interpretation remains "permissible."

So, in the hypothetical case of the law student research assistant regulation, suppose that Congress never defined "certain fringe benefits" in the original statute that gave rise to the regulation. Later on, however, imagine that Congress defines the term "certain fringe benefits" in three other statutes and explicitly includes childcare in the definition each time. One of these statutes deals with graduate students in another field, and that statute's preamble acknowledges the necessity of childcare as a fringe benefit for graduate students who have children but are still in school. Now, a plaintiff brings a new challenge to the agency's no-childcare regulation, asserting that the regulation is inconsistent with the statute. The agency defends itself by citing the statutory stare decisis paragraph in *Loper Bright*, asserting that the Supreme Court does not allow challenges to regulations that have been upheld under *Chevron*. Here, the new plaintiff would have a powerful response: He is not arguing that the prior decision's reliance on *Chevron* is the reason to overrule that decision; instead, he is arguing that "the later law has rendered the decision irreconcilable with competing legal . . . policies."[186] This argument could get the lawsuit around the statutory stare decisis paragraph, even though the plaintiff is challenging the very same interpretation that the prior court upheld. The plaintiff would face an uphill battle—he would still have to

184 Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074.

185 *Id.* (first citing Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 480–81 (1989) (for the first proposition); then citing Andrews v. Louisville & Nash. R.R. Co., 406 U.S. 320, 322–23 (1972) (same); then citing, Braden v. 30th Jud. Cir. Ct. of Ky., 410 U.S. 484, 497–99 (1973) (for the second proposition); and then citing Local No. 438 Constr. & Gen. Laborers' Union v. Curry, 371 U.S. 542, 552 (1963) (same)).

186 *Id.*

demonstrate that the agency's interpretation is not even "permissible" (rather than simply "not the best") in light of the intervening changes to law and policy.[187] But he would be able to make the argument nonetheless—not precluded by the statutory stare decisis paragraph in *Loper Bright*.

Notably, all of these arguments—another aspect of the agency's statutory interpretation was wrong; the regulation was arbitrary and capricious; and a compelling, non-*Chevron*-related reason requires the overruling of a prior precedent that upheld a regulation under *Chevron*—were available to litigants before *Loper Bright*. The point is that they remain available after *Loper Bright*, too. That is true notwithstanding the statutory stare decisis paragraph. Indeed, *Loper Bright* will ease the plaintiff's burden when making the first of those arguments (another aspect of the agency's interpretation was wrong), because the plaintiff now only needs to show that the agency's interpretation was not the best one. Moreover, recent changes in arbitrary-and-capricious review at the Court suggest that an arbitrariness challenge to such a regulation might also have an easier time today than it would have had a decade ago.[188] The statutory stare decisis paragraph is important. But it does not foreclose all arguments against regulations that have been upheld under *Chevron*—even at the Supreme Court.

3. *Loper Bright*'s Rule of Statutory Stare Decisis in the Lower Courts

To this point, this Article has focused primarily on the impact of the statutory stare decisis paragraph on regulations that the Supreme Court has applied *Chevron* to uphold. But the Supreme Court is not where the vast majority of litigation over the paragraph will occur—nor is it the decisionmaking body for which the stare decisis value of its *Chevron* precedents will be the most important going forward. As noted, the federal district courts and the federal courts of appeals have relied on *Chevron* in potentially tens of thousands of cases to uphold regulations. Do those decisions get statutory stare decisis, too? And if so, what exactly does that mean in the lower courts?

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187 Additionally, unlike with the other challenges outlined in this subpart, he would not be able to prevail in the lower courts. He would be calling for the Supreme Court to overrule a prior precedent of its own, and the Court has explained that "[i]f a precedent of [the] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower court] should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas*, 490 U.S. at 484. The point here is that the plaintiff, if the case made it up to the Court, could evade the Court's application of the statutory stare decisis paragraph from *Loper Bright* by disclaiming reliance on the *Chevron*-applying decision's use of *Chevron* as the "special justification" counseling in favor of overruling.

188 *See supra* note 178 and accompanying text.

We cannot know for sure if Justice Barrett insisted on the inclusion of the statutory stare decisis paragraph in the *Loper Bright* opinion. Her interest at oral argument in the stability of *Chevron*-grounded precedents suggests that she might have played a role in that paragraph's inclusion, but five other Justices also signed onto the majority without noting any misgivings about the paragraph.[189] Nevertheless, Justice Barrett looms large in any discussion about how the statutory stare decisis paragraph applies in the lower courts. That is because, in addition to signing onto the paragraph in *Loper Bright*, she has published perhaps the leading law review article on the practice of statutory stare decisis in the lower courts.[190]

The Supreme Court was not explicitly clear that the statutory stare decisis paragraph was meant to apply to lower courts. If it was meant to apply, the paragraph would be far more meaningful—applying, as it would, to thousands of *Chevron*-grounded precedents. And notwithstanding Justice Barrett's article about statutory stare decisis in the lower courts, the nature of "statutory stare decisis" in the *Chevron* context suggests that the paragraph's application in the lower courts is less problematic than it might ordinarily be.

The paragraph's impact has a practical dimension, too. The stare decisis effect of prior *Chevron* precedents applies only to the courts that decided those cases (and the courts below them). Thus, for example, a *Chevron*-grounded D.C. Circuit precedent would apply in the D.C. Circuit and the U.S. District Court for the District of Columbia. But it would not apply in the Fifth Circuit or the district courts in that circuit.[191] This reality presents regulatory litigators with an opportunity. If one lower court upheld a regulation's validity based on *Chevron*, a litigant could bring an APA challenge in a different lower court and seek to generate a circuit split. The first court's reliance on *Chevron* may even provide evidence that the original decision was wrong. And depending on one's position on the "vacatur" debate in APA cases, winning in a subsequent challenge in a new court could erase the regulation altogether (or force the agency to take a position of nonacquiescence in other circuits)—potentially prompting Supreme Court review.

189 Transcript of Oral Argument, *supra* note 81, at 20.

190 *See generally* Barrett, *supra* note 71.

191 *But cf.* Dep't of Lab. v. Americare Healthcare Servs., LLC, 762 F. Supp. 3d 666, 685 (S.D. Ohio 2025) (citing the statutory stare decisis paragraph to rely on a *Chevron*-grounded D.C. Circuit precedent post-*Loper Bright*).

a. Application in the Lower Courts

All would agree that the Supreme Court meant for the statutory stare decisis paragraph to apply to the relitigation of regulations that the Court itself had already upheld under *Chevron*. But the Court did not expressly provide that the paragraph was meant to apply to lower-court precedents. To illustrate this idea with an example, the Court was not clear about how the Eighth Circuit should think about a prior Eighth Circuit precedent that relied on *Chevron* to uphold a regulation's validity. Of course, that precedent would not be entitled to stare decisis at the Supreme Court, given that a lower court issued it. But one might argue that the Eighth Circuit should refrain from overruling the precedent because the statutory stare decisis paragraph represents an instruction from the Supreme Court about how to think about the ongoing vitality of *Chevron*-grounded precedents in light of *Loper Bright*.

At face value, that argument fails to grapple with a serious problem: At least one Justice from the *Loper Bright* majority (Justice Barrett) appears to believe that statutory stare decisis means something different in the Supreme Court and in the lower courts.[192] Fortunately for proponents of *Chevron* stare decisis, the paragraph likely does apply in the lower courts—in part because of one of this Article's core insights: *Chevron* stare decisis and statutory stare decisis are not the same thing.

To start, the Supreme Court's hawkishness on the stare decisis strength of statutory precedents stems in part from the nature of the Court's relationship with Congress. The Court and Congress are in constant conversation about the meaning of the statutes that Congress passes—and Congress has overruled the Court frequently when the Court has either misinterpreted the law or interpreted the law to mean something that Congress does not favor.[193] Thus, a strong doctrine of statutory stare decisis is grounded partly in the idea that Congress's failure to overrule a statutory decision from the Supreme Court is evidence of congressional acquiescence in the ruling.[194] Justice Barrett also cites the separation of powers as an alternative rationale that the Court has employed in justifying its doctrine of strong statutory stare decisis—a rationale that "rests on concerns about institutional competence rather than on inferences from congressional silence."[195] But the

192 *See* Barrett, *supra* note 71, at 318.

193 *See* Mascott & Nachmany, *supra* note 118, at 68–70.

194 *See* Barrett, *supra* note 71, at 322. *But cf. id.* (describing the rationale as "misguided").

195 *Id.* at 323.

congressional acquiescence argument appears more frequently (or, at least, more directly) in the caselaw and the literature.[196]

As Justice Barrett notes, "the courts of appeals should not presume that Congress reacts to them in the same way" as it does to the Supreme Court.[197] To be sure, Justice Barrett reports that "[a] majority of the circuits has explicitly adopted the super-strong presumption against overruling statutory precedents."[198] But in light of Justice Barrett's view that even the separation-of-powers idea "ultimately fails to justify statutory stare decisis in the courts of appeals,"[199] one might pause before asserting that the Supreme Court wanted the statutory stare decisis paragraph in *Loper Bright* to apply in the lower courts.

Perhaps the main issue with thinking about the statutory stare decisis paragraph in this way, however, is that *Chevron*-grounded precedents are not statutory precedents. *Chevron* allowed a court to uphold a regulation even if it believed that the agency's interpretation was not the best reading of the statute. Thus, "congressional acquiescence" in such a decision could have meant that Congress agreed with the court that the agency's interpretation was flawed. Moreover, to the extent that the agency's view is relevant, an agency would have every reason to "acquiesce" in a decision that upheld one of its own regulations. Courts in these cases were not reviewing Congress's work on its own; they were reviewing the agency's work for validity under the APA, and the task of statutory interpretation was just one step along the path to determining whether to set aside the regulation. Moreover, even in federal district courts and courts of appeals, the litigation would have taken place in the shadow of potential vacatur—a remedy with nationwide effect.

Thus, the main arguments against statutory stare decisis in the courts of appeals are not especially relevant in this context. As this Article has pointed out, "statutory stare decisis" is a misnomer when describing the precedential weight of *Chevron*-grounded cases. The true nature of the *Chevron* cases offers reason to believe that lower courts would be acting appropriately if they followed the instruction of the statutory stare decisis paragraph in *Loper Bright* as though it were

196 *See id.* at 322–23 (acknowledging that "unpack[ing] the potential connection between separation of powers and statutory stare decisis" requires "a more detailed account" of the relevant materials); *see also id.* at 330 ("The statutory presumption is grounded in judgments about how Congress reacts to the Supreme Court.").

197 *Id.* at 330.

198 *Id.* at 327. *But see* Aaron Baum, *How Much of the Regulatory State is Safe Post-*Loper Bright*?*, HARV. L. REV.: BLOG (Dec. 20, 2024), https://harvardlawreview.org/blog/2024/12/how-much-of-the-regulatory-state-is-safe-post-loper-bright/ [https://perma.cc/2D3Y-3YYY] ("[T]he circuits are split over whether their own statutory precedents deserve enhanced force.").

199 Barrett, supra note 71, at 340.

directed at them, too. And in any event, as one commentator notes, "[l]ower courts are [already] implementing that stare decisis instruction."[200]

b. Disrupting *Chevron* Stare Decisis in Lower Courts

As federal courts of appeals often like to remind litigants, precedents from one circuit are not binding in another. In the post-*Chevron* world, the lack of "horizontal" stare decisis across the circuits provides an opening for litigants looking to challenge regulations that some lower court has upheld under *Chevron.* The statutory stare decisis paragraph in *Loper Bright* does not preclude new litigation, in one circuit, about regulations that another circuit has upheld under *Chevron.* Indeed, depending on the wording of the other circuit's opinion that applied *Chevron,* the fact that another court needed to resort to *Chevron* could be evidence that the other court's decision was wrong. And because of the potentially nationwide nature of relief in APA cases, relitigation—in other circuits—of regulations previously upheld under *Chevron* in the lower courts could generate meaningful circuit splits that the Supreme Court would be hard-pressed to ignore.[201]

The law student research assistant hypothetical is illustrative. In subsection II.C.2, this Article offered the example of a statute that required law schools to furnish certain fringe benefits to law student research assistants, and it gave the example of a regulation issued under that statute that narrowed the universe of those fringe benefits not to include childcare. Subsection II.C.2 considered the implications of a Supreme Court decision upholding the regulation under *Chevron.* But what if the decision had been issued by the Sixth Circuit instead of the Supreme Court?

Different courts might diverge—with significant consequences. Sub-subsection II.C.3.a offers reason to believe that the Sixth Circuit would refuse to overrule this precedent. That is true despite the Supreme Court's expression in *Loper Bright* of disapproval with the methodology that the Sixth Circuit applied in the case—thanks to the statutory stare decisis paragraph. But the Fifth Circuit, for example, would not be bound by the Sixth Circuit's precedent in the case. In fact, in adjudicating a new challenge to the regulation, a district court in the Fifth Circuit might choose to go in a different direction and declare that the regulation is unlawful. If it did, then the court's view of the proper remedy in APA cases could generate a meaningful circuit split.

200 Baum, *supra* note 198.

201 *See generally* Ronald M. Levin, *Vacatur, Nationwide Injunctions, and the Evolving APA*, 98 NOTRE DAME. L. REV. 1997 (2023).

As this Article has previewed, an ongoing debate about the proper scope of the remedy in APA cases is one of the most important open questions in administrative law right now.[202] The prevailing position, at least in the D.C. Circuit, is that the APA's instruction to "set aside" unlawful regulations requires courts to vacate those regulations entirely—wiping them off the books and preventing the agency from applying them against anyone.[203] (That is in contrast to a position that has been gaining steam in recent years: "Set aside" means that the court should "set aside" the regulation only as to the individual party before it.[204]) Thus, if the district court in the Fifth Circuit agreed with the D.C. Circuit's position on APA remedies, then it might vacate the rule in full.

This nationwide vacatur would conflict with the Sixth Circuit's earlier ruling that upheld the rule under *Chevron*. And if the Fifth Circuit upheld the district court, such a decision would create a circuit split. But this divergence would not be an ordinary circuit split. The district court's decision would prevent the agency from enforcing the rule anywhere, including in the Sixth Circuit—notwithstanding the Sixth Circuit's own determination that the rule is valid. The expansiveness of vacatur as a remedy therefore necessarily forces the vacatur decision to supersede any decision upholding a given regulation. The extreme version of this hypothetical: Eleven circuits could uphold a rule under *Chevron*, but if one district court in a twelfth circuit "set aside" the rule, it would override all of the other circuits' judgments. If the Fifth Circuit upheld the decision on appeal, such a circuit split might catch the Supreme Court's attention, given the nationwide effect of the vacatur ruling. The fallout could spark further discussion about the drawbacks of vacatur's nationwide effects in light of the Supreme Court's decision in *Trump v. CASA, Inc.* about a related subject (universal injunction),[205] the benefits of uniformity in the interpretation of federal law (which *Chevron* deference arguably encouraged),[206] and the adequacy of

202 *See supra* note 100.

203 *See* Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 144 S. Ct. 2440, 2462–63 (2024) (Kavanaugh, J., concurring).

204 *See* United States v. Texas, 143 S. Ct. 1964, 1981–82 (2023) (Gorsuch, J., concurring in judgment).

205 *Cf.* Trump v. CASA, Inc., 145 S. Ct. 2540, 2550 (2025) (opining that "[a] universal injunction can be justified only as an exercise of equitable authority, yet Congress has granted federal courts no such power"). *But cf. id.* at 2554 n.10 ("Nothing we say today resolves the distinct question whether the Administrative Procedure Act authorizes federal courts to vacate federal agency action." (citing 5 U.S.C. § 706(2) (2024))).

206 *See* Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1121 (1987); *cf.* Cass R. Sunstein, *Zombie* Chevron*: A Celebration*, 82 OHIO ST. L.J. 565, 574 (2021) (suggesting that one benefit of *Chevron* was that it reduced "the effect of policy preferences

Supreme Court review to harmonize circuit splits in administrative law.[207] At bottom, *Chevron* stare decisis in the lower courts is on shakier ground.

The initial court's application of *Chevron* may impact the later court's analysis of the APA question, too—but perhaps not in the way that the Supreme Court in *Loper Bright* had hoped. The Supreme Court appears to have envisioned *Chevron* stare decisis as a stabilizing force, taking prior *Chevron*-resolved disputes off the table and establishing a new rule of law going forward. But the *Loper Bright* opinion eviscerated *Chevron*'s interpretive foundations and implored courts not to settle for second-best interpretations of statutes. As noted, a district court in the Fifth Circuit would not be bound by the Sixth Circuit's prior *Chevron*-grounded ruling. More importantly, however, the prior court's decision to uphold the regulation based on *Chevron* might counsel in favor of coming to the opposite conclusion. If another court acknowledged that the agency's position was not the best reading of the statute (yet nevertheless warranted deference under the then-governing framework), a court in the post-*Loper Bright* era could see this judicial acknowledgment as evidence that the regulation is contrary to law.[208] Here, the existence of the *Chevron*-grounded precedent about a

on the part of *judges*"). *But see* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1588–89 (2008) (questioning the correctness of Strauss's assertion when considered over time).

207 *See* MICHAEL JOHN GARCIA & DANIEL T. SHEDD, CONG. RSCH. SERV., LSB11210, CONGRESSIONAL COURT WATCHER: FEDERAL APPELLATE DECISIONS IN RECENT YEARS APPLYING *CHEVRON* DEFERENCE 2 (2024); *see also* McLaughlin Chiropractic Assocs., Inc. v. McKesson Corp., 145 S. Ct. 2006, 2021 (2025) ("If an agency order is upheld in a pre-enforcement challenge by a court of appeals, it is true that a different court of appeals (upon review of a district court's decision) might disagree with the agency's interpretation in an appeal from a subsequent enforcement proceeding. But that inter-circuit disagreement would simply create a circuit split on the interpretation of the law and likely trigger review in this Court. Circuit splits followed by this Court's review are commonplace.").

208 *Cf.* Eli Nachmany, Loper Bright *as Evidence of Unlawful Regulations*, YALE J. ON REGUL.: NOTICE & COMMENT (Oct. 15, 2025), https://www.yalejreg.com/nc/loper-bright-as-evidence-of-unlawful-regulations-by-eli-nachmany/ [https://perma.cc/FAE5-JSNR] ("Mere reliance on *Chevron* deference does not mean that an agency's regulation is unlawful. But that reliance does at least suggest that the regulation might be unlawful. Before *Loper Bright* came down, an agency could have promulgated a regulation based on the best interpretation of the statute yet asserted *Chevron* deference as a backup justification. But the agency just as easily could have relied on *Chevron* because it knew that its reading of the statute was a stretch. Thus, *Loper Bright*'s abrogation of *Chevron* deference means that a lawyer should pause—and look more closely—when seeing that a regulation explicitly relied on *Chevron* (or, to take it a step further, when seeing that a regulation was issued during the *Chevron* era). Like how the United States Code 'is "prima facie" evidence of law, not the law itself,' reliance on *Chevron* (either explicit or implicit) is perhaps evidence of unlawfulness, even if such reliance does not conclusively demonstrate that a regulation is inconsistent with law." (quoting Will Baude, *Reminder: The United States Code is Not the Law*, WASH. POST

given regulation in one court could encourage the invalidation of that regulation in other courts.

Courts will need to develop a framework for reading *Chevron*-grounded opinions. As Nash points out, courts reviewing the old *Chevron* cases might find "uncertainty . . . 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."[209] Nash gives the example of *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,[210] in which the Supreme Court was ambivalent about whether the agency's interpretation was the best reading of the statute or only a permissible one.[211] But if, instead of a Supreme Court decision, *Sweet Home* had been a decision of a federal circuit court of appeals, litigants in other courts would attempt to characterize the case one way or the other in a post-*Loper Bright* challenge to the same regulation. And although the exact holding of the case (the regulation is valid) would not be entitled to out-of-circuit stare decisis, the original court's reasoning could offer assistance to a later court's attempt at performing the same task—even if that reasoning now points toward a different result than the *Chevron*-applying court reached.

III. IMPLICATIONS

Setting aside the formalities of statutory interpretation vs. APA adjudication, the statutory stare decisis paragraph in *Loper Bright* makes practical sense. By including it, the Supreme Court lowered the cost of the methodological change that it introduced by departing from *Chevron* deference. But the distinction between statutory and regulatory stare decisis will have an important influence on agency flexibility (and incentive) to depart from old regulations—or to return to regulations—that had been upheld under *Chevron*. Additionally, Congress remains an important actor in this space: If Congress prefers to open up prior *Chevron*-grounded precedents to challenge, it appears to have the power to make that change.

A. *What to Do With Regulations That Were Upheld Under* Chevron

Conservatives may have supported the demise of *Chevron* deference, but the end of the doctrine does not necessarily lead to a

(May 15, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/05/15/reminder-the-united-states-code-is-not-the-law/ [https://perma.cc/LY6F-D587])).

209 Nash, *supra* note 137, at 195.

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

211 *See* Nash, *supra* note 137, at 195–96 (describing *Sweet Home*).

conservative result in every case. For example, the "conservative" result in *Chevron* itself was what the Court did: uphold the Reagan administration's deregulatory policy because the statute was ambiguous and the EPA's deregulatory interpretation was a permissible construction of the law.[212] Had the Supreme Court taken a stricter view of its interpretive role, it may have concluded that the Clean Air Act demanded a more stringent standard. That position would have led the Court to side against deregulation. Moreover, even broad assertions of government authority may be appealing to conservatives in some instances; immigration, for example, "is an area of the law where the partisan alignments break down over Chevron."[213]

To pursue their policy priorities, presidents can take advantage of the opportunities that *Loper Bright* has created. And because courts have relied on *Chevron* in many thousands of cases, the statutory stare decisis paragraph will be key to the executive branch's strategy. Several questions are important, and this Part sketches out some answers to them. To start, what are the relevant considerations involved with keeping a regulation on the books if it has been upheld under *Chevron*? Next, what happens if a regulation has been upheld under *Chevron*, but a new administration replaces that regulation with one based on a new interpretation? Finally, what to do if a later administration returns to the interpretation underlying the initial regulation?

1. Incentives and Stare Decisis for Regulatory Action

With *Chevron* deference out of the way, courts in APA cases will look for the best interpretation of the underlying statute. But this judicial review requires the existence of a case, which itself requires agency action. It is true that *Corner Post* allows challenges, in some instances, to regulations that have been on the books for many years—including those that have been upheld under *Chevron* in a prior judicial proceeding.[214] But the universe of potential plaintiffs is far larger for new agency actions. Thus, repealing (and replacing) an old regulation with a new one could spur a new APA action. And in the post-*Loper Bright* world, promulgating a new regulation comes with the heightened risk that a court will disagree with the agency's interpretation and set aside

212 Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc. 467 U.S. 837, 840, 866 (1984), *overruled by*, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

213 Fiona Harrigan, *Why the End of* Chevron *Could Be a Win for Immigrants*, REASON (July 2, 2024, at 14:55 ET), https://reason.com/2024/07/02/why-the-end-of-chevron-could-be-a-win-for-immigrants/ [https://perma.cc/N69W-MAGP] (quoting Professor Michael Kagan from the University of Nevada, Las Vegas William S. Boyd School of Law).

214 *See supra* Section II.C.1.

the rule. An agency will feel that risk acutely if an existing regulation enjoys the heightened protection of *Loper Bright* stare decisis.

As Otto von Bismarck famously quipped, "Politics is the art of the possible."[215] The same can be said of regulation. After *Loper Bright*, the range of what is "possible" for the agency to do is limited to the text of the statute in question. But the statutory stare decisis paragraph establishes a loophole for certain regulations. For a regulation that happens to have been upheld under *Chevron*, the agency can continue to administer the regulation even if it rests on an erroneous interpretation of the law, without fear that this interpretation will be vulnerable to a challenge. As soon as the agency changes the regulation, however, the stare decisis protection is lost and the agency has to defend the regulation on the statute's terms.

The existence of special stare decisis protection for certain regulations will alter the agency's calculus. If a *Chevron*-upheld regulation gets an agency eighty percent of the way to its desired policy goal, then the stare decisis protection offers an important reason to pause before attempting to push forward and get one hundred percent of what the agency wants. That more aggressive interpretation could be invalidated by a court applying *Loper Bright*'s more stringent framework, leaving the agency with nothing. For progressives, this might mean that leaving in place a regulation that set an environmental standard at a substantially restrictive threshold—one that perhaps exceeds the agency's statutorily delegated authority—may be preferable to pressing forward and imposing a maximally restrictive standard, if the existing regulation had been upheld under *Chevron*. Yet, for conservatives, a minimally restrictive standard might also be deemed out of bounds. Thus, although a future administration may well repeal the *Loper Bright*-protected rule itself and go in a different direction, that agency action also would be subject to *Loper Bright*'s heightened standard of review. In sum, a subset of regulations exists for which *Loper Bright*'s rule of stare decisis may encourage future administrations of different policy persuasions to reach détente. This sort of regulatory stability would appear to further one of the general policies of the *Loper Bright* decision.[216]

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215 *See* Jennifer Kindred Mitchell, *Why Not More States?: States' Importance to Democracy and Statehood's Relevance to Twenty-First Century America*, 48 J. LEGIS. 236, 236 n.2 (2022) (quoting 1 FÜRST BISMARCK: NEUE TISCHGESPRÄCHE UND INTERVIEWS 248 (Heinrich von Poschinger ed., Stuttgart, Deutche Verlags-Anstalt 1895)).

216 *See supra* Section II.B.

2. Replacing a *Chevron*-Upheld Regulation

Still, the statutory stare decisis paragraph did not eliminate all flexibility. Notwithstanding the paragraph, agencies are still free to change their regulations, even if those regulations had been upheld under *Chevron*. That is a net benefit for the rule of law. Again, those regulations will be subject to scrutiny under the new, deference-free standard for reviewing agency interpretations. But so long as the new regulation effectuates the best reading of the underlying statute, no problem exists. Despite this seemingly straightforward understanding of *Loper Bright*, however, the Supreme Court's reliance on "statutory stare decisis" suggests that the Court's decision locks in those regulations that have been upheld under *Chevron*. This interpretation of the paragraph should be rejected, however, because the term "statutory stare decisis" is a misnomer in the context of *Loper Bright* and *Chevron*.

Loper Bright presents agencies with a golden opportunity. If the existence of *Chevron* deference over the last forty years is evidence that agencies may have been gilding the lily in terms of their interpretations of statutes, the end of *Chevron* deference is as good of a reason as any to rectify this practice. During *Chevron* deference's heyday, agencies promulgated countless regulations against the background understanding that judicial review of their interpretations would be more forgiving. *Loper Bright* signals a judicial willingness to bring agency interpretive practice back in line with statutory text. And for those regulations that are already on the books (and especially for those that have been upheld under *Chevron*), getting square with the statute might require the agency to rock the boat—and change its interpretation—one last time.

At first blush, that might seem to contravene the statutory stare decisis paragraph. From a policy perspective, the paragraph seemed to prioritize regulatory stability and disfavor even one more regulatory switch. And from a legal perspective, the idea of "statutory stare decisis" is that the prior judicial interpretation of the statute, even if incorrect, must stand. Taken together, one could conclude that the prior court's interpretation of the statute underlying the regulation is final, and the agency must maintain its regulation as-is in light of the paragraph.

This interpretation of the paragraph misses the mark for several reasons. As to policy, the background of *Loper Bright* suggests that the paragraph was responding to a fear of opening the floodgates to litigation over old regulations, not to a fear of agencies revisiting regulations that rested on dubious statutory authority.[217] As to the law, Nash rightly

217 *See supra* note 81 and accompanying text; *cf.* Sunstein, *supra* note 206, at 574 (positing, in 2021, that the Supreme Court could "make clear that overruling *Chevron* is not

points out that this understanding of the paragraph would create "precedent on steroids," given that the prior court had only "found the agency interpretation to be 'lawful,' not mandatory."[218]

Yet this observation about the lawful/mandatory distinction speaks to a broader issue: The determination of the interpretation's lawfulness was in the context of APA review. The review of the agency's statutory interpretation was not so much an example of parallel judicial statutory interpretation as it was a box-checking exercise to ensure that the agency met one of the APA's requirements (as the *Chevron* doctrine understood that requirement). The result of this review is not entitled to statutory stare decisis effect because it was merely a waystation along the path toward determining whether to set aside a regulation. Instead, the relevant holding—and the one entitled to some kind of stare decisis effect—is that the regulation does not offend the APA on the ground that the agency acted contrary to law. Put simply, the relevant holding is that the regulation was valid, and the reasoning is that the agency's statutory interpretation was one of potentially multiple permissible interpretations. This holding is entitled to regulatory stare decisis, and it only applies to the particular regulation at issue—not to the interpretation underlying that regulation.

Indeed, *Chevron*-grounded decisions themselves contemplated the possibility of agencies taking different positions in the future. In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,[219] the Supreme Court concluded that a federal court of appeals should have deferred under *Chevron* to a Federal Communications Commission interpretation, despite that court having deferred under *Chevron* to a different interpretation (in connection with an earlier regulation) in a prior case.[220] *Brand X* drew its share of criticism over the years. But as the Supreme Court explained, "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."[221] And because the court of

meant to open up previous *decisions* made under the *Chevron* framework" (emphasis added)).

218 Nash, *supra* note 137, at 192.

219 Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

220 *Id.* at 1002–03.

221 *Id.* at 982. The Court warned that "[a] contrary rule would produce anomalous results" because "whether an agency's interpretation of an ambiguous statute is entitled to *Chevron* deference would turn on the order in which the interpretations issue." *Id.* at 983; *see also id.* ("If the court's construction came first, its construction would prevail, whereas if the agency's came first, the agency's construction would command *Chevron* deference."). Thus, the Court concluded, "whether Congress has delegated to an agency the authority to interpret a statute does not depend on the order in which the judicial and administrative

appeals in the prior case had not concluded that the agency's interpretation "was the *only permissible* reading of the statute," the Supreme Court allowed the FCC to switch its position.[222]

At the same time, the fact that an agency's regulation has been on the books for a while may cut against the agency's position if it seeks to change the regulation. In the abstract, an agency may claim credibly that its new regulation best comports with the statute, as opposed to the old, *Chevron*-upheld regulation. But in *Loper Bright*, the Supreme Court noted that the consistency of an agency's interpretation over time could entitle that interpretation to "very great respect."[223] The Court pointed out that "'the longstanding practice of the government'—like any other interpretive aid—'can inform [a court's] determination of what the law is.'"[224] Several years before *Loper Bright* came down, important scholarly work by Aditya Bamzai had highlighted this time-honored interpretive tradition.[225] To be sure, "respect" is different from deference, and both the *Loper Bright* Court and Bamzai suggest that courts often would look also to whether the executive's interpretation was contemporaneous with the statute's passing.[226] But the upshot is that an interpretation once upheld under *Chevron* as a second-best construction in the 1980s may turn out to be the best

constructions occur." *Id.* This idea comports with Nash's skepticism of the lock-in effect of the statutory stare decisis paragraph; Nash asked why "an interpretation that was lawful [should] ascend to permanency just because a case in which it was challenged happened to be one that reached the Supreme Court." Nash, *supra* note 137, at 192; *cf.* Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. 1477, 1485 (2023) (criticizing the Supreme Court for setting "the law on high-stakes [constitutional] issues . . . by accidents of history" in a way that "depend[s] on whatever political practices happened to exist when the Court first turned to an issue").

222 *Brand X*, 545 U.S. at 984. Cases like *Brand X* demonstrate another problem that might arise in the post-*Loper Bright* universe. The Court in *Brand X* acknowledged that the court of appeals had concluded in its earlier decision that although the agency's interpretation was not the "*only permissible*" one, it did represent the "*best*" interpretation of the statute. *Id.* Although this Article takes the position that this "best reading" determination is not entitled to statutory stare decisis weight, such a conclusion by a prior tribunal could be strong evidence of the law's meaning. In fact, the Sixth Circuit applied *Loper Bright*'s statutory stare decisis paragraph in a case involving a new FCC interpretation that departed from the one that the Supreme Court upheld in *Brand X*. *See In re* MCP No. 185, 124 F.4th 993, 1002–03 (6th Cir. 2025). Because the "specific agency action" at issue in *Brand X* was different from the new agency action, the court determined that it was "not bound by *Brand X*'s holding as a matter of statutory *stare decisis*." *Id.*

223 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2257 (2024) (quoting Edwards' Lessee v. Darby, 25 U.S. (12 Wheat.) 206, 210 (1827)).

224 *Id.* at 2258 (alterations in original) (quoting NLRB v. Noel Canning, 573 U.S. 513, 525 (2014)).

225 *See* Bamzai, *supra* note 53, at 916.

226 *See Loper Bright*, 144 S. Ct. at 2258; Bamzai, *supra* note 53, at 916.

interpretation after a four-decade, unbroken approach to the statute by the executive.

3. Going Back to the *Chevron*-Upheld Regulation

Once the agency has departed from the *Chevron*-upheld regulation, can it return? That question could become relevant if one presidential administration shifts from a *Chevron*-upheld regulation to a regulation that best comports with the underlying statute and, at the same time, effectuates that administration's policy priorities. A later administration, with different policy priorities, could seek to return to the old regulation. Its argument might be that *Loper Bright* entitled the prior regulation to statutory stare decisis effect, so a new regulation that effectively reenacts the old regulation should obtain the same statutory stare decisis effect. Again, despite *Loper Bright*'s use of the term "statutory stare decisis," this argument is unpersuasive. *Loper Bright* is best understood as establishing a rule of regulatory stare decisis, and that rule applies only to the particular regulation that was at issue in the original case that relied on *Chevron*.

Once an agency has switched post-*Loper Bright* to the best interpretation of the statute, it cannot go back to the older, inferior interpretation and claim stare decisis. The stare decisis of *Loper Bright* applies only to the old regulation—a specific exercise of agency power that happened to have been upheld by a court during a fortuitous time for agencies (the time between *Chevron* and *Loper Bright*). As the Sixth Circuit explained in a decision applying the *Loper Bright* statutory stare decisis paragraph, the decision "forecloses new challenges based on specific agency actions that were already resolved via *Chevron* deference analysis."[227] If an agency seeks willingly to depart from that regulation, then it forfeits the limited benefits that the *Loper Bright* Court conferred through the statutory stare decisis paragraph by breaking the chain of regulatory precedent and disclaiming its own reliance on the old regulation's continued existence. The touchstone, then, is the

227 Tennessee v. Becerra, 117 F.4th 348, 363 (6th Cir. 2024) (emphasis added), *amended and superseded by*, 131 F.4th 350 (6th Cir. 2025). As Aaron Baum notes, the Sixth Circuit in this case was somewhat troubled by the fact that the precedent establishing *Loper Bright* stare decisis for the specific agency action at issue was a Sixth Circuit decision; the court thus grappled with Justice Barrett's article about statutory stare decisis in the courts of appeals. *See* Baum, *supra* note 198. The Ninth Circuit expressed no such consternation when it applied the statutory stare decisis paragraph in a case involving immigration law. *See* Bartolo v. Garland, No. 23-1578, 2025 WL 32825, at *2 (9th Cir. Jan. 6, 2025). Rather, the *Bartolo* court construed the statutory stare decisis paragraph as a "clear directive" to courts like the Ninth Circuit, *see id.*, notwithstanding their status as inferior courts and their different relationship with Congress.

original regulation: If it is no longer in place, then stare decisis ends, even if a later-in-time regulation copies its interpretation.

One exception might exist. Notwithstanding its strong language about de novo review of agency interpretations, the *Loper Bright* Court acknowledged that in some cases, "the best reading of a statute is that it delegates discretionary authority to an agency."[228] Defining the contours of delegated authority after *Loper Bright* will be critical; near the end of the Biden Administration, the government started citing language in *Loper Bright* about delegation to argue for a framework that looks like *Chevron* deference in several cases.[229] But in the context of the statutory stare decisis paragraph, an agency could take the position that future flip-flops are not inconsistent with *Loper Bright*—even without the help of the statutory stare decisis paragraph. To make this point, the agency would argue that the "particular statute delegates authority to an agency consistent with constitutional limits," so "courts must respect the delegation, while ensuring that the agency acts within it."[230] Multiple different implementations of the agency's delegated authority, the agency may contend, could each be consistent with the agency's statutory charge.

Delegation issues notwithstanding, the statutory stare decisis paragraph could end up being impactful in the agency decisionmaking process. A group of regulations exists for which a court has upheld the regulation under *Chevron*. Per the Court's ruling in *Loper Bright*, those regulations are largely safe from a future challenge. Switching away from such a regulation could be risky—courts are not going to accept agency interpretations that deviate from the best construction of the underlying statute anymore. That does not mean that the agency is unable to change course from the *Chevron*-upheld regulation. *Loper Bright*'s rule of regulatory stare decisis, cloaked in the language of statutory stare decisis, does not preclude the agency from switching to a regulation that adopts the best reading of the statute in question. But in general, once that happens, the game is over. Switching back to the original regulation does not reinstate the now-abrogated stare decisis for that particular regulation, which no longer exists. Rather, in the

228 *Loper Bright*, 144 S. Ct. at 2263.

229 Adrian Vermeule, Chevron *by Any Other Name*, THE NEW DIGEST (June 28, 2024), https://thenewdigest.substack.com/p/chevron-by-any-other-name [https://perma.cc/B6TD-YYG6] (predicting this phenomenon); *see* Eli Nachmany, *The Looming Post-*Chevron *Fight Over the Administrative State*, THE HILL (Dec. 15, 2024, at 08:00 ET), https://thehill.com/opinion/judiciary/5039259-post-loper-bright-regulatory-power/ [https://perma.cc/SZ8D-TFVN]. The Court in *Loper Bright* likely hoped that the elimination of *Chevron* deference would signal to agency officials that they should exhibit prudence in exercising flexibility with delegated authority. *Cf.* Chad Squitieri, *Administrative Virtues*, 76 ADMIN. L. REV. 599, 661 (2024).

230 *Loper Bright*, 144 S. Ct. at 2273.

context of a challenge to that new regulation, a court likely would frown at the backslide to a worse interpretation of the statute—especially after the agency had brought its interpretation in line with the law.

B. The Final Frontier of Chevron *Waiver*

In cases involving regulations about which the statutory stare decisis paragraph applies, another issue may remain: the problem of "*Chevron* waiver."[231] *Chevron* deference was a tool in government litigators' toolkits, but these litigators did not see fit to seek such deference in every case. Indeed, as *Chevron* deference became a central aspect of judicial review in agency cases, a curious phenomenon arose: Sometimes, when litigating agency cases in which *Chevron* deference might be applicable, the government would choose consciously not to cite *Chevron* in a given regulation's defense. Jeremy Rozansky highlighted this practice, noting that "[a]n agency may choose to waive *Chevron* for any number of reasons."[232] In response, courts grappled with the problem of *Chevron* waiver—weighing the importance of the party-presentation principle against the importance of getting the legal question right.[233] Courts largely concluded that the government could not waive *Chevron*, given the federal courts' freestanding "interest—independent of the litigating parties—in applying the right body of law."[234] But what happens when the government seeks to waive the stare decisis effect of a prior *Chevron*-grounded holding instead of *Chevron* itself? Unfortunately for those who are uncomfortable with the statutory stare decisis paragraph in *Loper Bright*, the answer is likely that the agency cannot waive *Chevron*'s applicability even by way of stare decisis.

The practice of deliberate *Chevron* waiver demonstrated the uniqueness of regulatory litigation, but courts largely did not buy it. Federal government lawyering requires careful balancing of various concerns, including the preferences of changed presidential administrations, sensitivity to the positions of interest groups, and broader presidential objectives. Rozansky notes several of these concerns as reasons why government lawyers saw fit to refrain from arguing for *Chevron* deference.[235] As one example, he cites the litigation that resulted in the D.C. Circuit's opinion in *Global Tel*Link v. Federal Communications Commission*, in which the FCC had promulgated a regulation

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231 Jeremy D. Rozansky, Comment, *Waiving* Chevron, 85 U. CHI. L. REV. 1927, 1928 (2018).

232 *Id.* at 1929.

233 *See id.* at 1940 n.79.

234 Note, *Waiving* Chevron *Deference*, 132 HARV. L. REV. 1520, 1539 (2019).

235 *See* Rozansky, *supra* note 231, at 1929.

during the Obama administration that it did not want to defend during the Trump administration.[236]

Courts and commentators mostly concluded "that an agency's lawyers cannot *forfeit* the applicability of *Chevron* deference unless" *Chevron* would not apply anyway.[237] Not all agreed, to be sure; when he was still on the Tenth Circuit, then-Judge Gorsuch contended in a dissent that courts "don't normally make arguments for litigants (least of all administrative agencies)," explaining that he saw "no reason to make a wholly uninvited foray into step two of *Chevron* land."[238] But the idea behind disallowing *Chevron* waiver is that, as the Supreme Court has explained in a separate context, a court "retains the independent power to identify and apply the proper construction of governing law."[239] Likening *Chevron* waiver to a litigant's intentional "failure to invoke interpretive canons such as *expressio unius* or constitutional avoidance," the D.C. Circuit took the position that "[t]he 'independent power' to identify and apply the correct law presumably includes application of the *Chevron* framework when determining the meaning of a statute."[240]

The same is probably true for waiving *Chevron* stare decisis. True, *Chevron* is no longer the governing framework—in general—after *Loper Bright.* But as to the particular regulations that courts have upheld under *Chevron*, the Supreme Court has now established that "the law" is that those regulations are valid—at least wherever those decisions are binding as vertical (or, probably, horizontal) stare decisis. That is true notwithstanding the faulty reasoning of the underlying decisions. Thus, for the regulations to which *Chevron* stare decisis still applies, the government likely cannot waive the applicability of the *Chevron*-applying precedent. The prohibition on *Chevron* waiver lives on.

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236 *See id.* (discussing *Global Tel*Link v. FCC*, 866 F.3d 397 (D.C. Cir. 2017)).

237 Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 920 F.3d 1, 22 (D.C. Cir. 2019) (per curiam); *see also* Aaron L. Nielson, *D.C. Circuit Review—Reviewed:* Chevron *Waiver*, YALE J. ON REGUL.: NOTICE & COMMENT (Apr. 12, 2019), https://www.yalejreg.com/nc/d-c-circuit-review-reviewed-chevron-waiver/ [https://perma.cc/Q52Z-P9MD].

238 TransAm Trucking, Inc. v. Admin. Rev. Bd., 833 F.3d 1206, 1216 (10th Cir. 2016).

239 Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 99 (1991).

240 *Guedes*, 920 F.3d at 22. To be sure, *Guedes*'s description of the *Chevron* framework's purpose is somewhat at odds with how this Article has described it. *Guedes* viewed *Chevron* deference as assisting with a court's determination of "the meaning of a statute." *Id.* A Note in the *Harvard Law Review* on the subject of *Chevron* waiver described it similarly. *See* Note, *supra* note 234, at 1528 (stating that *Chevron* deference is "a doctrine about statutory meaning"). This Article claims that *Chevron* deference assisted courts with determining a regulation's validity under the APA—a process that required a loose form of "statutory interpretation" (to determine the range of permissible agency interpretations) as a waystation along the path toward answering the ultimate APA question in the case.

C. *Congress's Role in Managing* Loper Bright *Stare Decisis*

The statutory stare decisis paragraph also could be an invitation to another key player to step into the space: Congress. Several members of Congress have taken a keen interest in *Loper Bright* and the future of regulatory litigation. And if Congress thinks that the Court misfired with the statutory stare decisis paragraph in *Loper Bright*, then it has several options for involvement. The most straightforward path is that Congress can update the laws on which the *Chevron*-upheld regulations relied, making clear that the agency does not have the discretion that it (and the prior court) believed that it did. But another, more interesting possibility is that Congress could abrogate any "statutory stare decisis" that the *Loper Bright* Court sought to achieve. Still, because of the confusion between statutory and regulatory stare decisis, Congress's power to take this action is less certain.

If Congress disagrees with an agency's regulation, it can change the statute underlying the regulation. As Judge Menashi has explained, "[a] statute overrides a preexisting regulation when the 'regulation conflicts with [the] subsequently enacted statute.'"[241] To be sure, this option existed for Congress before *Loper Bright* came down. But perhaps the Court's decision in *Loper Bright*, and the explicit carving-out (for "statutory stare decisis") of past regulations upheld under *Chevron*, would spur Congress to action. The decision has attracted Congress's attention, spurred the publication of a working group report, and inspired legislation;[242] Congress could use the decision as justification for taking aim at particular regulations.

But the bigger question is this: Could Congress instruct courts, including the Supreme Court, not to give stare decisis effect to prior cases that relied on *Chevron*—thereby opening up the regulations to litigation? Congressional power to alter the rules of stare decisis has been a subject of debate in the literature.[243] But some of this literature

241 United States v. Kahn, 5 F.4th 167, 179 (2d Cir. 2021) (Menashi, J., dissenting) (second alteration in original) (quoting Farrell v. United States, 313 F.3d 1214, 1219 (9th Cir. 2002)).

242 *See, e.g.*, Eric Schmitt, *Post-*Chevron *Working Group Report*, 2025 HARV. J.L. & PUB. POL'Y: PER CURIAM, no. 13; Press Release, Ron Wyden, U.S. Senate, Wyden Bill Would Restore Congressional Authority, Check Power of MAGA Judges (Aug. 2, 2024), https://www.wyden.senate.gov/news/press-releases/wyden-bill-would-restore-congressional-authority-check-power-of-maga-judges [https://perma.cc/46L7-2QDU].

243 *Compare* John Harrison, *The Power of Congress Over the Rules of Precedent*, 50 DUKE L.J. 503 (2000), *and* Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535 (2000), *with* Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570 (2001), Thomas Healy, *Stare Decisis and the Constitution: Four Questions and Answers*, 83 NOTRE DAME L. REV. 1173 (2008), *and* Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191 (2001).

contemplated a broad question: whether Congress could abrogate stare decisis in general. James Durling criticized this broad focus, arguing that "[r]egardless of whether . . . Congress can abrogate *constitutional* precedent, . . . Congress has a strong claim of authority to abrogate precedent in *statutory* cases."[244] Durling's argument is a greater-includes-the-lesser appeal: "If Congress may overrule decisions interpreting statutes and if it may prescribe rules of statutory interpretation, Congress would also appear to have the power to prescribe a rule of interpretation requiring courts to ignore a past Supreme Court decision."[245] Durling then addresses *Chevron*; he claims "[i]f Congress banned the Court from citing *Chevron*, then it would eliminate both the narrow holding and the broader canon—at least as binding precedent."[246]

Durling is right, and his essay leads to the conclusion that Congress can overrule the "statutory stare decisis" in *Loper Bright* if it so desires. In his essay, Durling does not distinguish between statutory and regulatory stare decisis—a distinction that this Article has taken great care to honor. But in the context of congressional authority, the distinction is meaningless. "[F]or agencies charged with administering congressional statutes," the Supreme Court has explained that "[b]oth their power to act and how they are to act are authoritatively prescribed by Congress."[247] That is because "an agency literally has no power to act . . . unless and until Congress confers power upon it."[248] The idea that Congress can abrogate the stare decisis effect of the holdings in prior *Chevron*-grounded cases, then, is the logical endpoint of Durling's argument in the regulatory context: a greater-includes-the-lesser-includes-the-even-lesser syllogism, if the reader will indulge. Thus, if Congress wanted to come to the table and reform administrative law post-*Loper Bright*, then scuttling *Chevron* stare decisis is on the menu.

CONCLUSION

Chevron is not overruled. Instead, the Supreme Court has departed from *Chevron* deference. The two are different things. Indeed, the Court's decision in *Loper Bright* ended *Chevron* deference but explicitly preserved the holdings of *Chevron* and other cases that courts had decided when applying *Chevron*. The Court accomplished this preservation by including a paragraph about "statutory stare decisis"

244 James Durling, *May Congress Abrogate Stare Decisis by Statute?*, 127 YALE L.J.F. 27, 31 (2017).

245 *Id.* at 37.

246 *Id.*

247 City of Arlington v. FCC, 569 U.S. 290, 297 (2013).

248 La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986).

in its opinion. Yet the term "statutory stare decisis" is a curious fit for what to do with holdings about regulations. That is especially true in the context of *Chevron* deference, where courts applied the *Chevron* framework toward the ultimate end of determining whether a regulation was valid under the APA. The courts in these cases were not engaging in statutory interpretation, and decisions at *Chevron* Step Two do not represent statutory holdings. Moreover, even in light of the statutory stare decisis paragraph, multiple avenues remain open to challenging regulations that courts have upheld under *Chevron.*

Understanding the statutory stare decisis paragraph as a discussion of regulatory stare decisis is important for several reasons. In *Loper Bright,* the Supreme Court preserved the validity of particular holdings about particular regulations. The interpretations underlying those regulations are not protected by stare decisis. Thus, the stare decisis effect of the initial ruling cannot prevent an agency from switching to a faithful interpretation of the governing statute by issuing a new rule. Moreover, the stare decisis effect of the initial ruling would not apply if an agency later sought to go back to the interpretation that the old regulation advanced. By including the statutory stare decisis paragraph in *Loper Bright,* the Supreme Court attempted "to keep the gates mostly closed" to relitigation of regulations that courts had upheld under *Chevron* (a figure potentially numbering in the tens of thousands).[249] But the paragraph makes clear that, contrary to popular belief, *Loper Bright* did not overrule *Chevron* itself—a case about an EPA regulation.

249 Walker, *supra* note 81.