Loper Bright in a Larger Interpretive Perspective: Is This Justice Scalia's Court Anymore?

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Abstract. Loper Bright Enterprises v. Raimondo *has left administrative lawyers agog: Could the Supreme Court really reverse the "goliath" known as* Chevron *deference? For those who study the Court's interpretive landscape more broadly, however,* Chevron *reversal may not be as unexpected as administrative lawyers believe. This Article will look at* Loper Bright *by linking three notable interpretive developments: the major questions doctrine,* Chevron *skepticism, and strict constructions of statutory text. These developments share the same risk: the Court is imposing a new "clarity tax" on both Congress and administrative agencies. Having said this, others' grave worries about changes in* Chevron *are misplaced; the administrative state will not disappear even if* Chevron *does. This Article will urge readers to think more broadly than* Chevron *and consider larger trends of interpretive practice on the current Supreme Court.*

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Introduction

This Article asks, in light of *Loper Bright Enterprises v. Raimondo*,[1] whether interpretive regime change is afoot: Is the textualist orthodoxy championed by Justice Antonin Scalia entering a new phase? If the Court strikes down *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[2] it will reverse a decision Justice Scalia celebrated early in his career,[3] faithfully applied, and even expanded.[4] *Chevron* and textualist philosophy are quite compatible if the statute's text runs clearly contrary to the agency interpretation.[5] As Professor Jonathan Masur shares in his contribution to this Symposium, *Chevron* was never "for" or "against" the administrative state: deregulatory and pro-regulatory regimes gain the same amount of deference.[6] Given that, one has to wonder whether *Chevron* skepticism signals something different, something bigger than *Chevron* alone. Several new developments, including *Chevron* skepticism, are moving us away from Justice Scalia's emphasis on reasonable interpretation toward a world that Justice Scalia himself once described as a "degraded form of textualism," a form of twenty-first century "strict" construction.[7]

No tear should be shed when *Chevron* is gone or limited. As one who writes about Congress and interpretation, it has never made any sense to me to read Congress's notoriously ambiguous silence as a delegation of power. Large delegations of power should be read as they were written, as should narrow delegations of power. That is what an honest textualist would say. Similarly, no one should believe that changing *Chevron* puts the administrative state on life support. That doomsday view overclaims. If *Chevron* falls, regulations will continue to be issued—approving drugs, predicting hurricanes, and taming inflation.

But if *Chevron* is overruled or seriously limited, *legal rules governing agency regulations will change abruptly*. Given that *Chevron* is seen as a legal

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1 45 F.4th 359 (D.C. Cir. 2022), *cert. granted in part*, 143 S. Ct. 2429 (argued Jan. 17, 2024) (mem.).

2 467 U.S. 837, 864–66 (1984)

3 *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (arguing that "*Chevron* is unquestionably better than what preceded it"); Craig Green, Chevron *Debates and the Constitutional Transformation of Administrative Law*, 88 GEO. WASH. L. REV. 654, 665–69 (2020) (discussing Justice Scalia's "enthusiasm" for *Chevron*).

4 *See, e.g.*, City of Arlington v. FCC, 569 U.S. 290, 301–305, 307 (2013) (holding that the *Chevron* regime applied to an agency's determination of its own statutory jurisdiction).

5 *See, e.g.*, MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 225–34 (1994) (rejecting the agency's interpretation of the word "modify" at step one of *Chevron*).

6 Jonathan S. Masur, Loper Bright *as Entrenchment*, 31 GEO. MASON L. REV. 573, 574 (2024).

7 *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 23 (Amy Gutmann ed., 1997).

"goliath,"[8] one should worry that this reflects a Court with a "disruptive" instinct to use Professor Adrian Vermeule's phrase.[9] If the Roberts Court could once be characterized as deploying legal conservatism in the Burkean sense, that is no longer true. After all, that kind of conservatism would simply follow precedent, leaving *Chevron* intact. If nothing else, the impending demise or narrowing of *Chevron* will spell a full employment bill for agency lawyers and those who challenge agency regulations.[10]

This Article aims to understand *Loper Bright*'s deference skepticism as part of a larger regime change by linking three apparently unrelated interpretive developments. Part I highlights textualism's uneasy relationship to the major questions doctrine. As Justices on both right and left have made clear, the new major questions doctrine sits uneasily with textualism. Part II considers interpretive practice more generally, based on a larger empirical study of the Court's most recent decisions, arguing that the Court is more often narrowing statutes to what this Article calls their "core." Part III suggests that these shifts in interpretive thought are consistent with overruling *Chevron* entirely or cabining it severely, even if there are more moderate approaches the Court could take. Each of these doctrines tells the same story: textualism is entering a new phase.

I. Textualism Meets Major Questions

Textualism has never been a liberal or a conservative theory unless a judge seeks to impose that upon the text. It is an incomplete theory because it limits evidence of statutory meaning to the bare text, creating a "hermeneutical pinch," by excluding relevant evidence of statutory meaning in hard cases.[11] Because it is incomplete, critics have worried that judges will decide difficult cases by imposing a politically "conservative" tilt.[12] Too often, Justices exude certainty about an interpretation in the face of doubt. For something to be the most "reasonable" interpretation, there must be reasons. Even if the Justices have now shifted to discussing the

[8] Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1158 (10th Cir. 2016) (Gorsuch, J., concurring) ("All of which raises this question: what would happen in a world without *Chevron*? If this goliath of modern administrative law were to fall?").

[9] ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 113 (2022).

[10] A more serious challenge to the administrative state, by the way, is in the Court's structural decisions reimagining agencies as part of a unitary executive.

[11] It provides less and less information to the interpreter to find Congress's meaning, what Eskridge and I call the "hermeneutical pinch." *See* William N. Eskridge, Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. REV. 1718, 1737 (2021) (emphasis removed).

[12] *See, e.g.*, William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 549–50 (2013).

"best" interpretation, how does one define a "best" interpretation when language so often resists precision?[13]

Recent Supreme Court cases show that textualism is neither liberal nor conservative in theory. For example, textualism has led to apparently "liberal" results about gay rights and Native American sovereignty.[14] Similarly, on the conservative side, textualism has led to no consistent set of libertarian results. Theoretical worries about textualism are not crassly political; they challenge the theory's worth in hard cases. Textualism's theory tells us that there are "right" answers. Recent data tell a different story: committed textualists on the Supreme Court regularly disagree.[15] If there is "a right answer," as Justice Scalia once wrote,[16] one would expect to see higher rates of agreement in statutory cases and fewer Supreme Court opinions lambasting fellow textualists for their "absurd" interpretations.[17]

Justice Scalia's most famous plea for a textualist approach—the ancient case of *Church of the Holy Trinity v. United States*[18]—shows why textualism does not lead to predictable, libertarian-leaning results. Textualism does not reliably narrow statutes. In *Holy Trinity*, Justice Scalia argued that Justice David Brewer's invocation of the "spirit" of the law was highly offensive, and from there, textualism was born.[19] But notice what Justice Scalia's interpretation did: it expanded the statute from an obvious core. No one doubted that the statute covered manual laborers; Justice

[13] *See* Patel v. Garland, 596 U.S. 328, 346 (2022) ("As we have emphasized many times before, policy concerns cannot trump the best interpretation of the statutory text."); Wooden v. United States, 595 U.S. 360, 377 (2022) (Kavanaugh, J., concurring) (citing Kisor v. Wilkie, 139 S. Ct. 2400, 2448 (2019) (Kavanaugh, J., concurring in judgment)) (arguing rule of lenity should and will rarely be applied if the court is focused on the best interpretation of the statute); Kisor v. Wilkie, 139 S. Ct. 2400, 2439 (2019) (Gorsuch, J., concurring in judgment) ("When we defer to an agency interpretation that differs from what we believe to be the best interpretation of the law, we compromise our judicial independence and deny the people who come before us the impartial judgment that the Constitution guarantees them.").

[14] Bostock v. Clayton Cnty., 590 U.S. 644, 649 (2020) (holding that it is a violation of the text of Title VII for an employer to fire an individual for being homosexual or transgender); *see* McGirt v. Oklahoma, 140 S. Ct. 2452, 2478–79 (2020) (holding that Indian territory, for purposes of the Major Crimes Act, extends to nearly half of Oklahoma); *see also* Julian Brave NoiseCat, *The* McGirt *Case Is a Historic Win for Tribes*, ATLANTIC (July 12, 2020), https://perma.cc/V4U9-D6EB.

[15] Victoria Nourse, *The Paradoxes of a Unified Judicial Philosophy: An Empirical Study of the New Supreme Court, 2020–22*, 38 CONST. COMMENT. 1, 5 (2023) (when an interpretive conflict has arisen, at least one textualist Justice defected on interpretation 67% of the time).

[16] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 6 (2012).

[17] Nourse, *supra* note 15, at 49–50.

[18] 143 U.S. 457 (1892).

[19] Scalia, *supra* note 7, at 18–20.

Scalia's textualism expanded the coverage of the statute to "brain-toilers," a larger proportion of the working public.[20] In this sense, textualism's origins were not conservative in the sense of narrowing the law's application. If one were to put a thumb on the scale of narrowing the law's reach, one would have praised Justice Brewer's decision, which kept the statute to its core—the manual laborer.[21]

Justice Scalia rejected the deliberately narrowing interpretation associated with "strict constructionism."[22] He believed that a text "should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means."[23] Although his critics have tended to see Justice Scalia as a strict constructionist,[24] he did not see himself that way; in fact, he called strict construction a "degraded" form of interpretation that brings the "whole philosophy into disrepute."[25] In short, to have adopted a "narrowing" approach in *Holy Trinity,* keeping the statute to its core application, was to apply strict construction, not to reasonably interpret the words.

Empirics suggest that things have changed since Justice Scalia left the Court.[26] For one thing, the Court's composition has changed. There is no reason for conservative Justices to compromise on method any longer in the run-of-the-mill, non-ideologically-charged case (most of what the Court does goes entirely unnoticed by the public). All of the Republican-appointed Justices have written highly textualist opinions.[27] There is a supermajority of Justices who agree in theory about the approach. Since they can reliably win every case, textualist Justices need not compromise on method with their liberal brethren.[28] Numbers alone predict that the Court could veer sharply precisely because there is no structural brake to stop the engine.

Doctrinal changes confirm that the traditional Scalia approach is changing. The easiest way to see this is to consider the major questions

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20 *See id.*

21 *See Holy Trinity*, 143 U.S. at 458–59 (holding that while the "letter" of the law covered religious pastors, the "spirit" of the law, the core of what Congress intended, was limited to alien manual laborers).

22 Scalia, *supra* note 7, at 23.

23 *Id.*

24 *See, e.g.*, Bradley C. Karkkainen, *"Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Construction*, 17 HARV. J.L. & PUB. POL'Y 401, 425 (1994).

25 *See* Scalia, *supra* note 7, at 23.

26 *See* Nourse, *supra* note 15, at 1.

27 *See id.* at app. A.

28 *Cf.* Lawrence Baum, *Membership Change and Collective Voting Change in the United States Supreme Court*, 54 J. POL. 3, 14 (1992) (finding that membership change on the Supreme Court was the primary source of voting change).

doctrine. That doctrine sits rather uneasily with textualism, as both liberal and conservative Justices have written. In *West Virginia v. EPA*,[29] Justice Elena Kagan accused the majority of inventing a new "major questions" doctrine: "When [textualism] would frustrate broader goals, special canons like the 'major questions doctrine' magically appear as get-out-of-text-free cards."[30] In last Term's *Biden v. Nebraska*,[31] Justice Amy Coney Barrett, who as an academic, penned the most famous indictment of canons as inconsistent with textualism,[32] wrote that she took Justice Kagan's statement "seriously."[33]

Justice Barrett's concurrence in the *Nebraska* case deserves particular attention because it works very hard to make the major questions canon *consistent* with textualism, even if there are good reasons—which she acknowledges—to see it as quite *inconsistent* with textualism. Justice Barrett concedes that "many strong-form canons have a long historical pedigree, [but] they are 'in significant tension with textualism' insofar as they instruct a court to adopt something other than the statute's most natural meaning."[34] Citing Justice Scalia, she writes that

> a strong-form canon "load[s] the dice for or against a particular result" in order to serve a value that the judiciary has chosen to specially protect. Even if the judiciary's adoption of such canons can be reconciled with the Constitution, it is undeniable that they pose "a lot of trouble" for "the honest textualist."[35]

Quoting Dean John Manning, she punctuates this by explaining that strong canons amount to a "clarity tax" on Congress.[36] A strong form operates like a negative inference: if Congress has not said the magic words or something clearly importing the magic words, then the Court's policy controls, not Congress's text. A fairly well-known example of this kind of rule tips the scales against extraterritorial application of law: if Congress has not said, "this law applies extraterritorially," anything more ambiguous means the law applies only domestically.[37]

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29 596 U.S. 697 (2022).

30 *Id.* at 779 (Kagan, J., dissenting).

31 143 S. Ct. 2355 (2023).

32 Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 110 (2010).

33 *Nebraska*, 143 S. Ct. at 2376 (Barrett, J., concurring).

34 *Id.* at 2377 (quoting Barrett, *supra* note 32, at 123–24).

35 *Id.* (quoting Scalia, *supra* note 7, at 27) (internal citations omitted); *see also* Barrett, *supra* note 32, at 124, 168–69; *Nebraska*, 143 S. Ct. at 2377 (Barrett, J., concurring) (quoting Scalia, *supra* note 7, at 28).

36 *Nebraska*, 143 S. Ct. at 2376–77 (Barrett, J., concurring); *see also* John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 403 (2010) (describing clear statement rules generally).

37 *See, e.g.*, Abitron Austria GmbH v. Hetronic Int'l, Inc., 143 S. Ct. 2522, 2527 (2023) (holding that the relevant statutory provisions did not apply extraterritorially).

Barrett candidly acknowledges that a "'clear statement' version of the major questions doctrine 'loads the dice' so that [the judicial policy] interpretation wins even if the agency's interpretation is better."[38] Barrett's opinion is an extended essay on the uneasy relationship between canons and textualism. To reconcile the two, she rejects the "thumb on the scales" view of the major questions doctrine;[39] instead, she downgrades major questions to a common sense interpretive principle, as Justice Scalia had: Congress is more likely to keep "big time" policy decisions to itself, rather than "pawning them off" to an agency.[40] She urges instead the "no elephants in a mousehole" principle from which major questions sprung.[41] But her concession that the Court's opinions can be read as Justice Kagan has (as a made-up "get-out-of-text-free card[ ]") clearly supports this Article's claim that Justice Scalia's version of textualism may no longer be the dominant view on the Court; after all, Justice Kagan's opinion invoking Justice Scalia was in dissent.[42]

Justice Barrett puts her finger on a real issue for interpretation specialists: is the Court loading the dice in favor of a conclusion, even if that is not the best reading of the statute? Despite the extraordinary rush of academics writing on the major questions doctrine, there are many things we do not know about it. Sometimes it is applied by courts of appeals, and sometimes not—no doubt an endless source of frustration to agency general counsel. Many cases that may seem quite "major" from an ordinary person's view, may not be major from the view of the agency or Congress.[43] If one cannot explain textualism and the major questions doctrine as consistent, then there is another explanation suggested by both Justice Barrett and Justice Kagan: today's Court has imposed a clarity tax on Congress and agencies.[44] There have been six opinions deploying

[38] *Nebraska*, 143 S. Ct. at 2378 (Barett, J., concurring).

[39] *But see id.* at 2396–97 (Kagan, J., dissenting) (arguing major questions places a "thumb on the scales").

[40] *Id.* at 2380 (citing West Virginia v. EPA, 597 U.S. 697, 723 (2022)). This is a questionable understanding of congressional process, but I leave that to the footnotes. *See* Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2207–11 (2017). In most worlds, experience deserves respect (think the military and medicine), but apparently not when it comes to experience of lawyers in Congress. Because of the increasing complexity of the world, Congress is forced to delegate given its limited institutional capacity, an entirely nonpartisan view.

[41] *Nebraska*, 143 S. Ct. at 2382 (Barrett, J., concurring) (citing Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001)).

[42] *Id.* at 2376, 2382 (citing West Virginia v. EPA, 597 U.S. 697, 779 (2022) (Kagan, J., dissenting)).

[43] *See* Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475, 480–81 (2021).

[44] *See Nebraska*, 143 S. Ct. at 2377–78 (Barrett, J., concurring); West Virginia v. EPA, 597 U.S. 697, 756 (Kagan, J., dissenting) ("Congress knows what it doesn't and can't know when it drafts a statute;

the major questions doctrine since 2019.[45] All six opinions concluded that the agency had overstepped its authority.[46]

Justice Scalia believed strict construction violated the rule of law.[47] One can easily achieve "neutrality" in law by simply picking a side: always rule against the government, for example, would be a neutral rule. But that is exactly the problem with the strict construction Justice Scalia abjured. It is a "thumb on the scale."[48] By definition, law cannot mean that one party always wins, or wins most of the time, or sixty or seventy percent of the time. Strict construction should fail the rule of law principle because it puts a thumb on the scale of interpretations against the most natural reading of the statute, remaking the statute in the image of judicially created policy preferences. So, for example, a court that sought to deliberately narrow law would reliably tend to pick the most specific language in the statute as opposed to its more general language, or *sub silentio* add limiting meanings to the text's language that were not stated in the text. Although my empirical work is not done yet, current results suggest a reliable tilt narrowing statutes' domains. This work is explained below, including its use of the notion of a statutory "core" or "domain."

and Congress therefore gives an expert agency the power to address issues—even significant ones—as and when they arise. . . . The majority today overrides that legislative choice.").

45 *See* cases cited *infra* note 46.

46 Gundy v. United States, 139 S. Ct. 2116, 2131, 2141–42 (2019) (Gorsuch, J., dissenting); Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1925, 1931 (2020) (Thomas, J., concurring in part and dissenting in part) (arguing that the agency would violate the major questions doctrine by restructuring immigration); Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S. 109, 117 (2022); *West Virginia*, 597 U.S. at 725, 735 (majority opinion); Sackett v. EPA, 143 S. Ct. 1322, 1361 (2023) (Kagan, J., concurring) (arguing the majority opinion invokes the major questions doctrine); *Nebraska*, 143 S. Ct. at 2375 (majority opinion). This does not include *Ruan v. United States*, 597 U.S. 450, 459 (2022), where Justice Stephen Breyer used the term "major question" borrowing it from *Gonzales v. Oregon*, 546 U.S. 243, 257–58 (2006), which was decided in 2006; the case does not apply the "major questions" doctrine as such. This also does not include *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., concurring in the denial of certiorari on the nondelegation doctrine).

47 *See* SCALIA & GARNER, *supra* note 16, at 39 (rejecting strict construction as a "hyperliteral brand of textualism"); *see also id.* at 355–58 ("Strict constructionism, as opposed to fair-reading textualism, is not a doctrine to be taken seriously.").

48 *See, e.g.*, *Nebraska*, 143 S. Ct. at 2397 (Kagan, J., dissenting) ("So the Court puts its own heavyweight thumb on the scales. It insists that '[h]owever broad' Congress's delegation to the Secretary, it (the Court) will not allow him to use that general authorization to resolve important issues. The question, the majority helpfully tells us, is 'who has the authority' to make such significant calls. The answer, as is now becoming commonplace, is this Court." (internal citations omitted)).

II. Narrowing Statute's Domains

Many years ago, the textualist icon, Judge Frank Easterbrook, introduced the concept of a statute's "domain" in a famous law review article.[49] He contended, in essence, that there were some cases where statutory "construction" was impermissible because the party was seeking an interpretation outside the statute's domain (if the statute says "dogs," a party could not argue that it covers "cats").[50] This Article deploys this concept for somewhat different purposes.[51] It is doubtful the cat case would ever be litigated.[52] Nevertheless, the insight that there are "domains" for statutes is important if one is trying to assess whether courts are putting a thumb on the scale in favor of narrower or broader readings.

As Professor Henry Hart contended, many (but not all) statutes have a core—what this Article will call a "prototypical application."[53] The question that often arises in litigation is whether the Court should move beyond that prototypical application to cover more extensive applications. In his famous "no vehicles in the park" example, for instance, the prototypical application is to a car. This Article defines "prototypical" as the application upon which most ordinary people and judges would agree; typically, both sides in litigation will agree upon a core prototypical application. Once one moves beyond that prototypical application (to something more extensive, such as bicycles or scooters), people and judges start to differ.[54] This reflects the basic psychological and linguistic principle that we understand language by prototypes, not definitions.[55]

In a forthcoming empirical study, I argue that the Court today regularly construes statutes to keep to their core application. In some cases, the Court deploys statutory construction to achieve this; in others, it uses the common law to define unclear terms. But there are other ways to narrow law: by constitutional construction or limitation, which also happens on a regular basis. The easiest way to think of this in operational

49 Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 534–35 (1983).

50 *Id.* at 535–36.

51 *See* Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Statutory Interpretation from the Outside*, 122 COLUM. L. REV. 213, 280–81 (2022); Victoria F. Nourse, *Two Kinds of Plain Meaning*, 76 BROOK. L. REV. 997, 1000–01 (2011).

52 The kind of distinction that Easterbrook wrote about was in fact embraced by treatise writers of the early eighteenth century, who believed that there were cases that did not require interpretation or construction.

53 *See* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958).

54 *See* Kevin Tobia, *Experimental Jurisprudence*, 89 U. CHI. L. REV. 735, 772, 784–90 (2022).

55 *See, e.g.*, Eleanor H. Rosch, *Natural Categories*, 4 COGNITIVE PSYCH. 328, 348–49 (1973).

terms is that, when presented with two constructions, the thumb is on the scale of the narrower one. The statute will be construed more toward its core application than its peripheral ones. This Article presents some of the findings based on the cases in the 2023 Term; elsewhere I have surveyed the universe of cases in the 2020-2022 Terms[56]; the full study will include all three Terms.

Sackett v. EPA[57] offers an easy example.[58] The Sacketts wanted to build a property next to a lake, but the Environmental Protection Agency halted the work upon finding that the Sacketts' lot contained a federally protected wetland.[59] In 2006, in a case called *Rapanos v. United States*,[60] Justice Scalia wrote for a plurality that the Clean Water Act should be limited to what amounts to flowing water, exactly what an average person would think was meant by water.[61] In a 2023 rematch on this question, in *Sackett*, the majority accepted the Scalia *Rapanos* test.[62] Justice Brett Kavanaugh disagreed, finding with the majority that the agency's interpretation was wrong, but that the majority's proposed reading had essentially "rewrit[ten]" the statute by redefining "adjacent" to mean "adjoining."[63] Adjoining wetlands had to flow into a body of water; Justice Kavanaugh read the statute to cover more wetlands (wetlands that did not flow into waters, but were next to water).[64] This debate, among avowed textualists, is not anomalous; it characterizes interpretive practice on the Court, as demonstrated by how the Justices have sparred about statute's domains in the 2020, 2021, and 2022 Terms.[65]

It turns out that *Sackett*'s modus operandi—narrowing statutes' domains in the sense defined by this Article—is not unusual in the new 2023 Term. Cases in which the Court followed the same "narrowing" pattern clearly exceeded those accepting a broader application.[66] Consider the following examples. In an identity theft case, the Court refused to allow the government to deploy the statute broadly, favoring what it called the more "restrained" reading, keeping the statute closer to something

56 *See* Nourse, *supra* note 15, at 1.

57 143 S. Ct. 1322 (2023).

58 *Id.* at 1338–41.

59 *Id.* at 1331.

60 547 U.S. 715 (2006).

61 *Id.* at 739 (plurality opinion).

62 *See Sackett*, 143 S. Ct. at 1344.

63 *Id.* at 1367 (Kavanaugh, J., concurring in the judgment).

64 *Id.* at 1362–63, 1368.

65 *See* Nourse, *supra* note 15, at 5–6.

66 This awaits confirmation, but currently our results show approximately 60% of all cases interpreting a statutory or regulatory text are narrowing constructions. The findings will be posted as an appendix to a draft of this Article available on SSRN.

that most people would associate with identity theft.[67] Similarly, the Court narrowed the ability of the federal government to deploy the mail and wire fraud statutes to attack public corruption, limiting them to their common law applications.[68] In another case, the Court narrowed the terrorism statute's "aiding and abetting" language to prevent recovery against major internet providers, again focusing on the core statutory prohibition against actual help to terrorists.[69]

The data so far show that narrowing constructions predominated, meaning that undisputed applications won more of the time, even if that required a bit of judicial creativity given the broad language of a statute. This occurred both through statutory construction as well as constitutional construction, reflecting both constitutional avoidance and a direct limit on unconstitutional statutory applications.[70] For example, in another public corruption case, the Court narrowed the wire services fraud statute because of "due process" vagueness concerns.[71] In an immigration case, the Court narrowed the scope of a statute criminalizing the "encouragement" of illegal immigration by deploying the First Amendment.[72] Similarly, the Court limited the reach of a state forfeiture statute because it resulted in an application that violated the Takings Clause.[73] In a stalking case, and in light of the First Amendment, the Court narrowed the statute's coverage to cases in which the stalker knew of a risk that his communications were actually threatening.[74] Similarly, the Court narrowed a Colorado public accommodations law's application to a web developer to accord with the notion that public accommodations laws cannot control pure speech.[75]

This pattern is a sign of an emerging interpretative regime that puts a thumb on the scale favoring core applications. There could be sound normative reasons to applaud this view, depending upon one's theory of interpretation. If consistently true, it could mean that the Court was narrowing the statute to something analogous to its core "mischief"—a

67 Dubin v. United States, 143 S. Ct. 1557, 1572 (2023).

68 Ciminelli v. United States, 143 S. Ct. 1121, 1128–29 (2023) (limiting the scope of the federal wire fraud statute); *see also* Turkiye Halk Bankasi A.S. v. United States, 143 S. Ct. 940, 946–51 (2023) (limiting the scope of the foreign sovereign immunity statute to exclude criminal activities of foreign entities).

69 Twitter, Inc. v. Taamneh, 143 S. Ct. 1206, 1218–23 (2023).

70 Typically, a court does not strike down a statute as unconstitutional on its face, but as it is applied.

71 *See, e.g.*, Percoco v. United States, 143 S. Ct. 1130, 1135–39 (2023).

72 United States v. Hansen, 143 S. Ct. 1932, 1939–42 (2023).

73 Tyler v. Hennepin Cnty., 143 S. Ct. 1369, 1380 (2023).

74 Counterman v. Colorado, 143 S. Ct. 2106, 2111–12 (2023).

75 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2315 (2023).

term that Blackstone used to describe "the problem that prompted the statute"[76] Such an approach might well be more efficient and easier to apply than textualism. On the other hand, a consistently applied "mischief" rule poses serious problems for unforeseen applications, which are inevitable given a world in which facts and norms change regularly. It also raises questions about whether such a rule is properly deferential to the "public good" more generally.[77] However one comes down on the wisdom of a "mischief" rule, all should recognize the point about regime change: this is not textualism as Justice Scalia propounded it. After all, as we saw in the case of *Holy Trinity*, textualist interpretations may, in theory, expand a statute's domains. Textualism, as originally conceived, did not put a thumb on the scale to narrow statutes.

A caveat: a consistent narrowing pattern does not necessarily support the claim, made by some, that the Court is engaged in libertarian construction.[78] If that were true, the cases would have a reliable tilt toward the individual when pitted against the government, but the data do not support that presumption, at least not yet. For example, if the Court were reliably libertarian, then criminal defendants would win most of the time, but that does not necessarily appear to be the case.[79] Justice Neil Gorsuch has asserted the most consistency along libertarian lines, notably attempting to revive the rule of lenity in some criminal cases.[80] But the trend is not robustly consistent. Justices Kavanaugh and Gorsuch have sparred about the rule of lenity, and the Court has ruled against criminal defendants and immigrants in several cases in the past three years.[81] One might worry that the Court is more reliably libertarian for the well-heeled white-collar defendants as opposed to the average criminal defendant, but

[76] Samuel L. Bray, *The Mischief Rule*, 109 GEO. L.J. 967, 1001 (2021); Timothy J. Bradley, *Getting into Mischief: Reflections on Statutory Interpretation and the Mischief Rule*, 109 GEO. L.J. ONLINE 199, 221–23 (2021).

[77] Judge Richard Posner once claimed that textualism was "autistic," meaning that it tended to take text out of context. RICHARD A. POSNER, HOW JUDGES THINK 194 (2008). Today, no textualist claims that context is irrelevant. On the other hand, there are good arguments for why the Court narrows and expands the context in ways that are deeply untheorized. *See* Eskridge & Nourse, *supra* note 11, at 1784–85, 1788–89.

[78] *See e.g.*, Bradford C. Mank, *Textualism's Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY. L.J. 527, 565 (1997).

[79] *See, e.g.*, Turkiye Halk Bankasi A.S. v. United States, 143 S. Ct. 940, 951–52 (2023). Notice that my research depends upon the domain of the statute, not the results of the case. We measure the interpretative claims of the parties themselves, the Court's descriptions of those claims, use independent coding, and confirm these judgments by looking at legal commentary.

[80] *See, e.g.*, Wooden v. United States, 595 U.S. 360, 388 (2022) (Gorsuch, J., concurring) (arguing that the "key" in this case lies in the rule of lenity).

[81] *See, e.g.*, Jones v. Hendrix, 143 S. Ct. 1857, 1876–77 (2023).

there is no consistent empirical data yet supporting that conclusion.[82] If anything, the turn toward limiting statutes toward their core is consistent with what some commentators have called "populist" interpretation.[83]

Finally, it is important to note that this narrowing technique is *inconsistent* with the "original" meaning of strict construction, as measured by caselaw and treatises in the early Republic. Strict construction as a term in political discourse is as old as the Republic.[84] And in that sense, it meant something we might call libertarian construction.[85] Thomas Jefferson famously said: "That government is best which governs least."[86] Over time, various meanings of "strict construction" have arisen in the political realm, well up until the end of the twentieth century, not all of them particularly pretty since they bear the stain of racism.[87] Perhaps reflecting Justice Scalia's own worry that strict construction was a "degraded" form of construction,[88] the evidence shows that the Court's current practices are inconsistent with what strict construction most consistently meant at the Founding and through the nineteenth century. Then, strict construction was limited to criminal cases,[89] something not

82 *Compare* Percoco v. United States, 143 S. Ct. 1130, 1133 (2023) (honest-services wire fraud), *and* Ciminelli v. United States, 142 S. Ct. 1121, 1124 (2023) (federal wire fraud), *with Hendrix*, 143 S. Ct. at 1863–64 (denying habeas claim in a case involving unlawful possession of a firearm by a felon and making false statements to acquire a firearm).

83 *See* Anya Bernstein & Glen Staszewski, *Judicial Populism*, 106 MINN. L. REV. 283, 287 (2021); Eskridge & Nourse, *supra* note 11, at 1733.

84 *See* PETER ZAVODNYIK, THE AGE OF STRICT CONSTRUCTION: A HISTORY OF THE GROWTH OF FEDERAL POWER, 1789–1861, at 1 (2007).

85 *See id.* at 2 (quoting nineteenth century scholars supporting strict constructionism to preserve liberty).

86 First cited in print in EDWARD PETERSON, HISTORY OF RHODE ISLAND 41 (1853).

87 In the 1960s, President Richard Nixon famously called for "strict construction," which he associated with law and order. *See* S.L. Whitesell, *The Church of Originalism*, 16 U. PA. J. CONST. L. 1531, 1539 (2014). He nominated two Justices to the Supreme Court whose confirmations were denied because of their associations with racial segregation. *See* TREVOR PARRY-GILES, THE CHARACTER OF JUSTICE: RHETORIC, LAW, AND POLITICS IN THE SUPREME COURT CONFIRMATION PROCESS 88 (Martin J. Medhurst ed., 2006); Bruce H. Kalk, *The Carswell Affair: The Politics of a Supreme Court Nomination in the Nixon Administration*, 42 AM. J. LEGAL HIST. 261, 267–68 (1998).

88 Scalia, *supra* note 7, at 23.

89 *See* United States v. Wiltberger, 18 U.S. 76, 94 (1820) (construing a criminal statute involving manslaughter on the high seas narrowly); United States v. Sheldon, 15 U.S. 119, 121 (1817) (construing a forfeiture law narrowly); United States v. Morris, 39 U.S. 464, 475 (1840) ("In expounding a penal statute the Court certainly will not extend it beyond the plain meaning of its words; for it has been long and well settled, that such statutes must be construed strictly. Yet the evident intention of the legislature ought not to be defeated by a forced and over strict construction."). For one explanation of the rule, see *The Enterprise*, 8 F. Cas. 732, 734 (C.C.D.N.Y. 1810) ("But while it is said that penal statutes are to receive a strict construction, nothing more is meant than that they shall not, by what may be thought their spirit or equity, be extended to offences other than those which are specially and clearly

borne out by my data to this point, and many of the examples explained above.

III. *Loper Bright*'s Future

Why is *Chevron* skepticism a signal of interpretive regime change? Textualism sat perfectly at ease with *Chevron*, and Justice Scalia deployed it in key cases where the agency was held to the statute's plain meaning.[90] That the Court is now poised to overrule *Chevron* means that something new may be going on, just as we saw when looking at major questions and statutory narrowing. How do we explain these moves? One unifying factor of all these developments—major questions, narrow construction, and *Chevron* skepticism—is that each moves beyond Justice Scalia's textualism.

Justice Scalia, founder of textualism, did not see *Chevron* as a threat to his judicial philosophy.[91] He was also an astute student of administrative law and understood that agencies served some important purposes.[92] If one is resolutely hostile to agency government, however, then a thumb on the scale against Congress and agencies makes sense. No doubt the Justices believe that there are overarching structural reasons for their concerns. For example, the major questions doctrine trades on the idea that Congress, not an agency, should be the decisionmaker for particularly important problems.[93] One might justify deliberately narrowing statutes' domains as an interpretive corollary to that proposition. But one must also worry that each of these moves—major questions, narrowing constructions, and *Chevron* skepticism—has predictable costs. Even if there may be good reasons impelling the move, the result is that agencies, when faced with new, unexpected, and large problems, will find it harder to act: they will have to ask themselves whether the rule or enforcement action amounts to a "major question," and whether their interpretation of the statute is too broad, particularly if their interpretation will receive no deference.

Chevron's rule-of-law justification lay in the theory that courts are more restrained if they defer to the agency on technical matters of

described and provided for."). *See also* THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 291–92 (1857) (penal statutes to be strictly construed).

90 *See, e.g.*, AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 397 (1999).

91 *See* Gregory E. Maggs, *Reconciling Textualism and the* Chevron *Doctrine: In Defense of Justice Scalia*, 28 CONN. L. REV. 393, 395 (1996).

92 *See* Scalia, *supra* note 3, at 517–18.

93 *See* West Virginia v. EPA, 597 U.S. 2587, 716 (2022) (quoting Util. Air Regul. Grp. V. EPA, 573 U.S. 302, 324 (2014)).

statutory application. In a world of increasing complexity, there was a judicial humility about *Chevron*.[94] When matters involved expert judgment in statutory application (like *Chevron*'s own "bubble concept" for measuring polluting sources), courts deferred.[95] Common sense supported that humility: Do we really want the Supreme Court predicting the path of a hurricane or assessing nuclear safety measures? In this sense, *Chevron* is consistent with judicial restraint and prudence about the limits of the judicial role. But that is not the view held by those seeking to overturn *Chevron*—who see *Chevron* as an attack on the judicial role itself.[96] They believe that interpretation, under the Administrative Procedure Act, is left to the courts.[97] And they believe that political considerations too often infect agency interpretation.[98] Why would or should, as Justice Gorsuch has asked, a judge defer to a "political actor" for a legal interpretation?[99]

The arguments for overruling *Chevron* contend that *Chevron* misallocates the judicial role to "say what the law is."[100] Of course, the latter is nothing but an *ipse dixit*; ask any Senator or President and they will each say that their branch "says" what the law is. The imprecision of "say" is breathtaking. Nevertheless, judges challenging *Chevron* see interpretation as their duty, one they may not "pawn[] . . . off" on agencies, to quote Justice Barrett.[101] There are good reasons to see how *Chevron*'s increasingly complex architecture of deference (which makes up hundreds of pages of casebooks, including mine) has led to some very odd results. Justice Gorsuch is perfectly right to ask why an immigration judge should tell the Court of Appeals for the Tenth Circuit how to interpret a statute;[102] that *should* seem odd. But the question is whether one should move from that important question to the conclusion that all agencies do is "politics," and therefore, they deserve no deference at all.

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94 *See* Laurence H. Silberman, Chevron—*The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 823 (1990).

95 *See* Scalia, *supra* note 3, at 511.

96 *See* Michigan v. EPA, 576 U.S. 743, 761 (2015) (Thomas, J., concurring).

97 5 U.S.C. § 706.

98 *See Michigan*, 576 U.S. at 761–64 (Thomas, J., concurring) (noting the importance of a court's independent judgment when interpreting law, unlike that of an agency's).

99 Kisor v. Wilkie, 139 S. Ct. 2400, 2429 (2019) (Gorsuch, J., concurring in the judgment). The APA itself says the following about judicial review of agency action: "To the extent necessary to decision and when presented, 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." 5 U.S.C. § 706.

100 *See Michigan*, 576 U.S. at 761 (Thomas, J., concurring) (internal quotation marks omitted) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

101 Biden v. Nebraska, 143 S. Ct. 2355, 2380 (2023) (Barrett, J., concurring).

102 Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1150 (10th Cir. 2016) (Gorsuch, J., concurring).

Loper Bright's facts are a dream case for those who see the administrative state as overweening. It has the flavor of many cases, in other doctrinal areas, that the Court has taken to make a similar point: enough is enough, stop with the regulation! Consider *Cedar Point Nursery, Inc. v. Hassid*,[103] where the Court pushed back on unions going on private property to recruit members and found that the law amounted to an express taking.[104] *Loper Bright* does not involve a takings claim, but there is the strong flavor of similar equities: Why should the agency force the regulated to pay for their own regulation?[105] A court might resolve *Loper Bright* by restraining agencies from similar practices: if the agency does not have the money to regulate, it must go to Congress. Such a resolution limited to *Loper Bright*'s facts may have implications for other regulatory regimes, but at the least it would be limited to a particular kind of problem and resonate with Congress's expressed will through the appropriations process.

By contrast, reversing or seriously cabining *Chevron* is a much larger proposition because it will resonate across the government more broadly. It will affect the Food and Drug Administration as much as the Department of Labor, the Federal Reserve, and the entire alphabet city up and down Pennsylvania Avenue. Agency lawyers throughout the government will now have to ask themselves whether their interpretation of the statute is one the Court would approve, not simply in the past, but now with a Court focused on text and deploying rules of interpretation set toward narrow readings. One imagines many general counsel's offices writing lots of memos on whether their prior interpretations are now subject to attack. In short, overruling *Chevron* could have an immediate chilling effect across agency government, on regulations small and large. At the very least, it will unleash lots of work in general counsel's offices.

Some academics believe that the Court will not eliminate *Chevron* but will limit it.[106] In 2019, when the Court refused to overrule a different deference regime, *Auer* deference, in *Kisor v. Wilkie*,[107] it cabined the rule.[108] Before, *Auer v. Robbins*[109] required almost complete and reflexive deference to an agency's interpretation of its own ambiguous regulation.[110] Rather

103 594 U.S. 139 (2021).

104 *See id.* at 143, 162.

105 The answer, in this case, is the tragedy of the commons which occurs from overfishing. No regulation may mean no fish.

106 *See, e.g.*, Kristin E. Hickman & Aaron L. Nielson, *Narrowing* Chevron*'s Domain*, 70 DUKE L.J. 931, 999 (2021).

107 139 S. Ct. 2400 (2019).

108 *Id.* at 2408.

109 519 U.S. 452 (1997).

110 *See id.* at 461.

than overruling *Auer*, the Court cabined it. It insisted on true "ambiguity" (after all other tools of statutory interpretation were applied) and that the agency's interpretation had to be based on an expertise-based "fair and considered judgment."[111]

Some have suggested a similar compromise in *Loper Bright*, with the Court insisting on strict attention to the text but leaving a safety valve for "expertise-based" judgments.[112] This might be one way to satisfy those worried that agency government is riddled with partisan politics and those who still hold out hope for the concept of agency expertise. But if this Article's propositions are correct about *Chevron* skepticism as part of a larger interpretive trend, then one should not hold out hope that this kind of compromise will prevail. The current Court has not shown itself particularly willing to rely upon agency expertise. The *Sackett* majority narrowed the statute, even though Justice Kavanaugh concurred with a different textualist reading relied upon by experts.[113] Whatever the *Loper Bright* opinion does, if this Article's propositions are correct about the larger trend to narrow law's domain, deference will only remain for agency actions that do just that: narrow law's domain.

Some believe the Court might cut back on *Chevron* but leave other deference regimes in place. There are a myriad of deference doctrines that exist apart from *Chevron* and are largely agency or subject matter deference regimes.[114] These may well continue to exist and govern particular agencies, but those agencies may have to reconsider their special deference rules in light of an aggressive *Loper Bright* opinion reversing *Chevron*. Then, too, there is the backdrop of *Skidmore v. Swift & Co.*[115] "power to persuade" deference;[116] the Court is quite aware of this, however, and one can assume that they will say yay or nay on its continued viability should they make a major anti-*Chevron* pronouncement.

If nothing else, a new anti-deference rule will increase litigation. Regulated parties will now be incentivized to attack regulations that harm them but were created under the prior *Chevron* regime. Just as parties now attack statutory interpretations based on legislative history (now barred in theory if not in fact), so too will regulated parties attack prior

111 *Kisor*, 139 S. Ct. at 2417 (quoting Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012)).

112 *See, e.g.*, Ufonobong Umanah, *Expect Narrowing of* Chevron *Doctrine, High Court Watchers Say*, BLOOMBERG L. (Oct. 10, 2023, 5:00 AM), https://perma.cc/FY4C-FVTS.

113 Sackett v. EPA, 143 S. Ct. 1322, 1362 (2023) (Kavanaugh, J., concurring in the judgment).

114 William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1100, 1109–11 (2008) (explaining that there are agency specific rules of deference that have existed alongside *Chevron*).

115 323 U.S. 134 (1944).

116 *Id.* at 140.

regulations based on undue *Chevron* deference. If *Chevron* falls or even if it is just cut back, regulated parties—banks, hospitals, debt collectors—have the incentive to litigate all these matters. Of course, interest groups (whether they focus on climate change or consumer rights) are likely to resist narrow readings, and they can be repeat litigants, but they generally have fewer resources. Put in other words, this Court (with its various changes in legal practice) is a gift that is going to keep giving to lawyers.

When a serious problem with this approach emerges, it will be a problem that comes from the raw fact that statutes cannot be omniscient. The world changes and technological change is moving faster and faster. No one disputes that Congress cannot anticipate vast amounts of change. Let's assume that Congress regulates based on core problems and that courts keep statutes to the core problem. What happens when errant actors find something new, whether it is cryptocurrency or weapons of mass destruction? If the agency must keep to the core, there is a risk that they will refuse to regulate in analogous cases, ones that may be truly harmful to the nation. Reversing *Chevron* is only part of the problem, as this example suggests; the Court decides very few agency cases a term, but the vast bulk of its work is statutory interpretation. A wise court would recognize the age-old wisdom that statutory interpretations should not be narrow or broad, but should analogize to unquestioned statutory applications. However much ballyhoo is made of *Chevron*'s impending demise or restraint, the larger job of agencies will be to reconcile their work to an increasingly new and different interpretive regime.

Conclusion

I fully expect the Court to make major changes in the *Chevron* doctrine. It will assert its role to determine the "best" meaning of statutes. This, in turn, will require major changes in agency practice and will create a significant amount of litigation.