STATUTORY LIQUIDATION

DANIEL T. DEACON*

When might practice by the political branches settle the meaning of legal text? That question has mostly been taken up in the constitutional setting, with one strand of scholarship taking inspiration from Madison's statement in Federalist No. 37, that "[a]ll new laws . . . are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications." The prospect that post-enactment practice might liquidate the meaning of statutory *text has been comparatively underexamined. That's not surprising. Under modern textualism, post-enactment considerations would seem to have little place. And under* Chevron*, although courts deferred to executive branch actors, those actors lacked the ability to finally settle, or fix, statutory meaning—a power usually associated with liquidation.*

But in a spate of recent cases involving agency authority, the Supreme Court has embraced the idea that extrajudicial practice may settle the meaning of statutory text. In cases associated with the new major questions doctrine, the Court has confronted seemingly broad statutes only to narrow them, placing heavy reliance on the Court's judgment that the agency action under review represented a deviation from past agency practice that had effectively liquidated the statutes in question. And in Loper Bright*, the Court quoted approvingly*

* Assistant Professor of Law, University of Michigan Law School. For helpful comments and conversation, I am indebted to Nick Bagley, Maggie Blackhawk, Curt Bradley, Sam Bray, Aaron Bruhl, Avery Comar, Dan Crane, Alma Diamond, Ryan Doerfler, Jacob Goldin, Tara Grove, Daniel Hemel, Don Herzog, Sam Issacharoff, Ron Levin, Leah Litman, Nina Mendelson, Julian Mortenson, Melissa Murray, JJ Prescott, Nick Parrillo, Richard Primus, Richard Re, Mark Seidenfeld, Sid Shapiro, Larry Solum, Peter Strauss, Kevin Tobia, and Chris Walker, as well as to all who participated when this paper was presented at the Cornell Law School faculty workshop, the University of Michigan Law School faculty workshop, the NYU Public Law Colloquium, the 2025 Harvard/Yale/Stanford Junior Faculty Forum, the 2025 National Conference of Constitutional Law Scholars, the ABA Administrative Law and Regulatory Practice Section 2025 Spring Conference, the New Voices in Administrative Law program held at the 2025 AALS Annual Conference, and the roundtable on "Textualism and Administration After *Loper Bright*" hosted by the C. Boyden Gray Center for the Study of the Administrative State at George Mason University's Antonin Scalia Law School. Generous support was provided by the Gray Center and the William W. Cook Endowment Fund at the University of Michigan.

from both Federalist No. 37 and Noel Canning, *a case closely associated with constitutional liquidation, in service of its conclusion that longstanding and consistent agency interpretations are due special respect, especially when those interpretations are issued contemporaneously with the statute. By contrast, interpretations that break from the agency's prior views or are otherwise "novel" would seem to receive a kind of negative deference.*

This Article traces the emergence of statutory liquidation in the Supreme Court's case law and explores it critically. It unpacks how statutory liquidation affects the constitutional separation of powers. And it tentatively explores various theories that may ground statutory liquidation. It argues that all such theories fall short in that they are either incomplete, fail to cohere with the Court's broader commitments, or do not justify features of statutory liquidation reflected in the emerging practice.

INTRODUCTION 505
I. STATUTORY SETTLEMENT INSIDE AND OUTSIDE THE COURTS 512
A. *Settlement by Precedent* 512
B. *Settlement by Evidence of Common Understanding or Practice* 515
II. STATUTORY LIQUIDATION IN AGENCY CASES 518
A. *Liquidation under* Chevron 518
B. *Liquidation under the New Major Questions Doctrine* 520
C. *Liquidation under* Loper Bright 530
III. IMPLICATIONS OF STATUTORY LIQUIDATION FOR THE SEPARATION OF POWERS 534
A. *Agencies* 534
B. *Congress* 539
C. *The Courts* 541
IV. THE THEORY OF STATUTORY LIQUIDATION 548
A. *The Anti-Liquidation Theory of* Bostock 548
B. *The Anti-Liquidation Theory of* Chevron 549
C. *In Search of a Pro-Liquidation Theory* 551
1. *Epistemic Theories* 552
a. *Liquidation and Textualism* 552
b. *Liquidation and Purposivism* 559
c. *Liquidation and Intentionalism* 561
2. *Constitutional Theories* 562
3. *Normative Theories* 565
a. *Reliance* 566
b. *Expertise* 569
4. *Agreement-Based Theories* 571
CONCLUSION 573

INTRODUCTION

Courts are rarely, if ever, the first actors to grapple with legal text. Long before judicial resolution may be possible, executive branch officials face decisions about what the law requires, what it allows, and how it should be implemented. Members of Congress may express their views, or act (or refrain from acting) in ways that reflect a certain understanding of the law. And regulated entities, as well as the broader public, routinely order their affairs according to their perceived legal obligations.

In recent years, the question of how to incorporate extrajudicial practice into judicial decisionmaking has largely been taken up by scholars of constitutional law. Such scholars—including those associated with the "historical gloss" method—have catalogued the Supreme Court's use of historical practice in constitutional cases and explored various normative grounds that may support it.[1] A related strand of the literature on practice-based methods has taken inspiration from Madison's statement in Federalist No. 37, that "[a]ll new laws . . . are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."[2] Such "discussions and adjudications" might occur within a judicial setting. But they might not, raising the prospect that historical practice could itself liquidate—in the sense of "[t]o make clear or plain (something obscure or confused)"[3]—the meaning of legal texts.[4]

---

1. *See generally* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012); *see also* Samuel Issacharoff & Trevor Morrison, *Constitution by Convention*, 108 CALIF. L. REV. 1913 (2020); Aziz Z. Huq, *Fourth Amendment Gloss*, 113 NW. U. L. REV. 701 (2019); Curtis A. Bradley, *Doing Gloss*, 84 U. CHI. L. REV. 59 (2017). Commentators have also examined the Supreme Court's recent turn to "history and tradition" in cases involving constitutional rights. *See, e.g.*, Reva B. Siegel, *The Levels-of-Generality Game: "History and Tradition" in the Roberts Court*, 47 Harv. J.L. & Pub. Pol'y 563 (2024).

2. THE FEDERALIST NO. 37, at 235 (James Madison) (Jacob E. Cooke ed., 1961). The literature on constitutional liquidation includes, among other work, William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019); Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1775–76 (2015); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 525–53 (2003) [hereinafter *Originalism and Interpretive Conventions*]; Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 10–21 (2001). On the differences between gloss and liquidation, *see* Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 VA. L. REV. 1 (2020).

3. *Liquidate*, OXFORD ENGLISH DICTIONARY (2d ed. 1989).

4. McConnell, *supra* note 2, at 1773 ("'Decisions' and 'adjudications' most plausibly refer *both* to adjudications in court (precedent) and also to 'decisions' in other forums.").

Although the Madisonian concept of liquidation is broad enough to extend to both constitutional and statutory settings,[5] the extent to which historical practice might bear on the resolution of statutory questions has been comparatively neglected.[6] That may be due, in part, to the perceived dominance of textualist methods of interpreting statutes.[7] Practice-based methods represent a more broadly conventionalist approach to discerning legal rules, one that is more accommodating of unwritten sources of law.[8] Textualism, particularly in its original-public-meaning form, would by contrast seem to leave little room for post-enactment considerations.[9] In *Bostock v. Clayton County*,[10] the Supreme Court appeared to agree, concluding that post-1964 practices by various actors were simply irrelevant to whether Title VII prohibited employment discrimination on the basis of sexual orientation or gender identity.[11]

---

5. Bradley & Siegel, *supra* note 2, at 43 ("Madison was not tying liquidation specifically to constitutional interpretation; he was simply observing that it was something that one should expect with all new laws (including statutory law and the common law).").

6. A couple of exceptions particularly stand out. The first is Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908 (2017). Bamzai's article is concerned, among other things, with tracing a body of pre-Administrative Procedure Act (APA) case law that gave weight to "longstanding and contemporaneous executive interpretations of law," *id.* at 916, a practice Bamzai relates to Madisonian liquidation, *id.* at 940. This Article will sidestep the historical debate concerning the state of judicial review of agency action around the time of the APA's enactment, focusing instead on tracing the emergence of a modern form of statutory liquidation and providing an initial normative evaluation of the emerging practice that is not tied to its historical pedigree. *See infra* notes 315–321 and accompanying text. For a critique of Bamzai's reading of the pre-APA case law, see Ronald M. Levin, *The APA and the Assault on Deference*, 106 MINN. L. REV. 125, 167–70 (2021).

The second exception is Anita S. Krishnakumar, *Longstanding Agency Interpretations*, 83 FORDHAM L. REV. 1823 (2015). Krishnakumar takes up courts' treatment of longstanding agency interpretations, and she defends a posture of judicial deference toward such interpretations. Krishnakumar was writing before the rise of the major questions doctrine and during the *Chevron* era, and thus necessarily does not document the trend highlighted by this Article. Although Krishnakumar is focused on longstanding interpretations that the agency continues to hold, she also briefly discusses why courts should not give a kind of negative deference when agencies change such interpretations. *See id.* at 1862–63.

7. *See* Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), https://youtu.be/dpEtszFT0Tg?si=f_5d53T1dl71ztrN [https://perma.cc/S9JK-ZFYN] ("We're all textualists now.").

8. *See* Issacharoff & Morrison, *supra* note 1, at 1914–15.

9. *See infra* notes 294–296 and accompanying text.

10. 140 S. Ct. 1731 (2020).

11. *See infra* Part I.B.

However, as this Article shows, the last several years have seen the Supreme Court endorse the use of post-enactment, extrajudicial practice in cases involving agency authority. In *Loper Bright Enterprises v. Raimondo*,[12] the Court jettisoned *Chevron* but retained the idea that historical practices or understandings—particularly those of the Executive Branch—might bear on questions of statutory interpretation.[13] On this score, *Loper Bright* continued a trend evident in the Court's new major questions cases, which have relied in substantial part on the Court's interpretation of past agency practice.[14]

The incorporation of executive branch practice into the post-*Chevron* framework for reviewing agency action might be seen as a balm for those concerned about the passing of formal deference toward agency legal interpretations and who believe (or hope) that the Court might simply recreate *Chevron* using new labels.[15] The scholarship on practice-based methods in constitutional law has by and large stressed those methods' promise as a means to promote a kind of restrained judicial posture. Whether couched in terms of Burkean values,[16] the need to respect agreements worked out over time by the political branches,[17] or the desire to inject some amount of determinacy into the interpretation of open-ended text,[18] bringing historical practice into the interpretive mix holds the promise of minimalistic-style judging with a decidedly departmentalist flavor.[19] *Loper Bright*'s invocation of historical practice can thus be read as an attempt by the Court to associate itself with such a stance at a time when many fear an out of control judiciary keen to place whatever limits it can on administrative government.[20]

---

12. 144 S. Ct. 2244 (2024).

13. *See generally* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc. 467 U.S. 837 (1984). *See, e.g.*, *infra* notes 201–202 and accompanying text.

14. *See infra* Parts II.B–C. On the new major questions doctrine generally, *see, e.g.*, Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022); Jody Freeman & Matthew C. Stephenson, *The Anti-Democratic Major Questions Doctrine*, 2022 SUP. CT. REV. 1 (2022); Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009 (2023); Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded*, 112 CALIF. L. REV. 899 (2024); Daniel E. Walters, *The Major Questions Doctrine at the Boundaries of Interpretive Law*, 109 IOWA L. REV. 465 (2024).

15. *Cf.* Adrian Vermeule, *The Deference Dilemma*, 31 GEO. MASON L. REV. 619 (2024).

16. *See* Bradley & Morrison, *supra* note 1, at 426; *see also* Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 356 (2006) ("On [the Burkean] view, constitutional interpretation should be conservative in the literal sense—respecting settled judicial doctrine, but also deferring to traditions.").

17. *See* Issacharoff & Morrison, *supra* note 1, at 1917.

18. *See* Bradley & Siegel, *supra* note 2, at 24.

19. *See* Baude, *supra* note 2, at 35–36.

20. *See generally* Josh Chafetz, *The New Judicial Power Grab*, 67 ST. LOUIS UNIV. L.J. 635 (2023).

However, if the Court's major questions cases are a guide, the Court's real focus may lie elsewhere. There, the Court's greatest interest has been using past practice to permanently fix statutory meaning, with the effect of limiting agency discretion going forward. In particular, the Court has used the practices—including alleged failures to act—of past agency officials to narrow the range of options available to their successors. These practices become etched in stone, such that the future agency must abide by them and them only. And crucially, it is the Court itself that enjoys the discretion to define the contours of past agency practice and decides which practices to elevate.

Although it's early days still, the seeds of a similar approach can be spotted in *Loper Bright*. There, the Court noted the special "respect" due to agency interpretations when those interpretations are longstanding, especially if they were issued roughly contemporaneously with the statute in question.[21] Although the Court holds open the possibility that such agency interpretations might work in the agency's favor,[22] a rigid privileging of early agency action (or inaction) may again operate to reduce agency discretion considered across time, if the courts extend a kind of negative deference toward interpretations that represent a break from the old or are otherwise perceived as "novel." Early returns suggest they may.[23]

This Article has three broad aims. The first is to document the Court's recent embrace of agency practice as a way to settle the meaning of statutory text. I describe the Court's emerging practice using the liquidation label advisedly and not without some mixed feelings. Indeed, one recurring theme will be that the Court has not abided by the decisional criteria identified by William Baude in describing the practice of constitutional liquidation.[24] Furthermore, to the extent the Court wants to say that agency practice is relevant

21. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2258 (2024).

22. For a post-*Loper Bright* decision pointing to the consistency of the agency's interpretation as a reason to give it weight, see Bondi v. VanDerStok, 145 S. Ct. 857, 873 (2025).

23. *See, e.g.*, In re: MCP No. 185, No. 24-7000, 2024 WL 3650468, at *6 (6th Cir. Aug. 1, 2024) (Sutton, J., concurring) (finding in a case involving challenge to the FCC's most recent reclassification of internet service providers that the *Skidmore* factors incorporated in *Loper Bright* "all favor the Commission's first interpretation, not its recent one").

24. For example, the Court has not said that practice is relevant only in cases of statutory indeterminacy. *See* Baude, *supra* note 2, at 13 ("The first premise of liquidation is an indeterminacy in the meaning of the Constitution."). Indeed, most scholars read the Court's major questions cases as allowing a deviation even from otherwise unambiguous statutory text, *see infra* note 120, and even Justice Barrett's seemingly more modest version of the doctrine would appear to allow practice-based considerations to come in when determining whether the statute is clear in the first place. *See infra* notes 166–175 and accompanying text. Second, the Court has not been clear that the practice in question must represent a particularly robust "course" nor that such course be "deliberate." *See* Baude, *supra* note 2, at 16–18. Finally, the

to the original meaning of the enacted text, that claim may place further distance between the Court's practice and true liquidation, which is typically thought to be purely conventionalist.[25] Practitioners of liquidation in the proper sense are not searching for the original meaning of enacted text; rather, they are approaching text that is in some sense incomplete and using practice to constitute the law itself.[26]

Nevertheless, I will use the term liquidation as shorthand for two primary reasons. First, liquidation—unlike some other practice-based methods—is most associated with the use of historical practice to finally settle the meaning of text,[27] and that is what largely distinguishes the Court's emerging use of practice from that employed under *Chevron*.[28] Indeed, the shift toward a more anti-change, anti-novelty, "use-it-or-lose-it" approach to agency practice is likely to represent the single biggest break with the *Chevron* regime.[29] Second,

---

Court has not given much of an indication that acquiescence—by Congress, by those who might initially resist a given practice, or others—or public sanction play a role in the analysis of statutory liquidation. *See id.* at 18–21.

25. *See* Bradley & Siegel, *supra* note 2, at 42.

26. *See id.* at 42–43.

27. *See generally* Bradley & Siegel, *supra* note 2. Baude argues that liquidation, as properly understood, may allow "reliquidation" in a broader set of cases than usually thought. *See* Baude, *supra* note 2, at 53–59. However, even Baude appears to set the bar for re-liquidating meaning quite high, such that in practice it may rarely occur. *See id.* at 59 (stating that "[i]t might be the case that liquidation was *expected* to be permanent," and that re-liquidation may not occur "for *purely* normative reasons, even with a 'substantial justification'").

28. *See* Nelson, *Originalism and Interpretive Conventions*, *supra* note 2, at 551–52 n.137 ("[T]he terms of the delegation inferred by *Chevron* give administrative agencies substantially more freedom to depart from settled understandings than the Madisonian concept of 'liquidation.'"). In particular, the Court appears attracted to what Curtis Bradley and Neil Siegel have called the "narrow account of liquidation, which would look primarily to early historical practice and disallow 're-liquidation' of constitutional meaning once it had become settled through practice." *See* Bradley & Siegel, *supra* note 2, at 8. The Court's use of practice also shares a close resemblance to anti-novelty moves the Court has made in various constitutional areas. *See* Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407 (2017); *see also* Spencer G. Livingstone, *The Use and Limits of Longstanding Practice: A Theory of Historical Gloss* (Sept. 19, 2022) (working paper) (on file with Yale University) (discussing "negative gloss," which "uses the longstanding failure to engage in a practice to support, but not conclusively determine, the unconstitutionality of that practice when later engaged in"). By equating past agency practice with the universe of the allowable, the Court necessarily casts suspicion on the new, including in situations where the agency is not reversing course but is instead acting against the backdrop of perceived past inaction.

29. *See generally* Nina A. Mendelson, *Tossing Sand in the Regulatory Gears: Hurdles to Policy Progress in the Supreme Court*, 62 Harv. J. on Legis. 40 (2024) (cataloguing the Supreme Court's increasingly "anti-change" posture).

although the Supreme Court's conservative members appear keen to maintain a rhetorical allegiance to textualism, the relationship between the Court's use of practice and original meaning is complex and uncertain. When it comes to the major questions doctrine, which allows courts to deviate from even relatively plain text, it is not at all clear the Court is using practice as a tool to uncover meaning.[30] More broadly, I will argue below that practice—even early practice—will often be a rather faulty guide when it comes to ascertaining original meaning.[31] Thus, as much as the *Loper Bright* Court insists that practice is relevant to meaning, it may in fact be the case that the Court's use of practice to finally settle issues of statutory interpretation gives such practice independent force as law—the power to create statutory meaning and not just uncover it.

This Article's second aim is to assess how the form of statutory liquidation I identify affects the constitutional separation of powers. In particular, I reveal how liquidation operates to distribute power across time. Early agency administrators are empowered compared to their successors. The opposite is true of Congress. Liquidation limits the enacting Congress's ability to "choose change" by enacting broad statutory language that would otherwise grant agencies flexibility going forward. At the same time, liquidation may increase the power of post-enactment Congresses and congressmembers, depending on their ability to influence early-in-time agency officials and depending on the uncertain role that congressional action (or inaction) plays in the liquidation analysis.

Standing above it all, however, are the courts. When it comes to the judiciary, although proponents of practice-based methods in constitutional law sometimes tout those methods' ability to constrain judicial discretion, the Court's emerging practice leaves so much play in the joints that it currently places courts in the primary driver's seat in determining which agency practices should be allowed to fix statutory meaning. With so much left to judicial discretion, statutory liquidation becomes a tool for courts to more actively manage legal change over time.[32]

The Article's final aim is to investigate possible normative bases for the Court's emerging practice. Using practice to fix statutory meaning would seem to sit ill at ease with the Court's stated preference, in *Bostock* and other

30. *See infra* Part II.B.

31. *See infra* Part IV.C.1.a.

32. Reva Siegel has made a similar point when it comes to the Court's use of "history and tradition" in constitutional cases. *See* Siegel, *supra* note 1, at 565–66 (questioning whether "tying constitutional interpretation to facts about the past can constrain the expression of judicial values").

cases, for formalist approaches to statutory interpretation that freeze meaning at the time of enactment.[33] As stated above, the Court's primary impulse has been to square the circle by insisting that post-enactment practice is in fact relevant to statutory meaning, much as a contemporary dictionary might be.[34] Similar theories might be brought to bear with respect to more intentionalist or purposivist approaches.

The problem is that, as I will argue, in many circumstances historical practice proves an unreliable guide to textual meaning, the purpose of the statute, or the intent of the Legislature, and it will be exceedingly difficult for judges to figure out when practice should be credited and when it should not.

The alternative possibility is that practice (or certain kinds of practice) is normatively relevant in its own right and thus is properly used to resolve cases when text is underdeterminate or as its own free-floating modality within a more pluralist approach to statutory interpretation. Either way, when it comes to the Court's preferred use of practice, what's needed is a normative theory to justify its preference for fixing statutory meaning such that the practice of earlier-in-time officials may prevent the agency from later deviating.

Constructing such a theory faces serious difficulties. In significant part, that's because the Court's practice reflects a preference for certain goals—such as the promotion of stability, the protection of reliance interests, and the minimization of costs of agency action—without justifying why such goals should predominate over others, such as the preservation of responsive and effective government, or the maximization of societal welfare, as a blanket matter. The Court has thus not provided adequate justification for rejecting administrative law's traditional approach, which allows agencies to make trade-offs among values within the bounds of particular statutes that themselves vary in terms of which values receive primacy.

The balance of the Article proceeds as follows. Part I describes how the settlement of statutory meaning is traditionally thought to occur: through the establishment of judicial precedent that has some amount of binding force on later courts. Part I goes on to describe the Court's resistance in *Bostock* to concluding that statutory meaning had become settled by practice absent a binding ruling by the Supreme Court itself. Part II turns to agency cases. After describing how *Chevron* operated to resist final statutory settlement

33. *See also* Ryan D. Doerfler, *High-Stakes Interpretation*, 116 MICH. L. REV. 523, 541 (2018) (describing tension between modern textualism and practice-based methods); Richard L. Revesz, Bostock *and the End of the Climate Change Double Standard*, 46 COLUM. J. OF ENV'T. L. 1 (2020) (using *Bostock*'s method to question various arguments, including those sounding in agency practice, for restricting EPA's authority over greenhouse gas emissions).

34. *See infra* notes 205–207.

when it came to ambiguous statutes, the balance of the Part traces the emergence of statutory liquidation in the Court's major questions cases and in *Loper Bright*. Part III describes the implications of statutory liquidation when it comes to the powers of agencies, Congress, and the courts. Part IV first surveys the normative theories underlying the liquidation-resistant elements of *Bostock* and *Chevron*. It then interrogates a variety of theories that may justify the Court's turn in a more pro-liquidationist direction.

I. STATUTORY SETTLEMENT INSIDE AND OUTSIDE THE COURTS

Liquidation is, at bottom, a kind of settlement.[35] And for present purposes, it is a form of settlement that is entitled to respect by courts, such that a court may deviate from what it may have otherwise considered the correct result because it concludes that post-enactment events have given the statute a settled meaning. Writing on a blank slate, the court would have selected meaning "A." But because of "Y," which occurred after the statute was enacted, the court gives the statute meaning "B." Of course, such post-enactment considerations, even when they come into play, may not always be outcome altering. It could be that the court would have always chosen "B," and "Y" was merely confirmatory. Settlement matters, however, in cases where post-enactment events alter the outcome that otherwise would have been reached.

This Part first briefly introduces how federal statutes achieve settled status through the operation of judicial precedent, and particularly precedent generated by the Supreme Court of the United States. Part I.B. then describes the Supreme Court's extreme reluctance, in *Bostock*, to finding that something other than the Court's own rulings might finally settle statutory meaning.

A. Settlement by Precedent

Although the literature on constitutional liquidation has focused on the role of the political branches in settling meaning, the concept is capacious enough to include one common way in which legal texts become settled: judicial precedent.[36] To avoid terminological confusion, however, I will refer to courts settling—and not liquidating—statutory meaning, saving the term liquidation for settlement achieved by other actors, particularly the political branches.[37]

---

35. *See* Baude, *supra* note 2, at 9.

36. *See* Bradley & Siegel, *supra* note 2, at 48–49 (stating that "Madison . . . grouped judicial precedent and political practices together" and that "when referring to 'adjudications' of constitutional meaning, it is unlikely he was referring only . . . to judicial determinations").

37. I will also be glossing over difficult questions concerning how to conceptualize what it means for a court to follow precedent. *See, e.g.*, Lawrence B. Solum, *The Supreme Court in*

Precedent operates to settle meaning in an outcome-determinative way when it alters a later court's resolution of an interpretive question. How much gravitational pull is associated with a given precedent varies based on the circumstances. The Supreme Court's holdings bind lower courts as an absolute matter.[38] Prior panel opinions have traditionally been thought to bind later panels in the same Court of Appeals, absent an intervening en banc decision.[39] Courts may give persuasive weight to the opinions of others, even if those opinions lack formal binding force.[40]

Typically receiving most attention is the stare decisis effect that prior Supreme Court rulings exert on the Court's own decisionmaking. Though not treated as absolutely binding on the Court, the Supreme Court's statutory holdings "are treated to a 'super-strong' presumption of correctness."[41] This distinguishes them from the Court's constitutional holdings, which enjoy a lesser presumption of correctness on the grounds that the Constitution is relatively more difficult to amend.[42] That a subsequent court should, as a general matter, follow its own precedent is thought justified by a cluster of related considerations, including the need to preserve the court's own legitimacy, treat like litigants alike, and protect reliance interests and promote the general stability of the law.[43]

At the same time, horizontal stare decisis is not an "ironfisted command,"[44] and even when it comes to statutory precedent, the Supreme Court has occasionally taken a more flexible approach. In particular, the Court has suggested that, in certain areas, statutory stare decisis comes with less force. For example, in *Leegin Creative Leather Prod., Inc. v. PSKS*,[45] the Supreme Court called stare decisis "not as significant" when it comes to the Sherman Act.[46]

Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights, 9 U. PA. J. CONST. L. 155, 186–89 (2006) (distinguishing among different approaches to precedent).

38. Jeffrey C. Dobbins, *Structure and Precedent*, 108 MICH. L. REV. 1453, 1460–61 (2010). *But see generally* Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921 (2016) (complicating matters).

39. Dobbins, *supra* note 38, at 1461.

40. *Id.* at 1462–63.

41. Anita S. Krishnakumar, *Textualism and Statutory Precedents*, 104 VA. L. REV. 157, 165 (2018); *see also* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988).

42. Krishnakumar, *supra* note 41, at 165; *see also* Randal C. Picker, Twombly, Leegin*, and the Reshaping of Antitrust*, 2007 SUP. CT. REV. 161, 165 (2007).

43. *See, e.g.*, Eskridge, *supra* note 41, at 1361.

44. *Id.*

45. 551 U.S. 877 (2007).

46. *Id.* at 899. *Leegin* did not mention that the most famous example of the Supreme Court sticking with a prior interpretation on stare decisis grounds also arose under the antitrust laws. *See* Flood v. Kuhn, 407 U.S. 258, 259 (1972).

The federal antitrust statutes have long been considered to have a common-law-like character in that they leave much room for judicial innovation.[47] In *Leegin*, the Supreme Court endorsed that view,[48] and it spelled out its implications for stare decisis: "Just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act's prohibition on 'restraint[s] of trade' evolve to meet the dynamics of present economic conditions,"[49] as well as "new wisdom."[50] The Court went on to overrule a prior holding that had read the Act to prohibit vertical price restraints.[51]

Anita Krishnakumar has documented similar instances where the Supreme Court has appeared to relax the rules of statutory stare decisis when operating within realms more akin to policymaking than statutory interpretation per se. In an exhaustive study, Krishnakumar finds that the textualist Justices may be more amenable to overruling statutory precedent when it comes to judge-made rules that are not clearly rooted in the "meaning" of statutory text.[52] Such acts of statutory implementation, as opposed to interpretation, are particularly likely to be required when courts are operating against the background of relatively more open-textured statutory provisions, or in situations where statutes are simply silent on matters (such as burdens of proof) that cannot be left unresolved.[53] Outside of antitrust, examples may be found in the antidiscrimination area, where Krishnakumar also finds evidence of a rather more relaxed attitude toward stare decisis, among others.[54]

---

47. *See, e.g.*, Daniel A. Crane, *Antitrust Antitextualism*, 96 NOTRE DAME L. REV. 1205, 1210 (2021) (observing that "antitrust has been assumed to operate as a broad delegation from Congress to the courts to create a common law of competition," though pushing back on the view that the relevant statutes contain few textual constraints); Picker, *supra* note 42, at 188.

48. *Leegin*, 551 U.S. at 899.

49. *Id.*

50. *Id.* at 900.

51. *See id.* at 900–08.

52. Krishnakumar, *supra* note 41 at 185–87.

53. *See e.g.*, Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 893 (2020) (distinguishing, in agency context, between "cases in which lawyers' arguments cut both ways" and cases "in which there is no surface upon which traditional lawyers' tools can have purchase" and require decisions "about what norms ought to govern within a space of delegated discretion"). The point might also be made by reference to the interpretation-construction distinction. Lawrence B. Solum & Cass R. Sunstein, Chevron *as Construction*, 105 CORNELL L. REV. 1465, 1468 (2020) (distinguishing "between 'interpretation,' which calls for discerning the meaning of a statute, and 'construction,' which calls for determining the legal effect of the statute, through implementation rules, specification, and other devices").

54. *See* Krishnakumar, *supra* note 41, at 173–78, 186.

B. Settlement by Evidence of Common Understanding or Practice

When might statutory meaning become settled by practice, absent a prior holding by the Supreme Court, such that even that Court may rely on such practice in rendering an interpretation?

One circumstance where this question has occurred is in debates over the effect of congressional inaction or silence in the face of some preexisting interpretation by the lower courts or the Executive. Under the "acquiescence rule . . . if Congress does not overturn a judicial or administrative interpretation it probably acquiesces in it."[55] And under the "'reenactment rule,' . . . a reenactment of the statute incorporates any settled interpretations of the statute by courts or agencies."[56]

Such rules, however, have never uniformly been followed and have always been "cautiously invoked," even in the era prior to the widespread acceptance of textualism.[57] The rise of textualism further eroded them, with textualists such as Justice Scalia criticizing reliance on inaction-based arguments due to the perceived difficulty of drawing conclusions from the lack of action on Congress's part.[58]

More broadly, one might think that prior (and especially early) interpretations of statutes, including by persons or entities other than courts, might be given special place due to the likelihood such interpretations reflect the original meaning of the statute in question or approximate the intention of the enacting Congress, or simply to protect reliance interests that may have grown up around the interpretation.[59] Such considerations may lie behind the Supreme Court's occasional practice of nodding to the consensus (or near consensus) views of the lower courts, in ways that occasionally make it seem as if such views matter, even absent an argument that Congress had ratified them.[60] They also might be thought to justify giving weight to interpretations rendered by the Executive in the course of administering the statutory scheme.[61]

A majority of the Supreme Court appeared to solidly reject the practice of consulting such post-enactment sources, at least with respect to statutes the

---

55. William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 69 (1988).

56. *Id.*

57. *See id.* at 69, 79. In particular, Eskridge finds that in the pre-1988 cases, "when the Court finds meaning in Congress' inaction, it points to specific legislative consideration of the issue and, either implicitly or explicitly, indicates that Congress' failure to act bespeaks a probable intent to reject the alternative(s)." *Id.* at 69.

58. *See* Anita S. Krishnakumar, *Statutory History*, 108 VA. L. REV. 263, 323–24 (2022).

59. *See infra* Part IV.C. (discussing various rationales for privileging such interpretations).

60. *See* Aaron-Andrew P. Bruhl, *Following Lower-Court Precedent*, 81 U. CHI. L. REV. 851, 853–54 (2014).

61. *See infra* note 189 and accompanying text.

Court considers unambiguous, in *Bostock*. That case concerned whether Title VII of the Civil Rights Act of 1964—which makes it unlawful for an employer to "discriminate against any individual . . . because of such individual's . . . sex"[62]—prohibits employment discrimination on account of a person's sexual orientation or gender identity.[63] The Supreme Court held that it does.[64] For ease of discussion, I'll focus on the Court's analysis with respect to discrimination on the basis of sexual orientation, though its reasoning was similar with respect to gender identity.

In coming to the conclusion that Title VII unambiguously prohibited discrimination because of an employee's sexual orientation, the Supreme Court rejected a variety of considerations that together may have been thought to reflect a settled view of bans on sex discrimination. Those considerations included the principal dissent's suggestion that few, if any, Americans would have understood Title VII to prohibit sexual orientation discrimination in the years following 1964.[65] In addition, until 2017, every Court of Appeals to have considered the question, and all 30 individual judges, had concluded that Title VII did not prohibit discrimination on the basis of sexual orientation.[66] Until 2015, the Equal Employment Opportunity Commission (EEOC) felt similarly.[67]

On the congressional side, Congress had reenacted the operative text against the above backdrop, while simultaneously making other changes to the statute.[68] It had considered but never enacted bills that would have expressly added sexual orientation to Title VII's list of protected characteristics—arguably reflecting the understanding that amending Title VII was necessary in order to prohibit sexual orientation discrimination.[69] And it had enacted other bills that expressly prohibited sexual orientation discrimination in addition to sex discrimination, supporting the conclusion, according to Justice Kavanaugh's dissent, that Congress understood that including mention of sexual orientation in addition to sex was necessary to make discrimination based on the former unlawful.[70]

62. 42 U.S.C. § 2000e-2(a)(1).
63. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1743 (2020).
64. *Id.* at 1737.
65. *Id.* at 1755–56 (Alito, J., dissenting).
66. *Id.* at 1757–58; *id.* at 1833 (Kavanaugh, J., dissenting).
67. *Id.* at 1757–58, 1757 n.7 (Alito, J., dissenting).
68. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.
69. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1822–23 (2020) (Kavanaugh, J., dissenting).
70. *Id.* at 1829–30.

The majority's response to these various points can be cobbled together from its occasional direct rejoinders and its broader reasoning. Justice Gorsuch's opinion was most direct in its rejection of congressional inaction as a basis for interpreting statutes. Pointing out that there may be many reasons that Congress could have failed to act, including that "[m]aybe some in the later legislatures understood the impact Title VII's broad language already promised for cases like ours and didn't think a revision needed," the majority broadly declared that "speculation about why a later Congress declined to adopt new legislation offers a 'particularly dangerous' basis on which to rest an interpretation of an existing law a different and earlier Congress did adopt."[71] In a parenthetical, the Court quoted Justice Scalia: "'Arguments based on subsequent legislative history . . . should not be taken seriously, not even in a footnote.'"[72]

Regarding the broader argument that various pieces of evidence reflect a settled societal understanding regarding what it means to discriminate because of sex, the *Bostock* Court's rebuttal came in its selection of a textualist methodology that evidently placed such considerations off limits. I will return to the particular textualist theory underlying *Bostock* below.[73] But a few of the Court's moves bear emphasis.

First, the Court declared that the "ordinary public meaning" of a statute's terms control.[74] Second, the Court found that meaning by giving each relevant word in Title VII its 1964 dictionary definition.[75] Recombining those words, the majority stated the test as follows: "If an employer would not have discharged an employee but for that individual's sex, the statute's causation standard is met, and liability may attach."[76] And, under that test, the *Bostock* majority concluded that discrimination on the basis of sexual orientation necessarily entails discrimination on the basis of sex.[77] If an employer fires a male employee for being attracted to men, but would not have fired an otherwise identical female employee for being attracted to men, sex discrimination has occurred.[78] The statute was thus unambiguous.[79]

71. *Id.* at 1747 (majority opinion).

72. *Id.* (quoting Sullivan v. Finkelstein, 496 U.S. 617, 632 (1990) (Scalia, J., concurring)).

73. *See infra* Part IV.A.

74. *Bostock*, 140 S. Ct. at 1738–39.

75. *Id.* at 1738–41.

76. *Id.* at 1752.

77. *Id.* at 1746–47.

78. *Id.* at 1747–48.

79. *Id.* at 1749–50 ("[N]o ambiguity exists about how Title VII's terms apply to the facts before us.").

What of the fact, which we can assume arguendo for present purposes, that few in 1964 or the decades following understood the statute to have prohibited firing an employee for being gay? There, the majority drew a distinction between the original meaning of the text and arguments tending to show a statute's "expected applications."[80] *Bostock* declared that such arguments, which the Court viewed as a backdoor appeal to "legislative intent," are simply off limits, at least when it comes to a text that is unambiguous.[81] Nor was it material for the majority that discrimination on the basis of sex and discrimination on the basis of sexual orientation are generally treated as distinct phenomena, and Congress had not mentioned sexual orientation in Title VII.[82] As the Court stated, there is no "such thing as a 'canon of donut holes,' in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception. Instead, when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule."[83]

II. STATUTORY LIQUIDATION IN AGENCY CASES

This Part traces the emergence of statutory liquidation in cases challenging agency action. It starts by tracing how *Chevron* operated as an anti-liquidation doctrine, at least to the extent that liquidation is understood to entail a permanent or semi-permanent form of settlement. Part II.B. then describes the role that past agency practice has come to play in shaping statutory interpretation under the major questions doctrine. Part II.C turns to *Loper Bright* and the Court's rejection of *Chevron* and its replacement by a new regime designed to achieve greater settlement of statutory meaning.

A. Liquidation under Chevron

Bostock involved a statute over which no agency had authority to act with the force of law.[84] Before it was overruled, *Chevron* governed review of agency legal interpretations when presented in a form that did have such force.[85] Although no longer good law, for purposes of comparison it's instructive to recap how statutory settlement occurred—and did not—under the *Chevron* regime.

---

80. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1751–52 (2020).

81. *Id.* The majority also found it relevant that much Title VII precedent was not in accord with original expected applications. *See id.* at 1751–53.

82. *Id.* at 1746–47.

83. *Id.* at 1747.

84. *See* Julie Chi-hye Suk, *Antidiscrimination Law in the Administrative State*, 2006 U. ILL. L. REV. 405, 441–42 (describing how EEOC guidelines lack the force of law and were not entitled to *Chevron* deference).

85. *See* United States v. Mead Corp., 533 U.S. 218, 229–30 (2001).

Chevron told courts to defer to reasonable agency interpretations of ambiguous statutory provisions.[86] But agencies received no such deference when it came to unambiguous text, and courts (not agencies) decided whether a statute was ambiguous in the first place, using the traditional tools of statutory interpretation.[87] Where a court found a statute to be unambiguous, that interpretation bound the agency in the same manner as any other judicial ruling, subject to alteration only through subsequent judicial revision.[88] Nationwide settlement thus occurred when the Supreme Court determined a statute was unambiguous in the relevant respect, qualified only by the possibility that the Supreme Court may reverse itself pursuant to the rules governing statutory stare decisis.[89]

With respect to statutes deemed ambiguous, *Chevron* typically operated to prevent final settlement. *Chevron* itself held that, when it comes to such statutes, the fact that an agency previously interpreted the statute in a different way does not, by itself, provide a basis to deny deference.[90] Thus, unlike under some other deference regimes, the existence of a prior administrative interpretation exerted no gravitational pull on the court's resolution of the interpretive question.[91] Further, in *National Cable & Telecommunications Association v. Brand X Internet Services*,[92] the Supreme Court held that an agency may depart even from a prior judicial interpretation, if the court which provided the interpretation had found the statute to be ambiguous in the relevant respect and merely supplied what the court viewed to be the "best" interpretation of the statute.[93] In these respects, then, *Chevron* was a doctrine providing resistance to statutory liquidation. Ambiguous statutes remained fluid, subject to the possibility of continuing administrative revision.

That said, when an agency changes course it still must satisfy a set of reasoned decisionmaking requirements, usually associated with *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company*,[94] in

86. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

87. *See id.* at 843 n.9.

88. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982–83 (2005).

89. *See* United States v. Home Concrete & Supply, LLC, 566 U.S. 478, 490 (2012) (plurality opinion).

90. *Chevron*, 467 U.S. at 863–64 (stating that "[a]n initial agency interpretation is not instantly carved in stone" and that, in fact, "the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.").

91. *See infra* notes 199–202 and accompanying text (describing *Skidmore* deference).

92. 545 U.S. 967 (2005).

93. *Id.* at 982–83.

94. 463 U.S. 29 (1983).

order to withstand review.[95] That was equally true, in the period in which *Chevron* reigned, with respect to changed agency legal interpretations.[96] Apart from requiring a valid policy justification for the agency's new position, such reasoned decisionmaking requirements obligated the agency to consider alternatives to the interpretation it now embraced, including the alternative of retaining its preexisting interpretation.[97] And they required the agency to consider important drawbacks to its new position, including the possibility that the change may unsettle reliance interests.[98] The reviewing court's role, however, was just to ensure the agency provided the required explanation. As the D.C. Circuit stated, "so long as an agency 'adequately explain[ed] the reasons for a reversal of policy,' its new interpretation of a statute [could not] be rejected simply because it [was] new."[99]

B. Liquidation under the New Major Questions Doctrine

Even prior to *Chevron*'s formal overruling, its importance in hot-button cases was severely diminished by the emergence of the major questions doctrine. And a significant strand of the cases associated with that doctrine used prior agency practice to conclude that a statute's meaning had been effectively liquidated.

This Section describes how agency practice came to play an increasingly important role in the Court's major questions line of cases. The short of it is this: in cases such as *FDA v. Brown & Williamson Tobacco Corp.*,[100] the Court's emphasis was on how a prior agency view might become locked in by subsequently passed legislation. Over time, however, the Court began to sweep away the limitations built into the older cases, and post-enactment understandings embraced by—or purportedly reflected in the actions of—the political branches have come to play a more significant role in placing certain agency decisions out of bounds.

---

95. *See id.* at 41 (1983).

96. Sometimes, in cases involving agency interpretations, such review was said to occur at "step two" of *Chevron*. *See* Judulang v. Holder, 565 U.S. 42, 52 n.7 (2011). Other cases analyzed whether the agency had engaged in reasoned decisionmaking as part of a separate inquiry. *See e.g.*, United States Telecom Ass'n v. FCC, 825 F.3d 674, 706 (D.C. Cir. 2016). But it didn't matter. In either circumstance, "[t]he APA's requirement of reasoned decisionmaking ordinarily demand[ed] that an agency acknowledge and explain the reasons for a changed interpretation." Verizon v. FCC, 740 F.3d 623, 636 (D.C. Cir. 2014).

97. *See* Daniel T. Deacon, *Responding to Alternatives*, 122 MICH. L. REV. 671, 707–11 (2024).

98. *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009).

99. *Verizon*, 740 F.3d at 636 (quoting Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005)).

100. 529 U.S. 120 (2000).

Brown & Williamson concerned FDA's determination that nicotine was a "drug" for purposes of the Food, Drug, and Cosmetic Act (FDCA),[101] a conclusion that would seem to follow, perhaps even unambiguously, from the Act's definition section, which defines drugs as "articles (other than food) intended to affect the structure or any function of the body."[102] As a seemingly independent ground for rejecting FDA's classification of nicotine, *Brown & Williamson* invoked FDA officials' previous disavowal of jurisdiction over tobacco products[103] in conjunction with the fact that Congress had considered and rejected bills to grant FDA such jurisdiction while at the same time enacting over decades various pieces of tobacco-specific legislation regulating tobacco products in various ways.[104]

Read carefully, the decision in *Brown & Williamson* reflects a somewhat ambivalent posture toward the use of agency practice. Early on in the relevant part of the opinion, the Court declared that "[a]t the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent *acts* can shape or focus those meanings."[105] Read broadly, such a statement might be an invocation of statutory liquidation in the strong sense—any "act," including executive branch practice, might operate to solidify statutory meaning. Read narrowly, the Court may simply have been saying that subsequently enacted statutes (i.e., "acts" in the more legal sense) can preclude an interpretation that would otherwise have been available—a rather unremarkable proposition.

In context, the Court seems to have intended the narrower understanding.[106] In its discussion, the Court went on to speak of "reconciling many laws enacted over time."[107] And later on in the opinion, the Court expressly disclaimed reliance on Congress's failure to act in response to FDA's historical disavowals of jurisdiction, placing primary emphasis instead on Congress's passage of tobacco-specific legislation.[108] It also nodded to *Chevron*'s

101. *Id.* at 125.

102. 21 U.S.C. § 321(g)(1)(C).

103. *Brown & Williamson*, 529 U.S. at 144–46 (stating that "[t]he FDA's disavowal of jurisdiction [in 1964] was consistent with the position that it had taken since the agency's inception").

104. *See id.* at 155–56 (stating "these actions by Congress over the past 35 years preclude an interpretation of the FDCA that grants FDA jurisdiction to regulate tobacco products").

105. *Id.* at 143 (emphasis added).

106. Though interestingly, where the Court elsewhere referred to "acts" in the sense of statutes, it capitalized the term. *See id.* at 133 ("[T]he meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand.").

107. *Id.* at 143 (quoting United States v. Fausto, 484 U.S. 439, 453 (1987)).

108. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 155 (2000).

statement that agency positions are not carved in stone.[109] But here, the Court concluded, "Congress' tobacco-specific legislation has effectively ratified the FDA's previous position that it lacks jurisdiction to regulate tobacco."[110] The agency had thus become precluded—but seemingly by Congress—from pulling an about face by concluding that nicotine was in fact a drug. *Massachusetts v. EPA*,[111] decided seven years later, also appeared to embrace the narrower view.[112]

Still, *Brown & Williamson* is well known as a somewhat mysterious opinion, and one could be forgiven for reading it as a broader endorsement of a kind of statutory liquidation. Nothing in the actual text of the subsequently enacted tobacco-specific statutes barred FDA from asserting jurisdiction over tobacco products as a supplement to Congress's more targeted measures.[113] And the Court never revealed when, exactly, FDA had become locked in to its "no jurisdiction" view. Rather, the Court seemed content that the overall course of conduct, unfolding as it did over time, revealed a kind of shared premise that nicotine was not a drug for purposes of the FDCA.[114] As the Court put it: "Although not crucial, the consistency of the FDA's prior position bolsters the conclusion that when Congress created a distinct regulatory scheme addressing the subject of tobacco and health, it understood that the FDA is without jurisdiction to regulate tobacco products and ratified that position."[115]

Brown & Williamson, especially when paired with *Massachusetts*, thus represents an at best equivocal stance toward using post-enactment practices and understandings to fix statutory meaning. Indeed, read most narrowly, *Brown & Williamson* supported only the modest proposition that subsequently enacted statutes might operate to preclude agency action otherwise authorized.

---

109. *Id.* at 156–57.

110. *Id.* at 156.

111. 549 U.S. 497 (2007).

112. *See id.* at 531 (limiting *Brown & Williamson* to where there was "an unbroken series of congressional enactments that made sense only if adopted 'against the backdrop of the [agency]'s consistent and repeated statements that it lacked authority'" (quoting Brown & Williamson, 529 U.S. at 144)).

113. *See Brown & Williamson*, 529 U.S. at 181 (Breyer, J., dissenting).

114. *See id.* at 155–56 (highlighting a combination of Congressional action and inaction, and FDA's own statements, to conclude that FDA lacked jurisdiction over tobacco products).

115. *Id.* at 157. The Court came back to this theme in the final part of its opinion, which is best known for articulating an early version of the major questions doctrine. *See, e.g.*, Deacon & Litman, *supra* note 14 at 1021–22 (discussing *Brown & Williamson* as an early major questions case). In particular, in determining that it was dealing with no "ordinary case," the Court mentioned, though in a way that left its exact significance unclear, that FDA's assertion of authority over a significant industry was "[c]ontrary to [the agency's] representations to Congress since 1914." *Id.* at 159.

A much more aggressive form of statutory liquidation emerged from the post-2020 major questions cases.[116] As used in the most recent set of cases, the major questions doctrine requires courts to consider whether the case before them is ordinary or extraordinary (i.e., presents a major question).[117] If the case is a major one, which is assessed using a variety of factors,[118] the agency must point toward "clear congressional authorization" for its action.[119] The Court itself has been somewhat unclear about how clear Congress's authorization must be.[120] Most commentators have understood the Court's new major questions cases to require something more than an unambiguous but broad statutory delegation.[121] Rather, the agency must point to some specific language in support of its claim to authority.[122]

For purposes of this Article, the most important thing about the new major questions cases has been how they have used the purported novelty of the agency's claim to authority.[123] In short, the perceived novelty of an agency

116. A debatable bridge to the post-2020 major questions cases is *Utility Air Regulatory Group v. EPA*. *See* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 311 (2014). There, in finding EPA's interpretation to be unreasonable, the Court described it as entailing an "enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization," *id.* at 324, as involving the "discover[y]" of a previously "unheralded power" deserving of a "measure of skepticism," *id.*, and as an assertion of "newfound authority," *id.* at 328. By the time the Court got around to the above observations, however, it had already determined that EPA's interpretation was incompatible with the "statutory scheme," understood without reference to EPA's (or anyone else's) historical actions. *Id.* at 321–23.

117. *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2607–09 (2022).

118. *See* Deacon & Litman, *supra* note 14, at 1050; Freeman & Stephenson, *supra* note 14, at 25–27 (discussing factors at play in *West Virginia*).

119. *West Virginia*, 142 S. Ct. at 2609.

120. *See* Deacon & Litman, *supra* note 14, at 1037.

121. *See id.*; *see also* Sohoni, *supra* note 14, at 283 (stating that the new major questions cases "demand[] not just that Congress speak, but that Congress yell."). *See generally* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 611–12 (1992) (identifying category of "'super-strong clear statement rules' . . . that can be rebutted only through unambiguous statutory text *targeted at the specific problem*" (emphasis added)). *But see* Ilan Wurman, *Importance and Interpretive Questions*, 110 VA. L. REV. 909, 916 (2024) (arguing that "it is at least possible to conceptualize a [major questions] doctrine that centers on resolving ambiguity"); see *infra* notes 166–175 and accompanying text (discussing Justice Barrett's views).

122. *See* Chafetz, *supra* note 20, at 650 ("[I]f five justices determine that eating an ice cream cone is a major question, then it is not enough that Congress has empowered the agency to 'eat any dessert it chooses.'"); Deacon & Litman, *supra* note 14, at 1037–38 (arguing that the Court has been "requiring something more than that the statute be unambiguous in the normal sense," namely "that the authorization jump off the page.").

123. *See* Deacon & Litman, *supra* note 14, at 1069–78.

action has been used to assess whether clear authorization for it is required or, in some Justices' formulations, as bearing on whether such authorization has been given or whether the best reading of the statute supports the agency. In any case, in assessing novelty, the Court and its members have repeatedly relied on evidence of post-enactment practices and understanding. Two cases in particular, *West Virginia v. EPA*[124] and *Biden v. Nebraska*,[125] best illustrate this emerging form of statutory liquidation.[126]

West Virginia dealt with the legality of the Obama-era Clean Power Plan.[127] As relevant to the case, the Clean Power Plan had established federal emissions standards governing carbon dioxide pollution from existing coal-fired power plants.[128] It did so pursuant to § 111(d) of the Clean Air Act.[129] That section authorizes EPA to establish standards of performance applicable to existing sources of pollutants not otherwise controlled under other programs.[130] Such standards must reflect "the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any non-air quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated."[131]

In the Clean Power Plan, EPA set such standards by reference not only to technology-based controls capable of reducing emissions levels from particular sources but also by what it described as "generation shifting" from higher emitting sources of carbon dioxide to relatively cleaner ones.[132] EPA determined that a regulated plant could produce such a shift by reducing its own production of electricity, building or investing in additional cleaner sources, or purchasing emissions allowances pursuant to a cap-and-trade regime.[133] In repealing and replacing the Clean Power Plan in 2019, the Trump Administration EPA determined that the Plan had been adopted

124. 142 S. Ct. 2587 (2022).

125. 143 S. Ct. 2355 (2023).

126. Those two cases are also the two cases associated with the new major questions doctrine that have been decided outside of a preliminary posture. The other cases are *Alabama Ass'n of Realtors v. Department of Health & Human Services*, 141 S. Ct. 2485 (2021), and *National Federation of Independent Business v. Department of Labor*, 142 S. Ct. 661 (2022). Both of those cases, it should be said, also relied on anti-novelty, practice-based considerations.

127. *West Virginia*, 142 S. Ct. at 2602–03.

128. *Id.*

129. *Id.* at 2602.

130. 42 U.S.C. § 7411(d)(1).

131. *Id.* §§ 7411(a)(1), (d)(1).

132. *West Virginia*, 142 S. Ct. at 2603.

133. *Id.*

without valid statutory authorization, citing the major questions doctrine.[134] *West Virginia* ultimately reviewed a D.C. Circuit judgment vacating the Trump Administration's replacement rule, but the key issue was whether the Clean Power Plan had been validly promulgated.[135]

In finding that the Clean Power Plan triggered the major questions doctrine and thus required "clear authorization," the Court appeared to place primary reliance on the fact that, in the Court's judgment, "EPA had always set emissions limits under Section 111 based on the application of measures that would reduce pollution by causing the regulated source to operate more cleanly[,]" and "had never devised a cap by looking to a 'system' that would reduce pollution simply by 'shifting' polluting activity 'from dirtier to cleaner sources.'"[136] The Court then quoted Justice Frankfurter: "'[J]ust as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.'"[137] It went on to distinguish other regulatory programs the government had claimed were similar to the Clean Power Plan.[138]

In addition to bare agency practice, the Court invoked past EPA language referring to § 111(d)'s "'technology-based approach.'"[139] To be clear, EPA had never previously expressly ruled out generation-shifting-type measures when setting § 111 standards. In that sense, the Clean Power Plan did not represent a classic agency flip flop. But the agency had, in the Court's view, consistently described § 111(d) as adopting a "technology-based approach".[140] That historical understanding was also reflected in various academic articles the Court cited in a footnote,[141] as well as by language EPA used in the Clean Power Plan's regulatory preamble.[142]

---

134. *Id.* at 2604–05.

135. *Id.* at 2605–06.

136. *Id.* at 2610; *see also id.* at 2639 (Kagan, J., dissenting) (calling "[t]he majority's claim about the Clean Power Plan's novelty" the "most fleshed-out part of today's opinion").

137. *West Virginia*, 142 S. Ct. at 2610 (quoting FTC v. Bunte Brothers, Inc., 312 U.S. 349, 352 (1941)).

138. *Id.* at 2610–11, 2611 n.1.

139. *Id.* at 2610–11 (quoting Standards of Performance for New Stationary Sources, 40 Fed. Reg. 53,343, 53,343 (1975)).

140. *Id.*

141. *Id.* at 2610–11, 2611 n.2.

142. *Id.* at 2611.

For the Court, such considerations were enough to make the Clean Power Plan "unprecedented."[143] Similar considerations made it "transformative."[144] As the Court stated:

> Under the Agency's prior view of Section 111, its role was limited to ensuring the efficient pollution performance of each individual regulated source. Under that paradigm, if a source was already operating at that level, there was nothing more for EPA to do. Under its newly 'discover[ed]' authority, however, EPA can demand much greater reductions in emissions based on a very different kind of policy judgment: that it would be 'best' if coal made up a much smaller share of national electricity generation. And on this view of EPA's authority, it could go further, perhaps forcing coal plants to 'shift' away virtually all of their generation—*i.e.*, to cease making power altogether.[145]

As another indication of the Clean Power Plan's majorness, the Court pointed to the fact that the Clean Power Plan resembled programs that Congress "'considered and rejected' multiple times."[146] Such post-enactment legislative history might be used in multiple ways: to show Congress's intent over time; as evidence of the importance or political controversy surrounding the matter; or, in a more liquidationist vein, as indicating Congress's own post-enactment understanding that the agency lacks a certain authority under existing law. *West Virginia* was not forthright about how Congress's failed attempts to address greenhouse gas emissions fit into the broader puzzle. Its final line on the matter appeared to fasten on the conclusion that such efforts demonstrated the agency's intent to usurp control over a matter that had been subject to "earnest and profound debate."[147] But the Court also made reference to *FTC v. Bunte Brothers, Inc.*,[148] the same Justice Frankfurter opinion it had previously invoked, in which the Court had stated that the FTC's past failure to claim the power in question had been "reinforced by the Commission's unsuccessful attempt" to secure such power from Congress—something closer to an argument from statutory liquidation.[149]

Justice Gorsuch's much discussed concurring opinion made use of similar post-enactment considerations, though he approached them from a slightly different angle than did the majority opinion, which Justice Gorsuch joined in full.[150] Justice Gorsuch's concurring opinion declared that an agency's "past interpretations of the relevant statute" may be relevant at the second

143. *West Virginia*, 142 S. Ct. at 2612.
144. *See id.* at 2610, 2612.
145. *Id.* at 2612.
146. *Id.* at 2614.
147. *See id.*
148. 312 U.S. 349 (1941).
149. *Id.* at 352.
150. *See West Virginia*, 142 S. Ct. at 2623 (Gorsuch, J., concurring).

step of the major questions doctrine, when courts consider whether the agency's action was clearly authorized.[151] In support, Justice Gorsuch cited an 1887 case declaring that "contemporaneous" executive branch interpretations are "entitled to some weight as evidence of the statute's original charge."[152] Justice Gorsuch then invoked the modern line of major questions cases for the converse proposition that an agency's discovery of a "previously 'unheralded power' . . . warrants 'a measure of skepticism.'"[153] And Justice Gorsuch relied on EPA's purported failure to previously assert the power in question, among other considerations, in declaring that the Clean Power Plan lacked clear authorization.[154]

With respect to congressional action, Justice Gorsuch's concurring opinion stated that prior congressional efforts were relevant at the threshold stage, when courts determine whether the action in question was a "major" one.[155] At that stage, Justice Gorsuch declared, courts may inquire into whether Congress has considered and rejected "bills authorizing something akin to the agency's proposed course of action," along with whether there's been general political debate on a matter, in deciding whether an agency is attempting to resolve a matter "of great political significance."[156] In a footnote, Justice Gorsuch stated that neither he nor the Court were relying on "failed legislation to resolve what a duly enacted statutory text means."[157]

The second illustrative case is *Nebraska*, where the Court also relied on post-enactment evidence in the course of defeating an agency's claim to authority. In *Nebraska*, the Court reviewed the Secretary of Education's student loan forgiveness program, pursuant to which the Secretary canceled $430 billion in debt related to federally issued student loans.[158] As authorization for the program, which was created in response to the COVID-19 pandemic, the Secretary pointed to a statutory provision added by the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act), which gave the Secretary authority to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title

151. *See id.*

152. *Id.*; *see also infra* Part IV.C.1.a and accompanying text (considering such rationale).

153. *West Virginia*, 142 S. Ct. at 2623 (Gorsuch, J., concurring) (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

154. *Id.* at 2624.

155. *Id.* at 2620–21.

156. *Id.*

157. *Id.* at 2620–21, 2621 n.4.

158. Biden v. Nebraska, 143 S. Ct. 2355, 2362 (2023).

IV of the [Education Act] as the Secretary deems necessary in connection with a war or other military operation or national emergency."[159]

In a somewhat confusingly structured majority opinion, the Court appeared to first reject the Secretary's claim to authority using normal principles of statutory interpretation.[160] But in a section responding to what the Court characterized as the government's appeal to purpose, the majority also invoked the major questions doctrine.[161] And again, the Court began its major questions analysis by asserting that the loan cancellation program was unprecedented.[162] In support, the Court stated that prior "waivers and modifications . . . have been extremely modest and narrow in scope," and that the HEROES Act had been used "only once before to waive or modify a provision related to debt cancellation."[163] That consideration, in conjunction with others such as the transformative nature of the agency action and its economic effects, led the Court to conclude that the program required clear congressional authorization, which the Court found lacking.[164]

The majority opinion in *Nebraska* differed from *West Virginia* in citing practice-based evidence alone in support of its conclusion that the student debt cancellation program was unprecedented. Recall that in *West Virginia*, EPA had not only traditionally set § 111(d) standards by reference to technology-based controls, it had also at various points described that section as adopting a technology-based approach.[165] Those statements arguably supported an *expressio unius*-type inference that EPA historically understood such an approach to be the *sole* means of implementing the statute. In *Nebraska*, by contrast, the agency had merely adopted waivers and modifications that, according to the Court, were comparatively modest. The Court pointed to no language indicating the agency thought it was limited to making modest changes. The agency's view, to the extent the Court believed it to have one, was expressed *sub silentio*.

---

159. *Id.* at 2363–65 (quoting 20 U.S.C. § 1098bb(a)(1)).

160. *See id.* at 2368–71.

161. *See id.* at 2372.

162. *Id.*

163. *Id.*

164. *Nebraska*, 143 S. Ct. at 2372–75. The Court also invoked the fact that Congress had recently considered numerous bills that would have provided some amount of loan forgiveness. *See id.* at 2373 nn.7–8. It linked that fact with the observation that student loan cancellation "raises questions that are personal and emotionally charged . . . ." *Id.* at 2373 (quoting Jeff Stein, *Biden Student Debt Plan Fuels Broader Debate Over Forgiving Borrowers*, WASH. POST (Aug. 31, 2022), https://www.washingtonpost.com/us-policy/2022/08/31/student-debt-biden-forgiveness/ [https://perma.cc/NT4Z-P78U]).

165. *See supra* notes 139–140 and accompanying text.

Justice Barrett's concurring opinion in *Nebraska* also relied on evidence of post-enactment practice, while departing from what commentators have taken to be the majority of the Court's view of the major questions doctrine.[166] Justice Barrett announced her view that the major questions doctrine operates not as a substantive canon of statutory interpretation that licenses courts to deviate from the most natural reading of the statute in question, but as a tool for "discerning" the "text's most natural interpretation."[167] In laying out that view, Justice Barrett argued that the major questions doctrine helps interpreters understand text in its broader context, as modern forms of originalism strive to do.[168] That argument proceeds from the premise, which Justice Barrett endorsed, that we might naturally expect more clarity from a principal when authorizing her agent to undertake a major action.[169] That clarity might come from "specific words," but it might also come—or be undermined by—broader, more contextual indications: "Surrounding circumstances, whether contained within the statutory scheme or external to it, can narrow or broaden the scope of a delegation to an agency."[170]

In canvassing the range of contextual indications that might be relevant, Justice Barrett drew on *Brown & Williamson*'s discussion of FDA's past disavowal of jurisdiction over nicotine and Congress's enactment of "a distinct regulatory scheme for tobacco products."[171] Justice Barrett labeled such considerations part of the "critical context" that had led the Court to reject the facially colorable claim that nicotine was a drug under the Food, Drug, and Cosmetic Act.[172] And in discussing the line of cases dealing with "unheralded" assertions of agency authority, Justice Barrett returned to a similar point.[173] While conceding that "an agency's post-enactment conduct does not control the meaning of a statute," Justice Barrett wrote that courts may nevertheless consider as relevant an agency's prior views, quoting Frankfurter's statement from *Bunte Brothers* and stating that in *Brown & Williamson* the Court "balked at the FDA's novel attempt to regulate tobacco in part because this move was '[c]ontrary to its representations to Congress since 1914.'"[174]

166. *See supra* note 121 and accompanying text (citing commentary taking the major questions doctrine to embody a super strong clear statement rule).

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

168. *See id.* at 2378.

169. *See id.* at 2379–80 (making argument by reference to analogies involving babysitters and the like).

170. *Id.* at 2380.

171. *Id.* at 2381–82.

172. *Id.*

173. *Nebraska*, 143 S. Ct. at 2383.

174. *Id.*

Returning to her position that the major questions doctrine represents a linguistic tool, Justice Barrett stated that the canvassed considerations helped to reveal the "most plausible reading of the statute" in context.[175]

C. Liquidation under Loper Bright

In *Loper Bright*, the Court overruled *Chevron*.[176] Its core reasoning was straightforward if not uncontroversial. The Court declared that the traditional purview of courts involved acting as the final interpreters of the law, using their independent judgment.[177] And it found that the Administrative Procedure Act (APA) had adopted that traditional understanding of the judicial role in its language directing courts to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[178] Under *Chevron*, the Court claimed, courts violate that directive by giving "*binding*" authority to agencies' interpretations, in cases where the statute is ambiguous, even where the court would have chosen a different interpretation on its own.[179]

It was clear from oral argument in *Loper Bright*, as well as its companion case *Relentless, Inc. v. Department of Commerce*,[180] that a major driver of some of the Justices' antipathy toward *Chevron* was the power it gave agencies to change their position on statutory meaning over time, as well as to "override" the decisions of courts in some cases.[181] Similar complaints came through in the majority opinion and Justice Gorsuch's separate concurrence. *Brand X* received particular scorn.[182] But both on the merits and in the section of the opinion devoted to explaining why stare decisis was no bar to overruling *Chevron*, the Justices in the majority expressed broad disapproval of *Chevron*'s supposed tendency to "destroy[]" reliance interests.[183] As Justice Gorsuch summed it up: "Rather than promoting reliance by fixing the meaning of the law, *Chevron* deference engenders constant uncertainty and convulsive change even when the statute at issue itself remains unchanged."[184]

---

175. *Id.*

176. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2247 (2024).

177. *Id.* at 2257–61.

178. 5 U.S.C. § 706.

179. *Loper Bright*, 144 S. Ct. at 2265 (emphasis in original).

180. 144 S. Ct. 325 (2024).

181. *See* Daniel T. Deacon & Leah M. Litman, *Two Takes on Administrative Change from the Roberts Court*, 62 HARV. J. ON LEGIS. 1, 4–5 (2024) (collecting statements from oral argument).

182. *See, e.g.*, *Loper Bright*, 144 S. Ct. at 2265 (calling *Brand X* "the antithesis of the time-honored approach the APA prescribes."); *id.* at 2288 (Gorsuch, J., concurring).

183. *Id.* at 2272 (majority opinion).

184. *Id.* at 2288 (Gorsuch, J., concurring).

The Court's preference, instead, was in favor of stability. An early nod in that direction came when the Court quoted Madison's statement that unclear laws may be "settled 'by a series of particular discussions and adjudications.'"[185] Somewhat curiously, even though Madison's reference to "discussions and adjudications" has been taken to refer to extrajudicial practices in addition to court decisions,[186] in context the Court seems to have been touting the need for courts, in particular, to bring clarity to the law. The *Loper Bright* regime seems intended to accomplish that end by making judicial interpretations final and inalterable, regardless of how ambiguous the statute.

Importantly, however, *Loper Bright* also preserved the possibility that past executive branch action might exert a kind of gravitational pull on the courts' own decisionmaking—resulting in a kind of extrajudicial liquidation. In recounting its version of the history of judicial review involving agency legal interpretations, the Court quoted *Edwards' Lessee v. Darby*[187] to the effect that "[i]n the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect."[188] Such respect, the Court stated, was due especially where an interpretation was issued "roughly contemporaneously" with the statute in question and "remained consistent over time."[189] The Court made similar statements at various other places in its opinion.[190] For his part, Justice Gorsuch's concurring opinion endorsed the same proposition.[191]

The idea that longstanding and, particularly, contemporaneous agency interpretations should receive weight has a solid historical pedigree.[192] Interestingly, in first introducing the idea that executive branch interpretations should

185. *Id.* at 2257–58 (majority opinion) (quoting The Federalist No. 37, p. 236 (J. Cooke ed. 1961) (J. Madison)).

186. *See* Baude, *supra* note 2, at 8–9; Bradley & Siegel, *supra* note 2, at 48–49.

187. 25 U.S. (12 Wheat.) 206 (1827).

188. *Loper Bright*, 144 S. Ct. at 2257–58 (quoting Edwards' Lessee v. Darby, 25 U.S. (12 Wheat.) at 210 (1827)).

189. *Id.* at 2257–58.

190. *See, e.g.*, *id.* at 2262–63 (stating that "interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning.").

191. *See id.* at 2283–84 (Gorsuch, J., concurring) ("To be sure, this Court has also long extended 'great respect' to the 'contemporaneous' and consistent views of the coordinate branches about the meaning of a statute's terms."); *id.* at 2283 ("[T]he executive's consistent and contemporaneous views warranted respect.").

192. *See* Bamzai, *supra* note 6; Levin, *supra* note 6, at 167.

be given respect, the Court also cited *NLRB v. Noel Canning*.[193] The Court quoted *Noel Canning* in stating that "the longstanding 'practice of the government'"—like any other interpretive aid—"can inform [a court's] determination of what the law is."[194] *Noel Canning* is the case perhaps most associated with the idea of *constitutional* liquidation and the related but distinct "historical gloss" method.[195] In the course of resolving a separation of powers dispute involving whether the Recess Appointments Clause applies to vacancies that arise pre-recess, the *Noel Canning* Court found it relevant that presidents had long engaged in the challenged practice, and that the Senate "as a body has done nothing to deny the validity of this practice for at least three-quarters of a century."[196] Such evidence of historical practice seemed largely to drive the Court's decisionmaking, at least after the Court concluded that the constitutional provision in question was "ambiguous" as a "linguistic" matter.[197]

What accounts for *Loper Bright*'s embrace of "respect" for executive branch interpretations, of at least certain kinds, at the same moment it rejected *Chevron* deference? That question implicates the broader issue of what to make of *Loper Bright*'s repeated citation of *Skidmore v. Swift*.[198] That 1944 case stated:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[199]

In the *Chevron* period, at least post-*United States v. Mead Corp.*,[200] *Skidmore* became the label for a set of factors that courts used, typically when *Chevron* did not supply the controlling standard of review, for assessing the weight to

193. *Loper Bright*, 144 S. Ct. at 2257–58 (citing NLRB v. Noel Canning, 573 U.S. 513, 525 (2014)).

194. *Id.* (quoting *Noel Canning*, 573 U.S. at 525) (cleaned up).

195. *See, e.g.*, Baude, *supra* note 2, at 6 (describing *Noel Canning* as the case that "reintroduced the concept" of liquidation); Bradley & Siegel, *supra* note 2, at 4 (describing *Noel Canning* as one of the Court's recent decisions that has "relied heavily on historical practice"); *see generally id.* (distinguishing between liquidation and gloss).

196. *Noel Canning*, 573 U.S. at 533.

197. *Id.* at 540.

198. 323 U.S. 134 (1944).

199. *Id.* at 140.

200. 533 U.S. 218 (2001).

be given to agency interpretation.[201] Some of those factors appeared in *Skidmore* itself, while others, including whether the interpretation was longstanding or contemporaneous, were either folded into its framework over time or seemed to exist alongside it.[202]

In *Loper Bright*, the Court cited *Skidmore*, or at least various of the factors associated with it, favorably.[203] At the same time, the Court stressed that "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires."[204] To square that circle, the Court appeared to insist that under *Skidmore* an agency's interpretation of the statute in question may be relevant to uncovering the *meaning* of the statute in question.[205] Thus, an agency's views may be relevant "like any other interpretive aid."[206] The Court brought this point home most forcefully in footnote 3. There, the Court contrasted *Chevron*'s "binding" form of deference with older cases stating that a "'*contemporaneous* construction' shared by 'not *only* . . . the courts' but also 'the departments' could be 'controlling,'" as well as those endorsing the idea that "courts might 'lean in favor' of a 'contemporaneous' and 'continued' construction of the Executive Branch as strong evidence of a statute's meaning."[207]

The above should not be overstated. By reducing agency interpretations to one tool for ascertaining meaning, the Court in *Loper Bright* preserves the strong possibility that in any given case, other tools might overwhelm the agency's view. The Court also never expressly embraces the proposition that a statute that is otherwise clear can ever be overcome by a contrary interpretation put forward by an agency, no matter how longstanding.[208] Further, the Court does appear to endorse at least some *Skidmore*-associated factors other than those related to longstandingness. In particular, the Court stated that agencies' interpretations may receive respect to the extent they embody expert knowledge relevant to the interpretative question.[209] Nevertheless, the Court's repeated return to the factors of longstandingness, consistency, and

201. *See generally* Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235 (2007).

202. *See id.* at 1289–91 (discussing the status of longstandingness and contemporaneity under *Skidmore*).

203. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2259 (2024).

204. *Id.* at 2273.

205. *See* Ryan D. Doerfler, *How Clear Is "Clear"?*, 109 VA. L. REV. 651, 707 (2023) (endorsing idea that *Skidmore* is about ascertaining the meaning of the statute).

206. *Loper Bright*, 144 S. Ct. at 2257–58.

207. *Id.* at 2260 n.3.

208. *See infra* notes 383–385 and accompanying text (considering the normative implications of allowing contemporaneous agency interpretations to alter otherwise clear text).

209. *See Loper Bright*, 144 S. Ct. at 2267.

contemporaneity—along with the Court majority's evident uneasiness with the anti-liquidationist bent of the *Chevron* regime—indicate that those factors may loom particularly large in the courts' decisionmaking going forward.

III. IMPLICATIONS OF STATUTORY LIQUIDATION FOR THE SEPARATION OF POWERS

This Part describes how the emergence of statutory liquidation in agency cases may affect the powers of agencies, Congress, and the courts.

A. Agencies

From one angle, the incorporation of executive branch practice (including prior agency interpretations) into the interpretive mix might be seen as blunting the effect of *Chevron*'s demise and as preserving some amount of agency power to interpret.[210] Agencies armed with a longstanding interpretation—or a strong argument that the agency's current practice is continuous with what came before—retain a chit to play when it comes to judicial review.

At least in the "narrow liquidation" form favored by the Court's major questions cases, however, reliance on agency practice works more to shift agency power across time than to enhance (or preserve) agency authority generally.[211] The Court's preferred version of liquidation involves recognizing potentially great authority in agencies when they act in the first instance. It also attaches power to agencies' failures to act in particular ways or to patterns of action and inaction of which agency officials themselves may not even be consciously aware. And by doing so it disempowers later agencies by using earlier-in-time practice to narrow their range of options. In this way, it makes what first-to-move agency officials do more legislative in character than under *Chevron*, because the practices of such officials may permanently alter the authority of the agency going forward.

At the same time, as will be explored in greater depth in Part III.C, courts retain much discretion to decide which actions by first-mover agencies limit the power of their successors. Liquidation thus becomes a way to hide the courts' hand in limiting the authority of present-day agencies by passing blame onto the agency itself, and another method by which the Supreme Court has diminished the power of agencies as it works to expand its own.[212]

---

210. *See supra* note 15 and accompanying text.

211. On narrow liquidation, see *supra* notes 28–30 and accompanying text.

212. A quality that liquidation shares with the major questions doctrine generally. *See, e.g.*, Freeman & Stephenson, *supra* note 14, at 21 ("[T]he [major questions doctrine] shifts substantial policy discretion to unelected federal judges."); Deacon & Litman, *supra* note 14, at 1065; *see generally* Chafetz, *supra* note 20.

To unpack a bit, consider the surprisingly dramatic power statutory liquidation appears to confer on earlier-in-time administrators, especially when liquidation is used to support the conclusion that particularly clear text must support a deviation from past practice.[213] Generally, courts follow a kind of symmetry principle coupled with an understood hierarchy of forms of legal authority, which together govern how administrative change can occur. What's done through one process can be undone through the same process, or through a process considered "superior" to it. So statutes may be altered by subsequent statute but not through non-legislative means.[214] Agency rules, promulgated through notice-and-comment processes, can be altered by statute or through a subsequent notice-and-comment proceeding, but not otherwise.[215] Similar principles govern policies announced via adjudication, which can be changed via subsequent adjudication or through a legislative rule,[216] as well as sub-regulatory guidance.[217]

This symmetry principle and its accompanying hierarchy of authorities serve important values. For one, they provide clarity about how change might occur. Such clarity benefits the public as well as the agency itself, which can predict which processes it must use in order to withstand review. They also provide incentives for agencies to use what are generally considered to be superior methods of policymaking. An agency that acts through notice-and-comment procedures as opposed to through adjudication or sub-regulatory methods knows that its policies are more likely to stick and is more able to make credible commitments to regulated entities and others.[218] On the margins, the agency may therefore be more likely to use such processes, especially for formulating policy it considers to be major.

Statutory liquidation threatens to disrupt both the symmetry principle and destabilize the understood hierarchy of authorities. The first way that it does so is by operating to deprive an agency of the ability to alter its positions using the same processes as used in the initial proceeding. To use a stylized example drawn from *West Virginia*: Let's say that in an initial notice-and-comment

213. *See supra* note 121 and accompanying text (describing how most commentators view the new major questions doctrine as a strong clear statement rule).

214. *See generally* INS v. Chadha, 462 U.S. 919 (1983).

215. *See* Montgomery Ward & Co. v. FTC, 691 F.2d 1322, 1329 (9th Cir. 1982).

216. *See* Daniel T. Deacon, Chenery II *Revisited*, 92 GEO. WASH. L. REV. 1050 (2024) (discussing how agencies can change policies announced via adjudication in subsequent adjudications but may not alter regulations via adjudication).

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

218. *See* Deacon, *supra* note 216, at 1107; *see also* Aaron Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. 85, 90 (2018) (arguing that the comparative burdens of rulemaking "sometimes benefit agencies" by operating as a "credible commitment mechanism against change").

proceeding the agency is deciding between defining the "best system of emissions reduction" using technology-based controls alone or using a combination of technology-based controls and generation-shifting measures. It chooses the former. When a court later finds that action to have liquidated the statute in an outcome-determinative manner, the result is that the agency may not select generation-shifting measures in subsequent notice-and-comment proceedings even if it could have if writing on a blank slate.

That's simply to describe what statutory liquidation is, but notice the implication: The agency's early practice has essentially been elevated to the status of statutory law—narrowing a statute that otherwise would have been broad and plain enough to sustain the agency's later action. And that implication is most dramatic when liquidation is given its strongest form, as under the new major questions cases. Recall that under one reading of those cases, a statute that appears on its face even to unambiguously grant an agency the authority in question may be narrowed if the agency's claim to that authority is deemed out of step with past agency practice or understandings,[219] and the statute does not clearly and with enough specificity confer the authority.[220] Thus, the initially unambiguous statute is effectively amended by subsequent agency practice, which cannot be departed from through later agency action, no matter the processes used.

In this way, statutory liquidation results in a kind of delegation to the initial agency to narrow statutes in a way that is inalterable by later agencies.[221] And unlike when agencies are granted the express power to nullify or alter statutory provisions through properly promulgated regulations,[222] liquidation may occur through rather more subtle, and less transparent, mechanisms. In its weakest form, liquidation may come through an actual agency interpretation that the agency later seeks to change. But in the major questions cases, the Supreme Court has concluded that an agency has become hemmed in by past practice, including past inaction, even without any actual act of interpretation on the agency's part. The best example is *Biden v. Nebraska*, the student debt cancellation case.[223] There, the Court pointed only to past examples of the agency using the delegation in question to effect what the Court considered "minor" modifications; there was no agency interpretation on the

219. Perhaps in conjunction with other factors. *See supra* notes 117–119 and accompanying text (discussing multi-factor nature of the major questions doctrine).

220. *See supra* notes 118–122 and accompanying text.

221. *See infra* notes 391–394 and accompanying text (exploring the normative implications of this observation).

222. *See generally* David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265 (2013); Daniel T. Deacon, *Administrative Forbearance*, 125 YALE L.J. 1548 (2016).

223. *See supra* notes 158–164 and accompanying text.

books limiting itself to modifications of a particular type.[224] But that was enough, at least in conjunction with the other factors mentioned by the Court, to require the agency to point to some grant of authority more than otherwise would be required to sustain the debt cancellation program.[225]

The Court's increasing tendency to use evidence of past agency practice or understandings to limit agencies' discretion has the potential to scramble the egg in another way as well, depending on how far the Court pushes.[226] In *Brown & Williamson*, the agency's prior disavowals of jurisdiction over tobacco products had not come in the form of agency regulations promulgated via notice-and-comment.[227] Rather, the statements relied on by the Court were found in much less formal settings, including testimony to Congress itself.[228] Reliance on such statements is one thing when used to support a conclusion that later statutes effectively adopted the agency's positions, as *Brown & Williamson* concluded.[229] It's quite another if used as a freestanding consideration when determining whether an agency has become hemmed in by its past practice alone—including when the later agency acts through notice-and-comment. And Justice Barrett's concurrence in *Biden v. Nebraska* arguably indicates that the kind of statements at issue in *Brown & Williamson* might indeed be relevant to ascertaining the statute's "context."[230] To the extent similar, informally announced statements might be used to disable agencies from departing from past positions via subsequent notice-and-comment rulemaking, it would represent a destabilizing departure from the understood hierarchy of authorities.

Loper Bright may also restrict agency changes of position in a similar way as the major questions doctrine but even in "ordinary" cases. Under *Loper Bright*'s logic, the courts may give a kind of negative respect to more recent agency interpretations that represent a break with past agency views. In that situation, the older agency interpretation, as the one more worthy of respect by the Court's criteria, exerts a kind of gravitational force with respect to the courts' decisionmaking, pulling courts away from the agency's new interpretation and toward the old. Again, the result is a narrowing of options open to the later-in-time agency compared to what it could have selected if writing on a blank slate—representing something closer to a statutory amendment than, as under *Chevron*, an agency pronouncement that can be revised through the same processes that produced it.

---

224. *Id.*
225. *Id.*
226. *Id.*
227. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 145–46 (2000).
228. *See id.* at 145–47.
229. *See supra* notes 100–104 and accompanying text.
230. *See supra* notes 167–175 and accompanying text.

So where does that leave later-in-time agencies that are not writing on a blank slate? Administrative change will, of course, be more difficult as a general matter. Certain kinds of changes will likely face more resistance than others. Change will be easiest to justify where agencies can credibly claim to be operating in the pure policymaking realm and where the change in question cannot be described as paradigm-altering. *Loper Bright* itself discussed statutes, such as those that use open-textured terms such as "appropriate" or "reasonable," where the best interpretation of the statute in question is that the agency enjoys delegated discretionary authority.[231] One way to understand that caveat is as an endorsement of the position that not all cases involving the application of statutory language are properly conceived of as presenting interpretive disputes.[232]

The upshot is that even statutes that have been given a fixed meaning may still allow agencies to effect change if the statute's fixed meaning is underdeterminate.[233] To illustrate, consider EPA's ability to set ambient pollution-control standards "the attainment and maintenance of which . . . are requisite to protect the public health" with "an adequate margin of safety."[234] Assume that prior precedent has settled the semantic meaning of that grant of authority such that the statute means what it says: that the agency must set standards sufficient to protect the health of the public at large.[235] Even under the major questions cases and *Loper Bright*, the agency should still be able to lower the standards associated with a particular pollutant from the previously allowable level of 0.09 ppm to 0.08 ppm based on data showing previously unappreciated dangers from exposure levels at the previous standard.[236]

That said, liquidation may still restrict agencies' powers even when they are exercising what *Loper Bright* would treat as delegated policymaking authority. Where a challenger can convince a court that the agency is not simply incrementally adjusting the rules but operating pursuant to some new decisionmaking paradigm, as in *West Virginia*, the agency may find that its past ways of acting—or its past pattern of action and inaction—has deprived

231. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2263 (2024).

232. *See* Pojanowski, *supra* note 53, at 893 (distinguishing between questions "upon which traditional lawyers' tools can have purchase" and those that cannot, even if they trace to statutory language).

233. *See* Lawrence B. Solum, *Disaggregating* Chevron, 82 OHIO ST. L.J. 249, 259 (2021) ("When a statute includes a vague or open textured term, such as 'excessive,' 'reasonable,' or 'heavy,' the communicative content of the statute does not fully determine the legal content of statutory doctrine or the application of the statute to particular cases.").

234. 42 U.S.C. § 7409(b)(1).

235. *See* Whitman v. Am. Trucking Associations, 531 U.S. 457, 473 (2001).

236. *See generally id.* (reviewing such a change).

it of the ability to implement a statutory delegation in a particular way. Indeed, *Loper Bright* tells us that, when it comes to such true delegations, the courts remain in charge of "fix[ing] the boundaries of [the] delegated authority,"[237] and looking to past agency practice may be an important way that courts do so. For this reason, agencies would be smart to identify "regulatory antecedents" when promulgating new policies that are designed to show that the agency's method is continuous with its past practice.[238]

The above suggests that, looking forward, agencies may trim their sails in order to avoid being perceived as engaged in novel endeavors. There is a way that liquidation is likely to operate in the shorter term, however, that somewhat confounds the tendency of liquidation to disempower later-in-time agencies as a general matter. During the Trump Administration, we are likely to see agencies disavow the policies of prior Democratic administrations by claiming that those policies were novel and unlawful innovations and inviting courts to agree. The blueprint for doing so was laid down in the proceedings at issue in *West Virginia*.[239] And a recent executive order, entitled "Ensuring Lawful Governance and Implementing the President's 'Department of Government Efficiency' Deregulatory Initiative," directs all agencies to review regulations to ensure, among other things, that they comport with the best interpretation of the statute in question and that they are valid under the major questions doctrine.[240] Thus, we are likely to see liquidation wielded as a sword against past pro-regulatory initiatives, including those undertaken at times when agencies may not have been on notice of the current legal framework.

B. Congress

Statutory liquidation also has implications for Congress's authority, and, once again, an important effect of looking to post-enactment practice is to shift Congress's power across time.

As far as the enacting Congress, statutory liquidation restricts Congress in its ability to "choose change"—that is, to license frameworks that are capable of being adapted over a long time horizon. One reason that Congress may select an agency as a delegatee, and authorize it to act using broad language, is because Congress desires a flexible regulatory regime that can be adapted to new facts and circumstances and, even, to combat previously unforeseen

237. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2263 (2024) (quoting H. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 27 (1983)).

238. *See* Richard L. Revesz & Max Sarinsky, *Regulatory Antecedents and the Major Questions Doctrine*, 36 GEO. ENV'T. L. REV. 1 (2023) (urging agencies to do just that).

239. *See supra* notes 137–138 and accompanying text.

240. *See* Exec. Order No. 14,219, 90 Fed. Reg. 10,583 (Feb. 25, 2025).

though analogous kinds of problems.[241] That choice contrasts with a decision to leave matters to courts, knowing that the rules of judicial precedent make court decisions rather more impervious to change.[242]

When courts find that earlier-in-time agency practices restrict agency action going forward, it interferes with Congress's ability to license flexibility. Compounding that fact is the Court's seemingly miserly attitude toward statutes that expressly authorize agencies to modify statutory and regulatory law. That attitude was on display in *Biden v. Nebraska*, where, even before getting to its major questions doctrine analysis, the Court adopted a rather cramped interpretation of Congress's grant of authority to the Secretary of Education to "waive or modify any statutory or regulatory provision" applicable to certain student loan programs.[243] Thus, Congress may find that using a rather open-textured term such as "best system"—or potentially even words like "reasonable" or "appropriate"[244]—is not enough to grant the ability to adapt it may wish to invest in agencies. And it may find that writing rather more detailed statutory provisions but granting agencies the authority to alter them may not work well either.

The increasing use of post-enactment practice to settle statutory meaning has implications for the power wielded by post-enactment Congresses as well. It's as yet unclear whether, under the Court's developing case law, post-enactment practice by Congress itself, as opposed to the Executive, can liquidate statutory meaning. As described above, in the major questions cases the Court has pointed to Congress's failure to enact legislation as important, but it has been cagey about whether such failure matters because it is indicative of Congress's view that the agency currently lacks the authority at issue, because it is a kind of ratification of or acquiescence in the agency's prevailing view of its own authority, or simply because it provides evidence that the matter is politically controversial.[245] In *Loper Bright*, the Court only mentioned interpretations provided by an agency as potentially indicative of meaning, though it's somewhat unclear why under the logic of *Loper Bright* the "contemporaneous" understandings of enacting members of Congress would not also be relevant.[246]

---

241. *See* Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 139–40 (2005); Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 412 (2008).

242. *See* Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035 (2006).

243. *See* Biden v. Nebraska, 143 S. Ct. 2355, 2363, 2368 (2023).

244. *See supra* note 231 and accompanying text.

245. *See supra* Part II.B.

246. *See infra* Part IV.C.1.a and accompanying text (considering liquidation's fit with textualism). As Leah Litman and I have explained, the broader dynamics of the major questions

Even if the focus is kept on executive branch practice, however, statutory liquidation affects the power of later Congresses to the extent that Congress, and individual members of it, can influence executive branch practice and pronouncements.[247] Allowing such practice to settle the meaning of statutory provisions means that members of Congress who are able to influence agencies in their initial choices of policy gain potentially outsized power. That power projects backwards, to the extent that it results in action by the Executive Branch that has the effect of altering the initial delegation. But it also projects forwards, to the extent that it deprives future members of Congress of the ability to encourage agencies to take a different path. It thus serves to enshrine a kind of democratic end point—a moment in time past which an agency practice is no longer subject to contestation by the political branches.

C. The Courts

Although on a superficial level statutory liquidation might be thought to make judging more focused, the Supreme Court has deployed it in a way that leaves the concept with so many fuzzy edges that it can be seen as another aspect of the trend toward increasing judicial discretion in agency cases.[248]

In constitutional law, practice-based methods are sometimes perceived as making judicial inquiry more grounded—and judging less discretionary—when the relevant text is underdeterminate.[249] At a high level of generality, something similar might be said for what I am calling statutory liquidation. Statutory text is also often unclear. When it is, the practice of other branches may be helpful in resolving disputes about its meaning. The alternatives may

---

doctrine further work to allocate potentially significant power to post-enactment Congresses, factions of Congress, and individual members. *See* Deacon & Litman, *supra* note 14, at 1060–64 (explaining how the major questions doctrine turns "the minority checks that are built into the system into a power held by a [political] minority to effectively amend statutes").

247. *See* Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1482 (2015) (describing how members of Congress can influence administrative policymaking through means including "committee oversight, threats to reduce appropriations, investigations of administrative conduct, reporting requirements, and the confirmation process for high-level officials").

248. *See supra* note 20 and accompanying text.

249. *See* Bradley & Siegel, *supra* note 2, at 24 ("[R]elying on practice may offer the best option for a reasoned disposition of the case that seeks to avoid appealing simply to a policy assessment, partisan calculation, or 'choosing a side' in a dispute between the branches."); Bradley & Morrison, *supra* note 1, at 454. *But see* Alison L. LaCroix, *Historical Gloss: A Primer*, 126 HARV. L. REV. F. 75, 77 (2012) ("Historical practice is a slippery, unhelpfully capacious notion masquerading as a mid-twentieth-century neutral principle.").

be more open appeals to purpose or policy as conceived by the court,[250] interminable disputes over clashing canons of interpretation,[251] or seemingly arbitrary tie-breaking methods.[252]

In reality, however, the Supreme Court has not provided guardrails to guide courts' use of practice by the political branches to settle statutory meaning. Pointing out that the Supreme Court has left things underspecified—and open to the possibility of manipulation—is a rather stale observation when it comes to methods associated with the new major questions doctrine.[253] But few have explored the malleability associated with looking to past practice specifically, and employing practice-based methods might be thought to hold the promise of greater determinacy.[254] This Part, therefore, runs through just a handful of questions left open by the Supreme Court when it comes to using practice in order to solidify, and often narrow, statutes.

First, what counts as a "practice"? Writing on historical gloss, Bradley and Siegel argued that courts place more weight on the behavior of governmental institutions than their professed views "for the obvious reason that talk can be cheap in politics."[255] In recent cases on statutory interpretation, it is unclear where the Court's focus lies. *Loper Bright* emphasized "interpretations"—things that agencies say about the meaning of the statute in question—though such interpretations may often be proffered in support of a particular agency action.[256] *West Virginia* pointed primarily to actual past practice by the agency and, in particular, the fact that the agency had historically implemented the relevant statutory directive in a certain way.[257] *West Virginia* also referenced agency statements suggesting that the relevant provision adopted a "technology-based" standard.[258] In *Nebraska*, the Court pointed

250. *See, e.g.*, King v. Burwell, 576 U.S. 473, 492 (2015) (turning to purpose after finding text ambiguous).

251. *See, e.g.*, Yates v. United States, 574 U.S. 528, 531–32 (2015) (battle of canons over whether a fish is a tangible object).

252. *See generally* Adam M. Samaha, *On Law's Tiebreakers*, 77 U. CHI. L. REV. 1661 (2010).

253. *See, e.g.*, Freeman & Stephenson, *supra* note 14, at 23 (describing "the Court's inability or unwillingness to articulate an objective test, or even consistently applied guidelines, for determining when a rule is sufficiently major to trigger [the major questions doctrine]").

254. *See* Natasha Brunstein & Donald L.R. Goodson, *Unheralded and Transformative: The Test for Major Questions After* West Virginia, 47 WM. & MARY ENV'T L. & POL'Y REV. 47, 50 (2022) (arguing that *West Virginia* abandoned an "amorphous multifactor test" in favor of looking to whether the agency had taken an unprecedented action that fundamentally changes the statutory scheme).

255. Bradley & Siegel, *supra* note 2, at 18.

256. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2247, 2261 (2024).

257. *See supra* notes 136–138 and accompanying text.

258. *See supra* notes 139–140 and accompanying text.

to agency practice alone.[259] As stated, the agency had never given the statute an actual interpretation that would have limited it to making only minor modifications, or only modifications of a particular kind.[260] Going back to *Brown & Williamson*, the agency statements in question were given to Congress, unconnected to a specific agency action, and were backed by behavior only in the form of FDA's historical inaction with respect to tobacco products.[261]

Second, how does one define the contours of an agency's past practice, such that one knows whether the agency's current position represents a break? In cases where an agency expressly deviates from a previously stated interpretation of the statute in question, answering that question might not be so difficult. But in other cases, there may be significant freedom to define what the agency's past practice was. Partly, this is a familiar level-of-generality problem.[262] Partly, it is a question tied to why the courts are looking to past agency practice in the first place. If, for example, the normative theory underlying statutory liquidation requires the agency to have *understood* itself to have been limited to the kind of practice reflected by its prior behavior,[263] things get more difficult still. The inquiry would now involve defining not only the practice but also what understanding the practice reflected. When EPA casually referred to § 111(d) as embodying a technology-based approach in the years prior to *West Virginia*,[264] did it understand such an approach to be the sole means of implementing the provision or just a common one? How about the Department of Education, when it issued past waivers and modifications the Court would describe as "extremely modest and narrow in scope"?[265] It is also a matter of deciding which kind of differences count when it comes to comparing past agency practice with its current action. In *West Virginia*, the majority and dissent quibbled over whether EPA's prior use of § 111(d) to institute a cap-and-trade scheme for mercury was different in a way that should matter.[266] That a prior agency action was taken on a Tuesday obviously should not count. But in many real-world cases things will not be so clear. Should, for example, the agency be able to point

259. *See supra* notes 163–164 and accompanying text.

260. *See supra* notes 159–160 and accompanying text.

261. *See supra* notes 103–104 and accompanying text.

262. *See* Litman, *supra* note 28, at 1483 ("[T]here does not seem to be a good—or at least consistent—way to select a level of generality at which to describe . . . past practice[]."); Bradley & Morrison, *supra* note 1, at 424 ("Any practice- or precedent-based approach naturally must confront questions about how to specify the scope of the past practice or precedent.").

263. *See infra* Part IV.C (discussing various normative bases).

264. *See supra* note 139 and accompanying text.

265. Biden v. Nebraska, 143 S. Ct. 2355, 2372 (2023).

266. *Compare* West Virginia v. EPA, 142 S. Ct. 2587, 2610–11 (2022), *with id.* at 2639–40 (Kagan, J., dissenting).

to precedent supporting its present-day position if that precedent involved a different statutory provision that uses the same (or similar) language?[267]

The controversy over EPA's 2024 revision to automobile tailpipe emissions standards presents a good example of these kinds of difficulties.[268] In tightening those standards, EPA made a credible claim that it was doing what it always did—namely, setting standards based on the use of feasible technologies for reducing emissions.[269] But because the technologies in question include those that allow vehicles to operate with zero emissions, challengers characterized the rule as "shift[ing] a longstanding scheme to regulate internal combustion engine vehicles into one that erases most of those same cars from the market."[270] Courts will also have to sort out whether EPA's prior consideration of zero-emitting technologies in the context of various programs were similar enough to render EPA's current position non-novel.[271]

Third, how longstanding or consistent must the practice be? In the literature on practice-based methods in constitutional law, the durability of the practice has been considered important for a variety of reasons.[272] *Loper Bright* refers to both longstandingness and consistency as plus factors when it comes to assessing agency interpretations.[273] In the major questions cases, the Court seems to have adopted a looser attitude. The statute at issue in *Nebraska* was passed in 2003, and the agency used its waiver and modification authority to address "a handful of specific issues" the Court considered to be minor.[274] The Court also noted in its major questions analysis that the agency had "only once" before waived or modified a provision related to debt cancellation.[275] Left unsaid was how many prior, similar-enough actions would have been sufficient.

---

267. *See West Virginia*, 142 S. Ct. at 2611 n.1 (dismissing various claimed precedents because they "were not Section 111 rules").

268. *See* Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles, 89 Fed. Reg. 27,842, 27,842 (2024).

269. *Id.* at 27,898.

270. Commonwealth of Ky. Off. of the Att'y Gen. & the State of W. Va. Off. of the Att'y Gen., Comment Letter on Multi-Pollutant Emissions Standards for Model Years 2027 and Later (July 5, 2023), https://www.regulations.gov/comment/EPA-HQ-OAR-2022-0829-0649 [https://perma.cc/4CGT-AAYS]; *see also* American Enterprise Institute, Comment Letter on Multi-Pollutant Emissions Standards for Model Years 2027 and Later (July 5, 2023), https://www.regulations.gov/comment/EPA-HQ-OAR-2022-0829-0571 [https://perma.cc/7MF6-QC3Z].

271. *See* Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles, 89 Fed. Reg. at 27,898.

272. *See, e.g.*, Bradley & Morrison, *supra* note 1, at 426; Baude, *supra* note 2, at 16–18.

273. *See supra* notes 194–197 and accompanying text.

274. Biden v. Nebraska, 143 S. Ct. 2355, 2363 (2023).

275. *Id.* at 2372.

Fourth, and relatedly, is agreement between the political branches, or the acquiescence of one in the face of action by the other, important?[276] In the constitutional law literature, longstandingness is sometimes taken as a proxy for acquiescence,[277] but, as just stated, in its major questions cases the Court has not focused closely on the longstanding nature of the agency's practice in the statutory context. The Court also has not provided a clear answer concerning how other evidence of agreement or acquiescence by Congress should be weighed. As described above, the Court has sometimes intimated that Congress's failure to enact bills that would have granted an agency a particular authority—read against the backdrop of agency disclaimers of such authority—might reflect a kind of meeting of the minds that the agency lacks the power in question.[278] But members of the Court have more often described such considerations as relevant to demonstrating the politically controversial nature of an agency action.[279] And the Court has never said that evidence of agreement or acquiescence is strictly necessary to finding that past agency practice should be given weight. *Loper Bright* was entirely silent on how post-enactment congressional action (or inaction) should come into play, if at all.

Finally, what is the relationship between statutory liquidation and other tools of statutory interpretation? This is tied to a broader question regarding whether practice-based evidence can only be admitted if the text is otherwise unclear. Baude wrote that the Madisonian concept of liquidation requires textual "indeterminacy" because otherwise practice would be allowed to "alter" the law rather than "expound" it.[280] And *Bostock* seemed to strongly reject looking to post-enactment sources concerning otherwise unambiguous text—at least as long as those sources were being consulted for evidence of expected applications as opposed to meaning.[281]

In the agency line of cases, by contrast, the Court hasn't appeared to use textual clarity as a gating mechanism when it comes to evidence of post-enactment practice. That's most apparent if one accepts that the new major questions doctrine allows courts to depart from unambiguous statutory text.[282] But even under the seemingly more modest version of the doctrine

276. *See generally* Bradley & Morrison, *supra* note 1, at 432–48 (discussing role of acquiescence).

277. *See* Bradley & Siegel, *supra* note 2, at 19 (arguing that "acquiescence . . . means at least that the practice must have become reasonably stable over time").

278. *See supra* note 154 and accompanying text.

279. *See supra* note 153 and accompanying text.

280. Baude, *supra* note 2, at 57 (quoting Letter from James Madison to Joseph C. Cabell (Sept. 18, 1828), *in* 9 THE WRITINGS OF JAMES MADISON 316, 324 n.5 (Gaillard Hunt ed., 1910)).

281. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1750–53 (2020) (rejecting the use of evidence regarding expected applications to interpret Title VII's prohibition on sex discrimination).

282. *See supra* notes 118–119 and accompanying text.

associated with Justice Barrett, the factors made relevant by the major questions cases—all of them—appear relevant to deciding the best meaning of the text within its broader context, seemingly without need for a formal finding that such text is unclear prior to their consideration.[283]

Something similar appears true under *Loper Bright*. Indeed, the rejection of *Chevron* appeared partially tied to the Justices' discomfort with rules of interpretation that depend on an initial finding of ambiguity.[284] Further, recall that the Court seemed to endorse the position that an agency's prior interpretations may be a kind of tool used to discern statutory meaning, which is why use of such interpretations does not constitute "deference" to the Executive Branch any more so than consulting a dictionary does.[285] If that's true, it's difficult to see why evidence of post-enactment practice—at least practice that can be said to shed light on meaning—should not be used to determine whether text is clear in the first place.[286]

Of course, even if a particular tool can be relevant to discerning the meaning of text, and thus should not strictly be off the table when ascertaining whether the text is clear, it could be that the tool is relatively weaker than other sources of meaning. In his dissent in *King v. Burwell*,[287] for example, Justice Scalia wrote that when a text's meaning is particularly clear when considered in isolation, it should take stronger context-based evidence to justify deviating from that meaning.[288] But the Court has not been forthright about how practice-based methods of statutory interpretation fit into the broader interpretive landscape. In the *Loper Bright* context, that's perhaps understandable. We are now only beginning our journey into the "wonderful new world that the Court [has] create[d],"[289] and we can hold out hope

283. *See supra* notes 162–166 and accompanying text.

284. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2269–71 (2024) (stating that one reason *Chevron* was unworkable is that "ambiguity has always evaded meaningful definition"); *see also* Brett M. Kavanaugh, *Keynote Address: Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1910 (2017) (arguing that there is no common way to decide whether a statute is ambiguous or not, and that judges will differ on the question).

285. *See supra* notes 200–202 and accompanying text.

286. *See* William Baude & Ryan D. Doerfler, *The (Not So) Plain Meaning Rule*, 84 U. CHI. L. REV. 539, 540 (2017) ("Information that is relevant shouldn't normally become irrelevant just because the text is clear.").

287. 576 U.S. 473 (2015).

288. *See id.* at 500–01 (Scalia, J., dissenting) ("Ordinary connotation does not always prevail, but the more unnatural the proposed interpretation of a law, the more compelling the contextual evidence must be to show that it is correct.").

289. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1019 (2005) (Scalia, J., dissenting).

that future cases will clarify the relative importance of agencies' prior interpretations. With respect to the major questions doctrine, the concern is related to the broader indeterminacy created by the Court's use of a multifactor approach in which it never appears certain which factors are necessary (if any), which are sufficient (if any), and how everything fits together.[290] Until the Court sorts out that broader set of issues, it is unlikely there will be much clear guidance concerning the relative importance of practice-based evidence in particular.

In the above ways, then, statutory liquidation as practiced by the Supreme Court has given courts a great deal of discretion. And such discretion means power. For it is judges who ultimately decide which agency practices should be given weight and how much, and who are thus in control of determining when settlement has been achieved.

The recent cases—and *Loper Bright* in particular—increase judicial power in another way as well. By allowing courts to select a statute's single best meaning, even in cases where the text would have been considered ambiguous under *Chevron*, judicial precedent is given a super-charged force: the selection of the single best interpretation insulates the issue from further democratic contestation, at least absent statutory amendment.

One wonders if an effect of this dynamic will be to loosen the strictures of statutory stare decisis in cases that would have formerly been governed by *Chevron*.[291] Recall that Anita Krishnakumar has uncovered evidence suggesting that the Supreme Court has been somewhat more cavalier about its own precedent in areas where the statutory text is more open-ended, and the Court had admitted as much when it comes to antitrust.[292] Under *Loper Bright*, courts will be in charge of many more such statutes, and there may be pressure to engage in more judicial "updating" in order to account for new facts or, in the words of *Leegin*, new "wisdom."[293] If borne out in reality, that prediction would reduce the power of any single court to finally settle statutory meaning. But it would only highlight how thoroughly courts—considered in the collective sense—have been placed in charge when it comes to mediating change over time.

290. *See supra* note 118 and accompanying text.

291. *Cf.* Richard W. Murphy, *Abandon* Chevron *and Modernize Stare Decisis for the Administrative State*, 69 ALA. L. REV. 1, 3 (2017) (proposing, prior to *Loper Bright*, that the Supreme Court replace *Chevron* with a more relaxed form of stare decisis).

292. *See supra* note 52 and accompanying text.

293. Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 551 U.S. 877, 900 (2007).

IV. THE THEORY OF STATUTORY LIQUIDATION

This Part will interrogate possible normative bases for using evidence of post-enactment practice to determine that statutory meaning has become liquidated. First, however, it surveys the theories supporting the anti-liquidationist stances taken in *Bostock* and in the *Chevron* line of cases. Because the focus of this Article is on statutory liquidation, those theories will be laid out rather briefly. In giving them summary treatment, I do not intend to suggest they are beyond reproach. But they are useful here primarily to provide a point of contrast with the normative grounds that might be given to support the practice of statutory liquidation.

I will then move on to discussing how statutory liquidation might be justified, with a particular focus on the form of liquidation that extends a kind of anti-deference to agency action that is perceived to depart from old ways. To preview, the various theories I will discuss all fall short in that they are either incomplete, fail to cohere with the Court's broader jurisprudential commitments, or do not justify many features of statutory liquidation reflected in the emerging practice.

A. The Anti-Liquidation Theory of Bostock

As described above, in *Bostock* the Supreme Court held that the plain terms of Title VII forbid employment discrimination on the basis of sexual orientation or gender identity, despite the EEOC's longstanding position that such discrimination was not actionable and the Court's assumption that few members of the relevant public would have understood Title VII to touch those forms of discrimination.[294] In doing so, *Bostock* displayed a skeptical orientation toward the idea that statutory meaning might become liquidated by post-enactment practice.

Bostock's rejection of post-enactment practice as a guide to decisionmaking can be explained by the theory of textualism it embraced. As Tara Grove has written, the majority in *Bostock* purported to apply a rather formalistic method of textualism, which downplays the significance of broader societal context, especially post-enactment context.[295] Several aspects of *Bostock*'s approach are worth reviewing.

First, *Bostock* described the Court's job as uncovering the original public meaning of Title VII—how the public would have understood Title VII's terms in 1964.[296] Such original public meaning-oriented textualism borrows from modern originalism both the fixation thesis, the idea that the meaning

294. *See supra* notes 79–83 and accompanying text.

295. Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 267 (2020).

296. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1738–39 (2020).

of text is fixed when enacted, and the constraint principle, the normative position that such meaning should constrain courts.[297] Such guides to judging work in tandem to reduce the importance of post-enactment practice.[298]

Second, the *Bostock* majority rejected reliance on evidence showing how government actors or the broader public understood the statute would be applied, as opposed to the "meaning" they ascribed to it.[299] Under that "intensional approach, what matters is the original concepts, not the original expected applications: Even if no person would have expected in 1964 that Title VII would apply to *Bostock's* 2020 circumstances, Title VII's original meaning prohibited the discrimination that Bostock faced."[300]

Third, the *Bostock* majority stressed that it was dealing with unambiguous statutory text.[301] *Bostock* did not expressly say that, if the text were unclear, all the various pieces of legislative history and evidence of post-enactment practice pointed to by the dissents would be fair game. But it did emphatically reject the use of "extratextual consideration[s]" when the "statute's terms [are] plain."[302] To be sure, *Bostock* left a slight opening for courts to consider such materials to the extent they showed that the statute bore a different meaning when enacted than it might be thought to have from the perspective of modern readers.[303] But the Court concluded that the material in question shed light only on expected applications and not meaning rightly understood.[304]

B. The Anti-Liquidation Theory of Chevron

In *Bostock*, the Court rejected reliance on post-enactment practice—and thus resisted embracing a theory of statutory liquidation—at least with respect to unambiguous text. Under *Chevron*, the same theory embraced by *Bostock* would justify discounting post-enactment practice when determining whether the statutory text was ambiguous in the first place. And indeed, during the

297. *See* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 1 (2015); *see also* Lawrence B. Solum, *Pragmatics and Textualism*, 33 J. L. & POL'Y 2, at 103–08 (2025) [hereinafter Solum, *Pragmatics*] (discussing these principles in the statutory context).

298. *See* Doerfler, *supra* note 33, at 541.

299. *See Bostock*, 140 S. Ct. at 1750–51.

300. William N. Eskridge, Jr., Brian G. Slocum, & Kevin Tobia, *Textualism's Defining Moment*, 123 COLUM. L. REV. 1611, 1635 (2023).

301. *See Bostock*, 140 S. Ct. at 1748–50.

302. *Id.* at 1749–50.

303. *See id.*

304. *Id.* at 1750.

Chevron period courts generally held that agencies' views were owed no deference when it came to that "step one" question.[305]

As described above,[306] the *Chevron* framework was also resistant to liquidation once it was determined the text was ambiguous—for a different reason. Although the agency's currently preferred interpretation of such text was owed deference, its prior conflicting interpretations provided no general roadblock. Nor did a court's interpretation, at least if the court had merely provided the best interpretation of a statute it considered ambiguous.[307] What justified this anti-liquidationist strand in the Court's *Chevron* jurisprudence?[308]

The answer has to do with *Chevron*'s normative underpinnings. Broadly, *Chevron* treated statutory ambiguity as creating policy space in which agencies could operate. The resolution of ambiguity may, in one view, call for policy judgment as much as, or more so than, legal judgment.[309] *Chevron* rested on a general presumption that, therefore, Congress would prefer agencies to resolve ambiguities in statutes they administer when the choice is between them and the courts.[310]

Once it's accepted that agencies are operating in a largely policymaking paradigm when resolving ambiguities, the reasons in favor of installing them as primary interpreters also point toward allowing them freedom to depart from their own past interpretations. Agencies' expert judgment may advise deviating from a past interpretation due to new facts and circumstances, or just new learning.[311] And in cases involving trade-offs among different values, or in other circumstances where expert judgment only goes so far, values related to government responsiveness and accountability may justify allowing agencies to alter their positions based on the views of the current President and her Administration.[312]

---

305. *See, e.g.*, Vill. of Barrington v. Surface Transp. Bd., 636 F.3d 650, 659–60 (D.C. Cir. 2011).

306. *See supra* Part II.A.

307. *See supra* note 93 and accompanying text (describing *Brand X*).

308. You might alternatively say that, although *Chevron* allows agencies to liquidate statutory meaning for the time being, the statute remains subject to the prospect of ongoing reliquidation. I don't believe the difference in description matters.

309. *See* Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2086–87 (1990).

310. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2297 (2024) (Kagan, J., dissenting).

311. *See id.* at 2298 ("Agencies are staffed with 'experts in the field' who can bring their training and knowledge to bear on open statutory questions.").

312. *See id.* at 2298–99; *see also* Deacon & Litman, *supra* note 181, at 2.

The same theory explains why, under *Chevron*, agencies shifting between different interpretations had to satisfy reasoned decisionmaking requirements.[313] Those requirements are designed to ensure nonarbitrary policymaking by the Executive Branch by forcing agencies to confront trade-offs and otherwise articulate the bases for their choices so as to promote important values.[314] But the fact remained that, because the selection of a new interpretation was conceptualized as involving primarily policy and not law, the ultimate choice was the agency's to make, as long as it provided the requisite justification.[315]

C. In Search of a Pro-Liquidation Theory

This Section surveys various theories that may ground statutory liquidation. It finds all of them inadequate in various respects.

I bracket here a purely historical defense of liquidation, which would hold that courts today are bound to use post-enactment practice in a particular way because that is what courts did when the APA was passed in 1946.[316] A full analysis of that claim would require taking stock of the historical evidence in favor and against its premise,[317] a task beyond the practical scope of this Article. Further, even accepting that a cousin of today's emerging form of liquidation prevailed during the relevant period, I am skeptical that the Court would conclude that every interpretive practice embraced by the courts in 1946 continues to bind them today, notwithstanding *Loper Bright*'s invocation of judicial practice in support of its conclusion that *Chevron* was inconsistent with the APA.[318] Finally, even if an unwritten "law of interpretation" may justify judges employing certain rules today,[319] a full normative

313. *See supra* notes 94–95 and accompanying text.

314. *See* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 534–35 (2003); Daniel T. Deacon, *Responding to Alternatives*, 122 MICH. L. REV. 671, 687–88 (2024).

315. *See supra* note 97 and accompanying text.

316. *See* Bamzai, *supra* note 6 (exploring pre-APA canons that gave executive branch pronouncements weight in particular cases).

317. *See* Levin, *supra* note 6 (questioning Bamzai's historical telling).

318. *See* Daniel T. Deacon, Loper Bright, Skidmore, *and the Gravitational Pull of Past Agency Interpretations*, YALE J. ON REGUL.: NOTICE AND COMMENT (June 30, 2024), https://www.yalejreg.com/nc/loper-bright-skidmore-and-the-gravitational-pull-of-past-agency-interpretations/ [https://perma.cc/2DDB-6BYU] (making this point).

319. *See generally* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079 (2017).

evaluation of those rules using present-day criteria remains relevant to assessing whether such rules should be altered, clarified, extended, or limited,[320] especially given that the historical analogues likely do not map perfectly onto the Court's current practice.[321] This Section thus undertakes that evaluation.

1. Epistemic Theories

The first set of normative bases for grounding the emergent trend documented by this Article would hold that practice of various sorts is epistemically relevant to the project of statutory interpretation because prior practice may shed light on the text of the statute, its purpose, or the intent of its drafters.[322] I'll spend most time on the relationship between practice and text, because the Court is inclined (at least rhetorically) toward textualist methods of statutory interpretation, before more briefly touching on purpose- and intent-based theories.

a. Liquidation and Textualism

As the discussion of *Bostock*'s theory indicates, practice-based methods of interpretation might be thought to sit ill at ease with the prevailing, original-public-meaning version of textualism.[323] But, as the Supreme Court's recent practice shows, some self-identified textualist Justices appear to think the story is not so clear.[324]

Appeals to extratextual considerations such as agency practice can be seen as part of a broader move within textualism toward discerning statutory meaning by reference to a broader range of evidence that may inform statutory meaning-in-context. Of course, it's long been the case that textualists have embraced a kind of contextualism—one in which other provisions of the statute in question, the broader "statutory scheme," or even other statutes, might yield evidence of statutory meaning.[325] Repairing to such context need not be seen as taking us out of the standard textualist paradigm, though it does have the consequence of making textualism somewhat more flexible

320. *See* Baude & Doerfler, *supra* note 286, at 556.

321. *See, e.g.*, Bamzai, *supra* note 6, at 936–37 (discussing the *contemporanea expositio* canon as relevant to discerning the meaning of "an ambiguous statute").

322. *See* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 368–69 (1986).

323. *See supra* Part IV.A; *see also* Doerfler, *supra* note 33, at 541 ("[T]he appeal of 'historical gloss' is limited insofar as it is fundamentally at odds with familiar formalist approaches to interpretation.").

324. *See supra* Parts II.B–C.

325. *See, e.g.*, Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 319–20 (2014).

in ways that can make it harder to distinguish from purposivism.[326] At least depending on how one discerns the "statutory scheme," the above moves all still attached to the text, even as they pull the lens back from the provision being interpreted considered in isolation.

On the academic side, Lawrence Solum has argued that good textualist interpreters properly incorporate an even broader range of evidence into their search for the meaning of statutes.[327] Solum explains that textualists seek to uncover the communicative content of the text, which is "the set of propositions communicated by the text to its primary intended audience."[328] Such content is determined by the interaction of sentence-level meaning and the broader context of the communication between the speaker and her audience.[329] Because that broader context may be unstated, allowing it to come into play can lead to divergence between sentence-level (or literal) meaning and the actual communicative content of the text.[330] From this, Solum rejects what he calls the evidentiary conception of textualism, under which textualism functions as an exclusionary rule barring non-textual evidence.[331] Rather, Solum argues that because textualists seek communicative content, and because communicative content depends on surrounding context, the better position is that any evidence shedding light on that content is fair game for use.[332] Therefore, courts can make proper use of evidence, such as legislative history, not found within the four corners of the U.S. Code, as long as such evidence bears on the relevant context of the statutory communication.[333]

If legislative history is fair game, then, when it comes to discerning a statute's communicative content, so too might agencies' views be consulted in search of the same. To be clear, that's not because subsequent agency practice itself is relevant context—for Solum, the context that matters is the context of enactment and promulgation.[334] But agencies' views, stated or reflected in their

326. *See* Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1304–19 (2020) (arguing that various textual tools are in fact used to support inferences about purpose); Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819, 1853–54 (2016) (suggesting that textualism has blended with purposivism); Richard M. Re, *The New* Holy Trinity, 18 GREEN BAG 2d 407, 417 (2015) (describing trend which "view[s] purposive and pragmatic considerations as relevant to the identification of textual clarity or ambiguity").

327. *See* Solum, *Pragmatics*, *supra* note 297.

328. *Id.* at 15.

329. *See id.* at 53–54.

330. *See id.* at 54.

331. *Id.* at 21–23.

332. *See id.* at 24.

333. *See id.* at 88.

334. *Id.* at 57–58.

practices, might still be relevant evidence of meaning, in part because agencies may have greater familiarity with the kind of context that does matter.

Indeed, with respect to regulatory statutes, it may be that the audience—or the "primary intended readership"—of the statute is the agency itself, as well as the regulated industry, as opposed to the public at large.[335] Especially where that's the case, agency officials may have a greater ability than courts or laypeople to grasp the communicative content of the statute as shaped by the background context understood by Congress and its audience.[336] Certain words, for example, may have been intended to bear a technical (as opposed to ordinary) meaning, and the agency may be better able to discern where that's the case.[337] In addition, agencies may have superior knowledge of how a given piece of text fits in with the broader statutory structure, which may also be relevant to uncovering its meaning.[338]

This brief sketch also points to why earlier agency views might be given a special weight—leading to a kind of liquidation. Earlier-in-time agency officials are more likely to occupy a privileged position when it comes to understanding the meaning of text situated in its shared context at the time when the statute was enacted and promulgated.[339] It also reveals statutory liquidation to be something of a misnomer when used to describe consulting agency views as evidence of meaning. In the above telling, it's not so much that post-enactment practice has settled what was once unclear statutory text. It's rather that the agencies' views are relevant to the meaning of the text as initially enacted, including (presumably) at the stage where the court discerns whether the text is clear in the first place.[340]

However, the case for considering agency practice for the light it sheds on statutory meaning is subject to a number of caveats. And taken together, those caveats may overwhelm the case.

Caveat one: When agency practice reflects the agency's own policy views, as opposed to its view of statutory meaning or information regarding relevant shared context, such practice is not relevant to uncovering the communicative content of the text.[341]

---

335. *See id.* at 91.

336. *See* Solum, *supra* note 233, at 287.

337. *See id.* at 285; *see also* Doerfler, *supra* note 205, at 708; Kevin Tobia, Brian G. Slocum, & Victoria Nourse, *Ordinary Meaning and Ordinary People*, 171 U. PA. L. REV. 365 (2022) (arguing that ordinary people expect legal texts to feature technical, not ordinary, language).

338. *See* Doerfler, *supra* note 205, at 708.

339. *See* Solum, *Pragmatics*, *supra* note 297, at 103.

340. *See* Doerfler, *supra* note 205, at 708.

341. *See* Solum, *supra* note 233, at 287–88.

This caveat would seem to deny settlement-producing force to most agency practice from the *Chevron* period, during which agencies were affirmatively licensed to use their policy judgment in order to resolve statutory ambiguities.[342] *Loper Bright*, by contrast, can be seen as an instruction to agencies that they are now to discern (and adopt) the best meaning of the statute in question, policy views aside. But even in such a world there's reason to doubt that agency interpretations will always, or even often, reflect their good-faith efforts to uncover the communicative content of the text. Agencies may well proceed instead based on the perceived policy payoffs associated with a given interpretation and a prediction about how likely *courts* are to disagree with that interpretation. If so, agencies might advance interpretations with high perceived pay offs even when they think courts are more likely than not to reject the agency's interpretation. Further complicating matters is the fact that the agency knows that, under the *Skidmore* factors embraced in *Loper Bright*, the agency's views may receive a form of de facto deference, increasing the chance that the agency may be able to achieve its preferred outcome even while advancing an interpretation it knows not to be the best. Finally, to the extent that what the agency is taking into account in addition to its own policy goals is a prediction about the likelihood of judicial invalidation, the agency's proffered interpretation may not tell the court much about the agency's independent beliefs about meaning, which are the beliefs that merit weight under the view of textualism described above.

Of course, agencies will not tell courts which scenario reflects reality. They will tell courts they have what they feel to be the best interpretation—full stop—and courts will have limited ability to discern what the agency's actual views are.[343] Thus, as Solum has put it, "textualist judges might have very good reason to doubt that policy driven agency officials are making a good faith attempt to discern the communicative content of a regulatory statute. And for similar reasons, the judges might doubt that the agency's representations about statutory meaning are sincere."[344]

342. *See* E. Donald Elliott, Chevron *Matters: How the Chevron Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 VILL. ENV'T. L.J. 1, 11–13 (2005) (providing anecdotal evidence that "*Chevron* moved the debate from a sterile, backward-looking conversation about Congress' nebulous and fictive intent to a forward-looking, instrumental dialogue about what future effects the proposed policy is likely to have.").

343. *See* Dep't of Com. v. New York, 139 S. Ct. 2551, 2573–76 (2019) (recognizing "a narrow exception to the general rule against inquiring into 'the mental processes of administrative decisionmakers'") (quoting Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971)).

344. Solum, *supra* note 233, at 288.

Add to the above the fact that Congress and the Executive may relate to each other not only as speaker and audience but also as rivals, with different interests and different stakes in the legislative deal. The Executive, of course, is itself involved in forging that deal, formally through the President's role in the legislative process and informally through agencies' frequent involvement in statutory drafting.[345] Allowing agencies' views potentially outcome-altering effect therefore threatens to displace the deal reflected in the text of the statute as enacted based on the policy views of only a subset of the relevant constitutional actors, raising concerns similar to those voiced by an earlier generation of textualists about relying on legislative history or other extratextual considerations.[346]

Caveat two: Agency practice is not relevant when it reflects a determination about how a statute with a given meaning should be implemented, as opposed to when it provides evidence of meaning itself. This point might be made by distinguishing between interpretation, which involves discerning the meaning of a statute, and construction, "which calls for determining the legal effect of the statute, through implementation rules, specification, and other devices."[347] It's probably best highlighted, however, by an example. Let's say a statute authorizes an agency to promulgate rules requiring owners of dangerous animals to take "appropriate measures" for the containment of large cats.[348] The agency determines one such appropriate measure is the construction of a containment fence at least eight feet high. That isn't so much an act of interpreting any word in the statute as implementing it in a particular situation.[349] It thus does not provide evidence of the meaning of the statute—everyone may agree on the communicative content of "appropriate measures" while still disagreeing about the agency's policy determination.

Loper Bright appears to recognize this distinction when it references statutes using open-textured terms such as "appropriate" or "reasonable" and indi-

345. *See* Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. 1377, 1378–79 (2017) ("Federal agencies help draft statutes.").

346. *See, e.g.*, IBEW, Loc. Union No. 474 v. NLRB, 814 F.2d 697, 717 (D.C. Cir. 1987) (Buckley, J., concurring) (arguing that the use of legislative history encourages legislators "to salt the legislative record with unilateral interpretations of statutory provisions they were unable to persuade their colleagues to accept"); *see generally* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61 (1994).

347. Solum & Sunstein, *supra* note 53, at 1468.

348. This example is very loosely based on the facts of *Hoctor v. U.S. Department of Agriculture*, 82 F.3d 165 (7th Cir. 1996).

349. *See id.* at 170 (stating that such determinations cannot be made "by a process reasonably described as interpretation").

cates that agencies may still receive policy-style deference when implementing such statutes.[350] But the range of agency action properly characterized as involving implementation as opposed to interpretation may be much broader than *Loper Bright* appears to appreciate. Solum and Cass Sunstein have argued that *Chevron* itself, which involved the word "source," really involved an act of construction as opposed to interpretation.[351] And the major questions cases haven't been particularly attentive to the distinction—as explained above, there is reason to think those cases allow past agency practice to narrow the scope of even those statutes using truly open-textured terms.[352]

Of course, there may still be strong reasons to defer to agency choices about how best to implement statutes—i.e., when they are operating within the "construction zone."[353] But those reasons would reduce to the classic *Chevron* justifications related to agencies' superior expertise and accountability. And because implementation decisions do not provide evidence of statutory meaning as fixed at the time of enactment, it's not clear why they would justify using agency practice to liquidate statutes such that subsequent agency officials could not depart from the agency's prior determinations, say by tightening the fencing requirement or adopting a different view of how to treat sources of pollution.

Caveat three: Using agency practice to discern meaning is particularly challenging when the "practice" in question is inaction. As described above, various members of the Court have been drawn to the idea, particularly in the major questions cases, that an agency's past failure to regulate in a particular way provides evidence that the statute fails to authorize such action.[354] Thus, EPA's historical embrace of technology-based measures under § 111(d), and its failure to adopt a generation-shifting approach, may indicate the latter is off the table.[355] Same with the Secretary of Education's use of her authority to "modify or waive" statutory requirements to make only minor modifications.[356]

In *The New Major Questions Doctrine*, Leah Litman and I explained why, contrary to such assertions, an agency's failure to act in a particular way has "at

350. *See supra* note 231 and accompanying text.

351. Solum & Sunstein, *supra* note 53, at 1469–70 (stating that "no one seriously disputed the linguistic meaning of the word 'source'" and that "[t]he real question . . . was about how to implement that meaning in the relevant context").

352. *See supra* Part II.B.

353. *See* Solum & Sunstein, *supra* note 53, at 1470–71.

354. *See supra* notes 146–157, 166–170 and accompanying text.

355. *See supra* notes 132–137 and accompanying text.

356. *See supra* notes 163–164 and accompanying text.

most a tangential relationship to . . . statutory meaning."[357] In short, there are a variety of reasons an agency may not exhaust its regulatory toolkit in its first few years, or even decades, of existence.[358] Those include, for example, that new facts and circumstances may have made new ways of doing things more attractive.[359] Furthermore, to the extent that the Court's view depends on a supposition that agencies will always act to maximize their power, there are good reasons to doubt that premise.[360] And on a practical level, given the number of reasons agencies may have for historically acting one way and not another, discerning whether an agency failed to act in a particular way based on its view of statutory meaning or because of some other consideration may be exceedingly difficult.

Caveat four: Agency practice is relevant only when it sheds light on the concepts communicated by the text and not expected applications. This caveat is for those who wish to hew to *Bostock*'s distinction between evidence bearing on intensional meaning and evidence bearing on how people expected a statute to be applied.[361] A full discussion of that distinction lies outside the scope of this Article. But *Bostock* appeared to place in the "expected applications" category reasoned EEOC opinions concluding that Title VII's words did not cover discrimination on the basis of sexual orientation or gender identity.[362] If that is off the table when it comes to a court's search for meaning, it's unclear what, in the agency context, is on.

Caveat five: Agency practice is only relevant to the extent it sheds light on meaning as fixed at the time of enactment. This caveat explains why the *Loper Bright* Court particularly stressed interpretations issued roughly contemporaneously with the statute in question. It may give courts pause, however, when considering later interpretations, and in deciding what it means for an interpretation to be contemporaneous in the first place. And even with respect to roughly contemporaneous interpretations, things may not be so clear. "Policy [c]ontext" can shift quickly in the regulatory arena, and it may affect the interpretations that agencies give even shortly after the enactment of a statute.[363]

---

357. Deacon & Litman, *supra* note 14, at 1073.

358. *See id.* at 1074–76.

359. *See id.* at 1074–75.

360. *See* Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 932–34 (2005) (casting doubt on view that agencies systematically aggrandize their own power).

361. *See supra* notes 299–300 and accompanying text.

362. *See* Dillon v. Postmaster General, EEOC DOC 01900157, 1990 WL 1111074, at *4 (Feb. 14, 1990); Labate v. USPS, EEOC DOC 01851097, 1987 WL 774785, at *2 (Feb. 11, 1987).

363. *See* Solum, *Pragmatics*, *supra* note 297, at 70–73 (discussing the relationship between policy context and the kind of context relevant to communicative content).

Caveat six: Agency practice is of less value when the agency is not the primary audience of the statute in question. The force of the affirmative case for using agency practice to shed light on statutory meaning depends at least in part on agencies' privileged position as the primary audience, or intended readership, of the statute in question.[364] Complications ensue, the first being how to determine the audience for a particular statute.[365]

Given the above qualifications, it may be quite unclear, in any given case, whether agency practice sheds light on the meaning of a statute, and how much. Indeed, the inquiry may be so fraught that one might be excused for indulging the temptation to resurrect the evidentiary conception of textualism under which such sources of meaning are simply off the table. That would be so not because of a conclusion that textualism necessarily entails the position that agency practice is never relevant to meaning. Rather, it would be because we have no good way for judges to determine when it is, and as a matter of institutional competence affixing judges with blinders may make good sense.[366]

b. Liquidation and Purposivism

Practice of various sorts might also, at least in theory, be relevant to discerning a statute's purpose. Take the Food, Drug, and Cosmetics Act, for example. One might argue that the history of FDA's disavowals of jurisdiction, coupled with inferences drawn from congressional behavior, justifies concluding that everyone simply understood that the Act's aims did not include the regulation of "drug[s]" like nicotine.[367] There, using practice to support an inference regarding purpose would serve a kind of limiting function by providing evidence that certain kinds of things fell outside the "spirit" of the statute, *Holy Trinity*-style.[368] In theory, similar reasoning could support using purpose to expand the apparent scope of a statute—say, if FDA early on concluded that nicotine *was* a drug the regulation of which served the purposes served by the statute, and Congress acquiesced.

---

364. *See supra* notes 333–336 and accompanying text.

365. *See* Solum, *Pragmatics*, *supra* note 297, at 69 (suggesting that the "question should be answered on a statute-by-statute basis," but that "rules of thumb based on recurring statute types may be useful"); *see also* Ryan D. Doerfler, *Can A Statute Have More Than One Meaning?*, 94 N.Y.U. L. REV. 213, 219–21 (2019) (raising the possibility that a statute may have more than one audience, and therefore more than one meaning).

366. *See generally* Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885 (2003).

367. *See supra* notes 101–104 and accompanying text.

368. *See generally* Re, *supra* note 326, at 407, 410–11.

In some circumstances, evidence might be such that practice might be used to support that persons around the time of enactment understood a statute's purpose in a particular way. The difficulty, however, is again partly in devising a method by which practice might be used to reliably discern statutory purpose. Especially though not only because many modern-day purposivists believe that close attention to text is an important part of the purposivist enterprise,[369] many of the same caveats that apply to using practice as an indicator of textual meaning apply to its use to unearth purpose. For example, rather than uncovering evidence related to purpose, practice may simply reveal the particular policy objectives of the actor whose practice is being examined.[370]

A similar point may be made somewhat more theoretically by distinguishing between methods of interpretation that seek to uncover the subjective understanding of the Legislature (or legislators) and the kind of objective inquiry that defines modern purposivism. Such purposivism seeks the objective purpose of a statute, where what matters is the "telos or goal that the statute would serve if it had been enacted by an ideal, public-spirited and well-informed legislature," and not the subjective intent of the Legislature or its members.[371] Practice, even early practice, is more likely to speak to the intent, subjective understanding, or aims of particular actors than to the kind of constructed purpose relevant to modern purposivism.

Finally, when it comes to the kind of narrow liquidation on which this Article is focused, there's an oddity involved in using practice to limit a present-day agency's range of options under the banner of purposivism. That is because, after uncovering a statute's objective purpose, the purposivist asks "how is the law's purpose best promoted under the *current* circumstances?"[372] Thus, purposivism is usually seen as a more dynamically flexible form of statutory interpretation than textualism.[373] Indeed, the facts of *Brown & Williamson* well illustrate how it may in fact frustrate statutory purpose to privilege early agency understandings as against present-day learning. There, FDA's conclusion that nicotine was in fact a drug was based on evidence, amassed

369. *See* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 3 (2006) ("[T]extualism has so succeeded in discrediting strong purposivism that it has led even nonadherents to give great weight to statutory text.").

370. Solum, *supra* note 233, at 287–88.

371. Solum, *supra* note 233, at 267.

372. Hillel Y. Levin, *Contemporary Meaning and Expectations in Statutory Interpretation*, 2012 U. ILL. L. REV. 1103, 1110 (2012) (emphasis added).

373. *See* JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION: CASES AND MATERIALS 145 (4th ed. 2021).

over decades, that was not available to early officials.[374] Such evidence may reveal that certain applications once thought not to advance a statute's purpose actually do so. Liquidation may thus work as much to frustrate statutory purpose as serve it.

c. Liquidation and Intentionalism

The above might suggest that early practice is in fact most relevant to the method of statutory interpretation, intentionalism, in least favor with the courts today. That is, early practice may reveal the subjective intent of government actors on a particular question they confronted around the time of enactment.

One problem, of course, is at least when it comes to executive branch practice, the officials involved appear to be the wrong actors on which to focus. Intentionalism looks to the intent of the "legislative body," or "the will of actual legislators as combined through legislative processes"—not society more broadly.[375]

It's true that agency officials are often involved in providing statutory drafting assistance.[376] To some extent, therefore, agencies may have particular insights into the intent of the legislators (or legislative staff) they work with. Alternatively, because of their special role, one might impute the views of the agency to the Legislature under a kind of principal-agent theory.

Doing so in any across-the-board way, however, would be unjustified. Agency drafting assistance usually happens confidentially—it's not known which statutes agency officials contributed to and on which issues.[377] Moreover, the agency officials who provide drafting assistance are almost always different than the officials who subsequently implement the statute, though others within agencies may help bridge the divide.[378] For these reasons, it would seem quite strange to give much weight at all to the views of agency officials, when those views can often only be inferred through practice, on the theory that such views can be imputed to the Legislature, while at the same time radically discounting other, more direct evidence of legislative intent, as is the Supreme Court's current practice. To put things more affirmatively: If we're experiencing a return to intentionalism, and that return entails scouring agency practice for hints at what it might tell us about legislative intent, it would seem that the courts' interpretive practices would have to change much more fundamentally than the Supreme Court is likely to countenance.

374. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 171–74 (2000) (Breyer, J., dissenting).

375. Solum, *supra* note 233, at 268.

376. *See generally* Walker, *supra* note 345, at 1378–79.

377. *See id.* at 1379.

378. *Id.* at 1402–03.

***

The above grounds for privileging past agency practice rely on such practice's supposed evidentiary value under various canonical approaches to statutory interpretation. Practice serves as a kind of input, similar to a dictionary, but it does not have force of its own. Other theories would serve to imbue practice with an independent weight of its own.

2. Constitutional Theories

One such theory sounds in a constitutional register. It's no secret that some Justices believe the Court has tolerated too much delegation to agencies.[379] And one consequence of delegation, especially under the *Chevron* framework, is greater flexibility in lawmaking. Legislation must run the gauntlet of bicameralism and presentment to become effective. Not so with agency rules, which can be done—and undone—through less exacting processes. In his concurrence in *West Virginia*, Justice Gorsuch identified that as a threat to the constitutional scheme.[380] The Framers, in his telling, designed the government to make lawmaking "difficult."[381] But delegation makes legislation "nothing more than the will of the current President," with the consequence that "[s]tability would be lost, with vast numbers of laws changing with every new presidential administration."[382]

Allowing agency practice to liquidate statutory meaning may therefore represent a kind of second-best solution to a purported problem caused by delegation in the first place.[383] Agencies can have one bite at the apple, and by effectively deferring to the first-in-time agency courts promote the kind of stability served at the legislative level by the requirements of bicameralism and presentment.

The problem with evaluating this rationale is it ultimately gets us back to the first-order debate about whether delegation is constitutionally problematic, which cannot be resolved here. If delegation is constitutionally proper, any resulting loss of stability resulting from it would not in fact disrupt a constitutional scheme purportedly designed to make all forms of lawmaking durable.

In recent years, the debate over the nondelegation doctrine has focused mostly on how to interpret various delegations of authority in the immediate

379. *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2139–41 (2019) (Gorsuch, J., dissenting).

380. West Virginia v. EPA, 142 S. Ct. 2587, 2617–18 (2022) (Gorsuch, J., concurring).

381. *Id.* at 2618.

382. *Id.*

383. *Cf.* Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 399 (2015) ("[L]ibertarian administrative law may be understood as a second-best enterprise—an attempt to compensate for perceived departures during the New Deal from the baseline of the original constitutional order.").

post-founding period. Critics of a revived nondelegation doctrine have read statutes containing such delegations as showing a widespread consensus that delegation was (at least in the main) constitutionally unproblematic.[384] Those favoring a more robust nondelegation doctrine have countered.[385]

My own sense is that the nondelegation skeptics have the better of the argument.[386] But that debate cannot be conclusively resolved here. For that reason, I will assume that supporters of a revived nondelegation doctrine may be on to something. Even given that assumption, however, it's unclear that the nondelegation/bicameralism and presentment argument provides a good basis for statutory liquidation.

First, the general response from supporters of reforming (i.e., strengthening) the nondelegation doctrine to evidence showing healthy amounts of delegation at the founding has been to distinguish that evidence in various ways. Nicholas Parrillo has grouped nondelegation reformers into two camps. The first are "categorical reformers," who believe that Congress is prohibited from giving agencies power to promulgate binding rules, subject to various categorical exceptions that cover, for example, non-domestic rules or rules related to privileges or rules that depend on mere "fact-finding."[387] The second are "noncategorical reformers." Those reformers hold that "Congress cannot delegate 'important subjects' but can delegate power to 'fill up the details' on matters 'of less interest.'"[388]

Either way, if the nondelegation doctrine cannot be defended across the board, then sub-constitutional practices inspired by it should not hold across the board either. For example, it's unclear whether, under the categorical view, rules related to the conditions attached to federal student loans are within the category of matters that it is constitutionally suspect for Congress to delegate.[389] And if they are not, any lost stability due to Congress's decision to invest agencies with rulemaking authority over such matters would

384. *See, e.g.*, Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 278–79 (2021); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1301–02 (2021); Christine Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. 81, 86 (2021).

385. *See, e.g.*, Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1493, 1556 (2021); Philip Hamburger, *Nondelegation Blues*, 91 GEO. WASH. L. REV. 1083, 1094–95 (2023); Aaron Gordon, *Nondelegation Misinformation: A Reply to the Skeptics*, 75 BAYLOR L. REV. 152, 155 (2023).

386. For surreplies, see Nicholas R. Parrillo, *Nondelegation, Original Meaning, and Early Federal Taxation: A Dialogue with My Critics*, 71 DRAKE L. REV. 367 (2024); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding: A Response to the Critics*, 122 COLUM. L. REV. 2323 (2022).

387. *See* Parrillo, *supra* note 386, at 371.

388. *Id.*

389. *See id.* (noting the categorical reformers' distinction between "binding domestic

not be constitutionally problematic. The "important subjects"/"fill up the details" distinction may do better work explaining why the Court is suspect of agency-initiated change in the major questions context.[390] But it wouldn't seem to justify a kind of anti-deference attaching when an agency issues an interpretation inconsistent with its prior views in the mine run of cases governed by *Loper Bright*, which governs more mundane matters.

Second, even in areas where nondelegation principles apply, one might question whether the Court's cure is worse than the disease. That's because, in service of avoiding one problem related to the purported evasion of bicameralism and presentment, allowing agencies to liquidate statutory meaning through practice may create another, potentially more significant one. Recall that one consequence of statutory liquidation is that it allows agencies' initial practices to effectively reform statutes such that only subsequent congressional action can undo them, making initial agency action more legislative in character.[391] That's closer to the kind of thing the Court has identified as actually violating the Constitution's bicameralism and presentment requirements. In *Clinton v. New York*,[392] most notably, the Court invalidated a delegation to the President allowing the President to permanently "cancel" provisions contained in certain tax and spending statutes.[393] The Court held that such a power to "amend" statutes could not be exercised absent bicameralism and presentment.[394]

Relatedly, effectively delegating to the initial agency the ability to shape the law on a permanent basis may also offend the kind of concerns motivating textualists who remain skeptical of repair to notions of congressional intent. One prominent textualist critique of intentionalism and of the use of tools such as legislative history to get at congressional intent is, of course, that neither the subjective intent of individual members nor legislative history goes through the constitutionally prescribed processes for lawmaking.[395] Thus, raising such matters to the level of "the law" gives statutory effect to things that haven't received the imprimatur the Constitution requires. And something similar might be said about giving outcome-determinative effect to the views—or inferred views—of first-in-time agency officials.

---

rules" and matters involving "privileges").

390. *Id.*

391. Clinton v. New York, 524 U.S. 417, 438–47, 449 (1998).

392. 524 U.S. 417 (1998).

393. *See id.* at 446–47, 449.

394. *See id.* at 438–41, 449.

395. *See, e.g.*, Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 64–65 (1988).

These problems are most pronounced in the major questions cases, for a few reasons. There, the Court seems to allow agency practice, in combination with other factors, to narrow even broad and otherwise unambiguous statutes—in other words, agency practice is not being used to clarify the law but to change or create it.[396] In addition, the other factors relevant to the major questions analysis, such as the present-day political controversy surrounding an agency action, also enable what is effectively lawmaking to occur outside constitutionally prescribed channels.[397] Finally, in the major questions cases, the Court has leaned particularly heavily on agency views as gleaned from purported patterns of action and inaction. Allowing such practice legislative-type weight thus permits what is effectively a permanent alteration of the law to occur through rather subtle means that may be very difficult to observe in real time. Not until the courts tell us do we know that the law has been altered through nominally sub-legislative action.

Third, although the justification being surveyed in this Section purports to protect one set of constitutionally inspired values, it may threaten others. In a recent short essay, Leah Litman and I have explored how, in service of stability, the Court in *Loper Bright* (and by extension the major questions cases) undermines democratic values such as accountability and government responsiveness it has touted in other contexts.[398] In particular, by giving past agency views dead-hand power, the Court has limited what current presidents may do to advance policies valued by their voters.

In sum, even if one grants credence to the view that the Court has let delegation "run riot" in contravention of the original constitutional scheme—and I am skeptical that it has—there may still be powerful reasons to resist statutory liquidation, particularly as an across the board matter.

3. Normative Theories

Perhaps if statutory liquidation cannot be identified as a penumbral aspect of the nondelegation doctrine, it still may serve values of a different kind. Allowing values loosely if at all connected to the Constitution or the text of the APA to shape doctrine is not an alien concept in administrative law, at least in

396. *Cf.* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 863 (1992) (arguing that the above critique of legislative history does not apply where legislative history is being used to understand the meaning of unclear law).

397. *See* Deacon & Litman, *supra* note 14, at 1058 ("Triggering the major questions doctrine with some reference to the political controversy surrounding a policy allows political opponents of that policy '[i]n both legal and practical effect,' to amend an Act of Congress by essentially 'repealing a portion' of an agency's authority.").

398. *See* Deacon & Litman, *supra* note 181, at 6.

its pragmatic or "common law" forms.[399] More broadly, Francisco Urbina has argued that deciding on a method of interpretation must involve a weighing of normative reasons that may relate to values such as democracy, fairness, the legitimacy of institutions, or the promotion of good consequences.[400] This Subsection focuses on two ends liquidation might be thought to promote: the protection of reliance interests and the preservation of agency expertise.

a. Reliance

Any system that operates based on precedent may serve to protect reliance interests.[401] When used to limit agencies to approaches reflected in past practice, liquidation may minimize the likelihood of surprise, allow the realization of investment-backed expectations, and the like. A variety of administrative law doctrines are concerned with advancing such aims.[402] And as detailed above, the Justices comprising *Loper Bright*'s majority appeared particularly exercised by the *Chevron* regime's failure to adequately protect reliance interests, which may also explain their attraction to the elements of the *Skidmore* approach aimed at preserving stability.[403]

In the administrative law context, courts are usually concerned with what has been termed "private reliance," the kind of reliance that occurs when parties rely on a given legal regime when "mak[ing] their plans and structur[ing] their activities."[404] In the rulemaking context, reliance may be threatened by facially prospective changes to the law that have "retroactive effects" by, for example, undermining the future value of investments made in the past.[405]

---

399. *See generally* Christopher J. Walker & Scott T. MacGuidwin, *Interpreting the Administrative Procedure Act: A Literature Review*, 98 NOTRE DAME L. REV. 1963 (2023) (surveying different approaches to administrative law); Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293 (2012).

400. *See* Francisco J. Urbina, *Reasons for Interpretation*, 124 COLUM. L. REV. 1661, 1665, 1676 (2024).

401. *See* Bradley & Morrison, *supra* note 1, at 427 (stating that "one justification for adhering to judicial precedent is that it promotes consistency and predictability in the law by protecting reliance interests" and that "[s]uch interests . . . can presumably arise as a result of governmental practices as well as judicial decisions").

402. *See, e.g.*, Retail, Wholesale & Dep't Store Union v. NLRB, 466 F.2d 380 (D.C. Cir. 1972) (providing framework for deciding whether policies made retroactive in adjudication work a manifest injustice).

403. *See supra* note 202 and accompanying text.

404. *See* William N. Eskridge Jr., *Reliance Interests in Statutory and Constitutional Interpretation*, 76 VAND. L. REV. 681, 687 (2023).

405. *See* Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1068 (1997).

Thus, in the typical range of cases, the threat to reliance interests will take something of the following form. A party has made a past investment in, say, a power plant. At the time of the investment, the agency interpreted the statute one way. The agency then announces a new interpretation in support of a regulation more stringently regulating plants of the kind in question. That regulation may decrease the expected value to be derived from the ownership of the plant—in extreme cases, it may even require its closure. Other scenarios might involve parties who may be more sympathetic to the average reader. A noncitizen may have structured her life in part due to the security provided by a given interpretation of the immigration laws.[406] Changing that interpretation could, for example, deprive that person of the expected benefits of having received a college degree in the United States.[407]

The problem with grounding liquidation in reliance is that it privileges one kind of value over others without adequate explanation. If one grounds an interpretive practice in normative reasons, it should be because the balance of reasons favors that practice.[408] And while the narrow form of liquidation may serve to protect reliance interests, it may also have the effect of reducing government responsiveness, entrenching certain interests over others, limiting policy effectiveness, or otherwise causing bad outcomes. Yet, in *Loper Bright*, the Supreme Court signaled that those kinds of considerations were simply out of bounds when it comes to selecting an interpretive method.[409] Instead, the Court viewed courts as bound by their judicial role to select the "best" interpretation of a statute by reference to traditional tools oriented to the "meaning of a text."[410] Allowing reliance interests to shape the interpretive inquiry is thus a form of special pleading.

Although I cannot make out the full case here, there's reason to think that administrative law's method of accommodating interpretive change under *Chevron* did a better job protecting reliance interests without sacrificing the pursuit of other normative ends. That method policed such change as a matter of arbitrary-and-capricious review.[411] And arbitrary-and-capricious review imposes upon an agency the burden to explain why it was departing

406. *Cf.* Dep't of Homeland Sec. v. Regents of the Univ. of California, 140 S. Ct. 1891, 1913 (2020).

407. Cinthya Salazar, Cindy Barahona, & Francesco Yepez-Coello, *Where Do I Go from Here? Examining the Transition of Undocumented Students Graduating from College*, J. OF HIGHER EDUC. 1, 2 (2023) ("unlike their peers with authorized immigration statuses, undocumented students . . . need to reconfront limitations associated with their social location . . . .").

408. *See* Urbina, *supra* note 400, at 1666.

409. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2267–68 (2024).

410. *Id.* at 2271.

411. *See supra* notes 97–98 and accompanying text.

from past practice in light of the reliance interests involved.[412] Arbitrary-and-capricious review serves to ensure agencies provide reasonable justifications for their discretionary acts,[413] and a total failure to address reliance interests can properly be viewed as making a given action unreasonably explained.[414]

At the same time, however, an agency may address reliance interests by explaining why the agency reasonably believes that sacrificing reliance interests is "worth it" given other considerations relevant to the statute in question.[415] And statutes themselves differ in how much they prioritize or deprioritize considerations related to the cost of the agency's action, with courts serving to ensure on the back end that the agency has attended to the statutorily required decisionmaking structure.[416]

Treating reliance interests as part of an agency's explanatory burden thus recognizes reliance as a value but allows it to be traded off against other values, and it leaves Congress ultimately in charge of how much reliance should matter in particular contexts. Liquidation, by contrast, appears to operate across the board. And by making past practice relevant to interpretation as opposed to policymaking, it disallows agencies from overcoming their burden by pointing to countervailing policy considerations. It is thus a much blunter tool, and one that is much less accommodating of the political branches' ability to decide when and how much reliance should matter versus other kinds of values.[417]

More broadly, viewing the selection of an interpretive method as a normative matter is compatible with a more context-sensitive approach to the enterprise of statutory interpretation. Recently, scholars have begun to question administrative law's transsubstantive ambitions.[418] And it could be the case that values such as stability and fair notice should receive special protection in some but not all areas. It is unlikely, however, that they should be elevated above other values as a general matter, as the Court's emerging practice does.

---

412. *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515–16 (2009).

413. *See* Dep't of Com. v. New York, 139 S. Ct. 2551, 2568–69 (2019).

414. *See* Dep't of Homeland Sec. v. Regents of the Univ. of California, 140 S. Ct. 1891, 1913 (2020).

415. *See id.* at 1914 (an agency "may determine, in the particular context before it, that other interests and policy concerns outweigh any reliance interests").

416. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1977) (agencies must make decisions "based on a consideration of the relevant factors").

417. *Cf.* Krishnakumar, *supra* note 6, at 1863 ("Reliance interests would remain an important consideration when an agency seeks to change its own longstanding interpretation, but agencies are better positioned than courts to balance competing interests and to make the judgment that the costs of an interpretive change are outweighed by its benefits.").

418. *See generally* Noah Rosenblum, Lev Menand & Ash Ahmed, *Beyond Neoliberal Administrative Law: Towards a Political Economy Approach* (June 9, 2024) (unpublished manuscript) (on file with the Administrative Law Review).

b. Expertise

Another potential normative justification for a kind of liquidation aims to preserve agency expertise from the threat of politics. This justification returns us to several of the Justices' apparent discomfort with change—or at least interpretive change—that happens due to the election of a new president.[419] The concern that politics may drive executive officers to change their position is one that has been voiced with increasing frequency over the past decade or so.[420] One reason to be concerned with such flip flopping grows out of the threat that it poses to reliance interests, discussed above. But one might more broadly think that, when an agency changes position, it indicates that political considerations rather than more noble reasons lay behind the agency's new view. By locking in an agency to past practice, statutory liquidation thus serves to minimize the threat posed to agency decisionmaking by changes in political administration.

When offered as a reason to hold agencies to their past practices, the problem with this justification is that it seems to assume that the agency's initial practice—that which is given authority to liquidate the statute in question—reflects apolitical considerations of one kind or another, and it is the subsequent agency deviation from that practice that is suspect because of its likely political nature. That assumption, however, seems hard to defend.

First, one might suppose that an agency's initial practice likely reflects its neutral understanding of statutory meaning, whereas later interpretations are suspect attempts to evade that meaning. But for the reasons above, it may often be very difficult or impossible to ascertain whether the agency's initial interpretation in fact reflects much at all about a statute's original public meaning.[421] Rather, the agency's initial practice is likely to reflect a mélange of considerations including how it thinks the courts would likely rule on the question, how it believes the statute should be implemented given the problems of the moment, and "political" decisionmaking concerning how to evaluate trade-offs among different values advanced by one interpretation or another.

Alternatively, one might think that the initial agency practice represents the application of the agency's expertise whereas later deviations represent a red flag indicating that political considerations have overcome that expertise. That justification suffers from similar flaws, however, in that it's unclear why one would think the agency's initial practice represents an apolitical resolution of an issue whereas later agency actions do not. Locking in an agency

419. *See supra* note 181 and accompanying text.

420. *See* Cristina M. Rodríguez, *Foreword: Regime Change*, 135 HARV. L. REV. 1 (2021) (documenting such concerns).

421. *See supra* notes 341–366 and accompanying text.

to a view because it is more likely to reflect the agency's subject matter (as opposed to interpretive) expertise also sits uneasily with *Loper Bright*'s devotion to the idea that all that matters is meaning, and an agency's expertise is only relevant to the extent it sheds light on such meaning.

If I am correct that the initial agency view is also likely, in many cases, to reflect political-type judgments, locking in that view is decidedly anti-democratic. Essentially, statutory liquidation would allow the first-mover agency to lock in its view of the relevant trade-offs and create a policy with dead-hand effects.[422] The current President and their Administration are thus left with less ability to effect policy change, a situation the same Justices forming the *Loper Bright* majority have warned against in other settings.[423]

Perhaps, then, the strongest form of the justification does not focus simply on the first-mover agency. Instead, say that an agency holds consistently to a given practice, or stated view, across different administrations representing different political parties. That might provide evidence that the statute in question really does call for judgments reflecting more "neutral" considerations related to meaning and expertise. Every statute will vary, based on its language, in how much it invites values-based judgments. If an agency has consistently held a given position across time, that might indicate it is operating in an area where the statute largely calls for the exercise of more expert—and less values-based—judgment. And the fact that the agency has uniformly held to a certain view may provide evidence that the consistent view is the view most faithful to what expertise requires.[424]

Even that justification falters on closer inspection, however, at least as a justification for the interpretive practice of statutory liquidation as opposed to a more searching form of arbitrary-and-capricious review.

For one, the power of inertia cannot be underestimated in administrative law. A given view might not change across administrations not because it's "right" in some objective sense but simply because changing it was not high on the priority list of various administrations.

More fundamentally, however, even if one stipulates that an agency's subject-matter expertise should be the primary driver of its decisionmaking in a

---

422. *Cf.* Bradley & Siegel, *supra* note 2, at 46 ("It is unclear . . . why it would have made sense for the Founders to decide that constitutional meaning should be determined dispositively by the particular political alignments that happened to exist whenever the issue arose the first time or subsequent times.").

423. *See generally* Deacon & Litman, *supra* note 181.

424. *See* Krishnakumar, *supra* note 6, at 1850 ("[T]he fact that multiple actors in multiple branches acting over a period of several years have left a statutory interpretation intact suggests that the interpretation is workable as a practical matter and performs well within—or at least is not inconsistent with—our legal and political system.").

given area, it could still be that in many cases that expertise counsels a change in position, including after many years of consistently holding to a prior view.[425] The agency's change of position in *Brown & Williamson*, often closely identified with President Clinton, also came about because of new evidence concerning what tobacco companies knew about the effects of tobacco products on the body.[426] Similarly, the identification of a new "system" of emissions reduction might well be driven by an agency's expert judgment about what kind of strategies are best conducive to addressing emerging problems or harnessing new technologies. And a consistent practice of modestly modifying student debt obligations may simply reflect a judgment across time that only small modifications were needed given the conditions that existed at the time the relevant decisions were made. They tell us little about what expert judgment requires under *different* conditions that may require more dramatic action.

Thus, while the consistency of a practice may tell us something, it's not a foolproof guide by any means. The issue then becomes similar to that confronted with respect to reliance interests. There is no reason that a later agency should not at least be allowed to justify a change in position, or alteration in practice, by providing an explanation similar to those above. But by making consistency relevant to interpretation, as opposed to something that might inform a court's review of agencies' policy determinations, statutory liquidation would seem to disallow those very kinds of explanations.

4. Agreement-Based Theories

A final theory that might be offered to ground the practice of statutory liquidation would hold that prior (and particularly longstanding) agency views, when paired with congressional inaction, represent a kind of agreement between the political branches to a particular interpretation. Such a theory draws support from an analogy to judicial precedent and the "super strong" stare decisis effect that the Supreme Court gives its statutory holdings (at least some of the time).[427] The idea, roughly, is that congressional inaction in the face of a prevailing interpretation supports at least the presumption that Congress approves of the interpretation and justifies placing the onus on Congress to alter the statute in response if it wishes.[428] Similar acquiescence-

425. *See* Krishnakumar, *supra* note 6, at 1863 ("[T]he assumption of soundness is directly contradicted when the agency in charge of administering the interpretation determines that there are good reasons for revising a longstanding interpretation.").

426. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 188 (2000) (Breyer, J., dissenting).

427. *See supra* note 41 and accompanying text.

428. *See* Krishnakumar, *supra* note 6, at 1845.

based theories have been offered when it comes to the use of executive branch practice in the constitutional sphere.[429]

In her article on longstanding agency interpretations, Anita Krishnakumar argues that a presumption of acquiescence justifies judicial deference to longstanding agency interpretations.[430] Indeed, though she acknowledges that the presumption represents a default rule and not a "presumption about *actual* congressional intent,"[431] Krishnakumar contends that the default rule may be even more justified when it comes to agency interpretations versus judicial ones, in part because Congress has easier means to monitor, influence, and override agency action.[432] When it does not exercise those means of control such that an interpretation becomes "longstanding," we may infer a kind of agreement among the political branches regarding that interpretation.

Krishnakumar, however, is focused on longstanding agency interpretations that the present-day agency wishes to stick with. I am focused here, by contrast, on situations where the present-day agency is seen as departing from some past practice or interpretation. And Krishnakumar herself argues that acquiescence-based theories do not support giving a kind of negative deference when agencies seek to revise or reject their own longstanding interpretations.[433] Indeed, the theory itself depends on there being an amount of congressional control over agency behavior such that may support a default rule holding that agency *changes* should also be thought to receive the tacit support of Congress.[434]

I am somewhat more deeply skeptical of agreement- or acquiescence-based theories, at least when offered in support of concluding that the agency has bound itself through past practice. As stated above, in the stare decisis context, the presumption of congressional approval is usually justified as a kind of fictional imputation rather than a rule that reflects actual congressional intent in any given case. It should thus have a normative basis—a reason why we are imputing an intent to Congress notwithstanding the well-known problems of reading much at all into congressional inaction.[435]

---

429. *See supra* notes 276–277 and accompanying text.

430. *See* Krishnakumar, *supra* note 6, at 1845–49.

431. *Id.* at 1845.

432. *See id.* at 1845–49.

433. *Id.* at 1863.

434. *See id.* ("Legislative acquiescence, too, becomes uncertain when the agency seeks to change its own interpretation because the agency's revised reading may well reflect congressional approval or even pressure to change an interpretation.").

435. *See supra* note 55, at 110 (looking at the "policy bas[es]" in support of the presumption).

When it comes to longstanding practice that the Executive wishes to abide by, that normative basis may most plausibly sound in notions of judicial restraint and respect for the more democratic branches. The kind of liquidation that justifies placing constraints on present-day agencies requires a reason why courts should enforce supposed agreements against agencies when they no longer wish to abide by them, and that reason should be strong enough to overcome the downsides of holding agencies to their past views, including its democracy-arresting effects. Because there has been no actual statutory amendment, there is no formal legal reason why agencies should be so bound, and thus we are back to seeking a normative basis for why we should hold them to be. Those normative bases would be the same as those already surveyed, and questioned, in the prior Sections.

CONCLUSION

It's a pivotal time in administrative law. The twin forces of the major questions doctrine and *Loper Bright* threatened to significantly destabilize the existing regime even prior to the reelection of Donald Trump in November 2024. In a time of tumult, new fault lines will emerge and redefine the field. This Article has attempted to trace an emerging trend in the Supreme Court's administrative law jurisprudence, one that implicates fundamental questions regarding how to mediate the relationship between the past, present, and future. In our current political moment, the answers to those questions may start looking different based on one's perspective. In the face of a destabilizing administration, progressives and liberals may increasingly seek stability in the constraining hand of the past. But it is equally likely that the second Trump Administration will itself wield the past as a sword against what it claims to be unjustified innovations perpetrated by prior Democratic presidents, as part of an agenda that seeks not only to arrest future change but to return law to an earlier point of time and freeze it there. How successful it will be in doing so will have effects on the regulatory state that will be felt far into the future.