ARTICLE

DISCRETION IS NOT (CHEVRON) DEFERENCE

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Discretion is not deference. Many often confuse the two, but the distinction is important, especially now that the Supreme Court has eliminated the deference doctrine associated with *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.[1] *Chevron* deference concerned ambiguous statutory terms or phrases (and implicit grants of authority[2]), while discretion often concerns unambiguously broad statutory terms or phrases (and explicit grants of authority[3]). So even with *Chevron* deference gone, agencies that can point to broad terms or phrases in the statutes they administer will retain wide latitude to carry out their missions. The Supreme Court made this clear in *Loper Bright Enterprises v. Raimondo*, explaining, in juxtaposition to *Chevron* deference, that a "statute's meaning may well be that the agency is authorized to exercise a degree of discretion,"[4] and "courts must respect the delegation" of this discretionary authority from Congress.[5]

To see the distinction between discretion and *Chevron* deference, first consider the *Chevron* opinion itself and the deference doctrine embodied in it. That case involved the meaning of "stationary source" as used in the Clean Air Act.[6] The Supreme Court concluded that the phrase was ambiguous as it could mean a single "pollution-emitting device[]," "all of the pollution-emitting devices within the same industrial grouping" (also dubbed the "plantwide definition" or "bubble concept"), or "a dual definition that could apply to both the entire 'bubble' and its components."[7] For various reasons, the *Chevron* Court concluded that these kinds of ambiguous statutory terms or phrases convey an implicit grant of authority to the agency administering the statute, requiring courts to accept the agency's reasonable interpretations of such ambiguous terms or phrases.[8] Of course, many have quibbled with those reasons.[9] But the reasons and any critiques of them are

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[1] 467 U.S. 837 (1984); *see* Loper Bright Enters. v. Raimondo, 144 S.Ct. 2244, 2273 (2024) (overruling *Chevron*).

[2] *Chevron*, 467 U.S. at 844.

[3] *Loper Bright*, 144 S.Ct. at 2263.

[4] *Id.*

[5] *Id.* at 2273.

[6] *Chevron*, 467 U.S. at 839–40.

[7] *Id.* at 840, 859.

[8] *Id.* at 842–45.

[9] *See, e.g.*, Loper Bright Enters. v. Raimondo, 144 S.Ct. 2244, 2263–67 (2024) (cataloguing the majority's critiques of *Chevron* deference); *see also* Michigan v. EPA, 576 U.S. 743, 760–63 (2015) (Thomas, J., concurring); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV.

irrelevant for present purposes; the essential point is that only ambiguous terms or phrases triggered *Chevron* deference. Accordingly, with *Chevron* deference gone, courts are no longer required to defer to agencies' reasonable interpretations of ambiguous statutes; they must instead determine the best reading of such text themselves, guided by any other relevant doctrines.[10]

As *Loper Bright* itself explains, discretion, in contrast, arises when statutes "'expressly delegate[]' to an agency the authority to give meaning to a particular statutory term"[11] or "prescribe rules to 'fill up the details' of a statutory scheme."[12] Often, statutes also "empower an agency . . . to regulate subject to the limits imposed by a term or phrase that 'leaves agencies with flexibility,' such as 'appropriate' or 'reasonable.'"[13] Such broad terms and phrases are incapable of precise definition, but they are not ambiguous; to the contrary, they are unambiguously open-ended. They represent an explicit grant of authority to the agency to choose from a wide range of options that the agency determines are reasonable, appropriate, feasible, practicable, in the public interest, and so on.

Even the *Chevron* opinion itself recognizes the deference-discretion distinction, or at least a flavor of it, explaining that, "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority for the agency to elucidate a specific provision of the statute by regulation," but "[s]ometimes the legislative delegation to an agency on a particular question is implicit rather than explicit."[14] The explicit category overlaps with those broad and capacious terms that convey discretion; the implicit category covers the types of statutory ambiguities or silences so closely associated with *Chevron* deference.[15]

2118, 2143 (2016); Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 GEO. J. L. & PUB. POL'Y, 103 (2018) (surveying criticisms of *Chevron* and *Auer* deference).

[10] *See, e.g.*, *Loper Bright*, 144 S. Ct. at 2266 ("It . . . makes no sense to speak of a 'permissible' interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best. In the business of statutory interpretation, if it is not the best, it is not permissible"); *see also id.* at 2262 (explaining that "courts must exercise independent judgment in determining the meaning of statutory provisions" but "may . . . seek aid from the interpretations of those responsible for implementing particular statutes") (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

[11] *Loper Bright*, 144 S. Ct. at 2263 (noting statute in question "expressly delegated to the [agency] the power to prescribe standards for determining what constitutes 'unemployment' for [certain] purposes") (quoting Batterton v. Francis, 432 U.S. 416, 425 (1977)).

[12] *Id.* (quoting Wayman v. Southard, 10 Wheat 1, 43 (1825)).

[13] *Id.* (citations omitted).

[14] Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

[15] Justice Stevens, the author of *Chevron*, effectively made this same point in *Morgan Stanley Cap. Grp. v. Pub. Util. Dist. No. 1 of Snohomish Cnty. et al.*, explaining that "Congress . . . used the general words 'just and reasonable' because it wanted to give FERC, not the courts, wide latitude in setting policy" and contrasting such explicit gaps for agencies to fill with the types of

Few understand this distinction between discretion and deference better than Justice Kavanaugh, and it is hard to avoid the assumption that he played a role in ensuring the inclusion of key passages on the distinction in *Loper Bright*. In a 2016 article reviewing Judge Robert A. Katzmann's *Judging Statutes*, then-Judge Kavanaugh explained that he was not a fan of *Chevron* deference. Among other things, he thought that the doctrine turned on a nebulous initial finding of ambiguity[16] and that judges were well-equipped to determine the best reading of a statute.[17] Given these views, he contended that, if "an agency is . . . interpreting a specific statutory term or phrase"—say, "stationary source"—"courts should determine whether the agency's interpretation is the best reading of the statutory text" rather than apply the two-part *Chevron* deference framework.[18] This approach ultimately prevailed in *Loper Bright*. At the same time, and notwithstanding his criticism of *Chevron* deference, then-Judge Kavanaugh also believed that "courts should still defer to agencies in cases involving statutes using broad and open-ended terms like 'reasonable,' 'appropriate,' 'feasible,' or 'practicable.'"[19]

Justice Kavanaugh later repeated the same point in a 2019 concurring opinion in *Kisor v. Wilkie*,[20] which addressed the related but separate question whether to eliminate *Auer* deference to agencies' interpretations of their own ambiguous regulations.[21] Just as Justice Kavanaugh would have cast *Chevron* deference aside, he would have "formally retired" *Auer* deference because he believed "a judge should engage in appropriately rigorous scrutiny of an agency's interpretation of a regulation."[22] Again, however, he also believed that a judge should "be appropriately deferential to an agency's reasonable policy choices within the discretion allowed by regulation."[23] In fact, Justice Kavanaugh emphasized that *Auer* deference had nothing to do with "cases involving regulations that employ broad and open-ended terms like 'reasonable,' 'appropriate,' 'feasible,'

implicit gaps associated with *Chevron* deference. 554 U.S. 527, 557–58 (2008) (Stevens, J., dissenting).

[16] *See* Kavanaugh, *supra* note 9, at 2118 ("Several substantive principles of interpretation—such as constitutional avoidance, use of legislative history, and *Chevron*—depend on an initial determination of whether a text is clear or ambiguous. But judges often cannot make that initial clarity versus ambiguity decision in a settled, principled, or evenhanded way").

[17] *See id.* at 2154 ("Judges are trained to [determine whether the agency's interpretation is the best reading of the statutory text], and it can be done in a neutral and impartial manner in most cases").

[18] *Id.*

[19] *Id.* at 2153.

[20] 588 U.S. 558, 631–33 (2019) (Kavanaugh, J., concurring).

[21] As the Supreme Court explained in *Kisor*, it "has often deferred to agencies' reasonable readings of genuinely ambiguous regulations" under "*Auer* deference, or sometimes *Seminole Rock* deference, after two cases" employing that practice. *Id.* at 563 (citing Auer v. Robbins, 519 U.S. 452 (1997); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945)). *Auer* and *Chevron* deference both apply a similar two-part deference framework; the former applies to agencies' interpretations of their own regulations, the latter to their interpretations of statutes they administer. *See, e.g.*, *Kisor*, 588 U.S. at 576 (comparing *Auer* and *Chevron* deference).

[22] *Id.* at 631, 633.

[23] *Id.* at 633.

or 'practicable.'"[24] He once more declared that "[t]hose kinds of terms afford agencies broad policy discretion."[25]

Although Justice Kavanaugh did not author *Loper Bright*, the majority opinion contains many of the same points, which arguably were unnecessary for the holding overruling *Chevron* deference.[26] That Justice Kavanaugh felt compelled to repeatedly draw his readers' attention to the distinction between deference and discretion—and that the *Loper Bright* majority also went out of its way to do so—may signal a concern among the Supreme Court's members that scholars, lawyers, and judges often do not understand the distinction between deference and discretion.

New England Power Generators Association v. FERC, a D.C. Circuit case involving the authority of the Federal Energy Regulation Commission (FERC) over interstate transmission and wholesale sales of electricity, provides an apt example of the confusion. In that case, the D.C. Circuit declared that "reasonable agency interpretations of ambiguous statutory terms like 'just and reasonable' are already subject to judicial deference under the regime set forth in *Chevron*" because the terms are "obviously incapable of precise judicial definition."[27] These statements make little sense because "just and reasonable" is not ambiguous; it is an intentionally broad, open-ended phrase that unambiguously conveys discretion. *Chevron* deference thus has nothing to do with FERC's authority to determine just and reasonable rates for interstate transmission and wholesale sales of electricity. Despite these confusing statements, the D.C. Circuit went on to correctly observe that "[t]he only question . . . is whether FERC exceeded the bounds of its considerable discretion" in that case to determine whether a particular practice was "just and reasonable."[28] And rather than determine whether FERC's interpretation of "just and reasonable" was itself reasonable (as a court would do under *Chevron*), the D.C. Circuit soundly concluded that FERC's challenged action should be upheld because it was a "reasonable choice within a gap left open by Congress" for FERC to fill.[29] The court got to the right result in the end, but it confusingly invoked *Chevron* deference along the way.

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[24] *Id.* at 632.
[25] *Id.*
[26] Most notably, after spending pages explaining that "[t]he APA . . . incorporates the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions," the Supreme Court concluded this portion of the opinion by emphasizing—just as Justice Kavanaugh had—that the best reading of a given statute "may well be that the agency is authorized to exercise a degree of discretion." 144 S. Ct. at 2262–63; *see also* Kavanaugh, *supra* note 9, at 2152.
[27] 707 F.3d 364, 370 (D.C. Cir. 2013).
[28] *Id.* at 371.
[29] *Id.* (quoting Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc., 467 U.S. 837, 866 (1984)).

Scholars, lawyers, and judges should keep this example in mind when assessing *Loper Bright*'s potential impact. If a past decision upholding an agency action incorrectly referenced or invoked *Chevron* deference when it should have referenced discretion, eliminating *Chevron* deference should not have any effect on the case. (In addition, as the Supreme Court noted, *Loper Bright* itself does not call into question prior opinions that properly relied on *Chevron* deference.[30])

One reason for the confusion may be that it is often hard to define discretion without using the term "deference," as the above examples from Justice Kavanaugh demonstrate. Dictionary definitions can be instructive in pinning down the difference. The verb "defer" means to "submit to another's wishes, opinion, or governance usu[ally] through deference or respect."[31] This definition captures the general idea behind *Chevron* deference: when there is more than one reasonable interpretation of a statutory term or phrase, courts should voluntarily acquiesce to the agency's opinion on the meaning of that term or phrase based on respect for the agency's judgment. The noun "discretion," however, means "power of free decision or latitude of choice within certain legal bounds."[32] In contrast to deference, discretion connotes compulsory accession to the views of another—compulsory because Congress has given this choice to an agency, not the courts.

These dictionary definitions, in conjunction with Justice Kavanaugh's attempts at distinguishing discretion and deference, may help illuminate the distinction. Open-ended terms like "reasonable," "appropriate," "feasible," and "practicable" afford agencies power of free decision or latitude of choice within certain legal bounds—i.e., discretion. In those settings, Congress has given the agency—not the courts—latitude of choice over certain decisions.[33] So even with *Chevron* deference gone and judges now required to determine whether an agency's interpretation of ambiguous statutory text is the best reading of that text (again, guided by any other relevant doctrines), judges must still abide by the agency's policy choices within the agency's statutorily granted discretion.

To be sure, even when Congress uses broad, open-ended terms or phrases, an agency's discretion is not limitless—it must, by definition, be "within certain legal bounds."[34] As the Supreme Court explained in *Loper Bright*, the reviewing court's role when confronted with a congressional grant of discretionary authority

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[30] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) (explaining that in overruling *Chevron*, the Supreme Court "do[es] not call into question prior cases that relied on the *Chevron* framework").

[31] *Defer*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2014). Note the circular use of deference even here.

[32] *Discretion*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2014).

[33] *Cf.* SEC v. Chenery Corp., 318 U.S. 80, 94 (1943) ("It is not for us to determine independently what is 'detrimental to the public interest or the interest of investors or consumers' or 'fair or equitable' within the meaning of … the Public Utility Holding Company Act of 1935").

[34] *Discretion, supra* note 32.

is to "fix the boundaries of the delegated authority and ensure the agency has engaged in reasoned decisionmaking within those boundaries."[35]

When fixing such boundaries, as the Supreme Court explained in a different case involving FERC's authority under the Natural Gas Act, "the width of administrative authority must be measured in part by the purposes for which it was conferred."[36] This principle of interpretation applies in equal measure to broad, open-ended terms or phrases that convey discretion.[37] Moreover, while even "capacious[]" terms or phrases conveying broad discretion may also require agencies to consider "all the relevant factors,"[38] they still provide agencies significant room to operate.[39]

It bears noting that the list of broad, open-ended terms and phrases conveying discretion provided earlier in this essay is not exhaustive.[40] There are many other terms or phrases that convey similarly broad power of free decision or latitude of choice within certain legal bounds.[41] And there may be other terms or phrases that fall in the gray area between an unambiguously open-ended term or phrase (like reasonable) and an ambiguous one (like stationary source). Context may clarify into which category a term or phrase falls. In addition, as the Supreme Court noted in *Loper Bright*, Congress may delegate discretionary authority to an agency to give meaning to a particular term or "fill up the details."[42]

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[35] *Loper Bright*, 144 S. Ct. at 2263 (cleaned up).

[36] Fed. Power Comm'n v. Texaco Inc., 417 U.S. 380, 389 (1974).

[37] *See*, *e.g.*, NAACP v. Fed. Power Comm'n, 425 U.S. 662, 669 (1976) ("Thus, in order to give content and meaning to the words 'public interest' as used in the Power and Gas Acts, it is necessary to look to the purposes for which the Acts were adopted").

[38] Michigan v. EPA, 576 U.S. 743, 752 (2015) (quoting White Stallion Energy Ctr., LLC v. EPA, 748 F.3d 1222, 1266 (D.C. Cir. 2014) (Kavanaugh, J., concurring)). As *Michigan v. EPA* suggests, arbitrary-and-capricious review under the Administrative Procedure Act gives further content to courts' review of agency exercises of broad discretionary authority.

[39] Consider the examples the Supreme Court offered in *Loper Bright*, 144 S. Ct. at 2263 n.6 (providing as examples of discretionary authority 33 U.S.C. § 1312(a) ("requiring establishment of effluent limitations '[w]henever, in the judgment of the [EPA] Administrator …, discharges of pollutants from a point source or group of point sources … would interfere with the attainment or maintenance of that water quality … which shall assure' various outcomes, such as the 'protection of public health' and 'public water supplies'") and 42 U.S.C. § 7412(n)(1)(A) ("directing EPA to regulate power plants 'if the Administrator finds such regulation is appropriate and necessary'")) (alterations in original).

[40] Justice Kavanaugh acknowledged as much when introducing a similar list with the preposition "like." Kavanaugh, *supra* note 9, at 2153; Kisor v. Wilkie, 588 U.S. 558, 632 (2019) (Kavanaugh, J., concurring).

[41] *See*, *e.g.*, Perkins v. Bergland, 608 F.2d 803, 906 (9th Cir. 1979) (explaining that "such terms as 'that (which) will best meet the needs of the American people' … 'breathe[] discretion at every pore'") (quoting Strickland v. Morton, 519 F.2d 467, 469 (9th Cir. 1975)).

[42] *Loper Bright*, 144 S. Ct. at 2263.

As the above discussion further demonstrates, when an agency is exercising its authority under a discretionary grant of authority—rather than claiming the authority to do so pursuant to ambiguous statutory text—and when the exercise of such discretionary authority aligns with the "purposes for which it was conferred,"[43] the agency's actions should be "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[44] This is the same standard of review Justice Kavanaugh referred to in his 2016 article when he compared the task courts confront when reviewing agency decisions pursuant to broad, open-ended terms and the "reasoned decisionmaking principle of *State Farm*."[45] Here, too, the Supreme Court echoed Justice Kavanaugh in *Loper Bright*, explaining that a reviewing court confronted with an exercise of an agency's discretionary authority fulfills its judicial "role by recognizing constitutional delegations, 'fix[ing] the boundaries of [the] delegated authority,' and ensuring the agency has engaged in reasoned decisionmaking' within those boundaries."[46]

The essence of discretion is the power of free decision or latitude of choice. Discretion often finds its source in unambiguously broad and open-ended terms or phrases, while *Chevron* deference turned on ambiguous terms or phrases. *Loper Bright*'s overruling of *Chevron* is accordingly limited to ambiguous statutory terms or phrases. It does not extend to unambiguously broad, open-ended terms or phrases that explicitly convey broad grants of authority to federal agencies.[47]

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[43] Fed. Power Comm'n v. Texaco, Inc., 417 U.S. 380, 389 (1974).

[44] Morgan Stanley Cap. Grp. v. Pub. Util. Dist. No. 1 of Snohomish Cnty. et al., 554 U.S. 527, 558 (2008) (Stevens. J., dissenting) (quoting Chevron, 467 U.S. at 844).

[45] Kavanaugh, *supra* note 9, at 2154.

[46] *Loper Bright*, 144 S. Ct. at 2263 (citations omitted).

[47] Some may get to the end of this essay and wonder about the nondelegation doctrine. *Cf.* Kavanaugh, *supra* note 9, at 2154 n.177 ("Excessive delegation may be another problem (at least for some) in the examples"). Others have capably put that argument to rest. *See, e.g.*, Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 284 (2021) ("Already by 1940, the Supreme Court was rejecting a nondelegation challenge to statutory authorization for a commission to set coal prices 'in the public interest'").