ARTICLE

OVERRULING *CHEVRON* WITHOUT A COHERENT THEORY OF STATUTORY INTERPRETATION AND THE COURT-CONGRESS RELATIONSHIP

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I. INTRODUCTION

The Supreme Court does not have, and has not ever had, a coherent theory of the Court-Congress relationship in statutory interpretation. Nevertheless, the Court overruled one of the most cited cases in the U.S. Reports—*Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[1]—based on a theory of statutory-interpretation separation of powers. What's more, the Court did so by deploying a theory inconsistent with much of its own, actual, ongoing, statutory-interpretation practice in most other cases. Ultimately, the opinion—*Loper Bright Enterprises v. Raimondo*[2]—raises more questions than it answers about the jurisprudential muddle that continues to characterize the Court's entire statutory-interpretation enterprise.

If one read only *Loper Bright,* one would think the Court imagines itself in an ongoing dialogue with Congress. One would think the Court is not eager to impose its own policy values on Congress. One would think the Court is

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[1] 467 U.S. 837 (1984).

[2] 144 S. Ct. 2244 (2024).

interested in effectuating legislative intent and furthering interpretive predictability. One would be wrong. The *Loper Bright* pronouncements were convenient for purposes of overruling *Chevron,* but they do not reflect with any accuracy the current Court's own prevailing approaches to statutory interpretation. The stakes of these inconsistent judicial pronouncements are especially high: in overruling *Chevron*, *Loper Bright* transfers even more interpretive authority to courts, and so it is more important than ever that the Court's approach to statutory interpretation have a legitimate foundation.

The opinion reads like a statutory-interpretation manifesto—and suggests that *Chevron* is being overruled for violating its precepts. The Court proclaims that canons of interpretation must reflect the realities of the congressional drafting process to effectuate legislative intent. It says canons are precedents and that canons are legitimate only to the extent they originated at or before the founding. The Court asserts its view of statutory meaning is originalist, fixed at the time of enactment. It argues the *Chevron* doctrine was uniquely unworkable.

Actually, no. As this Essay details, most of the Court's interpretive canons do not reflect congressional drafting practice, and the Court usually does not view that fact as delegitimizing. Some justices, like Justice Amy Coney Barrett, even now expressly disavow the virtue of maintaining interest in congressional practice for purposes of interpretation.[3] This Court in particular has declared that legislative intent is no longer core to statutory interpretation. This Court has said instead that it is determined to displace any inquiry into what Congress meant or what Congress intended with a new focus on "ordinary meaning" and ordinary people, rather than congressional "insiders."[4] This ordinary-meaning approach is not only inconsistent with the traditional "faithful-agent-of-the-legislature" approach to statutory cases to which the *Loper Bright* theory harkens back; it is also often inconsistent with the originalism *Loper Bright* endorses. Ordinary people read statutes *today*, not as they were understood in 1964.

Indeed, *contra Loper Bright*, the Supreme Court creates new canons all the time—*Chevron* was not an outlier in that regard, as the Court suggested. And despite the stare decisis discussion in the opinion, as this Essay will elaborate, the Court does not usually treat canons as precedents or as common law that can be overruled.[5] As to *Chevron*'s "unworkability," as the Court charged, any unworkability associated with *Chevron* was due to the Court's own failure, *across all* of statutory interpretation, to create any predictable hierarchy of interpretive rules with stare decisis effect and the Court's decisions to make ambiguity trigger most of the Court's interpretive doctrines. *Chevron* shared

[3] Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2204–05 (2017) [hereinafter Barrett, *Congressional Insiders and Outsiders*].
[4] *See id*.; *infra* Part IV (collecting citations from all of the Court's textualists for this proposition).
[5] *See infra* Parts II and 0.

those features—a lack of interpretive order and an ambiguity threshold—with many other interpretive rules, to be sure, but only because *Chevron* itself famously turned on the "traditional tools of statutory interpretation,"[6] not because of something inherent to *Chevron*. The Court itself created this unworkable regime for *all* statutory questions. It was not unique to *Chevron,* and so *Chevron*'s demise will not cure it.

If one takes *Loper Bright*'s pronouncements about statutory interpretation seriously, most of the Court's interpretive practices are now invalid because they fail the tests the opinion announces. It does not seem plausible that the Court meant for the opinion to have that kind of ripple effect (Ironically, when the Court handed down the original *Chevron* opinion in 1984, it likewise did not recognize the major doctrinal shifts it would ultimately cause.[7]). *Loper Bright* either marks a sea-change in the Court's practice (unlikely) or, like other opinions that fall back on citation to *Marbury v. Madison*,[8] it is a one-off for purposes of a judicial power grab.

Zooming out from the particulars of statutory interpretation theory, *Loper Bright* also displays little understanding of Congress writ large—or else it adopts a fictitious view of Congress's abilities for convenience (which would be ironic, given it slaughtered *Chevron* on the ground that it was a legal fiction). The opinion seems to assume that Congress can update statutes as often as needed to keep up with changing technologies and facts, so broad delegations to agencies are unnecessary. But we all know that such constant updating by Congress is neither possible nor usually wise, given the pace and complexity of many regulatory schemes. The opinion also implies that congressionally sanctioned agency deference would indeed be permissible (and seems to acknowledge why Congress would want to delegate), yet at the very same time, the opinion suggests the opposite.[9] The Court states there is no evidence that Congress agreed with *Chevron* and so implies that had Congress said, "yes, we agree!" *Chevron* would have survived. But then the Court implies, in other sections of the opinion, that any such attempt by Congress would be unconstitutional. And of course, the Court has already emphasized through a separate line of "major questions" cases that any such delegations must now be significantly constrained.[10] All of this raises the question, *why make such grand*

[6] *Chevron*, 467 U.S. at 843 n.9 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect").
[7] Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253, 257, 277 (2014) (explaining that the Court did not realize when *Chevron* was announced that it was announcing a new doctrine and that it was only after utilization by the D.C. Circuit and Executive Branch lawyers that *Chevron*'s impact became significant).
[8] 5 U.S. 137 (1803).
[9] *See infra* Part VI.
[10] *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S. 109 (2022) (holding that imposing a vaccine mandate exceeded the Secretary of Labor's authority); West Virginia v. EPA, 597 U.S. 697 (2022) (preventing the EPA from using a generation-shifting approach to emissions

pronouncements about statutory interpretation canons at all—especially when those pronouncements further muddy the Court's interpretive approach—if the real basis for the opinion is constitutional law?

This Essay explores what *Loper Bright* tells us about the Court's continued lack of a coherent theory of Congress and statutory interpretation. Much is at stake. Administrative law scholars are well aware that with *Chevron*'s downfall, the Court's own statutory interpretation preferences will become even more important in agency implementation of federal statutes, and so understanding the Court's approach is critical.

But the importance here extends far beyond administrative law and those who have sweated *Chevron*'s end. A critical part of any inquiry into statutory interpretation is what the prevailing theory tells us about the interbranch relationship. As Jerry Mashaw observed long ago, "[a]ny theory of statutory interpretation is at base a theory about constitutional law."[11] *Loper Bright* is purportedly an opinion about precisely that, but the extent to which the Court's pronouncements contradict its usual practice obscures, rather than clarifies, any theory of statutory-interpretation separation of powers.

This Essay begins by showing that the Court's denouncement of *Chevron* as a "judicial invention" and a "fiction" is inconsistent with its asserted approach to statutory interpretation rules in most all other instances. It details the Court's unwillingness to set forth a developed and consistent theory of Article III that justifies whether canons are law, and who has the power to create them and why. That very failure is also the reason that *all* statutory interpretation rules are unpredictable—a problem not limited to *Chevron*, and one that *Chevron*'s end will not resolve. The Essay then illustrates how the Court's originalism-based critique of *Chevron* is inconsistent with the Court's typical, potentially more dynamic, approach to statutory interpretation that relies on what the reasonable reader of *today* would think a statute means. Finally, the Essay questions whether *Loper Bright*'s entire statutory interpretation analysis is smoke and mirrors. Despite everything *Loper Bright* proclaims about what legitimatizes certain statutory interpretation rules and delegitimizes others, the opinion simultaneously suggests that even if *Chevron* complied with all of *Loper Bright*'s stated conditions—that is, even if *Chevron* were not a fiction, even if it were predictable, and even if it were originalist in approach—the Court would still find it unconstitutional. All the more reason to wonder whether to take any of the dramatic statutory interpretation pronouncements in this opinion at face value.

Ultimately, the opinion reveals that Hart and Sacks's infamous charge—"[t]he hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory

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reduction for lack of sufficiently explicit Congressional authorization); Biden v. Nebraska, 143 S. Ct. 2355 (2023) (denying the Secretary of Education authority to cancel certain student loans absent clear delegation from Congress).

[11] Jerry Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685, 1686 (1988).

interpretation"[12]—remains true. The opinion reinforces leading textualist jurist Frank Easterbrook's similar and more recent charge (aligned with my own) that the Court's approach is marked by an "absence of method."[13] For decades, judges and scholars have debated how prevailing approaches to statutory interpretation should accommodate both Article III and the principle of legislative supremacy.[14] But *Loper Bright* illustrates that, even 100 years into the age of statutes—and with it, a legal regime dominated by statutory interpretation—we still do not have a coherent, developed theory of the Court-Congress relationship.

II. *Loper Bright* Makes Clear That the Court Still Lacks a Jurisprudential Theory of What Justifies the Existence and Application of the Canons of Statutory Interpretation.

Loper Bright drives home that the Court still does not have a coherent jurisprudential theory of what legitimizes the interpretive rules it deploys, and why. The Court impugns *Chevron* as "a judicial invention."[15] Justice Neil Gorsuch, in concurrence, claims *Chevron* is illegitimate because it lacks the features of other interpretive rules "that have guided federal courts since the Nation's founding."[16] These arguments go to the fundamental constitutional question of which branch has the power to create interpretive rules, and imply that the judiciary cannot.

Justice Elena Kagan, in dissent, was correct to call her colleagues' bluff. As she argued, "presumptions of this kind are common in the law,"[17] whether it is the presumption against extraterritoriality that the Court entrenched as a canon (led by Justice Antonin Scalia) in 2010;[18] or "the (so far unnamed) presumption against treating a procedural requirement as 'jurisdictional' unless 'Congress clearly states that it is'"[19] that the Court announced in 2022;[20] the presumption against preemption announced as a canon in *Rice v. Santa Fe Elevator Corp.* in 1947;[21] the federalism canon announced in 1991 in *Gregory v. Ashcroft*;[22] the

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[12] Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

[13] Frank H. Easterbrook, *The Absence of Method in Statutory Interpretation*, 84 U. Chi. L. Rev. 81, 83 (2017); *accord* Abbe R. Gluck, *Congress, Statutory Interpretation, and the Failure of Formalism: The CBO Canon and Other Ways That Courts Can Improve on What They Are Already Trying to Do*, 84 U. Chi. L. Rev. 177, 179 (2017) [hereinafter Gluck, *Failure of Formalism*].

[14] *See, e.g.*, Roscoe Pound, *Spurious Interpretation*, 7 Colum. L. Rev. 379, 384–86 (1907).

[15] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2272 (2024).

[16] *Id.* at 2275 (Gorsuch, J., concurring).

[17] *Id.* at 2297 n.1 (Kagan, J., dissenting).

[18] Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010).

[19] *Loper Bright*, 144 S. Ct. at 2297 n.1 (Kagan, J., dissenting) (internal citation omitted).

[20] Boechler v. Comm'r, 596 U.S 199, 203 (2022).

[21] 331 U.S. 218, 230 (1947).

[22] 501 U.S. 452, 470 (1991).

no-elephants-in-mouseholes canon of 2001 (developed by Justice Scalia himself);[23] the presumption in favor of arbitration formalized in 1983;[24] or the major questions canon, the first whiffs of which were offered in 1994 (again by Justice Scalia)[25] and then solidified as a powerful canon as recently as 2022.[26]

It does not seem plausible that the Court is suggesting that all of these rules created in the modern era, and many more, are illegitimate. *Loper Bright*'s new proclamation that interpretive canons that did not exist at the founding are illegitimate must be based on some theory of Article III—and the judicial power or lack thereof to create interpretive rules—yet the Court has never articulated any such theory.

I have written previously about the stubborn jurisprudential ambiguity of the Court's approach to statutory interpretation.[27] Federal courts generally do not treat statutory interpretation rules as law or precedent. They do not consider them on par with other interpretive rules for written texts, like the parol evidence rule, for purposes of doctrines of precedent or the *Erie* doctrine. And, most critically for this discussion, courts have generally been reluctant to opine on where their own power comes from to create these rules of statutory interpretation. Instead, courts adopt the fiction that interpretive rules are not created by judges, but rather are merely mirrors of existing congressional processes. As I have detailed, that justification is a fiction with respect to most canons,[28] and it is the same fiction the Court used to overrule *Chevron*. The Court has always been unwilling to take the Article III questions head on. But how can the Court invalidate canons on the ground they lack a founding-era pedigree without addressing the core question of where canons come from?

The truth is that canons are federal common law. They are federal common law—or if one resists that term, judicial creations or adoptions—because they impose order or policy norms upon Congress that Congress does not impose upon itself. Congress does not use words consistently across the U.S. Code, but consistent-word-usage canons are prevalent in the Court's opinions.[29]

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[23] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001).

[24] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983).

[25] MCI Telecomm. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 (1994).

[26] *See* Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S. 117; West Virginia v. EPA, 597 U.S. 697, 723–25 (2022).

[27] Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898, 1902 (2011) [hereinafter Gluck, *Intersystemic Statutory Interpretation*]; Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation*, 54 WM. & MARY L. REV. 753, 755–56 (2013) [hereinafter Gluck, *Federal Common Law*].

[28] *See generally* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 907 (2013) (showing that statutory drafters are not aware of—or, despite awareness, do not use—a host of canons); Abbe R. Gluck, *Justice Scalia's Unfinished Business in Statutory Interpretation: Where Textualism's Formalism Gave Up*, 92 NOTRE DAME L. REV. 2053, 2067–69 (2017) [hereinafter Gluck, *Justice Scalia's Unfinished Business*].

[29] Gluck, *Failure of Formalism*, *supra* note 13; Gluck & Bressman, *supra* note 28, at 936 ("[O]nly 9% of respondents told us that drafters often or always intend for terms to apply consistently across statutes that are unrelated by subject matter").

Congress does not legislate with presumptions like federalism, lenity, or arbitration in mind, but the Court itself imposes those presumptions through canons.[30] Judicially-created interpretive doctrines for federal statutes are a necessary corollary of the federal statutory age. No one expects federal courts to use state interpretive rules to interpret federal statutes—that would be nonsensical for creatures of Congress's creation.

Enter *Loper Bright*. Justice Gorsuch writes as if *Erie* was never decided.[31] Gorsuch's concurrence emphasizes that "[a]t common law . . . a judge's job was to find and apply the law, not make it."[32] These pronouncements contradict the core jurisprudential tenet of *Erie*, namely, that common law is not a "brooding omnipresence" to be found—it is *made*, and made by judges.[33] And this *Erie* confusion is relevant to the arguments about what makes statutory interpretation rules like *Chevron* legitimate because the Court continues to insist that *it* (the Court) is not creating canons—and that judicially created canons are illegitimate. But the canons come from somewhere, not "the sky."[34] And *Chevron* is no different from many other canons in use. They were mostly created by courts.

Gorsuch is not alone. The majority opinion likewise implies that judicially created canons are unconstitutional. The majority claims that the Constitution empowers judges "to construe the law with '[c]lear heads . . . and honest hearts,' not with an eye to policy preferences that had not made it into the statute."[35] But my legislation casebook with Eskridge and Nourse lists *more than 100* so-called substantive canons in which judges do absolutely impose policy

[30] Gluck & Bressman, *supra* note 28, at 941 fig.5, 944–47 (indicating that fewer than 15% of legislative drafters used the rule of lenity (by name) or its underlying assumptions, noting that drafters did not expect ambiguities concerning federalism or preemption to be resolved in any particular direction, and empirically demonstrating "[t]he irrelevance of clear statement rules").

[31] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("There is no federal general common law"). The only alternative to deeming these rules common law, as I have detailed elsewhere, is to depart from the tenets of the *Erie* doctrine and declare there exists some other as-yet-unnamed category of law that is somehow of lesser weight, and the canons are in that category.

[32] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2276 (2024) (Gorsuch, J., concurring).

[33] *See* Guaranty Trust Co. v. York, 326 U.S. 99, 101–02 (1945) ("In overruling *Swift v. Tyson*, *Erie R. Co. v. Tompkins* did not merely overrule a venerable case. It overruled a particular way of looking at law which dominated the judicial process long after its inadequacies had been laid bare. Law was conceived as a 'brooding omnipresence' of Reason, of which decisions were merely evidence and not themselves the controlling formulations") (citations omitted).

[34] S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) ("The common law is not a brooding omnipresence in the sky").

[35] *Loper Bright*, 144 S. Ct. at 2268 (quoting 1 WORKS OF JAMES WILSON 363 (J. Andrews ed., 1896)).

preferences onto statutes.[36] Justice Scalia himself created many of those canons, even as he called them illegitimate.[37]

Justice Barrett herself has previously argued that judges have no authority to create canons unless they derive from constitutional principles, but she exempts text-oriented canons from her critique, even though those canons also impose policy preferences.[38] Justice Brett Kavanaugh, in a 2024 concurrence, questions the premise of one of the pro-veteran canons created by courts, implying that only Congress has the ability to put a thumb on the scale in favor of which groups receive government benefits.[39] It is hard to see how the same arguments would not apply to other groups the Court favors with different canons: criminal defendants (lenity),[40] state actors (the federalism canon),[41] judges (the presumption in favor of concurrent state and federal jurisdiction),[42] and Native Americans (the Indian canons).[43] And, if one responds, *à la* Justice Barrett, that those doctrines have a plausible constitutional basis, then what about those canons favoring debtors (the presumption in favor of a fresh start in bankruptcy),[44] or the IRS (the presumption that exceptions to the tax code are narrowly construed),[45] or corporations (the presumption favoring arbitration)?[46]

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[36] WILLIAM N. ESKRIDGE, JR., ABBE R. GLUCK & VICTORIA F. NOURSE, STATUTES, REGULATION, AND INTERPRETATION: LEGISLATION AND ADMINISTRATION IN THE REPUBLIC OF STATUTES 1042–60 (2d ed. 2024).

[37] *See* Gluck, *Justice Scalia's Unfinished Business*, *supra* note 28, at 2062–63; ANTONIN SCALIA, A MATTER OF INTERPRETATION 27–28 (2018) (calling into question judicial authority to impose "dice-loading rules"). For further information regarding some canons Justice Scalia created, *see, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001) (the no-elephants-in-mouseholes canon); MCI Telecomm. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 (1994) (offering an early articulation of the major questions doctrine).

[38] Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 168–69, 179 (2010) [hereinafter Barrett, *Substantive Canons and Faithful Agency*]. Text-based canons impose judicial preferences like consistency or incorporation of common-law definitions that are not in the statutes themselves.

[39] Rudisill v. McDonough, 601 U.S. 294, 317–18 (2024) (Kavanaugh, J., concurring) (stating that "judges have no constitutional authority to favor or disfavor one group over another").

[40] *E.g.*, United States v. Santos, 553 U.S. 507, 514 (2008); Bittner v. United States, 598 U.S. 85, 101–03 (2023).

[41] *E.g.*, Gregory v. Ashcroft, 501 U.S. 452, 470 (1991); Sackett v. EPA, 598 U.S. 651, 679 (2023).

[42] *E.g.*, Atl. Richfield Co. v. Christian, 590 U.S. 1, 14–15 (2020).

[43] *E.g.*, McGirt v. Oklahoma, 591 U.S. 894, 904, 916 (2020) (the presumption against disestablishment of Indian reservations absent a clear expression of congressional intent); Herrera v. Wyoming, 587 U.S. 329, 345 (2019) (stating the presumption that ambiguities in Indian treaties "must be . . . resolved in favor of the Indians") (internal quotations and citation omitted); Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 123 (1993) (the presumption against state taxation of Native Americans absent express congressional authorization); Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 790 (2014) (the presumption in favor of tribal immunity absent an "unequivocal[]" expression of congressional purpose to the contrary).

[44] *E.g.*, Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007); Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 599 U.S. 382, 390 (2023).

[45] *E.g.*, United States v. Wells Fargo Bank, 485 U.S. 351, 354 (1988); Chickasaw Nation v. United States, 534 U.S. 84, 95 (2001).

[46] *E.g.*, Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 232–33 (2013).

Finally, the Court also charged *Chevron* as doing something illicit by operating as a clarifying interpretive presumption when statutes are vague. But how is a presumption of deference to an agency's expert opinion when a statute is vague different than a presumption in favor of interpreting ambiguous statutes not to raise constitutional questions?[47] The Court has gone so far as to apply that "constitutional avoidance" presumption when one interpretation renders a statute "unconstitutionally vague."[48] *Loper Bright*, in contrast, implies it is a *Marbury* violation to construe a statute in ways that deviate from the best interpretation, even if the statute is vague.

In other words, *Chevron* was the target here, but the Court's critique of it implicates many canons that the Court has validated.

III. STATUTORY INTERPRETATION IS FULL OF FICTIONS. WHY SINGLE OUT *CHEVRON*?

What is most striking about the opinion for those who follow statutory interpretation doctrine is how many times the words "reality" and "fiction" appear in both the majority and concurrence.[49] *Chevron*'s failure to "approximate reality" was a primary reason given to overrule it.[50] The expressed concern about fictions relates to the jurisprudential point I have just elaborated, because the Court implies in *Loper Bright* that interpretive rules have to reflect Congress; that is, rules have to come from somewhere other than courts to be legitimate. I have spent the past decade addressing whether the Court's interpretive presumptions actually aim to reflect Congress. Largely, the answer is no. Again, *Chevron* is not alone.

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[47] *See, e.g.*, Skilling v. United States, 561 U.S. 358, 405–06 (2010) ("It has long been our practice, however, before striking a federal statute as impermissibly vague, to consider whether the prescription is amenable to a limiting construction").

[48] *Id.*

[49] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2265 (2024) ("Presumptions have their place in statutory interpretation, but only to the extent that they approximate reality"); *id.* at 2268 ("In truth, *Chevron*'s justifying presumption is, as Members of this Court have often recognized, a fiction"); *id.* ("Consider the many refinements we have made in an effort to match *Chevron*'s presumption to reality"); *id.* at 2269 (referring to "*Chevron*'s fictional presumption of congressional intent"); *id.* at 2282 (Gorsuch, J., concurring) ("[A]s even its most ardent defenders have conceded, *Chevron* deference rests upon a '*fictionalized* statement of legislative desire,' . . . . As proponents see it, that fiction represents a 'policy judgmen[t] about what . . . make[s] for good government.' But in our democracy unelected judges possess no authority to elevate their own fictions over the laws adopted by the Nation's elected representatives") (footnote omitted) (citations omitted); *id.* at 2282 n.2 (citing a 1989 article by Justice Scalia and a 1986 article by then-Professor Stephen Breyer describing *Chevron* as resting upon a fiction); *id.* at 2282 n.3 (citing for a second-time then-Professor Kagan's 2001 article for the proposition that *Chevron*'s presumption is fictional); *id.* at 2286 ("*Chevron*'s fiction has led us to a strange place"); *id.* at 2289 ("[A]gencies cannot invoke a judge-made fiction to unsettle our Nation's promise to individuals that they are entitled to make their arguments about the law's demands on them in a fair hearing, one in which they stand on equal footing with the government before an independent judge").

[50] *Id.* at 2265.

Until Justice Scalia's death, the prevailing theory of statutory interpretation was the "faithful agent" theory: the goal of interpretation was to serve as a "faithful agent of Congress."[51] The big theoretical fight between textualists and purposivists was not about this shared goal, but rather about which of the two interpretive approaches best effectuated it. Textualists argued that discerning legislative intent in a legislature of 535 persons was not possible,[52] and so argued that textualist rules were a "second-best" solution to coordinate the system.[53] Textualism's rules were justified because Congress presumably knew and agreed with them, or at least drafted knowing them, and because they were mere reflections of congressional drafting practices, not judicial inventions.[54] Scalia described legitimate canons as those "established interpretive presumptions that are (1) based upon realistic assessments of congressional intent, and (2) well known to Congress—thus furthering rather than subverting genuine legislative intent."[55]

Similarly, Justice Scalia premised his support of *Chevron* on explicitly dialogic grounds, namely, that *Chevron* was a way for the Court and Congress to be in dialogue about Congress's intentions. In his view, *Chevron*, even if fictional, "operate[d] principally as a background rule of law against which Congress can legislate."[56] Chief Justice John Roberts and Justice Kavanaugh, who both grew up as lawyers and judges during the Scalia era and (especially for the Chief) as products of Harvard Law School's Legal Process School, have long continued to embrace this dialogic approach to interpretation, and to canons in particular.[57]

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[51] *See, e.g.*, Barrett, *Substantive Canons and Faithful Agency*, *supra* note 38, at 110 ("[T]extualists . . . understand courts to be the faithful agents of Congress"); *cf.* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 18, 86, 126–27 (2001) (arguing that a textualist approach best effectuates faithful agency).

[52] Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930) ("The chances that of several hundred men each will have exactly the same determinate situations in mind as possible reductions of a given determinable, are infinitesimally small").

[53] Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning,* 1990 SUP. CT. REV. 231, 232 (1990); *accord* John F. Manning, *Inside Congress's Mind*, 115 COLUM. L. REV. 1911, 1912 (2015).

[54] *E.g.*, Lockhart v. United States, 546 U.S. 142, 148 (2005) (Scalia, J., concurring) ("[L]egislative express-reference or express-statement requirements may function as background canons of interpretation of which Congress is presumptively aware").

[55] Bond v. United States, 572 U.S. 844, 872 (2014) (Scalia, J., concurring).

[56] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (1989) [hereinafter Scalia, *Judicial Deference to Administrative Interpretations*].

[57] For example, Chief Justice Roberts has argued that "[p]art of a fair reading of statutory text is recognizing that 'Congress legislates against the backdrop' of certain unexpressed presumptions." *Bond*, 572 U.S. at 857 (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991)). Justice Frankfurter has stated that reading a statute correctly "demands awareness of certain presuppositions." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947); *see also* Bostock v. Clayton Cnty., 590 U.S. 644, 792 (2020) (Kavanaugh, J., dissenting) (arguing that "longstanding and widespread congressional practice matters" because Congress has illustrated it knows how to incorporate sexual orientation into statutes when it wants to); Rudisill v. McDonough, 601 U.S. 294, 315 (2024) (Kavanaugh, J.,

My work with Lisa Bressman, however, has illustrated that many canons generally do *not* effectuate interbranch dialogue. *Chevron*, ironically, was actually one of the few canons Congress *did* know and legislated against the backdrop of, just as Justice Scalia assumed.[58]

The premises of these arguments about the virtues of Court-Congress dialogue were emphatically challenged by then-Professor Barrett in 2017. In *Congressional Insiders and Outsiders*, she argued that textualists

> do not use canons and dictionaries in an effort to track the linguistic patterns of the governors; they use them because they reflect the linguistic patterns of the governed. What matters to the textualist is how the ordinary English speaker—one unacquainted with the peculiarities of the legislative process—would understand the words of a statute.[59]

Justice Gorsuch picked up this baton. He has steered his textualist colleagues towards a new approach that puts a premium on "ordinary meaning" as understood by "ordinary people" seeking to "understand the rules that govern them"—not meaning as understood by legislators.[60] In Section IV below, I elaborate how that ordinary reader approach conflicts with the approach in *Loper Bright*. But, for now, know that Justice Gorsuch is a fellow traveler with Justice Barrett on the question of the utility of a perspective focused on what Congress knows or how Congress drafts legislative text.

When looking for empirical evidence to justify canon usage, Justice Gorsuch does not seek empirical evidence of how Congress understands canons or drafts statutes, but rather how *ordinary people* read language and whether *their readings* track the canons.[61] Justice Samuel Alito echoes the same point in *Facebook, Inc. v. Duguid*.[62]

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concurring) ("Because a substantive canon by definition has important decision-altering effects, any substantive canon must be sufficiently rooted in constitutional principles or congressional practices").

[58] *Bond*, 527 U.S. at 927 fig.1, 941 fig.5, 993 fig.10, 995–96; Scalia, *Judicial Deference to Administrative Interpretations*, *supra* note 56, at 516 (arguing that "Congress now knows that the ambiguities it creates, whether intentionally or unintentionally, will be resolved, within the bounds of permissible interpretation, not by the courts but by a particular agency, whose policy biases will ordinarily be known").

[59] Barrett, *Congressional Insiders and Outsiders*, *supra* note 3, at 2194.

[60] Niz-Chavez v. Garland, 593 U.S. 155, 169 (2021).

[61] *Id.*

[62] 592 U.S. 395, 412 (2021) (Alito, J., concurring) ("The strength and validity of an interpretive canon is an empirical question, and perhaps someday it will be possible to evaluate these canons by conducting what is called a corpus linguistics analysis, that is, an analysis of how particular combinations of words are used in a vast database of English prose") (citations omitted).

The point should be obvious. *Who cares if* Chevron *did not reflect congressional intent (and it very likely did) if the Court is no longer using that guide as a legitimating feature of statutory interpretation?*[63]

The *Loper Bright* Court argued that "[p]resumptions have their place in statutory interpretation, but only to the extent that they approximate reality."[64] This phraseology goes back to the Gluck-Bressman study, where we labeled those canons that reflect congressional drafting practice as "approximation canons."[65] But this Court has never been seriously interested in Congress's practices and perspectives until now; nor has it invalidated any of the of the other canons that have been shown to deviate from how Congress drafts statutes. Justice Gorsuch's concurrence makes the same about-face, suddenly interested in Congress's practices:

> *Chevron* deference rests upon a "*fictionalized* statement of legislative desire" . . . As proponents see it, that fiction represents a "policy judgment about what . . . make[s] for good government." But in our democracy unelected judges possess no authority to elevate their own fictions over the laws adopted by the Nation's elected representatives.[66]

This treatment of fictions in *Loper Bright* seems to be a useful-for-this-case-only strategy rather than a sincere assessment of the Court's own approach. If the Court means what it says about the dangers of canonical fictions in *Loper Bright*, it needs to not only reassess many other canons, but also square how a focus on congressional reality fits into its new "ordinary reader"/outsider-not-insider approach.

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[63] In other work, I detail how this has not been as successful as it initially appears. The Court continues to profess fidelity to the new "not Congress" approach, and yet in fact often sneaks in the very "insider" tools Justice Barrett critiques. For example, the Court still relies on legislative history, but often purposefully masks it with citations to earlier cases that use it rather than citing to the legislative history directly. *See generally* Abbe R. Gluck & Laila M. Robbins, *The Shift to the Ordinary Reader in Statutory Interpretation—and the Enduring Relevance of Congress v*, 64 J.L. & POL'Y (forthcoming 2024) (showing how ordinary-meaning textualism smuggles in congressional meaning). But what matters here is what the Court asserts it is doing.

[64] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2265 (2024).

[65] *See* Gluck & Bressman, *supra* note 28, at 907 (defining "approximation canons" as "rules in which the Court seems to be correctly intuiting how Congress signals its intent even as Congress remains unaware of the rules' existence"); *id.* at 953 ("[T]he legitimacy of an approximation rule depends on how well it actually approximates"); *id.* at 955–56 (arguing that "continued application of [textual] canons in those limited circumstances in which one can confirm that they do approximate drafting reality").

[66] *Loper Bright*, 144 S. Ct. at 2282 (Gorsuch, J., concurring) (quoting David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 212 (2001)).

IV. *CHEVRON* WAS A CANON—AND A PRECEDENT.

Loper Bright treats *Chevron* as a precedent—as common law to be overruled. This is another way in which the opinion seems to unwittingly wade into an ongoing theoretical muddle and complicate it further, because other canons are not treated in the same way.

One of the reasons that the field of statutory interpretation remains a jurisprudential muddle is that, despite the thousands of pages in the U.S. Reports devoted to statutory interpretation debates, the Court has never answered the fundamental question of the canons' legal status: are presumptions of statutory interpretation common law, nothing, or something in between? As this Essay has already explained, this ambiguity inherent in the legal status of canons raises questions about which branches have the power to create interpretive rules.[67]

The ambiguity also contributes to a theoretical gap when it comes to the idea of methodological precedents. Justice Scalia long ago claimed textualism would bring predictability to statutory interpretation, but he failed in this endeavor in large measure because he—along with the rest of the Court—was unwilling to give statutory interpretation methodology precedential effect—because he refused to treat canons as ordinary law.[68] As a result, the methodology used in one case does not carry over to the next, even where the same statute is being construed. To see why this has been so puzzling, consider that even though many judges do not think statutory interpretation methodology is precedential law subject to the *Erie* doctrine, all judges believe methodologies for other written instruments, like contracts and the parol evidence rule, are law that is precedential and subject to *Erie*.[69]

In a set of articles about a decade ago, I engaged in debates with others about whether *Chevron* was just a "canon" or also a "precedent." I was in the minority in arguing that it was both.[70] In my work with Judge Richard Posner, federal appellate judges agreed that some rules of statutory interpretation, like *Chevron* and the rule of lenity, had more lawlike status than others and were

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[67] Are the canons a form of federal common law that the Court is empowered under Article III to create, and that Congress can overrule? Are they instead something on the order of constitutional common law, or inherent to Article III power, making Congress's authority over them unclear? *See generally* Gluck, *Intersystemic Statutory Interpretation*, *supra* note 27; Gluck, *Federal Common Law, supra* note 27.

[68] *See* Gluck, *Failure of Formalism*, *supra* note 13, at 198.

[69] *See, e.g.*, Gluck, *Intersystemic Statutory Interpretation*, *supra* note 27, at 1970–76; Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1757 (2010) [hereinafter Gluck, *States as Laboratories*]; Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1900 (2008); Nicholas Rosenkranz, *Federal Rules of Statutory Interpretation,* 115 HARV. L. REV. 2085, 2152 (2002).

[70] *Compare* Connor N. Raso & William N. Eskridge, Jr., Chevron *as a Canon, Not a Precedent: An Empirical Study of What Motivates Judges in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1796 (2010), *and* Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1295 (2012), *with* Gluck, *Federal Common Law*, *supra* note 27, at 798–800.

viewed by judges as more precedential.[71] And in *Kisor v. Wilkie*, the Court engaged in statutory interpretation analysis about the future of *Auer* deference, discussing the canon throughout as a precedent subject to stare decisis.[72]

If there was anything left to that debate, *Loper Bright* settles it. The Court engages in traditional stare decisis analysis to justify overruling *Chevron*, including considering reliance interests.[73] It is particularly eye-opening that even after Justice Gorsuch goes to the trouble of talking about dicta, he does not even classify *Chevron* as dicta, whereas others who have argued that methodology is not precedential have called it something on the order of dicta. Justice Ketanji Brown Jackson herself, in another case last Term, cited Justice Scalia's *Reading Law* for the proposition that the textual canons are not law.[74] But, as with the rest of *Loper Bright*, the Court does nothing to consider how its one-off analysis of *Chevron* as a precedent affects the Court's ongoing jurisprudential understanding of other canons.

If *Chevron* is a precedent, isn't the presumption against preemption also a precedent? The rule of lenity? The presumption in favor of Native American rights? The rule against superfluities? One cannot respond that *Chevron* was somehow different from other interpretive presumptions, and so can be treated differently. The Court dispelled that idea by analyzing *Chevron* in general terms, just like all other interpretive presumptions. "Presumptions have their place in statutory interpretation, but only to the extent that they approximate reality," Roberts writes, speaking generally of the canons, not just of *Chevron* as a unique subspecies.[75] And more: the only legitimate "interpretive rules" are ones that "have guided federal courts since the Nation's founding."[76]

For now, let me conclude this point with two other observations about methodological stare decisis. The Court holds that *Chevron* is overruled as a regime of interpretation, but the underlying rulings that have relied on it for forty years are not vacated. This is the same position taken by some state courts that have been more explicit about creating precedential methodological frameworks and then overruling them.[77] But these rulings still create instability, as they are

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[71] Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1302, 1331–32 (2018).
[72] 588 U.S. 558, 588 (2019) ("Of course, it is good—and important—for our opinions to be right and well-reasoned. But that is not the test for overturning precedent"); *id.* at 586 ("If all that were not enough, *stare decisis* cuts strongly against *Kisor*'s position. 'Overruling precedent is never a small matter'") (quoting Kimble v. Marvel Entertainment, 576 U.S. 446, 455 (2015)).
[73] *See, e.g.*, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2272 (2024) ("Given our constant tinkering with and eventual turn away from *Chevron*, and its inconsistent application by the lower courts, it instead is hard to see how anyone—Congress included—could reasonably expect a court to rely on *Chevron* in any particular case").
[74] Fischer v. United States, 144 S. Ct. 2176, 2191 n.1 (2024) (Jackson, J., concurring) ("As one treatise explains, such canons are 'not . . . rule[s] of law' but rather 'one of various factors to be considered'") (quoting A. SCALIA & B. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 212 (2012)).
[75] *Loper Bright*, 144 S. Ct. at 2265.
[76] *See id.* at 2275 (Gorsuch, J., concurring).
[77] These developments were first detailed in Gluck, *States as Laboratories*, *supra* note 69.

an invitation to lawyers to go in and relitigate under the new preferred methodology. This is precisely what happened in Michigan when it overruled one precedential statutory interpretation framework and replaced it with another.[78]

The second observation is that this opinion does nothing to deal with the broader methodological issues that *Chevron* helped reveal and then was unfairly blamed for. The Court complained that one major problem with *Chevron* was that it made decisions unpredictable because it was not clear when it was triggered; these problems were caused by the fact that *Chevron* relied on an ambiguity threshold and also because it was not clear whether *Chevron* could be applied to resolve ambiguity before other canons might first be applied to do so.

In other words, none of the canons are ranked, and that's the problem, not *Chevron*. The Court has asked, for instance, "[d]oes *Chevron* displace the rule of lenity?"[79] meaning whether application of the rule of lenity first might clarify ambiguity, and therefore prevent *Chevron* from even being triggered, or whether *Chevron* is triggered first. *Loper Bright* solves none of this. We still do not know whether legislative history or any other substantive canon displaces the rule of lenity, or any other canon, because the Court does not definitely answer these questions—ever. It is not that they do not come up—see, for example, *United States v. Hayes* (pitting legislative history against lenity).[80] But, because the Court does not usually treat statutory interpretation methodological holdings with stare decisis effect, the same debates continue to cycle without resolution.

Chevron's famous footnote nine stated that *Chevron*'s deference presumption was triggered when "a court, employing traditional tools of statutory construction" could not "ascertain[] that Congress had an intention on the precise question at issue."[81] The problem has always been that those traditional tools are not ordered or ranked in a hierarchy. Because the tools are not ranked the same way from case to case, a "traditional tools" rule is simply a whole-universe-open rule for statutory interpretation. Use whatever tools you want in whatever order and then decide if there is still ambiguity. And some of those tools—like lenity, constitutional avoidance, federalism, and even sometimes text canons—the Court has long held are *themselves* triggered by ambiguity. *Chevron*'s mistake was to rely on all those tools in the first place.[82]

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[78] *Id.* at 1804; *see* Robert A. Sedler, *The Michigan Supreme Court, Stare Decisis, and Overruling the Overrulings*, 55 WAYNE L. REV. 1911, 1939–40 (2009) (counting thirty-four overrulings by the textualist majority between 1999 and 2008 as compared to eight between 1989 and 1998); Joseph Kimble, *What the Michigan Supreme Court Wrought in the Name of Textualism and Plain Meaning: A Study of Cases Overruled, 2000-2015*, 62 WAYNE L. REV. 347, 348 (2017) (counting ninety-six overruled cases by the Michigan Supreme Court between 2000 and 2015).

[79] *Loper Bright*, 144 S. Ct. at 2271.

[80] 555 U.S. 415, 429 (2009).

[81] *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984).

[82] *Loper Bright*, 144 S. Ct. at 2270 ("Experience has also shown that *Chevron* is unworkable. The defining feature of its framework is the identification of statutory ambiguity, which requires deference at the doctrine's second step").

If one needs more examples of the inherent unpredictability of this open-canon universe, just look to *Yates v. United States*, a textual-canon-vs.-textual-canon extravaganza pitting Justice Ruth Bader Ginsburg against Justice Kagan;[83] or to *Lockhart v. United States* (Justice Kagan against Justice Sonia Sotomayor over the interpretation of a comma, with dueling textual canons);[84] or to *Van Buren v. United States* (Justice Barrett against Justice Clarence Thomas);[85] or, for a debate about when lenity is trigged, to *United States v. Davis* (Justice Gorsuch against Justice Kavanaugh).[86] *Chevron*'s demise solves none of this.

With *Chevron* gone, the unpredictability remains, and in fact will grow stronger because, at least until recently, and certainly in the lower courts, there was always a good chance that when the interpretive chips fell evenly, courts would go with the agency.

V. The Opinion Evinces that Textualism Lacks a Coherent Theory of Originalism, Legislative Intent, and Fair Notice.

Justice Scalia was no diehard statutory interpretation originalist. He rejected methods of interpretation that required courts to consider what the enacting Congress assumed the words they wrote to mean.[87] By contrast, his approach to constitutional interpretation was more originalist, a tension that puzzled some Court watchers.[88]

Loper Bright makes clear that the link between textualism and originalism remains inconsistent and undertheorized.[89] By now, most everyone knows that Justice Alito compared Justice Gorsuch's majority opinion in the Title VII sexual-orientation-discrimination case *Bostock v. Clayton County* to "a pirate ship" that "sails under a textualist flag."[90] The reason Alito did so was because he concluded that Gorsuch's approach was not originalist.[91] Alito wrote: "[O]ur duty is to interpret statutory terms to 'mean what they conveyed to

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[83] 574 U.S. 528 (2015).
[84] 588 U.S. 445 (2019).
[85] 593 U.S. 374 (2021).
[86] 588 U.S. 445 (2019).
[87] Gluck & Bressman, *supra* note 28, at 951 ("Justice Scalia sometimes emphasizes ordinary public meaning, at other times explicitly grounds canon application in how he believes the ordinary legislative drafter uses language, and sometimes does both. Obviously, the kinds of interpretive presumptions that lawyers might be expected to know are different from those that might be expected to approximate public understanding") (footnote omitted).
[88] Legislation aficionados, for example, were struck by Justice Scalia's opinion in *District of Columbia v. Heller*, 554 U.S. 570 (2008), in which he utilized post-enactment legislative materials in a way he would have refused to utilize legislative history in order to determine the intent of the Second Amendment's Drafters.
[89] I am not the first to point out that textualism is at war with itself. *See, e.g.*, Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265 (2020) (arguing in favor of formalistic, rules-bound textualism).
[90] 590 U.S. 644, 685 (2020) (Alito, J., dissenting).
[91] *Id*.

reasonable people at the time they were written' . . . [T]he question in these cases is not whether discrimination because of sexual orientation or gender identity should be outlawed. The question is whether Congress did that in 1964."[92]

In *Loper Bright,* the Court claimed that "every statute's meaning is fixed at the time of enactment,"[93] and that *Chevron* violated that precept by allowing for dynamic interpretive changes. Justice Gorsuch concurred this time, stating that:

> courts have sought to construe statutes as a reasonable reader would "when the law was made." . . . In that way, textualism serves as an essential guardian of . . . fair notice. If a judge could discard an old meaning and assign a new one to a law's terms, all without any legislative revision, how could people ever be sure of the rules that bind them?[94]

This fair-notice-meets-originalism version of textualism, however, is not exactly the same as the textualism this Court has applied in recent years. As I have explained, the current conservative Justices now argue, *à la* Justice Barrett's article, that their interpretive partner is not Congress, but the ordinary person or the reasonable reader. For example, Justice Gorsuch has stated that "[u]nless some feature of the law suggests that one or another of its terms bears a specialized meaning, our duty is to interpret Congress's work as an ordinary reader would."[95] Justice Kavanaugh has stated "[t]he 'prime directive in statutory interpretation is to apply the meaning that a reasonable reader would derive from the text of the law.'"[96] Chief Justice Roberts has described the textualist inquiry as discerning "how the word is ordinarily used."[97]

While sometimes these newer textualist Justices discuss public meaning at the time of enactment, at other times they use a "fair notice" justification for this approach that applies notice to *present* members of the public. For example, Justice Barrett, writing for the Court in the computer-crime case *Van Buren v. United States*, was accused by Justice Thomas of not taking a sufficiently "originalist" approach to statutory text.[98] Justice Thomas, in dissent, wrote that the majority was too focused on "the way people use computers today" and criticized "[t]he majority's reliance on modern-day uses of computers to

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[92] *Id.* Note that Justice Alito's own theory, even as he chides Justice Gorsuch for his, is not fully consistent. What "reasonable people" at the time might have understood a term to mean is not necessarily the same as "whether Congress did."
[93] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2266 (2024).
[94] *Id.* at 2285 (Gorsuch, J., concurring).
[95] Pulsifer v. United States, 601 U.S. 124, 161 (2024) (Gorsuch, J., dissenting).
[96] Bostock v. Clayton Cnty., 590 U.S. 644, 784 (2020) (Kavanaugh, J., dissenting) (quoting WILLIAM N. ESKRIDGE, JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 33–35 (2016)).
[97] Biden v. Nebraska, 143 S. Ct. 2355, 2368 (2023).
[98] Van Buren v. United States, 593 U.S. 374, 393 (2021).

determine what was plausible in the 1980s[, which] wrongly assumes that Congress in 1984 was aware of how computers would be used in 2021."[99]

The bottom line is that *Chevron* got blamed for allowing a dynamism in statutory meaning that even some of the Court's textualists accommodate in other ways through their current ordinary meaning approach. It is true that agency updates to a statute for technical or other reasons are not always the same thing as an update that occurs because the ordinary understandings of words change. Nevertheless, an inquiry focused on what an ordinary person would understand a statute to mean, if truly in the spirit of fair notice to the regulated public, is *necessarily dynamic* because the person encounters the statute in the present, not when it was drafted.

VI. IS *LOPER BRIGHT* REALLY A STATUTORY OPINION?

Finally, the opinion purports to be one about statutory construction. The Court claims that the problem is that *Chevron* does not reflect congressional drafting expectations, and that *Chevron* conflicts with another statute, the Administrative Procedure Act (APA). The Court holds:

> C*hevron* defies the command of the APA that "the reviewing court"—not the agency whose action it reviews—is to "decide *all* relevant questions of law" and "interpret . . . statutory provisions." § 706 (emphasis added). It requires a court to *ignore*, not follow, "the reading the court would have reached" had it exercised its independent judgment as required by the APA. *Chevron*, 467 U. S., at 843, n. 11.[100]

These statements imply that Congress could make the decision to reinstate *Chevron*. But then the opinion cites *Marbury*, the Court's favorite signal that it is about to take power for itself:

> The Framers also envisioned that the final "interpretation of the laws" would be "the proper and peculiar province of the courts." THE FEDERALIST No. 78, at 525 (A. Hamilton) . . . In the foundational decision of *Marbury* v. *Madison*, Chief Justice Marshall famously declared that "[i]t is emphatically the province and duty of the judicial department to say what the law is." 1 Cranch 137, 177, 2 L. Ed. 60 (1803).[101]

And then it implies that its statutory discussion was simply a cover for a constitutional ruling. "The APA thus codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*:

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[99] *Id.* at 407 (Thomas, J., dissenting).
[100] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2265 (2024).
[101] *Id*. at 2257.

that courts decide legal questions by applying their own judgment."[102] If the APA merely codifies a constitutional rule, then the APA and congressional intent or desire are not relevant after all. The Constitution controls regardless. So, who cares if *Chevron* is a fiction? Even if Congress said *Chevron* was a truth, this part of *Loper Bright* reveals it likely would not matter.

Justice Kagan implicitly presses this point when she argues that *Chevron* does indeed reflect Congress's preferences. She turns the majority's love of text-based canons against itself:

> Over the last four decades, Congress has authorized or reauthorized hundreds of statutes. The drafters of those statutes knew all about *Chevron* . . . So if they had wanted a different assignment of interpretive responsibility, they would have inserted a provision to that effect. With just a pair of exceptions I know of, they did not. *See* 12 U.S.C. § 25b(b)(5)(A) (exception #1); 15 U.S.C. § 8302(c)(3)(A) (exception #2). Similarly, Congress has declined to enact proposed legislation that would abolish *Chevron* across the board. *See* S. 909, 116th Cong., 1st Sess., § 2 (2019) (still a bill, not a law); H.R. 5, 115th Cong., 1st Sess., § 202 (2017) (same).[103]

Thus, per Justice Kagan, Congress knew about *Chevron*, and showed itself capable of abolishing it when it wanted to. Under this Court's own typical interpretive practice, the implication is that *Chevron* was approved.[107] If overruling *Chevron* was really about the Court-Congress dialogue, these congressional signals would have mattered. That they did not matter, and indeed were not even addressed by the majority, invites the question of whether *Loper Bright*'s entire statutory discussion—as puzzling as it is—was mere window dressing.

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[102] *Id*. at 2261.

[103] *Loper Bright*, 144 S. Ct. at 2301 (Kagan, J., dissenting).

[107] One of the Court's most favored canons is the *inclusio unius* or meaningful variation rule: when Congress expressly goes out of its way to specify an exception in one part of the Code, it shows that it is aware of the baseline and knows how to exempt from it when it wants. In such scenarios, the Court is loath to interpret such an exemption elsewhere. *See, e.g.*, Azar v. Allina Health Services, 587 U.S. 566, 576–77 (2019); Keene Corp. v. U.S., 508 U.S. 200, 208 (1993); Russello v. U.S., 464 U.S. 16, 23 (1983). A second favored canon is the reenactment rule: "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." Lorillard v. Pons, 434 U.S. 575, 580 (1978). A third well-trodden rule is that when Congress is aware of a controversial opinion and has rejected countless efforts to override it, the Court will not interpret the statute otherwise. Flood v. Kuhn, 407 U.S. 258, 279 (1972); Bostock v. Clayton Cnty., 590 U.S. 644, 780, 782, 793–94 (2020) (Kavanaugh, J., dissenting).

VII. CONCLUSION

Statutory interpretation rules decide the majority of federal cases, and yet the theories underlying the field remain a mess. Theoretical messes produce muddled and inconsistent doctrine. *Loper Bright* reveals these developments in full glory.

Is it really true that all of the Court-created canons are illegitimate? Is it actually the case that any canon that does not reflect how Congress drafts is invalid? Can we sincerely claim that some canons are lawlike precedents and others have a lesser status? Why blame *Chervon* for methodological unpredictability when the fault is the failure to rank all traditional interpretive tools? How can an insistence on interpretive originalism be squared with the Court's preferred fair-notice approach? These are just some of the questions the opinion raises, and that this Essay has explored.

Loper Bright is a big opinion and makes big pronouncements about the field of statutory interpretation. Those pronouncements are particularly dangerous—or at the very least unhelpfully confusing—to the extent they are wildly inconsistent with the Court's approach to interpretation in most other cases. And they are. If *Loper Bright* were meant to be a one-off for the purpose of killing *Chevron* and the Court did not mean to call large swaths of the enterprise into question, the Court should have been more careful and said less. If *Loper Bright* is instead announcing a revolution in the Court's approach to interpretive canons, then we are facing an incredibly unstable and unpredictable road ahead. It would be preferable to know which it is.

Either way, it seems long past time to bring these arguments to the surface. We have had decades of talk about the implementing devices of statutory interpretation—talk about various canons, talk about text versus purpose, and so on. But opinions almost never address the big constitutional and theoretical questions that frame all of these debates. Nearly one hundred years after the New Deal, we are long overdue for a cogent, transparent debate about the nature of the judicial power, the Court's relationship to Congress, and what legitimatizes the enterprise of statutory interpretation—and why.