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TOSSING SAND IN THE REGULATORY GEARS: HURDLES TO POLICY PROGRESS IN THE SUPREME COURT

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I. INTRODUCTION

In the last few years, the Supreme Court has been a source of seismic change. In *Dobbs v. Jackson Women's Health Organization*, [1] the Court overruled *Roe v. Wade*,[2] which had protected the right to abortion for nearly fifty years. In *Loper Bright Enterprises v. Raimondo*, the Court abandoned so-called *Chevron* deference to particular categories of administrative agency interpretations, a doctrine viewed as bedrock for over forty years.[3] *Humphrey's Executor v. United States*,[4] the 1935 ruling validating independent multi-member commissions such as the Federal Trade Commission, Securities and Exchange Commission, and

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[1] *See* 597 U.S. 215, 292 (2022).

[2] 410 U.S. 113, 154 (1973).

[3] *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024)*; see also* Kisor v. Wilkie*,* 588 U.S. 558, 589–90 (2019) (restricting previous approach of deference to agency interpretations of regulatory language).

[4] 295 U.S. 602, 631–32 (1935).

Federal Communications Commission, may soon join the others on the chopping block.[5]

But the Court has been far more skeptical when other governmental institutions seek change to address modern problems, whether it is Congress enacting regulatory legislation, or executive branch agencies seeking to exercise statutory authority. Governmental policy change can, of course, be critical to addressing newly significant problems, including climate change, environmental and health risks from widely used per-fluoroalkyl and polyfluoroalkyl substances (PFAS) found in industry and consumer products and other new pollutants, and innovative means of financial fraud. Policy change may also be needed to incorporate new technologies or other new solutions to societal problems or address new implementation issues that have emerged over time.

Particularly in the last five years, the Court has hobbled numerous executive branch agency efforts to address modern challenges with a new interpretive move that, in 2022, it named the major questions doctrine ("MQD").[6] While the MQD has drawn controversy and attention, this essay argues that the MQD's creation is not an isolated judicial move. It is simply the most visible of a suite of alterations to administrative law and statutory interpretation doctrine, of which the Court's *Loper Bright* ruling is the most recent example.

As discussed in greater detail below, between 2019 and 2024, the Court not only developed the MQD, but altered the landscape of judicial deference to agency interpretations. The Court abandoned an attitude that had tolerated, and even lauded, agency policy change in many interpretive settings, replacing it with across-the-board antagonism to change. This included modifying so-called *Skidmore* deference by significantly strengthening its existing anti-change aspects, making it what we might call *Skidmore 2.0*.[7] The Court also has strengthened anti-change aspects of arbitrary and capricious review by requiring agencies to consider the unwieldy factor of generalized reliance.[8] Finally, the Court is developing additional statutory interpretation rules that disfavor regulatory legislation and limit its application, including a potential "private property" canon.[9]

All of these alterations have made the courts an increasingly powerful barrier to both legislative and executive policy change, ultimately impeding governmental institutions from addressing modern societal challenges in a democratically responsive fashion.

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[5] In 2020, a majority of the Court suggested a default rule of unrestricted presidential removal power, against which its ruling in *Humphrey's Executor* was described weakly as a limited exception, rather than defended. *See, e.g.,* Seila Law, LLC v. CFPB, 591 U.S. 197, 204 (2020) ("Our precedents have recognized only two exceptions to the President's unrestricted removal power"); *id.* at 228 ("[T]he President's removal power is the rule, not the exception").

[6] West Virginia v. EPA, 597 U.S. 697, 723 (2022).

[7] *See infra* text and accompanying notes 93–102.

[8] *See infra* Section III.

[9] *See infra* Section V.

II. THE MAJOR QUESTIONS DOCTRINE: THE COURT'S MOST VISIBLE ANTI-CHANGE MOVE

Under the MQD, first named by a majority of the Court in the 2022 decision *West Virginia v. EPA*, the Court held that an agency's assertion of economically or politically significant authority would not be within the scope of an otherwise broad statutory grant of power unless the statute provides "clear congressional authorization."[10] The majority conceded that in major questions cases, the statutory language has often supplied a "colorable textual basis" for the agency's interpretation.[11] But, the Court explained that extraordinary circumstances would prompt it to take a different approach, and instead to require a clear statutory statement.[12] As the cases discussed below show, the statutory authorizing language must not only be clear, but *specific.*[13] Broad language seemingly will not do.

Under the MQD, an agency's claim of significant authority to take action that can be characterized as new or different in kind is particularly vulnerable to challenge. In *West Virginia v. EPA,* the agency had sought to regulate coal-fired power plant greenhouse gas emissions through a "standard of performance" for existing coal-fired power plants known as the Clean Power Plan.[14] Under the statutory provisions the Environmental Protection Agency (EPA) relied upon, it was then up to the states to issue the particular rules achieving those emissions reductions.[15] "Standard of performance" was defined as a "standard for emissions" reflecting the application of the "best system of emission reduction" that has been "adequately demonstrated."[16] As the Court explained, EPA's standard was based on a number of potential measures to reduce emissions, including power plant operators burning coal more cleanly, shifting to cleaner fuels or renewables (so-called generation shifting), or participating in an emissions trading regime with other operators who had succeeded in lowering greenhouse gases, including by generation shifting.[17] The Court conceded that these measures, including generation shifting, could be encompassed within the statute's language as a "system" capable of reducing emissions.[18] Other sections of the Clean Air Act that more narrowly authorized the agency to set "standards

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[10] *West Virginia*, 597 U.S. at 723; *see* Biden v. Nebraska, 600 U.S. 477, 507 (2023) ("[O]ur precedent . . . requires that Congress speak clearly before a Department Secretary can unilaterally alter large sections of the American economy").

[11] *West Virginia*, 597 U.S. at 722–23 (discussing major questions cases in which each claim to authority "had a colorable textual basis," yet the Court found the action unauthorized).

[12] *Id.* at 724 (explaining that in major questions cases, "there may be reason to hesitate" before accepting a statutory reading that would be upheld under ordinary circumstances) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).

[13] *See* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine,* 109 VA. L. REV. 1009, 1012 (2023) (explaining that the "new" major questions doctrine requires "explicit and specific congressional authorization for certain agency policies").

[14] Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015).

[15] 42 U.S.C. § 7411(d)(1).

[16] 42 U.S.C. § 7411(a)(1).

[17] *West Virginia*, 597 U.S. at 697–98.

[18] *Id.* at 732 (arguing that context was nonetheless critical to assessing the breadth of the term).

applicable to . . . emission[s]," without referencing a "system," seemed to confirm the breadth of this particular authority.[19] It is worth emphasizing that the policy's reliance on the market mechanism of emissions trading was an "unqualified bull's-eye" in terms of economic efficiency, since it "create[d] economic incentives to have . . . pollution reductions undertaken by those . . . that can do so least expensively," the kind of regulatory approach also typically "trumpeted by Republican administrations."[20] One might fairly infer that the statutory term "system" had been chosen by Congress not only to enable the agency to respond to technological evolution, but also to evolving thinking on maximizing regulatory effectiveness.

The Court hesitated to read the statute in this way, however, characterizing the Clean Power Plan as the agency asserting a "newfound power" in a "rarely . . . used" provision, because the agency had previously tended to set or call for source-based emissions limits.[21] Calling the action "novel" was a critical step in the Court's invocation of the major questions doctrine.[22] Using that doctrine, the Court then rejected the broad term "system of emissions reduction" as inadequately specific to authorize the Clean Power Plan.[23]

Similarly, in a case decided the previous year on the so-called shadow docket, *Alabama Assn. of Realtors v. Department of Health and Human Services,* [24] the Court alluded to the "unprecedented" nature of the Centers for Disease Control's assertion of statutory authority to institute a nationwide eviction moratorium in response to the COVID-19 pandemic. Again, the statute's language broadly authorized the agency to adopt measures "necessary to prevent" the spread of disease, but the Court instead focused on the purported newness of the action. Despite evidence of disease transmission among the unhoused, the Court characterized the action as housing-focused, rather than aimed at combatting the spread of disease.[25] Again, the newness of the agency action was a key step in the Court's application of the MQD. The agency ultimately lost its claim that action was authorized for lack of specific statutory language.

In *National Federation of Independent Business v. Occupational Safety and Health Administration*, the Court held that the power of the Occupational Safety and Health Administration (OSHA) over "occupational safety and health standards" did not permit it to require large employers to institute a "vaccine or test" rule during the early years of the COVID-19 pandemic, an action the Court

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[19] *See, e.g.,* 42 U.S.C. 7521(a)(1) (automotive emissions limits).

[20] Richard J. Lazarus, *The Scalia Court: Environmental Law's Wrecking Crew within the Supreme Court,* 47 HARV. ENV. L. REV. 407, 415–16 (2023) (mentioning the Reagan Administration as well as both Bush Administrations).

[21] *West Virginia*, 597 U.S. at 724.

[22] *Id.* at 716. The Court also characterized the Clean Power Plan as implicating energy policy, something it viewed as beyond EPA's expertise. *Id.* at 729.

[23] *See id.* at 733.

[24] 594 U.S. 758, 765 (2021) (per curiam); *see also* Util. Air Reg. Grp. v. EPA, 573 U.S. 302, 324 (2014) (declining to apply *Chevron* in part because the agency was claiming "unheralded" regulatory power).

[25] *See Alabama*, 594 U.S. at 764 ("This downstream connection between eviction and the interstate spread of disease is markedly different from the direct targeting of disease. . .").

also found to be unprecedented.[26] Although the statute made reference to "occupational . . . health" as well as "safety," language facially clear enough to authorize a rule aimed at reducing workplace disease transmission, the Court nonetheless invalidated the rule because the statute's authorization was not sufficiently specific.[27] Similarly, in *Biden v. Nebraska,* the Court characterized the agency's claimed use of its power to "waive or modify" student loans to waive repayment obligations as creating a "novel and fundamentally different loan forgiveness program."[28] It then applied the MQD to strike down the action, finding the statutory language inadequately specific to meet the "clear congressional authorization" requirement.[29]

The major questions doctrine is deeply problematic because it lacks objective criteria for a "major" question or "significant" economic or political impact, thus conferring substantial discretion on courts and making its application unpredictable.[30] It seems hard to justify as a substantive interpretive canon that would effectuate the nondelegation doctrine, since that doctrine does not preclude large delegations to agencies, only unprincipled ones.[31] The MQD also cannot be justified as an interpretive rule that provides Congress with a stable background for legislation, since, even if the MQD could be considered predictable, a dubious proposition, the MQD has been applied to statutes enacted long before the MQD was created, when Congress could not have anticipated it.[32] Finally, the MQD also seems difficult to justify as a "common sense"

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[26] 595 U.S. 109, 113 (2022) ("OSHA has never before imposed such a mandate").
[27] *Id.* at 117–18 (holding that although the agency was tasked with regulating "occupational" hazards and health of employees, that authority did not extend to COVID-19).
[28] 600 U.S. 477, 494, 496 (2023).
[29] *Id.* at 506.
[30] Nathan Richardson, *Antideference: COVID, Climate, and the Rise of the Major Questions Canon,* 108 VA. L. REV. ONLINE 174, 195 (2022) ("The most prominent critique of the major questions doctrine has been that its boundaries are unclear, unpredictable, and arbitrary"); *see also* Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine,* 74 ADMIN. L. REV. 217, 253 (2022) ("It is hard to imagine that the courts could develop judicially manageable standards [on the public salience question]"); Lisa Heinzerling, *The Power Canons,* 58 WM. & MARY L. REV. 1933, 1983–84 (2017) (critiquing the major questions doctrine as unpredictable, among other things); Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded,* 112 CAL. L. REV. 899, 927–29 (2024) ("it is too soon to assess how flexibly the Court will implement the major questions doctrine over time").
[31] *See* Daniel E. Walters, *The Major Questions Doctrine at the Boundaries of Interpretive Law,* 109 IOWA L. REV. 465, 517 (2024) ("[T]he Supreme Court has never linked majorness to the nondelegation doctrine"); *see also* Mila Sohoni, *The Major Questions Quartet,* 136 HARV. L. REV. 262, 287 (2022); *see generally* Deacon & Litman, *supra* note 13.
[32] *See* Nina Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade,* 117 MICH. L. REV. 71, 87–88 (2018) (discussing conditions necessary for the substantive canon to function as a stable background and commenting, "Congress obviously cannot anticipate a not-yet-developed canon"); *see also* Amy Coney Barrett, *Substantive Canons and Faithful Agency,* 90 B.U. L. REV. 109, 117 (2010) (arguing that substantive canons are in significant tension with the role of the judiciary as the faithful agent of the legislature); Walters, *supra* note 31, at 535–37 ("the major questions doctrine's novelty makes it a difficult fit" for the theory that canons can contribute to a "stable background" for legislative drafters); *see generally* Deacon & Litman, *supra* note 13, at 1084 ("Congress did not draft most of the important federal regulatory statutes currently in existence with knowledge of the [major questions doctrine]").

assumption about congressional use of language, a sort of linguistic canon presented by Justice Amy Coney Barrett in her concurrence in *Biden v. Nebraska*.[33] Survey-based research suggests that ordinary people's understanding of delegations do not typically include significance limitations.[34] Congressional drafters and agency counsel also likely understand broad language in a statute to delegate "wide authority" to agency administrators.[35]

That said, the MQD is here to stay.[36] Its inclusion of newness as a factor that could make an issue of agency authority a "major question" is obviously antagonistic to policy change and innovation. It constrains agencies from adapting policy in response to new problems, new advances in knowledge or technology, and unforeseen implementation problems.

The MQD also can be understood as playing "gotcha" with Congress—even when Congress could not have anticipated an MQD-type requirement—by requiring it to have anticipated and spoken to the agency's specific policy solution to a modern problem. In the cases discussed above, the challenged policies seemed plainly within both the underlying statute's broad language as well as its purpose, as with the Occupational Safety and Health Act's instruction to protect workplace "health" in the face of a global pandemic. (The Act was, of course, enacted in 1970, long before the creation of the MQD, so even if members of Congress anticipated its application in a global pandemic, they might have felt no call to include specific language). Again, such broad statutory language seems aimed at empowering implementing agencies to respond to specific issues Congress understands may arise later.[37] But in the MQD era, if the Court considers the issue to be "major," and Congress has not specifically anticipated that particular issue in statutory language, one statute is not good enough for the Court—Congress must legislate a second time. Courts effectively

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[33] *See* 600 U.S. at 511–17 (Barrett, J., concurring) (arguing that major questions doctrine simply reflects "common sense" approach to reading language).

[34] Walters, *supra* note 31, at 534–35 (arguing that evidence for congressional preferences supporting a MQD are mixed at best, and almost certainly evolving); *see also* Kevin Tobia, et al., *Major Questions, Common Sense?* 97 S. CAL. L. REV. __, __ (forthcoming 2024) (draft at 49–50) (finding that vast majority of ordinary people, contrary to Barrett's argument, did not find major, or significant, actions outside broad, but clear, delegations).

[35] Levin, *supra* note 30, at 942.

[36] As of writing, the Court has yet to analyze a major questions doctrine argument and find that the statute raised no major question. However, similar arguments were made in *Massachusetts v. EPA* in arguing that whether greenhouse gases qualified as a regulable Clean Air Act "air pollutant" raised a major question. 549 U.S. 497, 512 (2007) (noting EPA's position that "imposing limitations on greenhouse gases would have even greater economic and political repercussions than regulating tobacco"). The Court's majority opinion assessed neither significance nor novelty but reasoned simply that greenhouse gases "fit well within the Clean Air Act's capacious definition of 'air pollutant.'" *Id.* at 532.

[37] *See e.g.,* Levin, *supra* note 30, at 962; West Virginia v. EPA, 597 U.S. 697, 756 (2022) (Kagan, J., dissenting) ("A key reason Congress makes broad delegations . . . is so an agency can respond, appropriately and commensurately, to new and big problems"); City of Arlington v. FCC, 569 U.S. 290, 296 (2013) ("Congress knows to speak in . . . capacious terms when it wishes to enlarge[] agency discretion"); *Massachusetts*, 549 U.S at 532 (commenting that in reading the Clean Air Act term "pollutant" to encompass greenhouse gases, Congress knew that "without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete").

regulating the legislative process in this way seems problematic at any time, but it is particularly cynical in an era of legislative dysfunction.

The MQD is not only anti-change; it is distinctly anti-regulatory. First, as Professors Deacon and Litman have argued, the Court's focus on "new" agency actions essentially requires agencies to "use it [early on] or lose it."[38] Second, *creating* regulation is particularly vulnerable as "new." Deregulation—even dramatic deregulation—seems less susceptible to being characterized as "new" because in the case of deregulation, the agency has already plowed that subject-matter ground by regulating in the first place. Finally, the MQD burdens regulation through its legislative process impacts. Losers in a major questions doctrine case must return to Congress to obtain specific authorizing language. As if requiring Congress to legislate a second time weren't enough, MQD-required specific regulatory language will likely be especially difficult to enact since a specific regulatory proposal will be strongly opposed by regulated industry. As public choice theory predicts, regulated industry is likely to be better organized and better-funded than diffuse public beneficiaries, and thus more effective at defeating even legislation that significantly benefits the public.[39] Broad, public-facing legislation has long been understood as vulnerable to this sort of behind-the-scenes resource imbalance; the MQD's requirement of specific language worsens it by further tilting the scales against regulatory legislation.

The MQD is mainly focused on new agency actions that are economically or politically "significant," which might seem to limit its scope. But judicial opposition to change is not limited to the MQD. The Court has embedded antipathy to "new" agency actions—even those that might not be deemed so "significant"—through several other doctrinal moves.

III. EARLIER, SUBTLER MOVES TOWARDS AN ANTI-CHANGE REGIME: REQUIREMENTS THAT AGENCIES CONSIDER RELIANCE IN ARBITRARY AND CAPRICIOUS REVIEW

Under the foundational statute governing the federal administrative state, the Administrative Procedure Act, courts are to set aside agency action if they judge it to be "arbitrary, capricious, an abuse of discretion, or otherwise contrary to law."[40] While reviewing courts have long demanded reasoned and rational decisions from agencies, the Court also had long indicated its comfort with, and even expectation of, administrative policy flexibility and change.[41]

There were, of course, certain limits. In the enforcement setting, fair warning requirements rooted in due process precluded an agency from imposing

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[38] Deacon & Litman, *supra* note 13, at 1086.

[39] William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 285 (1988) ("[T]he market systematically yields too few laws that provide 'public goods' [including collective benefits and] too many laws that are 'rent-seeking'"); *see also id.* at 288–89 (legislation is "unlikely where there is little organized demand (distributed benefits), or where demand is met by strong opposition (because of concentrated costs)").

[40] Administrative Procedure Act § 7, 5 U.S.C. § 706(2)(A).

[41] *See infra* text accompanying notes 46–54 (discussing *State Farm*).

liability on an entity based on newly announced regulatory requirements.[42] The Court also previously suggested that agencies should not be able to act through adjudication (as opposed to rulemaking) if the result might create new liability for regulated entity actions taken in good-faith reliance on previous agency regulations, a similarly targeted notion of reliance.[43] Similarly, the Court indicated that Congress might itself create a safe harbor for regulated entities who might have relied on earlier versions of regulations.[44] One might also infer that the presumption against retroactive applications of statutes incorporates reliance concerns, though such a presumption generally can be readily rebutted by language or some other indication that Congress meant for a statute to apply retroactively.[45] But crucially, none of this precluded agencies from changing policy or instituting new rules that would apply prospectively and broadly.

For example, the iconic 1984 arbitrary and capricious review case, *Motor Vehicles Manufacturers Association v. State Farm*,[46] involved regulatory policy change. In 1981, the Reagan Administration repealed a 1977 Carter-era rule that would have required all automotive manufacturers to install passive restraints (automatic seatbelts or airbags) on new cars by automotive model year 1984. The Court established that rule repeals were subject to arbitrary and capricious review,[47] even though agency inaction might not require justification[48] or—though the Court did not specifically state this—might not even be subject to judicial review.[49] The Court noted that an agency's earlier position should be seen as an "informed judgment" on the best course of implementation, justifying arbitrary and capricious review of a rescission of that judgment.[50] The *State Farm* Court's analysis identified the still-leading factors that compose arbitrary and capricious review, including whether the agency has: 1) considered relevant alternatives, 2) considered relevant factors under a statute (and not irrelevant

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[42] *See e.g.,* Gen. Elec. Co. v. EPA, 53 F.3d 1324, 1329–30 (D.C. Cir. 1995).

[43] In the 1970s, the Court discussed reliance on previous agency regulations as a defense to an agency enforcement action in U.S. v. Pennsylvania Indus. Chem. Corp., 411 U.S. 655, 675 (1973), and (in dicta) good-faith reliance as a reason not to permit an agency to use adjudication to announce principles and impose new liability for past actions in NLRB v. Bell Aerospace Co., 416 U.S. 267, 295 (1974). Both cases were cited in Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 742 (1996), discussed *infra* text accompanying notes 56–59.

[44] *Cf.* Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 106 (2015) (noting that Congress often speaks directly to reliance interests by, for example, enacting safe harbor provisions in statutes for reliance on a range of agency documents or statements).

[45] *See e.g.,* INS v. St. Cyr*,* 533 U.S. 289, 321–23 (2001) (quoting Landgraf v. USI Film Prods.*,* 511 U.S. 244, 270 (1994)) (applying the presumption against retroactivity based upon "familiar considerations of fair notice, reasonable reliance, and settled expectations").

[46] 463 U.S. 29 (1983).

[47] *Id.* at 41.

[48] *Id.* at 30 ("An agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance").

[49] *Cf.* Heckler v. Chaney, 470 U.S. 821, 832–33 (1985) (explaining that agency failure to act is presumptively unreviewable); Norton v. S. Utah Wilderness All., 542 U.S. 55, 64–65 (2004) (holding that agency failure to act would not be reviewable "action" under the APA unless it was discrete and subject to mandatory requirements).

[50] *State Farm*, 463 U.S. at 37, 41–42 (quoting Atchison, T. & S.F.R. Co. v. Wichita Bd. Of Trade, 412 U.S. 800, 807–08 (1973)).

ones), and 3) articulated a rational connection between the facts it found and the choices it made.[51]

The agency's earlier rule requiring passive restraints did, to some extent, shape the Court's review of the rescission in *State Farm*. For example, the agency's requirement of airbags and automatic belts as the 1977 compliance options led the Court to unanimously set aside the 1981 agency action for failure to consider an airbags-only alternative.[52] Yet, the Court emphasized that an agency must be given "ample latitude" to adapt its rules and policies to changing circumstances,[53] and notably, *State Farm* did not mention either manufacturer or consumer reliance on the earlier rule as a consideration for the agency. To the contrary, Justice William Rehnquist, in dissent, famously suggested that the Court should have been even more generous with the agency's rescission decision, stating: "A change in administration . . . is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations [including public resistance and uncertainty], as long as the agency remains within the bounds established by Congress."[54]

Beginning in the 1990s, however, the Court began to embed more anti-change seeds in its arbitrary and capricious rulings. It did so by requiring agencies changing policy to expressly consider reliance.[55] The Court first flagged reliance as a general concern for agency policy changes in its 1996 decision, *Smiley v. Citibank (South Dakota), N.A.*[56] In a unanimous opinion authored by Justice Antonin Scalia, the Court upheld an agency interpretation under *Chevron* deference and rejected challenges based on the agency's interpretive change since it found no meaningful change in official position.[57] The Court reaffirmed that such interpretive change could be ordinary, but—in dicta—identified reliance as an additional factor for an agency to consider. The Court commented, "[C]hange is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency,"[58] but cautioned that a failure to "take account of legitimate reliance on prior interpretation" could render a decision arbitrary or capricious.[59]

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[51] *Id*. at 43–44, 48.
[52] *Id.* at 51. A five-member majority of the Court also found flawed the agency's conclusion that passive restraints were not worth adopting because of the possibility that people might bypass them, undercutting anticipated safety benefits. That majority said it could not conclude the finding was the "product of reasoned decisionmaking." *Id.* at 52.
[53] *Id.* at 42.
[54] *Id.* at 59.
[55] *See generally* Randy J. Kozel, *Precedent and Reliance,* 62 EMORY L.J. 1459, 1478–84 (2013) (discussing complexities inherent in judicial protection of reliance, including encouraging less-than-optimal levels of investment).
[56] 517 U.S. 735 (1996).
[57] *Id.* at 742–45.
[58] *Id.* at 742.
[59] *Id.*

In 2008, in *FCC v. Fox Television Stations, Inc.*,[60] the Court, in a majority opinion by Justice Scalia, rejected an arbitrary and capricious challenge[61] to the FCC's decision to abandon a safe broadcasting harbor for fleeting expletives and to treat them instead as indecent. Although the Court's majority stated that an agency has flexibility to change policy, it laid out a more detailed explanatory requirement for the agency, and again affirmed that an agency cannot change policy without considering reliance. The *Fox* Court stated that an agency changing its policy need not demonstrate that a new policy was "better" than the old, but it must display "awareness" that it was changing position and explain (if necessary) why it might disregard "facts and circumstances" associated with the prior policy.[62] The Court also stated that the agency's consideration must include "serious reliance interests" potentially engendered by the earlier policy.[63]

In contrast to other requirements for agencies, the reliance requirement has been developed as free-floating judicial common law not specifically rooted in other legal sources or doctrines. The Court has not mentioned fair warning or fair notice concerns, for example. With respect to other relevant factors an agency must consider, the Court generally has felt compelled to anchor its analysis in the agency's underlying authorizing statute. For example, in *Michigan v. EPA*,[64] the Court set aside an EPA decision as arbitrary and capricious because the agency failed to consider cost in an initial decision that mercury emissions from power plants required regulation.[65] But it did so only after exhaustively explaining that cost should be understood as an implicitly required factor by the statute's terms "appropriate and necessary."[66] Although the Court has engaged in no such analysis for reliance, courts nonetheless have set aside new agency policy decisions for failure to consider reliance.[67]

The Court has also been unclear about just which sorts of reliance interests an agency must consider, creating additional opportunities for the courts to nitpick agency policy changes. The cases discussed above implicate economic concerns, and the Court repeatedly mentioned the "significant [economic] reliance interest involved" in setting aside, as inadequately reasoned, an agency's Fair Labor Standards Act regulation interpreting "salesman" to cover service advisors at auto dealerships in *Encino Motorcars v. Navarro* in

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[60] FCC v. Fox Television Stations, 556 U.S. 502, 514–16 (2009).

[61] 5 U.S.C. § 706(2)(A) (Administrative Procedure Act provision requiring a court to set aside an agency decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); *see* Motor Vehicle Mfrs. Ass'n v. State Farm, 463 U.S. 37, 52 (1984).

[62] *Fox Television Stations,* 556 U.S. at 514–16.

[63] *Id.* at 515; *see also id.* at 536 (Kennedy, J., concurring) ("Reliance interests in the prior policy may also have weight in the analysis."); Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 106 (2015) (reaffirming position that agency failure to consider reliance in an interpretive rule might be arbitrary and capricious).

[64] 576 U.S. 743 (2015).

[65] *See id*. at 760.

[66] *Id.* at 752–53.

[67] *See, e.g., infra* notes 69–71 and accompanying text (discussing Department of Homeland Security v. Regents, 591 U.S. 1 (2020)); BNSF Ry. v. Fed. R.R. Admin., 105 F.4th 691, 701 (5th Cir. 2024) (setting aside agency decision in part because the "FRA obviously failed to" consider reliance).

2016.[68] But in 2020, in *Department of Homeland Security v. Regents of the University of California*,[69] the Court set aside as arbitrary and capricious the Department of Homeland Security's recission of the Deferred Action for Childhood Arrivals, or "Dreamers" program, for failure to consider reliance interests in detail.[70] The Court expanded the list of plausible reliance interests beyond purely economic interests—though without ranking them, evaluating them, or anchoring them in the underlying statute—to include personal decisions to take jobs, marry, purchase houses, or seek education, as well as money invested in employer training and governmental tax revenue.[71] Such a list may be appealing as broadening legitimate reliance concerns beyond the purely economic. Irrespective of its potential appeal, however, courts have developed this requirement in an ad hoc, unpredictable fashion.

Thus, in addition to offering an extensive explanation of why it sees the world differently, an agency seeking to change policy must address a difficult-to-anticipate set of reliance interests. These requirements represent a subtle new set of judicial roadblocks to agency policy changes.

IV. CHANGE ITSELF AS A REASON TO REFUSE DEFERENCE TO AGENCY INTERPRETATIONS ACROSS THE BOARD

Prior to 2019, two of the three general doctrines governing judicial review of agency interpretations of law incorporated considerable scope for agency flexibility and policy change. The doctrine of *Auer*[72] or *Seminole Rock*[73] deference to an agency's interpretation of its own regulation left space for an agency to change its position. The *Chevron* doctrine, requiring presumptive deference to certain categories of agency interpretations of statutes, also supported flexible interpretation. Only the framework of the 1944 decision *Skidmore v. Swift*[74] disfavored change by suggesting that other agency statutory interpretations would be more worthy of deference if they were consistently held over time.[75] But in 2019, in *Kisor v. Wilkie*,[76] the Court significantly modified *Auer*, and of course in the 2024 decision of *Loper Bright Enterprises v. Raimondo*,[77] the Court overruled *Chevron* and reinstated the judiciary as the primary decider of legal questions about an agency's authority.[78] *Loper Bright*

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[68] *See* Encino Motorcars v. Navarro, 579 U.S. 211, 222 (2016).
[69] 591 U.S. 1 (2020).
[70] *See id.* at 33–34.
[71] *See id.* at 31–32 (describing these various concerns as "noteworthy" and supporting the analysis of alternatives). For a thorough discussion of the interests motivating "reliance" analysis in these cases, including an argument to limit them to certain individual, rather than state government interests, *see* Haiyun Damon-Feng, *Administrative Reliance,* 73 DUKE L.J. 1743, 1812–16 (2024).
[72] Auer v. Robbins, 519 U.S. 452 (1997).
[73] Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).
[74] 323 U.S. 134 (1944).
[75] *See id.* at 140.
[76] 588 U.S. 558 (2019).
[77] 144 S. Ct. 2244 (2024).
[78] *See id.* at 2273.

also modified *Skidmore* deference to strengthen its anti-change tilt.[79] Thus, change in agency interpretations is now judicially disfavored across the board.

A. Skidmore *and* Chevron *Prior to* Loper Bright

Before *Chevron*, the Court had long applied the so-called *Skidmore* framework to decide whether deference to an agency interpretation might be warranted.[80] In *Skidmore,* the Court, in addressing a private employment dispute over pay, followed an agency interpretation of a statute announced in an agency "bulletin."[81] The open-ended *Skidmore* framework largely left the deference question to a judge's discretion, though it expressed the notion that some agency interpretations might be especially deserving, and thus a worthy source of guidance to which a court might resort (or not).[82] The *Skidmore* framework afforded "respect" to the agency's interpretation of the law based on 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."[83] The preference for consistency, of course, disfavored change. Though the *Skidmore* Court did not explain why it chose consistency as a criterion, conceivably a consistently-held interpretation might have been judged relatively well-considered at the start—or perhaps frequent interpretive changes might be deemed disruptive.

By contrast, under the stronger *Chevron* deference framework (in which courts deferred to reasonable agency interpretations of ambiguous authorizing statutes), change was no bar to deference. In *Chevron*, [84] the Court expressly rejected the notion that change would delegitimize an agency's legal interpretation, deferring to the agency's interpretation of a Clean Air Act term even though the agency had changed its interpretation over time. The Court explained: "An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis."[85] The Court reaffirmed this position—and the agency's legitimate need to reconsider a policy's wisdom via reinterpretation of its authority—in *National Cable & Telecommunications Ass'n v. Brand X*, where it stated that change in an agency interpretation, even if contrary to a Court of Appeals ruling, would not render the new agency interpretation ineligible for *Chevron* deference.[86] The *Brand X* Court reaffirmed the reasons given in Justice Rehnquist's *State Farm* dissent, commenting that, at most, unexplained inconsistency might prompt a court to find a changed interpretation arbitrary and capricious.[87]

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[79] *See id.* at 2272–73.
[80] 323 U.S. 134 (1944); *see, e.g.*, *Loper Bright,* 144 S. Ct. at 2259–62.
[81] *See* Skidmore v. Swift, 323 U.S. 134, 138 (1944).
[82] *See id.* at 140 (agency interpretations might constitute a body of "experience and informed judgment to which courts and litigants may properly resort for guidance").
[83] *Id*.
[84] Chevron v. Nat. Res. Def. Council*,* 467 U.S. 837 (1984).
[85] *Id.* at 863–64.
[86] Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*,* 545 U.S. 967, 981–82 (2005) (also quoting "wisdom" language from *Chevron*).
[87] *See id.* at 982.

B. Chevron*'s Abandonment in* Loper Bright *and* Skidmore 2.0*'s Deepened Opposition to Change*

By the time *Loper Bright* was argued in 2024, members of the Court had expressed significant concern regarding change in an agency's interpretation of its own authorizing statute. In a dissent to a 2022 certiorari denial in *Buffington v. McDonough*,[88] Justice Neil Gorsuch argued that *Chevron* invited executive officials to interpret the law aggressively—and then, during a change in presidential administration, emboldened new officials to "proceed in the opposite direction with equal zeal."[89] Gorsuch suggested that *Chevron* facilitated so much change that "individuals can never be sure of their legal rights and duties," potentially leaving them "caught in the whipsaw" of rule changes.[90] Similarly, at the *Loper Bright* oral argument, Justice Brett Kavanaugh expressed concern for the prospect that *Chevron* deference might still apply when the "agency changes position every four years,"[91] a sharp contrast to Justice Rehnquist's endorsement of policy change initiated by new presidential administrations in *State Farm*.[92]

In *Loper Bright,* the Court overruled *Chevron* and returned to *Skidmore* deference for all agency statutory interpretations—but in a way that significantly strengthened *Skidmore*'s anti-change tilt. *Skidmore* already incorporated a preference for consistent agency interpretations of statutes so that the announcement of a changed position would apparently be less deserving of deference. The *Loper Bright* Court endorsed this principle in what we might call *Skidmore 2.0*.[93]

Loper Bright strengthened *Skidmore's* obstacles to change in two ways. First, the Court suggested that respect should be denied not only to changed agency interpretations, but to *new* ones as well. Citing pre-New Deal cases, the Court characterized its historical approach as respectful to agency views when an agency interpretation was not just consistent but was issued "roughly contemporaneously" with a statute's enactment.[94] It emphasized that in *Skidmore 2.0*, courts should find especially useful "interpretations issued contemporaneously . . . and which have remained consistent over time."[95]

The Court did not explain its rationale for this additional limit on interpretations. Conceivably, privileging interpretations contemporaneous with enactment might recognize that an agency official had been involved in drafting

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[88] 143 S. Ct. 14 (2022).
[89] *Id.* at 19 (Gorsuch, J., dissenting from denial of certiorari); *see also* Baldwin v. United States, 140 S. Ct. 690, 694 (2020) (Thomas, J., dissenting from denial of certiorari) (arguing that *Chevron* should be reconsidered and noting that it differed from historical practice by requiring deference even when an agency has changed its position).
[90] *Buffington,* 143 S. Ct. at 21 (Gorsuch, J., dissenting from denial of certiorari).
[91] Transcript of Oral Argument at 40, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024) (No. 22-451).
[92] *See supra* notes 53–54 and accompanying text; *see generally* Deacon & Litman, *supra* note 13 (discussing Court's attitudes towards presidential control of agency policy).
[93] *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2262 (2024).
[94] *See id*. at 2258. The Court cited three cases for this proposition, all decided in 1920 or earlier, even though *Skidmore* itself was not decided until 1944.
[95] *Id*. at 2244.

or negotiating the statute, and thus might have particular knowledge of legislative context or congressional goals. Or, perhaps it reflects the possibility that Congress has not had an opportunity to respond to later interpretations, and thus cannot be assumed to have acquiesced. But whatever the justification, the Court's decision means less respect for a later-in-time agency interpretation. Such interpretations can, of course, be important to addressing new problems, new solutions, and new implementation issues that have emerged as a statute has been interpreted. For example, after the Court ruled in 2007 in *Massachusetts v. EPA* that the core 1970 Clean Air Act term "air pollutant" clearly includes greenhouse gases,[96] the EPA confronted interpretive difficulties from the fact that greenhouse gases are often emitted in more "vast quantities" than other air pollutants regulated under the Clean Air Act.[97] Any statute may present a host of issues that Congress could not or did not specifically address.

Second, the *Loper Bright* Court set forth a statutory interpretation approach, at least in the setting of agency actions, that seems to leave little room for change over time, even when a statute is phrased broadly. The Court stated, "[E]very statute's meaning is fixed at the time of enactment," expressly rejecting the notion that statutes could have gaps or ambiguities, which in past opinions has warranted deference to agency interpretations.[98] Over a dissent by Justice Elena Kagan, the majority denied that "Congress's instructions" could "run out" at a particular point in time[99] and insisted that every statute must have a "single, best meaning" that simply awaits judicial detection.[100] This focus on the time of enactment paves the way for future cases to adopt a particularly time-bound approach to statutes, whether it is by limiting application of a statute to circumstances mentioned in dictionaries at the time, or to those specifically contemplated by members of the enacting Congress. Consider, for example, the use of the term "drug" in the Federal Food, Drug, and Cosmetic Act of 1938, defined to include "articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease . . . [and those] intended to affect the structure or any function of the body . . . ."[101] Antihistamines for human use were not distributed widely until the 1940s; immunotherapy treatments for cancer were developed far more recently.[102] The statute, aimed at protecting the public from unsafe and ineffective drugs, was clearly meant to encompass such substances

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[96] Massachusetts v. EPA, 549 U.S. 497, 532 (2007).

[97] *See* Util. Air Regul. Grp. v. EPA*,* 573 U.S. 302, 320 (2014). The Court characterized greenhouse gases as "atypical pollutants." *Id.* It disagreed with the EPA's proposed interpretive solution for the difficulty in favor of its own in one of the earliest antecedent rulings for the major questions doctrine. *Id.* at 324 (stating that, absent clear language, it would be skeptical of EPA's interpretation as a discovery of an "unheralded power" in a "long-extant statute").

[98] *Loper Bright,* 144 S. Ct. at 2266 (quoting Wis. Cent. Ltd. v. United States, 585 U.S. 274, 284 (2018)).

[99] *Id.* at 2266.

[100] *Id.* (responding to Justice Kagan's dissent in *Loper Bright*).

[101] 21 U.S.C. § 321(g)(1)(B)–(C).

[102] *See* M. B. Emanuel, *Histamine and the Antiallergic Antihistamines: A History of Their Discoveries,* 29 CLIN. & EXP. ALLERGY, suppl. 3, 1, 8 (1999) ("Antihistamines became widely used in the mid- to late[]1940s"); Paula Dobosz & Tomasz Dzieciątkowski, *The Intriguing History of Cancer Immunotherapy*, FRONTIERS OF IMMUNOLOGY, at 3 (2019) (building on sporadic earlier efforts, the field of immunotherapy "re-emerged" in the 1980s).

even if Congress did not, or could not, specifically anticipate them in 1938. The Court's approach is in tension with Congress's deliberate selection of capacious words in regulatory statutes.

In contrast, in other settings with no agency interpretation on offer, the Court has acknowledged that a statute could be properly interpreted to encompass situations not specifically anticipated at the time of enactment. For example, in the 2018 opinion quoted in *Loper Bright* for the proposition that a statute's meaning is "fixed" at enactment, *Wisconsin Central Ltd. v. United States*,[103] the Court held that the term "money remuneration" did not include stock options for purposes of the Railroad Retirement Tax Act of 1937.[104] But it also acknowledged in dicta that "electronic transfers of paychecks," although unknown in 1937, would still qualify as "money remuneration."[105] Justice Gorsuch wrote for the majority that although "every statute's *meaning* is fixed at the time of enactment, new *applications* may arise in light of changes in the world."[106] Whether or not the concept of statutory "meaning" can be convincingly distinguished from "applications,"[107] the *Wisconsin Central* opinion clearly contemplated that a general term can be appropriately interpreted over time to apply to circumstances the drafters did not specifically anticipate. Similarly, in the 2018 decision *Bostock v. Clayton County*,[108] a majority of the Court held that the term "sex" in the Civil Rights Act of 1964's employment discrimination provisions was properly interpreted to encompass sexual orientation and transgender status, since such discrimination is necessarily "based on sex,"[109] although the majority acknowledged that these particular outcomes "might not have [been] anticipated" at the time.[110]

Perhaps the *Loper Bright* Court simply forgot to mention that broad statutory terms implemented by agencies could properly apply to circumstances not specifically foreseen at the time of enactment. But it is also conceivable that the Court is laying the groundwork to extend some aspects of the MQD to a much larger class of cases, not just those raising "major" issues. Where a statute authorizes an agency to act, the Court could seek to limit a statute's scope of authorization just to circumstances specifically addressed in the text or specifically intended at the time of enactment. While the issue is beyond the scope of this essay, this sort of approach is in tension with textualism's commitments, since it may require looking beyond generally phrased statutory

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[103] 585 U.S. 274 (2018); *see Loper Bright,* 144 S. Ct. at 2266 ("single, best meaning").
[104] *See Wis. Cent.*, 585 U.S. at 284–85.
[105] *See id.* at 284.
[106] *Id.* (emphasis in original).
[107] *See, e.g.*, Levin, *supra* note 30, at 937 ("Courts must often decide whether a broad enabling statute applies to a particular agency action, and that inquiry can be difficult because the statute is, *in that respect,* ambiguous") (emphasis in original).
[108] 590 U.S. 644 (2020).
[109] *See id.* at 660 ("based on sex"); *id.* at 682–83.
[110] *Id.* at 653 (acknowledging that Act's drafters likely "weren't thinking about many of the Act's consequences that have become apparent over the years" but nonetheless finding sexual orientation and transgender status covered by the text).

text to specific legislative intent, legislative history, or both.[111] And the Court might apply such an approach even to statutes enacted long before *Loper Bright* was decided, irrespective of whether Congress could have anticipated this interpretive move. As with the MQD, such an interpretive approach could force Congress to legislate again to achieve a desired and appropriate policy response to new problems.

C. Restricting Auer *Deference for Changed Agency Interpretations*

The Court's shift against change also has extended to its treatment of an agency interpretation of its own regulation. In the 1997 decision *Auer v. Robbins*, the Court reaffirmed a longstanding doctrine announced in a 1945 case, *Bowles v. Seminole Rock*, that an agency's interpretation of its own rules should be accepted as "controlling unless 'plainly erroneous or inconsistent with the regulation.'"[112] In *Auer* and in a 2007 decision, *Long Island Care at Home Ltd. v. Coke*, the Court held that *Auer* deference was available for interpretations both in internal memoranda and amicus briefs as long as they created no "unfair surprise" and were not post hoc rationalizations.[113] In *Long Island Care*, the Court specifically held that a change in an agency's interpretation would be no reason to deny deference,[114] implying that generalized reliance on previous positions would not bar an agency from adopting a new interpretation. The Court did not amplify the meaning of the sort of "unfair surprise" that would be a reason to deny deference, but did suggest that the use of notice and comment rulemaking to change a policy would be sufficient to eliminate any unfairness.[115] Again, the Court's concern seemed limited to the case in which a party faced liability based on a new agency interpretation, something akin to a lack of fair warning required by due process.[116]

But in *Kisor v. Wilkie*,[117] the Court more clearly ruled a far larger class of changed interpretations unworthy of deference. *Kisor* reaffirmed that an agency interpretation of its rule would not warrant *Auer* deference if it created "unfair surprise," but equated that surprise to the "disruption of expectations [that] may occur when an agency substitutes one view of a rule for another."[118]

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[111] *See* Mendelson, *supra* note 32, at 74 (noting textualists' strong opposition to such approaches).

[112] *See* Auer v. Robbins, 519 U.S. 452, 461 (1997) (quoting Robertson v. Methow Valley Citizens Council*,* 490 U.S. 332, 359 (1989)) (cleaned up); *see also* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945) (same).

[113] *See Auer*, 519 U.S. at 461 (deferring to interpretation in amicus briefs that was not a post hoc rationalization); Long Island Care at Home Ltd. v. Coke, 551 U.S. 158, 170–71 (2007) (deferring to agency interpretation set forth in advisory memorandum and noting the interpretation created no unfair surprise); *see also Auer*, 519 U.S. at 461 (a deferral to an interpretation in amicus briefs, not a post hoc rationalization).

[114] *Long Island Care,* 551 U.S. at 171 (deferring to interpretation with which the agency had "struggled" for years).

[115] *See id.*

[116] *See, e.g.*, Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155–56 (2012) (analogizing potential "massive liability" for pre-interpretation conduct to a lack of fair warning).

[117] 588 U.S. 558 (2019).

[118] *Id.* at 2418.

The Court added that such disqualifying "upending of reliance" might happen—even if an agency had not previously plowed the interpretive ground—if the agency, through its interpretation, sought to address "longstanding conduct that the agency had never before addressed."[119] If the Court follows through and applies this language as written, it would seem to cover most newly announced agency interpretations of rules, making them ineligible for deference.

Moreover, if this expansive notion of "upending reliance" is extended to other areas in which the Court has decided reliance is relevant, such as in arbitrary and capricious review or review of changed agency interpretations of statutes, it would further impede agency efforts to respond to new problems, technologies, or democratic policy preferences.

V. ANTI-CHANGE STATUTORY INTERPRETATION RULES THAT IMPEDE EFFECTIVE REGULATORY LEGISLATION

Finally, the Court seems to be developing interpretive approaches that would limit the scope and effectiveness of regulatory legislation. A handful of anti-change substantive interpretive canons are already in use, most notably the so-called common law canon, stating that "statutes in derogation of the common law are to be strictly construed."[120] The canon includes the notion that enacted words with a settled common law meaning take that "common law soil" along with them.[121] But statutes, of course, are often meant to respond to inadequacies of common law.[122] The common-law canon can thus blunt a statute's impact. For example, in *United States v. Bestfoods*,[123] the Court narrowly interpreted the Comprehensive Environment, Response, Compensation, and Liability Act (CERCLA) in light of "general principle[s]" of corporate law, which it characterized as common law.[124] CERCLA imposes strict, joint and several, and retroactive liability for hazardous waste cleanup costs on those responsible for contamination, including facility "operators."[125] It was passed in response to environmental disasters, especially abandoned hazardous waste sites, that were not being adequately addressed by common law remedies.[126] Guided by what it

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[119] *Id*.

[120] *See, e.g.*, ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 318–21 (2004) (discussing common law canon and related canon regarding the meaning of undefined terms).

[121] *Id.*

[122] *Cf.* Babbitt v. Sweet Home Chapter, 515 U.S. 687, 697 n.10 (1995) (arguing that canon should not apply because statute included a definition of the relevant term).

[123] 524 U.S. 51 (1998).

[124] *See id.* at 61.

[125] *See* 42 U.S.C. § 9607 (liability provisions of CERCLA).

[126] Congress enacted the statute after environmental disasters at hazardous waste sites across the country. That included Love Canal in New York, which concerned the consequences of a 16-acre chemical waste disposal site that had been capped in the 1950s. The land was sold to the city, which built an elementary school on top; residences were also built nearby. The cap broke in the mid-1970s, causing widespread chemical contamination throughout the groundwater with carcinogens, mutagens, and fetotoxic and embryotoxic chemicals. Love Canal was evacuated and declared a national disaster in 1978. *See generally* U.S. GOV'T ACCOUNTABILITY OFF., CED-

characterized as common-law restrictions on "piercing the corporate veil" to impose legal responsibility on corporate shareholders, the Court nonetheless interpreted the statute to almost never impose liability on a corporate shareholder or parent company, even one with complete ownership of a polluting company, and thus the ability to control its operation and environmental impacts.[127] Such an interpretive approach can be understood as undercutting a statute's effectiveness, impeding Congress from making meaningful change.

Two of the doctrinal changes discussed above can be understood as adding to the Court's arsenal of anti-change interpretive rules. Besides serving as a roadblock to agency assertions of authority, the MQD hinders Congress from using clear, but broad, language to create regulatory programs that can effectively address problems arising over time. Meanwhile, the *Loper Bright* Court's dicta that a statute's meaning is "fixed at the time of enactment" could hamper the application of many broadly-phrased statutes to later-arising issues, even when no "major questions" are implicated.

Finally, the Court more recently alluded to a nascent "private property" interpretive rule in the 2023 decision of *Sackett v. Environmental Protection Agency.*[128] In that case, a majority of the Court narrowly interpreted the scope of the central federal water pollution statute, the Clean Water Act. The Court held that the Clean Water Act's jurisdictional "waters of the United States" language did not cover wetlands other than those with a continuous surface connection to traditionally navigable waters and their tributaries.[129] It further stated that Congress would have to "enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property."[130] While the Court's reference to the balance of federal and state power seemed to invoke its late-twentieth-century federalism canons,[131] an extra-clear statement rule to protect private property would be wholly new.[132] Virtually all federal regulation—economic,

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81-57, REPORT BY THE COMPTROLLER GENERAL OF THE UNITED STATES: HAZARDOUS WASTE SITES POSE INVESTIGATION, EVALUATION, SCIENTIFIC, AND LEGAL PROBLEMS, at 52–53 (1981) (describing the numerous hazardous waste sites as "ticking time bombs" and summarizing Love Canal events). Commentary at the time explained some of the limits on common law remedies. *See, e.g.*, William R. Ginsberg & Lois Weiss, *Common Law Liability for Toxic Torts: A Phantom Remedy,* 9 HOFSTRA L. REV. 859, 865 (1981) ("victims of hazardous waste disposal will be poorly served by the common law and the judicial process . . . federal legislation creating an administrative remedy should be enacted").

[127] *See Bestfoods*, 524 U.S. at 72 (finding parent company liability as "operator" to be appropriate only if parent's agent acts "alone" and actions are "eccentric under accepted norms of parental oversight").

[128] 598 U.S. 651 (2023); *see id.* at 679.

[129] *Id.* at 678–79 (wetlands must have a "continuous surface connection" with "waters of the United States," meaning a relatively permanent body of water connected to traditional interstate navigable waters).

[130] *Id.* at 679.

[131] *See* Mendelson, *supra* note 32, at 119–20 (summarizing twentieth-century rise of federalism canons).

[132] *Sackett* quoted dicta in U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 590 U.S. 604, 621–22 (2020), but that case concerned whether the U.S. Forest Service could authorize a pipeline under the Appalachian Trail (roughly speaking) or whether, instead, the Appalachian Trail was

environmental, safety, or health—affects private property in the sense that it aims to improve some parties' well-being or wealth, and changes the way others spend their resources or use their assets. Thus, such an interpretive rule, if entrenched, could limit the application of a wide array of federal regulatory statutes, old and new, unless Congress is able to see into a crystal ball and address individual issues in a highly specific fashion. Ironically, given this seeding of a new anti-regulatory change canon, in adopting a narrow application of the Clean Water Act, the Court fractured longstanding practice by overruling the position of all eight post-enactment presidential administrations on the Clean Water Act's coverage.[133]

VI. CONCLUSION

By requiring not just clear, but specific, statutory authorization language, the Court's major questions doctrine has unquestionably made it harder both for Congress and agencies to respond to significant modern problems. But in a far less visible way, numerous other doctrinal changes embody the Court's efforts to restrict the scope of modern government. The Court is instituting large and small doctrinal obstacles to legislative regimes that were designed to respond to entire categories of modern challenges such as environmental pollution, occupational health, product safety, and financial fraud. At the same time, the Court is also hampering agencies—to which Congress has entrusted the implementation of particular programs—from responding to new technical challenges and to evolving democratic preferences. The Court's lack of democratic accountability, as well as policy and technical expertise, make it a poor institution to impose these barriers. Nonetheless, through ongoing doctrinal changes, the Court is exercising its power to send both Congress and the agencies, time and time again, back to the drawing board, with damaging economic and social welfare consequences.

National Park Service land, in which case, by statute, no pipeline could be built there. Private property did not seem to be implicated. *Sackett*, 598 U.S. at 679; *see also* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758, 764 (2021) (also quoting *Cowpasture*, though with reference to intrusion "into an area that is the particular domain of state law").

[133] *See Sackett*, 598 U.S. at 720 (Kavanaugh, J., concurring).