Society for Mining, Metallurgy & Exploration

2025 Minnesota Conference

Reigning in Federal Agency Action In Regulatory Programs

Do Agencies Have the Statutory Authority to Act?

April 7-9, 2025

Virginia, MN

Karen D. Olson (Minneapolis, MN)
John L. Watson (Denver, CO)
Spencer Fane LLP

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Too Much to Cover Too Little Time

- **No surprise, I don’t have the time to go into the detail I’d like.**
- **Thus, the slides are presented in two phases:**
- ***Phase 1:***
  - **The ones from which I’ll talk**
  - **So, the presentation will be shorter but will hit the main points.**
- ***Phase 2:***
  - **More slides at the end with detail you may want to read.**

Loper Bright Enterprises

- The jurisprudential earthquake occurred less than a year ago with the Supreme Court's **June 28, 2024**, decision in ***Loper Bright Enterprises v. Raimondo***.
- There, the SCOTUS overturned 40 years of precedent established in the ***Chevron case.***
- ***Chevron*** had established a two-step test that would be used in hundreds of cases over the last four decades
- Whereby the courts were authorized to
- **Defer to agency expertise when interpreting regulations.**

First, What Did Chevron Do?

- Forty years ago, *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984).
- The U.S. Supreme Court **required courts to defer** to "permissible" agency interpretations of the statutes the agencies administer.
- **Even when a reviewing court reads the statute differently.**

What Did Chevron Do?

- The *Chevron* doctrine required courts to use a two-step framework to interpret statutes administered by federal agencies.
- Initially, *Chevron* said that a reviewing court must determine that a case satisfies the various preconditions set by the Supreme Court for *Chevron* to apply.
- If *Chevron* is triggered, the two-step dance commences.

Step One

- A reviewing court must first assess “whether Congress has directly spoken to the precise question at issue.”
- If, and only if, congressional intent **IN THE STATUTE** is “clear,”
  - That is the end of the inquiry.
- **If the authority has clearly been provided by Congress in the statute,**
- That’s great and **the court doesn’t go any further.**

Step Two

- If the court determines that “the statute is **silent or ambiguous** with respect to the specific issue” at hand,
- The court must then **defer to the agency’s interpretation**
- **If the agency’s interpretation**
- “is based on a permissible construction of the statute.”

That's the Two-Step Protocol Federal Courts Used for Four Decades

Then Loper Happened

Loper Bright Enterprises v. Raimondo

Chevron is Wiped Off the Books

- The district and appellate courts in each of the two cases before the Supreme Court in ***Loper Bright*** applied the ***Chevron*** framework and
- The lower courts upheld the agency's interpretation of a regulation promulgated by the National Marine Fisheries Service (NMFS).
- Then on the bases of those lower court opinions,
- **The Supreme Court in *Loper Bright* overturned 40 years of precedent and**
- **Wiped *Chevron* off the books.**

Setting the Stage
Marine Fisheries Act and the Administrative Procedures Act

- In *Loper Bright Enterprises v. Raimondo*, the Supreme Court granted *certiorari* in two cases brought by **the owners of fishing vessels**
- *They challenged a regulation* issued by the National Marine Fisheries Service (NMFS) pursuant to the **Magnuson-Stevens Act** (MSA), 16 U.S.C.§1801 *et seq*. (MSA).
- Importantly, as it is central to the Supreme Court's decision,
- The **Magnuson-Stevens Act incorporates the Administrative Procedures Act** (APA), 5 U.S.C. §551 *et seq.*

More Details Re: Two Cases Under Review

- ***If I have the time, I'll add some detail re: the two cases in the district and appellate courts.***
  - ***Slides with details are located at the end of this PPT***
- ***But, in light of the time constraints, I'll get to the SCOTUS decision.***

Deference re: Facts – That's Okay. Deference re: the Law – Not So Much.

- Chief Justice John Roberts began the majority opinion in *Loper* by quoting Alexander Hamilton in the Federalist No. 78 (at 525) stating that
- The framers envisioned that the **final "interpretation of the laws"** would be "the proper and peculiar **province of the courts**."
- And citing Chief Justice John Marshall in *Marbury v. Madison,*
- **"It is emphatically the province and duty of the judicial department to say what the law is."** 1 Cranch 137, 177 (1803).

Interpretation of the Law is One Thing

–

The Courts Control

Facts? That's Different

Historically, deference to an agency's *determinations of fact*

were binding on the courts.

However, a court-imposed limitation required that there was "evidence to support the findings." *See e.g., St. Joseph Stock Yards Co. v. United States,* 298 U.S. 38, 51 (1936).

And the *Loper Bright* majority in agreed.

Facts?

That's different

- Congress could therefore "appoint[] an agent to act within that sphere of legislative authority" and
- Endow the agent with **power to make findings of fact which are conclusive**,
  - Provided the requirements of **due process** are met,
    - Such as providing a **fair hearing** and
    - **Acting upon evidence**
      - **Rather than acting arbitrarily**.

The Supreme Court Did Not Extend Similar Deference To Agency Resolutions of Questions of Law

The SCOTUS instead made it clear, repeatedly, that

The interpretation of the meaning of statutes,

As applied to justiciable controversies,

Is "exclusively a judicial function."

The 1946 Administrative Procedure Act

The discussion of the Administrative Procedures Act

Is central to the SCOTUS decision in *Loper Bright*

But we don't’ have time to delve into that.

The 1946 Administrative Procedure Act
A Check Upon Administrator's Zeal

For details re: the SCOTUS consideration of the APA?

See the slides at the end of this PPT

Justice Roberts Continued

Referring to Chevron As Creating "A Dizzying Breakdance"

- ***Four Decades of Rulings Made Chevron Unworkable***
- Citing multiple lower court cases, scholarly articles, and Supreme Court decisions,
- Chief Justice Roberts says that multiple attempts to "clarify" the *Chevron* doctrine have **transformed the "original two-step into a dizzying breakdance."**
- Thus, *Chevron* has become" an impediment, rather than an aid, to accomplishing the basic judicial task of 'saying what the law is.'"

To Drive the Point Home

"Chevron's presumption is misguided because agencies have no special competence in resolving statutory ambiguities. "Courts do."

Justice Elena Kagan Was Highly Critical Of That Conclusion

- Basically, Justice Kagan embraced what dozens of courts have historically held.
- She read a summary of her dissent from the bench stating, in part, that:

Agencies are more likely than judges

to have the technical and scientific expertise

to make decisions about ambiguities and gaps in statutes.

Implications?

Implications?

1. **Federal agencies' future rulemaking authority has been curtailed.**
   - No longer will they be able to interpret statutes that appear to be either "silent" or "ambiguous" on any particular issue and rely on the *Chevron* two-step analysis that essentially "required" a court to defer to the agency's expertise.
2. **As for earlier decisions related to agency rulemaking, Chief Justice Roberts confirms their viability:**
   - "[W]e do not call into question prior cases that relied on the *Chevron* framework.
   - "The holdings of those cases that specific agency actions are lawful – including the Clean Air Act holding of *Chevron* itself – are still subject to statutory *stare decisis* despite our change in interpretive methodology.
   - In other words, if agency actions in earlier cases have run the *stare decisis* gauntlet, those decisions are not being overturned.

Implications?

Going forward, however,

Courts will interpret the applicable law and determine if Congress statutorily authorized the agency actions.

Deference to the agency's interpretation is

***no longer required*.**

Implications?

3. **Burden on the courts? There will undoubtedly be many more challenges to future agency rulemaking and enforcement actions.**

- Floodgate-like volume?
  - **Unknown.**
- Forum shopping to find what some may perceive as a district court judge (or an appellate panel) “more sympathetic” to the challenge?
  - **No doubt.**

Implications?

4. Will judges be allowed to "consider" the agency's interpretation of what Congress has authorized?

- **Yes.**

- Chief Justice Roberts' opinion does not eliminate a court's ability to "respect" and "consider" an agency's expertise
  - And the agency's interpretation of its statutory authority in the context of promulgating regulations and enforcing those rules.
- **Respect and consideration?**
  - **Yes.**
- **Required deference?**
  - **Not anymore.**

Implications?

5. **How dramatic is the opinion?**

If Justice Neil Gorsuch is correct, **not all that significant**.

In his 33-page concurring opinion, he said that although the Supreme Court

"places a tombstone on *Chevron* no one can miss,"

The Supreme Court actually "returns judges to interpretative rules

[concerning the statutory authority granted agencies by Congress]

That have guided federal courts since the Nation's founding.

And Since the June 2024 *Loper Bright* Decision?

San Francisco v. EPA

Authority Under the Clean Water Act

- In *San Francisco v. EPA*, the U.S. Supreme Court (in another 5:4 ruling) overturned a Ninth Circuit interpretation of the Clean Water Act ("CWA").
- Link: https://www.supremecourt.gov/opinions/24pdf/23-753_f2bh.pdf

  - ***Detailed slides at the end***

Ohio Telecom Association, et al v. Federal Communications Commission (FCC)

- **Net Neutrality Rules Not Authorized**
- The FCC's net neutrality rules sought to regulate broadband internet service providers like telecommunications providers under Title II of the Communications Act of 1934.
- On January 2, 2025, in *Ohio Telecom Association, et al v. Federal Communications Commission*
- A three-judge panel of the Sixth Circuit Court of Appeals ruled that the Federal Communication Commission's (FCC) net neutrality rules
- Were incompatible with the Communications Act of 1934
- Link: https://www.opn.ca6.uscourts.gov/opinions.pdf/25a0002p-06.pdf

However, Challenges Do Not Always Invalidate Regulations

Challenges Do Not Always Invalidate Regulations

- In ***Cogdell v. Reliance Standard Life Ins. Co.*** (E.D. Va.), the district court rejected a facial challenge to a Department of Labor (DOL) regulation considering a claim administratively exhausted if no appeal decision had been rendered by the plan administrator within 45 days.

- The court noted that the statute – ERISA – grants the DOL **exceedingly broad power to prescribe regulations,**

- Including setting limits for administrative claim exhaustion.

- **The court found *Loper Bright Enterprises* did *not* apply.**
  - Link: https://www.yourerisawatch.com/wp-content/uploads/sites/856/2024/09/Cogdell-v.-Reliance-Standard-Life-Ins.-Co.pdf

Challenges Do Not Always Invalidate Regulations

For a first-hand examination of the *Cogdell* case, read the article by Damon Miller, **the attorney who represented the Plaintiff,** Ms. Cogdell, in the case.

Link: https://www.benglasslaw.com/blog/big-erisa-win-loper-bright-decisions-impact-on-erisa-disability-case/

Before Loper?

Even before the 2024 Supreme Court's decision in *Loper Bright Enterprises*

The SCOTUS questioned agency authority to regulate certain activities and operations.

Here are some examples

Some Examples Before Loper Bright

- **Sackett v. EPA** (2023)
- **Author:** Samuel A. Alito, Jr.
- The Clean Water Act extends to only those wetlands with a continuous surface connection to bodies that are waters of the United States in their own right, so that they are indistinguishable from those waters.
- **West Virginia v. EPA** (2022)
- **Author:** John Roberts
- Congress did not grant the EPA in Section 111(d) of the Clean Air Act the authority to devise emissions caps based on the generation-shifting approach that the EPA took in the Clean Power Plan.

Before Loper?

- **Michigan v. EPA** (2015)
- **Author:** Antonin Scalia
- The EPA strayed well beyond the bounds of reasonable interpretation in concluding that cost is not a factor relevant to the appropriateness of regulating power plants.
- **Utility Air Regulatory Group v. EPA** (2014)
- **Author:** Antonin Scalia
- The EPA exceeded its statutory authority when it interpreted the Clean Air Act to require PSD (Prevention of Significant Deterioration) and Title V permitting for stationary sources based on their greenhouse gas emissions.

Before Loper?

- **Los Angeles County Flood Control Dist. v. NRDC** (2013)
- **Author:** Ruth Bader Ginsburg
- The flow of water from an improved portion of a navigable waterway into an unimproved portion of the same waterway does **not** qualify as a discharge of a pollutant under the Clean Water Act.
- *See additional* summaries of pre-*Loper Bright Enterprises* cases at https://supreme.justia.com/cases-by-topic/climate-change-environment/

As Promised

More Details

For Your Reading Enjoyment

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Loper Bright
Involved Two Cases on Appeal
The Details

- **Two Fisheries Cases Under Review – Case Number One**
- In the first case, *Loper Bright Enterprises*, family-owned businesses operated in the Atlantic herring fishery.
- In February 2020, they challenged the NMFS's rule that required them to pay for observers on the fishing vessels for the purpose of collecting data "necessary for the conservation and management of the fishery."
- The district court granted summary judgment to the agency concluding that the MSA authorized the regulation
- But noted that even if the petitioners' "arguments were enough to raise an ambiguity in the statutory text," deference to the agency's interpretation would be warranted under *Chevron.* 544 F. Supp. 3d 82, 107 (DC 2021).

Two Fisheries Cases Under Review in Loper

Case Number One

- **The D.C. Circuit affirmed. *See* 45 F. 4th 359 (2022).**
- The appellate court addressed various provisions of the MSA and concluded that it was not "wholly unambiguous" whether NMFS may require Atlantic herring fishermen to pay for observers.
- Because there remained "some question" as to Congress's intent, the court proceeded to Chevron's second step and
- Deferred to the agency's interpretation as a "reasonable" construction of the MSA.

Two Fisheries Cases Under Review In Loper

Case Number Two

- In the second case, Petitioners *Relentless Inc., Huntress Inc., and Seafreeze Fleet LLC* owned two fishing vessels that also operate in the Atlantic herring fishery.
- These petitioners generally "declare into multiple fisheries per trip" so they can catch whatever they find.
- If the vessels declare into the Atlantic herring fishery for a particular trip, they must carry an observer for that trip if NMFS selects the trip for coverage.
- In their suit challenging the regulation as unauthorized by the MSA
- The district court deferred to NMFS's contrary interpretation under *Chevron* and thus granted summary judgment to the government. *See* 561 F. Supp. 3d 226, 234-238 (RI 2021).

Two Fisheries Cases Under Review In Loper
Case Number Two

- **The First Circuit affirmed. *See* 62 F. 4th 621 (2023).**
- The court concluded that the "agency's interpretation of its authority to require at-sea monitors who are paid for by owners of regulated vessels does not 'exceed the bounds of the permissible.'"
- The court stated that it was applying *Chevron's* two-step framework.
- But it did not explain which aspects of its analysis were relevant to which of *Chevron's* two steps.
- Similarly, the appellate court declined to decide whether the result was "a product of *Chevron* step one or step two."

Loper's Discussion of the Administrative Procedures Act

The 1946 Administrative Procedure Act

A Check Upon Administrator's Zeal

- In 1946, Congress passed the Administrative Procedure Act (APA) (5 U.S.C. §§ 551-559).
- The act establishes how federal administrative agencies make rules and how they adjudicate administrative litigation.
- Four years later, the Supreme Court referred to the APA as "a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices." *U.S. v. Morton Salt*, 338 U. S. 632, 644 (1950).

Loper's Discussion of the APA

- In the ***Loper Bright Enterprises*** case, Chief Justice Roberts said that the APA was the culmination of a "comprehensive rethinking of the place of administrative agencies in a regime of separate and divided powers." *Bowen v. Michigan Academy of Family Physicians*, 476 U. S. 667, 670-671 (1986).
- The APA thus codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*:
- That courts decide legal questions by applying their own judgment.

Loper's Discussion of the APA

- ***Chevron* Deference Cannot be Squared with the APA**
- Section III of Chief Justice Roberts' opinion summarizes the *Chevron* two-step analysis and explores the decades of court decisions employing that analysis.
- That serves as prelude to the Supreme Court's conclusion that
- "Neither *Chevron* nor any subsequent decision of this Court attempted to reconcile its framework with the APA."
- Moreover, *Chevron* "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." . . .
- "*Chevron* turns the statutory scheme for judicial review of agency action upside down."

Justice Gorsuch's Summary in Loper

[A]ll today's decision means is that, going forward,

Federal courts will do exactly as this Court has since 2016,

Exactly as it did before the mid-1980s, and

Exactly as it had done since the founding:

Resolve cases and controversies

without any systemic bias in the government's favor.

Justice Kagan Disagreed

Loper Is A "Jolt to the Legal System"

- She emphasized the deep roots that *Chevron* has had in the U.S. legal system for decades.
- "It has been applied in thousands of judicial decisions.
- "It has become part of the warp and woof of modern government, supporting regulatory efforts of all kinds – to name a few, keeping air and water clean, food and drugs safe, and financial markets honest."
- By overruling the *Chevron* doctrine, Justice Kagan concluded,
- The Supreme Court has created a "jolt to the legal system."

Cases Since The June 2024 *Loper* Decision

San Francisco v. EPA

March 4, 2025

Authority Under the Clean Water Act

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San Francisco v. EPA

Authority Under the Clean Water Act

- Under the CWA, any person or entity that “discharges” “pollutants” into the “waters of the United States” is required to hold NPDES permits which impose limits on the pollutants that can be discharged, and
- Permits establish steps the discharger must take to comply with the permit.
- **San Francisco operated a combined wastewater treatment facility**
- The facility processed both wastewater and stormwater
- And discharged pollutants into the Pacific Ocean.

San Francisco v. EPA
Authority Under the Clean Water Act

- **End-Result Requirements**
- Both the California Regional Water Quality Control Board and the EPA had to approve the NPDES permit because the city's Oceanside facility discharges into waters that fall under **both state and federal jurisdiction**.
- The case involved a challenge to "end-result" requirements in the city's NPDES permit that contained provisions that do **not** spell out what a permittee must do or refrain from doing
- Instead, the city was made responsible for the quality of the water in the body of water into which the city discharged pollutants.

San Francisco v. EPA
Authority Under the Clean Water Act

- The renewal permit for the city included two “end-result requirements” that
- (1) Prohibited any discharge that “contribute[d] to a violation of any applicable standard” for the **receiving waters**; and
- (2) Prohibited any discharge that “create[d] pollution, contamination, or nuisance as defined by California Water Code section 13050.”

San Francisco v. EPA
Authority Under the Clean Water Act

- **San Francisco Lost its Appeal That Challenged The two "end-result requirements"**
- The EPA's Environmental Appeals Board, and the Ninth Circuit Court of Appeals, both held that
- **The EPA was within its rights to include such provisions in the permit.**

San Francisco v. EPA
Authority Under the Clean Water Act

- **The Supreme Court Disagreed**
  - Link: https://www.supremecourt.gov/opinions/24pdf/23-753_f2bh.pdf
- The Supreme Court held that the EPA's and the Ninth Circuit's reliance on the CWA Section 301(b)(1)(C) did not authorize "end-result requirements."
- It held that Congress did not authorize the agencies to impose NPDES permit requirements that condition permitholders' compliance on whether receiving waters meet applicable water quality standards.
- Rather, the Supreme Court held that it is agencies' responsibility to
- **Determine what steps a permittee must take to ensure that water quality standards are met**.

Ohio Telecom Association, et al v. Federal Communications Commission

January 2, 2025

Net Neutrality Rules Not Authorized

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Ohio Telecom Association, et al v. Federal Communications Commission

- **Net Neutrality Rules Not Authorized**
  - ***Loper Bright Enterprises* Controls**
- The appellate court stated that the FCC lacked the authority to classify broadband as a telecommunications service and impose Title II regulations.
- The court's decision was based on a close reading of the Communications Act,
- **Concluded that the agency's interpretation of the statute was <u>inconsistent</u> with its plain language.**

Ohio Telecom Association, et al v. Federal Communications Commission

- The **Sixth Circuit's** decision relied on the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, which limited the deference courts give to agency interpretations of statutes.
  - Link: https://www.opn.ca6.uscourts.gov/opinions.pdf/25a0002p-06.pdf
- This ruling effectively **ends the FCC's ability to impose net neutrality rules** on broadband internet service providers
- **Unless Congress provides the agency with clear authority.**

For the Scholars in the Audience With a Lot of Time on Their Hands

Nearly 500 Years of Cases Involving Judicial Deference To Agency Interpretation

- The ***BallotPedia*** website provides a table that contains major court cases related to ***judicial deference***.
  - It begins with historical examples from ***English courts*** before treating decisions made by ***state and federal courts in the United States***.
  - Dates ranging from ***1553*** (not a typo) to ***Loper Bright*** in ***2024***
- Link: https://ballotpedia.org/List_of_court_cases_relevant_to_judicial_deference_to_administrative_agencies

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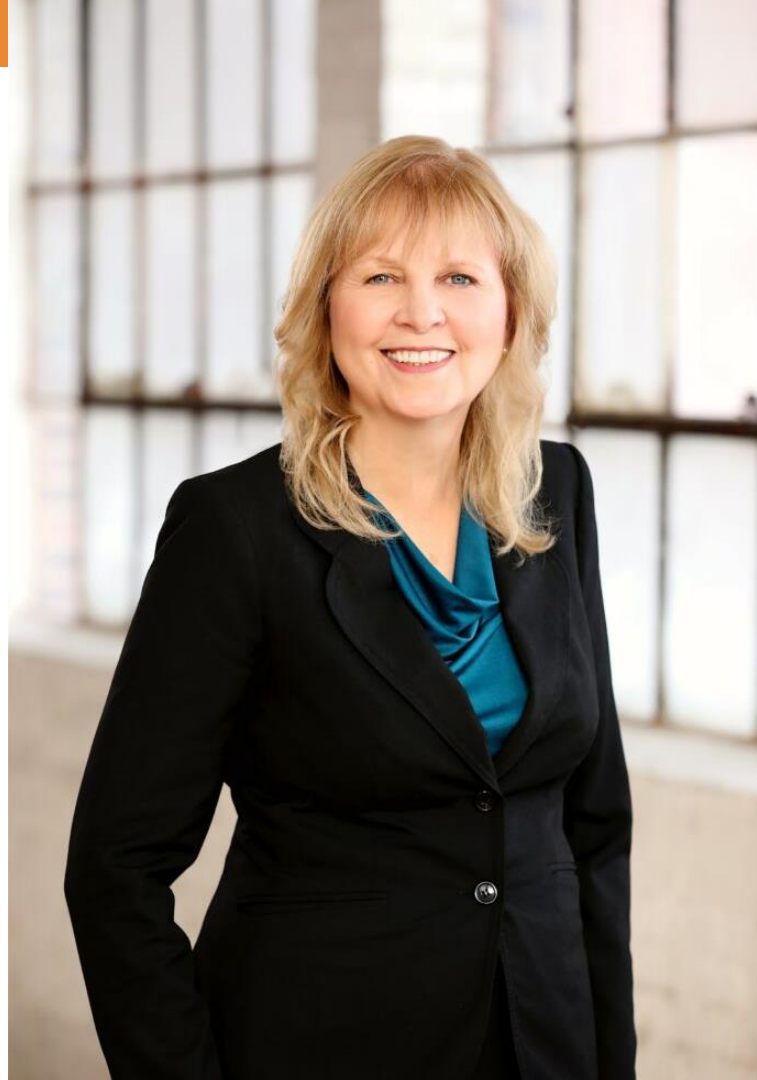
Karen D. Olson

Kolson@spencerfane.com

Minneapolis, MN



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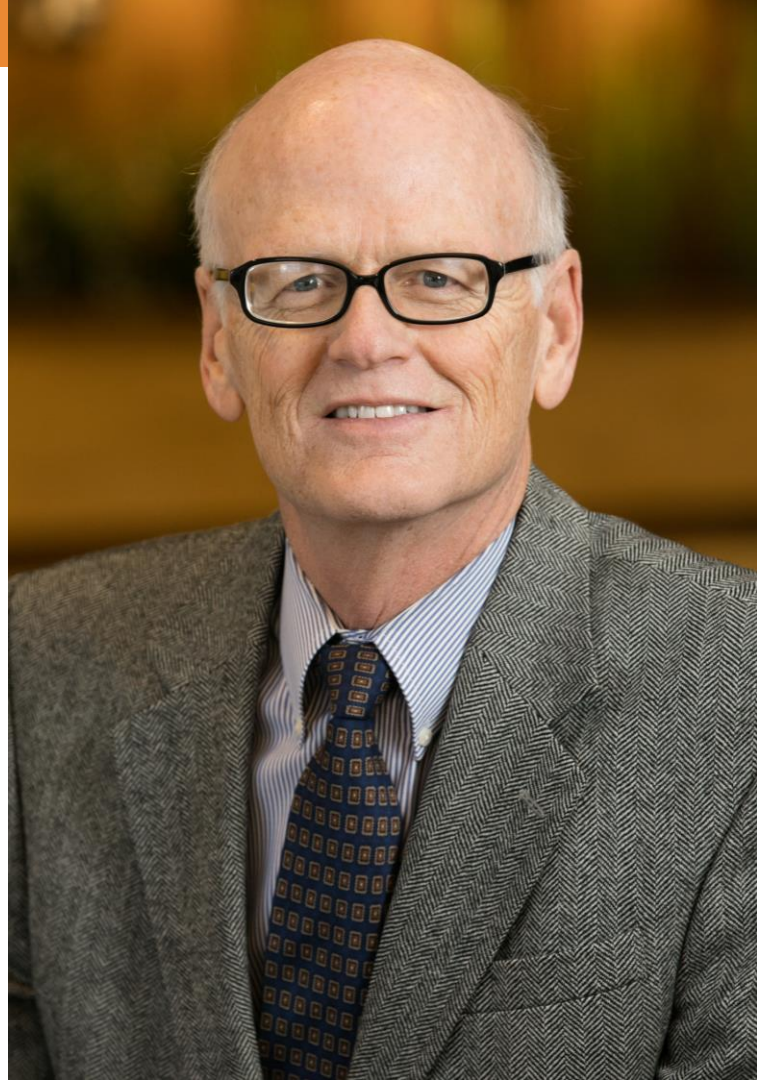

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