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A NEW ERA OF DEFERENCE: FROM *CHEVRON* TO *LOPER BRIGHT*

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A NEW ERA OF DEFERENCE: FROM *CHEVRON* TO *LOPER BRIGHT*

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Deference to administrative agencies' interpretations of ambiguous statutory provisions has been a hallmark of administrative law and regulatory policy for the past forty years. The Supreme Court recently upended that settled allocation of power between agencies and courts, granting interpretive primacy to courts even where statutes essentially require policy choices. However, questions remain about precisely how courts will exercise this policymaking authority that agencies used to exercise, as well as about the multiple "offramps" from this nondeferential standard that the Court left open. Rather than a new era of nondeference, it is just as likely we are embarking on a new era of deference — different in some respects from the regime that preceded it, but still ultimately respectful of agencies' superior ability to responsibly and legitimately develop policy.

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I. INTRODUCTION

In *Loper Bright Enterprises v. Raimondo*, the U.S. Supreme Court upended forty years' worth of law by overruling the doctrine known as *Chevron* deference.[2] That doctrine had required federal courts to allow administrative agencies in the executive branch to determine which among permissible meanings of ambiguous statutes ought to be adopted as a matter of policy.[3] As the Supreme Court that gave us *Chevron* deference explained, such an approach reflected a judicial awareness of the reality that Congress often implicitly delegates authority to agencies,[4] and that, compared with independent judicial choice, deferring to agencies' exercise of policymaking discretion within their delegations ensures political accountability for policy choices and infuses policies with substantive expertise.[5] *Loper Bright* turned this account on its head, denying the existence of real ambiguities in statutes and exalting the interpretive expertise of unelected judges in finding statutes' "single, best meaning."[6] The *Loper Bright* decision has thus been rightly read as an institutional reconfiguration of power moving interpretive primacy from the elected branches — Congress and the Executive Branch acting in concert through legislation and regulatory decisionmaking — to the courts.[7] Few who had observed the previous decade's worth of administrative law had reason to believe that the Supreme Court would leave *Chevron* deference entirely alone,[8] but in rejecting not only the doctrine itself but also the premise that "law runs out," the Supreme Court initiated an "earthquake" that has the potential, at least, to fundamentally unsettle government.[9]

This essay has the modest goal of contextualizing this change, explaining why it was surprising to see the Court go as far as it did, and beginning to catalogue how the decision is being understood by the lower courts in litigation involving administrative programs. To be sure, *Loper Bright* implicates much bigger questions than these. The decision will almost certainly launch a thousand lawsuits and scholarly articles. Yet even preliminary answers to these basic questions can shed light on what we might expect going forward in the latest installment of what has been a perennial conflict over interpretive primacy in the implementation of law.

II. THE DEFERENCE WARS: FROM *CHEVRON* TO *LOPER BRIGHT*

In order to understand *Loper Bright*, it is first necessary to understand what it was reacting to: *Chevron* deference, and the whole universe of precedent that grew up around it.

A. The Chevron Framework

The name of the doctrine refers to a 1984 case, *Chevron U.S.A. v. NRDC*, in which the Supreme Court upheld a U.S. Environmental Protection Agency ("EPA") interpretation of the Clean Air Act that had the effect of exempting power plants from requirements to seek permits.[10] Under the so-called "bubble concept," EPA interpreted the Act's regulatory unit of analysis — a "stationary source" — as referring to plants as a whole rather than as referring to individual components (e.g. boilers, smoke stacks, etc.) that together compose plants.[11] Under this bubble concept interpretation, owners of power plants could argue that no increase of pollution occurred, and therefore no permit was required, so long as any new emissions from specific components were offset within the plant.[12]

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2 144 S. Ct. 2244 (2024) (overruling *Chevron v. NRDC*, 467 U.S. 837 (1984)).

3 467 U.S. 837 (1984).

4 *Id.* at 844.

5 *Id.* at 864-66.

6 144 S. Ct. at 2266.

7 See e.g. Steve Vladeck, *The Most Aggressive Restructuring of Government in Almost 90 Years*, CNN (Jul. 2, 2024), https://www.cnn.com/2024/07/02/opinions/supreme-court-radically-restructures-government-vladeck/index.html (noting that "the justices took a massive amount of power away from Congress and executive branch agencies, and gave it, instead, to the courts").

8 Nathan D. Richardson, *Deference is Dead, Long Live* Chevron, 73 Rutgers L. Rev. 441 (2021) (arguing that popular perceptions of *Chevron* as "powerful and important" missed that the doctrine's influence had significantly eroded over the years); Gregory A. Elinson & Jonathan S. Gould, *The Politics of Deference*, 75 Vand. L. Rev. 475 (2022) (describing the political movement to undermine *Chevron*).

9 Cary Coglianese, *A Legal Earthquake*, Reg. Rev. (Aug. 8, 2024), https://www.theregreview.org/2024/08/08/coglianese-a-legal-earthquake/.

10 467 U.S. 837 (1984).

11 *Id.* at 840.

12 *Id.*

The interpretive questions presented by the bubble concept were unremarkable in the modern administrative state, and the lower court dealt with them as courts did in similar cases at the time — by arriving at the best reading of the statute in light of the text, intent, and purpose of the provisions. It unanimously held that EPA lacked authority to adopt the bubble concept with respect to permitting requirements in nonattainment states, even though it had accepted the bubble policy as a valid interpretation of the same basic statutory language in the context of a different Clean Air Act program targeted at states already in attainment of national air quality standards.[13] The lower court's decision was thus fundamentally guided by the judges' beliefs about the purpose of the Clean Air Act's nonattainment provisions — to improve air quality rather than maintain the *status quo* — and a belief that the Reagan-era EPA was attempting to manufacture ambiguity that could be used to undermine that purpose for deregulatory ends.

When the Supreme Court inherited the case, it did not engage with the lower court's independent judgment about the best reading of the statute in light of the statutory purpose. Instead, the Court used the occasion to instruct the lower court about its appropriate role in overseeing administrative compliance with complex regulatory statutes containing ambiguities. According to the Supreme Court, the "Court of Appeals misconceived the nature of its role in reviewing the regulations at issue" because, "[o]nce it determined . . . that Congress did not actually have an intent regarding the applicability of the bubble concept to the permit program, the question before it was not whether in its view the concept is 'inappropriate' in the general context of a program designed to improve air quality, but whether the Administrator's view that it is appropriate in the context of this particular program is a reasonable one."[14] As this statement reveals, the Supreme Court understood the inquiry to involve two "steps." First, the reviewing court must use the "traditional tools of statutory construction" to determine whether "Congress has directly spoken to the precise question at issue."[15] Second, if the reviewing court determines that Congress "has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation," but instead simply determines whether the "agency's answer is based on a permissible construction of the statute."[16] The first step resembles the standard judge-centered inquiry in workaday statutory interpretation, but the opinion clearly contemplated that sometimes administrative implementation of statutes involves an explicit or implicit delegation of authority to the agency to "fill any gap left" after the semantic meaning of the statute has been exhausted.[17] It is at this second step that *Chevron* deference does its work—the Court argued that "[j]udges are not experts in the field, and are not part of either political branch of the Government," and they have no prerogative to make what are fundamentally policy decisions based on their "personal policy preferences."[18] A rule of deference therefore protected against the encroachment by judges into an explicitly non-legal realm of policy.

Subsequent histories of this founding moment of the Chevron Era make it clear that the *Chevron* decision itself was not thought at the time to change the law of judicial review of agency interpretations, let alone revolutionize it.[19] These histories also make it clear that it was not long before *Chevron*, whatever its author's original intent, took on a life of its own and did genuinely come to define and redefine the law as it began to be deployed by the courts.[20] Judges allegedly applied the two-step inquiry rigidly and with too much willingness to find that regulatory statutes failed to yield any definitive meaning at step one.[21] Additionally, new steps proliferated as judges confronted situations calling for limitations on "*Chevron's* Domain."[22] For instance, in the so-called "step zero" cases, the Supreme Court made it clear that only agency interpretations offered in relatively formal decisionmaking processes, such as notice-and-comment rulemaking and formal adjudications under the Administrative Procedure Act ("APA"), even potentially qualified for deference despite the ambiguity of statutes.[23] Likewise, the influential U.S. Court of Appeals for the District of Columbia Circuit elaborated what some called a "step one-and-a-half," in which agencies could receive deference

13 *NRDC v. Gorsuch*, 685 F.2d 718, 726-27 (D.C. Cir. 1982) ("The nonattainment program's raison d' etre is to ameliorate the air's quality in nonattainment areas sufficiently to achieve expeditious compliance with the NAAQSs.").

14 467 U.S. 837, 845 (1984).

15 *Id.* at 842-43 & n.9.

16 *Id.*

17 *Id.* at 843 (citing *Morton v. Ruiz*, 415 U.S. 199 (1974)).

18 *Id.* at 865.

19 See e.g. Thomas W. Merrill, The *Chevron* Doctrine: Its Rise and Fall, and the Future of the Administrative State 79 (2022).

20 *Id.* at 93-97.

21 See Isaiah McKinney, *The Chevron Ball Ended at Midnight, but the Circuits are Still Two-Stepping By Themselves*, Cato Inst. (Dec. 18, 2022), https://www.cato.org/commentary/chevron-ball-ended-midnight-circuits-are-still-two-stepping-themselves.

22 Merrill, *supra* note 20, at 120-21; see also Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 Geo. L.J. 833 (2001).

23 See Cass R. Sunstein, Chevron *Step Zero*, 92 Va. L. Rev. 187 (2006) (describing these cases and coining the term "*Chevron* step zero").

under *Chevron* only if they affirmatively acknowledged that the statute was ambiguous and that they were exercising policy discretion.[24] More recently, the Supreme Court began to elaborate a "major questions doctrine," which operated either as an exception to *Chevron* deference (i.e. an empowerment of judges to choose between permissible interpretations because of a belief that Congress could not have intended to delegate such significant authority to agencies) or as a clear statement rule (i.e. a requirement that Congress provide explicit authorization for the exercise of extraordinary uses of administrative power).[25]

What we can now think of as the *"Chevron Era"* was therefore marked by both stasis and significant change. The core of *Chevron* — the two-step inquiry and its recognition of the fact that law sometimes runs out and leaves nothing but delegation of policy discretion — became a constitutive meta-principle of administrative law, and *Chevron* became one of the most cited cases of all time. At the same time, operationalization of the doctrine in the real world of regulatory administration revealed considerable unease about its implications, and the doctrine became littered with offramps that judges were increasingly willing to take. On top of this, as will be discussed later, the politics of *Chevron* drastically shifted and intensified, especially in recent years. That is where things stood when the Court, after declining several other opportunities, formally took up the question of whether to overrule *Chevron* deference in the *Loper Bright* case.

B. The Loper Bright 180

As was the case with *Chevron v. NRDC*, the interpretive dispute at the center of what would become *Loper Bright v. Raimondo* was unremarkable — the kind of interpretive dispute that arises constantly in what Justice Kagan called the "warp and whoof of modern government."[26] The National Marine Fisheries Service ("NMFS") interpreted the Magnuson-Stevens Fishery Conservation Act to permit it to require owners of regulated fishing vessels to share in covering the costs of "observers" (essentially, third-party regulatory compliance staff) that are often required to ride aboard ships pursuant to fishery management plans.[27] The lower courts both held either that the statute unambiguously gave NMFS authority to impose cost-sharing on the fishing industry or that the statute was ambiguous and NMFS's interpretation was permissible at step two of the *Chevron* inquiry.[28] However, in granting the petition for writ of certiorari, the Supreme Court limited consideration to whether *Chevron* deference should be overruled. Ultimately, the Supreme Court never answered the question of whether NMFS had the authority it claimed — it simply overruled *Chevron* deference and remanded to the lower courts to decide the matter without the possibility of deference.[29]

Many observers did not expect this result. Even by the terms of the question presented, the Court had the option of partly overruling *Chevron* deference, perhaps by "*Kisor*-izing" *Chevron* — a reference to the 2019 case of *Kisor v. Wilkie*, in which the Supreme Court declined to overturn the closely related deference doctrine that applies to agency interpretations of ambiguous regulations (instead of statutes), and instead used the case as a vehicle to reformulate and limit the doctrine to curb purported abuses by agencies and courts.[30] Instead, in dramatic fashion, the Court wiped the slate clean, paying very little heed to the stare decisis analysis that pulled the Court back from the brink in *Kisor*.[31] *Chevron* is simply gone, along with all of the doctrine that built up around it.

Beyond this bottom-line takeaway, the opinion in *Loper Bright* is breathtaking in its reasoning. The central premise of the majority opinion is that the APA requires "independent judgment" by courts about the meaning of statutes, leaving no room for anything like *Chevron's* rule of deference.[32] This would have come as a surprise to the drafters of the APA, and it is hardly the only possible, let alone most reasonable, interpretation of the APA's language.[33] Deference of some sort was well established in the caselaw even before *Chevron v. NRDC*, which is part

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24 See Daniel J. Hemel & Aaron L. Nielson, Chevron *Step One-and-a-Half*, 84 U. Chi. L. Rev. 757 (2017).

25 See Daniel E. Walters, *The Major Questions Doctrine at the Boundaries of Interpretive Law*, 109 Iowa L. Rev. 465 (2024).

26 144 S. Ct. 2244, 2295 (2024)(Kagan, J., dissenting).

27 144 S. Ct. 2244, 2255-56 (2024).

28 *Id.* at 2256.

29 *Id.* at 2273.

30 Richard Pierce, *Court's New Chevron Analysis Likely to Follow One of These Paths,* Bloomberg (Feb. 7, 2024), https://news.bloomberglaw.com/us-law-week/courts-new-chevron-analysis-likely-to-follow-one-of-these-paths (citing *Kisor v. Wilkie*, 588 U.S. 558 (2019)).

31 144 S. Ct. at 2272-73.

32 *Id.* at 2263.

33 Ronald M. Levin, *The APA and the Assault on Deference*, 106 Minn. L. Rev. 125 (2021) (methodically dismantling the arguments, floated before *Loper Bright*, that *Chevron* deference was inconsistent with the text of the APA and the original understanding of its drafters, who intended to codify the existing law of judicial review of agency legal determinations that had deferential elements in it).

of why most contemporaries in 1984 did not see *Chevron* as a landmark.[34] And, although courts, as part of their "independent judgment," routinely resolve statutory questions by reference canons of interpretation that create rebuttable presumptions, the Court denied even that route to deference. It rejected the influential idea that ambiguities "necessarily reflect a congressional intent that an agency, as opposed to a court, resolve the resulting interpretive question."[35] The Court explained that Congress routinely legislates in areas where agencies do not have any rulemaking authority (for instance, the Sherman Antitrust Act), and that in those circumstances courts have no difficulty discerning the "single, best meaning" no matter how impenetrable the text or how likely it might seem that the law has simply "run out" and left only policy questions.[36] For the Court, there simply isn't any such thing as a true ambiguity that takes courts out of the legal realm an into the realm of policy choice, and therefore there is no opening for anything but independent judicial interpretation. If taken seriously, this is a radical theory with extremely significant implications for the allocation of power in the federal government—namely, it seems like the apotheosis of judicial aggrandizement and a virtual zeroing out of the political branches' roles, given how difficult it is for Congress to pass laws specific enough to deny courts this power to determine policy details.[37]

Two parts of the *Loper Bright* majority opinion could prove relevant in limiting the impact of this otherwise complete reversal from the *Chevron* framework. First, the Court acknowledged that there might be certain "express" delegations of authority to agencies that *do* require something like deference.[38] (It is probably best to say "something like deference," because the Court would insist that in following an agency interpretation pursuant to an express delegation, the court doesn't really defer at all, but rather follows the "single, best meaning" of the statute, which just so happens to be that the agency decides.) Scholars have already highlighted that this caveat has the potential to become "*Chevron* by another name," depending on how expansively courts understand the category of "express" delegations.[39] Second, the Court acknowledged that the APA's new "independent judgment" requirement is not violated when judges factor agency perspectives into their search for the best resolution of interpretive questions.[40] Under this approach, which resembles the category of analysis known as *Skidmore* weight, the agency might be able to "persuade" the court, by virtue of its experience and expertise, among other factors, of the wisdom of adopting a particular interpretation.[41] This new endorsement of across-the-board *Skidmore* weight could, like the express delegation loophole discussed above, provide cover for courts to continue deferring without technically calling what they are doing deference.

Loper Bright thus turns sharply against the animating principles of the *Chevron* Era, but its theory of judicial power also contains plenty of ambiguities and potential complications that may, in due time, undermine the decision's practical import, much as developments subsequent to *Chevron* made that doctrine into a very different thing than anybody originally anticipated.

III. THE EARLY DAYS OF THE *LOPER BRIGHT* ERA

Chevron deference was never much about what happened in the Supreme Court — its primary purpose was to constrain lower courts, and it was fairly successful in this regard.[42] The Supreme Court simply does not have the institutional capacity or attentional bandwidth to review every statutory interpretation case involving administrative agencies itself.[43] Much therefore hinges on how lower courts implement whatever standard of review exists. The same will likely be true of the new independent judgment standard under *Loper Bright*, and it is therefore instructive to look at how lower courts are loping along (with the caveat that these early signals may not hold up over time).

34 *Id.*

35 144 S. Ct. at 2265.

36 *Id.* at 2266.

37 For a helpful literature review of recent writing about judicial aggrandizement, see Allen Sumrall & Beau J. Baumann, *Clarifying Judicial Aggrandizement,* 172 U. Pa. L. Rev. Online (2024), https://scholarship.law.upenn.edu/penn_law_review_online/vol172/iss1/3/.

38 144 S. Ct. at 2263.

39 See Adrian Vermeule, Chevron *By Any Other Name*, The New Digest (June 28, 2024), https://thenewdigest.substack.com/p/chevron-by-any-other-name.

40 144 S. Ct. at 2262.

41 Peter L. Strauss, *Deference is Too Confusing—Let's Call Them 'Chevron Space' and 'Skidmore Weight,'* 112 Colum. L. Rev. 1143 (2012).

42 Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1 (2017) (showing a disparity between *Chevron*'s use in the Supreme Court and its use in the circuit courts).

43 Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 Colum. L. Rev. 1093 (1987). The limitation has only become more constraining as the Supreme Court's certiorari docket has steadily shrunk in recent decades. See Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 Wm. & Mary L. Rev. 1219 (2012).

Although most published court of appeals decisions citing *Loper Bright* simply remand to district courts to reconsider cases decided under the *Chevron* regime,[44] or to grant preliminary relief pending review,[45] there have been a handful of precedential merits opinions applying *Loper Bright*. This section samples some of the more thorough discussions and applications of *Loper Bright*. The biggest takeaway is that virtually every possible outcome under *Loper Bright* has already occurred even in just a very short amount of time.

A. Variability in the Applicability of the "Independent Judgment" Standard

Of course, many cases in the future will attempt to replace agency interpretations of otherwise ambiguous statutes with independent judicial interpretations of those statutes. In light of the nebulous concept of an independent judgment, it seems likely that lower courts may develop contestable interpretations, some of which may plausibly lead to circuit splits.[46] This already can be seen in some of the early post-*Loper Bright* cases.

In *Union Pacific Railroad v. Surface Transportation Board*, for example, the Eighth Circuit engaged in a sweeping application of *Loper Bright* as it vacated a Surface Transportation Board rule that set efficient procedures for resolving disputes about rail carrier rates. Writing for a unanimous panel, Judge Levanski Smith waded into longstanding questions about the applicability of the formal adjudication procedures of the APA,[47] finding that the Board misinterpreted the Surface Transportation Board Reauthorization Act of 2015 when it determined that formal adjudication was not required. According to the panel, the best interpretation of the statute's requirement of a "full hearing" was that Congress meant to require formal adjudication, even though Congress did not use the words "on the record."[48] This holding is in tension with the Supreme Court's own treatment of triggering words for formal rulemaking to apply,[49] so it may well be that other circuits, faced with the fresh question of what triggers formal adjudication under the APA, will adopt an approach more in keeping with that caselaw, resulting in splits.

Likewise, in *Texas Medical Association v. Department of Health and Human Services*, the Fifth Circuit similarly applied *Loper Bright* to vacate several rules that "established priorities for independent arbitrators appointed to resolve insurance reimbursement disputes under the No Surprises Act."[50] Writing for the majority, Judge Edith Jones acknowledged that "Congress may so draft statutes as to 'confer discretionary authority on agencies,'" but found that the No Surprises Act "fully determined" the standards that should apply in "meticulous detail."[51] Moreover, the rules were found to "infring[e] on arbitrators' discretion to balance the statutory factors."[52] This holding drew disagreement from Judge Carolyn Dineen King, who "would reach a narrower holding that considers the [No Surprises Act]'s legislative history and context in light of statutory ambiguity."[53] Individual judges' technical disagreements about the proper applications of judicial tools of statutory construction will likely result in many more intra-panel splits about the best reading of a statute.

In *United States Sugar Corporation v. Environmental Protection Agency*, the D.C. Circuit offered a seemingly lax version of *Loper Bright*'s independent judgment standard in part of its analysis. In a *per curiam* opinion, the court examined whether the Environmental Protection Agency violated the Clean Air Act when it promulgated a rule that classified certain industrial boilers as new sources of hazardous pollutants subject to "stricter" regulation.[54] Citing *Loper Bright* as requiring "de novo" review of an industry petition for review, the panel had little trouble concluding

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44 See e.g. *Utah v. Su*, 109 F.4th 313, 318 (5th Cir. 2024) ("Given the upended legal landscape, and our status as a court of review, not first view, we vacate and remand so that the district court can reassess the merits."); *Allen v. United States,* No. 2024-1117, 2024 WL 4002305, at *1 (Fed. Cir. Aug. 30, 2024) (same).

45 Robert Iafolla, *GOP-Picked Judges Take Hard Line on Regulations Post-Chevron*, Bloomberg (Sept. 4, 2024).

46 For a helpful analysis of the way that *Loper Bright* likely will increase the incidence of circuit splits due to the institutional realities of the judicial hierarchy, see Daniel J. Hemel, *Flips and Splits in Administrative Law*, 74 Duke L.J. __ (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4913656.

47 See e.g. Adrian Vermeule, *Deference and Due Process*, 129 Harv. L. Rev. 1890, 1915-16 (2016)(noting the question and that the dominant approach was to defer to agency choices about whether to use formal adjudication citing *Chevron*).

48 *Union Pac. R.R. Co. v. Surface Transportation Bd.*, 113 F.4th 823, 836 (8th Cir. 2024).

49 *United States v. Florida East Coast Ry. Co.*, 410 U.S. 224 (1973) (requiring both "hearing" and "on the record," or some equivalent, to appear in the governing statute in order for formal rulemaking to be required under the APA).

50 *Texas Med. Ass'n v. United States Dep't of Health & Hum. Servs.*, 110 F.4th 762, 767 (5th Cir. 2024).

51 *Id.* at 775.

52 *Id.* at 776.

53 *Id.* at 782.

54 *United States Sugar Corp. v. Env't Prot. Agency*, 113 F.4th 984, 988 (D.C. Cir. 2024).

that the agency did violate the Act by applying this classification to sources built before the hazardous pollution standard was promulgated.[55] Under the Act, "new source" was defined to include only sources "the construction or reconstruction of which is commenced after the Administrator first proposes regulations."[56] But the panel also rejected a separate challenge by environmental groups that argued the Act required the agency to use certain data in recalculating emission standards as part of the rulemaking. Again applying *Loper Bright*, the panel noted that the statutory question was "tricky," but it concluded that the challenge would interfere with "EPA's widely accepted ability to use its expertise to craft sensible standards."[57] The opinion did not so much as mention *Skidmore*, which may suggest that the panel thought that preservation of EPA's expert discretion was part of the de novo judgment that *Loper Bright* requires—a theory that could greatly complicate independent judgments, given widespread disagreements about the levels of expertise agencies have.

The D.C. Circuit similarly nodded to a role for agency expertise under *Loper Bright*'s independent judgment (again, without mentioning *Skidmore*) in its decision in *Pacific Gas & Electric Company v. Federal Energy Regulatory Commission*. Writing for a unanimous panel, Judge Neomi Rao rejected Commission order adopting a "class-based interpretation" of a statutory exception.[58] But rather than pinpointing the "single, best meaning" of the statutory exception, Judge Rao noted that "the application of the statutory text to the meaning of the Tariff may 'rest on factual premises within the agency's expertise,'" and remanded to the agency to "apply the plain meaning" after incorporating that expertise.[59] Separately concurring, Judge Florence Pan offered her "view of the best reading of the statute" rather than leaving room for the Commission to apply its expertise to factual questions in application.[60]

If one tried to predict ex ante how the judges in each of these disputes would actually exercise their independent judgment, they likely would have had a poor record. Going forward, the embrace of an independent judgment standard is only the beginning of an inquiry that can still range from deferential to nondeferential, depending on *how* a judge conceives of their role on an individual basis.

B. Explicit Delegations

Turning now to the *Loper Bright* framework's exceptions, or offramps, there has already been some caselaw on the boundaries of the explicit delegation concept, but so far a bit less than more straightforward (but highly variable) implementations of the *Loper Bright* independent judgment standard.

In *Mayfield v. Department of Labor*, for instance, the Fifth Circuit upheld the Department of Labor's 2019 "Minimum Salary Rule," which updated a longstanding minimum threshold for an exemption from the Fair Labor Standards Act's regulations for white-collar workers. Writing for a unanimous panel, Judge Jennifer Walker Elrod invoked the explicit delegation exception, stating that the Act contained an "uncontroverted, explicit delegation of authority," and therefore the only question was whether the rule fell within the "outer boundaries of that delegation," and the court determined that it did.[61] The relevant statute gave the Department of Labor the power to "define[] and delimit[]" the white-collar exemption,62 and this statute was actually cited by *Loper Bright* itself to illustrate the kind of statutory language that could be construed as explicitly delegating discretion to an agency.[63] Since this case was more or less pre-ordained in light of *Loper Bright*'s dicta, it is difficult to tell how lower courts are receiving the explicit delegation category and whether they will build a jurisprudence around triggering statutory language for an explicit delegation.

Potentially more instructive is *Bernardo-De La Cruz v. Garland*, in which the Seventh Circuit similarly had "little trouble" concluding that a rule fell "within the agency's delegated authority."[64] Judge John Lee, writing for a unanimous panel, emphasized the "broad discretion"

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55 *Id.* at 991.

56 42 U.S.C. § 7412(a)(4).

57 113 F.4th at 1000.

58 *Pac. Gas & Elec. Co. v. FERC*, 113 F.4th 943 (D.C. Cir. 2024).

59 *Id.* at 951.

60 *Id.* (Pan, J., concurring).

61 *Mayfield v. United States Dep't of Lab.*, No. 23-50724, 2024 WL 4142760, at *4 (5th Cir. Sept. 11, 2024). The Third Circuit also briefly examined this explicit delegation exception in determining that *Loper Bright* did not "undermine the validity" of regulations central to the court's preemption analysis. See *Schaffner v. Monsanto Corp.*, No. 22-3075, 2024 WL 3820973, at *9 (3d Cir. Aug. 15, 2024).

62 29 U.S.C. § 213(a)(1).

63 144 S. Ct. at 2263 n.5.

64 *Bernardo-De La Cruz v. Garland*, 114 F.4th 883, 890 (7th Cir. 2024).

that the statute gave to the Attorney General to "limit eligibility for voluntary departure . . . for any class or classes of aliens."[65] For instance, the panel noted that, under relevant statutes, the "Attorney General *may* permit an alien voluntarily to depart the United States," and is "empower[ed]" to "promulgate regulations that 'limit the eligibility for voluntary departure when a noncitizen challenges his order of removal.'"[66] The panel held that the rule, which "limits the availability of departure for noncitizens contesting a removal order,"[67] was a textbook example of "such regulation."[68] The language in these statutes departs from the formulas explicitly sanctioned by the Supreme Court in *Loper Bright*, so at least one lower court has begun what will likely become the long-term project of figuring out the outer bounds of this offramp from *Loper Bright*.

C. Skidmore Weight (Or Even Skidmore"Deference")

The *Loper Bright* decision's other major offramp — *Skidmore* weight, or whatever one wants to call it — has similarly already been at the heart of several disputes. Again, we can find examples of courts affording it and denying it, sometimes with some guidance about *why* it was or was not applicable.

In *Restaurant Law Center v. Department of Labor*, however, Judge Elrod wrote for another unanimous Fifth Circuit panel in vacating a 2021 Department of Labor rule on "tip credits."[69] Here, the panel candidly acknowledged that "[c]ourts are constantly faced with statutory ambiguities and genuinely hard cases,"[70] but rejected the Department of Labor's resolution of this ambiguity, noting that the court's "interpretation of the statutory language is the best one because it gives full effect to the entirety of the provision."[71] The panel also considered, but rejected, the possibility of giving weight to the Department of Labor's interpretation under *Skidmore*.[72] Judge Elrod noted that, "even in the absence of *Chevron*, courts are well-advised to consider agency 'interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time."[73] Despite the "vintage" of the rule at issue — the statute had been more or less consistent since 1988 — the panel decided that it could not "defeat the [Fair Labor Standards Act]'s plain text."[74]

By contrast, Judge Elrod's other post-*Loper Bright* opinion — *Mayfield v. Department of Labor* — came to nearly the opposite conclusion about *Skidmore*. Rather than singing *Skidmore's* praises, this opinion asked whether *Skidmore* does any work when the Supreme Court has said that statutes have a single, best meaning. But then the opinion noted that "if *Skidmore* deference does any work, it applies here" because "DOL has consistently issued minimum salary rules for over eighty years," more or less since passage of the FLSA, and Congress had seemingly acquiesced in these interpretations by declining to tinker with the Minimum Salary Rule at issue.[75]

Finally, in *Lopez v. Garland*, a panel of the Ninth Circuit similarly invoked *Skidmore* to "defer" to a Board of Immigration Appeals decision finding Lopez removable. The panel held that the Board's precedential decision in a prior case was "thorough and well-reasoned," as well as "consistent with judicial precedent."[76] The panel overlooked the fact that the precedent in question was of relatively recent vintage — dating back only to 2016.[77] The panel was careful to note, however, that in granting "*Skidmore* deference" to the agency's application of a precedent, the panel was "[e]xercising [its] independent evaluation of the statute."[78]

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65 *Id.*

66 *Id.* (citing 8 U.S.C. § 1229c(b)(1), (e)).

67 *Id.* at 887.

68 *Id.*

69 *Rest. L. Ctr. v. DOL*, 115 F.4th 396 (5th Cir. 2024).

70 *Id.* at 404.

71 *Id.* at 407.

72 *Id.*

73 *Id.*

74 *Id.*

75 *Mayfield*, 2024 WL 4142760, at *6 (5th Cir. Sept. 11, 2024).

76 *Lopez v. Garland*, No. 23-870, 2024 WL 4140626, at *6 (9th Cir. Sept. 11, 2024).

77 *Id.* at *5.

78 *Id.* at *6.

In sum, *Skidmore* weight remains available for judges to pull on as they see fit, and there is by no means a consensus yet about when such respect for agency interpretations is most appropriate — some courts have focused on the "vintage" of interpretations, while others have focused on the "power to persuade."

IV. CONCLUSION

We are still in the early days of the *Loper Bright* Era, and with a doctrinal change this drastic, it will inevitably take much longer to sort out all of the implications — implications for both trans-substantive administrative law as well as specific regulatory domains. The Supreme Court aimed big, but whether *Loper Bright* will percolate down through the lower courts in precisely the way that the majority in *Loper Bright* anticipated remains to be seen. Just as with *Chevron* before it, clever lawyering and practical realities will shape the implementation of *Loper Bright*, perhaps leaving us not far from where we were before — a "new era of deference" rather than an "end of deference." In the meantime, though, there is much to keep our eyes on.

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