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# SYMPOSIUM

## THE *LOPER BRIGHT* REGULATORY LANDSCAPE

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### I. THE LAW PRE-*LOPER BRIGHT*

The aim of this contribution is to provide a very brief introduction to the administrative regulatory state of play in light of the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*.[1] This introduction will necessarily be selective, speculative, and contestable in some respects. Still, there is value in a general mapping of the territory, even if some of the landmarks are at some future time shifted or removed.

Unsurprisingly, a necessary but hardly sufficient condition for understanding *Loper Bright* is a sense of the most relevant prior case law. Immediately below is a sampling of some of the most doctrinally significant pre-*Loper Bright* judicial landmarks.

As it happens, two of the cases of the greatest continuing interest were decided just before the adoption of the crucially relevant Administrative Procedure Act of 1946.[2] These two cases were *National Labor Relations Board v. Hearst Publications* and *Skidmore v. Swift & Co*.[3] *Hearst* involved a determination by the NLRB that so-called "newsboys" generally fell within the category of employees for collective bargaining purposes.[4] The Court initially declared that the relevant statute must be interpreted by looking to the legislative "history, terms and purposes" of the statute, along with "the statute's background," and the statutory context, given "the mischief to be corrected and the end to be attained."[5]

The *Hearst* Court thus initially assigned the bulk of the statutory

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1. Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024).

2. *See* 5 U.S.C. § 706 (1946) (on the available levels of judicial review of federal administrative actions in the forms of rulemaking and adjudication). *See also* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410-20 (1971), *abrogated by* California v. Sanders, 430 U.S. 99 (1977).

3. NLRB v. Hearst Publications, 322 U.S. 111 (1944), *overruled by* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992); Skidmore v. Swift & Co., 323 U.S. 134 (1944).

4. *See Hearst*, 322 U.S. at 130-32.

5. *Id.* at 123-24.

interpretation authority, power, and responsibility to the courts rather than to the administrative agency, given the courts' overall greater competence at this level of generality.[6] In this respect, *Hearst* may be seen as loosely anticipating *Loper Bright's* general empowerment of the federal courts.[7]

The *Hearst* Court, however, then distinguished what we might think of as more granular, case-specific, application-focused interpretations of statutory terms. In *Hearst*, the crucial role in interpreting the key statutory term "employee" was said to have been "assigned primarily to the agency created by Congress to administer the Act."[8] As a matter of common sense, experience and expertise in administering the relevant statute ordinarily lies mainly with the congressionally empowered agency, rather than with non-specialized general jurisdiction courts.[9]

In seeking to limit the tensions between these two lines of argument, *Hearst* sought to distinguish among levels of generality and specificity.[10] Thus the Court ultimately declared that "[u]ndoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute."[11] Thus, in such cases, the primary interpretive responsibility typically lies with courts, to whatever degree, but as limited by some unspecified level of judicial deference to the relevant agency.[12]

If the interpretive question is more contextualized, however, the balance of authority shifts toward the agency. *Hearst* thus declares that "where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited."[13] More concretely, but with fascinating implications that were eventually challenged in *Loper Bright*,[14] the court in *Hearst* concluded that "the Board's determination that specified persons are 'employees' under the Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law."[15]

The *Skidmore* case, as well, displays similar duality, if not an ambivalence, toward the question of judicial authority in interpreting statutory terms. On the one hand, the *Skidmore* Court declared that administrative judgments need not

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6. *See* Marbury v. Madison, 5 U.S. 137, 177 (1803) (Chief Justice Marshall's famous observation that it is "emphatically the province and duty of the judicial department to say what the law is.").

7. *See infra* Part II.

8. *See Hearst*, 322 U.S. at 130.

9. *Id.*

10. *Id.* at 130-31.

11. *Id.*

12. *Id.*

13. *Id.* at 131.

14. *See infra* notes 75-77 and accompanying text.

15. *See Hearst*, 322 U.S. at 131-32 ("[t]he record sustains the Board's findings and there is ample basis in the law for its conclusion.").

have been more or less formally arrived at in order to deserve some degree of judicial deference. Thus:

> [t]he fact that the Administrator's policies and standards are not reached by trial in adversary form does not mean that they are not entitled to respect. This Court has long given considerable and in some cases decisive weight to . . . interpretive regulations . . . that were not of adversary origin.[16]

In that respect, *Skidmore* stands for relatively high deference to agency statutory interpretations. Thus, an agency's "rulings, interpretations and opinions . . . while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts . . . may properly resort for guidance."[17]

Importantly, though, *Skidmore* endorses an apparently less deferential judicial approach to agency interpretations of statutes as well. On this relatively less deferential approach, *Skidmore* declares that in a given case, the weight of the agency determination "will depend upon 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, if lacking power to control."[18]

In that respect *Skidmore* affords only minimal judicial deference. Assessing apparently *de novo* the validity of an agency's reasoning is hardly deferential at all. A teacher who independently assesses the validity of a student's math reasoning does not even rebuttably presume the likely correctness of the student's work.

As well, an agency may change its interpretation of a statute, thereby creating an inconsistency over time, for a range of more or less legitimate reasons. Agency inconsistency may reflect not mere arbitrary partisanship, but a thoughtful and responsible reassessment. The accumulating evidence may, for example, clearly suggest that the agency's initial assumptions and predictions were mistaken.[19] Not all cases of an agency's inconsistency over time in interpreting its statute should be equally suspect or detract equally from judicial deference.

The Supreme Court's crucial case of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* was then decided four decades after both *Hearst* and *Skidmore*.[20] *Chevron* adopted broadly applicable rules with respect to the division of authority among Congress, the agencies, and the courts in interpreting statutory language. However interpreted, *Chevron* also held sway

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16. *Skidmore*, 323 U.S. at 140.

17. *Id.*

18. *Id.*

19. For a classic such case, see *Syracuse Peace Council v. F.C.C.*, 867 F.2d 654 (D.C. Cir. 1989).

20. Chevron, U.S.A. v. NRDC, Inc., 467 U.S. 837 (1984).

for four decades.[21]

*Chevron* uncontroversially declared that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."[22] More specifically, though, *Chevron* also held more narrowly that "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."[23]

Frequently, though, and for various reasons, no relevant specific congressional intent will be discernible. In such cases, "the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation."[24] Instead, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[25]

*Chevron* then seeks to distinguish between instances in which Congress has left agencies with either an explicit, or else an implicit, delegation of authority to address statutory gaps and ambiguities, assuming any delegation of any kind has been intended by Congress.[26] Where Congress "has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."[27] Agency regulations adopted under and pursuant to such express delegations "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[28] Where the congressional delegation of authority is thought to instead be merely implicit, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[29]

Over the past forty years, this multi-part *Chevron* test been subjected to a

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21. *See Loper Bright*, 144 S. Ct. at 2271.

22. *Chevron*, 467 U.S. at 843 n.9.

23. *Id.*

24. *Id.* at 843.

25. *Id.*

26. *Id*. at 837 (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)).

27. *Id.* at 843-44.

28. *Id.* at 844. One problem is that tests such as for "arbitrariness" can be applied in more and less vigorous versions. *See, e.g.*, *Overton Park*, 401 U.S. at 410-20. More broadly, see R. George Wright, *Arbitrariness: Why the Most Important Idea in Administrative Law Can't Be Defined and What This Means for the Law in General*, 44 U. RICH. L. REV. 839 (2010).

29. *Chevron*, 467 U.S. at 844. Setting aside the complications of how to determine when there has or has not been a merely implicit delegation, one might wonder whether there is any realistically enforceable difference between "arbitrariness" and "unreasonableness," or why the latter would be imagined, presumably, to be the less deferential standard for courts to apply to agency interpretations of statutory terms.

number of interpretations, reinterpretations, and significant exceptions.[30] At one point, the Court confined *Chevron* deference only to agency interpretations adopted in ways that would normally carry the force and effect of law, as through, for example, informal notice-and-comment rulemaking, as opposed to procedural mechanisms such as mere agency opinion letters, interpretive bulletins, agency manuals, mere interpretive rules, or enforcement guidelines.[31] Agency interpretations of statutes adopted through the latter, relatively casual procedural mechanisms, would then receive only what we have referred to as the less deferential version of judicial review under *Skidmore*.[32]

This at least relatively simple approach was, however, then quickly "murkified" in *United States v. Mead Corporation*.[33] The Court in *Mead* required *Chevron* deference when Congress somehow delegated lawmaking authority to an agency, and the agency somehow promulgated its rule pursuant to and in the exercise of that authority.[34] Crucially, according to *Mead*, such congressional delegation of binding law-making authority, assuming that it was granted at all, "may be shown in a variety of ways."[35] Certainly, notice-and-comment rulemaking power would normally indicate such a congressional intent.[36] But *Mead* also referred to the possibility of "some other indication of a comparable congressional intent"[37] to delegate law-making authority to the agency that could be exercised by less formal means.[38] And *Mead* emphasized the possible vitality of meaningful *Skidmore* deference to agency interpretations undeserving of *Chevron* deference.[39]

Following up on *Mead*, the case of *Barnhart v. Walton* reiterated that agency interpretations arrived at thorough procedures less elaborate than notice-and-comment rulemaking could still, in some instances, deserve relatively high *Chevron* deference.[40] Justice Breyer in *Barnhart* declared that "the fact that the Agency previously reached its interpretation through means less formal than 'notice and comment' rulemaking . . . does not automatically deprive that

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30. *See infra* notes 92-94 and accompanying text. For a brief reference to the "clear statement" and "major questions" limitations on *Chevron* deference, see *Gonzales v. Oregon*, 546 U.S. 243, 274-75 (2006). *See also infra* note 94.

31. *See* Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000).

32. *See* Syracuse Peace Council v. F.C.C., 867 F.2d 654 (D.C. Cir. 1989). That is, agency interpretations adopted through entirely in-house or relatively casual mechanisms would be "entitled to respect" by courts "only to the extent that those interpretations have the 'power to persuade.'" *See Christensen*, 529 U.S. at 587 (internal citation omitted).

33. United States v. Mead Corp., 533 U.S. 218 (2001).

34. *Id.* at 218-19.

35. *Id.* at 227, 229-31.

36. *Id.* at 227.

37. *Id.* at 218-19 (referring implicitly to at least some of the procedural mechanisms listed in text).

38. *Id.*

39. *Id.* at 234-35 (citing, *e.g.*, the value of nation-wide uniformity in the interpretation of a statutory term or phrase).

40. Barnhart v. Walton, 535 U.S. 212, 221-22 (2002).

interpretation of the judicial deference otherwise its due."[41] In the *Barnhart* case itself, this amounted to *Chevron* deference.[42]

Characteristically, Justice Breyer sought to distinguish between the applicability of *Chevron* deference and *Skidmore* deference through an unweighted multi-factor balancing test.[43] In the *Barnhart* case itself,

> [t]he interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that Chevron provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.[44]

Roughly, then, this was the state of play under *Chevron* and *Skidmore* deference prior to *Loper Bright*.

## II. THE *LOPER BRIGHT* CASE ITSELF

The *Loper Bright* case overruled, at least in some difficult-to-specify sense, the *Chevron* relatively high level deference case law. [45] *Loper Bright* first presented its own exegesis of *Hearst* and of *Skidmore*. [46] Under the subsequently adopted Administrative Procedure Act ("APA"),[47] though, the "courts decide legal questions by applying their own judgment."[48] Emphatically, "courts, not agencies, will decide 'all relevant questions of law' arising on review of agency action."[49] And specifically, *Loper Bright* observed that the APA "prescribes no deferential standard for courts to employ in answering those legal questions."[50]

In this regard, *Loper Bright* sought to somehow draw a viable line between judicial review of agency determinations of law and judicial review of agency policy making.[51] The Court observed that the APA does, explicitly, mandate deferential review of the latter, but not the former.[52] In contrast, the Court concluded, "questions of law are for courts rather than agencies to decide in the

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41. *Id.* at 221.
42. *Id.* at 221-22.
43. *Id.* at 222.
44. *Barnhart*, 535 U.S. at 222 (as distinct from a relatively broad or fundamental legal question). Note the important difference between an agency's careful or thoughtful consideration over time, and an agency's consistency over time in interpreting the term, as under *Skidmore*, 323 U.S. at 140.
45. *Loper Bright*, 144 S. Ct. at 2273.
46. *Id.* at 2259-60.
47. *See* 5 U.S.C. § 706 (1946).
48. *Loper Bright*, 144 S. Ct. at 2261.
49. *Id.* (quoting 5 U.S.C. § 706).
50. *Id.*
51. *Id.*
52. *Id.*

last analysis."[53] And the "courts must exercise independent judgment in determining the meaning of statutory provisions."[54]

The crucial problem, though, is that having the final or ultimate say on questions of law, and indeed, exercising completely independent judgment in doing so tells us precisely nothing about whether that final and independent, autonomous judicial judgment should attach any measure of credence or weight to the judgment of the agency. One can exercise one's own final, independent, autonomous, unconstrained judgment as to, say, the completeness of quantum theory. But that exercise may attach no weight, or, usually more sensibly, quite substantial weight, to the judgments of the physicists.[55]

The *Loper Bright* Court recognized that the upshot of a court's own independent assessment of a statute may be that whatever the substantive content of that statute, the statute also somehow indicates a congressional intent that the administrative agency largely control the substantive legal meaning of that statute.[56] And even in the absence of any such congressional intent, there is inevitably what we might call the rationality of autonomous deference to epistemic superiority.[57] People often make the ultimate autonomous decision to acknowledge the plainly greater expertise of others.

Thus, the Court continues to validate both the higher and lower levels of *Skidmore* deference. In particular, courts may still continue to "seek aid from the interpretations of those responsible for implementing particular statutes."[58] Common-sensically, agency interpretations may "constitute a body of experience and informed judgment to which courts . . . may properly resort for guidance consistent with the APA."[59] Contemporaneously issued, and consistently adhered to, such agency interpretations "may be especially useful in determining the statute's meaning."[60] *Loper Bright* here criticizes what it takes to be the *Chevron* requirement that "courts mechanically afford binding deference to agency interpretations, including those that have been inconsistent over time."[61]

*Loper Bright* crucially emphasizes that not every statutory gap or ambiguity, in and of itself, intends, or amounts to, a delegation of interpretive authority to

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53. *Id.* at 2262 (citation omitted).

54. *Id.*

55. For broad background, see LINDA TRINKAUS ZAGZEBSKI, EPISTEMIC AUTHORITY: A THEORY OF TRUST, AUTHORITY, AND AUTONOMY IN BELIEF (2012); Lara Buchak, *Faith and Rational Deference to Authority*, 108 PHIL. & PHENOMENOLOGICAL RES. 637 (2024); R. George Wright, *Epistemic Peerhood in the Law*, 91 ST. JOHN'S L. REV. 663 (2017).

56. *See Loper Bright*, 144 S. Ct. at 2263.

57. *See infra* note 65.

58. *Loper Bright*, 144 S. Ct. at 2262.

59. *Id.* (quoting *Skidmore*, 323 U.S. at 140). *See also* Union Pacific Railroad v. Surface Transportation Bd., 113 F.4th 823, 833 (8th Cir. 2024).

60. *Loper Bright*, 144 S. Ct. at 2262. *See also* Gonzales & Gonzales Bonds & Ins. Agency, Inc. v. U.S. Dep't of Homeland Security, 107 F.4th 1064, 1085-86 (9th Cir. 2024) (Johnstone, J., concurring).

61. Again, the possibility of both well-justified and entirely unjustified changes in an agency's interpretation over time is often ignored. *See Loper Bright*, 144 S. Ct. at 2262.

an agency, on the theory that some such gaps and ambiguities are merely unrecognized by Congress at the time of enactment.[62] In a phrase, ambiguity does not imply delegation of rulemaking authority, even implicitly, to any agency. This is so even though Congress is aware of its own fallibility and limited insight. Curiously, though, *Loper Bright* insists at the same time that no matter the statutory gaps, ambiguities, silences, and apparent contradictions, essentially every legal question has some single, unique, unequivocally best or right answer.[63] That is, "such statutes, no matter how impenetrable, do – in fact, must – have a single, best meaning . . . 'fixed at the time of enactment.'"[64]

The claim that statutes, and their constitutive terms, usually have some single, unique best interpretation is intensely contested.[65] Professor Ronald Dworkin's "right answers" thesis is the best known defense of such a view.[66] Such views run up against the sense of frequent, and often important, legal indeterminacy.[67] *Hearst*, after all, had distinguished between uniquely correct and a range of reasonable or permissible agency interpretations of a statute.[68] And the APA seems to presume elsewhere that a statute may, at least rarely, be formulated "in such broad terms that . . . there is no law to apply."[69] Such a case would amount to an extreme, rather than a moderate or substantial, statutory indeterminacy.

*Loper Bright* thus holds that in the vast majority, if not all cases, there actually is no range of reasonable or permissible legal interpretations of statutory language.[70] If an interpretation "is not the best, it is not permissible."[71] Even if the statute is ambiguous, "there is a best reading all the same – 'the

62. *Id.*

63. *Id.* at 2266.

64. *Id.* (quoting Wisconsin Central Ltd. v. United States, 585 U.S. U.S. 274, 284 (2018)). *See also* Restaurant Law Center v. U.S. Dep't of Labor, 115 F.4th 396, 400 (5th Cir. 2024) ("[i]nstead of declaring a particular party's reading 'permissible' in such a case, courts use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity." (quoting Loper Bright, 144 S. Ct. at 2266)).

65. Ronald Dworkin, *No Right Answer?,* 53 N.Y.U. L. REV. 1 (1978), *reprinted in* RONALD DWORKIN, A MATTER OF PRINCIPLE 119 (1985). *See also* RONALD DWORKIN, LAW'S EMPIRE 266-71 (1986) ("[t]he sheer existence of a single right answer, however, tells us nothing about the ascertainability in practice of that sole best answer."). *See* Dworkin, *No Right Answer?*, at 30. For discussion, see, for example, Charles F. Capps, *Does Law Ever Run Out?*, 100 NOTRE DAME L. REV. (forthcoming 2025); Richard H. Fallon, Jr., *Selective Originalism and Judicial Role Morality*, 102 TEX. L. REV. 221, 291-92 (2023). Justice Scalia took the "one correct interpretation" view to have been overruled by *Chevron*. *See* Barnhart v. Sigmon Coal Co., 535 U.S. 226, 226 (2002) (Scalia, J., concurring in part and concurring in judgment).

66. *Id.*

67. *See, e.g.,* Kenneth J. Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283 (1989); Mark Tushnet, *Defending the Indeterminacy Thesis*, 16 QLR 339 (1997).

68. *See Hearst*, 322 U.S. 111 (1944).

69. See 5 U.S.C. § 701 (a)(2) on reviewability, as discussed in *Overton Park*, 401 U.S. at 410.

70. *See Loper Bright*, 144 S. Ct. at 2266.

71. *Id.*

reading the court would have reached' if no agency were involved."[72]

In this respect, *Loper Bright* seems to imply an odd sort of judicial relativism. Imagine a case in which the Ninth Circuit independently interprets a statutory term to mean one thing, and the Fifth Circuit interprets the same term to mean the opposite. What can we, as observers, then say that the term "really" means? The term, evidently, means one thing in one circuit, and its opposite in another.

Meaning of statutory terms is thus crucially relative to, and dependent upon, circuit. This sort of relativism, if not subjectivism, would certainly be controversial in the ethical or scientific domain.[73] Of course, the Supreme Court might, at some later point, resolve this apparent or actual conflict. But what is the law, "really," in the meantime? Does the "real" law then exist only in a deeply mysterious, perhaps indeterminate state of superposition, akin to a Schrodinger-type cat that has not yet been observed by the Supreme Court?[74]

Less mysteriously, *Loper Bright* then flatly and broadly declares that "agencies have no special competence in resolving statutory ambiguities. Courts do."[75] Here, though, the course of future litigation post-*Loper Bright* may turn out to be more nuanced than the Court seems to imagine. We may, for example, perhaps suppose that a court may have a better sense of what constitutes a "gift" than does the relevant tax agency. And some statutory terms, such as a "crime of violence," may just be inherently difficult, whichever branch of government is making the determination.[76]

But the case for an absolute advantage of a court over the relevant agency is clearly questionable in cases of at least partly scientific, technological, technical, or field-specific statutory terms. Imagine a case in which Congress allocates funding to the National Science Foundation to support the advancement of "string theory." In such cases, courts may claim to have an advantage over expert agencies in interpreting the term. But inevitably, courts will realistically tend to pay greater deference to the agency here than in other more familiar sorts of cases.

Thus, in all likelihood, and whether doctrinally acknowledged by courts,

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72. *Id.* (quoting *Chevron*, 467 U.S. at 843 n.11).

73. *See, e.g.*, Chris Gowans, *Moral Relativism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (rev. ed. Mar. 10, 2021), https://plato.stanford.edu/entries/moral-relativism [https://perma.cc/H9VS-N74Y].

74. For an accessible treatment, see, for example, JOHN GRIBBIN, IN SEARCH OF SCHRODINGER'S CAT: QUANTUM PHYSICS AND REALITY (1984). *See also* Philip Ball, *Real Life Schrodinger's Cats Probe the Boundary of the Quantum World*, QUANTAMAGAZINE (Jun. 25, 2018), https://www.quantamagazine.org/real-life-schrodingers-cats-probe-the-boundary-of-the-quantum-world-20180625/ [https://perma.cc/U37K-H56R].

75. *Loper Bright*, 144 S. Ct. at 2266.

76. *See* Willem de Haan, *Violence as an Essentially Contested Concep*t, *in THEORIZING VIOLENCE* (2009) (applying W.B. Gallie, *Essentially Contested Concepts*, 56 PROCEEDINGS OF THE ARISTOTELIAN SOC'Y 167 (1956)). Justice Sotomayor usefully points out that "domestic" violence is not merely a subset of some broader, generic concept of "violence." *See* United States v. Castleman, 572 U.S. 157, 164-65 (2014) (noting the divisions as well among judicial opinions addressing "violence" as a statutory term).

over the long term, the courts will tend to give greater weight to agency interpretations of statutory terms where professional experience and accumulated subject-matter expertise evidently matter. Consider more generally the observation of the celebrated Professor Louis Jaffe:

> [T]he administrative and the judiciary share the role of law pronouncing and law making. They are in partnership. The court may supersede the administrative and itself determine the question of law; it is the senior partner. According to one view it must decide every question of law. With this view I do not agree.[77]

Ultimately, any pretense to universal judicial superiority over agencies in matters of legal interpretation may be practically trivial, and largely formalistic. No doubt Congress would prefer a "correct" over a "wrong" but nationally uniform interpretation of a statutory term. But any such claim is too question-begging to provide much guidance.[78] And no one disputes, post-*Marbury*, that courts, rather than agencies, bear the "ultimate interpretive authority."[79]

*Loper Bright* itself thus recognizes that Congress often, though not always, endows administrative agencies with discretionary law and policy-making authority, subject to judicially enforceable statutory and constitutional limits.[80] And as a general matter, an agency's formally non-binding interpretation "may be especially informative to the extent it rests on factual premises within [the agency's] expertise."[81] There are, *Loper Bright* recognizes, many considerations that continue to counsel some form of *Skidmore*-type deference in appropriate cases.[82]

Finally, *Loper Bright* notes that any simple application of *Chevron* deference across the board has been precluded by the gradual accretion of judicially adopted limits and exceptions, including, for example, cases of agency procedural errors and so-called major questions. [83] *Loper Bright* understandably

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77. LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 546 (1965) (citing Hearst, 322 U.S. at 135-36 (Roberts, J., dissenting)).

78. *Loper Bright*, 144 S. Ct. at 2267.

79. It would mischaracterize Chevron itself to say that it denies "ultimate" authority to the courts. "Ultimacy" of judgment is compatible with giving substantial weight to the opinions of others in the course of making that ultimate judgment.

80. *See Loper Bright*, 144 S. Ct. at 2267 (quotation omitted).

81. *Id.*

82. *Id.* at 2268-69.

83. *Id.* at 2268 (quoting Encino Motor Cars, LLC v. Navarro, 579 U.S. 211, 220 (2016) (in turn quoting Mead, 533 U.S. at 227)); *id.* at 2269 (quoting King v. Burwell, 576 U.S. 473, 486 (2015)); West Virginia v. EPA, 597 U.S. 697, 723 (2022)). Perhaps the major questions doctrine will often now operate merely to help find the supposed one best legal answer. *See also* Jonathan H. Adler, West Virginia v. EPA*: Some Answers About Major Questions*, 2021 CATO SUP. CT. REV. 37 (2022); Thomas B. Griffith & Haley N. Proctor, *Deference, Delegation, and Divination: Justice Breyer and the Future of the Major Questions Doctrine*, 132 YALE L.J. 693 (2022); Cass R. Sunstein, *Two Justifications for the Major Questions Doctrine*, 76 FLA. L. REV. 251 (2024).

takes the various accruing exceptions to amount to daunting judicial complications.[84] But this approach raises its own complications. One might take each of the exceptions to the basic *Chevron* deference test as justified improvements over any oversimplified deference test. As judicial experience with *Chevron* deference has accumulated, we might thus say that a more complex but better justified *Chevron* deference test gradually emerged.

Overall, the scope and depth of *Loper Bright's* overruling of *Chevron* deference will, of course, be clarified only over the course of time. But one justifiable reaction is to anticipate something less than a revolution in practice. Doubtless agencies and courts will, with *Loper Bright*, change their approaches in some respects. Undeniably, *Loper Bright* expresses a change in judicial mood.[85]

But no change of judicial mood can abolish the undeniable fact that regardless of congressional intent or the absence thereof, some cases are best suited, in a realistic, practical sense, though not in a formal, ultimate sense, for resolution by expert agencies rather than by general jurisdiction courts. Where the courts choose to draw any relevant dividing line in this regard is likely to follow a pendulum-like swing, to and from, over a substantial period of time, as the costs of an excessive swing in either direction accrue or are thought to become disproportionate.[86]

## III. LIGHT AND DARKNESS POST-*LOPER BRIGHT*

As we have seen, the application of *Chevron* deference resulted in a number of gradually accruing complications and uncertainties.[87] The jurisprudence of *Loper Bright* must, as we now see as through a glass darkly, eventually involve complications of its own.

Some such complications already seem apparent. For one, the current remarkably complex and exception-bound jurisprudence of strong judicial deference to an agency's informal interpretations of its own vague legislative rules would, after *Loper Bright* seem to be in jeopardy.

As thus briefly stated in *Auer v. Robbins*, currently, an agency interpretation of its own regulation is "controlling unless 'plainly erroneous or inconsistent

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Perhaps the major questions doctrine will often now operate merely to help find the supposed one best legal answer.

84. *Loper Bright*, 144 S. Ct. at 2273. *Loper Bright* understandably invokes the doctrine of stare decisis to presumptively sustain prior judicial decisions invoking Chevron deference. We omit herein the Court's stare decisis analysis in rejecting the Chevron deference test itself.

85. Consider, by analogy, a pendulum-like swing in the area of criminal sentencing between a concern for uniformity in sentencing of similar crimes and a concern for the distinctive individual circumstances in any given case. As the costs of emphasizing either approach continue to accrue, the judicial "mood" changes, and the pendulum tends to swing in the other direction. Individual due process hearing rights, and the costs of such hearings, may follow a similar pattern of oscillation over time.

86. *See infra* notes 92-94 and accompanying text.

87. Auer v. Robbins, 519 U.S. 452 (1997).

with the regulation.'" [88] A number of exceptions have accreted to this notably deferential *Auer* standard.[89] But despite, if not partly because of, the sundry exceptions to strong judicial deference to agency interpretations of their own rules, *Auer* deference may well not withstand the logic and "mood" of *Loper Bright*, despite the Court's recent reaffirmation of the *Auer* doctrine.[90]More broadly, *Loper Bright* may start the Court down a path of increasing complexity with a resemblance to the history of both *Auer* and *Chevron* deference. More fundamentally, though, courts and litigants must somehow come to terms with *Loper Bright's* stronger emphasis on the idea that ambiguity, silence, and limited imagination at the congressional level do not, in themselves, amount to express or implied delegation of law-making authority to an agency. How much this increased emphasis, or this "mood," will really affect judicial outcomes is debatable. Prudence suggests, however, that agencies should devote greater attention than formerly to elaborately establishing their delegated authority to make binding rules, whether that authority is said to be expressly or implicitly granted.[91] Parties contesting a regulation will then have stronger incentives to contest that asserted pedigree.[92]

In particular, critics of a new agency rule will presumably be especially alert to broad, extreme, or adventurous agency rulemaking, and certainly to any arguable inconsistency or change of agency position, whatever the merits of any such change, on the part of the agency.[93] Lack of any agency position adopted at or near the time of enactment may also receive more emphasis than formerly.[94] Critics of a rule will also continue to emphasize any crucial respects

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88. *Id*. at 461 (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989), in turn quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)). *See also* Kisor v. Wilkie, 588 U.S. 558, 563-64 (2018) (Auer deference as "potent in its place, but cabined in its scope.").

89. *Kisor*, 588 U.S. at 563-64. For a recent application of *Kisor* itself, see *United States v. Johnson*, 104 F.4th 662, 665-66 (7th Cir. 2024). It is unclear why the doctrine of stare decisis does not suffice to uphold Chevron deference, but would suffice to uphold Auer deference, with its many exceptions and complications. *Auer* may confer substantial law and policy making authority, in practice, on even relatively casual agency determinations.

90. *See* Kristen E. Hickman, *Anticipating a New Modern Skidmore Standard*, 15 (Minnesota Legal Stud. Rsch. Paper No. 24-37, 2024), https://dx.doi.org/10.2139/ssrn.4941144 [https://perma.cc/MXZ5-U4SA]; Christopher Walker, *What Loper Bright Enterprises v. Raimondo Means for the Future of Chevron Deference,* YALE J. ON REG. (Jun. 28, 2024), https://www.yalejreg.com/nc/what-loper-bright-enterprises-v-raimondo-means-for-the-future-of-chevron-deference/ [https://perma.cc/LT7Z-JY2P] (arguing that *Loper Bright*'s delegation-but-independent-judgment standard will be no more practically manageable than the Chevron deference standard).

91. *See* Cass R. Sunstein, *The Consequences of Loper Bright*, 1 (Harvard Pub. Law Working Paper, Paper No. 24-29, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4881501? [https://perma.cc/2THH-HFDV] (last visited September 9, 2024).

92. *See id*.

93. *See id*.; *see also* Hickman *supra* note 90, at 9-10 (citing *Loper Bright*, 144 S. Ct. at 2265, 2272 on the distinction between justified and unjustified agency inconsistency).

94. *See* Jonathan H. Adler, *from "Deference" to "Respect"—The Real Import of Loper Bright*, REASON (Jul. 3, 2024), https://reason.com/volokh/2024/07/03/from-deference-to-respect-the-real-import-of-loper-bright/ [https://perma.cc/D49G-2SD3].

in which the agency rule does not require or has not received any technical or scientific expertise peculiar to the relevant agency.

In contrast, though, litigants defending an agency interpretation will, whatever the rubric, presumably emphasize the sheer pragmatic necessity of broad and frequent delegation, at least implicitly, of binding rulemaking authority to administrative agencies. As one commentator has observed, "litigants defending agency action should position *Loper Bright* to demonstrate that Congress 'often' provides agencies with broad discretion to effectuate the purpose of a given statute in rapidly changing complex areas of regulation."[95]

Finally, a less agency-deferential *Loper Bright* regime will likely tend to raise the stakes in determining whether any given issue, in rulemaking or in adjudication, is really a question of law, and thus subject to *Loper Bright*, or else instead a question of policy, or even of complex fact, and thus perhaps outside the purview of the *Loper Bright* rule.[96] Advocates on both sides of the case will thus have an increased stake in delving more aggressively into these often disputable law, policy, and fact distinctions.

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95. Patrick Jacobi, *Administrative Law After* Loper Bright Enterprises v. Raimondo, YALE J. ON REGUL. (Aug. 28, 2024), www.yalejreg.com/nc/administrative-law-after-loper-bright [https://perma.cc/YU49-KUBF]. For a thoughtful analysis of some uncertainties arising from post-Loper Bright appellate court opinions, see Haley Proctor, Loper Bright *in Action*, YALE J. ON REGUL. (Aug. 26, 2024), www.yalejreg.com/nc/loper-bright-in-action [https://perma.cc/CM83-GYQF].

96. For some complications in these sorts of classifications, see, for example, *United States v. Mateo-Mendez*, 215 F.3d 1039, 1042 (9th Cir. 2000); *Holly D. v. California Institute of Technology*, 339 F.3d 1158, 1180 n.27 (9th Cir. 2003). *See also* Pullman Standard v. Swint, 456 U.S. 273, 287-88 (1982) (citing Baumgartner v. United States, 322 U.S. 665, 671 (1944)). For an especially provocative discussion, see the conflicting opinions in Allentown Mack Sales and Service v. NLRB, 522 U.S. 359 (1998). For further development of the occasional malleability, if not elusiveness, of this distinction, see Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U.L. REV. 1769 (2003). We set aside herein questions of congressional responses to Loper Bright, including the value of more explicit but broad delegations of authority to agencies, as well as the possibility of a statutory codification of the Chevron doctrine, or something akin thereto. *But see Warren Leads Senate Response to End of Chevron Doctrine,* U.S. SENATE (Jul. 23, 2024), https://www.warren.senate.gov/newsroom/press-releases/warren-leads-senate-response-to-end-of-chevron-doctrine [https://perma.cc/8KHG-DTLM].