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COLUMBIA LAW REVIEW

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ARTICLES

IN SEARCH OF THE MODERN *SKIDMORE* STANDARD

*Kristin E. Hickman**
*Matthew D. Krueger***

This Article offers a comprehensive examination of the Skidmore *standard of judicial review as applied by the courts in the period since the Supreme Court revitalized* Skidmore *in* United States v. Mead Corp. *The Article documents an empirical study of five years worth of* Skidmore *applications in the federal courts of appeals. In the study, we evaluate two competing conceptions of* Skidmore *review that are apparent from the Supreme Court's post-*Mead *jurisprudence—the independent judgment model and the theoretically more deferential sliding-scale model—and demonstrate that the appellate courts overwhelmingly follow the sliding-scale approach. Also, we document that* Skidmore *review is much more deferential to agency legal interpretations than indicated by two other, significantly more limited studies, with agency interpretations prevailing in more than sixty percent of* Skidmore *applications. Drawing from the* Skidmore *applications studied, we analyze qualitatively how the appellate courts apply the* Skidmore *standard as a sliding scale and identify where those courts are struggling to make sense of* Skidmore*'s dictates within that model. To resolve the lower courts' difficulties, we propose reconceptualizing* Skidmore*'s sliding scale as balancing comparative agency expertise against the potential for agency arbitrariness across three attitudinal zones. Finally, we note several burgeoning issues concerning the scope of* Skidmore*'s applicability and offer preliminary thoughts for addressing those questions.*

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INTRODUCTION

Skidmore deference is back. For forty years, the Supreme Court's opinion in *Skidmore v. Swift & Co.*[1] enjoyed prominence as perhaps the Supreme Court's best expression of its policy of judicial deference toward many if not most agency interpretations of law.[2] *Skidmore* called upon

1. 323 U.S. 134 (1944).

2. See, e.g., Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977) (citing *Skidmore* for guiding standard of review for agency interpretation); Gen. Elec. Co. v. Gilbert, 429 U.S.

reviewing courts to assess multiple factors to decide on a case-by-case basis what deference, if any, to afford agency legal interpretations.[3] With its well-known 1984 decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* and its emphasis therein on mandatory deference toward reasonable agency interpretations of ambiguous statutes,[4] the Supreme Court threw the viability of *Skidmore* into doubt. Then, with *Christensen v. Harris County* in 2000 and *United States v. Mead Corp.* the following year, the Court clarified that *Chevron*'s scope is not limitless and that *Skidmore* governs a wide range of administrative interpretations that do not carry congressionally authorized legal force.[5]

Thus, in 2001 the "modern" *Skidmore* era began. Courts again regularly invoke *Skidmore*—as well as *Christensen* and *Mead*—as providing the guiding standards for judicial review of administrative interpretations.[6] However, while *Christensen* and *Mead* resurrected *Skidmore*'s now boilerplate recitation of factors, the Court has been substantially less clear in explaining how lower courts should apply the *Skidmore* standard. Indeed, the Court's discussions of *Skidmore* in *Christensen* and *Mead* reflect surprisingly different conceptions of *Skidmore*'s standard for evaluating administrative interpretations. All agree that *Skidmore* is less deferential than *Chevron*, but how much less and in what way remain open questions. Furthermore, just as the boundaries of *Chevron*'s domain were substantially less certain pre-*Mead*, the scope of *Skidmore*'s applicability in the post-*Mead* era is still unclear.

While *Skidmore* has reemerged as a unique and frequently used standard of review, contemporary scholarship contains little discussion of these unsettled questions regarding the "modern" *Skidmore* doctrine.[7]

125, 141–42 (1976) (same); Fed. Mar. Bd. v. Isbrandtsen Co., 356 U.S. 481, 499–500 (1958) (same); Mabee v. White Plains Publ'g Co., 327 U.S. 178, 182 (1946) (same); 2 Kenneth Culp Davis, Administrative Law Treatise § 7:10, at 50 (2d ed. 1979) [hereinafter 2 Davis] (describing *Skidmore* in such terms).

3. See *Skidmore*, 323 U.S. at 140.

4. 467 U.S. 837, 843–45 (1984).

5. See United States v. Mead Corp., 533 U.S. 218, 230–33 (2001); Christensen v. Harris County, 529 U.S. 576, 587 (2000).

6. See, e.g., Gonzales v. Oregon, 546 U.S. 243, 268–69 (2006); Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon, 541 U.S. 1, 18 (2004); Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 487–88 (2004); Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 449–50 (2003); Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 385–86 (2003); Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 110 n.6 (2002).

7. The whole of scholarly discussion of *Skidmore* in its "modern" form can be found in these works: William N. Eskridge, Jr. & Lauren E. Baer, The Supreme Court's Deference Continuum, An Empirical Analysis (from *Chevron* to *Hamdan*), 96 Geo. L.J. (forthcoming Apr. 2008) (manuscript at 92–94, on file with authors); Michael Herz, Judicial Review of Statutory Issues Outside of the *Chevron* Doctrine, *in* A Guide to Judicial and Political Review of Federal Agencies 125 (John F. Duffy & Michael Herz eds., 2005) [hereinafter Herz, Judicial Review]; Ronald J. Krotoszynski, Jr., Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of *Skidmore*, 54 Admin. L. Rev. 735, 750–56 (2002); Richard W. Murphy, A "New" Counter-*Marbury*: Reconciling *Skidmore* Deference

This Article begins to fill this void by evaluating the *Skidmore* standard from several angles and synthesizing the results into a single, practicable *Skidmore* framework.

Part I of this Article provides a brief overview of *Skidmore*'s history and place in the judicial deference framework that includes *Chevron* and *Mead*. Part II then empirically assesses the "modern" *Skidmore* standard that courts apply daily as a doctrine of judicial deference. In Part II.A, we identify two conceptions of *Skidmore* that compete in both the Supreme Court's and lower courts' opinions: the independent judgment model, which effectively denies any deference to agencies, and the sliding-scale model, which tailors deference in accordance with *Skidmore*'s factors. In Part II.B, we then document our empirical study of federal courts of appeals' post-*Mead* applications of *Skidmore*'s standard. We conclude that the sliding-scale model predominates over the independent judgment model and, thus, that most judges perceive *Skidmore* as an actual restraint on their decisionmaking. In the same vein, our study shows that *Skidmore*'s standard is, as a whole, surprisingly deferential, with courts applying *Skidmore*'s standard to accept agencies' views at a higher rate than was previously assumed by some scholars.[8]

However, our study also shows that the sliding-scale model lacks uniformity and that courts have varying views of what *Skidmore*'s factors mean. Therefore, in Part II.C we delve deeper into the sliding-scale approach to *Skidmore* deference by analyzing the various factors as applied.

Based on our analysis of appellate practice, in Part III we propose reconceptualizing *Skidmore*'s sliding-scale approach in two ways. We posit that *Skidmore*'s sliding scale encompasses three zones or "moods" reflecting strong, intermediate, and weak or no deference. To determine which of these moods to adopt in evaluating an agency interpretation, we also suggest that courts focus on *Skidmore*'s underlying goal of respecting agency expertise while guarding against agency arbitrariness, employing *Skidmore*'s factors in pursuit of that end rather than for their own sake.

Finally, our study uncovered burgeoning questions over when *Skidmore*'s deference standard should apply at all, rather than pure de novo review. We suspect that, as with *Chevron* deference, it is only a matter of

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and Agency Interpretive Freedom, 56 Admin. L. Rev. 1, 46–51 (2004) [hereinafter Murphy, Counter-*Marbury*]; Christopher M. Pietruszkiewicz, Discarded Deference: Judicial Independence in Informal Agency Guidance, 74 Tenn. L. Rev. 1, 45 (2006); Jim Rossi, Respecting Deference: Conceptualizing *Skidmore* Within the Architecture of *Chevron*, 42 Wm. & Mary L. Rev. 1105, 1137–46 (2001); Amy J. Wildermuth, Solving the Puzzle of *Mead* and *Christensen*: What Would Justice Stevens Do?, 74 Fordham L. Rev. 1877, 1896–1906 (2006); Eric R. Womack, Into the Third Era of Administrative Law: An Empirical Study of the Supreme Court's Retreat from *Chevron* Principles in *United States v. Mead*, 107 Dick. L. Rev. 289, 323–33 (2002). Of course, many other articles discuss *Skidmore*, but principally in the context of analyzing *Chevron*, *Mead*, or other related issues.

8. See infra notes 223–234 and accompanying text (summarizing and analyzing studies by Eric Womack and Amy Wildermuth finding low rates of agency success under *Skidmore*).

time before some of these questions divide the lower courts outright. In Part IV, we bring these underlying issues to light and offer some preliminary thoughts on the proper extent of *Skidmore*'s domain.

I. *Skidmore* Deference and Judicial Review of Administrative Interpretations

This Article focuses on *Skidmore*, not *Chevron* or *Mead*. Nevertheless, the Supreme Court's judicial deference doctrine has evolved over time, through each of these cases, so that they now function collectively as parts of a comprehensive framework for judicial review of administrative interpretations. Evaluating the modern *Skidmore* standard thus calls for a brief treatment of the deference doctrine's evolution and the Court's current framework for judicial deference. This Part summarizes *Skidmore*'s history, particularly as it relates to *Chevron* and *Mead*. It also situates the recently revitalized *Skidmore* standard within the analytical framework for judicial review of administrative interpretations.

A. *The Evolution of Judicial Deference Doctrine*

Judicial deference to agency interpretations of law predates any of *Skidmore*, *Chevron*, or *Mead*. In cases such as *AT&T v. United States* and *Atchison, Topeka & Santa Fe Railway v. Scarlett,* the Supreme Court instructed that reviewing courts should uphold regulations adopted pursuant to a specific grant of legislative power unless the promulgating agency exceeded the scope of its statutory authority.[9] The same principle of controlling deference also applied where an agency exercised a specific authority grant through formal adjudication.[10] Nevertheless, such specific authority grants from Congress were few; and for forty years before *Chevron* was decided, the Supreme Court's opinion in *Skidmore v. Swift & Co.*[11] was a leading expression of the Court's policy toward judicial review of most other administrative interpretations.[12]

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9. Atchison, Topeka & Santa Fe Ry. v. Scarlett, 300 U.S. 471, 474 (1937) ("The regulation having been made by the commission in pursuance of constitutional statutory authority, it has the same force as though prescribed in terms by the statute."); AT&T v. United States, 299 U.S. 232, 236–37 (1936) ("This court is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers."); see also, e.g., Norfolk & W. Ry. v. United States, 287 U.S. 134, 141 (1932); Fawcus Mach. Co. v. United States, 282 U.S. 375, 378 (1931); Kan. City S. Ry. v. United States, 231 U.S. 423, 447 (1913); United States v. Moore, 95 U.S. 760, 763 (1877).

10. See, e.g., NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 131 (1944) ("But 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."); Gray v. Powell, 314 U.S. 402, 412 (1941) ("Where, as here, a determination has been left to an administrative body, this delegation will be respected and the administrative conclusion left untouched.").

11. 323 U.S. 134 (1944).

12. See supra note 2 and accompanying text.

1. Skidmore *in the Pre-*Chevron *Period.* — The interpretive question in *Skidmore* was whether the time that fire-fighting employees of a packing plant spent on call for fire alarms constituted "working time," for which the employees were owed overtime pay under the Fair Labor Standards Act (FLSA).[13] The Administrator of the Department of Labor's Wage and Hour Division had issued informal rulings applying the statute in various scenarios and advocating a case-by-case approach to interpretation.[14] Though none of those rulings addressed the circumstances at bar, the Administrator applied the rulings in an amicus brief to conclude that only some of the time in question was compensable.[15] Nevertheless, the lower courts in *Skidmore* had ignored the Administrator's interpretation and decided as a matter of law that such "waiting time" could not be working time.[16]

Congress had expressly given the courts, rather than the Administrator, primary interpretive responsibility over the FLSA,[17] but the *Skidmore* Court recognized its own past practice of giving weight to interpretations by executive agencies of statutes they administered.[18] The Court therefore neither accepted nor explicitly rejected the lower courts' interpretation of the FLSA.[19] Instead, the Court remanded the case for reconsideration, and in so doing articulated the standard by which the lower courts should evaluate such cases:

> [T]he rulings, interpretations and opinions of [the agency], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case 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.[20]

Skidmore carefully disclaims an administrative interpretation's power to "control" the court's decision, but it also suggests that the interpreta-

13. See *Skidmore*, 323 U.S. at 135–36. The FLSA requires employers to provide overtime pay for hours worked in excess of forty per week. See 29 U.S.C. § 207(a)(1) (2000). The firefighters were required to be on duty at or near the firehouse to respond to incoming fire alarms but typically spent such time sleeping or playing pool or dominos. See *Skidmore*, 323 U.S. at 136. In a companion case, *Armour & Co. v. Wantock*, the Court analyzed the relevant statutory provisions and found that the statute did not expressly preclude treating such time as working time subject to overtime pay. See 323 U.S. 126, 132–34 (1944); see also *Skidmore*, 323 U.S. at 136 (relying on this finding in *Armour* to reach its own holding).

14. *Skidmore*, 323 U.S. at 138.

15. Id. at 139.

16. See id. at 136.

17. Id. at 137 (citing Kirschbaum v. Walling, 316 U.S. 517, 523 (1942)).

18. See id. at 140.

19. See id.

20. Id.

tion should have "weight" in some cases.[21] Thus, several scholars have described *Skidmore* as prescribing a kind of weak deference, falling somewhere between the poles of independent judgment and controlling deference.[22]

2. *The* Chevron *Revolution and the Uncertain Status of* Skidmore. — The dichotomy of strong deference for exercises of specific authority grants and weaker *Skidmore* deference for other administrative interpretations prevailed until 1984,[23] when the Court changed the deference landscape with its decision in *Chevron*.[24] The *Chevron* decision is best known for articulating the Court's two-part test for evaluating agency interpretations of law: whether the meaning of the statutory language in question is clear and unambiguous; and if not, whether the agency's interpretation of that statutory language is a permissible one.[25] In fact, *Chevron*'s two steps merely reflect pre-*Chevron* deference principles.[26] Even before *Chevron*, if the meaning of a statute was clear, there was no opportunity for an agency to claim judicial deference.[27] Unambiguous statutes are not susceptible of multiple interpretations; and absent constitutional issues, courts are bound to follow the clearly expressed intent of

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21. Id.

22. See, e.g., John F. Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 Colum. L. Rev. 612, 686–88 (1996) (describing *Skidmore* as "a nonbinding version of deference" from "a court exercising independent judgment"); Richard J. Pierce, Jr., Democratizing the Administrative State, 48 Wm. & Mary L. Rev. 559, 568–69 (2006) (describing *Skidmore* standard as "weaker and more contingent type of deference" than *Chevron*); Rossi, supra note 7, at 1116–18 (describing *Skidmore* as "weak deference" and as "a lesser degree of deference" than *Chevron*).

23. See, e.g., Chrysler Corp. v. Brown, 441 U.S. 281, 295–316 (1979) (explaining that only "properly promulgated, substantive agency regulations have the 'force and effect of law'" (citing Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977))); Foti v. INS, 375 U.S. 217, 223 (1963); United States v. Mersky, 361 U.S. 431, 437–38 (1960); Atchison, Topeka & Santa Fe Ry. v. Scarlett, 300 U.S. 471, 474 (1937); see also *Batterton*, 432 U.S. at 425–26 & n.9 (1977) (summarizing then-prevailing deference doctrine); 2 Davis, supra note 2, § 7:10, at 50–54 (discussing same).

24. 467 U.S. 837 (1984).

25. See id. at 842–43.

26. See, e.g., Kenneth Culp Davis, Administrative Law of the Eighties: 1989 Supplement to Administrative Law Treatise 2d § 29:16, at 505–07 (1989) [hereinafter Davis, 1989 Supplement] (opining that *Chevron*'s command of controlling deference to reasonable legislative regulations reflected longstanding doctrine). But see, e.g., E. Donald Elliott, *Chevron* Matters: How the *Chevron* Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law, 16 Vill. Envtl. L.J. 1, 6–8 (2005) (describing *Chevron*'s two steps as major doctrinal shift).

27. See, e.g., NLRB v. Brown, 380 U.S. 278, 291 (1965) ("Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute."); Norwegian Nitrogen Prod. Co. v. United States, 288 U.S. 294, 315 (1933) ("True indeed it is that administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction.").

Congress.[28] For ambiguous statutes, the standard of strong, mandatory deference for reasonable agency interpretations issued pursuant to express congressional commands pre-existed *Chevron*.[29] Standing alone, therefore, *Chevron*'s two-part test is notable more as a tool for organizing judicial analysis than as a unique doctrinal statement.

Chevron is more significant but less often appreciated for expanding the applicability of the strong form of judicial deference.[30] The interpretive question in *Chevron* involved the Environmental Protection Agency's exercise of general rather than specific rulemaking authority to redefine a term in the Clean Air Act.[31] The Court characterized the ambiguous statute, coupled with the general rulemaking grant under which the EPA interpreted it, as an "implicit" delegation of legislative authority over the instant question.[32] Thus, the Court counseled mandatory, controlling deference not only where Congress specifically calls for regulatory elaboration or formal adjudication, but also where Congress implicitly delegates interpretive power through the combination of statutory ambiguity and administrative responsibility.[33] This application of compulsory judicial deference to so-called implicit delegations, more than the two-part test, is what made *Chevron* revolutionary.[34]

However, *Chevron* did not make clear when exactly courts should presume that Congress delegated interpretive authority to the agency, or

28. There is extensive debate, however, over how clear a statute must be to qualify as unambiguous in this context. See infra notes 168–170 and accompanying text.

29. See supra notes 10–11 and accompanying text; see also Davis, 1989 Supplement, supra note 26, § 29:16, at 505–07 (suggesting that *Chevron* reflects longstanding doctrine); Bernard Schwartz, Administrative Law § 10.34, at 703 (3d ed. 1991) (citing Inv. Co. Inst. v. Conover, 790 F.2d 925, 931–32 (D.C. Cir. 1986), for view that *Chevron* deference is more evolutionary than revolutionary).

30. See *Chevron*, 467 U.S. at 844 ("Sometimes the legislative delegation to an agency on a particular question is *implicit rather than explicit*. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." (emphasis added)); Davis, 1989 Supplement, supra note 26, § 29:16-1, at 508, § 29:16-10, at 525 (noting that *Chevron* expanded applicability of strong deference).

31. See *Chevron*, 467 U.S. at 840–41 (citing 46 Fed. Reg. 50,766 (Oct. 14, 1981)). The term in question, "stationary source," was loaded with policy implications, and a change in presidential administrations prompted the EPA to alter its definition to include an entire pollution-emitting plant rather than an individual pollution-emitting piece of equipment. See id. at 841–42.

32. See id. at 844.

33. See id.

34. See, e.g., Michael Herz, Deference Running Riot: Separating Interpretation and Lawmaking Under *Chevron*, 6 Admin. L.J. Am. U. 187, 203 (1992) [hereinafter Herz, Running Riot] ("If *Chevron* is a revolutionary case, what makes it so is its apparent hospitality to implied delegations generally, and delegations by ambiguity in particular."); Jonathan T. Molot, The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role, 53 Stan. L. Rev. 1, 71–73 (2000) (labeling *Chevron*'s call for deference to implied delegations a "transfer of interpretive authority . . . to administrators [that] alters the traditional relationship between judges and legislators").

concomitantly, when *Chevron*'s framework of controlling deference was appropriate. Some, most notably Justice Antonin Scalia, read *Chevron* broadly to govern any authoritative administrative interpretation of a statute the agency was charged with implementing.[35] By this view, *Chevron*'s scope was vast, completely replacing the pre-*Chevron* multifactor approach—including *Skidmore*.[36] Others, however, attempted to reconcile *Chevron* with the pre-*Chevron* case law. One group, including now-Justice Stephen Breyer, contended that the pre-*Chevron* factors remained relevant as part of *Chevron* analysis (or vice versa).[37] Another camp advocated separate spheres for *Chevron* and *Skidmore* review.[38] Under these conceptions, *Skidmore* retained some vitality, although just how much was not precisely clear.

Chevron seemed to abandon many of the factors previously considered relevant in determining the court's proper level of deference. *Skidmore*'s focus on the context of the agency's interpretation seemed particularly out of place in *Chevron*'s regime.[39] Indeed, the *Chevron* Court

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35. See Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 519; see also Peter H. Schuck & E. Donald Elliott, To the *Chevron* Station: An Empirical Study of Federal Administrative Law, 1990 Duke L.J. 984, 1024 (contending that *Chevron* "swept aside all of these [*Skidmore*] criteria for determining the extent of deference and set forth a dramatic reformulation of the grounds for deferring to agency constructions of statutes").

36. See Christensen v. Harris County, 529 U.S. 576, 589–91 & n.* (2000) (Scalia, J., concurring) (asserting *Chevron* deference is inapplicable only when "the statute is unambiguous," "no interpretation has been made by personnel . . . responsible for administering the statute," or that "interpretation . . . was not authoritative," and calling *Skidmore* an "anachronism"); EEOC v. Arabian Am. Oil Co. (ARAMCO), 499 U.S. 244, 259–60 (1991) (Scalia, J., concurring) (characterizing *Skidmore*'s standard, as represented in Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976), again as an "anachronism"); see also Kenneth W. Starr, Judicial Review in the Post-*Chevron* Era, 3 Yale J. on Reg. 283, 297 (1986) (declaring that *Chevron* "cast doubt upon" continuing validity of *Skidmore*'s multifactor approach to deference).

37. See, e.g., Stephen Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363, 379–81 (1986) (arguing for loose reading of *Chevron* incorporating pre-*Chevron* considerations); Herz, Running Riot, supra note 34, at 208–09 (supporting "continuing role" for *Skidmore* within *Chevron* analysis); see also *Christensen*, 529 U.S. at 596–97 (Breyer, J., dissenting) (contending that "*Chevron* made no relevant change" to *Skidmore* analysis but rather "simply focused upon an additional, separate legal reason for deferring to certain agency determinations").

38. See, e.g., Robert A. Anthony, Which Agency Interpretations Should Bind Citizens and the Courts?, 7 Yale J. on Reg. 1, 40–63 (1990) [hereinafter Anthony, Agency Interpretations] (suggesting that *Chevron* should apply in some cases and *Skidmore* in others).

39. See, e.g., Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740–41 (1996) (denying relevance of interpretation's contemporaneity for *Chevron* analysis); Rust v. Sullivan, 500 U.S. 173, 186–87 (1991) (rejecting argument that *Chevron* deference is unavailable for revised interpretation, but also noting that agency "amply justified [its] change of interpretation"). In other cases, the Court invoked various *Skidmore* factors in applying *Chevron* step two, although the factors played a diminished role. See, e.g., Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 416–20 (1993) (noting inconsistency of agency's interpretations over time but nonetheless accepting agency's current view as reasonable);

emphatically rejected the argument that the EPA's interpretation should fail because it was inconsistent with previous interpretations.[40] Some initial post-*Chevron* decisions correspondingly suggested that *Chevron* superseded *Skidmore*.[41]

By the early 1990s, however, the Court began hinting that *Skidmore* persisted as a separate standard of deference.[42] In the 1991 case of *EEOC v. Arabian American Oil Co.* (*ARAMCO*), the Court rejected the view embodied in an EEOC interpretive guideline, which construed Title VII of the Civil Rights Act to cover U.S. citizens working for U.S. companies outside the U.S.[43] The majority opinion concluded that the EEOC's guideline merited only *Skidmore* rather than *Chevron* deference because the Court's precedents established that Congress "'did not confer upon the EEOC authority to promulgate rules or regulations'" interpreting Title VII.[44] In the years both before and after *ARAMCO*, the Court similarly suggested in several other cases that *Chevron* would not apply to some administrative interpretations and that some lesser deference standard existed.[45] Yet Justice Scalia, concurring in *ARAMCO*, called *Skidmore* deference "an anachronism" in the post-*Chevron* era.[46] Furthermore, the Court in the 1990s extended *Chevron* deference to a number of agency

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Arkansas v. Oklahoma, 503 U.S. 91, 110 (1992) (noting agency's consistency in accepting its interpretation as reasonable).

40. See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 863–64 (1984); see also Richard W. Murphy, Judicial Deference, Agency Commitment, and Force of Law, 66 Ohio St. L.J. 1013, 1033–35 (2005) [hereinafter Murphy, Judicial Deference] (describing consistency as irrelevant under *Chevron* analysis).

41. See, e.g., Adams Fruit Co. v. Barrett, 494 U.S. 638, 649–50 (1990) (rejecting *Chevron*'s applicability in absence of delegated authority but failing to discuss *Skidmore* as available alternative standard).

42. See Thomas W. Merrill & Kristin E. Hickman, *Chevron*'s Domain, 89 Geo. L.J. 833, 856–58 (2001) (documenting Court's recognition of *Skidmore*'s utility alongside *Chevron* beginning in early 1990s).

43. See EEOC v. Arabian Am. Oil Co. (ARAMCO), 499 U.S. 244, 256–58 (1991).

44. Id. at 257 (quoting Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976)).

45. See, e.g., Bragdon v. Abbott, 524 U.S. 624, 642 (1998) (noting but avoiding issue of whether *Chevron* applied to administrative interpretations of Rehabilitation Act, for which Congress did not delegate administrative authority to any single agency, and instead citing *Skidmore* to justify examination of agencies' views which "'constitute a body of experience and informed judgment'" (quoting Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944))); Metro. Stevedore Co. v. Rambo, 521 U.S. 121, 136 (1997) (applying *Skidmore*'s standard to opinion of the Director of the Office of Workers' Compensation); Reno v. Koray, 515 U.S. 50, 61 (1995) (affording Bureau of Prisons internal guidelines "some deference"). A forthcoming study of Supreme Court deference cases by Eskridge and Baer identified fifty-four cases between *Chevron* and *Mead* in which the Court relied on the *Skidmore* review standard. See Eskridge & Baer, supra note 7 (manuscript at 23).

46. See *ARAMCO*, 499 U.S. at 259–60 (Scalia, J., concurring in part and concurring in the judgment). Justice Scalia cites General Electric Co. v. Gilbert, 429 U.S. 125, rather than *Skidmore*, for the deference standard at issue. See *ARAMCO*, 499 U.S. at 259–60. As the majority opinion notes, however, the cited passage from *Gilbert* in turn cites *Skidmore*; and the standard as described is that of *Skidmore* review. See id. at 257 (quoting *Gilbert*, 429 U.S. at 141–42 (quoting *Skidmore*, 323 U.S. at 140)).

actions that clearly would not be *Chevron*-eligible post-*Mead*.[47] Thus, *Chevron* left *Skidmore* in doctrinal limbo.[48]

3. *The* Mead *Counterrevolution and Revitalization of* Skidmore. — With *Christensen*[49] in 2000 and *Mead*[50] in 2001, the Court significantly constricted *Chevron*'s scope. In so doing, these cases reaffirmed *Skidmore* as the deference standard for most administrative interpretations. In *Christensen*, the Court considered a dispute reminiscent of *Skidmore*: The United States as amici urged *Chevron* deference for a nonbinding Department of Labor opinion letter that interpreted the FLSA to bar employers from mandating employees to take compensatory time instead of overtime pay.[51] The Court declined to defer and held further that the interpretations expressed in the letter were "'entitled to respect' under our decision in *Skidmore v. Swift & Co.*, but only to the extent that those interpretations ha[d] the 'power to persuade.'"[52] The Court's explanation of its holding on this point was exceptionally brief; the Court stated, in total, that *Chevron* is appropriate for those agency interpretations

> arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference. Instead, interpretations contained in formats such as opinion letters are [governed by *Skidmore*].[53]

Thus, the Court held that *Chevron* did not apply to a broad array of administrative interpretations that lacked the force of law and resulted from

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47. See, e.g., Your Home Visiting Nurse Servs., Inc. v. Shalala, 525 U.S. 449, 452–53 (1999) (evaluating Medicare Provider Reimbursement Manual under *Chevron*); Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740–43 (1996) (affording *Chevron* deference to proposed agency rule adopted in response to litigation); cf. Holly Farms Corp. v. NLRB, 517 U.S. 392, 398–99 (1996) (citing *Chevron* and using *Chevron*'s two-step inquiry, though not expressly endorsing *Chevron*'s mandatory deference, in reviewing NLRB adjudication lacking legal force). Before the Court decided *Mead*, the circuits disagreed over whether agencies that lacked rulemaking authority could be eligible for *Chevron* deference. Compare, e.g., Atchison, Topeka & Santa Fe Ry. v. Peña, 44 F.3d 437, 441–42 (7th Cir. 1994) ("[O]nly statutory interpretations by agencies with rulemaking powers deserve substantial deference [under *Chevron*]."), with OSG Bulk Ships, Inc. v. United States, 132 F.3d 808, 812 n.7 (D.C. Cir. 1998) ("But where, as here, Congress has not explicitly delegated rulemaking authority to the agency charged with administering the statute, the *Chevron* analysis is the appropriate means by which to evaluate the agency's interpretation of the statute.").

48. For a more comprehensive analysis of the confusion over *Chevron*'s scope, see Merrill & Hickman, supra note 42, at 848–52 (2001) (identifying fourteen areas of confusion, including several circuit splits, over *Chevron*'s scope within lower court jurisprudence).

49. 529 U.S. 576 (2000).

50. 533 U.S. 218 (2001).

51. See *Christensen*, 529 U.S. at 586–87.

52. Id. at 587 (citation omitted) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

53. Id. (citations omitted).

relatively informal procedures—or perhaps those that fulfilled just one of these criteria. In either case, *Skidmore*'s domain would be vast.

The following term, in *Mead*, the Court elaborated *Christensen* and further contracted *Chevron*'s scope in favor of *Skidmore*. This time, the majority held that *Chevron*'s framework was inapplicable to a Customs Office's ruling letter that classified Mead's day planners as "bound" diaries and therefore subject to tariffs.[54] The Court characterized *Skidmore* as the baseline deference standard and *Chevron* as applying to a subset of "interpretive choices distinguished by an additional reason for judicial deference."[55] This "additional reason" that defined *Chevron*'s scope was the reason *Chevron* gave for deference: the existence of Congress's delegation of legislative authority to the agency.[56] Yet the *Mead* Court affirmed *Chevron*'s principle that some delegations are " 'implicit.' "[57] Thus, reviewing courts must consider all circumstances surrounding the statutory scheme and agency action to ascertain whether "Congress would expect the agency to be able to speak with the force of law" on the matter at hand.[58] As in *Christensen*, the *Mead* Court contended that agency positions reached through relatively formal procedures qualified for *Chevron*'s approach, since it is more plausible that Congress would expect the agency's action to carry the force of law when the agency engages in a deliberative, interpretive process.[59] *Chevron* deference was inapposite for the tariff rulings because the statutory scheme and informality of the letters did not suggest that Congress would have intended the letters to hold the force of law.[60]

Hence, after the *Chevron* revolution cast doubt on *Skidmore*'s vitality, *Christensen* and *Mead* confirmed that *Skidmore*'s standard continues to govern many if not most administrative interpretations. However, *Christensen* and *Mead* did not resolve all of the questions surrounding the Court's deference doctrine.

B. *The Deference Framework*

The Court's decisions in *Christensen* and *Mead* make clear that the current regime for judicial review of agency legal interpretations includes both *Chevron* and *Skidmore* as separate standards of review.[61] As outlined

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54. *Mead*, 533 U.S. at 225, 231–34.

55. Id. at 228–29.

56. See id. at 229.

57. See id. (quoting Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984)).

58. Id.

59. See id. at 230; see also Christensen v. Harris County, 529 U.S. 576, 587 (2000); Cass R. Sunstein, *Chevron* Step Zero, 92 Va. L. Rev. 187, 224–26 (2006) [hereinafter Sunstein, Step Zero] (discussing *Mead*'s emphasis on agency procedure).

60. See *Mead*, 533 U.S. at 231–34.

61. For a more recent case articulating the role of *Chevron* and *Skidmore* in modern review of agency interpretations, see Gonzales v. Oregon, 546 U.S. 243, 255–56 (2006) (summarizing Supreme Court's current deference framework). Though we describe the

above, the *Chevron* deference standard contemplates the two steps of evaluating whether a statute is ambiguous, and if so, deferring to any reasonable or permissible agency interpretation.[62] The *Skidmore* deference standard, by contrast, calls upon reviewing courts to evaluate an interpretation's persuasiveness by weighing various factors including the agency's thoroughness and consistency.[63]

Mead, in turn, articulates its own two-part inquiry for discerning which of these two standards of review applies in any given case: whether Congress gave the agency in question the authority to bind regulated parties with "the force of law" and, if so, whether the agency "exercise[d] . . . that authority."[64] Some have described *Mead*'s inquiry as a "step zero" in the overall analytical framework, coming before the application of either *Chevron*'s two steps or *Skidmore*'s multiple factors.[65] Others view *Mead* as "sort of a *Chevron* step one-and-one-half," relevant only if the reviewing court first concludes that the statute's meaning is ambiguous.[66] Both conceptualizations are technically correct. *Mead*'s two steps provide a threshold inquiry to determine which of two potential evaluative standards, *Chevron* or *Skidmore*, applies to a given case. Yet because a reviewing court will not defer to an agency under either doctrine if the statute's meaning is clear, the *Skidmore* standard implicitly replicates *Chevron*'s first step.[67] Thus, a court can engage in step one analysis before having to use *Mead* to make the choice between *Chevron* and *Skidmore*.

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current framework as consisting of *Mead*, *Chevron*, and *Skidmore*, the forthcoming study by Eskridge and Baer identifies seven different deference regimes, including *Chevron* and *Skidmore*, within the Court's jurisprudence since 1984. See Eskridge & Baer, supra note 7 (manuscript at 11–12). However, most of the other deference doctrines they identify—such as *Seminole Rock* deference for agency interpretations of their own regulations, see Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945); anti-deference doctrines such as the rule of lenity; or *Curtiss-Wright* deference for national security and foreign affairs matters, see United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936)—represent narrow exceptions or apply in different situations from the norm of the framework consisting of *Mead*, *Chevron*, and *Skidmore*. See Eskridge & Baer, supra note 7 (manuscript at 11–33) (discussing different deference regimes).

62. See *Chevron*, 467 U.S. at 842–43.

63. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). Citing *Skidmore*, the *Mead* Court paraphrased these factors in saying that agency interpretations not entitled to *Chevron* deference should be evaluated based upon "the degree of the agency's care, its consistency, formality, and relative expertness, and . . . the persuasiveness of the agency's position." *Mead*, 533 U.S. at 228 (footnotes omitted).

64. *Mead*, 533 U.S. at 226–27.

65. See, e.g., Merrill & Hickman, supra note 42, at 836; Sunstein, Step Zero, supra note 59, at 191.

66. See Joseph Cordaro, Note, Who Defers to Whom? The Attorney General Targets Oregon's Death With Dignity Act, 70 Fordham L. Rev. 2477, 2506 (2002); see also, e.g., Scott H. Angstreich, Shoring Up *Chevron*: A Defense of *Seminole Rock* Deference to Agency Regulatory Interpretations, 34 U.C. Davis L. Rev. 49, 64 (2000) (describing *Christensen*'s force-of-law inquiry similarly as an intermediate step after *Chevron* step one inquiry).

67. See infra notes 165–173 and accompanying text and Part II.B.3.c (elaborating relationship between *Skidmore* and *Chevron*'s first step inquiry).

Of course, whether a given statute is clear is often a close call. In applying the interpretive process of *Chevron*'s first step, even the most unbiased judge may find herself preferring a particular view of the statute. Considering the *Mead* questions first requires a judge at least to consider what her attitude should be toward an agency's interpretation before becoming too committed to her own statutory analysis. Yet the *Mead* analysis suffers from its own lack of clarity.[68] Many cases may be resolved either by deciding that the statute's meaning is clear or that the court would or would not defer to the agency's interpretation under either standard.[69] Hence, judges with heavy dockets may reasonably prefer to assess cases in such terms before entering *Mead*'s thicket to discern whether *Skidmore* or *Chevron* is applicable.

Regardless of how a reviewing court chooses to order the various inquiries, *Christensen* and *Mead* present *Skidmore* deference as distinct from *Chevron* deference. Just how different the two doctrines are remains a matter of some debate.

Justice Breyer has long adopted the view that *Chevron* and *Skidmore* are functionally similar, with *Chevron*'s emphasis on delegation representing merely another factor for a reviewing court to evaluate in deciding whether to defer to an administrative interpretation.[70] Justice Breyer premises his view in large part on his observations that the courts have always considered congressional intent in resolving deference questions, and yet that *Chevron*'s notion of implicit congressional delegation of lawmaking power is mere legal fiction.[71] Justice Breyer demonstrates his approach most concisely in his opinion for the Court in *Barnhart v. Walton*, in which he incorporates *Skidmore*-like factors into his analysis of whether *Chevron* applies, even as he cites *Mead* in support of his analysis:

> [T]he interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to the 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

68. See, e.g., William S. Jordan, III, Judicial Review of Informal Statutory Interpretations: The Answer is *Chevron* Step Two, Not *Christensen* or *Mead*, 54 Admin. L. Rev. 719, 719 (2002) (describing *Mead* test as "a cumbersome, unworkable regime under which courts must draw increasingly fine distinctions using impossibly vague standards"); Ronald M. Levin, *Mead* and the Prospective Exercise of Discretion, 54 Admin. L. Rev. 771, 780–806 (2002) [hereinafter Levin, Exercise of Discretion] (analyzing problems with *Mead* analysis); Adrian Vermeule, Introduction: *Mead* in the Trenches, 71 Geo. Wash. L. Rev. 347, 353–58 (2003) (criticizing *Mead* as overly abstract, "producing a great deal of confusion and error").

69. See Herz, Judicial Review, supra note 7, at 144 (highlighting these two possibilities in which *Chevron* and *Skidmore* would lead to same outcome).

70. See, e.g., Breyer, supra note 37, at 379–81; see also Sunstein, Step Zero, supra note 59, at 198–202 (describing Justice Breyer's conception of relationship between *Chevron* and *Skidmore*).

71. See Breyer, supra note 37, at 379–81.

appropriate legal lens through which to view the legality of the Agency interpretation here at issue.[72]

Alternatively, one can view *Chevron* and *Skidmore* as fundamentally distinct, arising from different premises and serving different purposes.[73] *Chevron* relies on an admittedly fictional presumption that Congress chose an agency rather than the courts to be the primary interpreter of a given statutory scheme.[74] Thus, *Mead* limits *Chevron*'s scope to cases in which a court affirmatively finds that Congress implicitly delegated primary interpretive power and that the agency exercised that power in taking the action in question.[75] *Chevron* does not require the courts to abdicate their responsibility for interpreting the law altogether;[76] but where it applies, *Chevron* deference is mandatory.[77]

By contrast, *Skidmore* merely reflects a policy of judicial prudence. Unlike *Chevron*, *Skidmore* envisions the courts rather than the agencies as the primary interpreters of statutes. Nevertheless, as the *Skidmore* Court acknowledged, courts often lack the resources and expertise to understand and evaluate fully the consequences of complex statutory schemes.[78] Sometimes agencies are simply better at assessing and applying alternative statutory interpretations. Thus, unless circumstances otherwise suggest arbitrary or unreasonable agency behavior, reviewing courts are often wise to defer to an agency's greater expertise and, sometimes, extensive interpretive efforts. Other evaluative standards such as hard look review, as well as *Skidmore*'s emphasis on factors such as thoroughness and consistency, allow the courts to guard against arbitrariness while simultaneously deferring to administrative interpretations.[79]

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72. 535 U.S. 212, 222 (2002) (citing United States v. Mead Corp., 533 U.S. 218 (2001)); see also Krzalic v. Republic Title Co., 314 F.3d 875, 879 (7th Cir. 2002) (reading *Barnhart v. Walton* as merging the *Chevron* and *Skidmore* standards).

73. See, e.g., *Krzalic*, 314 F.3d at 882 (Easterbrook, J., concurring) (rejecting merger of *Chevron* and *Skidmore* standards as inconsistent with *Mead*).

74. See, e.g., *Mead*, 533 U.S. at 229–30 & n.11.

75. See id. at 226–27; see also Thomas W. Merrill, The *Mead* Doctrine: Rules and Standards, Meta-Rules and Meta-Standards, 54 Admin. L. Rev. 807, 813 (2002) [hereinafter Merrill, The *Mead* Doctrine] (describing *Mead*'s holding).

76. See, e.g., Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 481 (2001) (rejecting agency interpretation at *Chevron* step two); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132–33 (2000) (rejecting agency interpretation at *Chevron* step one); AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 389–92 (1999) (rejecting agency interpretation at *Chevron* step two).

77. See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982–86 (2005) (requiring courts to defer under *Chevron*—even when prior judicial construction of ambiguous statute differs from agency's subsequent interpretation).

78. See Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944).

79. Where *Skidmore* or even *Chevron* deference applies to an agency's legal interpretation, the courts still evaluate agency action for adequacy of process under the arbitrary and capricious review standard of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2000), also known as "hard look review."

> [T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts

However one construes the relationship between *Chevron* and *Skidmore* deference, a few things are certain. Post-*Mead*, the Court clearly considers *Skidmore* to be an important component of its deference doctrine. Also, *Skidmore* is less deferential than *Chevron*. What remains unclear, at least from the Supreme Court's opinions, is precisely how much less deferential *Skidmore* is and in what way this is so.

II. What Is *Skidmore* Deference?

Drawing fine distinctions among deference standards may seem a purely academic exercise. Legal realists contend that such an effort is pointless, as courts only invoke deference standards to justify their preferred outcome.[80] Although we acknowledge that this critique may be true in some instances, we nevertheless submit to the contrary that deference standards matter. We accept that courts feel constrained by deference standards and speak sincerely when they discuss the application of those standards.

It is easy enough to recognize the consensus view that *Skidmore* gives judges more discretion than *Chevron*'s command of mandatory deference. Similarly, from the Court's articulation of the two standards, one can readily discern that *Chevron* deference involves two binary inquiries, while *Skidmore* requires courts to evaluate several factors. Nevertheless, once a reviewing court finds itself in *Skidmore*'s realm of discretionary deference, elucidating the appropriate degree of deference is not so simple as plotting a point on a line. Standards of review are not precision instruments. Rather, to paraphrase Justice Frankfurter, standards of review are more accurately described in terms of the "mood" a reviewing court should possess in evaluating the issue at bar.[81] The question to be answered, therefore, is what sort of mood *Skidmore* analysis contemplates.

> found and the choice made." In reviewing that explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given.

Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (citations omitted); see also *Brand X*, 545 U.S. at 981–82 (discussing relationship between *Chevron* and hard look review); Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 157–58 (1991) (noting applicability of both *Skidmore* and hard look review); Gary Lawson, Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions, 48 Rutgers L. Rev. 313, 325–31 (1996) (contrasting *Chevron* analysis with hard look review).

80. See Colin S. Diver, Statutory Interpretation in the Administrative State, 133 U. Pa. L. Rev. 549, 564 (1985) (acknowledging and dismissing legal realist critique).

81. Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951).

A. *Competing Conceptions of* Skidmore *Review*

Our examination of how *Skidmore* functions begins with an old debate. Pre-*Mead*, some suggested that *Skidmore* actually requires no deference at all, but instead prescribes nothing more than independent judgment by the reviewing court. Others described *Skidmore* as a type of deference that varies in extent from case to case along a sliding scale. The following sections explain these competing conceptions of *Skidmore*.

1. *Distinguishing Independent Judgment from Judicial Deference.* — Many scholars have described standards of review as falling along a spectrum with independent judgment and deference at opposite poles.[82] But independent judgment and deference differ not only in degree but also in kind.

The key difference between independent judgment and deference is whether a court is restrained to give an agency's interpretation special consideration that the court need not give to other litigants.[83] A court applying deference must at least *consider* whether to give weight to the agency's point of view, even if it is not *required* to give such weight. Deference to an administrative interpretation is triggered by the interpretation's "pedigree"—i.e., the fact that an agency holds the view.[84] In contrast, a court exercising independent judgment is free to consider the merits of the agency's interpretation alone, or even to ignore the agency's interpretation altogether.[85] For a court exercising independent judgment, "the pedigree of an interpretation—that is, the identity of its sponsor or author"—has no impact on the court's decision.[86] In independent judgment mode, a court may still examine the agency's view of the statute, but the court considers it on "an equal a priori footing" with all other arguments advanced by litigants in the case.[87]

Once a court finds itself in a deferential mode, the question of how much deference to afford the agency interpretation arises, since deference may occur in varying degrees.[88] The bare synopsis of *Chevron* and

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82. See, e.g., Cynthia R. Farina, Statutory Interpretation and the Balance of Power in the Administrative State, 89 Colum. L. Rev. 452, 453–54 & n.10 (1989); Thomas W. Merrill, Judicial Deference to Executive Precedent, 101 Yale L.J. 969, 971 & n.6 (1992) [hereinafter Merrill, Judicial Deference]; Henry P. Monaghan, *Marbury* and the Administrative State, 83 Colum. L. Rev. 1, 6–7 (1983). See generally Diver, supra note 80, at 552–67 (1985) (providing useful overview of courts' modes of review).

83. See Merrill & Hickman, supra note 42, at 855 ("*Skidmore* is properly regarded as a deference doctrine because the court cannot ignore the agency interpretation—the court must assess that interpretation against multiple factors and determine what weight they should be given.").

84. See Diver, supra note 80, at 559.

85. See id.

86. Id. (emphasis omitted).

87. See id.

88. See, e.g., Anthony, Agency Interpretations, supra note 38, at 6–7 (describing courts' deliberations regarding "degrees of 'deference' or 'weight' to be granted the agency interpretations" (quoting Bureau of Alcohol, Tobacco & Firearms v. Fed. Labor Relations Auth., 464 U.S. 89, 98 n.8 (1983); Zuber v. Allen, 396 U.S. 168, 192 (1969)));

Skidmore deference offered above touches upon this notion of degrees of deference. In general, scholars agree that *Chevron*'s step two nears the fully deferential end of the spectrum: Courts employing this standard retain little discretion and are required to defer to the agency's view unless it is unreasonable.[89] Thus, it is unsurprising that most agency interpretations survive *Chevron*'s second step.[90] Commentators also generally agree that *Skidmore* is less deferential than *Chevron*, falling somewhere further away from the deference pole.[91] This is all well and good, but it offers little guidance for the application of *Skidmore* as a stand-alone doctrine.

2. *The Independent Judgment Model of* Skidmore *Review.* — One might conceptualize *Skidmore* as directing courts to engage in independent judgment when reviewing administrative interpretations. Most closely associated with work by Colin Diver before the *Chevron* doctrine seriously took hold, this conception of *Skidmore* does not require courts to consider giving weight to an agency's view on the basis of contextual factors, but instead leaves courts free to do what they will in evaluating an administrative interpretation. Justice Jackson in *Skidmore* concluded that the "weight" the administrative interpretation should receive depends upon its "power to persuade."[92] As Diver suggested, such deference really represents no deference at all: "Of course, the 'weight' assigned to *any* advocate's position is presumably dependent upon the 'thoroughness evident in its consideration' and the 'validity of its reasoning.'"[93]

The independent judgment model of *Skidmore* deference thus understands the "persuasiveness" of an administrative interpretation to depend ultimately on the interpretation's merits or rightness.[94] This conception discounts *Skidmore*'s contextual factors and does not require courts to re-

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Diver, supra note 80, at 564–67 (discussing different kinds of deference that courts may allocate to administrative interpretations); Merrill, Judicial Deference, supra note 82, at 972 (noting that, prior to *Chevron*, Supreme Court recognized deference as "exist[ing] along a sliding scale").

89. See, e.g., Rossi, supra note 7, at 1112–14.

90. A study of all federal courts of appeals' applications of *Chevron* over a two-year period found that at *Chevron* step two, courts upheld the administrative interpretation eighty-nine percent of the time. Orin S. Kerr, Shedding Light on *Chevron*: An Empirical Study of the *Chevron* Doctrine in the U.S. Courts of Appeals, 15 Yale J. on Reg. 1, 30–31 (1998).

91. See, e.g., Murphy, Counter-*Marbury*, supra note 7, at 46 (noting that "*Skidmore* deference is considerably weaker than the strong stuff of *Chevron*"); Rossi, supra note 7, at 1109 (noting that *Skidmore* is often called "weak deference"); Wildermuth, supra note 7, at 1898–99.

92. See Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

93. Diver, supra note 80, at 565 (quoting *Skidmore*, 323 U.S. at 140).

94. See id. at 559, 565 (describing independent mode of statutory interpretation as evaluation only of whether agency's interpretation is "more plausible or convincing than" others); Murphy, Judicial Deference, supra note 40, at 1015 (explaining that *Skidmore* "basically instructs courts to exercise independent judgment regarding statutory meaning subject to the weak requirement that they carefully consider agency views for persuasiveness").

gard the presence or absence of those factors as particularly relevant. At most, this view understands *Skidmore* to require "due regard" be given to the agency's view, while "instruct[ing] courts to adopt the statutory interpretations that they themselves deem best."[95] In effect, then, *Skidmore* directs courts to treat the agency's view just as it would the view of any litigant.[96]

The independent judgment conception of *Skidmore* finds support in more recent case law. Most notably, the majority opinion in *Christensen v. Harris County*—a case which helped revitalize *Skidmore*—applies *Skidmore* in this fashion.[97] As discussed above,[98] in *Christensen*, the Court encountered a Department of Labor opinion letter interpreting the FLSA as precluding employers from mandating compensatory time.[99] The Court first engaged in independent review of the statute and determined that the best interpretation of the statute permitted mandatory compensatory time.[100] Only then did the Court address the contrary opinion letter, explaining that under *Skidmore*, the Court owed the letter respect "only to the extent that those interpretations have 'the power to persuade.'"[101] The Court ignored *Skidmore*'s contextual factors and dismissed the opinion letter, declaring simply that it was "unpersuasive" in comparison to the Court's preferred interpretation.[102] *Christensen*'s application of *Skidmore* demonstrates how the independent judgment approach does not ask a court to assess the proper weight to give the agency's interpretation on the basis of contextual factors; instead, this approach permits a court to enforce its preferred interpretation.[103]

The *Christensen* majority's approach to *Skidmore* analysis is not unusual, particularly not within the Supreme Court's jurisprudence. Since deciding *Christensen* and *Mead*, the Court has had several opportunities to apply *Skidmore* deference. In most of those cases, the Court's analysis closely resembles the above description of the *Christensen* opinion.[104] In *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, for example,

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95. Murphy, Judicial Deference, supra note 40, at 1015 n.13.

96. Cf. Diver, supra note 80, at 565. Diver labels *Skidmore* an extremely low level of deference. See id. However, his view of *Skidmore* is similar to the independent judgment conception, since he concludes that under *Skidmore*, the interpretation's "pedigree adds nothing" to the court's consideration, and that courts treat the administrative view on par with any litigant's position. See id.

97. See 529 U.S. 576, 587–88 (2000); see also Rossi, supra note 7, at 1131–34 (analyzing *Christensen*'s majority opinion as independent judgment approach to *Skidmore*).

98. See supra notes 51–53 and accompanying text.

99. See 529 U.S. at 586.

100. See id. at 582–86.

101. See id. at 587.

102. See id.

103. Cf. Rossi, supra note 7, at 1127 (describing *Christensen* majority's approach as essentially insisting upon what it believed to be the "better" interpretation).

104. See Gonzales v. Oregon, 546 U.S. 243, 268–69 (2006); Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon, 541 U.S. 1, 17–18 (2004); Clackamas Gastroenterology Assocs. v. Wells, 538 U.S. 440, 448–50 (2003); Wash. State Dep't of Soc. & Health Servs. v.

the Court analyzed the relevant statutory text, history, and purpose to reach a conclusion about the statute's meaning.[105] The Court then "finally" noted a Department of Labor advisory opinion's concurrence with the Court's interpretation and described the agency's interpretation as reflecting "'a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'"[106] The Court cited *Skidmore* for that proposition but never discussed any of the factors ordinarily identified as relevant to *Skidmore* analysis. Similarly, in *Clackamas Gastroenterology Associates v. Wells*, the Court compared its own precedents with the interpretations the parties suggested to conclude that its own view of the statute was best.[107] Only after reaching that conclusion did the Court note that an EEOC amicus brief and guidelines adopted a similar position, and that it was "persuaded" by the EEOC's approach.[108] Again, the Court cited *Skidmore* but failed to mention any of the *Skidmore* factors.

The independent judgment conception of *Skidmore* should be distinguished from a court's finding that a statute's meaning is unambiguous, as in *Chevron* step one.[109] The two modes of review seem similar on their surface: In both, the reviewing court independently finds and enforces what it believes to be the statute's meaning.[110] These modes of review differ, however, by the court's ability to exercise discretion. When a statute's meaning is clear, the court has no discretion and the administrative interpretation can be of no import—regardless of whether the interpretation concurs or differs from the statute, the court must enforce the congressional intent plainly embodied in the statute.[111] In such cases, it matters not whether the court applies *Skidmore, Chevron,* or some other standard, because deference is not available. By contrast, when a court applies *Skidmore*, the statute is typically ambiguous, or at least not so clear as to prevent the court's exercise of discretion. In *Christensen*, the Court observed the statute's total silence on the relevant question.[112] In *Yates*, the Court described the statute's definitions of the terms in question as

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Guardianship Estate of Keffeler, 537 U.S. 371, 385–86 (2003); Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 111 (2002).

105. *Yates*, 541 U.S. at 12–17.

106. Id. at 17–18 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

107. *Clackamas*, 538 U.S. at 448.

108. Id. at 448–49.

109. Cf. Rossi, supra note 7, at 1131–32 (comparing independent judgment model of *Skidmore* to Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947), even though *Packard* Court confronted an "unambiguous" statute).

110. Compare *Packard*, 330 U.S. at 492–93 (upholding administrative determination that aligned with statute found to have "no ambiguity" without reference to agency's views), with Christensen v. Harris County, 529 U.S. 576, 587 (2000) (rejecting administrative interpretation after determining best view of silent statute and dismissing agency's view as "unpersuasive").

111. See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

112. See 529 U.S. at 582, 588.

"uninformative."[113] In *Clackamas*, the Court noted the total inadequacy of the relevant statutory definition and turned to its own precedents to "fill the gap in the statutory text."[114]

In short, cases in which the reviewing court employs the independent judgment model of *Skidmore* review are distinguishable from those in which a court finds the statute to have a clear meaning. Independent judgment cases purport to follow *Skidmore* deference but do so in a manner that is not at all deferential, instead imposing the courts' determination of the best, better, or preferred interpretation of the statute in question.

3. Skidmore*'s Review as Deference Varying Along a Sliding Scale.* — A competing conception characterizes *Skidmore* as prescribing deference along a continuum or sliding scale, with the degree of deference varying according to the reviewing court's evaluation of *Skidmore*'s contextual factors.[115] Most closely associated with Kenneth Culp Davis and Thomas Merrill,[116] this view of *Skidmore* represents a type of "deference" because a court is not free to ignore the administrative interpretation or to reject it solely because it differs from the court's preferred interpretation.[117] Instead, *Skidmore* review intrudes upon courts' judgment by requiring courts to apply multiple factors to the agency's interpretation to decide how much weight to assign to the interpretation.[118] In effect, under this model, *Skidmore* prescribes a method by which a reviewing court should

113. Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon, 541 U.S. 1, 12 (2004).

114. Clackamas Gastroenterology Assocs. v. Wells, 538 U.S. 440, 444 (2003).

115. See, e.g., Merrill & Hickman, supra note 42, at 855.

116. Davis did not use the sliding-scale descriptor but consistently described pre-*Chevron* deference in similar terms. See, e.g., 5 Kenneth Culp Davis, Administrative Law Treatise § 29:16, at 400 (2d ed. 1984) [hereinafter 5 Davis] (describing pre-*Chevron* deference as "variable; it can be stronger or weaker"); Kenneth Culp Davis, Administrative Rules—Interpretative, Legislative, and Retroactive, 57 Yale L.J. 919, 934 (1948) ("Legislative rules normally have greater authoritative weight than interpretative rules, but the authoritative weight of interpretative rules varies considerably."). Merrill regularly utilizes the sliding-scale phraseology to describe *Skidmore* deference. See, e.g., Merrill, Judicial Deference, supra note 82, at 972 (describing pre-*Chevron* deference as sliding scale, "from 'great' to 'some' to 'little'" (citing 5 Davis, supra, § 29:16, at 400)); Merrill, The *Mead* Doctrine, supra note 75, at 810 (quoting Justice Scalia's use of the sliding-scale term in United States v. Mead Corp., 533 U.S. 218, 250 (2001) (Scalia, J., dissenting)); Merrill & Hickman, supra note 42, at 855 (describing *Skidmore* as sliding scale in which "agency interpretations receive various degrees of deference, ranging from none, to slight, to great, depending on the court's assessment of the strength of the agency interpretation under consideration").

117. Murphy, Counter-*Marbury*, supra note 7, at 46 ("[*Skidmore*] does intrude on judicial independence by requiring courts to give serious consideration to agency views. . . . [A] court is free to reject those with which it disagrees after fair consideration; but it is equally true that courts are not free to ignore them.").

118. See Merrill & Hickman, supra note 42, at 855 (describing sliding-scale conception of *Skidmore*); Rossi, supra note 7, at 1134–37 (same).

determine how much deference to give an agency's interpretation but does not mandate the outcome of that determination.

The sliding-scale model of *Skidmore* counsels special consideration of agency interpretations that courts do not necessarily afford to the views of other litigants. *Skidmore* justified giving agency interpretations such "weight" on two grounds. First, agencies typically hold specialized expertise and experience related to their respective regulatory schemes.[119] In light of this reality, *Skidmore* directs courts to assess to what extent the interpretation reflects an exercise of the agency's potentially superior interpretive competency.[120] Second, courts can promote uniformity of the law and thereby promote the public good by harmonizing judicial interpretations with administrative interpretations.[121]

The sliding-scale conception of *Skidmore* can be found in some of the Court's recent decisions, most notably in the Court's recent reaffirmation of *Skidmore* in *Mead*.[122] As discussed above, the *Mead* Court held that *Skidmore*'s standard (rather than *Chevron*'s) governed a Customs tariff classification letter.[123] The Court outlined how lower courts should review such administrative opinions: "The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances . . . . The approach has produced a spectrum of judicial responses, from great respect at one end, to near indifference at the other."[124] In this and other sections of *Mead*, the Court affirmed that lower courts have latitude to decide how much deference to give any particular administrative interpretation.[125]

Although most of the Court's post-*Mead* applications of *Skidmore* review reflect the independent judgment model described above, the Court has also employed the sliding-scale model since deciding *Mead*. In *Alaska Department of Environmental Conservation v. EPA*, the Court was called upon to evaluate an interpretation of the Clean Air Act advanced in interpretive guidelines published in 1983, 1988, 1993, and 1998.[126] Acknowledging that such guidelines lack the force of law and thus are ineligible for *Chevron* deference, the Court nevertheless counseled deference under

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119. See Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944) (noting that agency's policies were "based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case," and agency's opinions "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance").

120. See Rossi, supra note 7, at 1136–37 (discussing *Skidmore*'s rationale).

121. See *Skidmore*, 323 U.S. at 139–40.

122. See United States v. Mead Corp., 533 U.S. 218, 228–29 (2001). For other examples of the sliding-scale approach to *Skidmore*, see EEOC v. Arabian Am. Oil Co. (ARAMCO), 499 U.S. 244, 256–58 (1991) and Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141–43 (1976).

123. See *Mead*, 533 U.S. at 231–32.

124. Id. at 228 (footnotes and citations omitted).

125. For example, the Court explained that *Skidmore* stood for the proposition "that an agency's interpretation may merit some deference whatever its form." Id. at 234.

126. 540 U.S. 461, 487–88 (2004).

Skidmore.[127] Rather than interpreting the statute for itself, the Court examined the agency's interpretation in conjunction with the statute's language and history and found the agency's approach to be reasonable. The Court also emphasized the agency's expertise and the longstanding duration of its interpretation.[128]

Even if one assumes that the sliding-scale model of *Skidmore* is the correct one, it is not altogether clear exactly how the sliding scale operates. The Court has not offered firm rules, either in *Skidmore* or elsewhere, for how courts should calibrate their level of deference along the sliding scale. For example, the Court's conclusion in *Alaska Department of Environmental Conservation* that the agency's interpretation was "reasonable" and not "impermissible" prompted Justice Kennedy to accuse the majority of applying *Chevron*-style analysis under the *Skidmore* label.[129] Justice Kennedy's accusation raises this question: Does *Skidmore* deference allow a court to defer to an interpretation that it considers merely reasonable but not the only or even best option, given the presence of other contextual factors?

Moreover, the Court has not precisely delineated which contextual factors the courts should evaluate in applying the sliding scale. Neither *Skidmore* nor *Mead* purports to provide a conclusive list of factors. Both invite courts to consider any fact speaking to an interpretation's persuasiveness.[130] And neither *Skidmore* nor *Mead* explain how these factors relate to each other or whether certain factors are more important than others.[131]

Prior to *Chevron*, the courts relied upon a host of factors to determine the appropriate level of deference owed to an agency's interpretation in any given case.[132] Thomas Merrill usefully groups these "pre-*Chevron* deference factors" into three categories.[133] The first category of factors appraises whether Congress intended courts to defer to the agency's construction, with a focus on the distinction between "legislative rules" and "interpretative rules."[134] The second category of factors fo-

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127. See id.

128. See id. at 487.

129. See id. at 517–18 (Kennedy, J., dissenting).

130. See *Mead*, 533 U.S. at 235 (permitting courts to consider "any other sources of weight"); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (directing courts to consider "all those factors which give [the agency view] power to persuade").

131. See *Mead*, 533 U.S. at 228–29, 234–35; *Skidmore*, 323 U.S. at 140.

132. See Anthony, Agency Interpretations, supra note 38, at 14–15 (noting that pre-*Chevron* opinions did not explain "which 'factors' were to be heeded, and how they were to be used"); David R. Woodward & Ronald M. Levin, In Defense of Deference: Judicial Review of Agency Action, 31 Admin. L. Rev. 329, 332–35 (1979).

133. See Merrill, Judicial Deference, supra note 82, at 973–75. For other helpful collections of these factors, see Diver, supra note 80, at 562 n.95; Woodward & Levin, supra note 132, at 332–35.

134. Merrill, Judicial Deference, supra note 82, at 973. Here courts examined the underlying statutory scheme to determine whether Congress delegated lawmaking authority to the agency, such that Congress intended the agency, rather than courts, to set

cuses on the context of the particular agency interpretation, such as whether it embodied a longstanding and consistent agency position; the extent to which the agency drew upon specialized expertise; how thoroughly the agency considered the interpretation; and whether the agency supported the interpretation with a well-reasoned explanation.[135] A final category of factors potentially shows that the agency's view aligned with Congress's preference on the substantive question at hand.[136] In this vein, courts favor an agency interpretation that was adopted contemporaneously to the enactment of the underlying statute[137] or an interpretation of a statute that Congress reenacted while aware of the agency's interpretation.[138]

The relevance of all of these factors to modern *Skidmore* analysis is unclear. For example, while *Mead* relies on congressional intent to determine the applicability of *Chevron* as opposed to *Skidmore* review, contemporary Court opinions do not incorporate that factor again into *Skidmore* analysis. Similarly, neither *Mead* nor *Christensen* mentions longevity or contemporaneity as a component of *Skidmore* analysis; yet a few post-*Chevron* opinions by the Court mention such considerations in conjunction with *Skidmore* analysis.[139]

Nevertheless, the Court has identified certain factors as particularly informative. Since *Mead*, the Court has often reiterated the factors articulated in the *Skidmore* opinion itself: "the thoroughness evident in [the interpretation's] consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements."[140] The *Skidmore* Court's repeated emphasis on the agency's expertise renders that an important factor as well.[141] In *Mead*, the Court lists a slightly different set of factors: "the degree of the agency's care, its consistency, formality, and relative expertness, and . . . the persuasiveness of the agency's position."[142] Elsewhere, the *Mead* Court produces yet another list: "thoroughness, logic,

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the law. Courts tended to give greater deference to "legislative rules"—those adopted pursuant to a specific lawmaking delegation—and lesser deference to "interpretive rules"—those adopted without such delegation. See, e.g., Batterton v. Francis, 432 U.S. 416, 425–26 (1977).

135. Merrill, Judicial Deference, supra note 82, at 973–74.

136. Id. at 974.

137. See Woodward & Levin, supra note 132, at 333 ("Special weight is given to a construction which the agency has followed since its governing statute was adopted, especially if the agency participated in the drafting of the legislation." (footnote omitted)).

138. See, e.g., Red Lion Broad. Co. v. FCC, 395 U.S. 367, 380–81 (1969); Woodward & Levin, supra note 132, at 334.

139. See, e.g., Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 487 (2004).

140. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); see Gonzales v. Oregon, 546 U.S. 243, 268–69 (2006); Edelman v. Lynchburg Coll., 535 U.S. 106, 122–23 (2002) (O'Connor, J., concurring); Wis. Dep't of Health & Family Servs. v. Blumer, 534 U.S. 473, 505 (2002).

141. See *Skidmore*, 323 U.S. at 139–40.

142. United States v. Mead Corp., 533 U.S. 218, 228 (2001) (footnotes omitted).

and expertness, [and] its fit with prior interpretations."[143] These articulations can be distilled to five key factors in modern *Skidmore* analysis: thoroughness, formality, validity, consistency, and agency expertise. As noted above, longevity and contemporaneity may together comprise a sixth key factor.

To summarize, *Skidmore*'s standard for reviewing administrative interpretations has ascended in importance in the wake of *Christensen* and *Mead*. An incredible diversity of administrative interpretations now falls under *Skidmore*'s scope. Yet, it is not clear whether *Skidmore* is best understood as allowing reviewing courts to exercise independent judgment or requiring them to apply deference along a sliding scale based on an analysis of contextual factors. Another way of thinking about this question is to ask whether the *Skidmore* doctrine is really deferential at all, or whether the courts merely employ the doctrine to reinforce their own independent judgment. Moreover, to the extent that a court applies the sliding-scale approach, the relevant contextual factors and mechanics for their application remain less than clear. Part II.B explains how we undertook to study which of these conceptions of *Skidmore* deference the federal courts of appeals actually employ as well as how they employ them.

B. Skidmore *Deference in Practice: An Empirical Study*

The goals of this study were twofold. First, we sought to determine the extent to which the appellate courts apply *Skidmore* using the independent judgment model versus the sliding-scale model. Second, to the extent that the appellate courts use the sliding-scale approach, we wanted to evaluate how the sliding scale operates. This section explains the set of cases considered in this study and then lays out the tests we applied to the cases and factors we tracked within that set of cases. Finally, this section details our findings. Specifically, we conclude that the sliding-scale model of *Skidmore* deference dominates in practice. Relatedly, we find that, while *Skidmore* is indeed less deferential than *Chevron*, *Skidmore* nevertheless represents a highly deferential standard of judicial review.

Because the sliding-scale model of *Skidmore* review prevails in most day-to-day judicial decisionmaking, *Skidmore*'s contextual factors and the analysis they represent are all the more important. While the courts' application of these factors does not lend itself particularly well to empirical study, in the course of reviewing 106 identified *Skidmore* applications, we observed certain patterns in the courts' consideration of those factors. In this section, we also discuss these observations.

1. *Identifying* Skidmore *Applications.* — To evaluate the courts' contemporary application of *Skidmore*, we turned to opinions issued by the federal courts of appeals during the five-year period following the Court's

143. Id. at 235.

opinion in *Mead* on June 18, 2001.[144] Recognizing that the courts occasionally cite *Mead* or *Christensen* rather than *Skidmore* when applying the *Skidmore* standard, for thoroughness we collected federal appellate court opinions that cited any of the three.[145]

Structuring our study around judicial citations to these three cases presented certain limitations. We did not review cases that cited *Chevron* alone.[146] We also did not seek out cases in which courts employed a *Skidmore*-like review without citing any of *Skidmore*, *Christensen*, or *Mead*. For example, courts sometimes cite other cases that applied *Skidmore*'s standard, such as circuit precedent, to support their own *Skidmore* analysis.[147] We see little reason to think that these applications of *Skidmore* analysis would differ substantially from cases in which the reviewing court does cite *Skidmore*, *Christensen*, or *Mead*. Further, courts often speak loosely of deference, agency expertise, and the like while citing as precedents other cases with similarly loose deference rhetoric, making it difficult if not impossible to discern precisely which standard of review the court means to invoke.[148] Such cases, while perhaps related to *Skidmore*'s

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144. We limited the study to federal courts of appeals because of the role that those courts play in reviewing administrative interpretations. Because the Supreme Court hears so few cases, the federal courts of appeals usually give the final word on administrative interpretations. Although the federal district courts also apply *Skidmore* routinely, by virtue of the judiciary's structure, the appellate courts set the pattern for how district courts apply *Skidmore*. Finally, the federal courts of appeals often give the *only* review of administrative interpretations, since some statutes permit appeals from administrative interpretations to go straight to a federal appellate court. See William F. Fox, Jr., Understanding Administrative Law § 62[A] (3d ed. 1997).

145. Unsurprisingly, the vast majority of cases that cited only *Mead* or *Christensen* and not *Skidmore* did not include an application of *Skidmore*. Most cited *Mead* or *Christensen* for a different reason, such as to justify the court's application of *Chevron* to an administrative interpretation. See, e.g., Metrophones Telecomms., Inc. v. Global Crossing Telecomms., Inc., 423 F.3d 1056, 1064–66 (9th Cir. 2005) (holding that *Chevron* applies to FCC interpretation). Nonetheless, this search yielded twenty-two cases that applied *Skidmore*'s test after citing *Mead* or *Christensen* alone. See infra Appendix.

146. A Westlaw search indicates that the federal courts of appeals issued opinions fitting this description in 832 cases during the five-year period studied.

147. See, e.g., Morenz v. Wilson-Coker, 415 F.3d 230, 235 (2d Cir. 2005) (failing to cite *Skidmore*, *Christensen*, or *Mead*, and instead relying on *Community Health Center v. Wilson-Coker*—which in turn discusses *Skidmore*'s factors and cites *Mead*—in concluding that agency's interpretations "warrant 'respectful consideration'" (quoting Cmty. Health Ctr. v. Wilson-Coker, 311 F.3d 132, 138 (2d Cir. 2002))).

148. In *Watters v. Wachovia Bank, N.A.*, for example, Justice Stevens, writing in dissent, rejected *Chevron* as the standard for reviewing an agency regulation preempting state law. See 127 S. Ct. 1559, 1584 (2007) (Stevens, J., dissenting). Instead, noting the agency's expertise and the statute's complexity, Justice Stevens advocated giving the regulation, or at least the agency's interpretation thereof, "some weight." See id. Justice Stevens cited Geier v. Am. Honda Motor Co., 529 U.S. 861, 883 (2000), and Medtronic, Inc. v. Lohr, 518 U.S. 470, 512 (1996) (O'Connor, J., concurring in part and dissenting in part), rather than *Skidmore* as support for that proposition. See *Watters*, 127 S. Ct. at 1584. *Geier* in turn cites several cases, including *Medtronic*, 518 U.S. at 496, 506 (Breyer, J., concurring in part and concurring in judgment), and Auer v. Robbins, 519 U.S. 452, 461–62 (1997), in deferring to an agency's interpretation of its own regulations. See *Geier*, 529 U.S. at 883–84. Justice

standard, are simply too vague and indefinite to illuminate any court's understanding and application of *Skidmore* as such.

Also, because we relied on judicial citations to *Skidmore*, *Christensen*, and *Mead*, we did not evaluate cases in which courts exercised independent judgment without reference to deference principles even though the *Skidmore* standard arguably applied. As noted above, our goals with this study emphasize how federal appellate courts purporting to apply *Skidmore* did so, rather than when such courts deemed *Skidmore* appropriate or whether they utilized *Skidmore* in all cases where we think they should. Because we regard applying independent judgment in lieu of deference as distinguishable from employing the independent judgment model of the *Skidmore* standard, opinions that fail to mention *Skidmore* at all are unlikely to provide much insight. Thus, when this study discusses the independent judgment conception of *Skidmore*, it refers to instances in which a court cites *Skidmore*, *Mead*, and/or *Christensen* yet treats those cases as prescribing independent judgment.

We thus began our inquiry with a total population of 450 federal appellate court opinions that cited *Skidmore*, *Christensen*, or *Mead*. From the initial group of 450 cases, we attempted to identify instances in which courts applied *Skidmore* to review an administrative interpretation. In defining a *Skidmore* application, we prioritized two criteria. First, the definition needed to be as objective as possible to limit our own biases in applying the definition. Second, the definition needed to exclude cases in which the court mentioned the *Skidmore* standard but did not actually apply it.[149] With these goals in mind, we considered a case to involve a *Skidmore* application if it exhibited the following four elements:

(1) The case addressed a federal administrative agency's interpretation of a statute in the course of resolving a dispute;

(2) The majority opinion cited *Skidmore* or the analogous parts of *Mead* or *Christensen* for its standard of review of the administrative interpretation;

(3) The majority opinion did not find the underlying statute that the agency interpreted to be plain, clear, or unambiguous; and

(4) The majority opinion accepted or rejected the agency's interpretation upon application of *Skidmore*'s standard of review.[150]

O'Connor's opinion in *Medtronic* denied the applicability of *Chevron* deference to agency regulations concerning federal preemption of state law. See *Medtronic*, 518 U.S. at 512 (O'Connor, J., concurring in part and dissenting in part). The doctrinal basis for Justice Stevens's call for deference is thus unclear. In their forthcoming study of Supreme Court deference cases, Eskridge and Baer acknowledge a large number of such "*Skidmore*-Lite" cases, where the Court arguably engaged in *Skidmore* analysis without citing *Skidmore*. See Eskridge & Baer, supra note 7 (manuscript at 25–28) (discussing this category of cases).

149. In a study such as this one, such goals are easier said than met. Courts are not known for articulating their conclusions clearly and precisely. Accordingly, some subjectivity of analysis was inevitable, despite our best efforts.

150. We did not specifically track how many cases were excluded by each of the individual elements. We note, however, that 229 of the initial 450 cases cited *Mead* or

The first element is exclusive in important ways. First, it excludes instances of courts considering agencies' interpretations of their own regulations. As we discuss further in Part IV, the law regarding the appropriate standard for such cases is unsettled.[151] Courts occasionally apply *Skidmore*[152] but often rely upon the highly deferential standard of *Bowles v. Seminole Rock & Sand Co.*[153] instead to evaluate such interpretations.[154] This uncertainty and inconsistency suggests that *Skidmore* applications in such contexts may not represent the heartland of the *Skidmore* doctrine. More importantly, reviewing regulations strikes us as sufficiently different from reviewing statutes as to color the courts' application of *Skidmore* in the former context.[155] Accordingly, we chose to cordon off these applications for future study rather than artificially conflate the analysis here.[156]

Christensen without also citing *Skidmore*. Although we ultimately retained twenty-two such cases as *Skidmore* applications, see supra note 145, a vast majority of the others cited *Mead* or *Christensen* for a purpose other than invoking the *Skidmore* standard. See, e.g., *Metrophones*, 423 F.3d at 1065–67 (citing *Mead* in recognizing *Chevron* as relevant standard of review). Accordingly, most of the cases from the initial population of 450 were excluded from the study under the second element. See infra note 162 and accompanying text.

151. See Angstreich, supra note 66, at 56–58 (noting "th[e] longstanding need for a better understanding of why, and when, courts ought to defer to an agency's interpretation of its own regulation"); Manning, supra note 22, at 680–96 (arguing against mandatory deference to agency interpretations of their regulations); see also infra notes 385–398 and accompanying text (discussing relationship between *Seminole Rock* and *Skidmore* review).

152. See, e.g., Mercy Catholic Med. Ctr. v. Thompson, 380 F.3d 142, 155 (3d Cir. 2004) (applying *Skidmore* to Secretary of Health and Human Service's interpretation of departmental regulations); Ind. Family & Soc. Servs. v. Thompson, 286 F.3d 476, 480–83 (7th Cir. 2002) (applying *Mead*'s affirmation of *Skidmore* to Health Care Financing Administration interpretation of its own manual and regulations); see also Gonzales v. Oregon, 546 U.S. 243, 268–69 (2006) (identifying *Skidmore* as standard for evaluating agency's interpretation of regulations that it does not administer).

153. 325 U.S. 410, 414 (1945) (explaining that, in reviewing administrative interpretations of regulations, "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation").

154. In addition, Auer v. Robbins, 519 U.S. 452, 461–63 (1997)—which endorsed the standard of *Seminole Rock*—often draws citations along with or in lieu of *Seminole Rock*. See, e.g., Humanoids Group v. Rogan, 375 F.3d 301, 305–06 (4th Cir. 2004) (distinguishing *Christensen* as applying only to statutory interpretations and applying *Auer* deference to "agency's interpretation of its own regulation"); Eli Lilly & Co. v. Bd. of Regents, 334 F.3d 1264, 1266 (Fed. Cir. 2003) (citing both *Seminole Rock*, 325 U.S. at 414, and *Auer*, 519 U.S. at 461–62, for evaluating such interpretations); see also *Gonzales,* 546 U.S. at 255 (identifying *Auer* deference in dicta as applying to agency's interpretation of its "own ambiguous regulation").

155. See Harold J. Krent, Judicial Review of Nonstatutory Legal Issues, *in* A Guide to Judicial and Political Review of Federal Agencies, supra note 7, at 151–58 (discussing unique concerns related to agency's interpretations of their own regulations).

156. In some contexts, it is difficult to say whether an agency has construed a statute or a regulation; for instance, an agency opinion letter may address a specific factual question that requires reference to both statutes and regulations. See, e.g., Beck v. City of Cleveland, 390 F.3d 912, 919–26 (6th Cir. 2004) (determining whether city's compensatory time policy complied with "unduly disrupt" standard of 29 U.S.C. § 207(o)(5) (2000) by referencing both Department of Labor regulations and opinion letters). Only where it was

Separately, while *Skidmore*'s attention to agency expertise might suggest that it should apply to state agencies,[157] the Court has never suggested that *Skidmore* extends that far. Accordingly, we did not treat cases involving state agency interpretations as *Skidmore* applications.

This first element is also inclusive in certain ways. It includes interpretations of statutes that multiple agencies are charged with enforcing, since the Court has applied *Skidmore* in such instances.[158] This element also sweeps broadly by including disputes between private parties that nevertheless implicate agency interpretations and thus *Skidmore* review. This element requires only that a court address an agency's interpretation, not that the agency be a party to the litigation or that the litigation involve a direct challenge to the interpretation.[159] We chose to include these cases because often a private party relies on an agency's interpretation and forces the court to pass judgment on the interpretation, creating a situation hardly different from one in which the agency is a party.[160] Also, this element does not attempt to weed out applications of *Skidmore* that arguably occur in dicta.[161] Attempting to separate necessary elements of a case's holding from mere dicta would have introduced another level of subjectivity in the case coding.

The second element requires that the majority opinion cite *Skidmore* or the analogous sections of *Mead* or *Christensen* as providing the appropriate standard of review of the agency's statement. The effect of this decision was to limit this study to cases in which courts subjectively understand themselves to be applying *Skidmore* as a standard of review. Courts occasionally cite *Skidmore*, *Christensen*, or *Mead* for legal propositions

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clear that the interpretation to which *Skidmore* was applied construed a regulation did we exclude the case. See, e.g., Southco, Inc. v. Kanebridge Corp., 390 F.3d 276, 285–87 (3d Cir. 2004) (deferring under *Skidmore* to Copyright Office's conclusion that a part number falls within the "short phrases" provision in 37 C.F.R. § 202.1(a) (2004)).

157. See, e.g., Ace Elec. Contractors, Inc. v. Int'l Bhd. of Elec. Workers, 414 F.3d 896, 903 (8th Cir. 2005) (citing *Skidmore* to support deference to state agency interpretation of Minnesota statute barring age discrimination).

158. See, e.g., Bragdon v. Abbott, 524 U.S. 624, 642 (1998) (citing *Skidmore* to justify deference to agencies' reading of Rehabilitation Act, for which Congress delegated administrative authority to multiple agencies); cf. In re New Times Sec. Servs., Inc., 371 F.3d 68, 77–80 (2d Cir. 2004) (discussing decision to afford *Skidmore* deference to SEC's interpretation, which conflicted with interpretation of Securities Investor Protection Corporation).

159. Cf. Kerr, supra note 90, at 18–20 (limiting study of *Chevron* applications to "appeals from adverse agency adjudications and direct challenges to agency regulations").

160. *Skidmore* itself involved such a situation—the Administrator was not a party to the dispute, but his views were taken into account by the Court. See 323 U.S. 134, 137–40 (1944).

161. See, e.g., Kort v. Diversified Collection Servs., Inc., 394 F.3d 530, 539 (7th Cir. 2005) (approving of Department of Education's interpretation of statute even though court decided case on different grounds); Glover v. Standard Fed. Bank, 283 F.3d 953, 962–63 (8th Cir. 2002) (applying *Skidmore* as alternate basis for holding, in case *Christensen* rendered *Seminole Rock* deference inappropriate for regulation that merely parrots the statutory term).

other than judicial deference, then proceed either to exercise independent judgment without reference to deference doctrine or to extend deference without explicitly invoking *Skidmore* or any other deference standard.[162] Thus, as this study discusses the independent judgment and sliding-scale conceptions of *Skidmore*, it refers to instances in which a court actually purports to be applying *Skidmore* or the relevant sections of *Mead* or *Christensen*.

In applying this element, we included cases that cited *Skidmore*, *Mead*, or *Christensen* in a string citation of several cases.[163] However, we excluded *Skidmore* applications that occur only in concurring or dissenting opinions. We adopted this approach because the empirical aspect of this study seeks to describe the "law" regarding *Skidmore* and, of course, only majority opinions are characterized as law in a given circuit.[164] Nonetheless, we did consider the dissenting and concurring opinions for substantive arguments raised in their theoretical discussions of *Skidmore*'s test.

The third element excludes cases in which a court finds the statute's meaning plain, clear, or unambiguous. Each of these terms stands for the same idea: Because the court discerns statutory clarity, deference to an administrative interpretation is not an option. The Supreme Court has not explicitly held that *Skidmore* contains a "step one" analogous to *Chevron*'s first step.[165] However, the logic of *Chevron*'s step one applies with equal force to interpretations governed by *Skidmore*. If the statute clearly expresses Congress's intent as to the matter at hand, no contrary administrative interpretation can stand, no matter what standard of review a court employs.[166] Thus, *Skidmore* does not come into play in a

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162. For example, *Skidmore* is often cited for the highly fact-bound inquiry into whether waiting time in a particular case represents working time for purposes of the FLSA. See, e.g., Brigham v. Eugene Water & Elec. Bd., 357 F.3d 931, 935–36 (9th Cir. 2004).

163. See, e.g., Coal. for Gov't Procurement v. Fed. Prison Indus., Inc., 365 F.3d 435, 477 (6th Cir. 2004) (citing first Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 385 (2003), and then Christensen v. Harris County, 529 U.S. 576, 587 (2000), and United States v. Mead Corp., 533 U.S. 218, 234 (2001), to support proposition that agency's interpretation "is entitled to deference to the extent that it is reasonable").

164. More cynically, a judge writing a concurring or dissenting opinion may be less thorough or precise in applying *Skidmore*, knowing that the opinion carries no precedential weight.

165. See, e.g., *Mead*, 533 U.S. at 227–28 (describing *Skidmore*'s place within judicial review of agency's interpretations).

166. See, e.g., Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2534 (2007) ("'If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" (quoting Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984))); Fed. Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 31–32 (1981) (describing lower court's discussion of "whether and to what extent it should defer to" agency's interpretation as "pointless if the court was correct that the agency agreements violated the plain language of the Act").

meaningful way when a court concludes that the statute's meaning is clear or unambiguous.[167]

Assessing statutory meaning is not a precise inquiry, of course. The scope of *Chevron* step one analysis is a matter of extensive debate over, among other things, how clear is clear enough and which methods and tools of statutory construction are permissible in the inquiry.[168] The mere existence of litigation over a statute's meaning is prima facie evidence of some level of ambiguity, and courts rarely require absolute clarity to resolve a case at *Chevron* step one.[169] Consequently, there may be at least marginal overlap between a court's evaluation of statutory clarity and its consideration of an agency interpretation. Some commentators go so far as to assert that *Chevron* step one and *Skidmore* are synonymous, with both requiring a court to make an independent assessment of congressional intent through textual analysis as well as reference to extrinsic interpretive aids, including the agency's construction.[170]

Although we would resist conflating *Chevron* step one and *Skidmore* review, it suffices for present purposes to explain that we excluded opinions that found the statute's meaning to be clear because they offer little insight into the nature of *Skidmore* review. When a court concludes that the statute allows for only one interpretation, the agency's view cannot play a meaningful role in the court's decisionmaking. If the agency interpretation aligns with the court's view of the statute's clear meaning, that congruity may increase the court's confidence in its decision.[171] But the

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167. See, e.g., Murphy, Counter-*Marbury*, supra note 7, at 43–44 ("[T]he *Skidmore* framework should include a step one at which a court uses the 'traditional tools of statutory construction' to check for clear meaning." (quoting *Chevron*, 467 U.S. at 843 n.9)); Rossi, supra note 7, at 1139 ("[E]ven when courts review the types of agency statements for which *Skidmore* would normally apply, they presumably engage in the *Chevron* step-one inquiry."); Wildermuth, supra note 7, at 1906 (observing that *Chevron*'s first step "is the beginning point for every analysis of statutory interpretation involving an agency regardless of the type of agency action that is taken when interpreting the statute"). But see Herz, Running Riot, supra note 34, at 203–04, 208–09 (arguing that *Skidmore*'s analysis should inform *Chevron* step one).

168. See, e.g., Thomas W. Merrill, Textualism and the Future of the *Chevron* Doctrine, 72 Wash. U. L.Q. 351, 351–63 (1994) (analyzing relationship between textualism and *Chevron* deference); Scalia, supra note 35, at 520–21 (highlighting debate over *Chevron* step one); Cass R. Sunstein, Law and Administration After *Chevron*, 90 Colum. L. Rev. 2071, 2105–19 (1990) (discussing interpretative norms and *Chevron* analysis).

169. See Levin, Exercise of Discretion, supra note 68, at 779 (describing *Chevron* step one as encompassing "a *range* of potential judicial responses" and noting disparate Supreme Court cases).

170. See Herz, Running Riot, supra note 34, at 209 ("Within step one, the court attempts to determine congressional intent 'employing the traditional tools of statutory construction;' one of those tools, of course, is the interpretation of the agency charged with administering the statute." (footnote omitted) (quoting *Chevron*, 467 U.S. at 843 n.9)); Herz, Judicial Review, supra note 7, at 142–45 (discussing overlap between *Skidmore* and *Chevron* doctrines); Levin, Exercise of Discretion, supra note 68, at 778–84 (discussing role of deference in evaluating plain meaning at *Chevron* step one).

171. In this vein, even after concluding that a statute's meaning is certain, some courts still proceed to note the agency's concurring interpretation, stating that it merited

court would reach the same decision without the agency's interpretation, and any reference to the deference purportedly due under *Skidmore* is superfluous.[172] Alternatively, if the agency interpretation differs from the court's view of the statute's clear meaning, the agency interpretation must be rejected, and *Skidmore* cannot direct a different result.[173] By excluding circumstances in which the court believed itself bound by the statute's terms, we were left with a set of applications in which the agency's interpretation, considered under *Skidmore*'s standard, had the potential to influence the court's decision significantly. In these instances, *Skidmore*'s true nature is revealed, whether that be independent judgment or deference varying along a sliding scale.

That said, we did not presume that *Skidmore* review necessarily encompasses a step one. This element does not require that a court affirmatively declare the statute to be unclear or ambiguous and thus worthy of deferential review. Instead, an opinion that did not engage in a step one analysis, making no finding of statutory clarity or ambiguity, remained in the data set.[174] As discussed below, however, we found that many courts did, in fact, engage in a step one analysis before applying *Skidmore*.[175]

Evaluating whether a particular judicial opinion engaged in this step one inquiry was at times subjective. To limit bias in applying this element of our definition, we relied on signals from the reviewing court rather than our own evaluation of statutory clarity. Thus, only when a court expressly stated that a statute's meaning was "plain," "clear," or "unambig-

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"deference." See, e.g., Fairhurst v. Hagener, 422 F.3d 1146, 1149–51 (9th Cir. 2005) (determining "plain meaning" of term "chemical waste" in 33 U.S.C. § 1362(6) (2000) and then noting that EPA's corroborating interpretation was "entitled to some deference"); Kaspar Wire Works, Inc. v. Sec'y of Labor, 268 F.3d 1123, 1130–31 (D.C. Cir. 2001) (declaring "[t]he plain language of the Act could hardly be clearer," then also stating that "even had Congress had [sic] not spoken directly to the question [at hand], the Secretary's interpretation would be entitled to deference" under *Skidmore*). We do not consider such references to *Skidmore* to represent an application of its standard of review.

172. See, e.g., Russ Berrie & Co. v. United States, 381 F.3d 1334, 1336, 1338 (Fed. Cir. 2004) (concluding that statutory provisions' "meaning and intent are clear" and therefore that "we need not consider" whether deference was due to Customs's classification rulings); Marcella v. Capital Dist. Physicians' Health Plan, Inc., 293 F.3d 42, 47–48 & n.1 (2d Cir. 2002) (interpreting "plain language of the statute," then noting that agency's opinion letters supported this interpretation, but ultimately declining to "decide whether we would be obligated to defer to these opinion letters" because they were "in accord with our interpretation" of statute).

173. See, e.g., Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481, 491–94 (2d Cir. 2001) (noting *Skidmore*'s standard but ultimately ignoring EPA's interpretation because it contradicted "the plain meaning of the text"). In *Skidmore* parlance, a court in this posture often deems the agency interpretation "unpersuasive." See, e.g., Kai v. Ross, 336 F.3d 650, 654–55 (8th Cir. 2003) (determining "[t]he plain language of th[e] provision," and then concluding that agency's opinion letter is not "persuasive" because "plain language of the statute is otherwise").

174. See, e.g., Rocknel Fastener, Inc. v. United States, 267 F.3d 1354, 1358–61 (Fed. Cir. 2001) (engaging in no explicit "step one" inquiry and considering Customs's interpretation throughout discussion of statutory provision).

175. See infra Part II.B.3.c.

uous," or used some other cognate language indicating that its hands were tied, did this element operate to exclude the case.[176]

Finally, the fourth element requires that a court actually apply the *Skidmore* standard to reach a conclusion regarding the administrative interpretation. This element weeds out situations in which a court discusses *Skidmore* as a standard of review, but then decides the issue on some other ground.

Ultimately, in the first five years of the modern *Skidmore* era, 104 cases applied *Skidmore* as the controlling standard of review for an administrative interpretation. Two of these cases applied *Skidmore* to two separate agency interpretations,[177] so the total number of *Skidmore* applications in the time period studied was 106.

2. *Evaluating the* Skidmore *Applications.* — Having identified our group of *Skidmore* applications, we evaluated the courts' opinions with respect to two different questions. First, we asked whether the courts of appeals follow the independent judgment model or the sliding-scale model of *Skidmore* deference. Second, to evaluate how deferential *Skidmore* actually is, we tracked whether or not courts applying *Skidmore* deference sided with or against the agency's interpretation. The latter question is entirely objective and easy to track—either the court upholds the agency's interpretation or it does not—and, thus, it requires no elaboration as to methodology. The former entails some degree of subjective analysis that necessitates further explanation, however.

We categorized each *Skidmore* application as exemplifying independent judgment or sliding-scale deference, or as indeterminate. In general, we categorized an opinion as applying the sliding-scale model of *Skidmore* deference if the court discussed at least one of the *Skidmore* factors identified above—thoroughness of consideration, agency expertise, validity of the reasoning, consistency of application, longevity of the inter-

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176. See, e.g., Metro Leasing & Dev. Corp. v. Comm'r, 376 F.3d 1015, 1024 (9th Cir. 2004) ("Because the statutory language is not ambiguous, there is no need to rely on the Department of Treasury's regulations or administrative rulings that interpret [26 U.S.C.] § 535."); Bullcreek v. Nuclear Regulatory Comm'n, 359 F.3d 536, 541 (D.C. Cir. 2004) (declining to determine what deference is due NRC's interpretation "because the result is the same whether the court applies *de novo* review, deference under [*Skidmore*], or *Chevron* deference," as "the text of [42 U.S.C.] § 10155(h) as well as the statutory structure and legislative history" of statute support agency's view).

177. See Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 395 F.3d 25, 34–36 & n.6 (2d Cir. 2005) (applying *Skidmore* in accepting SEC's view that phrase "in connection with the purchase or sale of a . . . security" means the same thing in Securities Litigation Uniform Standards Act as it does under section 10(b) of the Securities Exchange Act of 1934); id. at 39–44 & n.9 (applying *Skidmore*, by way of Cmty. Health Ctr. v. Wilson-Coker, 311 F.3d 132, 138 (2d Cir. 2002), in rejecting SEC's view that purchaser-seller rule of Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975), does not apply to SLUSA); La. Envtl. Action Network v. EPA, 382 F.3d 575, 582–84 (5th Cir. 2004) (applying *Skidmore* to EPA's construction of Clean Air Act's requirement that state antipollution plans include measures "to take effect" in certain instances); id. at 584–86 (applying *Skidmore* to EPA's view of Act's measurement of baseline emissions "in the area").

pretation, and formality of format—in evaluating the administrative interpretation. Some courts applied *Skidmore* factors to the agency interpretation only briefly in the midst of a larger analysis of the statute's text, its legislative history, and its interpretation by other courts. In such cases, it is difficult to say that the court's evaluation of that factor was determinative or even a key factor in the court's decision. Nevertheless, we contend that a court that bothers to discuss the presence or absence of a *Skidmore* factor feels constrained by the need to justify its conclusion in those terms and, correspondingly, applies that factor to assign some degree of weight (or no weight) to the agency's interpretation. Thus, a court's active discussion of one or more *Skidmore* factors, however brief, places its opinion within the sliding-scale conception of *Skidmore*.

The Tenth Circuit's opinion in *McGraw v. Barnhart* offers a good example of sliding-scale analysis in action.[178] *McGraw* was a social security case involving the availability of attorney's fees incurred in agency-level proceedings under section 406(b)(1) of the Social Security Act.[179] As in many of the cases we reviewed, the court considered the statute's text, legislative history, and purpose, to conclude that a broad interpretation allowing fee awards under such circumstances was likely, though not necessarily conclusively, the "more appropriate reading."[180] Citing *Skidmore*, the court then recognized that the Social Security Administration had a policy of not opposing attorney's fee awards in like cases and observed that the agency's practice was consistently applied over a number of years, thoroughly considered, and supported by valid reasoning.[181] The court held in favor of the agency's interpretation of the statute.[182]

By contrast, a court following the independent judgment model typically accepted or rejected the agency's interpretation based upon its own independent review of the statute and resulting conclusion that the agency's interpretation is or is not the right or best one. In these applications, courts do not apply any *Skidmore* factors to determine whether the agency's interpretation merits deference. Courts following the independent judgment model generally do not even evaluate the agency's interpretation on its own terms. Instead, courts in such cases tend to evaluate the interpretive question using a variety of methods of statutory construction to reach a conclusion that happens to correspond or not with the agency's view. Such courts then cite *Skidmore*, *Christensen*, or *Mead* almost as an afterthought, without discussing or even mentioning the relevant contextual factors.

The Second Circuit's opinion in *Mack v. Otis Elevator Co.* is illustrative.[183] Mack was an elevator mechanic's helper who brought a sexual

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178. 450 F.3d 493, 501 (10th Cir. 2006).
179. Id. at 497–98.
180. See id. at 498–500.
181. See id. at 500–01.
182. See id. at 503.
183. 326 F.3d 116 (2d Cir. 2003).

harassment claim against her employer, Otis, based upon the behavior of the employee designated "mechanic in charge" of the group of elevator mechanics at the office building where Mack worked.[184] The interpretive question in *Mack* was whether such a mechanic in charge was a "supervisor" for the purposes of Title VII of the Civil Rights Act of 1964.[185] Without mentioning any agency interpretation at all, the court considered the statute's purposes and policies, related agency law principles, and relevant judicial precedents in adopting a broad definition of supervisor that included the mechanic in charge.[186] Only after reaching its own conclusion did the court note that enforcement guidelines issued by the EEOC corresponded with the court's own interpretation and were thus "persuasive" and entitled to "respect" under *Skidmore*.[187] In referencing the EEOC's guidelines, the court mentioned none of the *Skidmore* factors.

The most subjective classifications involved distinguishing whether a court was interpreting the statute independently or evaluating the validity of the agency's reasoning and thus the permissibility of the agency's interpretation.[188] We evaluated such cases for the tone of the court's rhetoric. Opinions that focused on the agency's analysis of the statute's language, history, and purpose or described the agency's interpretation as "reasonable" or "permissible" struck us as considering the validity of the agency's reasoning as a *Skidmore* factor.[189] By contrast, opinions were more consistent with the independent judgment model if they examined the statute's language, history, and purpose without reference to the agency's analysis, accepted an agency's interpretation because it was the "right" or "best" or "better" one, or rejected an agency's interpretation as "unpersuasive" or

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184. Id. at 120–22.

185. See id. at 123.

186. See id. at 123–27.

187. See id. at 127 (citing Christensen v. Harris County, 529 U.S. 576, 587 (2000), which quotes *Skidmore* for its authority).

188. Twelve *Skidmore* applications discussed only the validity factor. As discussed below, while they were challenging to categorize, these cases do not negate our findings regarding the predominance of the sliding-scale approach. See infra text accompanying notes 201–207.

189. Four such applications that we categorized as applying *Skidmore*'s validity factor rather than employing independent judgment were particularly close calls. See St. Mary's Hosp. v. Leavitt, 416 F.3d 906, 914–15 (8th Cir. 2005) (accepting agency's interpretation because it "makes sense" and was "logical" way to fill statutory gap); United States v. City of New York, 359 F.3d 83, 93–94 (2d Cir. 2004) (examining circuit precedent, then noting that EEOC opinion was "entitled to respect" because it was "reasonable and completely consistent with the Second Circuit's employee test"); IA 80 Group, Inc. v. United States, 347 F.3d 1067, 1072–73 (8th Cir. 2003) (construing 26 U.S.C. § 168(e)(3)(E)(iii) (2000) first independently and then "accept[ing] the IRS's construction" because it "is consistent with the statute's legislative history and is not unreasonable"); Bolen v. Dengel (In re Dengel), 340 F.3d 300, 310 (5th Cir. 2003) (finding agency handbook's interpretation "persuasive" in light of statute's broader context and legislative history, concluding finally that the interpretation "is not prohibited by" statute).

"incorrect." As discussed above, Justice Thomas's majority opinion in *Christensen* is a prototypical example of this approach.[190]

Finally, seven *Skidmore* applications defied categorization altogether.[191] This indeterminate group of applications resembled neither the independent judgment nor the sliding-scale model as described above, nor did their analysis suggest additional conceptions of *Skidmore* to compete with those two theories. Rather, in such instances, the court accepted the agency interpretation and, invoking *Skidmore*, adopted a deferential tone but failed to consider the context of the interpretation to measure whether or to what extent such deference was due. A court applying deference in this unconditional manner would seem to fit neither within the sliding-scale model nor the independent judgment model of *Skidmore*, and no scholar has suggested that *Skidmore* operates in this way. Yet, a review of the study's dataset quickly revealed that courts occasionally cite *Skidmore* to justify deferring to the agency without explaining whether or why deference is merited.

For example, in *Noviello v. City of Boston*, the First Circuit considered whether an employer's tolerance of a hostile work environment constitutes "discrimination" for the purposes of a retaliation claim under Title VII.[192] The court scanned Title VII's text and legislative history, and then noted that it owed "*Skidmore* deference" to a compliance manual of the EEOC, which favored a broad reading of "discrimination."[193] In deciding to afford deference to the manual, however, the court did not so much as mention any of *Skidmore*'s factors, much less assess the manual under them. Instead, the court seemed persuaded principally by the fact that most other circuits facing the question had reached the same conclusion.[194]

In theory, this category could represent a model of *Skidmore* that is distinct from the independent judgment and sliding-scale models—a model in which *Skidmore* prescribes automatic deference without regard

190. See *Christensen*, 529 U.S. at 586–87; supra notes 97–103 and accompanying text (summarizing *Christensen* majority opinion); see also Rossi, supra note 7, at 1125–27 (describing *Christensen* majority as rejecting agency interpretation because it was not the "better" view).

191. See Appoloni v. United States, 450 F.3d 185, 190–94 (6th Cir. 2006) (deferring to IRS revenue ruling); Fujitsu Am., Inc. v. United States, 422 F.3d 1364, 1367–69 (Fed. Cir. 2005) (deferring to Customs tariff classification ruling); Noviello v. City of Boston, 398 F.3d 76, 90 & n.3 (1st Cir. 2005) (deferring to EEOC compliance manual); Goswami v. Am. Collections Enter., Inc., 377 F.3d 488, 493–94 (5th Cir. 2004) (deferring to FTC staff commentary); Hecht v. Barnhart, 68 F. App'x 244, 246–47 (2d Cir. 2003) (deferring to social security program manual); Jewelpak Corp. v. United States, 297 F.3d 1326, 1331–37 (Fed. Cir. 2002) (deferring to Customs tariff classification ruling); Forrester v. Am. Dieselelectric, Inc., 255 F.3d 1205, 1207–09 (9th Cir. 2001) (deferring to Federal Railroad Administration memorandum).

192. See *Noviello*, 398 F.3d at 88–89.

193. See id. at 90 & n.3.

194. See id. at 89 ("Although this court has never fully analyzed the question, our case law tilts noticeably toward the majority view.").

to contextual factors. We hesitate, however, to so characterize this group of applications for several reasons. First, as the "indeterminate" label suggests, classifying these applications was difficult primarily because they resembled both rather than neither of the independent judgment and sliding-scale models.[195] Second, the courts' analyses in these cases are rather cursory, suggesting not that the courts understood *Skidmore* to entail a blunt directive to defer but that the courts simply declined to elaborate their application of *Skidmore*.[196]

3. *Results of Study of* Skidmore *in Courts of Appeals.* — Our analysis of *Skidmore* applications in the federal courts of appeals supports these conclusions: First, the sliding-scale model of *Skidmore* deference dominates the independent judgment model among the federal circuit courts of appeals. Second, *Skidmore* deference, while less deferential than *Chevron*, is nevertheless highly deferential to administrative interpretations as applied.

a. *Establishing Dominance of the Sliding-Scale Model.* — We found that the sliding-scale conception of *Skidmore* most accurately describes the prevailing appellate court practice. In 79 of 106, or 74.5%, of *Skidmore* applications, the reviewing court assessed at least one *Skidmore* factor in evaluating the administrative interpretation. By contrast, only 20 of 106, or 18.9%, of *Skidmore* applications reflected independent judgment. Only 7 applications, or 6.6% of the total, were indeterminate—deferring to the agency without explanation.

TABLE 1: INDEPENDENT JUDGMENT VERSUS SLIDING-SCALE REVIEW

Description of *Skidmore* Application	Number of Applications	Percent of Applications
Independent Judgment Model	20	18.9%
Sliding-Scale Model	79	74.5%
Indeterminate	7	6.6%
	106	100.0%

This study thus shows that courts do not, on the whole, understand *Skidmore* to sanction independent judgment of a statute in the face of an

195. These applications and the independent judgment applications shared the common feature of the court accepting the agency's interpretation without applying any *Skidmore* factors. Yet these applications differed from the independent judgment applications since the courts, both in word and in tone, purported to assign weight to the agency's interpretation rather than merely using the agency's interpretation as affirmation of the courts' own views. In that sense, they more closely resembled the sliding-scale applications in which the courts explicitly articulated reasons for deferring.

196. E.g., *Fujitsu Am.*, 422 F.3d at 1366–69 (quoting *Mead*'s articulation of sliding-scale standard but then neglecting to assess any factors and instead accepting agency's view because plaintiff gave "no[ ] reason for not giving deference"); *Goswami*, 377 F.3d at 493–94 (accepting FTC interpretation as "persuasive" with no consideration of *Skidmore*'s factors and then noting that statute's legislative history and other judicial decisions were in agreement).

administrative interpretation. Instead, most courts that cite *Skidmore* believe themselves bound to afford agencies special consideration that is not due to ordinary litigants. In a sense, *Mead*'s vision of *Skidmore* has prevailed over *Christensen*'s approach of citing *Skidmore* in order to justify independent review.

Some judicial opinions reviewed in this study discussed forthrightly the tension between the competing models.[197] For example, in *Cathedral Candle Co. v. United States International Trade Commission*, the Federal Circuit explained:

> At times, the [Supreme] Court has characterized the degree of deference to particular agency interpretations of statutes as depending on "the extent that the interpretations have the 'power to persuade'" [citing *Christensen*]. We are confident that the Court did not mean for that standard to reduce to the proposition that "we defer if we agree." If that were the guiding principle, *Skidmore* deference would entail no deference at all. Instead, we believe the Supreme Court intends for us to defer to an agency interpretation of the statute that it administers if the agency has conducted a careful analysis of the statutory issue, if the agency's position has been consistent and reflects agency-wide policy, and if the agency's position constitutes a reasonable conclusion as to the proper construction of the statute, even if we might not have adopted that construction without the benefit of the agency's analysis.[198]

The *Cathedral Candle* court thus comprehended how *Christensen*'s approach could boil down to independent judgment, accepting the agency's view only if the court concludes it is the best interpretation.[199] The court also read *Mead* to compel sliding-scale deference that is conditioned on the context surrounding the agency's interpretation.[200]

This study's finding that the sliding-scale approach is more prevalent than the independent judgment model is robust. However, the courts employing the sliding-scale approach varied significantly in the extent to

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197. See, e.g., Cathedral Candle Co. v. U.S. Int'l Trade Comm'n, 400 F.3d 1352, 1366 (Fed. Cir. 2005); Collins v. Nat'l Transp. Safety Bd., 351 F.3d 1246, 1254 (D.C. Cir. 2003) (describing *Skidmore* deference as less than *Chevron* "but more than acknowledgement that the agency's position is more convincing than its adversaries', as would be true any time it submitted the more convincing brief").

198. *Cathedral Candle Co.*, 400 F.3d at 1366 (citation omitted) (quoting Christensen v. Harris County, 529 U.S. 576, 587 (2000)).

199. See id. For an even more stark example of a court reading *Christensen*'s formulation of *Skidmore* as prescribing independent judgment, see Forest Park II v. Hadley, 336 F.3d 724, 732 n.6 (2003) ("[W]e owe no deference to an opinion letter purporting to interpret a statute that is not the result of the agency's rulemaking procedures." (citing *Christensen*, 529 U.S. at 587)).

200. See *Cathedral Candle Co.*, 400 F.3d at 1365–66 (relying on *Mead* to explain that "[w]hile the *Skidmore* standard does not entail the same degree of deference to administrative decisionmaking as the *Chevron* standard, it nonetheless requires courts to give some deference to informal agency interpretations of ambiguous statutory dictates, with the degree of deference depending on the circumstances").

which they applied the *Skidmore* factors. The next subsection explores the sliding-scale approach in finer detail, but one subset of applications—those in which the court applied only the "validity" factor—bears mentioning here because it is potentially distinct from other applications of the sliding-scale approach to *Skidmore*.

Recall that we defined "validity" as testing the merits of the agency's interpretation for its reasonableness or permissibility.[201] In some of the instances that we identified as *Skidmore* applications, a court purporting to engage in *Skidmore* analysis only considered whether the agency's interpretation was reasonable and ignored whether the agency's consideration was thorough, whether its position was consistent or the product of formal procedures, etc.[202] Such an approach neglects the assessment of whether the agency has exercised care and expertise in forming its interpretation—an assessment that goes to the core of *Skidmore*'s rationale for affording deference to administrative interpretations.[203] Instead, because these courts evaluate only the merits of the interpretation, their decision to defer (or not) is disconnected from *Skidmore*'s underlying premise and is motivated by other concerns. To the extent that a court accepts an agency's interpretation solely because it is "valid," the court potentially extends deference beyond what *Mead* envisioned.[204] Indeed, such cases resemble *Chevron*'s step two, which at least conceptually evaluates the permissibility of the agency's conclusion without regard to the agency's interpretive process or procedures.[205]

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201. See supra notes 188–190 and accompanying text.

202. See, e.g., M. Fortunoff of Westbury Corp. v. Peerless Ins. Co., 432 F.3d 127, 139–40 (2d Cir. 2005) (accepting Federal Motor Carrier Safety Administration's interpretation because it "makes economic sense" and is "consistent with the [underlying statute]"); Cmty. Bank of Ariz. v. G.V.M. Trust, 366 F.3d 982, 987–89 (9th Cir. 2004) (accepting Office of Comptroller of the Currency's view because it was "reasonable" and "consistent with the statutory text"); O'Brien v. Town of Agawam, 350 F.3d 279, 298 (1st Cir. 2003) (upholding Secretary of Labor's construction because it "provides a clear and useful" test for undefined statutory term); see also St. Mary's Hosp. v. Leavitt, 416 F.3d 906, 915 (8th Cir. 2005); La. Envtl. Action Network v. EPA, 382 F.3d 575, 583–84 (5th Cir. 2004); George Harms Constr. Co. v. Chao, 371 F.3d 156, 160–63 (3d Cir. 2004); Coal. for Gov't Procurement v. Fed. Prison Indus., Inc., 365 F.3d 435, 477–78 (6th Cir. 2004); Tum v. Barber Foods, Inc., 360 F.3d 274, 280–81 (1st Cir. 2004); United States v. City of New York, 359 F.3d 83, 93 (2d Cir. 2004); Malacara v. Garber, 353 F.3d 393, 401 (5th Cir. 2003); IA 80 Group, Inc. v. United States, 347 F.3d 1067, 1072–73 (8th Cir. 2003); Bolen v. Dengel (In re Dengel), 340 F.3d 300, 310 (5th Cir. 2003).

203. Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944) (justifying deference to administrative interpretations by their status as "a body of experience and informed judgment to which courts and litigants may properly resort for guidance"); see also United States v. Mead Corp., 533 U.S. 218, 227–28 (2001).

204. See *Mead*, 533 U.S. at 235–38 (recalling that Court has recognized "more than one variety of judicial deference," and emphasizing that "judicial responses to administrative action must continue to differentiate between *Chevron* and *Skidmore*").

205. See, e.g., Lawson, supra note 79, at 325–31 (contending that *Chevron* step two considers only interpretive outcomes, while questions of agency procedure and process represent independent inquiries). For a contrary view of *Chevron* step two that incorporates process considerations, see, for example, Ronald Levin, The Anatomy of

On the other hand, courts that assess only an interpretation's validity may be implicitly signaling that application of the other *Skidmore* factors is unnecessary. This could be because the court independently agrees with the agency's view and would accept its interpretation regardless of how the factors turn out.[206] Similarly, a court might find the agency's view impermissible and so refuse to accept it no matter what direction the other *Skidmore* factors point.[207] Because courts often do not make clear the precise basis for their approach to *Skidmore*, this subset of applications merits further study.

Twelve of 79, or 15%, of the sliding-scale *Skidmore* applications fell into this subset by applying only the validity factor. We do not believe that the heavy reliance of some courts on the validity factor undermines our overall conclusion regarding the predominance of the sliding-scale approach to *Skidmore*. As discussed above, the tone of a reviewing court's rhetoric speaks volumes about whether a court is acting independently or deferentially in evaluating the merits of the agency's analysis.[208] Moreover, even excluding these applications, the sliding-scale conception of *Skidmore* is still over three times more common than the independent judgment conception (67 sliding-scale applications versus 20 independent judgment applications).[209]

Finally, as an interesting side note, we found the Supreme Court decision a reviewing court cites in support of *Skidmore* deference to be suggestive of whether the court will engage in independent judgment or slid-

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Chevron: Step Two Reconsidered, 72 Chi.-Kent L. Rev. 1253, 1292–94 (1997) (disagreeing with Lawson's framework "because 'outcome' issues and 'process' issues should not be analyzed in isolation from each other"); Mark Seidenfeld, A Syncopated *Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes, 73 Tex. L. Rev. 83, 125–32 (1994) (arguing that "[s]ubstituting something akin to hard look review for the deferential reasonableness standard that courts have used in *Chevron*'s step two" would help *Chevron* review better serve interests of democracy and political accountability of agencies).

206. For example, although the Ninth Circuit in *G.V.M. Trust* invoked terms of deference, such as "reasonable," the opinion's reasoning gives one the impression that the court agreed with the agency's conclusion independently. See 366 F.3d at 989.

207. See, e.g., *George Harms*, 371 F.3d at 162 (rejecting Secretary of Labor's interpretation because it lacked any valid basis); *Barber Foods*, 360 F.3d at 280–81 (rejecting Secretary of Labor's construction that would lead to "absurd result" and "threaten[ ] to undermine Congress's purpose" for statute).

208. See supra notes 188–190 and accompanying text.

209. One might argue that these applications, in which the court considers only the validity factor and so assesses only the merits of the agency's interpretation, actually reflect the independent judgment model rather than the sliding-scale model. This would result in a 2:1 ratio of 67 sliding-scale applications to 32 independent judgment applications, a ratio that still heavily favors the sliding-scale model. However, we perceive the courts in these cases generally to be affording weight to the agency view (and so falling in the sliding-scale model) because the agency view falls within the realm of reasonableness rather than being the best or right answer. In contrast, we perceive that courts in the independent judgment mode generally accept agency interpretations for the very different and nondeferential reason of aligning with the courts' own views. See supra notes 188–190 and accompanying text.

ing-scale review.[210] Recall that the Court's opinion in *Christensen* reflects the independent judgment model of *Skidmore* deference, while *Mead* more clearly contemplates the sliding-scale model. Of the 106 *Skidmore* applications we identified, 13 cited only *Christensen* as the applicable standard of review, and 6 of those 13, or 46%, proceeded to apply independent judgment of the statute.[211] In contrast, of the 9 *Skidmore* applications that cited solely *Mead* for the standard of review only 1, or 11%, applied independent judgment of the statute.[212] And of the 84 *Skidmore* applications that cited *Skidmore*, whether alone or along with *Mead* or *Christensen*, only 13, or 15%, applied independent judgment to the statute.[213] These findings support our contention that *Christensen* and *Mead* do, in fact, represent competing models of *Skidmore* and that courts tend to follow the model of whichever case they cite.

b. *Documenting* Skidmore*'s Deferential Character.* — Our second major finding was that *Skidmore* is relatively deferential as applied by the federal courts of appeals. In 64 of 106, or 60.4%, of the *Skidmore* applications studied, the courts sided with the agency.

TABLE 2: OUTCOME OF *SKIDMORE* APPLICATIONS

Skidmore Application Outcomes	Number of Applications	Percent of Applications
Court accepts agency's interpretation	64	60.4%
Court rejects agency's interpretation	42	39.6%
	106	100.0%

210. By this we mean the case that a court cited for its description of what the *Skidmore* standard entails, not for another proposition, such as the fact that *Skidmore* was the appropriate standard of review.

211. See Padilla-Caldera v. Gonzales, 426 F.3d 1294, 1300–01 (10th Cir. 2005); Trowell v. Beeler, 135 F. App'x 590, 595–96 (4th Cir. 2005); Broad. Music, Inc. v. Roger Miller Music, Inc., 396 F.3d 762, 778–80 (6th Cir. 2005); Howard v. Surface Transp. Bd., 389 F.3d 259, 270 & n.15 (1st Cir. 2004); Forest Park II v. Hadley, 336 F.3d 724, 732 n.6 (8th Cir. 2003); Mack v. Otis Elevator Co., 326 F.3d 116, 127 (2d Cir. 2003).

212. See James v. Von Zemenszky, 284 F.3d 1310, 1318–19 (Fed. Cir. 2002).

213. Eight of 40 applications (20%) citing *Skidmore* alone applied independent judgment. See Zhang v. Gonzales, 426 F.3d 540, 543–49 (2d Cir. 2005); Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 395 F.3d 25, 34–36 & n.6, 39–44 & n.9 (2d Cir. 2005) (two applications); White v. Burlington N. & Santa Fe Ry. Co., 364 F.3d 789, 798–800 (6th Cir. 2004); Town of Stratford v. FAA, 292 F.3d 251, 253 (D.C. Cir. 2002); Old Ben Coal Co. v. Dir., Office of Workers' Comp. Programs, 292 F.3d 533, 542 n.8 (7th Cir. 2002); Franklin v. United States, 289 F.3d 753, 757–61 (Fed. Cir. 2002); Am. Fed'n of Gov't Employees v. Veneman, 284 F.3d 125, 129–30 (D.C. Cir. 2002). Five of 26 applications (19%) citing *Skidmore* and *Mead* applied independent judgment. See New Orleans Stevedores v. Ibos, 317 F.3d 480, 483–88 (5th Cir. 2003); Herman v. Fabri-Centers of Am., Inc., 308 F.3d 580, 592–93 (6th Cir. 2002); Landmark Legal Found. v. IRS, 267 F.3d 1132, 1135–37 (D.C. Cir. 2001); Matz v. Household Int'l Tax Reduction Inv. Plan, 265 F.3d 572, 574–76 (7th Cir. 2001); Morris v. Bus. Concepts, Inc., 259 F.3d 65, 70–71 & n.3 (2d Cir. 2001). Surprisingly, however, none of the 13 applications citing *Skidmore* and *Christensen* applied independent judgment.

Not surprisingly, when courts engage in independent judgment, they are less likely to accept the agency's interpretation. Courts accepted the agency's view in 10 of 20, or 50%, of the applications in which the court followed the independent judgment approach to *Skidmore*.

TABLE 2A: OUTCOME IN INDEPENDENT JUDGMENT APPLICATIONS

Skidmore Application Outcomes	Number of Applications	Percent of Applications
Court accepts agency's interpretation	10	50.0%
Court rejects agency's interpretation	10	50.0%
	20	100.0%

By contrast, courts accepted the agency's view in 47 of 79, or 59.5%, of the applications in which courts applied the sliding-scale model of *Skidmore* and evaluated whether deference was merited. All 7 of the *Skidmore* applications classified as indeterminate resulted in the court accepting the agency's position.

TABLE 2B: OUTCOME IN SLIDING-SCALE APPLICATIONS

Skidmore Application Outcomes	Number of Applications	Percent of Applications
Court accepts agency's interpretation	47	59.5%
Court rejects agency's interpretation	32	40.5%
	79	100.0%

These findings suggest that *Skidmore* is in fact deferential to agency statutory interpretations, but as compared to what? Studies by other scholars support the unsurprising conclusion that *Skidmore* is measurably less deferential than *Chevron*, regardless of the *Skidmore* model employed. In particular, a study by Orin Kerr of federal appellate decisions from 1995 and 1996 demonstrated that such courts accepted the agency's view in 89% of *Chevron* applications decided at step two.[214] Kerr's study predates *Mead* but is nevertheless consistent with other studies in showing a high government success rate in *Chevron* cases.[215] Yet, another substan-

214. See Kerr, supra note 90, at 31. Because the 89% deference rate documented by Kerr reflects only those cases resolved by a reviewing court at *Chevron* step two, this finding offers the best comparison to our study. Kerr separately found an overall deference rate among identified "*Chevron* applications" of 73%. See id. at 30. However, that latter finding includes both *Chevron* step one and *Chevron* step two outcomes. Id.

215. See, e.g., Eskridge & Baer, supra note 7 (manuscript at 13 tbl.1) (showing agency win rates of 76.2% in *Chevron* cases and 73.5% in *Skidmore* cases decided by Supreme Court between *Chevron* decision in 1984 and end of 2005 term, as compared to 66% agency win rate when Court applied no deference standard); Thomas J. Miles & Cass R. Sunstein, Do Judges Make Regulatory Policy? An Empirical Investigation of *Chevron*, 73 U. Chi. L. Rev. 823, 849 (2006) (finding overall government success rate of 64% in EPA and NLRB cases citing *Chevron* before federal courts of appeals between 1990 and 2004). These studies did not separately track *Chevron* step one and step two outcomes and thus are more

tial body of literature claims judicial deference to government agencies as litigants generally.[216] If so, one must ask whether *Skidmore*'s 60% success rate in the courts of appeals is any more deferential than the norm. Two studies of federal administrative agency success rates covering roughly the same period offer seemingly contradictory results.

Martha Anne Humphries and Donald Songer documented a 58% success rate for federal administrative agencies generally in the federal courts of appeals from 1969 through 1988.[217] However, Humphries and Songer did not detail comparative success rates among different subcategories of administrative law cases. Further, Humphries and Songer limited their study to those cases in which a federal government agency was a party,[218] while our study included cases in which the federal government participated only as an amicus or not at all.[219] Given the significantly higher success rate for *Chevron* cases identified by Kerr and others and the roughly comparable success rate for *Skidmore* cases found by our study, one could reasonably hypothesize that federal government agencies must enjoy appreciably lower success rates in other types of administrative law cases to yield an overall 58% success rate.

In another study of samples of federal appellate cases drawn from periods in 1965, 1974–75, 1984–85, and 1988, however, Peter Schuck and

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comparable to Kerr's finding of a 73% overall deference rate among all *Chevron* applications. See supra note 214. Also, the Miles & Sunstein study evaluated the influence of judges' political views in *Chevron* decisionmaking, and their lower 64% rate of government success may be influenced by their evaluation of only two agencies, the EPA and the NLRB, chosen explicitly for the highly political nature of their actions. See Miles & Sunstein, supra, at 848 (outlining rationale for limiting data set to challenges to EPA and NLRB interpretations); see also Schuck & Elliott, supra note 35, at 1054–55 (questioning whether studies that focus on particular agencies are reliable indicators of patterns across all administrative agencies and the courts).

216. See, e.g., Linda R. Cohen & Matthew L. Spitzer, The Government Litigant Advantage: Implications for the Law, 28 Fla. St. U. L. Rev. 391, 395 (2000) (arguing that strategic behavior by government litigators yields pro-government advantage in Supreme Court); Martha Anne Humphries & Donald R. Songer, Law and Politics in Judicial Oversight of Federal Administrative Agencies, 61 J. Pol. 207, 208–10 (1999) (surveying numerous studies demonstrating high overall success rate among agencies in Supreme Court litigation); Reginald S. Sheehan, Federal Agencies and the Supreme Court: An Analysis of Litigation Outcomes, 1953–1988, 20 Am. Pol. Q. 478, 483–95 (1992) (considering impact of economic versus social policy orientation and executive branch versus independent status on success rates in Supreme Court litigation).

217. See Humphries & Songer, supra note 216, at 215.

218. See id.

219. Nevertheless, our review found that agency interpretations tended to fare only slightly worse under *Skidmore* analysis if the agency was not a party to the case. For example, our study included 21 applications in which the federal government was neither a party nor submitted an amicus brief. The government's interpretation was accepted in 12, or 57%, of those 21 applications. Similarly, our study identified 14 applications in which the federal government participated as amicus, and the government's interpretation was accepted in 8, or 57%, of those cases. By comparison, the government's interpretation was accepted in 44, or 62%, of the 71 applications in which the government was a party. See infra Appendix.

Donald Elliott found increasing and ultimately substantially higher agency success rates in administrative cases, ranging from 55.1% in 1965 up to 76.7% in 1984–85 and 75.5% in 1988.[220] If correct, these findings may suggest that *Skidmore* is in fact less deferential than the norm. Yet despite the overlap in periods covered by the two studies, Schuck and Elliott studied a substantially different group of cases than Humphries and Songer.[221] We simply lack the data to reconcile the findings of these studies or to compare them meaningfully as a baseline against our own study of *Skidmore* applications.

None of these studies take into account how different anticipations regarding potential outcomes under different administrative law doctrines may influence the behavior of agencies and regulated parties in deciding whether and when to pursue litigation.[222] Without a better understanding of how the pools of *Skidmore*, *Chevron*, and administrative law cases generally differ from one another, we cannot make strong inferences about just how deferential *Skidmore* review really is. Nevertheless, a comparison of our findings with the Kerr study offers support for the widely shared belief that *Skidmore* is less deferential than *Chevron*, and with further research may demonstrate that *Skidmore* represents a thumb on the scale in favor of administrative interpretations.

Finally, our finding that the appellate courts accepted the agencies' views under *Skidmore* in 60% of the applications studied reveals that *Skidmore* is substantially more agency-friendly than other scholars conducting post-*Mead* analysis have supposed. Eric Womack and Amy Wildermuth each conducted smaller-scale examinations of *Skidmore* in the federal courts and reported significantly lower acceptance rates.[223] Womack looked at decisions from all federal courts, both trial and appellate, that cited *Mead* in the six months following *Mead*.[224] Womack found that a mere 9 of 29, or 31%, of cases reviewed accepted the agency's preferred interpretation under *Skidmore* review.[225] However, the percentage of acceptances was slightly higher for the court of appeals decisions he

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220. See Schuck & Elliott, supra note 35, at 1003, 1038–39.

221. Humphries and Songer limited their study to 734 cases between 1969 and 1988 in which a federal administrative party was either an appellant or a respondent. See Humphries & Songer, supra note 216, at 215. Schuck and Elliott employed a series of electronic searches focused principally on Westlaw topical categories to identify administrative law cases decided in six-month periods in 1965, 1974–75, 1984, and 1985, and a two-month period in 1988. See Schuck & Elliott, supra note 35, at 992. Notwithstanding their limited sample periods, however, Schuck and Elliott analyzed more than three times as many cases as did Humphries and Songer. See id. at 1003 tbl.1 (charting results from study that included total of 2,325 cases).

222. See Eskridge & Baer, supra note 7 (manuscript at 34) (noting potential role of selection biases in post-*Chevron* agency win rates).

223. See Wildermuth, supra note 7, at 1897–99; Womack, supra note 7, at 327–28.

224. See Womack, supra note 7, at 323 & n.189.

225. See id. at 327 & n.199.

studied: 6 of 15, or 40%, of cases.[226] Also, Womack included two cases that applied *Skidmore* to an agency's interpretation of a regulation,[227] which we excluded since, as explained above, we view such applications as a class apart from agency statutory interpretations.[228] Additionally, Womack included a case that we contend does not contain a *Skidmore* application,[229] and two more cases in which the court rejected the agency view as contravening the statute's plain meaning.[230] Without these cases, Womack would have found an acceptance rate of 5 of 10, or 50%—a rate that more closely resembles the rate we found courts to have maintained in the years following his study.

Wildermuth's 2006 article purports to have examined "federal appeals court cases citing *Skidmore* since Womack's work" and reports that only 39% of cases affirmed the agency's view.[231] Yet, Wildermuth's study included only 23 cases, far fewer than the 104 that we identified.[232] Wildermuth provides no explanation for how she selected the cases she studied, which makes her finding difficult to assess. Moreover, review of Wildermuth's article shows that she included two cases that we excluded as dismissing the agency's view as contrary to the statute's plain meaning,[233] and one case that we excluded as interpreting a regulation rather than a statute.[234] Excluding these three cases from Wildermuth's set of 23 cases raises courts' acceptance rate of administrative interpretations to 9 of 20, or 45%. This is closer to but still significantly lower than the rate of acceptance we found. Without knowing how Wildermuth chose her cases, whether by sampling or some other criteria, we cannot assess her conclusion. Regardless, our research shows that agencies fare reasonably well under *Skidmore* analysis, winning about 60% of their battles, thus refuting Womack's and Wildermuth's conclusions that *Skidmore* is not at all deferential.

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226. See id. at 325 n.194 (listing 15 appellate decisions among others); id. at 327 n.199 (listing 6 appellate decisions).

227. See id. at 325 n.194 (citing Tate v. Farmland Indus., Inc., 268 F.3d 989 (10th Cir. 2001); Navarro v. Pfizer Corp., 261 F.3d 90 (1st Cir. 2001)).

228. See supra notes 151–155 and accompanying text.

229. See Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs, 260 F.3d 1365, 1379 (Fed. Cir. 2001) ("[W]e need not decide whether *Skidmore* deference would be sufficient to support the government's interpretation, for 38 C.F.R. § 3.22, as revised, must be remanded to the agency for another reason. Without further explanation of § 3.22, it is inconsistent with the agency's interpretation of another virtually identical statute.").

230. See Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481, 489 (2d Cir. 2001); Michigan v. EPA, 268 F.3d 1075, 1082 (D.C. Cir. 2001). We excluded such cases because when a statute's meaning is clear, courts lack discretion to defer to an agency's interpretation such that there can be no meaningful *Skidmore* review.

231. See Wildermuth, supra note 7, at 1898–99.

232. See id. at 1899 nn.176–177.

233. See Orlando Food Corp. v. United States, 423 F.3d 1318, 1325 (Fed. Cir. 2005); Tax & Accounting Software Corp. v. United States, 301 F.3d 1254, 1261–62, 1267 (10th Cir. 2002).

234. See Moore v. Hannon Food Serv., Inc., 317 F.3d 489, 492 (5th Cir. 2003).

c. *One Final Note:* Skidmore *"Step One."* — As noted above,[235] this study defined a *Skidmore* application to exclude cases in which the court found the statute clear or unambiguous. However, this criterion retained cases in which the court did not reach an explicit conclusion that the statute was clear; after all, the Court has not said that *Skidmore* necessarily includes a "step one" inquiry along the lines of *Chevron* step one. Although we did not track data specifically with respect to this conclusion, we nevertheless discovered that, in practice, *Skidmore* generally does include a "step one." In many *Skidmore* applications, the court first reviewed the statute for a plain meaning, determined that the statute was ambiguous, and then proceeded to apply *Skidmore*.[236] This approach should be uncontroversial, given that the administrative interpretation can have little effect on the way the court reads the statute if Congress's intent is certain. Yet, this finding is important for scholars who have urged that *Skidmore* should include a step one inquiry.[237] The fact of the matter is that, in many cases, *Skidmore* already does.

4. *Summary.* — In summary, careful analysis of 106 identified *Skidmore* applications in the federal courts of appeals demonstrates that, in a strong majority of cases, the *Skidmore* doctrine represents a bona fide standard of review, rather than merely an excuse for reviewing courts to follow their own interpretive preferences. Additionally, the evidence shows that *Skidmore* review is highly deferential—less so than *Chevron*, but still weighted heavily in favor of government agencies over their challeng-

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235. See supra notes 165–176 and accompanying text.

236. See, e.g., McGraw v. Barnhart, 450 F.3d 493, 499–500 (10th Cir. 2006) (stating that relevant statute "reasonably can be read either narrowly or broadly" and that "neither of [the statute's] purposes directly addresses the question before us"); United States v. W.R. Grace & Co., 429 F.3d 1224, 1237 (9th Cir. 2005) ("[T]he statutory definition of 'removal' is vague and, consequently, the EPA's construction of this statutory term warrants our deference."); La. Envtl. Action Network v. EPA, 382 F.3d 575, 583 (5th Cir. 2004) (finding ambiguity in Clean Air Act's requirement that state antipollution plans include measures "to take effect" in certain instances, and then applying *Skidmore*); Fed. Nat'l Mortgage Ass'n v. United States, 379 F.3d 1303, 1307–08 (Fed. Cir. 2004) (applying *Skidmore* only after stating that the "language at issue . . . is equally subject to both proffered interpretations"); Ammex, Inc. v. United States, 367 F.3d 530, 535 (6th Cir. 2004) (noting that Internal Revenue Code did not define "export" in context of excise taxes, then deferring to agency's interpretation); Wells Fargo Bank, N.A. v. FDIC, 310 F.3d 202, 205–09 (D.C. Cir. 2003) (finding Congress did not clearly speak in Federal Deposit Insurance Act to issue at hand, then assessing FDIC's interpretation under *Skidmore*'s standard); see also Reimels v. Comm'r, 436 F.3d 344, 346–47 (2d Cir. 2006); Rabin v. Wilson-Coker, 362 F.3d 190, 196–99 (2d Cir. 2004); Bolen v. Dengel (In re Dengel), 340 F.3d 300, 308–10 (5th Cir. 2003).

237. See, e.g., Murphy, Counter-*Marbury*, supra note 7, at 43–44 ("[T]he *Skidmore* framework should include a step one at which a court uses the 'traditional tools of statutory construction' to check for clear meaning." (quoting Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984))); Rossi, supra note 7, at 1139 ("[E]ven when courts review the types of agency statements for which *Skidmore* would normally apply, they presumably engage in the *Chevron* step-one inquiry.").

ers. Finally, as with *Chevron*, the courts generally apply *Skidmore* deference only in the face of statutory ambiguity.

C. Skidmore*'s Sliding Scale in Practice*

Once one accepts that the courts of appeals overwhelmingly approach *Skidmore* in the mode of a sliding scale, evaluating the functionality of that model takes on added significance. In fact, the overarching impression that one receives from the *Skidmore* cases is a lack of uniformity in how courts apply the sliding-scale conception of *Skidmore*.

At one level, the ad hoc quality of the *Skidmore* applications is compelled by *Skidmore*'s instruction that courts consider "all those factors which give [the agency's interpretation] power to persuade."[238] Hence Justice Scalia's mocking description in his *Mead* dissent of *Skidmore* review as "th'ol' 'totality of the circumstances' test."[239] However, the varying ways in which courts apply *Skidmore*'s factors arguably run deeper than the variety to be found in the typical totality of the circumstances test. The cases reveal disparate approaches to which factors should be applied first, how the factors relate to each other, and what each factor means. To describe in more detail how courts apply the sliding-scale conception of *Skidmore*, the following subsections address the individual factors, noting particularly where relevant (1) the courts' varying understandings of the factor, (2) the factor's relationship to other factors, and (3) the weight courts appear to assign to the factor.

1. *Thoroughness of Consideration.* — Among the *Skidmore* factors identified in Part II, the "thoroughness" of the agency's consideration of an issue was one of the most cited in the sliding-scale applications of the *Skidmore* standard.[240] That said, the courts' opinions reflected two different conceptions of what this factor entails. Many courts conceived of the thoroughness factor as testing the extensiveness of the agency's explanation of its interpretation.[241] Others viewed thoroughness as measuring

238. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

239. United States v. Mead Corp., 533 U.S. 218, 241 (2001) (Scalia, J., dissenting).

240. Identifying discussions of thoroughness was occasionally difficult. For example, in *OfficeMax, Inc. v. United States*, the court referred dismissively to the agency's "one-page analysis" of the relevant issue as "not contain[ing] the traditional hallmarks for receiving deference." 428 F.3d 583, 594 (6th Cir. 2005). While the significance of such a limited statement could be debated, more than anything else, the statement seems to convey the court's sense that the agency's consideration of the issue was not especially thorough. For purposes of determining which factor was being applied, we classified an assessment of the extensiveness of an agency's explanation as "thoroughness" and an assessment of the agency's procedures as "formality." See infra notes 241–242. By our highly subjective count, 40 of the 79 sliding-scale *Skidmore* applications offered some discussion related to the thoroughness of the agency's consideration. See infra Appendix.

241. See, e.g., Coke v. Long Island Care at Home, Ltd., 376 F.3d 118, 134–35 (2d Cir. 2004) (finding that Department of Labor failed to "exhibit thoroughness in its consideration" because it "offered virtually no explanation for the direct inconsistency" of its regulations), rev'd on other grounds, 127 S. Ct. 2339 (2007); Heinz v. Cent. Laborers' Pension Fund, 303 F.3d 802, 812 n.17 (7th Cir. 2002) (declining to defer to IRS manual

the formality of the agency's procedures in adopting the interpretation,[242] notwithstanding *Mead*'s identification of formality as a separate factor.[243] Both inquiries permit a generalist court to evaluate whether the agency has brought its expertise to bear on the interpretive question and whether the agency has respected regulated parties' interests in regulatory process. However, these two views of thoroughness cover distinct aspects of agencies' actions.

Consider, for example, *De La Mota v. United States Department of Education*, in which the government sought deference for an interpretation advanced by midlevel agency officials through two handbooks and an email.[244] The *De La Mota* court weighed the thoroughness factor against the agency based on the interpretation's informality:[245] "[T]horoughness is impossible for an agency staff member to demonstrate when the staff member does not report to the Secretary, bears no lawmaking authority, and is unconstrained by political accountability. Thorough consideration requires a macro perspective that a staff member, acting alone, lacks."[246] A reviewing court that defined thoroughness by reference to the extensiveness of the legal analysis contained in the email might have resolved the factor in the agency's favor.

Some evidence suggests that the thoroughness factor carries the potential to negate an agency's poor performance on the consistency factor. In five applications, courts held that an agency's thoroughly considered interpretation can merit deference even if it is inconsistent with previous agency views.[247] For instance, in *Horn v. Thoratec Corp.*, the Third Circuit accepted the FDA's view that a medical device approval process preempted state law—even though the FDA had previously concluded otherwise—because the FDA supported its position with well-reasoned analysis.[248] Five applications do not constitute a large set, but the pattern of

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because "[t]he single statement in the manual does not tell us anything about the thoroughness of the agency's analysis").

242. See, e.g., Pension Benefit Guar. Corp. v. Wilson N. Jones Mem'l Hosp., 374 F.3d 362, 370 (5th Cir. 2004) (deeming PBGC's view to have been thoroughly considered because PBGC order was promulgated "after a thorough review" by agency official); Cline v. Hawke, 51 F. App'x 392, 397 (4th Cir. 2002) ("Because the OCC implemented a formal notice-and-comment procedure and consulted [regulated parties] in reaching its decision, we find that the OCC's consideration was thorough."); Heartland By-Products, Inc. v. United States, 264 F.3d 1126, 1135 (Fed. Cir. 2001) (concluding that Customs gave "thorough consideration" to its revocation ruling because it "was issued pursuant to a notice and comment process").

243. See *Mead*, 533 U.S. at 228.

244. 412 F.3d 71, 78 (2d Cir. 2005).

245. See id. at 78–80.

246. Id. at 80.

247. See Warner-Lambert Co. v. United States, 425 F.3d 1381, 1385–86 (Fed. Cir. 2005); Horn v. Thoratec Corp., 376 F.3d 163, 178–79 (3d Cir. 2004); Rubie's Costume Co. v. United States, 337 F.3d 1350, 1358 (Fed. Cir. 2003); Springfield, Inc. v. Buckles, 292 F.3d 813, 819–20 (D.C. Cir. 2002); *Heartland*, 264 F.3d at 1136.

248. See 376 F.3d at 179.

these applications is reinforced by the fact that no courts withheld deference on the basis of an agency's inconsistent position when the agency thoroughly explained its new interpretation. Moreover, this relationship surfaces in courts' review of the agencies' processes, and several courts in this study supported deferring to an inconsistent but well-explained agency position by citing *Motor Vehicles Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*,[249] the leading process-review case.[250]

2. *Formality of the Agency's Procedure and Interpretation.* — Courts assessed the formality of the administrative interpretation's procedural pedigree and format with somewhat less frequency than other factors.[251] The lower frequency may stem from the fact that *Skidmore* did not include this factor in its list—*Mead* added it to the list of relevant factors.[252] Another explanation may be that, because *Mead* makes this factor relevant to the determination of whether to apply *Chevron* or *Skidmore*,[253] courts do not wish to repeat the inquiry in the actual application of *Skidmore*. That is, a court might find that an interpretation's informality disqualifies it from *Chevron* deference and then move on to apply other *Skidmore* factors besides formality.[254] Accordingly, the relative infrequency with which the courts specifically discuss the formality factor within the *Skidmore* analysis is not necessarily indicative of the courts' assessment of its importance.

As noted above, some courts conducted this inquiry under the label of thoroughness rather than formality.[255] Whatever the label, strong rea-

249. 463 U.S. 29, 43, 57 (1983).

250. See *Horn*, 376 F.3d at 179 (citing *State Farm*, 463 U.S. at 42); *Springfield, Inc.*, 292 F.3d at 819–20 (citing *State Farm*, 463 U.S. at 57). In the context of discussing *Chevron* deference, the Supreme Court has also reiterated that "if the agency adequately explains the reasons for a reversal of policy, 'change is not invalidating.'" Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) (quoting Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 742 (1996)); cf. Long Island Care at Home Ltd. v. Coke, 127 S. Ct. 2339, 2349 (2007) (deferring under Auer v. Robbins, 519 U.S. 452 (1997), and stating, "as long as interpretive changes create no unfair surprise . . . the change in interpretation alone presents no separate ground for disregarding the Department's present interpretation"). At least one court in this study pointed to *Brand X* to support prioritizing thoroughness over consistency. See *Warner-Lambert Co.*, 425 F.3d at 1385–86.

251. By our count, 16 of the 79 sliding-scale *Skidmore* applications discussed the formality factor. See infra Appendix. See supra note 240 for an explanation of how we defined "formality."

252. Compare Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944), with United States v. Mead Corp., 533 U.S. 218, 228 (2001).

253. See *Mead*, 533 U.S. at 229–30 (noting that "a very good indicator of delegation meriting *Chevron* treatment" exists when agencies possess authority to engage in "relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie" a regulation with legal force).

254. See, e.g., George Harms Constr. Co. v. Chao, 371 F.3d 156, 161–63 (3d Cir. 2004) (refusing to apply *Chevron* to Secretary of Labor's litigation position because it was "informal interpretation" and rejecting *Skidmore* deference without reference to informality of interpretation).

255. See, e.g., Shikles v. Sprint/United Mgmt. Co., 426 F.3d 1304, 1316 (10th Cir. 2005) ("The EEOC's brief provides no indication of whether the agency has been

sons exist for courts to include the formality factor in their *Skidmore* analysis. Even more than the thoroughness factor, under which many courts focus on the extensiveness of an agency's explanation of its interpretation, the formality factor protects the interests of regulated parties by rewarding agencies for engaging in procedures that allow for public input.[256] For example, *Mead* suggests that interpretations adopted pursuant to notice-and-comment rulemaking typically, though not always, deserve *Chevron* deference.[257] When such interpretations do not merit *Chevron* deference, courts are right to find that notice-and-comment rulemaking bolsters the agency's claim for strong *Skidmore* deference.[258] The procedure provides the public notice and opportunity to participate in rulemaking that ameliorates concerns about agency overreaching. By contrast, courts found the formality factor cut against deferring to the agency in cases where the agency's interpretation appeared only in formats lacking public scrutiny: an internal agency manual;[259] an agency amicus brief;[260] an email from a midlevel agency official;[261] a Customs tariff schedule classification;[262] and a permit decision that neglected the required National Environmental Policy Act analysis, for example.[263] In all of these cases, the reviewing courts valued deliberative agency procedures and interpretations.

It is possible to take this factor too far, however. For example, in *Structural Industries, Inc. v. United States*, the court indicated that a Customs classification ruling of the sort at issue in *Mead* was not entitled even to *Skidmore* deference in part because it was not promulgated

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thorough in its consideration of the issue, and it appears that the agency's position has not been subjected to any sort of public scrutiny."); see also supra note 240 (explaining how we defined thoroughness versus formality); supra notes 244–246 and accompanying text (discussing De La Mota v. U.S. Dep't of Educ., 412 F.3d 71, 76–80 (2d Cir. 2005)).

256. See, e.g., Research Triangle Reg'l Pub. Transp. Auth. v. United States, 83 F. App'x 505, 510 (4th Cir. 2003) (noting favorably that agency officials met directly with regulated party regarding issue at hand).

257. *Mead*, 533 U.S. at 229–30; see also Long Island Care at Home, Ltd. v. Coke, 127 S. Ct. 2339, 2350–51 (2007) (strengthening connection by finding regulation to be legally binding and thus entitled to *Chevron* deference partly because it was promulgated through notice-and-comment rulemaking).

258. See, e.g., Rubie's Costume Co. v. United States, 337 F.3d 1350, 1356 (Fed. Cir. 2003) (finding Customs classification warranted *Skidmore* deference in part because it was adopted "pursuant to a deliberative notice-and-comment rulemaking process"). But cf. Coke v. Long Island Care at Home, Ltd., 376 F.3d 118, 131–33 (2d Cir. 2004) (noting that agency interpretation was adopted pursuant to notice-and-comment rulemaking but nonetheless finding interpretation impermissible), rev'd on other grounds, 127 S. Ct. 2339 (2007).

259. See Ebbert v. DaimlerChrysler Corp., 319 F.3d 103, 115 (3d Cir. 2003) (analyzing deference to EEOC Compliance Manual).

260. See *Shikles*, 426 F.3d at 1315–16.

261. See De La Mota v. U.S. Dep't of Educ., 412 F.3d 71, 80 (2d Cir. 2005).

262. See Structural Indus., Inc. v. United States, 356 F.3d 1366, 1371 (Fed. Cir. 2004).

263. See High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630, 648 (9th Cir. 2004).

through notice-and-comment rulemaking.[264] This heightened formality requirement contradicts *Christensen* and *Mead* and also risks collapsing *Mead*'s test for whether *Skidmore* or *Chevron* applies into the inquiry of whether *Skidmore* deference is warranted. Also, since the vast majority of *Skidmore* applications will involve interpretations that do not issue from notice-and-comment rulemaking, it makes little sense to view the absence of such rulemaking as meaningful.

3. *Validity of the Agency's Reasoning.* — Courts evaluated the validity of an interpretation's reasoning more often than any other *Skidmore* factor.[265] The high frequency with which courts consider the validity factor may be explained partly by our defining "validity" to include discussion of the reasonableness and plausibility of the interpretation itself.[266] It is no surprise that most courts consider the substantive merits of the agency's interpretation in determining whether to defer to it; even those courts that do not explicitly apply this factor but accept the agency view undoubtedly make an implicit determination that the agency's view is valid.

Validity is a unique factor within the *Skidmore* framework because it alone tests the merits of the agency's interpretation. The other factors assess an interpretation's context, but not its merits. Most courts pay no attention to this distinction and evaluate the interpretation's reasonableness in the midst of the other contextual factors.[267] However, the nature of the validity inquiry suggests—and some courts accordingly implement—a logical progression of the *Skidmore* factors. First, the courts evaluate the contextual factors—thoroughness, formality, consistency, and expertise—to gauge the level of deference an interpretation deserves. Then, having determined how much leeway the agency has earned, the court applies the validity factor to decide whether the interpretation falls within that interval.[268] *Heartland By-Products, Inc. v. United States* contains a prototypical example of this approach to *Skidmore*'s sliding scale.[269] Reviewing a challenge to a Customs classification ruling, the Federal Circuit

264. *Structural Indus., Inc.*, 356 F.3d at 1370.

265. By our count, 63 of the 79 sliding-scale *Skidmore* applications included a discussion of this factor. See infra Appendix.

266. See supra notes 188–190 and accompanying text.

267. See, e.g., Pension Benefit Guar. Corp. v. Wilson N. Jones Mem'l Hosp., 374 F.3d 362, 370 (5th Cir. 2004) (describing interpretation as "logical" in midst of noting its consistency with previous interpretations, its compatibility with other regulations, and the fact that it resulted from thorough analysis by expert agency); Cal. State Legislative Bd. v. Mineta, 328 F.3d 605, 607–08 (9th Cir. 2003) (remarking upon agency's thorough consideration, consistent stance, and its "not unreasonable" views before concluding that deference was due and accepting interpretation).

268. See, e.g., Cathedral Candle Co. v. U.S. Int'l Trade Comm'n, 400 F.3d 1352, 1366–67 (Fed. Cir. 2005) (assessing various *Skidmore* factors besides validity and then, having determined deference is due, deciding interpretation is reasonable); Heartland By-Products, Inc. v. United States, 264 F.3d 1126, 1135–37 (Fed. Cir. 2001) (same).

269. See 264 F.3d at 1135–37; see also *Cathedral Candle Co.*, 400 F.3d at 1366–67 (noting, among other things, agency's consistent adherence to interpretation, its explanation of interpretation, and its expertise).

first noted that the ruling resulted from notice-and-comment rulemaking, was supported by a thorough explanation, and hailed from an agency with expertise in the subject matter, but was inconsistent with prior Customs pronouncements.[270] Taking each of these factors into account, the court determined that a measure of deference was due, and then the court evaluated the interpretation, finding it neither illogical nor unreasonable.[271]

4. *Consistency of the Agency's Interpretation.* — As with thoroughness, courts discussed the consistency of the agency's interpretation in many of the cases we evaluated.[272] However, despite its numerous appearances in judicial opinions, "consistency" seems less dispositive than other *Skidmore* factors. In 18 applications, the court found the agency's interpretation to be inconsistent with former or following positions; yet in 7 of those applications, the court accepted the agency's position.[273] By contrast, an explicitly negative finding with respect to any of the other factors was virtually always associated with a decision against the agency.[274] This suggests that courts are willing to accept changes in agencies' policies so long as the agency accompanies those shifts with procedures and reasoning that alleviate concerns about arbitrariness and unfairness to regulated parties.[275]

Consistency's decline in *Skidmore* analysis may stem in part from *Chevron*'s deemphasis of that factor.[276] Indeed, the opinions reviewed in this study indicate that some courts are uncertain why exactly they should value an agency's consistency and that courts rarely explain the importance of this *Skidmore* factor.[277] Generally, courts value consistency be-

270. See *Heartland*, 264 F.3d at 1135–36.

271. See id. at 1136.

272. By our count, the courts discussed the consistency factor in 36 of the 79 sliding-scale *Skidmore* applications. See infra Appendix.

273. See Warner-Lambert Co. v. United States, 425 F.3d 1381, 1386 (Fed. Cir. 2005); Horn v. Thoratec Corp., 376 F.3d 163, 179–80 (3d Cir. 2004); In re New Times Sec. Servs., Inc., 371 F.3d 68, 87 (2d Cir. 2004); Rubie's Costume Co. v. United States, 337 F.3d 1350, 1356 (Fed. Cir. 2003); Springfield, Inc. v. Buckles, 292 F.3d 813, 819–20 (D.C. Cir. 2002); Chao v. Russell P. Le Frois Builder, Inc., 291 F.3d 219, 228 (2d Cir. 2002); *Heartland*, 264 F.3d at 1136–37.

274. See, e.g., De La Mota v. U.S. Dep't of Educ., 412 F.3d 71, 80 (2d Cir. 2005) (rejecting Department of Education's interpretation after concluding it did not reflect agency's congressionally delegated "authority or expertise"); Tum v. Barber Foods, Inc., 360 F.3d 274, 280 (1st Cir. 2004) (rejecting Secretary of Labor's interpretation after reaching negative finding of its validity, noting that it would lead to "absurd" results); Smith v. City of Jackson, 351 F.3d 183, 189 n.5 (5th Cir. 2003) (declining deference for EEOC interpretive guidelines because they lack "significant analysis").

275. This comports with the discussion above, see supra notes 247–250 and accompanying text, regarding cases in which courts explicitly explained that a thoroughly considered and explained policy change need not be invalidated solely due to its inconsistency. See, e.g., *Warner-Lambert Co.*, 425 F.3d at 1385–86.

276. See supra note 40 and accompanying text.

277. See, e.g., Butterbaugh v. Dep't of Justice, 336 F.3d 1332, 1341–42 (Fed. Cir. 2003) (speculating as to relevance of interpretation's longstanding, consistent nature in

cause it protects parties' reliance interests, promotes the rule of law by ensuring similarly situated parties are treated similarly, and guards against capricious or ill-intentioned agency action.[278] Especially since *Chevron*'s ascendance, however, courts have been more attuned to administrative agencies' need for flexibility in administering statutes, which sometimes requires changing positions on a given policy.[279] Thus, there exists a need for courts to spell out why the consistency—or inconsistency—of a given interpretation affects the availability of judicial deference.

The Tenth Circuit's opinion in *Southern Utah Wilderness Alliance v. Bureau of Land Management* reflects this concern.[280] The Bureau of Land Management (BLM) altered an interpretation in a manner that threatened to destabilize vested property rights but claimed its new interpretation deserved deference on the basis of the other *Skidmore* factors.[281] The court rejected BLM's argument and accorded the new interpretation little deference principally because BLM had changed its interpretation of the statute three times in thirty years, upsetting settled expectations of rights holders at each turn.[282]

Adding to the confusion regarding the meaning of consistency, some judges merge their evaluations of consistency with their inquiries into congressional intent.[283] As discussed further below, other courts style discussions of congressional intent as implicating the "longstanding or contemporaneous" factor.[284] Yet these two conceptions of consistency reflect

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Chevron context, but also applying *Skidmore*); cf. Landmark Legal Found. v. IRS, 267 F.3d 1132, 1137 (D.C. Cir. 2001) (noting in citations that "consistency" could refer to temporal or logical consistency but not explaining which definition it was using to evaluate agency's interpretation).

278. See Yoav Dotan, Making Consistency Consistent, 57 Admin. L. Rev. 995, 1000–01 (2005).

279. See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) (explaining *Chevron*'s leeway for agencies to alter their interpretations); see also Dotan, supra note 278, at 1018–29 (discussing *Chevron*'s approach to consistency and its impact on administrative law).

280. See 425 F.3d 735, 760–61 (10th Cir. 2005).

281. See id at 759–60.

282. See id at 760–61.

283. See OfficeMax, Inc. v. United States, 428 F.3d 583, 602 (6th Cir. 2005) (Rogers, J., dissenting) ("The logical basis for taking consistency into account is perforce that Congress must have acquiesced in the agency's interpretation where it has been consistently applied."); Butterbaugh v. Dep't of Justice, 336 F.3d 1332, 1350–51 (Fed. Cir. 2003) (Bryson, J., dissenting) (arguing that agency's consistent interpretation merits deference because Congress was aware of interpretation and reenacted statute several times).

284. See infra Part II.C.6. We distinguished between applications of the "consistency" factor and the "longstanding or contemporaneous" factor by asking if the court sought to determine whether the interpretation gave insight into congressional intent. If so, we considered the application to be an example of longstanding or contemporaneous factor evaluation. If instead the court discussed the interpretation's consistency in the abstract or in relation to reliance interests or fairness, we thought of the application as evaluating the consistency factor.

very different reasons for deferring to an agency. Consistency counsels deference to protect regulated parties and reward well-crafted interpretations; under this factor, the court focuses on society and the agency.[285] A contemporaneous interpretation may trigger deference because the agency's proximity to the statute's enactment suggests that the interpretation benefited from special insight into Congress's wishes. Similarly, longstanding interpretations may trigger deference because, in theory, Congress has acquiesced, especially where it has reenacted the statutory provision after the agency's interpretation was made public.[286] Concomitantly, the reasons for not deferring under these inquiries will be very different, and courts would improve the transparency and coherency of their decisions by keeping these inquiries separate.[287]

5. *Agency Expertise.* — While the *Skidmore* Court did not include agency expertise in its oft-cited list of factors,[288] the "expertise" factor nevertheless played a prominent role in that opinion[289] and appeared explicitly in *Mead*'s compilation of factors.[290] In our view it undergirds the *Skidmore* doctrine.[291] Therefore, it is unsurprising that a sizable number of the sliding-scale *Skidmore* applications included discussion of the agency's expertise.[292] Yet the expertise factor generally lacks teeth, as

285. See *OfficeMax*, 428 F.3d at 598 (evaluating IRS's consistency in relationship to IRS's treatment of taxpayers filing claims for refunds).

286. Under a strong version of the reenactment doctrine, an agency interpretation may become legally binding solely because Congress has reenacted the relevant statutory provision without explicitly rejecting the agency's view. See, e.g., Nat'l Lead Co. v. United States, 252 U.S. 140, 146 (1920) (describing reenactment as "an implied legislative recognition and approval of the executive construction of the statute"); United States v. Cerecedo Hermanos y Compañia, 209 U.S. 337, 339 (1908) ("[T]he reënactment by Congress, without change, of a statute, which had previously received long continued executive construction, is an adoption by Congress of such construction." (citing United States v. Falk, 204 U.S. 143, 152 (1907))). Although the reenactment doctrine is arguably inconsistent with modern deference doctrine's emphasis on interpretive flexibility, the Court still occasionally emphasizes legislative reenactment as supporting deference. See, e.g., Barnhart v. Walton, 535 U.S. 212, 220 (2002) (citing reenactments as evidence that "Congress intended the Agency's interpretation, or at least understood the interpretation as statutorily permissible"); United States v. Cleveland Indians Baseball Co., 532 U.S. 200, 219–20 (2001) ("'Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law.'" (quoting Cottage Sav. Ass'n v. Comm'r, 499 U.S. 554, 561 (1991))).

287. For a positive example of keeping these factors separate and a good discussion of the dangers inherent in finding congressional approval of longstanding agency views, see *Butterbaugh*, 336 F.3d at 1342–43.

288. See Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (listing particularly thoroughness, validity, and consistency).

289. Id. at 137–39 (emphasizing agency expertise).

290. See United States v. Mead Corp., 533 U.S. 218, 228 (2001) (listing "relative expertness" as relevant to gauging deference).

291. See infra Part III.

292. By our count, 29 of the 79 sliding-scale *Skidmore* applications included discussion of the agency's expertise. See infra Appendix.

courts only counted this factor against agency deference in three of the cases we evaluated.[293] Indeed, many invocations of expertise seem not to be careful evaluations of agencies' interpretive competence vis-à-vis the court, but are instead mere throwaway lines tacked onto independent decisions to defer to the agency.[294]

Nevertheless, one of the applications that counted the expertise factor against deference suggests an approach that could give the factor more heft. In *Hall v. EPA*, the Ninth Circuit reviewed a challenge to the Environmental Protection Agency's interpretation of the Clean Air Act's requirement that state pollution reduction plans must not "interfere" with other regulatory goals.[295] In rejecting the EPA's bid for *Skidmore* deference, the court noted that the "EPA has given us no basis to conclude that the EPA has drawn on any special expertise in advocating this interpretation."[296] The *Hall* court did not focus on whether the EPA possessed expertise in administering the Clean Air Act generally—surely, the EPA does. Instead, the *Hall* court demanded evidence that the EPA actually applied that expertise in forming the particular interpretation.[297] Conceptualizing the expertise factor in this way usefully hones in on the interpretation at hand, helping the court focus on whether it should defer to the interpretation rather than to the agency generally. Moreover, this conception creates incentives for agencies to form their views more deliberately, for example, by forcing an agency to explain the relationship among a particular interpretation, the overall statutory scheme, and the agency's policy choices.

6. *Longstanding or Contemporaneous Interpretations.* — As noted above, neither *Skidmore* nor *Mead* mentioned the factor of an interpretation's longevity or contemporaneity with the statute's adoption. Yet pre-*Chevron* courts often included this factor in their *Skidmore* analysis,[298] and the

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293. See De La Mota v. U.S. Dep't of Educ., 412 F.3d 71, 80 (2d Cir. 2005) (stating that interpretation adopted by midlevel agency official did not reflect exercise of agency expertise); Wilderness Soc'y v. U.S. Fish & Wildlife Serv., 353 F.3d 1051, 1069 (9th Cir. 2003) (declining to defer to agency's decision because it did not "reflect the product of specialized agency expertise" (citing *Mead*, 533 U.S. at 228, 235)); Hall v. EPA, 273 F.3d 1146, 1156 (9th Cir. 2001) (declining to defer to EPA's approval of state implementation plan under Clean Air Act).

294. See, e.g., Santiago v. GMAC Mortgage Group, Inc., 417 F.3d 384, 389 n.4 (3d Cir. 2005) (stating that HUD's "expertise in the area of federally-related home mortgages" adds weight to its interpretation); Student Loan Fund of Idaho, Inc. v. U.S. Dep't of Educ., 272 F.3d 1155, 1164 (9th Cir. 2001) (concluding without analysis that Secretary of Education's "expertise and long experience with the [student loan program]" favor giving deference to his interpretation).

295. 273 F.3d at 1155–56.

296. Id. at 1156.

297. See id.; see also *Wilderness Soc'y*, 353 F.3d at 1069 & n.17 (focusing on agency's decisionmaking process).

298. See, e.g., Steadman v. SEC, 450 U.S. 91, 103 (1981) (noting SEC's longstanding practice, in place since 1938, as evidence of congressional intent); Adamo Wrecking Co. v. United States, 434 U.S. 275, 287 n.5 (1978) (rejecting agency's "contemporaneous construction" of statute because other *Skidmore* factors weighed against it); Gen. Elec. Co.

Court has mentioned longevity and contemporaneity in more recent jurisprudence.[299] Consequently, we wondered whether this factor had, in practice, become grafted onto modern *Skidmore* applications.

We found that, for the most part, courts have kept longevity and contemporaneity distinct from the other *Skidmore* factors. Only a small number of modern *Skidmore* applications, 11 by our count, involved discussion of whether the agency's longstanding or contemporaneous interpretation revealed congressional intent on the issue at hand.[300] Two of those 11 cases considered *only* this factor in determining whether to defer under *Skidmore*, which suggests that they comprehended the interpretation's longevity or contemporaneity as a distinct inquiry from the other *Skidmore* factors, even as they purported to apply *Skidmore*'s standard.[301] Hence, while courts do not uniformly separate their evaluation of contemporaneity or longevity from *Skidmore* analysis, the great majority do.

As mentioned in the discussion of consistency above, it makes sense to keep inquiry into longevity and contemporaneity separate from the *Skidmore* test because this factor measures congressional approval of the agency view.[302] The implications of this factor are quite unlike those of other *Skidmore* factors. If the court applies this factor to find that Congress intends the agency's conclusion, no other *Skidmore* factors should matter: Congress's intent should trump the court's preferred interpretation. Yet modern courts are wary of reading too much certainty into Congress's failure to address even a longstanding agency interpretation.[303] The *Skidmore* factors are geared toward situations in which

v. Gilbert, 429 U.S. 125, 141–42 (1976) (noting in midst of *Skidmore* analysis that EEOC's interpretation was not "contemporaneous"); see also 2 Davis, supra note 2, § 7.14, at 64–69 (discussing role of contemporaneity, longevity, and reenactment in pre-*Chevron* judicial review of interpretative rules).

299. See Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 487 (2004) ("We 'normally accord particular deference to an agency interpretation of "longstanding" duration.'" (quoting Barnhart v. Walton, 535 U.S. 212, 220 (2002))); United States v. Cleveland Indians Baseball Co., 532 U.S. 200, 219 (2001) ("'A regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent.'" (quoting Nat'l Muffler Dealers Ass'n, Inc. v. United States, 440 U.S. 472, 477 (1979))).

300. By our count, the courts discussed longevity and/or contemporaneity in only 11 of the 79 sliding-scale *Skidmore* applications. See infra Appendix. See also supra note 284 (describing our definition of this factor for purposes of interpreting applications).

301. See Reimels v. Comm'r, 436 F.3d 344, 347–48 (2d Cir. 2006) (accepting agency's "longstanding revenue ruling" in part to preserve agency's "unbroken pattern of narrow statutory interpretation"); O'Shaughnessy v. Comm'r, 332 F.3d 1125, 1130–31 (8th Cir. 2003) (finding district court's decision not to grant deference was justifiable in part because, as compared to other agency interpretations that had earned deference, the revenue ruling at issue "d[id] not reflect a similarly longstanding or consistent interpretation").

302. See supra Part II.C.4 (discussing consistency factor).

303. See, e.g., OfficeMax, Inc. v. United States, 428 F.3d 583, 595–96 (6th Cir. 2005) (expressing doubts about viability of reenactment doctrine and construing its applicability narrowly); Butterbaugh v. Dep't of Justice, 336 F.3d 1332, 1340–42 (Fed. Cir. 2003)

Congress's intent is uncertain, and the court must determine whether the agency's actions, not Congress's approval, compel deference.

7. *Summary*. — The appellate courts seem to believe that *Skidmore* review represents something more than mere totality of the circumstances evaluation. Yet the courts are uncertain as to precisely what that something is. In the end, the overlapping definitions of the various factors may make little difference to the outcome in most cases. Put another way, one might argue, for example, that it matters little whether the courts label their evaluation of the process by which an agency adopted its interpretation as thoroughness or formality, so long as they are considering the implications of that process for deference purposes. Yet the confusion over the inquiry each factor represents in turn feeds the uncertainty over how the *Skidmore* standard should function. What the courts seem to be searching for, and what seems to be lacking in many cases, is an underlying guiding principle that links the various factors and explains why one informal, nonbinding agency action is superior to another.

III. Reconceptualizing *Skidmore* Review

It is apparent that the courts of appeals lack a coherent conception of how *Skidmore*'s sliding scale should function. By now, it is equally plain that the Court is unlikely to follow Justice Scalia's suggestion of eliminating *Skidmore* deference altogether.[304] The Supreme Court continues to assert a role for *Skidmore* deference; and the courts of appeals clearly take seriously *Skidmore*'s admonition that they weigh the various contextual factors to determine the extent to which administrative interpretations should be accorded deference. Yet the courts' approach to the factors is rather ad hoc and lacking in consistency, from the Supreme Court on down.

Given the disarray that characterizes the courts' application of the *Skidmore* standard, it is unsurprising that other scholars have taken up the task of reconceptualizing *Skidmore* to alleviate some of the difficulty in its application. Based upon his perceptive analysis of *Christensen*, Jim Rossi draws from Justice Breyer's dissenting opinion to suggest viewing *Skidmore* as an intensified version of reasonableness review under *Chevron*—in essence advocating *Chevron* step two with a dash of hard look review.[305] Although Rossi's analysis predates *Mead* and uses slightly different phrase-

(questioning relevance of longevity absent other pro-agency *Skidmore* factors and then conducting separate analysis of reenactment doctrine and noting "congressional inaction is perhaps the weakest of all tools for ascertaining legislative intent, and courts are loath to presume congressional endorsement unless the issue plainly has been the subject of congressional attention"); *O'Shaughnessy*, 332 F.3d at 1130–31 (declining to infer congressional acquiescence to longstanding IRS revenue ruling).

304. See United States v. Mead Corp., 533 U.S. 218, 241 (2001) (Scalia, J., dissenting).

305. See Rossi, supra note 7, at 1137–46; see also supra note 79 (explaining hard look review).

ology, his approach is consistent with the notion of treating *Mead* as a *Chevron* step one-and-a-half.[306] Also, appropriately in our view, Rossi recognizes the relevance to *Skidmore* review of the *Chevron* step one search for a statute's plain meaning, and he acknowledges *Skidmore*'s potential for allowing a reviewing court to uphold an agency's interpretation even if the court would prefer an alternate reading.[307] Nevertheless, Rossi merely folds *Skidmore* review into the *Chevron* regime rather than treating *Skidmore* and *Chevron* as independent standards of review.[308] In so doing, Rossi in effect diminishes the significance of the distinct justifications for the *Chevron* and *Skidmore* standards. With the benefit of post-*Mead* hindsight, the courts of appeals, if not the Supreme Court, are seeking a more robust articulation of *Skidmore* as an independent standard of review.

Amy Wildermuth endeavors to achieve precisely that goal. Wildermuth acknowledges that courts understand *Skidmore*'s approach as a sliding scale of judicial deference in which "'agency interpretations receive various degrees of deference, ranging from none, to slight, to great, depending on the court's assessment of the strength of the agency interpretation under consideration.'"[309] Yet, Wildermuth doubts that "it is possible to sort the varying degrees of deference *Skidmore* imagines."[310] Accordingly, Wildermuth proposes viewing *Skidmore* as representing a single, fixed point of "intermediate" deference in which the reviewing court evaluates the agency's interpretation much as it would that of any other litigant, but with a thumb on the scale in the agency's favor ostensibly represented by the contextual factors.[311]

Wildermuth's revision of the *Skidmore* standard promises simplicity, but to a fault. As we read it, Wildermuth's approach seems largely analogous to Colin Diver's suggestion twenty years ago that "[c]ourts generally use 'deference' in an intermediate sense, between 'courteous regard' and 'submission,'" with an administrative interpretation's pedigree as a nondispositive plus factor.[312] Her approach thus resembles only a slightly more deferential version of the independent judgment model of *Skidmore* that our study found most courts of appeals declining to follow. Such a one-size-fits-all approach effectively dismisses the contextual significance that *Skidmore* aims to promote. Wildermuth nods toward

306. Cf. supra notes 65–67 and accompanying text (discussing *Mead*'s inquiry as step zero or step one-and-a-half in deference framework created by *Mead*, *Chevron*, and *Skidmore*).

307. See Rossi, supra note 7, at 1137–46.

308. See id.

309. See Wildermuth, supra note 7, at 1896 (quoting Merrill & Hickman, supra note 42, at 855).

310. See id.

311. See id. at 1905.

312. See Diver, supra note 80, at 565–66. The principal difference between Wildermuth and Diver seems to be that, while Diver attributes the courts' ultimately self-justificatory utilization of *Skidmore* deference to judicial obfuscation, Wildermuth blames such behavior on excessive doctrinal complexity.

Skidmore's factors, suggesting agency expertise and the interpretation's longevity as guides in applying them.[313] Yet those elements are all fundamentally variable across interpretations; and there simply is no room for such variability in the sort of on/off switch model that Wildermuth proposes. In short, Wildermuth forecloses the possibility that a court could or should feel *more* or *less* compelled to defer depending upon how the *Skidmore* factors apply in a given case.

While we disagree with Rossi's and Wildermuth's approaches toward *Skidmore*, we agree that the courts' haphazard application of *Skidmore*'s contextual factors suggests the need for reconceptualization. Further, based on review of *Skidmore*'s day-to-day application, we share Wildermuth's concern that courts are unwilling and likely unable to distinguish finely between numerous degrees of deference. In our view, however, the problem seems to arise from courts thinking of *Skidmore* review solely in terms of its factors rather than the goals those factors serve. With this view in mind, we offer two suggestions to clarify and yet simplify *Skidmore*'s standard.

First, the solution to *Skidmore*'s inconsistent application lies in the two competing concepts that are at the heart of *Skidmore* review: comparative agency expertise and the potential for arbitrariness in the exercise of that expertise. As a doctrine of judicial prudence, *Skidmore* is premised principally on the courts' recognition that sometimes agencies are simply better situated to resolve certain issues of statutory construction.[314] This institutional superiority arises from several sources. As compared to the generalist courts, agencies focus more narrowly in their endeavors upon a particular statute or group of statutes.[315] Agencies are staffed with attorneys and other experts who specialize in the areas they regulate.[316] Agencies dedicate their resources to investigating and evaluating the implications of alternative interpretations of the statutes they administer and enforce.[317] All of these elements culminate in expertise being not merely an isolated factor that the courts consider in employing *Skidmore* analysis.

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313. See Wildermuth, supra note 7, at 1909–11.

314. See Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944) (emphasizing agency's superior expertise regarding issue at bar). Whether an agency possesses relatively superior expertise in a given case will often depend partly on the subject matter of the question at hand. Along these lines, the forthcoming study by Eskridge and Baer found the Supreme Court more likely to side with the agency in cases involving technical and comparatively apolitical subject matters (e.g., tax, intellectual property, energy) and less likely to side with the agency regarding less technical or more highly charged subject matters (e.g., civil rights, labor, criminal law). See Eskridge & Baer, supra note 7 (manuscript at 57–59).

315. See *Skidmore*, 323 U.S. at 137–38 (observing also that statute gave Administrator both duties and powers over its administration).

316. See United States v. Mead Corp., 533 U.S. 218, 235 (2001) (recognizing agency's "specialized experience" with case's "subtle questions"); *Skidmore*, 323 U.S. at 138–39 (conceding Administrator's superior expertise); see also Gonzales v. Oregon, 546 U.S. 243, 269 (2006) (noting "Attorney General's lack of expertise in this area").

317. See *Skidmore*, 323 U.S. at 137–39 (acknowledging agency's investigatory efforts and consequent accumulated knowledge).

More importantly, agency expertise is the principle that guides *Skidmore* as a doctrine and to which all the other factors relate.

Yet the modern, post-*Mead* version of *Skidmore*, like *Chevron*, is also guided by the need to balance judicial respect for agency policy discretion against concerns over agency arbitrariness. Statutory ambiguity signals the opportunity for policy choice.[318] Agencies are more democratically accountable and thus better suited than courts to decide between policy alternatives,[319] but agencies are not as politically accountable as the elected branches. The informal interpretive formats for which *Skidmore* provides the appropriate standard often lack the procedural safeguards that the Administrative Procedure Act imposes on notice-and-comment rulemaking and formal adjudication.[320] The Administrative Procedure Act calls upon the courts to serve as a bulwark against arbitrary or capricious agency action.[321]

Skidmore's factors should thus be understood as ferreting out two things: first, the extent to which agencies have deliberately employed their superior expertise and resources in evaluating the statutory ambiguity at hand; and second, the potential for arbitrariness in agency action. Considering the factors in these terms, rather than as isolated inquiries, should help clarify their meaning and relative weight.[322]

For example, the fact of an agency's inconsistency, standing alone, tells the court little. Inconsistency may signal arbitrariness, but inconsistency is not troubling if a new interpretation was prompted by new information or changed circumstances, or accompanied by a well-reasoned justification, all of which would alleviate concern that the agency's waver-

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318. See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 864–66 (1984) (discussing policy implications of ambiguous statutory provisions).

319. See id. (recognizing significance of agencies' superior political accountability).

320. See, e.g., Eskridge & Baer, supra note 7 (manuscript at 93) (emphasizing relevance of public participation and/or feedback from elected officials as a criteria for deference); Nina A. Mendelson, Regulatory Beneficiaries and Informal Agency Policymaking, 92 Cornell L. Rev. 397, 425–33 (2007) (noting reduced opportunities for public participation in informal guidance documents and negative implications for agency accountability); Patricia M. Wald, Judicial Review in Midpassage: The Uneasy Partnership Between Courts and Agencies Plays On, 32 Tulsa L.J. 221, 223 (1996) (recognizing APA-era view of procedure as "the best mechanism for controlling agency discretion").

321. See 5 U.S.C. §§ 702, 703, 706 (2000) (supporting and providing standards for judicial review of administrative action); see also, e.g., Wald, supra note 320, at 223 (describing the role of judicial review under the APA as a secondary "retrospective check on the legality and rationality of administrative action").

322. Eskridge and Baer suggest similarly that courts applying *Skidmore* analysis should focus on core inquiries into agency expertise; "rule-of-law variable[s]," such as reliance issues; and the level of public participation or feedback in the interpretation's formation. See Eskridge & Baer, supra note 7 (manuscript at 92–94). Their formulation seems designed to require agencies to earn courts' respect, while our emphasis on arbitrariness suggests that courts should presume such respect while checking for reasons to disregard that presumption. Hence, our conception of *Skidmore* would permit strong judicial deference more often than that of Eskridge and Baer. See infra notes 326–329 and accompanying text (discussing strong form of *Skidmore* deference under our conception).

ing represents arbitrariness.[323] Similarly, the informality of an interpretation is important in *Skidmore* analysis only to the extent it shows that the agency has not brought its institutional superiority to bear in forming its interpretation. Thus, an agency handbook that senior agency officials have thoroughly reviewed and approved for use throughout the agency may reflect the agency's expertise despite its informality.[324] Carefully deliberated and explained interpretations that implicate an agency's core area of competency and draw upon the agency's experiences in that area, particularly when adopted through consultative processes, reflect the agency's expertise and eschew arbitrariness. Interpretations that do not possess these qualities—that stray to the boundaries of the agency's specialized knowledge, that are adopted ad hoc without collaborative and transparent deliberation, or that are insufficiently explained, for example—suggest that the agency has not truly brought its expertise to bear and should trigger a court's concern that the agency has behaved capriciously.

By emphasizing the juxtaposition of expertise and arbitrariness as the guiding principles underlying *Skidmore*'s multifactor analysis, we do not mean to suggest that the courts should superimpose yet another two-part test on top of the current, already too complicated deference framework. Rather, courts should simply use these principles to focus their inquiry, ensuring they do not miss the forest for the trees in applying the factors of *Skidmore*'s sliding scale.

Second, in evaluating the relationship between expertise and arbitrariness with respect to a particular interpretation, we suggest that courts view *Skidmore*'s sliding scale as a choice among three identifiable moods or attitudes that the courts may adopt toward agencies' legal interpretations. Conceptualizing *Skidmore*'s sliding scale in this manner should ease the burden of its application while also fulfilling its promise of tailoring deference to the unique interpretation at hand. The three moods of *Skidmore* share some important characteristics. Each turns on an evaluation of the contextual factors, guided by the overarching principles of expertise and arbitrariness. Also, a substantively invalid or unreasonable interpretation would not pass muster under any of the three, any more than it would under *Chevron* analysis. Rather, the three attitudinal zones on the *Skidmore* sliding scale merely reflect the attitudes courts may adopt, based upon the contextual factors, in deciding whether their own preferred, reasonable interpretation or the agency's should prevail.

The first of these three moods is highly deferential. This strong deference is appropriate when the court finds that *Skidmore*'s factors more or

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323. For example, in *McGraw v. Barnhart*, the court accepted the agency's change of course as responding to several other courts rejecting its former, more contemporaneous interpretation and in light of the agency's subsequent consistency and valid reasoning in support of its present view. See 450 F.3d 493, 500–01 (10th Cir. 2006).

324. See, e.g., Lapine v. Town of Wellesley, 304 F.3d 90, 106 (1st Cir. 2002) (giving considerable deference to Department of Labor handbook).

less uniformly fall in the agency's favor, suggesting applied expertise rather than arbitrariness as the basis for the agency's action. In such a case, a court should defer to a reasonable agency interpretation even if the court might prefer an alternative view. Thus, if the reviewing court finds that the agency's interpretation is the product of extensive agency evaluation, backed by careful reasoning that demonstrates the consideration of alternatives, consistently applied, and within the range of reasonable interpretations, then the court should simply defer to the agency. *Skidmore* deference at this level is distinctly *Chevron*-like in effect, in that courts should only reject agency interpretations that are clearly statutorily impermissible. In fact, for a court to assert its contrary interpretational preferences under these circumstances would smack of judicial capriciousness and intrusion into the agency's policy sphere, rather than protection against arbitrary agency behavior.

Rocknel Fastener, Inc. v. United States offers a good example of this particular *Skidmore* mood.[325] *Rocknel Fastener* involved an importer's challenge to a Customs Service tariff classification.[326] The Federal Circuit noted that Customs had adopted the classification not only in multiple Headquarters Ruling Letters, but also in a Customs Service publication. The classification had been supported with "thorough analysis," consistently maintained for "more than 16 years," and harmonized with widely accepted standards of the industry.[327] Finally, the court noted Customs's expertise with the "highly detailed" "regulatory scheme," and so determined that deference was due to Customs's interpretation.[328] Satisfied that Customs had applied its expertise in forming the interpretation, and finding no hint of arbitrariness, the court deferred to Customs's view.[329]

At the opposite end of the sliding scale is an attitude of little or no deference toward the agency's interpretation. When the contextual factors fall more or less uniformly against the agency, suggesting that an interpretation is an ad hoc, arbitrary conclusion rather than the result of

325. 267 F.3d 1354 (Fed. Cir. 2001). For other examples of courts properly giving strong deference under *Skidmore*'s sliding scale, see Santiago v. GMAC Mortgage Group, Inc., 417 F.3d 384, 389 n.4 (3d Cir. 2005) (stating, as alternative basis for holding, that HUD policy statement deserved deference because it was reasonable position and demonstrated agency's ongoing, thorough consideration of issue within its expertise); Cathedral Candle Co. v. U.S. Int'l Trade Comm'n, 400 F.3d 1352, 1365–67 (Fed. Cir. 2005) (deferring to International Trade Commission's interpretation as "product of the Commission's 'specialized expertise,'" informed by thorough investigation and consideration, and having no hint of arbitrariness, since it had been consistently held and cohered with agency's other positions (citing United States v. Mead Corp., 533 U.S. 218, 234 (2001); Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs, 260 F.3d 1365, 1379 (Fed. Cir. 2001))).

326. See *Rocknel Fastener*, 267 F.3d at 1356 (challenging classification of metal fasteners).

327. Id. at 1356–58 (noting classification's agreement with American National Standards Institute and its long standing position in Customs documents).

328. See id. at 1358.

329. See id.

the agency's applied expertise, then a court should without hesitation impose its own interpretation of the statute. For example, a court finding that an agency has interpreted the statute inconsistently in comparable circumstances with little or no explanation for the deviation would rightly suspect that the agency's view is a product of arbitrary and ad hoc reaction rather than reasoned judgment and applied expertise.[330] This mode of analysis differs from pure independent judgment in that a reviewing court is constrained to justify its adoption of its own interpretation versus that of the agency through analysis of *Skidmore*'s factors. Nevertheless, in practical terms, the end result is little different from independent judgment because the court rejects the agency's interpretation as inferior to its own, even if the agency's interpretation otherwise falls within the realm of reasonableness.

Rosales-Garcia v. Holland illustrates this lower end of the *Skidmore* deference spectrum.[331] *Rosales-Garcia* involved an interpretation of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 advanced by the then-Immigration and Naturalization Service solely through briefs in the course of litigation.[332] While the Sixth Circuit cited *Skidmore* as the appropriate evaluative standard, the court noted both the litigation context in which the agency asserted the interpretation and also the agency's inconsistency in having asserted a different interpretation in other, similar litigation.[333] Hence the court declared the agency's interpretation "unpersuasive" and instead adopted its own interpretation of the statute.[334]

Finally, true intermediate *Skidmore* deference occupies the middle ground, where a court may legitimately assert its own preferences but should be wary of doing so for fear of intruding too deeply upon agency policy prerogatives. Intermediate deference is appropriate when assessment of the factors leaves the court with some question of whether the interpretation resulted from the agency's applied expertise or from arbitrary action. For example, an agency may adopt a permissible interpretation through a thorough vetting process that includes consideration by the agency's highest officials, demonstrating applied expertise; but the

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330. See, e.g., Rodriguez v. Whiting Farms, Inc., 360 F.3d 1180, 1189 (10th Cir. 2004) (declining to defer to Department of Labor opinion letter that was contradicted by another opinion letter, especially where neither letter included persuasive analysis).

331. 322 F.3d 386 (6th Cir. 2003). For other examples of courts properly giving little to no deference under *Skidmore*'s sliding scale, see Shickles v. Sprint/United Mgmt. Co., 426 F.3d 1304, 1315–16 (10th Cir. 2005) (denying deference to EEOC's position that was first asserted in amicus brief, gave no sign of thorough, agency-wide deliberation or public scrutiny, and contradicted various judicial precedents—all of which suggest arbitrariness); Hall v. EPA, 273 F.3d 1146, 1156 & n.6 (9th Cir. 2001) (denying deference to EPA's final ruling because it contradicted other rulings and lacked any supporting explanation, thus giving court "no basis to conclude that the EPA has drawn on any special expertise in advocating this interpretation").

332. See *Rosales-Garcia*, 322 F.3d at 403 n.22.

333. See id.

334. See id. at 403–08 & n.22.

same interpretation may represent a change in agency policy or may appear in a wholly internal, informal format that gave regulated parties little notice or opportunity for input.[335] Or, an agency may have never articulated a clear basis for its interpretation nor adopted it in a format that suggests thorough consideration, leaving the court with no evidence that the agency employed its expertise deliberately; yet the same interpretation may reflect a long-established agency practice, perhaps dating back to the statute's enactment, to which regulated parties generally have conformed their primary behavior.[336] In such circumstances, even if it might prefer another interpretation, the prudent court should think twice before asserting its own views over those of the agency and upending settled regulatory understanding if, in litigation, the agency can demonstrate the reasonableness of its interpretation.[337]

Heartland By-Products, Inc. v. United States nicely exemplifies this intermediate attitude of *Skidmore* deference.[338] Like *Mead*, the *Heartland* case involved a Customs classification ruling. Unlike the *Mead* ruling, however, the *Heartland* ruling was adopted after a notice-and-comment process, which in turn represented an effort by the Customs Service to reconsider and ultimately revoke an earlier, contrary ruling letter.[339] The Federal Circuit recognized the statute as ambiguous and susceptible of more than one interpretation, but did not express its own interpreta-

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335. For example, in *In re New Times Securities Services, Inc.*, the court noted that the SEC's interpretation related to a statutory scheme, the Securities Investor Protection Act, which lies outside of the SEC's core competency. See 371 F.3d 68, 83 (2d Cir. 2004). While having carefully considered the issue, the SEC's interpretation had first been advanced in its amicus brief to the case even though the SEC could have intervened with its view in any number of previous cases. Id. at 80–82. This mixed picture of expertise and arbitrariness led the court to afford "some degree of deference," but not the "considerable deference" the SEC requested. Id. at 83.

336. For example, in *New Hampshire v. Ramsey*, the court gave some respect to a Department of Transportation memorandum of guidance which was relatively informal and laid out its views without much justification, but which had been adhered to since 1983. 366 F.3d 1, 25–26 (1st Cir. 2004); see also Rabin v. Wilson-Coker, 362 F.3d 190, 198 (2d Cir. 2004) (acknowledging agency's general expertise regarding issue but finding no evidence that agency either applied its expertise through deliberative process or considered prominent contrary court ruling).

337. Admittedly, intermediate deference in our framework may become the default mode that is applied to a wide variety and the majority of interpretations. That result, however, is entirely appropriate given the types of informal interpretations which are generally *Skidmore* eligible.

338. See 264 F.3d 1126 (Fed. Cir. 2001). For other examples of courts properly giving intermediate deference under *Skidmore*'s sliding scale, see Cmty. Bank of Ariz. v. G.V.M. Trust, 366 F.3d 982, 987–89 (9th Cir. 2004) (concluding that Office of the Comptroller of Currency's view was "entitled to respect" because OCC's expertise extended to statute at issue, and OCC's interpretation was sensible, but was only implicitly adopted in series of opinion letters); Cunningham v. Scibana, 259 F.3d 303, 307–09 (4th Cir. 2001) (accepting Bureau of Prison (BOP) classification of offense as "crime of violence" because decision was "sound," based on BOP's expertise, and consistently held, although classification appeared in program statement that provided no reasoning to support classification).

339. See *Heartland*, 264 F.3d at 1129–32.

tion.[340] Instead, analyzing the ruling under *Skidmore*, the Federal Circuit noted several factors supporting deference, including Customs's thoroughness in collecting and considering public comments, the "logical and well-reasoned explanation" that Customs published, and Customs's "'specialized experience' in classifying goods."[341] The court weighed the lack of consistency represented by the earlier ruling against deference, but the court also noted that the statute expressly permitted revocation of earlier rulings, that the earlier ruling was not adopted with the benefit of notice-and-comment rulemaking, and that the earlier ruling did not address the issue raised in the revocation process.[342] Given that analysis and the reasonableness of the agency's interpretation, the *Heartland* court deferred to the agency's view.[343]

In sum, we are confident that, as courts center their analysis of *Skidmore*'s factors around the dual goals of assessing relative expertise and checking arbitrary decisionmaking, *Skidmore*'s sliding scale can assume a more certain form. Also in the interests of simplification and transparency, courts need not bother trying to ascertain a precise degree of deference that the *Skidmore* factors prescribe in isolation from the facts of the given case. Instead, it suffices to keep in mind just three distinct moods that are available—strong deference, no deference, or intermediate deference.

IV. *SKIDMORE*'S DOMAIN

In conducting our study, we observed that questions remain regarding the range of *Skidmore*'s applicability. Our primary goals with this Article were to evaluate the modern *Skidmore* standard and offer a vision for how it should be applied. Full consideration of *Skidmore*'s reach is thus beyond this Article's scope. Nevertheless, emerging questions over when *Skidmore* applies reinforce the importance of settling how *Skidmore* should operate. Accordingly, a brief synopsis of our observations and preliminary thoughts on this issue is warranted.

Christensen and *Mead* make clear that *Skidmore* stands as an important standard of review alongside of *Chevron*, but those cases do not limit judicial review of agency interpretations solely to *Chevron* or *Skidmore*. In Part III we suggested that *Skidmore*'s sliding scale, applied under the right circumstances, can result in little or no deference at all.[344] Yet recall from Part II our observation that deferential review—even where it leads to a conclusion that little or no deference is warranted—nevertheless differs from independent judgment at the outset.[345] Straight de novo review,

340. See id. at 1134–35, 1136–37.

341. Id. at 1135–36 (quoting United States v. Mead Corp., 533 U.S. 218, 234–35 (2001)).

342. See id. at 1136.

343. See id. at 1137.

344. See supra notes 330–334 and accompanying text.

345. See supra Part II.A.1.

with a reviewing court exercising its independent judgment, is conceivably appropriate under certain circumstances as well. In short, there must be some outer limits on *Skidmore*'s domain. The question is where those outer limits lie.

Courts often apply *Skidmore* as the evaluative standard for administrative interpretations that fail to qualify for *Chevron* deference on the basis of *Mead* step one because the agency lacks the authority to bind regulated parties with the force of law.[346] Many if not most of these cases involve agencies that nevertheless possess some degree of congressionally delegated authority over the statute in question. Both *Christensen* and *Skidmore* involved informal interpretations of the FLSA by the Administrator of the Wage and Hour Division of the Department of Labor, an officer with many congressionally imposed duties in the area of labor and employment but not *Chevron*-requisite authority.[347] Likewise, the courts regularly apply the *Skidmore* standard in reviewing interpretive guidelines, compliance manuals, and amicus briefs from the EEOC interpreting Title VII of the Civil Rights Act of 1964, though that statute gives the EEOC only limited enforcement authority.[348]

Courts also regularly apply *Skidmore* review when agencies that possess binding authority nevertheless interpret the statutes they administer through less formal, nonbinding formats.[349] In other words, such inter-

346. See, e.g., S. Utah Wilderness Alliance v. Bureau of Land Mgmt., 425 F.3d 735, 759–60 (10th Cir. 2005) (applying *Skidmore* to proposed regulations of Bureau of Land Management that could not, per operation of statute, take effect without later statutory authorization); Butterbaugh v. Dep't of Justice, 336 F.3d 1332, 1339–40 (Fed. Cir. 2003) (applying *Skidmore* partly because Office of Personnel Management lacked explicit rulemaking authority regarding question at hand); Cal. State Legislative Bd. v. Mineta, 328 F.3d 605, 607 (9th Cir. 2003) (applying *Skidmore* to Federal Railroad Administration's interpretive rule because agency "does not have rulemaking power with respect to the Act").

347. See Christensen v. Harris County, 529 U.S. 576, 587–88 (2000); Skidmore v. Swift & Co., 323 U.S. 134, 137–38 (1944) (discussing Administrator's authority); see also Herman v. Fabri-Centers of Am., Inc., 308 F.3d 580, 592 (6th Cir. 2002) (noting that *Skidmore* and *Mead* may support deference to such opinion letters); Arriaga v. Fla. Pac. Farms, LLC, 305 F.3d 1228, 1238 (11th Cir. 2002) (applying *Skidmore* deference to Department of Labor opinion letter).

348. See Noviello v. City of Boston, 398 F.3d 76, 90 & n.3 (1st Cir. 2005) (deferring to EEOC Compliance Manual interpreting Title VII under *Skidmore*); United States v. City of New York, 359 F.3d 83, 93 (2d Cir. 2004) (citing *Christensen* for deference to EEOC Compliance Manual interpreting Title VII); White v. Burlington N. & Santa Fe Ry. Co., 364 F.3d 789, 798 (6th Cir. 2004) (applying *Skidmore* in evaluating EEOC amicus brief and guidelines interpreting Title VII); Smith v. City of Jackson, 351 F.3d 183, 189 n.5 (5th Cir. 2003) (considering court "bound to treat [EEOC guidelines] as having persuasive force, to the extent that they are thoughtfully considered" (citing *Christensen*, 529 U.S. at 587)).

349. See, e.g., Reimels v. Comm'r, 436 F.3d 344, 347 n.2 (2d Cir. 2006) (granting *Skidmore* deference to IRS revenue ruling interpreting Internal Revenue Code); La. Envtl. Action Network v. EPA, 382 F.3d 575, 583 (5th Cir. 2004) (applying *Skidmore* review to informal EPA interpretation of Clean Air Act); Horn v. Thoratec Corp., 376 F.3d 163, 178–80 & n.25 (3d Cir. 2004) (deferring to FDA amicus brief interpreting Food, Drug & Cosmetic Act).

pretations satisfy *Mead* step one but not *Mead* step two, and thus are ineligible for *Chevron* deference solely on that basis.[350] *Mead* itself was just such a case, as the Customs Service possesses the authority to bind with the force of law but the interpretation in question was advanced through a ruling letter with much more limited application.[351] Hence, in speaking of deference generally, the *Mead* Court explained, "The fair measure of deference to an agency administering *its own statute* has been understood to vary with circumstances . . . ."[352] As the *Mead* Court observed, the Customs Service issues 10,000 to 15,000 such rulings each year.[353] Unsurprisingly, many are challenged, and the courts apply *Skidmore* deference in evaluating such interpretations.[354] Other common examples are rulings and other informal interpretations issued by the Internal Revenue Service concerning the Internal Revenue Code[355] or by the Environmental Protection Agency interpreting the Clean Air Act and the Clean Water Act.[356] *Skidmore* deference may vary within this category based in part upon the relative formality of the agency's interpretation: Published rulings issued by an agency head may be more persuasive than mere post-hoc litigating positions.[357]

In these common scenarios, where an administering agency either possesses expertise but not the power to bind or enjoys *Chevron*-requisite authority but chooses to act more informally, *Mead*'s two prongs apply neatly to deny *Chevron* deference. Such cases thus fall in the heartland of *Skidmore*'s domain and represent the majority of *Skidmore* applications. Under such circumstances, the courts are generally in agreement that *Skidmore* provides the appropriate standard of review. Applying *Skidmore* in these contexts makes sense, as deferential review clearly serves *Skidmore*'s appreciation for agency expertise and concern for uniformity

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350. See United States v. Mead Corp., 533 U.S. 218, 226–27 (2001) (establishing this two-part test); see also supra notes 64–67 and accompanying text (discussing *Mead* test).

351. *Mead*, 533 U.S. at 222–23.

352. Id. at 228 (emphasis added).

353. See id. at 233.

354. See, e.g., Warner-Lambert Co. v. United States, 407 F.3d 1207, 1209 (Fed. Cir. 2005); Structural Indus., Inc. v. United States, 356 F.3d 1366, 1370 (Fed. Cir. 2004); Int'l Trading Co. v. United States, 281 F.3d 1268, 1274 n.2 (Fed. Cir. 2002); Mead Corp. v. United States, 283 F.3d 1342, 1346 (Fed. Cir. 2002); Rocknel Fastener, Inc. v. United States, 267 F.3d 1354, 1357 (Fed. Cir. 2001).

355. See, e.g., Appoloni v. United States, 450 F.3d 185, 193–94 (6th Cir. 2006); Reimels v. Comm'r, 436 F.3d 344, 347 n.2 (2d Cir. 2006); OfficeMax, Inc. v. United States, 428 F.3d 583, 594–95 (6th Cir. 2005); Ammex, Inc. v. United States, 367 F.3d 530, 535 (6th Cir. 2004); O'Shaughnessy v. Comm'r, 332 F.3d 1125, 1130 (8th Cir. 2003); Omohundro v. United States, 300 F.3d 1065, 1067–68 (9th Cir. 2002).

356. See, e.g., La. Envtl. Action Network v. EPA, 382 F.3d 575, 583–84 (5th Cir. 2004); Hall v. EPA, 273 F.3d 1146, 1155–60 (9th Cir. 2001).

357. Compare, e.g., *Omohundro*, 300 F.3d at 1068–69 (deferring under *Skidmore* to published revenue ruling consistent with subsequently adopted regulation), with U.S. Freightways Corp. v. Comm'r, 270 F.3d 1137, 1142–47 (7th Cir. 2001) (finding interpretation advanced solely through application and litigation unpersuasive under *Skidmore* analysis).

of interpretation. Occasionally, however, cases present circumstances where the courts of appeals are less clear as to whether *Chevron*, *Skidmore*, or no deference is appropriate for the administrative interpretations before them.

As between the standards of *Chevron* and *Skidmore*, *Mead*'s two-part test ultimately ought to determine which standard a court applies. However, it appears that courts may have extended the scope of *Skidmore*'s applicability arguably beyond what the *Mead* Court envisioned simply to avoid the complexity of the *Mead* test.[358] Whether congressional delegation exists (*Mead* step one) and whether an interpretation holds legal force (*Mead* step two) are often unclear. Thus, where courts agree with the agency's arguably but not obviously *Chevron*-eligible interpretation, they may be inclined to dodge the *Mead* inquiry entirely by finding that the interpretation withstands *Skidmore*'s less deferential scrutiny.[359] In this way, some interpretations that arguably merit *Chevron* deference receive *Skidmore* review.

Likewise, on the opposite end of the *Skidmore* spectrum, where *Chevron* is obviously inappropriate and courts agree with the agency's interpretation, they may assume without further inquiry the applicability of *Skidmore* deference.[360] Consequently, interpretations that arguably are not entitled to *Skidmore* deference seem to receive it. The result in such cases is the same—the agency's view stands.[361] After all, the true test of the scope of a judicial deference doctrine only comes when the reviewing court prefers a different interpretational alternative from that advanced by the agency. Yet assumptions made in the course of judicial agreement with agency interpretations may be taken as precedents in later cases

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358. See Lisa Schultz Bressman, How *Mead* Has Muddled Judicial Review of Agency Action, 58 Vand. L. Rev. 1443, 1464–69 (2005) (observing same and discussing problems).

359. See, e.g., United States v. W.R. Grace & Co., 429 F.3d 1224, 1241 (9th Cir. 2005) ("Whichever of [*Chevron* or *Skidmore*] applies, we reach the same result . . . ."); Santiago v. GMAC Mortgage Group, Inc., 417 F.3d 384, 389 n.4 (3d Cir. 2005) ("[B]ecause we would find HUD's interpretation to be persuasive under *Skidmore*, we would not need to reach whether *Chevron* deference is warranted."); Southco, Inc. v. Kanebridge Corp., 390 F.3d 276, 286 n.5 (3d Cir. 2004) (declining to "decide what degree of deference is warranted under the circumstances" and citing *Skidmore* to justify deferring to Copyright Office's interpretation); Pension Benefit Guar. Corp. v. Wilson N. Jones Mem'l Hosp., 374 F.3d 362, 369 (5th Cir. 2004) ("We do not need to decide whether the PBGC's interpretation . . . warrants *Chevron* deference because it is clear that the PBGC's order may be upheld . . . under the less deferential standard set forth in [*Mead*'s affirmation of *Skidmore*]."); Stephen Bronte, Advisors, LLC v. Commodities Futures Trading Comm'n, 90 F. App'x 251, 252 (9th Cir. 2004) ("We need not determine whether to afford this interpretation *Chevron* or *Skidmore* deference, since even under *Skidmore* deference we would sustain the CFTC's interpretation of the Act as a reasonable one.").

360. See, e.g., Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 395 F.3d 25, 34 n.6 (2d Cir. 2005) (assuming but declining to apply *Skidmore* review because agreed with agency).

361. See Herz, Judicial Review, supra note 7, at 143–44 (recognizing that courts can resolve many cases without deciding which deference doctrine applies); Sunstein, Step Zero, supra note 59, at 229–30 (same).

when judges and agencies disagree. The Court only took up *Christensen* and *Mead* after several years of the lower courts' grappling with questions over *Chevron*'s applicability under various circumstances—difficulties prompted at least in part by mixed messages in the Court's own jurisprudence.[362]

The Court has not enunciated a rule comparable to *Mead* for determining which interpretations should be the subject of independent judgment rather than *Skidmore* review. Broad-based application of *Skidmore* deference in the post-*Mead* era really has only just begun. Cases raising true scope-of-applicability issues at the lower end of the scale are the exceptions rather than the rule of *Skidmore* applications. Consequently, appellate court jurisprudence to date is too limited and fragmented to yield many clear patterns. Yet a few such circumstances have emerged requiring courts to address the line between *Skidmore* deference and no deference at all, and we suspect that others will follow.

For example, interpretations advanced for the first time in the course of litigation represent an agency interpretation that arguably does not deserve *Skidmore* deference. In *Skidmore*, the Court deferred to the agency's interpretation as expressed in an amicus brief, buttressed by an interpretive bulletin and informal rulings addressing analogous though not precisely identical circumstances.[363] Hence the courts seem generally inclined to include amicus briefs filed by agencies among the *Skidmore*-eligible formats.[364] Where the agency is a party to litigation in the course of enforcement, however, the courts are less clearly unanimous in their support for *Skidmore*'s applicability. In *Chao v. Russell P. Le Frois Builder, Inc.*, for example, the Second Circuit considered an interpretation of the Occupational Safety and Health Act advanced by the Secretary of Labor for the first time in the course of litigation challenging an enforcement decision by the Occupational Safety and Health Review Commission, and concluded that *Skidmore* provided the appropriate standard of review.[365] Other courts, such as the Federal Circuit in *Caribbean*

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362. For example, the circuits disagreed over whether *Chevron* deference was available for interpretative rules and policy statements. Compare Elizabeth Blackwell Health Ctr. for Women v. Knoll, 61 F.3d 170, 181–82 (3d Cir. 1995) (applying *Chevron* in reviewing interpretative rule), with Massachusetts v. FDIC, 102 F.3d 615, 621 (1st Cir. 1996) (denying *Chevron*'s applicability for "[l]ess formal interpretations" including policy statements and guidelines). See generally Merrill & Hickman, supra note 42, at 848–52 (detailing lower court confusion over *Chevron*'s applicability pre-*Mead*).

363. See Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944).

364. See, e.g., Conn. Office of Prot. & Advocacy for Persons with Disabilities v. Hartford Bd. of Educ., 464 F.3d 229, 239–40 (2d Cir. 2006); M. Fortunoff of Westbury Corp. v. Peerless Ins. Co., 432 F.3d 127, 139 (2d Cir. 2005); Cmty. Bank of Ariz. v. G.V.M. Trust, 366 F.3d 982, 987 (9th Cir. 2004); Matz v. Household Int'l Tax Reduction Inv. Plan, 265 F.3d 572, 574–75 (7th Cir. 2001).

365. See 291 F.3d 219, 227–28 (2d Cir. 2002); see also Shikles v. Sprint/United Mgmt. Co., 426 F.3d 1304, 1315–16 & n.7 (10th Cir. 2005) (applying *Skidmore* factors but declining to defer to interpretation advanced in EEOC amicus brief); Old Ben Coal Co. v. Dir., Office of Workers' Comp. Programs, 292 F.3d 533, 542 n.8 (7th Cir. 2002)

Ispat Ltd. v. United States, have employed *Skidmore* review in evaluating agency litigating positions, only to apply *Skidmore*'s contextual factors to conclude that such interpretations merited little or no deference.[366] In still other cases, such as *Connecticut Office of Protection & Advocacy for Persons with Disabilities v. Hartford Board of Education*, courts have suggested that agency litigation positions are mere "'post hoc rationalizatio[ns]'" to which any form of deference is inappropriate.[367]

Another issue of *Skidmore*'s reach pertains to the relationship between *Skidmore* and stare decisis. Prior to *Mead*, jurisprudence regarding the primacy of *Chevron* or judicial precedent was extraordinarily conflicted.[368] In its 2005 decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, the Supreme Court resolved that controversy in favor of deference.[369] "Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction."[370] Yet *Brand X* was a *Chevron* case, involving a legally binding Federal Communications Commission interpretation of the Communications Act of 1934 promulgated through public notice and comment.[371] *Skidmore* is neither discussed nor even cited in any of the opinions issued in *Brand X*, even though *Skidmore* deference shares the

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(suggesting that *Skidmore* deference may be appropriate for some agency litigation positions).

366. See 450 F.3d 1336, 1340–41 (Fed. Cir. 2006) (applying *Skidmore* but declining deference based on inconsistency and unpersuasiveness); see also Padash v. INS, 358 F.3d 1161, 1168 n.6 (9th Cir. 2004) (employing *Skidmore* analysis in dicta and rejecting agency view); Natural Res. Def. Council v. Abraham, 355 F.3d 179, 201 (2d Cir. 2004) ("'[T]o carry much weight, an agency's interpretation must be publicly articulated at some time prior to the embroilment of the agency in litigation over the disputed provision.'" (quoting Natural Res. Def. Council v. Herrington, 768 F.2d 1355, 1428 (D.C. Cir. 1985))).

367. See 464 F.3d at 239–40 (contrasting amicus brief in case at bar with "'post hoc rationalizatio[ns]'" and suggesting latter may not be entitled to *Skidmore* deference (quoting Auer v. Robbins, 519 U.S. 452, 462 (1997))); see also *Old Ben Coal Co.*, 292 F.3d at 542 n.8 (distinguishing between agency litigating position "trying to defend an action it already had taken" from another with "a less-vested interest in the outcome"); Defenders of Wildlife v. Norton, 258 F.3d 1136, 1145 n.11 (9th Cir. 2001) ("[W]e ordinarily will not defer 'to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice.'" (quoting Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988))).

368. In a series of cases in the 1990s, the Supreme Court seemed to suggest that its own precedents trumped *Chevron* deference. See Neal v. United States, 516 U.S. 284, 290, 294–95 (1996); Lechmere, Inc. v. NLRB, 502 U.S. 527, 536–37 (1992); Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 126–31 (1990). The courts of appeals were divided on the question with respect to their own precedents. Compare, e.g., Satellite Broad. & Commc'ns Ass'n of Am. v. Oman, 17 F.3d 344, 348 (11th Cir. 1994) (favoring *Chevron* over circuit precedent), and Chem. Waste Mgmt., Inc. v. EPA, 873 F.2d 1477, 1480–82 (D.C. Cir. 1989) (same), with Bankers Trust N.Y. Corp. v. United States, 225 F.3d 1368, 1376 (Fed. Cir. 2000) (finding no conflict between applying *Chevron* and stare decisis).

369. See 545 U.S. 967, 981 (2005).

370. Id. at 982–83.

371. See id. at 980–81.

same tension with stare decisis as *Chevron* previously did.[372] Furthermore, the dilemma of *Skidmore* and stare decisis falls squarely into the long-standing problem of agencies declining to follow adverse decisions from the courts of appeals,[373] as such nonacquiescence is rarely expressed through *Chevron*-eligible formats.[374] And it is far from clear that the outcome should be the same and that *Skidmore* should trump judicial precedent.

Mead expressly premised *Chevron* deference upon a presumption that Congress vested primary interpretive authority in an agency, such that the agency's interpretation enjoys a superior pedigree to that of the court.[375] *Brand X* not only post-dated *Mead* but reiterated and relied upon the same delegation premise in prioritizing *Chevron* over stare decisis.[376] Under such circumstances, the *Brand X* Court had no problem sacrificing its expressed interpretative preferences to the results of the FCC's notice-and-comment process.[377] Under both *Skidmore* and *Mead*, however, where Congress has not vested the agency with primary interpretive authority, expertise and other factors may call for judicial deference, but the courts rather than the agencies hold ultimate interpretive authority.[378] Moreover, whether or not the agency possesses the authority to bind with the force of law, it is more difficult to imagine courts throwing over their own precedents for agency interpretations expressed through amicus briefs or opinion letters, no matter how thoroughly and expertly reasoned.

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372. See, e.g., Kenneth A. Bamberger, Provisional Precedent: Protecting Flexibility in Administrative Policymaking, 77 N.Y.U. L. Rev. 1272, 1300–01 (2002) (recognizing tension between *Skidmore* and stare decisis); Bressman, supra note 358, at 1466–69 (same); Murphy, Counter-*Marbury*, supra note 7, at 38–39 (same).

373. See Samuel Estreicher & Richard L. Revesz, Nonacquiescence by Federal Administrative Agencies, 98 Yale L.J. 677, 687 (1989) (recognizing three types of agency nonacquiescence); see also, e.g., Ross E. Davies, Remedial Nonacquiescence, 89 Iowa L. Rev. 65, 76 (2003) (noting that agencies engaged in nonacquiescence "might be seen as participating in the complex separation-of-powers dance in which Congress and the executive branch play roles equal to the role of the Supreme Court, or at least equal to the lower federal courts that, are after all, creations of Congress and the executive" (footnote omitted)).

374. Agencies typically signal such nonacquiescence through policy statements or informal rulings. See Gary W. Carter, The Commissioner's Nonacquiescence: A Case for a National Court of Tax Appeals, 59 Temp. L.Q. 879, 885 (1986) (describing IRS nonacquiescence through notices called Actions on Decisions); Estreicher & Revesz, supra note 373, at 694–99 (describing Social Security Administration's approach to nonacquiescence through agency handbook, interim circular, and informal rulings); Samuel Figler, Executive Agency Nonacquiescence to Judicial Opinions, 61 Geo. Wash. L. Rev. 1664, 1680–82 (1993) (detailing NLRB nonacquiescence through informal agency policy).

375. See United States v. Mead Corp., 533 U.S. 218, 226–27 (2001).

376. See *Brand X*, 545 U.S. at 982.

377. See id. at 980–81 (noting legally binding effect of FCC interpretation at bar).

378. See *Mead*, 533 U.S. at 226–27; Skidmore v. Swift & Co., 323 U.S. 134, 137 (1944).

Our conceptualization of the *Skidmore* standard is not a comprehensive solution for resolving all the questions regarding *Skidmore*'s boundaries. Nevertheless, we believe our approach will offer assistance in dealing with many such issues. Returning to the above examples, and assuming that an agency is operating within the sphere of its core competency, both litigation positions and interpretations that contradict existing judicial precedent should fall within the realm of *Skidmore* deference. Reviewing courts may properly apply *Skidmore*'s factors to give little or no deference to such interpretations, particularly when one views *Skidmore*'s sliding scale as having three potential attitudinal zones.[379] Yet one can envision a litigation position that is thoroughly reasoned, substantively valid, and consistently applied over time in like cases as worthy of at least an intermediate level of *Skidmore* deference. Likewise, one can imagine that an agency might attempt to resolve a disagreement in the courts of appeals over a particular interpretation question by issuing an official, thoroughly considered but nonbinding notice of its intent to adopt one of the competing, reasonable interpretations. Perhaps the courts would be wise in deferring under *Skidmore* to the agency's application of its expertise in such situations rather than insisting rigidly upon adherence to judicial precedent absent notice-and-comment rulemaking.

Nevertheless, the courts may properly resolve other potential issues of *Skidmore*'s domain in favor of independent judgment. For example, the Supreme Court in the past has given conflicting signals as to how it intends to address agency interpretations that are arguably unconstitutional. In the *Chevron* context, the Court has taken two slightly different approaches to such questions.[380] On some occasions, the Court has exercised independent judgment in lieu of *Chevron* deference to evaluate interpretations that presented mere constitutional questions (not necessarily constitutional violations) and thereby avoided the constitutional inquiry.[381] In *Rust v. Sullivan*, however, the Court was not so quick to discard *Chevron* deference when faced with an arguably unconstitutional interpretation.[382] Instead, the Court suggested that independent judgment was required only where the agency interpretation would in fact render the statute unconstitutional; but because the interpretation

379. See supra Part III (conceptualizing *Skidmore* deference in three zones).

380. See Merrill & Hickman, supra note 42, at 914–15 (discussing relationship between deference doctrines and constitutional avoidance).

381. See Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172–74 (2001) (declining *Chevron* deference to interpretation "invok[ing] the outer limits of Congress' power" absent "a clear indication that Congress intended that result"); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 574–77 (1988) ("Even if [the agency] construction of the Act were thought to be a permissible one, . . . we must independently inquire whether there is another interpretation, not raising these serious constitutional concerns, that may fairly be ascribed to [the Act].").

382. 500 U.S. 173, 190–91 (1991) (deferring to agency regulations that "do not raise the sort of 'grave and doubtful constitutional questions' that would lead us to assume Congress did not intend to authorize their issuance" (internal citation omitted)).

passed constitutional muster, the Court afforded it *Chevron* deference.[383] In either approach, independent judgment plays a significant role in trumping *Chevron* deference when the Constitution is at issue. From the *Skidmore* perspective, constitutional interpretation is beyond the range of any agency's core competency, particularly vis-à-vis the judiciary. Thus, *Skidmore* review should be applied sparingly, if at all, to such questions.

Finally, *Skidmore*'s domain is also being extended to another category of agency interpretations that arguably fall under a different standard entirely—interpretations of the agency's own regulations. The Supreme Court has frequently applied a rule, often traced to *Seminole Rock & Sand Co.*,[384] that an agency's interpretation of its regulations receives strong deference and is "controlling unless 'plainly erroneous or inconsistent with the regulation.'"[385] However, the Court has not clearly established the bounds of *Seminole Rock* deference—also known as *Auer* deference—and has hinted that *Skidmore* may instead provide the appropriate standard in certain circumstances.[386] Most notably, in *Martin v. Occupational Safety & Health Review Commission*, the Court suggested in dicta that *Skidmore* rather than *Seminole Rock* was the appropriate standard for "less formal means of interpreting regulations," embodied in such forms as "interpretive rules" and "enforcement guidelines," because they did not "derive from the exercise of the Secretary's delegated lawmaking powers."[387]

The Court's later reliance in *Christensen* and *Mead* on similar ideas of delegation and interpretive format to draw the line between *Chevron* and *Skidmore* has led some to contend that the same principles also cabin *Seminole Rock* deference.[388] The Court did not confirm this contention,

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383. See id. at 184–91.

384. 325 U.S. 410 (1945).

385. Auer v. Robbins, 519 U.S. 452, 461 (1997) (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989) (quoting *Seminole Rock*, 325 U.S. at 414)); see also Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2537–38 (2007) (applying same standard in deferring to agency interpretation of its own regulations); Long Island Care at Home, Ltd. v. Coke, 127 S. Ct. 2339, 2349 (2007) (same); Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 387–88 (2003) (same); *Methow Valley Citizens Council*, 490 U.S. at 358–59 (same); cf. Gonzales v. Oregon, 546 U.S. 243, 255–58 (2006) (declining to apply *Auer* deference to interpretation of regulation that parroted statute); Christensen v. Harris County, 529 U.S. 576, 588 (2000) (declining to apply *Auer* deference because regulation at issue was unambiguous).

386. See *Auer*, 519 U.S. at 461; see also supra note 385.

387. Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 157 (1991) (citing *Skidmore* and other cases in explaining that "informal interpretations" of regulations that might not deserve *Seminole Rock* deference "are still entitled to some weight on judicial review"); cf. *Gonzales*, 546 U.S. at 256–69 (applying *Skidmore* after declining *Auer* and *Chevron* deference; Court perceived interpretation as construing statute, not regulation, because regulation merely parroted statute).

388. See, e.g., Krent, supra note 155, at 156–58 (discussing merits of this argument); cf. Keys v. Barnhart, 347 F.3d 990, 993 (7th Cir. 2003) (suggesting that after *Christensen* and *Mead*, agency interpretations promulgated in legal briefs could not receive strong *Auer* deference).

however, in *Long Island Care at Home, Ltd. v. Coke*, its most recent application of *Seminole Rock*.[389] There the Court cited *Seminole Rock* in showing strong deference to an agency interpretation appearing in an internal advisory memorandum written in response to litigation, a format that surely would not receive *Chevron* deference were it interpreting a statute.[390]

Yet it is clear that *Christensen* and *Mead* have led some federal courts of appeals to invoke *Skidmore* rather than *Seminole Rock* to review informal agency interpretations of their regulations. Some courts cite *Christensen* as dictating this result, neglecting *Seminole Rock* completely and stating simply that *Skidmore* applies to agency interpretations lacking legal force.[391] In this mold, courts have invoked *Skidmore* when reviewing an agency's view of its regulations advanced in opinion letters,[392] legal briefs,[393] or through the course of administering its regulations.[394] This may be explained partly by the fact that, as a matter of practice, agency interpretations of regulations often appear in the very same formats that *Christensen* and *Mead* identified as meriting only *Skidmore*'s standard when the interpretation construes a statute.[395] Other courts, though, have read

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389. See *Long Island Care at Home*, 127 S. Ct. at 2349.

390. See id. at 2342–43 (applying *Seminole Rock* deference despite interpretation's format in part because "agency's course of action indicates that its interpretation . . . reflects its considered views"); see also *Auer*, 519 U.S. at 462–63 (stating that fact that "the Secretary's interpretation comes to us in the form of a legal brief . . . does not, in the circumstances of this case, make it unworthy of deference"); cf. Geier v. Am. Honda Motor Co., 529 U.S. 861, 883–84 (2000) (citing *Auer* and affording "some weight" to Department of Transportation's interpretation of its regulations, as contained in amicus brief).

391. See, e.g., Mercy Catholic Med. Ctr. v. Thompson, 380 F.3d 142, 155 (3d Cir. 2004).

392. See Arriaga v. Fla. Pac. Farms, L.L.C., 305 F.3d 1228, 1237–39 (11th Cir. 2002). This case is especially noteworthy because the court had no doubt that the letters reflected the agency's considered judgment. See id. at 1239 (acknowledging that "the Administrator's opinion letters since 1969 consistently have taken the [same] position").

393. See Union Pac. R.R. v. Cal. Pub. Utils. Comm'n, 346 F.3d 851, 858, 866 (9th Cir. 2003) (concluding that agency's amicus brief, which argued that its regulations did not preempt state law, was entitled to at least *Skidmore* deference).

394. See U.S. Freightways Corp. v. Comm'r, 270 F.3d 1137, 1141–42 (7th Cir. 2001) (applying *Skidmore* to interpretations that "ha[ve] emerged inferentially in the way the IRS has applied the rules to different cases" and "appeared through the litigating positions the Service has taken").

395. See United States v. Mead Corp., 533 U.S. 218, 234 (2001) (concluding that classification rulings, like "'interpretations contained in policy statements, agency manuals, and enforcement guidelines,'" lie beyond *Chevron*'s pale (quoting Christensen v. Harris County, 529 U.S. 576, 587 (2000))). Illustrating the overlap between *Seminole Rock* and *Skidmore*, in *Reutter ex rel. Reutter v. Barnhart*, the Eighth Circuit considered the Social Security Administration's program manual interpreting its regulations. See 372 F.3d 946, 951 (8th Cir. 2004). The court stated both that the interpretation deserved strong deference because it was an interpretation of a regulation, and also that it deserved respect under *Skidmore* because it was a program manual. See id.

Christensen and *Mead* as not precluding *Seminole Rock*'s application to interpretations lacking legal force.[396]

For many, federal appellate courts' extension of *Skidmore* into *Seminole Rock*'s domain is a welcome development.[397] Critics of *Seminole Rock* have argued that the doctrine may tempt agencies to issue vague regulations through the relatively burdensome notice-and-comment process and then clarify the regulations later through less formal—and less costly—interpretations.[398] Given this and other critiques, *Skidmore* may appear as an attractive alternative. Its factors direct courts to consider a key justification for *Seminole Rock*—the agency's expertise and familiarity with the regulations it has crafted—but also to scrutinize the agency interpretation for unfairness or arbitrariness. If calibrated in the manner we suggest in this Article, *Skidmore*'s standard should still result in strong deference to agency interpretations in many cases.

CONCLUSION

Without question, *Skidmore*'s standard of review for administrative interpretations holds a place of great importance in the wake of *Christensen* and *Mead*. In this modern *Skidmore* era, courts use *Skidmore* frequently to evaluate a wide variety of interpretive formats spanning many regulatory areas. This study answers a number of questions and raises several new ones. While *Skidmore* is indeed less deferential than *Chevron*, it leads courts to uphold more agency interpretations than was previously assumed. This study demonstrates that most courts understand *Skidmore* to prescribe deference that is tailored in accordance to contextual factors. Comparatively few cases cite *Skidmore* to justify courts independently fixing the statute's meaning.

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396. See Taylor v. Vt. Dep't of Educ., 313 F.3d 768, 780 n.7 (2d Cir. 2002) (rejecting plaintiff's argument that *Christensen* precluded *Auer* deference to agency's informal policy letter); Chalenor v. Univ. of N.D., 291 F.3d 1042, 1046–47 (8th Cir. 2002) (same); cf. Air Brake Sys., Inc. v. Mineta, 357 F.3d 632, 644 (6th Cir. 2004) (contending that "*Seminole Rock* deference appears to have survived *Mead*" but that it nevertheless was inapplicable because opinion letters of agency's chief counsel did not represent agency's authoritative view).

397. See Robert A. Anthony, The Supreme Court and the APA: Sometimes They Just Don't Get It, 10 Admin. L.J. Am. U. 1, 4–11 (1996) (arguing that complete deference to agencies' interpretations "allows agencies to take self-serving actions, and to be the judges in their own causes"); Krent, supra note 155, at 154–55 (addressing criticism of *Seminole Rock* deference); Manning, supra note 22, at 686–90 (discussing benefits of using *Skidmore* as doctrinal check on *Seminole Rock*). But see Angstreich, supra note 66, at 112–28 (reasoning that while clarity may suffer under *Seminole Rock*, agencies are better able to achieve desired substantive effects when given deference on regulatory interpretation).

398. See Manning, supra note 22, at 655–60 (arguing that *Seminole Rock* creates heightened risk of regulatory vagueness); see also Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 519 (1994) (Thomas, J., dissenting) (claiming that *Seminole Rock* deference in that case "permit[ted] the Secretary to transform by 'interpretation' what self-evidently are mere generalized expressions of intent into substantive rules of reimbursability").

Yet within the realm of cases applying the sliding-scale conception of *Skidmore*, consistency and coherence is lacking. Courts blur distinctions between factors and often appear uncertain of the rationale underlying the various factors. Amidst the confusion, however, certain cases provide promising examples of more coherent ways to apply *Skidmore*'s factors. Recognizing agency expertise and the avoidance of arbitrariness as the guiding principles behind *Skidmore*'s multifactor review should help in stabilizing the courts' approach to the different factors. And reconceptualizing *Skidmore* as prescribing a choice of three distinct zones of deference should simplify its application.

Meanwhile, to some extent, we will simply have to take a "wait and see" approach to questions of *Skidmore*'s domain. Nevertheless, with further study and discussion, we have high hopes that the modern *Skidmore* test will evolve into a useful, stable standard for assessing administrative interpretations.

APPENDIX

APPLICATIONS OF THE *SKIDMORE* STANDARD IN U.S. COURTS OF APPEALS FROM JUNE 17, 2001 TO JUNE 17, 2006

Application	Model of *Skidmore* Applied*	Accept/Reject Agency View	Case(s) Cited for Standard	Factors Discussed**	Role of United States in Case***
Forrester v. Am. Dieselelectric, Inc., 255 F.3d 1205 (9th Cir. 2001)	I	Accept	Christensen		None
Morris v. Bus. Concepts, Inc., 259 F.3d 65 (2d Cir. 2001)	IJ	Accept	Skidmore Mead		None
Cunningham v. Scibana, 259 F.3d 303 (4th Cir. 2001)	SS	Accept	Skidmore Christensen	Thoroughness Validity Consistency Expertise	Party
Am. Fed'n of Gov't Employees v. Rumsfeld, 262 F.3d 649 (7th Cir. 2001)	SS	Accept	Skidmore Christensen Mead	Validity Consistency Longstanding	Party
Heartland By-Products, Inc. v. United States, 264 F.3d 1126 (Fed. Cir. 2001)	SS	Accept	Skidmore Mead	Thoroughness Formality Validity Consistency Expertise	Party
Matz v. Household Int'l Tax Reduction Inv. Plan, 265 F.3d 572 (7th Cir. 2001)	IJ	Reject	Skidmore Mead		None
Landmark Legal Found. v. IRS, 267 F.3d 1132 (D.C. Cir. 2001)	IJ	Accept	Skidmore Mead		Party
Rocknel Fastener, Inc. v. United States, 267 F.3d 1354 (Fed. Cir. 2001)	SS	Accept	Skidmore Mead	Thoroughness Validity Consistency Expertise	Party
Student Loan Fund of Idaho, Inc. v. U.S. Dep't of Educ., 272 F.3d 1155 (9th Cir. 2001)	SS	Accept	Skidmore Mead	Validity Expertise	Party

Application	Model of *Skidmore* Applied*	Accept/Reject Agency View	Case(s) Cited for Standard	Factors Discussed**	Role of United States in Case***
Hall v. EPA, 273 F.3d 1146 (9th Cir. 2001)	SS	Reject	Skidmore Mead	Thoroughness Consistency Expertise	Party
Int'l Trading Co. v. United States, 281 F.3d 1268 (Fed. Cir. 2002)	SS	Reject	Mead	Thoroughness Consistency	Party
Glover v. Standard Fed. Bank, 283 F.3d 953 (8th Cir. 2002)	SS	Accept	Skidmore	Validity Expertise	None
Mead Corp. v. United States, 283 F.3d 1342 (Fed. Cir. 2002)	SS	Reject	Skidmore Mead	Validity Expertise	Party
Am. Fed'n of Gov't Employees v. Veneman, 284 F.3d 125 (D.C. Cir. 2002)	IJ	Accept	Skidmore		Party
James v. Von Zemenszky, 284 F.3d 1310 (Fed. Cir. 2002)	IJ	Reject	Mead		Party
Franklin v. United States, 289 F.3d 753 (Fed. Cir. 2002)	IJ	Reject	Skidmore		Party
Chao v. Russell P. Le Frois Builder, Inc., 291 F.3d 219 (2d Cir. 2002)	SS	Accept	Skidmore	Consistency Expertise	Party
Pronsolino v. Nastri, 291 F.3d 1123 (9th Cir. 2002)	SS	Accept	Skidmore	Validity Consistency Expertise	Party
Old Ben Coal Co. v. Dir., Office of Workers' Comp. Programs, 292 F.3d 533 (7th Cir. 2002)	IJ	Accept	Skidmore		Party
Springfield, Inc. v. Buckles, 292 F.3d 813 (D.C. Cir. 2002)	SS	Accept	Skidmore	Thoroughness Validity Consistency Expertise	Party
Town of Stratford v. FAA, 292 F.3d 251 (D.C. Cir. 2002)	IJ	Accept	Skidmore		Party
Jewelpak Corp. v. United States, 297 F.3d 1326 (Fed. Cir. 2002)	I	Accept	Skidmore		Party

Application	Model of *Skidmore* Applied*	Accept/Reject Agency View	Case(s) Cited for Standard	Factors Discussed**	Role of United States in Case***
Omohundro v. United States, 300 F.3d 1065 (9th Cir. 2002)	SS	Accept	Skidmore Mead	Validity Consistency	Party
Heinz v. Cent. Laborers' Pension Fund, 303 F.3d 802 (7th Cir. 2002)	SS	Reject	Mead	Thoroughness Validity Consistency	None
Lapine v. Town of Wellesley, 304 F.3d 90 (1st Cir. 2002)	SS	Accept	Skidmore	Validity Consistency Longstanding	None
Herman v. Fabri-Centers of Am., Inc., 308 F.3d 580 (6th Cir. 2002)	IJ	Accept	Skidmore Mead		Party
Bryson v. Shumway, 308 F.3d 79 (1st Cir. 2002)	SS	Accept	Skidmore Mead	Validity Expertise	None
Bank of Am. v. City of San Francisco, 309 F.3d 551 (9th Cir. 2002)	SS	Accept	Christensen	Formality Validity	Amicus
Cmty. Health Ctr. v. Wilson-Coker, 311 F.3d 132 (2d Cir. 2002)	SS	Accept	Mead	Validity Consistency Expertise	None
Cline v. Hawke, 51 F. App'x 392 (4th Cir. 2002)	SS	Accept	Skidmore	Thoroughness Formality Validity	Party
Wells Fargo Bank, N.A. v. Fed. Deposit Ins. Corp., 310 F.3d 202 (D.C. Cir. 2002)	SS	Accept	Skidmore	Validity Consistency Expertise	Party
New Orleans Stevedores v. Ibos, 317 F.3d 480 (5th Cir. 2003)	IJ	Accept	Skidmore Mead		Party
Ebbert v. DaimlerChrysler Corp., 319 F.3d 103 (3d Cir. 2003)	SS	Reject	Skidmore	Thoroughness Formality	Amicus
Rosales-Garcia v. Holland, 322 F.3d 386 (6th Cir. 2003)	SS	Reject	Skidmore	Validity Consistency	Party

Application	Model of *Skidmore* Applied*	Accept/Reject Agency View	Case(s) Cited for Standard	Factors Discussed**	Role of United States in Case***
Mack v. Otis Elevator Co., 326 F.3d 116 (2d Cir. 2003)	IJ	Accept	Christensen		None
Brown v. United States, 327 F.3d 1198 (D.C. Cir. 2003)	SS	Accept	Skidmore	Thoroughness Formality Validity Expertise	Party
Vernazza v. SEC, 327 F.3d 851 (9th Cir. 2003)	SS	Accept	Skidmore Mead	Validity Expertise	Party
Cal. State Legislative Bd. v. Mineta, 328 F.3d 605 (9th Cir. 2003)	SS	Accept	Skidmore Mead	Thoroughness Validity Consistency Longstanding	Party
O'Shaughnessy v. Comm'r, 332 F.3d 1125 (8th Cir. 2003)	SS	Reject	Skidmore Mead	Longstanding	Party
Public Citizen, Inc. v. Dep't of Health & Human Servs., 332 F.3d 654 (D.C. Cir. 2003)	SS	Reject	Skidmore Christensen Mead	Thoroughness Validity	Party
Butterbaugh v. Dep't of Justice, 336 F.3d 1332 (Fed. Cir. 2003)	SS	Reject	Skidmore Mead	Thoroughness Formality Validity Consistency	Party
Forest Park II v. Hadley, 336 F.3d 724 (8th Cir. 2003)	IJ	Reject	Christensen		None
Colorado v. Sunoco, Inc., 337 F.3d 1233 (10th Cir. 2003)	SS	Accept	Skidmore	Validity Consistency Expertise	Amicus
Rubie's Costume Co. v. United States, 337 F.3d 1350 (Fed. Cir. 2003)	SS	Accept	Skidmore Mead	Thoroughness Formality Validity Consistency Expertise	Party

Application	Model of *Skidmore* Applied*	Accept/Reject Agency View	Case(s) Cited for Standard	Factors Discussed**	Role of United States in Case***
Bolen v. Dengel (In re Dengel), 340 F.3d 300 (5th Cir. 2003)	SS	Accept	Skidmore Christensen	Validity	Party
IA 80 Group, Inc. v. United States, 347 F.3d 1067 (8th Cir. 2003)	SS	Accept	Christensen	Validity	Party
O'Brien v. Town of Agawam, 350 F.3d 279 (1st Cir. 2003)	SS	Accept	Skidmore	Validity	None
Smith v. City of Jackson, 351 F.3d 183 (5th Cir. 2003)	SS	Reject	Christensen	Thoroughness	None
Collins v. Nat'l Transp. Safety Bd., 351 F.3d 1246 (D.C. Cir. 2003)	SS	Accept	Skidmore	Validity Expertise	Party
Wilderness Soc'y v. U.S. Fish & Wildlife Serv., 353 F.3d 1051 (9th Cir. 2003)	SS	Reject	Skidmore Mead	Thoroughness Validity Expertise	Party
Malacara v. Garber, 353 F.3d 393 (5th Cir. 2003)	SS	Reject	Skidmore Christensen	Validity	None
Research Triangle Reg'l Pub. Transp. Auth. v. United States, 83 F. App'x 505 (4th Cir. 2003)	SS	Accept	Skidmore	Thoroughness Formality Validity	Party
Hecht v. Barnhart, 68 F. App'x 244 (2d Cir. 2003)	I	Accept	Skidmore Christensen		Party
Structural Indus., Inc. v. United States, 356 F.3d 1366 (Fed. Cir. 2004)	SS	Reject	Skidmore Mead	Formality Consistency	Party
Padash v. INS, 358 F.3d 1161 (9th Cir. 2004)	SS	Reject	Skidmore Christensen Mead	Thoroughness Formality Validity	Party
United States v. City of New York, 359 F.3d 83 (2d Cir. 2004)	SS	Accept	Christensen	Validity	Party
Tum v. Barber Foods, Inc., 360 F.3d 274 (1st Cir. 2004)	SS	Reject	Skidmore	Validity	Amicus
Rodriguez v. Whiting Farms, Inc., 360 F.3d 1180 (10th Cir. 2004)	SS	Reject	Skidmore Christensen	Thoroughness Consistency	None

Application	Model of *Skidmore* Applied*	Accept/Reject Agency View	Case(s) Cited for Standard	Factors Discussed**	Role of United States in Case***
Rabin v. Wilson-Coker, 362 F.3d 190 (2d Cir. 2004)	SS	Reject	Mead	Thoroughness Formality Validity Consistency Expertise	None
White v. Burlington N. & Santa Fe Ry. Co., 364 F.3d 789 (6th Cir. 2004)	IJ	Reject	Skidmore		Amicus
Coal. for Gov't Procurement v. Fed. Prison Indus., Inc., 365 F.3d 435 (6th Cir. 2004)	SS	Accept	Skidmore Christensen Mead	Validity	Party
Cmty. Bank of Ariz. v. G.V.M. Trust, 366 F.3d 982 (9th Cir. 2004)	SS	Accept	Skidmore Christensen	Validity	None
New Hampshire v. Ramsey, 366 F.3d 1 (1st Cir. 2004)	SS	Accept	Skidmore Mead	Validity Longstanding	Party
Ammex, Inc. v. United States, 367 F.3d 530 (6th Cir. 2004)	SS	Accept	Skidmore Mead	Formality Validity Consistency Expertise	Party
George Harms Constr. Co. v. Chao, 371 F.3d 156 (3d Cir. 2004)	SS	Reject	Skidmore	Validity	Party
In re New Times Sec. Servs., Inc., 371 F.3d 68 (2d Cir. 2004)	SS	Accept	Skidmore Mead	Validity Consistency Expertise	Amicus
Pension Benefit Guar. Corp. v. Wilson N. Jones Mem'l Hosp., 374 F.3d 362 (5th Cir. 2004)	SS	Accept	Skidmore Mead	Thoroughness Validity Consistency Expertise	Party

Application	Model of *Skidmore* Applied*	Accept/Reject Agency View	Case(s) Cited for Standard	Factors Discussed**	Role of United States in Case***
Coke v. Long Island Care at Home, Ltd., 376 F.3d 118 (2d Cir. 2004)	SS	Reject	Skidmore	Thoroughness Validity Consistency Longstanding	Amicus
Horn v. Thoratec Corp., 376 F.3d 163 (3d Cir. 2004)	SS	Accept	Mead	Thoroughness Consistency Expertise	Amicus
Goswami v. Am. Collections Enter., Inc., 377 F.3d 488 (5th Cir. 2004)	I	Accept	Christensen		None
Fed. Nat'l Mortgage Ass'n v. United States, 379 F.3d 1303 (Fed. Cir. 2004)	SS	Reject	Skidmore	Thoroughness Longstanding	Party
Perez-Gonzalez v. Ashcroft, 379 F.3d 783 (9th Cir. 2004)	SS	Reject	Christensen	Thoroughness Validity	Party
Intercontinental Marble Corp. v. United States, 381 F.3d 1169 (Fed. Cir. 2004)	SS	Reject	Skidmore	Consistency	Party
La. Envtl. Action Network v. EPA, 382 F.3d 575, 582–84 (5th Cir. 2004)	SS	Accept	Skidmore Christensen	Thoroughness Validity	Party
La. Envtl. Action Network v. EPA, 382 F.3d 575, 584–86 (5th Cir. 2004)	SS	Reject	Skidmore Christensen	Validity	Party
Howard v. Surface Transp. Bd., 389 F.3d 259 (1st Cir. 2004)	IJ	Accept	Christensen		Party
High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630 (9th Cir. 2004)	SS	Reject	Skidmore Mead	Thoroughness Formality Validity	Party
Stephen Bronte, Advisors, LLC v. Commodities Futures Trading Comm'n, 90 F. App'x 251 (9th Cir. 2004)	SS	Accept	Skidmore Christensen	Validity Consistency	Party
Beck v. City of Cleveland, 390 F.3d 912 (6th Cir. 2004)	SS	Accept	Skidmore Mead	Validity Consistency	Amicus
Kort v. Diversified Collection Servs., Inc., 394 F.3d 530 (7th Cir. 2005)	SS	Accept	Mead	Validity Expertise	None

Application	Model of *Skidmore* Applied*	Accept/Reject Agency View	Case(s) Cited for Standard	Factors Discussed**	Role of United States in Case***
Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 395 F.3d 25, 34–36 & n.6 (2d Cir. 2005)	IJ	Accept	Skidmore		Amicus
Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 395 F.3d 25, 39–44 & n.9 (2d Cir. 2005)	IJ	Reject	Skidmore		Amicus
Broad. Music, Inc. v. Roger Miller Music, Inc., 396 F.3d 762 (6th Cir. 2005)	IJ	Reject	Christensen		None
Noviello v. City of Boston, 398 F.3d 76 (1st Cir. 2005)	I	Accept	Skidmore Christensen		None
Cathedral Candle Co. v. U.S. Int'l Trade Comm'n, 400 F.3d 1352 (Fed. Cir. 2005)	SS	Accept	Skidmore	Thoroughness Validity Consistency Expertise Longstanding	Party
Carnival Cruise Lines, Inc. v. United States, 404 F.3d 1312 (Fed. Cir. 2005)	SS	Accept	Mead	Thoroughness Validity	Party
Warner-Lambert Co. v. United States, 407 F.3d 1207 (Fed. Cir. 2005)	SS	Reject	Skidmore	Thoroughness Validity	Party
De La Mota v. U.S. Dep't of Educ., 412 F.3d 71 (2d Cir. 2005)	SS	Reject	Skidmore	Thoroughness Formality Validity Expertise	Party
Lin v. U.S. Dep't of Justice, 416 F.3d 184 (2d Cir. 2005)	SS	Reject	Skidmore	Thoroughness	Party
St. Mary's Hosp. v. Leavitt, 416 F.3d 906 (8th Cir. 2005)	SS	Accept	Skidmore Christensen	Validity	Party
Santiago v. GMAC Mortgage Group, Inc., 417 F.3d 384 (3d Cir. 2005)	SS	Accept	Skidmore	Thoroughness Validity Expertise	Amicus
Packard v. Pittsburgh Transp. Co., 418 F.3d 246 (3d Cir. 2005)	SS	Reject	Skidmore	Thoroughness	None

Application	Model of *Skidmore* Applied*	Accept/Reject Agency View	Case(s) Cited for Standard	Factors Discussed**	Role of United States in Case***
Fujitsu Am., Inc. v. United States, 422 F.3d 1364 (Fed. Cir. 2005)	I	Accept	Mead		Party
Warner-Labmert Co. v. United States, 425 F.3d 1381 (Fed. Cir. 2005)	SS	Accept	Skidmore	Thoroughness Validity Consistency	Party
S. Utah Wilderness Alliance v. Bureau of Land Mgmt., 425 F.3d 735 (10th Cir. 2005)	SS	Reject	Skidmore Christensen	Consistency	Party
Zhang v. Gonzales, 426 F.3d 540 (2d Cir. 2005)	IJ	Reject	Skidmore		Party
Padilla-Caldera v. Gonzales, 426 F.3d 1294 (10th Cir. 2005)	IJ	Reject	Christensen		Party
Shikles v. Sprint/United Mgmt. Co., 426 F.3d 1304 (10th Cir. 2005)	SS	Reject	Skidmore	Thoroughness Formality Validity Longstanding	Amicus
OfficeMax, Inc. v. United States, 428 F.3d 583 (6th Cir. 2005)	SS	Reject	Skidmore Christensen Mead	Thoroughness Validity Consistency Longstanding	Party
United States v. W.R. Grace & Co., 429 F.3d 1224 (9th Cir. 2005)	SS	Accept	Skidmore	Thoroughness Validity Expertise	Party
M. Fortunoff of Westbury Corp. v. Peerless Ins. Co., 432 F.3d 127 (2d Cir. 2005)	SS	Accept	Skidmore Christensen	Validity	Amicus
Trowell v. Beeler, 135 F. App'x 590 (4th Cir. 2005)	IJ	Reject	Christensen		Party
Reimels v. Comm'r, 436 F.3d 344 (2d Cir. 2006)	SS	Accept	Skidmore	Longstanding	Party
McGraw v. Barnhart, 450 F.3d 493 (10th Cir. 2006)	SS	Accept	Skidmore	Thoroughness Validity Consistency	Party
Appoloni v. United States, 450 F.3d 185 (6th Cir. 2006)	I	Accept	Skidmore		Party

Application	Model of *Skidmore* Applied*	Accept/Reject Agency View	Case(s) Cited for Standard	Factors Discussed**	Role of United States in Case***
Caribbean Ispat Ltd. v. United States, 450 F.3d 1336 (Fed. Cir. 2006)	SS	Reject	Skidmore Mead	Thoroughness Formality Consistency	Party

* Model of *Skidmore* Applied:
IJ — Independent judgment model of the *Skidmore* standard.
SS — Sliding-scale model of the *Skidmore* standard.
I — Indeterminate: application of *Skidmore* fit neither the independent judgment model nor the sliding-scale model.
** Because courts employ varying notions of what *Skidmore*'s factors mean, our assessment of whether a court was applying a given factor entailed a measure of subjectivity. Accordingly, this list of what factors a court applied should not be taken as absolute or definitive. For discussion of the varying ideas of what the factors mean, see Part II.C.
*** Role of United States in Case:
Party — The agency was a party to the litigation.
Amicus — The agency submitted an amicus brief but was not a party.
None — The agency did not participate in the litigation.