In Search of the Modern Skidmore Standard

Kristin Hickman

*University of Minnesota Law School, khickman@umn.edu*

Matthew D. Krueger

Follow this and additional works at: [https://scholarship.law.umn.edu/faculty_articles](https://scholarship.law.umn.edu/faculty_articles)

Part of the [Law Commons](https://scholarship.law.umn.edu/faculty_articles)

**Recommended Citation**


This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in the Faculty Scholarship collection by an authorized administrator of the Scholarship Repository. For more information, please contact [lenzx009@umn.edu](mailto:lenzx009@umn.edu).
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.

INTRODUCTION .................................................. 1236

I. SKIDMORE DEFERENCE AND JUDICIAL REVIEW OF
   ADMINISTRATIVE INTERPRETATIONS .................... 1239
   A. The Evolution of Judicial Deference Doctrine ........ 1239
      1. Skidmore in the Pre-Chevron Period .............. 1240

---

* Associate Professor of Law, University of Minnesota Law School.
** Bristow Fellow, Office of the Solicitor General, U.S. Department of Justice. All of the views expressed in this Article are our own, and none represent the positions or views of the United States or the Department of Justice. We would like to thank Ellen Aprill, Tino Cuellar, Bill Eskridge, Brad Karkkainen, Ron Levin, Brett McDonnell, Tom Merrill, Jim Rossi, and David Zaring for helpful comments and suggestions, and Lindsey Tonsager for excellent research assistance.
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).
reviewing courts to assess multiple factors to decide on a case-by-case basis what deference, if any, to afford agency legal interpretations. 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, 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.

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. However, while *Christensen* and *Mead* resurrected *Skidmore*’s now boiler-plate 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.


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


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

---

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. The same principle of controlling deference also applied where an agency exercised a specific authority grant through formal adjudication. 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. was a leading expression of the Court’s policy toward judicial review of most other administrative interpretations.

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, 292 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.”).


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). 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. 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. 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.

Congress had expressly given the courts, rather than the Administrator, primary interpretive responsibility over the FLSA, but the Skidmore Court recognized its own past practice of giving weight to interpretations by executive agencies of statutes they administered. The Court therefore neither accepted nor explicitly rejected the lower courts’ interpretation of the FLSA. 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. 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).
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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{23} when the Court changed the deference landscape with its decision in \textit{Chevron}.\textsuperscript{24} The \textit{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.\textsuperscript{25} In fact, \textit{Chevron}'s two steps merely reflect pre-\textit{Chevron} deference principles.\textsuperscript{26} Even before \textit{Chevron}, if the meaning of a statute was clear, there was no opportunity for an agency to claim judicial deference.\textsuperscript{27} Unambiguous statutes are not susceptible of multiple interpretations; and absent constitutional issues, courts are bound to follow the clearly expressed intent of

\begin{enumerate}
\item \textsuperscript{21} Id.
\item \textsuperscript{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 \textit{Chevron}); Rossi, supra note 7, at 1116–18 (describing Skidmore as "weak deference" and as "a lesser degree of deference" than \textit{Chevron}).
\item \textsuperscript{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 \textit{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).
\item \textsuperscript{24} 467 U.S. 837 (1984).
\item \textsuperscript{25} See id. at 842–43.
\item \textsuperscript{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 affirmation 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.").
\end{enumerate}
Congress. For ambiguous statutes, the standard of strong, mandatory deference for reasonable agency interpretations issued pursuant to express congressional commands pre-existed *Chevron.* 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. 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. 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. 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.

This application of compulsory judicial deference to so-called implicit delegations, more than the two-part test, is what made *Chevron* revolutionary. 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.


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.

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

---

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 “ample 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.  

Some initial post-Chevron decisions correspondingly suggested that Skidmore superseded Chevron.  

By the early 1990s, however, the Court began hinting that Skidmore persisted as a separate standard of deference. 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. 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. 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. Yet Justice Scalia, concurring in ARAMCO, called Skidmore deference “an anachronism” in the post-Chevron era. Furthermore, the Court in the 1990s extended Chevron deference to a number of agency


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


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. Thus, Chevron left Skidmore in doctrinal limbo. Thus, Chevron left Skidmore in doctrinal limbo.

3. The Mead Counterrevolution and Revitalization of Skidmore. — With Christensen49 in 2000 and Mead50 in 2001, the Court significantly constrained 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

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).


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. 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.” 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. Yet the Mead Court affirmed Chevron’s principle that some delegations are “‘implicit.’” 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. 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. 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.

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. As outlined

54. Mead, 533 U.S. at 225, 231–34.
55. Id. at 228–29.
56. See id. at 229.
58. Id.
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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{67} Thus, a court can engage in step one analysis before having to use *Mead* to make the choice between *Chevron* and *Skidmore*.

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).

\textsuperscript{62} See *Chevron*, 467 U.S. at 842–43.

\textsuperscript{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).

\textsuperscript{64} *Mead*, 533 U.S. at 226–27.

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


\textsuperscript{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. 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. 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. 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. 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

---


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.\textsuperscript{72}

Alternatively, one can view \textit{Chevron} and \textit{Skidmore} as fundamentally distinct, arising from different premises and serving different purposes.\textsuperscript{73} \textit{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.\textsuperscript{74} Thus, \textit{Mead} limits \textit{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.\textsuperscript{75} \textit{Chevron} does not require the courts to abdicate their responsibility for interpreting the law altogether;\textsuperscript{76} but where it applies, \textit{Chevron} deference is mandatory.\textsuperscript{77}

By contrast, \textit{Skidmore} merely reflects a policy of judicial prudence. Unlike \textit{Chevron}, \textit{Skidmore} envisions the courts rather than the agencies as the primary interpreters of statutes. Nevertheless, as the \textit{Skidmore} Court acknowledged, courts often lack the resources and expertise to understand and evaluate fully the consequences of complex statutory schemes.\textsuperscript{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 \textit{Skidmore}'s emphasis on factors such as thoroughness and consistency, allow the courts to guard against arbitrariness while simultaneously deferring to administrative interpretations.\textsuperscript{79}

\begin{footnotes}
\item[73] See, e.g., Krzalic, 314 F.3d at 882 (Easterbrook, J., concurring) (rejecting merger of \textit{Chevron} and \textit{Skidmore} standards as inconsistent with \textit{Mead}).
\item[74] See, e.g., \textit{Mead}, 533 U.S. at 229-30 & n.11.
\item[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 \textit{Chevron}—even when prior judicial construction of ambiguous statute differs from agency's subsequent interpretation).
\item[79] Where \textit{Skidmore} or even \textit{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."
\end{footnotes}
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. 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. The question to be answered, therefore, is what sort of mood *Skidmore* analysis contemplates.

---


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. 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. 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. 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. 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. 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.

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. The bare synopsis of Chevron and

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.
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. Thus, it is unsurprising that most agency interpretations survive Chevron's second step. Commentators also generally agree that Skidmore is less deferential than Chevron, falling somewhere further away from the deference pole. 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." 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.'" 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. This conception discounts Skidmore's contextual factors and does not require courts to re-
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." In effect, then, Skidmore directs courts to treat the agency's view just as it would the view of any litigant.

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. As discussed above, in Christensen, the Court encountered a Department of Labor opinion letter interpreting the FLSA as precluding employers from mandating compensatory time. The Court first engaged in independent review of the statute and determined that the best interpretation of the statute permitted mandatory compensatory time. 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.'" 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.

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.

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. In Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon, for example,
the Court analyzed the relevant statutory text, history, and purpose to reach a conclusion about the statute's meaning. 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." 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. 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. 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. 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. 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. 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. In Yates, the Court described the statute's definitions of the terms in question as

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.
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").
112. See 529 U.S. at 582, 588.
"uninformative." 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."

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.

Most closely associated with Kenneth Culp Davis and Thomas Merrill, 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. 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. In effect, under this model, Skidmore prescribes a method by which a reviewing court should

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. 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. Second, courts can promote uniformity of the law and thereby promote the public good by harmonizing judicial interpretations with administrative interpretations.

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. As discussed above, the Mead Court held that Skidmore’s standard (rather than Chevron's) governed a Customs tariff classification letter. 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." 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.

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. Acknowledging that such guidelines lack the force of law and thus are ineligible for Chevron deference, the Court nevertheless counseled deference under

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.
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.
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-

---

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, 392–35 (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. A final category of factors potentially shows that the agency's view aligned with Congress's preference on the substantive question at hand. In this vein, courts favor an agency interpretation that was adopted contemporaneously to the enactment of the underlying statute or an interpretation of a statute that Congress reenacted while aware of the agency's interpretation.

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.

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." The Skidmore Court's repeated emphasis on the agency's expertise renders that an important factor as well. In Mead, the Court lists a slightly different set of factors: "the degree of the agency's care, its consistency, formality, and relative expertise, and . . . the persuasiveness of the agency's position." Elsewhere, the Mead Court produces yet another list: "thoroughness, logic,
and expertness, [and] its fit with prior interpretations.” 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
opinion in *Mead* on June 18, 2001. 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.

Structuring our study around judicial citations to these three cases presented certain limitations. We did not review cases that cited *Chevron* alone. 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. 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. Such cases, while perhaps related to *Skidmore*'s

---

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 Telecommns., Inc. v. Global Crossing Telecommns., 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))).

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. Courts occasionally apply *Skidmore* but often rely upon the highly deferential standard of *Bowles v. Seminole Rock & Sand Co.* instead to evaluate such interpretations. 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. Accordingly, we chose to cordon off these applications for future study rather than artificially conflate the analysis here.

*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).


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").


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, 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. 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. 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. Also, this element does not attempt to weed out applications of Skidmore that arguably occur in dicta. 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 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)).


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{166} Thus, Skidmore does not come into play in a

\textsuperscript{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).

\textsuperscript{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").

\textsuperscript{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.

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

\textsuperscript{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.""); 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.\footnote{167}

Assessing statutory meaning is not a precise inquiry, of course. The scope of\textit{ 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.\footnote{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\textit{ Chevron} step one.\footnote{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\textit{ Chevron} step one and\textit{ 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.\footnote{170}

Although we would resist conflating\textit{ Chevron} step one and\textit{ 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\textit{ 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.\footnote{171} But the

\footnote{167}See, e.g., Murphy, Counter-Marbury, supra note 7, at 43–44 (“[T]he\textit{ Skidmore} framework should include a step one at which a court uses the 'traditional tools of statutory construction' to check for clear meaning." (quoting\textit{ 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\textit{ Skidmore} would normally apply, they presumably engage in the\textit{ Chevron} step-one inquiry.”); Wildermuth, supra note 7, at 1906 (observing that\textit{ 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\textit{ Skidmore}'s analysis should inform\textit{ Chevron} step one).


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

\footnote{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\textit{ Chevron}, 467 U.S. at 843 n.9)); Herz, Judicial Review, supra note 7, at 142–45 (discussing overlap between\textit{ Skidmore} and\textit{ Chevron} doctrines); Levin, Exercise of Discretion, supra note 68, at 778–84 (discussing role of deference in evaluating plain meaning at\textit{ Chevron} step one).

\footnote{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. 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. 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. As discussed below, however, we found that many courts did, in fact, engage in a step one analysis before applying *Skidmore*.

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-

---

"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 the [c] provision," and then concluding that agency's opinion letter is not "persuasive" because "plain language of the statute is otherwise").


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-

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

---

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. 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. 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. 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. 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. 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. 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

184. Id. at 120–22.
185. See id. at 123.
186. See id. at 123–27.
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.\textsuperscript{190}

Finally, seven Skidmore applications defied categorization altogether.\textsuperscript{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 \textit{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.\textsuperscript{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."\textsuperscript{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.\textsuperscript{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

\textsuperscript{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).


\textsuperscript{192} See Noviello, 398 F.3d at 88–89.

\textsuperscript{193} See id. at 90 & n.3.

\textsuperscript{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. 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.

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>
<thead>
<tr>
<th>Description of Skidmore Application</th>
<th>Number of Applications</th>
<th>Percent of Applications</th>
</tr>
</thead>
<tbody>
<tr>
<td>Independent Judgment Model</td>
<td>20</td>
<td>18.9%</td>
</tr>
<tr>
<td>Sliding-Scale Model</td>
<td>79</td>
<td>74.5%</td>
</tr>
<tr>
<td>Indeterminate</td>
<td>7</td>
<td>6.6%</td>
</tr>
<tr>
<td></td>
<td>106</td>
<td>100.0%</td>
</tr>
</tbody>
</table>

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. 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.

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. The court also read *Mead* to compel sliding-scale deference that is conditioned on the context surrounding the agency's interpretation.

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

---

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. 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. 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. 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. 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.

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. Envl. Action Network v. EPA, 582 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).
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-

---

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.
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. 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. 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. 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

<table>
<thead>
<tr>
<th>Skidmore Application Outcomes</th>
<th>Number of Applications</th>
<th>Percent of Applications</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court accepts agency’s interpretation</td>
<td>64</td>
<td>60.4%</td>
</tr>
<tr>
<td>Court rejects agency’s interpretation</td>
<td>42</td>
<td>39.6%</td>
</tr>
<tr>
<td></td>
<td>106</td>
<td>100.0%</td>
</tr>
</tbody>
</table>

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.


212. See James v. Von Zemenszky, 284 F.3d 1510, 1318–19 (Fed. Cir. 2002).

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**

<table>
<thead>
<tr>
<th>Skidmore Application Outcomes</th>
<th>Number of Applications</th>
<th>Percent of Applications</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court accepts agency's interpretation</td>
<td>10</td>
<td>50.0%</td>
</tr>
<tr>
<td>Court rejects agency's interpretation</td>
<td>10</td>
<td>50.0%</td>
</tr>
<tr>
<td></td>
<td>20</td>
<td>100.0%</td>
</tr>
</tbody>
</table>

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**

<table>
<thead>
<tr>
<th>Skidmore Application Outcomes</th>
<th>Number of Applications</th>
<th>Percent of Applications</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court accepts agency's interpretation</td>
<td>47</td>
<td>59.5%</td>
</tr>
<tr>
<td>Court rejects agency's interpretation</td>
<td>32</td>
<td>40.5%</td>
</tr>
<tr>
<td></td>
<td>79</td>
<td>100.0%</td>
</tr>
</tbody>
</table>

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. 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. 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, while our study included cases in which the federal government participated only as an amicus or not at all. 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 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).


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

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. Also, Womack included two cases that applied *Skidmore* to an agency's interpretation of a regulation, which we excluded since, as explained above, we view such applications as a class apart from agency statutory interpretations. Additionally, Womack included a case that we contend does not contain a *Skidmore* application, and two more cases in which the court rejected the agency view as contravening the statute's plain meaning. 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. Yet, Wildermuth's study included only 23 cases, far fewer than the 104 that we identified. 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, and one case that we excluded as interpreting a regulation rather than a statute. 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.

---

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, 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. 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. 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-

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[Even when courts review the types of agency statements for which Skidmore would normally apply, they presumably engage in the Chevron step-one inquiry.").
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.”

Hence Justice Scalia’s mocking description in his *Mead* dissent of *Skidmore* review as “th’ol’ ‘totality of the circumstances’ test.” 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. 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. Others viewed thoroughness as measuring

---

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 the 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,\textsuperscript{242} notwithstanding \textit{Mead}'s identification of formality as a separate factor.\textsuperscript{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, \textit{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.\textsuperscript{244} The \textit{De La Mota} court weighed the thoroughness factor against the agency based on the interpretation's informality: \textsuperscript{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." \textsuperscript{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.\textsuperscript{247} For instance, in \textit{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.\textsuperscript{248} Five applications do not constitute a large set, but the pattern of

\textsuperscript{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").

\textsuperscript{243} See \textit{Mead}, 535 U.S. at 228.

\textsuperscript{244} 412 F.3d 71, 78 (2d Cir. 2005).

\textsuperscript{245} See id. at 78–80.

\textsuperscript{246} Id. at 80.


\textsuperscript{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-

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."
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.\footnote{256} For example, *Mead* suggests that interpretations adopted pursuant to notice-and-comment rulemaking typically, though not always, deserve *Chevron* deference.\footnote{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.\footnote{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;\footnote{259} an agency amicus brief;\footnote{260} an email from a midlevel agency official;\footnote{261} a Customs tariff schedule classification;\footnote{262} and a permit decision that neglected the required National Environmental Policy Act analysis, for example.\footnote{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 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)).\footnote{256}


\footnote{258} See, e.g., *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).

\footnote{259} 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).


\footnote{261} See *Shikles*, 426 F.3d at 1315–16.

\footnote{262} See De La Mota v. U.S. Dep’t of Educ., 412 F.3d 71, 80 (2d Cir. 2005).

\footnote{263} See *Structural Indus., Inc. v. United States*, 356 F.3d 1366, 1371 (Fed. Cir. 2004).

\footnote{263} See High Sierra Hikers Ass’n v. Blackwell, 390 F.3d 630, 648 (9th Cir. 2004).
through notice-and-comment rulemaking.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{268} Heartland By-Products, Inc. v. United States contains a prototypical example of this approach to Skidmore’s sliding scale.\textsuperscript{269} Reviewing a challenge to a Customs classification ruling, the Federal Circuit

\begin{footnotes}
\item[264] Structural Indus., Inc., 356 F.3d at 1370.
\item[265] By our count, 63 of the 79 sliding-scale Skidmore applications included a discussion of this factor. See infra Appendix.
\item[266] See supra notes 188–190 and accompanying text.
\item[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).
\item[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).
\item[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).
\end{footnotes}
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. 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.

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. 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. By contrast, an explicitly negative finding with respect to any of the other factors was virtually always associated with a decision against the agency. 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.

Consistency’s decline in Skidmore analysis may stem in part from Chevron’s deemphasis of that factor. 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. 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.
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.\textsuperscript{278} Especially since \textit{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.\textsuperscript{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 \textit{Southern Utah Wilderness Alliance v. Bureau of Land Management} reflects this concern.\textsuperscript{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 \textit{Skidmore} factors.\textsuperscript{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.\textsuperscript{282}

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

\textit{Chevron} context, but also applying \textit{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).

\textsuperscript{278} See Yoav Dotan, Making Consistency Consistent, 57 Admin. L. Rev. 995, 1000–01 (2005).
\textsuperscript{279} See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) (explaining \textit{Chevron’s} leeway for agencies to alter their interpretations); see also Dotan, supra note 278, at 1018–29 (discussing \textit{Chevron’s} approach to consistency and its impact on administrative law).
\textsuperscript{280} See 425 F.3d 735, 760–61 (10th Cir. 2005).
\textsuperscript{281} See id at 759–60.
\textsuperscript{282} See id at 760–61.
\textsuperscript{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 1392, 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).
\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{287}

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

\textsuperscript{285} See OfficeMax, 428 F.3d at 598 (evaluating IRS’s consistency in relationship to IRS’s treatment of taxpayers filing claims for refunds).

\textsuperscript{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 reenactment 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))).

\textsuperscript{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.


\textsuperscript{289} Id. at 137–39 (emphasizing agency expertise).

\textsuperscript{290} See United States v. Mead Corp., 533 U.S. 218, 228 (2001) (listing “relative expenstess” as relevant to gauging deference).

\textsuperscript{291} See infra Part III.

\textsuperscript{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. 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.

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. 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.” 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. Conceptualizing the expertise factor in this way usefully homes 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 deliberatively, 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, and the

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).

Court has mentioned longevity and contemporaneity in more recent jurisprudence. 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. 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. 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. 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. The Skidmore factors are geared toward situations in which
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. 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. Although Rossi's analysis predates Mead and uses slightly different phrase-
ology, his approach is consistent with the notion of treating *Mead* as a *Chevron* step one-and-a-half.\(^\text{306}\) 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.\(^\text{307}\) Nevertheless, Rossi merely folds *Skidmore* review into the *Chevron* regime rather than treating *Skidmore* and *Chevron* as independent standards of review.\(^\text{308}\) 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.’"\(^\text{309}\) Yet, Wildermuth doubts that "it is possible to sort the varying degrees of deference *Skidmore* imagines."\(^\text{310}\) 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.\(^\text{311}\)

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 "'courts generally use 'deference' in an intermediate sense, between 'courteous regard' and 'submission,'" with an administrative interpretation’s pedigree as a nondispositive plus factor.\(^\text{312}\) 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.

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).
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. Agencies are more democratically accountable and thus better suited than courts to decide between policy alternatives, 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. The Administrative Procedure Act calls upon the courts to serve as a bulwark against arbitrary or capricious agency action.

*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.

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 wavering...
ing represents arbitrariness.\footnote{323} Similarly, the informality of an interpretation is important in \textit{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.\footnote{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 \textit{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 \textit{Skidmore}'s sliding scale.

Second, in evaluating the relationship between expertise and arbitrariness with respect to a particular interpretation, we suggest that courts view \textit{Skidmore}'s sliding scale as a choice among three identifiable moods or attitudes that the courts may adopt toward agencies' legal interpretations. Conceptualizing \textit{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 \textit{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 \textit{Chevron} analysis. Rather, the three attitudinal zones on the \textit{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 \textit{Skidmore}'s factors more or
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

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.\footnote{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.\footnote{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.\footnote{337}

\textit{Heartland By-Products, Inc. v. United States} nicely exemplifies this intermediate attitude of \textit{Skidmore} deference.\footnote{338} Like \textit{Mead}, the \textit{Heartland} case involved a Customs classification ruling. Unlike the \textit{Mead} ruling, however, the \textit{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.\footnote{339} The Federal Circuit recognized the statute as ambiguous and susceptible of more than one interpretation, but did not express its own interpreta-

\footnote{335. For example, in \textit{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.}

\footnote{336. For example, in \textit{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).

\footnote{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 \textit{Skidmore} eligible.}

\footnote{338. See 264 F.3d 1126 (Fed. Cir. 2001). For other examples of courts properly giving intermediate deference under \textit{Skidmore}’s sliding scale, see Cmty. Bank of Ariz. v. G.V.M. Trust, 966 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).

\footnote{339. See \textit{Heartland}, 264 F.3d at 1129–32.}
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." 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. Given that analysis and the reasonableness of the agency's interpretation, the Heartland court deferred to the agency's view.

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. 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. Straight de novo review,

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).

pretations satisfy Mead step one but not Mead step two, and thus are ineligible for Chevron deference solely on that basis. 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. 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 . . . ." As the Mead Court observed, the Customs Service issues 10,000 to 15,000 such rulings each year. Unsurprisingly, many are challenged, and the courts apply Skidmore deference in evaluating such interpretations. Other common examples are rulings and other informal interpretations issued by the Internal Revenue Service concerning the Internal Revenue Code or by the Environmental Protection Agency interpreting the Clean Air Act and the Clean Water Act. 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.

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.

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).
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. 2006); 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.

---

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) (“[W]e found 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
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.\textsuperscript{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 rationalization[s]” to which any form of deference is inappropriate.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{371} Skidmore is neither discussed nor even cited in any of the opinions issued in Brand X, even though Skidmore deference shares the

\textsuperscript{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) (“To 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))).

\textsuperscript{367} See 464 F.3d at 239–40 (contrasting amicus brief in case at bar with “post hoc rationalization[s]” 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) (“We 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))).


\textsuperscript{369} See 545 U.S. 967, 981 (2005).

\textsuperscript{370} Id. at 982–83.

\textsuperscript{371} See id. at 980–81.
same tension with stare decisis as *Chevron* previously did.\textsuperscript{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.\textsuperscript{373} as such nonacquiescence is rarely expressed through *Chevron*-eligible formats.\textsuperscript{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.\textsuperscript{375} *Brand X* not only post-dated *Mead* but reiterated and relied upon the same delegation premise in prioritizing *Chevron* over stare decisis.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{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).

\textsuperscript{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)).


\textsuperscript{376} See *Brand X*, 545 U.S. at 982.

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

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. 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. 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. 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. 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.*, that an agency’s interpretation of its regulations receives strong deference and is “controlling unless ‘plainly erroneous or inconsistent with the regulation.’” 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. 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.”

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. The Court did not confirm this contention,

---

383. See id. at 184–91.
384. 325 U.S. 410 (1945).
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, legal briefs, or through the course of administering its regulations.\(^{392}\) 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.\(^{393}\) Other courts, though, have read

---

\(^{389}\) 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).


\(^{392}\) 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. Utsls. 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.

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**

<table>
<thead>
<tr>
<th>Application</th>
<th>Model of Skidmore Applied*</th>
<th>Accept/Reject Agency View</th>
<th>Case(s) Cited for Standard</th>
<th>Factors Discussed**</th>
<th>Role of United States in Case***</th>
</tr>
</thead>
<tbody>
<tr>
<td>Forrester v. Am. Dieselectric, Inc., 255 F.3d 1205 (9th Cir. 2001)</td>
<td>I</td>
<td>Accept</td>
<td>Christensen</td>
<td></td>
<td>None</td>
</tr>
<tr>
<td>Cunningham v. Scibana, 259 F.3d 303 (4th Cir. 2001)</td>
<td>SS</td>
<td>Accept</td>
<td>Skidmore Christensen</td>
<td>Thoroughness Validity Consistency Expertise</td>
<td>Party</td>
</tr>
<tr>
<td>Am. Fed’n of Gov’t Employees v. Rumsfeld, 262 F.3d 649 (7th Cir. 2001)</td>
<td>SS</td>
<td>Accept</td>
<td>Skidmore Christensen Mead</td>
<td>Validity Consistency Longstanding</td>
<td>Party</td>
</tr>
<tr>
<td>Heartland By-Products, Inc. v. United States, 264 F.3d 1126 (Fed. Cir. 2001)</td>
<td>SS</td>
<td>Accept</td>
<td>Skidmore Mead</td>
<td>Thoroughness Formality Validity Consistency Expertise</td>
<td>Party</td>
</tr>
<tr>
<td>Matz v. Household Int’l Tax Reduction Inv. Plan, 265 F.3d 572 (7th Cir. 2001)</td>
<td>IJ</td>
<td>Reject</td>
<td>Skidmore Mead</td>
<td></td>
<td>None</td>
</tr>
<tr>
<td>Landmark Legal Found. v. IRS, 267 F.3d 1192 (D.C. Cir. 2001)</td>
<td>IJ</td>
<td>Accept</td>
<td>Skidmore Mead</td>
<td></td>
<td>Party</td>
</tr>
<tr>
<td>Rocknel Fastener, Inc. v. United States, 267 F.3d 1354 (Fed. Cir. 2001)</td>
<td>SS</td>
<td>Accept</td>
<td>Skidmore Mead</td>
<td>Thoroughness Validity Consistency Expertise</td>
<td>Party</td>
</tr>
<tr>
<td>Student Loan Fund of Idaho, Inc. v. U.S. Dep’t of Educ., 272 F.3d 1155 (9th Cir. 2001)</td>
<td>SS</td>
<td>Accept</td>
<td>Skidmore Mead</td>
<td>Validity Expertise</td>
<td>Party</td>
</tr>
<tr>
<td>Application</td>
<td>Model of <em>Skidmore</em> Applied*</td>
<td>Accept/Reject Agency View</td>
<td>Case(s) Cited for Standard</td>
<td>Factors Discussed**</td>
<td>Role of United States in Case***</td>
</tr>
<tr>
<td>----------------------------------------------------------------------------</td>
<td>------------------------------</td>
<td>---------------------------</td>
<td>---------------------------</td>
<td>---------------------</td>
<td>---------------------------------</td>
</tr>
<tr>
<td>Hall v. EPA, 273 F.3d 1146 (9th Cir. 2001)</td>
<td>SS</td>
<td>Reject</td>
<td>Skidmore Mead</td>
<td>Thoroughness Consistency Expertise</td>
<td>Party</td>
</tr>
<tr>
<td>Int'l Trading Co. v. United States, 281 F.3d 1268 (Fed. Cir. 2002)</td>
<td>SS</td>
<td>Reject</td>
<td>Mead</td>
<td>Thoroughness Consistency</td>
<td>Party</td>
</tr>
<tr>
<td>Mead Corp. v. United States, 283 F.3d 1342 (Fed. Cir. 2002)</td>
<td>SS</td>
<td>Reject</td>
<td>Skidmore Mead</td>
<td>Validity Expertise</td>
<td>Party</td>
</tr>
<tr>
<td>Am. Fed'n of Gov't Employees v. Veneman, 284 F.3d 125 (D.C. Cir. 2002)</td>
<td>IJ</td>
<td>Accept</td>
<td>Skidmore</td>
<td></td>
<td>Party</td>
</tr>
<tr>
<td>James v. Von Zemenszky, 284 F.3d 1310 (Fed. Cir. 2002)</td>
<td>IJ</td>
<td>Reject</td>
<td>Mead</td>
<td></td>
<td>Party</td>
</tr>
<tr>
<td>Franklin v. United States, 289 F.3d 753 (Fed. Cir. 2002)</td>
<td>IJ</td>
<td>Reject</td>
<td>Skidmore</td>
<td></td>
<td>Party</td>
</tr>
<tr>
<td>Chao v. Russell P. Le Frois Builder, Inc., 291 F.3d 219 (2d Cir. 2002)</td>
<td>SS</td>
<td>Accept</td>
<td>Skidmore</td>
<td>Consistency Expertise</td>
<td>Party</td>
</tr>
<tr>
<td>Pronsolino v. Nastri, 291 F.3d 1123 (9th Cir. 2002)</td>
<td>SS</td>
<td>Accept</td>
<td>Skidmore</td>
<td>Validity Consistency Expertise</td>
<td>Party</td>
</tr>
<tr>
<td>Old Ben Coal Co. v. Dir., Office of Workers' Comp. Programs, 292 F.3d 533 (7th Cir. 2002)</td>
<td>IJ</td>
<td>Accept</td>
<td>Skidmore</td>
<td></td>
<td>Party</td>
</tr>
<tr>
<td>Town of Stratford v. FAA, 292 F.3d 251 (D.C. Cir. 2002)</td>
<td>IJ</td>
<td>Accept</td>
<td>Skidmore</td>
<td></td>
<td>Party</td>
</tr>
<tr>
<td>Jewelpak Corp. v. United States, 297 F.3d 1926 (Fed. Cir. 2002)</td>
<td>I</td>
<td>Accept</td>
<td>Skidmore</td>
<td></td>
<td>Party</td>
</tr>
<tr>
<td>Application</td>
<td>Model of Skidmore Applied*</td>
<td>Accept/Reject Agency View</td>
<td>Case(s) Cited for Standard</td>
<td>Factors Discussed**</td>
<td>Role of United States in Case***</td>
</tr>
<tr>
<td>-------------</td>
<td>-----------------------------</td>
<td>---------------------------</td>
<td>---------------------------</td>
<td>---------------------</td>
<td>-------------------------------</td>
</tr>
<tr>
<td>Omohundro v. United States, 300 F.3d 1065 (9th Cir. 2002)</td>
<td>SS</td>
<td>Accept</td>
<td>Skidmore Mead</td>
<td>Validity Consistency</td>
<td>Party</td>
</tr>
<tr>
<td>Heinz v. Cent. Laborers’ Pension Fund, 303 F.3d 802 (7th Cir. 2002)</td>
<td>SS</td>
<td>Reject</td>
<td>Mead</td>
<td>Thoroughness Consistency</td>
<td>None</td>
</tr>
<tr>
<td>Lapine v. Town of Wellesley, 304 F.3d 90 (1st Cir. 2002)</td>
<td>SS</td>
<td>Accept</td>
<td>Skidmore</td>
<td>Validity Consistency Longstanding</td>
<td>None</td>
</tr>
<tr>
<td>Herman v. Fabri-Centers of Am., Inc., 308 F.3d 580 (6th Cir. 2002)</td>
<td>IJ</td>
<td>Accept</td>
<td>Skidmore Mead</td>
<td></td>
<td>Party</td>
</tr>
<tr>
<td>Bryson v. Shumway, 308 F.3d 79 (1st Cir. 2002)</td>
<td>SS</td>
<td>Accept</td>
<td>Skidmore Mead</td>
<td>Validity Expertise</td>
<td>None</td>
</tr>
<tr>
<td>Bank of Am. v. City of San Francisco, 309 F.3d 551 (9th Cir. 2002)</td>
<td>SS</td>
<td>Accept</td>
<td>Christensen</td>
<td>Formality Validity</td>
<td>Amicus</td>
</tr>
<tr>
<td>Cinty. Health Ctr. v. Wilson-Coker, 311 F.3d 132 (2d Cir. 2002)</td>
<td>SS</td>
<td>Accept</td>
<td>Mead</td>
<td>Validity Consistency Expertise</td>
<td>None</td>
</tr>
<tr>
<td>Cline v. Hawke, 51 F. App’x 392 (4th Cir. 2002)</td>
<td>SS</td>
<td>Accept</td>
<td>Skidmore</td>
<td>Thoroughness Formality Validity</td>
<td>Party</td>
</tr>
<tr>
<td>New Orleans Stevedores v. Ibos, 317 F.3d 480 (5th Cir. 2003)</td>
<td>IJ</td>
<td>Accept</td>
<td>Skidmore Mead</td>
<td></td>
<td>Party</td>
</tr>
<tr>
<td>Ebbert v. DaimlerChrysler Corp., 319 F.3d 103 (3d Cir. 2003)</td>
<td>SS</td>
<td>Reject</td>
<td>Skidmore</td>
<td>Thoroughness Formality</td>
<td>Amicus</td>
</tr>
<tr>
<td>Rosales-Garcia v. Holland, 322 F.3d 386 (6th Cir. 2003)</td>
<td>SS</td>
<td>Reject</td>
<td>Skidmore</td>
<td>Validity Consistency</td>
<td>Party</td>
</tr>
<tr>
<td>Application</td>
<td>Model of Skidmore Applied*</td>
<td>Accept/Reject Agency View</td>
<td>Case(s) Cited for Standard</td>
<td>Factors Discussed**</td>
<td>Role of United States in Case***</td>
</tr>
<tr>
<td>-----------------------------------------------------------------------------</td>
<td>-----------------------------</td>
<td>---------------------------</td>
<td>---------------------------</td>
<td>---------------------</td>
<td>---------------------------------</td>
</tr>
<tr>
<td>Mack v. Otis Elevator Co., 326 F.3d 116 (2d Cir. 2003)</td>
<td>IJ</td>
<td>Accept</td>
<td>Christensen</td>
<td></td>
<td>None</td>
</tr>
<tr>
<td>Brown v. United States, 327 F.3d 1198 (D.C. Cir. 2003)</td>
<td>SS</td>
<td>Accept</td>
<td>Skidmore</td>
<td>Thoroughness</td>
<td>Party</td>
</tr>
<tr>
<td>Vernazza v. SEC, 327 F.3d 851 (9th Cir. 2003)</td>
<td>SS</td>
<td>Accept</td>
<td>Skidmore Mead</td>
<td>Validity Expertise</td>
<td>Party</td>
</tr>
<tr>
<td>Cal. State Legislative Bd. v. Mineta, 328 F.3d 605 (9th Cir. 2003)</td>
<td>SS</td>
<td>Accept</td>
<td>Skidmore Mead</td>
<td>Thoroughness</td>
<td>Party</td>
</tr>
<tr>
<td>O'Shaughnessy v. Comm'r, 332 F.3d 1125 (8th Cir. 2003)</td>
<td>SS</td>
<td>Reject</td>
<td>Skidmore Mead</td>
<td>Longstanding</td>
<td>Party</td>
</tr>
<tr>
<td>Public Citizen, Inc. v. Dep't of Health &amp; Human Servs., 332 F.3d 654 (D.C. Cir. 2003)</td>
<td>SS</td>
<td>Reject</td>
<td>Skidmore Christensen Mead</td>
<td>Thoroughness Validity</td>
<td>Party</td>
</tr>
<tr>
<td>Butterbaugh v. Dep't of Justice, 336 F.3d 1332 (Fed. Cir. 2003)</td>
<td>SS</td>
<td>Reject</td>
<td>Skidmore Mead</td>
<td>Thoroughness</td>
<td>Party</td>
</tr>
<tr>
<td>Forest Park II v. Hadley, 336 F.3d 724 (8th Cir. 2003)</td>
<td>IJ</td>
<td>Reject</td>
<td>Christensen</td>
<td></td>
<td>None</td>
</tr>
<tr>
<td>Colorado v. Sunoco, Inc., 337 F.3d 1233 (10th Cir. 2003)</td>
<td>SS</td>
<td>Accept</td>
<td>Skidmore</td>
<td>Consistency</td>
<td>Amicus</td>
</tr>
<tr>
<td>Rubie's Costume Co. v. United States, 337 F.3d 1350 (Fed. Cir. 2003)</td>
<td>SS</td>
<td>Accept</td>
<td>Skidmore Mead</td>
<td>Thoroughness</td>
<td>Party</td>
</tr>
<tr>
<td>Application</td>
<td>Model of Skidmore Applied*</td>
<td>Accept/Reject Agency View</td>
<td>Case(s) Cited for Standard</td>
<td>Factors Discussed**</td>
<td>Role of United States in Case***</td>
</tr>
<tr>
<td>----------------------------------------------------------------------------</td>
<td>----------------------------</td>
<td>---------------------------</td>
<td>---------------------------</td>
<td>---------------------</td>
<td>---------------------------------</td>
</tr>
<tr>
<td>Bolen v. Dengel (In re Dengel), 340 F.3d 300 (5th Cir. 2003)</td>
<td>SS</td>
<td>Accept</td>
<td>Skidmore Christensen</td>
<td>Validity</td>
<td>Party</td>
</tr>
<tr>
<td>IA 80 Group, Inc. v. United States, 347 F.3d 1067 (8th Cir. 2003)</td>
<td>SS</td>
<td>Accept</td>
<td>Christensen</td>
<td>Validity</td>
<td>Party</td>
</tr>
<tr>
<td>O’Brien v. Town of Agawam, 350 F.3d 279 (1st Cir. 2003)</td>
<td>SS</td>
<td>Accept</td>
<td>Skidmore Christensen</td>
<td>Validity</td>
<td>None</td>
</tr>
<tr>
<td>Smith v. City of Jackson, 351 F.3d 183 (5th Cir. 2003)</td>
<td>SS</td>
<td>Reject</td>
<td>Christensen</td>
<td>Thoroughness</td>
<td>None</td>
</tr>
<tr>
<td>Wilderness Soc’y v. U.S. Fish &amp; Wildlife Serv., 353 F.3d 1051 (9th Cir. 2003)</td>
<td>SS</td>
<td>Reject</td>
<td>Skidmore Mead</td>
<td>Thoroughness</td>
<td>Party</td>
</tr>
<tr>
<td>Malacara v. Garber, 353 F.3d 393 (5th Cir. 2003)</td>
<td>SS</td>
<td>Reject</td>
<td>Skidmore Christensen</td>
<td>Validity</td>
<td>None</td>
</tr>
<tr>
<td>Hecht v. Barnhart, 68 F. App’x 244 (2d Cir. 2003)</td>
<td>I</td>
<td>Accept</td>
<td>Skidmore Christensen</td>
<td></td>
<td>Party</td>
</tr>
<tr>
<td>Structural Indus., Inc. v. United States, 356 F.3d 1366 (Fed. Cir. 2004)</td>
<td>SS</td>
<td>Reject</td>
<td>Skidmore Mead</td>
<td>Formality Consistency</td>
<td>Party</td>
</tr>
<tr>
<td>Padash v. INS, 358 F.3d 1161 (9th Cir. 2004)</td>
<td>SS</td>
<td>Reject</td>
<td>Skidmore Christensen Mead</td>
<td>Thoroughness</td>
<td>Party</td>
</tr>
<tr>
<td>United States v. City of New York, 359 F.3d 88 (2d Cir. 2004)</td>
<td>SS</td>
<td>Accept</td>
<td>Christensen</td>
<td>Validity</td>
<td>Party</td>
</tr>
<tr>
<td>Tum v. Barber Foods, Inc., 360 F.3d 274 (1st Cir. 2004)</td>
<td>SS</td>
<td>Reject</td>
<td>Skidmore Christensen</td>
<td>Validity</td>
<td>Amicus</td>
</tr>
<tr>
<td>Rodriguez v. Whiting Farms, Inc., 360 F.3d 1180 (10th Cir. 2004)</td>
<td>SS</td>
<td>Reject</td>
<td>Skidmore Christensen</td>
<td>Thoroughness</td>
<td>None</td>
</tr>
<tr>
<td>Application</td>
<td>Model of Skidmore Applied*</td>
<td>Accept/Reject Agency View</td>
<td>Case(s) Cited for Standard</td>
<td>Factors Discussed**</td>
<td>Role of United States in Case***</td>
</tr>
<tr>
<td>----------------------------------------------------------------------------</td>
<td>-----------------------------</td>
<td>---------------------------</td>
<td>---------------------------</td>
<td>---------------------</td>
<td>-------------------------------</td>
</tr>
<tr>
<td>Rabin v. Wilson-Coker, 362 F.3d 190 (2d Cir. 2004)</td>
<td>SS</td>
<td>Reject</td>
<td>Mead</td>
<td>Thoroughness Formality Validity Consistency Expertise</td>
<td>None</td>
</tr>
<tr>
<td>Cnty. Bank of Ariz. v. G.V.M. Trust, 366 F.3d 982 (9th Cir. 2004)</td>
<td>SS</td>
<td>Accept</td>
<td>Skidmore Christensen</td>
<td>Validity</td>
<td>None</td>
</tr>
<tr>
<td>New Hampshire v. Ramsey, 366 F.3d 1 (1st Cir. 2004)</td>
<td>SS</td>
<td>Accept</td>
<td>Skidmore Mead</td>
<td>Validity Longstanding</td>
<td>Party</td>
</tr>
<tr>
<td>Ammex, Inc. v. United States, 367 F.3d 530 (6th Cir. 2004)</td>
<td>SS</td>
<td>Accept</td>
<td>Skidmore Mead</td>
<td>Formality Validity Consistency Expertise</td>
<td>Party</td>
</tr>
<tr>
<td>In re New Times Sec. Servs., Inc., 371 F.3d 68 (2d Cir. 2004)</td>
<td>SS</td>
<td>Accept</td>
<td>Skidmore Mead</td>
<td>Validity Consistency Expertise</td>
<td>Amicus</td>
</tr>
<tr>
<td>Application</td>
<td>Model of Skidmore Applied*</td>
<td>Accept/Reject Agency View</td>
<td>Case(s) Cited for Standard</td>
<td>Factors Discussed**</td>
<td>Role of United States in Case***</td>
</tr>
<tr>
<td>----------------------------------------------------------</td>
<td>----------------------------</td>
<td>--------------------------</td>
<td>---------------------------</td>
<td>---------------------</td>
<td>---------------------------------</td>
</tr>
<tr>
<td>Coke v. Long Island Care at Home, Ltd., 376 F.3d 118 (2d Cir. 2004)</td>
<td>SS</td>
<td>Reject</td>
<td>Skidmore</td>
<td>Thoroughness Validity Consistency Longstanding</td>
<td>Amicus</td>
</tr>
<tr>
<td>Horn v. Thoratec Corp., 376 F.3d 163 (3d Cir. 2004)</td>
<td>SS</td>
<td>Accept</td>
<td>Mead</td>
<td>Thoroughness Consistency Expertise</td>
<td>Amicus</td>
</tr>
<tr>
<td>Goswami v. Am. Collections Enter., Inc., 377 F.3d 488 (5th Cir. 2004)</td>
<td>I</td>
<td>Accept</td>
<td>Christensen</td>
<td>None</td>
<td></td>
</tr>
<tr>
<td>Perez-Gonzalez v. Ashcroft, 379 F.3d 783 (9th Cir. 2004)</td>
<td>SS</td>
<td>Reject</td>
<td>Christensen</td>
<td>Thoroughness Validity</td>
<td>Party</td>
</tr>
<tr>
<td>Intercontinental Marble Corp. v. United States, 381 F.3d 1169 (Fed. Cir. 2004)</td>
<td>SS</td>
<td>Reject</td>
<td>Skidmore</td>
<td>Consistency</td>
<td>Party</td>
</tr>
<tr>
<td>High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630 (9th Cir. 2004)</td>
<td>SS</td>
<td>Reject</td>
<td>Skidmore Mead</td>
<td>Thoroughness Formality Validity</td>
<td>Party</td>
</tr>
<tr>
<td>Stephen Bronte, Advisors, LLC v. Commodities Futures Trading Comm'n, 90 F. App'x 251 (9th Cir. 2004)</td>
<td>SS</td>
<td>Accept</td>
<td>Skidmore Christensen</td>
<td>Validity Consistency</td>
<td>Party</td>
</tr>
<tr>
<td>Beck v. City of Cleveland, 390 F.3d 912 (6th Cir. 2004)</td>
<td>SS</td>
<td>Accept</td>
<td>Skidmore Mead</td>
<td>Validity Consistency</td>
<td>Amicus</td>
</tr>
<tr>
<td>Kort v. Diversified Collection Servs., Inc., 394 F.3d 530 (7th Cir. 2005)</td>
<td>SS</td>
<td>Accept</td>
<td>Mead</td>
<td>Validity Expertise</td>
<td>None</td>
</tr>
<tr>
<td>Application</td>
<td>Model of Skidmore Applied*</td>
<td>Accept/Reject Agency View</td>
<td>Case(s) Cited for Standard</td>
<td>Factors Discussed**</td>
<td>Role of United States in Case***</td>
</tr>
<tr>
<td>----------------------------------------------------------------------------</td>
<td>-----------------------------</td>
<td>---------------------------</td>
<td>----------------------------</td>
<td>---------------------</td>
<td>---------------------------------</td>
</tr>
<tr>
<td>Dabit v. Merrill Lynch, Pierce, Fenner &amp; Smith, Inc., 395 F.3d 25, 34–36 &amp; n.6 (2d Cir. 2005)</td>
<td>IJ</td>
<td>Accept</td>
<td>Skidmore</td>
<td>Thoroughness</td>
<td>Amicus</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Validity</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Consistency</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Expertise</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Longstanding</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Validity</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Consistency</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Expertise</td>
<td></td>
</tr>
<tr>
<td>Broad. Music, Inc. v. Roger Miller Music, Inc., 396 F.3d 762 (6th Cir. 2005)</td>
<td>IJ</td>
<td>Reject</td>
<td>Christensen</td>
<td>Thoroughness</td>
<td>None</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Validity</td>
<td></td>
</tr>
<tr>
<td>Noviello v. City of Boston, 398 F.3d 76 (1st Cir. 2005)</td>
<td>I</td>
<td>Accept</td>
<td>Skidmore</td>
<td>Thoroughness</td>
<td>None</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Validity</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Validity</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Consistency</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Expertise</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Longstanding</td>
<td></td>
</tr>
<tr>
<td>Carnival Cruise Lines, Inc. v. United States, 404 F.3d 1312 (Fed. Cir. 2005)</td>
<td>SS</td>
<td>Accept</td>
<td>Mead</td>
<td>Thoroughness</td>
<td>Party</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Validity</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Validity</td>
<td></td>
</tr>
<tr>
<td>De La Mota v. U.S. Dep’t of Educ., 412 F.3d 71 (2d Cir. 2005)</td>
<td>SS</td>
<td>Reject</td>
<td>Skidmore</td>
<td>Thoroughness</td>
<td>Party</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Validity</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Consistency</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Expertise</td>
<td></td>
</tr>
<tr>
<td>Lin v. U.S. Dep’t of Justice, 416 F.3d 184 (2d Cir. 2005)</td>
<td>SS</td>
<td>Reject</td>
<td>Skidmore</td>
<td>Thoroughness</td>
<td>Party</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Validity</td>
<td></td>
</tr>
<tr>
<td>St. Mary’s Hosp. v. Leavitt, 416 F.3d 906 (8th Cir. 2005)</td>
<td>SS</td>
<td>Accept</td>
<td>Skidmore</td>
<td>Thoroughness</td>
<td>Party</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Validity</td>
<td></td>
</tr>
<tr>
<td>Santiago v. GMAC Mortgage Group, Inc., 417 F.3d 384 (3d Cir. 2005)</td>
<td>SS</td>
<td>Accept</td>
<td>Skidmore</td>
<td>Thoroughness</td>
<td>Amicus</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Validity</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Consistency</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Expertise</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Validity</td>
<td></td>
</tr>
<tr>
<td>Application</td>
<td>Model of Skidmore Applied*</td>
<td>Accept/Reject Agency View</td>
<td>Case(s) Cited for Standard</td>
<td>Factors Discussed**</td>
<td>Role of United States in Case***</td>
</tr>
<tr>
<td>----------------------------------------------------------------------------</td>
<td>----------------------------</td>
<td>---------------------------</td>
<td>---------------------------</td>
<td>---------------------</td>
<td>---------------------------------</td>
</tr>
<tr>
<td>Fujitsu Am., Inc. v. United States, 422 F.3d 1364 (Fed. Cir. 2005)</td>
<td>I</td>
<td>Accept</td>
<td>Mead</td>
<td>Thoroughness</td>
<td>Party</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Validity</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Consistency</td>
<td></td>
</tr>
<tr>
<td>S. Utah Wilderness Alliance v. Bureau of Land Mgmt., 425 F.3d 735 (10th Cir. 2005)</td>
<td>SS</td>
<td>Reject</td>
<td>Skidmore Christensen</td>
<td>Consistency</td>
<td>Party</td>
</tr>
<tr>
<td>Zhang v. Gonzales, 426 F.3d 540 (2d Cir. 2005)</td>
<td>IJ</td>
<td>Reject</td>
<td>Skidmore</td>
<td>Thoroughness</td>
<td>Party</td>
</tr>
<tr>
<td>Padilla-Caldera v. Gonzales, 426 F.3d 1294 (10th Cir. 2005)</td>
<td>IJ</td>
<td>Reject</td>
<td>Christensen</td>
<td>Validity</td>
<td>Party</td>
</tr>
<tr>
<td>Shikles v. Sprint/United Mgmt. Co., 426 F.3d 1304 (10th Cir. 2005)</td>
<td>SS</td>
<td>Reject</td>
<td>Skidmore</td>
<td>Formality</td>
<td>Amicus</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Validity</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Longstanding</td>
<td></td>
</tr>
<tr>
<td>OfficeMax, Inc. v. United States, 428 F.3d 583 (6th Cir. 2005)</td>
<td>SS</td>
<td>Reject</td>
<td>Skidmore Christensen Mead</td>
<td>Thoroughness</td>
<td>Party</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Validity</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Consistency</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Longstanding</td>
<td></td>
</tr>
<tr>
<td>United States v. W.R. Grace &amp; Co., 429 F.3d 1224 (9th Cir. 2005)</td>
<td>SS</td>
<td>Accept</td>
<td>Skidmore</td>
<td>Thoroughness</td>
<td>Party</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Validity</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Expertise</td>
<td></td>
</tr>
<tr>
<td>M. Fortunoff of Westbury Corp. v. Peerless Ins. Co., 432 F.3d 127 (2d Cir. 2005)</td>
<td>SS</td>
<td>Accept</td>
<td>Skidmore Christensen</td>
<td>Validity</td>
<td>Amicus</td>
</tr>
<tr>
<td>Trowell v. Beeler, 135 F. App'x 590 (4th Cir. 2005)</td>
<td>IJ</td>
<td>Reject</td>
<td>Christensen</td>
<td>Thoroughness</td>
<td>Party</td>
</tr>
<tr>
<td>Reimels v. Comm'r, 436 F.3d 344 (2d Cir. 2006)</td>
<td>SS</td>
<td>Accept</td>
<td>Skidmore</td>
<td>Validity</td>
<td>Party</td>
</tr>
<tr>
<td>McGraw v. Barnhart, 450 F.3d 493 (10th Cir. 2006)</td>
<td>SS</td>
<td>Accept</td>
<td>Skidmore</td>
<td>Thoroughness</td>
<td>Party</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Validity</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Consistency</td>
<td></td>
</tr>
<tr>
<td>Appoloni v. United States, 450 F.3d 185 (6th Cir. 2006)</td>
<td>I</td>
<td>Accept</td>
<td>Skidmore</td>
<td>Thoroughness</td>
<td>Party</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Validity</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Consistency</td>
<td></td>
</tr>
</tbody>
</table>

* Model of Skidmore Applied: I - Initials, SS - Supreme Court, J - Justiciable, P - Public Interest
** Factors Discussed: Thoroughness, Validity, Consistency, Formality, Longstanding
*** Role of United States in Case: Party, Amicus
<table>
<thead>
<tr>
<th>Application</th>
<th>Model of <em>Skidmore</em> Applied*</th>
<th>Accept/Reject Agency View</th>
<th>Case(s) Cited for Standard</th>
<th>Factors Discussed**</th>
<th>Role of United States in Case***</th>
</tr>
</thead>
<tbody>
<tr>
<td>Caribbean Ispat Ltd. v. United States, 450 F.3d 1336 (Fed. Cir. 2006)</td>
<td>SS</td>
<td>Reject</td>
<td>Skidmore Mead</td>
<td>Thoroughness, Formality, Consistency</td>
<td>Party</td>
</tr>
</tbody>
</table>

* Model of *Skidmore* Applied:
  IJ — Independent judgment model of the *Skidmore* standard.
  SS — Sliding-scale model of the *Skidmore* standard.

** 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.