

Note

The *Skidmore* Compromise: Interpreting *Skidmore* as a Tiebreaker to Preserve Judicial Wisdom in the Era of *Loper Bright*

Mitchell Zaic*

‘Law must be stable, and yet it cannot stand still.’ Here is the great antinomy confronting us at every turn. Rest and motion, unrelieved and unchecked, are equally destructive. The law, like human kind, if life is to continue, must find some path of compromise. – Judge Cardozo¹

In the summer of 2024, the world of administrative law was upended when the Supreme Court overruled the Chevron decision. Chevron had long served as one of administrative law’s foundational cases and it had been the foremost vehicle by which Courts analyzed agency interpretations for decades. But suddenly, the case was gone. With its overruling, an old case has taken on new importance: Skidmore v. Swift.

Skidmore is a short administrative law case from 1944 with modest facts. The decision, which can fit on three sheets of paper, briefly and arcanelly stated that deference awarded to agency interpretations will “depend upon the thoroughness evident in [their] consideration, the validity of [their] reasoning, [their] consistency with earlier and later pronouncements, and all those

* J.D. Candidate, 2026, University of Minnesota Law School; B.A., 2022, University of Saint Thomas. Writing this piece has been one of the great privileges of my life. I want to first and foremost thank the *Minnesota Law Review* and its fantastic staff for the ongoing feedback and assistance. I also want to thank the superb administrative law staff at the Law School who introduced me to this entire field of law and got me interested. Special thanks to Professor Amy Wildermuth, Professor Kristin Hickman, and Professor Ilan Wurman—who served as my faculty advisor as I wrote this Note. *Soli Deo gloria*. Copyright © 2026 by Mitchell Zaic.

1. BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 2 (1924) (quoting ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY 1 (Harold Dexter Hazeldine ed., 1923)).

factors which give [them] power to persuade” Eighty years later, these words are no less clear. Yet Skidmore has become more important than at any point in history, meaning a clear interpretation is needed now more than ever.

This Note seeks to resolve the continued indeterminacy of Skidmore. It argues that the existing methods of interpreting Skidmore fall short and proposes a new path forward: the Skidmore tiebreaker. This interpretation of Skidmore would only be used by interpreters when judges are faced with interpretive ties that have no other method of resolution. Only then can judges resort to applying the agency’s interpretation. This method of interpreting Skidmore ensures that agency interpretations never overrule the best meaning of the statute, instead facilitating the judge in his or her interpretive quest. In addition, the tiebreaker continues the long tradition of respect for agency interpretations beyond that of the typical litigant.

This Note explains the intricacies of the Skidmore tiebreaker and illustrates its application through comparison to similar rules inside and outside the law. It also considers and rebuts anticipated objections that could be brought towards the use of Skidmore as a tiebreaker, mainly that interpretive ties never occur and that the tiebreaker is merely Chevron under another name. This Note concludes by urging the adoption of the Skidmore tiebreaker as a compromise for the future of administrative law.

INTRODUCTION

When the Department of Agriculture (DOA) initiated an enforcement action against Amazon,² there's a good chance the agency believed it had a strong case. The DOA alleged that Amazon "aid[ed], abet[ted], caus[ed], or induc[ed]"³ the importation of products that violated the Plant Protection Act and the Animal Health Protection Act—despite the fact that Amazon was completely unaware that these importations were occurring.⁴ Even though a recent Supreme Court case cast significant doubt on the DOA's interpretation of the statute,⁵ the agency still had the ace up its sleeve that had given administrative agencies an edge for decades: *Chevron*.⁶ It played this card in the concluding portions of its final brief, arguing that even if the D.C. Circuit were to reject its interpretation based on the court's own independent judgment, the court still shouldn't set aside the agency's interpretation.⁷ The DOA proclaimed that "[w]hen reviewing an interpretation of a statute by an agency charged with the administration of that statute,' this Court [the D.C. Circuit] applies 'the . . . *Chevron* framework.'"⁸ *Chevron* instructed courts to defer to agency interpretations of statutes so long as the intent of

2. *Amazon Servs. LLC v. U.S. Dep't of Agric.*, 109 F.4th 573, 575 (D.C. Cir. 2024) (describing the DOA's power to initiate enforcement actions).

3. 7 U.S.C. § 7702(9)(B).

4. *Amazon Servs. LLC*, 109 F.4th at 576 ("In September 2019, the Department's Animal and Plant Health Inspection Service began enforcement proceedings against Amazon for allegedly importing plant and animal products in violation of the PPA and AHPA.").

5. The Supreme Court had determined that the common law meaning of the same words in a different statute required "a conscious, voluntary, and culpable participation in another's wrongdoing." *Twitter, Inc. v. Taamneh*, 143 S. Ct. 1206, 1223 (2023) (discussing the meaning of the phrase "aids and abets" and how to properly interpret it). An administrative law judge previously had found the Department's view of the statute's text was "liberal[.]" *Amazon Servs. LLC*, 109 F.4th at 577.

6. *See Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

7. *See* Final Brief for Respondent at 50, *Amazon Servs. LLC*, 109 F.4th at 573 (No. 22-1052) ("But even if the Court were to conclude that ambiguities remained after applying tools of statutory construction, it should hesitate to set aside an agency interpretation that is at a minimum reasonable and wholly consistent with the governing statutes.").

8. *Id.* (quoting *Coosemans Specialties, Inc. v. Dep't of Agric.*, 482 F.3d 560, 564 (D.C. Cir. 2007)).

Congress was unclear and the agency's interpretation was permissible.⁹

As the DOA's case was being litigated, the Supreme Court shook the foundations of administrative law. On June 28, 2024, the Court released its decision in *Loper Bright Enterprises v. Raimondo*.¹⁰ Although the facts in *Loper Bright* were relatively unassuming,¹¹ the actual decision was monumental. To the shock of many, the Supreme Court overruled *Chevron* and, in the blink of an eye, the old model of deference to agency interpretations was gone.¹² With this new holding, the DOA was now entitled to no deference at all—the ace up their sleeve had vanished. The D.C. Circuit determined the DOA's interpretation was at odds with the text of the statute,¹³ and the agency lost its case in what must have been a stunning turn of events.¹⁴

The overruling of *Chevron* set off a time bomb in the administrative law sphere. In many ways, the case wasn't just an interpretive framework, but rather a way of thinking about the judiciary's relationship with executive agencies entirely¹⁵—a way

9. See *infra* notes 45–51 (discussing *Chevron*, how it works, and its effect).

10. See *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2244 (2024).

11. *Loper Bright* concerned regulations on fishing boats that required them to maintain observers on board their ships for the collection of conservation data. See *id.* at 2254–57 (tracing the statutory background of the Magnuson-Stevens Act, 16 U.S.C. §§ 1801–82, the National Marine Fisheries Service's adoption of an industry-funded observer program for Atlantic herring vessels, and the fishermen's challenge to that rule).

12. *Loper Bright*, 144 S. Ct. at 2273 (“*Chevron* is overruled.”); see also Thomas W. Merrill, *The Demise of Deference — and the Rise of Delegation to Interpret?*, 138 HARV. L. REV. 227, 234–47 (2024) (discussing *Chevron*'s overruling).

13. The court found the agency's interpretation to be incorrect because it had neglected the “old soil” that came with the language of “aid[ing], abet[ting], caus[ing], or induc[ing]” that appeared in the relevant statute. *Amazon Servs. LLC*, 109 F.4th at 578–79 (“In defending the imposition of liability against Amazon in this case, the Department construes ‘aid, abet, cause, or induce’ in the PPA and AHPA in a manner incompatible with the understanding of aiding-and-abetting liability recognized by the Supreme Court . . .”).

14. *Id.* at 583 (“For the foregoing reasons, we grant the petition for review, vacate the Department's order, and remand to the agency for further proceedings consistent with this opinion.”).

15. See Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 446–67 (1989) (“When the Supreme Court [decided *Chevron*] . . . it did more than merely declare the victor in a forty-year war between advocates of the deferential model and defenders of independent judgment. . . . [It] generated a powerful new

of thinking that has since been rejected. Whether the Supreme Court's decision was warranted is a subject for other notes and articles.¹⁶ This Note is concerned with a more pressing question: Where do we go from here?

With *Chevron's* demise, a case that has largely lived in its shadow has suddenly been thrust back into the spotlight: *Skidmore v. Swift & Co.*¹⁷ The majority opinion in *Loper Bright* made numerous references to *Skidmore*, indicating that the case is (for now) the governing law for reviewing agency interpretations of statutes.¹⁸ But considerable questions remain on what *Skidmore* actually means, and the *Loper Bright* decision did little to resolve that ambiguity.¹⁹

Skidmore's text requires courts evaluating agency interpretations of statutes to consider “the thoroughness evident in [an agency's] 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

image of the appropriate functions of court and agency in the administrative state.”).

16. Debates over the viability of *Chevron* were the subject of numerous articles. These articles, while outdated, still have real academic value in their considerations of the proper relationship between the judiciary and agency action. See Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 782–85 (2010) (arguing vehemently for the overruling of *Chevron*, citing its numerous flaws). But see Nicholas R. Bednar & Kristin E. Hickman, *Chevron's Inevitability*, 85 GEO. WASH. L. REV. 1392, 1392 (2017) (“[C]laims that *Chevron* is in decline are overblown, and efforts to overturn *Chevron* in any meaningful sense are misdirected. *Chevron*-style deference is inevitable in the modern administrative state.”).

17. 323 U.S. 134 (1944).

18. See *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2309 (2024) (Kagan, J., dissenting) (“[T]he majority makes clear that what is usually called *Skidmore* deference continues to apply.”); Merrill, *supra* note 12, at 266 (“The Court in *Loper Bright* made several approving references to *Skidmore*.”).

19. See Merrill, *supra* note 12, at 267 (“That said, even when *Skidmore* applies, there are unresolved questions about what it means.”); Kristin E. Hickman, *Anticipating a New Modern Skidmore Standard*, 74 DUKE L.J. ONLINE 111, 114 (2025), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1123&context=dlj_online [https://perma.cc/D2Z9-Q6YV] (“Yet, Roberts's opinion for the Court in *Loper Bright* offered little in the way of forward-looking guidance regarding *Skidmore* as a doctrine—for example, how *Skidmore* operates, or when it ought to apply.”).

control.”²⁰ These guidelines are less than clear,²¹ and courts and legal scholars have long attempted to determine precisely what, if anything, *Skidmore* means.²²

These determinations have taken on new importance with *Skidmore*'s status as the likely vehicle for courts evaluating agency interpretations of statutes.²³ Interpretations of *Skidmore* now must consider the lengthy *Loper Bright* decision and what it seems to say about deference by the judiciary to administrative bodies as a whole.²⁴ Within this morass, this Note introduces a clear method of applying *Skidmore* as a judicial tiebreaker.

This Note dissects and explains the two predominant interpretations of *Skidmore*—the sliding scale model and the independent judgment model—and argues that each interpretation falls short because it either, respectively, affords deference at the cost of the court's best interpretation (which is prohibited based on *Loper Bright*) or it treats the agency as no different than any other litigant (seemingly at odds with decades of Supreme Court precedent). Interpreting *Skidmore* as a tiebreaker will, on the one hand, acknowledge the new era of administrative law that *Loper Bright* has inaugurated, and, on the other hand, integrate the collected wisdom of decades of review of agency action.²⁵

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

21. See Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1250 (2007) (“*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.”).

22. In fact, this debate extends to the current Justices on the Supreme Court. See Jack Fitzhenry & Caleb Sampson, *After Chevron, a New Birth of Deference for the Administrative State?*, HERITAGE FOUND. (Aug. 15, 2024), <https://www.heritage.org/courts/commentary/after-chevron-new-birth-deference-the-administrative-state> [<https://perma.cc/BP83-W9VF>] (describing the diverging views of the current Justices on *Skidmore* demonstrated in *Loper Bright*'s oral arguments, including: Kavanaugh highlighting *Skidmore* as only concerning “the power to persuade,” Roberts pointing out that *Skidmore* is usually referred to as a “deference doctrine,” and Kagan stating, “*Skidmore* has always meant nothing”).

23. See *supra* note 18 and accompanying text.

24. See *infra* Part II. See generally *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2248–51 (2024) (explaining that executive interpretations may inform but not control judicial decision-making, with *Skidmore* deference turning only on persuasiveness and the APA confirming courts' duty to decide all questions of law).

25. See, e.g., Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 975 (1992) (explaining the variety of factors the courts

Part I of this Note lays out the legal timeline that led to *Skidmore's* prominence. It describes *Skidmore's* place as one of the Supreme Court's pre-*Chevron* administrative law cases. It also briefly details the rise of *Skidmore* with several clarifying Supreme Court decisions, and its reemergence with the overruling of *Chevron* in *Loper Bright*. Part I concludes by introducing traditional understandings of *Skidmore's* meaning, provided by scholars and judges. Part II considers judicial deference to agency interpretations, including common justifications for deference and an exploration of the viability of deference after *Loper Bright*. Finally, Part III proposes an interpretation of *Skidmore* as a judicial tiebreaker. This Part explains the theoretical justification for such a tiebreaker and considers the tiebreaker's consistency with *Loper Bright*. Finally, this Note concludes by responding to potential objections to *Skidmore* as a tiebreaker.

I. SKIDMORE'S JOURNEY

As an eighty-year-old decision, *Skidmore* has had a variety of interpretations and played a variety of roles in the administrative law sphere. Part I of this Note acquaints the reader with *Skidmore's* journey thus far. Section A explains *Skidmore's* origin and its place as one of many pre-*Chevron* Supreme Court cases dealing with agency action. Section B discusses *Chevron*, the case that overshadowed *Skidmore* for decades, and whose gradual decline culminated in the *Loper Bright* decision. Finally, Section C discusses the predominant interpretations of the *Skidmore* decision in the modern era, which provide bases of comparison for this Note's tiebreaker proposal.

A. PRE-CHEVRON REVIEW OF AGENCY INTERPRETATIONS

The degree of deference that courts should award administrative agencies has always been an important question in the field of administrative law.²⁶ Prior to the rise of *Chevron*, judicial review involving agency deference is best described as

considered before *Chevron* and warning the reader against "dismiss[ing] them as empty rhetoric").

26. See, e.g., Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 3 (1983) ("The propriety of judicial deference to agency interpretation of law is an issue of systemic importance to the theory and practice of administrative law.").

scattered.²⁷ Nonetheless, general ideas arose from these scattered decisions, most notably that agency constructions of statutes should be treated with some level of deference.²⁸ Many of these pre-*Chevron* cases focused on the presence of several factors in the agency's analysis in determining the degree of deference to be afforded.²⁹ *Skidmore*, which focused on the reasoning of the agency, was one of these cases.³⁰

In *Skidmore*, the Supreme Court reviewed an agency interpretation of a provision of the Fair Labor Standards Act (FLSA).³¹ Employees of the Swift and Company plant in Texas argued they deserved overtime pay under the FLSA for time they spent on site "working" in the company's fire hall.³² The employees' task was not difficult; they merely had to respond to alarms (which were rare) but otherwise could stay in the room and sleep, listen to the radio, or play dominoes.³³ The central question of *Skidmore* asked whether the mostly recreational hours spent in the firehall should be considered "hours worked" for overtime purposes.³⁴

The FLSA had created an office of administrator, and the current administrator had released a bulletin concluding that certain hours worked by the firemen fell outside the ambit of the

27. Merrill, *supra* note 25, at 972 ("Prior to 1984, the Supreme Court had no unifying theory for determining when to defer to agency interpretations of statutes.").

28. David R. Woodward & Ronald M. Levin, *In Defense of Deference: Judicial Review of Agency Action*, 31 ADMIN. L. REV. 329, 332 (1979) ("Hence the courts approach agency interpretations with a measure of respect that is distinct from, though not wholly divorced from, their assessment of the inherent persuasiveness of the agencies' arguments.").

29. *Id.* at 332-33 (detailing the factors considered by the courts in these cases including expertise, whether interpretation was "long-standing," and whether they were supported by reasoned analysis).

30. *Id.* at 342 (noting that under *Skidmore*, the weight of an agency's interpretation depends on the thoroughness and validity of its reasoning and other factors giving it persuasive force).

31. *Skidmore v. Swift & Co.*, 323 U.S. 134, 135 (1944).

32. *Id.* at 135-36.

33. *Id.*

34. *Id.* at 136 ("[The lower court] said, however, as a 'conclusion of law' that 'the time plaintiffs spent in the fire hall subject to call to answer fire alarms does not constitute hours worked, for which overtime compensation is due them under the Fair Labor Standards Act, as interpreted by the Administrator and the Courts,' and in its opinion observed, 'of course we know pursuing such pleasurable occupations or performing such personal chores, does not constitute work.'" (citations omitted)).

FLSA.³⁵ The administrator did not have statutory authority to issue rules, yet the act still contained gaps that needed to be filled as the statute was enforced.³⁶ Therefore, the Supreme Court was tasked with determining how much deference it should show the agency in its analysis.³⁷ The Court concluded first that the agency's interpretation cannot be "conclusive,"³⁸ but it also found that the agency's conclusions "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."³⁹ The Court held the weight of the administrator's interpretation would depend on "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."⁴⁰ With that explanation laid out, the Court ultimately sided with the administrator's interpretation of the statute and reversed the judgment of the District Court that had found otherwise.⁴¹

For many years after it was decided, the Supreme Court cited *Skidmore* when evaluating the weight to afford agency interpretations.⁴² For example, the Supreme Court referred to *Skidmore* in *General Electric Company v. Gilbert* as "[t]he most

35. *Id.* at 139 (describing the conclusions of the Administrator as expressed in his amicus brief).

36. See KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.8, at 446 (7th ed. 2024) ("Even though Congress denied the Administrator the power to make legislative rules, he had to decide questions about the meaning of the Act in order to determine how to enforce it.").

37. *Skidmore*, 323 U.S. at 139 ("There is no statutory provision as to what, if any, deference courts should pay to the Administrator's conclusions. And, while we have given them notice, we have had no occasion to try to prescribe their influence.").

38. *Id.*

39. *Id.* at 140.

40. *Id.*

41. *Id.* ("But in this case, although the District Court referred to the Administrator's Bulletin, its evaluation and inquiry were apparently restricted by its notion that waiting time may not be work, an understanding of the law which we hold to be erroneous."). Note the vagueness in the Court's concluding paragraph. While it references the agency's interpretation, its holding seems to reverse the district court based on its *own* understanding of the text—not the agency's. *Id.*

42. See HICKMAN & PIERCE, *supra* note 36, § 3.8, at 446 ("The Supreme Court cited and applied the *Skidmore* standard on numerous occasions prior to its decision in *Chevron*."); Hickman & Krueger, *supra* note 21, at 1236 ("For forty years, the Supreme Court's opinion in *Skidmore v. Swift & Co.* 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.").

comprehensive statement of the role of interpretative rulings.”⁴³ Yet *Skidmore* was preeminent in an era where the Court’s administrative law jurisprudence was exceedingly muddled and its efficacy unclear.⁴⁴

B. THE RISE OF *CHEVRON* AND *SKIDMORE*’S REVITALIZATION

In 1984, the Supreme Court decided *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*⁴⁵ The case was notable for the test that it established for courts to use in analyzing agency interpretations of statutes. The *Chevron* test is traditionally understood as having two steps. First, courts ask “whether Congress has directly spoken to the precise question at issue.”⁴⁶ Then, “[i]f 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.”⁴⁷

If the intent of Congress is unclear, then courts must defer to any agency construction, so long as it is “based on a

43. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976).

44. See HICKMAN & PIERCE, *supra* note 36, § 3.1, at 250 (quoting the pre-*Chevron* second edition of the treatise which describes the Supreme Court as having “consistently kept the scope of review unpredictable”); Merrill, *supra* note 25, at 974 (“Standing alone, these factors did not comprise, either individually or collectively, what could be described as a coherent doctrine. No attempt was made to connect the various factors together or to explain their relevance in terms of a model of executive-judicial relationship. Indeed, my own attempt to organize them in functional categories may impose a greater sense of order than the cases themselves warrant.”).

45. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *Chevron* concerned interpretation of a term within the Clean Air Act by the EPA. *Id.* at 840. Justice Kagan gives a great summary of the legal issue within *Chevron* in her *Loper Bright* dissent. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2296–97 (2024) (Kagan, J., dissenting) (“In amendments to the Clean Air Act, Congress told States to require permits for modifying or constructing ‘stationary sources’ of air pollution. Does the term ‘stationary source[.]’ refer to each pollution-emitting piece of equipment within a plant? Or does it refer to the entire plant, and thus allow escape from the permitting requirement when increased emissions from one piece of equipment are offset by reductions from another?” (citations omitted)).

46. *Chevron*, 467 U.S. at 842.

47. *Id.* at 842–43. Beyond these two steps, many scholars suggested subsequent Supreme Court cases created a *Chevron* step zero. See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006) (“It is an understatement to say that a great deal of judicial and academic attention has been paid to the foundations and meaning of *Chevron*’s two-step inquiry. But in the last period, the most important and confusing questions have involved neither step. Instead they involve *Chevron* Step Zero—the initial inquiry into whether the *Chevron* framework applies at all.”).

permissible construction of the statute.”⁴⁸ The degree of deference that *Chevron* affords is debated,⁴⁹ but traditionally it has been viewed as a very deferential test—especially compared to the Court’s pre-*Chevron* jurisprudence.⁵⁰ Courts applying *Chevron* were frequently called upon to affirm an interpretation they considered not the best so long as the interpretation was “permissible” under the statute’s language.⁵¹

Perhaps unintentionally,⁵² *Chevron* took the administrative law world by storm.⁵³ It became one of the most cited Supreme Court decisions in history,⁵⁴ and it completely overtook

48. *Id.* at 843.

49. While it was still good law, the proper understanding of *Chevron*’s efficacy and scope was debated among scholars for years. Most of these conversations are outside the scope of this Note’s discussion of *Skidmore*. See Bednar & Hickman, *supra* note 16, at 1419 (“[T]he *Chevron* opinion itself . . . describes the relevant standard of review in highly variable terms, and thus supports a multiplicity of interpretations. Identifying all of *Chevron*’s many variations is probably impossible.”). For a good overview of the bevy of interpretations, see *id.*

50. Merrill, *supra* note 25, at 977 (“[T]he Court’s new framework inverted the traditional default rule. In the pre-*Chevron* period, deference to executive interpretations required special justification; independent judgment was the default rule. Under *Chevron*, the court must initially establish whether the issue is suitable for independent judicial resolution; if it is not, the court automatically shifts into a deferential mode. As a result, independent judgment now requires special justification, and deference is the default rule.”).

51. See *Chevron*, 467 U.S. at 843 n.11 (“The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.”); see also Fed. Election Comm’n v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 39 (1981) (“[I]n determining whether the Commission’s action was ‘contrary to law,’ the task for the Court of Appeals was not to interpret the statute as it thought best but rather the narrower inquiry into whether the Commission’s construction was ‘sufficiently reasonable’ to be accepted by a reviewing court.” (first quoting *Train v. Nat. Res. Def. Council*, 421 U.S. 60, 75 (1975); and then quoting *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978))).

52. See Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253, 272 (2014) (“[T]here is nothing in the conference notes to suggest that the justices regarded *Chevron* as a watershed case about the standard of judicial review. The case presented nothing more than a puzzle about the legality of the bubble concept.”).

53. See Bednar & Hickman, *supra* note 16, at 1393–94 (“The *Chevron* standard of judicial review . . . has dominated discussions of American administrative law for a generation and continues to do so. *Chevron* has been dissected, debated, and applied more than any other canonical administrative law case.”).

54. Merrill, *supra* note 52, at 254 (“In its relatively brief life span, *Chevron* has been cited in 11,760 judicial decisions and 2,130 administrative decisions. It continues to accumulate judicial citations at the rate of about 1000 per year.

Skidmore and the cases that came before it.⁵⁵ However, during *Chevron's* reign as the dominant approach to reviewing agency interpretations, the Supreme Court decided two cases that left room for *Skidmore* to play a role: *Christensen v. Harris County*⁵⁶ and *United States v. Mead Corporation*.⁵⁷ First, in *Christensen*, the Court applied *Skidmore* to an interpretation contained in an agency's opinion letter⁵⁸ instead of using the typical *Chevron* framework.⁵⁹ The Court reasoned that because the agency opinion letter had not undergone the rigors of the Administrative Procedure Act (APA)⁶⁰—including the processes of notice and comment rulemaking or adjudication—it should be afforded less deference.⁶¹ Second, in *Mead*, the Supreme Court affirmed that

It is eclipsed only by decisions like *Erie Railroad Co. v. Tompkins* . . . and *Bell Atlantic Corp. v. Twombly* . . .”).

55. *Id.* at 255–56 (“[The law prior to *Chevron*] had been something of a hodge-podge, but the conventional wisdom was that it required courts to assess agency interpretations against multiple contextual factors, such as whether the agency interpretation was longstanding, consistently held, contemporaneous with the enactment of the statute, thoroughly considered, or involved a technical subject as to which the agency had expertise. The two-step formula provided no logical place for courts to consider these contextual factors.” (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944))).

56. *See generally* *Christensen v. Harris Cnty.*, 529 U.S. 576 (2000) (explaining that agency opinion letters and similar guidance lacking the force of law do not warrant *Chevron* deference but may receive respect under *Skidmore*).

57. *See generally* *United States v. Mead Corp.*, 533 U.S. 218 (2001) (holding that Customs classification ruling letters do not warrant *Chevron* deference but may receive respect under *Skidmore* to the extent they are persuasive).

58. An opinion letter is exactly what it sounds like. It's just a letter from an agency official expressing his or her opinion on how a statute works. *See Christensen*, 529 U.S. at 581 (detailing the Department of Labor opinion letter at issue).

59. *Id.* at 587.

60. The APA was passed in 1946 and revolutionized how agencies acted and operated. Roni A. Elias, *The Legislative History of the Administrative Procedure Act*, 27 FORDHAM ENV'T L. REV. 207, 207 (2016). Like other statutes, the APA was the product of political compromise. *Id.* at 208–11 (describing the political compromise by Democrats and Republicans necessary for the APA to be enacted). The APA is notable for its new method of classifying agency actions as either rulemaking or adjudication and associating a procedure with each category. *Id.* at 214 (“[The] definitional section of the APA is important not only because it specifies the meaning of important term, but also because it establishes a foundational – and novel – categorization of types of agency action. This categorization is the basis upon which the APA establishes its procedural requisites.”).

61. *Christensen*, 529 U.S. at 587 (“Here, however, we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as

Chevron had not entirely overruled *Skidmore*; rather, it “left *Skidmore* intact and applicable where statutory circumstances indicate no intent to delegate general authority to make rules with force of law.”⁶² *Mead* further limited the reach of *Chevron*, finding that where agency action was not “official” (meaning not connected with agency procedure) it should not be afforded *Chevron* deference.⁶³ With both of these cases, *Skidmore* was given an importance it had not seen in decades.⁶⁴

Skidmore’s unlikely rise from irrelevancy concluded with *Loper Bright*.⁶⁵ In *Loper Bright*, the Court overruled *Chevron*

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.”). The Court’s application of *Skidmore* does make intuitive sense, as *Skidmore* was decided before the APA had been passed.

62. *Mead*, 533 U.S. at 237 (“Whether courts do owe deference in a given case turns, for him, on whether the agency action (if reasonable) is ‘authoritative.’ The character of the authoritative derives, in turn, not from breadth of delegation or the agency’s procedure in implementing it, but is defined as the ‘official’ position of an agency, and may ultimately be a function of administrative persistence alone.” (citations omitted)).

63. *Id.* at 231 (“There are, nonetheless, ample reasons to deny *Chevron* deference here. The authorization for classification rulings, and Customs’s practice in making them, present a case far removed not only from notice-and-comment process, but from any other circumstances reasonably suggesting that Congress ever thought of classification rulings as deserving the deference claimed for them here.”). *Mead* also relies on the lack of notice-and-comment procedure as an indicator that no deference should be afforded—similar to *Christensen*. See *id.* at 230 (“It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.”). *Loper Bright* has rejected a connection between deference and administrative procedure. See *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024) (“[C]ourts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.”).

64. Hickman & Krueger, *supra* note 21, at 1237 (“[W]ith *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.”).

65. See generally *Loper Bright*, 144 S. Ct. at 2244. There were warning signs this ruling was forthcoming. See *Baldwin v. United States*, 140 S. Ct. 690, 691 (2020) (mem.) (Thomas, J., dissenting) (“*Chevron* is in serious tension with the Constitution, the APA, and over 100 years of judicial decisions.”); Merrill, *supra* note 12, at 227 (“The decision in *Loper Bright Enterprises v. Raimondo* was not a surprise. After treating the *Chevron* doctrine as a settled principle of administrative law for more than three decades, the Court stopped applying it in 2016.”).

and sent ultimate interpretive authority back to the courts to decide.⁶⁶ The primary justification the *Loper Bright* decision provided for overruling *Chevron* was its inconsistency with the APA, specifically section 706, which mandates that courts rely on their own independent judicial decision-making in resolving questions of law.⁶⁷

The *Loper Bright* Court appeared to view *Skidmore* favorably. The majority opinion cited *Skidmore* eight times⁶⁸ and expressly found at least part of the *Skidmore* test to be consistent with section 706 of the APA.⁶⁹ Justice Gorsuch's concurrence also viewed *Skidmore* in a favorable light, citing it as emblematic of the proper themes in administrative law.⁷⁰ Yet the Court did not take a hard stance on how to apply *Skidmore*, nor did it resolve the hodgepodge of competing interpretations of the case that have sprung up.⁷¹ These interpretations are discussed in the following Section.

C. MODERN INTERPRETATIONS OF *SKIDMORE*

Skidmore remains a difficult case to understand.⁷² Because it was decided long before *Loper Bright*, a bevy of interpretations

66. *Loper Bright*, 144 S. Ct. at 2273 (“*Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires.”).

67. 5 U.S.C. § 706; see also *Loper Bright*, 144 S. Ct. at 2262 (“The APA, in short, incorporates the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions.”). *Loper Bright* founded its holding in reasoning beyond § 706 as well. *Id.* at 2257 (arguing the Framers envisioned interpretation of statutes to be the exclusive domain of the judiciary based on Article III).

68. See generally *Loper Bright*, 144 S. Ct. *passim*.

69. See *id.* at 394 (“[Agency] interpretations ‘constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance’ consistent with the APA.” (quoting *Skidmore v. Swift & Co*, 323 U.S. 134, 140 (1944))). *Loper Bright* overruled *Chevron* primarily because of its inconsistency with APA § 706, so *Skidmore* being consistent likely indicates some degree of longevity. See *id.* at 412 (“*Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires.”).

70. *Id.* at 431 (Gorsuch, J., concurring) (describing *Skidmore* as “[e]choing themes that had run throughout our law from its start”).

71. See Merrill, *supra* note 12, at 266–67 (noting that even after *Loper Bright* considerable questions remain about *Skidmore*, including whether its application is compulsory or optional, how to weigh its factors, and whether *Skidmore* is beyond just a judicial truism).

72. See *supra* note 21 and accompanying text. Perhaps an additional reason for confusion around *Skidmore* is how short the decision is. For context, the

by scholars and judges exist. A helpful dichotomy can be used to classify the wide-ranging approaches to this case.⁷³ Approaches to *Skidmore* can be categorized as either “independent judgment” interpretations or “sliding-scale” interpretations.⁷⁴ Scholars use these labels as tools to help make sense of the differing approaches used by jurists. The two approaches differ in the amount of deference they award to agencies.

1. The Independent Judgment Approach

The “independent judgment” approach gives little to no deference to agencies in the court’s evaluation. The approach interprets the “weight” that *Skidmore* affords agencies to be no more than the weight every litigant receives based on the legal merits of the litigant’s interpretation.⁷⁵ That means agencies receive no deference and agency interpretations are only adopted if the Court agrees with them.

The independent judgment approach characterizes many *Skidmore* opinions. *Christensen v. Harris County* provides an example of the Supreme Court applying this form of *Skidmore*, as the court considered exclusively the persuasiveness of the agency’s interpretation in its analysis.⁷⁶ After conducting their own independent analysis, the Court found the agency’s interpretation generally unpersuasive and thus chose not to follow it.⁷⁷

White v. Burlington Northern & Santa Fe Railway Co. offers an example of a circuit court applying the independent judgment

entire decision (without keycites) can be printed onto three pages from Westlaw. This is a far cry from modern Supreme Court cases. *See, e.g.*, *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022) (running over 100 pages).

73. *Hickman & Krueger, supra* note 21, at 1251–55 (detailing the two different classifications of *Skidmore* used).

74. *See infra* Part I.C.1–2.

75. *Hickman & Krueger, supra* note 21, at 1252 (“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.”).

76. *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (finding agency opinion letters were “entitled to respect” under our decision in [*Skidmore*] but only to the extent that those interpretations have the ‘power to persuade.’” (first quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); and then citing *EEOC v. Arabian Am. Oil Co.*, 499 U. S. 244, 256–58 (1991))).

77. *Id.* at 577–78.

approach.⁷⁸ In *White*, the Equal Employment Opportunity Commission (EEOC) filed an amicus brief asking the court to adopt the EEOC's definition of "adverse employment action" used within their guidelines.⁷⁹ The Sixth Circuit did not offer a *Skidmore*-factor analysis; rather, it merely quoted *Skidmore* for the notion that it can resort to agency material for guidance as a "body of experience."⁸⁰ The court proceeded to reject the agency's interpretation based on its own independent judgment and instead utilized the definition of "adverse action" it had used in its prior cases.⁸¹

Advocates of the independent judgment model focus their *Skidmore* analyses on "the power to persuade" language mentioned previously.⁸² They compare the respect that *Skidmore* mandates with that of a typical party and find there is no substantive difference between the two.⁸³ This understanding of *Skidmore* sees it doing nothing more than stating the obvious. Perhaps the most famous proponent of this view of *Skidmore* was

78. See Hickman & Krueger, *supra* note 21, at 1311 (listing the case in its appendix as exercising independent judgement).

79. *White v. Burlington N. & Santa Fe Ry. Co.*, 364 F.3d 789, 798 (6th Cir. 2004), *aff'd*, 548 U.S. 53 (2006) ("In this appeal, *White* and the EEOC, which has filed an *amicus curiae* brief on *White's* behalf, urge us to revise our definition of adverse employment action for purposes of Title VII retaliation cases and adopt the interpretation included in the EEOC Guidelines.").

80. *Id.* at 799 ("Although EEOC Guidelines are not binding on the courts, they 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" (quoting *Skidmore*, 323 U.S. at 140)).

81. *Id.* at 798, 800 ("We therefore reject *White's* and the EEOC's request that we adopt a new definition of adverse employment action for purposes of Title VII retaliation cases, and we reaffirm the definition that we have developed in cases such as *Kocsis* and its progeny. Since the adverse-employment action element developed by this Circuit is an exception to a broad, strictly literal reading of Title VII's anti-discrimination provisions, we will continue to define the exception narrowly so as not to frustrate the purpose of Title VII while deterring lawsuits over trivial matters.").

82. See *supra* note 76 and accompanying text.

83. See Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 565 (1985) ("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.' Deference in this sense is no more than 'courteous regard.' The argument's *pedigree* adds nothing to the persuasive force inherent in its reasoning."). But see Woodward & Levin, *supra* note 28, at 332 ("Hence the courts approach agency interpretations with a measure of respect *that is distinct from*, though not wholly divorced from, their assessment of the inherent persuasiveness of the agencies' arguments." (emphasis added)).

Justice Scalia.⁸⁴ In his dissent in *Mead*, he stated: “Justice Jackson’s eloquence notwithstanding, the rule of *Skidmore* deference is an empty truism and a trifling statement of the obvious: A judge should take into account the well-considered views of expert observers.”⁸⁵ Subscribers to the independent judgment model of interpretation largely agree in their views on *Skidmore*, save for a few more nuanced interpretations.⁸⁶

But how accurate is this interpretation of *Skidmore*? Proponents of the independent judgment model focus on the *Skidmore* decision’s “power to persuade” language.⁸⁷ But *Skidmore* contains additional guidance for courts examining agency interpretations, instructing them to look at the “thoroughness evident in [the agency’s] consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements”⁸⁸ Courts applying the independent judgment version of *Skidmore* seem to gloss over this language.⁸⁹ In sum, the independent

84. See *United States v. Mead Corp.*, 533 U.S. 218, 250 (2001) (Scalia, J., dissenting).

85. *Id.* Justice Jackson is the author of the *Skidmore* decision.

86. One such nuanced form of the independent judgment model comes from Peter Strauss. Strauss proposes interpreting *Skidmore* as “*Skidmore* weight,” morphing the case into “an element of independent judicial judgment” whereby judges award weight to agency interpretation to promote efficiency and consistency across the country because the agency likely has an expertise around the statute, as it has been tasked with putting the statute into effect. Peter L. Strauss, “*Deference*” *Is Too Confusing—Let’s Call Them “Chevron Space” and “Skidmore Weight,”* 112 COLUM. L. REV. 1143, 1145–46 (2012). “*Skidmore* weight” also penalizes agencies for changing interpretations over time. Interpretations that have shifted frequently have likely done so to match political whims and are thus entitled to less respect. *Id.* at 1147.

87. *E.g.*, *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000).

88. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (“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.” (emphasis added)). Beyond the *Skidmore* factors, the mere existence of *Skidmore*’s discussion of agency interpretations suggests something more than mere independent judgment. Why would the Court discuss agency interpretations at such length just to treat them exactly the same as other litigants?

89. See Hickman & Krueger, *supra* note 21, at 1268 (“[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.”). Beyond glossing over this language, the author of this Note finds the independent judgment interpretation unpersuasive for another reason. If *Skidmore* really just asks courts to

judgment approach affords no deference to agencies and interprets *Skidmore* as merely restating the obvious proposition that agency interpretations should be thoroughly considered by interpreting judges. This approach is contrasted with the approach discussed in the following Section.

2. The Sliding Scale Approach

The second interpretation is often referred to as the “sliding scale” approach.⁹⁰ The sliding scale approach is an umbrella term that covers a variety of models, all alike in the fact they award some degree of deference to the agency based on the consideration of a variety of factors.⁹¹

The sliding scale approach is illustrated in a variety of opinions. The Supreme Court utilized and explained this approach in *Batterton v. Francis* when it stated: “a court is not required to give effect to an interpretative regulation. Varying degrees of deference are accorded . . . based on such factors as the timing and consistency of the agency’s position, and the nature of its expertise.”⁹²

consider the views of the agency in their interpretations, why mention that? Courts already must consider the views of both parties.

90. *See id.* at 1255 (“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.”).

91. *See id.* (“[T]his 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.”).

92. *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977). As you can see, the Supreme Court appears to jump between independent judgment and sliding scale interpretations of *Skidmore*. Compare *id.* (implementing a sliding scale deference analysis), with *Christensen*, 529 U.S. at 587 (using a “power to persuade” deference analysis). A variety of theories can be posited to explain the jump between these two interpretations, the most plausible being the ideological differences of the justices. *See, e.g.*, Tom S. Clark et al., *Politics from the Bench? Ideology and Strategic Voting in the U.S. Supreme Court*, 214 J. PUB. ECON., Sept. 15, 2022, at 1, 1 (“In the United States, Supreme Court justices often vote along ideological lines.”). The author of this Note generally disfavors simplistic views of judges as puppets of their own ideology, but in the case of *Skidmore*, because its meaning is so indeterminate, it follows that the justices will honestly interpret the case through their own ideological lens to attempt to discern its meaning.

Heartland By-Products, Inc. v. United States offers an example of a circuit court applying a “sliding scale” type of *Skidmore* deference.⁹³ The Federal Circuit reviewed a United States Customs classification ruling and stated it would determine the “degree of deference” to afford Customs based on the ruling’s thoroughness, logic, and fit with prior interpretations.⁹⁴ The Federal Circuit determined that the Customs classification came about from responding to the industry’s concerns,⁹⁵ the explanation that Customs gave was well reasoned,⁹⁶ and Customs had specialized experience in the subject matter.⁹⁷ The application of these factors on the classification ruling indicated that the Federal Circuit should award deference—and it did so.⁹⁸

Courts and legal theorists who apply “sliding scale” interpretations of *Skidmore* share a similar procedure. The way each is structured seems almost *Chevron*-esque,⁹⁹ giving courts steps

93. *Heartland By-Products, Inc. v. United States*, 264 F.3d 1126, 1135–36 (Fed. Cir. 2001) (applying the *Skidmore* factors to determine whether to defer to an agency ruling); see also Hickman & Krueger, *supra* note 21, at 1311 (listing the case as an example of courts applying sliding scale type deference).

94. *Heartland By-Products, Inc.*, 264 F.3d at 1135 (“*Mead* indicates that the following factors are to be evaluated when determining the degree of deference to accord a Customs classification ruling: ‘its writer’s thoroughness, logic and expertness, its fit with prior interpretations, and any other sources of weight.’” (citing *United States v. Mead Corp.*, 533 U.S. 218, 220 (2001))). As the court notes, the above stated factors “echo the factors set forth in *Skidmore* for determining the weight to accord an administrative ruling, interpretation, or opinion.” *Id.*

95. *Id.* (“The revocation ruling was issued pursuant to a notice and comment process, during which numerous members of the sugar industry, including the United States Beet Sugar Association and Heartland, submitted comments in support of and in opposition to the ruling. Customs responded to the two main legal issues raised by the comments when it issued the ruling.”).

96. *Id.* (“The revocation ruling is supported by a logical and well-reasoned explanation published in the Customs Bulletin.”).

97. *Id.* at 1135–36 (“We also note that Customs has ‘specialized experience’ in classifying goods, which lends further persuasiveness to its ruling.”); see also *infra* Part II.C.2 (discussing agency expertise as a possible justification for granting “deference” to agency interpretations).

98. *Heartland By-Products, Inc.*, 264 F.3d at 1135 (“Applying these factors to the classification of Heartland’s sugar syrup, we determine that the revocation ruling is entitled to deference because of its persuasiveness.”).

99. See, e.g., Amy J. Wildermuth, *Solving the Puzzle of Mead and Christensen: What Would Justice Stevens Do?*, 74 *FORDHAM L. REV.* 1877, 1905–12 (2006) (proposing an interpretation of *Skidmore* with an extensive seven-step test that builds off of *Chevron*’s two-step test). The test also includes *Skidmore*’s language and is “guided by two background inquiries: whether the agency has specific expertise on an issue and whether its decision reflects that expertise,

to follow or distinct categories to place cases within.¹⁰⁰ Instead of awarding some indeterminate amount of deference, courts can review the record and categorize the amount of deference they offer.¹⁰¹ These approaches also emphasize a different component of the *Skidmore* opinion than the independent judgment approach: the so-called *Skidmore* factors, i.e., thoroughness in consideration, the validity of reasoning, and consistency with earlier and later pronouncements.¹⁰² Sliding scale approaches frequently highlight or reword the *Skidmore* factors provided in the oft-cited portion of the decision and task courts with weighing each factor against the present case to determine the appropriate degree of deference.¹⁰³ Advocates of something

and whether the process involved in making the decision ensures that the agency's decision will endure." *Id.* Wildermuth argues that a "thumb on the scale" approach, which "affords the agency's determination less than *Chevron* deference but more than no respect whatsoever," is preferable to the sliding scale approach, which affords an agency "*Skidmore* deference [] on a sliding scale 'from great respect on one end . . . to near indifference at the other,'" based on *Skidmore* factor analysis. *Id.* at 1887, 1905 (citations omitted). For purposes of this Note, Wildermuth's "thumb on the scale" analysis is nonetheless a form of the sliding scale approach, as it "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." See Hickman & Krueger, *supra* note 21, at 1255; see also Wildermuth, *supra*, at 1909–12 (arguing that courts should evaluate the *Skidmore* factors in light of agency expertise and the decision-making process to decide whether "the agency's determination warrants deference").

100. Hickman and Krueger propose courts utilize "three attitudinal zones" in analyzing agency interpretations: highly deferential, somewhat deferential, and little/non-deferential. See Hickman & Krueger, *supra* note 21, at 1295–97. In determining where on the scale the agency interpretation should land, courts should be guided by "the overarching principles of expertise and arbitrariness." *Id.* at 1295. Hickman and Krueger suggest that using the attitudinal approach "should ease the burden of . . . application" of *Skidmore* while remaining consistent with the language and themes of *Skidmore*. *Id.*

101. Hickman and Krueger offer the example of *Rocknel Fastener, Inc. v. United States*, where the court strongly deferred to an interpretation because the Customs Service had expertise in the complex regulatory scheme, had been thorough in their analysis, and had been consistent in the way it had been interpreted. *Id.* at 1296 (citing *Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1358 (Fed. Cir. 2001)).

102. See *supra* note 88 and accompanying text.

103. See Hickman & Krueger, *supra* note 21, at 1267–68 ("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 interpretation, and formality of format—in evaluating the administrative interpretation."); Wildermuth, *supra* note 99,

approximating a sliding scale model have also been open to considering factors beyond those specifically enumerated in *Skidmore*.¹⁰⁴ Courts and scholars differ in what factors they apply and to what degree they apply them, which results in inconsistency in application.¹⁰⁵

* * *

So far, this Note has discussed the history and contemporary interpretations of *Skidmore*. This included *Skidmore*'s rise from just one of the many administrative law cases living in the shadow of *Chevron* to becoming one of the preeminent administrative law cases going forward. This Part also discussed the two predominant modern interpretations of *Skidmore*: the independent judgment model and the sliding scale model. The former interprets *Skidmore* as a non-deferential decision, while the latter argues *Skidmore* mandates deference where certain factors are present. Part II builds on this analysis by discussing deference in its entirety—a concept thoroughly intertwined with *Skidmore* and its history.

II. THE FALL OF DEFERENCE: WHAT REMAINS?

Up to this point, this Note has discussed *Skidmore* in the practical sense. How should courts apply *Skidmore*? What degree of deference should they afford agency interpretations? But perhaps the more important question lurking in the background is *why* would courts defer? And what does deference even mean? Part II of this note answers these underlying questions.

Section A explores the different types of “deference” discussed in the administrative law sphere. Section B explores the viability of judicial deference and its justifications in the wake of the *Loper Bright* decision. Finally, Section C explores the

at 1909–12 (mentioning frequently how courts should apply the “*Skidmore* factors” in their analysis).

104. See Kenneth Culp Davis, *Administrative Rules—Interpretative, Legislative, and Retroactive*, 57 YALE L.J. 919, 934–35 (1948) (“Degrees of authoritative weight of interpretative rules may depend upon such factors as the extent of judicial confidence in the particular agency and the relative skills of administrators and judges in handling the particular subject matter.”). *Skidmore* also seems to imply the existence of more factors than it describes. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (concluding with the catch-all “all those factors which give it power to persuade, if lacking power to control”).

105. See Hickman & Krueger, *supra* note 21, at 1281 (“The cases reveal disparate approaches to which [*Skidmore*] factors should be applied first, how the factors relate to each other, and what each factor means.”).

historical justifications that have been provided for judicial deference to agencies.

A. JUDICIAL DEFERENCE EXPLORED

Deference as a concept appears frequently in American law, but it is seldom defined with specificity.¹⁰⁶ When lawyers discuss “deference” in the context of administrative law, they are really discussing two separate things: epistemic deference and doctrinal deference.¹⁰⁷

1. Epistemic Deference

First, deference could merely be judicial decision-makers giving weight and respect to the views of a particular party.¹⁰⁸ That definition might raise more questions than answers, so an example can help illuminate its meaning. Imagine you are assigned a take-home multiple-choice assignment in a high school math class. Suppose you reach a particularly difficult question in which the answer isn’t immediately clear to you. There are four options, each represented by the first four letters of the alphabet. Your friend Martha believes the answer is “C.”¹⁰⁹ If you are at all influenced by Martha’s suggestion, or if you consider it in selecting your answer, you are affording Martha epistemic deference. This example also illustrates the degree that epistemic deference can vary. For example, you could afford Martha’s suggestion much more weight if you knew she was a state

106. See GARY LAWSON & GUY I. SEIDMAN, *DEFERENCE: THE LEGAL CONCEPT AND THE LEGAL PRACTICE* 3 (2020) (“The term ‘deference’ is tossed about routinely in American law and scholarship, but it is very rare to see the term carefully defined or analyzed. Everyone is just supposed to know what it means.”); see also Monaghan, *supra* note 26, at 4–5 (“The notion of deference is also troublesome. It is not a well-defined concept but rather an umbrella that has been used to cover a variety of judicial approaches.”).

107. PAUL DALY, *A THEORY OF DEFERENCE IN ADMINISTRATIVE LAW* 7–8 (2012) (laying out the distinction between epistemic and doctrinal deference). Daly is far from the only scholar to notice this distinction, but his terminology is particularly clear. See, e.g., Diver, *supra* note 83, at 565 (“At one extreme, deference might mean nothing more than ‘respectful or courteous regard.’ . . . At the other extreme, ‘deference’ might mean that an administrative interpretation is decisive as to the statute’s meaning.” (footnote omitted)).

108. See DALY, *supra* note 107, at 7 (“The notion here is that deference involves the paying of respect to the decisions of others by means of according weight to those decisions.”).

109. Assume for purposes of this hypothetical that collaboration with classmates is allowed.

math competition champion. Conversely, you could award her opinion less weight if you knew that Martha was a poor student who didn't pay attention in class. Regardless of the degree of weight, this type of deference would be classified as epistemic.

Prior to *Loper Bright*, *Skidmore* was often viewed as the poster child of epistemic deference because of its language about agency interpretations having only as much weight as their "power to persuade."¹¹⁰ Many in the administrative law sphere have critiqued this type of deference as problematic; for example, Justice Scalia described this interpretation of deference as "mealy-mouthed" and argued such deference is meaningless.¹¹¹ Others have cautioned that such deference can lead to fruitless circular reasoning.¹¹²

2. Doctrinal Deference

Second, deference could be judicial decision-makers giving up their decision-making authority to another entity, subject to certain restrictions.¹¹³ To return to our previous example of the multiple-choice question and Martha's suggestion: Doctrinal deference would require that you defer to Martha's answer entirely. If she says the answer is C, you need to answer C—even if you think the answer may be something different.¹¹⁴ In a sense, you are giving up your authority to answer the question entirely to Martha.

110. See *id.* at 21 (listing *Skidmore* as an example of "epistemic deference in practice"); see also *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (using "power to persuade" language).

111. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514 (1989) (stating that this view of deference doesn't mean "anything more than considering those views with attentiveness and profound respect, before we reject them").

112. DALY, *supra* note 107, at 22 ("Tom Hickman has gone further, suggesting that a 'circularity' infects the *Skidmore* approach, for a court 'cannot know whether the reasons supplied at the time are worthy of respect until it has first determined what reasons are sufficient to justify the decision.'" (quoting TOM HICKMAN, PUBLIC LAW AFTER THE HUMAN RIGHTS ACT 151 (2010))).

113. *Id.* at 8 ("Rather than simply paying respect to the decisions of another, one might allocate authority to another to make binding decisions. Such authority need not be absolute: its exercise might be subject to limitations of, to take a pertinent example, reasonableness. Decisions are binding, as long as they are, say, reasonable. I attach the label of *doctrinal deference* to this notion.").

114. Note the complete absence of discussions of "weight" in doctrinal deference conversations. The other party's decision is so "weighty" as to subsume all other possible factors.

Doctrinal deference better encompasses the typical, ordinary meaning of the word “defer.”¹¹⁵ The textbook example of doctrinal deference is, of course, *Chevron*, which recognizes an implicit delegation to agencies as a justification for the court’s *doctrinally* deferring to agency interpretations.¹¹⁶ *Chevron* step one excludes egregious interpretations, but deference doctrines with slight restrictions still fit within the above-stated definition.¹¹⁷ Like epistemic deference, this form of deference has been extensively critiqued, as will be discussed later.¹¹⁸ The viability of each form of deference in the post-*Loper Bright* world is discussed in the following section.

B. THE BEST-MEANING THEOREM

The result of the *Loper Bright* decision is clear—it killed doctrinal deference and heavily restricted the space in which epistemic deference has room to operate. To understand why, it is necessary to take another look at *Loper Bright* and to explore an aspect of the decision that may be overlooked in the excitement of *Chevron*’s overruling.

The Court in *Loper Bright* stated that a judge’s interpretative task when interpreting statutes is to determine the “single,

115. See LAWSON & SEIDMAN, *supra* note 106, at 72 (“In ordinary conversation, when one says to another, ‘I defer to your judgment’—regarding, for example, where to go to dinner tonight—that normally means the deferring party is *yielding entirely* to the judgment of the other party.”).

116. See *infra* notes 143–48 and accompanying text. Recall that *Chevron* is built on the idea that where statutes are at all ambiguous, Congress has implicitly delegated actual decision-making to the agency. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (“If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.”).

117. See *infra* note 146 and accompanying text. *Chevron* doesn’t stand for the proposition that courts should defer to agency interpretations no matter what they may be. Rather, it requires that the statute be ambiguous. See *Chevron*, 467 U.S. at 842–43 (noting that courts should grant agency interpretations *Chevron* deference only “if the statute is silent or ambiguous with respect to the specific issue”). Courts will not give up their decision-making power where the statute is clear. *Id.* (“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.”). Deference that is only applicable under certain conditions can still be considered doctrinal. See DALY, *supra* note 107, at 17–18 (using the *Chevron* decision as an example of “doctrinal deference in practice”).

118. See *infra* Part II.C.1.

best meaning.”¹¹⁹ This is a new paramount goal for interpreters and has forced other courts to recognize the idea that statutes have a *single best meaning* whenever they interpret statutes.¹²⁰ This is despite the fact that many legal minds would argue that no best meaning exists.¹²¹ For example, *Chevron* was built on the premise that statutes have multiple permissible constructions.¹²² Similarly, the dissent in *Loper Bright* rejected the argument that statutes have a single best meaning and found that courts are better off not choosing arbitrarily which interpretation they prefer.¹²³ These two cases are far from the only opinions expressing skepticism that best meanings even exist.¹²⁴

119. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2266 (2024).

120. *Id.* (“Courts instead understand that such statutes, no matter how impenetrable, do—in fact, must—have a single, best meaning. That is the whole point of having written statutes . . .”). Note that the Court uses the phrase “best meaning,” not “best reading,” although both are used in the decision. *See id.* (referring to the “best reading” of a statute). Frankly, it’s unclear if the Court uses the two interchangeably or not. *See id.* (stating that statutes have a “best meaning,” then stating courts should “use every tool at their disposal to determine the *best reading*. . . .” (emphasis added)). Perhaps the potential difference is best conceptualized like this: “best reading” is the best that a particular judicial interpreter can do, while “best meaning” is simply the best interpretation possible.

121. *See, e.g.*, Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2120 (2016) (“One judge will say that the statute is clear, and that should be the end of it. The other judge will respond that the text is ambiguous, meaning that one or another canon of construction should be employed to decide the case. Neither judge can convince the other. That’s because there is no right answer.”); J. A. Corry, *Administrative Law and the Interpretation of Statutes*, 1 U. TORONTO L.J. 286, 290 (1935) (“The meaning of a statute is then, a judicial creation, in the light of social demands. And since we can never know all the possible situations, we can never possess its full meaning.” (citation omitted)). Attentive readers may note that Justice Kavanaugh is in the majority for the *Loper Bright* decision, which seems to argue the complete opposite—how does one reconcile this view with the *Loper Bright* decision? Perhaps the Justice has changed his mind on whether there is a right answer.

122. *Chevron*, 467 U.S. at 843 (“Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”).

123. *Loper Bright*, 144 S. Ct. at 2297 (Kagan, J., dissenting) (listing a series of cases dissecting ambiguous statutes and noting that “[i]n each case, a statutory phrase has more than one reasonable reading. And Congress has not chosen among them: It has not, in any real-world sense, ‘fixed’ the ‘single, best meaning’ at ‘the time of enactment’ (to use the majority’s phrase). A question thus arises: Who decides which of the possible readings should govern?” (citations omitted)).

124. *See, e.g.*, *Train v. Nat. Res. Def. Council, Inc.*, 421 U.S. 60, 87 (1975) (“We therefore conclude that the Agency’s interpretation of §§ 110(a)(3) and 110(f) was ‘correct,’ to the extent that it can be said with complete assurance

The idea that statutes have a best meaning appears to be a relatively modern creation. In 1991, Justice Scalia, rather ironically, mentioned the concept to support the idea that the government need not produce the best reading of a statute—they just can't adopt an unreasonable reading.¹²⁵ But going back nearly a century allows one to see a view of the law fundamentally opposed to the Court's new theorem.¹²⁶ That view saw the law as much more malleable, with a range of permissible interpretations allowed.¹²⁷

That history illustrates that the split between the *Loper Bright* majority and the dissent (which echoes the *Chevron* majority) goes further than mere policy disagreements. Indeed, the

that any particular interpretation of a complex statute such as this is the 'correct' one."). Numerous cases use language implying that a range of interpretations is allowed. *See, e.g.*, *Pareja v. Att'y Gen. of U.S.*, 615 F.3d 180, 193 (3d Cir. 2010) ("Accordingly, we perceive no basis for concluding, based on IIRIRA's plain language, that the BIA's interpretation falls outside *the broad range of permissible interpretations* authorized by the statutory language." (emphasis added)); *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 414 (1993) ("Confronted with an ambiguous statutory provision, we generally will defer to a permissible interpretation espoused by the agency entrusted with its implementation.").

125. *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 716 (1991) ("The Government's present argument depends on a showing, not that a natural reading of the HEW regulations produces less than the best reading of the statute, but that it produces an *unreasonable* one."). "Best meaning" as an abstract concept has appeared in just three Supreme Court cases. Two are concurrences by Justice Thomas critiquing doctrines affording deference to agencies. *Michigan v. EPA*, 576 U.S. 743, 762 (2015) (Thomas, J., concurring) (critiquing *Chevron* and arguing it means ambiguity gives agencies authority "not to find the best meaning of the text, but to formulate legally binding rules to fill in gaps based on policy judgments made by the agency rather than Congress"); *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 123–24 (2015) (Thomas, J., concurring) (critiquing another administrative law deference doctrine and stating that "[r]ather than judges' applying recognized tools of interpretation to determine the best meaning of a regulation, [the doctrine] demands that courts accord 'controlling weight' to the agency interpretation of a regulation"). The last is *Loper Bright*. *See Loper Bright Enters.*, 144 S. Ct. at 2266.

126. *See Corry, supra* note 121, at 290 (1935) ("The statute, it is said, must be interpreted according to the plain literal meaning of the words used without regard to the intention of anyone. This view assumes that words have definite and exact meanings and invites a philosophical discussion about the meaning of meaning. However, it is surely clear that they do not have the exactness of mathematical symbols and cannot have the same definiteness of content. . . . The meaning of a statute is then, a judicial creation, in the light of social demands. And since we can never know all the possible situations, we can never possess its full meaning." (citation omitted)).

127. *Id.* at 291 ("In many cases, there is no logical compulsion on the judge to accept a single meaning; two or more possible meanings are open to him.").

two sides appear to disagree about how the law works. The majority appears to hold, as a metaphysical concept, that there is an ultimate goal for judicial interpreters to strive for: a best meaning.¹²⁸ In contrast, the dissent denies the existence of this “best meaning.”¹²⁹ Regardless of which view of the law is more persuasive, *Loper Bright* has made the best meaning theorem into law. This development must change the way we approach statutory interpretation and, in particular, deference.¹³⁰

Under the best meaning theorem, something like doctrinal deference can no longer survive. Such deference requires courts to give up their quest to find the best meaning and awards the task to someone else—an agency, for example.¹³¹ Epistemic deference is similarly problematic where it causes the court to choose an interpretation that it otherwise wouldn’t have chosen, because it necessitates the court to stray away from what it views as the “single, best meaning.”¹³² What we are left with is

128. See *Loper Bright*, 144 S. Ct. at 2266 (asserting that best meanings are “fixed at the time of enactment” (quoting *Wis. Cent. Ltd. v. United States*, 585 U.S. 274, 284 (2018))). For an alternative view of statutes, see Corry, *supra* note 121, at 291 (“The intention of the legislature cannot be found, and there is no literal meaning which automatically resolves every case. In many cases, there is no logical compulsion on the judge to accept a single meaning; two or more possible meanings are open to him. In making his choice, he makes law in spite of his protests to the contrary.”).

129. *Loper Bright*, 144 S. Ct. at 2297 (Kagan, J., dissenting) (“[A] statutory phrase has more than one reasonable reading. And Congress has not chosen among them: It has not, in any real-world sense, ‘fixed’ the ‘single, best meaning’ at ‘the time of enactment’ (to use the majority’s phrase).”).

130. See Diver, *supra* note 83, at 552 (“Each generation has its theory of statutory interpretation.”). A question outside the scope of this Note, but worth further discussion: Is the majority in *Loper Bright* right that each statute has a “best meaning”? The author of this Note believes so—or, at the very least, lawyers and judges act as if it is true. When law students spend time discussing a statutory interpretation case or when a judge considers statutory arguments from parties, such a discussion seems to necessitate a right answer. If not, such discussion seems to be nothing more than a charade.

131. See *Mayfield v. U.S. Dep’t of Lab.*, 117 F.4th 611, 619–20 (5th Cir. 2024) (questioning if *Skidmore* can serve as a deferential doctrine considering the Supreme Court’s understanding of statutes having “best reading[s]”).

132. See *supra* note 108 and accompanying text. Many authors have noted that “deference” (whatever the form) is really only worth noting when the court moves away from what it views as the best interpretation, or in other words, acting as it otherwise wouldn’t have. See, e.g., Monaghan, *supra* note 26, at 5 (“Deference, to be meaningful, imports agency displacement of what might have been the judicial view *res nova*—in short, administrative displacement of judicial judgment.”); Farina, *supra* note 15, at 454 n.10 (“A court following the deferential model declares that the statute means what the agency says it does (so

limited space for epistemic deference to operate. It can only be used by courts to the extent that it *assists* them in finding that “single best meaning.”¹³³

This is a small sphere in which to operate because, theoretically, a canon detailing respect to an agency interpretation offers *little to no* help in determining the best meaning of a statute.¹³⁴ Supposing there is a best meaning, what an agency *believes* to be the best reading would have no discernible impact on what that best meaning is.¹³⁵ *Loper Bright* is clear that it’s the courts’ job alone to determine what the best meaning of a statute is.¹³⁶ What we are therefore left with is this: The best meaning theorem means any doctrine considering an agency interpretation must “help courts identify the meaning of a text

long as the agency’s position is not irrational) even if the court would declare a different meaning were the interpretive question to rest in its hands alone.”)

133. Cf. Woodward & Levin, *supra* note 28, at 336 (discussing how the Supreme Court’s [pre-*Chevron*] administrative law jurisprudence is permissible because courts aren’t avoiding their job of interpretation but are using deference to agencies as the best way to reach the meaning of a term).

134. Cf. Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 123–24 (2010) (“Substantive canons are in significant tension with textualism . . . insofar as their application can require a judge to adopt something other than the most textually plausible meaning of a statute.”); see also Lopez v. Bondi, 151 F.4th 1196, 1198 (9th Cir. 2025) (Bumatay, J., dissenting) (“[T]he right question is, and always is, ‘what’s the best reading of the statute?’ Even if an interpretation is thorough, well-reasoned, and consistent with some authorities, that doesn’t mean it’s the best one. And ‘[i]n the business of statutory interpretation, if it is not the best, it is not permissible.’ . . . We don’t then check whether the Executive branch agrees with the plain meaning. We don’t check because we don’t care. The law governs—not agency interpretation. So deference and respect have nothing to do with this question.” (quoting *Loper Bright*, 144 S. Ct. at 2244)).

135. Suppose one is attempting to solve a complex math equation. Then suppose I, the author of this Note, tell you I think the answer is twelve. You would tell me that’s all well and good, however, what I *think* the answer is has no actual impact on what the actual answer to the equation is. If we accept that all statutes have a transcendent, best meaning, interpretations do nothing to help determine this “best meaning.” The *Loper Bright* decision suggests this as well. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2266 (2024) (“Perhaps most fundamentally, *Chevron*’s presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do.”).

136. *Id.* at 2266–67 (finding judges are the proper actors to determine the meaning of a statute); see also Silvio Augusto Lima Carneiro v. Att’y Gen. U.S., No. 25-1060, 2025 WL 3281409 at *3 (3d Cir. Nov. 25, 2025) (Matey, J., concurring) (“[I]n easy and hard cases alike, our task is the same: to identify the statute’s ‘single, best meaning.’” (quoting *Loper Bright*, 144 S. Ct. at 2266)).

rather than allow the Executive Branch to displace it.”¹³⁷ As this Note will later argue, a tiebreaker fits this narrow space.¹³⁸

C. JUSTIFICATIONS FOR DEFERENCE

Given the requirements that *Loper Bright* imposes, what justifications for deference (if any) can survive? Although dozens of justifications have been proffered, two have dominated: implicit delegation of authority¹³⁹ and agency expertise.¹⁴⁰ The first has faded to an anachronism,¹⁴¹ while the second continues on in modern administrative law jurisprudence in some fashion.¹⁴²

1. Implicit Delegation of Authority

Perhaps the most common justification for judicial deference to agencies offered in the last fifty years is an implied delegation of authority to agencies to resolve ambiguity within statutes. This justification famously appeared in the *Chevron* decision.¹⁴³ “If Congress has explicitly left a gap for the agency to fill,” the agency is free to fill that gap.¹⁴⁴ Similarly, if Congress hasn’t explicitly delegated authority, “the legislative delegation to an agency on a particular question is implicit rather than explicit.”¹⁴⁵ This line of reasoning means a court that refuses to accept an agency’s interpretation is “substitut[ing] its own construction of a statutory provision” and going against the will of Congress.¹⁴⁶ This implicit delegation of authority is deeply

137. *Id.* at 2271.

138. *See infra* Part III.A.

139. *See infra* Part II.C.1.

140. *See infra* Part II.C.2.

141. *See Loper Bright*, 144 S. Ct. at 2265 (“Chevron cannot be reconciled with the APA, as the Government and the dissent contend, by presuming that statutory ambiguities are implicit delegations to agencies.”).

142. *See id.* at 2251–52 (“An agency’s interpretation of a statute ‘cannot bind a court,’ but may be especially informative ‘to the extent it rests on factual premises within [the agency’s] expertise.’ Delegating ultimate interpretive authority to agencies is simply not necessary to ensure that the resolution of statutory ambiguities is well informed by subject matter expertise.” (quoting *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 98 n.8 (1983))).

143. *See Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

144. *Id.*

145. *Id.* at 844.

146. *Id.*

connected with another idea: the separation of powers.¹⁴⁷ Under this justification, when courts choose not to defer to agency interpretation, they are stepping outside their own authority and infringing on the domains of the other branches of government.¹⁴⁸

In the years after *Chevron*, many scholars have disputed this justification for deference to agency interpretations.¹⁴⁹ Many have pointed out that the Court has treated the implicit delegation of authority as the only possibility for gaps in statutes, even though three other possibilities are just as probable.¹⁵⁰ Congress may want the judiciary to resolve the ambiguity; it may think there is no ambiguity to be resolved in the first place; or it may have “no intent whatsoever about interpretive responsibility or its allocation.”¹⁵¹ These critics have suggested

147. See Farina, *supra* note 15, at 466 (“Power exercised by someone other than its designated possessor is power abused. Deference is necessary, *Chevron* argues, to avoid judicial usurpation of functions Congress wished to entrust to the agency.”). Interestingly enough, separation of powers arguments have been made on the opposite end of the spectrum, with many arguing *Chevron* runs afoul of separation of powers by calling on judges to give up their constitutionally prescribed duties. See, e.g., Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273–75 (2024) (Thomas, J., concurring) (“*Chevron* compels judges to abdicate their Article III ‘judicial Power.’”); see also Michigan v. EPA, 576 U.S. 743, 760–64 (2015) (Thomas, J., concurring) (arguing *Chevron* runs afoul of “Article III’s Vesting Clause, which vests the judicial power exclusively in Article III courts”); Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 140 S. Ct. 789, 789–91 (2020) (statement of Gorsuch, J., respecting the denial of certiorari) (agreeing with the Court’s decisions to deny certiorari, but arguing *Chevron* was inapplicable because of separation of power concerns).

148. See Farina, *supra* note 15, at 466 (“If the judiciary displaces the conclusions of the legislature’s chosen administrative delegate with its independent views on statutory meaning, it frustrates the will of a coordinate branch for its own aggrandizement.”).

149. See, e.g., Merrill, *supra* note 25, at 995 (“Congress has never enacted a statute that contains a general delegation of interpretative authority to agencies. The very practice of enacting specific delegations of interpretative authority suggests that Congress understands that no such general authority exists. Moreover . . . the Administrative Procedure Act . . . suggests that Congress contemplated courts would always apply independent judgment on questions of law . . .”).

150. Farina, *supra* note 15, at 468–69 (posing various scenarios that could explain statutory ambiguities).

151. *Id.* It should be noted, many prominent proponents of *Chevron* recognized this presumption was frequently a judicial fiction but argued it was worth adopting regardless. See Scalia, *supra* note 111, at 517 (“[T]o tell the truth, the quest for the ‘genuine’ legislative intent is probably a wild-goose chase anyway. In the vast majority of cases I expect that Congress *neither* (1) intended a single result, *nor* (2) meant to confer discretion upon the agency, but rather (3) didn’t

that *Chevron's* justification for deference was an aberration in the administrative jurisprudence.¹⁵²

The Court in *Loper Bright* agreed with the sentiments of these scholars and wholeheartedly rejected the idea of implicit delegation.¹⁵³ The Court detailed a variety of situations where Congress had no implicit delegation to agencies regarding statutory interpretations,¹⁵⁴ and it pointed out that even the *Chevron* decision itself contemplated these very situations.¹⁵⁵ The Court also noted that nowhere else in the law is ambiguity considered an implicit delegation, implying *Chevron* is an unwelcome departure from typical statutory interpretation.¹⁵⁶ With

think about the matter at all. If I am correct in that, then any rule adopted in this field represents merely a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate.”); see also THOMAS W. MERRILL, *THE CHEVRON DOCTRINE* 75 (2022) (“Indeed, [implied delegation by Congress] was wholly made up. Congress has on multiple occasions sought to say the opposite—that courts should exercise independent judgment in interpreting agency statutes.”).

152. See Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735, 742 (2002) (arguing *Chevron* “relocated the basis for judicial deference from expertise to an implied delegation of lawmaking power”).

153. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2265 (2024) (“*Chevron* cannot be reconciled with the APA, as the Government and the dissent contend, by presuming that statutory ambiguities are implicit delegations to agencies.”).

154. The Court didn’t say that Congress never implicitly delegated. After *Chevron* became dominant it’s almost certain Congress did at times leave things intentionally vague as implicit delegation. See Scalia, *supra* note 111, at 517 (“Congress now knows that the ambiguities it creates, whether intentionally or unintentionally, will be resolved . . . by a particular agency . . .”). But because this delegation was never explicit, there’s no cognizable way for courts to tell the difference. Beyond this issue, Congress intending something of a statute seems to run afoul the predominant form of statutory interpretation today: originalism. Most forms of originalism criticize the concept of Congressional intent as impossible to determine and emphasize it shouldn’t be the focus of analyzing statutory language.

155. Compare Farina, *supra* note 15, at 468–69 (providing examples of situations where statutory ambiguity doesn’t entail an implied delegation by Congress), with *Loper Bright*, 144 S. Ct. at 2265 (“As *Chevron* itself noted, ambiguities may result from an inability on the part of Congress to squarely answer the question at hand, or from a failure to even ‘consider the question’ with the requisite precision.” (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984))).

156. *Loper Bright*, 144 S. Ct. at 2266 (“Courts, after all, routinely confront statutory ambiguities in cases having nothing to do with *Chevron*—cases that do not involve agency interpretations or delegations of authority. Of course, when faced with a statutory ambiguity in such a case, the ambiguity is not a

the arrival of *Loper Bright*, this basis for deference is no longer viable, and therefore cannot be a plausible basis for any theory extrapolating from *Skidmore*.¹⁵⁷ Understanding this exclusion will help rule out certain justifications going forward.

2. Agency Expertise

Another possible justification for “deference” to agency interpretations is agency expertise.¹⁵⁸ The idea behind this deference is simple: agencies, by their nature (whether that be through staff interactions or communications with Congress), better understand how to interpret the statute properly.¹⁵⁹ Courts defer because the agency has become a pseudo-expert in statutory schemes due to its continuous exposure to that area of the law.¹⁶⁰

This justification is often connected to the *Skidmore* decision, which seemed to embrace it as justification for deference, at least in part.¹⁶¹ Expertise has also been a consistent theme among Supreme Court cases, with many cases that pay respect

delegation to anybody, and a court is not somehow relieved of its obligation to independently interpret the statute.”).

157. Only *implicit* delegations of authority have lost their viability. *Explicit* delegations remain viable. In fact, the *Loper Bright* court reaffirmed where interpretive power is delegated, courts are forbidden to infringe. See Merrill, *supra* note 12, at 256–57 (“Although *Loper Bright* rejected the idea that ambiguity can be the basis for deferring to agency interpretations, it contained several passages indicating that delegations by Congress of interpretive authority to agencies are permissible. . . . It noted with approval that Congress has enacted statutes ‘expressly delegat[ing] to an agency the authority to give meaning to a particular statutory term.’” (quoting *Loper Bright*, 144 S. Ct. at 2262)).

158. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN L. REV. 363, 368 (1986) (“[O]ne might believe that judges should pay special attention to the agency because the agency knows more about the particular area of the law than does the court.”).

159. See *id.* (noting that agencies may have special insight into the relevant substantive area of law and legislative drafting process).

160. *Id.*; Woodward & Levin, *supra* note 28, at 332 (“The primary justification for [judicial deference] is that agencies tend to be familiar with, and sophisticated about, statutes that they are charged with administering. This expertise is assumed to result not only from the frequency of an agency’s contact with the statute, but also from its immersion in day-to-day administrative operations that reveal the practical consequences of one statutory interpretation as opposed to another.” (footnote omitted)).

161. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (“We consider that the rulings, interpretations and opinions of the Administrator under this Act, 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.”).

to agencies relying on it as their foremost justification.¹⁶² But this justification is not without its problems or critics. First, judges run into an obvious question: Do agencies even have expertise in the relevant field? This difficulty creates two options for courts: (1) they can conduct a rigorous review of the agency to determine the degree of expertise the agency has in the action being reviewed; or (2) they could merely assume agencies have expertise in all the fields they are acting in—an assumption sure to be incorrect at certain points.¹⁶³ But even supposing an agency has expertise in a given area, is that a valid justification for the courts to delegate their constitutionally prescribed role to a different entity?

Legal scholars differ in their answers to that question, with some arguing that a court deferring solely because of expertise abdicates and muddies its duty “to say what the law is.”¹⁶⁴ *Loper Bright* seemed to shut down any notion of delegation to other branches, but it left the door open to whether expertise could somehow inspire the judge’s interpretive task, albeit in a limited fashion.¹⁶⁵

* * *

In summary, deference refers to two separate things. Doctrinal deference means delegating decision-making authority to a different entity entirely, while epistemic deference means merely giving that entity some degree of “weight.” Both are restricted by the *Loper Bright* decision and its promotion of the

162. Krotoszynski, *supra* note 152, at 739–42 (describing agency expertise as being “the source of judicial deference to [an] agency”); *see also* SEC v. Chenery Corp., 332 U.S. 194, 207–08 (1947) (deferring to agency expertise); FTC v. Cement Inst., 333 U.S. 683, 727 (1948) (finding that the agency exhibited familiarity with the problems before it as “Congress originally anticipated”).

163. *See Chenery Corp.*, 332 U.S. at 214–15 (Jackson, J., dissenting) (“Is fictitious experience to be conclusive in matters of law and particularly in the interpretation of statutes, as the Court’s opinion now intimates . . . ?”).

164. *See* Scalia, *supra* note 111, at 514 (“If it is, as we have always believed, the constitutional duty of the courts to say what the law is, we must search for something beyond relative competence as a basis for ignoring that principle when agency action is at issue.”).

165. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2251–52 (2024) (“An agency’s interpretation of a statute ‘cannot bind a court,’ but may be especially informative ‘to the extent it rests on factual premises within [the agency’s] expertise.’ Delegating ultimate interpretive authority to agencies is simply not necessary to ensure that the resolution of statutory ambiguities is well informed by subject matter expertise.” (quoting Bureau of Alcohol, Tobacco & Firearms v. FLRA, 464 U.S. 89, 98 n.8 (1983))).

idea of statutes having a “single best meaning.” Anything that doesn’t facilitate courts in determining the single best meaning should be discarded. That means the death of doctrinal deference and a limited space for epistemic deference to operate.¹⁶⁶ Additionally, any form of deference can only be justified through an appeal to agency expertise and not an implicit delegation of authority.

III. THE *SKIDMORE* TIEBREAKER

So, what do we make of *Skidmore*? Is the deference-less independent judgment model the only viable interpretation? As established in Part II, doctrinal deference in the post-*Loper Bright* world cannot work. Yet the independent judgment model falls short as well, because it treats the *Skidmore* factors as superfluous¹⁶⁷ and seems to neglect decades of case law.¹⁶⁸ While *Chevron* is gone, dozens of Supreme Court cases analyzing agency interpretations remain good law and recognize that analyzing agency interpretations should be different from the average litigant’s proposed interpretation.¹⁶⁹ As a way out of the conundrum, this Note proposes the *Skidmore* tiebreaker.

Section A of this Part proposes the *Skidmore* tiebreaker and explains the values underlying this interpretation. Section B discusses why a tiebreaker is particularly fitting for *Skidmore*. Section C further explains the *Skidmore* tiebreaker by comparing it to a similar “rule” existing in baseball, as well as the rule of lenity. Finally, Section D anticipates two objections to the use of *Skidmore* as a tiebreaker and responds to each.

166. See *Dayton Power & Light Co. v. FERC*, 126 F.4th 1107, 1137 (6th Cir. 2025) (Nalbandian, J., concurring) (“Whatever we call *Skidmore’s* lesson—‘deference,’ ‘respect,’ ‘due respect,’ ‘weight,’ ‘consideration,’ ‘careful attention’—the label should not distract from the fact that its referent comes down to persuasion, not control; epistemic, rather than binding, authority.”).

167. See *supra* notes 88–89 and accompanying text.

168. See *infra* notes 171, 177 and accompanying text; see also *supra* notes 28–29.

169. Merrill, *supra* note 25, at 975 (“Still, it would be presumptuous to dismiss [the many factors discussed in pre-*Chevron* cases] as empty rhetoric. Some factors . . . have been invoked as reasons for deferring to executive interpretations for over 150 years.”).

A. THE *SKIDMORE* TIEBREAKER

The *Skidmore* tiebreaker would operate as follows:

Where competing interpretations are at equipoise to an interpreter, courts should resolve conflicts in the agency's favor so long as the agency's reasoning is valid, thorough and its interpretation arises from experience and informed judgment.¹⁷⁰

This tiebreaker reconstructs the language of *Skidmore* as a substantive canon for judges to refer to in interpreting statutes. This canon borrows *Skidmore's* language to communicate the necessity that the agency's interpretation arises from expertise and the thoroughness of its reasoning.¹⁷¹ Note that the tiebreaker operates only when competing interpretations are at "equipoise"—i.e., two or more interpretations that are *equally* plausible.¹⁷² That means it lies at the end of the judge's interpretive

170. I've formatted the proposed tie breaker to replicate the format used by Scalia and Garner when describing canons. See generally ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW passim* (2012). Aficionados of *Skidmore* may note that the tiebreaker doesn't contain anything replicating the "consistency with earlier and later pronouncements" language in the *Skidmore* decision. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). That omission is intentional. The language used by *Skidmore* appears to reference two already recognized administrative law canons:

The names for these two canons are *contemporanea expositio* and *interpres consuetudo*. The former idea is that an executive branch agency tasked with administering the statute near in time to its creation is more likely to know Congress's likely intended meaning. The latter idea is that if this interpretation is longstanding, that is further evidence of its correctness.

ILAN WURMAN, *ADMINISTRATIVE LAW* 105–06 (2d ed. 2024). Note that, unlike the rest of *Skidmore*, these canons (at least arguably) are tools that help the judge determine the best meaning of a statute (beyond merely breaking a tie). Because they are weightier, it would be improper to include them within the tiebreaker because they should be considered by interpreters before the end of their interpretive quest.

171. See *Skidmore*, 323 U.S. at 140 ("We consider that the rulings, interpretations and opinions of the Administrator . . . 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." (emphasis added)). A natural follow-up question to the use of this canon would be, what should an interpreter do if the agency's judgment isn't "valid" or "thorough?" It's likely this wouldn't happen (in fact it may be impossible), considering an agency position that isn't very well thought-out is *exceedingly* unlikely to be at equipoise with a competing interpretation such that the tiebreaker would be necessary.

172. For examples of other tiebreakers, see *infra* Part III.C.1–2. Another way to conceptualize when tiebreakers should operate is when a judge's

quest.¹⁷³ Only after all other tools of statutory construction have been exhausted can judges resort to the *Skidmore* tiebreaker.¹⁷⁴ Note as well, this means that where one interpretation is more persuasive to an interpreter than another (even only *slightly*), the tiebreaker is not applied.

Why utilize such a canon? The core justification is *stare decisis*—or rather, the values undergirding the doctrine, which seem to counsel such an approach.¹⁷⁵ While the Supreme Court overruled *Chevron*, decades of case law recognize that agency

interpretive toolkit reveals no “best meaning” at all. *Kisor v. McDonough*, 995 F.3d 1347, 1350 (Fed. Cir. 2021) (Prost, J., concurring) (describing judicial tiebreakers as coming into effect “when descriptive tools do not illuminate a best meaning”). A keen reader may argue that—technically speaking—any element that a judge considers could be considered a tiebreaker. If a judge was presented with two equally likely considerations but then added another element to consider, then that would break the tie. There are two key ways to distinguish regular factors from tiebreakers. Firstly, tiebreakers are utilized for the express purpose of breaking a tie; other typical persuasive factors that a judge considers don’t have solely this purpose. See Adam M. Samaha, *On Law’s Tiebreakers*, 77 U. CHI. L. REV. 1661, 1668 (2010) (arguing considering a rule’s purpose helps differentiate tie breakers from other decisional rules). The second and best way to differentiate a tiebreaker is to consider *when* a judge utilizes it when interpreting a statute. A tiebreaker (unlike other factors considered by a judge) can be used *only* at the end of the judge’s interpretive task. Adam Samaha defines tiebreakers as a “lexically inferior decision rule” that is used “if and only if a lexically superior decision rule fails to rank those same options.” *Id.* at 1669. Consider a shootout, for example, utilized in several different sports. These are tiebreakers because they are only used when all the other rules within the game fail to establish a winner.

173. This Note intends the *Skidmore* tiebreaker to be applicable to individuals who favor textualism and those who prefer purposivism (though the reader may be able to tell the author of this Note favors textualist approaches). Something outside the scope of this Note, but an interesting thought to consider, would be a general ranking of canons of interpretation—which are the most important and which are the least important? Such a ranking may help judges come to more consistent and doctrinally accurate results.

174. The stage at which *Skidmore* is applied is a key interpretive question. See *Lopez v. Bondi*, 151 F.4th 1196, 1198 (9th Cir. 2025) (Bumatay, J., dissenting) (“Simply, the panel ‘asked the wrong question’ by starting with whether the BIA’s interpretation was ‘entitled to respect.’ Rather, the right question is, and always is, ‘what’s the best reading of the statute?’ Even if an interpretation is thorough, well-reasoned, and consistent with some authorities, that doesn’t mean it’s the best one.” (citation omitted)).

175. See Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1016 (2003) (“‘Stare decisis’ is short for *stare decisis et non quieta movere*, which means ‘stand by the thing decided and do not disturb the calm.’ The term ‘stare decisis’ is used in varying ways. At its most basic level, however, stare decisis refers simply to a court’s practice of following precedent, whether its own or that of a superior court.” (footnotes omitted)).

interpretations should be afforded weight and stand for the proposition that agencies should somehow be treated differently from the average litigant.¹⁷⁶ Although it is true that these cases are far from coherent,¹⁷⁷ that doesn't mean that general themes can't be pulled from their pages.¹⁷⁸ Respect for agency interpretations was a core component of American administrative law long before *Chevron*.¹⁷⁹ As far back as 1809, Justice Marshall indicated that agency constructions should be awarded some degree of weight or deference.¹⁸⁰ For centuries, jurists like Justice

176. See Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REGUL. 1, 5 (1990) ("Although no analysis can harmonize all of the pre-*Chevron* cases, some rather clear patterns are evident. . . . Where agencies exercised delegated power to pronounce interpretations in formats bearing the force of law, reviewing courts accepted those interpretations, provided they were reasonable and consistent with statute."); *Aluminum Co. of Am. v. Cent. Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 389 (1984) ("Under established administrative law principles, it is clear that the Administrator's interpretation of the Regional Act is to be given great weight."); *Udall v. Tallman*, 380 U.S. 1, 16 (1965) ("When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration."); *Norwegian Nitrogen Prods. 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. True it also is that administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful.").

177. These cases are clearly inconsistent in their results, but that doesn't necessarily make them entirely inconsistent in the principles they espouse. For example, the case *SEC v. Sloan* could be cited as a case where the Court didn't defer to an agency's construction of a statute. 436 U.S. 103, 118 (1978) ("[T]he construction placed on the statute by the Commission, though of long standing, is . . . inconsistent with the statutory mandate."). But those cases fail to support the proposition that agencies should be given no deference. Go back a few paragraphs in *Sloan* and the Court endorses agency interpretations being given at least some deference. *Id.* ("The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a 'reasonable basis in law.'" (quoting *NLRB v. Hearst Publ'gs*, 322 U.S. 111, 131 (1944))).

178. See Merrill, *supra* note 25, at 975 ("[I]t would be presumptuous to dismiss [pre-*Chevron* cases] as empty rhetoric.").

179. Woodward & Levin, *supra* note 28, at 332 ("Hence the courts approach agency interpretations with a measure of respect that is distinct from, though not wholly divorced from, their assessment of the inherent persuasiveness of the agencies' arguments. . . . Such deference to administrative constructions has been a feature of American law since its earliest days.").

180. *United States v. Vowell*, 9 U.S. 368, 372 (1809) ("If the question had been doubtful, the court would have respected the uniform construction which

Marshall have argued these interpretations made “in pursuance of official duty”¹⁸¹ and grounded in “specialized experience”¹⁸² should be treated differently from that of the average litigant. That history indicates that the idea has merit.¹⁸³

The *Skidmore* tiebreaker—grounded in centuries of case law respecting administrative decisions—allows for a new compromise in the field of administrative law. Although *Chevron* had its problems, the Supreme Court should not be so quick to throw the baby out with the bathwater. The *Skidmore* tiebreaker recognizes the flaws of *Chevron* but affords a measure of respect to agency interpretations. This creates a compromise between the new and the old. Beyond this theoretical justification, the following Section details the practical reasons why a tiebreaker fits the *Skidmore* decision particularly well.

B. WHY A TIEBREAKER FITS *SKIDMORE*

First and foremost, the authoritative meaning of *Skidmore*, as a case, is still indefinite.¹⁸⁴ Its holding is famously arcane and has been the subject of a variety of interpretations. While this is a significant impediment for judges looking to apply *Skidmore*, it does allow the Supreme Court a degree of flexibility in choosing the direction in which they would like to take administrative law. *Skidmore* instructs courts to consider certain factors in their analysis, but it has nothing to say about *how* courts should apply those factors,¹⁸⁵ so the Supreme Court is free to mold *Skidmore* as it pleases.¹⁸⁶ While *Skidmore* makes no specific

it is understood has been given by the treasury department of the United States upon similar questions.”).

181. *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944).

182. *Id.*; see also *supra* Part II.C.2 (exploring the expertise justification for deference).

183. See Anita S. Krishnakumar & Victoria F. Nourse, *The Canon Wars*, 97 TEX. L. REV. 163, 184 (2018) (“How long an interpretive rule has been in effect may be one of the most important factors in determining whether it qualifies as a canon of statutory construction. When an interpretive rule has been around for a while, it is likely to be familiar to members of the legal community.”).

184. See sources cited *supra* note 19 (discussing *Skidmore*’s indeterminate meaning).

185. See *id.*

186. *Loper Bright* obviously didn’t mold *Skidmore* into a tiebreaker. See generally *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2248–49 (2024) (summarizing the holding in *Loper Bright*). But that doesn’t mean the Supreme Court can’t do so in the future. *Loper Bright* would have been an ill fit for declaring such a rule, because the case at its roots isn’t about *Skidmore*, it’s about

reference to the notion of a tiebreaker, this concept is perfectly consistent with a major theme of the decision, which alludes to the idea of agency expertise affecting a judge's decision-making to some degree.¹⁸⁷

Second, a tiebreaker remedies the main issue with *Chevron*. One of the primary problems with *Chevron*, according to the *Loper Bright* Court, is that it took the job of interpretation out of the hands of the judges.¹⁸⁸ *Chevron* was doctrinal deference, which cannot survive *Loper Bright*'s mandates.¹⁸⁹ A tiebreaker fixes this problem: Instead of taking interpretation out of the judge's hands, it facilitates that interpretation.¹⁹⁰ When a judge confronts two equally likely interpretations of a statute, they have no way of distinguishing between the two to determine which is better and a judge simply throwing up his hands and not choosing isn't an option.¹⁹¹ The tiebreaker then becomes a canon that helps the judge determine what the "best

tearing down the old *Chevron* regime. *See id.* at 2248 ("The Administrative Procedure Act requires courts to exercise their independent judgment . . . *Chevron* is overruled."). The Court will move incrementally as it always does in fashioning the future of administrative law, which allows time for the tiebreaker this Note proposes. The current justices still clearly disagree about the actual meaning of *Skidmore*. Hickman, *supra* note 19, at 136 ("Just as was the case with *Chevron*, the justices already seem to have different conceptions of *Skidmore* at present . . .").

187. *See supra* Part II.C.2.

188. *Loper Bright*, 144 S. Ct. at 2273 ("Judges have always been expected to apply their 'judgment' *independent* of the political branches when interpreting the laws those branches enact. And one of those laws, the APA, bars judges from disregarding that responsibility just because an Executive Branch agency views a statute differently." (citations omitted)).

189. *See generally supra* Part II.A.2 (discussing "doctrinal deference").

190. Tiebreakers are already used to assist judges in their interpretations. *See Barrett, supra* note 134, at 117 (describing the rule of lenity as a tiebreaker); *see also* SCALIA & GARNER, *supra* note 170, at 297–98 ("The rule of lenity, however, is a rule of statutory construction whose purpose is to help give authoritative meaning to statutory language."); Woodward & Levin, *supra* note 28, at 336 ("The courts do not defer to agency expertise in order to *avoid* their job of construing a statute. Rather, their approach is the product of a judgment, distilled from decades of case law, that deference may be the most constructive and prudent way to *reach a correct decision* about the meaning of a disputed statutory term.").

191. Ties when interpreting a statute are "intolerable" meaning they cannot merely stand as ties. Samaha, *supra* note 174, at 1708 ("Across the history of modern adjudication, apparently no judge has answered the questions, 'What does this statute mean?' or 'What does this constitutional provision mean?' with the answer, 'I don't know' and left it at that. When litigants will not settle, judges decide controversies one way or another.").

interpretation” actually is.¹⁹² This is applying epistemic deference,¹⁹³ without overruling the “best meaning”¹⁹⁴ of the statute. Without the tiebreaker, the judge would be forced to merely arbitrarily choose between the two equally likely options.¹⁹⁵

Third, the tiebreaker is clean and easy to apply. *Skidmore*, in its current form, is difficult to apply, especially compared to prior methods of analyzing agency interpretations like *Chevron*.¹⁹⁶ The decision itself spits out a variety of factors for courts to consider without guidance on the order or weight to assign to them.¹⁹⁷ As Justice Scalia wrote, *Skidmore* “is a recipe for uncertainty, unpredictability, and endless litigation.”¹⁹⁸ Compare *Skidmore*’s indeterminacy with the clarity the tiebreaker offers. Clarity also explains why *Skidmore*, as a tiebreaker, is

192. The idea of interpreting *Skidmore* as a canon of interpretation is not exclusive to this Note—and in fact, seems to be the favored interpretation among a growing consensus of scholars. See, e.g., Merrill, *supra* note 12, at 267 (“*Loper Bright* appears to contemplate that *Skidmore* will now be used as one of several substantive canons to evaluate agency interpretations whenever they are challenged on judicial review. There is only one standard of review — ‘independent judgment’ — and *Skidmore* is one of several canons of interpretation courts may use in deciding whether the agency interpretation is ‘the best.’”). Peter Strauss’s “*Skidmore* weight” greatly resembles a canon as well. See Strauss, *supra* note 86.

193. See generally *supra* Part II.A.1 (explaining “epistemic deference”).

194. See *supra* note 125 (explaining the judicial precedent surrounding the term “best meaning”).

195. Treating a variable as a tiebreaker resolves ties more than merely treating it like any other variable. Samaha, *supra* note 174, at 1691–92 (“The same variable will usually do more good against ties as a tiebreaker than it will when treated like any other relevant variable. Although I am not aware of a mathematical proof for this proposition, it holds for many situations.”).

196. MERRILL, *supra* note 12, at 257 (“In terms of method, the great strength of the *Chevron* doctrine is unquestionably its adoption of a simple and readily comprehensible formula for determining, in any case, which institution is the preferred interpreter of the statute—the agency or the court. This is no small matter.”). Of course, this simplicity may have come with too steep a cost in *Chevron*’s case. *Id.* at 259 (“In short, the two-step method, as framed by the . . . doctrine, wins points for its ‘attractive simplicity.’ But that simplicity was obtained by compounding two indeterminate standards . . . [T]hey provide inadequate guidance to courts about the relevant values that are central to the process of judicial review of agency interpretations of law.”).

197. “[V]ariables that are controversial or otherwise *costly* to assess might be good candidates for tiebreakers. . . . Tiebreaker variables will not be considered very often if ties are rare. Decisionmakers can then take advantage of a bifurcated decision structure to minimize evaluation of the most taxing variables.” Samaha, *supra* note 174, at 1699.

198. *United States v. Mead Corp.*, 533 U.S. 218, 250 (2001) (Scalia, J., dissenting).

preferable over interpreting *Skidmore* as merely one factor to consider.¹⁹⁹ Considering *Skidmore* on a case-by-case basis (based on confusing measures like expertise) and continuing to modify it depending on each different scenario risks the Court making the same mistakes it made with *Chevron*.²⁰⁰ Applying *Skidmore* on a case-by-case basis fails to further justice in any meaningful way; the sheer indeterminacy of what it directs courts to do means results would vary widely.²⁰¹ Applying *Skidmore* as a tiebreaker promotes less indeterminacy, as it takes *Skidmore's* themes and factors and morphs them into something the judge can feasibly understand and apply.²⁰²

Finally, interpreting *Skidmore* as a tiebreaker remedies the issues with the two predominant interpretations of *Skidmore*. Recall the independent judgment model's deficiency of treating the *Skidmore* factors as superfluous.²⁰³ The *Skidmore* tiebreaker fixes this by utilizing the *Skidmore* factors in determining the best meaning if the tiebreaker applies—making them more than empty words. Recall the sliding scale model's deficiency of forcing courts to move away from the “best meaning” as required by *Loper Bright*.²⁰⁴ The tiebreaker never asks the court to move away from its best meaning; in fact, it facilitates the court's search for that best meaning.²⁰⁵ The tiebreaker once again serves as a compromise between two positions seemingly at odds. In sum, there are a variety of practical reasons why a

199. See *supra* note 86 (explaining the benefits of adopting Peter Strauss's idea of “*Skidmore* weight” to provide consistency in judicial interpretation exercises).

200. Hickman, *supra* note 19, at 136 (noting that the Court's *Skidmore* jurisprudence “raise[s] [its] own set of questions regarding that standard's operation and applicability,” that today's open questions suggest the possibility that more will emerge, and “that the Court again will start to tinker, and with that tinkering add complexity, creating just another complicated framework for judicial review”).

201. See *supra* Part III.B (discussing the indefiniteness of *Skidmore's* authority and the resulting implications for judicial interpretation in the future).

202. Cf. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) (“Predictability, or as Llewellyn put it, ‘reckonability,’ is a needful characteristic of any law worthy of the name. There are times when even a bad rule is better than no rule at all.”).

203. See *supra* note 88 and accompanying text explaining how courts apply *Skidmore* factors to independent fact patterns.

204. See *supra* Part II.B (exploring the best meaning theorem which prevents courts from using any deference doctrine to move away from the best meaning of the statute).

205. See Barrett, *supra* note 134, at 177.

tiebreaker fits *Skidmore*. Moving beyond the justifications, the next Section will illustrate the tiebreaker's intricacies through comparison to other tiebreakers.

C. THE *SKIDMORE* TIEBREAKER AS COMPARED TO TIEBREAKERS IN OTHER AREAS

To help explain how the *Skidmore* tiebreaker would operate, this Note provides two analogies: one from outside the law and one from within the law. Each provides a sample of how tiebreakers operate and helps explain *why* we utilize them.

1. Tiebreakers in Baseball

There is a popular notion in baseball that the “tie goes to the runner.”²⁰⁶ It is the idea that if an umpire is watching a base and cannot tell who touched the base first—the runner or the basemen—then the umpire should rule the runner safe.²⁰⁷ In other words, when faced with a tie, the umpire chooses to side with the runner. As it turns out, tie goes to the runner is nowhere in the rule book for baseball umpires, but that doesn't stop fans and umpires alike from citing the “rule” as gospel.²⁰⁸

Where does this idea come from? Ask a baseball fan, and they'll say it's because it makes the game more fun, or perhaps it benefits the team they root for.²⁰⁹ There is, however, a value

206. See Mike Curkov, *Glad You Asked: Does The Tie Go to the Runner?*, CBS58 NEWS MILWAUKEE (May 28, 2018), <https://cbs58.com/news/glad-you-asked-does-the-tie-go-to-the-runner> [<https://perma.cc/R3F3-YX4U>] (“It's one of the most overused and misunderstood phrases in baseball, ‘the tie goes to the runner.’ Does it?”).

207. PAUL DICKSON, *THE DICKSON BASEBALL DICTIONARY* 873–74 (Skip McAfee ed., 3d ed. 2011) (defining “tie goes to the runner”).

208. Mark Dewdney, “*COME ON, BLUE: TIE GOES TO THE RUNNER!*” *No, It Does Not*, BLEACHER REP. (June 6, 2009), <https://bleacherreport.com/articles/225160-come-on-blue-tie-goes-to-the-runner-no-it-does-not> [<https://perma.cc/63TU-PMPZ>] (expressing frustration at having to continuously explain to coaches that “ties go[ing] to the runner” is a misconception and not an actual rule in baseball). My father worked as an umpire when he was younger, and after I questioned him about the idea that the “tie goes to the runner,” he confirmed he applied it when he umpired and was shocked to learn it doesn't appear in the modern rules. *But see* DICKSON, *supra* note 207 (citing an old umpire guide and a *Chicago Tribune* issue (both from the late 1800's) which state that a tie does in fact go to the runner).

209. Basejester, Comment to *Tie goes to the runner*, UMPIRE EMPIRE (July 29, 2014), <https://umpire-empire.com/topic/59233-tie-goes-to-the-runner> [<https://perma.cc/78YB-T4RR>] (“When a fan yells, ‘Tie goes to the runner!’ from

encoded in this rule that fans would be loath to admit but lives there, nonetheless: Games are more fun when the offense does more. At the same time, it wouldn't be fun to make the game too easy for players to try to get to base.²¹⁰ So the "rule" should only be used when we aren't certain.

Judges, like the bewildered umpire at first base, should resolve a tie with an unwritten rule to promote a value that underlies the system as a whole.²¹¹ For judges, the value should be respect for administrative interpretations²¹² and administrative effectiveness in general.²¹³ But is such a comparison proper? Whether a runner reaches a base is a material concrete fact. Whether an interpretation is the best meaning is abstract.²¹⁴ Is this comparing apples to oranges? Legal realists would certainly say so. But recall the best-meaning theorem discussed earlier.²¹⁵ "[S]tatutes, no matter how impenetrable, do—in fact, must—have a single, best meaning."²¹⁶ The best-meaning theorem's impact is so revolutionary that it allows unusual comparisons like this.

the stands, he's just saying, 'Really close plays should go to the offense, which coincidentally happens to be the team I am rooting for.'").

210. *Cf.* Barrett, *supra* note 134, at 177 ("Canons promoting such values can serve only as presumptions, tie breakers that help judges choose among competing interpretations. When employed as presumptions, extraconstitutional canons are entirely consistent with the norm of faithful agency.").

211. The job of a judge and an umpire are quite similar, save for the outfits. *See* Kavanaugh, *supra* note 121, at 2120 ("Judges are umpires, or at least should always strive to be umpires.").

212. *See supra* note 176 (discussing court decisions and analyses of court decisions in which courts deferred to administrative interpretations when appropriate).

213. *See* SCALIA & GARNER, *supra* note 170, at 63 ("A textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored."); *see also* Citizens Bank of Bryan v. First State Bank, Hearne, 580 S.W.2d 344, 348 (Tex. 1979) ("It is recognized that a statute is to be construed with reference to its manifest object, and if the language is susceptible of two constructions, one of which will carry out and the other defeat such manifest object, it should receive the former construction.").

214. *See generally* Hon. Neomi Rao, *Best Meaning Interpretation*, CATO SUP. CT. REV., 2024–2025, at 7 (describing how courts apply the "best meaning" theory of interpretation in practice).

215. *See supra* Part II.B (discussing the best-meaning theorem).

216. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2266 (2024).

2. Tiebreakers in the Law: Lenity

Tiebreakers like the one proposed previously are nothing new in the law, with the most famous example being the rule of lenity.²¹⁷ It wouldn't be an overstatement to describe the rule of lenity as an ancient canon.²¹⁸ Yet despite its age, the canon remains remarkably relevant in today's world because of its promotion of fairness.²¹⁹ The rule of lenity has been applied by courts in a variety of ways throughout the years.²²⁰ Early versions of the rule of lenity are better characterized as a "rule of strict construction" and were much stronger than the tiebreaker proposed by this Note.²²¹

In the modern era, the predominant interpretation of lenity is as a tiebreaker.²²² Justice Souter's explanation of the rule, for example, stated that "[l]enity applies only when the equipoise of competing reasons cannot otherwise be resolved"²²³ That explanation closely resembles this Note's proposed tiebreaker,

217. See Samaha, *supra* note 174, at 1708 ("[S]ome canons of construction are supposed to be consulted only when other tools of interpretation yield doubt. Among the most famous is the rule of lenity for criminal statutes, which is reserved for the closest cases.").

218. See Barrett, *supra* note 134, at 128–29 (identifying the rule of lenity's appearance in a 16th century treatise).

219. *Id.* at 130 ("Fairness, in other words, demands that the accused be on clear notice of what the law proscribes.").

220. Many would argue too many. See, e.g., SCALIA & GARNER, *supra* note 170, at 268 ("[T]he main difficulty with the rule of lenity is the uncertainty of its application."). Scalia and Garner define the canon as such: "Ambiguity in a statute defining a crime or imposing a penalty should be resolved in the defendant's favor." *Id.* at 296. Keen readers may identify that this definition bears an uncanny resemblance to the *Chevron* doctrine. As Justice Scalia interprets the canon, it certainly appears as such.

221. See Shon Hopwood, *Restoring the Historical Rule of Lenity as a Canon*, 95 N.Y.U. L. REV. 918, 927–28 (2020) ("The rule of strict construction typically applied as follows. First, a court would consult the statutory text, linguistic canons, and structure. Then, if there was a reasonable doubt about the statute's meaning and ambiguity remained about what Congress intended, the court would construe it in favor of the defendant.").

222. See *id.* at 931 ("The Supreme Court's current version of lenity is significantly weaker than the historical rule of strict construction. With the court required to exhaust every other interpretive resource before applying it, lenity plays almost no role in deciding cases of statutory ambiguity."); see also Barrett, *supra* note 134, at 131 ("Courts repeatedly emphasized that lenity could never overcome the ordinary meaning of a statute. . . .").

223. Johnson v. United States, 529 U.S. 694, 713 n.13 (2000).

which applies the canon only when a judge has reached an interpretive tie.²²⁴

The rule of lenity has been said to incorporate several different core values within American jurisprudence.²²⁵ First and foremost, the rule is thought to promote the constitutional value of due process.²²⁶ It is this Note's contention that as due process justifies the use of the rule of lenity, a value of respect for agency expertise should justify a *Skidmore* tiebreaker. This isn't to suggest that due process and respect for agency expertise are equal values. The rule of lenity has deeper roots in jurisprudence, and its motivating values are explicitly mentioned in the Constitution.²²⁷ The strength of the value justifying the tiebreaker should match the strength of the tiebreaker—which would

224. This Note isn't the first to compare the rule of lenity and doctrines like *Skidmore* and *Chevron*. Professor Hickman made this comparison eighteen years ago. Kristin E. Hickman, *Of Lenity, Chevron, and KPMG*, 26 VA. TAX REV. 905, 916–19 (2007). Professor Hickman, however, concluded that comparing the two was like comparing apples to oranges. “The rule of lenity operates as a tie breaker, guiding the court’s interpretive choice; but the Court’s goal in applying the doctrine is ‘to help give authoritative meaning to statutory language’ By contrast, the *Chevron* doctrine [Professor Hickman also mentioned *Skidmore* in this section] in particular is premised on an assumption of interpretive flexibility on the part of executive branch or agency officials. By this thinking, statutory ambiguity reflects the opportunity for agency policy choice.” *Id.* While this analysis was correct in the age of *Chevron*, I would posit this comparison is now proper. *Loper Bright’s* acknowledgement that statutes have a “best meaning” would appear to foreclose the agency flexibility Professor Hickman talks about here. See *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2266 (2024).

225. Note, *The New Rule of Lenity*, 119 HARV. L. REV. 2420, 2424 (2006) (“[T]he rule of lenity was transplanted from England, where it was developed to nullify the harsh results of the criminal law. American courts kept the doctrine but abandoned the nullification rationale, instead justifying the rule by reference to the values of fair notice, separation of powers, and the rule of law.”).

226. See *Bittner v. United States*, 143 S. Ct. 713, 725 (2023) (“[T]he rule [of lenity] exists in part to protect the Due Process Clause’s promise that ‘a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.’” (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931))).

227. See U.S. CONST. amends. V, XIV; Barrett, *supra* note 134, at 168 (“Textualists describe themselves as ‘enthusiasts of canons that reflect constitutionally derived values.’ [T]heir particular attraction to constitutionally inspired canons suggests an intuition that such rules are more consistent with the principle of faithful agency than extraconstitutional canons.”). *But see id.* (“That enthusiasm does not tell the whole story, for textualists apply extraconstitutional canons as well.”).

explain the stronger rule of lenity compared to a weaker *Skidmore* tiebreaker.²²⁸

Where *Chevron* and some deferential interpretations of *Skidmore* would not fit with the *Loper Bright* decision,²²⁹ a tiebreaker resembling the rule of lenity does. The rule doesn't hinder a court in choosing the interpretation that it thinks best,²³⁰ which *Chevron* did.²³¹ Nor does the rule rely on a fictional grant of congressional authority, another theory that *Loper Bright* wholeheartedly rejected.²³²

As this Section demonstrates, the *Skidmore* tiebreaker—while a novel proposal—has analogues in law and other rule-based institutions that provide helpful blueprints as well as demonstrate the feasibility of the tiebreaker. With the meaning of the tiebreaker now fully developed, the following Section anticipates potential objections that could be brought against this new tiebreaker.

D. OBJECTIONS TO THE SKIDMORE TIEBREAKER

Two objections are likely to be raised against using *Skidmore* as a tiebreaker: first, that ties don't exist in legal interpretation; and second, that a tiebreaker revitalizes *Chevron* under another name. This Section addresses each of these objections in turn.

1. "There's no Tiebreakers in Baseball"

A common objection to the use of tiebreakers in the law is that ties don't exist. Justice Scalia was an adherent to this philosophy, arguing "[i]n appellate opinions, there is no such thing

228. Many critique the Court's current use of the rule of lenity as too weak and not resembling its common law usage. *See, e.g.*, Hopwood, *supra* note 221, at 921 ("The current rule only applies after a court has canvassed every possible interpretive rule or shred of evidence for congressional intent and, even then, only in cases in which that multitude of evidence leaves 'grievous ambiguity' about the statute's meaning. As a result, the canon rarely applies because judges have a nearly endless set of interpretive tools to resolve ambiguity.").

229. *See* Merrill, *supra* note 19, at 271–72 (discussing *Loper Bright*'s rejection of *Chevron* deference, and implications for use of *Skidmore* doctrine).

230. Barrett, *supra* note 134, at 131 ("Courts repeatedly emphasized that lenity could never overcome the ordinary meaning of a statute.").

231. *See supra* note 51 and accompanying text.

232. *See* Barrett, *supra* note 134, at 129 ("[T]he rule of lenity was not grounded in any fiction about Parliament's presumed intent; rather, it was unabashedly grounded in a policy of tenderness for the accused.").

as a tie.”²³³ Those who don’t believe in ties aren’t just limited to the law. In an interview with MLB.com, veteran umpire Tim McClelland was asked about the notion that a “tie goes to the runner.”²³⁴ His response was: “There are no ties and there is no rule that says the tie goes to the runner.”²³⁵ It seems Justice Scalia and Umpire McClelland would have gotten along well—but are they right?

In theory, Justice Scalia and Umpire McClelland’s tie-less world makes sense. When a judge is presented with two interpretations—that is, if you subscribe to the Supreme Court’s “best interpretation” theory—then one of the interpretations must be better than the other.²³⁶ There can only be one best interpretation.²³⁷ Similarly, in the baseball context, either the runner gets to the base first, or the baseman does. Both can’t reach the plate at the exact same time.

Yet this interpretation of ties rings hollow because it fails to accord with reality. If judges and umpires had perfect information available, there would be no ties. But neither judges nor umpires have perfect information.²³⁸ The information available to judges is limited whether that be because of the parties involved, time restraints, or perhaps the judge overlooked something they shouldn’t have.²³⁹ Similarly, sometimes umpires can’t

233. Scalia, *supra* note 111, at 520; *see also id.* (“If the judicial mentality that is developed by such a system were set to answering the question, ‘When are the arguments for and against a particular statutory interpretation in equipoise?,’ I am certain the response would be ‘almost never.’”).

234. NickG, *Tie Goes to the Runner?*, UMPIRE BIBLE: THE BLOG (Sept. 6, 2017), <https://www.umpirebible.com/ubBlog/archives/author/dbnickg> [<https://perma.cc/GP83-AUXY>] (quoting an “Ask the Umpire” question and answer interview done by MLB.com).

235. *Id.* Interestingly enough, many umpires may utilize a tiebreaker opposite to “tie goes to the runner” in actuality. *See* Dewdney, *supra* note 208 (“MLB umpires, and, truthfully, even those of us at lesser levels, are taught a simple little ditty; ‘*IF IN DOUBT, BANG HIM OUT!*’ In other words, if you’re not sure of the result, SELL THE CALL . . . (If you *sound* sure, the coach is *probably* going to stay put & grumble. That’s a good thing.)”).

236. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2266 (2024) (“In the business of statutory interpretation, if it is not the best, it is not permissible.”).

237. *Id.* at 2266.

238. *See* Samaha, *supra* note 174, at 1666 (“Put simply, ‘*tie*’ means any equality relevant to an observer.”).

239. *See id.* at 1666–67 (“There are several well-known impediments to rank ordering aside from indifference or equipoise with complete information. To this we can add uncertainty, ignorance, and incommensurability as other forms of

see everything going on in front of them; their vision could be blocked or the difference between the baseman and the runner could be so miniscule as to be invisible to the human eye.²⁴⁰ In theory, ties are impossible. In reality, “ties . . . are a fact of life.”²⁴¹ This isn’t to say a statute’s best meaning doesn’t exist; rather, it just acknowledges an umpire’s natural limitations.²⁴² There will be moments when a judge needs to call something a ball or a strike, so to speak, because of complete indeterminacy.²⁴³ Utilizing a tiebreaker prevents judges of all types from breaking that tie arbitrarily.²⁴⁴

indeterminacy. Essential information regarding the likely consequences of possible actions might be impossible to obtain or too costly to gather; or the system might stall because the decisionmaker is unable or unwilling to rank options that differ along more than one dimension of value.”).

240. DICKSON, *supra* note 207, at 873–74 (“Umpires are taught that there are no ties and to do their best to determine which occurred a split-second earlier, but experiments have shown that it is virtually impossible to reliably judge which event comes first when they occur within 0.05 seconds or less.”).

241. NickG, *supra* note 234 (“Ties at first are a fact of life, and they’ll continue being called in a manner consistent with the umpire’s religion, so to speak.”).

242. This failure to consider the limitations of the umpire is one of the notable deficiencies of the *Loper Bright* decision. After the Court’s proclamation that statutes have a “single, best meaning,” it states as a matter of fact that courts must “use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity.” *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2266 (2024). The Court assumes employing all tools will result in a discernable answer, something often true but not always the case.

243. This is one of Justice Kagan’s primary arguments in her *Loper Bright* dissent. *Id.* at 2297 (Kagan, J., dissenting). She provides several examples of statutes with more than one “reasonable reading” which judges now have no method of resolving. *Id.* That point is well stated and reflects this Note’s conception of ties, although Justice Kagan’s characterization of *Chevron* doesn’t seem to completely comport with the reality of how it was used. Compare *id.* at 2297 (describing *Chevron*’s step 1 inquiry as “rigorous”) with *id.* at 2256 (majority opinion) (“A divided panel of the D.C. Circuit affirmed. The majority addressed various provisions of the MSA and concluded that it was not ‘wholly unambiguous’ whether NMFS may require Atlantic herring fishermen to pay for observers. Because there remained ‘some question’ as to Congress’s intent, the court proceeded to *Chevron*’s second step. . . .” (citations omitted)).

244. For example, judges may break a tie by choosing the option that brings about the outcome their political ideology prefers. Or maybe they break a tie through something as ridiculous as a coin flip. See Alvaro Sandroni, *Is It a Coin Flip or Is It Justice? It Could Be Both.*, KELLOGG SCH. OF MGMT.: KELLOGG INSIGHT (Aug. 1, 2025), <https://insight.kellogg.northwestern.edu/article/is-it-a-coin-flip-or-is-it-justice-it-could-be-both> [<https://perma.cc/LGB8-KJEQ>]. Either way, the judge is injecting an element into their decision-making that is improper.

2. *Chevron* by Another Name?

The tiebreaker proposed above may give some readers visions of a ghost from the past—one that dominated the administrative law sphere for decades. Isn't the tiebreaker merely *Chevron* under a new name?

There are two essential differences between a *Skidmore* tiebreaker and the old *Chevron* regime. First, notice the tiebreaker proposed above doesn't ask courts to identify an undefined degree of ambiguity like *Chevron*.²⁴⁵ *Chevron* asked the courts first to determine whether the intent of Congress was clear—which is an unclear mandate.²⁴⁶ How clear is clear?²⁴⁷ What's the line where we can't figure out what Congress intended? *Chevron* failed to clearly explain the actual level of ambiguity needed for the test to apply.²⁴⁸ Step one's obscurity resulted in confusion and manipulation, with courts struggling to determine how ambiguous a statute must be and using the indeterminacy of step one to bring about their desired consequences.²⁴⁹ The *Skidmore* tiebreaker doesn't require courts to determine whether there is some unspecified degree of ambiguity.²⁵⁰ Rather, courts need to

245. See *supra* notes 45–48 (discussing *Chevron* doctrine step 1).

246. *Chevron U.S.A. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) (“If the intent of Congress is clear, that is the end of the matter . . .”).

247. The D.C. Circuit's opinion that led to *Loper Bright* provides a textbook example of how this concept can be abused. *Loper Bright*, 144 S. Ct. at 2256 (describing the D.C. Circuit's opinion, which deferred under *Chevron* because they concluded the statute wasn't “wholly unambiguous”).

248. See Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2091 (1990) (“*Chevron* does not say how ambiguous [sic] a statute must be in order for the agency view to control. If any ambiguity triggers the deference rule—if the agency wins whenever a reasonable person could be persuaded that more than one interpretation exists—the principle will be extraordinarily broad.”).

249. Ambiguity is, rather ironically, a fairly ambiguous concept that allows for manipulation by judges, whether consciously or unconsciously. See MERRILL, *supra* note 151, at 258 (“[C]larity refers to some [particular] degree of certainty This gives judges considerable discretion in ruling at step 1, and that discretion, in turn, invites result-oriented judicial decisions.”).

250. In the past, some courts have only utilized *Skidmore* when, like *Chevron*, they determine a text is ambiguous. See Hickman, *supra* note 19, at 123 (“Many federal courts of appeals have expressly embraced the notion that *Skidmore*'s contextual factors should be considered only upon a finding of statutory ambiguity.”). The viability of these approaches has been challenged by *Loper Bright*, to say the least. See *id.* at 122–25. (“[I]t is not at all clear what the impact of *Loper Bright* will be with respect to the many circuit court decisions requiring a finding of ambiguity before considering whether deference might be appropriate under *Skidmore*.”). But see Merrill, *supra* note 12, at 259 (“*Loper*

determine that there is complete indeterminacy between equally plausible interpretations.²⁵¹ That distinction is key, because if there is complete indeterminacy, courts relying on canons to resolve the ambiguity don't trump or neglect the best meaning of the text.²⁵² Complete indeterminacy as a metric allows for easier application than *Chevron's* vague "ambiguity" threshold.²⁵³

Second, the *Skidmore* tiebreaker rejects *Chevron's* "permissible" interpretation idea.²⁵⁴ A permissible interpretation doesn't need to be the best interpretation. Under the *Skidmore* tiebreaker, courts must always choose what they consider to be the best interpretation, which makes the concept consistent with the language and themes of *Loper Bright*.²⁵⁵ The idea behind the tiebreaker is that it should help judges determine what the best

Bright made it abundantly clear that statutory 'ambiguity' (and its opposite 'clarity') will no longer be the operative concept in differentiating between cases in which the court resolves the meaning of a statute and those in which the court accepts reasonable agency interpretations.").

251. Readers sympathetic to legal realism may identify this threshold as ripe for abuse by rogue members of the judiciary. That criticism is well taken. If the *Skidmore* tiebreaker were to be used by courts, it's almost a certainty that it would be abused by some judges to bring about their desired outcomes. But every tool of the judiciary can be abused. The best tools are those that are least likely to be abused, and the *Skidmore* tiebreaker has less potential to be abused for the reasons described above.

252. *Cf.* Barrett, *supra* note 134, at 131 ("This insistence upon legislative supremacy is a constant refrain in the case law regarding the [rule of lenity]. Courts repeatedly emphasized that lenity could never overcome the ordinary meaning of a statute; on the contrary, the principle applied only in the event of ambiguity. Moreover, saying that ambiguity justified the application of lenity did not mean that a court had recourse to the rule whenever a narrower interpretation was plausible. Over and over again, courts stressed that they were obliged to choose the best, not the narrowest, interpretation of a statute.").

253. This isn't to argue that identifying when two interpretations are at equipoise is an *easy* endeavor. Rather it's easier by comparison to the notoriously vague language used in the *Chevron* decisions and other doctrines which require a finding of "ambiguity." *See* Kavanaugh, *supra* note 121, at 2121 ("[B]ecause it is so difficult to make those clarity versus ambiguity determinations in a coherent, evenhanded way, courts should reduce the number of canons of construction that depend on an initial finding of ambiguity.").

254. *Chevron U.S.A. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) ("Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a *permissible* construction of the statute." (emphasis added)).

255. *See Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2266 (2024) ("In the business of statutory interpretation, if it is not the best, it is not permissible.").

interpretation is—not trump it.²⁵⁶ Recall as well that the idea of permissible interpretations seems to be dead in the wake of *Loper Bright*.²⁵⁷

Perhaps one way to contemplate the difference between *Chevron* and a *Skidmore* tiebreaker is to view *Chevron* as a faulty tiebreaker. To return to the baseball comparison: Imagine you watch from the stands as the first baseman catches the ball just before the runner reaches first plate. Yet you see the umpire call the runner safe. You would naturally be upset; you saw what the correct call *should* have been. It wouldn't be any comfort if the umpire agreed but said, "Well, it was close, so I went with the runner." *Chevron* operates similarly to this situation, as it is a "tiebreaker" that's not being used to resolve actual ties, rather just when things are somewhat close. When viewed as such, the *Skidmore* tiebreaker remedies *Chevron*'s faults. Ties are broken when there are *actually* ties, not just when it's "close."

What these two key differences would mean in practice is that a *Skidmore* tiebreaker would be imposed in exceptionally rare circumstances. Justice Scalia is undeniably correct that actual ties by judicial decision-makers are exceptionally rare.²⁵⁸ Their rarity is a good thing; the *Skidmore* tiebreaker should be a break-in-case-of-emergency type of doctrine.²⁵⁹ The rarity of

256. See THE FEDERALIST NO. 78 (Alexander Hamilton) ("The interpretation of the laws is the proper and peculiar province of the courts.").

257. See *supra* Part II.B (discussing *Loper Bright*'s "best-meaning" standard versus the historic concept of "permissible interpretations").

258. See Scalia, *supra* note 111 (citing his determination that "there is no such thing as a tie" in appellate opinions); see also Samaha, *supra* note 174, at 1699 ("Tiebreaker variables will not be considered very often if ties are rare."). The post-*Loper Bright* world is a testament to their rarity, and circuit courts thus far haven't faced a case they believe to be close. See generally HICKMAN & PIERCE, *supra* note 36, § 3.A.4.3 (Supp. 2025) (detailing in a supplement a variety of circuit court cases where the courts have determined definitely the best meaning of a statute post-*Loper Bright*).

259. One might question how important a *Skidmore* tiebreaker would be considering the rarity of such ties. Cf. Hopwood, *supra* note 221, at 931 ("[I]f judges possess every interpretive tool at their disposal to construe away ambiguity, they will, inevitably, never reach the rule of lenity."). Realistically it will be used very infrequently, if applied correctly. However, I think there's something to be said for promoting doctrinal consistency in the law. Additionally, *Skidmore* as a tiebreaker has judicial values underneath it that I think are important to recognize, even if rarely directly apply.

the tiebreaker's application ensures the supremacy of the judiciary in the field of interpretation as *Loper Bright* emphasized.²⁶⁰

CONCLUSION

Administrative law will likely go to entirely new places in the next decade. The foundations that *Loper Bright* tore up will need to be replaced. The *Skidmore* tiebreaker is one way to start rebuilding. By merging the wisdom of the past with observations from the present, the *Skidmore* tiebreaker enables the Supreme Court and the entire American judiciary to not just start from scratch. A compromise for the future of administrative law, the *Skidmore* tiebreaker lets respect for agencies live on and weighs agencies' expertise without letting that expertise take over the prescribed role of the courts.

260. *Loper Bright*, 144 S. Ct. at 2273 ("The dissent ends by quoting *Chevron*: 'Judges are not experts in the field.' That depends, of course, on what the 'field' is. If it is legal interpretation, that has been, 'emphatically,' 'the province and duty of the judicial department' for at least 221 years." (citations omitted)).