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## Accountability, Deference, and the *Skidmore* Doctrine

**ABSTRACT.** This Note argues that government agencies should receive substantial deference when they interpret statutes informally under the standard of *Skidmore v. Swift & Co.* A key reason why courts defer to agencies is that agencies are more politically accountable than courts. Current legal scholarship, however, reflects an outdated view of accountability that does not reflect the insights of modern political science. Modern political scientists emphasize that agency officials are held accountable through a variety of mechanisms beyond formalistic procedures or direct electoral ties to the populace. The Note correspondingly offers an innovative justification as well as a fresh critique of a substantial body of cases implementing the *Skidmore* standard. Furthermore, this Note suggests a model for how courts should handle informal agency interpretations of statutes. Courts could compare their treatment of such decisions to the familiar standard of “persuasive precedent.” This proposed *Skidmore* standard is largely consistent with recent Supreme Court precedent, though the Court should still benefit from clarification of the doctrine.

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## INTRODUCTION

But the Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case. . . . The fact that the Administrator's policies and standards are not reached by trial in adversary form does not mean that they are not entitled to respect.

— *Skidmore v. Swift & Co.*<sup>1</sup>

With the landmark decision *United States v. Mead Corp.*,<sup>2</sup> the Supreme Court breathed new life into the administrative law classic *Skidmore v. Swift & Co.* In *Mead*, the Court ruled that there are essentially two types of statutory interpretation by government agencies.<sup>3</sup> The first category, formal interpretations, occurs in notice-and-comment rulemaking and formal adjudicatory proceedings when Congress has clearly delegated lawmaking authority to the agency. The second category, informal interpretations, governs a wide swath of administrative rulings, ranging from advisory opinions to ruling letters to interpretative guidance. The *Mead* court held that courts should defer strongly to formal interpretations under the very deferential standard set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,<sup>4</sup> but should be less deferential to informal interpretations by using the standard articulated in *Skidmore*.

*Chevron* is by far the most cited Supreme Court case of the last twenty-five years and has been the subject of hundreds of law review articles.<sup>5</sup> Despite its older pedigree, *Skidmore*—*Chevron*'s "little brother"—has by contrast gone

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1. 323 U.S. 134, 139-40 (1944).

2. 533 U.S. 218 (2001).

3. See *infra* notes 132-135 and accompanying text. But for a more complicated picture, see *infra* notes 138-142 and accompanying text.

4. 467 U.S. 837 (1984).

5. See STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 247 (6th ed. 2006); 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.5, at 158 (5th ed. 2010) (identifying *Chevron* as one of the most important modern Supreme Court cases and noting that it has been cited and applied thousands of times); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2075 (1990). But see William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1120 (2008) ("Contrary to the conventional wisdom, *Chevron* is not the alpha and the omega of Supreme Court agency-deference jurisprudence.").

understudied.<sup>6</sup> As a result, courts and scholars have not come to a consistent understanding of its doctrine. This lapse is quite significant, since *Skidmore* governs the vast majority of interpretative decisions in the modern administrative state.<sup>7</sup>

This Note argues that government agencies should receive substantial deference when they interpret statutes informally. A key reason why courts defer to agencies is that agencies are more politically accountable than courts. Current legal scholarship, however, reflects an outdated view of accountability that does not reflect more recent insights from political science. While political scientists previously worried that government bureaucracies were not responsive to political forces, the current consensus holds that government agencies are, in fact, quite responsive to the public.

Contemporary legal scholars continue to focus on the extent to which government officials are accountable via formalistic procedures or alternatively through direct electoral ties to the populace. However, political scientists now emphasize that agency officials are actually held accountable through a multitude of other mechanisms. These mechanisms include extensive oversight from the elected branches, direct contact with constituents, and interaction with the media. Thus, as a practical matter, officials are held accountable in more varied ways than indicated by the current legal literature.

The doctrinal implication of this accountability is that courts should give meaningful deference to agencies' informal decisions. Courts implementing so-called "*Skidmore* deference" often state that agencies receive deference to the degree their arguments have the "power to persuade."<sup>8</sup> This Note argues that the legitimate decision of a politically accountable government actor is itself persuasive. As my epigraph suggests, this treatment is consistent with Justice Jackson's tone in *Skidmore*, which suggests substantial "respect" for agency decisions made "in pursuance of official duty."<sup>9</sup> On the other hand, while deference in the informal context should be substantial, it should still be less than the very strong deference accorded to formal interpretations. *Skidmore* deference should represent an intermediate level between strong deference and none at all.

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6. See Jim Rossi, *Respecting Deference: Conceptualizing Skidmore Within the Architecture of Chevron*, 42 WM. & MARY L. REV. 1105, 1110 (2001) ("[H]istorically courts and scholars have paid scant attention to what *Skidmore* deference means. Few law review articles address the topic.").

7. See David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 202-03.

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

9. *Id.* at 139.

Recent empirical work shows that courts operate inconsistently when implementing *Skidmore*. Some court decisions do give substantial deference under *Skidmore*, but others do not. These latter courts give agencies deference only to the degree that the agency demonstrates particular expertise in the substantive context in question. This Note argues that such cases were wrongly decided, given the modern understanding of agency accountability. Furthermore, I provide a novel justification for a set of cases previously unexplained by scholars. These cases are those in which courts have deferred to agencies without reference to contextual factors such as expertise. Such deference is justified by the political accountability of the agencies.

Courts' inconsistent treatment of the *Skidmore* standard suggests they would benefit from a coherent model for the treatment of informal agency interpretations. This Note offers such a model. The model is familiar: courts can analogize agency statutory interpretation to "persuasive precedent," the nonbinding decisions of other circuits. Since *Skidmore* deference is based on the "power to persuade," looking to persuasive precedent is a natural fit. More than just linguistic wordplay, however, the persuasive precedent model makes sense for *Skidmore* deference. When one court cites the decision of another, it does so to indicate that another legitimate government body has made a decision worthy of respect. The political accountability of government agencies justifies giving them similar respect.

Finally, this model of deference is consistent with recent Supreme Court precedent. The Court has repeatedly cited political accountability as a foundational rationale for deferring to government agencies in all contexts. Furthermore, in recent decisions, the Court has given agencies substantial deference in the informal *Skidmore* context. However, like the circuit courts, the Supreme Court has shown inconsistency when invoking *Skidmore*. In particular, the Court has purported to give *Skidmore* deference in some situations in which it gave no deference at all. While justified in giving no deference in these cases, these decisions should not, I argue, have cited *Skidmore*, which represents an intermediate level between strong *Chevron* deference and no deference at all.

Part I of this Note makes the argument for giving deference to informal agency decisions on the basis of political accountability. Part II then frames this line of reasoning within an overview of the judicial doctrine of deference to agency interpretations of statutes. Part III applies the argument for substantial *Skidmore* deference to the actual practice of courts reviewing agency decisions. The Note concludes with a summary of its argument: because agencies are politically accountable when acting informally, courts should give substantial deference to informal interpretations of statutes.

## I. ACCOUNTABILITY AND INFORMAL AGENCY ACTION

Informal agency decisions deserve substantial deference from courts because agency officials are politically accountable even when acting informally. Modern political science reveals that politics impacts government agencies generally. Informal agency decisions are not made by Kafkaesque bureaucrats tucked away in some distant customs office, and political accountability is not cabined exclusively within notice-and-comment rulemaking. Rather, those affected by agency decisions put pressure on agencies—either directly or indirectly through sympathetic political actors in the White House or on Capitol Hill.

Agency policies, to borrow the phrase from *Skidmore*, “are made in pursuance of official duty,”<sup>10</sup> and are therefore subject to significant oversight by political officials in both the executive and legislative branches. Furthermore, beyond such oversight, the public itself frequently interacts directly, both formally and informally, with agencies. This direct interaction provides an additional layer of oversight and accountability to agency decisions. Since the agency bureaucrat knows his decision is ultimately reviewable by political actors, he has an incentive to listen to the public before, during, and after making decisions.

### A. What Accountability Means

Political accountability is clearly an important foundational principle in a democracy and is a key source of legitimacy for government action. That being said, the notion is notoriously slippery.<sup>11</sup> My argument uses accountability as Justice Stevens did in *Chevron*, namely as responsibility to balance the competing political forces at work in society.<sup>12</sup> The *Chevron* opinion thus repeatedly mentions “a reasonable accommodation of manifestly competing interests,” “reconcil[ing] competing political interests,” and “resolving the

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10. *Id.*

11. One of the many political scientists who has contributed to the voluminous literature on accountability has called it “the ultimate ‘moving target.’” Kevin P. Kearns, *The Strategic Management of Accountability in Nonprofit Organizations: An Analytical Framework*, 54 PUB. ADMIN. REV. 185, 187 (1994).

12. See Richard Mulgan, ‘Accountability’: *An Ever-Expanding Concept?*, 78 PUB. ADMIN. 555, 559 (2000) (describing “the democratic imperative for government organizations to respond to demands from politicians and the wider public”).

competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency.”<sup>13</sup>

When legal scholars refer to political accountability, however, they typically do so in a relatively narrow sense. These authors rely on a view of political accountability focusing on ties to the elected branches of government—what political scientist David Mayhew famously deemed “the electoral connection.”<sup>14</sup> The traditional understanding of accountability within the legal literature is thus the “transmission belt” model, in which accountability flows from the elected representatives to those appointed—and able to be fired—by them.<sup>15</sup> This unduly cramped conception of accountability overlooks the myriad of ways in which everyday government officials are accountable to the public.

For example, in a thoughtful article, David Barron and Elena Kagan stress the importance of political accountability as a rationale for deference to agencies. In attacking the formalism of recent legal reasoning, Barron and Kagan criticize the “ostensible virtues” of notice-and-comment rulemaking, which “often functions as a charade.”<sup>16</sup> But as a substitute for this procedural formalism, Barron and Kagan employ a quite narrow view of accountability based on direct electoral ties to the public. They thus argue that only decisions made by top-ranking political appointees should receive deference, because “[i]t is only the presence of high-level agency officials that makes plausible *Chevron’s* claimed connection between agencies and the public.”<sup>17</sup> I will show, on the contrary, that everyday government officials are actually quite connected and responsive to the public—both directly and indirectly through the influence of the media and Congress.

Susan Rose-Ackerman has distinguished between two types of accountability important in democracies: policymaking accountability and performance accountability.<sup>18</sup> Policymaking accountability requires that policies themselves accurately reflect societal demands for governmental action

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13. 467 U.S. 837, 865–66 (1984).

14. See generally DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (2d ed. 2004) (arguing that a wide variety of activities performed by Congress are driven primarily by electoral considerations).

15. See, e.g., Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95 (1985) (explaining the presidential context); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1675 (1975) (explaining the congressional context).

16. Barron & Kagan, *supra* note 7, at 231.

17. *Id.* at 242.

18. SUSAN ROSE-ACKERMAN, FROM ELECTIONS TO DEMOCRACY: BUILDING ACCOUNTABLE GOVERNMENT IN HUNGARY AND POLAND 5–6 (2005).

and provision of resources.<sup>19</sup> Performance accountability, by contrast, indicates that the government is effectively implementing whatever policy choices have previously been made.<sup>20</sup>

My use of accountability—and, I would argue, the Court’s own language in *Chevron* and other cases—corresponds to Rose-Ackerman’s “policy-making accountability.” What emerges from the political science research described below is that government bureaucrats routinely balance political forces, even when making very informal decisions, at all levels of government. On the other hand, informal decisionmaking arguably does less well by the “performance accountability” metric in that most of its operation occurs behind the scenes, ordinarily out of view of the everyday public. This is one reason why *Skidmore* deference, while substantial, should be less than *Chevron* deference.

Of course, to say that government bureaucrats engage in a deliberative process with constituent groups within a broader context of political pressures is not to explain *why* they do so. Unlike politicians, who are obviously accountable to their constituents through elections, bureaucratic incentives for accountability are both more varied and more opaque.

Government officials are, as detailed below, affected by a host of political factors beyond the direct influence of hierarchically superior elected officials. As Jerry Mashaw explains, “[s]uperiors seldom ‘command’ their subordinates in any straightforward way. . . . Hierarchies turn out to be, not pyramids, but dense networks.”<sup>21</sup> Bureaucrats routinely respond to a diverse range of other political forces. Direct interaction with constituent groups, congressional oversight, pressure from the White House, the media—all these actors make their voices heard, and loudly.

Bureaucrats face real consequences for ignoring these forces. As one political scientist writes, in an account that will be familiar to anyone who has worked in a federal agency: “[T]he people being held accountable . . . have a very clear picture of what being held accountable means to them—to them personally. They recognize that, if someone is holding them accountable . . . when they screw up, all hell can break loose.”<sup>22</sup> Indeed, even civil servants neither appointed by elected representatives nor removable for political reasons

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19. *Id.* at 6 (referring to “institutions that channel and manage public participation by individuals and groups in policy making”).

20. *Id.* at 5.

21. Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, in *PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES* 115, 124 (Michael W. Dowdle ed., 2006).

22. ROBERT D. BEHN, *RETHINKING DEMOCRATIC ACCOUNTABILITY* 3 (2001).



are, in a quite real sense, politically accountable in that they have systematic incentives to respond to political forces.<sup>23</sup>

*B. A New Consensus on Accountability*

Scholarship on bureaucracy has changed dramatically over the past several decades. Legal doctrine, however, has not sufficiently shifted to incorporate this change. From the 1950s until well into the 1980s, bureaucracy was a dirty word. Both scholarship and popular sentiment portrayed government agencies as out of touch and out of control—the opposite of politically accountable.<sup>24</sup> Politically, Ronald Reagan, in particular, marked perhaps the high water mark of a harsh attitude toward the bureaucracy. One typical comment was that “every once in a while, somebody has to get the bureaucracy by the neck and shake it loose and say, stop what you’re doing.”<sup>25</sup> Recent scholarship has traced this common complaint through the administrations of Presidents Truman, Kennedy, Nixon, and Carter.<sup>26</sup>

Until fairly recently, legal and political science writings mirrored this view of the political accountability of government agencies.<sup>27</sup> Scholars explicitly argued that the lack of agency accountability made it problematic to give discretion to agencies to interpret statutes. As one seminal article stated, “[i]nsofar as statutes do not effectively dictate agency actions, individual autonomy is vulnerable to the imposition of sanctions at the unrul[ed] will of executive officials, [and] major questions of social and economic policy are determined by officials who are not formally accountable to the electorate . . . .”<sup>28</sup> More generally, prominent academics—including Justice Breyer—have made careers out of suggesting ways to improve a bureaucratic

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23. Cf. Laurence H. Silberman, Foreword, *Chevron—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 823 (1990) (“The agencies—even the independent ones—have superior political standing to the life-tenured federal judiciary in performing that policy making function.”).

24. See MARISSA MARTINO GOLDEN, WHAT MOTIVATES BUREAUCRATS? POLITICS AND ADMINISTRATION DURING THE REAGAN YEARS 4-5 (2000) (“[O]ver time, both scholars and presidents came to hold the view that bureaucrats exercised discretion in ways that undermined the goals and directives of their elected superior in the White House.”).

25. *Id.* at 5.

26. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2272-73 (2001).

27. See, e.g., WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971).

28. Stewart, *supra* note 15, at 1676.

structure portrayed as lethargic or even irrational.<sup>29</sup> And at least one leading scholar attributed the strongly critical view of courts toward agency action during this period to a similar “loss of faith in agencies.”<sup>30</sup>

In the last twenty-five years, however, the academic consensus about the lack of political accountability in government agencies has eroded beyond recognition. We now understand that federal government agencies are vigorously overseen both by Congress and the executive branch, and are directly accountable both to constituent groups and to political forces such as the media. One political science article described the change as a “veritable revolution” in scholarly perceptions of bureaucracies.<sup>31</sup> A classic example is the 1984 article by Mathew McCubbins and Thomas Schwartz, analyzing congressional oversight mechanisms.<sup>32</sup> Though previous scholars had bemoaned Congress’s failure to adequately oversee the executive branch, McCubbins and Schwartz suggested that congressional oversight was actually robust. What had appeared to other scholars to be neglect, the authors maintained, actually reflected “a preference for one form of oversight over another, less-effective form.”<sup>33</sup> Congress actually holds administrative agencies quite accountable via a decentralized system of responding to complaints from constituent groups and the media.<sup>34</sup>

Many other works have detailed the numerous ways by which Congress oversees agency action.<sup>35</sup> Furthermore, in addition to the congressional literature, many scholars have argued that the President and other White House staff have greater control over the executive bureaucracy than previously

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29. See, e.g., STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1993); JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* (1989).
  30. Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1047 (1997).
  31. Richard W. Waterman, Amelia Rouse & Robert Wright, *The Venues of Influence: A New Theory of Political Control of the Bureaucracy*, 8 J. PUB. ADMIN. RES. & THEORY 13, 14 (1998).
  32. Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984).
  33. *Id.* at 165.
  34. See *id.* at 166.
  35. See, e.g., JOEL D. ABERBACH, ROBERT D. PUTNAM & BERT A. ROCKMAN, *BUREAUCRATS AND POLITICIANS IN WESTERN DEMOCRACIES* (1981); WILLIAM F. WEST, *CONTROLLING THE BUREAUCRACY: INSTITUTIONAL CONSTRAINTS IN THEORY AND PRACTICE* 170-71 (1995); Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61 (2006); Richard J. Lazarus, *The Neglected Question of Congressional Oversight of EPA: Quis Custodiet Ipsos Custodes (Who Shall Watch the Watchers Themselves)?*, 54 LAW & CONTEMP. PROBS. 205, 208-10 (1991).

understood, including over independent agencies.<sup>36</sup> Since then, an ongoing debate has raged (and continues to this day) about which form of oversight is most legitimate or predominates over the others.<sup>37</sup> This change in the scholarship may also reflect a real change in the realities of bureaucratic administration. Elena Kagan maintains that presidential control over the bureaucracy has “expanded dramatically” in the last two decades, “jolt[ing] into action bureaucrats suffering from bureaucratic inertia.”<sup>38</sup> Thus, as sporadic as the oversight may seem to the casual observer, agency officials are widely constrained in their decisionmaking by very real political pressure.

Viewed from the contemporary perspective, there are three striking features of the political science literature. The first is that scholars saw their work as a deliberate, purposeful *break* with the mistaken views of the past. McCubbins and Schwartz described congressional oversight as “overlooked,” arguing that scholars who have interpreted congressional behavior as “a neglect of oversight”<sup>39</sup> had misinterpreted legislative activity. Another wrote that “[s]cholars have probably always tended to underestimate the legislature’s interest in and influence over policy implementation . . . .”<sup>40</sup> This work is thus not a mere refinement or revision of the previous view; it is a clear overturning of the old consensus in the academic community.

The second striking feature of this scholarship is how pervasive the current scholarly *consensus* is that government agencies are politically accountable. An article in the *American Journal of Political Science* concluded that “few political scientists still believe that bureaucracy is a lumbering, static entity oblivious to external control.”<sup>41</sup> In the words of another political scientist, “Over a hundred published empirical studies of bureaucracy in the past two decades have demonstrated that bureaucratic outputs of many agencies are responsive to the political principals that oversee their activities.”<sup>42</sup>

Finally and most importantly, the third feature is the *degree* to which we now understand government agencies to be politically accountable. If the old

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36. See Kagan, *supra* note 26; Terry M. Moe, *Regulatory Performance and Presidential Administration*, 26 AM. J. POL. SCI. 197, 221 (1982).

37. Compare Kagan, *supra* note 26 (arguing for “presidential administration”), with Beermann, *supra* note 35 (defending “congressional administration”).

38. Kagan, *supra* note 26, at 2249; see also *id.* at 2317.

39. McCubbins & Schwartz, *supra* note 32, at 165.

40. WEST, *supra* note 35, at 139.

41. B. Dan Wood & Richard W. Waterman, *The Dynamics of Political-Bureaucratic Adaptation*, 37 AM. J. POL. SCI. 497, 497 (1993).

42. Mihriye Mete, *Bureaucratic Behavior in Strategic Environments: Politicians, Taxpayers, and the IRS*, 64 J. POL. 384, 384 (2002).

view was that agencies were completely unaccountable, the new view reflects the polar opposite conclusion. One researcher studying the Environmental Protection Agency commented that the “amount and character of congressional oversight of EPA are both remarkable.”<sup>43</sup> Another recent commentator refers to the “plethora of oversight mechanisms,” including “scrutin[y] by the Office of Management and Budget” and “review by Congress.”<sup>44</sup>

The overwhelming conclusion to be taken from this literature is that government agencies are, in fact, quite politically accountable, through a variety of oversight mechanisms. It should be no surprise, then, that agencies are highly responsive to political forces. One early study of the FTC, for example, found a close correspondence between the policies at the FTC and the changing political preferences of its congressional oversight committee.<sup>45</sup> More extensive later research found a high degree of political responsiveness, both to Congress and to the President, in each of six different agencies examined—the FTC, Equal Employment Opportunity Commission (EEOC), Nuclear Regulatory Commission, FDA, National Highway Traffic Safety Administration (NHTSA), and Office of Surface Mining (OSM).<sup>46</sup> This dramatic change in our understanding of how government agencies operate should be reflected in courts’ treatment of agency action.

### C. *Informal Political Accountability*

What has been overlooked by current legal scholarship is that politics permeates government agencies *generally*, affecting informal as well as formal decisions. Because they are ultimately accountable to political actors, American bureaucrats have an incentive to listen to constituent groups about decisions of all kinds. As a prominent team of social scientists have written, “American bureaucrats, to a degree unmatched elsewhere, are responsible for shoring up their own bases of political support.”<sup>47</sup> Indeed, far from seeing themselves as

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43. Lazarus, *supra* note 35, at 206.

44. Mark Seidenfeld, *The Psychology of Accountability and Political Review of Agency Rules*, 51 DUKE L.J. 1059, 1059 (2001).

45. See Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983).

46. See B. Dan Wood & Richard W. Waterman, *The Dynamics of Political Control of the Bureaucracy*, 85 AM. POL. SCI. REV. 801 (1991).

47. ABERBACH ET AL., *supra* note 35, at 95.

rulers of independent fiefdoms, American bureaucrats view their role generally to be no different from other political actors.<sup>48</sup>

An anecdote from the Clinton administration provides an instructive example of how political input from constituent groups affects informal decisions by agencies. In 1992, the Nissan Motor Corporation applied to the Department of Commerce for the approval of a “foreign trade zone” for a newly expanded car assembly plant in Tennessee, the biggest of its kind in the United States. Classification as a foreign trade zone would allow imported auto parts to be taxed at a substantially lower rate and would also allow Nissan to defer the taxes temporarily.<sup>49</sup> Though foreign trade zones are approved by civil servants at the Commerce Department as a matter of routine and Commerce staff was close to approving this application, the Big Three American automakers brought political pressure to bear and held up the decision.<sup>50</sup> Executives from General Motors, Ford, and Chrysler objected to the request, and these objections caught the attention of U.S. Trade Representative Mickey Kantor, who worried that the decision would inhibit political support from the Big Three for President Clinton’s economic plan.<sup>51</sup> Kantor thus protested to Commerce Secretary Ronald H. Brown and Treasury Secretary Lloyd Bentsen. Only after Vice President Al Gore, the former senator from Tennessee, intervened and a compromise was forged between various political officials did the decision go forward.<sup>52</sup>

This narrative, though anecdotal, has implications for deference to agency decisions. Indeed, notice how similar this decision by Commerce officials, about how to classify a particular item of foreign trade for the purposes of taxation, is to the decision in question in *Mead*, the key case in the Court’s modern *Skidmore* doctrine.<sup>53</sup> A court reviewing the bureaucrat’s interpretation of the statute in question could very easily misunderstand the nature of the decision. After all, the decision would not typically be political, as applications are “routinely approved by civil servants at the Commerce Department with little political involvement.”<sup>54</sup> This reasoning, however, would be mistaken,

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48. *Id.* at 95-96.

49. Keith Bradsher, *Trade Policy Test at Nissan’s Tennessee Plant*, N.Y. TIMES, June 14, 1993, at D1; see also Douglas Harbrecht & James B. Treece, *Tread Marks on Detroit*, BUS. WK., May 31, 1993, at 30.

50. Bradsher, *supra* note 49.

51. *Id.*

52. *Id.*

53. See *infra* note 132 and accompanying text.

54. Bradsher, *supra* note 49.

because it fails to recognize the thick political environment in which bureaucrats make decisions. It is true that, in the typical case, a decision of this kind would be made with little political input or process. However, the key insight from McCubbins and Schwartz is that occasional oversight *is* legitimate oversight. Though politics is not involved in every decision, decisions with important political consequences get political attention. Thus, even a seemingly routine decision made “informally” by an agency bureaucrat has some political legitimacy. Indeed, the deliberations within the Clinton Administration were precisely the “resolving [of] competing interests” referred to by Justice Stevens in *Chevron* that should be “entitled to deference.”<sup>55</sup>

This example involves political accountability via the informal intervention of White House officials, but Congress provides similar oversight as well. More formal mechanisms of congressional oversight, such as hearings and budgeting, are only the most visible aspect of congressional supervision. In reality, much of Congress’s oversight occurs informally. Congressional staffers themselves deem informal communication with agency personnel their most effective and frequently used oversight technique.<sup>56</sup> Members of Congress and staff are in regular communication with agency officials “through telephone conversations, private meetings, and other off-the-record contacts.”<sup>57</sup>

Agency bureaucrats, as noted, also respond directly to informal political forces. These forces include the input of constituent groups as well as the news media. One study has found that American bureaucracy is more sensitive to media attention than to congressional oversight.<sup>58</sup> Anecdotal evidence confirms that bureaucrats are highly responsive to the prospect of future media attention. For instance, one study of the Food and Drug Administration found that “FDA operators define their jobs” in accordance with “their overriding fear . . . [of] the scandal that would occur if they approved a new drug that later caused death or injury.”<sup>59</sup> As with congressional oversight, media attention is haphazard and episodic, but still a powerful and indeed constant influence over

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55. See *supra* note 13 and accompanying text.

56. JOEL D. ABERBACH, KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT 130-37 (1990).

57. WEST, *supra* note 35, at 132.

58. Wood & Waterman, *supra* note 41, at 524; see also BERNARD ROSEN, HOLDING GOVERNMENT BUREAUCRACIES ACCOUNTABLE 78-80 (1982) (describing how the media hold government agencies accountable). *But see* SUSAN HUNTER & RICHARD W. WATERMAN, ENFORCING THE LAW: THE CASE OF THE CLEAN WATER ACTS 117 (1996) (“[W]e did not find that the media exerted influence over EPA activity . . .”).

59. WILSON, *supra* note 29, at 80-81; see also Paul J. Quirk, *Food and Drug Administration*, in THE POLITICS OF REGULATION 191, 217 (James Q. Wilson ed., 1980).

agency behavior. Bureaucrats consider how a particular decision will “look” before proceeding, even though they know that the chances of any individual action garnering media attention are small.<sup>60</sup> And the mistakes that are publicized both provoke systematic change and serve as a warning to other agencies.

Constituent groups wielding the force of the media can also have a powerful effect on all aspects of agency decisionmaking. For example, in the wake of Ralph Nader’s 1965 bestseller *Unsafe at Any Speed*, Nader developed an influential relationship with NHTSA. Originally, Nader’s influence on the agency came indirectly through his clout with the Senate Commerce Committee.<sup>61</sup> In time, Nader’s Center for Auto Safety became simply “an intermediary between the agency and disgruntled consumers,” as the Center’s staff took letters sent to Nader by the members of the public and forwarded them directly to “senior regulatory officials, including the secretary of transportation.”<sup>62</sup> Clearly, the voice of the public was heard well beyond the narrow confines of notice-and-comment rulemaking.

Agencies interpreting and implementing statutes nonetheless are often similarly pressured by those affected by their actions and have incentives to take that pressure into account when making decisions. A study of the creation of OSM, for instance, provides a fascinating example of the direct influence of a diverse array of constituent groups on agency decisionmaking, in the wake of the Office’s 1977 conception to regulate coal mining.<sup>63</sup> The initial rulemaking process was marked by “rancorous political conflict” as the coal industry and environmentalists “[e]ach wanted and expected to have a significant part in shaping the forthcoming regulations” which would dictate the parameters of the new agency.<sup>64</sup>

The political input of these groups did not end with the conclusion of notice and comment, however. To the contrary, the ongoing enforcement process of inspecting mines and levying fines on offenders was affected by direct political pressure on the agency by the same groups that participated in rulemaking. The relative success of this pressure was driven, in part, by the political relationship between the parties and the current presidential administration. During the first seven months of inspections (May-December

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60. See Quirk, *supra* note 59, at 217.

61. See JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 126 (1990).

62. *Id.*

63. See NEAL SHOVER, DONALD A. CLELLAND & JOHN LYNXWILER, *ENFORCEMENT OR NEGOTIATION: CONSTRUCTING A REGULATORY BUREAUCRACY* 37 (1986).

64. *Id.* at 54; see also *id.* at 54-71.

1978), the agency inspected only ten percent of regulated mines, prompting harsh criticisms from environmentalists, who “carefully examined the agency’s performance of inspections.”<sup>65</sup> As a result of the criticism, the agency, under the Carter Administration, quite literally redoubled its efforts, inspecting twenty-five percent of mines within the six months.<sup>66</sup> The rise led to complaints from the coal industry, which, in turn, led to the softening of agency policies in the newly sympathetic Reagan Administration.<sup>67</sup>

The “bigger picture” political science research confirms the lesson of these anecdotes: bureaucrats are legitimately responsive to political forces through a wide variety of mechanisms. One study, for example, surveyed more than a hundred middle management officials at federal agencies.<sup>68</sup> The study found significant agency responsiveness to interest groups, executive management, and Congress.<sup>69</sup> The officials reported that interest groups make their voices heard through informal communication with agency personnel and public meetings, as well as written comments in the rulemaking process.<sup>70</sup> Other research confirms the range of “‘direct’ and ‘diffuse’” influences political forces have on bureaucrats.<sup>71</sup>

Because bureaucrats are politically accountable when making informal decisions about how to interpret statutes, courts should not pretend that rulemaking carries with it political legitimacy altogether different from other agency decisions. Indeed, the groups interacting with agencies informally are often the same ones who participated in notice-and-comment rulemaking or even lobbied Congress for (or against) the statute granting the agency regulatory authority in the first place.<sup>72</sup> It may still be necessary for a court to step in and overrule an agency when it has, in fact, stretched the language of its statute too far. But courts should be sensitive to the fact that agency decisions, as a result of the political processes behind them, have some initial authority and legitimacy.

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65. *Id.* at 81.

66. *Id.*

67. *Id.* at 80-81.

68. Scott R. Furlong, *Political Influence on the Bureaucracy: The Bureaucracy Speaks*, 8 J. PUB. ADMIN. RES. & THEORY 39, 45 (1998).

69. *Id.* at 47-48.

70. *Id.* at 54-56; see also Scott R. Furlong & Cornelius M. Kerwin, *Interest Group Participation in Rule Making: A Decade of Change*, 15 J. PUB. ADMIN. RES. & THEORY 353, 365 (2005) (describing effectiveness of informal communication).

71. See Waterman et al., *supra* note 31, at 35-36.

72. SHOVER ET AL., *supra* note 63, at 54 (“Now, the bitter legislative adversaries turned their attention to the Office of Surface Mining and its rule-making process.”).



Of course, one may question whether these political forces are a desirable feature in a functioning democracy. Scholars have long worried about agency “capture”—that government agencies will become more responsive to well-organized interest groups with a stake in their decisions than to the diffuse public whose interests the agencies were created to serve.<sup>73</sup> Prominent scholars have cited agency capture specifically as a reason to worry about delegating lawmaking authority to agencies.<sup>74</sup>

There is reason to believe, though, that these fears are overblown. Substantial doubts have been raised about whether the influence of “special interest” groups really has such pernicious effects on agencies. The “agency capture” view has been under attack for some time. Indeed, one well-known political scientist noted as early as the mid-1980s that “no version of the capture theory is universally accepted, and it is increasingly under attack by those who dispute both the pervasiveness of the capture phenomenon and its proffered explanations.”<sup>75</sup> Recent scholarship has emphasized that past theorists overestimated the degree to which “concentrated special interests” really get their way at the expense of the populace.<sup>76</sup> These arguments have been made primarily by political scientists, though, and seem not to have permeated the legal discourse.

My task here, however, is not to wade into the debate about delegation to agencies. My thesis is not about the original decision to delegate to agencies, but rather that fears about agency capture are not *especially* salient in the context of delegated decisions made informally. The political forces at work in informal agency decisionmaking are more or less the same as those working elsewhere in the administrative and legislative process.

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73. See Kagan, *supra* note 26, at 2264–65. For classic explications of “capture theory,” see generally Samuel P. Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 YALE L.J. 467 (1952); and George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

74. See, e.g., Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 63–67 (1982); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 321 (2000).

75. Terry M. Moe, *Control and Feedback in Economic Regulation: The Case of the NLRB*, 79 AM. POL. SCI. REV. 1094, 1094 (1985).

76. Donald Wittman, *The End of Special Interests Theory and the Beginning of a More Positive View of Democratic Politics*, in GOVERNMENT AND MARKETS: TOWARD A NEW THEORY OF REGULATION 193, 193 (Edward J. Balleisen & David A. Moss eds., 2010); see also Daniel Carpenter, *Confidence Games: How Does Regulation Constitute Markets?*, in GOVERNMENT AND MARKETS: TOWARD A NEW THEORY OF REGULATION, *supra*, at 164; Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RES. & THEORY 245, 260 (1998) (“[T]here is little evidence of agency capture.”).

Finally, it should be noted that the political process by which Congress itself operates is subject to the same concerns about democratic legitimacy as informal agency decisionmaking. Justice Breyer has pointed out the similarities between Congress's lawmaking process and the operations of an administrative bureaucracy, arguing in favor of the legitimacy of both.<sup>77</sup> In fact, since much of the informal influence on agencies comes directly from Congress, the political forces affecting agencies may be quite literally the same as the forces affecting Congress. One well-known scholar has thus argued that the "deviation between agency action" and the actual enactments of Congress "is not that great."<sup>78</sup> Indeed, Jerry Mashaw has taken this argument one step further, arguing that delegation to bureaucracies actually provides more political accountability than direct action by Congress itself.<sup>79</sup> The political process of Congress is, for all of its faults, treated as having authority, and informal agency decisions should similarly be treated with some respect.

#### *D. Political Accountability and Formal Procedures*

As a theoretical matter, a key virtue of notice-and-comment rulemaking is that all parties have an equal chance to submit comments and have the agency respond to them, either by changing the regulation or giving a counterargument.<sup>80</sup> Informal political processes, by this logic, may disadvantage relatively disorganized or powerless groups.<sup>81</sup> This would suggest that the process of notice-and-comment is a better guarantee of political input than the informal mechanisms I have described.<sup>82</sup>

While there is some truth to this theoretical analysis, in reality it both overstates the extent to which formal processes are democratic and undersells the political legitimacy of informal action. Though in theory practices like notice-and-comment rulemaking put all affected parties on an equal playing field, as a practical matter this is far from the truth. For one thing, well-organized interest groups, who are able to monitor the Federal Register for the

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77. See Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 858-60 (1992).

78. Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2128 (2002).

79. See Mashaw, *supra* note 15, at 95-99.

80. See 1 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 6:38 (2d ed. 1978) ("Rulemaking procedure allows the agency to consult any and all who are interested . . .").

81. See *infra* notes 126-127 and accompanying text.

82. See Kagan, *supra* note 26, at 2264-65.

publication of upcoming rules and are able to hire experienced lawyers to participate effectively in the notice-and-comment process, will have systematic advantages over the disorganized public or relatively less powerful groups in rulemaking.<sup>83</sup> The advantages of well-heeled or organized groups in the rulemaking process are similar to the advantages these groups will have in informal processes.

Additionally, while the process of notice and comment theoretically treats the comments made by actors of all stripes equally, in reality agency staff is not blind to the source of each comment. Agencies may take different comments more or less seriously, depending on the political power of the commenter.<sup>84</sup> A member of the public who is more likely to sue or pursue “behind the scenes” political channels may receive more changes than a less well-connected commenter. Indeed, studies conducted by political scientists have found precisely this result.<sup>85</sup>

Furthermore, as those with experience with the process have observed, notice-and-comment rulemaking is typically not where the political process works itself out in agency decisions. Rather, even in formal rulemaking contexts, public participation happens more significantly by “informal” means. As Professor Donald Elliott, a former General Counsel of the EPA, explains:

No administrator in Washington turns to full-scale notice-and-comment rulemaking when she is genuinely interested in obtaining input from interested parties. Notice-and-comment rulemaking is to public participation as Japanese Kabuki theater is to human passions—a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues. To secure the genuine reality, rather than a formal show, of public participation, a variety of techniques is available—from informal meetings with trade

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83. See CORNELIUS M. KERWIN, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* 111 (2d ed. 1999); Katharine Q. Seeyle, *Flooded with Comments, Officials Plug Their Ears*, N.Y. TIMES, Nov. 17, 2002, at C4 (noting “AstroTurf campaigns” by well-organized advocacy groups in the rulemaking process).

84. See Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 16 (1982) (“The agency virtually always retains a broad range of discretion, the exercise of which involves inherently political choices.”).

85. See, e.g., Steven J. Balla, *Administrative Procedures and Political Control of the Bureaucracy*, 92 AM. POL. SCI. REV. 663, 671 (1998) (finding that “the agency was more responsive to comments submitted by high-income specialties after publication of the Proposed Rule than to those submitted by low-income specialties”).

associations and other constituency groups, to roundtables, to floating “trial balloons” in speeches or leaks to the trade press . . . .<sup>86</sup>

As this account makes clear, the political process is not actually working, in any realistic way, in rulemaking. To the degree that deference is rooted in political accountability, agencies should not be accorded less deference simply because they chose not to utilize notice and comment. In either case, the political process really works itself out informally.

Elena Kagan, who served as deputy director of the Domestic Policy Council in the Clinton Administration, confirms that notice-and-comment rulemaking is not actually how political accountability works in government agencies. As Kagan writes, “the formal (though nominally ‘informal’) process of notice-and-comment” has “little to do with genuine exchange between regulators and interested parties.”<sup>87</sup> Rather, “prior, informal consultations . . . currently serve as the principal means for government officials to gain information from interested parties.”<sup>88</sup>

Kagan buttresses this assertion with two telling anecdotes from her tenure in the Clinton Administration. The first is President Clinton’s decision to regulate cigarettes using an expansive reading of the authority of the Food and Drug Administration—a reading eventually struck down by the Supreme Court.<sup>89</sup> Clinton announced the decision prior to the commencement of rulemaking, laying out, in detail, how the agency would regulate tobacco.<sup>90</sup> Though the agency then proceeded with the notice-and-comment process, this process was largely irrelevant.<sup>91</sup> Similarly, the rulemaking process played little if any role in the Department of Labor’s action to allow states to offer paid leave to new parents through the unemployment insurance system.<sup>92</sup> Kagan argues persuasively that these decisions were supported by a substantial amount of political accountability, as President Clinton himself took public responsibility for the proposals.<sup>93</sup> However, to accord these rulemaking proceedings particular deference because the government utilized notice and

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86. E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492-93 (1992).

87. Kagan, *supra* note 26, at 2360.

88. *Id.*

89. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

90. Kagan, *supra* note 26, at 2282-83.

91. *See id.* at 2283, 2301.

92. *See id.* at 2284.

93. *See id.* at 2331-39.

comment would simply not reflect the reality of the minimal role the process actually had in the decisions.

The political science research confirms these anecdotal accounts that political forces have only minimal effect in notice-and-comment rulemaking. One extensive study of ten instances of agency rulemaking by Marissa Golden found only a single instance of the notice-and-comment process producing significant changes to a rule.<sup>94</sup> By contrast, “in the majority of cases the agency made some of the changes that were requested by commenters, but it rarely altered the heart of the proposal.”<sup>95</sup> Indeed, one significant finding of the study was that agencies consistently used the notice-and-comment process to justify previously made policy decisions, rather than taking into account the strength of forces favoring or disfavoring the proposal.<sup>96</sup>

Other research similarly indicates that agencies are politically accountable, but that the notice-and-comment process is not where this accountability plays out. A study of forty-two rulemaking proceedings confirmed Golden’s findings that changes made in the comment process “seldom address the fundamental nature of the policy.”<sup>97</sup> Notably, this study found that, in the vast majority of rulemaking proceedings, agency officials consulted informally with nongovernmental officials in the process of formulating the proposed rule, but relied on constituent input far less during the formal comment period.<sup>98</sup> Thus, agency officials’ positions may actually rigidify by producing “detailed and thoroughly justified proposals.”<sup>99</sup>

The lesson of this research is not that notice-and-comment rulemaking is useless. On the contrary, notice and comment serves valuable functions. For example, the procedure allows agencies to solicit input from a broader range of voices in the regulatory process, as well as to create an administrative record for judicial review.<sup>100</sup> Relatedly, the notice-and-comment procedure also promotes transparency in the regulatory process. Furthermore, notice and comment may alert agency staff to the existence of factors that, for whatever reason, they were

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94. Golden, *supra* note 76, at 259.

95. *Id.*

96. *See id.* at 261-62.

97. William F. West, *Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 PUB. ADMIN. REV. 66, 74 (2004).

98. *Id.* at 70-71.

99. *Id.* at 74-75.

100. *See id.* at 70, 74-75.

previously unaware of.<sup>101</sup> And by allowing outside groups to give input on the regulatory language prior to its formal enactment, the agency may be made aware of unintended consequences of its phrasing of the rule, or allow the agency to clarify ambiguous language.

These advantages of formal rulemaking suggest affording greater deference to statutory interpretation performed with such procedures. My point is not that formal rulemaking has no benefits. But the contrast between informal and formal decisionmaking should also not be overestimated. When it comes to political accountability, the difference between how formal and informal decisions get made may be very slight. The large amount of political accountability buttressing informal decisions warrants significant, albeit lesser, deference.

### *E. Related Scholarship*

David Barron and Elena Kagan, as noted above,<sup>102</sup> have argued for the significance of political accountability in supporting deference to agency decisions. However, because these authors focus exclusively on electoral ties, they substantially underestimate the broad accountability of everyday government officials. It is quite difficult to reconcile Barron and Kagan's comment that "[c]areer agency staff, as a rule, are (proudly) resistant to broad political influence"<sup>103</sup> with, for example, political science findings that that very same staff's behavior tracks closely the political preferences of congressional oversight.<sup>104</sup> As one political scientist starkly concluded in a study on the subject, "the career civil service is . . . at least at the upper levels of the civil service—considerably more responsive than resistant" to political forces.<sup>105</sup>

In fact, Barron and Kagan themselves give various examples of officials being held accountable through informal political mechanisms. Because these instances have no connection to elections, however, Barron and Kagan fail to recognize them as examples of real political accountability. The authors recount instances in both the Clinton and George W. Bush Administrations of low-level government officials making informal decisions that generate a large degree of political backlash.<sup>106</sup> As the authors note, in each case the relevant

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101. See *id.* at 71-72.

102. See *supra* notes 16-17 and accompanying text.

103. Barron & Kagan, *supra* note 7, at 242.

104. See *supra* note 45 and accompanying text; see also *supra* note 43 and accompanying text.

105. GOLDEN, *supra* note 24, at 13.

106. See Barron & Kagan, *supra* note 7, at 253-54 & n.180.

department secretary endured “a firestorm of protest from individuals, companies, members of Congress, and even the White House”—and, as a result, reversed the decision.<sup>107</sup> These are examples of the process working through informal political mechanisms, not failing to work; the political backlash completely changed the original decision. Yet Barron and Kagan cite them as examples of the problem, complaining that “[n]o resignation took place.”<sup>108</sup> That reflects a metric of political accountability that is too narrow.

Similarly, in a recent insightful article on congressional oversight of the executive, Jack Beermann argues that political accountability resulting from congressional oversight justifies deference to agency decisions.<sup>109</sup> Beermann’s account is congruent with my own to the extent that he recognizes that government agencies are broadly political accountable.<sup>110</sup> However, Beermann disputes the degree to which agency officials are accountable in the *informal* context. He thus argues against deference in those circumstances.

Beermann attacks accountability in the informal context based on a claim about publicity. Beermann reasons that without notice-and-comment rulemaking, “the lack of public proceedings makes it less likely that substantial communication between members of Congress and agency officials took place.”<sup>111</sup> This statement misjudges informal political accountability for three reasons. First, even if the informal mechanisms sometimes operate behind the scenes, they still represent a viable and legitimate political process. Second, groups and individuals affected by agency action have a natural incentive to make the matter public—either by bringing it to the attention of political representatives or by alerting the media. Third, an exclusive focus on Congress misses a variety of ways in which agencies are held accountable, both before and after the fact.

Beermann’s point about public proceedings having some value is well taken. *Skidmore* deference should be less than *Chevron* precisely because of the public guarantees of notice and comment.<sup>112</sup> Yet Beermann is mistaken if he believes that the lack of notice and comment makes the process behind informal decisions inherently illegitimate. The Nissan anecdote described above is instructive in this regard.<sup>113</sup> Though the machinations of the Clinton

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107. *Id.*

108. *Id.* at 254.

109. Beermann, *supra* note 35, at 153-54.

110. *See id.* at 157.

111. *Id.* at 153; *see also id.* at 152.

112. *See supra* notes 80-82 and accompanying text; *supra* notes 100-101 and accompanying text.

113. *See supra* notes 49-52 and accompanying text.

administration were behind the scenes, the agency decision was still clearly the product of a viable political process. Indeed, it is precisely this type of behind-the-scenes wrangling that is the hallmark of congressional dealmaking. In administrative agencies as well as the legislature, what is public is only a shadow of the real interests at stake.

Additionally, Beermann's account understates the degree to which informal agency proceedings will, as a practical matter, become public. As the empirical accounts indicate, notice-and-comment rulemaking is not actually how public debate about an issue occurs. Even in formal rulemaking proceedings, the public learns about agency decisions by presidential press conferences and agency news releases, not by scanning the Federal Register. And in the informal context, parties affected by agency decisions have proven themselves quite capable of drawing attention to the proceedings—either by calling their congressional representatives (or contacts at the White House) or by alerting the press. It is hardly the case that consequential decisions made by federal government agencies go without notice.

Finally, by focusing solely on actual congressional oversight, Beermann misses the wide variety of ways in which agency officials are otherwise held accountable. For one thing, Beermann's emphasis on Congress overemphasizes the importance of this *after-the-fact* means of control. Even more important than the actual action of Congress is the anticipation, or threat, of possible action. Bureaucrats live with the idea of Congress watching over their shoulder. Like accountability mechanisms in many domains, it is not so much the limited actual punishment as the broader, constant threat of action that creates incentives to behave in a particular way. Furthermore, Beermann probably understates the degree to which agency officials respond not only to Congress but also to White House officials and the press. The potential for future media attention is arguably the most important means of accountability, and Beermann's account neglects it.

Ultimately, it is not clear whether Professor Beermann believes the lack of publicity *completely* undermines the political accountability rationale for *Skidmore* deference. He might, alternatively, be amenable to the argument presented here that *Skidmore* deference should be substantial, but less than *Chevron*. Without an explicit statement in this regard, it is difficult to say. But his attack on informal agency accountability is unwarranted.

Einer Elhauge, in his work on “preference-estimating default rules,” has also defended deference to agencies under *Chevron* on the basis of the political legitimacy of agencies.<sup>114</sup> However, Elhauge explicitly challenges my notion

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114. See Elhauge, *supra* note 78, at 2126-29, 2135-37.



that political accountability supports deference in the informal context. Elhauge's key claim is that "it is only rulemaking that is conducted after notice and comment that gives some reasonable assurance that the agency surveyed the current political preferences before acting."<sup>115</sup> Elhauge's reasoning in support of this claim centers around notice—that notice and comment "alerts congressional members and the President's political advisors that an issue is coming up that they may be interested in influencing, or at least alerts private parties who then alert these political officials."<sup>116</sup>

As a realistic matter, though, notice and comment does not actually play nearly the role Elhauge describes within government agencies. As the Kagan and Elliott accounts both make clear, notice and comment is not how government agencies assess current political preferences. Interested groups often do not learn about agency action in the Federal Register. Rather, they monitor agencies for conduct which affects them. Likewise, as Elhauge himself seems to acknowledge, it is not through comment but by exerting political pressure informally that interested groups make their voices heard.<sup>117</sup> The "Kabuki theater" of notice and comment cannot bear the weight that Elhauge puts on it.

## II. WHY, WHEN, AND HOW MUCH DEFERENCE

Recent political science research has thus made clear that government agencies are quite responsive to political forces of all kinds. Political accountability was one of the principal justifications for *Chevron*, and it should not be abandoned in the *Skidmore* context. It is true that informal decisions lack the guaranteed quasi-political input from constituent groups that is the hallmark of notice-and-comment rulemaking governed by *Chevron*. Still, the research makes clear that political forces do hold sway in the informal context. These forces should not count for nothing in the courts.

### A. Justifications for Deference

The Supreme Court has long held that courts should defer to some degree to an agency's own interpretation of the statutes it implements. The Court has cited three primary reasons for deferring to agency interpretative decisions.

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<sup>115.</sup> *Id.* at 2140.

<sup>116.</sup> *Id.*

<sup>117.</sup> See also Seeyle, *supra* note 83 ("[T]he public comment period has become a widely discredited measure of public sentiment . . .").

The first, and most traditional, reason for deferring to agency interpretations is expertise.<sup>118</sup> This reason has been cited by the Court in various decisions over many years, with the basic rationale being that the agency officials who implement and administer statutes on a consistent basis have more expertise to interpret the statute's meaning than courts.<sup>119</sup>

The second reason for affording deference to agency interpretations of statutes is that Congress has delegated lawmaking authority to the agency under the statute in question. This reason was part of the justification for *Chevron*,<sup>120</sup> and the Court reiterated its significance in *Mead*.<sup>121</sup> As Justice Souter wrote for the Court, "We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."<sup>122</sup> The Court confirmed the implied delegation rationale as recently as 2006.<sup>123</sup>

The third and final reason cited by the Court for agency deference is political accountability. This reason was at the heart of *Chevron*. Justice Stevens, writing for the unanimous Court, relied heavily on this factor, in a discussion worth quoting at length:

[P]olicy arguments are more properly addressed to legislators or administrators, not to judges. . . . [I]t is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the

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118. See Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735, 739 (2002).

119. See, e.g., *Chevron U.S.A. Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 865 (1984); *FTC v. Cement Inst.*, 333 U.S. 683, 720 (1948) ("The kind of specialized knowledge Congress wanted its agency to have was an expertness that would fit it to stop at the threshold every unfair trade practice . . ."); *SEC v. Chenery Corp.*, 332 U.S. 194, 209 (1947) (emphasizing that administrative determinations are entitled to the most deference when they are the product of "administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the uncontested facts").

120. 467 U.S. at 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.").

121. 533 U.S. 218, 226-27 (2001).

122. *Id.*

123. See *Gonzales v. Oregon*, 546 U.S. 243, 255-56 (2006).

agency charged with the administration of the statute in light of everyday realities . . . . In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.<sup>124</sup>

While this statement came from liberal icon Justice Stevens, its core message is one also held dear by modern judicial conservatives: the elected branches, and not judges, should make policy. The courts have routinely invoked this core rationale for deferring to agencies in the quarter-century since *Chevron*.<sup>125</sup> The central project of this Note is to show that the rationale of political accountability applies in large degree to informal *Skidmore* decisions.

In addition to the primary three reasons, a fourth reason for deferring to agency interpretations is interest representation. The basic idea underlying this rationale is that groups affected by agency action should be given an opportunity to make their views heard in the agency's process. If this process occurs, the agency action takes on legitimacy.<sup>126</sup> This theory overlaps with the political accountability model in that it involves bringing the input of affected groups to bear on administrative decisions, but is more formalistic in its emphasis on allowing each group to "have their say." The Supreme Court has never cited this rationale for deferring to agencies, but it was cited frequently by circuit courts in pre-*Chevron* decisions.<sup>127</sup>

### B. Domains of Deference: *Chevron vs. Skidmore*

The Supreme Court has, in recent years, indicated that the amount courts should defer to an agency's interpretation of a statute has a close relationship

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124. *Chevron*, 467 U.S. at 864-66.

125. See, e.g., *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005); *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680 (1991); see also Silberman, *supra* note 23, at 822 ("*Chevron's* rule . . . is simply a sound recognition that a political branch, the executive, has a greater claim to make policy choices than the judiciary."); Sunstein, *supra* note 5, at 2087.

126. See Stewart, *supra* note 15, at 1670 ("Increasingly, the function of administrative law is . . . the provision of a surrogate political process to ensure the fair representation of a wide range of affected interests in the process of administrative decision.").

127. See, e.g., *Alcaraz v. Block*, 746 F.2d 593, 611 (9th Cir. 1984) (claiming that rulemaking procedure "reintroduces a representative public voice"); *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980) ("Notice and public comment . . . reintroduce public participation and fairness to affected parties."); *Texaco, Inc. v. Fed. Power Comm'n*, 412 F.2d 740, 744 (3d Cir. 1969) ("Section 553 was enacted to give the public an opportunity to participate in the rule-making process.").

with the method by which the agency came to the particular interpretation. The strongest form of deference is associated with the *Chevron* decision, and its famous “two step.” The first step is determining whether the statute in question is clear or ambiguous. When the statute is clear, no deference is necessary, as “courts are bound to follow the clearly expressed intent of Congress.”<sup>128</sup> But when the statute is ambiguous, *Chevron* established that courts must be very deferential to reasonable interpretations of the statute by agencies. This deference standard has been referred to by scholars as “strong, mandatory deference”<sup>129</sup> or “a very broad rule of deference.”<sup>130</sup>

However, the Court has recently limited this strong version of judicial deference to a certain subset of agency statutory interpretations. In *Christensen*<sup>131</sup> and *Mead*,<sup>132</sup> the Court held that agency decisions made by formal adjudication or utilizing full notice-and-comment rulemaking procedures as prescribed by the Administrative Procedure Act are entitled to full *Chevron* deference. Such decisions are “formal” instances of statutory interpretation. On the other hand, “informal agency interpretations” are governed by a lower level of deference, associated with *Skidmore*.<sup>133</sup> As the Court stated in *Christensen*, “interpretations contained in formats such as opinion letters are ‘entitled to respect’ under our decision in *Skidmore v. Swift & Co.*, . . . but only to the extent that those interpretations have the ‘power to persuade.’”<sup>134</sup> In order to decide whether to give an agency interpretation *Chevron* or *Skidmore* deference, therefore, the Court must conduct what scholars have called a “Step Zero” analysis of the formality of the procedures used by the agency in coming to that decision.<sup>135</sup>

Although this determination about the agency’s procedures precedes the usual *Chevron* analysis, courts considering informal interpretations under *Skidmore* still need to consider whether the statute in question is, in fact,

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128. Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1241-42 (2007).

129. *Id.* at 1242.

130. Eskridge & Baer, *supra* note 5, at 1086.

131. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

132. 533 U.S. 218 (2001).

133. See Eskridge & Baer, *supra* note 5, at 1088.

134. *Christensen*, 529 U.S. at 587 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

135. See Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 912-14 (2001); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006).

ambiguous.<sup>136</sup> The Supreme Court has recently confirmed this point explicitly, stating that it has “no need to choose between *Skidmore* and *Chevron*” when the statute in question is clear.<sup>137</sup> Thus, only when a court has found a statute to be ambiguous does the level of deference matter. When a court makes such a finding, it then proceeds to Step Two, deciding whether the agency’s interpretation is “reasonable.” The Step Zero analysis of formality thus determines how deferential the court should be in judging the reasonableness of the agency’s interpretation.

It should be noted that this description may somewhat overstate how precisely the Court has demarcated the boundaries of *Chevron* and *Skidmore* deference. The decision in *Mead* strongly linked the standard of deference to the formality of agency procedures: “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 . . . .”<sup>138</sup> Even so, some members of the Court have objected to the idea that formality exclusively dictates the degree of deference.<sup>139</sup> In particular, *Mead* indicated that Congress might be able to prescribe strong deference to informal action by explicitly delegating lawmaking authority to informal action.<sup>140</sup> This language has proven confusing to scholars and lower courts.<sup>141</sup> Nonetheless, despite the possibility of exceptions on the margins, scholars agree that formality is the

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136. See Hickman & Krueger, *supra* note 128, at 1247 (“[B]ecause a reviewing court will not defer to an agency under either doctrine if the statute’s meaning is clear, the *Skidmore* standard implicitly replicates *Chevron*’s first step.”).

137. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004).

138. *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001).

139. See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 1004 (2005) (Breyer, J., concurring) (“[T]he existence of a formal rulemaking proceeding is neither a necessary nor a sufficient condition for according *Chevron* deference to an agency’s interpretation of a statute.”).

140. See *Mead*, 533 U.S. at 227.

141. See William S. Jordan, III, *United States v. Mead: Complicating the Delegation Dance*, [2001] 31 *Env’tl. L. Rep. (Env’tl. Law Inst.)* 11,425, 11,429-30 (discussing the interpretation of *Mead* by lower courts); William S. Jordan, III, *Judicial Review of Informal Statutory Interpretations: The Answer Is Chevron Step Two, Not Christensen or Mead*, 54 *ADMIN. L. REV.* 719, 719 (2002) (“First in *Christensen v. Harris County*, then in *United States v. Mead Corp.*, the Court created a cumbersome, unworkable regime under which courts must draw increasingly fine distinctions using impossibly vague standards.” (footnotes omitted)); Richard W. Murphy, *Judicial Deference, Agency Commitment, and Force of Law*, 66 *OHIO ST. L.J.* 1013, 1038 (2005) (calling *Mead* “downright confusing”).

*principal* factor that determines the level of deference afforded to agency interpretations.<sup>142</sup>

Thus, the Court has laid out a fairly coherent framework for different levels of deference to agencies' interpretation of ambiguous statutes. For formal agency decisions, such as formal adjudications or notice-and-comment rulemaking, courts should be quite deferential to agency interpretations under the *Chevron* doctrine. So long as the agency's interpretation of the statute is reasonable or plausible, the agency's interpretation should not be overruled. For other, informal agency decisions, however, the *Skidmore* standard operates as a default setting of lesser deference.<sup>143</sup> In other words, "Skidmore is the backstop doctrine that applies when *Chevron* deference is unavailing."<sup>144</sup> Since the *Skidmore* backstop governs the majority of administrative decisions,<sup>145</sup> the level of deference indicated by that default setting is crucially important.

### C. How Much Is *Skidmore* Deference?

Current scholarship has not come to a consistent view of how deferential courts are or should be when giving an agency interpretation *Skidmore* deference. There is thus a substantial amount of disagreement about the *Skidmore* doctrine.<sup>146</sup> At one end of the spectrum are those who believe that *Skidmore* deference is no deference at all—what could be called "zero deference." This belief is the doctrinal target of this Note. Giving agencies no deference under *Skidmore* does not comport with the underlying rationale that

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142. See Elhauge, *supra* note 78, at 2140 ("[The Court] continues to define the rulemaking that has force of law as 'notice-and-comment rulemaking' and the adjudication that has the force of law as 'formal' adjudication. True, *Mead* left open a small residual category illustrated by one case that involved informal rulemaking, but it made clear that the most significant factor was the existence of a 'notice-and-comment' procedure." (footnotes omitted)); see also Barron & Kagan, *supra* note 7, at 203 ("The Court emphasized most heavily the divide between formal and informal procedures, suggesting that, except in unusual circumstances, only decisions taken in formal procedural contexts merit *Chevron* deference."); Murphy, *supra* note 141, at 1016 (characterizing the Court's doctrine as indicating that "procedure should be the presumptive touchstone of strong deference").

143. See Eskridge & Baer, *supra* note 5, at 1092.

144. Elhauge, *supra* note 78, at 2136 n.358.

145. See *supra* note 7 and accompanying text.

146. See Michael Herz, *Judicial Review of Statutory Issues Outside of the Chevron Doctrine*, in A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 123, 129 (John F. Duffy & Michael Herz eds., 2005) ("Just how *much* respect these interpretations merit or in fact receive is both variable and disputed . . ."); Rossi, *supra* note 6, at 1111; Charles A. Sullivan, *On Vacation*, 43 HOUS. L. REV. 1143, 1204 n.287 (2006).

the greater political accountability of agencies justifies deference. Nonetheless, some courts have improperly interpreted *Skidmore* as a doctrine of zero deference.

At the heart of zero deference is the oft-quoted maxim, originating in *Skidmore* itself, that the “power to persuade” is the source of *Skidmore* deference. The problem with this formulation is that it suggests that the persuasive force of the *argument* made by agencies is the sole consideration for courts.<sup>147</sup> No weight is given to the fact that the agency is a government entity. In the words of then-Judge Breyer, “The simple fact that the agency *has* a position, in and of itself, is of only marginal significance.”<sup>148</sup> The agency’s decision is treated by the court in essentially the same manner as a brief by any other party in litigation.<sup>149</sup> Under this regime, circumstances in which the agency has very technical expertise would be perhaps the only instances in which courts should defer at all.<sup>150</sup> It is very hard to see how this gives any content to so-called *Skidmore* deference.<sup>151</sup>

My assertion is that the “power to persuade” should not refer merely to the persuasive force of an agency’s argument. An analogy to courts’ use of “persuasive precedent” is instructive. When one court cites the nonbinding decision of another, it sometimes delves into the *reasoning* used by the other court. However, in many instances, one court will cite another court without even mentioning the reasoning of that other court. In those instances, the court is citing the other court simply to note that another legitimate government actor has made a particular decision. In the same way, a statutory interpretation performed by a federal agency has legitimacy; the fact that the agency is politically accountable gives its decision authority.<sup>152</sup> This was the deference rationale cited by Justice Stevens in *Chevron*.

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147. For an interpretation of *Skidmore* deference along these lines, see Jed I. Bergman, Note, *Putting Precedent in Its Place: Stare Decisis and Federal Predictions of State Law*, 96 COLUM. L. REV. 969, 982 n.69 (1996). See also *Mayburg v. Sec’y of Health & Human Servs.*, 740 F.2d 100, 106 (1st Cir. 1984) (Breyer, J.) (“[U]nder *Skidmore* the agency ultimately must depend upon the *persuasive power* of its argument.”).

148. *Mayburg*, 740 F.2d at 106. According to a former student, Judge Breyer, in his capacity as a professor at Harvard Law School, used to tell his students that agency decisions should be afforded roughly the same weight as law review articles.

149. See Christopher M. Pietruszkiewicz, *Discarded Deference: Judicial Independence in Informal Agency Guidance*, 74 TENN. L. REV. 1, 8 (2006).

150. See *Mayburg*, 740 F.2d at 106 (“The fact that a question is closely related to an agency’s area of expertise may give an agency greater ‘power to persuade.’”).

151. See Pietruszkiewicz, *supra* note 149, at 8.

152. See generally *supra* Part I.

Of course, it makes sense that, without the guarantees of notice and comment, courts should give less weight to these political factors in the informal context.<sup>153</sup> As current doctrine properly indicates, *Skidmore* deference should be less than *Chevron* deference. But to act as if informal agency decisions are made in a political vacuum is simply inaccurate, and introduces needless discontinuity between the two doctrines.

*Skidmore* deference, then, should be intermediate deference—more than zero deference to agency interpretations but less than full *Chevron* deference.<sup>154</sup> This level of deference has been called “thumb-on-the-scale” deference.<sup>155</sup> Political accountability gives agency interpretations a baseline level of legitimacy prior to consideration of these contextual factors. Nonetheless, substantial deference and context need not be mutually exclusive. Courts can give substantial deference to agencies but modify this default when, for example, the agency happens to have particular technical expertise.

Justice Scalia has been perhaps the most vocal proponent of deference to administrative decisions.<sup>156</sup> He dissented sharply in *Mead*, on the grounds that agency decisions should receive full *Chevron* deference even in the informal context.<sup>157</sup> However, Justice Scalia has also disputed the notion of intermediate

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153. See *supra* notes 80-82 and accompanying text; *supra* notes 100-101 and accompanying text.

154. Of course, explicitly adopting a deference regime with an “intermediate” level between two extremes invites a comparison to the Court’s Equal Protection jurisprudence, in which “intermediate scrutiny” inhabits a middle ground between “strict” and “rational basis” scrutiny. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 8-3 to -4. The Court has thus shown its comfort with such a tiered structure. Although a thorough treatment is beyond the scope of this Note, it is interesting to note the conceptual parallels between a “deference” regime, in which a court considers overriding the executive with its reading of a statute, and a “scrutiny” regime, in which a court considers overriding the legislature with its reading of the Constitution. I thank Haninah Levine for pointing out this comparison to me. On the other hand, commentators in the “legal realist” tradition have long suggested that the “tiers of scrutiny” are a judicial contrivance that does little to determine the outcome of decisions. See David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 308 (1976) (famously calling the test “a label to describe a preordained result”). Perhaps not surprisingly, a similar, though somewhat less severe, claim has recently been leveled about the Court’s deference regime. See Eskridge & Baer, *supra* note 5, at 1098-1100 (arguing “that the Court’s deference practice functions along a *continuum*,” not the articulated deference regime, and noting that “a majority of the Court’s cases involving an agency interpretation of a federal statute do not invoke *any* deference regime”).

155. Amy J. Wildermuth, *Solving the Puzzle of Mead and Christensen: What Would Justice Stevens Do?*, 74 FORDHAM L. REV. 1877, 1905 (2006).

156. See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511; see also Barron & Kagan, *supra* note 7, at 205 (noting the “nearly unlimited deference [Justice Scalia] favors”).

157. 533 U.S. at 239-40 (Scalia, J., dissenting).



deference. At the heart of Justice Scalia's objection is the metaphysical claim that one cannot defer more or less to someone else. Either one defers or one does not: "the notion that there are degrees of deference is absurd. . . . 'Some deference,' or 'less than total deference,' is no deference at all."<sup>158</sup> By providing a familiar model for *Skidmore* deference—that of persuasive precedent—I hope to prove unfounded Justice Scalia's worry that "so-called *Skidmore* deference" is "indeterminate."<sup>159</sup> Courts do defer *somewhat* to the rulings of sister circuits, even as this deference is less than that afforded to binding precedent.<sup>160</sup> On the other hand, recent scholarship confirms Justice Scalia's notion that some invocations of *Skidmore* by courts indicate no deference whatsoever.<sup>161</sup> I contend that these cases were wrongly decided, as Justice Scalia would presumably agree.

#### D. Rationales for Chevron and Skidmore

The *Skidmore* and *Chevron* doctrines have sometimes been associated with somewhat different underlying rationales. The difference between the two doctrines, as a practical matter, is indicated by the degree of formality of agency procedure. The Court stated in *Mead* that delegated authority is the foundational rationale for this distinction: "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 . . . ."<sup>162</sup> The Court has reiterated that the distinction between *Chevron* and *Skidmore* deference is grounded in delegated authority on various other occasions.<sup>163</sup>

Beyond delegated authority, however, courts and commentators have generally associated the *Skidmore* doctrine more clearly with agency expertise than with political accountability.<sup>164</sup> The Court in *Mead* thus stressed that the agency "can bring the benefit of specialized experience to bear on the subtle

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158. *Metro. Life Ins. Co. v. Glenn*, 128 S. Ct. 2343, 2358 n.2 (2008) (Scalia, J., dissenting).

159. *Mead*, 533 U.S. at 239 (Scalia, J., dissenting).

160. See Wildermuth, *supra* note 155, at 1905. Recent empirical work by Bill Eskridge and Lauren Baer confirms that the amount of deference given by the Court itself varies substantially, depending on the context. See Eskridge & Baer, *supra* note 5, at 1098-1115. On the other hand, these authors argue that the Court's articulated deference regimes have little effect on the actual amount of deference an agency's interpretation of a statute receives.

161. See *infra* notes 171-174 and accompanying text.

162. 533 U.S. at 230.

163. See, e.g., *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157 (1991).

164. *But see infra* notes 212-213 and accompanying text.

questions in this case” in arguing that *Skidmore* warranted “some deference.”<sup>165</sup> Likewise, academic scholarship on *Skidmore* has tended to focus on the expertise rationale;<sup>166</sup> to my knowledge no one has argued, as I do, that *Skidmore* decisions warrant deference due to political accountability. On the other hand, both political accountability and expertise are often cited as justification for deference in the formal *Chevron* context.<sup>167</sup>

I do not intend here to arbitrate between the various rationales for agency deference. Delegated authority, expertise, and political accountability are all sensible reasons for deferring to agencies. Indeed, the Court’s own recent statements suggest it is quite comfortable with a blend of rationales.<sup>168</sup> Nonetheless, the political accountability rationale has, I maintain, been unduly neglected in the *Skidmore* context. Justice Breyer, among others, has said that *Chevron* and *Skidmore*, rather than being distinct doctrines, are in fact simply points on a deference continuum.<sup>169</sup> It thus follows that the political accountability rationale, which figured so prominently in *Chevron*, should not drop entirely out of the discussion in decisions governed by *Skidmore*. Furthermore, the simple realities of agency decisionmaking support this logic: political accountability operates, as a practical matter, nearly as much in the informal context as the formal context. Thus, political accountability supports giving *Skidmore* interpretations substantial deference.

### III. *SKIDMORE* DEFERENCE IN ACTION

#### A. Current Circuit Court Practice

Circuit courts have implemented the *Skidmore* standard inconsistently. While some courts do give substantial deference under *Skidmore*, others do not. In recent, very informative empirical work, Kristin Hickman and Matthew Krueger studied 104 cases in which federal appeals courts applied the *Skidmore* standard to agency interpretation of statutes that the courts agreed were

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165. *Mead*, 533 U.S. at 234-35.

166. See, e.g., Krotoszynski, *supra* note 118, at 737 (“Whether *Chevron* deference applies in a given case should [turn] . . . on whether the materials at issue reflect and incorporate agency expertise.”).

167. See *supra* note 125.

168. See, e.g., *Negusie v. Holder*, 129 S. Ct. 1159, 1172 (2009) (Stevens, J., concurring) (“Certain aspects of statutory interpretation . . . are properly understood as delegated by Congress to an expert and accountable administrative body.”).

169. See *Christensen v. Harris County*, 529 U.S. 576, 596 (2000) (Breyer, J., dissenting); Hickman & Krueger, *supra* note 128, at 1248; Rossi, *supra* note 6, at 1138.

ambiguous.<sup>170</sup> This study shows clearly that many circuit courts are giving agencies no deference under *Skidmore*.

Hickman and Krueger analyzed the reasoning in each case to determine how the court was applying *Skidmore* and categorized the opinions into three groups. The first were those that clearly gave the agency no deference, what the authors call the “independent judgment” model.<sup>171</sup> The authors found that courts applied the “independent judgment model” in 20 of the 104 cases. The agencies won exactly half of those twenty cases—exactly what one would expect in cases in which courts treat the government like any other litigant.<sup>172</sup> The second Hickman and Krueger classification was cases in which courts applied contextual factors to the agency’s interpretation. They found that courts applied this “sliding-scale” model to seventy-five percent of the sample, and the agency was victorious in sixty percent of these cases.<sup>173</sup> Last, Hickman and Krueger labeled seven cases as “indeterminate,” because the courts gave no reason for their rulings in these cases other than a citation to the relevant deference cases. In all seven such cases, the courts accepted the agency’s statutory interpretation.

The cases in which courts gave no deference are the primary target of this Note. The political accountability of agencies justifies more deference than these courts gave to the agencies in question. Such courts are acting out Justice Scalia’s worry that *Skidmore* deference is “no deference at all.”<sup>174</sup> Courts decided these cases inappropriately, giving too little weight to the fact that an independent government actor had made a decision. Courts giving substantial deference to the executive may still have decided that the government’s position was untenable in some of these cases. But an appropriate degree of deference would almost certainly have meant that the government prevailed more than half the time, the rate of any ordinary litigant.

It is worth noting that Hickman and Krueger’s count may actually underestimate how often courts are giving no deference in the *Skidmore* context. In the cases categorized as instances of “independent judgment,” the court has clearly come to its own conclusion about the “best” reading of the statute in question using the ordinary tools of statutory interpretation. However, in the remaining cases, the mere fact that a court acknowledges

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170. See Hickman & Krueger, *supra* note 128, at 1259–67.

171. *Id.* at 1268.

172. *Id.* at 1276.

173. *Id.*

174. *Metro. Life Ins. Co. v. Glenn*, 128 S. Ct. 2343, 2358 n.2 (2008) (Scalia, J., dissenting); see also *supra* text accompanying note 158.

deference hardly proves that that factor really influenced the decision. One does not have to be a dyed-in-the-wool legal realist to believe that courts may, from time to time, cite certain reasons as additional justification for decisions that they have actually reached on independent grounds. Justice Breyer, for one, has noted as much.<sup>175</sup> Indeed, Hickman and Krueger rely on “the tone of the court’s rhetoric” for distinguishing between cases in which the court is really exercising independent judgment, despite the mention of deference, and those in which deference is actually playing a role in the decision.<sup>176</sup> It is not clear that we should give “tone” such weight in judging the cause of a court’s decision. In reality, even more than twenty cases in Hickman and Krueger’s sample may reflect no deference to the agency’s decision.

My argument also helps to clear up two areas of confusion in Hickman and Krueger’s study, about two sets of cases. The first set of cases my theory explains are the seven so-called indeterminate ones. As the authors note, “courts occasionally cite *Skidmore* to justify deferring to the agency without explaining whether or why deference is merited.”<sup>177</sup> Hickman and Krueger are unable to account for these decisions, stating that “applying deference in this unconditional manner would seem to fit neither within the sliding-scale model nor the independent judgment model of *Skidmore*, and no scholar has suggested that *Skidmore* operates in this way.”<sup>178</sup> It is precisely my point, however, that political accountability gives the agency interpretation some baseline authority; all other things being equal, the agency should win. That a legitimate government actor has made a decision is, in itself, persuasive, without any additional contextual reasons.<sup>179</sup> If a court believes that the statute

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175. See Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 379 (1986) (“[O]ne can find many cases in which the opinion suggests the court believed the agency’s legal interpretation was correct and added citations to ‘deference’ cases to bolster the argument.”).

176. Hickman & Krueger, *supra* note 128, at 1269–70, 1274.

177. *Id.* at 1270.

178. *Id.*

179. A contrary view is expressed in Amy J. Wildermuth, *Bringing Order to the Skidmore Revival: A Response to Hickman & Krueger*, 107 COLUM. L. REV. SIDEBAR 20 (2007), [http://www.columbialawreview.org/Sidebar/volume/107/20\\_Wildermuth.pdf](http://www.columbialawreview.org/Sidebar/volume/107/20_Wildermuth.pdf). Although Professor Wildermuth agrees with my view that *Skidmore* deference should reflect an intermediate level between *Chevron* and no deference, she believes this deference is justified only by agency expertise and/or process. *Id.* at 23. I disagree with Professor Wildermuth’s assertion that “parties are typically offered few, if any, opportunities to participate in the adoption of nonbinding [informal] interpretations.” *Id.* On the contrary, agencies have strong incentives to be responsive to parties’ views about a wide variety of agency interpretations.

in question is legitimately ambiguous, there is no reason why the court should run through a variety of rationales just to determine that one statutory construction is as good as the next. The court does not need to give reasons but may simply defer to the agency. This is why the courts held for the agency in all seven of these cases.

Additionally, my theory sheds light on another set of cases about which Hickman and Krueger express concern: that in which courts applied only the “validity” contextual factor. In 12 of the 104 cases, “a court purporting to engage in *Skidmore* analysis only considered whether the agency’s interpretation was reasonable and ignored” the circumstantial factors.<sup>180</sup> Hickman and Krueger worry that such a decision “extends deference beyond what *Mead* envisioned” because it gives deference “without regard to the agency’s interpretive process or procedures.”<sup>181</sup> Again, a reasonable agency interpretation should, all else equal, not need buttressing circumstantial factors in order to be accepted by a court. When a court finds that an agency interpretation is reasonable and then defers to the agency, it is essentially saying that it has found the statute ambiguous and therefore sees no reason to overturn the reasonable decision made by another legitimate government actor.

In fact, the cases in which the court cites only the validity of the agency’s reasoning are actually more similar than Hickman and Krueger may realize. In the “indeterminate” cases, the court implicitly says that the agency interpretation is “valid” (or “reasonable”) merely by upholding it. The “validity only” cases merely make that judgment of reasonableness explicit; after that, the two sets of cases are the same in that no contextual factors are relied upon. The contextual factors may be subsequently relevant if they support or undermine the agency interpretation, but in lieu of either circumstance a reasonable interpretation by an agency should be deferred to under *Skidmore*. No additional reasons are necessary. It should be no surprise, then, that the agencies won eight of these twelve cases—a 67% victory rate substantially higher than the 58.2% rate of the remaining 67 sliding-scale cases.<sup>182</sup>

### B. *The Persuasive Precedent Model*

At the core of the argument about *Skidmore* deference is the meaning of the phrase “power to persuade.”<sup>183</sup> In those decisions in which courts have given

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180. Hickman & Krueger, *supra* note 128, at 1273.

181. *Id.*

182. *See id.* at 1276, 1311–20.

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

no deference to an agency's interpretation of a statute, the agency is treated like any other petitioner before the court, able to convince the court only on the basis of the persuasiveness of its *arguments*. This practice ignores the fact that federal agencies are legitimate government actors with political constituencies overseeing their decisions, a fact which should lend their decisions persuasive force on courts.

Courts have a readily available model for giving deference to decisions having the power to persuade. This is the model of "persuasive precedent"—the way courts treat the nonbinding decisions of other circuits.<sup>184</sup> Such decisions are, by definition, not controlling, but still have substantial "power to persuade" due to the respect one court has for the authority and legitimacy of another court. Indeed, courts often cite other circuits' decisions without delving into their reasoning; they recognize that the sheer fact that another court has decided is itself "persuasive." In the *Skidmore* context, a federal agency—another authoritative governmental body with substantial political accountability—has made a decision, and courts should afford that decision a similar degree of deference.

Courts afford persuasive precedent less deference than "binding" precedent. Binding precedent reflects deference analogous to the stronger *Chevron* deference. Yet while "persuasive precedent" does not have controlling force, courts still treat such decisions with substantial deference and are reluctant to split from other circuits without good reason.<sup>185</sup>

When one court considers an issue previously decided by another circuit, the court does not review the issue *de novo*, as it would the legal decision of a lower court within its jurisdiction. Rather, the court respectfully reads that decision and has, as the Ninth Circuit has articulated, at least a "presumption"

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184. Tom Merrill and Charles Sullivan have both previously compared agency deference to persuasive precedent. However, their analysis substantially differs from my own. Professor Sullivan describes *Skidmore* as being similar to "persuasive precedent" only in a passing footnote, as something of an afterthought. See Sullivan, *supra* note 146, at 1204 n.287. Professor Merrill adopted the model substantially before *Mead*, and thus suggests the model for judicial deference in all contexts. See Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 1003-12 (1992). I argue, by contrast, that persuasive precedent specifically fits midlevel *Skidmore* deference. Furthermore, Merrill offers little justification for why the model is appropriate for deference to agencies, instead simply tossing it out as a possibility. I give a justification for the model: the political accountability of agencies gives them legitimacy worthy of respect.

185. On the distinction between binding and persuasive precedent, see generally 18 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶ 134.02 (3d ed. 1997).

of following it.<sup>186</sup> The Seventh Circuit has explicitly deemed this an “intermediate” obligation—somewhere between the decisions of the Supreme Court (binding) and the British House of Lords (not at all binding)—to “follow them whenever we can.”<sup>187</sup> Other circuit courts have similarly indicated that they ordinarily will follow persuasive authority unless they have good reason to differ. As the Eighth Circuit has described its practice on more than one occasion: “Although we are not bound by [another circuit’s] decision, ‘we adhere to the policy that a sister circuit’s reasoned decision deserves great weight and precedential value.’”<sup>188</sup> Likewise, the Federal Circuit has indicated that “we accord great weight to the decisions of our sister circuits when the same or similar issues come before us, and we ‘do not create conflicts among the circuits without strong cause.’”<sup>189</sup>

Obviously, each circuit court is ultimately free to depart from the decision of other circuits. Circuit courts are quite assertive about their right to do so.<sup>190</sup> Even so, courts treat persuasive authority with a certain degree of respect, showing a conscientiousness about considering the decision and departing from it only for good reason. As Charles Sullivan explains, the “norms of judgecraft require that persuasive authorities be dealt with appropriately . . . [and] must be confronted precisely because the authority is an authority.”<sup>191</sup> Judge Alex Kozinski of the Ninth Circuit confirms that “we would consider it bad form to ignore contrary authority.”<sup>192</sup>

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186. *Env'tl. Prot. Info. Ctr., Inc. v. Pac. Lumber Co.*, 257 F.3d 1071, 1077 (9th Cir. 2001) (“Our court has provided us with the analysis to be followed: unless there are valid and persuasive reasons to hold otherwise, we should not create an intercircuit conflict. That is, the presumption is not to create an intercircuit conflict.”). *But see* *Wedelstedt v. Wiley*, 477 F.3d 1160, 1165 (10th Cir. 2007) (“Although this court is not bound by other circuits’ precedent, we are guided in our decisions by their well-reasoned and thoughtful opinions.” (internal citation omitted)).

187. *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1123 (7th Cir. 1987).

188. *In re Owens v. Miller*, 276 F.3d 424, 428-29 (8th Cir. 2002) (quoting *United States v. Auginash*, 266 F.3d 781, 784 (8th Cir. 2001)).

189. *Admiral Fin. Corp. v. United States*, 378 F.3d 1336, 1340 (Fed. Cir. 2004) (quoting *Wash. Energy Co. v. United States*, 94 F.3d 1557, 1561 (Fed. Cir. 1996)).

190. *See, e.g.,* *Newsweek, Inc. v. U.S. Postal Serv.*, 663 F.2d 1186, 1196 (2d Cir. 1981) (splitting from the D.C. Circuit’s interpretation of a statute while stating that “it is well settled that the decisions of one Circuit Court of Appeals are not binding upon another Circuit”), *aff’d on other grounds sub nom.* *Nat’l Ass’n of Greeting Card Publishers v. U.S. Postal Serv.*, 462 U.S. 810 (1983).

191. Sullivan, *supra* note 146, at 1205; *see also* Merrill, *supra* note 184, at 1007-08.

192. *Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001).

This model is appropriate for courts' treatment of agency interpretations of statutes. The government agency's interpretation should be treated as "prima facie correct," and then the court should look to the traditional contextual factors to decide whether to afford the decision more or less weight. Agencies should get a baseline level of deference—a "thumb on the scale"—and only then should factors such as "expertise" or "consistency of decision" come into play. If the court then decides to overrule the agency, it is free to do so, just as one circuit is always free to split from another. However, as Professor Sullivan notes, when one circuit decides to break from another's precedent, it "will often go to great lengths to distinguish it, although there is no formal requirement to do so[, a]nd, when such prior authority cannot be distinguished . . . , [the court] will usually feel compelled to explain why it has reached a different result."<sup>193</sup> In other words, while a court is free to disregard an agency interpretation, it should feel compelled to give reasons for doing so, out of respect for the political process that rendered that decision. It is wrong to toss aside a government agency as if it were any other petitioner.

Courts have on a few occasions explicitly invoked the "persuasive precedent" model of *Skidmore* deference. The First, Second, and Sixth Circuits have referred to an informal agency decision as "persuasive authority."<sup>194</sup> Peter Strauss has thus characterized court decisions as giving "weight" to *Skidmore* agency interpretations, as opposed to "obedience" for those in the *Chevron* context.<sup>195</sup> Nonetheless, the language used by courts in describing the amount of deference due under *Skidmore* is inconsistent and varies widely, from "some weight" (but not "considerable weight") to "respectful consideration" to "a non-trivial boost."<sup>196</sup>

The persuasive precedent model is consistent with the *Skidmore* decision for several reasons. Although the decision makes no reference to the accountability of the government agency in question, the *tone* of *Skidmore* is quite respectful of the agency's authority. Justice Jackson states almost reverently that "the Administrator's policies are made in pursuance of official duty."<sup>197</sup> He similarly notes courteously that "[t]he fact that the Administrator's policies and standards are not reached by trial in adversary

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193. Sullivan, *supra* note 146, at 1206.

194. See *New Hampshire v. Ramsey*, 366 F.3d 1, 26 (1st Cir. 2004); *White v. Burlington N. & Santa Fe Ry.*, 364 F.3d 789, 812 (6th Cir. 2004); *Reich v. S. New Eng. Telecomms. Corp.*, 121 F.3d 58, 65 (2d Cir. 1997).

195. PETER L. STRAUSS, *ADMINISTRATIVE JUSTICE IN THE UNITED STATES* 371 & n.104 (2d ed. 2002).

196. Herz, *supra* note 146, at 132-33.

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



form does not mean that they are not entitled to respect.”<sup>198</sup> Possibly most important, prior to mentioning the oft-quoted contextual factors, the *Skidmore* Court notes its respect for the agency’s “body of experience and informed judgment to which courts and litigants may properly resort for guidance.”<sup>199</sup>

This respectful tone is much like the one adopted by circuit courts in dealing with the decisions of their “sister circuits.”<sup>200</sup> Courts are deferential to the decisions made by other circuits, and they often cite the fact that a sister circuit has made a decision as *itself* persuasive for deciding the instant case in a particular way.<sup>201</sup> The sheer fact that several other circuits have decided an issue consistently is sometimes enough to persuade a court to rule in a particular way.<sup>202</sup> Similarly, the fact that an executive branch government agency has come to a particular decision in light of the political forces at play and has persisted in defending that decision in litigation should be afforded some respect by the courts.

Perhaps even more significantly, the same practical reasons for preferring consistency between circuit court rulings on statutes apply to consistency between agency and court statutory interpretation, as Justice Jackson himself noted in *Skidmore*. Circuit splits are generally an undesirable state of affairs. For one thing, prospective litigants in one jurisdiction rely on the decisions of courts in other jurisdictions in coming to predict how their own jurisdiction will rule on a given matter not yet considered. Since the majority of the time courts do, indeed, follow their sister circuits, persuasive precedent is the best (and often the only) way for people to foresee how they will be treated by their own courts with respect to a particular issue. Furthermore, it violates basic intuitions about the rule of law that like cases under the identical statute be treated differently simply because a court in a different jurisdiction is considering the matter. Recognition of this fact is, indeed, precisely why so much of the Supreme Court’s work consists of resolving circuit splits.

Similarly undesirable are splits between how agencies and courts interpret the same statute. It is quite problematic for the federal government to be enforcing and executing a statute under a particular standard, only to have those actions be dealt with inconsistently on the relatively few occasions that

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198. *Id.* at 140.

199. *Id.*

200. *See, e.g.*, *Robert v. Tesson*, 507 F.3d 981, 998 (6th Cir. 2007) (revising a previous holding “to incorporate some of the wisdom of our sister circuits”).

201. *See, e.g.*, *Tenn. Scrap Recyclers Ass’n v. Bredesen*, 556 F.3d 442, 457 n.7 (6th Cir. 2009); *Bowers v. NCAA*, 475 F.3d 524, 544 (3d Cir. 2007); *Official Comm. of Unsecured Creditors of PSA, Inc. v. Edwards*, 437 F.3d 1145, 1151 (11th Cir. 2006).

202. *See Hickman & Krueger, supra* note 128, at 1270.

the matter reaches the courts. Justice Jackson in *Skidmore* highlighted this rationale for deferring to agencies: “Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons.”<sup>203</sup> The Court also echoed this sentiment strongly in *Mead* when it emphasized “the value of uniformity in [the] administrative and judicial understandings of what a national law requires.”<sup>204</sup> Thus, as circuit courts strive to avoid gratuitously creating splits, so too should courts try to avoid creating inconsistency between how the government enforces a statute in the executive branch and how the statute is interpreted in the judiciary.

Furthermore, several prominent commentators have argued that deference to agency interpretations is beneficial because it itself reduces circuit splits, since disparate courts across the country will be less often independently injecting their own judgment into disputes about statutory interpretation.<sup>205</sup> These scholars have made the case in the *Chevron* context. However, the same argument is, if anything, more persuasive in the *Skidmore* context, since such decisions constitute the majority of agency action.

All other factors being equal, it is better for the decision of a legitimate governmental actor to stand, so that people can rely on that decision as a guide for their own behavior.

### C. Current Supreme Court Practice

The Supreme Court’s implementation of the *Skidmore* standard over the last several years is substantially compatible with the model of deference outlined in this Note. Broadly speaking, the Court operates with three levels of deference: strong *Chevron* deference, intermediate *Skidmore* deference, and no deference at all. However, the Court has not been especially consistent in the language it uses when implementing deference. The Court has applied *Skidmore* deference three times in the past six years.<sup>206</sup> In two of the decisions

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<sup>203</sup> *Skidmore*, 323 U.S. at 140.

<sup>204</sup> 533 U.S. 218, 234 (2001).

<sup>205</sup> See Silberman, *supra* note 23, at 824; see also Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court’s Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1118-29 (1987).

<sup>206</sup> Fed. Express Corp. v. Holowecki, 128 S. Ct. 1147 (2008); *Gonzales v. Oregon*, 546 U.S. 243 (2006); *Alaska Dep’t of Env’tl. Conservation v. EPA*, 540 U.S. 461 (2004). The Court has also mentioned *Skidmore* deference in the dicta of several other decisions, but did not find the doctrine relevant in these instances because the statute in question was unambiguous.

applying *Skidmore*, *Federal Express* and *Alaska Department of Environmental Conservation*, the Court has invoked a standard of deference quite similar to my own, even citing political accountability as a rationale. In the third, *Gonzales v. Oregon*, the Court appropriately gave the agency no deference because the circumstances dictated, under the Court's existing doctrine, that even *Skidmore* deference was inappropriate.

In *Federal Express* and *Alaska*, the Supreme Court gave informal interpretations of statutes substantial deference under the *Skidmore* standard. Furthermore, as I have suggested, the Court gave the agency reading of the statutes meaningful initial deference and then used the contextual factors to corroborate that initial respect. The key phrase used in the decisions (apparently coined in *Alaska*) is that agency interpretations under *Skidmore* deserve a "measure of respect."<sup>207</sup> In both, the Court adopted a noticeably deferential tone toward the authority of the agencies in question. In *Alaska*, the Court referred to the EPA as "the expert federal agency charged with enforcing the [Clean Air] Act."<sup>208</sup> In *Federal Express*, the Court said that the decision in question "is a matter for the [EEOC] to decide in light of its experience and expertise in protecting the rights of those who are covered by the [Age Discrimination in Employment] Act."<sup>209</sup>

It is particularly notable how much this latter language echoes Justice Jackson's respect for agencies' "body of experience and informed judgment."<sup>210</sup> The Court quite explicitly adopted the tenor of respect signified by *Skidmore*. Perhaps more significantly, the Court called the agencies "expert" and cited their "experience," but made no effort to explain what, in the context of the cases, made the agencies' expertise particularly relevant. The Court instead recognized the general legitimacy of the agency as the experienced executor of the statute. Again, this confirms that agencies get deference—as the Court said, "a measure of respect"—under *Skidmore* separate and prior to a consideration of the contextual factors. In both *Alaska* and *Federal Express*, the Court then went on to consider the consistency of the agency's interpretation, finding that consistency corroborative of deference to the agency.<sup>211</sup>

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See Merrill, *supra* note 184, at 976-77 (explaining the relationship between deference regimes and statutory ambiguity).

207. *Fed. Express Corp.*, 128 S. Ct. at 1156; *Alaska*, 540 U.S. at 488.

208. 540 U.S. at 492.

209. 128 S. Ct. at 1158.

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

211. *Fed. Express Corp.*, 128 S. Ct. at 1156 (noting that "the relevant interpretive statement . . . has been binding on EEOC staff for at least five years"); *Alaska*, 540 U.S. at 487-88 (noting the "longstanding, consistently maintained interpretation").

In fact, the Supreme Court in *Federal Express* explicitly cited political accountability as a reason for deferring to agency authority in the *Skidmore* context. After noting that “[r]easonable arguments can be made that the [EEOC] should adopt a standard giving more guidance,” the Court went out of its way to state that “[f]or its decisions in this regard the agency is subject to the oversight of the political branches.”<sup>212</sup> The Court cited as support for this statement its own recent decision in *National Cable & Telecommunications Association v. Brand X Internet Services*, a case decided under the *Chevron* doctrine in which the court similarly cited the importance of political accountability.<sup>213</sup> This citation confirms that, as I have argued, the *Skidmore* doctrine has the same foundation as the *Chevron* line of cases, in which political accountability was predominant. The Court’s reference to this rationale in both *Federal Express* and *Brand X* also suggests that the salience of political accountability has not waned in the Court’s thinking.

Giving the agencies substantial *Skidmore* deference, the Court thus upheld the agency’s statutory interpretation in both cases. Noting the statute’s “less than crystalline text,” the Court in *Alaska* held that EPA’s “rational interpretation” was “surely permissible.”<sup>214</sup> Similarly, in *Federal Express*, the Court held that although “[r]easonable arguments can be made that the agency should adopt a [different] standard,” “[w]here ambiguities in statutory analysis and application are presented, the agency may choose among reasonable alternatives.”<sup>215</sup>

The Supreme Court’s decision in *Gonzales v. Oregon* is admittedly less compatible with substantial *Skidmore* deference. The *Gonzales* Court gave a statutory interpretation of the Attorney General no more than nominal deference before overturning his decision. *Gonzales*, however, represents an unusual and indeed incoherent use of the *Skidmore* doctrine. The Court in *Gonzales* afforded the Attorney General the appropriate amount of deference—that is, none. Nonetheless, it should have explicitly stated that it was giving the government zero deference, without ever invoking *Skidmore*.

A controversial informal Interpretive Rule issued by then-Attorney General John Ashcroft triggered the *Gonzales* case. The rule stated that so-called physician-assisted suicide is not a “legitimate medical purpose” for prescription drugs under the Controlled Substances Act and threatened to revoke the license

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<sup>212</sup>. *Fed. Express Corp.*, 128 S. Ct. at 1158.

<sup>213</sup>. 545 U.S. 967, 980 (2005) (“Filling these gaps [in ambiguous statutes] involves difficult policy choices that agencies are better equipped to make than courts.”).

<sup>214</sup>. *Alaska*, 540 U.S. at 490, 493.

<sup>215</sup>. *Fed. Express Corp.*, 128 S. Ct. at 1158.

of any physician who prescribed drugs for that purpose.<sup>216</sup> This provoked a conflict with Oregon's Death With Dignity Act, which specifically allowed doctors to prescribe drugs for patient suicide under certain circumstances.<sup>217</sup> The Court found that the statute did not delegate authority for interpreting the phrase "legitimate medical purpose" to the Attorney General, but rather gave that authority to the Secretary of Health and Human Services.<sup>218</sup>

On this basis, the *Gonzales* Court, strangely, purported to give the Attorney General *Skidmore* deference: "Since the Interpretive Rule was not promulgated pursuant to the Attorney General's authority . . . it receives deference only in accordance with *Skidmore*."<sup>219</sup> This version of *Skidmore* deference proved to be very minimal. Noting that "under *Skidmore*, we follow an agency's rule only to the extent it is persuasive," the Court merely recited the usual contextual factors, mentioned "the Attorney General's lack of expertise in this area," and held that "we do not find the Attorney General's opinion persuasive."<sup>220</sup>

The key distinction between *Gonzales* and the other recent *Skidmore* cases is that in *Gonzales* the Court found that the wrong person made the decision in question—rather than that the right person made the decision but was wrong on the merits. Of course, if one government official usurps the decisionmaking authority of another, then that official's interpretation of the statute should receive no deference under any theory.<sup>221</sup> But that is no deference, not *Skidmore* deference.

By invoking *Skidmore* in *Gonzales*, the Court seemed to be treating *Skidmore* deference as a catch-all category for all situations in which the agency does not receive full *Chevron* deference. Yet it is quite difficult to reconcile the substantial "measure of respect" attributed to *Skidmore* in *Alaska* and *Federal Express* with the lack of deference afforded to the Attorney General in *Gonzales*. Indeed, notice how bizarre it is that the *Gonzales* Court even considered the *Skidmore* factor of expertise. If the Attorney General, like the Surgeon General, happened to possess a medical degree, would it really make any difference,

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216. *Gonzales v. Oregon*, 546 U.S. 243, 254 (2006).

217. *Id.* at 249.

218. *See id.* at 267-68.

219. *Id.* at 268.

220. *Id.* at 269.

221. *Cf. Cottage Sav. Ass'n v. Comm'r*, 499 U.S. 554, 569 (1991) (Blackmun, J., concurring in part and dissenting in part) ("I find it somewhat surprising that an agency [the Federal Home Loan Bank Board] not responsible for tax matters would presume to dictate what is or is not a deductible loss for federal income tax purposes. I had thought that that was something within the exclusive province of the Internal Revenue Service . . . . Certainly, the FHLBB's opinion in this respect is entitled to *no deference whatsoever*." (emphasis added)).

given that the statute delegated the decisionmaking authority to the Secretary of Health and Human Services? The answer seems clearly to be no.

In fact, the case most similar to *Gonzales* is not *Mead*, but rather *FDA v. Brown & Williamson Tobacco Corp.*<sup>222</sup> In that case, the Court decided that the Food and Drug Administration did not have the authority to regulate cigarettes as a drug-delivery device under the statutory scheme of the FDCA and other statutes specific to tobacco.<sup>223</sup> The intent of Congress not to give the FDA regulatory authority precluded giving the agency any deference—in this instance, the *Chevron* deference that would have been due, since the agency utilized notice-and-comment rulemaking. Likewise, the statutory scheme in *Gonzales*, because of the interlocking of various statutes, did not give authority to the Attorney General to make the relevant decision, thereby not warranting the deference the Attorney General would have received—*Skidmore*, since the decision was informal. In both cases, then, the appropriate amount of deference was none at all.

## CONCLUSION

In a series of recent decisions, the Supreme Court has thus proven amenable to giving agencies an intermediate level of deference in the *Skidmore* context, as modified by the presence or absence of various contextual factors. On the other hand, the Court's articulation of this doctrine has been muddled, perhaps indicating that the Court itself does not have a clear model in mind for how to implement the standard.

This Note has aimed to give both context and content to the consideration of informal statutory interpretation by government agencies. Modern political science has come to a consensus about the broad accountability of government agencies. This accountability reaches beyond the relatively narrow focus of legal scholars on formal procedures or direct ties to the electorate. Government officials are politically accountable through a wide variety of mechanisms, both formal and informal.

On the other hand, though political accountability does justify judicial deference to agency decisions, political considerations do not track particularly well with the formality of agency procedures. Formal procedures such as notice-and-comment rulemaking have their virtues. By occurring publicly, notice and comment lends transparency to the process by which agency policy

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222. 529 U.S. 120 (2000).

223. See *id.* at 132-33 (“[T]he FDA’s claim to jurisdiction contravenes the clear intent of Congress.”); see also *supra* notes 89-91 and accompanying text.

is made. This process may also slow down agency deliberation, ensuring that the agency considers all possible considerations before coming to a decision. And notice and comment may play an important role in creating an administrative record for later review by courts. What formal procedure does not do, however, is ensure the political accountability of agency decisions.

This understanding of how government officials actually behave suggests that *Skidmore* deference should be substantial, but less than *Chevron*. Rather than the full deference favored by Justice Scalia or no deference whatsoever, *Skidmore* deference should be intermediate, analogous to the respect a court gives when considering persuasive precedent. Courts should readily recognize, and be able to implement, this familiar model.