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STRUCTURING *SKIDMORE* AFTER *LOPER BRIGHT*

Michael Asimow*

ABSTRACT

The epochal *Loper Bright* decision overruled *Chevron* and established that courts must determine the best meaning of statutory text without being required to follow agency interpretations of ambiguous statutes. In determining the best meaning, courts must consider whether and how to apply *Skidmore* analysis. *Skidmore* calls for giving extra weight to agency interpretations of statutory text when it is appropriate to do so. This article addresses several issues involving *Skidmore* analysis that remain unresolved post-*Loper Bright*. So far, reviewing courts have often ignored *Skidmore* entirely, brushed it aside, or misapplied it. Court decisions before and after *Loper Bright* have not agreed upon a uniform structure for applying *Skidmore*.

This article urges that courts must (rather than may) apply *Skidmore* analysis along with other familiar tools of statutory interpretation when seeking the best meaning of disputed statutory text. In addition, courts should engage with *Skidmore* without first determining whether the disputed text is ambiguous. The article further suggests that federal courts adopt a structure for applying *Skidmore* consistently across the wide variety of cases involving disputed agency legal interpretations. In establishing such a structure, courts should first determine whether courts or agencies have a comparative advantage in interpreting the text. They should also then take account of various contextual factors that determine whether the agency's interpretation has power to persuade. This structure is adapted from well-established California law to which federal courts might look for guidance in establishing a *Skidmore* structure. The article also proposes that courts unify the rules for interpreting the meaning of statutes and regulations by applying *Skidmore* analysis to both.

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INTRODUCTION

In its epochal *Loper Bright* decision,¹ the Supreme Court buried *Chevron* deference.² Under *Chevron*, courts were required to defer to reasonable agency interpretations of ambiguous statutes.³ *Chevron* was based on the theory that Congress implicitly delegated interpretive discretion to agencies by enacting a statute containing ambiguous text. *Loper Bright* rejected the doctrine of implicit interpretive delegation. Instead, courts must independently determine the best interpretation of statutory text, whether the agency's interpretation was situated in a legally binding format such as notice and comment rulemaking or agency adjudication or in a non-binding format such as a guidance document.

The *Loper Bright* decision contains two important qualifications to the rule of independent judicial judgment in interpreting statutory text. First, if the court determines that Congress *actually* delegated interpretive discretion to an agency, the court must respect that delegation and adopt the agency's interpretation unless it fails the APA's arbitrary/capricious test.⁴ Second, in the process of independently ascertaining the best meaning of statutory text, a reviewing court must utilize the established tools of statutory interpretation. One of these tools

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¹ *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).

² *Chevron, U.S.A. v. Nat. Res. Def. Coun., Inc.*, 467 U.S. 837 (1984).

³ *Chevron* Step One asked whether the statute was ambiguous. If not, the court should substitute its judgment as to the meaning of statutory text. Step Two asked whether the agency's interpretation of an ambiguous statutory text was reasonable. *Chevron* at 843.

⁴ *Loper Bright* at 404. The determination of whether Congress delegated interpretive authority to the agency presents difficult issues and is beyond the scope of this article. See generally Cary Coglianese & David M. Froomkin, *Loper Bright's Disingenuity*, 174 U. PA. L. REV. 91 (2025); Thomas W. Merrill, *The Demise of Deference--And the Rise of Delegation to Interpret?* 138 HARV. L. REV. 227 (2024); *Lesko v. United States*, 161 F.4th 1352 (Fed. Cir. 2025) (7-4 split on whether statute delegated interpretive discretion to the Office of Personnel Management).

requires a court to give extra *weight* to an agency's prior interpretation of text when it is appropriate to do so under the multi-factor doctrine of *Skidmore v. Swift*.⁵

This article considers the application of *Skidmore* in the interpretation of both statutes and regulations after *Loper Bright*. The *Loper Bright* decision refers to *Skidmore* in a number of passages in the opinion,⁶ but does not provide a unified account of how it should be applied. Post-*Loper Bright* court of appeal decisions have done no better.⁷ They often ignore *Skidmore* entirely or treat *Skidmore* analysis as an afterthought or as optional rather than mandatory. This article argues that reviewing courts must (rather than may) engage in a *Skidmore* analysis after the court has determined that the statute did not delegate interpretive authority to the agency or (if it did so delegate) that the agency chose not to use that authority. It urges courts to utilize *Skidmore* analysis without first determining that the statutory text is ambiguous and argues that courts should be more reluctant to ascribe a “plain meaning” to the statute than they have done in the past. The article proposes a structure for applying the *Skidmore* factors as part of the judicial process for determining the best interpretation of statutory text. This proposed structure draws on well-established California administrative law. Finally, it proposes that the same decisional structure be employed in judicially reviewing agency interpretations of their own *regulations*.

⁵ 323 U.S. 134 (1944). This article uses the word “weight” rather than “deference” in describing *Skidmore*'s application. “The term ‘deference’ remains radically undefined and under-examined, both in general and specifically in connection with judicial review of federal agency action. It can mean anything from modest respect to utter obeisance.” Gary Lawson, “*Then What? A Framework For Life Without Chevron*,” 60 WAKE FOREST L. REV. 55, 61 (2025). Peter Strauss suggested avoiding the term “deference.” Strauss urged that *Skidmore* required courts to give “weight” to administrative interpretations of ambiguous statutes whereas *Chevron* required courts to give “space” to reasonable agency interpretations of ambiguous statutes. Peter L. Strauss, *Deference is Too Confusing--Let's Call Them “Chevron Space” and “Skidmore Weight,”* 112 COLUM. L. REV. 1243, 1245 (2012). During the Supreme Court oral argument in *Loper Bright*, the Chief Justice stated that *Skidmore* is “usually described as a deference doctrine,” but Paul Clement contended that *Skidmore* is not a deference doctrine at all. Kristin E. Hickman, *Anticipating a New Modern Skidmore Standard*, 74 DUKE L. J. ONLINE 111, 112 n.6 (2024-25). In this article, I will follow Strauss' suggestion and use the term “weight” instead of “deference” to describe *Skidmore* analysis.

⁶ See text at notes 16-18, *infra*.

⁷ See text at notes 19-30, *infra*.

I. THE *SKIDMORE* DOCTRINE

Other authors have described the evolution of the *Skidmore* doctrine that requires courts to give extra weight to an agency’s interpretation of statutory text when it is appropriate to do so.⁸ This methodology can be traced back to decisions as early as 1827.⁹ It was already a well-established doctrine before the Supreme Court in 1944 provided the definitive account in *Skidmore*. That decision involved interpretive rulings by the Administrator of the Wage and Hour Division of the Department of Labor (DOL) explaining how to apply the term “working time” in the Fair Labor Standards Act (FLSA). Fire-fighting employees in a meat packing plant (who also worked regular shifts) were required to remain in or near the plant’s fire hall while waiting for fire alarms. During that time, they had no required duties and could eat, sleep, or pursue recreational activities. The issue was whether this waiting time constituted “working time” for purposes of calculating overtime pay. Under FLSA, the DOL had neither adjudicatory nor rulemaking power, but it could seek injunctions and other relief against employers that it believed were violating FLSA. Absent such an injunction, employees alleging violation of the FLSA had to sue the employer in court.

The Administrator issued Interpretive Bulletin 13 which called for a flexible, fact-based analysis, rather than setting forth a blanket ruling that waiting time is or is not always “working time.” The Bulletin included various examples, none of them precisely like the fire-fighting situation presented by the *Skidmore* case. The Administrator relied on the Bulletin in an amicus brief filed in a case brought by the fire-fighting employees seeking overtime pay. The amicus

⁸ Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235 (2007); Aditya Bamzai, *On the Interpretive Foundations of the Administrative Procedure Act*, 31 GEO. MASON L. REV. 439, 443-46 (2024).

⁹ Strauss, note 5 *supra* at 1254-56; Peter L. Strauss, *In Search of Skidmore*, 83 FORD. L. REV. 789 (2014); . Ronald M. Levin, *The APA and the Assault on Deference*, 106 MINN. L. REV. 125, 168-70 (2021).

brief urged that time spent eating and sleeping in the fire hall was not working time, but the remaining time spent there was working time. The legal analysis in the Bulletin was not binding on anyone since DOL had no delegated power to make it binding. The Supreme Court ruled that courts should consider such administrative interpretations in the process of applying FLSA in employee v. employer litigation. The *Skidmore* decision called for a multi-factor analysis; its application was entirely dependent on the specific context in which the interpretive issue arose. Its language has been quoted and applied on countless occasions:

There is no statutory provision as to what, if any, deference courts should pay to the Administrator's conclusions. And, while we have given them notice, we have had no occasion to try to prescribe their influence. The rulings of this Administrator are not reached as a result of hearing adversary proceedings in which he finds facts from evidence and reaches conclusions of law from findings of fact. They are not, of course, conclusive, even in the cases with which they directly deal, much less in those to which they apply only by analogy. They do not constitute an interpretation of the Act or a standard for judging factual situations which binds a district court's processes, as an authoritative pronouncement of a higher court might do. 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. They do determine the policy which will guide applications for enforcement by injunction on behalf of the Government. 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. 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. This Court has long given considerable and in some cases decisive weight to Treasury Decisions and to interpretative regulations of the Treasury and of other bodies that were not of adversary origin.

We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.¹⁰

Once the Court decided *Chevron*, the continuing role of *Skidmore* became disputed. Obviously, the *Chevron* doctrine that required courts to accept all reasonable agency interpretations of ambiguous statutes was inconsistent with *Skidmore* which made clear that administrative interpretations (reasonable or otherwise) should be given appropriate weight but were not binding on the courts.¹¹ However, *Skidmore* lived on in cases in which an agency interpretation lacked the force of law because it did not arise from legally binding rules or from a legally binding adjudication. These decisions were often referred to as *Chevron* “step zero” decisions.¹²

¹⁰ *Skidmore* at 139-40. Similarly, see *SEC v. Chenery Corp.*, 332 U.S. 194, 209 (1947). The Court explained that agency decisions reflecting “the product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the uncontested facts” are “entitled to the greatest amount of weight by appellate courts.”

¹¹ *Skidmore* was much less deferential to agency interpretation than *Chevron*. A study of judicial deference in the federal courts of appeals from 2003 through 2013 documented agency win rates of 77.4 percent under *Chevron* and 56.0 percent under *Skidmore*. Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 30 (2017).

¹² Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006).

The first Supreme Court “step zero” decision did not contain an adequate *Skidmore* analysis and could be read to establish that *Skidmore* analysis is optional rather than mandatory. The issue in *Christensen v. Harris County*¹³ was whether FLSA prohibited local government entities from requiring employees to use up their compensatory time off that they had previously earned by working overtime. DOL sent an opinion letter to the County stating that the County could not require employees to use up their compensatory time off. Using conventional statutory interpretation tools, the Supreme Court held that the County’s action was permissible and that the DOL opinion letter was not entitled to receive *Chevron* deference since it lacked the force of law. So what about *Skidmore*? “[I]nterpretations contained in formats such as opinion letters are ‘entitled to respect’ under our decision in *Skidmore*... but only to the extent that those interpretations have the ‘power to persuade.’ As explained above, we find unpersuasive the agency’s interpretation of the statute at issue in this case.” In other words, since the Court disagreed with the opinion letter, the letter was not entitled to respect, and it played no role in the Court’s analysis of the meaning of the statute.

The Court’s subsequent step zero case, *United States v. Mead Corp.*,¹⁴ thoroughly rehabilitated *Skidmore*. The issue in *Mead* was whether ring-bound day planners are subject to the tariff for “bound diaries,” rather than being tax-free. The Customs Service issued a ruling letter that three-ring day planners were “diaries” and were “bound.” The lower court held that *Chevron* was inapplicable to customs rulings and gave no special weight to the ruling. The Supreme Court agreed that the ruling did not warrant *Chevron* deference, but it held that the lower courts should have engaged in a *Skidmore* analysis.¹⁵ The opinion said:

¹³ 529 U.S. 576, 587 (2000)

¹⁴ 531 U.S. 218 (2001).

¹⁵ Justice Scalia, speaking only for himself, vehemently dissented, arguing that the ruling should have received *Chevron* deference and that *Skidmore* was obsolete. He concluded: “I dissent even more vigorously from the

There is room at least to raise a *Skidmore* claim here, where the regulatory scheme is highly detailed, and Customs can bring the benefit of specialized experience to bear on the subtle questions in this case: whether the daily planner with room for brief daily entries falls under “diaries” ... and whether a planner with a ring binding should qualify as “bound”... A classification ruling in this situation may therefore at least seek a respect proportional to its “power to persuade”... Such a ruling may surely claim the merit of its writer’s thoroughness, logic, and expertness, its fit with prior interpretations, and any other sources of weight...

Since the *Skidmore* assessment called for here ought to be made in the first instance by the Court of Appeals for the Federal Circuit or the [Court of International Trade], we go no further than to vacate the judgment and remand the case for further proceedings consistent with this opinion.

II. *SKIDMORE* ANALYSIS IN *LOPER BRIGHT*

The *Loper Bright* opinion contains extended and repeated discussion of the role of *Skidmore* analysis in cases involving agency statutory interpretation.

[C]ongress expects courts to handle technical statutory questions, and courts did so without issue in agency cases before *Chevron*. After all, in an agency case in particular, the reviewing court will go about its task with the agency’s “body of experience and informed judgment,” among other information, at its disposal. *Skidmore*... An agency’s interpretation of a statute cannot bind a court, but may be especially informative “to the extent it rests on factual premises

reasoning that produces the Court’s judgment, and that makes today’s decision one of the most significant opinions ever rendered by the Court dealing with the judicial review of administrative action. Its consequences will be enormous, and almost uniformly bad.” *Id.* at 261.

within [the agency's] expertise...”¹⁶ Delegating ultimate interpretive authority to agencies is simply not necessary to ensure that the resolution of statutory ambiguities is well informed by subject matter expertise...

The APA, in short, incorporates the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions. In exercising such judgment, though, courts may—as they have from the start—seek aid from the interpretations of those responsible for implementing particular statutes. Such interpretations “constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance” consistent with the APA. *Skidmore*... And interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning...

But even when an ambiguity happens to implicate a technical matter, it does not follow that Congress has taken the power to authoritatively interpret the statute from the courts and given it to the agency. Congress expects courts to handle technical statutory questions. [M]any statutory cases call upon courts [to] interpret the mass of technical detail that is the ordinary diet of the law, ...and courts did so without issue in agency cases before *Chevron*... Courts, after all, do not decide such questions blindly. The parties and *amici* in such cases are steeped in the subject matter, and reviewing courts have the benefit of their perspectives.

¹⁶ The Court quoted *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 98 n.6 (1983), which gave *Skidmore* weight to an interpretive ruling of the Federal Labor Relations Authority but nevertheless declined to follow it.

In an agency case in particular, the court will go about its task with the agency's "body of experience and informed judgment," among other information, at its disposal. *Skidmore*... And although an agency's interpretation of a statute cannot bind a court, it may be especially informative to the extent it rests on factual premises within [the agency's] expertise. Such expertise has always been one of the factors which may give an Executive Branch interpretation particular "power to persuade, if lacking power to control."¹⁷

Echoing themes that had run throughout our law from its start, Justice Robert H. Jackson wrote for the Court in *Skidmore*. There, he said, courts may extend respectful consideration to another branch's interpretation of the law, but the weight due those interpretations must always "depend upon the[ir] thoroughness ..., the validity of [their] reasoning, [their] consistency with earlier and later pronouncements, and all those factors which give [them] power to persuade."...¹⁸

III. *SKIDMORE* IN POST *LOPER BRIGHT* DECISIONS

Post-*Loper Bright* decisions concerning statutory interpretation often appear to give lip service to *Skidmore* or ignore it entirely.¹⁹ According to Professor Craig, in the six-month period

¹⁷ The Court again cited *Skidmore* as well as *County of Maui v. Hawaii Wildlife Fund*, 590 U.S. 165, 180 (applying *Skidmore* to an EPA interpretation but declining to follow it); *United States v. Moore*, 95 U.S. 760, 763 (1877) ("The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons... The officers concerned are usually able men, and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret.").

¹⁸ *Loper Bright* at 374, 394, 402, 431 (internal quotation marks and citations omitted).

¹⁹ Similarly, the Supreme Court mostly ignored *Skidmore* in its post-*Mead* pre-*Loper Bright* cases involving statutory interpretation. It was cited in only 6.9% of such cases. 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, 1110-11 (2008). See, e.g., *City of Arlington v. FCC*, 569 U.S. 290 (2013), a decision that entirely ignored *Skidmore*.

from June 28, 2024 (when *Loper Bright* was decided) to December 27, 2024, *Loper Bright* was cited 111 times in decisions by federal courts of appeal and 121 times in decisions by federal district courts. But *Skidmore* was applied in only eight court of appeal decisions and 23 district court opinions.²⁰

A typical opinion that studiously ignored *Skidmore* is *NLRB v. Starbucks Corp.*²¹ This case involved the interpretation of a statute that empowers the Board to take “such *affirmative action*, including reinstatement of employees with or without backpay, as will effectuate the policies” of the National Labor Relations Act.²² The issue was whether the term “affirmative action” includes the power to order an employer to pay consequential damages (“direct or foreseeable pecuniary harms”) as part of its practice of awarding “make whole relief.” The court’s 15 page discussion dwells on the fact that the term “affirmative action” has always referred to equitable remedies and consequential damages are a legal remedy. In addition, the court was influenced by the need to interpret statutes to avoid constitutional issues.²³ It also raises question as to the practical feasibility of identifying and calculating the consequential damages suffered by employees.

²⁰ Robin Kundis Craig, *The Impact of Loper Bright v. Raimondo: An Empirical Review of the First Six Months*, 109 MINN. L. REV. 2671, 2713-14 (2025). Similarly, in the month following the *Loper Bright* decision, 19 of 20 cases citing *Loper Bright* failed to discuss *Skidmore* and the other decision stated *Skidmore* wasn’t applicable. Robert Iafolla, *Courts Show Little Interest in Skidmore as a Chevron Alternative*, Bloomberg Law, July 20, 2024, <https://news.bloomberglaw.com/daily-labor-report/courts-show-little-interest-in-skidmore-as-a-chevron-alternative>. It is possible, however, that many of these post-*Loper Bright* cases deferred decision until after *Loper* was decided on the theory that *Loper* would give the court greater latitude to substitute its judgment for that of the agency than did *Chevron*. Such decisions would likely have ignored *Skidmore*.

²¹ 159 F.4th 455, 467-482 (6th Cir. 2025). Similarly, see *American Clinical Laboratory Ass’n v. FDA*, 776 F. Supp. 3d 554 (E.D., Tex. 2025), sharply criticized by Catherine M. Sharkey & Ian M. Pultz-Earle, *Out from Under the Guise of Judicial Review*, 76 ADMIN. L. REV. __ (2026). The *American Clinical* case involved a consequential FDA rule defining laboratory developed tests (LDTs) as medical devices. The court decided the case against the FDA based on dictionary definitions and canons of construction. It completely ignored *Skidmore*.

²² 29 U.S.C. §160(c) (emphasis added).

²³ Allowing administrative determination of consequential damages might violate the employer’s right to a jury trial under the Seventh Amendment. See *SEC v. Jarkesy*, 603 U.S. 109 (2024).

But the court in *Starbucks* never mentions the need to analyze whether the Board’s interpretation of the term “affirmative action” deserves *Skidmore* weight. Neither does the 4-page dissent. If the majority had analyzed the issue under *Skidmore*, the court might well have accorded little or no weight to the Board’s interpretation under the criteria discussed in Part IV of this article. First, the Board has no comparative advantage in deciding whether consequential damages are a legal or an equitable remedy nor whether the Board’s construction might be unconstitutional. On the other hand, the majority partially relied on the practical problems of identifying and calculating consequential damages in its unfair labor practice cases; that seems to be an issue on which the Board has more relevant experience and expertise than the court. Second, the factors addressing whether the Board’s interpretation had power to persuade (also discussed in Part IV) do not point strongly in the Board’s favor. The NLRB’s *Starbucks* decision was based on its earlier *Thryv* precedent,²⁴ which was a 3-2 decision. The *Thryv* doctrine was neither longstanding nor consistent with prior Board precedent nor contemporaneous with enactment of the statute. On the other hand, the interpretation arose from a formal adjudication decision by the agency heads and was thoroughly and carefully reasoned. In any event, the failure to even mention, much less discuss, *Skidmore* analysis in *Starbucks* seems to conflict with the treatment of *Skidmore* in the *Loper Bright* opinion.

The post-*Loper Bright* decisions that do apply *Skidmore* provide only a sketchy treatment of the *Skidmore* factors. In *Lopez v Garland*,²⁵ the court applied *Skidmore* in what seems to be a case in which *Skidmore* weight was problematic. The court gave substantial weight to a precedent decision of the Board of Immigration Appeals which contradicted prior BIA authority.

²⁴ *Thryv, Inc. and Int’l Brotherhood of Electrical Workers*, 372 NLRB No. 22 (2022)

²⁵ 116 F.4th 1032, 1041 (9th Cir 2024). *Lopez* was decided before *Loper Bright* but was followed by a post-*Loper* case that weighed some *Skidmore* factors. *Lemus-Escobar v. Bondi*, 158 F.4th 944, 959-61 (9th Cir. 2025)

It concerned interpretation of the statutory term “crimes of moral turpitude.” However, the court failed to consider whether the BIA had a comparative advantage in interpreting this term. Since the precedent decision relied heavily on the Model Penal Code and state-law precedents, it would seem that the court was better qualified to interpret the term than the BIA.

More frequently, courts mention the *Skidmore* exception to *Loper Bright* in passing but then ignore it.²⁶ One decision questioned what work *Skidmore* could do in assisting a court to ascertain the “best reading” of a statute; obviously the court’s answer was “none” since its analysis ignored *Skidmore*.²⁷ Similarly, the Eleventh Circuit wrote: “The agency's reasoning doesn't move the needle here because it merely echoes (or more accurately, anticipated) Perfection's main arguments, which we have rejected as unpersuasive. The [Pension Benefit Guaranty] Corporation's guidance can't convert a losing position into a winning one.”²⁸

A good example of *Skidmore* misapplication is *3M Co. v. Commissioner*,²⁹ in which the court recognized its duty to apply *Skidmore* analysis, but then seemingly ignored it because the disputed interpretation was recently adopted. The *3M* case decided a difficult question of the validity of a tax regulation concerning misallocation of foreign income mostly by relying on canons of statutory construction. However, it should have accorded more weight to the IRS’ interpretation, given the IRS’ expertise in regulating the highly complex problem of allocation of income and expense between countries under a discretionary statutory standard and the court’s lack of such expertise. In addition, factors that constitute power to persuade pointed strongly in

²⁶ See e.g. *Bivens v. Zep, Inc.*, 147 F.4th 635, 646 (6th Cir. 2025); *Art & Antique Dealers of America v. Seggos*, 121 F.4th 423, 435 (2d Cir. 2024); *Seldon v. Garland*, 120 F.4th 527, 531 (6th Cir. 2024); *Restaurant Law Center v. DOL*, 120 F.4th 163, 174 (5th Cir. 2024); *Iowa v. Wright*, 154 F.4th 918, 944 (8th Cir. 2025).

²⁷ *Mayfield v. Dep’t of Labor*, 117 F.4th 619 (5th Cir. 2025).

²⁸ *Perfection Bakeries Inc. v. Retail, Wholesale & Dep’t Store Int’l Union*, 147 F.4th 1314, 1321-22 (11th Cir. 2025).

²⁹ 154 F.4th 574, 582 (8th Cir. 2025).

favor of the agency. The disputed regulation was adopted shortly after enactment of an amendment to the underlying statute, was carefully considered and was the subject of notice and comment rulemaking.

IV. PROPOSED STRUCTURE FOR *SKIDMORE* ANALYSIS

A. *Skidmore* Analysis Should Be Mandatory

Prior to *Chevron*, it was uncertain whether courts were required to engage in a *Skidmore* analysis or whether such analysis was optional. Hickman and Krueger surveyed hundreds of decisions applying *Skidmore* analysis. They found that about 75% of the decisions treated judicial application of the *Skidmore* sliding-scale approach as mandatory and about 19% treated such application as optional.³⁰ Colin Diver, on the other hand, argued that *Skidmore* analysis is optional because it depends on the “power to persuade” of the agency’s interpretation which is the same consideration a court applies to the arguments of any litigant.³¹ Numerous post-*Chevron* Supreme Court decisions, including *Christensen*, gave only lip service to *Skidmore* considerations and failed to analyze most of the *Skidmore* factors.³² After *Loper Bright*, the question of whether *Skidmore* analysis is optional or mandatory remains open.³³

I believe that courts must (not may) employ *Skidmore* analysis when seeking to interpret statutory text in all cases involving agency interpretations but in which the statute does not

³⁰ See Hickman & Krueger, *supra* note 8 at 1259-81. About 6% of the cases they surveyed were indeterminate. Hickman updated her analysis after *Loper Bright*. See Hickman, *supra* note 5.

³¹ Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. R. 549, 565 (1985). Similarly, Murphy describes *Skidmore* as a doctrine “which basically instructs courts to exercise independent judgment regarding statutory meaning subject to the weak requirement that they carefully consider agency views for persuasiveness.” Richard W. Murphy, *Judicial Deference, Agency Commitment, and Force of Law*, 66 OHIO ST. L. J. 1013, 1015 (2005).

³² Hickman & Krueger, note 30 at 1253. See, e.g., *Vance v. Ball State Univ.*, 570 U.S. 421, 431 n.4 (2013); *Gonzales v. Oregon*, 546 U.S. 243, 268-69 (2005); *Raymond B. Yates, M.D. P. C. v. Hendon*, 541 U.S. 1, 18 (2004); *Alaska Dep’t of Conservation v. E.P.A.*, 540 U.S. 461, 487 (2004); *Clackamas Gastroenterology Assoc. P.C. v. Wells*, 538 U.S. 440, 449 (2003); *Washington State Dep’t of Social & Health Services*, 537 U.S. 371, 385 (2003); *Ntl. R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110 n.6 (2002).

³³ See Merrill, *supra* note 4 at 267-68.

delegate interpretive discretion to the agency. *Skidmore* analysis is a necessary tool for ascertaining the best reading of a statute along with the other familiar tools of statutory interpretation. As further discussed below, agency interpretations should be taken seriously because the agency often has a comparative interpretive advantage over the court, owing to its experience and expertise in the subject matter. In addition, the inclusion of *Skidmore* analysis increases the likelihood that courts will adopt the agency's reading as the best one (not, of course, as likely as it was under *Chevron*). That would promote uniformity by reducing the likelihood of conflicts among the federal courts.³⁴ Such splits are harmful because they require the agency to exercise different enforcement criteria depending on which circuit will review its decision. Uncertainty of interpretation causes confusion among regulated parties and others affected by particular statutes. Giving weight to agency interpretations also tends to unify interpretation of the statute whether enforcement is by the agency or by a private lawsuit.³⁵

Treating *Skidmore* analysis as optional deprives it of nearly all force. *Skidmore* would be reduced to something the reviewing court might cite when it agrees with the agency interpretation but which it could ignore or brush aside when it disagrees. *Skidmore* analysis should be part of a reviewing court's decisional process, regardless of whether, in the end, the court agrees or disagrees with the agency's interpretation.

The language in both *Skidmore* and *Loper Bright* leave in doubt whether *Skidmore* analysis is mandatory or optional. This oft-quoted passage from *Skidmore* uses the word "may."

³⁴ Strauss argued that *Chevron* served an important interest in promoting uniformity by reducing circuit splits. Peter 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, 1121 (1987). See also Eskridge & Baer, *supra* note 19 at 1169.

³⁵ "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." *Skidmore* at 140.

“We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants *may* properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”³⁶ I interpret this language to mean that courts are authorized to resort to agency interpretations for guidance even if the interpretation does not occur in an adversary proceeding or through rulemaking. Moreover, I believe it means that courts *must* perform a *Skidmore* analysis of disputed text. After doing so, however, courts *may or may not* decide to give substantial weight to the agency’s interpretation along with other tools of statutory interpretation

Loper Bright says in two places “in an agency case in particular, the court *will* go about its task with the agency’s ‘body of experience and informed judgment,’ among other information, at its disposal.”³⁷ The opinion also states: “So instead of declaring a particular party’s reading ‘permissible’ in such a case, courts *use every tool at their disposal* to determine the best reading of the statute and resolve the ambiguity.”³⁸ This language sounds mandatory.

On the other hand, the *Loper Bright* opinion quotes the “may” language in *Skidmore* quoted above.”³⁹ And it also states: “Courts *must* exercise their independent judgment in

³⁶ 323 U.S. at 140 (emphasis added). Later, in *SEC v. Chenery Corp.*, 332 U.S. 194, 209 (1947), the Court strongly suggested that *Skidmore*-type analysis is mandatory. It said that agency decisions reflecting “the product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the uncontested facts” are “*entitled to the greatest amount of weight by appellate courts*” (emphasis added).

³⁷ 603 U.S. at 374 and 402 (emphasis added). Similarly, in a post-*Loper* decision, the Court said: “District courts are not bound by the agency’s interpretation, but instead *must* determine the meaning of the law under ordinary principles of statutory interpretation, affording appropriate respect to the agency’s interpretation.” *McLaughlin Chiropractic Assoc. v. McKesson Corp.*, 606 U.S. 146, 155 (2025) (emphasis added).

³⁸ 603 U.S. at 400.

³⁹ 603 U.S. at 394 (emphasis added).

deciding whether an agency has acted within its statutory authority, as the APA requires.

Careful attention to the judgment of the Executive Branch *may* help inform that inquiry.”⁴⁰ The foundational 1941 Report of the Attorney General’s Committee on Administrative Procedure is also unclear on this point.⁴¹

There is solid modern authority for the proposition that *Skidmore* analysis is not optional. *United States v. Mead Corp.*⁴² involved a letter ruling by the Customs Service that three-ring day planners are “bound diaries” which carried a higher tariff than if the planners were not bound diaries. Lower courts had decided the issue independently without considering the applicability of *Skidmore*, but the Supreme Court held this was error. It remanded to the lower courts to conduct a *Skidmore* analysis.⁴³ Thus *Mead* stands for the proposition that *Skidmore* analysis is mandatory. I believe that *Mead* was correct on this point.

B. Determining Whether Disputed Text Is “Ambiguous”

It is unclear whether i) a reviewing court should ignore *Skidmore* if it first determines that a statute is unambiguous, or ii) whether the court should consider *Skidmore* along with other tools of statutory interpretation without first deciding whether the statute is ambiguous.⁴⁴ The apparent majority view in pre-*Loper* cases is the former—*Skidmore* comes into play only if the court first determines that the statute is ambiguous (meaning that the text reasonably has more

⁴⁰ 603 U.S. at 413 (emphasis added).

⁴¹ Pp. 90-91: “Thus where the statute is reasonably susceptible of more than one interpretation, the court *may* accept that of the administrative body. Again, the administrative interpretation *is to be given weight*, not merely as the opinion of some men or even of a lower tribunal, but as the opinion of the body especially familiar with the problems dealt with by the statute and burdened with the duty of enforcing it. This *may* be particularly significant when the legislation deals with complex matters calling for expert knowledge and judgment” (emphasis added).

⁴² 531 U.S. 218 (2001).

⁴³ See text at note 14. See also *Alaska Dep’t of Envir. Conserv. v. EPA*, 540 U.S. 461, 487 (2004): “We ‘normally accord particular deference to an agency interpretation of ‘longstanding duration,’ recognizing that ‘well-reasoned views’ of an expert administrator rest on ‘a body of experience and informed judgment to which courts and litigants may properly resort for guidance’” (citations omitted).

⁴⁴ See Hickman, *supra* note 5 at 122-27.

than one meaning).⁴⁵ That majority view, in other words, is like *Chevron* Step One—the court must first determine whether the disputed text was ambiguous and, if it wasn’t, the interpretive analysis is over. The court would then impose the unambiguous meaning and *Skidmore* analysis would have been extraneous.

The question of whether a statutory text is ambiguous (meaning the text could rationally support more than one interpretation) is inherently problematic.⁴⁶ Judges will differ in their conclusions on this issue, as they often did in applying *Chevron* Step One and as the lower court decisions did in *Loper Bright*.⁴⁷ Textualist judges are more likely to find statutory text unambiguous, purposivist judges less likely.⁴⁸ Realistically, by the time a statutory interpretation

⁴⁵ *Id.* at 123-25.

⁴⁶ In *Kisor v. Wilkie*, the Supreme Court discussed the meaning of “ambiguity” in regulations, but the same reasoning applies to ambiguity in statutes: “Begin with a familiar problem in administrative law: For various reasons, regulations may be genuinely ambiguous. They may not directly or clearly address every issue; when applied to some fact patterns, they may prove susceptible to more than one reasonable reading. Sometimes, this sort of ambiguity arises from careless drafting—the use of a dangling modifier, an awkward word, an opaque construction. But often, ambiguity reflects the well-known limits of expression or knowledge. The subject matter of a rule may be so specialized and varying in nature as to be impossible—or at any rate, impracticable—to capture in its every detail...Or a problem may arise that the agency, when drafting the rule, could not have reasonably foreseen. Whichever the case, the result is to create real uncertainties about a regulation’s meaning.” *Kisor v. Wilkie*, 588 U.S. 558, 566 (2018) (citations and internal quotation marks omitted).

⁴⁷ The majority of the D.C. Circuit found the statute “not wholly unambiguous,” for purposes of *Chevron* Step 1, but the dissent found the statute unambiguous against the government. *Loper Bright Enter. v. Raimondo*, 45 F.4th 359, 368, 373 (D.C. Cir. 2022). In the other fisheries case that also reached the Supreme Court and was decided together with *Loper Bright*, the court alternatively held that the statute was unambiguous in favor of the government under *Chevron* Step 1 as well as reasonable under Step 2. *Relentless, Inc. v. Dep’t of Commerce*, 62 F.4th 621, 634 (1st Cir. 2023). The District Court again decided the case on remand from the Supreme Court and upheld the regulation, apparently considering the statute unambiguous, and it never mentions *Skidmore*. *Relentless Inc. v. Dep’t of Commerce*, 2025 WL 1939025 (D.R.I. 2025). These differences highlight the difficulties in determining whether statutory text is ambiguous. In a case involving interpretation of the Internal Revenue Code, the court split 2-1 over whether the statute was unambiguous in the government’s favor or the taxpayer’s favor. *Sirius Solutions L.L.P. v. Commissioner*, 2026 WL 125600 (5th Cir. 2026). The majority also applied *Skidmore* to give weight to the IRS’ *former* interpretation of the statute rather than its current interpretation.

⁴⁸ See Bernard W. Bell, *Loper Bright: Resurrecting Skidmore in a New Era*, 55 SETON HALL L. REV. 1577, 1581-86 (2025). For discussion of the conflict between textualism and purposivism, see Stephen Breyer, *Pragmatism or Textualism*, 138 HARV. L. REV. 717 (2025); John F. Manning, *What Divides Textualists from Purposivists*, 106 COLUM. L. REV. 70 (2006).

issue comes to court, especially to an appellate court, it is likely that more than one meaning of the text is reasonably possible.⁴⁹ Easy cases of plain meaning are unlikely to get this far.

Courts should be more willing to acknowledge that a disputed text is ambiguous in the *Loper Bright* era than they were in the *Chevron* era. Under *Chevron*, the decision of whether the statute was ambiguous under Step One was usually outcome determinative, given that agencies generally passed the Step Two test with ease.⁵⁰ Judges who agreed with the agency's interpretation were likely to find the statute ambiguous so that the agency would probably win under Step 2. Judges who disagreed with the agency's interpretation were more likely to find the statute unambiguous under Step 1 so the judges could substitute their preferred meaning and avoid Step 2. Thus, the Step 1 determination of ambiguity was subject to strategic behavior. Under *Loper Bright*, courts can be more candid about whether a statute is ambiguous because that conclusion is no longer outcome determinative.

I believe a better approach is to apply *Skidmore* analysis *without* first deciding whether the statute is ambiguous. Requiring courts to make a threshold determination of ambiguity is a vestige of the now-discredited *Chevron* two-step and an invitation to strategic behavior. Rather, instead of flipping an ambiguity on-off switch, courts should initially assume that the disputed text is ambiguous. *Skidmore* should be applied *along with* the other familiar tools of statutory interpretation—dictionary definitions, statutory context, canons of statutory construction, and, for judges willing to do so, legislative history and statutory purpose. These tools are helpful in determining the single best reading of the text, as *Loper Bright* requires the court to do. After performing this exercise, the court is free to rule against the agency's interpretation because the

⁴⁹ Breyer, *supra* note 48 at 724.

⁵⁰ See, e.g., Kent Barnett & Christopher J. Walker, *Chevron Step Two's Domain*, 93 NOTRE DAME L. REV. 1441, 1445 (2018). Barnett & Walker found that agencies prevailed in 39% of cases decided under *Chevron* Step One and 93.8% in cases decided under Step 2.

Skidmore factors may signal that the agency interpretation deserves little weight. Even if a reviewing court finds the agency interpretation does deserve *Skidmore* weight, it can still disagree with the agency and adopt a different meaning based on other tools of statutory interpretation. But the court should not initiate its analysis by asking whether the text is ambiguous or unambiguous and then terminating the discussion of interpretation if it is unambiguous.

C. Structure of *Skidmore* Analysis

There needs to be a commonly accepted structure to assist courts in determining whether *Skidmore* weight is appropriate across the vast array of cases in which agency statutory interpretations are disputed. The federal case law has never attempted to come up with such a structure, leading courts (including the *Loper Bright* opinion) to list some but not all of the relevant factors and failing to explain how the various factors fit into a coherent analysis.

Obviously, it is difficult to give a precise account of how *Skidmore* can or should be applied the concept of giving “weight” or “respect” to an agency decision is inevitably problematic. Situations in which the issue arises differ greatly.⁵¹ Nevertheless, an agreed-upon structure for applying *Skidmore* can greatly reduce the vagueness and unpredictability of this useful tool for performing statutory interpretation.

I propose that federal courts adopt and apply a framework that will be applied across all future cases raising *Skidmore* issues. In doing so, the courts might consider a structure that has developed in California since the California Supreme Court’s 1998 decision in *Yamaha Corp. of*

⁵¹ In her *Loper Bright* dissent, Justice Kagan treated *Skidmore* dismissively. She wrote: “If the majority thinks that the same judges who argue today about where ‘ambiguity’ resides [under *Chevron* Step One] ... are not going to argue tomorrow about what ‘respect’ requires, I fear it will be gravely disappointed.” *Loper Bright*, 606 U.S. at 476.

*America v. State Board of Equalization*⁵² a decision explicitly modeled on *Skidmore*.⁵³ The *Yamaha* decision has been cited and applied in 682 appellate cases up to December 31, 2025.⁵⁴ I believe that this methodology works smoothly and well. The *Yamaha* case involved the question of what weight (if any) courts should give to statutory interpretation contained in an “annotation,” a brief statement by a Board of Equalization attorney explaining how a statutory term in the sales tax law should be interpreted. The annotation was issued in response to a request for advice. It was published and was intended for general guidance, although it was not adopted through notice and comment rulemaking.⁵⁵

The *Yamaha* decision made clear that the reviewing court was not bound by the agency’s interpretation of the disputed statute. However, reviewing courts must consider the contextual factors surrounding the agency’s interpretation and give that interpretation appropriate weight in the process of statutory interpretation. The decision explained:

Although an agency's interpretation of the meaning and legal effect of a statute is entitled to consideration and respect by the courts...the binding power of an agency's interpretation of a statute or regulation is contextual. Its power to persuade is both

⁵² 19 Cal.4th 1 (1998). The Supreme Court drew this analysis from recommendations for reform of California’s system of judicial review submitted by the California Law Revision Commission, but that were not enacted by the legislature. See Michael Asimow, *Speed Bumps on the Road to Administrative Law Reform in California and Pennsylvania*, 8 WIDENER J. OF PUB. L. 229, 272-283 (1995). The Commission in turn relied on an earlier law review article by the author. Michael Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. REV. 1157, 1192-1209 (1995).

⁵³ 19 Cal.4th at 13-14.

⁵⁴ California does not publish trial court decisions so the actual number of citations to *Yamaha* is undoubtedly a much larger number. *Yamaha* and the cases applying it are discussed in detail in 2 MICHAEL ASIMOW, MICHAEL LEVY, LAURINE TULEJA, & PIPPIN C. BREHLER, CALIFORNIA PRACTICE GUIDE: ADMINISTRATIVE LAW ¶¶ 17:20 to 17:182 (Rutter Group, updated to 2026) (this treatise is accessible on Westlaw).

⁵⁵ Unlike federal law, California requires agencies to follow notice and comment procedure for adoption of all rules of general applicability including guidance documents. CALIF. GOV’T C. §11340.5(a). See Michael Asimow, *California Underground Regulations*, 44 ADMIN. L. REV. 43 (1992); Asimow, et al., *supra* note 53, Chap. 25. However, there is an exception for advisory rulings by tax agencies, such as the “annotation” involved in the *Yamaha* case, so the Board was not required to engage in notice and comment rulemaking. CALIF. GOV’T C. §11340.9(b).

circumstantial and dependent on the presence or absence of factors that support the merit of the interpretation. Thus, the reviewing court exercises its independent judgment in reviewing an agency's interpretation of law, giving deference to the determination of the agency appropriate to the circumstances of the agency's action...Courts *must*, in short, independently judge the text of the statute, taking into account and respecting the agency's interpretation of its meaning, of course, whether embodied in a formal rule or less formal representation. Where the meaning and legal effect of a statute is the issue, an agency's interpretation is one among several tools available to the court. Depending on the context, it may be helpful, enlightening, even convincing. It may sometimes be of little worth.⁵⁶

Yamaha established a structure for analyzing the *Skidmore* factors. It applies only if the reviewing court first determines that the statute does not delegate interpretive discretion to the agency.⁵⁷ The reviewing court should consider separately two broad questions: 1) did the agency have a comparative interpretive advantage over the courts in construing the disputed text; and 2) to what degree did the particular circumstances of the agency's interpretation of that language have power to persuade the court?⁵⁸

1. Comparative Interpretive Advantage

Following *Skidmore*'s lead,⁵⁹ the *Yamaha* decision requires that a reviewing court determine whether the agency or the court has superior competence in interpreting statutory text. An

⁵⁶ *Yamaha*, 19 Cal.4th at 7-8 (emphasis added).

⁵⁷ See Asimow et al., *supra* note 54

‘ at ¶17:165 to :199.

⁵⁸ *Yamaha*, 19 Cal.4th at 12-13

⁵⁹ “...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.” *Skidmore* at 139.

agency has comparative interpretive advantage if the interpretation calls for the application of agency expertise.⁶⁰

Agency expertise is an essential element of law and public administration and pervades all aspects of agency policymaking and implementation, including statutory interpretation.⁶¹ Professors Fisher and Shapiro describe this as “administrative competence” or “craft expertise.”⁶² It arises out of the presence of a staff consisting of individuals with training in varying disciplines and who are socialized in working together to solve regulatory problems. The staff often has decades of practical experience in administering the agency’s statute and regulations. Staff members gain in-depth understanding of the regulated industry and the technical and scientific issues raised by particular regulatory schemes. The staff has access to experts outside the agency (both to private experts or to those within other agencies). It is experienced in dealing with practical issues of enforcement and implementation of complex statutory schemes. It includes internal accountability devices and internal checks and balances. This body of staff expertise is an essential check on agency arbitrariness and excessive politicization.⁶³ Agencies thus have a comparative advantage in interpreting text that is technical

⁶⁰ “In the first category are factors that assume the agency has expertise and technical knowledge, especially where the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion.” *Yamaha*, 19 Cal.4th at 12. See, e.g., *Calif. Bldg. Ind. Ass’n v. Bay Area Air Qual. Mgmt. Dist.*, 62 Cal.4th 369, 390 (2015), holding that California Environmental Quality Act guidelines written by the California Natural Resources Agency deserve substantial *Yamaha* weight because the agency “is precisely the kind of agency that accumulates specialized knowledge of such an intricate statute and the trade-offs involved in its implementation.”

⁶¹ Eskridge & Baer, *supra* note 19 at 1173; Emily Hammond, *Finding a Place for Expertise after Loper Bright*, 31 GEO. MASON L. REV. 559 (2024); Ronald J. Krotoszynski Jr., *Why Deference: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735 (2002).

⁶² ELIZABETH FISHER AND SIDNEY A. SHAPIRO, *ADMINISTRATIVE COMPETENCE: REIMAGINING ADMINISTRATIVE LAW* (2020) (analyzing expertise in great detail); Elizabeth Fisher & Sidney A. Shapiro, *Disagreement about Chevron: Is Administrative Law the “Law of Public Administration?”* 70 DUKE L.J. ONLINE 111 (2020-2021); Sidney A. Shapiro, *The Failure to Understand Expertise in Administrative Law: The Problem and the Consequences*, 50 WAKE FOREST L. REV. 1097 (2015); Eskridge & Baer, *supra* note 19 at 1174.

⁶³ For a good overview, see Brian McNamara, *Loper Bright and the Assault on Expertise*, 22 RUTGERS J. L. & PUB. POL., Issue 2 p. 43 (2024).

or obscure, is imbued with policy considerations, or that requires knowledge of the problems in implementing and enforcing the regulatory scheme.⁶⁴

On the other hand, courts have the interpretive advantage when the agency's expertise and technical competence are not particularly helpful in resolving the interpretive dispute.⁶⁵ These are the sorts of interpretive issue that courts routinely resolve in everyday litigation. The case may require the court to ascribe meaning to non-technical language or common law concepts.⁶⁶ Or it might require analysis of prior judicial precedent or of trans-substantive statutes like the APA. Thus the interpretive issue in *Loper Bright* itself may well be one in which courts have the comparative advantage. The issue of whether an agency can require fishing boats to pay the cost of non-government inspectors in the North Atlantic calls for careful consideration of a complex statute, but it does not seem to depend on agency expertise.

2. Power to Persuade⁶⁷

⁶⁴ Many federal court decisions, including some post-*Loper Bright*, recognize the importance of agency expertise in determining whether *Skidmore* weighting is appropriate. See, e.g., *Miller Plastic Prods. Inc. v. NLRB*, 141 F.4th 492, 503 (D.C. Cir. 2025). “Given the Labor Board’s expertise in resolving labor disputes, the Board’s assessment of what constitutes ‘concerted activities’ continues to form ‘a body of experience and informed judgment’ that can aid our analysis.”

⁶⁵ For examples under California law, see *Asimow, et al.*, *supra* note 54, ¶17:52 to 17:67. See, e.g., *Styrene Inf. & Res. Ctr. v. Office of Envir. Health Hazard Assessment*, 148 Cal.Rptr.3d 776, 789 (Cal. App. 2012). The *Styrene* case involved a statute requiring the agency to list toxic chemicals. The issue was whether chemicals listed by an international agency had to be included on the list. This issue does not involve technical knowledge or expertise, but instead calls only for skills in construing a complex statute.

⁶⁶ For a post-*Loper Bright* example, see *Turner v. Attorney General*, 130 F.4th 1254, 1265 (11th Cir. 2025). In the *Turner* case, a now-repealed immigration statute extended citizenship to a non-citizen child when the child’s custodial parent is naturalized but the non-custodial parent is not naturalized “when there has been a *legal separation* of the parents.” The child’s parents had been legally separated but had remarried at the time his mother but not his father was naturalized. Does the statute require that the custodial parent be separated from the non-custodial parent at the time of the custodial parent’s naturalization or is it sufficient if the parents had been legally separated in the past but not at the time of naturalization? The court correctly identified this dispute as one in which the Board of Immigration Appeals had no particular expertise, so the court need not extend *Skidmore* weight to several previous BIA decisions that supported the child’s position.

⁶⁷ The *Yamaha* decision stated: “The second group of factors in the *Asimow* classification—those suggesting the agency’s interpretation is likely to be correct—includes indications of careful consideration by senior agency officials (‘an interpretation of a statute contained in a regulation adopted after public notice and comment is more deserving of deference than [one] contained in an advice letter prepared by a single staff member’), evidence that the agency ‘has consistently maintained the interpretation in question, especially if [it] is long-standing’ (‘[a] vacillating position ... is entitled to no deference’), and indications that the agency’s

According to *Yamaha*, the second set of issues that a court must balance in deciding how much *Skidmore* weight should be accorded to an agency's interpretation of statutory text is the degree to which the particular circumstances of the agency interpretation give it power to persuade the court. These circumstances increase the probability that the agency's reading is the best one. Courts should consider each of these contextual factors (or at least those that are referred to in the briefs). If particular factors are not present, the court should not treat their absence as a minus. For example, an agency interpretation might be a recent one that overturned prior agency interpretations. Thus, it lacks longevity, consistency, and contemporaneity. The absence of these plus factors weakens the case for giving *Skidmore* weight. However, their absence should not disqualify the agency interpretation from receiving positive weight under *Skidmore* or *Yamaha*, if other factors point in the direction of ascribing positive weight.

a. Thoroughness of the agency's consideration of the issue. A carefully considered legal analysis that takes account of tools of statutory interpretation, prior precedents, legislative history, and policy considerations, is more likely to lead to the best interpretation of the statute. In contrast, an agency decision or practice unsupported by a reasoned analysis has little persuasive power.⁶⁸

interpretation was contemporaneous with legislative enactment of the statute being interpreted. If an agency has adopted an interpretive rule in accordance with Administrative Procedure Act provisions—which include procedures (e.g., notice to the public of the proposed rule and opportunity for public comment) that enhance the accuracy and reliability of the resulting administrative ‘product’—that circumstance weighs in favor of judicial deference.” *Yamaha* 19 Cal.4th 1, 13 (citations omitted).

⁶⁸ Asimow et al., *supra* note 54, ¶¶17:91 to :99. See, e.g., *Jones v. Lodge at Torrey Pines Partnership*, 42 Cal.4th 1158, 1173 (adjudicatory precedent entitled to little weight because it stated a conclusion without legal analysis).

b. Level of the agency where the interpretation was made. An interpretation rendered by the agency heads or high-level staff such as the general counsel has greater power to persuade than an interpretation rendered by low-level agency staff.⁶⁹

c. Formality of the process. An interpretation reached through a procedure involving public participation has more persuasive power than one rendered without public participation. For example, statutory interpretation arising out of notice and comment rulemaking or an adversarial adjudicatory process is likely to have been thoroughly and carefully researched. Those processes require the agency to consider and respond to arguments made by the respondent private party or other interested persons outside the agency.⁷⁰ In contrast, an interpretation arising from a request for advice or from an internal memo written by the enforcement staff often furnishes the private party no opportunity to argue its side of an interpretive dispute before the agency. Thus, it might have been less carefully researched and considered.⁷¹

d. Consistency and longevity. An agency interpretation that has been asserted consistently over a long period of time is more persuasive than a recently adopted interpretation or one that has been inconsistently maintained.⁷² This makes sense since the agency has lived

⁶⁹ See *Sharon S. v. Superior Ct.*, 31 Cal.4th 417, 436 (careful study by senior agency officials entitled to substantial *Yamaha* weight).

⁷⁰ *Yamaha*, 19 Cal.4th at 13. See, e.g., *Hoechst Celanese Corp. v. Franchise Tax Bd.*, 25 Cal.4th 508, 524-25 (2001) (giving substantial weight to interpretations in several Board adjudicatory decisions).

⁷¹ Asimow, et al., *supra* note 56, at 17:110-17:116; Hickman, *Duke Online*, *supra* note 5, at 131-32; Eskridge & Baer, *supra* note 19 at 1188.

⁷² *Yamaha*, 19 Cal.4th at 13; *Ramirez v. Yosemite Water Co., Inc.*, 20 Cal.4th 785, 801 (1999). See Eskridge & Baer, *supra* note 19 at 1151, 1189. Eskridge and Baer argue: “A consistent agency interpretation is one that is relatively more likely to have generated private as well as public reliance, usually bears the legitimacy of support across politically different administrations, and has the practical advantage of knowability, as ambiguities get ironed out over time. Flip the analysis and the virtues of longevity may be even more apparent. An agency interpretation that departs from a previously established agency understanding is more likely to be *arbitrary* in several senses: compared with a longstanding interpretation, a new construction is more likely to unsettle reliance interests, is more likely to reflect a partisan political judgment not carefully moored to

with the practical implications of the interpretation over a lengthy period of apparently satisfactory administration.⁷³ In addition, a long-held interpretation often engenders significant reliance interests on the part of regulated parties. The *Loper Bright* opinion repeatedly mentioned continuity and consistency as hallmarks of *Skidmore* practice.⁷⁴

e. Contemporaneity. An agency interpretation made soon after the statute was enacted or amended is more persuasive than one made years after enactment or amendment, because the agency was probably involved in the legislative process and was familiar with the intentions and purposes of the legislators.⁷⁵

f. Validity. *Skidmore* also mentioned “the validity of its reasoning” as a relevant factor in determining the weight given to an agency interpretation and *Loper Bright* echoed this language.⁷⁶ *Yamaha*, however, does not mention “validity” as a factor in determining whether the interpretation has power to persuade. Validity is not a helpful factor since it seems circular. It simply asks whether the court agrees with the agency’s reasoning as to the meaning of the text. But that is the ultimate issue to be decided.⁷⁷ Taking “validity” into account means that the court

carrying out Congress's statutory purposes, and is more likely to raise new interpretive difficulties for regulated interests.” *Id.* at 1151. *See also id.* at 1189.

⁷³ See Anita S. Krishnakumar, *Longstanding Agency Interpretations*, 83 FORDHAM L. REV. 1823 (2015). Krishnakumar demonstrates how the longevity factor has been inconsistently applied and often ignored in numerous appellate decisions. “An agency interpretation that has been in place for years, directing both private and government behavior, and that has withstood executive and congressional oversight as well as the shifting political whims of several presidential administrations, is a precedent in its own right. It has its own, independent claim to authority. As such, it deserves more than loose mention as merely one factor in a laundry list of considerations taken into account upon judicial review.” *Id.* at 1829

⁷⁴ *Loper Bright* at 388, 410.

⁷⁵ See Asimow et al. *supra* note 56 at ¶¶17:120-17:123; Daniel T. Deacon, *Statutory Liquidation*, 77 ADMIN. L. REV. 503 (2025); *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 315 (1933) (observing that “peculiar weight” is owed to “a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion”); *United States v. American Trucking Assn.’s*, 310 U.S. 534, 549 (1946) (“...the Commission's interpretation gains much persuasiveness from the fact that it was the Commission which suggested the provisions' enactment to Congress”).

⁷⁶ *Skidmore* at 140; *Loper Bright* at 370, 388.

⁷⁷ See Hickman & Kruger, *supra* note 8 at 1273-74. Ronald Levin wrote: “Gorsuch's version [of *Skidmore* as expressed in his *Kisor* dissent] seems to be one in which a court will accept an agency's interpretation only if it

should give *Skidmore* weight only if the court agrees with the agency's interpretation and should ignore the agency's interpretation if it disagrees with it.

3. Balancing the Factors

The reviewing court should separately consider the two major questions—comparative interpretive advantage and power to persuade. If the court has the comparative interpretive advantage, it is likely that the agency interpretation will be given little weight, regardless of its power to persuade. If the agency has the comparative advantage, the court should consider the various persuasive factors, giving a plus weight to factors that are persuasive, but not assigning a minus weight to the factors that are not persuasive. Thus a thoroughly reasoned interpretive analysis, produced at the agency head level and contained in a formal adjudicatory decision or a rule enacted after notice and comment, may be quite persuasive, even if the interpretation is a recent one and not contemporaneous with enactment of the statute.⁷⁸ Finally, of course, the weight given to the agency's interpretation after analysis of all the factors remains as only one part of the court's process of independently determining statutory interpretation along with other tools of statutory interpretation. It is not dispositive. Other factors, such as legislative history or statutory context or dictionary meanings may still outweigh the agency's interpretation, even if the persuasive factors strongly support the agency.

V. AGENCY'S INTERPRETATION OF ITS OWN REGULATIONS

Agencies often are required to interpret their own regulations. The law relating to judicial review of agency interpretation of regulations developed separately from the law relating

is persuaded by that position, which is a very faint form of deference, if it can be called by that name at all.” Levin, *supra* note 9 at 131.

⁷⁸ Thus I disagree with cases that decline to give *Skidmore* consideration to an agency interpretation that is not consistent, longstanding, or contemporaneous, without consideration of other relevant factors. See, e.g. *Iowa v. Wright*, 154 F.4th 918, 941-45 (8th Cir 2025).

to judicial review of agency statutory interpretation. Under what is referred to as *Auer* deference, when the meaning of a regulation is in doubt, the agency's interpretation is “controlling unless plainly erroneous or inconsistent with the regulation.”⁷⁹ In *Kisor v. Wilkie*,⁸⁰ a badly split Supreme Court decision declined an invitation to overrule *Auer*. The Court explained that *Auer* deference posited an implied delegation to agencies to interpret their own regulations,⁸¹ an analysis similar to *Chevron*’s presumption that Congress delegated interpretive discretion to agencies when writing ambiguous statutes. However, the *Kisor* decision limited the scope of the *Auer* doctrine by requiring a court first to consider whether the regulation was ambiguous by using traditional tools of textual interpretation (an analysis similar to *Chevron* Step One)⁸² and, if so, to decide whether the agency’s interpretation was “reasonable” (an analysis similar to *Chevron* Step Two).⁸³ The court should consider various factors that closely resemble those in a *Skidmore* analysis to determine whether the interpretation was reasonable and thus should be given controlling weight.

Now, however, *Loper Bright* has overruled *Chevron* and rejected the idea that Congress delegated interpretive discretion to the agency merely by writing an ambiguous statute. It seems

⁷⁹ *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (emphasis added, citations omitted). *Auer* followed the lead of *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). Thus, the principle that courts must give controlling weight to agency interpretation of its own regulations is often referred to “*Seminole Rock* deference.”

⁸⁰ 588 U.S. 568 (2019).

⁸¹ *Auer* deference is “rooted in a presumption about congressional intent—a presumption that Congress would generally want the agency to play the primary role in resolving regulatory ambiguities... Or otherwise said, we have thought that when granting rulemaking power to agencies, Congress usually intends to give them, too, considerable latitude to interpret the ambiguous rules they issue.” *Kisor* at 569-70. See Levin, *supra* note 9 at 132, describing the presumption of interpretive delegation as well-established administrative common law; Kevin O. Leske, *Between Seminole Rock and a Hard(er) Place: A New(er) Approach to Agency Deference*, 75 CATHOLIC UNIV. L. REV. – (2025), ms. p. 7-11.

⁸² The court should carefully consider “the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on.” *Kisor* at 574.

⁸³ “Reasonable” means that the interpretation “must come within the zone of ambiguity the court has identified after employing all its interpretive tools.” *Kisor* at 576.

likely that the Court will soon decide that delegated authority to adopt regulations does not imply delegated authority to the agency to interpret the regulations. *Loper Bright* establishes that reviewing courts must exercise independent judgment over questions of interpretation and rejects the idea that an agency interpretation can be outcome determinative.

After *Loper Bright*, the *Kisor* decision to maintain *Auer* deference seems vulnerable. This vulnerability is enhanced because of the vehemence of Justice Gorsuch’s concurring opinion (which spoke for 4 justices) and the fact that the center of gravity on the Supreme Court has shifted sharply to the right since that decision. Chief Justice Roberts, who cast the decisive fifth vote for most of the plurality’s holdings, concurred in *Auer* largely on stare decisis grounds, but Roberts wrote the decision in *Loper Bright* that buried *Chevron* and resoundingly rejected stare decisis. Thus *Auer* is ripe to be overruled,⁸⁴ but what should take its place?

I believe that the law relating to interpretation of statutes and regulations should be unified, as it is in California. *Yamaha* explicitly included agency interpretation of regulations in its analysis of the appropriate role of reviewing courts in interpreting text.⁸⁵ Both should be analyzed according to the same structure—that an agency interpretation of either a statute or regulation should be accorded the appropriate degree of weight in a court’s interpretive analysis. The rationales for the *Skidmore* doctrine apply, if anything, even more strongly to agency interpretation of its own regulations. This rationale is based on an agency’s comparative

⁸⁴See Edward L. Rubin, *Chevron Was Not, and Cannot Be, Overruled: The Dullness of Loper Bright*, 20 DUKE J. OF CONST. L. & PUB. POL. 31, 109 (2025). Leske disagrees, arguing that the APA preserved the prior law of judicial review and *Seminole Rock*, decided one year before enactment of the APA, established that there is an implied delegation to agencies to interpret their own regs. *Supra* note 81, ms. pp. 17-37. And, of course, the *Loper Bright* opinion repeatedly cited *Kisor*, which suggests that the Court does not intend to overrule that case.

⁸⁵ “A court is more likely to defer to an agency’s interpretation of its own regulation than to its interpretation of a statute, since the agency is likely to be intimately familiar with regulations it authored and sensitive to the practical implications of one interpretation over another.” *Yamaha*, 19 Cal.4th at 12.

advantage in interpreting its own regulations since it wrote them.⁸⁶ The agency is more likely than a court to understand the meaning of its regulation as well as the policy implications of a particular interpretation.⁸⁷ And uniformity is promoted if all courts are required to give weight to the agency's interpretations of ambiguous regulations instead of creating their own divergent interpretations.⁸⁸

In *Kisor*, the Court prescribed a *Chevron*-like two stage inquiry: *Auer* deference applies only if the regulation is ambiguous and the agency's interpretation is reasonable. In addition,

- the interpretation is “authoritative” meaning that the interpretation “must at the least emanate from those actors, using those vehicles, understood to make authoritative policy in the relevant context;
- the agency's interpretation must in some way implicate its substantive expertise.⁸⁹
- An agency's reading of a rule must reflect “fair and considered judgment” to receive *Auer* deference, thus ruling out a convenient litigating position or a post hoc rationalization.

⁸⁶ The *Kisor* decision makes this point well. “[T]he implied delegation to agencies to interpret their own regulations reflects the fact that the agency that promulgated a rule is in the better position to reconstruct its original meaning. Consider that if you don't know what some text (say, a memo or an e-mail) means, you would probably want to ask the person who wrote it. And for the same reasons, we have thought, Congress would too (though the person is here a collective actor). The agency that ‘wrote the regulation’ will often have direct insight into what that rule was intended to mean. The drafters will know what it was supposed to include or exclude or how it was supposed to apply to some problem... Want to know what a rule means? Ask its author.” *Kisor*, 588 U.S. at 570 (citations and internal quotation marks deleted).

⁸⁷ *Kisor* at 571-72. See Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. CHI. L. REV. 297, 306-08 (2017).

⁸⁸ *Kisor* at 572-73

⁸⁹ “Some interpretive issues may fall more naturally into a judge's bailiwick. Take one requiring the elucidation of a simple common-law property term.” *Kisor* at 578.

- The agency’s interpretation must be consistent—a sudden change in interpretation can disappoint reliance interests or create unfair surprise.⁹⁰

These criteria apply comfortably to the interpretation of both statutes and regulations in a post-*Loper Bright* world in which interpretive delegation is not presumed. They operate smoothly in determining what weight to accord agency interpretations of both statutes and regulations, even shorn of the *Auer* presumption of implied delegation.

However, in cases involving interpretation of regulations rather than statutes, there is an important difference in how the *Skidmore* analysis should function. The first important question in a *Skidmore* analysis is whether an agency or a reviewing court has a comparative interpretive advantage. When an agency interprets its own regulation, it has a comparative advantage since it (rather than Congress) was the author of the disputed regulation. Consequently, the adopting agency is more likely than a court to understand what disputed language in the regulation was supposed to mean. Moreover, it is likely that the regulation will be deeply enmeshed in the agency’s regulatory and enforcement process and interpreting it requires technical knowledge and expertise that an agency is more likely than a court to possess. Under the California model discussed in Part IV, the structure set forth in the *Yamaha* case applies to interpretation of both rules and statutes, but agencies are more likely to have a comparative advantage over courts in interpreting their own regulations.⁹¹ I think this is the right approach.

CONCLUSION

Loper Bright launched a new era for judicial review of agency interpretation of statutory text. The federal judiciary is struggling to adapt to this new regime and many important issues

⁹⁰ For example, *Auer* deference should not be accorded to an interpretation that would have imposed retroactive liability on parties for longstanding conduct that the agency had never before addressed. The lack of “fair warning” outweighed the reasons to apply *Auer*: *Kisor* at 579.

⁹¹ See Asimow et al., *supra* note 54 at ¶17:70 -17:80.

remain to be resolved. The *Loper Bright* opinion made it clear that reviewing courts must at least consider whether they should give or deny extra weight to agency interpretations of disputed text under the venerable standards set forth in *Skidmore v. Swift*. This article proposes a structure modelled on California's approach to the problem by which reviewing courts ascertain how much weight to give agency interpretations, if any. The *Yamaha* formula employs a balancing approach involving two questions—does the agency or the court have a comparative interpretive advantage and does the agency's interpretation have power to persuade? The article contends that reviewing courts must (rather than may) apply *Skidmore* analysis along with other tools of statutory interpretation and should do so before determining whether the disputed text is ambiguous. Finally, the article urges that the same approach be used for judicial review of agency interpretation of their own regulations. *Skidmore* will have its day. Let's be ready!

