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Against Deferential *Skidmore*

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AGAINST DEFERENTIAL SKIDMORE

By John O. McGinnis & Phil Pillari

ABSTRACT—This Article argues that any version of *Skidmore* that grants agencies institutional weight for expertise in their interpretation of statutes is incompatible with § 706 of the APA and cannot survive Loper Bright. The Article distinguishes between "educational *Skidmore*," which treats agency views as useful information, and "deferential *Skidmore*," which gives agencies a doctrinal thumb on the scale for their legal interpretations. Contrary to the emerging scholarly consensus, we show that deferential *Skidmore* is unlawful.

Section 706's text, structure, and history foreclose a standard of review for legal questions that defers to agency expertise beyond what its persuasiveness warrants, and neither *Skidmore* nor *Hearst* is plausibly incorporated as "old soil" importing as matter of past doctrine expertise-based deference into section 706. Deferential *Skidmore* meets every criterion *Loper Bright* used to abandon *Chevron*: it is egregiously erroneous, unworkable, and elicits no substantial reliance. Changed conditions also favor overruling deferential *Skidmore*: the premises for institutional deference have eroded in a world where the political control of agencies is recognized and where there is wider access to the technical knowledge relevant to interpreting texts. The "respect" due to agency expertise under *Loper Bright* is consistent with "educational *Skidmore*." Agency expertise in statutory interpretation is a source of illumination, not authority.

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INTRODUCTION

Loper Bright ended Chevron deference for agency interpretation of the statutes they administer and reaffirmed that courts must exercise independent judgment on questions of law.[1] Yet almost immediately, courts[2] and commentators[3] claimed that the more modest and qualified deference to

[1] Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024) ("*Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires.")

[2] *See, e, g*., Nicoletti v. Bayless, No. 24-6012, 2025 WL 80294, at *2 (4th Cir. Jan. 13, 2025) (per curiam) (stating that *Loper Bright* does not change *Skidmore* framework for deference); Lopez v. Garland, 116 F.4th 1032, 1039–41 (9th Cir. 2024) (deferring to agencies view because its technical expertness) Regents of Univ. of Cal. v. Chefs' Warehouse, Inc. Emp. Benefit Plan, No. 2:23-cv-00676-KJM, 2024 WL 3937161, at *5 (E.D. Cal. Aug. 26, 2024) (asserting that *Skidmore* deference remains applicable).

[3] *See, e.g.*, Bernard W. Bell, Loper Bright*: Resurrecting* Skidmore *in a New Era*, 55 SETON HALL L. REV. 1577, 1581–85 (2025) (arguing that *Loper Bright* reinstated *Skidmore* as the "preeminent approach" to agency deference, though applied in a more textually constrained judicial environment); Daniel T. Deacon, Loper Bright*,* Skidmore*, and the Gravitational Pull of Past Agency Interpretations*, YALE J. ON REG.: NOTICE & COMMENT (June 30, 2024) https://www.yalejreg.com/nc/loper-bright-skidmore-and-the-gravitational-pull-of-past-agency-interpretations/ (contending that *Skidmore* remains operative and can be outcome-determinative, particularly for longstanding agency views); Richard J. Pierce, Jr., *Two Neglected Effects of* Loper Bright, REG. REV. (July 1, 2024), https://www.theregreview.org/2024/07/01/pierce-two-neglected-effects-of-loper-bright/ (reading *Loper*

agencies thought to be mandated by *Skidmore* survives.[4] This Article argues that the claim is doctrinally wrong, because deference is inconsistent with § 706 of the Administrative Procedure Act (APA)—the very statute that was key to *Loper Bright*'s reasoning.[5] But this path would not represent just a doctrinal error. If deferential *Skidmore* still applies, so will *Chevron*'s troubling asymmetry between government and private parties because the government will receive weight for its expertise in statutory interpretation beyond that which any litigant would receive.

In *Loper Bright* the Court did explain that "exercising independent judgment is consistent with the 'respect' historically given to Executive Branch interpretations" of the law.[6] And the Court repeatedly cited *Skidmore*, which tells courts that agency interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[7] If *Skidmore* deference did survive *Loper Bright*, its regime would differ from the *Chevron* regime in both its rationale and its operation. It is based on the agency's policy expertise, not on any inference of congressional intent from statutory ambiguity.[8] And unlike *Chevron*, it provides only a factor to be weighed in the interpretive balance, rather than a space in which agencies can control outcomes, provided their judgment is reasonable.[9]

Nevertheless, a deferential *Skidmore* regime would greatly matter in litigation about agency action. It accords agencies institutional weight in their expert interpretive judgments, rather than evaluating such interpretations on the merits alone. To be clear about this distinction, institutional weight exists whenever a court credits an interpretation more

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Bright as requiring courts to give "respectful consideration" to agency views under *Skidmore*, thereby curbing interpretive flip-flops); Daniel A. Farber, *After* Loper*: The Primacy of Skidmore*, CPR BLOG (July 10, 2024), https://progressivereform.org/cpr-blog/after-loper-primacy-of-skidmore/ (arguing that *Skidmore* is now the controlling test and courts must pay serious attention to persuasive agency interpretations); Michael Asimow, *Teaching* Skidmore *in the Post*-Loper Bright *World*, YALE J. ON REG.: NOTICE & COMMENT (July 26, 2024), https://www.yalejreg.com/nc/teaching-skidmore-in-the-post-loper-bright-world-by-michael-asimow/ (proposing a structured post-*Loper* framework that accords substantial weight to agency expertise under *Skidmore* when justified).

[4] Skidmore v. Swift & Co., 323 U.S. 134 (1944)

[5] Administrative Procedure Act § 706, 5 U.S.C. § 706 (2018): *Loper Bright*, supra note x, at 14.

[6] *Id.* at 399 (citing Edwards' Lessee v. Darby, 25 U.S. (12 Wheat.) 206, 210 (1827); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

[7] *Skidmore*, 323 U.S. at 140.

[8] Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 872–75 (2001) (explaining that *Skidmore* rests on an expertise- and persuasiveness-based rationale for giving "weight" to agency views, whereas *Chevron* rests on a theory that statutory ambiguity reflects an implicit congressional delegation of primary interpretive authority to the age).

[9] Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight"*, 112 COLUM. L. REV. 1143, 1145–46 (2012) (making this key distinction).

because it comes from an agency rather than because of the interpretation's independently persuasive reasons and support. Evidentiary weight exists when the court credits an interpretation only to the extent its reasons, sources, and arguments would persuade, regardless of the source. To be sure, courts routinely assess the credibility of witnesses, including experts. But that evaluation is categorically different from providing a deference based on their institutional status, particularly when that status is the same one that makes the government a party to the case.

Deferential *Skidmore* thus confers an advantage that other litigants systematically lack, regardless of their credibility. In some cases, it may result in regulations being upheld that *de novo* review would have invalidated.

But it is not clear that *Loper Bright* or even *Skidmore* itself mandates such institutional deference under any circumstances. For instance, Justice Gorsuch has raised significant questions about whether *Skidmore* requires deference to agencies rather than simply instructing courts to consider the contemporaneous construction of a statute to understand its original public meaning.[10] As Justice Gorsuch explained, the Supreme Court has "long extended 'great respect' to the 'contemporaneous' and consistent views of the" executive branch, "[b]ut traditionally, that did not mean a court had to 'defer' to" the agency.[11] It is rational for courts to provide some deference to an agency official who was in government when the agency's organic statute was enacted had knowledge that modern judges do not and cannot replicate, given their lack of that historical proximity.[12] In contrast, there is no reason to believe that agencies cannot fully communicate any expertise they have to evaluate, like any other expert witness. After all, experts within the agency had to communicate the same expertise-based information when drafting the final rule or conducting the adjudication.[13]

If that is true, that aspect of *Skidmore* does not require deferring to the agency's views on the basis of its expertise but only giving them weight because of their temporal proximity. Moreover, agencies are not distinctive in getting that kind of deference. Canons established long before *Skidmore*

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[10] *See, e.g.*, *Loper Bright*, 603 U.S. at 430–31 (Gorsuch, J., concurring) (drawing a distinction between respect and deference).

[11] *Id.* at 430; *see also id.* at 430–31; Bondi v. van der Stok, 600 U.S. 458, 480–81 (2025).

[12] *See, e.g.*, Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 933–37 (2017) (explaining how English courts generally thought that people who were around to see the enactment of a statute were most likely to understand what it meant).

[13] *See* Paul Ray, *Lover, Mystic, Bureaucrat, Judge: The Communication of Expertise and Deference Doctrines*, CSAS Working Paper 23-32 at 10–12. (Oct. 17, 2023).

gave weight to contemporaneous constructions of written enactments by a wide variety of actors.[14]

Thus, *Loper Bright*'s embrace of *Skidmore* may be far more modest than many suppose.[15] The Court never described *Skidmore* as currently operating as a doctrine of deference, but only of "respect."[16] And respect, unlike deference, does not require courts to yield. Respect denotes consideration of a view on the merits while deference grants it presumptive or added weight. The former is consistent with judicial independence; the latter risks compromising it.

The overruling of *Chevron* forces courts to choose one of two possible versions of *Skidmore*. One—call it "educational *Skidmore*"—treats agency views that come from their expertise with "respect" as simply information which may or may not be persuasive. In this model, the interpretive judgments of agencies, based on expertise, inform, but do not carry institutional weight greater than any other interpretation from any other entity, public or private. The other—call it "deferential *Skidmore*"—treats agency expertise as having institutional weight that a court should assess according to a list of factors. The first comports with the APA's structure and the Supreme Court's textualist turn. The second revives, albeit in a subtler form, the same asymmetry that doomed *Chevron*.

The question of whether *Skidmore* deference to agency interpretation of statutes, in the sense of expert institutional weight beyond evidentiary or persuasive merits, survives *Loper Bright* is of more than academic interest. In the year since *Loper Bright*, the courts of appeals have already begun to split not just on the question of whether and how to cite it but on the fundamental question whether *Skidmore* permits any institutional "weight" or deference for agency views beyond the intrinsic force of their reasoning. The Ninth Circuit has embraced a form of *Skidmore* "deference," expressly stating that "the deference given to an agency action may range from great respect to near indifference" and treating the BIA's construction as "entitled to respect" because of its thoroughness, consistency, and "relative expertness," rather than because the panel independently found that construction the single best reading of the Immigration and Nationality Act.[17] The Fourth Circuit appears to have adopted a similar view, vacating a

[14] Bamzai, *supra* note xx, at 933–37.

[15] *See supra* notes xx (showing consensus of scholars in favor of *Skidmore* deference even after *Loper Bright*).

[16] Loper Bright Enters. v. Raimondo, 603 U.S. 369, 399 (2024).

[17] Lopez v. Garland, 116 F.4th 1032, 1039–41 (9th Cir. 2024) (explaining that "the deference given to an agency action may range from great respect to near indifference" even after *Loper Bright* and concluding that the BIA's interpretation "is entitled to respect under *Skidmore*" based on its thoroughness, consistency, and expertness).

decision that relied on *Chevron* and remanding with instructions that the district court evaluate the Bureau of Prisons' interpretation under *Skidmore*'s "power to persuade" --as if *Skidmore* supplied a freestanding doctrinal command to weigh agency legal views beyond their evidentiary or persuasive merit.[18] By contrast, the Fifth Circuit has discounted providing any deference on the basis of *Skidmore* because, in the wake of the Supreme Court decision, an agency's interpretation is either the best reading (and so "does not need deference") or is not the best (and thus "is not entitled to deference at all").[19] The emerging split is not merely about whether courts rely on *Skidmore*. It is about the much more critical question of whether *Skidmore* authorizes a doctrinal thumb on the scale in favor of the executive branch in litigation.

The Article makes three overarching arguments. First, it shows that, originally, *Skidmore* did not provide a general doctrinal basis for deferring to agency expertise. We demonstrate for the first time how *Skidmore* was initially a case only about wage and hour and regulations that likely gave deference to the Administrator of the Wage and Hour Division at the Department of Labor only because of the need for companies to rely on labor regulations to avoid being held doubly liable for failure to pay correct wages. This historical account does not merely provide *Skidmore*'s origin story, though that is interesting in its own right. It also reveals that general expertise-based deference based on the case postdated the APA.

Moreover, it did not make sense generally to defer to agencies on their interpretation of statutes based on expertise. If experts within the agencies could educate those responsible for promulgating the regulation, then they can do the same with the courts to aid in their own duty to say what the law is.[20] Only later (and especially after *Chevron*) did *Skidmore* gradually take on broader relevance in administrative law, eventually reemerging as a fallback doctrine of deference when *Chevron* did not apply.

Second, assuming that *Skidmore*, as currently understood, does embrace the idea that courts must give weight to agency interpretations because of the agency's institutional status, it is incompatible with the text of the APA. The weight it gives to agency expertise distorts the *de novo*

[18] Nicoletti v. Bayless, No. 24-6012, 2025 WL 80294, at *2 (4th Cir. Jan. 13, 2025) (per curiam) (vacating and remanding where the district court had relied on *Chevron* and instructing it instead to consider the persuasiveness of the Bureau of Prisons' interpretation under *Skidmore*'s "power to persuade").

[19] Mayfield v. DOL, 117 F.4th 611, 617–19 (5th Cir. 2024) (treating *Skidmore* deference as largely irrelevant after *Loper Bright* because an agency interpretation is either the single best reading, in which case it "does not need deference," or is not the best, in which case it "is not entitled to deference at all").

[20] See Paul Ray, *Lover, Mystic, Bureaucrat, Judge: The Communication of Expertise and Deference Doctrines*, CSAS Working Paper 23-32 at 10-12. (October 17, 2023).

review mandated by the APA for legal determinations, in contrast to the deferential review it directs for factual determinations. Moreover, since *Skidmore* was not widely understood as a doctrine of general deference to administrative expertise before the APA, it is impossible for that statute to have incorporated it *sub silentio*.

Third, if interpreted as a doctrine of deference, *stare decisis* should not protect *Skidmore*. It is egregiously wrong, has been undermined by changes in fact (because of the now widespread recognition that agency judgments reflect political values, not just expertise), is inherently unworkable (because the weight given agency interpretation depends on a subjective balancing test), and cannot have induced reasonable reliance (because of its unpredictable application).

This Article argues that any interpretation of *Skidmore* that provides weight to the agency's expert judgment as an institutional matter (rather than as an evidentiary or persuasive matter) is inconsistent with the reasoning in *Loper Bright*. Most scholars believe that this version of *Skidmore* survives *Loper Bright*.[21] We have a different perspective for three reasons. First, we do not believe that *Loper Bright* endorsed this version of *Skidmore* as opposed to giving agency decisions "respect" for their educational value. Second, only this view of *Skidmore* is consistent with *Loper Bright*'s correct understanding of § 706. If the Court has not overruled deferential *Skidmore*, it should, both because of its inconsistency with the plain meaning of § 706 and because it raises constitutional questions by deferring to the expertise of the agency at the expense of expertise provided by other litigants. Third, providing weight to expertise differs from applying long-established canons of contemporaneous construction and liquidation.

The Article has implications beyond the doctrine of *Skidmore* in several ways. First, it reflects the growing interest in APA originalism.[22] Courts must follow the APA's original meaning, not impose their own views of appropriate common-law administrative procedure. Second, it moves the courts to their proper place in the constitutional scheme, saying what the law

[21] *See supra* note 3.

[22] APA originalism interprets the APA by looking to the original understanding of its text and statutory provisions. Like with the Constitution, the approach proceeds on the basis that "(1) the meaning of a legal text consists in its communicative content," and (2) ratification or enactment fixes "the communicative content conveyed through particular words, phrases, and sentences. Evan D. Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 ADMIN. L. REV. 807 (2018); *see also* Chris J. Walker & Scott T. MacGuidwin, *Interpreting the Administrative Procedure Act: A Literature Review*, 98 NOTRE DAME L. REV. 1963, 1976–82 (2023) (surveying the prominent cases and articles that applied and/or endorsed APA textualism).

is.[23] Third, it reflects our modern information-rich world, where expert information is available to all and can be evaluated on its merits.[24]

This Article proceeds as follows. Part I describes the difference between deferential *Skidmore* and educational *Skidmore*, showing that the latter is consistent with the "respect" suggested by *Loper Bright* and can be retained while the former is rejected. Part II recounts the doctrinal history of *Skidmore*, beginning with its modest origins as a wage-and-hour case that was likely designed to protect the reliance interests of employers, not exalt agency expertise in statutory intepretation generally. And it shows how *Skidmore* was initially understood as a context-specific ruling about agency experience within the Department of Labor, not a generalized command of deference. Only decades later—especially post-*Chevron*—did *Skidmore* gradually take on broader relevance in administrative law, emerging as a fallback doctrine of deference.

Part III argues that this expanded form of deferential *Skidmore* is inconsistent with the APA's text and structure. We provide an analysis of the APA that shows the relevance of the distinction that the statute draws between legal and factual review. In contrast to deferential review for factual determinations, courts must decide "all relevant questions of law," without qualification.[25]

Part IV shows that *Skidmore* deference should not be protected by *stare decisis*. If the Court did not give *stare decisis* effect to *Chevron*, the argument against *stare decisis* for *Skidmore* is even stronger. It is egregiously wrong. At least *Chevron* was based on the claim that Congress intended deference. Instead, *Skidmore* is based on the claim of agency expertise in statutory interpretation. Even if it has such expertise, it should be able to explain its reasons for its interpretation to the Court like any other litigant. Moreover, *Skidmore* is unworkable because the weight the agency's interpretation receives in the judicial calculus depends on a variety of factors, leading to unpredictable outcomes. And that very unpredictability militates against any plausible arguments that litigants have substantially relied on its existence. Finally, the justifications for deferential *Skidmore*, such as agency expertise

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[23] *Loper Bright* is not alone among the cases showing this trend. *See* Kisor v. Wilkie, 588 U.S. 558, 575–76 (2019) (plurality opinion) (emphasizing that interpretation of legal texts is a judicial function and limiting deference doctrines so that courts must first exhaust "all the traditional tools of construction" before giving any weight to agency views); West Virginia v. EPA, 597 U.S. 697, 722–23 (2022) (rejecting agency interpretation under the major questions doctrine and reaffirming that court determine the scope of statutory authority on questions of vast economic and political significance)

[24] *See generally* EMILY B. LAIDLAW, REGULATING SPEECH IN CYBERSPACE: GATEKEEPERS, HUMAN RIGHTS AND CORPORATE RESPONSIBILITY 1–35 (2015) (discussing democratization of information enabled by internet technologies)

[25] 5 U.S.C. § 706.

and judicial inability to access expertise relevant to interpretation, have eroded over time. *Skidmore*'s deference model no longer fits into today's world, where agency politicization is more overt and better understood and where courts and litigants have ready access to expert information.

Part V clarifies what this Article does not reject. It recognizes and accepts that section 706 of the APA provides substantial deference to factual as opposed to interpretive judgments of the agency, even when those judgments are made pursuant to broad delegations of authority. Nor do we cast doubt on longstanding interpretive canons—such as contemporaneous construction or liquidation—which assign weight to early or consistent interpretations based on temporal proximity, not agency identity. The APA did not disturb these established doctrines applicable to a wide variety of government actors. But they are distinct from *Skidmore*'s expertise-based rationale.

Part VI responds to leading counterarguments. We show that legal uniformity does not depend on deference, as the Supreme Court routinely resolves circuit splits. Nor does rejecting deference to agency's statutory intepretations disable courts from handling complex or technical disputes because judges can consult expert testimony, *amici*, and modern research tools. Educational *Skidmore* protects the transmission of knowledge from agencies to judges. Arguments from judicial modesty and democratic legitimacy similarly fail. When courts enforce the boundaries Congress set, they do not override democratic will. They respect it.

I. THE AMBIGUOUS STATUS OF *SKIDMORE* AFTER *LOPER BRIGHT*

Loper Bright swept away *Chevron*'s "space," the zone in which a reasonable agency reading displaced every rival.[26] It did not, however, directly resolve the question of "weight" traced to *Skidmore*. Under *Chevron*, deference came in two steps.[27] Once a court found ambiguity, the agency charged with administering the statute could fill the gap so long as its reading was "reasonable."[28] The agency thus filled the interpretive space that Congress arguably left open.[29] The doctrine rested on two premises. One was that ambiguity was an implicit delegation of interpretative authority to the

[26] For the key distinction between *Chevron's* space and *Skidmore's* weight, see Peter Strauss, *Deference is Too Confusing, Let's Call Them Chevron Space and Skidmore Weight*, 112 COLUM. L. REV. 1143 (2012)/

[27] Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, ADMIN. L. REV. 258-260 (2010)

[28] Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs., 545 U.S. 967, 986 (2005).

[29] Merrill, *supra* note xx, at 258–60; Strauss, supra note x, at 1145.

agency.[30] The other was that deference promoted democratic accountability because the democratically-elected President to whom agencies are answerable is more accountable to the electorate than life-tenured judges. Thus, policy choices lurking beneath ambiguous words should be made by actors subject to electoral discipline.[31]

Skidmore differs in both rationale and operation. As later cases read it, the Court gave an agency's interpretation of its own statute unspecified weight in deciding the correct interpretation.[32] And because weight, unlike space, depends on its heft, its effect turns on how a court measures it.[33] On this interpretation, *Skidmore* employed process-based proxies for a court's calibration of weight. These included the thoroughness of the agency's inquiry, the validity and transparency of its reasoning, its fidelity to prior positions, the formality of the procedure that produced the interpretation, and the degree to which regulated parties could have relied upon it.[34] The justification for *Skidmore* also differed from *Chevron*: it was grounded in expertise rather than democratic accountability.[35]

Space conferred the power to determine the interpretation so long as it was not unreasonable. Weight on this view is to have special power to influence the interpretation of a court.[36] On this reading of *Skidmore,* the agency's determination does more than merely "persuade." Any brief can do that. Then, the judges determine weight of the submission because of its persuasive merits, not its origins. Thus, that is another sense of weight. It could just mean its persuasive weight. This distinction is not just semantic but structural. Whether the weight of an agency's reasoning goes beyond its persuasive merits determines whether the Court's determination is truly independent of the executive or whether a post-*Chevron* form of deference will affect the scale of justice.

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[30] *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law,* 1989 DUKE L.J. 511, 516; Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine,* 2 ADMIN. L.J. 269, 277 (1988).

[31] Lisa Schultz Bressman, *Deference and Democracy*, 75 GEO. WASH. L. REV. 761, 766–69 (2007) (explaining that *Chevron* rests in significant part on a belief that delegating interpretive discretion over statutory ambiguities to politically accountable executive officials promotes democratic accountability more than leaving such choices to unelected judges).

[32] *See* United States v. Mead Corp., 533 U.S. 218, 234–35 (2001).

[33] *See* Hickman & Krueger, *supra* note xx, at 1238 (describing *Skidmore*'s deference as operation on a sliding scale).

[34] *Skidmore*, *supra* note xx, at 140.

[35] *See* Strauss, *supra* note xx, at 1146 (courts defer because agencies act in a "coherent, intelligent way").

[36] *Id*. at 1145-46.

In short, these two senses of weight frame the issue that this Article seeks to resolve and lead to two different forms of review of agency action. By "educational *Skidmore*," we mean only that agency submissions may be information deserving of respectful consideration, just like a learned treatise or expert *amicus* brief, and thus may carry whatever persuasive weight their reasoning and factual grounding justify. The educational model of *Skidmore* rests on a familiar feature of adjudication. Courts may credit expertise insofar as it improves the quality of information before them, but not insofar as it reallocates decisional authority. Expert witnesses educate, but they do not decide. Educational *Skidmore* is not a softened form of deference, but ordinary adjudication in which courts assess reasoning, weight, and credibility independently. By "deferential *Skidmore*," in contrast, we mean a doctrinal instruction to give an agency's interpretation extra weight by virtue of *the agency's* status, such that the government begins the case with a thumb on the interpretive scale. Our view is that *Loper Bright*'s reasoning about § 706 of the APA is consistent with educational *Skidmore* but not deferential *Skidmore*.

Although, as we argue below, *Loper Bright*'s reasoning about § 706 leaves no room for deferential *Skidmore*, its references to *Skidmore* in the opinion might seem compatible with it. For instance, it quotes the best-known language of *Skidmore*:

> 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.[37]

But this quotation is an inert description of *Skidmore* as a historical matter. It is not central to the generative reasoning of the *Loper Bright* Court's opinion.

Loper Bright's only other reference to weight comes in again in description—this time of an old opinion that gave "great weight" to contemporary exposition.[38] That kind of deference concerns timing or stability, not technical mastery. "Contemporaneous construction," which is the idea that an interpretation issued near a statute's birth deserves special

[37] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (quoted in Loper Bright Enters. v. Raimondo, 603 U.S. 369, 388 (2024)).

[38] *Loper Bright*, 603 U.S. at 388 (quoting United States v. Am. Trucking Ass'ns, 310 U.S. 534, 549 (1940)).

regard because of the temporal proximity of the interpreter, not his expertise.[39] Moreover, that canon of interpretation has been long-established and is not confined to administrative agencies. Courts have invoked it for the first Congress,[40] the early Presidents,[41] the state ratifying conventions,[42] and even for early courts themselves.[43] "Liquidation" through consistent practice functions similarly. It resolves ambiguities when a series of government actors read the text in the same way over time.[44] As we discuss below, these doctrines were a staple of legal interpretation long before the rise of the administrative state. They have persisted because they protect settled expectations, not because they have a special solicitude for bureaucrats' opinions.

When *Loper Bright* finishes with historical descriptions of cases, and describes how agencies are to behave today, it focuses on the information value of agency interpretations. The opinion says judges may "seek aid" from administrators and must "respect" their interpretations.[45] On its face, that language restores little more than the ancient rule of professional civility. One does not dismiss an agency's views with contempt any more than one slights a learned treatise.[46] "Respect," however, is not necessarily "weight." The reasoning in the concurrences by Justices Thomas and Gorsuch underscore that point. They argue that a "thumb on the scale" violates Article III's duty of independent judgment.[47]

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[39] Bamzai, *supra* note xx, at 933–34.

[40] Myers v. United States, 272 U.S. 52, 175 (1926) (deferring to the first Congress's interpretation of the Constitution).

[41] *Ex parte* Grossman, 267 U.S. 87, 118–19 (1925) (deferring to early Presidents' view of the scope of the Pardon power).

[42] Chiafalo v. Washington, 591 U.S. 578, 600 (2020) (Thomas, J., concurring) (relying on evidence from North Carolina's ratifying convention); Millsaps v. Thompson, 259 F.3d 535, 539–40 (6th Cir. 2001) (relying on evidence from Pennsylvania's and Virginia's ratifying conventions).

[43] Stuart v. Laird, 5 U.S. (1 Cranch) 299, 309 (1803) (deferring to their own participation in practice of circuit riding as settling the constitutionality of the practice); *see also* New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 50–60 (2022) (relying heavily on early state court decisions to interpret the Second Amendment).

[44] William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 13–21 (2019) ("When an entire branch or a long line of actors reads the text the same way over time, the ambiguity may be resolved.").

[45] Loper Bright Enters. v. Raimondo, 603 U.S. 369, 394 (2024).

[46] When commentators, such as Bell and Farber, treat *Loper Bright*'s repeated citations to *Skidmore* and its references to "respect" or "weight" as an affirmative endorsement of a modern, expertise-based *Skidmore* deference, *see* Bell, *supra* note xx, at 1581–85; Farber, *supra* note xx, their reading overlooks both the Court's textual reasoning and its avoidance of the word "deference" to describe the decision. The majority's insistence that courts "must exercise their independent judgment" under § 706 is irreconcilable with any doctrine that tells judges to adjust the weight of their legal conclusions based on the identity and asserted expertise of one litigant. *Loper Bright*, 603 U.S. at 412.

[47] *Id.* at 413–14 (Thomas, J., concurring); *id.* at 433 (Gorsuch, J., concurring).

Yet some have read the majority's nod to *Skidmore* as allowing a soft presumption that an expert agency is more likely to be right, so long as the judge remains free, after full consideration, to reject the view. Everything turns on what "respect" means. If it requires only engagement by reading the agency's argument, evaluating it, and then explaining acceptance or rejection, the practice comports with educational, not deferential *Skidmore*. Educational *Skidmore* requires that the Court listen to the agency's explanations of its regulations. But if "respect" means the agency's technical assessment receives more credit than other litigants because of crediting the agency's unique expertise, we face a potential clash with *Loper Bright*'s reaffirmation of judicial control.

Administrative law thus approaches a fork in the road. One path treats agency expertise as ordinary information or evidence, like other matters presented to a judge. It does not discount expertise but assumes that, like other information or evidence, it can be explained to a judge. After all, agency experts had to explain the reasons for their interpretation to their heads of agencies to persuade them to adopt it.[48] On the other hand, if the political appointees just adopted it without expert input, the argument for agency expertise vanishes.

The other path retains the deferential *Skidmore* approach, giving institutional weight to an agency at least when it demonstrates procedural rigor in developing its interpretation. The court determines the weight not by evaluating the reasoned analysis itself but by deploying proxies for agency credibility that it can evaluate, such as the thoroughness of the agency's investigation and coherence of its reasoning

In our view, the majority can be best read as drawing the line we advocate in this Article. Respect, as understood as serious engagement with an agency's reasons and the factual premises, is just what we call "educational *Skidmore*." Deference, which provides a doctrinal thumb on the scale for the government because it is *the government* providing the information, is what we will argue that § 706 forbids. As the reader parses the words of *Loper Bright* and the rest of this Article, he will see that deferential *Skidmore* cannot be made consistent with the clear meaning of APA and raises serious constitutional questions. If *Loper Bright* has not implicitly overruled deferential *Skidmore*, it should be explicitly overruled. But to determine whether deferential *Skidmore* needs to be overruled rather than distinguished, one must first understand whether *Skidmore* originally was a case supporting a general principle of administrative deference.

[48] *See* Ray, *supra* note xx, at 10–12.

II. THE HISTORY OF DEFERENTIAL *SKIDMORE*

Modern accounts treat *Skidmore* as a general endorsement of expertise-based deference. That understanding is historically shaky. This Part addresses how *Skidmore* arose in particular and peculiar context and how it grew to an important and general doctrine of deference. Section II.A discusses the origin of *Skidmore* deference. Section II.B discusses the expansion of *Skidmore* in APA cases.

A. The Origins of Skidmore Deference

Skidmore involved firefighters at "the Swift and Company packing plant at Fort Worth, Texas" who sued for backpay under the Fair Labor Standards Act ("FLSA").[49] The firefighters had a normal eight-hour workday, but they were also expected "to stay in the fire hall on the Company premises, or within hailing distance, three and a half to four nights a week. This involved no task except to answer alarms, either because of fire or because the sprinkler was set off for some other reason."[50] The Court ruled "that no principle of law found either in the statute or in Court decisions precludes waiting time from also being working time"—*i.e.*, time subject to overtime pay requirements—but the Court refused to come up with a formalistic test for determining when such time would qualify for overtime pay.[51]

The second half of the opinion focused on the Department of Labor's views. The Court explained that the Administrator of the Wage and Hour Division was tasked with enforcing the FLSA and had thus "accumulated a considerable experience in the problems of ascertaining working time in employments involving periods of inactivity and a knowledge of the customs prevailing in reference to their solution."[52] "There is no statutory provision as to what, if any, deference courts should pay to the Administrator's conclusions," the Court continued, but the Administrator's position was "entitled to respect."[53]

Then came the now-universally quoted passage from *Skidmore* that embodies the deference doctrine the case has come to stand for:

> 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

[49] 323 U.S. 134, 135 (1944).
[50] *Id.*
[51] *Id.* at 136.
[52] *Id.* at 137–38.
[53] *Id.* at 139–40.

> 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.[54]

How the Supreme Court arrived at that conclusion, however, is unclear. There are two citations over the three-plus pages covering deference to the agency: one to a case about the role of the courts in interpreting the FLSA and the other to a bulletin from the Administrator of the Wage and Hour Division.[55] The Supreme Court did not cite any authority for the proposition that the Administrator's guidance deserved deference or weight of any kind. And neither the government (appearing as an *amicus*), nor Skidmore himself ever asked for deference to the Wage and Hour Division's interpretation of the FLSA.[56] As discussed in more detail below,[57] the setting of *Skidmore* matters. It arose in a narrow statutory regime, enforced against private parties facing unusually severe penalties. Reliance on agency guidance was expressly encouraged by Congress.

B. The Expansion of Skidmore in APA Adjudication: From Wage and Hour Law to Modern Deference

The Supreme Court's precedents from shortly after *Skidmore* further undercut the view that it was supposed to be a case about administrative interpretations generally. In the period before the Administrative Procedure Act, the Court applied it in five wage-and-hour disputes[58] and in one back-pay dispute under the National Labor Relations Act.[59] The government was not a party in the vast majority of those disputes. This suggests that *Skidmore* was not viewed as a watershed case on the general issue of deference to agencies at the time. Instead, it was viewed as a case about government decisions about wages for corporate employees.

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[54] *Id.* at 140.

[55] *See id.* at 137–40 (first citing Kirschbaum v. Walling, 316 U.S. 517, 523 (1942); and then citing Adm'r, Wage & Hour Div., Interpretative Bulletin No. 13 (July 1939)).

[56] *See* Br. of Adm'r of Wage & Hour Div., U.S. Dep't of Lab., as *Amicus Curiae* at *6–19, Skidmore v. Swift & Co., 323 U.S. 134 (1944) (OT 1944, No. 12); Br. for Pet'rs at *9–14, Skidmore v. Swift & Co., 323 U.S. 134 (1944) (OT 1944, No. 12).

[57] *See infra* notes xx and accompanying text.

[58] Armour & Co. v. Wantock, 323 U.S. 126 (1944); Jewell Ridge Coal Corp. v. Loc. No. 6167, United Mine Workers of Am., 325 U.S. 161 (1945); 10 E. 40th St. Bldg. v. Callus, 325 U.S. 578 (1945); Roland Elec. Co. v. Walling, 326 U.S. 657 (1946); Mabee v. White Plains Pub. Co., 327 U.S. 178 (1946); Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275 (1946).

[59] Soc. Sec. Bd. v. Nierotko, 327 U.S. 358 (1946).

This analysis makes sense of *Skidmore*. The FLSA is an unusual statute in that laypeople are generally tasked with FLSA compliance, and violating that statute contains unusually draconian penalties. A defendant who violates the FLSA faces six months in prison, a $10,000 fine, or both for a criminal violation and double compensatory damages, punitive damages, equitable relief, and attorneys' fees for a civil violation.[60] Moreover, an employee can bring an FLSA action "on behalf of himself or themselves and other employees similarly situated,"[61] so liability under the FLSA can quickly balloon into the hundreds of thousands (or even millions) of dollars.[62]

When understood in context, *Skidmore* was really about fairness and reliance interests. That is why Congress made relying on the Wage and Hour Division's guidance an absolute defense to FLSA liability, even when the relevant guidance "is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect."[63] And that is why *Skidmore* said that "litigants may properly resort" to the Wage and Hour Division's interpretations of the FLSA "for guidance."[64] The Court was not telling lower courts to defer to the Wage and Hour Division's interpretations of the law as a matter of administrative law. Rather, it was telling lower courts and litigants that litigants are entitled to rely on the Wage and Hour Division's interpretations of the FLSA, and they should not lightly depart from it in an area where defendants could face crippling damages liability. This would also explain why agency flip-flopping and "the thoroughness evident in" the agency's "consideration" of the legal issue are so important.[65] No reasonable person is going to rely on agency guidance when the agency changes its mind on a regular basis, nor would a reasonable person order his/her affairs around a tweet by a Cabinet secretary when the official contradicts a lengthy guidance document issued by that same agency.

After a 15-year hiatus, the Supreme Court started applying *Skidmore* again in the 1960s. From the 1960s until *Chevron*, the Supreme Court applied

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[60] 29 U.S.C. § 216(a)–(b); *see* Travis v. Gary Cmty. Mental Health Ctr., Inc., 921 F.2d 108, 111 (7th Cir. 1990).

[61] *Id.* § 216(b).

[62] *See, e.g.*, Martin v. Selker Bros., 949 F.2d 1286, 1292 (3d Cir. 1991) (judgment of $280,268.38, which would be almost $667,000 in today's dollars); Chavez-Deremer v. Med. Staffing of Am., LLC, 147 F.4th 371, 383 (4th Cir. 2025) (nearly $10 million in total damages).

[63] 29 U.S.C. §§ 258, 259(a).

[64] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[65] *Id.*

Skidmore in a dispute over state taxation of federal land,[66] an estate tax case,[67] two environmental cases,[68] two public benefits cases,[69] six labor and employment disputes,[70] an insurance dispute,[71] two securities cases,[72] a public records dispute,[73] and an election law case.[74] Two matters warrant emphasis. First, although the Supreme Court had started citing *Skidmore* outside the employment context, the lion's share of *Skidmore* cases remained labor disputes. That suggests that, even at this point, *Skidmore* was largely regarded as a case about labor and employment law rather than as a watershed precedent in administrative law. Second, the Court appears to have applied *Skidmore* as a case about deference to the agency for the first time in *Morton v. Ruiz* in 1974[75]—30 years after *Skidmore* was decided—but it does not appear to have deferred to the agency under *Skidmore* until *Whirlpool Corp. v. Marshall*[76] in 1980—nearly four decades after *Skidmore* was decided. All of these cases were decided after the APA was enacted in 1946.

After *Chevron*, *Skidmore* began to take shape as the deference case we know today. Deference took on a more prominent role, with Skidmore deference serving as a secondary justification for adopting the agency's position.[77] That said, *Skidmore* still did not have substantial influence outside of the employment context.

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[66] Fed. Land Bank of Wichita v. Bd. of Cnty. Comm'rs of Kiowa Cnty., 368 U.S. 146 (1961). The citation to *Skidmore* in this case is puzzling. The Court said it was not "required to review" the agency's "interpretation" of the relevant statute because "the court below . . . did not challenge" it. *Id.* at 155. The Court cited the portion of *Skidmore* that described the deference rule, *see id.* at 155 n.25 (citing *Skidmore*, 323 U.S. at 139–40), but it is unclear how that would be relevant to holding that courts do not need to decide questions not raised by the parties.

[67] United States v. Stapf, 375 U.S. 118 (1963).

[68] United States v. Pennsylvania Indus. Chem. Corp., 411 U.S. 655 (1973); Adamo Wrecking Co. v. United States, 434 U.S. 275 (1978).

[69] Morton v. Ruiz, 415 U.S. 199 (1974); Batterton v. Francis, 432 U.S. 416 (1977).

[70] Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976); Nashville Gas Co. v. Satty, 434 U.S. 136 (1977); City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978); Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980); St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772 (1981); ATF v. FLRA, 464 U.S. 89 (1983).

[71] United States v. Consumer Life Ins. Co., 430 U.S. 725 (1977).

[72] SEC v. Sloan, 436 U.S. 103 (1978); Steadman v. SEC, 450 U.S. 91 (1981).

[73] CPSC v. GTE Sylvania, Inc., 447 U.S. 102 (1980).

[74] FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27 (1981).

[75] 415 U.S. 199, 237 (1974).

[76] *See* Morton v. Ruiz, 415 U.S. 199, 237 (1974); Adamo Wrecking Co. v. United States, 434 U.S. 275, 287 n.5 (1978); City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. 702, 714 n.26 (1978); SEC v. Sloan, 436 U.S. 103, 117–18 (1978); Whirlpool Corp. v. Marshall, 445 U.S. 1, 11 (1980).

[77] *See, e.g.*, Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65–67 (1986); Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 597–98 (1999).

Things started to change in 2000. In *Christensen v. Harris County*, the Supreme Court held "that nothing in the FLSA or its implementing regulations prohibits an employer from compelling the use of compensatory time."[78] There, sheriff's deputies received compensatory time in lieu of cash for their overtime hours worked, and the dispute was over whether such an arrangement was permitted.[79] In response to the federal government's plea for *Chevron* deference, the Court held that the government's position was, at most, entitled to *Skidmore* deference and then proceeded to reject the request for deference.[80]

Perhaps seeing an opportunity, the United States explicitly requested *Skidmore* deference a year later in *United States v. Mead Corp.*[81] And the government got it.[82] The Court said that "*Chevron* did nothing to eliminate *Skidmore*'s holding that an agency's interpretation may merit some deference whatever its form given the specialized experience and broader investigations and information available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires."[83]

And then things took off. As the Court restricted the *Chevron*'s domain,[84] *Skidmore* became a greater focal point for the efforts of agencies to obtain deference to their legal interpretations. Over the next twenty years, the Supreme Court repeatedly relied on *Skidmore* to defer to the agencies.[85] All told, the Supreme Court relied on *Skidmore* deference six times in the first eleven years after *Christensen*. The government had successfully made

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[78] 529 U.S. 576, 578 (2000).

[79] *Id.* at 580. This is sometimes referred to as "lieu time," "time off in lieu of cash," or "TOIL." *See generally, e.g.*, David J. Walsh, *The FLSA Comp Time Controversy: Fostering Flexibility or Diminishing Worker Rights?*, 20 BERKELEY J. EMP. & LAB. L. 74, 118–19 (1999).

[80] *Christensen*, 529 U.S. at 587.

[81] *See* Br. for the United States at *17, 31–33, United States v. Mead Corp., 533 U.S. 218 (2001) (citing Skidmore v. Swift & Co., 323 U.S. 134 (1944)). *Mead* was about the proper tariff classification for notebooks. United States v. Mead Corp., 533 U.S. 218, 224 (2001).

[82] *Id.* at 221.

[83] *Id.* at 234 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944)) (citation modified). On remand, the Federal Circuit denied *Skidmore* deference to the Customs letter. Mead Corp. v. United States, 283 F.3d 1342, 1350 (Fed. Cir. 2002).

[84] Kristin E. Hickman & Aaron L. Nielson, *Narrowing Chevron's Domain*, 70 DUKE L.J. 931, 934–38 (2021) (explaining that *Mead* marked a turning point, as the Supreme Court began to define and restrict "*Chevron*'s domain" to agency actions carrying the force of law, thereby narrowing the scope of deference available under *Chevron*)

[85] Washington State Dep't of Soc. & Health Servs. v. Guardianship Est. of Keffeler, 537 U.S. 371, 385 (2003); Clackamas Gastroenterology Assocs., P. C. v. Wells, 538 U.S. 440, 449–51 (2003); Alaska Dep't of Env't Conservation v. EPA, 540 U.S. 461, 486–88 (2004); Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon, 541 U.S. 1, 17–18 (2004); Fed. Exp. Corp. v. Holowecki, 552 U.S. 389, 399–403 (2008); Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1, 14–16 (2011).

Skidmore into a fall-back doctrine to bolster its position in cases where *Chevron* was not available.

Thus, *Skidmore*'s transformation from a wage-hour footnote into a catch-all fallback doctrine was a later innovation, not part of the interpretive landscape Congress codified in 1946. Once *Skidmore*'s history is correctly understood, the claim that Congress silently incorporated an expertise-based deference regime into the APA becomes implausible.

III. THE APA: NO PLACE FOR DEFERENCE TO LEGAL CONCLUSIONS

Section 706 of the Administrative Procedure Act leaves no room for expertise-based deference on questions of law. As *Loper Bright* recognized, the APA governs whether the agencies receive deference on questions of law.[86] Section III.A demonstrates that on its face the APA's text precludes allowing any deference at all on questions of law, whether they be pure questions of law or so-called "mixed questions of fact and law." Section III.B forecloses any argument that Congress sought to incorporate a deferential standard of review into the APA *sub silentio*.

A. The Plain Meaning of § 706 and the Role of Independent Judicial Review

The APA does not allow for deferential review of legal questions. The APA draws a sharp and deliberate line that mandates deference for facts and independent judgment for law. Start with the text:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;

[86] Loper Bright Enters. v. Raimondo, 603 U.S. 369, 396 (2024).

> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court.[87]

Note how the APA applies different standards for review of factual findings and legal conclusions—a point that bolsters *Loper Bright*'s holding on the inconsistency between the APA and *Chevron*. Factual findings are reviewed under the "highly deferential"[88] substantial evidence standard of review,[89] which requires only that there be "evidence [that] a reasonable mind might accept as adequate to support a conclusion, taking into account whatever in the record detracts from its weight."[90] Meanwhile, Congress does not impose any caveat on review of legal conclusions.[91] This suggests that the standards of review on legal and factual questions are supposed to be different—and that the standard of review for legal questions is *de novo*.[92]

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[87] 5 U.S.C. § 706.

[88] AT&T Corp. v. FCC, 86 F.3d 242, 247 (D.C. Cir. 1996).

[89] 5 U.S.C. § 706(2)(E).

[90] Banner Health v. Sebelius, 715 F. Supp. 2d 142, 153 (D.D.C. 2010) (quoting *AT&T Corp.*, 86 F.3d at 247) (citation modified).

[91] *See* 5 U.S.C. § 706(1)–(2)(D).

[92] Professor Hickman suggests that *Skidmore* is a substantive canon of interpretation, Hickman, *supra* note xx, at 127–29, which means that a court can conduct *de novo* review of an agency's legal conclusion while *also* deferring to the agencies. We do not agree.

First, unlike true canons of interpretation—such as the rule of lenity, *expressio unius*, or constitutional avoidance—*Skidmore*'s so-called "deference" is explicitly *non-binding* and varies case by case. The Court in *Skidmore* itself stated that the weight of an agency's view "depend[s]" on multiple discretionary factors (thoroughness, consistency, reasoning, etc.). Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). True canons, by contrast, are rules of decision courts are obligated to apply when triggered. *See* Nevada Half Moon Min. Co. v. Combined Metals Reduction Co., 176 F.2d 73, 75 (10th Cir. 1949) ("The intention of the parties, when manifest, or when ascertained from the written agreement in accordance with basic canons of interpretation, must control."). If the *Skidmore* factors can be ignored without legal error, they cannot be canonized. *See generally* Anita S. Krishnakumar & Victoria F. Nourse, *The Canon Wars*, 94 TEX. L. REV. 243, 277–82 (2016) (expressing concern about canonizing *Skidmore*).

Second, substantive canons are about interpreting language—they resolve ambiguities in favor of certain legal or moral values (e.g., liberty in the rule of lenity). *Skidmore*, by contrast, gives weight to the identity of the interpreter (i.e., an agency), not to a neutral linguistic principle. It functions more like a policy of judicial modesty or institutional respect—similar to comity or the political question doctrine—than a semantic rule.

Third, Hickman argues that *Skidmore* is "based on extra-textual policy goals and value judgments." Hickman, *supra* note 17, at 127–28. That would *undermine* deferential *Skidmore* by instructing courts to use public policy concerns to interpret statutes, which would only create the very concerns that proponents of deferential review of agency action try to avoid—courts using policy judgments to determine the validity of agency action. *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 450 (2024) (Kagan, J., dissenting).

The text alone would be sufficient to preclude any institutional weight on questions of law, but it is also supported by history, such as that of American appellate practice. Until the merger of law and equity (which was shortly before the APA's enactment[93]), appellate courts reviewed the facts *de novo* in equitable proceedings.[94] So Congress must have known that it was changing the default standard of review when it made factual findings subject to substantial evidence review in APA proceedings, to the extent they can be considered equitable proceedings.[95] The fact that Congress presumably knew it was changing the default standard of review for questions of fact in APA proceedings (to the extent that they are equitable proceedings) strongly suggests that Congress knew it was not changing the default standard of review for questions of law in APA proceedings.

The APA's legislative history supports this interpretation, too. The House Judiciary Committee said that the judicial review provisions of the APA would "require[] adequate, fair, effective, complete, and just determination of the rights of any person in properly invoked proceedings."[96] The Judiciary Committee also explained that "questions of law properly presented" were not "withdrawn from reviewing courts."[97] And the Judiciary Committee seemed to reject the idea that broadly written statutes or discretionary decisions committed to the agencies were entitled to deference—the Committee said "that questions of law are for courts rather than agencies to decide in the last analysis."[98] The lack of deference extended even to policy matters: "'[a]ccordance with law' requires, among other things, a judicial determination of the authority or propriety of interpretative rules and statements of policy."[99] More succinctly, "the independent judicial interpretation and application of [a statute's] terms[] is a function which is clearly conferred upon the courts in the final analysis" such that the Article III courts must independently "determine the meaning of the words and phrases used" in a statute.[100]

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[93] *See* SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC, 580 U.S. 328, 344–45 (2017).

[94] *See, e.g.*, Schulz v. Bowers, 223 S.W. 725, 726 (Mo. Sup. Ct. Div. 2 1920); Lockwood v. Lockwood, 189 N.W. 871, 871 (Mich. 1922). Some state appellate courts still do. *See, e.g.*, Sundance Land Co., LLC v. Remmark, 8 N.W.3d 145, 150 (Iowa 2024).

[95] *See* Merck & Co. v. Reynolds, 559 U.S. 633, 648 (2010).

[96] REPORT OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, ON S. 7, A BILL TO IMPROVE THE ADMINISTRATION OF JUSTICE BY PRESCRIBING FAIR ADMINISTRATIVE PROCEDURE, H.R. REP. 1980, at 275 (1946).

[97] *Id.*

[98] *Id.* at 278.

[99] *Id.*

[100] *Id.*

The Supreme Court's decision in *Vermont Yankee*[101] also illustrates the difficulty that deferential *Skidmore* faces under the APA. There, the Supreme Court explained that the APA was "a legislative enactment which settled 'long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest.'"[102] And for that reason, courts cannot modify the APA's requirements based on policy considerations.[103] But the primary justification for deferential *Skidmore* is a policy consideration—that an agency is in a better position to understand the nuances of a governing statute than the Article III courts.[104] If courts are not allowed to modify the procedural aspects of the APA, such as how agencies must collect evidence, then they should not be allowed to modify the substantive aspects, such as the standard of review applied to agency action, either.[105]

Finally, telling courts to apply a deferential standard of review by saying that "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action"[106] would involve "hid[ing] elephants in mouseholes."[107] Looking for an elephant in a mousehole problematic in administrative law generally, and applying a deferential standard of review to questions of law would do just that.[108] But it is even worse in this context because Congress plainly did no such thing. The command that courts "decide all relevant questions of law" is the opposite of a clear invitation to defer. If anything, it is a clear command *not* to defer. For decades, appellate courts have reviewed questions of law *de novo*.[109] Congress never signaled a change.

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[101] Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978).

[102] *Id.* at 523 (quoting Wong Yang Sung v. McGrath, 339 U.S. 33, 40 (1950)).

[103] *See id.* at 546–47.

[104] *See, e.g.*, John P.C. Duncan, *The Course of Federal Pre-Emption of State Banking Law*, 18 ANN. REV. BANKING L. 221, 227 (1999).

[105] Richard Pierce has read *Loper Bright* as "replacing the *Chevron* standard of review with the *Skidmore* standard" and as imposing a "duty on a reviewing court to give 'respectful consideration' to agency interpretations." *See* Pierce, *supra* note xx, at –. But § 706 does not speak in the language of standards of deference for questions of law at all. It draws a sharp textual contrast: highly deferential review for factual findings, and a bare command that courts "decide all relevant questions of law." Nothing in *Loper Bright* suggests that the Court meant to smuggle a third, expertise-based standard of review into that text under the rubric of "respect."

[106] 5 U.S.C. § 706.

[107] Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund, 583 U.S. 416, 431 (2018) (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001)).

[108] Sackett v. EPA, 598 U.S. 651, 677 (2023).

[109] *See, e.g.*, *In re* Marshall, 47 F.2d 209, 209 (2d Cir. 1931); Lowell O. W. Lumber Sales v. United States, 270 F.2d 12, 18 (9th Cir. 1959).

Even if the statute were ambiguous, the constitutional avoidance canon militates against deferential *Skidmore.* Under the doctrine of constitutional avoidance, courts must construe statutes, where fairly possible, to avoid constitutional doubts.[110]

Deferential *Skidmore* implicates precisely such concerns. Like *Chevron*, which has long been criticized for structurally favoring the government, *Skidmore* deference—when applied to agency expertise—introduces a similar asymmetry into adjudication. As Philip Hamburger argued, *Chevron* compelled courts to "exercise systematically biased judgment" by deferring to the views of one party to the case—namely, the government.[111] That same defect persists under deferential *Skidmore*. Although couched in the language of persuasiveness, deferential *Skidmore* gives the government a privileged position by instructing courts to afford weight to the agency's interpretation based on institutional expertise—an advantage that no private party enjoys. For example, in *Amerada Hess Pipeline Corp. v. FERC*, the D.C. Circuit deferred to the Federal Energy Regulatory Commission's interpretation of a pipeline settlement agreement explicitly "because the Commission has greater technical expertise in this field than does the Court," even though the parties challenging that interpretation were sophisticated pipeline companies with deep experience in the very ratemaking practices at issue.[112] And yet, their expertise was ignored.

But this built-in asymmetry is not just a fairness concern. It threatens the separation of powers by effectively transferring part of the judicial power—the authority "to say what the law is"—from Article III courts to executive agencies.[113] Forcing courts to assign legal weight to the executive branch's views, even if it puts it in the language of expertise, undermines the independence of the judiciary and, by its very language, provides additional weight to executive power. [114]

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[110] *See, e.g.*, INS v. St. Cyr, 533 U.S. 289, 299–300 (2001) ("[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and an alternative interpretation of the statute is fairly possible, we are obligated to construe the statute to avoid such problems." (alteration adopted)); Ashwander v. TVA, 297 U.S. 288, 345–48 (1936) (Brandeis, J., concurring) (same).

[111] Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187, 1211 (2016).

[112] Amerada Hess Pipeline Corp. v. FERC, 117 F.3d 596, 604 (D.C. Cir. 1997) (quotation marks omitted).

[113] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). As Justice Thomas has explained, this raises structural constitutional concerns: "*Skidmore* deference compels judges to abdicate the judicial power without constitutional sanction." Baldwin v. United States, 140 S. Ct. 690, 691 (2020) (Thomas, J., dissenting from denial of certiorari) (quoting U.S. CONST. art. III, § 1) (citation modified).

[114] While we are the first to argue comprehensively that deferential *Skidmore* is inconsistent with the best understanding of the reasoning of *Loper Bright*, Professor Merrill suggests so in passing. He argues that the *Loper Bright* "independent judgment" standard "appears to mean, therefore, [] that courts must

Making *Skidmore* conform to the APA supports the educational model of *Skidmore*. That is, *Skidmore* allows agencies to provide the information that courts need to make their decision, and courts independently determine how useful and persuasive that information is before interpreting the statute for themselves. Agency interpretations would remain entitled to "respect" as an educational tool for the courts to use when interpreting the statute. Courts would be free to favor their interpretations as persuasive but reject the application of the *Skidmore* factors.

B. The Limits of the Old Soil Principle: Skidmore and Hearst in Context

One possible way to argue for the consistency of *Skidmore* with the APA, but not for *Chevron* with the statute, is that the APA was enacted after *Skidmore*. Therefore, it could be argued that Congress implicitly incorporated the decision into the nature of the APA's judicial review. But in this section, we show that (1) Congress did not selectively incorporate *Skidmore* itself and (2) *Skidmore*'s proponents cannot save the doctrine by arguing the APA incorporated deference to expertise because of another case decided before its enactment (*Hearst*).

Proponents of deferential *Skidmore* might look to presumptions of statutory interpretation, such as the old-soil principle. "The point of the old-soil principle is that when Congress employs a legal term, that usage itself suffices to adopt the cluster of ideas that were attached to each borrowed word in the absence of an indication to the contrary."[115] This is a corollary of the principle that technical terms ordinarily carry their technical meaning.[116] Although this principle is a valid way to discern a statute's original public meaning, it cannot save *Skidmore*. The old soil doctrine requires soil, but

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evaluate the agency interpretation without any deference to the agency not warranted by the Court's canons of interpretation." Thomas W. Merrill, *The Demise of Deference—And the Rise of Delegation to Interpret*, 138 HARV. L. REV. 227, 263. This understanding of *Loper Bright* correctly rejects the argument that courts should defer to agency interpretations. To the extent that the Supreme Court's canons of interpretation call for deference at all, they do not call for deference *to the agencies*.

In contrast, Jack Beermann argues for a form of continued deference. Beermann acknowledges that deferential *Skidmore* is "in tension with much of" *Loper Bright*'s "reasoning," but he nonetheless argues that *Loper Bright* "revived" deferential *Skidmore*. Jack M. Beermann, Chevron *Deference Is Dead, Long Live Deference*, Cato Sup. Ct. Rev., 2023–2024, at 31, 47–48; *see also* Jed Handelsman Shugerman, *The Major Questions Doctrine, Post*-Chevron*?:* Skidmore*,* Loper Bright*, and A Good-Faith Emergency Question Doctrine*, 48 HARV. J.L. & PUB. POL'Y 73, 73–74 (2025) (similar argument). But if that is true, then the Court would have told the D.C. Circuit to apply *Skidmore* to the agency's interpretation in *Loper Bright*. After all, it would be odd for the Supreme Court to instruct lower courts to use a particular standard of review *sub silentio*.

[115] George v. McDonough, 596 U.S. 740, 753 (2022) (quoting FAA v. Cooper, 566 U.S. 284, 292 (2012)) (citation modified); *see, e.g.*, Taggart v. Lorenzen, 587 U.S. 554, 560 (2019).

[116] *See, e.g.*, Lackey v. Stinnie, 145 S. Ct. 659, 666–67 (2025).

§ 706 contains none. First, as we have suggested, Skidmore was not a general deference principle.

First, the argument fails at the threshold because no text in § 706 functions as the term needed to trigger old-soil incorporation. In *Loper Bright*, the Supreme Court said that "decide,"[117] "interpret,"[118] and "determine"[119] could not have imported a deferential standard of review into the APA.[120] And those are the only verbs in the provision related to the APA's standard of review.[121] The old soil principle does not apply when there is no soil to transplant in the first place.[122] So if the verbs in the APA do not carry a specific, common law meaning, then the old soil principle cannot provide a basis for incorporating *Skidmore*.

Second, even if Congress intended to transplant a legal term, there is no indication that it was specifically transplanting *Skidmore*.[123] Congress enacted a version of *Skidmore* deference into the FLSA when it enacted 29 U.S.C. §§ 258 and 259(a), which makes reliance on the Wage and Hour Division's guidance an absolute defense to FLSA liability. And Congress has, in the past, specifically designated the case that it hopes to incorporate into the statutory scheme (sometimes even by docket number).[124] If Congress

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[117] 5 U.S.C. § 706.

[118] *Id.*

[119] *Id.*

[120] *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 384–85 (2024).

[121] *See* 5 U.S.C. § 706. Section 706 also includes the verbs "hold unlawful and set aside," but those are remedial and do not discuss what the courts are supposed to do to reach that conclusion. *Id.* § 706(2).

[122] *See* Kemp v. United States, 596 U.S. 528, 539 (2022) ("Although statutory language obviously transplanted from another legal source will often bring the old soil with it, that principle applies only when a term's meaning was well-settled before the transplantation." (first quoting Taggart v. Lorenzen, 587 U.S. 554, 560 (2019); and then quoting Neder v. United States, 527 U.S. 1, 22 (1999)) (citation modified)).

[123] And even if it were, that would not necessarily mean that the APA incorporated a *deference* standard because *Skidmore* itself does not even appear to call for deference as that term has developed in the case law and scholarship. The Court explicitly disclaimed any reliance on a statutory requirement that courts defer to the Wage and Hour Division: "There is no statutory provision as to what, if any, deference courts should pay to the Administrator's conclusions." Skidmore v. Swift & Co., 323 U.S. 134, 139 (1944). Only after those caveats did the *Skidmore* Court go on to say that it found the Wage and Hour Division's position persuasive based on its experience and expertise. *See id.* at 140. Although the Court said that it had given "decisive weight to Treasury Decisions and to interpretative regulations of the Treasury and of other bodies," *id.*, that does not change the calculus. The cases that the Court is ostensibly referring to are just restatements of the congressional ratification doctrine and a pre-APA version of and capricious review. *See, e.g.*, Koshland v. Helvering, 298 U.S. 441, 445 (1936); *compare id. with* Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 240–41 (2009), *and Loper Bright*, 603 U.S. at 395–96, *and* Michigan v. EPA, 576 U.S. 743, 750 (2015), *and* Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42–44 (1983).

[124] *See* 22 U.S.C. § 8772(b); *see also* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(4)–(8), (b)(2)–(6), 122 Stat. 3553, 3553–54 (2008) (explicitly overriding two Supreme Court decisions); *cf. also* Mo. Rev. Stat. § 213.101.

wanted to make deferential *Skidmore* the rule of law in APA cases, it could have added a line to § 706 that said "courts shall defer to the position of the government under the circumstances described in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)," or language similar to 29 U.S.C. §§ 258 and 259(a). But Congress didn't, so it isn't.

Third, without clear and express language to the contrary, the old soil principle holds that Congress is trying to transplant the general rule, not a specific formulation of that rule in a single case. Put somewhat differently, when Congress transplants a term of art, it does not adopt a single variation of that term's definition; it adopts the settled meaning of that term.[125] And the Supreme Court has made clear that, at the enactment of the APA, Congress understood that courts would make an independent judgment of the meaning of a statute without deferring to the Executive branch.[126] So the old soil principle cannot justify importing a deferential standard of review into the APA.

Nor can scholars and judges rely on *Hearst* to save deference to administrative expertise. In *Loper Bright* itself, Justice Kagan relied heavily on the Court's decision in *NLRB v. Hearst Publications, Inc.*[127] to argue that the APA incorporated a deferential standard of review when reviewing questions of law.[128] The majority implicitly rejected that claim in overruling *Chevron* deference, and if *Hearst* did not save *Chevron*, we do not see why it would save *Skidmore*.

But in any event, Justice Kagan's dissent rests on a misreading of *Hearst*'s text and a misunderstanding of the questions raised in that case. *Hearst* is not a case about judicial deference to legal interpretation, but about judicial restraint in reviewing fact-bound policymaking delegated to the agency. *Hearst* involved whether a newspaper publisher was required to collectively bargain with its newsboys, which in turn required determining whether the newsboys were employees under the National Labor Relations Act.[129] The NLRB determined that the newsboys were employees and

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[125] *Neder*, 527 U.S. at 22–23; *see also Kemp*, 596 U.S. at 539 ("Although statutory language obviously transplanted from another legal source will often bring the old soil with it, that principle applies only when a term's meaning was well-settled before the transplantation." (first quoting *Taggart*, 587 U.S. at 560; and then quoting *Neder*, 527 U.S. at 22) (citation modified)).

[126] *Loper Bright*, 603 U.S. at 387–90.

[127] 322 U.S. 111 (1944).

[128] *Loper Bright*, 603 U.S. at 468 & n.6 (Kagan, J., dissenting). She also relied on *Gray v. Powell*, but that case was just a pre-APA version of arbitrary and capricious review. *Compare* 314 U.S. 402, 411 (1941), *with State Farm*, 463 U.S. at 42–44.

[129] NLRB v. Hearst Publications, 322 U.S. 111, 113 (1944), *overruled by* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992).

ordered the publisher to bargain collectively with them.[130] On a petition for review of the NLRB's order, the Court addressed the definition of "employee" and applied the facts to that definition.[131]

For the first question, the Court said there is no "simple, uniform and easily applicable test" for determining whether someone is an employee under the National Labor Relations Act.[132] Rather, lower courts and the agency should focus primarily on "the mischief to be corrected and the end to be attained."[133] In that spirit, the Court reasoned that the word "employee" needed to "be understood with reference to the purpose of the Act and the facts involved in the economic relationship,"[134] which is a fact-specific inquiry unique to each industry.[135]

Turning to the application of facts to law, the Court said that Congress made the NLRB's "determinations as to the facts in these matters conclusive, if supported by evidence," such that the NLRB had the primary responsibility for determining "whether the evidence establishes the material facts."[136] "Hence in reviewing the Board's ultimate conclusions, it is not the court's function to substitute its own inferences of fact for the Board's, when the latter have support in the record."[137] However, the court also made clear that "questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute."[138]

Justice Kagan seized on the Court's statement that "the reviewing court's function is limited" when it is reviewing the "specific application of a broad statutory term,"[139] but that language is just another way of describing the abuse of discretion standard that appellate courts routinely apply in arbitrary and capricious review. When the agency is acting to within its delegated authority to make policy determinations—in this case its determination of economic relationships—then the Court is supposed to

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[130] *Id.* at 114.

[131] *See id.* at 124.

[132] *Id.* at 120.

[133] *Id.* at 122–24 (quoting S. Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251, 549 (1940), *abrogated by* McDermott Int'l, Inc. v. Wilander, 498 U.S. 337 (1991)).

[134] *Id.* at 129.

[135] *See id.* at 129–30.

[136] *Id.*

[137] *Id.*

[138] *Id.* at 130–31.

[139] *Id.* at 131 (cited in Loper Bright Enters. v. Raimondo, 603 U.S. 369, 468–69 (2024)).

defer to the agency's policy decision.[140] Arbitrary and capricious review, however, does not address whether the agency had the authority to issue the regulation in the first place, and that is the legal question that we argue should be reviewed without deference.

This is clear from the text of the opinion itself. For the first ten pages of the opinion's substantive analysis, the court carefully examines the meaning of the words "employee" and "independent contractor," making its own legal conclusions without even referencing (much less relying on) the NLRB's legal conclusions.[141] Then, it devotes only two pages to analyzing the NLRB's factual findings, explaining that they were supported by the evidence and therefore conclusive.[142] This process resembles how the appellate court independently reviews the lower court's legal conclusions without deference while conducting only a limited analysis of the factual findings on abuse of discretion review.[143] No one would argue that the appellate court is deferring to the lower court when conducting a *de novo* review of the lower court's legal conclusions, and that should not be any different when the court is reviewing the agency's legal conclusions. Therefore, when an appellate court reviews an agency's decision under *Hearst*, the Court is not deferring to anyone on questions of law.

On that understanding, the formula that the Board's determination is to be accepted if it has "warrant in the record" and a "reasonable basis in law" is not an interpretive-deference rule at all. It is a pre-APA way of describing what the APA later codified: substantial-evidence and arbitrary-and-capricious review of an agency's delegated, fact-bound policymaking.[144]

Thus, the Court did not cede interpretive authority over legal meaning; instead, it recognized that the NLRB was charged with applying the statute to complex and variable labor relationships in light of statutory purpose. In that respect, *Hearst* reflects not deference to legal interpretation, but a

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[140] *See, e.g.*, Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42–43 (1983).

[141] NLRB v. Hearst Publications, 322 U.S. 111, 120–30 (1944), *overruled by* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992).

[142] *Id.* at 130–32.

[143] When a court is reviewing the law *de novo*, the court is "mak[ing] a judgment independent of the [lower] court's, without deference to that court's analysis and conclusion." *In re* Piper Aircraft Corp., 244 F.3d 1289, 1295 (11th Cir. 2001). But when a court is reviewing the facts for clear error, the appellate court "may not reverse a finding even though convinced that had [it] been sitting as the trier of fact, [it] would have weighed the evidence differently." Arkansas Tchr. Ret. Sys. v. Goldman Sachs Grp., Inc., 77 F.4th 74, 90 (2d Cir. 2023) (quoting Atl. Specialty Ins. Co. v. Coastal Env't Grp. Inc., 945 F.3d 53, 63 (2d Cir. 2019)) (first alteration adopted; second and third alterations rejected and replaced). Rather, the court must have a "definite and firm conviction that a mistake has been committed." *Id.* (quoting *Atl. Specialty*, 945 F.3d at 63).

[144] 5 U.S.C. § 706(2)(A), (E).

limited, deferential review akin to the arbitrary and capricious standard—focused on whether the agency's policy judgment reasonably falls within the statute's broad framework. To read *Hearst* otherwise is to conflate judicial engagement with interpretive meaning and judicial restraint in reviewing delegated policymaking.

Some scholars suggest that deference is not appropriate for pure questions of law but is appropriate when the agency is reviewing a mixed question of fact and law (as in *Hearst*).[145] As a result, whenever an agency has to apply a law of general applicability to a specific set of facts, courts should defer to the agency.[146]

This argument faces two obstacles. First, the APA does not recognize "mixed questions of fact and law," nor does it create a separate standard of review for those questions.[147] The APA creates a dichotomy between findings of fact and conclusions of law, and does not mix the two.[148] And § 706 assigns a standard of review for factual findings and discretionary judgments, but not for legal conclusions..[149] To find that there is a third type of question at issue in APA cases with its own standard of review would add words to the statute that are not there. The APA does not recognize a third category of "mixed" questions with a distinct standard of review, and courts are not free to invent one. *Vermont Yankee* demonstrates that the Court has rejected departures from the basic text of the APA to create hybrid structures not contemplated by the statute.[150]

Second, *Hearst* itself rejects the idea that questions of law and fact cannot be disentangled. *Hearst* spends nearly ten pages discussing a pure question of law (the definition of "employee").[151] Only then does the Court start discussing the facts of that case.[152] If it were true that courts could not disaggregate questions of fact and law like this, then *Hearst* itself would not have done it so well and so extensively.

In short, after *Loper Bright*, the right way to treat a *Hearst*-type case is not to invoke *Skidmore*-plus or a mini-*Chevron* for mixed questions, but to

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[145] *See, e.g.*, Michael B. Rappaport, Chevron *and Originalism: Why* Chevron *Deference Cannot Be Grounded in the Original Meaning of the Administrative Procedure Act*, 57 WAKE FOREST L. REV. 1281, 1307 (2022).

[146] Stuart Minor Benjamin & Arti K. Rai, *Who's Afraid of the APA? What the Patent System Can Learn from Administrative Law*, 95 GEO. L.J. 269, 295 n.135 (2007).

[147] *See* 5 U.S.C. § 706.

[148] *See id.*

[149] *See id.*

[150] *See supra* notes xx and accompanying text.

[151] *See* NLRB v. Hearst Publications, 322 U.S. 111, 120–31 (1944), *overruled by* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992).

[152] *See id.* at 131–32.

ask two distinct questions: (1) what is the best reading of the statute's legal standard (a question § 706 requires courts to answer *de novo*); and (2) has Congress delegated to the agency the job of applying that standard case-by-case, such that the agency's application is reviewed only for substantial evidence and reasoned decision making? When the answer to (2) is yes, "the reviewing court's function is limited" not because the agency's interpretation of law controls, but because the agency is exercising delegated policy discretion within judicially enforced legal bounds.[153]

If deferential *Skidmore* cannot be reconciled with the APA's text, structure, or history, then its continued viability depends entirely on stare decisis.

IV. WHY *SKIDMORE*, IF DEFERENTIAL, SHOULD BE OVERRULED

If *Skidmore* stands for deference to agency expertise, despite the fact that it did not originally do so, it should be overruled. In overruling *Chevron,* the Court articulated a framework for evaluating *stare decisis* for cross-cutting administrative interpretive doctrines. That framework applies in all of its factors with even greater force to deferential *Skidmore*. First, like *Chevron*, deferential *Skidmore* conflicts with the *de novo* review under the APA and is egregiously wrong. Second, like *Chevron*, *Skidmore* is unworkable, if anything more so, because the sliding scale it assigns to the agency's expertise is hard to calibrate and is likely to vary sharply with the sensibility of the judge. Third, deferential *Skidmore* could induce rational reliance no more than *Chevron*: the lack of certainty in the scope and heft of its application makes it unreasonable for either the government or a private party to have faith in its effect for upholding administrative action. But there is an additional reason often considered in the *stare decisis* calculus that also dooms the precedential value of *Skidmore.* It is based on outdated understandings of administrative law—both that expertise can be separated out from politics in agency deliberations, and that an agency has unique access to the meaning of technical terms. Given that these latter problems are peculiar to the *stare decisis* effect of *Skidmore* and thus unaddressed in *Loper Bright*, we address them below at greater length after first considering the factors of correctness, workability, and reliance.

First, like *Chevron,* deferential *Skidmore* directly conflicts with the APA. When *Skidmore* was decided, the APA did not exist. And, as shown above, the opinion's text is better read as an educational *Skidmore*. As such, it would comport with the APA because educational *Skidmore* just requires a court to take respectful account of the information the agency provides and

[153] *Id.* at 131.

does not alter *de novo* review, taking account of that information along with any other relevant support for statutory meaning.

But subsequently, educational *Skidmore* became deferential *Skidmore*.[154] As shown above, the interpretation undermines de novo review by placing the agency's expertise on the scale simply because it comes from the agency.[155] This problem parallels *Loper Bright*'s reasoning. The Court found that *Chevron* was fundamentally inconsistent with the *de novo* legal review mandated by the APA—a point strengthened by our analysis of the contrast between the APA's standard for review of law and deferential standard for review of facts.[156] And just as *Chevron* never analyzed this inconsistency, the Supreme Court has never analyzed deferential *Skidmore*'s inconsistency with the APA.

Nor has it analyzed its fundamental illogicality. If experts within the agency can communicate their expertise relevant to statutory interpretation to the agency administrators, ultimately charged with administrative decisions, then we think the agency can explain that expertise to the courts,[157] If the expertise is communicable, the courts can evaluate it just like any other relevant information they receive. Moreover, unlike *Chevron*, which rested on a contestable theory of congressional intent, deferential *Skidmore* lacks any theory of legislative authorization. If *Chevron* was egregiously wrong, so *a fortiori* is *Skidmore*.

Second, deferential *Skidmore* is also unworkable. *Loper Bright* finds *Chevron* unworkable, largely because it relies on an ambiguous concept that cannot be defined.[158] *Skidmore* has a similar problem. It does not tell courts how ambiguous a statute must be before deferring to agency expertise. After all, no opinion, however expert, should trump a statute's plain meaning. But deferential *Skidmore* has another deficiency in its workability: its concept of weight. At least by the time *Chevron* step two was reached, courts deferred entirely to the administrative judgment so long as it was reasonable. But under *Skidmore*, courts are to give the expert opinion unspecified weight, and that weight depends on a mélange of factors, such as the thoroughness of the agencies' review and its consistency with other pronouncements. Thus, deferential *Skidmore* is uncertain both as to when it applies and as to how much it applies in a given case. A doctrine that instructs judges to assign unspecified "weight" based on open-ended factors is not administrable law.

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[154] *See supra* notes xx and accompanying text.

[155] *See supra* notes xx and accompanying text.

[156] Loper Bright Enters. v. Raimondo, 603 U.S. 369, 396 (2024); *see supra* notes xx and accompanying text.

[157] *See* Ray, *supra* note xx, at 8–12.

[158] *Id.* at 31–32.

As Justice Scalia complained, "*totality-of-the-circumstances Skidmore* deference is a recipe for uncertainty, unpredictability, and endless litigation."[159] Commentators have agreed that the test is applied inconsistently with a substantial amount of disagreement about its weight.[160]

Third, precisely because of its amorphousness, *Skidmore* does not induce reliance. As the *Loper Bright* Court said of *Chevron*, "[t]o plan on [*Skidmore*] yielding a particular result is to gamble not only that the doctrine will be invoked, but also that it will produce readily foreseeable outcomes and the stability that comes with them. History has proved neither bet to be a winning proposition."[161] No litigant, either government or private, could be sure of winning or even of the quantum improvement of his chances of winning by invoking deferential *Skidmore*, when the weight to be given the expertise was unspecified and the factors leading to assessment of weight undefined in their heft as well. A doctrine whose application depends on subjective judicial calibration cannot plausibly induce reliance.

Moreover, eliminating *Skidmore* will not overturn judicial decisions that referenced deferential *Skidmore* to uphold an agency interpretation of its regulation. As the *Loper Bright* Court stated in overruling *Chevron*, "we do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful . . . are still subject to statutory *stare decisis* despite our change in interpretive methodology."[162] Thus, *Skidmore* would be eliminated only for regulations in the process of litigation or subject to future dispute.

The principal difference between *stare decisis* analysis in overruling *Skidmore* and *Chevron* is that the former is also premised on outdated assumptions. *Chevron* was wrongly decided, but its premises were analytic—ambiguity shows a congressional intent to delegate—and structural—the executive is more democratically accountable than the courts. These are contestable, but their validity has not changed over time. In contrast, deferential *Skidmore* relies on a view of the capacities of administrative agencies and courts that is no longer widely accepted. Changes in underlying factual assumptions are themselves grounds for

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[159] United States v. Mead Corp., 533 U.S. 218, 250–51 (2001) (Scalia, J., dissenting).

[160] Bradley Lipton, *Accountability, Deference, and the* Skidmore *Doctrine*, 119 YALE L.J. 2096, 2125 (2010) (noting "a substantial amount of disagreement about the *Skidmore* doctrine" and that at one extreme "*Skidmore* deference is no deference at all"—essentially "*zero deference*"); *see also* Jim Rossi, *Respecting Deference: Conceptualizing* Skidmore *within the Architecture of* Chevron, 42 WM. & MARY L. REV. 1105, 1106 (2001) (arguing that reviving *Skidmore* in lieu of *Chevron* "invites ad hocery by lower courts" in applying agency interpretations)

[161] *Loper Bright*, *supra* note xx, at 33.

[162] *Loper Bright*, supra note, at 34.

overruling a case.[163] Even if expertise-based deference once appeared to make sense, it no longer does.

First, courts and commentators who defend deferential *Skidmore* embrace the premise that agencies possess superior, neutral expertise.[164] That premise once had considerable acceptance. The modern administrative state is in substantial part a Progressive Era project to install technocracy at the heart of American governance on the theory that trained experts could implement statutes more rationally than politicians or judges.[165] *Skidmore*'s underlying assumption was that agencies are run by experts whose professional judgment deserves weight. But, whatever its plausibility then, it does not describe the bureaucracy of our era.

Today, the senior leadership of many agencies is selected less for technical credentials than for ideological compatibility and political loyalty.[166] Cabinet secretaries, deputy and assistant secretaries, and agency heads are selected from campaign and congressional staff and friendly think tanks, not from the ranks of long-serving technocrats.[167] Even in scientific and technical domains, civil servants' judgments are routinely revised and,

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[163] Lawrence v. Texas, 539 U.S. 558, 572–73 (2003).

[164] *See, e.g.*, Baylor Cnty. Hosp. Dist. v. Price, 850 F.3d 257, 264 (5th Cir. 2017); Smith v. Aegon Companies Pension Plan, 769 F.3d 922, 928 (6th Cir. 2014); 4 CHARLES H. KOCH, JR., & RICHARD MURPHY, ADMINISTRATIVE LAW & PRACTICE § 11:37 (3d ed. Mar. 2024 Update); Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1294 (2007).

[165] *See, e.g.*, Bret Baker, *Prometheus: Giving Life to Formal Retrospective Review Through "Thin Rationality" Judicial Review*, 81 OHIO ST. L.J. 723, 728–30 (2020); Devins & Lewis, *supra* note xx, at 1314.

[166] Terry M. Moe, *The Politicized Presidency*, in *The New Direction in American Politics* 235 (John E. Chubb & Paul E. Peterson eds., Brookings Inst. 1985) (describing the post-1970s rise of an intensely politicized executive branch, as presidents increasingly filled agency positions with loyalists to exert greater control at the cost of neutral expertise). Paul C. Light, *Thickening Government: Federal Hierarchy and the Diffusion of Accountability* (Brookings Inst. Press 1995) (documenting the proliferation of layers in the federal bureaucracy, including a growing number of political appointees, and arguing that this "thickening" undermines clear lines of accountability and the effective, expert management of agencies).

[167] *See, e.g.*, Brian D. Feinstein & M. Todd Henderson, *Congress's Commissioners: Former Hill Staffers at the S.E.C. and Other Independent Regulatory Commissions,* 38 YALE J. ON REG**.** 175, 182–89 (2021) (documenting that an increasingly large share of commissioners at independent regulatory commissions come from congressional service rather than technocratic careers); George A. Krause & Anne Joseph O'Connell, *Loyalty–Competence Trade-offs for Top U.S. Federal Bureaucratic Leaders in the Administrative Presidency Era*, 49 PRES. STUD. Q**.** 527, 527–29, 537–45 (2019) (showing that presidents frequently prioritize political loyalty and ideological alignment over policy-specific expertise when filling top agency leadership roles); Yu Ouyang, Evan T. Haglund & Richard W. Waterman, *The Missing Element: Examining the Loyalty–Competence Nexus in Presidential Appointments*, 47 PRES. STUD. Q. 62, 63–66, 71–80 (2017) (analyzing thousands of appointee résumés and finding that presidential appointments heavily reflect partisan and campaign ties, rather than long-term technocratic service.

at times, overridden by political appointees.[168] Because agency decisions today reflect a mix of political and expert considerations, courts can no longer justify deference to agency interpretations on the fiction that they are the product of neutral expertise.

One might respond that courts could preserve deferential *Skidmore*'s core by deferring only when an agency can show that an expert, rather than a political appointee, actually drove the interpretation at issue. On this view, litigants would use interrogatories and document requests to reconstruct the origin of the regulatory interpretation. If the idea was the brainchild of a non-expert political adviser, the agency would receive no deference; if it emerged from a PhD-level plant biologist on the EPA's career staff, it would.[169] But that regime would conflict with the deliberative process privilege and require dismissing the suit.[170] Internal memoranda, draft recommendations, and candid advisory exchanges are the paradigmatic materials protected by that doctrine.[171] The privilege rests on the "obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news."[172] Put another way, the deliberative process privilege allows an agency to withhold every document related to the agency action at issue in the case except for the final product.[173] Thus, litigants will rarely, if ever, obtain the evidence to rebut the claim that agency's interpretation is driven by expertise rather than politics.

The constitutional difficulty deepens when the President or senior White House staff play any role in shaping the policy at issue. Courts have repeatedly warned that intrusive discovery into presidential deliberations

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[168] *See, e.g.*, Peter F. Infante, *The Continuing Struggle Between Career Civil Servants and Political Appointees in the Development of Government Public Health Standards*, 22 INT'L J. OCCUP. & ENVT'L HEALTH 269, 269–72 (2016) (recounting multiple OSHA rulemakings in which political appointees weakened, delayed, or blocked standards proposed by career scientists); Kathleen M. Rest & Michael H. Halpern, *Politics and the Erosion of Federal Scientific Capacity: Restoring Scientific Integrity to Public Health Science*, 97 AM. J. PUB. HEALTH 1939, 1939–42 (2007) (surveying widespread instances of political officials in EPA, FDA, and other agencies suppressing, editing, or overruling scientific findings of career staff).

[169] *See generally, e.g.*, Elgin v. Dep't of Treasury, 567 U.S. 1, 5–6 (2012).

[170] *Cf.* Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1083–84 (9th Cir. 2010) (explaining that some cases that would require the disclosure of classified evidence must be dismissed for failure to state a claim). These disclosures might also risk violating executive privilege. If the President is involved in the creation of the rule, then any communications between the President and the agency officials are all protected. *See, e.g.*, Trump v. Thompson, 20 F.4th 10, 25–27 (D.C. Cir. 2021). Thus, in cases where the President played an instrumental role in enacting the regulation, it may be impossible to determine what the agency's motives are because the agency's motives would be shielded from discovery.

[171] *See* Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8–9 (2001).

[172] *Id.* at 8–9 (quoting NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975)) (citation modified).

[173] United States Fish & Wildlife Serv. v. Sierra Club, Inc., 592 U.S. 261, 269 (2021).

imposes "special burdens" on the executive[174] and risks distracting the President from "the most sensitive and far-reaching decisions entrusted to any official under our constitutional system," diverting his energies away from the performance of his constitutional duties. [175] The doctrine of presidential immunity from civil damages for official acts[176] and the solicitude the executive branch receives when it seeks appellate review of orders threatening disclosure of internal deliberations reflect similar concerns about judicial intrusion on the separation of power.[177] Deferential *Skidmore* would then require an evaluation whether the President or his advisers, rather than staff experts, drove a particular interpretation. That kind of review cannot be squared with other separation of powers norms.

Deferential *Skidmore* also wrongly assumes that courts can treat a given interpretation as the product of "the agency's expertise" in the first place. Under Article II, the law does not recognize disembodied "agency expertise" as a source of authority; it recognizes only the President and the officers through whom he exercises executive power. "The executive Power shall be vested in a President," who may appoint "Officers of the United States" to assist in carrying out that power.[178] The Vesting Clause and Appointments Clause together establish a unitary executive: executive power is vested in the President, who governs "by and through" his properly appointed officers.[179] On that understanding, the "buck" for any regulation always stops with the politically accountable officer who signs and defends it.[180] The law does not, and under Article II cannot, treat a lower-level expert as the true decisionmaker whose independent expertise is the operative reason for the agency's interpretation. That means that even if courts could somehow know that a particular interpretation began with an insulated expert, it would be a constitutional fiction to treat the interpretation as the expert's rather than the President's. Deferential *Skidmore*'s assumption that "expert authorship" can justify judicial deference to an agency's view is inconsistent with the basic structure of Article II.

Second, deferential *Skidmore* is obsolete because technology has democratized access to much of the knowledge and information that made

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[174] *In re* Trump, 781 F. App'x 1, 2 (D.C. Cir. 2019) (per curiam) (citing Clinton v. Jones, 520 U.S. 681, 707 (1997)).

[175] Trump v. United States, 603 U.S. 593, 611 (2024) (first quoting Nixon v. Fitzgerald, 457 U.S. 731, 752 (1982); and then quoting *id.* at 751).

[176] *Id.* at 642; *Nixon*, 457 U.S. at 749.

[177] Cheney v. U.S. Dist. Ct. for D.C., 542 U.S. 367, 381–82 (2004); *see Trump*, 781 F. App'x at 2.

[178] U.S. CONST. art. II, §§ 1–2.

[179] *See, e.g.*, Seila Law LLC v. CFPB, 591 U.S. 197, 202–05 (2020); *see also id.* at 213 ("The executive Power belongs to the President alone." (quotation marks omitted)).

[180] *See, e.g.*, *id.*

agency expertise so valuable. Tools like corpus linguistics mean that litigants outside the agency as well as judges can more easily ascertain the usage and meaning of specialized terms without help from agency experts.

Nobody disputes that technical terms in a statute generally carry their technical meaning.[181] And so, technical terms like "parties," "average wholesale price," and "base" may be interpreted in their technical senses.[182] But the fact that a technical term carries a technical meaning does not mean courts need to defer to agency experts anymore.

First, many lay dictionaries include technical terms like "immunofluorescence,"[183] and nobody disputes that dictionaries are acceptable tools for interpreting statutes.[184] Additionally, there are now specialized dictionaries in print and online covering nearly every discipline a federal judge will encounter, including medicine,[185] technology,[186] and geophysics.[187] Judges can easily turn to one of these resources to help define complex technical terms.

Second, technological advances make general research much easier than before. A simple Google search can tell a judge anything from the chemical composition of cement to the proper procedure for conducting a biophysical profile ultrasound on a pregnant woman. And, when used responsibly, judges can even start turning to AI resources like ChatGPT to ascertain the ordinary meaning of a particularly ambiguous term.[188] It may have been true in 1940 that deep research required dusting off books in a library in a process so time- and resource-intensive that only specialists could do it. But in an age where any piece of information imaginable can be found through a simple Google search, courts do not need to rely on agency experts.

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[181] *See, e.g.*, McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 342 (1991); FAA v. Cooper, 566 U.S. 284, 291–92 (2012); *see also, e.g.*, George v. McDonough, 596 U.S. 740, 746, 753 (2022).

[182] *E.g.*, Williams v. King, 875 F.3d 500, 503 (9th Cir. 2017) (parties); *In re* Pharm. Indus. Average Wholesale Price Litig., 582 F.3d 156, 169 (1st Cir. 2009) (average wholesale price); United States v. Easter, 981 F.2d 1549, 1553 (10th Cir. 1992) (base).

[183] *See Immunofluorescence*, Merriam-Webster's Dictionary (last visited Feb. 17, 2025), https://www.merriam-webster.com/dictionary/immunofluorescence.

[184] *See, e.g.*, United Mine Works of America Combined Benefit Fund v. Toffel (*In re* Walter Energy, Inc.), 911 F.3d 1121, 1143 (11th Cir. 2018).

[185] *See generally, e.g.*, DONALD VENES, TABER'S CYCLOPEDIC MEDICAL DICTIONARY (24th ed. 2021).

[186] *See generally, e.g.*, HARRY NEWTON & STEVEN SCHOEN, NEWTON'S TELECOM DICTIONARY (32d ed. 2022).

[187] *See generally, e.g.*, ROBERT E. SHERIFF, ENCYCLOPEDIC DICTIONARY OF GEOPHYSICS (4th ed. 2002).

[188] *See, e.g.*, Snell v. United Specialty Ins. Co., 102 F.4th 1208, 1221 (11th Cir. 2024) (Newsom, J., concurring).

Third, tools like corpus linguistics have made it even easier for judges to interpret statutes. "The data contained in a linguistic corpus allows legal interpreters to look for meaning in the surrounding linguistic context of an utterance in a systematic manner and to gain meaningful and *quantifiable* insight about the range of possible uses of a word and the frequency of its different senses. In other words, corpus linguistics' research methodology facilitates the study of language function and use through the analysis of large quantities of language."[189] Corpus linguistics relies on "real-world examples" of a word's usage "in actual written language in its native context."[190] When a judge needs to define a specialized term, he can look to specialized corpora.[191] And when no adequate corpora exist, the parties can collect their own texts and create a corpora that they believe most adequately represents the proper usage and meaning of a statutory term.[192] This allows courts to review hundreds, or even thousands, of examples of how a word is used to determine its ordinary meaning.

Moreover, judges do not need to conduct the primary research on these matters. Given that the technical information is readily available, private litigants will have every incentive to educate the judge. And eliminating deferential *Skidmore* does not prevent agencies from educating judges as well. Such expertise must be fully communicable, because experts within the agency have already had to communicate it to the politically accountable decision-makers.[193] The respect that judges owe agencies is no different in kind from the respect those decision makers owe their expert subordinates—the openness and humility involved in the process of education.

Once stare decisis no longer shields deferential *Skidmore*, the only remaining question is what survives its removal.

V. CLARIFYING THE LIMITS OF THE ARGUMENT

This Part shows that rejecting deferential *Skidmore* does not unsettle much of the broader architecture of administrative law. Our argument targets only expertise-based institutional weight on questions of law, not deference on facts, not delegated policymaking, and not longstanding temporal canons. First, this Part explains that deference on questions of fact remains

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[189] Neal Hoopes, Paxton M. Lewis & Amanda Black, *Patent Claim Construction and Corpus Linguistics*, 22 N.C. J. L. & TECH. 335, 364 (2021) (citation modified; emphasis original).

[190] State v. Rasabout, 356 P.3d 1258, 1271 (Utah 2015) (Lee, A.C.J., concurring).

[191] Hoopes, et al., *supra* note xx, at 364.

[192] Indeed, this is no different in many respects to Second Amendment cases, where the litigants collect a variety of historical sources that the judge reviews to determine whether a given regulation is consistent with the Nation's historical tradition of firearms regulations. *See, e.g.*, Suarez v. Paris, 741 F. Supp. 3d 237, 258 (M.D. Pa. 2024).

[193] *See* Ray, *supra* note xx, at 11–13.

permissible. Second, it explains that contemporaneous constructions of a statute remain persuasive in interpreting a statute. Third, it explains how rejecting deferential *Skidmore* can stand alongside these principles.

Even if deferential *Skidmore* is overruled, agencies *should* receive deference on factual questions for two reasons. First, the APA requires that courts defer to agencies on questions of fact. Section 706 says that reviewing courts are supposed to set aside agency action that is "unsupported by substantial evidence."[194] "Substantial evidence has been defined as more than a mere scintilla and as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The court must affirm [an agency] determination if it is reasonable and supported by the record as a whole, even if some evidence detracts from the [agency's] conclusion."[195] This standard of review is highly deferential.[196] Just as the statute's failure to state a deferential standard of review for questions of law means that deference is not permitted, the fact that *it does* provide such a standard of review on questions of fact means that courts should so defer. And when Congress delegates power to the agency under a vague or open-ended legal term, as it did with employees in the *Hearst* case, agencies will have a lot of room to rely on factual analysis for their judgments.[197]

Second, there is nothing inconsistent about the judicial role and deferring on questions of fact. Although courts apply different standards of review of judicial factual findings in different scenarios, they are all functionally the same: appellate courts do not second-guess the factual findings made below, and courts will reverse such a finding only if the finding is so manifestly incorrect that it can do so without second-guessing the credibility of the evidence.[198] Appellate courts have been applying this standard of review for centuries.[199]

Rejecting *Skidmore* deference would not undermine this principle. Unlike questions of law, the agency is both constitutionally and statutorily permitted to review questions of fact and receive deference from the Article

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[194] 5 U.S.C. § 706(2)(E).

[195] Broadcom Corp. v. ITC, 28 F.4th 240, 249 (Fed. Cir. 2022) (citation modified).

[196] Syverson v. USDA, 601 F.3d 793, 800 (8th Cir. 2010).

[197] *See infra* note xx and accompanying text.

[198] *See, e.g.*, Farrior v. Waterford Bd. of Educ., 277 F.3d 633, 635 (2d Cir. 2002) (jury verdict not against the weight of the evidence); Gaylord v. United States, 777 F.3d 1363, 1367 (Fed. Cir. 2015) (district court's factual findings were not clearly erroneous); Optronic Techs., Inc. v. Ningbo Sunny Elec. Co., 20 F.4th 466, 476 (9th Cir. 2021) (jury verdict supported by substantial evidence).

[199] *See, e.g.*, Burneson v. United States, 19 F.2d 780, 781 (6th Cir. 1927); Bryan L. Adamson, *Federal Rule of Civil Procedure 52(a) As an Ideological Weapon?*, 34 FLA. ST. U. L. REV. 1025, 1039 & n.42 (2007).

III courts.[200] *Skidmore* itself never addressed agency factual findings, nor could it. *Skidmore* was a lawsuit originally filed in the Article III courts,[201] so the Court had no occasion to address the degree of deference Wage and Hour Division should receive on questions of fact.

Nor does rejecting deferential *Skidmore* entail rejecting "temporal canons of construction." Indeed, this Article would submit that deferential *Skidmore* and temporal canons of construction are different concepts. Because our critique targets expertise-based deference, not time-based rules, nothing here undermines canons that look to contemporaneous or consistent interpretations. Temporal canons allocate weight based on timing and settlement, not institutional status.

Start with the rule that courts rely on a statute's contemporaneous construction. Contemporaneous constructions of statutes have been deemed useful tools for statutory interpretation long before anything resembling the administrative state existed.[202] Additionally, the contemporaneous construction rule does not require that the construction come from the executive branch. As Professor Bamzai has explained, courts would rely on contemporaneous constructions of a statute, not because of any agency expertise, but because the people who were around when the statute was enacted are most likely to understand what the words in the statute mean.[203]

For instance, consider the First Congress canon. Under the First Congress canon, interpretations of the Constitution by the First Congress "should be regarded, as of the greatest weight in the interpretation of that fundamental instrument."[204] That canon of interpretation is a temporal canon of interpretation—it is premised on the fact that the same people who wrote the Constitution were the ones enacting laws thereunder.[205] If members of the state ratifying conventions were making these interpretations, they would carry equal force.

Consider also the rule that consistent constructions of a statute are considered persuasive.[206] Although that rule is often invoked in

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[200] The extent to which an agency can review questions of fact in adjudications without a jury under the Seventh Amendment is an open question after *SEC v. Jarkesy*, 603 U.S. 109 (2024), but we do not and need not pass on that specific issue because, whether the agency relies on a jury, ALJs, or its own bureaucrats, the standard of review would ultimately be the same. *See supra* notes xx and accompanying text.

[201] *See* Skidmore v. Swift & Co., 323 U.S. 134, 135 (1944).

[202] *See* Bamzai, *supra* note xx, at 933–37

[203] *Id.* at 933–34.

[204] Myers v. United States, 272 U.S. 52, 174–75 (1926).

[205] *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 674 (1984).

[206] *See, e.g.*, Loper Bright Enters. v. Raimondo, 603 U.S. 369, 386 (2024) (quoting NLRB v. Noel Canning, 573 U.S. 513, 525 (2014)).

administrative law cases (it is, after all, explicitly mentioned in *Skidmore*[207]), its origin lies in the Madisonian belief that Americans would settle the meaning of difficult statutory provisions through litigation.[208] And constitutional liquidation is not the unique province of the agencies.[209] Rather, this is just another example of the interpreters having a temporal advantage, but that advantage remains only because the interpretation adopted when the provision was enacted is still in force today.

Temporal canons of construction are different from deferential *Skidmore* in both their rationale and their standing. As to rationale, they call for giving weight to a construction of the statute because it is better evidence of the statute's original public meaning or, in the case of the consistency canon, a well-established interpretation of an ambiguous provision is better to rely upon than an untested interpretation. Any additional weight that the interpretation would receive comes, not by virtue of it coming from an agency, but by virtue of it being a contemporaneous construction of the statute.

As a result, deferential *Skidmore* and temporal canons of construction are rooted in different things—temporal canons of construction rely on the temporal connection between the construction of the statute and its interpretation, while deferential *Skidmore* is rooted in agency expertise.[210] Courts can be educated about expertise. The idea behind temporal canons is that diffuse knowledge of meaning dissipates over time. Thus, early interpreters are more likely to get the interpretation right and deserve deference. In contrast, deferential *Skidmore* to interpretations of a statute that came long after the statute was originally enacted.[211]

Not only is the rationale different, but their status is different because both contemporary construction and liquidation were longstanding rules applied before the APA and indeed before the rise of modern administrative state.[212] There is no reason to believe that the APA disturbs these rules any more than it disturbs the longstanding rule of lenity.

In sum, educational *Skidmore*, deferential *Skidmore*, and temporal canons of construction all occupy different domains. Educational *Skidmore* allows courts to consider information provided by expert agencies, but it

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[207] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[208] *Noel Canning*, 573 U.S. at 525.

[209] *See generally* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019).

[210] *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 235 (2001).

[211] *See, e.g.*, Martin v. Soc. Sec. Admin., Comm'r, 903 F.3d 1154, 1162 (11th Cir. 2018) (per curiam) (according *Skidmore* deference to an agency's mid-2010's interpretation of a statute enacted in 1935); *cf., e.g.*, EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 256–57 (1991) (considering whether to accord *Skidmore* deference to EEOC guidance issued decades after Title VII was enacted).

[212] *See* Bamzai*, supra* note xx, at 935 (showing English examples of contemporaneous construction).

does not require them to give that information any additional weight based solely on agency expertise. Deferential *Skidmore* requires courts to give agency interpretations special weight. And temporal canons of construction tell courts interpretation additional weight if it was made at or around the time the statute was enacted, not requiring any consideration of the expertise of the agency. Cutting out the middle one (deferential *Skidmore*) in favor of the first one (educational *Skidmore*), therefore, does not undermine the last one (temporal canons of construction).

VI. EVALUATING AND RESPONDING TO COUNTERARGUMENTS

Defenders of deferential *Skidmore* tend to rely on four recurring arguments This Part explains why none withstands scrutiny. Section VI.A discusses why the uniformity rationale does not hold up, explaining that deference undermines uniformity in interpretation over time, because it makes it easier for interpretations to flip-flop among administrations. Moreover, the Supreme Court can address the lack of uniformity caused by disagreement among judges. Section VI.B explains that agency expertise in complex cases is not required because courts can rely on expert witnesses. Section VI.C explains that rejecting deferential *Skidmore* will not increase the risks of judicial overreach because deferential *Skidmore* addresses only whether the agency is allowed to take the action it did, not whether it should take that action. Section VI.D explains that rejecting deferential *Skidmore* will not delegitimize agency action because, even though agencies are more accountable than courts, courts are now the more neutral arbiters given the increase in agency politicization in recent years.

A. Uniformity and Predictability Without Deference

Among Justice Kagan's concerns in *Loper Bright* was that refusing to defer to the agency on questions of law would create disuniformity because there was "good empirical—meaning, non-impressionistic—evidence" that deference "fosters agreement among judges."[213] Uniformity amongst judges, however, does not necessarily mean a uniform interpretation of the statute over time, because administrative deference makes it easier for interpretations to change from administration to administration.[214] To be sure, deferring to early or consistent interpretations by agencies across administrations may promote uniformity of interpretation among both judges

[213] Loper Bright Enters. v. Raimondo, 603 U.S. 369, 474 (2024) (Kagan, J., dissenting) (citing Kent Barnett et. al., *Administrative Law's Political Dynamics*, 71 VAND. L. REV. 1463, 1502 (2018)) (quotation marks omitted).

[214] John O. McGinnis & Michael B. Rappaport, *Presidential Unilateralism*, 83 OHIO L. J. 1 (2022).

and agencies, but educational *Skidmore* preserves the longstanding doctrines of contemporary exposition and liquidation.

Moreover, the lack of uniformity among lower judges is not a problem peculiar to administrative law.[215] Virtually every area of the law (including administrative law) has circuit splits.[216] However, we do not observe a collapse of the administrative state whenever a split opens. There appear to be few practical problems caused by circuit splits in administrative law.

In any event, the need for uniformity is not a reason for deferring to the agency. Congress created the United States Court of Appeals for the Federal Circuit to ensure the uniform interpretation of federal patent law.[217] If circuit splits become an area of undue concern, Congress could channel all APA challenges through the D.C. Circuit or adopt the proposal to create the United States Court of Appeals for Administration, a specialized court that would "receive, decide, and expedite appeals from federal commissions, administrative authorities, and tribunals in which the United States is a party or has an interest, and for other purposes."[218] It is better to make such reforms than to give the government a litigation advantage based on claims of expertise that are not unique to it.

Finally, the Supreme Court could readily resolve any lack of uniformity in administrative law when such disuniformity is causing substantial problems for society. The Supreme Court's "certiorari jurisdiction exists to clarify the law."[219] If a split arises and the Supreme Court believes that the split will have significant practical implications, the Court can take a case to resolve it, as it does dozens of times per year. There is no reason to create a rule of decision that tilts the scales in favor of America's most powerful litigant.

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[215] And that assumes that agreement amongst judges is a good thing. The Supreme Court routinely extolls the virtues of letting lower court judges flesh out important issues before they step in. *See, e.g.*, Box v. Planned Parenthood of Indiana & Kentucky, Inc., 587 U.S. 490, 493 (2019) (per curiam) ("We follow our ordinary practice of denying petitions insofar as they raise legal issues that have not been considered by additional Courts of Appeals."); *see also, e.g.*, STEPHEN M. SHAPIRO, ET AL., SUPREME COURT PRACTICE §§ 6.37(i)(1) (11th ed. 2019).

[216] *See, e.g.*, Int'l Union of Operating Eng'rs, Stationary Eng'rs, Loc. 39 v. NLRB, 127 F.4th 58, 83 n.12 (9th Cir. 2025) (discussing a potential split regarding the NLRB's remedial authority); United States v. DeJesus, 347 F.3d 500, 509 n.7 (3d Cir. 2003) (discussing a split on the validity of peremptory strikes based on religion); Texas v. Trump, 127 F.4th 606, 614–15 (5th Cir. 2025) (discussing a circuit split over the President's authority to issue executive orders under 40 U.S.C. § 101).

[217] *See, e.g.*, Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 162–63 (1989); Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 7 (1989).

[218] Roni A. Elias, *The Legislative History of the Administrative Procedure Act*, 27 FORDHAM ENVT'L L. REV. 207, 220 (2016).

[219] City & Cnty. of San Francisco, Calif. v. Sheehan, 575 U.S. 600, 610 (2015).

Although this might increase the number and complexity of cases on the Court's case load, that does not warrant deferring to the agencies. First, the Supreme Court's current merits caseload is barely half of what it was 30 to 40 years ago.[220] The Supreme Court will not be overwhelmed if it hears even a dozen additional administrative law cases. Second, the Supreme Court regularly addresses difficult questions and interprets complex statutes.[221] Third, the Supreme Court will readily obtain the assistance of amici when a particularly complex or technical issue must be analyzed.[222]

The claim that there would be greater unpredictability in decisions about the interpretation of administrative statutes is hard to sustain. Empirical research has shown that deference itself has actually "driv[en] the predictability of judicial practice further down" over the last 30 years.[223]

B. The Role of Expertise in Complex or Technical Disputes

Likewise, among Justice Kagan's critiques in her *Loper Bright* dissent was that deference is necessary in certain "specialized" areas of law where "abstract analysis" "may obscure what matters most."[224] Some law professors agree, arguing that "highly technical" matters warrant deference because the agencies have a superior understanding of them.[225]

There are three problems with these arguments. First, those arguments wrongly suggest that only the government has the expertise needed to understand matters within an agency's discretion, but in reality, expertise is abundant even outside agencies. The government does not have a monopoly on knowledge. American colleges and universities have hundreds (or even thousands) of professors with deep expertise in every discipline of human knowledge. Surely someone outside of the FDA knows what "an alpha

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[220] *See, e.g.*, Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1225–26 (2012).

[221] *See, e.g.*, Pulsifer v. United States, 601 U.S. 124, 129 (2024) (analyzing the confusingly-worded safety valve provision for relief from a mandatory minimum sentence in 18 U.S.C. § 3553(f)(1)).

[222] *See* Sup. Ct. R. 37.

[223] Mathews, *supra* note xx, at 1350–51.

[224] Loper Bright Enters. v. Raimondo, 603 U.S. 369, 452–53 (2024) (Kagan, J., dissenting) (quoting Kisor v. Wilkie, 588 U.S. 558, 566 (2019) (plurality opinion of Kagan, J.)); *see also Kisor*, 588 U.S. at 566–67; Rosehill Tr. of Linda K. Rosehill Revocable Tr. dated Aug. 29, 1989 v. State 556 P.3d 387, 405 (Haw. 2024) ("We do not believe the expertise of courts outstrips that of the agencies charged with implementing complex regulatory schemes on a day-to-day basis.").

[225] John F. Duffy, *On Improving the Legal Process of Claim Interpretation: Administrative Alternatives*, 2 WASH. U. J.L. & POL'Y 109, 130–31 (2000) (quoting Markman v. Westview Instruments, Inc., 517 U.S. 370, 389 (1996)); *see also, e.g.*, Demetri Blaisdell, *Title VII Challenges to Security Clearance Referrals:* Rattigan *Points the Way*, 4 COLUM. J. RACE & L. 177, 183–84 (2014).

amino acid polymer" is and whether it qualifies as a "protein."[226] Indeed, under Justice Kagan's argument, a plant biologist at the EPA learned everything she ever knew upon joining the EPA and then forgot it all upon leaving. Eliminating deferential *Skidmore* would not take a stand against respecting expertise, but only against privileging government expertise.

Second, courts will not be left entirely to their own devices if they stop deferring to agency expertise. Any judge who believes he needs an expert to understand the case before him has the right to appoint one, and the litigants can proffer their own.[227] Those experts can ostensibly include a plant biologist at the EPA (on the government's side) and one at a college or university (on the challenger's side). That will provide just as much expertise (or more) as the court would have received simply by reading the preamble to the Final Rule in the Federal Register.

Third, deferential *Skidmore* is anomalous in the law. Courts address highly specialized matters regularly, but administrative law is the only area in which the government's expertise receives deference over that of other equally qualified experts. Whether the case involves infringement of a pharmaceutical patent,[228] anticompetitive conduct in the sale of sophisticated technologies,[229] or even garden-variety medical malpractice cases,[230] many lawsuits involve complex scientific or technical evidence that an Article III judge does not normally deal with. But when an Article III judge is assigned to that case, the judge can elicit information from both parties and determine what they need to know to fairly adjudicate the case. Administrative law cases involve many of the same challenges as patent, antitrust, or medical malpractice cases. But only administrative law cases require the court to defer to a party simply because of that party's identity. If a court can determine whether different types of resins for stereolithography machines

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[226] *Loper Bright* 603 U.S. at 452 (Kagan, J., dissenting) (citing Teva Pharms. USA, Inc. v. FDA, 514 F. Supp. 3d 66, 93–106 (D.D.C. 2020)). After two google searches, the Authors determined that an alpha amino acid polymer is a protein. *See, e.g.*, JOHN W. HILL, ET AL., HILL'S CHEMISTRY FOR CHANGING TIMES § 16.4 (15th ed. 2019) ("Proteins may be defined as compounds of high molar mass consisting largely or entirely of chains of amino acids."). This is another illustration of how knowledge has become more diffuse, undermining *Skidmore*'s core assumption.

[227] FED. R. EVID. 702, 706; *see, e.g.*, United States v. Bullock, No. 3:18-CR-165-CWR-FKB, 2022 WL 16649175, at *3 (S.D. Miss. Oct. 27, 2022); 29 CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE & PROCEDURE § 6304 (2d ed. June 2024 Update).

[228] *See, e.g.*, *In re* Cyclobenzaprine Hydrochloride Extended-Release Capsule Pat. Litig., 693 F. Supp. 2d 409 (D. Del. 2010); Otsuka Pharm. Co. v. Torrent Pharms. Ltd., Inc., 99 F. Supp. 3d 461 (D.N.J. 2015).

[229] *See, e.g.*, United States v. Google LLC, 747 F. Supp. 3d 1 (D.D.C. 2024); United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam).

[230] *See, e.g.*, Midland State Bank v. United States, 634 F. Supp. 3d 498 (N.D. Ill. 2022); Mobius v. Quest Diagnostics Clinical Lab'ys, Inc., 687 F. Supp. 3d 357 (W.D.N.Y. 2023).

are within the same relevant market, then surely a court can determine whether an alpha-amino acid polymer is a protein.[231]

In any event, educational *Skidmore* assures that that agencies remain in a position to educate the courts on the meaning of complex statutes.[232] Courts can always ask for *amicus* briefing to explain views and present information that a private litigant might not be willing or able to provide.[233] And then the court can use that information to make its decision on the correct meaning of a statute. The fact that the court would not be *deferring* to that agency's interpretation does not mean that the court is not allowed to consider the agency's views.

C. Judicial Modesty and the Risk of Overreach

Skidmore's proponents are also wrong when they say that getting rid of *Skidmore* deference will result in judicial overreach. For example, Justice Kagan argued in her *Loper Bright* dissent that ambiguous statutes are a sign that Congress wanted to give an agency "interpretive discretion" and that conducting *de novo* review of the agency's legal conclusions results in courts "substitut[ing] [their] own judgment" for that of the agencies.[234] But that argument misinterprets the APA and indeed the role of the judge: judicial modesty lies in enforcing statutory limits, not in deferring to their transgression.

Section 706's different subsections can be divided into three buckets. First, subsections (2)(B), (2)(C), and (2)(D) and parts of subsections (1) and (2)(A) require reviewing courts to determine whether the agency has violated the law.[235] Second, subsections (2)(E) and (2)(F) require courts to determine

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[231] *See* DSM Desotech Inc. v. 3D Sys. Corp., 749 F.3d 1332, 1339 (Fed. Cir. 2014). Although the experts cannot provide a legal opinion, *see, e.g.*, M.S. *ex rel.* Hall v. Susquehanna Twp. Sch. Dist., 969 F.3d 120, 129 (3d Cir. 2020), that only emphasizes deferential *Skidmore*'s doctrinal weaknesses. In a normal case, the judge needs to draw the relevant legal conclusions without help from an expert. *See id.* But deferential *Skidmore* and its progeny require that courts accept the legal conclusions of what would otherwise be expert witnesses under FED. R. EVID. 702 and 706.

[232] Professor Hickman suggests that ambiguity, rather than complexity, is the point at which courts should consider relying on deferential *Skidmore*, *see* Hickman, *supra* note xx, at 126–27, but that is in tension with *Skidmore*'s heavy emphasis on expertise. Statutory ambiguity suggests that there are two equally plausible interpretations for a statute. *See, e.g.*, Thomas v. Metro. Life Ins. Co., 631 F.3d 1153, 1161 (10th Cir. 2011). It is hard to see how Professor Hickman's theory is correct given that expertise is more helpful in determining the meaning of a complex or technical statute, rather than a statute that is inartfully drafted.

[233] *Cf.* United States v. Adams, 348 F.R.D. 408, 409 (S.D.N.Y. 2025) (appointing an *amicus* because neither party was willing to oppose the government's motion to dismiss the indictment).

[234] Loper Bright Enters. v. Raimondo, 603 U.S. 369, 450 (2024) (citing NFIB v. OSHA, 595 U.S. 109 (2022) (per curiam); West Virginia v. EPA, 597 U.S. 697 (2022); Biden v. Nebraska, 600 U.S. 477 (2023)).

[235] *See* 5 U.S.C. § 706(1)–(2)(D).

whether the agency's factual findings are adequately justified.[236] Third, parts of subsections (1) and (2)(A) require courts to determine whether the agency's actions are unreasonable or an abuse of discretion.[237]

Only the third bucket (whether the agency has unreasonably acted or refused to act, has abused its discretion, or has acted arbitrarily or capriciously) involves assessing the validity of the agency's policy decisions.[238] In these circumstances, Justice Kagan is correct that courts are to apply a deferential standard of review, giving the agency the benefit of the doubt when the agency's action could best be explained as the result of expertise or a policy preference.[239] Nobody disputes that a court cannot vacate agency action under the arbitrary or capricious standard of review simply because "the court would [not] have made" the same decision as the agency.[240] But that does not mean that we are deferring to the agency on questions of law. Courts decide *de novo* the question of the law that defines the agency's discretion. Within that legal discretion, they review the agency's action under a deferential "arbitrary and capricious" standard.

D. Democratic Accountability and the Legitimacy of Agency Action

Some scholars and jurists have suggested that values such as democratic accountability and the legitimacy of agency action counsel deferring to the agency on questions of law.[241] As Justice Kagan put it in her *Loper Bright* dissent, conducting *de novo* review of an agency's legal conclusions is an act "of judicial hubris" that involves "substitut[ing]" the courts' "judgment" for that of the agency.[242]

Although these jurists and scholars are correct that courts should not substitute their own judgment for that of the agency on policy matters, they are mistaken insofar as they assume that conducting *de novo* review of an agency's legal conclusions involves policymaking. Regardless of the basis for challenging the agency action (or inaction), APA cases share the same

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[236] *See id.* § 706(2)(E)–(F).

[237] *See id.* § 706(1)–(2)(A).

[238] *See, e.g.*, Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 40–42 (1983) (NHTSA's decision to modify seatbelt and airbag requirements reviewed under § 706(2)(A)).

[239] *See, e.g.*, Redeemed Christian Church of God v. USCIS, 387 F. Supp. 3d 734, 748 (S.D. Tex. 2016) ("Indeed, agency action is arbitrary and capricious 'only when it is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" (quoting Wilson v. USDA, 991 F.2d 1211, 1215 (5th Cir. 1993)).

[240] Wilson v. USDA, 991 F.2d 1211, 1215 (5th Cir. 1993).

[241] *See, e.g.*, Shane LaBarge, Note, Chevron*, and Beyond the Infinite: The Judicial and Legislative Challenges to the Administrative State*, 44 J. LEGIS. 107, 114 (2017).

[242] Loper Bright Enters. v. Raimondo, 603 U.S. 369, 450 (2024) (Kagan, J., dissenting).

core question: Is the agency authorized to do this?[243] That is not a policy question. Enforcing statutory boundaries respects democratic choice. It is ignoring them that does not.

When courts review agency action for legality under the APA (as opposed to arbitrariness or reasonableness), courts are just applying the statute Congress has already enacted. In other words, the policymaking has already taken place. The only question, then, is whether the agency has chosen one of the options Congress has authorized. In this respect, reviewing an agency's legal conclusions *de novo* is no different than reviewing whether a State can constitutionally enact a particular statute *de novo*.

Moreover, concerns about diminished democratic legitimacy following judicial scrutiny are overstated. To the extent that public trust in agency action has eroded, that erosion is largely attributable to the conduct of agencies themselves. In recent decades, agencies have repeatedly exceeded or tested the outer bounds of their authority—sometimes in the face of clear signals from the Supreme Court. Examples include regulatory initiatives pursued notwithstanding prior judicial skepticism,[244] or repeated efforts to implement programs previously struck down.[245] Agencies have also reversed their interpretations of statutes only because of changes in administration.[246] At the same time, agencies have increasingly been staffed in ways that reflect political loyalty rather than subject-matter expertise. These developments raise legitimate questions about the institutional competence and neutrality of modern administrative bodies. Courts, in reaffirming the limits of agency authority, are not undermining democratic legitimacy but rather reinforcing the principle that agencies must remain within the legal boundaries set by Congress—a democratically elected institution.

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[243] *See, e.g.*, City of Arlington, Tex. v. FCC, 569 U.S. 290, 297 (2013); *see also* Massachusetts v. EPA, 549 U.S. 497, 528 (2007) (vacating the EPA's denial of a petition for rulemaking because the EPA incorrectly concluded that it could not issue the requested rules).

[244] *See* Alabama Ass'n of Realtors v. HHS, 141 S. Ct. 2320, 2320–21 (2021) (Kavanaugh, J., concurring) ("In my view, clear and specific congressional authorization (via new legislation) would be necessary for the CDC to extend the [eviction] moratorium past July 31."); Alabama Ass'n of Realtors v. HHS, 594 U.S. 758, 760 (2021) (per curiam) ("When the eviction moratorium expired in July, Congress did not renew it. Concluding that further action was needed, the CDC decided to do what Congress had not.").

[245] *See* Biden v. Nebraska, 600 U.S. 477, 483–84 (2023); Missouri v. Trump, 128 F.4th 979, 984–85 (8th Cir. 2025); Missouri v. Biden, 112 F.4th 531, 534 (8th Cir. 2024) (per curiam); Missouri v. United States Dep't of Educ., No. 4:24-CV-01316-MTS, 2024 WL 4426370, at *1 (E.D. Mo. Oct. 3, 2024); Missouri v. United States Dep't of Educ., No. CV 224-103, 2024 WL 4069224, at *1 (S.D. Ga. Sept. 5, 2024).

[246] Josh Blackman, *Presidential Maladministration*, 2018 U. ILL. L. REV. 397, 408–15.

VII. CONCLUSION

The demise of *Chevron* is not merely the erosion of a precedent—it signals a jurisprudential recalibration that restores the judiciary's constitutional role in the separation of powers. In this renewed constitutional framework, the continued existence of deferential *Skidmore* is anomalous. The Administrative Procedure Act makes no provision for a third, quasi-deferential standard of review; it authorizes judicial evaluation of facts under a deferential "substantial evidence" test, and legal questions under *de novo* review. To insinuate a third standard—one built on providing agency weight for its interpretation of law—is to fabricate a doctrinal creature untethered from the APA's text and history.

The case for retaining deferential *Skidmore* cannot draw any support from APA originalism.[247] Congress neither codified *Skidmore* nor referenced *Hearst*. It did not transplant a common-law deference regime into § 706's command that courts "decide all relevant questions of law." As *Loper Bright* reminds us, interpretive fidelity to statutory text excludes judicial supplementation, even when motivated by perceived policy gains. If *Chevron* is impermissible, so too is a subtler variant that disguises deference as "persuasiveness."

Nor can institutional reality salvage the doctrine. The premises of deference—that agencies are expert, apolitical, and epistemically superior—no longer hold. Technological transformation, including access to corpus linguistic tools, has democratized access to expertise. Meanwhile, strong political control has diluted the technocratic character that once justified judicial humility. *Skidmore*, designed in an era of industrial regulation and limited judicial capacity, is ill-suited to a polity of networked knowledge and ideological agencies.

What remains is an alternative that satisfies both legal structure and institutional humility: educational *Skidmore*. On this view, agency interpretations—like amici or expert witnesses—are relevant only to the extent they illuminate original public meaning or furnish contextual understanding. Courts may find agency interpretations helpful, but never binding. This vision comports with the best of the temporal canons—such as contemporaneous construction and liquidation—while eschewing the judicial abdication that deference entails.

The path forward is therefore clear. The judiciary must apply the APA as written, respect the limits of delegated authority, and restore the constitutional norm of independent judgment. Deferential *Skidmore* was always a fragile compromise between legislative clarity and bureaucratic

[247] For discussion of APA originalism, *see supra* note xx.

convenience. In the post-*Chevron* landscape, it is no longer tenable. Law in our republic should not defer to what an agency suggests it to be, but should remain what the judiciary, through constitutional authority and reasoned interpretation, declares it to be.