

## COMMENT

# Deference to Agency Statutory Interpretations First Advanced in Litigation? The *Chevron* Two-Step and the *Skidmore* Shuffle

Bradley George Hubbard<sup>†</sup>

## INTRODUCTION

Imagine the Internal Revenue Service (IRS) commences suit against you and alleges that, in contravention of the Internal Revenue Code, you failed to report all of your taxable income. The statute in question is ambiguous—under the IRS’s interpretation, you are liable; under yours, you are not. The IRS argues that the court should defer to its interpretation. This position is unsurprising, given that courts often defer to agency interpretations by according either controlling *Chevron* deference when an agency’s interpretation is promulgated with the force of law, or persuasive *Skidmore* deference when it is promulgated informally.

But two things about this situation *are* surprising: not only is this suit the first time that the IRS has advanced this particular interpretation, but the IRS—even though it is appearing as a litigant, just like you—nonetheless is arguing for deference. You are quick to remind the court that “[d]eference to what appears to be nothing more than an agency’s convenient litigating position would be entirely inappropriate,”<sup>1</sup> citing *Bowen v Georgetown University Hospital*.<sup>2</sup> The IRS responds that it is not seeking *Chevron* deference, which is what *Bowen* addressed, but *Skidmore* deference. Relying on *United States v Mead Corp*,<sup>3</sup> the IRS argues that informal agency interpretations—like amicus briefs or administrators’ rulings—are entitled to *Skidmore* deference because “*Chevron* did nothing to eliminate *Skidmore*’s

---

<sup>†</sup> BS 2010, University of Missouri; MAcc 2010, University of Missouri; JD Candidate 2013, The University of Chicago Law School.

<sup>1</sup> *Bowen v Georgetown University Hospital*, 488 US 204, 213 (1988).

<sup>2</sup> 488 US 204 (1988).

<sup>3</sup> 533 US 218 (2001).

holding that an agency's interpretation may merit some deference whatever its form."<sup>4</sup>

As the above hypothetical suggests, the Supreme Court has deferred to agency litigation interpretations where the agency appears as amicus,<sup>5</sup> but has not yet addressed whether deference is appropriate when the agency appears as a litigant. This gap in the Court's administrative law jurisprudence has led to a split among the circuit courts. Five circuits have read *Bowen* as precluding a grant of both *Chevron* and *Skidmore* deference to agency statutory interpretations first advanced during litigation. Five circuits have taken the opposite view, according such interpretations *Skidmore* deference.

This Comment addresses this circuit split, which no court has recognized, and argues that *Skidmore* deference is appropriate for three reasons. First, every circuit that flatly denies deference—by either explicitly rejecting *Skidmore* or failing to consider it altogether—does so in reliance on *Bowen*. However, this reliance is misplaced because *Bowen* is about *Chevron*, rather than *Skidmore*, deference. Second, all circuit courts that have explicitly addressed whether *Skidmore* deference should be accorded to an agency's litigation interpretation when the agency appears as amicus agree that it should.<sup>6</sup> Third, post-*Mead*, all circuit courts defer, under either *Chevron* or *Skidmore*, to agency litigation interpretations when the agency is part of a dual-agency regime.<sup>7</sup> The latter two reasons are germane because the concerns that generally caution against deferring to agency litigation interpretations are not marginally heightened when the agency appears as a litigant in a single-agency regime. As such, given the unanimous deference when an agency appears as amicus or when the agency is a litigant in a dual-agency regime, there is no reason why such deference should be flatly denied when the agency appears as a litigant in a single-agency regime.

This Comment comprises three parts. Part I provides background on agency litigation interpretations, the Supreme Court's *Skidmore* and *Chevron* deference regimes, and the ra-

---

<sup>4</sup> Id at 234.

<sup>5</sup> See *Skidmore v Swift & Co*, 323 US 134, 139–40 (1944); *Talk America, Inc v Michigan Bell Telephone Co*, 131 S Ct 2254, 2260–61 (2011); *Chase Bank USA, NA v McCoy*, 131 S Ct 871, 880 (2011).

<sup>6</sup> An agency can appear before a court in one of two postures: as a litigant or as amicus.

<sup>7</sup> An agency can be part of one of two litigation regimes: a single-agency regime, where the agency begins litigation in federal court; or a dual-agency regime, where one agency litigates before another agency prior to litigating in federal court.

tionales behind these regimes in light of the Court's evolving view of agencies. This Part also analyzes the application of those regimes to litigation interpretations. Part II presents the split that has developed in the circuit courts. Finding the rationale provided by most circuits wanting, Part III advances a solution: agency interpretations first advanced during litigation are eligible to receive *Skidmore* deference regardless of the agency's posture before the court or its litigation regime.

## I. THE BASE STEP—BACKGROUND

This Part proceeds in three sections. The first describes the various moving parts involved in agency litigation interpretations and outlines the stakes of according deference. The second presents an in-depth discussion of two of the Court's deference regimes—*Skidmore* and *Chevron*—in light of its evolving view of agencies.<sup>8</sup> The third discusses the application of those regimes to agency litigation interpretations.

### A. Understanding Agency Litigation Interpretations

When Congress utilizes an agency to administer its legislation, the agency can interpret that legislation through a variety of mechanisms including rulemaking,<sup>9</sup> adjudication within the agency,<sup>10</sup> and other, informal procedures. This Comment addresses agency litigation interpretations—where an agency advances its interpretation for the first time during litigation, without having previously utilized any of the mechanisms outlined above. While it may seem that an agency should not receive deference for merely filing suit,<sup>11</sup> the Court has explicitly held that “the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.”<sup>12</sup>

When engaged in litigation, there are two moving parts to consider: the agency's posture before the court and the agency's litigation regime. An agency can appear before the court in one of two postures: amicus or litigant. This Comment addresses the

---

<sup>8</sup> For a more detailed analysis of the Court's deference jurisprudence over time, see Jon Connolly, Note, *Alaska Hunters and the D.C. Circuit: A Defense of Flexible Interpretive Rulemaking*, 101 Colum L Rev 155, 161–63 (2001).

<sup>9</sup> See 5 USC § 553.

<sup>10</sup> See 5 USC §§ 554, 556–57.

<sup>11</sup> See *In the Matter of UAL Corp (Pilots' Pension Plan Termination)*, 468 F3d 444, 449–50 (7th Cir 2006).

<sup>12</sup> *SEC v Chenery Corp*, 332 US 194, 201–03 (1947).

split that has developed when an agency appears as a litigant but draws on precedent regarding agencies appearing as amici to inform its solution.

The second variable to consider is the agency's litigation regime. An agency exists in either a single- or dual-agency litigation regime. Single-agency regimes are representative of "most regulatory schemes" in which "rulemaking, enforcement, and adjudicative powers are combined in a single administrative authority."<sup>13</sup> These regimes include both regulatory programs enforced by the courts in the first instance—like the Fair Labor Standards Act, where the Department of Labor first brings enforcement actions in the federal courts<sup>14</sup>—as well as those in which an agency serves as the legislative branch in promulgating regulations, the executive branch in bringing enforcement actions, and the judicial branch in adjudicating those enforcement actions. In single-agency regimes, disputes end up in the federal court system either because the agency (or a regulated party) initiates litigation there or because the regulated party appeals an unfavorable agency adjudication. In dual-agency regimes, Congress generally separates the enforcement and rulemaking powers from the adjudicative powers, "assigning these respective functions to two *different* administrative authorities."<sup>15</sup> The former powers are lodged in the "policy" agency, which is charged with promulgating rules and enforcing the statute. The latter power is lodged in the "adjudicatory" agency. When either the policy agency or a private party seeks to initiate litigation, the proceedings must first be brought before the adjudicatory agency, which is staffed with administrative law judges (ALJs), who generally hear disputes in the first instance. The heads of the adjudicatory agency may review these ALJ decisions; however, the agency heads often summarily adopt the decisions, leading to their treatment as the decision of the agency.<sup>16</sup> Adverse decisions are generally appealable to the federal courts of appeals.

---

<sup>13</sup> *Martin v Occupational Safety and Health Review Commission*, 499 US 144, 151 (1991) (citing the Federal Trade Commission, Securities and Exchange Commission, and Federal Communications Commission as examples of single-agency-regime agencies).

<sup>14</sup> See *Skidmore v Swift & Co*, 323 US 124, 202–03 (1944). See also Daniel J. Gifford, *Adjudication in Independent Tribunals: The Role of an Alternative Agency Structure*, 66 Notre Dame L Rev 965, 972–73 (1991).

<sup>15</sup> *Martin*, 499 US at 151.

<sup>16</sup> See, for example, *Ivanishvili v United States Department of Justice*, 433 F3d 332, 337 (2d Cir 2006). See also Stephen G. Breyer, et al, *Administrative Law and Regulatory Policy: Problems, Texts, and Cases* 257 (Wolters Kluwer 7th ed 2011); Charles H. Koch Jr, *Policymaking by the Administrative Judiciary*, 56 Ala L Rev 693, 701–13 (2005).

There are several reasons why Congress might utilize a dual-agency regime to administer a given statutory scheme. First, if the scheme entails fact-intensive, low-stakes cases, utilizing an agency as a court of first instance avoids clogging the district courts' dockets with matters that do not require the insight of an Article III judge. These benefits of judicial economy become especially potent when the regulatory regime calls for the agency to rapidly implement a "comprehensive system of behavioral controls over numerous subjects" because "the agency must set out detailed behavioral standards in advance."<sup>17</sup> Second, Congress may desire a "greater separation of functions than exists within the traditional 'unitary' agency, which under the Administrative Procedure Act (APA) generally must divide enforcement and adjudication between separate personnel."<sup>18</sup> This may explain why these dual-agency regimes are often utilized in the employment context, where Congress displaces traditional tort remedies with a structured recovery regime (OSHA, LWHCA, and so forth).<sup>19</sup> The split that this Comment addresses developed in the context of single-agency regimes, but the Comment uses precedent from the dual-agency context to inform its solution.

Turning to the stakes, an agency's litigation interpretation could potentially receive *Chevron* deference, *Skidmore* deference, or no deference. If it receives *Chevron* deference, an agency will prevail in the litigation (assuming the interpretation is favorable to its position) as long as its interpretation meets *Chevron*'s prerequisites<sup>20</sup> because *Chevron* instructs courts to accord an agency's interpretation controlling deference.<sup>21</sup> If the agency's interpretation is *Skidmore* eligible, the court will defer if the agency can convince the court that the agency is an expert, that it brought that expertise to bear in reaching its interpretation, and that its interpretation is persuasive.<sup>22</sup> If the agency is not eligible to receive any deference, the court will interpret the statute de novo. As such, to prevail on the merits, the agency must persuade the court just as any other litigant must.

---

<sup>17</sup> Gifford, 66 Notre Dame L Rev at 968 (cited in note 14).

<sup>18</sup> *Martin*, 499 US at 151, citing 5 USC § 554(d).

<sup>19</sup> For an example of a dual-agency regime, see *Martin*, 499 US at 147–48 (explaining the division of powers in OSHA).

<sup>20</sup> That is, the agency is empowered to—and does—act with the force of law, the statute is ambiguous, and the agency's interpretation is reasonable. See Part I.B.2.

<sup>21</sup> See David M. Gossett, Comment, *Chevron, Take Two: Deference to Revised Agency Interpretations of Statutes*, 64 U Chi L Rev 681, 691–92 (1997). See also *William Brothers, Inc v Pate*, 833 F2d 261, 265 (11th Cir 1987).

<sup>22</sup> See Part I.B.1.

B. The *Skidmore* Shuffle, the *Chevron* Two-Step, and the Court's View of Agencies over Time

This Section analyzes how the Court's view toward agencies has developed over time, utilizing its contemporaneous precedent. It begins with the expansion of the administrative state, which began just after the New Deal. During this period, the Court continued to cling tightly to its duty to "say what the law is"<sup>23</sup> while also recognizing that agencies possess useful expertise, an attitude epitomized by *Skidmore v Swift & Co.*<sup>24</sup> Although concerns about entrenchment and agency capture animated congressional activity in the 1960s and 1970s, concerns about judicial activism animated the Court's jurisprudence, culminating in 1984 with *Chevron U.S.A., Inc v Natural Resources Defense Council, Inc*,<sup>25</sup> in which the Court held that certain agency interpretations warranted controlling deference. By this phrase, the Court meant that a court should adopt an interpretation even though it was not the interpretation at which the court would arrive as a matter of first impression. The 1970s and 1980s also saw an expansion of "hard look" review, which resulted in the notice-and-comment process—initially intended to be a quick and efficient way for agencies to promulgate regulations—falling out of favor with agencies as it became unduly onerous. In place of the notice-and-comment process, which more closely resembles legislation, agencies began, with increasing frequency, to use informal methods to advance their interpretations.

In 2001, the Court recognized the danger of according controlling deference to interpretations that have not received formal vetting via the notice-and-comment process. The Court, in *Mead*, held that agencies are entitled to *Chevron* deference only when they have the power to act, and are indeed acting, with the force of law. At the same time, the Court rejuvenated *Skidmore* deference,<sup>26</sup> which was made applicable to those interpretations that, post-*Mead*, no longer qualified for *Chevron* deference.

---

<sup>23</sup> *Marbury v Madison*, 5 US (1 Cranch) 137, 177 (1803).

<sup>24</sup> 323 US 134 (1944).

<sup>25</sup> 467 US 837 (1984).

<sup>26</sup> *Mead* is said to have "rejuvenated" *Skidmore* because, prior to *Mead*, many observers believed that *Skidmore* had fallen by the wayside, giving way to *Chevron*.

1. The *Skidmore* shuffle and expert agencies.

From the rise of the administrative agencies, beginning in the mid- to late nineteenth century through the New Deal, the Court clung tightly to both the common law and its duty to say what the law is, making “clear that agency determinations . . . were to be paid no deference by a reviewing court.”<sup>27</sup> Following the stock market crash of 1929, the New Deal era saw an explosion in the administrative state. This expansion was contentious, to say the least—from the nondelegation doctrine’s one good year<sup>28</sup> to the switch in time that saved nine.<sup>29</sup> This drama culminated in the passage of the Administrative Procedure Act (APA) in 1946. As Professor George Shepherd described,

The more than a decade of political combat that preceded the adoption of the APA was one of the major political struggles in the war between supporters and opponents of the New Deal. Republicans and Southern Democrats sought to crush New Deal programs by means of administrative controls on agencies. Every legislator, both Roosevelt Democrats and conservatives, recognized that a central purpose of the proponents of administrative reform was to constrain liberal New Deal agencies . . . . They understood, and stated repeatedly, that the shape of the administrative law statute that emerged would determine the shape of the policies that the New Deal administrative agencies would implement.<sup>30</sup>

These conflicting views of agencies—as technocratic experts insulated from political pressure in the minds of the Roosevelt Democrats and as antithetical to individual freedom in the minds of the Republicans and the Southern Democrats<sup>31</sup>—shaped the Court’s view of agencies from the late 1930s through the early 1960s.<sup>32</sup> Demonstrative of this view, the Court observed that an agency’s interpretations “constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”<sup>33</sup> The Court thus granted con-

---

<sup>27</sup> Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 Stan L Rev 1189, 1232 (1986).

<sup>28</sup> See *Panama Refining Co v Ryan*, 293 US 388, 392 (1935); *A.L.A. Schechter Poultry Corp v United States*, 295 US 495, 501–02 (1935).

<sup>29</sup> See *West Coast Hotel Co v Parrish*, 300 US 379, 399–400 (1937).

<sup>30</sup> George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw U L Rev 1557, 1560 (1996).

<sup>31</sup> See *id.* at 1560–61.

<sup>32</sup> See Connolly, 101 Colum L Rev at 161 (cited in note 8).

<sup>33</sup> *Skidmore*, 323 US at 139–40.

trolling deference to an agency's interpretation of its own regulation so long as the interpretation was not "plainly erroneous or inconsistent with the regulation."<sup>34</sup>

Consistent with this approach, *Skidmore* instructs courts to accord deference—that is, "considerable and in some cases decisive weight"—to agency interpretations, even if "not controlling upon the courts by reason of their authority."<sup>35</sup> The *Skidmore* Court provided four factors to guide courts in determining how much weight the agency's interpretation warrants: the thoroughness evident in the agency's interpretation, the validity of its reasoning, the interpretation's consistency with earlier and later pronouncements, and "all those factors which give it power to persuade."<sup>36</sup> When *Mead* reinvigorated *Skidmore* sixty years later,<sup>37</sup> it presented four additional factors for courts to consider: the degree of the agency's care, consistency, formality, thoroughness, and logic; the agency's relative "expertness" and specialized experience; the highly detailed nature of the regulatory scheme and the value of uniformity in the agency's understanding of what a national law requires; and any other sources of weight.<sup>38</sup> Based on these factors, a court determines whether the agency's interpretation warrants deference.

This framework emphasizes that *Skidmore* deference does not require a court to adopt the agency's interpretation; rather, a court utilizes *Skidmore*'s factors in determining whether an agency's interpretation merits deference. Accordingly, *Skidmore*'s multifaceted analysis has "produced a spectrum of judi-

---

<sup>34</sup> *Bowles v Seminole Rock & Sand Co*, 325 US 410, 414 (1945).

<sup>35</sup> *Skidmore*, 323 US at 140.

<sup>36</sup> *Id.*

<sup>37</sup> Post-*Chevron*, lower courts concluded that *Chevron* "effectively displaced *Skidmore*." Derek P. Langhauser, *Executive Regulations and Agency Interpretations: Binding Law or Mere Guidance? Developments in Federal Judicial Review*, 29 J Coll & Univ L 1, 14 (2002). *Mead* confirmed that this was not, in fact, the case. *Mead*, 533 US at 234 ("*Chevron* did nothing to eliminate *Skidmore*'s holding that an agency's interpretation may merit some deference whatever its form."). See also Charles H. Koch Jr, *Evaluating Statutory Interpretations*, 4 Admin L & Prac § 11:33 at 11–12 (West 3d ed Supp 2012); Ann Graham, *Searching for Chevron in Muddy Watters: The Roberts Court and Judicial Review of Agency Regulations*, 60 Admin L Rev 229, 241 (2008) ("According to the *Gonzales v. Oregon* opinion, *Skidmore* deference was not displaced by *Chevron*, but remains a third, very limited deference standard."); Thomas J. Fraser, *Interpretive Rules: Can the Amount of Deference Accorded Them Offer Insight into the Procedural Inquiry?*, 90 BU L Rev 1303, 1323 (2010) ("For Breyer, *Chevron* did not displace *Skidmore*, but rather provided an additional reason to give deference to an agency interpretation: Congress delegates authority to agencies to make certain determinations.").

<sup>38</sup> *Mead*, 533 US at 228, 234.

cial responses, from great respect at one end . . . to near indifference at the other.”<sup>39</sup>

*Skidmore* deference is premised on practicality—a recognition that agencies are institutionally superior to the courts with respect to the interpretation of their statutes.<sup>40</sup> This pragmatic conclusion is perhaps unsurprising when one considers both the enormity and exponential growth of the United States Code along with the fact that federal judges are generalists—called upon to interpret the entirety of the Code—whereas agencies are only required to interpret their section of the Code.<sup>41</sup> Not only do agencies deal with a much smaller portion of the Code than courts do, but because an agency administers and enforces its statute, each agency sees how its respective statutory scheme operates on the ground.<sup>42</sup> Additionally, it is easier for agencies to update their understandings of what their respective statutes require, to reflect either changed circumstances or the unforeseen consequences of a given interpretation,<sup>43</sup> because they are not bound by *stare decisis*.<sup>44</sup>

*Mead* reaffirmed this pragmatic interpretation of *Skidmore*: “[T]he well-reasoned views of the agencies implementing a stat-

<sup>39</sup> Id at 228.

<sup>40</sup> See Kristin E. Hickman and Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 Colum L Rev 1235, 1249 (2007) (“[A]s the *Skidmore* Court acknowledged, courts often lack the resources and expertise to understand and evaluate fully the consequences of complex statutory schemes. Sometimes agencies are simply better at assessing and applying alternative statutory interpretations.”); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum L Rev 612, 686 (1996).

<sup>41</sup> See Hickman and Krueger, 107 Colum L Rev at 1256 (cited in note 40).

<sup>42</sup> See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L J 511, 514:

The cases, old and new, that accept administrative interpretations, often refer to the “expertise” of the agencies in question, their intense familiarity with the history and purposes of the legislation at issue, their practical knowledge of what will best effectuate those purposes. In other words, they are more likely than the courts to reach the correct result.

<sup>43</sup> See Cass R. Sunstein, Book Review, *Justice Scalia’s Democratic Formalism*, 107 Yale L J 529, 550–56 (1997); Hickman and Krueger, 107 Colum L Rev at 1249 (cited in note 40); Manning, 96 Colum L Rev at 688–89 (cited in note 40).

<sup>44</sup> Not only can agencies revise their prior interpretations to reflect new circumstances or information but, after *National Cable & Telecommunications Association v Brand X Internet Services*, 545 US 967 (2005), agencies can actually “overrule” prior judicial interpretations of their statutes, assuming that the agency did not receive *Chevron* deference in the first instance. Id at 981. In *Brand X*, the Court held that prior judicial construction of an agency’s ambiguous statute does not prevent the agency from later adopting a *Chevron*-eligible interpretation contrary to the court’s interpretation, to which a court would then have to defer (assuming reasonableness). Id at 982–83. In this context, *Brand X* represents the Court’s acknowledgement of the value of agencies’ flexibility. For further discussion of *Brand X*, see Part III.D.

ute constitute a body of experience and informed judgment . . . and [w]e have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer."<sup>45</sup> Thus, when courts defer under *Skidmore*, they do so on the ground that agencies are—through both their expertise and their experience—institutionally superior to courts.

## 2. The *Chevron* two-step, agency politicization, and congressional delegation.

Beginning in the early 1960s, the perception of agencies shifted dramatically—from disinterested experts to extensions of the very groups they were charged with regulating.<sup>46</sup> Concerns regarding agency capture by interest groups prompted Congress to pass both the Freedom of Information Act<sup>47</sup> and the Government in the Sunshine Act.<sup>48</sup> Courts also responded to these concerns by developing “hard look” review, which instructs courts to take a “hard look” at agency action, “even as to the evidence on technical and specialized matters.”<sup>49</sup>

The early 1980s saw a similarly dramatic shift; the Court recognized that the political pressures to which agencies are subject have positive effects, making agencies *more* responsive to the political process.<sup>50</sup> This view of agencies as politically accountable actors, combined with concerns about the “judicial activism [of] the 1960s and 1970s,”<sup>51</sup> prompted the Court to conclude that agency interpretations are more democratically legitimate and provide greater safeguards against errant interpretations than those of the judiciary.<sup>52</sup>

---

<sup>45</sup> *Mead*, 533 US at 227–28 (alterations in original) (quotation marks omitted).

<sup>46</sup> See Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 Wake Forest L Rev 745, 755 (1996); Connolly, 101 Colum L Rev at 161 (cited in note 8).

<sup>47</sup> Pub L No 89-487, 80 Stat 250 (1966), codified as amended at 5 USC § 552.

<sup>48</sup> Pub L No 94-409, 90 Stat 1241 (1976), codified at 5 USC § 552(b). See also Strauss, 31 Wake Forest L Rev at 754–56 (cited in note 46).

<sup>49</sup> *Ethyl Corp.*, 541 F2d at 35. See also *Motor Vehicle Manufacturers Association of the United States, Inc v State Farm Mutual Automobile Ins Co*, 463 US 29, 33–34 (1983).

<sup>50</sup> See Connolly, 101 Colum L Rev at 161–62 (cited in note 8).

<sup>51</sup> See Jeff Brown, *The Platonic Guardian and the Lawyer's Judge: Contrasting the Judicial Philosophies of Earl Warren and John M. Harlan*, 44 Houston L Rev 253, 254 n 4 (2007) (“[A]ggressive judicial activism in the 1960s and 1970s contributed largely to the erosion of the public's ‘faith in law's autonomy.’”), quoting Richard A. Posner, *The Problems of Jurisprudence* 428–29 (Harvard 1990). See also *Chevron*, 467 US at 865.

<sup>52</sup> See Connolly, 101 Colum L Rev at 161–63 (cited in note 8).

This view of agencies was manifested in *Chevron*, which, unlike *Skidmore*, instructs courts to accord controlling deference to an agency's interpretation if three questions are answered in the affirmative.<sup>53</sup> First, did the agency act with the force of law—that is, did “Congress delegate[] authority to the agency generally to make rules carrying the force of law, and [was] the agency[s] interpretation . . . promulgated in the exercise of that authority?”<sup>54</sup> Second, is the statute ambiguous—that is, did Congress leave a gap in the statute's construction?<sup>55</sup> Third, is the agency's interpretation reasonable?<sup>56</sup>

The rationales underlying *Chevron* map closely onto those underlying *Skidmore*. The Court explicitly recognized agencies' superior political accountability<sup>57</sup> and institutional competency.<sup>58</sup> However, *Chevron* also put forth a new, crucially important rationale in justifying its departure from the judiciary's duty to say what the law is—a congressional delegation to agencies to exercise primary interpretative control over their statutes.<sup>59</sup> That is, *Chevron* provides a “categorical presumption that silence or ambiguity in an agency-administered statute should be understood as an implicit delegation of authority to the agency.”<sup>60</sup>

---

<sup>53</sup> While *Chevron*'s analysis is commonly referred to as the “*Chevron* two-step,” *Mead* effectively added “*Chevron* step zero.” See Cass R. Sunstein, *Chevron Step Zero*, 92 Va L Rev 187, 207–31 (2006). *Chevron* step zero is “the initial inquiry into whether the *Chevron* framework applies at all,” which demands an inquiry as to whether the agency acted with the force of law. *Id.* at 191.

<sup>54</sup> *Mead*, 533 US at 226–27.

<sup>55</sup> *Chevron*, 467 US at 843–44.

<sup>56</sup> *Id.* at 844.

<sup>57</sup> *Id.* at 865–66.

<sup>58</sup> *Id.* at 866. See also David J. Barron and Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 S Ct Rev 201, 213; Richard W. Murphy, *Judicial Deference, Agency Commitment, and Force of Law*, 66 Ohio St L J 1013, 1032–33 (2005).

<sup>59</sup> See *Chevron*, 467 US at 843–44:

If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute. . . . Sometimes the legislative delegation to an agency . . . is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by . . . an agency.

See also Barron and Kagan, 2001 S Ct Rev at 212 (cited in note 58); Murphy, 66 Ohio St L J at 1032 (cited in note 58).

<sup>60</sup> Manning, 96 Colum L Rev at 623 (cited in note 40) (emphasis omitted). See also Cass R. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* 142–44 (Harvard 1990); Henry P. Monaghan, *Marbury and the Administrative State*, 83 Colum L Rev 1, 2–7 (1983).

While several scholars have argued that this delegation is nothing but a legal fiction,<sup>61</sup> “the Court has increasingly converged on the general claim that *Chevron* is best understood to suggest that deference is based on an implicit congressional delegation of law-interpreting power.”<sup>62</sup> As such, while *Chevron*—like *Skidmore*—recognized agencies’ institutional superiority, its grant of controlling deference to agency interpretations is premised on a congressional delegation to an agency, rather than to the courts, of the power to interpret a statute in the first instance.<sup>63</sup>

### C. Applicability of the Court’s Precedent to Litigation Interpretations

Recall that, to be eligible for *Chevron* deference, Congress must delegate to the agency the authority to act with the force of law and the agency’s interpretation must occur in the exercise of that authority.<sup>64</sup> As such, it is unsurprising that *Chevron* generally does not apply to agency litigation interpretations. This was confirmed by *Bowen*, where the Court held, “We have never applied the principle of [*Chevron* and its progeny] to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice.”<sup>65</sup>

However, there are two possible exceptions worth exploring. The first would apply to dual-agency regimes, where Congress

<sup>61</sup> See, for example, Barron and Kagan, 2001 S Ct Rev at 212 (cited in note 58) (“Because Congress so rarely makes its intentions about deference clear, *Chevron* doctrine at most can rely on a fictionalized statement of legislative desire, which in the end must rest on the Court’s view of how best to allocate interpretative authority.”); Scalia, 1989 Duke L J at 517 (cited in note 42):

In the vast majority of cases I expect that Congress . . . didn’t think about the matter at all. If I am correct in that, then any rule adopted in this field represents merely a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate.

<sup>62</sup> Breyer, et al, *Administrative Law* at 290 (cited in note 16).

<sup>63</sup> See Hickman and Krueger, 107 Colum L Rev at 1248–50 (cited in note 40) (“*Mead* limits *Chevron*’s scope to cases in which a court affirmatively finds that Congress implicitly delegated primary interpretive power and that the agency exercised that power. . . . By contrast, *Skidmore* merely reflects a policy of judicial prudence.”); Eric R. Womack, *Into the Third Era of Administrative Law: An Empirical Study of the Supreme Court’s Retreat from Chevron Principles in United States v. Mead*, 107 Dickinson L Rev 289, 297 (2002).

<sup>64</sup> *Mead*, 533 US at 226–27.

<sup>65</sup> *Bowen*, 488 US at 212–14 (“[W]e have declined to give deference to an agency counsel’s interpretation of a statute where the agency itself has articulated no position on the question, on the ground that ‘Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands.’”), quoting *Investment Company Institute v Camp*, 401 US 617, 628 (1971).

expressly authorizes an agency to litigate before another agency. Such interpretations, put forth by the policy agency before the adjudicatory agency, may be *Chevron* eligible before both the adjudicatory agency and the federal courts.<sup>66</sup> The second would apply where Congress explicitly delegates to an agency the power to speak with the force of law in federal court.<sup>67</sup>

Although agency litigation interpretations are generally not *Chevron* eligible, *Mead* presented the possibility that such interpretations could receive *Skidmore* deference when it held that the fact that an agency's interpretation falls outside of *Chevron* does not "place [it] outside the pale of any deference whatever."<sup>68</sup> The Court, however, has not expressly addressed deference to agency statutory interpretations first advanced during litigation either in amicus briefs<sup>69</sup> or in court filings when the agency is a litigant.<sup>70</sup>

---

<sup>66</sup> See *Mead*, 533 US at 229 ("We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication.") (emphasis added). The Court explicitly indicated this possibility, pre-*Mead*, when it held, "[T]he Secretary's litigating position before the Commission is as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a [rule]." *Martin*, 499 US at 152–54, 157, citing *NLRB v Bell Aerospace Co.*, 416 US 267, 292–94 (1974) and *Chenery*, 332 US at 201–03. There are, however, three caveats to *Martin*'s seemingly broad holding. First, the agency's interpretation must be put forth before the adjudicatory agency—asserting it for the first time before the federal court is insufficient. See *Martin*, 499 US at 156–57. Second, most of *Martin* is dicta, as the question presented was which agency should receive deference when they offer conflicting interpretations. See *id.* at 146–48, 159. Third, *Martin* dealt with an interpretation of a regulation rather than of a statute. *Id.* at 150. In the former context, the Court is generally more deferential, eschewing *Chevron*'s force-of-law requirement. Compare *Auer v Robbins*, 519 US 452, 461 (1997) (deferring to an agency's interpretation of its own regulations), with *Mead*, 533 US at 226–27 (limiting *Chevron* deference to agencies' statutory interpretations to instances of a congressional delegation of authority).

<sup>67</sup> See *Edelman v Lynchburg College*, 535 US 106, 114 & n 7 (2002). Two caveats to this exception are necessary, however, insofar as the exception derives from *Edelman*: the agency in the case appeared as amicus, and the Court declined to decide the deference issue. The former is noteworthy because, as discussed in Part III.B, the Court applies a different deference regime (*Auer*) when an agency appears as amicus. See note 70 and accompanying text. The latter is relevant because it renders the language from *Edelman* dicta. See *Edelman*, 535 US at 114 & n 7.

<sup>68</sup> *Mead*, 533 US at 234 ("*Chevron* did nothing to eliminate *Skidmore*'s holding that an agency's interpretation may merit some deference whatever its form.>").

<sup>69</sup> While *Skidmore* involved deferring to an agency's amicus brief, the agency's interpretation was also supported by an "interpretative bulletin." See *Skidmore*, 323 US at 138.

<sup>70</sup> See *Kasten v Saint-Gobain Performance Plastics Corp.*, 131 S Ct 1325, 1335 (2011).

## II. ALL TANGLED UP: DEFERRING TO AGENCY LITIGATION INTERPRETATIONS IN THE CIRCUIT COURTS

Given the seemingly divergent positions of *Bowen*, *Skidmore*, and *Mead*, it is unsurprising that a split has developed among the circuit courts as to whether interpretations first advanced by agencies during litigation in single-agency regimes can receive deference.<sup>71</sup> This Part, which discusses the split, comprises three sections. The first discusses those circuits that expressly grant *Skidmore* deference to such interpretations. The second presents those that have considered and denied deference under *Skidmore*. The third outlines those circuits that have flatly denied deference by explicitly rejecting *Chevron* deference or by implicitly rejecting *Skidmore* deference by omission.

### A. Circuits Doing the *Skidmore* Shuffle

Five circuits—the Second,<sup>72</sup> Sixth,<sup>73</sup> Eleventh,<sup>74</sup> DC,<sup>75</sup> and Federal<sup>76</sup>—accord *Skidmore* deference to agency litigation interpretations. Unfortunately, these courts generally fail to explain why such interpretations warrant *Skidmore* deference. Rather, their analyses follow a two-step process. First, they reject the agency’s argument for *Chevron* deference, noting, for example, that “the *Chevron* framework is inapplicable where, as here, the agency’s interpretation is presented in the course of litiga-

---

<sup>71</sup> Given *Mead*’s substantial shifting of the Court’s deference jurisprudence, this Comment only discusses pre-*Mead* circuit court cases if there are no post-*Mead* data points for that circuit or if the temporal comparison is analytically helpful.

<sup>72</sup> See *SEC v Rosenthal*, 650 F3d 156, 160 (2d Cir 2011); *Lopez v Terrell*, 654 F3d 176, 182 (2d Cir 2011).

<sup>73</sup> See *Rosales-Garcia v Holland*, 322 F3d 386, 403 (6th Cir 2003) (en banc). The Sixth Circuit later held that such interpretations are not *Skidmore* eligible but did not reference *Rosales-Garcia*. For an analysis of this intracircuit split, see notes 93–96 and accompanying text.

<sup>74</sup> See *Tennessee Valley Authority v Whitman*, 336 F3d 1236, 1250 (11th Cir 2003).

<sup>75</sup> See *City of Dania Beach v FAA*, 628 F3d 581, 586 (DC Cir 2010); *Landmark Legal Foundation v IRS*, 267 F3d 1132, 1136 (DC Cir 2001). See also *Brown v United States*, 327 F3d 1198, 1205–06 (DC Cir 2003).

The DC Circuit was even more deferential pre-*Mead*, according *Chevron* deference to such interpretations so long as the agency’s interpretation “represent[ed] the agency’s ‘fair and considered judgment.’” See *Association of Bituminous Contractors, Inc v Apfel*, 156 F3d 1246, 1252 (DC Cir 1998), quoting *Auer v Robbins*, 519 US 452, 462 (1997); *United Seniors Association, Inc v Shalala*, 182 F3d 965, 971 (DC Cir 1999) (“Even if the legal briefs contained the first expression of the agency’s views, under the appropriate circumstances we would still accord them deference.”); *National Wildlife Federation v Browner*, 127 F3d 1126, 1129 (DC Cir 1997). But see *Hill v Gould*, 555 F3d 1003, 1008 (DC Cir 2009).

<sup>76</sup> See *Caribbean Ispat Ltd v United States*, 450 F3d 1336, 1340–41 (Fed Cir 2006).

tion and has not been articulated before in a rule or regulation.”<sup>77</sup> Second, these courts cite *Mead* or its progeny for the proposition that “[w]here *Chevron* deference is not appropriate, we will defer to an agency’s interpretation only to the extent that it has the power to persuade.”<sup>78</sup>

Consistent with that line of reasoning, the Second Circuit held, “While a position adopted in the course of litigation lacks the indicia of expertise, regularity, rigorous consideration, and public scrutiny that justify *Chevron* deference, such an interpretation should still be followed to the extent persuasive.”<sup>79</sup> The Eleventh Circuit was a bit more responsive to the private litigant’s argument, noting that “most courts would not completely ignore an agency’s interpretation of its organic statutes—even if that interpretation is advanced in the course of litigation rather than a rulemaking or agency adjudication.”<sup>80</sup> The Sixth Circuit was more dismissive, simply concluding that “the government’s position is entitled to respect pursuant to *Skidmore*.”<sup>81</sup>

These courts then go on to determine whether to adopt the agency’s interpretation by analyzing some, but generally not all,<sup>82</sup> of the factors provided by *Mead* and *Skidmore*.<sup>83</sup> The cases are evenly split as to whether the court ultimately adopts the agency’s interpretation.<sup>84</sup>

---

<sup>77</sup> *Rosenthal*, 650 F3d at 160 (quotation marks omitted).

<sup>78</sup> *Lopez*, 654 F3d at 183 (quotation marks omitted), citing *Christensen v Harris County*, 529 US 576, 587 (2000). See also *Caribbean Ispat*, 450 F3d at 1340–41 (requiring the agency’s position to be persuasive in order to accord deference); *Rosales–Garcia*, 322 F3d at 403; *Landmark Legal*, 267 F3d at 1136.

<sup>79</sup> *Rosenthal*, 650 F3d at 160 (quotation marks omitted).

<sup>80</sup> *Whitman*, 336 F3d at 1250.

<sup>81</sup> *Rosales–Garcia*, 322 F3d at 403 n 22.

<sup>82</sup> Once a court has determined that an agency’s interpretation is *Skidmore* eligible (that is, once a court decides to analyze whether to defer by using the *Skidmore* framework), it often analyzes some—but not all—of the factors provided in *Skidmore* and *Mead* in deciding whether to actually defer. See, for example, *Christensen*, 529 US at 587.

<sup>83</sup> See Part I.B.

<sup>84</sup> For cases adopting the agency’s interpretation, see *Lopez*, 654 F3d at 183; *Landmark Legal*, 267 F3d at 1135–37. For cases rejecting the agency interpretation, see *Rosenthal*, 650 F3d at 160–61; *Rosales–Garcia*, 322 F3d at 403 n 22; *Caribbean Ispat*, 450 F3d at 1340–41. Interestingly, both circuits with multiple data points adopted the agency’s interpretation in one case and rejected it in another, indicating that the application of *Skidmore*’s factors is an objective, fact-specific exercise rather than a categorical presumption one way or the other.

## B. Circuits Rejecting the *Skidmore* Shuffle

Two circuits, the Sixth<sup>85</sup> and Ninth,<sup>86</sup> expressly deny *Skidmore* deference to agency litigation interpretations, and the Seventh does so implicitly.<sup>87</sup> The Ninth Circuit, responding to the agency's argument for *Chevron* deference, held that "[w]e afford *Skidmore* deference to official agency interpretations without the force of law."<sup>88</sup> This emphasis on an "official agency interpretation" comes not from the Court's opinion in *Mead*, but from Justice Antonin Scalia's dissent.<sup>89</sup> Nevertheless, the Ninth Circuit seized on the unofficial nature of the interpretation and held, "We do not afford *Chevron* or *Skidmore* deference to litigation positions unmoored from any official agency interpretation."<sup>90</sup> Further justifying its position, the court quoted *Bowen*: "Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands."<sup>91</sup> As such, because the agency's interpretation "appear[ed] to be purely a litigation position, developed during the course of the present case," the court "owe[d] the interpretation no deference."<sup>92</sup>

The Sixth Circuit observed, citing *Bowen*, that the "dissent does not defend [the agency's] reasoning, and it does not defend the government's litigating position in this case."<sup>93</sup> The court then refused to accord deference because "*Skidmore* deference does not apply to a line of reasoning that an agency could have, but has not yet, adopted."<sup>94</sup> What is interesting about this holding is that the court failed to distinguish—or even cite—its prior en banc decision, in which it held that agency litigation interpretations were eligible for *Skidmore* deference.<sup>95</sup> While this disregard for precedent could be explained on the ground that the judges in the latter case joined the court after the earli-

---

<sup>85</sup> See *OfficeMax, Inc v United States*, 428 F3d 583, 597–98 (6th Cir 2005).

<sup>86</sup> See *Alaska v Federal Subsistence Board*, 544 F3d 1089, 1095 (9th Cir 2008).

<sup>87</sup> See *In the Matter of UAL Corp (Pilots' Pension Plan Termination)*, 468 F3d 444, 449–50 (7th Cir 2006).

<sup>88</sup> *Alaska*, 544 F3d at 1095 (emphasis added), citing *Mead*, 533 US at 218, 228, 234.

<sup>89</sup> See *Mead*, 533 US at 257 (Scalia dissenting) ("Any resolution of the ambiguity by the administering agency that is authoritative—that represents the official position of the agency—must be accepted by the courts if it is reasonable.").

<sup>90</sup> *Alaska*, 544 F3d at 1095.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *OfficeMax*, 428 F3d at 598.

<sup>94</sup> *Id.*

<sup>95</sup> See notes 73, 81 and accompanying text.

er, en banc case,<sup>96</sup> or that the en banc case involved a different agency and much of the deference discussion occurred in footnotes,<sup>97</sup> there remains an intracircuit split within the Sixth Circuit.

The Seventh Circuit, while similar to the circuits in Part II.C insofar as it does not explicitly reject *Skidmore* deference, is placed with the circuits that do deny such deference for two reasons. First, unlike the circuits in Part II.C, the Seventh Circuit does cite *Skidmore* in the course of denying deference.<sup>98</sup> It does so, however, in the context of deference to the agency's opinion letters and does not explicitly discuss *Skidmore* when analyzing deference to the agency's litigation interpretation. Second, the court uses sweeping language in denying deference. After declaring that "[a]ll the [agency] ha[s] done is commence litigation,"<sup>99</sup> the court holds that no deference is warranted because "[a]s the plaintiff, a federal agency bears the same burden of persuasion as any other litigant."<sup>100</sup> The combination of these two factors suggests that the Seventh Circuit does, or at least would, flatly deny *Skidmore* deference to such interpretations.

### C. Circuits Rejecting the *Skidmore* Shuffle by Omission

Two circuits, the Third<sup>101</sup> and Fifth,<sup>102</sup> flatly deny deference to agency litigation interpretations, but do so without discussing, or even citing, *Skidmore*. The Ninth Circuit, in addition to explicitly rejecting *Skidmore's* applicability in this context—as discussed below<sup>103</sup>—has also flatly denied deference without mention of

---

<sup>96</sup> Two of the three judges in the latter case—Judges John Rogers and Jeffery Sutton—were appointed after the en banc case, and the third—Judge Gerald Rosen—was a district court judge sitting by designation.

<sup>97</sup> While applying different regimes to different agencies would not have been unreasonable at the time these cases were decided, the Supreme Court has since indicated that the same deference regimes should be applied to all agencies by eliminating the most prominent special deference regime (*National Muffler* deference, which applied to the IRS). See *National Muffler Dealers Association, Inc v United States*, 440 US 472 (1979), overruled by *Mayo Foundation for Medical Education and Research v United States*, 131 S Ct 704, 713 (2011).

<sup>98</sup> *UAL*, 468 F3d at 450–51.

<sup>99</sup> *Id.* (“[The agency’s] position is no more entitled to control than is the view of the Antitrust Division when the Department of Justice files suit under the Sherman Act.”).

<sup>100</sup> *Id.* at 450.

<sup>101</sup> See *Yusupov v Attorney General of the United States*, 518 F3d 185, 200 n 23 (3d Cir 2008); *In re Kaiser Aluminum Corp.*, 456 F3d 328, 345 (3d Cir 2006); *Connecticut General Life Ins Co v Commissioner of Internal Revenue*, 177 F3d 136, 143–44 (3d Cir 1999).

<sup>102</sup> See *R&W Technical Services Ltd v Commodity Futures Trading Commission*, 205 F3d 165, 171 (5th Cir 2000).

<sup>103</sup> See Part III.B.

*Skidmore*.<sup>104</sup> Before discussing these cases further, it is worth noting that their persuasive value is likely limited. While the denial of any deference could indicate a rejection of both *Chevron* and *Skidmore*, the absence of any discussion of *Skidmore* could, instead, indicate that the agency just failed to argue for *Skidmore* deference in the alternative<sup>105</sup> and that, as a result, the court declined to address it.<sup>106</sup> As such, one must be careful not to extrapolate too much from a court's denial of deference when it does not explicitly reject *Skidmore*.

These courts put forth three general rationales for denying deference. The first, suggested by the Third, Fifth, and Ninth Circuits, emphasizes that a "prior interpretation"<sup>107</sup> is required to receive deference—that is, these courts cite *Bowen* for the proposition that, "[t]o merit deference, an agency's interpretation . . . must be supported by regulations, rulings, or administrative practice."<sup>108</sup> Requiring "something more" than an agency's litigation interpretation to defer may be a reflection of the dichotomy drawn by the APA between substantive rules, which must be

---

<sup>104</sup> See *Independent Living Center of Southern California, Inc v Maxwell-Jolly*, 572 F3d 644, 654 (9th Cir 2009), vacd and remd 132 S Ct 1204, 1207–08 (2012); *United States v Able Time, Inc*, 545 F3d 824, 836 (9th Cir 2008); *Portland General Electric Co v Bonneville Power Administration*, 501 F3d 1009, 1032 (9th Cir 2007); *Defenders of Wildlife v Norton*, 258 F3d 1136, 1145–46 n 11 (9th Cir 2001).

<sup>105</sup> See, for example, Brief for Respondent, *Samadov v Gonzalez*, No 06-3160, \*19–37 (3d Cir filed Nov 13, 2008) (available on Westlaw at 2008 WL 5737676); Appellee's Brief, *Connecticut General Life Ins Co v Commissioner of Internal Revenue*, No 97-7612, \*11–45 (3d Cir filed June 1, 1998) (available on Westlaw at 1998 WL 34079433).

<sup>106</sup> While an agency's failure to argue for *Skidmore* deference could be ascribed to mere oversight, this possibility is unlikely. Rather, the decision to omit an argument for deference under *Skidmore* is likely to be a strategic decision, as an agency may be willing to risk receiving no deference in exchange for the possibility of receiving *Chevron* deference by arguing only for it. This decision is rational considering that some courts view *Skidmore* as representing merely the power to persuade, which is likely the same "deference" accorded to any litigant. See, for example, *Christensen*, 529 US at 587. See also *Kasten v Saint-Gobain Performance Plastics Corp*, 131 S Ct 1325, 1340 & n 6 (2011) (Scalia dissenting):

In my view [*Skidmore*] is incoherent, both linguistically and practically. To defer is to subordinate one's own judgment to another's. If one has been persuaded by another, so that one's judgment accords with the other's, there is no room for deferral—only for agreement. Speaking of "*Skidmore* deference" to a persuasive agency position does nothing but confuse.

But see Richard W. Murphy, A "New" Counter-Marbury: *Reconciling Skidmore Deference and Agency Interpretive Freedom*, 56 Admin L Rev 1, 46 (2004). See also *Whitman*, 336 F3d at 1250.

<sup>107</sup> *R&W Technical*, 205 F3d at 171.

<sup>108</sup> *Kaiser Aluminum*, 456 F3d at 345. See also *Defenders of Wildlife*, 258 F3d at 1145–46 n 11; *Connecticut General*, 177 F3d at 143–44.

enacted via the notice-and-comment process,<sup>109</sup> and interpretive rules and policy statements, which need not be.<sup>110</sup> To clarify, because the distinction between substantive and interpretive rules is somewhat unclear, these courts may view the agency interpretations as substantive, rather than interpretive, and thus require “something more” to warrant deference.

The second rationale, advanced by the Ninth Circuit, draws a distinction between regulatory and statutory interpretations. That is, while “at one time, the Supreme Court suggested that a legal opinion expressed by an agency in the course of litigation may be entitled to deference,”<sup>111</sup> the Court “subsequently limited such deference to an agency’s interpretation of ambiguities in its own regulations.”<sup>112</sup> As such, the Ninth Circuit held, “Whatever the merits of [agency counsel’s] views, we owe them no deference in this case.”<sup>113</sup>

The third rationale reflects a structural concern: the Third and Ninth Circuits have called into question the objectivity of interpretations by agency counsel due to counsel’s role as an advocate. As one court noted, the fact that agency “counsel advances a particular statutory interpretation during the course of trial does not confer upon that interpretation any special legitimacy.”<sup>114</sup> The Ninth Circuit twice indicated that no deference is warranted to an “interpretation of [a] statute now advocated by the [agency’s] counsel—newly minted, it seems, for this lawsuit, and inconsistent with prior agency actions.”<sup>115</sup> Similarly, the Third Circuit held that it “will not defer to an agency counsel’s interpretation of a statute where the agency itself has articulated no position on the question.”<sup>116</sup>

\* \* \*

As Table 1 shows, four circuits have accorded *Skidmore* deference, two have explicitly rejected *Skidmore*’s applicability, two have denied deference without explicitly rejecting *Skidmore*’s ap-

---

<sup>109</sup> See 5 USC §§ 701–06. See also Scalia, 1989 Duke L J at 514 (cited in note 42).

<sup>110</sup> See 5 USC § 553.

<sup>111</sup> *Independent Living*, 572 F3d at 654.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *City of Kansas City v Department of Housing & Urban Development*, 923 F2d 188, 192 (DC Cir 1991).

<sup>115</sup> *Defenders of Wildlife*, 258 F3d at 1145–46 n 11; *Portland General Electric*, 501 F3d at 1027 n 15.

<sup>116</sup> *Kaiser Aluminum*, 456 F3d at 345 (quotation marks omitted).

plicability, and one—the Sixth—has equivocated, according *Skidmore* deference in one case and explicitly rejecting it in another.

TABLE 1. DEFERENCE TO AGENCIES AS LITIGANTS IN SINGLE-AGENCY REGIMES

Circuit	Deference Regime
First	—
Second	<i>Skidmore</i>
Third	No Deference
Fourth	—
Fifth	No Deference
Sixth	Equivocates
Seventh	Rejects <i>Skidmore</i>
Eighth	—
Ninth	Rejects <i>Skidmore</i>
Tenth	—
Eleventh	<i>Skidmore</i>
DC	<i>Skidmore</i>
Federal	<i>Skidmore</i>

### III. FEELING THE RHYTHM: THE *SKIDMORE* SHUFFLE REDUX

While the state of the law across the various circuits seems to be in disarray, this Comment proposes a simple solution: agency litigation interpretations should be treated as eligible to receive *Skidmore* deference.

In support of that conclusion, this Part proceeds in four sections. After observing that all courts flatly denying deference do so in reliance on *Bowen*, Part III.A explains why this reliance is misplaced. While *Bowen* precludes *Chevron* deference to agency litigation interpretations, it provides no insight as to whether such interpretations are *Skidmore* eligible. Part III.B analyzes the deference accorded to agency litigation interpretations when the agency appears as amicus, rather than a litigant.

Finding that all circuits to address the issue accord these amicus interpretations *Skidmore* deference, Part III.C turns to the deference accorded to agencies in dual-agency regimes in an effort to determine whether an agency's posture before the court should bear on its interpretation's *Skidmore* eligibility. Observing, just as in the agency-as-amicus context, that every circuit to

address the issue accords deference in dual-agency regimes—either under *Skidmore* or under *Chevron*—Part III.C also presents the solution that agency litigation interpretations should be eligible to receive *Skidmore* deference. This solution follows from a relatively simple premise: given the uniformly accorded deference in both the agency-as-amicus and dual-agency contexts, there must be a principled reason to depart from that general rule. This Comment concludes that no such reason exists because the concerns associated with litigation interpretations generally do not militate more strongly against deference to agency litigants in single-agency regimes than to agency amici or agency litigants in dual-agency regimes. Part III.D utilizes *National Cable & Telecommunications Association v Brand X Internet Services*<sup>117</sup> to support this conclusion on pragmatic grounds.

#### A. *Bowen's* Importance and Irrelevance

The circuits that deny deference to agency litigation interpretations have one thing in common: all cite *Bowen* for the proposition that “something more” than a litigation interpretation is required for deference.<sup>118</sup> But this reliance on *Bowen* to flatly deny *Skidmore* deference is misplaced for two reasons. First, *Bowen* discusses *Chevron*, rather than *Skidmore*, deference, which is relevant because *Bowen's* complete denial of deference is premised on an absence of congressional delegation to agency counsel—something germane to *Chevron* but not *Skidmore*. Second, *Bowen* enunciates an antiquated view of the Court's agency-counsel jurisprudence.

Before analyzing these reasons further, it is helpful to consider *Bowen's* full statement, in context:

We have never applied the principle of *those cases* to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice. To the contrary, we have declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question, *on the ground that Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands*.<sup>119</sup>

---

<sup>117</sup> 545 US 967 (2005).

<sup>118</sup> See Parts II.B and II.C.

<sup>119</sup> *Bowen*, 488 US at 212 (emphasis added) (quotation marks omitted).

1. *Bowen: Chevron versus Skidmore.*

*Bowen's* discussion of “those cases” refers to a string cite to *Chevron* and its progeny, a string cite that immediately precedes the quote.<sup>120</sup> This is important when one considers when *Bowen* was decided in relation to the rest of the Court’s deference jurisprudence. *Bowen* was decided in 1988, four years after *Chevron* and thirteen years before *Mead*. At that point, it was generally believed that *Chevron* had displaced *Skidmore*—that is, the bar and the academy were of the opinion, post-*Chevron*, that there was only one deference regime and that regime was *Chevron*.<sup>121</sup>

With that in mind, it is easier to see that *Bowen* was not a watershed case. Rather, *Bowen* merely prophesied what *Mead* later made explicit—agency litigation interpretations cannot receive *Chevron* deference unless Congress has delegated to the agency the power to speak with the force of law during litigation.<sup>122</sup> While Congress could—in theory—delegate such power, the Court has yet to find an instance where Congress has done so sufficiently clearly.<sup>123</sup> Thus, while reliance on *Bowen* to deny *Chevron* deference is certainly appropriate, a *Bowen* citation—or quotation—without more, does not provide an independent justification for withholding *Skidmore* deference.

To understand why, consider the emphasized part of the *Bowen* quotation. Recall that while both *Skidmore* and *Chevron* are premised on similar pragmatic considerations—that is, agencies’ institutional superiority vis-à-vis the judiciary in terms of expertise, experience, and political accountability<sup>124</sup>—*Chevron* put forth one rationale that is notably absent from *Skidmore*. Specifically, *Chevron* relied on a congressional delegation to the agency, rather than to the courts, of the power to interpret a statute in the first instance.<sup>125</sup>

---

<sup>120</sup> Id at 212, citing *Young v Community Nutrition Institute*, 476 US 974, 980–81 (1986); *Chemical Manufacturers Association v Natural Resources Defense Council, Inc.*, 470 US 116, 125 (1985); *Chevron*, 467 US at 842–44.

<sup>121</sup> See note 37.

<sup>122</sup> *Mead*, 533 US at 226–27.

<sup>123</sup> The closest the Court has come to finding such a delegation was in *Edelman v Lynchburg College*, 535 US 106 (2002). However, because the Court “so clearly agree[d] with the [agency],” it held that “there is no occasion to defer and no point in asking what kind of deference, or how much.” Id at 114–15 & n 8.

<sup>124</sup> See Part I.B.

<sup>125</sup> See *Mead*, 533 US at 227–28. See also Bradley Lipton, Note, *Accountability, Deference, and the Skidmore Doctrine*, 119 Yale L J 2096, 2128 (2010), citing *Martin v Occupational Safety and Health Review Commission*, 499 US 144, 157 (1991).

While several commentators argue that *Chevron's* delegation rationale is a legal fiction,<sup>126</sup> when considered in light of the nondelegation doctrine, it helps to explain *Mead's* “*Chevron* step zero.”<sup>127</sup> That is, *Mead* fits doctrinally—as a piece of the nondelegation doctrine—if nondelegation is understood as mandating that, in order to legitimately exercise the power of one branch, a different branch must do so in the course of exercising *its own* power.<sup>128</sup> Just as an agency can exercise the legislative power—through rulemaking, for example—in the process of exercising its executive power,<sup>129</sup> so too can it exercise the judicial power in interpreting its statute(s). However, to remain within the bounds of the nondelegation doctrine, an agency’s exercise of the judicial power must occur concurrently with its exercise of the executive power. Thus, Congress must grant the agency the power to execute the law, and the agency’s interpretation must be set forth in the course of doing so.

Therefore, while *Bowen's* suggestion that “Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands”<sup>130</sup> is both true and germane to the *Chevron* inquiry, it is inapposite in the *Skidmore* context. As such, because a *Bowen* citation, without more, does nothing more than restate *Chevron's* premise (as clarified by *Mead*), it does not provide independent support for flatly denying *Skidmore* deference to agency litigation interpretations.

## 2. *Bowen* versus *Auer*: The Court’s changed view of agency counsel.

*Bowen's* emphasis on the fact that agency counsel—rather than “the administrative official”<sup>131</sup>—presented the agency’s interpretation provides another reason to question its continued

---

<sup>126</sup> See note 61 and accompanying text.

<sup>127</sup> See *Mead*, 533 US at 226–27.

<sup>128</sup> See *Mistretta v United States*, 488 US 361, 416–17 (1989) (Scalia dissenting):

The major [restriction that deters excessive delegation], it seems to me, is that the power to make law cannot be exercised by anyone other than Congress, except in conjunction with the lawful exercise of executive or judicial power. The whole theory of lawful congressional “delegation” is . . . that a certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action.

See also Hickman and Krueger, 107 Colum L Rev at 1245–50 (cited in note 40).

<sup>129</sup> See *Whitman v American Trucking Associations, Inc.*, 531 US 457, 474–76 (2001).

<sup>130</sup> *Bowen*, 488 US at 212, quoting *Investment Company Institute v Camp*, 401 US 617, 628 (1971).

<sup>131</sup> *Bowen*, 488 US at 212.

vitality. A brief excursion into the Court's view of agency counsel over time will illustrate why.

When *Bowen* was decided in 1988, the view it expressed about agency counsel—as incapable of speaking for the agency—was consistent with the Court's view of agency counsel over the preceding thirty years. However, in the subsequent twenty years, the Court's view of agency counsel has shifted dramatically, as demonstrated by *Auer v Robbins*<sup>132</sup> and its progeny.<sup>133</sup>

Beginning with *Auer* in 1997, the Court has adopted the exact opposite view of agency counsel from the view that it professed from the 1960s through *Bowen*.<sup>134</sup> In *Auer*, the Court, for the first time, extended the *Bowles v Seminole Rock & Sand Co*<sup>135</sup> deference regime—which grants agency regulatory interpretations “controlling weight unless [they are] plainly erroneous or inconsistent with the regulation”<sup>136</sup>—to agency regulatory interpretations first put forth in an amicus brief.<sup>137</sup> Such deference was warranted because, as the Court subsequently confirmed in *Chase Bank* and *Talk America*, it views agency counsel as an integral part of an agency, capable and competent to speak

---

<sup>132</sup> 519 US 452 (1997).

<sup>133</sup> See *Talk America, Inc v Michigan Bell Telephone Co*, 131 S Ct 2254, 2263–64 (2011); *Chase Bank USA, NA v McCoy*, 131 S Ct 871, 880–81 (2011). It is important to note that *Auer* and its progeny do not directly answer the question posed by this Comment for two reasons. First, they deal with agency regulatory interpretations rather than statutory interpretations; to warrant deference, the regulation being interpreted must be *Chevron* eligible. See *Ohio Valley Environmental Coalition v Aracoma Coal Co*, 556 F3d 177, 197 n 12 (4th Cir 2009). Second, the agencies in *Auer* and its progeny appeared as amici, rather than litigants. See, for example, *Chase Bank*, 131 S Ct at 873. That being said, *Auer* and its progeny do, nevertheless, provide useful insight into the Court's current view of agency counsel.

<sup>134</sup> See *Bowen*, 488 US at 212 (refusing to defer “to an agency counsel's interpretation . . . on the ground that Congress has delegated to the administrative official and not to appellate counsel th[at] responsibility”) (quotation marks omitted), citing *Camp*, 401 US at 627–28:

“For the courts to substitute their or counsel's discretion for that of the [agency] is incompatible with the orderly functioning of the process of judicial review.” Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands. It is the administrative official and not appellate counsel who possesses the expertise that can enlighten and rationalize the search for the meaning and intent of Congress.

(alteration in original) (citation omitted).

<sup>135</sup> 325 US 410 (1945).

<sup>136</sup> *Id* at 414.

<sup>137</sup> See *Auer*, 519 US at 462 (“Petitioners complain that the [agency's] interpretation comes to us in the form of a legal brief; but that does not, in the circumstances of this case, make it unworthy of deference.”).

on the agency's behalf.<sup>138</sup> Further, the Court has specifically indicated that an agency's utilization of outside counsel—from the Department of Justice or the Office of the Solicitor General, for example—does not alter this analysis.<sup>139</sup> Thus, because *Bowen's* second justification for denying deference—that agency counsel, rather than an agency official, put forth the agency's interpretation—no longer accurately represents the Court's view of agency counsel, it too fails to provide an independent ground on which to deny *Skidmore* deference.

### 3. After *Bowen*, what now?

Concluding that *Bowen* does not provide an independent basis to flatly deny *Skidmore* deference does not, however, answer the question presented by this Comment; rather, it merely demonstrates that the Court has not foreclosed the possibility that agency litigation interpretations could receive *Skidmore* deference.

There are two general concerns that militate against deferring to agency litigation interpretations. First, the litigation context might not be conducive to the exercise of an agency's expertise—that is, the interpretation proffered by agency counsel may either not represent the views of the agency,<sup>140</sup> or “have been developed hastily, or under special pressure, or without an adequate opportunity for presentation of conflicting views.”<sup>141</sup> Second, a litigating agency might have a “self-serving or pecuniary interest in advancing a particular interpretation.”<sup>142</sup> During litigation, agencies might interpret their statute(s) in an attempt to

---

<sup>138</sup> See *Talk America*, 131 S Ct at 2257 n 1 (“The Solicitor General, joined by counsel for the [agency], represents that the [ ] brief for the United States filed in this Court reflects the [agency's] considered interpretation. . . . We thus refer to the Government's arguments in these cases as those of the agency.”), citing *Chase Bank*, 131 S Ct at 878; *Long Island Care at Home, Ltd v Coke*, 551 US 158, 171 (2007) (“[W]e have accepted [a litigation] interpretation as the agency's own, even if the agency set those views forth in a legal brief.”).

<sup>139</sup> See, for example, *Williamson v Mazda Motor of America, Inc*, 131 S Ct 1131, 1137 (2011) (“[In *Geier*] we gave weight to the Solicitor General's view in light of the fact that it ‘embodie[d] the Secretary's policy judgment.’”) (second alteration in original), quoting *Geier v American Honda Motor Co*, 529 US 861, 881 (2000). Courts do, however, seem to insist that the agency at least sign on to the Government's brief to accord deference. See, for example, *Adair v United States*, 497 F3d 1244, 1252 (Fed Cir 2007).

<sup>140</sup> See *Federal Labor Relations Authority v U.S. Department of the Treasury, Financial Management Service*, 884 F2d 1446, 1455 (DC Cir 1989).

<sup>141</sup> *Id.*

<sup>142</sup> *Amalgamated Sugar Co LLC v Vilsack*, 563 F3d 822, 834 (9th Cir 2009). See also *Hertzberg v Dignity Partners, Inc*, 191 F3d 1076, 1082 (9th Cir 1999).

expand the scope of their power<sup>143</sup> or to advance their financial interests<sup>144</sup> by adopting an interpretation that is not necessarily in harmony with the text of the statute or congressional intent.

The following two sections analyze the circuit courts' deference jurisprudence in two similar settings—namely, when the agency appears as amicus and when the agency is part of a dual-agency regime—to determine how, if at all, these concerns affect the circuit courts' willingness to accord deference.

#### B. Agencies Appearing as Amici: The *Skidmore* Shuffle Revisited

All six circuits that have addressed the issue—the Second,<sup>145</sup> Third,<sup>146</sup> Fourth,<sup>147</sup> Seventh,<sup>148</sup> Ninth,<sup>149</sup> and Tenth<sup>150</sup>—accord *Skidmore* deference to agency litigation interpretations when the agency appears as amicus. Both the Second and Fourth Circuits note, “[T]he fact that the [agency’s] interpretation of the statutory language at issue comes to us in the form of a legal brief does not, in the circumstances of this case, make it unworthy of deference.”<sup>151</sup> The Second and Third Circuits agree that the fact that an agency has changed its interpretation is not a sufficient reason to deny *Skidmore* deference.<sup>152</sup> The Seventh Circuit,

<sup>143</sup> See *Amalgamated Sugar*, 563 F3d at 834 (declining deference because the court was “troubled that the USDA may have acted more out of concern for administrative convenience and self-interest [in advancing a particular interpretation], rather than with an interest in administering the Act according to statutory requirements and Congressional intent”).

<sup>144</sup> See *Director, Office of Workers’ Compensation Programs v General Dynamics Corp.*, 980 F2d 74, 79 (1st Cir 1992).

<sup>145</sup> See *Serricchio v Wachovia Securities LLC*, 658 F3d 169, 178 (2d Cir 2011); *Connecticut Office of Protection and Advocacy for Persons with Disabilities v Hartford Board of Education*, 464 F3d 229, 239 (2d Cir 2006); *In re New Times Securities Services, Inc.*, 371 F3d 68, 82–83 (2d Cir 2004); *Community Health Center v Wilson-Coker*, 311 F3d 132, 137–38 (2d Cir 2002).

<sup>146</sup> See *Horn v Thoratec Corp.*, 376 F3d 163, 178–79 (3d Cir 2004).

<sup>147</sup> See *Ball v Memphis Bar-B-Q Co.*, 228 F3d 360, 365 (4th Cir 2000). See also *Jones v American Postal Workers Union, National*, 192 F3d 417, 426–27 (4th Cir 1999); *Molinary v Powell Mountain Coal Co.*, 125 F3d 231, 235–36 (4th Cir 1997).

<sup>148</sup> See *Matz v Household International Tax Reduction Investment Plan*, 388 F3d 570, 573 (7th Cir 2004).

<sup>149</sup> See *Christopher v SmithKline Beecham Corp.*, 635 F3d 383, 395 & n 7, 400 (9th Cir 2011), *aff’d* 132 S Ct 2156, 2165–70 (2012).

<sup>150</sup> See *Been v O.K. Industries, Inc.*, 495 F3d 1217, 1227 (10th Cir 2007); *Shikles v Sprint/United Management Co.*, 426 F3d 1304, 1315–16 (10th Cir 2005).

<sup>151</sup> *Molinary*, 125 F3d at 235 n 4 (quotation marks omitted); *Hartford Board of Education*, 464 F3d at 239.

<sup>152</sup> See *Chao v Russell P. Le Frois Builder, Inc.*, 291 F3d 219, 224–25, 228 (2d Cir 2002); *Horn*, 376 F3d at 179.

on remand in light of *Mead*,<sup>153</sup> having before it an amicus brief filed by the agency twenty years prior before a different circuit,<sup>154</sup> held “[a] position stated in an amicus curiae brief has seemed to us a good example of what the Court [in *Mead*] had in mind.”<sup>155</sup>

TABLE 2. AGENCY AS AMICUS VERSUS AGENCY AS LITIGANT

Circuit	Agency as Amicus	Single-Agency Litigants
First	—	—
Second	<i>Skidmore</i>	<i>Skidmore</i>
Third	<i>Skidmore</i>	No Deference
Fourth	<i>Skidmore</i>	—
Fifth	—	No Deference
Sixth	—	Equivocates
Seventh	<i>Skidmore</i>	Rejects <i>Skidmore</i>
Eighth	—	—
Ninth	<i>Skidmore</i>	Rejects <i>Skidmore</i>
Tenth	<i>Skidmore</i>	—
Eleventh	—	<i>Skidmore</i>
DC	—	<i>Skidmore</i>
Federal	—	<i>Skidmore</i>

As Table 2 shows, there are three circuits that accord *Skidmore* deference when the agency appears as amicus, but not when the agency appears as a litigant. Given the circuits’ uniformity in granting *Skidmore* deference when the agency appears as amicus, the relevant question can be narrowed to whether the agency’s posture as a litigant, as opposed to as amicus, marginally intensifies the aforementioned concerns such

<sup>153</sup> See *Household International Tax Reduction Investment Plan v Matz*, 533 US 925, 925 (2001) (granting certiorari, vacating the Seventh Circuit’s prior judgment, and remanding “for further consideration in light of [*Mead*]”).

<sup>154</sup> In the case that was vacated, the Seventh Circuit had granted *Chevron* deference to the amicus brief. See *Matz*, 388 F3d at 573 (“[T]he court in *Weil* deferred to the [agency’s] position on the basis of the *Chevron* principle. So did we the first time this protracted litigation came before us.”) (citation omitted). In deciding not to request that the agency file a new, more current amicus brief, it seems the court just did not want to bother the agency, given that it was not a party to the litigation. *Id.* at 578:

We have considered whether we should invite the [agency] to submit an amicus curiae brief advising us of its current view . . . . We have decided not to do so because of the great age of the case. Obviously should the [agency] decide on its own to revisit the issue, we would give its views significant weight.

<sup>155</sup> *Id.* at 573–74, citing *Keys v Barnhart*, 347 F3d 990, 993–94 (7th Cir 2003).

that the ability of an agency's litigation interpretation to receive *Skidmore* deference should turn on its posture before the court. If so, an agency's posture may be relevant to whether its litigation interpretation receives *Skidmore* deference. If not, the same rationale underlying the grant of *Skidmore* deference to agency amici applies when an agency appears as a litigant.

There are two reasons to believe that an agency's posture before a court will not affect the likelihood—at the margin—that the interpretation proffered by agency counsel will diverge from the agency's preferred interpretation. First, as discussed above, the Court currently views agency counsel as competent to speak on behalf of the agency, as emphasized in *Auer*'s and its progeny's references to "legal brief[s],"<sup>156</sup> rather than amicus briefs. That is, by referring in all three relevant cases to "legal briefs," instead of "amicus briefs," the Court indicated that its faith in agency counsel's ability to speak competently for the agency is not limited to cases where the agency appears as amicus.<sup>157</sup> Second, regardless of whether the agency appears as amicus or a litigant, it is the agency's counsel that puts forth the agency's interpretation. To the extent that the concern that agency counsel will advance a divergent interpretation is premised on a principal-agent problem—that agency counsel rather than the agency head puts forth the interpretation—the agency's posture is irrelevant to the deference question. The same principal-agent problem exists regardless of the agency's posture before the court, as agency counsel speaks for the agency in both postures.

The concern about agency self-interest, however, cuts both ways. On the one hand, any interpretation of an agency's statute(s) may alter the scope of its power or jurisdiction, regardless of the agency's posture before the court or even whether the agency appears at all.<sup>158</sup> Take, for example, *Wyeth v Levine*<sup>159</sup> and

---

<sup>156</sup> See *Auer*, 519 US at 462 ("[T]hat the Secretary's interpretation comes to us in the form of a legal brief . . . does not, in the circumstances of this case, make it unworthy of deference."); *Chase Bank*, 131 S Ct at 873 ("This Court defers to an agency's interpretation . . . advanced in a legal brief, unless that interpretation is plainly erroneous or inconsistent.") (quotation marks omitted); *Talk America*, 131 S Ct at 2261 ("As we reaffirmed earlier this Term, we defer to an agency's interpretation . . . even in a legal brief.").

<sup>157</sup> The Court could have easily indicated its distrust for agency counsel as litigant by referring only to amicus briefs or by qualifying "legal briefs" with "where the agency appears as amicus."

<sup>158</sup> While amicus participation is, strictly speaking, voluntary, agencies frequently submit amicus briefs and, when their participation is requested by the court, agencies almost always reply. See Lisa McElroy, "CVSG's in Plain English," SCOTUSblog (Feb 10, 2010), online at <http://www.scotusblog.com/2010/02/last-week-in-plain-english-2> (visited Mar 3, 2013) (observing that "although the Court merely 'invites' the [Solicitor General] to

*Pliva, Inc v Mensing*,<sup>160</sup> two cases that addressed whether the Federal Food, Drug, and Cosmetic Act<sup>161</sup> (FDCA) preempted state law failure-to-warn claims against drug manufacturers.<sup>162</sup> While the FDA was not a party to either of these cases, it appeared as amicus in both, and its reason for doing so is obvious: the long-term implications for each of these decisions are enormous in terms of the FDA's power and importance. To wit, if the FDCA is preemptory, then the FDA is the sole source of pharmaceutical labeling requirements. This illustrates that the moral hazard attendant to the fact that the court is determining the scope of an agency's power is equally present regardless of whether the agency appears as a litigant or amicus. As such, an agency's litigation posture should be irrelevant to the deference question because concerns about agency self-interest militate equally against deference under either posture.

On the other hand, that an agency's interpretation has the potential of being outcome determinative when it appears as a litigant<sup>163</sup>—that is, if the agency's interpretation cuts against its litigation position, it will likely lose—suggests that concerns about an agency's self-interest influencing its interpretation do militate more strongly against deference when the agency appears as a litigant.

### C. Dual-Agency Regimes: The *Skidmore* Shuffle and the *Chevron* Two-Step

In an effort to examine how circuit courts' deference decisions account for the concern that an agency's self-interest might taint the agency's litigation interpretations, this Section analyzes the deference accorded to agencies in dual-agency regimes.<sup>164</sup>

---

file a brief, the [Solicitor General] treats it as a command"); Neal Devins and Saikrishna B. Prakash, *Reverse Advisory Opinions*, 80 U Chi L Rev \*23–27 (forthcoming 2013), online at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2186738](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2186738) (visited Mar 3, 2013).

<sup>159</sup> 129 S Ct 1187 (2009).

<sup>160</sup> 131 S Ct 2567 (2011).

<sup>161</sup> Pub L No 75-717, ch 675, 52 Stat 1040 (1938), codified as amended at 21 USC § 301 et seq.

<sup>162</sup> *Levine* addressed brand-name manufacturers; *Mensing* addressed generic manufacturers. *Levine*, 129 S Ct at 1191; *Mensing*, 131 S Ct at 2573.

<sup>163</sup> See note 21 and accompanying text.

<sup>164</sup> Most of these cases involved litigation commenced by the Director of the Office of Workers' Compensation Programs (OWCP), interpreting the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) before an ALJ, whose opinion is then reviewed by the Benefits Review Board (BRB).

Post-*Mead*,<sup>165</sup> a circuit split has developed regarding deference to such interpretations. However, unlike the single-agency regimes, the split is not between *Skidmore* and no deference, but between *Skidmore* and *Chevron* deference. This Section first presents the circuit split. Relying on *Mead* and the fact that a circuit split has developed in the first place, this Section then proposes a solution to this split. It concludes by explaining the relevance of this dual-agency jurisprudence to the single-agency regimes that are this Comment's focus.

### 1. The dual-agency regime circuit split.

Post-*Mead*, three circuits—the Ninth,<sup>166</sup> DC,<sup>167</sup> and Federal<sup>168</sup>—accord *Chevron* deference to litigation interpretations put forth by agencies in dual-agency regimes. In doing so, the Ninth Circuit relies on its pre-*Mead* precedent, concluding that *Mead* does not alter its analysis.<sup>169</sup> In according *Chevron* deference, the DC Circuit consistently cites pre-*Mead* Supreme Court precedent, which held, in regard to deference to agency regulatory interpretations in dual-agency regimes, that “the Secretary’s litigating position before the Commission is as much an exercise of delegated lawmaking powers as is the Secretary’s promulgation of a [rule].”<sup>170</sup> The DC Circuit emphasized that this deference was warranted because the agency is “exercis[ing its] delegated lawmaking powers.”<sup>171</sup> The Federal Circuit concludes that an agency’s litigation “interpretations are [ ] entitled to deference

---

<sup>165</sup> This Comment only addresses post-*Mead* interpretations because *Mead* effected a substantial shift in the Court’s deference jurisprudence, confirming that *Chevron* did not displace *Skidmore*. As such, courts are no longer faced with a dichotomous decision between controlling *Chevron* deference or no deference. Now, there are three choices: controlling *Chevron* deference, deference to the extent that an agency is an expert and brought that expertise to bear in proffering a persuasive interpretation (*Skidmore* deference), or no deference.

<sup>166</sup> See *Price v Stevedoring Services of America, Inc.*, 627 F3d 1145, 1148 (9th Cir 2010). See also *Wheaton v Golden Gate Bridge, Highway & Transportation District*, 559 F3d 979, 982 (9th Cir 2009).

<sup>167</sup> See *Secretary of Labor v National Cement Co of California*, 573 F3d 788, 793 (DC Cir 2009); *Secretary of Labor v Twentymile Coal Co*, 411 F3d 256, 261 (DC Cir 2005); *Secretary of Labor v Excel Mining, LLC*, 334 F3d 1, 5–6 (DC Cir 2003).

<sup>168</sup> See *Groff v United States*, 493 F3d 1343, 1349–50 (Fed Cir 2007).

<sup>169</sup> See, for example, *Price*, 627 F3d at 1148 & n 2; *Wheaton*, 559 F3d at 982. But see *Price*, 627 F3d at 1150–51 (O’Scannlain specially concurring) (“[T]he proposition that *Chevron* deference extends to agency statutory interpretations advanced in litigation conflicts with [*Mead*] . . . [T]he time is ripe for us to revisit our circuit’s law governing the deference we owe the [agency]’s litigating positions.”).

<sup>170</sup> *Martin*, 499 US at 157.

<sup>171</sup> *Twentymile*, 411 F3d at 261, quoting *Martin*, 499 US at 157. See also *National Cement*, 573 F3d at 792.

under *Chevron*” because it found an express congressional intent “for the [agency’s] statutory interpretations announced through adjudication to have the force of law.”<sup>172</sup>

Six circuits—the Second,<sup>173</sup> Third,<sup>174</sup> Fourth,<sup>175</sup> Fifth,<sup>176</sup> Sixth,<sup>177</sup> and Eleventh<sup>178</sup>—all accord *Skidmore* deference to litigation interpretations advanced by agencies in dual-agency regimes. The Eleventh Circuit, after observing the split between the Fifth and Ninth Circuits, concluded that, post-*Mead*, deference should be accorded under *Skidmore*, not *Chevron*.<sup>179</sup> It supported its conclusion by citing Supreme Court precedent, which held, “[T]he Director’s reasonable interpretation of the Act [first put forth in litigation] brings at least some added persuasive force to our conclusion.”<sup>180</sup>

These courts generally follow the same analysis as the courts that accord *Skidmore* deference to agencies in single-agency regimes. First, they generally cite either *Bowen* or *Mead* to support the holding that the agency’s interpretation is not eligible for *Chevron* deference.<sup>181</sup> These courts then turn to *Mead* in concluding that “*Skidmore*-level deference may be afforded [to] interpretations . . . [first put forth] in litigation.”<sup>182</sup> Similar to the single-agency context,<sup>183</sup> the cases are almost evenly split as to whether they actually adopt the agency’s interpretation.

<sup>172</sup> *Groff*, 493 F3d at 1350.

<sup>173</sup> See *Chao*, 291 F3d at 227–28.

<sup>174</sup> See *George Harms Construction Co v Chao*, 371 F3d 156, 161–62 (3d Cir 2004).

<sup>175</sup> See *Wheeler v Newport News Shipbuilding and Dry Dock Co*, 637 F3d 280, 290 (4th Cir 2011).

<sup>176</sup> See *Grant v Director, Office of Worker’s Compensation Programs*, 502 F3d 361, 363 (5th Cir 2007); *Pool Co v Cooper*, 274 F3d 173, 177–78 n 3 (5th Cir 2001). But see *Holcim (U.S.), Inc v Reed*, 291 Fed Appx 647, 652 (5th Cir 2008). However, *Holcim* can be distinguished on the ground that “the OWCP [did] not even argue in its brief for *Skidmore*-level deference.” *Id* at 652.

<sup>177</sup> See *Chao v Occupational Safety and Health Review Commission*, 540 F3d 519, 523 (6th Cir 2008).

<sup>178</sup> See *Boroski v DynCorp International*, 662 F3d 1197, 1203 (11th Cir 2011), vacd and remd on other grounds, 132 S Ct 2449 (2012); *The Pittsburgh & Midway Coal Mining Co v Director, Office of Workers’ Compensation Programs*, 508 F3d 975, 983–84 n 6 (11th Cir 2007); *Wilderness Watch v Mainella*, 375 F3d 1085, 1091 n 7 (11th Cir 2004). But see *Bianco v Georgia Pacific Corp*, 304 F3d 1053, 1056 n 3 (11th Cir 2002). However, *Bianco* can be distinguished based on its close temporal proximity to *Mead* and the Eleventh Circuit’s consistent granting of *Skidmore* deference post-*Bianco*.

<sup>179</sup> *Boroski*, 662 F3d at 1204 n 6.

<sup>180</sup> *Id* (first alteration in original), quoting *Metropolitan Stevedore Co v Rambo*, 521 US 121, 136 (1997). See also *Pool*, 274 F3d at 177 n 3.

<sup>181</sup> See, for example, *Wheeler*, 637 F3d at 289–90; *Grant*, 502 F3d at 363.

<sup>182</sup> *Grant*, 502 F3d at 363. See also *Wheeler*, 637 F3d at 289–90; *Boroski*, 662 F3d at 1204; *Chao*, 540 F3d at 525–27.

<sup>183</sup> See Part II.A.

TABLE 3. SUMMARY OF DEFERENCE REGIMES BY AGENCY LITIGATION POSTURE

Circuit	Agency as Amicus	Single-Agency Litigants	Dual-Agency Litigants
First	—	—	—
Second	<i>Skidmore</i>	<i>Skidmore</i>	<i>Skidmore</i>
Third	<i>Skidmore</i>	No Deference	<i>Skidmore</i>
Fourth	<i>Skidmore</i>	—	<i>Skidmore</i>
Fifth	—	No Deference	<i>Skidmore</i>
Sixth	—	Equivocates	<i>Skidmore</i>
Seventh	<i>Skidmore</i>	Rejects <i>Skidmore</i>	—
Eighth	—	—	—
Ninth	<i>Skidmore</i>	Rejects <i>Skidmore</i>	<i>Chevron</i>
Tenth	<i>Skidmore</i>	—	—
Eleventh	—	<i>Skidmore</i>	<i>Skidmore</i>
DC	—	<i>Skidmore</i>	<i>Chevron</i>
Federal	—	<i>Skidmore</i>	<i>Chevron</i>

As Table 3 shows, similar to the agency-as-amicus context, there is no split as to whether the courts accord deference to agencies in dual-agency regimes. However, unlike the agency-as-amicus context, the courts disagree as to which deference regime—*Skidmore* or *Chevron*—applies.

## 2. Resolution of the dual-agency split.

There are three reasons why deference under *Skidmore*, rather than under *Chevron*, is appropriate in the dual-agency regime. First, those circuits that continue to afford *Chevron* deference do so in reliance on *Martin*, which is pre-*Mead* Supreme Court precedent.<sup>184</sup> However, that precedent is inapposite both because that case dealt with agency regulatory—rather than statutory—interpretations<sup>185</sup> and because its oft-cited language is mostly dicta. That *Martin* was analyzing regulatory interpretations is relevant because the Court utilizes different regimes regarding deference to regulatory and statutory interpretations: regulatory interpretations receive deference regardless of the

<sup>184</sup> See note 66.

<sup>185</sup> See *Martin*, 499 US at 146–47.

formality of the interpretation,<sup>186</sup> whereas statutory interpretations receive deference only when the agency is acting with the force of law.<sup>187</sup> This distinction is relevant because, to act with the force of law, Congress must delegate to an agency the power to do so. In this context, it would mean that Congress would have to expressly authorize an agency to speak with the force of law during litigation—something, as discussed below, courts are unlikely to find post-*Mead*. Given that there is no formality requirement in the regulatory interpretation context, there is no such impediment to receiving deference. Additionally, the question presented in *Martin* was not whether deference should be granted, but which agency in a dual-agency regime should receive deference when the agencies put forth conflicting interpretations.<sup>188</sup>

Second, although *Mead* indicated that “express congressional authorization[ ] to engage in the process of rulemaking or *adjudication*”<sup>189</sup> is indicative of a *Chevron*-eligible delegation, the Court was likely referring to adjudications under the APA.<sup>190</sup> APA adjudications are those within a single agency, rather than before a *different* agency.<sup>191</sup> This distinction is relevant because litigating before another agency is substantially similar to litigating in federal court insofar as the agency must present its case before an impartial, third-party adjudicator.<sup>192</sup> The Eleventh Circuit, and Judge Diarmuid O’Scannlain specially concurring in the Ninth Circuit, maintained—consistent with this conclusion—that extending *Chevron* deference to agency statutory interpretations advanced during litigation is inconsistent with *Mead*’s holding.<sup>193</sup> Even if *Mead*’s “*Chevron* step zero” is not dispositive on this issue, Congress’s ambiguous intent, as evidenced by the split that has developed, combined with the Court’s sug-

---

<sup>186</sup> See *Coeur Alaska, Inc v Southeast Alaska Conservation Council*, 557 US 261, 274–75 (2009).

<sup>187</sup> See *Mead*, 533 US at 226–27.

<sup>188</sup> See *Martin*, 499 US at 146–48.

<sup>189</sup> *Mead*, 533 US at 229 (emphasis added).

<sup>190</sup> See 5 USC §§ 554, 556–57.

<sup>191</sup> See *In the Matter of UAL Corp (Pilots’ Pension Plan Termination)*, 468 F3d 444, 450 (7th Cir 2006) (“Review under the APA differs substantially from the sort of position that an agency must assume when, like any other litigant, it must demonstrate a preponderance of the evidence in order to prevail.”), citing *Director, Office of Workers’ Compensation Programs, Department of Labor v Greenwich Collieries*, 512 US 267 (1994). See also Breyer, et al, *Administrative Law* at 303 (cited in note 16).

<sup>192</sup> See Gifford, 66 Notre Dame L Rev at 971–73 (cited in note 19).

<sup>193</sup> See *Boroski*, 662 F3d at 1204 n 7, citing *Price*, 627 F3d at 1150–51 (O’Scannlain specially concurring).

gestion that *Skidmore* applies to these interpretations,<sup>194</sup> weighs in favor of according *Skidmore* deference.

Finally, to the extent that courts are worried about agency self-interest unduly influencing an agency's litigation interpretation,<sup>195</sup> they should be wary of granting *Chevron* deference to such interpretations because "[i]f courts deferred [under *Chevron*] to litigation positions, agencies would almost never lose."<sup>196</sup> Thus, because *Skidmore* (unlike *Chevron*) does not require granting an agency's interpretation controlling deference, it leaves courts free to consider the process through which an agency reached its interpretation.

### 3. Relevance of dual-agency jurisprudence to single-agency deference.

The question remaining after analyzing the circuit courts' deference jurisprudence as it is applied to agencies appearing as amici is whether an agency litigant's potential self-interest provides sufficient marginal concern to support having the deference decision turn on an agency's posture before the court.<sup>197</sup> That every circuit court to address the issue accords some level of deference when an agency is in a dual-agency regime emphatically suggests that the answer is no.<sup>198</sup> This is because the concerns that militate against deferring to an agency's litigation position—that agency counsel may proffer an interpretation different from the agency's interpretation or that the agency's interpretation may be tainted by self-interest—apply with the same force regardless of the agency's litigation regime.

Just as *Bowen's* delegation focus is inapposite to *Skidmore's* applicability, so too is an agency's litigation regime. That is, while an agency's regime may be germane to *Chevron* eligibility, by indicating a congressional delegation to the policy agency to act with the force of law when litigating before the adjudicatory agency, it is irrelevant in the *Skidmore* context—*Skidmore* is not premised on delegation. Further, there is nothing to say that

---

<sup>194</sup> See *Metropolitan Stevedore*, 521 US at 136.

<sup>195</sup> See notes 142–44, 159–63 and accompanying text.

<sup>196</sup> Gossett, Comment, 64 U Chi L Rev at 691–92 (cited in note 21). See also *William Brothers, Inc v Pate*, 833 F3d 261, 265 (11th Cir 1987) ("Common sense tells us that if [*Chevron*] deference were always to be given to the [agency's] litigating position, then [private parties] would be effectively denied the right to appellate review.").

<sup>197</sup> See Part III.B.

<sup>198</sup> The resolution of the dual-agency circuit split is not material to this analysis, because regardless of whether the split is resolved in favor of *Skidmore* or *Chevron*, the courts still accord some level of deference.

Congress could not delegate such authority to an agency in a single-agency regime. That is to say, Congress could confer upon an agency the power to speak with the force of law when appearing first before a federal court.<sup>199</sup>

Rather, the only difference between the two regimes is the initial forum in which the agency presents its interpretation. In a dual-agency regime, an agency appears first before a neutral Article I arbitrator before litigating in front of an Article III judge, whereas an agency in a single-agency regime begins litigation in front of an Article III judge. The concern that an agency's interpretation may reflect agency self-interest—rather than its expertise or experience in ascertaining congressional intent—applies with equal force regardless of whether an agency is in a single-agency or dual-agency regime. The same analysis applies with respect to the concerns that the litigation context may not be conducive to the agency's utilization of its expertise or that agency counsel may proffer an interpretation divergent from the agency's. These concerns militate equally against deference in both single- and dual-agency regimes. Thus, given that all circuit courts accord at least *Skidmore* deference to agency interpretations advanced for the first time in litigation when the agency appears as amicus or is in a dual-agency regime, interpretations by agency litigants in single-agency regimes should also be eligible to receive *Skidmore* deference.

#### D. *Brand X*: Why Deferring Makes Sense Pragmatically

*Brand X* provides a judicial-economy argument in favor of at least analyzing whether a given litigation interpretation warrants deference. In *Brand X*, the Court held that a court's prior construction of an agency's ambiguous statute does not prevent the agency from later adopting a contrary, *Chevron*-eligible interpretation.<sup>200</sup> This allows an agency—through notice-and-comment rulemaking, for example—to overrule a court's prior, contrary interpretation. Because of the possibility that any judicial interpretation could be subsequently overridden by the agency, requiring a court to at least consider deference under *Skidmore* promotes judicial and administrative efficiency, and rule-of-law values in the predictability and stability of law.

---

<sup>199</sup> See *Edelman*, 535 US at 114 & n 7.

<sup>200</sup> *Brand X*, 545 US at 982–83 (“Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation . . . displaces a conflicting agency construction.”).

*Brand X* presents a question: Why would the Court allow an agency to override its prior interpretation of a statute? The most logical answer is that *Brand X* serves as a response to Justice Scalia's concern that, by removing an "indeterminately large number of statutes" from *Chevron's* domain, *Mead* "will lead to the ossification of large portions of our statutory law."<sup>201</sup> This concern arises because, outside of the *Chevron* context, "[o]nce the court has spoken, it becomes *unlawful* for the agency to take a contradictory position; the statute now *says* what the court has prescribed."<sup>202</sup> That is, once a court interprets a statute, that interpretation is the law and only subsequent courts have the power to alter that interpretation; both private parties and agencies are bound to the interpretation.<sup>203</sup> By holding that "[o]nly a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency [*Chevron*-eligible] construction,"<sup>204</sup> *Brand X* ameliorated Justice Scalia's ossification concern by enabling agencies to subsequently revise the interpretation of their statutes, even in the face of prior contrary judicial precedent.

Unfortunately, in solving one problem, *Brand X* created another: "Even when the agency itself is party to the case in which the Court construes a statute, the agency will be able to disregard that construction and seek *Chevron* deference for its contrary construction the next time around."<sup>205</sup> That is, a court's prior construction does not prevent an agency from later adopting a contrary, *Chevron*-eligible interpretation to which later courts will have to defer,<sup>206</sup> notwithstanding the prior judicial construction. This, in effect, enables an agency to render a court's prior construction moot. On the one hand, one might ar-

---

<sup>201</sup> *Mead*, 533 US at 247 (Scalia dissenting).

<sup>202</sup> *Id.*

<sup>203</sup> In the *Chevron* context, on the other hand, this is not a concern because a second-in-time court will defer to an agency's different interpretation. This is because when a court defers under *Chevron*, it does not construe the statute for itself but adopts the agency's construction. As such, if the agency's construction changes over time, subsequent courts can defer to that changed interpretation while comporting with *stare decisis*. To wit, the first-in-time holding could be viewed as an interpretation not of the statute but of a decision to defer, holding, essentially, that the correct interpretation is the one that the agency puts forth.

<sup>204</sup> *Brand X*, 545 US at 982–83.

<sup>205</sup> *Id.* at 1017 (Scalia dissenting).

<sup>206</sup> Subsequent deference to a *Chevron*-eligible interpretation is not strictly mandatory. That is, the interpretation must still successfully pass the *Chevron* two-step. See Part I.B.2.

gue that was the very purpose of *Brand X*. On the other hand, this ability to “overrule” prior judicial interpretations presents serious judicial efficiency and rule-of-law concerns, especially in light of *Skidmore* and the fact that agencies often put forth their interpretations during the first-in-time litigation.

To better understand this interplay between *Brand X* and *Skidmore*, consider three propositions. First, an agency’s litigation interpretation is likely to be the same as the interpretation that it would adopt absent litigation, and *Skidmore* provides workable proxies for a court to determine if it is not.<sup>207</sup> This proposition serves to ameliorate concerns that agency self-interest might taint the interpretation and suggests there is sufficient judicial review to serve as a backstop in case it does. Second, the statute being interpreted is ambiguous. This proposition underscores the fact that the given statute is subject to more than one reasonable interpretation, emphasizing the usefulness of the agency’s interpretation, and that *Brand X* will, in fact, enable the agency to bypass any prior judicial construction.<sup>208</sup> Third, when faced with a court’s contrary construction, agencies will promulgate a *Chevron*-eligible interpretation—and effectively reverse the court’s interpretation—at roughly the same rate that they reimplement rules rejected as arbitrary and capricious under hard-look review: 80 percent of the time.<sup>209</sup> This proposition suggests that if a court ignores an agency’s litigation interpretation, even if it is the first time the agency has proffered its interpretation, then there is a substantial likelihood that the agency will effectively reverse the court’s decision by promulgat-

---

<sup>207</sup> *Skidmore* instructs courts to ask two interrelated questions in determining whether to defer: (1) is the agency an expert and (2) did the agency bring that expertise to bear? For a more detailed exposition of this proposition, see Ronald J. Krotoszynski Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 Admin L Rev 735, 750–56 (2002).

The following factors serve as proxies for an agency’s relative expertise: (1) its specialized experience and the broader investigations and information available to it, (2) the value of uniformity in its understanding of what a national law requires, and (3) a highly detailed regulatory regime. See Part I.B.1. Expertise asks whether the agency is institutionally superior to the courts. If not, there is no reason to defer, as courts are generally considered to be experts in statutory interpretation. The validity of an agency’s reasoning and its degree of care serve as proxies for an agency’s thoroughness. This demonstrates that expertise is a necessary, but not sufficient, condition for deference—there is no reason to defer to an expert agency if that agency failed to utilize its expertise in addressing the question at hand. If, after analyzing these factors, a court is convinced that the agency is an expert and brought that expertise to bear, it should defer.

<sup>208</sup> See *Brand X*, 545 US at 982–83.

<sup>209</sup> See William S. Jordan III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals through Informal Rulemaking?*, 94 Nw U L Rev 393, 440 & n 277 (2000).

ing a *Chevron*-eligible interpretation. If any of these propositions hold, even if only part of the time, according *Skidmore* deference to agency litigation interpretations when faced with an ambiguous statute promotes judicial efficiency as well as rule-of-law values.

Regarding judicial efficiency, given that an agency can render an earlier judicial interpretation moot, it is more efficient for the court to defer to the agency's interpretation in the first instance, rather than adopting a contrary interpretation to which it will later have to defer.<sup>210</sup> If nothing else, it would be prudent for a court to at least *consider* whether deference to the particular interpretation in question is warranted. Additionally, to the extent that analyzing whether to defer under *Skidmore* discourages a court from adopting a contrary interpretation lightly, deference also increases administrative efficiency insofar as it enables the agency to avoid the costly and time-consuming notice-and-comment process that would become necessary for it to adopt its preferred interpretation.

Regarding rule-of-law values, *Brand X* presents major predictability and stability concerns. Although an agency is generally free to alter its statutory interpretations over time,<sup>211</sup> when a court declines to adopt an agency's interpretation, the regulated parties are left in a difficult position as they face substantial uncertainty. On the one hand, because a court's interpretation is the law, they must comply with that interpretation. On the other hand, the regulated party knows that the agency both prefers an alternate interpretation and has the power to make that interpretation controlling on the courts. This leaves regulated parties with a Hobson's choice, uncertain how to structure their future behavior, at least until a court decides whether it will adopt an agency's later-in-time *Chevron*-eligible interpretation. "[U]ncertainty has been regarded as incompatible with the Rule of Law,"<sup>212</sup> and the law's instability—leaving regulated parties uncertain as to how to shape their behavior to comply with the law—certainly leads to inefficiency. Additionally, there is a very real possibility that similarly situated parties will be treated dif-

---

<sup>210</sup> See Kathryn A. Watts, *Adapting to Administrative Law's Erie Doctrine*, 101 Nw U L Rev 997, 1002 (2007) (concluding, post-*Brand X*, that "courts should be required to give due consideration to relevant agency views even if the views do not control the courts").

<sup>211</sup> See *Long Island Care at Home*, 551 US at 171 ("[T]he change in interpretation alone presents no separate ground for disregarding the [agency's] present interpretation."). See also *Horn*, 376 F3d at 179, citing *Motor Vehicle Manufacturers Association of the United States, Inc v State Farm Mutual Automobile Ins*, 463 US 29, 42 (1983).

<sup>212</sup> Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U Chi L Rev 1175, 1179 (1989).

ferently. Such a scenario would arise in the event that the agency holds a consistent view of how the statute should be interpreted over time, the first-in-time court rejects this interpretation, and the agency subsequently adopts its initial interpretation in a *Chevron*-eligible form. This would result in the party who litigated before the first-in-time court being treated differently than subsequent parties, against whom the statute is enforced after the agency adopts its formal interpretation. This not implausible scenario conflicts with notions of fairness, which require that similarly situated parties be treated similarly.<sup>213</sup>

This is not to say that a court should always adopt an agency's litigation interpretation. Rather, the unique institutional relationship that *Brand X* creates between the courts and agencies suggests that courts would be wise to at least consider an agency's views on an ambiguous statute instead of flatly denying deference—even if those views are first put forth during the course of litigation.

#### CONCLUSION

The Supreme Court held that some informal agency interpretations are eligible to receive *Skidmore* deference; however, it has not indicated whether an interpretation, first advanced in litigation by an agency in a single-agency regime, is a qualifying informal interpretation. This Comment argues that it is for two reasons.

First, every court that flatly denies deference does so on the ground that *Bowen* precludes deference. However, *Bowen* is inapposite to *Skidmore* deference for two reasons. Its reliance on a lack of congressional delegation to agency counsel, while germane to a *Chevron* deference inquiry, is irrelevant to the question of whether an interpretation can receive *Skidmore* deference. Additionally, *Bowen*'s distrust of agency counsel does not reflect the Court's current view of agency counsel as capable of speaking on an agency's behalf—as demonstrated by *Auer* and its progeny.

Second, all of the circuit courts accord at least *Skidmore* deference to agency litigation interpretations when the agency either appears as amicus or is part of a dual-agency regime. As such, the relevant inquiry is not whether the concerns about agency litigation interpretations apply to agency litigants in single-agency regimes, but whether those concerns matter more, at the margin, such that deference to an agency's interpretation

---

<sup>213</sup> See *id.* at 1178.

should turn on its posture or regime. The concerns about an agency counsel proffering a divergent interpretation apply with equal force in all three scenarios<sup>214</sup> because, in all three, agency counsel presents the agency's interpretation to the court. Additionally, the concern that agency self-interest will unduly influence its interpretation militates against deference regardless of the agency's regime. The only difference between single- and dual-agency regimes that is germane to the *Skidmore* inquiry is whether the agency begins litigation before an Article I or Article III court. As such, agency interpretations first advanced in litigation should be eligible to receive *Skidmore* deference regardless of an agency's litigation regime or its posture before the court.

---

<sup>214</sup> That is, agency litigants in a single-agency regime, agency litigants in a dual-agency regime, and agencies as amici.