Deference Lotteries

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Jud Mathews*

When should courts defer to agency interpretations of statutes, and what measure of deference should agencies receive? Administrative law recognizes two main deference doctrines—the generous Chevron standard and the stingier Skidmore standard—but Supreme Court case law has not offered a bright-line rule for when each standard applies.

Many observers have concluded that courts' deference practice is an unpredictable muddle. This Article argues that it is really a lottery, in the sense the term is used in expected utility theory. Agencies cannot predict which deference standard a court will apply or with what effect, but they have a sense for how probable the different possible outcomes are. This Article presents empirical support for the "deference lottery" hypothesis, and then conducts a simple game theory analysis to understand how judicial review bears on agency behavior in statutory interpretation under deference lottery conditions.

The Article concludes that, in fact, the deference lottery can function as a flexible tool for managing agency behavior. The lottery can curb agency opportunism by imposing a risk that agencies' interpretations of statutes will face elevated scrutiny rather than Chevron deference. This analysis offers a new perspective on deference doctrine, and in particular on the Supreme Court's Mead decision, which sets out the standard for when Chevron applies. Mead's vagueness, widely derived as a bug, may in fact be a feature. Still, the deference lottery can backfire badly if Skidmore is applied too stringently, as the Article shows.

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I. Introduction

When should courts defer to agency interpretations of statutes and what measure of deference should agencies receive? Administrative law recognizes two main deference doctrines—the generous Chevron\(^1\) standard and the stingier Skidmore\(^2\) standard\(^3\)—but Supreme Court case law has not offered a bright-line rule for which standard applies.\(^4\) Further, even when a court purports to operate within a given deference regime, it is not clear that the standards are applied consistently from case to case.\(^5\) Empirical work has confirmed that courts often fail to apply deference standards in circumstances where their own doctrine indicates they should.\(^6\) Moreover, courts continue to apply other deference doctrines in special contexts, driving

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3. Under Chevron, courts are to accept any “permissible” (meaning reasonable) agency construction of an ambiguous statute. Chevron, 467 U.S. at 843. When Skidmore applies, a court gives deference on a sliding scale: an agency’s interpretation will be credited in proportion to its “power to persuade.” Skidmore, 323 U.S. at 140. The standards are discussed in more detail below. See infra Part II.
4. United States v. Mead Corp., 533 U.S. 218, 229–31 (2001) (holding that Chevron deference is due when it is “apparent” that “Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law,” but declining to set out conclusive criteria for establishing the requisite congressional intent).
the predictability of judicial practice further down.\textsuperscript{7} Taken together, all this means that agencies seeking to defend statutory interpretations in court can anticipate with confidence neither what standard will be applied nor how the court will apply it.

The confused state of deference doctrine has attracted its share of critical commentary.\textsuperscript{8} The Supreme Court's 2001 \textit{United States v. Mead Corp.}\textsuperscript{9} decision, which declined to mark off the border between \textit{Chevron}'s domain and \textit{Skidmore}'s with a bright-line rule, has been a focal point for criticism.\textsuperscript{10} To be sure, a lack of clarity over the scope of deference an agency interpretation will receive—an unpredictability in the law generally—imposes costs.\textsuperscript{11} Here, the costs of an unpredictable deference

\begin{itemize}
\item \textsuperscript{7} Although \textit{Chevron} and \textit{Skidmore} are the deference standards most often employed, the Court has articulated a number of other deference standards for use in specialized contexts. See Eskridge & Baer, \textit{supra} note 6, at 1090 (identifying five distinct modes of deference to agency interpretations, including \textit{Seminole Rock}, \textit{Curtiss-Wright}, and Beth Israel). Work on deference doctrines in the lower federal courts has revealed a similarly variegated picture. See Jason J. Czarnecki, \textit{An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the Chevron Doctrine in Environmental Law}, 79 U. COLO. L. REV. 767, 770–71 (2008) (observing that “there remains much confusion and conflation in the circuits over how to apply the \textit{Chevron} doctrine”).

\item \textsuperscript{8} See, e.g., ADRIAN VERMEULE, \textbf{JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION} 215–16 (2006) (characterizing \textit{Mead} as “close to disastrous on institutional grounds” owing to the “cognitive and institutional load that the increasing complexity of \textit{Mead}'s legal regime imposes on lower courts, litigants, and other actors”); David J. Barron & Elena Kagan, \textit{Chevron's Nondelegation Doctrine}, 2001 SUP. CT. REV. 201, 205 (arguing that “the Court's reliance on congressional intent should give way to a frankly policy-laden assessment of the appropriate allocation of power in the administrative state” and “that the underlying policy evaluation of the Court misidentifies the criteria that should govern this allocation by focusing on the presence of formal procedures and generality”); Beermann, \textit{supra} note 5, at 788–835 (detailing inconsistencies in the application of \textit{Chevron}); Lisa Schultz Bressman, \textit{Chevron's Mistake}, 58 DUKE L.J. 549, 549 (2009) (contending that \textit{Chevron} “asks courts to determine whether Congress has delegated to administrative agencies the authority to resolve questions about the meaning of statutes that those agencies implement, but . . . does not give courts the tools for providing a proper answer”); William S. Jordan, III, \textit{Judicial Review of Informal Statutory Interpretations: The Answer is Chevron Step Two, Not Christensen or Mead}, 54 ADMIN. L. REV. 719, 719 (2002) (describing the Court's current approach to the review of administrative agencies' informal statutory interpretations as “a cumbersome, unwieldy regime under which courts must draw increasingly fine distinctions using impossibly vague standards”).

\item \textsuperscript{9} 533 U.S. 218 (2001).

\item \textsuperscript{10} See, e.g., Bressman, \textit{supra} note 5, at 1143–44 (endorsing the view that \textit{Mead} caused judicial review of agency action to “devolve into chaos”); William S. Jordan, III, United States v. Mead: \textit{Complicating the Delegation Dance}, 31 ENVTL. L. REP. 11425, 11425 (2001) (opining that \textit{Mead} obscured \textit{Chevron}'s “treasured clarity”); Thomas W. Merrill, \textit{The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards}, 54 ADMIN. L. REV. 807, 809 (2002) (arguing that both the majority and the dissent in \textit{Mead} were mistaken); Adrian Vermeule, \textit{Introduction: Mead in the Trenches}, 71 GEO. WASH. L. REV. 347, 347 (2003) (arguing that the flaws and incoherencies in the case law applying \textit{Mead} “are traceable to the flaws, fallacies, and confusions of the \textit{Mead} decision itself”).

\item \textsuperscript{11} Foundational works on the effects of uncertain legal standards include Richard Craswell & John E. Calfee, \textit{Deterrence and Uncertain Legal Standards}, 2 J.L. ECON. & ORG. 279 (1986) and Gillian K. Hadfield, \textit{Weighing the Value of Vagueness: An Economic Perspective on Precision in
regime might include increased litigation,12 more agency reversals in court,13
“defensive rulemaking” on the part of agencies,14 or perhaps a move away
from rulemaking entirely.15 A fuller accounting of our deference practice,
however, should consider whether unpredictability might yield benefits as
well as costs. This Article begins that work.

The key to this Article’s unique contributions is the insight that agencies
face a “deference lottery” when they advance a statutory interpretation in a
notice-and-comment rulemaking or formal adjudication.16 The Article uses
the term “lottery” in the sense it is used in expected utility theory. A person
faces a lottery any time he or she does not know what the outcome of a
process will be, but does know what the different possible outcomes are and
what the probability of each is.17 In more formal terms, a lottery refers to
any discrete probability distribution over outcomes.18 For instance, if I buy a
scratch-off lottery ticket, obviously I do not know what its payoff will be, but
I do know the odds (if I read the fine print on the back). For instance, the
ticket may pay $1,000 with a probability of 1-in-10,000, $1,000,000 with a
probability of 1-in-10,000,000, and $0 with a probability of 9,989,999-in-
10,000,000.19 We frequently encounter lotteries outside of the gaming
context as well. For instance, based on historical averages, we expect that an
A-rated municipal bond will pay its face value with .97 probability and
default with .03 probability.20

12. See Mead, 533 U.S. at 250 (Scalia, J., dissenting) (“In an era when federal statutory law
administered by federal agencies is pervasive, and when the ambiguities (intended or unintended)
that those statutes contain are innumerable, totality-of-the-circumstances Skidmore deference is a
recipe for uncertainty, unpredictability, and endless litigation.”).
13. Id.
14. See Jerry L. Mashaw, Improving the Environment of Agency Rulemaking: An Essay on
Management, Games, and Accountability, LAW & CONTEMP. PROBS., Spring 1994, at 185, 203
(referring not to the deference lottery, but to the unpredictability generally engendered
by aggressive judicial review of agency rulemakings).
15. Id.
16. These are situations where, after Mead, Chevron applies presumptively but not definitively.
As a shorthand, I sometimes refer to “agency statutory interpretations” to mean statutory
interpretations rendered in these formats. The Article focuses on this subset of agency statutory
interpretations because the most important agency decisions are likely to be taken pursuant to one of
these procedures, as opposed to less formal forms of agency action.
17. This somewhat technical usage is uncommon, though not unknown, in legal scholarship.
18. See MARTIN J. OSBORNE, AN INTRODUCTION TO GAME THEORY 501 (2004) (“We refer to a
probability distribution over outcomes as a lottery over outcomes.”). For a more in-depth and
technical discussion, see NOLAN MCCARTY & ADAM MEIROWITZ, POLITICAL GAME THEORY: AN
19. For the actual odds from a popular multistate lottery, see Powerball–Prizes and Odds,
How does the lottery concept translate to the administrative law context? I argue that courts’ deference practice contains two distinct sources of unpredictability that combine to generate a lottery with distinctive features. When an agency advances a statutory interpretation in a notice-and-comment rulemaking or formal adjudication, it can reliably predict neither which standard of review will be applied to its statutory interpretation—Chevron or Skidmore—nor, if Chevron deference is not granted, whether or not its interpretation will survive review. However, from observing judicial practice and doctrine, the agency can have a fairly good sense for both the ex ante odds of getting Chevron review and for the odds a given interpretation would survive Skidmore review.

In the terminology of this Article, agencies thus face a deference lottery that is a composite of two lotteries, which I refer to as the Chevron lottery and the Skidmore lottery.21 The core idea is that an agency interpretation faces some probability of receiving Chevron deference on review (the Chevron lottery), and in the event that Chevron is not forthcoming, some probability of surviving judicial scrutiny under Skidmore (the Skidmore lottery). This structure gives courts two levers over agencies: they can tweak the Chevron lottery—altering the probability that agencies will be reviewed under Chevron—and the Skidmore lottery—adjusting the stringency of review within the Skidmore framework when Chevron analysis is not forthcoming.

Of course, it is not only deference law that could be characterized as a lottery. Laws are rarely fully determinate and the outcomes of judicial processes can almost never be predicted with certainty. But the lottery characterization is especially apt here, as the quantum of unpredictability in deference issues is especially high.22 Moreover, the deference lottery has some distinctive and interesting properties, owing to the structure of deference doctrine.

This Article explores what follows if we take seriously the idea that, from the perspective of agencies, the deference regime is a lottery. It makes three significant contributions. First, it provides empirical evidence that the “deference lottery” is a reasonable characterization of how agencies experience judicial review. Part II surveys the development of deference doctrine, highlighting its sources of uncertainty, and then examines how deference is actually practiced in the courts. Drawing on existing empirical studies of deference practice in both the Supreme Court and the federal appellate courts, this Article identifies evidence that a deference lottery with the features described here approximates the environment that agencies face.

22. See Eskridge & Baer, supra note 6, at 1091 (observing that “there is no clear guide as to when the Court will invoke particular deference regimes, and why”).
actually face on judicial review. This is the first work to characterize courts’ deference practice in these terms and to offer support for the claim.

Second, the Article uses the concept of the deference lottery to unlock new insights into how unpredictability in our deference regime can reward or punish agency behavior in important, and sometimes counterintuitive, ways. The method this Article adopts is to explore the dynamics of the deference lottery using a simple model of agency–court interactions. This approach adopts the perspective of Principal–Agent (PA) theory. It treats the agency as the agent of an enacting Congress, tasked with carrying out a statutory regime but subject to the classic agency problem: the agency’s preferences may diverge from those encoded in the statute and the enacting Congress—the principal—has limited tools for keeping the agency on track. On this view, judicial review of agency statutory interpretations is understood as a strategy for monitoring agency performance.

The stylized model of the deference lottery developed in this Article generates surprising implications for administrative law. The first is that, relative to a Chevron-only regime, the deference lottery offers a more flexible tool for shaping agency behavior. A deference lottery can encourage a rational agency to choose an interpretation that lies somewhere between the safest and the most adventurous version that the agency can hope to get away with. This Article takes no position on what kind of interpretation is best—that is, on what is the optimal level of agency slack in the statutory interpretation context. Rather, the Article shows that a deference lottery opens possibilities for shaping agency behavior that are not available under a Chevron-only regime. In this way, the Article casts a new, and more favorable, light on Mead. To the extent that unpredictability in the deference regime can have desirable effects, the much-maligned vagueness of Mead may be a feature, not a bug.

The Article also shows how subtle changes to the deference lottery could have pronounced—and undesirable—effects on agency behavior. One of the most striking findings is that, paradoxically, increasing the scrutiny an agency will receive under Skidmore can actually encourage an agency to adopt a less faithful interpretation of the statute. The reason is this: if Skidmore deference is very difficult to satisfy, at a certain point, the expected rewards from compromising on policy are so meager that it makes sense for an agency to give up its effort to “win” the Skidmore lottery entirely. Instead, the expected benefit is higher from selecting an interpretation the

23. See infra subpart II(B).

24. For the classic introduction to Principal–Agent theory, as relevant to the public law context, see Terry M. Moe, The New Economics of Organization, 28 AM. J. POL. SCI. 739, 756–58 (1984).

25. For further discussion of the PA logic at work in this Article, and of how the analysis accommodates the President’s role in executing statutes, see infra Part III.
agency prefers and “betting it all” on the Chevron lottery. A strategy to avoid this outcome is to construct a deference regime in which a fairly deferential Skidmore standard is applied fairly frequently. The Article offers some reasons to think that this is the kind of deference regime federal agencies face.

The third major contribution of the Article is to the body of work on uncertainty and risk in the law generally. This piece builds on a research agenda that has identified, in general terms, both the potential behavior-shaping value of vagueness in the law and some of its limits. This Article advances the state of scholarship with respect to both the scope of application and the development of theory. This is the first piece to explore at length how the unpredictability of the deference regime in administrative law bears on agencies’ strategies of statutory interpretation. As such, it brings a new perspective to the extensive legal literature on judicial review of agency statutory interpretation.

Moreover, the Article explores the dynamics of a doctrinal structure that generalizes beyond administrative law. The scenario this Article analyzes is one where a court will evaluate conduct within one of two possible regimes, where one is relatively permissive and the other relatively stringent, and the decision which regime applies is governed by a vague standard (here, the Mead test). This research in principle translates to other doctrinal settings with the same features: for instance, to corporate law, where courts possess two standards that could plausibly be used to evaluate certain actions of directors and officers—the forgiving business judgment rule and the strict duty of loyalty—and the standard for when each applies is opaque.

26. The point has some parallels to Richard Craswell and John E. Calfee’s conclusion about the deterrent value of unpredictability. See Craswell & Calfee, supra note 11, at 287 (positing a counterintuitive, inverse relation between certainty and compliance incentives in certain criminal law contexts).

27. Economists often make a distinction between risk and uncertainty. FRANK H. KNIGHT, RISK, UNCERTAINTY AND PROFIT 197–232 (Univ. of Chi. Press 1971) (1921). Actors face risk when they do not know which event will occur, but they know the relative probabilities of the possible events; they face uncertainty when they do not even know the probabilities. See Daniel A. Farber, Uncertainty, 99 GEO. L.J. 901, 903 (2011) (reiterating this distinction); Sarah B. Lawsky, Probably? Understanding Tax Law’s Uncertainty, 157 U. PA. L. REV. 1017, 1026–31 (2009) (building on this dichotomy). This distinction is not always drawn in the law and economics scholarship, however, and for simplicity of exposition and consistency with ordinary usage, this Article sometimes refers to the “uncertainty” in deference doctrine even though its analysis supposes that the frequencies of different outcomes are knowable.

28. See Hadfield, supra note 11, at 548–49 (suggesting that vague legal standards might elicit a more socially desirable mix of behaviors than determinate standards).

29. See Craswell & Calfee, supra note 11, at 287 (finding that, contrary to the authors’ prior conjecture, “it is not necessarily true that reductions in the level of uncertainty will improve [defendants’] compliance decisions”).

The rest of the Article is structured as follows. Part II combines doctrinal and empirical analysis to show that the deference lottery concept reasonably approximates how agencies experience judicial review of their statutory interpretations. Part III develops a simple model of how the configuration of the deference lottery can shape agencies' strategies of statutory interpretation, and presents the key results. Part IV considers the applicability and limitations of the Part III analysis, suggests some implications for administrative law, and concludes.

II. Deference in Doctrine; Deference in Fact

This Part establishes that the judicial review environment for agency statutory interpretations can meaningfully be characterized as a deference lottery. In other words, in any individual case, agencies cannot predict with confidence either what standard the court will apply or, in the event sliding-scale Skidmore deference is applied, whether or not the court will uphold its interpretation, but the relative frequencies of the different possible outcomes are fairly stable over time. This Article does not claim that agencies face a perfect lottery, where the odds are known with certainty, and certainly does not claim that courts make their deference decisions by choosing at random from among the possible outcomes. Below, I detail the ways in which the experience of agencies facing judicial review may diverge from a true lottery. What I am claiming is that, from the perspective of the agency, the experience of judicial review in the statutory interpretation context reasonably approximates a lottery.

A. Deference Doctrine

This subpart summarizes the development of deference doctrine in administrative law. This story has been told before, sometimes in great detail. This account emphasizes a persistent theme: the Supreme Court's oscillation between clarity and obscurity in deference standards. More than once, the Supreme Court has established a fairly straightforward policy regarding the deference due to agencies, only to chafe under its rigidity and introduce more nuance.

The early decades of modern administrative law saw the Supreme Court swing from one pole to the other in its approach towards statutory


32. The Article, however, considers reasons why it is not surprising that judicial behavior in the aggregate approximates a lottery. See infra subpart II(C).

33. See infra section II(B)(1).

interpretation by agencies. The Court reserved for itself the authority to define key terms of regulatory statutes, such as “unfair methods of competition in commerce” (in the FTC Act), into the 1920s, but by the New Deal era had largely adopted a policy of broad deference to agency interpretations. In Gray v. Powell, the Supreme Court heard a challenge to the National Bituminous Coal Commission’s determination that the Seaboard Air Line Railway Company was a consumer of coal only, and not also a “producer” within the meaning of the Bituminous Coal Code. The Court sharply limited the scope of its own review of the agency’s interpretation:

In a matter left specifically by Congress to the determination of an administrative body, . . . the function of review placed upon the courts . . . is fully performed when they determine that there has been a fair hearing, with notice and an opportunity to present the circumstances and arguments to the decisive body, and an application of the statute in a just and reasoned manner.

. . . .

Where, as here, a determination has been left to an administrative body, this delegation will be respected and the administrative conclusion left untouched. . . .

. . . Just as in the Adkins case the determination of the sweep of the term “bituminous coal” was for this same administrative agency, so here there must be left to it, subject to the basic prerequisites of lawful adjudication, the determination of “producer.”

Gray seems to demote the Court, leaving it only to check that the agency’s interpretation followed proper process and represented a “just and reasoned” application of the statute.

The Court took a similar approach in its well-known decision three years later in NLRB v. Hearst Publications, Inc., upholding the NLRB’s determination that newsboys are “employees” within the meaning of the National Labor Relations Act. While reserving to the courts a leading role


36. For a detailed account, see Schiller, supra note 34, at 407–12, 430–38. As Schiller notes, the Court’s practice was not entirely uniform in any period; for instance, the Court more vigorously policed the activity of agencies operating on the periphery of traditional police powers. Id. at 407–09; see also Reuel Schiller, “Saint George and the Dragon” : Courts and the Development of the Administrative State in Twentieth-Century America, 17 J. POL’Y HIST. 110, 113 (2005) (arguing that courts were most deferential to agencies in “areas of regulation that fit comfortably within a traditional reading of the police powers”).

37. 314 U.S. 402 (1941).

38. Id. at 403–06.

39. Id. at 411–13 (citations omitted).

40. 322 U.S. 111 (1944).

41. Id. at 132.
in questions of abstract statutory interpretation,\textsuperscript{42} "where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited."\textsuperscript{43} More specifically, "the Board's determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law."\textsuperscript{44} Even more striking, as Reuel Schiller has noted, federal appeals courts during the same period frequently deferred to agency interpretations on matters of constitutional law, most notably, First Amendment issues raised by administrative practices.\textsuperscript{45} In the immediate aftermath of the New Deal, federal courts thus generally adopted a policy of broad deference to agency statutory interpretations.\textsuperscript{46}

The Court's decision in Skidmore v. Swift & Co.,\textsuperscript{47} decided later in 1944, reflects a more contextual approach to deference. Here, the question was whether nights that private firefighters spent on call and on premises at the Swift plant counted as "working time" for purposes of the Fair Labor Standards Act.\textsuperscript{48} The statute routed disputes under the Act to the courts, not the Labor Department, but the Administrator of the Wage and Hour Division had issued an "Interpretive Bulletin" containing a standard for calculating working time and filed an amicus curiae brief on the firemen's behalf.\textsuperscript{49} The district court had reviewed the question de novo, not taking the agency's position into account.\textsuperscript{50} In an opinion by Justice Jackson, the Supreme Court ruled that the district court had failed to give proper consideration to the agency's views on the subject, and remanded.\textsuperscript{51} How much deference was owed exactly? The Court offered this formula:

\begin{itemize}
\item[42.] See id. at 130–31 ("Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty it is to administer the questioned statute.").
\item[43.] Id. at 131. For a similar, contemporaneous approach with language that prefigures Chevron, see Dobson v. Commissioner of Internal Revenue, 320 U.S. 489 (1943). There the Court held that the tax court's interpretation of whether certain settlement proceeds qualified as "income" need only "have 'warrant in the record' and a rational basis in the law." Id. at 501.
\item[44.] Hearst, 322 U.S. at 131.
\item[45.] See Schiller, supra note 34, at 436–38 (noting circuit court deference to NLRB decisions punishing employers for statements made during union elections); Reuel E. Schiller, Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment, 86 Va. L. Rev. 1, 96–101 (2000) (arguing that scarcity of available broadcast stations and a belief in agency expertise led the Supreme Court to defer to the FCC's content-based regulation of speech).
\item[46.] See Schiller, supra note 34, at 429–38 (discussing judicial deference to administrative findings in the 1930s and 1940s).
\item[47.] 323 U.S. 134 (1944).
\item[48.] Id. at 135–36.
\item[49.] Id. at 138–39.
\item[50.] See id. at 140 ("[A]lthough the District Court referred to the Administrator's Bulletin, its evaluation and inquiry were apparently restricted by its notion that waiting time may not be work, an understanding of the law which we hold to be erroneous.").
\item[51.] Id.
\end{itemize}
We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.52

The Skidmore formula tailors the deference owed to the infinite variety of individual cases. From early on, Skidmore has divided opinion between those who appreciate its sensitivity to context53 and those who lament its open-endedness and question how it is to be administered consistently.54

The Supreme Court continued to refine its deference jurisprudence,55 but “revolutionary” change56 came forty years after Skidmore, in Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.57 In deciding whether to permit the EPA’s interpretation of “stationary source” to apply to entire facilities rather than individual smokestacks,58 the Court inaugurated its famous two-step approach to deference decisions:

When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court

52. Id.
53. See Reginald Parker, Administrative Interpretations, 5 MIAMI L.Q. 533, 538 (1951) (describing Skidmore as “the golden middle” between approaches that abdicate courts’ authority to review or usurp agencies’ authority to interpret.).
56. Thomas W. Merrill and Kristin E. Hickman have noted, but do not themselves subscribe to, the common view in administrative law scholarship that Chevron amounted to a revolution. See Thomas W. Merrill & Kristin E. Hickman, Chevron’s Domain, 89 GEO. L.J. 833, 834–35 (2001) (“[W]e accept for present purposes the Chevron revolution as an established fact . . . .”). They and others have emphasized Chevron’s roots in existing precedents. See id. at 833 (“The idea that deference on questions of law is sometimes required was not new.”). Indeed, already in the late 1940s, Professor Nathaniel Nathanson had identified a nascent doctrine “which teaches that there are occasions when the reviewing court need not be persuaded that the administrative agency’s choice of conflicting interpretations is right, but only that it is reasonable.” Nathaniel L. Nathanson, Administrative Discretion in the Interpretation of Statutes, 3 VAND. L. REV. 470, 470 (1950).
58. Id. at 840.
determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.  

On the face of it, *Chevron* appeared to jettison the complexities of *Skidmore* in favor of two yes-or-no questions: is the statute ambiguous, and if so, is the agency's interpretation "permissible," i.e., reasonable?  

*Chevron* attracted limited notice at first, but after its enthusiastic adoption by the D.C. Circuit and its increasing popularity on the Supreme Court itself, its potential to broaden the scope of deference and simplify the analysis quickly became apparent. But *Chevron*'s simple formula concealed difficult questions, including the matter of "Step Zero": the question of *Chevron*'s scope. Does *Chevron* apply to every statutory interpretation advanced by an agency or only some subset? And what analysis governs cases that do not get *Chevron* review?  

As the Court took up these questions, the contours of deference doctrine became harder to follow. In *Christensen v. Harris County*, the Court voiced a hard-line approach to *Chevron*'s scope: "Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference." Rather, they are analyzed under *Skidmore*.  

The following term, in *Mead*, the Supreme Court rejected *Christensen*'s proposition that the test for *Chevron* was the formality of the agency pronouncement. Returning to the stated rationale for deference in *Chevron*, Justice Souter in *Mead* wrote that *Chevron* deference is due whenever  

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59. *Id.* at 842–43 (footnotes omitted).  
60. *See id.* at 844 ("In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").  
61. For his part, Justice Stevens, the author of *Chevron*, regarded the opinion as merely a restatement of existing law. *See* Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, in *ADMINISTRATIVE LAW STORIES* 399, 420 & n.76 (Peter L. Strauss ed., 2006).  
62. *Id.* at 422–23.  
63. *Id.* at 421–23.  
64. *See* Merrill & Hickman, *supra* note 56, at 848–52 (cataloguing questions about *Chevron*'s scope). Even in cases where it is clear that *Chevron* applies, the core terms of the *Chevron* test are hardly self-defining: what does it mean for a statute to be "ambiguous" or for an interpretation to be "reasonable"?  
67. *Id.* at 587.  
68. *Id.*
"Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law." The formality of the agency’s interpretation is relevant to this inquiry, but not dispositive. Authorization from Congress to engage in rulemaking or adjudication is "a very good indicator of delegation meriting Chevron treatment," but "we have sometimes found reasons for Chevron deference even when no such administrative formality was required and none was afforded." The key question, though, is always one of congressional intent: did Congress mean for the agency, rather than the court, to be interpreting the statute? Mead offered little guidance, however, into how that inquiry should be conducted. Justice Souter catalogued indicia of classification rulings’ informality before pronouncing them “beyond the Chevron pale,” but did not explain which features, if any, were dispositive. As Thomas Merrill concludes, Mead offers “an undefined standard that invites consideration of a number of variables of indefinite weight.” Mead also confirmed that when Chevron does not apply, Skidmore deference does.

Mead’s majority opinion prompted a scathing dissent from Justice Scalia, who predicted that its “wonderfully imprecise” test would generate “protracted confusion.” Mead’s reception among administrative law scholars was scarcely more hospitable. The opinion was judged “opaque even by Justice Souter’s standards” and faulted for “provid[ing] little guidance to lower courts, agencies, and regulated parties about how to discern congressional intent in any given set of circumstances.” The Court’s 2002 decision in Barnhart v. Walton did little to clear up the confusion. That case concerned an interpretation of the Social Security Act that the Social Security Administration advanced first in a variety of informal formats over several decades and ultimately in a notice-and-comment regulation. In determining that Chevron provided the correct standard of

70. Id.
71. Id. at 231.
72. Id. at 234. The features Justice Souter noted included the large number of rulings issued each year from multiple offices, the rulings’ limited precedential value, and the lack of supporting evidence in the legislative history that these rulings were intended to have binding legal authority. Id. at 231–34.
73. Merrill, supra note 10, at 813.
75. Id. at 245 (Scalia, J., dissenting).
76. See supra note 10 and accompanying text.
77. Vermeule, supra note 10, at 347.
80. Id. at 217, 219–20.
deference, Justice Breyer’s decision for the Court considered a laundry list of factors:

In this case, the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue. 81

*Barnhart* thus introduced a set of factors to govern the threshold question of whether *Chevron* deference applies that resembles, at least loosely, the *Skidmore* analysis. 82 Though *Barnhart* has been cited hundreds of times by the lower courts, in none of the eight cases in which the Supreme Court cites to *Barnhart* 83 does the Court in fact follow its full framework for *Chevron* Step Zero analysis.

Subsequent cases have made further refinements to the deference regime, 84 but have not changed its basic architecture. Whether an agency statutory interpretation warrants *Chevron* or *Skidmore* deference, then, turns on an inquiry into congressional intent: did Congress mean for the agency to be able to decide the issue at hand with the force of law? If so, *Chevron* governs, and if not, *Skidmore* does. The Court has neither repudiated nor consistently applied its framework from *Barnhart*, which incorporates agency expertise, the scope of the legal question, the length of the agency’s experience, and other factors into this threshold determination. 85 In the event that *Skidmore* applies, the agency stands a better shot of surviving review the more persuasive its interpretation is.

**B. The Data on Courts’ Deference Practices**

This subpart turns from doctrine to data, to consider what is known about how the *Chevron*/*Skidmore* regime functions in practice. It draws from several important empirical studies of judicial review of agency statutory interpretations that have appeared in the past five years. The data and analysis assembled in this subpart are not comprehensive, and cannot answer all questions about how the deference regime operates in practice. But they offer a picture, however incomplete, of the deference landscape that agencies

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81. *Id.* at 222.
82. *See supra* text accompanying note 52.
83. As of April 2, 2013.
84. Many commentators had concluded, in the wake of *Mead*, that agency use of formal adjudication or notice-and-comment rulemaking procedures were sufficient, if not necessary, to guarantee *Chevron* deference. *See*, e.g., Sunstein, *supra* note 65, at 218. In his *BrandX* concurrence, Justice Breyer clarified his view that such formal procedures were not sufficient to guarantee *Chevron* deference. *See* Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 1004 (2005) (Breyer, J., concurring).
85. *See supra* text accompanying note 83.
Deference Lotteries face. And what they show is broadly consistent with this Article’s claim that the courts’ practice amounts to a deference lottery.

1. Deference in the Supreme Court.—Not surprisingly, deference practice in the Supreme Court has been the object of the most intensive study, starting with the landmark 1990 article by Peter Schuck and Donald Elliott.86 The most comprehensive source on Supreme Court deference to agency statutory interpretations yet assembled is a dataset constructed by William Eskridge and Lauren Baer.87 Eskridge and Baer studied every Supreme Court case involving an agency interpretation of a statute between the Chevron decision and the end of the 2005 Term, 1,014 in all.88 They coded each case on 156 variables that capture most of the issues one would expect to be relevant to the deference given by the Court.89 This dataset is the richest available for exploring how deference plays out in practice, and it forms the basis for the analysis here.

That said, the fact that the data is from Supreme Court cases only limits the generalizability of the results. First, while Supreme Court opinions of course are the most authoritative, as a matter of volume the Supreme Court has a much less active role in shaping the contours of administrative law than the lower courts.90 To the extent that agencies shape their behavior in response to cues they get from courts, agencies would be well advised to pay attention to practices in the circuit courts, as agencies are much more likely to have their rules reviewed there than in the Supreme Court.

Second, the pool of cases decided by the Supreme Court likely shows strong “selection effects”: they cannot be viewed as a representative sample of the entire population of agency statutory interpretation cases. With plenary control over the certiorari power, the Supreme Court can grant review to whichever cases it wishes, and those that attract the Court’s

86. Peter H. Schuck & E. Donald Elliott, To the Chevron Station: An Empirical Study of Federal Administrative Law, 1990 DUKE L.J. 984. For a fuller review of empirical studies on Supreme Court deference practice, see Raso & Eskridge, supra note 6, at 1739–42.
87. See Eskridge & Baer, supra note 6; Raso & Eskridge, supra note 6. The dataset is available in the IQSS Dataverse Network and on file with the author. See Replication Data For: The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan, IQSS, http://dvn.iq.harvard.edu/dvn/faces/study/StudyPage.xhtml?globalId=hdl:1902.1/16562&studyListingIndex=0_354424eece633571d155824566165.
88. Eskridge & Baer, supra note 6, at 1094. The Raso and Eskridge article uses a 667-case subset of this dataset, consisting of all cases where the agency interpretation at issue was not advanced for the first time in the course of litigation. See Raso and Eskridge, supra note 6, at 1741.
89. For a listing and explanation of the variables, see Eskridge & Baer, supra note 6, at 1203–24.
90. See Peter L. Strauss, One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court’s Limited Resources for Judicial Review of Agency Action, 87 COLUM. L. REV. 1093, 1095 (1987) (demonstrating the infrequency with which the Supreme Court reviews lower court decisions and observing the freedom this gives to lower courts to alter existing law).
91. Eskridge & Baer, supra note 6, at 1096–97.
attention are likely to be an exceptional bunch. As Eskridge and Baer point out, these probably include a disproportionate share of the most difficult cases, and they may be aberrant for other reasons as well. As a result, we cannot assume that these cases offer a reliable guide to how the federal judiciary as a whole applies deference.

Third, although the dataset is large, the number of potentially relevant variables is large as well, meaning it is difficult to draw firm conclusions about which (if any) factors bear on the Court’s practice of deference. Once we drill down to see how results vary by individual agency or subject matter area, for instance, we have few cases in any given condition, making it difficult to tell whether variations in outcome reflect systematic differences or random noise. When we look only at challenges to notice-and-comment regulations and formal adjudications—the focus of attention in this Article—the dearth of data is even more acute.

Finally, these data provide limited leverage for answering the important question of how much, and what kind of, scrutiny the Court is applying under Chevron and Skidmore. If the Chevron lottery is, in fact, a lottery—that is, if agencies cannot reliably anticipate which of their statutory interpretations will be reviewed under Chevron as opposed to Skidmore—then a higher survival rate among the former is evidence that Chevron review is more lax than Skidmore, as the doctrine asserts. Without a measure of the interpretive content of challenged rules, however, we cannot use these data to evaluate the features of the Skidmore lottery—that is, to assess how the

92. Id.
93. See id. at 1097 ("Even less predictable is the effect of the much-touted ‘Chevron Revolution’ . . . on the kinds of cases that are litigated and appealed . . . at the Supreme Court level.").
94. As Eskridge and Baer point out, their dataset is not a “sample” at all, but rather the complete universe of agency interpretation cases during the time period they study. But to the extent their study provides a guide to the Court’s conduct going forward, it is a time-specific sample; one would think that patterns identified here would apply also to the years since 2006.
95. See Eskridge & Baer, supra note 6, 1204–05 (displaying the results by agency and subject matter).
96. To take one example, in the entire Eskridge and Baer dataset, there are only six cases in which the statutory interpretation is advanced in a legislative rule from the Environmental Protection Agency, and not all of these were attended by notice-and-comment procedures.
97. This is, in fact, what the data show. See infra note 106. This finding contradicts the claim that similar reversal rates across different standards of review illustrate that the ostensibly different standards amount, at base, to a single “reasonableness” standard. See David Zaring, Reasonable Agencies, 96 Va. L. Rev. 135, 137 (2010) (arguing that Chevron and Skidmore deference essentially amounts to a single “reasonableness” standard). If agencies are in a position to anticipate which standard of review will be applied, the fact that agency survival rates hover around 70% under different standards of review need not mean that the various standards are equivalently stringent. For instance, when agencies interpret statutes in guidance documents, they know they are most likely to receive Skidmore deference. See United States v. Mead Corp., 533 U.S. 218, 234 (2001) (reaffirming Skidmore’s holding that “an agency’s interpretation may merit some deference”). A rational strategy for the agency would be to avoid more adventurous interpretations in guidance documents.
probability of surviving review under *Skidmore* varies with the content of the statutory interpretation. Fortunately, qualitative work on the courts of appeal offers some insight into this question.  

All that being said, Eskridge and Baer’s research broadly corroborates this Article’s characterization of the *Chevron* lottery. As Eskridge and Baer themselves state, “Are there factors that predict . . . when particular deference regimes will be invoked . . .? [O]ur data offer little to latch onto; there is no clear guide as to when the Court will invoke particular deference regimes, and why.” 99 This section now turns to explore what the data show us in more detail.

First, the Eskridge and Baer data establish that the interpretations that are the focus of this Article—those advanced in formal adjudications and legislative rules issued through notice-and-comment rulemaking—are more likely to get *Chevron* deference than those adopted through less formal proceedings. 100 The Court applied *Chevron*, or an equivalent or more deferential standard (*Beth Israel* 101 or *Curtiss-Wright* 102 deference, in Eskridge and Baer’s terminology 103) in 44% of the cases involving statutory interpretation through notice-and-comment rulemaking or formal adjudication. 104 This compares to an application of *Chevron* or the equivalent in only 5% of cases involving less formal interpretations. A glance at these results makes clear, though, that even for these more formal interpretations, agencies can hardly count on getting *Chevron* deference. While the doctrine suggests a strong presumption that notice-and-comment rules and formal adjudications will receive *Chevron* deference, 105 the data show a high probability that the Supreme Court may apply *Skidmore* instead. 106

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98. See infra section II(B)(2).
99. Eskridge & Baer, supra note 6, at 1091.
100. *Id.* at 1149 tbl.18.
103. Eskridge & Baer, supra note 6, at 1098. Eskridge and Baer also list *Seminole Rock* deference as a standard more deferential to agencies than *Chevron*, but it is inapplicable here because it applies only to an agency’s interpretations of its own regulations, not statutes. *Id.*
104. In discussing Eskridge and Baer’s data below, I use the terms “apply *Chevron*” and “receive *Chevron*” as shorthands to mean that the Court approaches the statutory interpretation question using the *Chevron* framework, or these equivalent or still more deferential standards. This does not necessarily mean either that the Court finds the statutory language to be ambiguous or that the Court accepts the agency’s interpretation—although the model I develop in Part III starts from the assumption that the agency wins when the Court applies *Chevron*, an assumption I later relax. The figures appearing in this subpart are my own calculations based on Eskridge and Baer’s data.
106. The agency’s chances of winning before the Court are lower when *Skidmore* is applied than when *Chevron* is applied. Of formal adjudications and notice-and-comment rulemakings in the
Within this population of agency interpretations, are there features of these rules that help explain whether *Chevron* or *Skidmore* can be applied? Some agencies receive *Chevron* more frequently than others,\(^\text{107}\) and the nature of the statutory grant of power has some correlation with the standard applied,\(^\text{108}\) but it is harder to find any factor within the agency’s control that it can manipulate to adjust its odds in the *Chevron* lottery.\(^\text{109}\) One might think that the politics of an interpretation could have some bearing on how it would be reviewed, but the data do not bear this out. Eskridge and Baer coded each agency action reviewed as liberal, conservative, or neutral/mixed.\(^\text{110}\) An interpretation is equally likely to receive *Chevron* consideration whether it has a liberal or conservative interpretation. Conservative and liberal interpretations also survive judicial review at the same rate.\(^\text{111}\) Ultimately, when we exclude the uncodeable or neutral interpretations, the politics of agency interpretation have no statistically significant bearing on either the deference regime or the agency’s win rate.

Eskridge and Baer’s data do identify one respect in which the content of agency interpretations relates to the deference standard applied; and to the extent this relationship is strong, the “*Chevron* lottery” characterization is inexact. Eskridge and Baer evaluate whether an agency interpretation is (1) long-standing and fairly stable, (2) evolving, or (3) recent.\(^\text{112}\) I find that the Court applied the *Chevron* framework somewhat more frequently, and agencies won more often, when they maintained a long-standing and stable interpretation. The Court applied *Chevron* 48% of the time when the agency

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\(^\text{107}\) For instance, the IRS receives *Chevron* for only 33% of its interpretations, while for the Department of Health and Human Services, the figure is 74%. These agency-based discrepancies are due in some part to subject-specific lines of doctrine that in some cases seem to be eroding. See, e.g., Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 706-07 (2011) (dropping the tax-specific *National Muffler* standard in favor of *Chevron* analysis for Treasury regulations).

\(^\text{108}\) Eskridge and Baer code for different statutory grants of authority, and the strongest, “Merrill-Watts” form of delegation—in which the agency is authorized to impose immediate sanctions for violations of its rules or orders—is associated with a higher incidence of *Chevron* deference. Eskridge & Baer, supra note 6, at 1125–26, 1209–10; Merrill & Watts, supra note 78, at 582–86 (describing a way of interpreting congressional delegations of authority). Not surprisingly, the forms of delegation also tend to vary systematically by agency. For instance the IRS lacks “Merrill-Watts” delegation, and the Department of Health and Human Services frequently proceeds under Merrill-Watts delegations of power. Eskridge & Baer, supra note 6, at 1210.

\(^\text{109}\) The data do suggest, in addition, that the rate at which *Chevron* is applied varies somewhat by agency, and also by whether the agencies are acting pursuant to an express delegation of legislative power, which is substantially correlated with the former. These are thus examples of variables that seem to vary systematically with the incidence of *Chevron* review, but they are not factors that agencies are in a position to control.

\(^\text{110}\) Eskridge & Baer, supra note 6, at 1205.

\(^\text{111}\) Conservative interpretations survive review 69.4% of the time, and liberal interpretations, 68.12% of the time.

\(^\text{112}\) Eskridge & Baer, supra note 6, at 1206. In the analysis performed for this Article, both of these latter two categories are recoded as representing a change in agency interpretation.
interpretation advanced was continuous, and 40% of the time when the interpretation was recent or evolving. If we ignore formal adjudications and restrict our attention to notice-and-comment rulemakings, however, the discrepancy is larger: continuous interpretations received *Chevron* review 51% of the time, compared to 35% for recent or evolving interpretations. A statistical test suggests that the difference in frequency is larger than we would expect to occur by chance.  

This result is surprising, and goes unremarked on by Eskridge and Baer. Under *Mead*, the continuity of an interpretation should have no bearing on the appropriateness of *Chevron* review, although *Barnhart*, by contrast, lists as one factor in the *Chevron* Step Zero analysis “careful consideration the Agency has given the question over a long period of time.” The discrepancy in *Chevron* application rates suggests that perhaps *Barnhart*, though infrequently cited by the Supreme Court, may play a larger role in guiding the Court’s *Chevron* Step Zero analysis than generally recognized. Alternatively, it raises the intriguing possibility that, if durability of an interpretation is in some way a proxy for its “quality,” the Court is manipulating its deference analysis by applying *Chevron* as a cover in cases where the Court in fact agrees with the interpretation on the merits. It falls outside the scope of this project to investigate this possibility further. In any event, whatever relevance continuity may have had to the *Chevron* Step Zero analysis for notice-and-comment rulemakings, it appears to be on the wane. The Court has moved in recent years to devalue continuity of agency practice in administrative law more generally, and if we confine our attention to cases decided since the 2000 Term (when *Mead* was decided), the trend vanishes.

Moreover, it is important to note that the Eskridge–Baer data may exaggerate the unpredictability of *Chevron* Step Zero decisions for reasons having to do with the nature of common law decision making and the organization of the federal courts. Once a court has determined which deference standard governs a particular agency’s interpretations of a particular statute, the issue is settled, at least for that court and those bound by its decisions. Over time, then, the set of cases subject to the *Chevron* lottery could dwindle, as each ruling on what standard governs a given

113. Specifically, a Pearson chi-squared test yields a value of 5.1654, with an associated probability of 0.023: in other words, if continuous and noncontinuous interpretations were in fact treated the same way, we would expect to see a difference this large emerge by chance only 2.3% of the time.


115. See, e.g., *FCC* v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1810–12 (2009) (explaining that an agency’s change in position does not trigger a heightened standard of review and does not require justifications for the new policy that is any “more substantial than those required to adopt a policy in the first instance”).
agency/statute pairing eliminates uncertainty going forward.\textsuperscript{116} Also, the Eskridge–Baer data concern deference practices in the Supreme Court only. Unpredictability may be systematically higher in the Supreme Court than in federal appeals courts, either because (1) issues of first impression form a larger part of the Supreme Court’s docket,\textsuperscript{117} or (2) the Supreme Court is more inclined than lower courts to deny \textit{Chevron} review to notice-and-comment rulemakings or formal adjudications.\textsuperscript{118}

These concerns could diminish the aptness of the \textit{Chevron} lottery as a characterization of the environment agencies face on judicial review. How seriously they undermine the lottery characterization is ultimately an empirical question that I lack the data to answer adequately. Still, there are reasons to think the \textit{Chevron} lottery remains an appropriate metaphor notwithstanding these concerns. First, while judicial decisions reduce uncertainty about which standard applies in a particular context, Congress continually replenishes the supply of uncertainty by establishing new statutes and new agencies. Second, only the Supreme Court’s rulings are binding on all circuit courts, and the Supreme Court itself hears few administrative law cases a term.\textsuperscript{119} Meanwhile, a baker’s dozen of circuit courts continue to review agency decisions, treating cases from sister circuits as persuasive authority only. If unpredictability is being squeezed out of the deference regime, it is being squeezed out gradually.

To sum up: the Eskridge–Baer data reveal that a significant proportion of agency statutory interpretations adopted in notice-and-comment rulemaking or formal adjudications receive \textit{Skidmore} deference, even though \textit{Mead} suggests a strong presumption in favor of \textit{Chevron}.\textsuperscript{120} The data also suggest that there is little a given agency can do to nudge its probability of getting \textit{Chevron} up or down in any particular rulemaking.\textsuperscript{121} The politics of the interpretation have no bearing on the deference regime at all.\textsuperscript{122} The data

\textsuperscript{116} For instance, in the past few years, the Supreme Court has ruled that \textit{Chevron} governs Treasury regulations interpreting the tax code (Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704 (2011)), FCC regulations interpreting the Telecommunications Act (Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967 (2005)), and Federal Reserve Board regulations interpreting the Truth in Lending Act (Household Credit Servs., Inc. v. Pfennig, 541 U.S. 232 (2004)). My thanks to Kristin Hickman for these examples.


\textsuperscript{118} See Eskridge & Baer, supra note 6, at 1119–20 (speculating that the Court views deference regimes as guides for lower courts, but is more flexible in its own decision to use such regimes).

\textsuperscript{119} See Strauss, supra note 90, at 1099 (stating that the Supreme Court hears only “a handful” of such cases each year). The Supreme Court’s docket has further fallen sharply since the appearance of Strauss’s article, over a quarter century ago.

\textsuperscript{120} See supra notes 100–06 and accompanying text.

\textsuperscript{121} See Eskridge & Baer, supra note 6, at 1137 (stating that “[t]he Court does not apply deference regimes in a foreseeable manner” but instead “invokes deference regimes in a manner that is seemingly sporadic and haphazard”).

\textsuperscript{122} See supra notes 110–11 and accompanying text.
do suggest that an agency can increase its odds of *Chevron*, at least in the notice-and-comment rulemaking context, by maintaining continuity in its interpretation over time.\(^{123}\) To the extent this observed effect is real, it is at odds with this Article’s characterization of the *Chevron* lottery, an environment in which the chances of getting *Chevron* are beyond the agency’s power to shape. That said, the evidence also suggests that continuity no longer matters to the Court’s choice of deference regime, even if it did in the past.\(^{124}\) On the whole, then, to the extent these data are revealing, they comport well with this Article’s characterization of the *Chevron* lottery.

2. *Deference in the Courts of Appeals.*—This section turns to work on deference practice in the courts of appeals. Scholarship in this area combines quantitative and qualitative methods to shed light on how *Skidmore* is applied.

For the purposes of this Article, the most valuable source on the circuit courts is a study by Kristin Hickman and Matthew Krueger.\(^{125}\) The work provides a helpful complement to the Eskridge–Baer and Razo–Eskridge pieces. Its scope is narrower: it examines a smaller set of cases, those applying *Skidmore* in circuit courts between summer 2001 and summer 2006, 106 in all.\(^{126}\) But if the dataset is smaller and the focus narrower, the work provides a close, qualitative analysis. The authors read the cases to characterize the nature of deference applied under *Skidmore*, and their study is the first to examine in depth the analysis conducted in a large population of *Skidmore* cases.\(^{127}\)

The authors contrast two models of *Skidmore* analysis that are rooted in the case law: a sliding-scale model, in which courts are sensitive to indicia of agencies’ reliability and fidelity, and an independent-judgment model that is tantamount to de novo review.\(^{128}\) Their core finding is that, generally, the circuit courts follow the sliding-scale model.\(^{129}\)

\(^{123}\) Eskridge & Baer, *supra* note 6, at 1133.

\(^{124}\) See *supra* notes 114–16 and accompanying text.

\(^{125}\) Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235 (2007). Other important studies of the impact of *Mead* in the lower courts include articles by Lisa Schultz Bressman and Adrian Vermeule. Both pieces show courts struggling to find their way in the early aftermath of *Mead*. Writing in 2003, Vermeule reported that “[i]n the trenches of the D.C. Circuit, . . . *Mead’s* ambitious recasting of deference law has gone badly awry,” as panels reached inconsistent, and in Vermeule’s view, frequently mistaken, views of what *Mead* required. Vermeule, *supra* note 10, at 349. Writing two years later, Bressman observed courts dividing over whether to follow *Mead* or *Barnhart*. Bressman, *supra* note 5, at 1459. Note that subsequent history suggests courts’ enthusiasm for *Barnhart* to be a passing fancy: court of appeals cases cited *Barnhart* twenty-eight times in 2003 alone, but only five to ten times annually in recent years.


\(^{127}\) *Id.* at 1267.

\(^{128}\) *Id.* at 1252–59.

\(^{129}\) *Id.* at 1271.
Hickman and Krueger's conclusions bolster this Article's characterization of the *Skidmore* lottery as an environment in which the probability of surviving judicial review is pegged to the plausibility of the agency's interpretation. Hickman and Krueger find that courts applied the sliding-scale approach to *Skidmore* in 79 of the 106 cases reviewed, and the independent judgment model in only 20. They further find that, of the factors named in *Skidmore*, the two given the most emphasis by reviewing courts are the validity of the agency's reasoning and the thoroughness of its consideration. Hickman and Krueger understand "validity" "to include discussion of the reasonableness and plausibility of the interpretation itself," and note that in evaluating the "thoroughness of consideration," courts examine the quality of the justification proffered by the agency. Courts give comparatively less weight to other "contextual" factors: the formality of the agency's procedures, the consistency of the agency's interpretation over time, and the agency's subject-specific expertise.

Putting this all together, when circuit courts apply *Skidmore*, they are generally applying sliding-scale deference. And in applying sliding-scale deference, they focus primarily on the content of the agency's interpretation, and specifically, its apparent consistency with the statute. Other, contextual factors that are independent of the interpretation's content—such as agency expertise and formality of procedures—turn out to play a less prominent role in *Skidmore* analysis than sometimes thought. In other words, when courts apply *Skidmore* review, the chance an interpretation will survive rises to the extent that it is credible as a faithful construction of the statute.

To be sure, the stylized account this Article presents of how sliding-scale deference works in the *Skidmore* lottery does not capture the full complexity of *Skidmore* review in practice. No doubt in many instances, statutory terms may be so open-ended that there is no way to say which possible interpretation better comports with the enacting Congress's intent.

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130. *Id.*
131. *Id.* at 1281, 1285.
132. *Id.* at 1285.
133. *Id.* at 1281.
134. See *id.* at 1283 ("Courts assessed the formality of the administrative interpretation's procedural pedigree and format with somewhat less frequency than other factors.").
135. See *id.* at 1286 ("[D]espite its numerous appearances in judicial opinions, 'consistency' seems less dispositive than other *Skidmore* factors.").
136. See *id.* at 1288–89 ("[T]he expertise factor generally lacks teeth, as courts only counted this factor against agency deference in three of the cases we evaluated.").
138. *Skidmore* itself may have been such a case. Again, the question at issue was whether the nights that firefighters spent on call at the plant counted as "working time" for purposes of the Fair Labor Standards Act. See *supra* notes 48–49 and accompanying text. The traditional tools of statutory construction aided the Court little in determining which interpretation better comported with the enacting Congress's intent.
the answer may depend on what theory of statutory interpretation one
endorses. But though this Article’s account of the *Skidmore* lottery is a
simplification, it is a reasonable one. The Article’s core contention is that,
all else equal, the more persuasive an agency’s claim that an interpretation is
consistent with the statute, the better chance it will stand under *Skidmore*
review. And this is consistent with Krueger and Hickman’s finding that
*Skidmore* is generally applied as a sliding-scale deference standard along the
lines discussed above.\textsuperscript{139}

A case such as *Lopez v. Terrell*\textsuperscript{141} illustrates how sliding-scale *Skidmore*
review works in practice. The case presented the question of whether a
federal prisoner accrues “Good Conduct Time” (GCT) for time spent in
federal and state custody before his federal sentencing.\textsuperscript{142} The applicable
statute provided that prisoners may receive “up to 54 days [GCT] at the end
of each year of the prisoner’s term of imprisonment.”\textsuperscript{143} In informal rulings,
the Bureau of Prisons (BOP) had interpreted the statutory language to permit
the accrual of GCT only for time spent in federal custody following
sentencing.\textsuperscript{144} Inmate Lopez had argued, and the district court had agreed,
that the statutory language permitted the accrual of GCT for all the time
spent in custody for his federal offense.\textsuperscript{145}

The appellate court evaluated the BOP’s interpretation under
*Skidmore*.\textsuperscript{146} Rather than interpreting the contested language for itself, or
calibrating the deference owed the agency based on its expertise, the court
carefully considered the agency’s case for its reading of the statute. BOP
made a tight textualist argument, arguing “that the phrase ‘term of
imprisonment’] must be understood within the context of the statute as a
whole and, in particular, in reference to the word ‘sentence’ in the preceding
phrase, ‘a prisoner . . . may receive credit toward the service of the prisoner’s
sentence.’”\textsuperscript{147} The agency argued that the meaning of “sentence” was clearly
defined in federal law, showed where, and explained how that definition

\footnotesize{\textsuperscript{139} See WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION:
STATUTES AND THE CREATION OF PUBLIC POLICY 689–846 (4th ed. 2007) (exploring intentionalist,
purposivist, and textualist approaches to statutory construction). The Supreme Court has described
the object of statutory interpretation as determining congressional intent, “[e]mploying traditional
tools of statutory construction.” INS v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987). This Article
need not—and does not—take a position in the rich theoretical debates over precisely what this
means. This is because, generally speaking, an interpretation of an ambiguous statute that satisfies
*Skidmore* will tend to be truer to the statute, by the lights of any plausible theory of statutory
interpretation, than an interpretation that fails to do so.

\textsuperscript{140} See supra notes 128–29 and accompanying text.

\textsuperscript{141} 654 F.3d 176 (2d Cir. 2011).

\textsuperscript{142} Id. at 177.

\textsuperscript{143} Id. (citing 18 U.S.C. § 3624(b) (2006)).

\textsuperscript{144} Id. at 180.

\textsuperscript{145} Id.

\textsuperscript{146} Id. at 183.

\textsuperscript{147} Id. (citing 18 U.S.C. § 3624(b)).}
foreclosed Lopez’s interpretation. Noting that it “aligns with traditional canons of statutory interpretation,” the court “[found] the BOP’s construction of [the statute] persuasive” under Skidmore.

To sum up this subpart: empirical evidence gathered from both Supreme Court and circuit court practice supports this Article’s claim that agencies facing judicial review of their statutory interpretations face a deference lottery with specific features. Even for interpretations offered in notice-and-comment rulemakings and formal adjudications, where Mead suggests a presumption of Chevron review, Eskridge and Baer’s Supreme Court data show that Skidmore is frequently applied instead. Moreover, the deference regime applied in individual cases is not correlated with objective measures of an interpretation’s content, meaning that, from the agency’s perspective, the standard applied seems to be chosen as if through a random draw. This is consistent with the Article’s characterization of the Chevron lottery. When Skidmore is applied, Hickman and Krueger’s study of circuit courts shows that panels are attentive to the plausibility of agencies’ statutory interpretation, more so than to content-independent contextual factors such as agency expertise. This finding tracks my account of the Skidmore lottery, in which agencies cannot ensure their survival under Skidmore review, but can improve their chances by choosing an interpretation that is safer—that is, more credibly faithful to the statute.

C. Why a Deference Lottery?

This Part has established that agencies face a deference lottery when they defend statutory interpretations in court. The ultimate object of this Article is not to explain why agencies encounter a deference lottery, but to explore how agencies would rationally respond to one. In other words, the focus of this Article is squarely on the behavior of agencies in reaction to deference lotteries, not the behavior of courts that gives rise to them. That being said, this subpart very briefly explains why the existence of a deference lottery is in fact consistent with some common-sensical suppositions about judicial behavior. The subpart concludes with a simple illustration of how the Skidmore lottery described in this Article can arise as the product of individual judicial decisions.

The deference lottery concept implies that the outcomes we are interested in—whether an agency gets Chevron or Skidmore deference (the

148. Id.
149. Id.
150. See supra text accompanying notes 104–05.
151. As noted above, there is an exception for notice-and-comment rulemakings prior to 2000, where the probability of Chevron review is somewhat higher when interpretations are long-standing or continuous. See supra text accompanying notes 112–15.
152. See supra text accompanying notes 129–36.
153. See infra Part III.
Deference Lotteries

*Chevron* lottery) and whether or not, under *Skidmore*, the agency is upheld (the *Skidmore* lottery)—are selected as if through random draws from given probability distributions. For this to be so, it need not be the case that individual judges are actually randomizing their decisions: flipping coins to decide cases, as it were. Rather, so long as individual judges differ sufficiently in how they apply the substantive standards, it is enough that the assignment of judges to panels be random.154 The deference lottery is not an attribute of the practice of any individual judge, but is instead an emergent feature of the judicial system.155

Consider, for instance, the *Chevron* lottery that governs whether agency statutory interpretations will be evaluated under *Chevron* or *Skidmore*. As a matter of doctrine, this decision is governed by the *Mead* standard: did Congress intend for the agency to speak to this issue with the force of law? But as discussed,156 the *Mead* standard is so vague that we can expect individual judges to differ over how liberally *Chevron* deference should be granted under it. Assuming that judges vary in their disposition to apply *Chevron* across a court, three-judge panels drawn at random from that court will reach different conclusions. The probability that a randomly selected panel will apply *Chevron* is a function of the distribution of views about *Chevron*’s scope in the pool of judges. The net effect is to randomize what standard is applied, although no individual judge is randomizing.

A similar story explains the emergence of the *Skidmore* lottery. Under *Skidmore*, an agency interpretation merits deference proportional to its “power to persuade.”157 This, too, is a vague standard, and judges may differ on just how “persuasive” an agency interpretation must be to survive judicial review under *Skidmore*. Depending on which judges are selected to hear a case, a given interpretation may or may not pass muster. But the more clearly faithful to the statute an interpretation is, the better chances it has of surviving *Skidmore* review, because a larger number of possible panels may deem it acceptable.

This point can be developed more formally. Suppose that the different possible interpretations of a statute are laid out on a continuum, from the


Indeed, the assignment of judges need not even be random for judicial review to approximate a lottery, so long as individual judges’ views on how the standards apply in concrete cases are sufficiently opaque from the agency’s perspective. The Supreme Court, of course, hears its cases en banc, and yet it is no easy feat predicting how the Court will apply its deference regime to particular cases, as Eskridge and Baer show. Eskridge & Baer, supra note 6, at 1136–53.


156. See supra subpart II(A).

most defensible (i.e., most readily justified as faithful) to the most adventurous. Imagine that each judge on a court has a “decision cutpoint” falling somewhere along this line: in his view, no interpretations more adventurous than this cutpoint are justifiable under *Skidmore* review. Imagine that this court has ten judges, whose cutpoints are distributed as shown in Figure 1. The point 0 on the axis denotes an interpretation so extreme that no judge would approve it under *Skidmore*. Points 0.1 through 1 each represent the cutpoint of one of the ten judges.

![Figure 1: Distribution of Cutpoints.](image)

A panel of three judges will be drawn at random from this court to evaluate an agency’s statutory interpretation. In the event that the court applies *Skidmore*, how does the outcome of judicial review vary as a function of which interpretation along this continuum it chooses? Figure 2 illustrates the answer. The court’s judgment varies probabilistically as a function of the interpretation the agency chooses. Moving along the continuum from left to right, the interpretation falls to the right side of more and more judges’ cutpoints, so that the chances rise of drawing a panel of three judges, of whom two would approve it. The actual shape of the probability distribution will depend on the distribution of judges’ cutpoints along the line.\(^{158}\) Obviously, this stylized representation greatly simplifies the actual practice of deference and decision making on appellate courts.\(^{159}\) But it suffices to show that a deference lottery follows naturally from reasonable assumptions about how multi-member courts operating in panels apply vague standards.

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\(^{158}\) The calculations of the probabilities shown in the graph are on file with the author and available upon request.

Figure 2: Skidmore Lottery as Aggregation of Judges’ Cutpoints.

Note that this account is entirely consistent with strategic behavior by judges in pursuit of their own policy preferences. Individual judges may be more disposed to defer to conservative rulings or liberal ones, and more or less willing to stretch doctrine in pursuit of their preferences. This framework can easily accommodate judges with policy preferences if we suppose that judges’ preferences reflect where their decision cutpoints lie in individual cases. For the deference lottery to work, doctrine need only provide at least a weak constraint on judicial action—preventing, for instance, judges from having “backwards” cutpoints, so that more extreme interpretations are less likely to be rejected. The other judges on a panel are in a position to check, or at the very least, spotlight politically motivated rulings that are sharply at odds with doctrine—for instance, rulings against


161. For the classic statement of the “attitudinal” model of judicial decision making, see Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited 86–97 (2002).
the agency when its interpretation is plainly justifiable under the Skidmore formula.162

III. Playing the Deference Lottery

Having established the deference lottery’s existence in the previous Part, this Part considers its implications for agency behavior. In particular, it investigates how different configurations of the deference regime’s component parts—the Chevron lottery and the Skidmore lottery, in the parlance of this Article—might induce different kinds of statutory interpretations on the part of agencies. The method for exploring these dynamics come from the tool kit of Positive Political Theory (PPT): a simple, decision-theoretic model of agency action.163 This Part lays out the model and highlights some of its key results. Part IV will consider what practical implications this deductive exercise has for administrative law and courts’ deployment of deference doctrines.

As noted in Part I,164 this approach to the problem of deference is strongly influenced by PA theory.165 From the perspective of this model, agencies are regarded as agents—first and foremost, of the Congresses that enacted the statutes they administer, or (more abstractly) of the statutes themselves. When Congress charges an agency with administering a statute, Congress intends the agency to carry out its statutory charge faithfully. However, Congress’s delegation of authority to the agency introduces slack and creates the possibility for “agency losses”—for the agency to pursue its own ends, rather than the principal’s.”166 Statutory interpretation is one means by which agencies can slant the administration of a statute to the service of their own policy priorities. For instance, in the 1970s, the National Labor Relations Board sought to broaden the definition of “employee” to include


164. See supra text accompanying note 24.


166. See EPSTEIN & O’HALLORAN, supra note 165, at 29 (noting that agency loss occurs when an agent generates outcomes at odds with the preferred interests of a principal).
some supervisors, despite the Taft-Hartley Act’s exclusion of managerial employees from its scope.\footnote{167} Within this PA perspective, judicial review functions as a strategy to monitor and discipline agency performance. More aggressive monitoring of agencies by courts can reduce agencies’ waywardness, by inducing them to follow the statutes they administer more faithfully than they otherwise might. The idea that judicial review can have this effect is commonplace in classic administrative law theory,\footnote{168} as well as in PA scholarship.\footnote{169} However, monitoring imposes costs of its own. In particular, aggressive judicial review of agency interpretations translates into higher reversal rates: all else equal, when courts review agencies more stringently, they will strike down agency actions more frequently.\footnote{170} Reversals of agencies are extremely costly, in that they can send agencies back to the drawing board, wiping out years of work formulating a policy, and disrupt expectations among those affected by agency policy.\footnote{171}

The PA account sketched here so far fails to account for a key player in the administrative process: the President. Of course, as instrumentalities of the Executive Branch, agencies are in an important sense also agents of the President. The President is equipped with powerful tools for shaping and monitoring agency performance, starting with the constitutional authority to appoint agency officials,\footnote{172} and including the power to review agency agendas and policies on an ongoing basis through the Office of Management and Budget (OMB).\footnote{173} “Common agency” problems—where a single agent


168. See LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 320 (1965) (explaining the need for restrictions on agencies).


170. Of course, a key point of this Article is that all else is not equal: if agencies anticipate more aggressive judicial review, they will adapt their interpretive practices strategically. But the net effect will still be a rise in reversal rates.

171. See JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 87–100 (1990) (describing in detail the costs, in terms of wasted agency resources and reduced auto safety, of judicial invalidations of vehicle safety standards).


has two or more principals—present their own dynamics, but the President’s role can also be accommodated more simply within the framework outlined here. From the perspective of the enacting Congress, the President can be regarded chiefly as a potential cause of agency losses. In other words, the President exacerbates the agency problem vis-à-vis the enacting Congress to the extent the agency is responsive to the President’s agenda at the expense of a faithful construction of the statute it is charged to administer.

That said, the President’s responsibility “[to] take Care that the Laws be faithfully executed” does bear on the model in the following important way. Focusing on the PA relationship between Congress and agency, as this Article does, is not to deny that a presidential role in steering agency policy making is appropriate or desirable. In fact, the thrust of much administrative law scholarship over the past quarter century has been to emphasize the benefits of active presidential management of agency decision making, not least because this allows for more informed and responsive policies. Accordingly, the Article does not assume that the socially optimal outcome is the elimination of all agency slack, such that agencies should have no interpretive leeway. Some measure of slack may best accommodate the competing, legitimate claims of the Legislative and Executive Branches to influence the content of statutory interpretation. This Article takes no position on just how much interpretive leeway is best left to agencies, a question that is impossible to answer with any sort of precision. Rather, this Article shows that the deference lottery makes it possible for courts to elicit a wider range of interpretive behaviors from agencies than would a 


175. See id. at 924 (explaining that common agency problems can arise when two different government bodies oversee one agent).

176. U.S. CONST. art. II, § 3.


Furthermore, as noted above, statutes are often sufficiently open-ended that there is no discernible “congressional intent” on the issues that come before agencies, so that responsiveness to the President need not come at the expense of fidelity to Congress. See Kagan, supra, at 2255–59 (reflecting on the practical extent of congressional oversight due to open-ended statutes).

Perhaps the most sustained and detailed empirical account of the systematic problems that aggressive judicial review can cause in a sensitive policy domain remains Shep Melnick’s study of the Clean Air Act in the courts. R. SHEP MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT 343–93 (1983).

178. The deference lottery is also more flexible than a Skidmore-only regime, so long as the inherent fuzziness of the scope-of-review language and the variation in how different judges would apply any single sliding-scale review standard combine to make a Skidmore-only regime, where the level of scrutiny applied is precisely calculated to produce a desired level of agency compliance, an
for shaping agency behavior, subject to the caveats and qualifications discussed below.

A. Agency Behavior and Lotteries

How do agencies decide what interpretation of a statute to advance in a regulation? Treating agencies as unitary, rational actors, I assume that an agency will choose the interpretation it believes to have the highest expected value to the agency. What gives an interpretation value from an agency’s perspective? The model posits that agencies have policy preferences, which may diverge from the aims encoded in the statutes that they administer. If we imagine the spectrum of policy possibilities as a line segment, and the agency’s most preferred policy as a point on that line (the agency’s “ideal point”), I assume that, the closer a policy is to the agency’s ideal point, the more value it has to the agency. The agency’s ideal point need not coincide with the interpretation that is most faithful to statutory intent. I also assume the agency wishes to avoid reversals by the reviewing court, and considers a reversal—in which case no policy takes effect—to be at least as bad as ending up with any point on the policy spectrum. For simplicity, we can think of this outcome as having a value to the agency of zero.

These assumptions are, of course, simplifications. But I argue they are reasonable first-cut approximations, suitable for this approach. Does it make sense to consider agencies to be rational, in the sense that they respond strategically to cues from courts? Close studies of agency decision making, and first-hand accounts from participants, strongly suggest that agencies do care about how their actions fare in the courts; that they seek to craft agency actions to resist reversal, and that they are aware, at least in broad strokes, about what standards courts are applying. And while agencies are unrealitic option. See infra text accompanying note 217. The Article focuses on Chevron because, for notice-and-comment rulemakings and formal adjudications, a Chevron-only regime seems to be the main alternative on the table. See United States v. Mead Corp., 533 U.S. 218, 240-41 (2001) (Scalia, J., dissenting) (arguing for Chevron when there is an authoritative agency interpretation).

179. See MCCARTY & MEIROWITZ, supra note 18, at 6-7 (defining rationality in game theory).

180. For a thorough discussion of subjective expected utility theory and the assumptions that underlie it, see generally PAUL ANAND, FOUNDATIONS OF RATIONAL CHOICE UNDER RISK (1993).

181. In the language of subjective utility theory, the agency’s preferences are single-peaked (i.e., the ideal point is the unique maximizer for the agency) and symmetric (i.e., deviations the same distance from the ideal point to either side of it have the same value to the agency).

182. See Schuck & Elliott, supra note 86, at 1047 (showing that in 40% of remand cases, rules undergo “major changes”).

183. See Mashaw, supra note 14, at 203 (describing the phenomenon of “defensive rulemaking”).

184. See William F. Pedersen, Jr., Formal Records and Informal Rulemaking, 85 YALE L.J. 38, 59-60 (1975). On the other hand, there is a good argument that we need not worry that introducing the possibility of Chevron deference for informal agency interpretations that otherwise might merit Skidmore deference will induce agencies to take greater license in interpreting the statutes. The mass of such informal actions are taken on the lower rungs of agency hierarchies and tend to have limited policy salience. See, e.g., United States v. Mead Corp., 533 U.S. 218, 233 (2001)
far from unitary—they are complex organizations whose component parts pursue independent, and sometimes conflicting, agendas—if the concern about judicial reversal is shared within an agency, it can induce an agency to act in a way that approximates a unitary, rational actor. Lastly, it is clear that agencies may act on preferences different from those encoded in the statutes they administer. Administrative law scholars and political scientists have identified many cases where agencies push policies that strain against a statutory frame, whether owing to "capture" by a set of powerful interests, or issue-driven civil servants, or at the behest of an administration and its political appointees.

How does the agency select an interpretation? In the absence of judicial review, the agency would simply pick its ideal point: the policy that maximizes its benefit. With judicial review, however, the agency has to make its selection with an eye to the rule's chances of making it past the court. To put the point more formally, we can represent the expected value (describing the 10,000 letter rulings issued by forty-six customs offices). There is little reason to suppose that the front-line officials issuing such interpretations are closely attuned to judicial doctrine, or that there would be a substantial difference in terms of the policy substance of their output if they were.

185. For an insightful discussion of how administrative law doctrines empower different constituencies within agencies, see Elizabeth Magill & Adrian Vermeule, Allocating Power Within Agencies, 120 YALE L.J. 1032, 1079–81 (2011).

186. But see id.; MELNICK, supra note 177, at 302–03 (arguing that judicial scrutiny of the Clean Air Act inflated lawyers' leverage over EPA rulemaking at the expense of agency engineers). The unitariness assumption is, however, shared by other game theoretic works on agency decision making. See Shipan, supra note 169, at 274–76 (representing the agency as a single actor in his game-theoretic model of the legislative choice of judicial review). For a selection of influential scholarship on the determinants of agency behavior, see PETER H. SCHUCK, FOUNDATIONS OF ADMINISTRATIVE LAW 82–129 (2d ed. 2004).

187. See generally MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION (1955) (describing how the policies of the Interstate Commerce Commission at that time were dominated by railroad industry interests so that the agency no longer effectively regulated other transportation industries).

188. For a historical perspective, see, for example, DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY 131–35 (2001) (describing how a "mezzo-level" manager within the Post Office Department was integral in getting a hesitant Congress to enact permanent authority for Rural Free Delivery).

189. See, e.g., Heidi Kitrosser, Scientific Integrity: The Perils and Promise of White House Administration, 79 FORDHAM L. REV. 2395, 2406 (2011) (illustrating Executive control over scientific information with reference to the Bush-era NASA policy of requiring all scientists' press appearances to be first cleared with the agency's public affairs office).

190. In reality, an agency would also need to steer clear of interpretations so unpalatable to the current Congress that they would elicit a statutory override, or other forms of congressional discipline. See EPSTEIN & O'HALLORAN, supra note 165, at 24–25 (describing direct and indirect methods of congressional discipline, including curtailing agency budgets).

191. Yehonatan Givati raises an intriguing possibility not explored here: that an agency might be able to choose an interpretation palatable enough to the interested parties to avoid a court challenge, and thereby short-circuit judicial review. Yehonatan Givati, Strategic Statutory Interpretation by Administrative Agencies, 12 AM. L. & ECON. REV. 95, 96 (2010). While this might be possible in some instances, it would probably be rare, at least with respect to important policy issues, that an agency interpretation would satisfy all potential challengers. Indeed, previous
to an agency of advancing interpretation \( x \) as \( p \cdot u_a(x) \), where \( p \) is the probability that \( x \) will survive judicial review, and \( u_a(x) \) is the utility to the agency of having interpretation \( x \) become law.\(^{192}\)

As I have argued, the probability that the agency’s interpretation survives review—\( p \), in the expression above—depends on both the *Chevron* lottery and the *Skidmore* lottery, and we can rewrite the expression above to take account of how each introduces unpredictability of a particular sort. I use \( p_c \) to represent the *ex ante* probability that an interpretation will receive *Chevron* review. I initially make (and later relax) the assumption that if an agency gets *Chevron*, it is home free: that the agency’s interpretation will be upheld.\(^{193}\) Consistent with the characterization of the *Chevron* lottery above, I also assume that \( p_c \) is independent of the content of the agency’s interpretation: that the agency cannot game the odds of getting *Chevron* deference in a predictable way by manipulating the content of its rule.\(^{194}\) This, then, is one “lever” the courts have over the deference lottery: how strong is the default norm that statutory interpretations are afforded *Chevron* review?

The probability that the interpretation survives sliding-scale *Skidmore* review is given by \( p_s(x) \). In contrast to \( p_c \), \( p_s(x) \) depends on the content of the interpretation the agency offers: in other words, it is a function of \( x \), which is why \( p_s(x) \) is written, instead of just \( p_s \). The model posits that the closer the agency’s interpretation is to the “best” reading of the statute—the one that can most persuasively be argued to be consistent with the statute—the greater the probability it will survive *Skidmore* review. The crucial question about the *Skidmore* lottery is: do incremental shifts in the agency’s interpretation shift the odds modestly or dramatically? Is *Skidmore* fairly deferential, in which case fairly adventurous readings of the statute stand a solid chance of

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\(^{192}\) We could also write the expected utility as \( p \cdot u_a(x) + (1 - p) \cdot u_a(\emptyset) \), where the second term is the probability the interpretation does not survive review \((1 - p)\) times the agency’s utility from that outcome \( u_a(\emptyset) \), but the value of this term is zero, since I have stipulated that \( u_a(\emptyset) = 0 \).

\(^{193}\) Of course, agencies do not always win under *Chevron*. Still, agency interpretations stand good odds of being upheld when courts apply *Chevron*. As noted above, agencies go on to win in 78% of the cases in which the Supreme Court determines the *Chevron* framework applies. See supra note 106; see also Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 31 (1998) (finding that agencies win 89% of the time when courts reach the “reasonableness” prong of the *Chevron* test).

\(^{194}\) As noted above, the one significant exception to this assumption suggested by the Supreme Court data is that the Supreme Court is significantly more likely to afford *Chevron* deference to consistent, rather than novel, agency interpretations. Eskridge & Baer, supra note 6, at 1133. But as also noted above, this regularity appears to have diminished over time. See supra notes 115–16 and accompanying text.
surviving review, or is it quite strict, so that agencies must hew quite close to the "best" reading to enjoy good odds? To put the point differently, if we think about increasing the odds under judicial review as buying "insurance" for the agencies against the risk of reversal, how expensive is the insurance in policy terms? 195

The figure below illustrates the issue graphically, in a simplified form. The x-axis denotes possible interpretations of the statute, with point $x = 1$ indicating the one that can be most persuasively justified. The point $x = 0$ represents an interpretation of the statute so adventurous that it stands no chance of surviving review under any of these standards.

On the y-axis is the agency's probability of surviving Skidmore review. The three curves on the graph represent three possible modes of Skidmore analysis. The dashed line depicts a strict Skidmore, where movement along the x-axis towards 1 is rewarded grudgingly, with small improvements in the probability of survival; the dotted line represents a lax Skidmore, and the solid line, a middle-of-the-road approach. 196 As noted above, 197 there has been a long-running debate about just what level of scrutiny Skidmore entails, with different courts choosing among these different approaches. 198

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195. Peter Strauss's characterization of deference doctrine in terms of "Chevron space" and "Skidmore weight" identifies the same salient distinctions between the two regimes as my deference lottery concept. *Chevron* creates a zone in which agencies have the discretion to set policy themselves, whereas *Skidmore* instructs courts how much credence to give agency views in their own resolution of statutory questions. Peter L. Strauss, "Deference" Is Too Confusing—Let's Call Them "Chevron Space" and "Skidmore Weight," 112 COLUM. L. REV. 1143, 1143 (2012).

196. Note that there are many other ways these curves could be drawn; the Article's only assumption is that the function is "increasing in x": in other words, that the probability of surviving Skidmore review goes up as the interpretation nears $x = 1$ (i.e., grows safer).

197. See *supra* notes 125–29 and accompanying text.

198. See *Hickman & Krueger*, *supra* note 125, at 1267–71 (highlighting several cases that illustrate how different courts of appeals have chosen different approaches to Skidmore deference—the independent judgment and sliding-scale models).
Putting the pieces of the deference lottery together gives us the agency’s optimization problem. The agency will select the interpretation that yields the highest expected value in light of the deference lottery—in light of the chances that it will receive sliding-scale deference instead of *Chevron*, and that it will not survive that scrutiny. Mathematically, this means choosing the value of \( x \) that maximizes this expression:

\[
p_c \cdot u_a(x) + (1 - p_c) \cdot p_s(x) \cdot u_a(x).
\]

This is the probability of receiving *Chevron* review \((p_c)\), times the benefit to the agency from interpretation \( x \) \((u_a(x))\), plus the probability of receiving *Skidmore* review \((1 - p_c)\), times the probability that interpretation \( x \) would survive *Skidmore* \((p_s(x))\), times the benefit to the agency from interpretation \( x \) \((u_a(x))\).

**B. Results**

What can be said about how the deference lottery can shape agency behavior and policy outcomes in this stylized model? Of course, specific results would depend on the particulars of how an agency’s utility function and preferences are defined, matters on which this Article takes no position.\(^{199}\) Although the Article does not work through the agency’s optimization problem formally, this subpart highlights three general results, all of which can be explained informally.

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\(^{199}\) The results can hold whether the agency is risk neutral or risk averse, but they are more pronounced if the agency is risk averse.
1. Increasing the Stringency of Skidmore Review Constrains Agency Opportunism—Up to a Point.—The first observation is important, and straightforward. Relative to a Chevron-only deference regime, introducing the possibility that agencies’ interpretations may be selected, as if at random, to face higher scrutiny can constrain agency opportunism. The chance of receiving more stringent review gives agencies an incentive to “play it safer” when interpreting statutes than they otherwise might. The mechanism comes straight from the logic of PA theory: more aggressive monitoring of agent behavior can reduce agency slack. What is perhaps most noteworthy about the deference lottery is how it increases the flexibility of judicial review as a tool for managing agency behavior, relative to an across-the-board Chevron standard. As noted above, this Article takes no position on what is the optimal amount of agency interpretive leeway. What is notable about the deference lottery is that it can be used to incentivize different amounts of agency leeway, depending on how high the probability of getting Skidmore is and how much scrutiny Skidmore entails. To put the point more technically, the model can yield different equilibria, depending on how the lottery is configured. This means that the deference lottery is a sensitive instrument for regulating agency conduct. Unless the desired level of agency leeway is the maximum afforded under Chevron, the unpredictability of the Mead regime, long derided as a bug, may in fact be a feature.

That being said, the model also shows that a poorly designed deference lottery can backfire. In particular, ratcheting up the scrutiny under Skidmore too far can have the counterintuitive—and undesirable—effect of encouraging more, rather than less, agency opportunism. One might suppose that increasing the stringency of review under Skidmore—that is, decreasing the deference owed to agency constructions—would always induce agencies to “play it safer” when interpreting statutes. And if Skidmore sliding-scale review were the only standard in play, then this would be the result.

But matters become more complicated, and more interesting, if agencies do not know ex ante whether they will be subject to Chevron review or to Skidmore. When Chevron is a possibility, increasing the stringency of Skidmore review past a certain point may cause a rational agency to promulgate its most preferred interpretation, rather than one calculated to win over the court with its fidelity to the statute. In technical terms, we can say that the stringency of Skidmore review has a “nonmonotonic” relationship to agency costs. In plainer language, judicial scrutiny can backfire, leading an agency to abandon its efforts to satisfy a demanding court.

200. See Epstein & O’Halloran, supra note 165, at 27–28 (discussing PA models of oversight).
201. See supra subpart III(A).
202. Depending on how the agency’s utility function and the Skidmore lottery are defined, it is possible that agency may shift its interpretation towards its ideal point gradually as Skidmore scrutiny increases, rather than all at once after some “tipping point” of Skidmore scrutiny has been reached.
It is not difficult to understand why this is so. Start by imagining a deference regime in which an agency is guaranteed Chevron review for its regulation. Assuming—as we do to start—that the agency’s most preferred interpretation would reliably be deemed “reasonable,” even if it is not the most natural reading of the statute, the agency’s strategy is clear: it will choose that most preferred interpretation. Now imagine that the agency faces a Chevron lottery: the agency has some probability of receiving Chevron and some probability of facing sliding-scale Skidmore review. The agency’s strategy, as before, will be to choose the interpretation that yields the highest expected benefit to the agency. Now, however, the agency’s best move in many instances will be to hedge: to pick a somewhat safer interpretation that stands a good chance of surviving Skidmore review, in the event that Skidmore is applied, but whose policy content is still satisfactory to the agency. This is the effect we want judicial review to have from a PA perspective: it induces changes in agency behavior to mitigate agency losses without generating wide-scale judicial reversals.

Imagine now the same scenario, except that the Skidmore standard is more strict. In other words, the “insurance” against judicial reversal in the event of Skidmore review has become more expensive in policy content terms: the agency must hew closer to the safest interpretation to enjoy the same probability in surviving review. At a certain point, however, the game is no longer worth the candle: the agency has a higher expected payoff from sticking with its most preferred interpretation and hoping for Chevron, rather than making the policy compromises needed to gain good odds of satisfying Skidmore. This is a bad outcome on any measure: the agency’s behavior is the same as we would see in a Chevron-only regime, but the level of judicial reversals is higher, because the court is applying Skidmore some of the time.

A concrete example helps to illustrate the point. Imagine an agency is choosing between three different possible interpretations of a statute: A, B, and C, with its preferences in that order. More specifically, let’s stipulate that the agency gets a benefit of 100 if interpretation A becomes law, 80 if B becomes law, and 60 if C becomes law. Suppose that all of the interpretations are sufficiently reasonable to withstand Chevron if it is applied, but that the interpretations have different probabilities of being approved by a court applying sliding-scale Skidmore deference. We can further imagine two hypothetical Skidmore regimes, one that is relatively lax and another that is relatively strict, with the probabilities for surviving review being higher for any given interpretation under the former regime than the latter regime. Specifically, imagine that the probabilities of survival in the event Skidmore is applied are given by the following table:
Finally, suppose that in the *Chevron* lottery, the *ex ante* probability of receiving *Chevron* deference is 60%. Which interpretation does it make sense for the agency to select?

In a world where the *Skidmore* standard applied by courts is lax, the agency’s best option is to choose Interpretation B: the middle-of-the-road interpretation that is neither the safest nor the most adventurous. Interpretation B, while not the agency’s favorite, is still acceptable to the agency, and it stands a solid chance of being upheld even if *Skidmore* is applied.

On the other hand, if the court applies the stricter version of *Skidmore*, the agency’s calculations change: now the best strategy is to choose Interpretation A and hope for *Chevron* deference. The agency must sacrifice so much in policy content to bring its odds of surviving *Skidmore* review above 50% that it makes sense to opt out of the *Skidmore* lottery and wager everything on winning the *Chevron* lottery. Note that this outcome is plainly unsatisfactory: tightening the screws of *Skidmore* has ironically yielded an agency interpretation less faithful to the statutory scheme and also spiked the rate of judicial reversals.

This finding introduces a cautionary note to judicial deference practice. Ratcheting up the scrutiny of *Skidmore* could backfire badly if agencies stand a good chance of drawing *Chevron* deference instead. How much scrutiny is too much will depend on the particulars of agency preferences and the *Chevron* and *Skidmore* lotteries; the following section explores the relations between some of these factors.

### 2. The *Chevron* Lottery and the *Skidmore* Lottery Can Interact to Shape Agency Behavior in Surprising Ways

What can be said about how the *Chevron* and *Skidmore* lotteries interact? One might suppose that they are substitutes: that “tightening” the *Chevron* lottery—raising the odds that an agency will face sliding-scale scrutiny—and “tightening” the *Skidmore* lottery.

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203. The agency’s expected benefit from choosing Interpretation B is $68.8: 0.6 \times 80 + 0.4 \times 0.65 \times 80$. That is the probability of receiving *Chevron* review (0.6) times the benefit to the agency from Interpretation B (80), plus the probability of receiving *Skidmore* review (0.4) times the probability of surviving that review (0.65) times the benefit to the agency from Interpretation B (80). This compares favorably to the expected benefit from Interpretation A (68) and Interpretation C (58.8).

204. Interpretation A yields an expected benefit of 66. This exceeds the expected benefit from Interpretation B (57.6) or Interpretation C (52.8).

205. We would expect courts to reverse agencies 34% of the time: *Skidmore* will be applied 40% of the time, and the agency will lose 85% of those cases.
lottery—raising the odds an opportunistic interpretation will fail Skidmore review—might be equally effective in inducing greater agency compliance.

In fact, it is not possible to make many specific claims about how the Chevron and Skidmore lotteries interact without knowing more about the agency’s utility function and the shape of the Skidmore lottery’s probability distribution. These are all abstractions, of course, and the fine-grained distinctions that are possible to draw with a mathematical model translate only roughly, at best, to the messier, real-world environment of agencies and courts. Certainly when agencies choose among different possible interpretations, they do not do so by undertaking subjective expected utility calculations with hard numbers. All that being said, it is still worth noting that the Chevron and Skidmore lotteries interact to shape agency incentives in sometimes counterintuitive ways, and this favors some strategies of judicial review over others.

In particular, it would seem reasonable at first blush to suppose that a strict Chevron lottery and a strict Skidmore lottery might be effective substitutes in inducing agency compliance. That is, we might expect that a low probability of getting more aggressive review under Skidmore could induce the same measure of agency compliance as a higher probability of getting a somewhat lower measure of Skidmore scrutiny. In other words, if Skidmore is applied quite stringently whenever it is applied, it could be used more sparingly and still induce a desired level of agency compliance.

In fact, the “substitutability” of Chevron and Skidmore lotteries is not reliable. Making it more likely that agencies will receive Chevron does create more agency slack, but tightening up the Skidmore scrutiny will not always reduce it. First, recall from above that if Skidmore review is too strict, it makes sense for agencies to give up on trying to satisfy it. As a result, ratcheting up Skidmore scrutiny to compensate for a looser Chevron lottery will backfire if Skidmore is pushed past its threshold of effectiveness. Secondly, the interactive effect depends on how adjustments to the intensity of Skidmore scrutiny affect the probability of surviving judicial review. Indeed, it is even possible that decreasing the intensity of Skidmore review may induce more agency compliance.

The broader lesson here is that aggressive review under Skidmore is a fairly blunt tool for shaping agency behavior. Ratcheting up the intensity of Skidmore review may not reliably rein in agencies, because the incentives generated by the interaction of the Chevron and Skidmore lotteries vary widely based on the particulars of the situation. On the other hand,

206. See Eskridge & Baer, supra note 6, at 1091 (concluding that “there is no clear guide as to when the Court will invoke particular deference regimes, and why”).

207. This may be the case if the bump upwards in probability of surviving review is greater the closer the agency’s interpretation is to the most plausibly faithful interpretation. This kind of manipulation to the Skidmore lottery weakens the “stick” (the penalty for opportunistic behavior) but strengthens the “carrot” (the reward for compliant behavior).
tightening up the *Chevron* lottery—that is, making it more likely that agencies will be reviewed under *Skidmore*—will reliably incentivize more compliance from agencies. Taken together, these findings suggest that a moderate intensity *Skidmore*, applied with more frequency, might be a more useful approach to managing agency behavior than very strict *Skidmore* applied sparingly.

This result lines up with arguments, both prescriptive and descriptive, made by other administrative law scholars. Eskridge and Baer call for an overall streamlining of deference doctrine, for smoothing some of the sharp discontinuities between different standards of review in favor of a continuum of deference. 208 A deference lottery that liberally features a moderate, sliding-scale *Skidmore* review, while not something that Eskridge and Baer endorse, enjoys some similarities to their vision. 209 Also, David Zaring has made the descriptive claim that the welter of different judicial review doctrines that courts apply to agencies reduce to a single “reasonableness” standard. 210 This Article does not come to the same conclusion. But to the extent that the deference lottery alternates *Chevron* deference with a moderate intensity *Skidmore* standard applied fairly frequently, the result would be approximately the same.

3. *An Unpredictable Chevron Regime Attenuates Chevron’s Capacity to Shape Agency Behavior and Leads to More Judicial Reversals.*—To this point, the analysis has proceeded on the assumption that, if an agency receives *Chevron* review, it is home free: its interpretation will be upheld as a reasonable construction of an ambiguous statute. Of course, in reality, agencies cannot count on surviving *Chevron* review. 211 This section relaxes the assumption and asks how the outcomes change if *Chevron* does not always translate into an agency win. Specifically, this section considers the effect of introducing some random variation into the outcome of *Chevron* review. The consequence is unwelcome: *Chevron*’s power to shape agency behavior goes down, and the rate of judicial reversals goes up. So whereas random assignment to different deference standards can be part of an effective regime for managing agency behavior, random variation in judgment worsens outcomes on any measure.

There is some empirical evidence that once agencies make it past *Chevron* Step One—the question of whether the statute is ambiguous—they are, if not guaranteed to win on Step Two, extremely likely to do so. A study by Orin Kerr finds that, under *Chevron* Step Two, agency interpretations are

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208. Eskridge & Baer, *supra* note 6, at 1183–85.
209. There are significant differences as well: for instance, Eskridge and Baer make suggestions for reducing the unpredictability of *Chevron*’s application, and pegging *Skidmore* deference squarely to agency expertise, rather than interpretive content. See *id.* at 1092–93.
upheld 89% of the time.\textsuperscript{212} Imagine, though, that courts applying \textit{Chevron} Step One frequently decide that statutes unambiguously foreclose the agency’s interpretation, and that these decisions are not predictable.\textsuperscript{213} We can call this situation “Crapshoot \textit{Chevron}.” What will be the effect on agency behavior?

The results are straightforward. As the predictability of \textit{Chevron} Step One declines, the \textit{Chevron} lottery’s capacity to shape agency behavior attenuates. The more the \textit{Chevron} lottery dissolves into noise, the more a rational agency will key its behavior off the \textit{Skidmore} lottery. Crapshoot \textit{Chevron} can thus have the same effect on agency behavior as increasing the chance of receiving \textit{Skidmore} review—namely, reining in agency interpretations—but with one critical difference: the rate of judicial reversals will rise.\textsuperscript{214} To the extent that courts rule against agencies in an unpredictable way, judicial review loses its capacity to guide agency behavior and imposes additional costs in the form of reversals.\textsuperscript{215} Any level of agency compliance achieved with Crapshoot \textit{Chevron} could also be achieved under a deference lottery with a fully predictable \textit{Chevron} and at a lower rate of judicial reversals.

Inevitably, there is a certain amount of noise in most doctrinal frameworks, owing to the inherent vagueness of legal standards. \textit{Chevron} analysis, the key operative concepts of which are “ambiguous” and “reasonable,” will never be fully determinate or perfectly predictable. But from the perspective of the operation of the deference lottery, it is best to hold the apparent randomness of \textit{Chevron} applications to a bare minimum. A strong default norm for the \textit{Chevron} framework of deciding close questions in the agency’s favor might seem to give agencies too much latitude. But in the context of a deference lottery, such a norm supports an effective regime for guiding agency behavior.

\begin{footnotesize}
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\item[212.] Kerr, \textit{supra} note 193, at 31; \textit{cf.} Hickman \& Krueger, \textit{supra} note 125, at 1252 (remarking that “it is unsurprising that most agency interpretations survive \textit{Chevron’s} second step” given that “\textit{Chevron’s} step two nearly the fully deferential end of the spectrum”).
\item[213.] Judges and justices differ in their willingness to grant or refuse deference at \textit{Chevron} Step One. Justice Scalia, for instance, is less inclined to find ambiguity than most of his colleagues. \textit{See, e.g.}, Babbitt \textit{v.} Sweet Home Chapter of Cmty’s. for a Great Or., 515 U.S. 687, 714 (1995) (Scalia, J., dissenting) (arguing that the regulation’s interpretation runs afoul of the “unmistakably clear” statute).
\item[214.] Hickman \& Krueger, \textit{supra} note 125, at 1278 (offering “support for the widely shared belief that \textit{Skidmore} is less deferential than \textit{Chevron}”).
\item[215.] \textit{See, e.g.}, Whitman, 531 U.S. at 486 (reversing in part after rejecting the agency’s interpretation).
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IV. Conclusion

A. Assessment

This Article has argued that it makes sense to characterize courts' practice of deference to agency statutory interpretations as a lottery with particular features. The Supreme Court's *Mead* ruling offers no clear rule to govern when courts will grant *Chevron* deference. In the event that *Chevron* deference is not forthcoming, *Skidmore* offers the agency no guarantee of survival, but the better the agency can justify its interpretation as consistent with the content of the statute, the better its chances. Part II draws on empirical work to confirm that this characterization of the doctrinal framework is consistent with courts' actual deference practice. That Part first establishes that the most extensive data collected have very little power to predict when a given agency's regulation will receive *Chevron* deference. Second, it establishes that in the circuit courts, *Skidmore* deference is best understood in probabilistic terms, where the agency worsens its odds by choosing constructions that cannot be easily justified with reference to the content of the statute. Part III explores what taking the deference lottery seriously means for how judicial review practices shape agency behavior. The most striking result is that, relative to an all-*Chevron* regime, introducing some chance of getting *Skidmore* review at random can curb agency opportunism—with the important caveat that, if *Skidmore* is too hard to satisfy, it may cease to affect agency behavior altogether, and instead simply result in a higher rate of judicial reversals.

It is not possible, even within the terms of the model described in Part III, to define the optimal configuration of the deference lottery—the ideal mix of *Chevron* and *Skidmore* review, and the ideal level of stringency within *Skidmore*. What is "optimal" depends on what level of agency autonomy in statutory interpretation is the goal, and how costly judicial reversals are thought to be—questions impossible to answer in the abstract. But what the exploration of the workings of the deference lottery suggests is that, if there is some value to curbing agency slack, a deference lottery is not necessarily a bad approach. The Supreme Court's *Mead* decision, which lays down a somewhat vague standard for whether *Chevron* or *Skidmore* applies, has been roundly criticized. This work shows that *Mead*'s vagueness may have hidden virtues. Facing some possibility that they may encounter a standard of scrutiny higher than *Chevron* may induce agencies to take more care in using statutory interpretation to pursue their own goals. When agencies are risk-averse, the effect on their behavior will be stronger still.

This is not to say, however, that if the courts were building a deference regime from scratch, a deference lottery would be the best approach to take. If the goal is to achieve a given level of agency compliance with as few

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216. See supra notes 75–78 and accompanying text.
Judicial reversals as possible, applying a uniform standard of properly calibrated scrutiny would be the best approach. But of course courts are not building a deference regime from scratch; they are working within an existing matrix of precedents. If the baseline norm is that *Chevron* applies whenever agencies interpret statutes in regulations and formal adjudications, as some assumed before *Mead*, the more relevant question is, what effect would it have to introduce the possibility that, sometimes, more scrutiny might be applied? At least in terms of the simple model, the answer is that it may cause agencies to stay closer to the statutory core without causing the reversal rate to spike.

It is also worth noting that the residual, unavoidable unpredictability of judicial standards of review may make the first-best solution—a uniform standard of review, “correctly” calibrated to produce a desired level of agency compliance—a difficult thing to craft. Just to state the goal is to show how elusive its attainment would be. Even if there were agreement in principle as to how much running room agencies should have in construing statutes, what verbal formula would properly express it? And how would it be possible to have a single standard be applied uniformly by the whole appellate bench, particularly given that judges may have preferences over policy and may apply the standard strategically in pursuit of those preferences? A deference lottery acknowledges the irreducible indeterminacy of legal standards and the diversity of the bench, and leverages both of these to produce a regime that can flexibly manage agency behavior. If no single deference formula can reliably find the “sweet spot” of agency autonomy in statutory interpretation, alternation between two different standards, each in the proper proportion, may nudge agencies towards it. The deference lottery is a second-best solution. But we live in the world of the second best, and it may be hard to improve on a deference lottery here.\(^\text{217}\)

Two real-world questions naturally arise. The first is, how strict or lax are the deference lotteries being imposed by our courts? The second is, do the lotteries in fact have an effect on the content of agencies’ statutory interpretation? I can offer some preliminary thoughts on both questions, although a complete answer to either is well beyond the scope of this Article.

A thorough assessment of the characteristics of the deference lotteries imposed by our courts would require the collection and analysis of new data,

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\(^{217}\) Another solution that would be effective in principle but difficult to implement in practice—and would also raise troubling questions from a transparency in governance perspective—is to create an “acoustic separation” between how courts review agencies and how agencies think courts review agencies. In other words, if the deference regime were in fact quite deferential, but agencies anticipated fairly stringent judicial review, the regime could generate the benefits of agency compliance without the costs of high levels of reversals. *Cf.* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 Harv. L. Rev. 625, 625, 630 (1984) (defining “acoustic separation” as an imaginary situation in which only officials know the rules for making decisions and only the public knows the conduct rules).
but I can venture some observations based on the data already discussed in this Article. On the whole, it seems that our deference lottery regime pairs a fairly strict *Chevron* lottery with a fairly lax *Skidmore* lottery. In other words, the chance that an agency will get *Skidmore* review is relatively high, and its chances of surviving *Skidmore* review is also relatively high. The Eskridge and Baer data show that, in the Supreme Court at least, agency statutory interpretations in notice-and-comment regulations are reviewed either under *Skidmore* or what they term "*Skidmore*-light" approximately 30% of the time. (To the extent that appeals courts do as the Supreme Court says and not as it does, however, the rate at which *Skidmore* is applied could be somewhat lower.) And the Hickman and Krueger work shows that, when the courts of appeals do apply *Skidmore*, they pay careful attention to the justifications offered by agencies, rather than interpreting statutes de novo. The Hickman and Krueger data show that the survival rate for statutory interpretations under *Skidmore* is just over 60%, which suggests that the review is not extraordinarily stringent. From the information available, then, it seems that the deference lottery avoids the combination of extremes—*Skidmore* applied harshly and infrequently—that would cause reversals to mount without reducing agency slack.

But do agencies actually respond to deference lotteries as the theory predicts? This question falls outside the scope of this Article, which is fundamentally a theory-building piece. A thorough empirical analysis would require either in-depth case studies of agency decision making or a large-scale quantitative analysis of the content of agency statutory interpretations, both of which present formidable challenges of data collection and measurement.

That being said, the agency behaviors I posit here are plausible, based on what we already know about how agencies operate. We know that agencies' leaders do care how their actions fare in courts, and that agencies make choices with an eye to surviving judicial review. Indeed, the prominent scholarship from the 1980s and 1990s on the "ossification" of rulemaking demonstrates that agencies respond strategically to cues from the judiciary. That body of work demonstrates in detail how intensive judicial

218. See *supra* text accompanying note 104.
219. As discussed above, the language of *Mead* suggests a strong presumption that *Chevron* will apply to statutory interpretations announced in notice-and-comment rulemakings and formal adjudications. See *supra* notes 70–71.
220. See Hickman & Krueger, *supra* note 125, at 1247 (stating that the *Skidmore* deference standard requires "reviewing courts to evaluate an interpretation's persuasiveness by weighing various factors").
221. *Id.* at 1275. Note, however, that the population of cases in the Hickman and Krueger dataset includes all statutory interpretations, not only those promulgated through notice-and-comment rulemaking or formal adjudication. Since the default standard for agency statutory interpretations promulgated through informal means is *Skidmore*, it may be that agencies are more conservative with these interpretations, pushing the survival rate up.
scrutiny of rulemaking can cause agencies either to forego rulemaking in favor of other forms of activity, or else to invest in additional procedures or explanation in order to pad out the record for judicial review. Moreover, we know that the General Counsel’s Office, which presumably keeps abreast of developments in judicial review of agencies, is involved in major policy initiatives from the earliest stages, at least in some large agencies. For the model to reflect actual agency practice, all that needs to happen is that personnel within agencies are broadly aware of reviewing courts’ recent deference practices with respect to the agency—do they grant Chevron review frequently, and if not, how stringent does review tend to be?—and that they bring this knowledge to bear when policy is made. And it seems that changes in judicial deference practices do, in fact, induce changes in how agencies interpret statutes, at least some of the time. Donald Elliott, a former General Counsel for EPA, reports that “[EPA] and other agencies gradually internalized and adapted to the additional interpretive discretion (i.e., the expanded power) that Chevron provided them. Accordingly, EPA and other agencies are now more adventurous when interpreting and elaborating statutory law.”

222. Richard J. Pierce, Jr., Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Rulemaking, 1988 DUKE L.J. 300, 300–01 (remarking that “policymaking through agency rulemaking has declined significantly at some agencies during the past decade,” in large part because of “the approach taken by appellate courts when they review agency rules”).

223. See Mashaw & Harfist, supra note 171, at 95, 148–49 (describing how the National Highway Transportation Safety Administration abandoned rulemaking in favor of vehicle recalls as a tool for enhancing public safety, in large part due to the inhospitable reception of its rules by the circuit courts).


225. See Mashaw, supra note 14, at 196, 197 n.38 (noting the rapid growth, between the 1970s and 1990s, in the length of the “concise statement[s] of basis and purpose” that the Administrative Procedure Act requires agencies to file in connection with rulemakings).

226. See Magill & Vermeule, supra note 185, at 1079–80 (observing how doctrines that extend the scope of judicial review increase the leverage of lawyers over agency policy-making processes); see also Thomas O. McGarity, The Internal Structure of EPA Rulemaking, LAW & CONTEMP. PROBS., Autumn 1991, at 57, 63–90 (providing an extensive overview of the EPA’s internal decision-making process, including the role of agency lawyers); id. at 67 (“[Office of General Counsel’s] duty to ensure that rules survive ‘arbitrary and capricious’ review justifies the office in taking positions on the substantive merits of proposals and on the technical and economic validity of the support documents.”).

227. E. Donald Elliott, Chevron Matters: How the Chevron Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law, 16 VILL. ENVTL. L.J. 1, 3 (2005) (footnotes omitted). That said, the impact of changes in judicial doctrine on agency behavior should not be overstated. Several years earlier, Elliott himself was quoted saying, “I would take issue with the assertion that we know that the effects of judicial review on the administrative process and on the internal deliberations within agencies are huge.” Administrative Law Symposium: Question & Answer with Professors Elliott, Strauss, and Sunstein, 1989 DUKE L.J. 551, 553.
B. Recommendations

Still, it is possible to offer some recommendations for some tweaks to courts’ practice that can improve the performance of the deference lottery, whatever level of latitude is ideal for agencies to have. When making recommendations, it is important to bear in mind that no single individual or entity is in charge of defining the contours of the deference lottery; rather, it is a phenomenon that emerges from the interactions of independent decisions made by multiple judges, and indeed depends on judges having different patterns of behavior. All that being said, the Supreme Court plays a critical role in setting out the argumentation frameworks that shape how all federal courts tackle legal questions.228 And there are two subtle changes to the Supreme Court’s deference doctrines that would make the deference doctrine more effective at directing agency behavior, by bringing actual practice more in line with the assumptions made in my model.

The first would be to reinforce the “sliding-scale” variant of Skidmore analysis, which best encourages agencies to strive for interpretive fidelity to the statutes they administer. As discussed above,229 close study of the appellate courts has identified two major strains of Skidmore analysis, the sliding-scale model and the independent-judgment model. The sliding-scale model better rewards agents for more justifiable readings of the statutes they administer. Under sliding-scale review, the agency’s interpretation, rather than the text of the statute, is the starting point for the court’s analysis, and it will stand or fall depending on how convincing a case the agency can make for it. Even if an interpretation is not the one the court would have chosen ab initio, the court is open to the agency’s reasons for its choice and will credit those reasons proportional to their power to persuade. This form of analysis trains the reviewing court’s focus squarely on the relevant question from an agency theory perspective: not, what interpretation would the court choose, but how justifiable is the interpretation chosen by the agency?

Although the factors expressly named in Skidmore do not speak directly to agency expertise,230 some commentators have understood Skidmore to peg deference to expertise,231 and courts have sometimes applied it that way as well.232 There may be good reasons to defer more to agencies with strong subject-specific expertise, but focusing exclusively on expertise leaves agencies no incentive to subvert their own policy preferences in favor of fidelity to the statutes they administer. Even if courts consider expertise in
their *Skidmore* analysis, courts should also consider the content of agencies' interpretations and the justifications agencies offer for them. As Hickman and Krueger found, the sliding-scale model of *Skidmore* review is already dominant on the circuit courts, although both the circuit courts and the Supreme Court rely on their independent judgment in a significant share of cases. To the extent that the Supreme Court can signal in its decisions that this is at the core of *Skidmore* analysis, the *Skidmore* lottery can exert a more consistent and effective pull on agency behavior.

Also, as I discussed above, the deference lottery works best if, when *Chevron* is applied, it is applied predictably and with a good deal of deference. There are three ways in which courts could diverge from this ideal. On the one hand, rather than deferring to any reasonable interpretation, broadly construed, courts could apply more scrutiny to the agency's interpretation and rationale, so that *Chevron*, too, functions as a kind of sliding-scale review. Convergence between *Chevron* and *Skidmore* is not necessarily undesirable, but it may induce agencies to play it safer with their interpretations than is optimal. When *Chevron* becomes *Skidmore*-light, the deference lottery becomes less flexible as a tool to regulate agency behavior. The second divergence from the idealized *Chevron* outlined here is the "Crapshoot *Chevron*" described in subpart III(C), in which the outcomes of judicial review within *Chevron* vary unpredictably. Crapshoot *Chevron* likewise reduces the deference lottery's ability to shape agency behavior, and it also translates into more judicial reversals with no gains in terms of agency fidelity. The third divergence is that courts can give *Chevron* deference at different rates to different agencies. We know that there is currently cross-agency variation within the *Chevron* lottery. To the extent that agencies face different *Chevron* lotteries, of course, the deference regime as a whole gives them different incentives. Barring grounds for differential treatment—such as a judicial judgment that some agencies can be trusted with discretion more than others—the Supreme Court would do well to subject all agencies to the same lottery, and there are some signs that such a convergence is underway.

In a legal regime, clarity has value, but sometimes unpredictability does too. This Article has argued that the deference regime agencies face when

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233. *Id.* at 1238.

234. *Id.*; see also Eskridge & Baer, *supra* note 6, at 1090 ("[I]n the majority of cases—53.6% of them—the Court does not apply any deference regime at all."). When we confine our attention to agency statutory interpretations offered in formal adjudications or notice-and-comment rulemakings, the Eskridge and Baer data show that the Supreme Court still reviews the agency without reference to any deference standard in 16% of the cases.

235. *See* Zaring, *supra* note 97, at 137 (arguing that the various standards for reviewing agency action have already converged into a single "reasonableness" standard).

236. *See supra* notes 214–30 and accompanying text.

237. *See supra* note 107 and accompanying text.

238. *See supra* note 107.
they seek to defend their statutory interpretations in court amounts to a lottery, and that a lottery can be an effective tool for managing agency behavior. If it were possible to craft legal standards with laser-like precision, if there were no variability in how judges applied standards, and if courts were devising a deference regime against a blank slate, there would be little to recommend a deference lottery. But given the incomplete determinacy of any legal standard, the variability in judicial behavior, and *Chevron’s* place in precedent as a default rule, the deference lottery approach may be the best available option for appropriately structuring the relationship between courts and agencies.