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BRINGING ORDER TO THE *SKIDMORE* REVIVAL: A RESPONSE TO HICKMAN & KRUEGER

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The first line of Kristin Hickman and Matthew Krueger’s article announcing that “*Skidmore* deference is back”¹ brings to my mind those awful horror villains of the 1980s—like Jason from the *Friday the 13th* movies or Chucky from the *Child’s Play* series—who repeatedly returned to terrorize. The fact that the revival of *Skidmore*² triggers the memory of these bloodthirsty and unstoppable-against-all-odds villains will be no surprise to most administrative law practitioners and scholars (not to mention law students). Like Jason and Chucky, *Skidmore* is not just scary; it is a very messy business.

In their article, *In Search of the Modern Skidmore Standard*, Hickman and Krueger examine the “modern’ *Skidmore* era,” and, based on their evaluation of the cases since *Mead*,³ propose solutions to bring order to the current disarray. Although I have quibbles with some of their characterizations—both with respect to their description of my work and the courts’ approaches to these cases⁴—their piece does much to advance the *Skidmore* discussion.

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1. Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 Colum. L. Rev. 1235, 1236 (2007).

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

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

4. For example, Hickman and Krueger suggest that my “study” included only the 23 cases found in footnotes 176 and 177 of my piece, Amy Wildermuth, *Solving the Puzzle of Mead and Christensen: What Would Justice Stevens Do?*, 74 Fordham L. Rev. 1877, 1899 (2006). That is not accurate. I did examine “federal court of appeals cases since Womack’s analysis” but the small subset of those cases found in footnotes 176 and 177 were only those in which courts did not “shortcut” the *Skidmore* analysis, i.e., engaged in something more than a cursory analysis of both when *Skidmore* applied as well as how it was applied. I did not mean for those cases to represent the whole universe of cases that referred to *Skidmore* or even the universe that Hickman and Krueger define to come up with their 104 cases. If anything, the cases in footnotes 176 and 177 are closer to—but not quite the same as—the smaller set of cases that Hickman and Krueger concluded fell into the category of sliding-scale cases. This disagreement illustrates the difficulty of characterizing the courts’ approaches to *Skidmore*, further underscoring the confusion and messiness in this area. See Hickman & Krueger, *supra* note 1, at 1278–79.

In this brief response to their work, I take up two issues. First, I consider the application of *Skidmore*, and react to their study and suggested solution. Although we agree on much, I suggest that further work on when *Skidmore* applies is in order. Moreover, when *Skidmore* does apply, I contend that my narrower thumb-on-the-scale approach has advantages over Hickman and Krueger's solution. Next, I turn to the importance of fitting the revival of *Skidmore* into the broader landscape of the Court's recent administrative law jurisprudence.

THE APPLICATION OF *SKIDMORE*: KEEP IT SIMPLE (WHEN IT APPLIES)

When examining an agency interpretation, a court must decide *when Skidmore* applies before it turns to *how* to apply it. Although it is a threshold question, Hickman and Krueger largely stay out of the when-does-*Skidmore*-apply thicket.

Determining when *Skidmore* applies is not an easy question. On one hand, *Mead* and *Christensen*⁵ ask whether the agency action has the force of law in order to determine whether the analysis is governed by *Chevron* or *Skidmore*. *Barnhart v. Walton*, on the other hand, suggests that whether *Chevron* or *Skidmore* applies is determined by several factors, which include "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."⁶ These competing tests have confounded lower courts and thus add to the overall confusion surrounding *Skidmore*.

By limiting their study to the application of *Skidmore*, Hickman and Krueger are able to avoid this mess and focus on the issue in which they are most interested. The preliminary question of whether *Skidmore* applies, however, might impact that analysis. It is possible that a court's (mis)handling of the threshold question of applicability might result in errors in the second step involving the application of *Skidmore*. For example, applying *Skidmore* deference to interpretations that should have received *Chevron* deference could skew any analysis of how *Skidmore* is applied, likely producing more instances of courts agreeing with agency interpretations.

Hickman and Krueger suggest at the end of their article that much work remains with respect to *Skidmore*'s domain. An analysis of how the determination of when *Skidmore* applies affects the application of *Skidmore* deference would seem to be an important part of that future work, but is noticeably absent from Hickman and Krueger's current effort.

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

6. 535 U.S. 212, 222 (2002).

Turning to the meat of their effort—the question of how *Skidmore* is applied—I begin with what the *Skidmore* analysis entails. Unlike *Chevron*,⁷ which provides a fixed-point sort of deference (so long as the agency’s interpretation of an ambiguous statutory provision is reasonable, courts are to defer), *Skidmore* requires a court to consider “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.”⁸ Most commentators agree that *Skidmore* deference is something less than *Chevron* deference but that it is difficult to determine exactly what level of deference will be afforded in any case because *Skidmore*’s multi-factor test embraces multiple degrees of deference.

Hickman and Krueger’s goal was to determine how courts handled this difficult test by examining *Skidmore* applications generally as well as how courts dealt with each of the *Skidmore* factors. Their analysis is extensive and is therefore more helpful than prior efforts. In the end, however, they confirm the common conclusion that courts are confused when it comes to *Skidmore*. In addition, with respect to this confusion, Hickman and Krueger agree with my concern regarding the difficulty of sorting out multiple levels of deference and the need for simplicity in this exercise. We disagree, however, on the solution.

Hickman and Krueger reject as too simple my solution that affords a nonbinding agency interpretation a limited weight—a thumb on the scale but no more—under *Skidmore*. This sort of deference only makes a difference in the small set of close-call cases in which the arguments for one interpretation and those for another are evenly balanced. In addition, it is available only where the evaluation of the *Skidmore* factors reveals that the interpretation reflects agency expertise and is the product of a more reflective process.⁹

Hickman and Krueger propose to view *Skidmore* deference as “three identifiable moods”: “strong deference”; “little or no deference”; and “true intermediate” deference, which “occupies the middle ground.”¹⁰ The correct mood is selected based on an evaluation of the *Skidmore* factors, all of which should be examined for “the extent to which agencies have deliberately employed their superior expertise” as well as for “the potential for arbitrariness” in the agency’s action.¹¹

Before turning to our disagreements, I think it is important to note how close Hickman and Krueger’s recommendations are to mine. We all agree that the *Skidmore* analysis needs to be easier because it is far too complicated in its original form. We also agree that the factors offered by

7. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

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

9. See Wildermuth, *supra* note 4, at 1911–12.

10. See Hickman & Krueger, *supra* note 1, at 1295–98.

11. See *id.* at 1294.

Skidmore lack a guiding principle to explain why one interpretation should get deference when another should not. Finally, although Hickman and Krueger's suggested guiding principles are articulated slightly differently, we agree that when determining whether to give the agency's view any weight, the factors should be used to measure generally (1) whether the agency did in fact use its expertise in reaching its conclusion and (2) whether that conclusion is the product of a process that reflects thoughtful consideration and deliberation.

Where we disagree is on how much nuance there can be to this exercise. My view is that courts tend to stumble over procedure on the way to the real substance of a case. They will not dedicate much time to sorting out the precise level of deference to be applied, whether it is a full sliding scale, six points on a scale, or even, I fear, three moods on a scale. The more difficulty we inject into this exercise, the more courts will end up looking for ways to make it easier, which in turn can only muddle the rules and will thus continue (and may even exacerbate) the confusion that exists today.

Moreover, it is possible that courts could use confusion as cover to favor or disfavor a particular agency.¹² The less straightforward the test, the easier it becomes to hide what is really going on. The mere possibility of this, whether it would in fact occur, is enough for me to conclude that this inquiry should not be unnecessarily complicated.

Finally, Hickman and Krueger's suggestion of a *Chevron*-like "strong deference" mood is troubling. According to *Mead*, *Chevron* applies where the agency interpretation has the force of law, that is, where the interpretation is binding. Agency interpretations receiving *Skidmore* deference are by definition not binding. The binding/nonbinding distinction is critical in terms of both process and judicial review. First, most binding interpretations are adopted with more process, such as through notice and comment procedures, but parties are typically offered few, if any, opportunities to participate in the adoption of nonbinding interpretations.¹³ Second, binding interpretations are subject to judicial review immediately after adoption; nonbinding interpretations are not subject to any judicial review prior to their application in a particular situation.¹⁴ Given these substantial differences,

12. Cf., e.g., Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 *Fordham L. Rev.* 1937, 1937 (2006) (suggesting that EEOC "receives remarkably little respect from the Court" regardless of deference standard).

13. See Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 *Cornell L. Rev.* 397, 403 (2007) (suggesting need for additional process for guidance documents).

14. See, e.g., *Gen. Motors Corp. v. EPA*, 363 F.3d 442, 448 (D.C. Cir. 2004) (citing precedent which held that reviewable agency actions are those that "marked the consummation of the agency's decision making process and determined rights or obligations of involved parties" and thus have the force of law regardless of agency label for action).

it would be inappropriate to give *Chevron* deference to any nonbinding interpretations.

Accordingly, although Hickman and Krueger's goal is noble, I stand by my approach. It avoids varying degrees that might trip up the uninitiated (or dare I say, the uninterested), or that may be used as cover for reaching particular results. Moreover, by turning to the agency interpretation only where the statutory question is close, it accords nonbinding interpretations only some weight, which is consistent with the overall scheme of how nonbinding interpretations are treated in terms of both process and judicial review. Finally, because the Court's post-*Mead* applications of *Skidmore* have been brief at best, my straightforward approach seems more likely to be adopted.

WHERE *SKIDMORE*'S REVIVAL FITS IN THE COURT'S CURRENT LANDSCAPE OF ADMINISTRATIVE LAW CASES

In addition to rethinking the particulars of the *Skidmore* issues, Hickman and Krueger's work inspires me to consider where *Christensen* and *Mead* fit into the Court's recent administrative law jurisprudence. In particular, it is worth exploring how the Court's administrative law cases might relate to one another and whether there is something that ties them all together.

One possibility is to begin by connecting *Chevron* deference to the lax nondelegation doctrine. For example, Patrick Garry suggests that "[i]f Congress is allowed to delegate lawmaking authority to administrative agencies with only the vaguest of directions and the thinnest of intelligible principles, then . . . [o]ne can hardly complain when agencies interpret vague statutes . . ." ¹⁵ Under this view, a broad nondelegation doctrine results in more gaps to fill, and more gaps to fill means that some entity must fill them. Given the time-consuming and specialized nature of the task in today's complex regulatory regime, agencies seem better suited than courts to take this on. Moreover, agencies operate better if they have some confidence that their interpretation of their organic statutes have some weight. Accordingly, it makes sense that the Court defers to agency interpretations—but only if we understand that the Court's take on the nondelegation doctrine lead here.

This kind of approach suggests that it is possible to link seemingly divergent strands found in the Court's administrative law cases and to

15. Patrick M. Garry, Accommodating the Administrative State: The Interrelationship Between the *Chevron* and Nondelegation Doctrines, 38 *Ariz. St. L.J.* 921, 923 (2006); cf. Thomas W. Merrill, Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation, 104 *Colum. L. Rev.* 2097, 2173 (2004) ("The exclusive delegation conception . . . supplies a secure foundation for the *Chevron* doctrine and reinforces the basic soundness of its allocation of interpretational authority.").

begin to assemble the Court's cases into a coherent whole. For example, in *Brand X*, the Court concluded that agencies should not lose their ability to interpret ambiguous statutes if a court gets to the issue first.¹⁶ This decision upset many, including Justice Scalia,¹⁷ but the case looks far less remarkable when we take in the overall administrative law landscape of which it is a part (particularly the point above that agencies are the primary interpreters of the statutes they administer). Likewise, affording some deference to nonbinding interpretations, as *Mead* and *Christensen* instruct, fits comfortably within this scheme. It continues the general trend of deference but makes the analysis more nuanced by awarding deference based on the form of the agency interpretation at issue.

Although putting the pieces of the Court's administrative law jurisprudence together in this way has a neat and tidy quality to it, we know that reshaping those pieces would result in a very different final puzzle. In particular, I wonder whether all this agency deference, even where nuanced and somewhat cabined, is a good thing. Should we worry that Congress has handed off many big decisions to less politically accountable entities and that the Court's response has been, by and large, to increase the power of those unaccountable agencies? Is a different balance needed? And how might we achieve it? Must we reconsider the nondelegation doctrine? Might we rework statutes to make them less complex? Or could we revamp the APA-required procedures employed by agencies to make all agency processes more public?

Like the bounds of *Skidmore's* domain, the answers to these questions are for another day. The questions themselves, however, serve to remind us to keep an eye on the big picture even as we investigate and attempt to explain the smaller pieces of the puzzle.

CONCLUSION

I admire Hickman and Krueger's effort to bring order to the modern *Skidmore* era, not only because it might ease the anxiety of future law students when it comes to *Skidmore* but also because it has the potential to inspire courts to be more coherent when applying *Skidmore*. Much work, however, remains and much bigger questions, such as those detailed above, lurk on the horizon. If Hickman and Krueger's work inspires similar projects in these areas, we may soon have much less to fear in administrative law.

16. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982–86 (2005).

17. *Id.* at 1005–20 (Scalia, J., dissenting).

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