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*A "New" Counter-Marbury: Reconciling Skidmore Deference and Agency Interpretive Freedom*

56 Admin. L. Rev. 1 (2004)

Abstract by Melissa Sutton

The author discusses the sixty-year-old Supreme Court decision of *Skidmore v. Swift & Co.* and proposes that it may be the new counter-*Marbury*. The article begins with a discussion of the case that was previously viewed as the counter-*Marbury* of the administrative state—*Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*—and its review which checks whether an agency's interpretation of a statute it administers falls within a zone of reasonable construction. The article explores the expansion of the scope of *Skidmore* at the expense of *Chevron*.

The article attempts to craft a legal framework satisfying a doctrinal approach that plausibly explains why judicial *Skidmore* constructions need not smother agency interpretive flexibility. The article further aims for the new framework to fit neatly and persuasively into the larger body of the law of judicial administrative relations. The author accomplishes this by reexamining the sixty-year-old *Skidmore* doctrine through the lens of basic principles of modern administrative law exemplified by the *Chevron* and hard-look doctrines. This reexamination supports the conclusion that judicial *Skidmore* constructions that purport to resolve statutory ambiguity should not be characterized, in *Marbury* fashion, as definitive declarations of "what the law is," but instead only represent defeasible policy judgments that leave agencies with substantial room for interpretive maneuver.

The first part of the article offers a brief overview of the federal courts' complex set of stare decisis norms and their power to bind agencies. It goes on to explore the equilibrium the Court created between judicial interpretive stasis and agency interpretive freedom, how that has been undermined, how the circuit courts have struggled to make sense of it, and how unexplained efforts have been made to begin restoring its substance. Part II draws upon basic principles of administrative law to explain why *Skidmore* constructions resolving statutory ambiguities do not say "what the law is" and so leave room for ongoing agency interpretive freedom. The article concludes that *Skidmore*, advancing into its seventh decade, blossoms into a new counter-*Marbury*.