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Christensen v. Harris County: Pumping Chevron For All It's Worth - Defining the Limits of Chevron Deference

NAAMAN ASIR FIOLA*

I. INTRODUCTION

One commentator called the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*¹ "the central case of modern administrative law."² Not surprisingly, scholars have produced countless studies regarding the influence of *Chevron*.³ One issue scholars have focused on is the considerable uncertainty as to how far so-called *Chevron* deference extends.⁴ Stated another way, under what circumstances should administrative agencies, rather than the courts, definitively interpret federal statutes?⁵ While the Court in *Chevron* deferred to a statutory

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1. 467 U.S. 837 (1984).

2. Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 ADMIN L.J. AM. U. 187 (1992); cf. Gregory E. Maggs, *Reconciling Textualism and the Chevron Doctrine: In Defense of Justice Scalia*, 28 CONN. L. REV. 393, 400 (1996) (asserting that: "The *Chevron* case did not revolutionize the field of administrative law. Many earlier precedents had indicated that courts should defer to administrative agencies.").

3. See *infra* notes 2-7.

4. See MICHAEL ASIMOV ET AL., STATE AND FEDERAL ADMINISTRATIVE LAW 566 (2d ed. 1998) (asking whether "*Chevron* appl[ies] to every agency interpretation, regardless of format"); see also Britt E. Ide, *To Defer or Not to Defer? The Circuit Split Over Chevron Deference to Agency Interpretations: Southern Ute Indian Tribe v. Amoco Production Co.*, 1998 UTAH L. REV. 397 (1998) (stating that "[t]he law regarding the level of deference courts give to an administrative agency's interpretation that is neither a rulemaking nor an adjudication is in disarray").

5. See Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts*, 7 YALE J. ON REG. 1, 2 (1990); see also Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administra-*

interpretation contained in a legislative rule,⁶ administrative agencies use a wide variety of formats to interpret administrative legislation.⁷ The different interpretive formats may be placed into three different categories: (1) legislative rules having the binding effect of a statute; (2) binding principles announced in adjudicative proceedings; and (3) non-legislative rules lacking legal authority to bind the public or courts.⁸ Under *Chevron*, the first two categories of agency interpretations are clearly entitled to judicial deference.⁹ Some courts have extended *Chevron*-deference to the third category of agency interpretations, such as opinion letters,¹⁰ guidelines and manuals,¹¹ informational bulletins and memoranda,¹² policy statements,¹³ and interpretive regulations,¹⁴ to name just a few.¹⁵ Lower courts have

tive State, 89 COLUM. L. REV. 452, 452 (1989) (stating that "one of the most persistently intriguing puzzles has been to define the appropriate judicial and administrative roles in the interpretation of regulatory statutes").

6. *Chevron*, 467 U.S. at 840-41.

7. See Anthony, *supra* note 5, at 2 (identifying legislative rules, adjudicatory opinions, procedural rules and actions, interpretive rules, policy statements, manuals, guidelines, staff instructions, opinion letters, and other formats that agencies use to interpret statutes).

8. Patricia G. Chapman, *Has the Chevron Doctrine Run Out of Gas? Senza Ripieni Use of Chevron Deference or the Rule of Lenity*, 19 MISS. C.L. REV. 115, 123-24 (1998).

9. See *United States v. Hagggar Apparel Co.*, 526 U.S. 380, 394 (1999) (stating that courts "must, when appropriate, give [agency] regulations *Chevron* deference"); see also *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (explaining that courts must apply *Chevron* principles to adjudicative decisions of an agency that has been delegated ultimate decision making authority in a particular area).

10. *Almendarez v. Barrett-Fisher Co.*, 762 F.2d 1275, 1281-82 (5th Cir. 1985); see also *Techworld Dev. Corp. v. D.C. Pres. League*, 648 F. Supp. 106, 121 (D.D.C. 1986).

11. *Friends of the Shawangunks, Inc. v. Clark*, 754 F.2d 446, 450 (2d Cir. 1985).

12. *Lukhard v. Reed*, 481 U.S. 368, 377-78 (1987); *Cook Inlet Native Ass'n v. Bowen*, 810 F.2d 1471, 1474-76 (9th Cir. 1987).

13. *Am. Fed'n of Gov't Employees v. Fed. Labor Relations Auth.*, 778 F.2d 850, 861 (D.C. Cir. 1985).

14. *Wis. Dep't of Health and Soc. Servs. v. Bowen*, 797 F.2d 391, 397-98 (7th Cir. 1986); see also *Am. Med. Ass'n v. Heckler*, 606 F. Supp. 1422, 1441 (S.D. Ind. 1985) (upholding interpretation of the Deficit Reduction Act as reasonable); *Elizabeth Blackwell Health Ctr. for Women v. Knoll*, 61 F.3d 170, 182 (3rd Cir. 1995) (deferring to informally promulgated agency statutory interpretation).

15. *But see Capitano v. Sec'y of Health and Human Servs.*, 732 F.2d

also created almost a netherworld of *Chevron* deference; ostensibly giving informal interpretations less than “full *Chevron* deference,”¹⁶ but in reality deferring to less formal interpretations.¹⁷ Adding to the confusion regarding the reach of *Chevron*, the Supreme Court itself has been inconsistent in deciding whether informal interpretations are entitled to *Chevron* deference,¹⁸ and at other times, the Court sidestepped the issue entirely.¹⁹ However, the Supreme Court’s decision in *Christensen v. Harris County*²⁰ should send a signal to lower courts that informal agency interpretations are not entitled to *Chevron* deference.²¹

The purpose of this article is to analyze the *Christensen* case and determine the influence it should have on lower courts. This note will briefly trace the history of judicial deference of agency interpretations, from pre-*Chevron* jurisprudence through the present. Subsequently, this note will attempt to predict the influence *Christensen* will have on lower courts, and on the administrative agencies themselves.

1066, 1076 (2d Cir. 1984) (declining to defer under *Chevron* because the regulation was not legislative); *accord* Motor Vehicle Mfrs. Ass’n of United States, Inc. v. New York State Dep’t of Env’tl. Conservation, 17 F.3d 521, 535 (2d Cir. 1994) (refusing to give *Chevron* deference to an EPA “Advisory Circular” after concluding that the circular was not a “regulation”).

16. *Massachusetts v. FDIC*, 102 F.3d 615, 621 (1st Cir. 1996).

17. *Id.* at 621-22.

18. *See* *Martin v. Occupational Safety and Health Review Comm’n*, 499 U.S. 144, 157 (1991) (indicating that informal interpretations are only entitled to “some weight”); *see also* *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 481, 482 (1999) (declining to defer to interpretive guidelines); *but see* *Lukhard*, 481 U.S. at 378-79 (deferring to agency interpretation found in memoranda); *Nations Bank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-57 (1995) (deferring to the opinion letter of the Comptroller of the Currency).

19. *City of Chicago v. Env’tl. Def. Fund*, 511 U.S. 328, 339 (1994).

20. 529 U.S. 576 (2000).

21. *Christensen v. Harris County*, 529 U.S. 576, 577 (2000) (stating that “[i]nterpretations 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”).

II. HISTORICAL BACKGROUND

A. *Pre-Chevron deference*

Prior to *Chevron*, courts did not articulate a systematic or consistent doctrine regarding deference that should be accorded to an agency's interpretation of legislation it was charged with administering.²² One commentator asserts that the Supreme Court's first attempt at establishing guidelines for deference to agency interpretations²³ resulted in deference to the National Labor Relations Board's (NLRB) interpretation.²⁴ Three years later, the Supreme Court reached the opposite conclusion, holding that the NLRB's adjudicative opinions addressing whether company forepersons could be classified as "employees" were not entitled to deference.²⁵ Thus, the Court established a pattern of wavering between strong and weak deference that would last for over forty years.²⁶

One leading pre-*Chevron* case is *Skidmore v. Swift & Co.*,²⁷ which, even after *Chevron*, remained "[t]he authoritative statement on the role of interpretive rules in administrative law."²⁸ In *Skidmore*, Swift employed plaintiffs to maintain the fire-fighting equipment of the company, operate the elevators, and relieve other employees of their fire-

22. See Anthony, *supra* note 5, at 6; see also Russel L. Weaver and Thomas A. Schweitzer, *Deference to Agency Interpretations of Regulations: A Post-Chevron Assessment*, 22 MEM. ST. U. L. REV. 411, 413 (1992) (pointing out that "[i]n the pre-*Chevron* era, the Supreme Court applied diverse deference standards to interpretations of regulations").

23. NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111 (1944).

24. *Id.* at 135. See also John G. Osborn, *Legal Philosophy and Judicial Review of Agency Statutory Interpretation*, 36 HARV. J. ON LEGIS. 115, 116 (1999).

25. Packard Motor Car Co. v. NLRB, 330 U.S. 485, 492 (1947) (stating that "[i]f we were obliged to depend upon administrative interpretation for light in finding the meaning of the statute, the inconsistency of the Board's decisions would leave us in the dark").

26. Osborn, *supra* note 24, at 116.

27. 323 U.S. 134 (1944).

28. Jamie A. Yavelberg, *The Revival of Skidmore v. Swift: Judicial Deference to Agency Interpretations After EEOC v. Aramco*, 42 DUKE L.J. 166 (1992) (arguing that "Skidmore established a doctrine of 'cautious deference' regarding agency interpretations").

fighting duties.²⁹ Under the terms of their employment, plaintiffs agreed to stay overnight at Swift three to four nights a week in order to answer fire alarms.³⁰ The plaintiffs, in addition to their fixed compensation, were initially paid fifty cents for every alarm answered,³¹ but during their time of employment there were few alarms and no fires.³² The employees claimed that they were entitled to overtime compensation for the nights they had spent on the company premises and brought an action under the Fair Labor Standards Act (FLSA) to recover overtime, liquidated damages, and attorney's fees.³³ Swift, bolstered by the Labor Administrator's interpretations of the FLSA, claimed that the nights spent by the employees at the company did not constitute work.³⁴ This interpretation meant that the employees were not entitled to overtime compensation under the FLSA.³⁵

The Supreme Court held that the interpretations and opinions of the Labor Administrator were "entitled to respect," but were "not controlling on the courts."³⁶ *Skidmore* established a doctrine of "cautious deference" to agency interpretations.³⁷ In contrast, *Chevron* required "deference to any reasonable agency interpretations."³⁸

According to Justice Antonin Scalia, pre-*Chevron* courts asked whether "(1) Congress intended a particular result, but was not clear about it; or (2) Congress had no particular intent on the subject, but meant to leave its resolution to the agency."³⁹ If the former situation applied, then the

29. *Skidmore*, 323 U.S. at 135.

30. *Id.*

31. This amount was later increased to sixty-four cents per alarm. *Id.* at 135-36.

32. *Id.* at 135.

33. *Id.*

34. The trial court found for the company and held that as a "conclusion of law" the employees were not entitled to overtime. *Id.* at 136.

35. *Id.*

36. *Id.*

37. Yavelberg, *supra* note 28, at 166.

38. *Id.*

39. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516 (1989).

courts asserted their right to interpret the law.⁴⁰ If the latter situation arose, courts deferred to the agency.⁴¹ Interestingly, the level of deference accorded to an agency interpretation of Congressional legislation often turned on the format of the interpretation.⁴² Thus, courts deferred to interpretational formats having “the force of law,” as long as they were reasonable, and accorded only “special consideration” to less formal formats.⁴³ Although courts have deferred to agency interpretations contained in legislative regulations and expressed in adjudicative decisions,⁴⁴ ordinarily, agency interpretations “[were] given important but not controlling significance.”⁴⁵

B. Post-Chevron

According to the Supreme Court’s opinion in *Chevron*, courts must defer to an administrative agency’s regulation containing a reasonable interpretation of an ambiguous statute.⁴⁶ *Chevron* involved the application of the Clean Air Act Amendments of 1977.⁴⁷ The amended Act required states that had not achieved the national air quality standards established by the Environmental Protection Agency (EPA) to implement a “permit program regulating new or modified major stationary sources of air pollution.”⁴⁸ Under the program, states could not issue permits unless stringent conditions were met.⁴⁹ The EPA interpreted “stationary source” to mean a single plant, regardless of the number of pollution-emitting devices the plant had.⁵⁰ This

40. *Id.*

41. *Id.*

42. Anthony, *supra* note 5, at 7.

43. *Id.*

44. *Id.* at 7-8.

45. *Batterton v. Francis*, 432 U.S. 416, 424 (1977).

46. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (citing *INS v. Wong*, 450 U.S. 139, 144 (1981); *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 87 (1978)).

47. *Id.* at 839.

48. *Id.* at 840.

49. *Id.*

50. *Id.*

interpretation was contained in an EPA regulation.⁵¹ Pursuant to this interpretation, an existing plant with several pollution-emitting devices could install or modify one piece of equipment without meeting the stringent conditions, as long as the total emissions fell under the maximum allowable.⁵² The issue in *Chevron* was whether the EPA's interpretation of "stationary source" was based on a "reasonable construction" of the amended Clean Air Act.⁵³ To answer this question, the Court first addressed the question of whether Congress' intent regarding the meaning of "stationary source" could be ascertained.⁵⁴ Finding that neither the statute itself nor the legislative history was clear on the meaning of "stationary source," the Court then analyzed the issue of the reasonableness of the EPA's interpretation.⁵⁵ The Court concluded that the EPA's definition of "stationary source" represented a reasonable construction of the statute.⁵⁶

It might seem obvious to state, but *Chevron* deference represents a "substantial departure from pre-*Chevron* case law."⁵⁷ Whereas prior to *Chevron*, the Court ruled that an agency's "rulings, interpretations, and opinions" need not be "controlling,"⁵⁸ *Chevron* mandates that courts defer to reasonable agency interpretations of ambiguous statutes.⁵⁹

Chevron deference to an agency's interpretation requires two levels of analysis.⁶⁰ First, the court must decide whether the statute has a clear meaning.⁶¹ If the statute is

51. *Id.*

52. *Id.* at 840.

53. *Id.*

54. *Id.* at 845-47.

55. *Id.* at 865.

56. *Id.*

57. Weaver and Schweitzer, *supra* note 22, at 418. See also Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 971 (1992) (stating that "*Chevron* is widely understood to mark a significant transformation in the Supreme Court's jurisprudence of deference"); Farina, *supra* note 5, at 455 (pointing out that *Chevron* "announced the end of judicial vacillation between [differing] interpretive models").

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

59. *Chevron*, 467 U.S. at 866.

60. *Id.*

61. ASIMOV, ET AL., *supra* note 4, at 565.

clear, the court and the agency must implement the intent of Congress.⁶² An agency's interpretation that conflicts with the clear meaning of the statute is presumptively invalid.⁶³ If the statute is ambiguous, the court moves to the next level of analysis: whether the agency interpretation is "permissible" or "reasonable."⁶⁴ The court "may not substitute its own construction of a statutory provision for a reasonable interpretation" of an agency.⁶⁵ Where Congress has spoken, "its will must prevail."⁶⁶ When Congress has not addressed the disputed issue, courts must presume that Congress has delegated interpretive authority to the agency.⁶⁷ Courts may interpret ambiguous law if Congress "has failed to designate an agency to administer the statute."⁶⁸

Some see *Chevron* as an "enormous improvement" over judicial decision-making in the pre-*Chevron* era.⁶⁹ Disputes regarding the interpretation of statutes should be resolved by agencies themselves because Congress has delegated its policy making power to the agency in its particular sphere of expertise.⁷⁰ *Chevron* is based in part on the premise that "the agency responsible for administering a regulatory scheme is often in the best position to interpret that scheme."⁷¹ The reasoning behind this premise is that the responsible agency possesses expertise and is politically accountable to the public.⁷² Moreover, administrative agencies function just as well as the courts in interpreting legislation to comport with changing times.⁷³

62. Anthony, *supra* note 5, at 16.

63. ASIMOV, ET AL., *supra* note 4, at 565.

64. *Id.*

65. *Chevron*, 467 U.S. at 844.

66. Merrill, *supra* note 57, at 979.

67. *Id.*

68. *Id.*

69. 1 KENNETH C. DAVIS & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* 112 (3d ed. 1994).

70. *Id.* at 112-14.

71. Weaver and Schweitzer, *supra* note 22, at 419.

72. Jonathon T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 *STAN. L. REV.* 1, 100-01 (2000).

73. Cass Sunstein, *Is Tobacco a Drug? Administrative Agencies as*

Others, however, view *Chevron* deference as a wrongful usurpation of the judiciary's power to interpret the law,⁷⁴ due to the fact that "[i]t is emphatically the province and duty of the judicial department to 'say what the law is.'"⁷⁵

Regardless of how one feels about *Chevron* deference, it seems clear that it has strengthened agency power⁷⁶ because *Chevron* replaced the old case-by-case analysis with a rigid formula for giving deference to the agency's position.⁷⁷

It is important to note that the Court in *Chevron* deferred to an agency interpretation contained in a legislative regulation.⁷⁸ There is a fundamental difference between legislative and interpretive (or non-legislative) rules.⁷⁹ Legislative rules derive from a Congressional grant of authority to the agency, and have the binding effect of a statute.⁸⁰ In con-

Common Law Courts, 47 DUKE L.J. 1013, 1019 (1998) (stating that "[o]perating as common law courts, agencies have, as they should, considerable power to adapt statutory language to changing understandings and circumstances").

74. Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2074-75 (1990).

75. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); see also Molot, *supra* note 72, at 6 (arguing that "[*Chevron*] weaken[s] judicial authority in a way that fundamentally alters the relationship between lawmaking and law interpretation in our constitutional framework").

76. Anthony, *supra* note 5, at 27; see also Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law*, 41 WM. & MARY L. REV. 1463, 1466 (2000) (observing that "the judiciary's rush to defer to reasonable agency interpretations of ambiguous statutory language has emboldened agencies to push the outer limits of their jurisdiction"); Keith Werhan, *The Neoclassical Revival in Administrative Law*, 44 ADMIN. L. REV. 567 (1992) (noting that courts have upheld significantly more agency decisions after *Chevron*).

77. David M. Hasen, *The Ambiguous Basis of Judicial Deference to Administrative Rules*, 17 YALE L.J. ON REG. 327, 336 (2000) (stating that, "[i]n place of a context-sensitive inquiry into deference factors, courts now [are] required to fit the widely varying circumstances of agency rulemaking into *Chevron's* rather rigid decision tree").

78. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 840 (1984).

79. Yavelberg, *supra* note 28, at 167; see generally Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretive Rules*, 2 ADMIN. L. REV. 547 (2000); cf. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (Scalia, J., dissenting) (arguing that post-*Chevron*, the "legislative rules vs. other action dichotomy . . . is an anachronism"), *overruled by Civil Rights Act of 1991*.

80. Yavelberg, *supra* note 28, at 167-68.

trast, agencies may issue interpretive rules without relying on a Congressional grant of power.⁸¹ An agency may issue this type of rule in a variety of formats, including manuals, policy statements, staff instructions, opinion letters, audits, correspondence, guidelines, press releases, and internal memoranda.⁸² Post-*Chevron* courts often gave *Chevron*-deference to agency interpretations that did not have the same force as a legislative rule.⁸³

A brief review of Supreme Court cases that applied *Chevron* shows that the Court has at times given deference to agency interpretations found in a variety of formats. Just two years after *Chevron*, the Court in *Young v. Community Nutrition Institute*⁸⁴ deferred to a "longstanding interpretation" found in Food and Drug Administration (FDA) policy.⁸⁵ In *Reno v. Koray*⁸⁶ the Court likewise deferred to a Bureau of Prisons (BOP) policy interpreting "official detention"⁸⁷ as excluding time spent out of prison on bail.⁸⁸ Paradoxically, the *Reno* Court indicated in dicta that a BOP internal agency guideline was only entitled to "some deference."⁸⁹ The Court has also applied *Chevron* deference to an agency interpretation found in a legal brief prepared for litigation.⁹⁰

However, *Christensen* revisits the issue of applying *Chevron* non-legislative rules, and finds that *Chevron* should not

81. *Id.* at 168.

82. *Id.*

83. *Arnold v. UPS, Inc.*, 136 F.3d 854, 864 (1st Cir. 1998); *but see S. Ute Indian Tribe v. Amoco Prod. Co.*, 119 F.3d 816, 832 (10th Cir. 1997) (finding that *Chevron* should not be applied to less formal agency interpretations), *rev'd*, 526 U.S. 865 (1999).

84. 476 U.S. 974 (1986).

85. *Id.* at 979-81; *see also PBGC v. LTV Corp.*, 496 U.S. 633, 656 (1990) (holding that PBGC's policy of restoring certain pension plans under section 4047 of the Employee Retirement Income Security Act of 1974 (ERISA) was a "permissible construction" of that statute).

86. 515 U.S. 50 (1995).

87. 18 U.S.C. § 3585(b) (2000).

88. *Reno v. Koray*, 515 U.S. 50, 65 (1995).

89. *Id.* at 61.

90. *Auer v. Robbins*, 519 U.S. 452, 462 (1997) (explaining that: "There is simply no reason to suspect that the interpretation [contained in the legal brief] does not reflect the agency's fair and considered judgment on the matter in question.").

be applied in this context.⁹¹

III. ANALYSIS OF *CHRISTENSEN V. HARRIS COUNTY*

Until *Christensen*, it was unclear whether *Chevron* deference extended to informal agency interpretive formats such as interpretive rules or opinion letters.⁹² While pre-*Chevron* jurisprudence placed an emphasis on the distinction between formal and informal interpretations in determining how much deference to give, post-*Chevron* decisions blurred the distinctions between formal and informal interpretations.⁹³ This resulted in confusion as to how to apply *Chevron* to informal interpretive contexts.⁹⁴

Christensen addresses the issue of whether *Chevron* deference extends to an administration agency's opinion letter interpreting a regulation the agency has promulgated.⁹⁵

In *Christensen*, Harris County adopted a policy requiring its employees to schedule time off in order to reduce the amount of accrued compensatory time.⁹⁶ The County, concerned that it lacked the monetary resources to pay the accrued compensatory time, sought a determination from the Department of Labor regarding the legality of its position.⁹⁷ The Department replied to the County in an opinion letter, stating that the County could not require its non-exempt employees to take time off.⁹⁸ The County, meanwhile, went ahead with its previously formulated policy of ordering its

91. *Christensen v. Harris County*, 529 U.S. 576, 587-88 (2000).

92. ASIMOV ET AL., *supra* note 4, at 566.

93. Chapman, *supra* note 8, at 125.

94. *Id.*

95. *Christensen*, 529 U.S. at 581.

96. *Id.* at 580-81.

97. *Id.*

98. *Id.* The Opinion Letter stated:

[I]t is our position that a public employer may schedule its nonexempt employees to use their accrued FLSA compensatory time as directed if the prior agreement specifically provides such a provision . . . Absent such an agreement, it is our position that neither the statute nor the regulations permit an employer to require an employee to use accrued compensatory time.

Dep't of Labor, Wage and Hourly Division (Sept. 12, 1992).

employees to use the compensatory time.⁹⁹ The County employees sued, claiming that the FLSA of 1938 prohibited the county from implementing a policy of forcing their employees to take time off in order to reduce compensatory time.¹⁰⁰

After a somewhat detailed explanation of the substantive law of the FLSA, the Court held that nothing in the FLSA prohibited the County from implementing its policy of forced time off.¹⁰¹ More importantly, the Court engaged in a *Chevron* analysis and did not defer to the Department of Labor's opinion letter interpreting its own regulation.¹⁰²

In Part III of its opinion, the Court directly confronts the *Chevron* issue.¹⁰³ The Court points out the substantive difference between an informal interpretation, such as the opinion letter at issue here, and interpretations arrived at after formal adjudication or notice-and-comment rulemaking.¹⁰⁴ The Court alludes to its previous decisions holding that interpretive guidelines do not receive *Chevron* deference, and proceeds to explicitly state that "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."¹⁰⁵ The Court goes back to a pre-*Chevron* demarcation between formal and informal interpretations, while affirming the *Chevron* doctrine itself.¹⁰⁶

Perhaps the most fascinating portion of the Court's majority opinion addresses the question of ambiguity of the FLSA regulation.¹⁰⁷ As is well settled under *Chevron*, the Court must first ask whether the statute or regulation has

99. *Christensen*, 529 U.S. at 581.

100. *Id.*

101. *Id.* at 587-88.

102. *Id.* at 586-87.

103. *Id.*

104. *Id.* at 587.

105. *Id.*

106. *Id.* at 587-88.

107. *Id.* at 588.

a clear meaning.¹⁰⁸ If so, the investigation ends; inquiry into the reasonableness of the agency's interpretation is superfluous.¹⁰⁹ Initially, the Court addresses the question of the agency's interpretation, holding that it is not entitled to deference, and subsequently finds that the FLSA regulation is unambiguous.¹¹⁰ The Court found that even if the Opinion Letter was entitled to *Chevron* deference, the regulation was clear in its meaning, thereby precluding any interpretation contrary to the clear meaning of the regulation.¹¹¹ The order of the Court's *Chevron* analysis is telling. The fact that the Court reverses the order of the "*Chevron* two-step" patently displays the Court's desire to definitively answer the question of whether informal interpretations of statutes or regulations should be allowed *Chevron* deference.¹¹² The answer to the question is a resounding "no."¹¹³

Justice Souter writes separately to emphasize his opinion that the Secretary of Labor could, if so inclined, issue a regulation limiting forced use of time off in order to cut down on compensation.¹¹⁴ He reinforces the majority's holding that regulations, adopted pursuant to notice-and-comment procedures, are entitled to *Chevron* deference.¹¹⁵ Thus, if the Secretary issued such a regulation it would presumably change the result arrived at in *Christensen*.¹¹⁶

Justice Scalia's concurrence raises several interesting arguments regarding the proper scope of *Chevron* deference.¹¹⁷ Justice Scalia, a former administrative law professor, frequently authors opinions and writes articles concerning the issue of *Chevron* deference.¹¹⁸ It is safe to say

108. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

109. *Id.*

110. *Christensen*, 529 U.S. at 587-88.

111. *Id.* at 588.

112. *Id.* (enunciating the Court's *Chevron* analysis as set forth above and stating that "[t]he regulation in this case . . . is not ambiguous").

113. William Funk, *Supreme Court News*, 25 ADMIN. & REG. L. NEWS 8, 9-17 (2000).

114. *Christensen*, 529 U.S. at 589.

115. *Id.*

116. *Id.*

117. *Id.* at 589-91.

118. *See, e.g.* Scalia, *supra* note 39; *EEOC v. Arabian Am. Oil Co.*, 499

that Scalia strongly supports *Chevron* deference.¹¹⁹ Moreover, he makes known his desire to extend *Chevron* to all agency interpretations, regardless of format.¹²⁰ He asserts that “[w]hile *Chevron* in fact involved an interpretive regulation, the rationale of that case was not limited to that context”¹²¹ One reason undergirding Scalia’s support of *Chevron* is his desire to prompt Congress to create unambiguous legislation.¹²² He also agrees with those who believe that, due to their superior knowledge, administrative agencies are in a better position to interpret ambiguous legislation than the courts.¹²³ According to Scalia, agencies that are accountable to the President have a better “democratic pedigree” than the courts.¹²⁴ In other words, courts are often insulated from public views, while agencies are, theoretically, accountable to the public.

Justice Scalia restates his case for the widespread application of *Chevron*.¹²⁵ He reasons that the agency’s opinion letter is entitled to deference “if it represents the authoritative view” of the agency.¹²⁶ Scalia concedes that the letter, by itself, does not necessarily represent the “authoritative view,”¹²⁷ however, he argues that an *amicus curiae* brief

U.S. 244, 259-60 (1991) (Scalia, J., concurring); *Auer v. Robbins*, 519 U.S. 452 (1997) (upholding Secretary of Labor’s reading of the FLSA).

119. Herz, *supra* note 2, at 187 n.4; see generally Maggs, *supra* note 2.

120. *Arabian Am. Oil Co.*, 499 U.S. at 259-60 (Scalia, J., concurring) (stating that the distinction between formal and informal interpretations is “an anachronism”); but see *Martin v. Occupational Safety and Health Review Comm’n*, 499 U.S. 144, 157 (1991) (reiterating the distinction between formal interpretive rules, entitled to *Chevron* deference, and informal interpretations, which are only entitled to “some weight” under *Skidmore*).

121. *Christensen*, 529 U.S. at 589-90.

122. Scalia, *supra* note 39, at 517 (stating that “Congress now knows that the ambiguities it creates, whether intentionally or unintentionally, will be resolved, within the bounds of permissible interpretation, not by the courts but by a particular agency, whose policy biases will ordinarily be known”).

123. Cass R. Sunstein, *Justice Scalia’s Democratic Formalism*, 107 YALE L. J. 529, 551 (1997) (reviewing Antonin Scalia, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997)).

124. *Id.*

125. See *Christensen*, 529 U.S. at 591 (Scalia, J., concurring).

126. *Id.*

127. *Id.*

filed by the United States Solicitor General,¹²⁸ purporting to endorse an opinion letter as the authoritative view, should be enough to merit *Chevron* deference.¹²⁹

Ultimately, Scalia's "authoritative view" argument raises more questions than it answers. How is "authoritative view" defined? Who is authorized to express the agency's "authoritative view" on a particular subject? If there are conflicting interpretations of a statute or regulation, does the court step in and choose which interpretation represents the "authoritative view?"¹³⁰ Unlike the majority's formulation of *Chevron's* applicability, Scalia's approach engenders the same confusion and lack of uniformity that has plagued the courts since *Chevron* was decided.¹³¹

Justice Scalia's desire to extend *Chevron* is equaled by Justice Breyer's desire to consign *Chevron* to a mere application of *Skidmore*.¹³² Breyer argues that *Chevron* "simply focused upon an additional, separate legal reason for deferring to certain agency determinations."¹³³ Ironically, Breyer agrees with Scalia that the agency's position is entitled to deference.¹³⁴ His rationale, however, represents a fundamental disagreement with Scalia about the nature of *Chevron*, because he believes that Scalia's approach is "counterproductive."¹³⁵ While Scalia would apply *Chevron* deference

128. Brief for the United States as Amicus Curiae supporting Petitioners, (1999 WL 112 8266).

129. *Christensen*, 529 U.S. at 591.

130. The Court did exactly that in *Martin*, where the Court had to choose between "reasonable but conflicting interpretations of an ambiguous regulation" furnished by the Secretary of Labor and the Occupational Safety and Health Review Commission. *Martin*, 499 U.S. at 150. Lower courts are ill-equipped to make such a choice, and should not be forced to do so. Thus, the rule set forth by the majority in *Christensen* is the superior view of *Chevron* deference.

131. *Id.*; ASIMOV, ET AL., *supra* note 4, at 400 (stating that "[t]he Supreme Court's holdings addressing deference to agency interpretive statements are unclear and have created confusion . . .").

132. *Christensen*, 529 U.S. at 596 (Breyer, J., dissenting) (stating that "*Chevron* made no relevant change" to *Skidmore's* holding that agency "rulings, interpretations and opinions" are "not controlling").

133. *Id.* (Breyer, J., dissenting).

134. *Id.* (Breyer, J., dissenting).

135. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 373 (1986) (stating that "applica[tion] [of *Chevron*] to all agency interpretations of law . . . would be seriously overbroad, counterpro-

to any “authoritative view” of an agency, Breyer says the court should examine each case independently and simply use the agency interpretation to aid the Court in deciding the case, rather than rigidly following the *Chevron* formula.¹³⁶ In *Christensen*, Breyer agrees with Justice Stevens’ that the agency’s opinion letter “merit[s] our respect,”¹³⁷ and explained that he would have held that the County’s policy violates the FLSA because the agency interpreted the FLSA as prohibiting the County’s policy.¹³⁸

Justice Stevens’ dissent, joined by Justices Ginsburg and Breyer, reaffirms his long-standing belief that *Chevron* represents a “restatement of existing law rather than a new approach.”¹³⁹ Ironically, while many others view *Chevron* as a pivotal moment in the Court’s administrative law jurisprudence,¹⁴⁰ the author of the opinion, Justice Stevens, regards *Chevron* as simply one more in a long line of deference cases.¹⁴¹ Stevens reads *Chevron* narrowly in part because agencies are less accountable to the public than are legislatures.¹⁴² Significantly, Stevens does not cite *Chevron* to support the proposition that the Court should defer to the agency’s opinion letter. Instead, he cites to *Skidmore*,¹⁴³ which ostensibly allows courts more leeway to substitute their own judgment for the agency interpretation. Justice Stevens uses subtle language to illustrate his support for a narrow reading of *Chevron* when he points

ductive and sometimes senseless”).

136. *Christensen*, 529 U.S. at 596 (Breyer, J., dissenting). Breyer places much importance on the Court’s *Skidmore* decision. His extensive reliance on *Skidmore* shows his preference for so called “weak deference,” as opposed to *Chevron*’s “strong deference” formulation. *But see* United States v. LaBonte, 520 U.S. 751 (1997) (Breyer, J., dissenting) (indicating that he would extend *Chevron* deference to an interpretive guideline issued by the United States Sentencing Commission, a judicial branch agency).

137. *Christensen*, 529 U.S. at 597 (Breyer, J., dissenting).

138. *See id.*

139. Merrill, *supra* note 57, at 1033 n.33.

140. Farina, *supra* note 5, at 457 (asserting that *Chevron* “generated a powerful new image of the appropriate functions of court and agency in the administrative state”).

141. *See* *Christensen*, 529 U.S. at 595 (Stevens, J., dissenting).

142. *See* William D. Popkin, *A Common Law Lawyer on the Supreme Court: The Opinions of Justice Stevens*, 1989 DUKE L.J. 1087, 1118 (1989).

143. *See* *Christensen*, 529 U.S. at 595 (Stevens, J., dissenting).

out that the agency shares his understanding of the statute's meaning, rather than vice versa.¹⁴⁴ According to Justice Stevens, the judiciary's understanding of a particular administrative statute still plays an important role in interpreting the statute, even in a post-*Chevron* determination.¹⁴⁵ Finally, *Chevron* and its progenitors simply require that a court "respect" the agency's interpretation.¹⁴⁶

IV. IMPACT OF THE OPINION

A. Future Cases

The Court's refusal to extend *Chevron* to agency opinion letters, interpretive rules, and other less formal interpretations sends a signal to lower courts that they may substitute their own judgment when faced with these types of issues. The courts, of course, can evaluate such informal interpretations and determine whether or not they are persuasive.¹⁴⁷ However, courts should not abdicate their judicial duty and automatically defer to informal agency interpretations analogous to opinion letters, because these interpretations do not carry the force of law.¹⁴⁸ These informal interpretations, which often impose heavy burdens on the public, are enacted without input from the public.¹⁴⁹ While the judicial principles espoused in *Chevron* are sound, courts should be wary of extending its reach beyond its "appropriate boundaries."¹⁵⁰ On the other hand, courts must also recognize that even informal agency interpretations are entitled to some deference under

144. See *id.* at 594 (Stevens, J., dissenting). Justice Stevens writes, "Finally, it is not without significance in the present case that the Government Department responsible for the statute's enforcement shares *my understanding* of its meaning." (emphasis added).

145. See *id.* (Stevens, J., dissenting).

146. *Id.* (Stevens, J., dissenting).

147. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944).

148. Anthony, *supra* note 5, at 4.

149. Chapman, *supra* note 8, at 137.

150. See generally Herz, *supra* note 2, at 187 (arguing that *Chevron's* holding creates risk of too much deference).

Skidmore.¹⁵¹ *Christensen* affirms the *Chevron* court's statement that "[t]he judiciary is the final authority on issues of statutory construction"¹⁵²

In the aftermath of *Christensen*, lower courts that have addressed the issue of deference to agency interpretations have uniformly recognized the importance of the *Christensen* decision.¹⁵³ One court correctly stated that the Court in *Christensen* "appeared to make the interpretation's legal effect the touchstone" of how much deference the interpretation was entitled to.¹⁵⁴ Stated another way, the determination of whether an agency's interpretation is entitled to *Chevron* deference turns on the distinction between informal and formal interpretations.¹⁵⁵ In *District of Columbia Hospital Ass'n v. District of Columbia*,¹⁵⁶ the court considered a letter from the General Accounting Office and inquired whether the interpretation contained in the letter was entitled to *Chevron* deference.¹⁵⁷ The court quoted at length from *Christensen* and recognized that it stands for the proposition that informal agency interpretations are not

151. *See, e.g.*, *Gonzalez v. Reno*, 215 F.3d 1243, 1245 (11th Cir. 2000) (stating that "even when *Christensen* does apply, administrative decisions of agencies are still due some deference").

152. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

153. *See* *District of Columbia Hosp. Ass'n v. District of Columbia*, 224 F.3d 776, 784 (D.C. Cir. 2000); *Gonzalez*, 215 F.3d at 1245; and *Bergerac v. United States*, 102 F. Supp.2d 497, 506 (Ct. Int'l Trade 2000); *see also* *United States v. Megamania Gambling Devices*, 231 F.3d 713, 719 (10th Cir. 2000) (finding that under *Christensen*, informal agency interpretations are entitled to weak deference); *Falvo v. Owasso Indep. Sch. Dist.*, 229 F.3d 957, 969 (10th Cir. 2000); *Pub. Serv. Co. v. Colorado v. EPA*, 225 F.3d 1144, 1148 (10th Cir. 2000); *Bellas v. CBS Inc.*, 221 F.3d 517, 530 (3d Cir. 2000); *Humane Soc. of the United States v. Glickman*, 217 F.3d 882, 887 (D.C. Cir. 2000); *Coal Traffic League v. Surface Transp. Bd.*, 216 F.3d 1168, 1177 (D.C. Cir. 2000) (Sentelle, J., dissenting) (stating that the Court "has more recently cautioned [in *Christensen*] that [application of *Chevron*] should not be automatic" to informal interpretations).

154. *In re Sealed Case*, 223 F.3d 775, 780 (D.C. Cir. 2000); *but see* *Esden v. Bank of Boston* 229 F.3d 154, 169 (2d Cir. 2000) (siding with Scalia's view that *Chevron* deference should be accorded to all reasonable agency interpretations regardless of format).

155. *Id.*

156. 224 F.3d 776 (D.C. Cir. 2000).

157. *Id.* at 780.

entitled to *Chevron* deference.¹⁵⁸ Furthermore, in a *per curiam* opinion from the Eleventh Circuit, the court, like the court in *District of Columbia Hospital*, concluded that *Christensen* represents a limit on the extent of *Chevron*.¹⁵⁹ As alluded to in Part II, the Supreme Court applied *Chevron* deference to an agency interpretation found in a legal brief prepared for litigation.¹⁶⁰ At least one lower court has concluded that *Christensen* overrules that decision because legal briefs carry the same weight as other informal interpretations, such as opinion letters.¹⁶¹ One post-*Christensen* court ruled that a Securities and Exchange Commission (SEC) bulletin was only entitled to some deference under *Christensen* and *Skidmore*.¹⁶² A different court likewise found that under *Christensen*, a Labor Department's bulletin is not entitled to *Chevron* deference.¹⁶³ An Internal Revenue Service (IRS) revenue ruling is not entitled to *Chevron* deference, one post-*Christensen* court has noted;¹⁶⁴ neither is an internal agency manual.¹⁶⁵ The court in *Bergerac v. United States*¹⁶⁶ confronted a formal interpretation contained in an agency regulation.¹⁶⁷ The court takes note of *Christensen*, but ultimately finds that *Christensen* does not apply because the case involves a formal interpretation rather than an informal interpretation.¹⁶⁸

158. *Id.*

159. *Gonzalez*, 215 F.3d at 1245.

160. *Auer v. Robbins*, 519 U.S. 452, 462 (1997).

161. *Ball v. Memphis Bar-B-Q Co., Inc.*, 228 F.3d 360, 365 (4th Cir. 2000); see also *S. Utah Wilderness Alliance v. Dabney*, 222 F.3d 819, 828 (10th Cir. 2000) (stating that policy statements, like litigation positions, are not entitled to *Chevron* deference); but see *Bigelow v. Dep't of Def.*, 217 F.3d 875, 878 (D.C. Cir. 2000) (misreading *Christensen* and giving deference to the Department's interpretation found in its legal brief).

162. *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 163 (2d Cir. 2000).

163. *Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 296 (5th Cir. 2000).

164. *Dominion Res., Inc. v. United States*, 219 F.3d 359, 366 (4th Cir. 2000).

165. *Moore v. Apfel*, 216 F.3d 864, 869 (9th Cir. 2000).

166. 102 F.Supp.2d 497, 506 (Ct. Int'l Trade 2000).

167. *Id.*

168. *Id.*

However, even in the face of *Christensen's* clear holding, one court gave deference to a "consistent and reasonable" IRS interpretation, even though the interpretation was contained in a notice rather than a legislative rule or agency adjudication.¹⁶⁹

In order to better understand the future influence of *Christensen*, it might be helpful to examine a court's recent attempt to expound upon the *Christensen* doctrine. *Madison v. Resources for Human Development, Inc.*,¹⁷⁰ may serve as a model for courts to follow on the deference issue, because it sets forth a clear and concise statement of *Chevron/Christensen* deference to agency interpretations.¹⁷¹

The issue in *Madison* was whether a non-profit corporation providing human services programs for mentally ill and retarded persons is subject to the FLSA.¹⁷² At the heart of the matter was the construction of the FLSA itself as interpreted by the Department of Labor.¹⁷³ On the one hand, the court affirmed the district court's decision to give *Chevron* deference to the Labor Department's formal regulations defining certain terms contained in the FLSA.¹⁷⁴ Conversely, the court of appeals disapproved of the district court's treatment of a different Labor Department interpretation as a "formal interpretation," when in fact it was not.¹⁷⁵ In fact, the court defined the interpretive format at issue as "merely an interpretive guideline" of the Labor Department, rather than a formal interpretation.¹⁷⁶

As we have seen, post-*Chevron* courts often haphazardly distinguish between "formal" and "informal" agency interpretations. Sometimes courts defer to informal interpretations, and sometimes they do not. The court in *Madison*, however, recognizes the importance of distinguishing be-

169. *Esden v. Bank of Boston*, 229 F.3d 154, 169 (3d Cir. 2000).

170. 233 F.3d 175 (3d Cir. 2000).

171. *Id.* at 186-87.

172. *Id.* at 178.

173. *Id.* at 181-87.

174. *Id.* at 182.

175. *Id.* at 185.

176. *Id.* at 185.

tween formal and informal interpretations.¹⁷⁷ Furthermore, the *Madison* court endorses the view that somehow informal interpretations are less legitimate because they are not subject to the more rigorous procedures called for in formal regulations.¹⁷⁸

In the wake of *Christensen*, *Madison* explains that informal agency pronouncements still must play a role in aiding courts to interpret ambiguous legislation.¹⁷⁹ However, *Christensen* unequivocally stands for the proposition that this role is limited, and courts should only rely on informal interpretations to the extent that such interpretations have the "power to persuade."¹⁸⁰

The Supreme Court itself has applied *Christensen* to a subsequent case and affirmed the principle established in *Christensen* that informal interpretations do not warrant *Chevron* deference.¹⁸¹

B. Possible Agency Responses to *Christensen*

According to one commentator, one aim of the Court in *Christensen* was to force agencies to use either notice and comment rulemaking or adjudications to interpret ambiguous legislation.¹⁸² It remains to be seen whether agencies will take the hint and issue their interpretations in more formal contexts, to insure that courts will be required to give them *Chevron* deference.

V. CONCLUSION

The approaches of Scalia and Breyer are equally untenable. Scalia's approach drastically adds to agency power by deferring to any reasonable interpretation regardless of

177. *Id.* (stating that the "formal agency regulations receive more deference than mere interpretive guidelines").

178. *Id.* (stating that "[t]o grant *Chevron* deference to informal agency interpretations would unduly validate the results of an informal process").

179. *Id.* at 186-87.

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

181. *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 1913, 1941 (2000).

182. *The Supreme Court, 1999 Term Leading Cases: Federal Preemption of State Law – Continued*, 114 HARV. L. REV. 359, 373-74 (2000).

format. Breyer, meanwhile, would eviscerate *Chevron* and return to a pre-*Chevron*, case-by-case analysis of the agency interpretation at issue. The middle ground carved out by the majority in *Christensen*, which institutes a clear rule applying *Chevron* deference to formal interpretations, represents the best alternative. The only issue that courts might have difficulty addressing is determining whether a particular agency interpretation is “formal” or “informal.” However, courts should follow the lead of many influential administrative law scholars and only classify regulations promulgated pursuant to notice and comment rulemaking as formal interpretations. Moreover, rules issued in adjudications should be classified as formal. Other methods of agency interpretation are not subjected to public scrutiny and agencies are not required to follow strict procedures to adopt them. Thus, deferring only to formal interpretations would force agencies to use strict procedures if they want a particular interpretation of ambiguous legislation to be followed. Otherwise, the supposed advantage that administrative agencies have over the courts, namely public accountability, would be rendered meaningless.