William and Mary
Law Review

VOLUME 42 NO. 4, 2001

RESPECTING DEFERENCE: CONCEPTUALIZING *SKIDMORE* WITHIN THE ARCHITECTURE OF *CHEVRON*

JIM ROSSI*

This Article addresses critically the implications of the U.S. Supreme Court's recent decision in Christensen v. Harris County, *120 S.Ct. 1655 (2000), for standards of judicial review of agency interpretations of law.* Christensen *is a notable case in the administrative law area because it purports to clarify application of the deference doctrine first articulated in* Skidmore v. Swift & Co., *323 U.S. 134 (1944). By reviving this doctrine,* Christensen *narrows application of the predominant approach to deference articulated in* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., *467 U.S. 837 (1984), thus reducing the level of deference in many appeals involving administrative agency interpretations of law. This Article addresses the deference debate in this context, criticizing* Christensen, *especially Justice Thomas's majority opinion. This Article argues that the majority did not correctly apply* Skidmore,

* Visiting Professor, University of Texas School of Law, 2000-2001; Patricia A. Dore Professor, Florida State University College of Law. Thanks to Scott Angstreich, Michael Asimow, Cynthia Farina, Michael Herz, Harold Krent, Ronald Krotoszynski, Lars Noah, Susan Rose-Ackerman, J.B. Ruhl, Peter Strauss, Russell Weaver, and Mark Seidenfeld for their comments on a previous draft. [Editor's Note: At the time this Article went to press, *Mead Corp. v. United States*, 185 F.3d 1304 (Fed. Cir. 1999), *cert. granted*, 120 S. Ct. 2193 (2000), was still pending before the U.S. Supreme Court. See *infra* notes 21, 89, 184 and accompanying text for citation of this case.]

and that the Court's decision invites ad hocery by lower courts in their review of agency legal interpretations. It concludes that conceptualizing Skidmore *within the architecture of* Chevron*'s step two—rather than as an alternative to the application of* Chevron*—will best promote goals of accountability, uniformity, and flexibility.*

TABLE OF CONTENTS

INTRODUCTION

Since it was decided in 1984, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[1]—a case commonly associated with strong deference to agency interpretations of law—has taken on canonical status as the "counter-*Marbury*" for the administrative state.[2] At the same time, the administrative law canon has not completely ignored that it is "the province and duty of the judicial department to say what the law is."[3] Particularly where courts review the legal interpretations of administrative agencies, the scope of the judiciary's province and duty remains a complex issue, puzzling courts and commentators alike. It is also a source of fragmentation on the Supreme Court, dividing its members in a variety of different regulatory contexts.[4]

Given the complexity and divisiveness surrounding judicial review of agency legal interpretations, it is rare when the Supreme Court speaks about the issue with near unanimity. In *Christensen v. Harris County*,[5] eight justices agree that interpretive rules and statements of policy issued by the acting administrator of the Wage and Hour Division of the U.S. Department of Labor are not entitled to *Chevron* deference. Instead, these informal agency statements—by which Congress presumably did not intend an agency to speak with the "force of law"[6]—are to be afforded only "respect" under the *Skidmore* doctrine.[7] Justice Scalia, himself no stranger to administrative law issues, is the sole member of the Court to depart from this rule.[8] On its face, *Christensen* hints toward a large degree

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

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

3. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

4. Recently, for example, the Supreme Court was divided five to four in *FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291 (2000). The justices agreed that *Chevron* applied, but disagreed on their assessment of the context of Congress's delegation of authority to the Food and Drug Administration to regulate cigarettes under the Food, Drug, and Cosmetic Act.

5. 120 S. Ct. 1655 (2000).

6. *See infra* text accompanying notes 81-84.

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

8. *See Christensen*, 120 S. Ct. at 1664 (Scalia, J., concurring) (dissenting from majority's ruling that *Skidmore* applies to the agency interpretive statement, but agreeing with majority's interpretation of the statute at issue). Scalia's position in *Christensen* should not

of certainty regarding the scope of strong deference to agency interpretations of law.

Beneath the surface, however, the justices in *Christensen* divide on what, exactly, courts should use in place of *Chevron*. *Skidmore* is commonly understood to be "weak deference"[9]—an approach to statutory interpretation that dates back to the 1940s—but none of the *Christensen* opinions explains how *Skidmore* deference is to apply to statements such as that before the Court; in fact, the opinions in *Christensen* take three distinct approaches to applying *Skidmore* to the agency's interpretation.[10] Thus, while the case purportedly resolves one doctrinal debate—that *Skidmore*, not *Chevron*, deference will apply to agency interpretive statements[11]—it raises another: Exactly what is *Skidmore* "deference"?

With *Christensen*, *Skidmore* is emerging—some might say re-emerging[12]—as an administrative law mainstay. Agencies publish far more statements in the form of opinion letters, guidelines and

---

come as a surprise, given his previously expressed skepticism about *Skidmore*. *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 259 (1991) (Scalia, J., concurring). Notably, the other administrative law scholar on the Court, Justice Breyer, is not unequivocally in the majority's camp in *Christensen*, although he refrains from aligning himself with Justice Scalia's position. *See Christensen*, 120 S. Ct. at 1667 (Breyer, J., dissenting) (noting that Justice Scalia "may well be right" but falling short of rejecting *Skidmore*'s application to the opinion letter).

9. *See* Michael Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. REV. 1157, 1194-98 (1995); Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 565 (1985) (describing *Skidmore* deference as "nothing more than 'respect or courteous regard'").

10. *See infra* notes 101-20 and accompanying text.

11. Although the Court has spoken with apparent clarity on this issue in the context of opinion letters where Congress did not delegate to the agency the "force of law" in this regulatory mode, it did not limit *Chevron*'s application to adjudication and notice-and-comment rulemaking. *See Christensen*, 120 S. Ct. at 1662. Thus it did not fully delimit the scope of its rule. *See* William Funk, *Supreme Court News*, ADMIN. & REG. L. NEWS, Summer 2000, at 8; Steven Croley, The Scope of *Chevron* Jan 2001 (prepared for the Scope of Judicial Review portion of the ABA Administrative Law Section's Project on the Administrative Procedure Act), *available at* http://www.abanet.org/adminlaw/apa/chevronscope2.doc.

12. *See Christensen*, 120 S. Ct. at 1664 (Scalia, J., concurring) (asserting *Skidmore* is an anachronism, "dating from an era in which we declined to give agency interpretations authoritative effect"); *see also* Jamie A. Yavelberg, Note, *The Revival of* Skidmore v. Swift: *Judicial Deference to Agency Interpretations After* EEOC v. Aramco, 42 DUKE L.J. 166 (1992) (asserting that *Chevron* and other strong deference cases replaced *Skidmore*, and that *Skidmore* then experienced a revival). *But see infra* text accompanying notes 121-23 (suggesting that *Skidmore* was not counterjuxtaposed against strong deference until the 1970s).

policy memoranda, now presumably subject to *Skidmore* deference, than statements through adjudication or notice-and-comment rulemaking, subject to *Chevron* deference. Thus, *Skidmore* will potentially apply to judicial review of agency interpretations of law in more instances than *Chevron*. Yet historically courts and scholars have paid scant attention to what *Skidmore* deference means. Few law review articles address the topic.[13] And, although *Skidmore* has been around nearly forty years longer than *Chevron*, it is cited by courts less than twenty percent as often.[14] This Article argues, that by leaving *Skidmore* for ad hoc application by lower courts, the *Christensen* decision has introduced even more confusion into the maze of cases regarding judicial review of agency interpretations of law.

Part I of this Article discusses the two predominant doctrinal approaches to judicial review of agency statutory interpretations—*Chevron* and *Skidmore* deference—within the framework of the *Christensen* case. In favoring *Skidmore* "weak deference" over *Chevron* step-two "strong deference," the Court resolved a debate that has ensnared administrative law scholars for several years. Although *Christensen* does not resolve every question regarding the scope of *Chevron* deference, it clarifies that *Skidmore* "deference" applies to many more agency statements that courts will review, increasing the judiciary's scrutiny of legal interpretations rendered in agency interpretive and policy statements, including opinion letters.[15]

---

13. Exceptions include Asimow, *supra* note 9, at 1194-98 (contrasting "strong" to "weak" deference and discussing purposes of *Skidmore* factors); Clark Byse, *Scope of Judicial Review in Informal Rulemaking*, 33 ADMIN. L. REV. 183, 192 (1981) (arguing that *Skidmore* "respect" differs from "great deference" because the "ultimate responsibility for determining the meaning of the statute is the court's"); Diver, *supra* note 9, at 565 (describing *Skidmore* as "nothing more than 'respect or courteous regard'"); Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under* Chevron, 6 ADMIN. L.J. AM. U. 187, 208-09 (1992) (arguing that *Skidmore* lives on as a step-one *Chevron* inquiry); Yavelberg, *supra* note 12, at 184 (arguing that *Skidmore* places a burden of persuasion on the agency, requiring it to "convince the court of the validity of the agency's view").

14. A search of Shepard's online citations reveals 1395 citing references to *Skidmore* in federal and state opinions, while *Chevron* has 8293 citing references. Search conducted July 27, 2000.

15. Empirical evidence suggests that the tone the Supreme Court sets for standards of review of agency decisions matters to lower courts, affecting affirmance and reversal rates on appeal. *See infra* notes 37-39 and accompanying text.

As Part I argues, however, the applications of *Skidmore* in the various *Christensen* opinions are hardly likely to create certainty in application of this rule. The majority and two dissenting opinions in *Christensen* take no fewer than three distinct approaches to applying *Skidmore* "deference." The majority opinion, written by Justice Thomas, does not afford any deference to the agency interpretation. Instead, it places the burden of persuasion on the agency without applying any of the factors mentioned in the *Skidmore* case.[16] Justice Stevens's dissent, by contrast, relies on the *Skidmore* factors, designed primarily to assess comparative institutional competence to evaluate the persuasive force of the agency's legal interpretation without eviscerating the presumption of validity that historically attaches to agency action.[17] Still another approach is implicit in Justice Breyer's dissent.[18] Like Justice Stevens, Justice Breyer relies on some application of *Skidmore*'s institutional factors to uphold the agency interpretation; however, his dissent also implicitly endorses a reinterpretation of *Skidmore* within the framework of *Chevron*'s deference analysis. These three divergent approaches create uncertainty regarding the application of *Skidmore*, posing confusion to lower courts as they begin applying *Skidmore* deference to agency interpretive and policy statements.

In Part II, this Article takes the occasion of *Christensen* as a springboard for assessing *Skidmore* and its contrast to *Chevron* deference. Justice Scalia asserts in his concurrence that the majority's reliance on *Skidmore* is an anachronism, "dating from an era in which we declined to give agency interpretations . . . authoritative effect."[19] This Article does not agree with Justice Scalia's position, but Part II takes up the challenge his position poses, with the objective of shedding light on *Skidmore* deference. Three alternative possibilities, paralleling the approaches in *Christensen*, are discussed: (1) that *Skidmore* deference or respect only applies if a court, after rendering its own interpretation, agrees with the agency's interpretation; (2) that *Skidmore* always advises respect or deference, but evaluates the "persuasive power" of the

16. *See infra* notes 101-12 and accompanying text.
17. *See infra* notes 113-16 and accompanying text.
18. *See infra* notes 117-20 and accompanying text.
19. Christensen v. Harris County, 120 S. Ct. 1655, 1664 (2000) (Scalia, J., concurring).

agency's position based on institutional factors; or (3) that *Skidmore* operates under the shadow of a *Chevron* analysis. Part II argues that approach (1), applied by the majority in *Christensen*, is not supported by the case law or normative rationales for *Skidmore* deference. Approaches (2) and (3) have much to commend; while approach (2) is more consistent with existing case law, this Article argues that approach (3), implicit in Justice Breyer's dissent, is normatively preferable. This *Chevron/Skidmore* synthesis holds promise to bridge the gap between the majority and Justices Scalia and Breyer. Under this approach, *Skidmore* is read within the architecture of *Chevron* deference, not as an alternative to *Chevron* deference. In other words, *Skidmore* deference might be understood as a type of heightened hard-look inquiry—reasonableness with a bite—at *Chevron*'s step two. The level of deference should not hinge on whether an agency interpretation speaks with the "force of law" (based on a hopelessly indeterminate analysis of congressional intent); rather, where Congress has not expressly withheld an agency's lawmaking powers, courts should focus on what level of scrutiny applies at the *Chevron* step-two reasonableness inquiry (based on the transparency of the procedure used by the agency). The synthetic approach promotes uniformity, flexibility, and legitimacy over alternative conceptions of *Skidmore*.

I. *CHRISTENSEN* AND THE (RE-?)EMERGENCE OF *SKIDMORE* DEFERENCE

The *Chevron* case, often seen as a very pro-agency approach to judicial review, has attracted the attention of administrative law scholars since it was decided in 1984. *Chevron* stands at the center of several major recent decisions by the Court;[20] in the coming term it remains an issue in other cases that the Court is considering.[21] In the 1999 term, however, the Court signaled a clear retreat away from application of the *Chevron* test, most notably in *Christensen*, a case that thrust *Skidmore* into a position that will eclipse *Chevron* for many judicial appeals involving agency legal interpretations.

20. *See* Whitman v. American Trucking Ass'ns, 121 S. Ct. 903 (2001); *Christensen*, 120 S. Ct. at 1655; FDA v. Brown & Williamson Tobacco Corp., 120 S. Ct. 1291 (2000).

21. *See, e.g.*, Mead Corp. v. United States, 185 F.3d 1304 (Fed. Cir. 1999), *cert. granted*, 120 S. Ct. 2193 (2000).

A. *The Rise of* Chevron *Deference*

Chevron, a unanimous opinion penned by Justice Stevens, articulates what has become the predominant judicial paradigm for review of agency interpretations of statutes and regulations. In *Chevron*, the Supreme Court upheld the Environmental Protection Agency's (EPA's) reasonable interpretation of the term "stationary sources" in the Clean Air Act Amendments of 1977.[22] The statute required "new or modified major stationary sources" of air pollution to comply with certain permit requirements and authorized the EPA to define the relevant terms by regulation.[23] Initially, the EPA determined that the "stationary source" referred to each individual piece of equipment that emitted pollution, but in 1981 the agency changed its position by construing "stationary source" more expansively, to mean an entire plant. As an effect of this new interpretation, firms could avoid some pollution permit requirements by offsetting the pollution from new equipment by reducing emissions from old equipment in the same plant.[24]

The *Chevron* Court's approach to reviewing an agency's statutory interpretation distills the judicial review task into two distinct steps. At step one of the *Chevron* test, the court inquires into "whether Congress has directly spoken to the precise question at issue."[25] If Congress has—and has done so clearly—the court "must give effect to the unambiguously expressed intent of Congress."[26]

If, however, the statute at issue is silent or ambiguous with respect to the specific question, a court is to move on to *Chevron*'s step two. Here, the court's inquiry is limited to determining whether the agency's legal interpretation "is based on a permissible construction of the statute."[27] At step two, *Chevron* endorses judicial deference to the agency's statutory interpretation. By leaving a gap in its statutory language for the agency to fill, Congress has made "an express delegation of authority to the agency to elucidate a

22. Pub. L. No. 9595, 91 Stat. 685 (1977) (codified as amended at 42 U.S.C. §§ 7407-7671 (1994 & Supp. IV 1998)).

23. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 840 n.1 (1984) (quoting 42 U.S.C. § 7502(b)(6) (1982)).

24. *See id.* at 858-59.

25. *Id.* at 842.

26. *Id.* at 843.

27. *Id.*

specific provision of the statute by regulation."[28] This gap, the Supreme Court observed, may be explicit or implicit.[29] The role of a court in such instances is to defer to the agency's statutory interpretation, giving the agency's regulations "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[30] Justice Marshall's exhortation in *Marbury v. Madison* that it is "the province and duty of the judicial department to say what the law is"[31] thus takes a back seat to an inquiry into the reasonableness of the agency's legal interpretation at step two of *Chevron*.

An appreciation of agency expertise, the limits of the specialized knowledge of judges, and political accountability are at the normative core of Justice Stevens's rationale for deference to the agency in *Chevron*. "Judges are not experts in the field," Justice Stevens wrote in *Chevron*, and thus in interpreting statutory gaps courts should "rely upon the incumbent administration's views of wise policy to inform its judgments."[32] Justice Stevens further recognized that judicial deference to an agency's statutory interpretation may increase political accountability:

> [T]he [EPA] Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference . . . . Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by these cases. Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency.[33]

28. *Id.* at 843-44.
29. *See id.* at 865.
30. *Id.* at 844.
31. 5 U.S. (1 Cranch) 137, 177 (1803).
32. *Chevron*, 467 U.S. at 865.
33. *Id.*

Implicit in Justice Stevens's accountability rationale is the recognition that agencies are institutionally superior to courts in their capacity for making accountable political decisions against the backdrop of ambiguous statutory terms.[34] Agency legal interpretations will be subject to political oversight and thus are accountable to presidential politics, as well as congressional oversight.[35] In addition, as Professor Peter Strauss has argued, *Chevron* promotes uniformity in regulatory policy. Because the Supreme Court has limited resources to resolve conflicting statutory interpretations by lower courts, judicial acceptance of agency legal interpretations of ambiguous statutory terms will promote uniformity in interpretation, thus providing regulated entities and other branches of government some degree of certainty in assessing the meaning of ambiguous statutory terms.[36]

Although the impact of *Chevron* on the doctrinal approach of lower courts is sometimes overstated,[37] studies suggest that the decision did affect the reversal and remand rates for judicial appeals of agency decisions in lower courts. Professors Peter Schuck and E. Donald Elliott observe that affirmance rates increased by almost fifteen percent after *Chevron*, and both remands and reversals declined by roughly forty percent.[38] Another study finds that the D.C. Circuit's deference to EPA interpretations increased after *Chevron*.[39] By setting the tone for application of standards of review for lower courts, the Supreme Court's decisions regarding

---

34. *See* Mark Seidenfeld, *A Syncopated* Chevron: *Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 96-97 (1994).

35. *See, e.g.*, Richard J. Pierce, Jr., *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from* Chevron *and* Mistretta, 57 U. CHI. L. REV. 481, 486 (1990) (explaining that *Chevron* is justified by the agency's superior political accountability).

36. *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, 1117-29 (1987).

37. *See* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 984 (1992).

38. *See* Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1058. The authors concluded, "On the evidence of this study, the Supreme Court is sometimes able to effectively shape the court-agency relationship through the kind of relatively broad, open-textured rule adopted in *Chevron*." *Id.* at 1059.

39. *See* Aaron P. Avila, Student Article, *Application of the* Chevron *Doctrine in the D.C. Circuit*, 8 N.Y.U. ENVTL. L.J. 398 (2000).

standards of review for agency action have had very real consequences for appeals of agency decisions.

B. Retreat From Chevron

At step two, *Chevron* endorses a strong notion of deference to the agency's statutory interpretation. For years, however, the scope of *Chevron*'s application has puzzled courts. *Chevron* deference is commonplace in reviewing agency legal interpretations adopted through notice-and-comment rulemaking procedures.[40] It is not confined to this regulatory procedure, though, and also applies to agency legal interpretations made in the context of formal adjudication where an agency has policymaking powers,[41] as well as to an agency's interpretation of its own regulations.[42] Many more informal agency actions, however, have been afforded a lesser degree of deference than *Chevron* advises.[43]

Skidmore v. Swift[44]—a case that preceded *Chevron* but with time has come to stand in counterjuxtaposition to it[45]—is the earliest case to suggest a lesser degree of deference for such statements. In *Skidmore*, the Supreme Court addressed the level of deference applicable to an interpretive Bulletin of the Wage and Hour Division of the Administrator of Labor, as explained by the Administrator's briefs on appeal.[46] Even though the rulings of the Administrator were "not reached as a result of hearing adversary proceedings in which he finds facts from evidence and reaches

40. *Chevron* itself arose in the context of review of notice-and-comment rules. *See* Chevron U.S.A. Inc., v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44, 865-66; *see also* AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999) (applying *Chevron* doctrine to agency rulemaking); Smiley v. Citibank, 517 U.S. 735 (1996) (same).

41. *See, e.g.*, INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999) (BIA order); National R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 418-19 (1992) (ICC order); Martin v. OSHRC, 499 U.S. 144, 156-57 (1991) (enforcement citation); INS v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987) (INS hearing).

42. *See* Auer v. Robbins, 519 U.S. 452, 457-63 (1997).

43. *See infra* note 59.

44. 323 U.S. 134 (1944).

45. At the time of *Skidmore*, however, the Supreme Court had endorsed stronger deference to agency interpretations of statutes in other contexts. *See, e.g.*, NLRB v. Hearst Publications, 322 U.S. 111, 130-32 (1944); Gray v. Powell, 314 U.S. 402, 412 (1941).

46. *Skidmore*, 323 U.S. at 138.

conclusions of law from findings of fact,"[47] the Court recognized that they were entitled to "respect."[48] Writing for the Court, Justice Jackson said:

> 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.[49]

In looking to the factors that make the agency's interpretation persuasive, *Skidmore* echoed an approach the Court had earlier endorsed in *United States v. American Trucking Associations, Inc.*[50] and *Norwegian Nitrogen Products Co. v. United States*.[51]

Skidmore deference is sometimes referred to as "weak deference," in contrast to the strong deference that has evolved post-*Chevron*.[52] It is deference nevertheless, as Justice Jackson recognized in providing normative reasons for the Court's approach.[53] As

---

47. *Id.* at 139.

48. *See id.* at 140.

49. *Id.*

50. 310 U.S. 534, 549 (1940) (noting agency interpretations are entitled to "great weight" where they are contemporaneous with the adoption of a statute, and that the court evaluates "persuasiveness" of agency's interpretations in light of this and other factors).

51. 288 U.S. 294, 315 (1933) ("[A]dministrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful.").

52. *See supra* note 9.

53. In its initial years, *Skidmore* was recognized as representing a type of deference—not as an extreme contrast to strong deference and certainly not as requiring de novo review of agency legal interpretations by courts. *See, e.g.*, Nathaniel L. Nathanson, *Administrative Discretion in the Interpretation of Statutes*, 3 VAND. L. REV. 470, 481 (1950) (observing that *Skidmore* requires courts to give respect to agency legal interpretations, even when not reached through adversarial litigation, and that courts may even give such statements decisive weight, depending on the context); *Recent Cases*, 59 HARV. L. REV. 794, 798-99 (1946) (citing *Skidmore* for the proposition that "[r]eviewing courts, recognizing the experience and familiarity of administrative agencies with the field to be regulated, generally give great weight to their interpretative rulings"); *see also infra* text accompanying notes 121-23

Skidmore explained, an agency administrator's rulings are entitled to some respect because they are "made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case."[54] Agencies determine policy on behalf of government and provide guidance for the enforcement of statutes.[55] By giving weight to agency interpretations, courts avoid resorting to legislative history as a means of discerning statutory meaning.[56] Moreover, as Peter Strauss has argued is the case with *Chevron*,[57] judicial respect for agency interpretation of law under *Skidmore* allows for enhanced consistency in the application of statutes.[58] Without a doubt, however, *Skidmore* affords less deference than *Chevron*.

In the spirit of *Skidmore*, various cases decided since *Chevron* refused to extend *Chevron* deference to agency interpretations made in the context of informal agency decisions or statements, such as appellate briefs, manuals, and opinion letters; but, before *Christensen* these cases did not clearly address *Chevron*'s appropriate scope.[59] Among scholars, Professor Robert Anthony has

---

(suggesting that *Skidmore* was not contrasted to stronger notions of deference until the 1970s).

54. *Skidmore*, 323 U.S. at 139.

55. *See id.* at 139-40.

56. Elsewhere, Justice Jackson disparaged courts' use of legislative history as an aid to statutory interpretation. *See* United States v. Public Utils. Comm'n of Cal., 345 U.S. 295, 320 (1953) (Jackson, J., concurring) (stating that judicial use of legislative history "pulls federal law, not only out of the dark where it has been hidden, but into a fog in which little can be seen if found"); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395-97 (1951) (Jackson J., concurring) (raising separation of powers concerns with respect to legislative history).

57. *See supra* note 36; *see also* Asimow, *supra* note 9, at 1203-06 (arguing that *Skidmore* advances uniformity, but conceding that *Chevron* is superior in this respect).

58. *See Skidmore*, 323 U.S. at 139-40 (noting that the agency's interpretation "will guide applications for enforcement by injunction on behalf of the Government" and that the standards for public and private enforcement should be "at variance only where justified by very good reasons").

59. *Compare* Stinson v. United States, 508 U.S. 36, 44-45 (1993) (finding no *Chevron* deference for Sentencing Commission Guideline commentary), *and* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 256-58 (1991) (finding EEOC guidelines not entitled to *Chevron* deference, but that *Skidmore* applies instead), *with* Reno v. Koray, 515 U.S. 50, 62 (1995) (giving Bureau of Prisons Program Statement *Chevron* deference), *and* NationsBank v. Variable Annuity Life Ins. Co., 513 U.S. 251, 256-57 (1995) (holding that Comptroller of the Currency's opinion letter warrants *Chevron* deference), *and* Pension Benefit Guar. Corp. v. LTV Corp.,

been the strongest proponent of the view that *Chevron* deference should not apply to agency interpretations adopted in informal decision-making procedures. As he argues, "Where the format is an informal one, it ordinarily does not carry the force of law, and a reviewing court is not bound by the agency interpretation, though it should give special consideration to the agency opinion."[60] The key, according to Professor Anthony, is the delegation inquiry: "whether Congress intended an interpretation in this format to have the force of law."[61] If so, *Chevron* applies;[62] if not, a court should only afford the agency legal interpretation *Skidmore* consideration.[63]

Christensen effectively adopts Anthony's view, signaling a clear move away from *Chevron* and toward *Skidmore* deference for many agency appeals making their way to federal courts. In *Christensen*, the Court reviews an interpretation of the federal Fair Labor Standards Act (FLSA),[64] which gives both public and private sector employees a statutory right to compensation for overtime work, payable in cash, in the context of a private challenge to a county's policy that conflicted with a federal agency's legal interpretation.[65] An exception to this general rule, articulated in section 207 of the FLSA, allows states and their political subdivisions to compensate public sector employees for overtime by granting them "comp time," entitling them to take time off from work with full pay.[66] Not

---

496 U.S. 633, 647-48 (1990) (giving opinion letter *Chevron* deference).

60. Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 4 (1990).

61. *Id.* at 43-44.

62. *See id.* at 40-41.

63. *See id.* at 41.

64. Christensen v. Harris County, 120 S. Ct. 1655, 1658-60 (2000).

65. *See* 29 U.S.C. §§ 206, 207 (1994 & Supp. III 1997), *cited in Christensen*, 120 S. Ct. at 1658-62.

66. The provision of the statute in dispute states:

> An employee . . .
> (A) who has accrued compensatory time off . . ., and
> (B) who has requested the use of such compensatory time, shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

Id. at § 207(o)(5), *quoted in Christensen*, 120 S. Ct. at 1660. If employees fail to use their accumulated "comp time," employers are "obligated to pay cash compensation under certain circumstances." *Christensen*, 120 S. Ct. at 1658 (citing 29 U.S.C. §§ 207(o)(3)-(4)).

surprisingly, many public employers became concerned with the cost of accumulated compensatory time for employees who worked overtime after reaching the statutory cap on compensatory time accrual and for employees who left their jobs with significant reserves of accrued time.

As a way of addressing this concern, Harris County, Texas proposed to schedule employees to use or take compensatory time, thus reducing its levels of accrued compensatory time.[67] Harris County wrote to the U.S. Department of Labor's Wage and Hour Division, inquiring "whether the [County] Sheriff may schedule nonexempt employees to use or take compensatory time."[68] In response to this inquiry, the Acting Administrator of the Division rendered an interpretation of the applicable statute and regulations in an opinion letter:

> [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.[69]

Dismissing the language of the federal agency's opinion letter,[70] Harris County implemented a policy that allowed the employee's supervisor to set a maximum number of compensatory hours that could be accumulated and provided for notification to the employee once the maximum number of hours was approached. The policy also permitted the employee to voluntarily take steps to reduce accumulated compensatory time, and allowed the supervisor to order the employee to use compensatory time if the employee did not voluntarily do so.[71] This policy was challenged by employees of

67. *See Christensen*, 120 S. Ct. at 1659.

68. *Id.*

69. *Id.* at 1659 (quoting Op. Ltr. Dep't Labor, Wage and Hour Div. (Sept. 14, 1992), *available in* 1992 WL 845100 (Opinion Letter)).

70. *See id.*

71. *See id.*

the County Sheriff's Office, each of whom agreed to accept compensatory time in lieu of cash as compensation for overtime.[72]

The Supreme Court agrees with a decision issued by the U.S. Court of Appeals for the Fifth Circuit, upholding the Harris County policy despite the conflicting interpretation of the statute by the federal agency.[73] The significance of the *Christensen* case is in the Court's approach to weighing the agency's statutory interpretation. Since each Justice agrees that the statutory language at issue in *Christensen* was silent or ambiguous with respect to the legality of the Harris County policy,[74] *Chevron* would advise deference to the agency's reasonable statutory interpretation. By contrast, *Skidmore* would afford respect, dependent on the "persuasive force" of the agency's position.[75] The majority opts for *Skidmore* deference for agency interpretive and policy statements.[76] All in all, eight Justices (with Justice Scalia the lone dissenter on the issue) agree that *Skidmore* deference applies to an agency legal interpretation in an opinion letter. As the majority reasons, an interpretation contained in an opinion letter is "not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking."[77] Thus, it concludes, "[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."[78] Instead, it holds, "interpretations contained in formats such as opinion letters are

72. *See id.* at 1658.

73. *See id.* at 1660.

74. *See id.* at 1660, 1662 (suggesting that the statute is silent on the issue, and implying that *Chevron* deference would be appropriate if *Chevron* applied); *id.* at 1663 (Souter, J., concurring); *id.* at 1664 (Scalia, J., concurring) (applying *Chevron*'s step-two to the interpretation). *But see id.* at 1668 (Breyer, J., dissenting) (implying that *Chevron* step-two deference would be appropriate if the *Chevron* case applies); *id.* at 1667 n.2 (Stevens, J., dissenting) (noting agreement with Justice Breyer's comments on *Chevron*).

75. *See id.* at 1663.

76. *See id.*

77. *Id.* at 1662.

78. *Id.* at 1662-63 ("[I]nternal agency guideline, which is not 'subject to the rigors of the Administrative Procedur[e] Act, including notice and comment,' entitled only to 'some deference.'") (citing Reno v. Koray, 515 U.S. 50, 61 (1995)); EEOC v. Arabian Am. Oil, Inc., 499 U.S. 244, 256-58 (1991) ("[I]nterpretive guidelines do not receive *Chevron* deference."); Martin v. OSHRC, 499 U.S. 144, 157 (1991) ("[I]nterpretive rules and enforcement guidelines are 'not entitled to the same deference as norms that derive from the exercise of the Secretary's delegated lawmaking powers.'" (citation omitted)).

'entitled to respect'" under *Skidmore*, "but only to the extent that those interpretations have the 'power to persuade.'"[79] For the majority, the agency interpretation in *Christensen* was not persuasive and thus the Harris County policy was upheld.[80]

Although the Court does not fully explain its rationale, three reasons support its application of *Skidmore* over *Chevron* deference to the opinion letter at issue in *Christensen*. First, and most formalistic, the Court recognizes that such interpretations "lack the force of law,"[81] presumably in the sense that Congress did not intend the informal mode of statement that the agency had chosen to be binding on courts or regulatees. By contrast, other more formal modes of agency decision, such as adjudication or rulemaking, are binding to the extent that Congress has formally delegated to the agency the authority to elucidate specific statutory provisions by these modes.[82] At least for the majority, the scope of *Chevron* deference is thus a function of the agency's delegated powers, not solely a function of silence or ambiguity in a statute.[83] Decisions following *Christensen* make this the touchstone to whether *Skidmore* rather than *Chevron* applies.[84]

Second, the majority observes that the process leading to the interpretation was "not one arrived at after" the type of vetting and deliberation afforded by other procedures, such as formal

79. *Christensen*, 120 S. Ct. at 1663 (citing *Skidmore v. Swift*, 323 U.S. 134, 140 (1944)).

80. *See id.*

81. *See id.* at 1662.

82. *See id.* The majority draws a clear distinction between interpretations contained in opinion letters and those arrived at by more "formal" means. *See id.*

83. *See id.* at 1663. Although Justice Scalia chastises this approach, Justice Breyer endorses it. *See id.* at 1667-68 (Breyer, J., dissenting) (suggesting that *Chevron* does not apply where "one has doubt that Congress actually intended to delegate interpretive authority to the agency (an 'ambiguity' that Chevron does not presumptively leave to agency resolution)"). *But see id.* at 1664 n.* (Scalia, J., concurring) (strongly criticizing Justice Breyer's suggestion).

84. *See* U.S. Steel Group v. United States, 123 F. Supp. 2d 1365, 1368 (Ct. Int'l Trade 2000) (noting that key consideration is whether Congress intended agency to use format to act with "the force of law" (quoting *Christensen*, 120 S. Ct. at 1662)); E.I. du Pont de Nemours & Co. v. United States, 116 F. Supp. 2d 1343, 1347 n.6 (Ct. Int'l Trade 2000) (declining to grant *Chevron*-style deference where formal rulemaking procedures are absent); *see also In re* Sealed Case, 223 F.3d 775 (D.C. Cir. 2000) (focusing on whether agency expression "assumes a form expressly provided for by Congress" (quoting Martin v. OSHRC, 499 U.S. 144, 157 (1991))); Gonzalez v. Reno, 215 F.3d 1243, 1245 (11th Cir. 2000) (per curiam) (relying on agency's exercise of delegated power).

adjudication or notice-and-comment rulemaking.[85] For these more formal procedures, the Administrative Procedure Act (APA) imposes procedural requirements designed to enhance public participation and build an explanatory record for the agency's decision.[86] Where the agency's interpretation is adopted without such public participation and with no guarantee of an explanatory record, heightened judicial scrutiny of the agency's statutory interpretation enhances the legitimacy of the agency's action.[87] *Christensen* does not, however, reconcile its approach with previous cases in which the Court extended *Chevron* deference to agency interpretations embodied in informal action.[88] A case pending before the Court provides an opportunity to clarify the appropriate level of deference for agency interpretations expressed through modes that are less formal than substantive rules and formal orders.[89]

Third, although not mentioned in any of the *Christensen* opinions, separation of powers principles may have influenced the Court's decision. Arguably, in *Christensen*, as in *Skidmore*, the Court exercises traditional Article III powers, since the agency's interpretation was before the Court in the context of review of an employment dispute between two nonagency parties, not in a context where a federal agency itself was exercising its regulatory authority.[90] When a court is exercising traditional Article III powers

85. *See id.* at 1662.

86. *See* 5 U.S.C. § 553(c) (1994) (giving interested persons the right to participate in rulemaking through submission of written data, views or arguments, and requiring a concise general statement of basis and purpose for rules); *id.* § 554 (providing interested persons the opportunity to submit and have considered facts and arguments in adjudicative hearings prior to final agency decision).

87. *See Christensen*, 120 S. Ct. at 1665 (Scalia, J., concurring) (stating that an agency rationale appearing for the first time in legal proceedings may be found legitimate and therefore be accorded deference).

88. *See* cases cited *supra* note 59; *see also Christensen*, 120 S. Ct. at 1664 (Scalia, J., concurring) (making this observation and citing previous cases).

89. *See* Mead Corp. v. United States, 185 F.3d 1304 (Fed. Cir. 1999), *cert. granted*, 120 S. Ct. 2193 (2000) (presenting the question of whether *Chevron* deference extends to a Customs Service tariff clarification ruling interpreting statutory tariff structures).

90. In a similar manner, Professor John Manning has argued that separation of powers principles advise *Skidmore*, rather than *Chevron*, deference for judicial review of an agency's legal interpretation of its own regulations, even in contexts where a court is reviewing the agency's own regulatory decisions. *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 681 (1996) ("[T]he [Supreme] Court should . . . embrac[e] the approach of *Skidmore v. Swift & Co.*, which adopts a standard of review that accounts for agency expertise and experience .

in adjudicating a private dispute before it, as in *Christensen*, for separation of powers reasons interpretative rules and policy statements might require independent judicial judgment.

With the single exception of Justice Scalia, all members of the Court agree that *Skidmore* deference should apply to the opinion letter in *Christensen*.[91] Justice Scalia concurs with the majority's bottom line regarding the legality of Harris County's policy, but he refuses to apply *Skidmore* in the case for several reasons. Most notably, Justice Scalia reasons, "*Skidmore* deference . . . is an anachronism, dating from an era in which we declined to give agency interpretations (including interpretive regulations, as opposed to "legislative rules") authoritative effect."[92] This approach, Justice Scalia argues, came to an end with the *Chevron* case.[93] In all instances where Congress has left a gap in statutory language, Scalia maintains, "'a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.'"[94] Justice Scalia also observes that applying *Skidmore* to the *Christensen* facts is inconsistent with precedent because elsewhere the Court has applied *Chevron* deference under circumstances that would not be allowed under *Christensen*.[95] Finally, and by no means least significantly, Justice Scalia directly takes Justice Breyer's dissent to task by rejecting the claim that the application of *Chevron* deference hinges on a first order inquiry into congressional intent to delegate interpretive authority to the agency. For Justice Scalia, *Chevron* creates a

---

. . ."). Manning argues that under such an approach, "the agency bears the burden of persuading the court to exercise its independent judgment in the agency's favor. In exercising such judgment, however, the reviewing court must take account of the special resources that the agency brings to the task." *Id.*

91. *See Christensen*, 120 S. Ct. at 1663, 1664.

92. *Id.* at 1664 (Scalia, J., concurring) (citing EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 259 (1991) (Scalia, J., concurring)).

93. *See id.*

94. *Id.* (quoting Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984)).

95. *See id.* (citing NationsBank v. Variable Annuity Life Ins. Co., 513 U.S. 251, 256-57 (1995) (regarding a letter opinion of the Comptroller of the Currency); Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 647-48 (1990) (regarding an opinion letter); Young v. Community Nutrition Inst., 476 U.S. 974, 978-79 (1986) (concerning a Federal Register Notice)).

presumption that in all ambiguous statutes Congress intended to do so.[96]

So, Justice Scalia reasons, even if *Chevron* deference applies to an agency's legal interpretation, this does not mean that the agency interpretation will be upheld. As Professor Russell Weaver has argued, *Chevron* does not give all agency interpretations the "force of law."[97] The majority's opinion in *Christensen* fails to fully appreciate the distinction. As Justice Scalia recognizes, *Chevron* means only that the Court will uphold interpretations that are not arbitrary and capricious.[98] Arbitrary and capricious review is therefore a necessary predicate to a finding that an agency statement has the force of law. Nevertheless, because Justice Scalia does not consider the Secretary's interpretation of the statute at issue in *Christensen* to be reasonable, he agrees with the majority's conclusion regarding the legality of the Harris County policy.[99]

C. The Emergence of Ad Hoc Skidmore *Deference*

Although *Christensen* clarifies that *Skidmore* deference applies to most agency interpretive and policy statements outside of adjudication and notice-and-comment rulemaking,[100] it also creates much uncertainty regarding how *Skidmore* should be applied to agency interpretations of law. The uncertainty can be illustrated by contrasting the majority's approach in applying *Skidmore* to the statute at issue in *Christensen* with the applications of *Skidmore* in dissents by Justice Stevens and Justice Breyer. There are no less than three distinct approaches among the Court's members as to how *Skidmore* applies to agency statutory interpretations.

1. The Majority's Application of Skidmore

In writing for the majority, Justice Thomas begins his analysis of the statutory interpretation issue not by addressing deference

96. *See id.* at 1664 n.*; *see also supra* note 83 (discussing Justice Breyer's dissent).

97. Russell L. Weaver, Chevron: Martin, *Anthony, and Format Requirements*, 40 U. KAN. L. REV. 587, 612 (1992).

98. *See supra* note 92-96 and accompanying text.

99. *See Christensen*, 120 S. Ct. at 1665 (Scalia, J., concurring).

100. *See id.* at 1663.

but by deciding which interpretation of the statute—that rendered by the petitioners and U.S., or that rendered by Harris County—he believes "better."[101] Petitioners and the U.S. contended "that the FLSA implicitly prohibits such a practice in the absence of an agreement or understanding authorizing compelled use."[102] The majority characterizes this argument as based upon the canon *expressio unius est exclusio alterius*, "contending that the [FLSA's] express grant of control to employees to use compensatory time, subject to the limitation regarding undue disruptions of workplace operations, implies that all other methods of spending compensatory time are precluded."[103]

Before it addresses the weight afforded the agency interpretation, the majority states, "[w]e find this reading unpersuasive."[104] The majority reasons that the canon *expressio unius* does not resolve this case in favor of the petitioners. The FLSA, the majority observes, did not require the expenditure of comp time; a "better reading" is that it set up "a safeguard to ensure that an employee will receive timely compensation for working overtime."[105] Thus, the provision of the FLSA in dispute is "*more properly* read as a minimal guarantee that an employee will be able to make some use of compensatory time when he requests to use it."[106] Given this, the majority opines that the "proper *expressio unius* inference is that an employer may not, at least in the absence of an agreement, deny an employee's request to use compensatory time for a reason other than that provided [in the statute]."[107] The majority concludes,

> [W]e think the better reading of §207(o)(5) is that it imposes a restriction upon an employer's efforts to *prohibit* the use of compensatory time when employees request to do so; that provision says nothing about restricting an employer's efforts to *require* employees to use compensatory time. Because the statute is silent on this issue and because Harris County's

101. *See id.* at 1661.
102. *Id.* at 1660.
103. *Id.* Justice Stevens, in a dissent, challenges this characterization of the petitioner's argument. *See id.* at 1666 (Stevens, J., dissenting).
104. *Id.* at 1660.
105. *Id.* at 1661.
106. *Id.* (emphasis added).
107. *Id.*

> policy is entirely compatible with §207(o)(5), petitioners cannot . . . prove that Harris County has violated §207.[108]

Only once it engages in this analysis does the majority purport to apply *Skidmore* deference. However, in its application of *Skidmore* the majority summarily dismisses any notion of deference to the agency and does not refer to any of the *Skidmore* factors. Instead, with but a brusque nod to *Skidmore*, it refers to its own independent reading of the statute, concluding in a single sentence that "we find unpersuasive the agency's interpretation of the statute at issue in this case."[109] Given this conclusion, the majority summarily states that the agency's interpretation of the statute did not warrant *Skidmore* respect.[110]

The *Christensen* majority's application of *Skidmore* deference goes something like this: A court makes its own interpretation of the statute, comparing it to the interpretation of the litigants. In so doing, the court determines whether it is persuaded that the agency's interpretation is "better,"[111] without affording the agency's interpretation any presumption of validity. If the agency's interpretation is "unpersuasive,"[112] no deference is due under *Skidmore*. Only after determining which reading of the statute it believes best does the majority decide what level of deference to afford the agency interpretation.

2. *Justice Stevens's Dissent and* Skidmore

Justice Stevens's dissent in *Christensen* offers an alternative application of *Skidmore* deference. In his dissent, Justice Stevens agrees with the agency's interpretation.[113] Like the majority, he does not begin his assessment of the statute with any reference to the level of deference to the agency interpretation. Instead, he begins by critiquing the majority's interpretation.[114] He also

---

108. *Id.*

109. *Id.* at 1663.

110. *See id.* (suggesting *Skidmore* respect applies only to the extent that an interpretation has the "power to persuade" (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944))).

111. *See id.* at 1661.

112. *See id.* at 1663.

113. *See id.* at 1665-66 (Stevens, J., dissenting).

114. *See id.* at 1665.

observes that the majority mischaracterizes the agency's argument on appeal:

> The Department, it should be emphasized, does not suggest that forced-use policies are *forbidden* by the statute or regulations. Rather, its judgment is simply that, in accordance with the basic rule governing compensatory time set down by the statutory and regulatory scheme, such policies may be pursued solely according to the parties' *agreement*.[115]

Justice Stevens concludes, "[b]ecause there is no reason to believe that the Department's opinion was anything but thoroughly considered and consistently observed, it unquestionably merits our respect."[116] In contrast to the majority, Justice Stevens relies on at least two of the *Skidmore* factors—thoroughness of the agency's consideration and consistency of the agency's position—in deciding whether the agency's interpretation was persuasive and warrants respect. Thus, Justice Stevens's application of *Skidmore* relies more explicitly than the majority on the *Skidmore* factors, designed to assess the relative decision-making capacity of the agency vis-à-vis the reviewing court.

3. Skidmore *in Justice Breyer's Dissent*

Justice Breyer, in a separate dissent, agrees with Justice Stevens's conclusion and analysis, adding three additional points. First, while Justice Stevens's application of *Skidmore* focuses on two of the *Skidmore* factors—thoroughness of consideration and consistency—Justice Breyer also addresses *Skidmore*'s third factor. "[P]articularly in a rather technical case such as this one," Justice Breyer writes, "an agency's views . . . 'meri[t] . . . respect.'"[117]

Second, Justice Breyer does not shut the door to the possibility, unequivocally argued in Justice Scalia's dissent, that *Chevron* deference is not necessarily inappropriate for an opinion letter.[118]

---

115. *Id.* at 1667.

116. *Id.*

117. *Id.* at 1668 (Breyer, J., dissenting) (quoting *id.* at 1667 (Stevens, J., dissenting)).

118. *See id.* at 1667 (noting Justice Scalia "may well be right" but falling short of rejecting *Skidmore*'s application to the opinion letter).

If *Chevron* deference applies, however, Justice Breyer would conclude that the agency's interpretation of the statute is reasonable—the opposite result of Justice Scalia.[119] Third, Justice Breyer implies that *Skidmore* deference is a type of *Chevron* step two reasonableness inquiry. He states that "the Labor Department's position in this matter is eminently *reasonable, hence persuasive*, whether one views that decision through *Chevron's* lens, through *Skidmore's*, or through both."[120] Thus, for Breyer, to the extent *Skidmore*'s "persuasive" standard applies, it may be equivalent to *Chevron*'s step-two deference inquiry.

II. TOWARD A *CHEVRON/SKIDMORE* SYNTHESIS

Skidmore had little grip on the mind of the administrative lawyer of the 1950s or 1960s. In fact, one of the leading treatises of the era, Professor Louis Jaffe's *Judicial Control of Administrative Action*, does not cite to *Skidmore* a single time in its 720 pages of text.[121] Other contemporaneous commentators, such as Professor Kenneth Culp Davis and Professor Clark Byse advocated various versions of *Skidmore* deference,[122] but it was not universally juxtaposed as *the* alternative to strong deference, whether under *Chevron* or earlier cases such as *Gray* and *Hearst*, until the mid-1970s.[123] *Christensen* has further thrust *Skidmore* into the limelight for future appeals of administrative actions. What *Christensen* does not answer, however, is what, exactly, *Skidmore* deference means, if it can be said to be "deference" at all.

Justice Scalia's approach—abandoning *Skidmore* altogether—has simplicity on its side and avoids a judicial inquiry into whether Congress has delegated to an agency authority to regulate with the "force of law." At the same time, it is inconsistent with cases

---

119. *See id.* at 1668 (stating that "the Labor Department's position in this matter is eminently reasonable").

120. *Id.* at 1668 (emphasis added).

121. *See* LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 729-70 (1965) (providing table of cited cases).

122. *See* KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 30.14 (1958) (discussing a variety of discretion factors, including the factors expressed by the Supreme Court in *Skidmore*); Byse, *supra* note 13, at 191-93 (explaining *Skidmore* "respect").

123. *See* General Elec. Co. v. Gilbert, 429 U.S. 125 (1976); *see also* Yavelberg, *supra* note 12, at 175-76 (claiming that *Gilbert* "revived a then-dormant *Skidmore* doctrine").

decided by both the Supreme Court and lower courts suggesting that more judicial scrutiny is appropriate when reviewing nontransparent decision-making procedures, such as legal interpretations adopted outside of notice-and-comment rulemaking. Heightened judicial review may enhance the legitimacy of agency interpretive and policy statements—such as that in the letter at issue in *Christensen*—because these statements were not fully vetted through transparent and deliberative decision-making procedures. Scholars such as Robert Anthony and John Manning have forcefully argued that a lesser degree of deference may be necessary to promote legitimacy in such circumstances.[124]

Christensen fails to resolve, however, how *Skidmore* deference will be applied. In fact, the majority and dissenting opinions in *Christensen* reflect three distinct positions: (1) that *Skidmore* deference applies only if a court, after rendering its own interpretation, still finds the agency's interpretation persuasive; (2) that *Skidmore* is always a type of varying deference, the degree of which is based on institutional factors; or (3) that *Skidmore* operates under the shadow of a *Chevron* analysis. As this Section argues, the first approach, applied by the majority in *Christensen*, is not supported by the case law and risks undermining the normative rationale for *Skidmore* deference. The second and third approaches are consistent with the case law and the normative rationale for *Skidmore* deference. While the second approach may be more consistent with existing case law, this Article concludes that the third approach, implicit in Justice Breyer's dissent, is normatively preferable. This *Chevron/Skidmore* synthesis holds promise to bridge the gap between the majority and Justices Scalia and Breyer.

---

124. *See* Anthony, *supra* note 60, at 55-60; Manning, *supra* note 90, at 686-90. Manning argues for *Skidmore* deference to agency interpretations of their own regulations. Ironically, *Christensen* advises *Skidmore* deference for an agency's interpretation of statutes, but *Chevron* deference for an agency's interpretations of its own regulations, *see Christensen*, 120 S. Ct. at 1663, perhaps for reasons of judicial economy and uniformity. *See* Strauss, *supra* note 36, at 1121-22 (defending *Chevron* as promoting uniformity in legal decisions). For a useful discussion of this aspect of *Christensen*, see Scott H. Angstreich, *Shoring Up* Chevron: *A Defense of* Seminole Rock *Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS L. REV. 49 (2000).

A. "Persuasiveness" Triggers Respect

The majority in *Christensen* places emphasis on whether the agency interpretation was "better" or "more proper" than alternative explanations.[125] In evaluating "persuasiveness," however, the majority does not assess institutional factors associated with the agency's expertise; instead, it renders its own independent interpretation of the statute. In the course of rendering this interpretation, it places the burden of persuasion on the agency, effectively giving the agency interpretation no weight.

In the Supreme Court's precedents, this independent interpretation view[126] is best exemplified by *Packard Motor Car Co. v. NLRB*.[127] There, the Court reviewed a Labor Board determination that shop foremen are "employees" subject to the National Labor Relations Act. The agency certified a union to represent foremen at the Packard Motor Car Company and issued a cease and desist order against the company for its refusal to bargain with the union.[128] While the Court—with Justice Jackson again writing for the majority—upheld the agency's determination, it characterized the issue—whether the cease and desist order was authorized by statute—as a "naked question of law."[129] As Justice Jackson stated in his majority opinion, there was "no ambiguity in this Act to be clarified by resort to legislative history."[130] The *Packard* Court's determination that the statute was unambiguous is puzzling—especially because "the Court itself noted [that] foremen fell squarely within . . . the definition of" both "employee" and "employer" in the statute[131]—but the Court independently parsed the statutory language based on context. In the Court's view, there is no construction of the statute that would exclude foremen from

125. *See supra* notes 101-12 and accompanying text.

126. *See* Asimow, *supra* note 9, at 1194; Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 366 (1990).

127. 330 U.S. 485 (1947).

128. *See id.* at 488.

129. *Id.* at 493.

130. *Id.* at 492. This is consistent with Justice Jackson's concerns about resorting to legislative history in other contexts. *See supra* note 56.

131. William S. Jordan, III, *Deference Revisited: Politics as a Determinant of Deference Doctrine and the End of the Apparent* Chevron *Consensus*, 68 NEB. L. REV. 454, 466 n.78 (1989).

the definition of employee.[132] Even though *Packard* upheld the agency, it made no reference to the agency's reasoning and did not afford the agency's position any weight. *Skidmore* itself would not necessarily have led to affirmance of the agency, but it is notable that *Packard* failed to support giving some weight to agency interpretations of law.[133]

While the *Christensen* majority pays lip service to *Skidmore*, its method bears more in common with the independent interpretation approach of *Packard*. The statute at issue in *Christensen*, unlike the statute at issue in *Packard*, is characterized by the Court as ambiguous or silent on the issue.[134] Despite any ambiguity in the statutory language, the majority adopts the interpretation it deems the "better" or "more proper" one. This interpretation is selected not by comparing the majority's assessment of statutory meaning to the agency's, taking into account the agency interpretation's "power to persuade." In fact, at no point does the majority assess the degree of weight it attaches to the agency's interpretation. In contrast, the majority seems to suggest that *Skidmore* "respect," or deference, is triggered only to the extent that the agency interpretation has the "power to persuade," which the majority claims is equivalent to whether the interpretation is "persuasive."[135] Moreover, Justice Thomas's majority opinion attempts to find meaning by treating the exercise of statutory interpretation as a word play, but he is disinclined to look beyond the very limited palette of the statute's text.[136]

The effect of this approach is to place the burden of persuasion on the agency. In other words, *Skidmore* deference—or "respect"—is not triggered until, after an independent interpretation by the

132. *See Packard*, 330 U.S. at 488 (stating that "[t]he context of the Act . . . leaves no room for a [contrary] construction").

133. *See supra* notes 44-58 and accompanying text (discussing *Skidmore*); *see also* NLRB v. Hearst Publications, 322 U.S. 111, 134-45 (1944) (applying the rational basis test to the NLRB's interpretation); Gray v. Powell, 314 U.S. 402, 412 (1941) (stating that when Congress leaves a determination to an agency, the "delegation will be respected and the administrative conclusion left untouched" by the Court).

134. The Justices unanimously agree on this issue. *See supra* note 74 and accompanying text.

135. Christensen v. Harris County, 120 S. Ct. 1655, 1663 (2000).

136. *Cf.* Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 373 (1994) (criticizing tendency of Justice Thomas and other textualists of imaginative interpretation, due to the small interpretive palette they work with).

Court, the agency's interpretation is deemed persuasive. Because in *Christensen* the majority does not consider the agency's interpretation to be persuasive, the interpretation is not entitled to any deference. Thus, the majority approach seems to have more in common with *Packard* and the independent interpretation approach than with cases applying deference, even cases such as *Skidmore*, which advise "respect" rather than strong deference. Under the majority approach in *Christensen*, if the Court finds the agency interpretation persuasive, it is then entitled to *Skidmore* "respect." Even under the approach of the *Christensen* majority, this presumably does not mean that the agency interpretation will always be upheld. Instead, once the Court begins to apply deference, the agency interpretation will be given the degree of respect it warrants under the *Skidmore* factors. Because the majority does not find the agency interpretation persuasive over the majority's independent interpretation, however, it completely ignores the *Skidmore* factors.

The approach of the *Christensen* majority finds support in a strong separation of powers rationale for the distinction between *Skidmore* and *Chevron* deference.[137] Courts applying this understanding of *Skidmore* make their own independent checks of agency statutory interpretation. This promotes transparency, enhanced deliberation, and limited executive official discretion, values at the core of traditional separation of powers principles.[138] The *Christensen* majority's approach, however, is clearly limited in its scope. One reason that the majority in *Christensen* takes the approach that it does is that, under the statute, the burden of proof was clearly on the employee-petitioners, who relied on the agency's interpretation.[139] In fact, the majority seems to conflate the burden of proof with the standard of review of the agency's legal interpretation, even though they could have easily been kept separate conceptually. Because the Court is exercising traditional Article III powers in assessing a matter between nonagency

137. *See, e.g.*, Manning, *supra* note 90 (urging *Skidmore* as a standard for review of an agency's interpretation of its own regulations for separation of power reasons, noting that under *Skidmore* the burden of persuasion is on the agency).

138. *See id.* at 696.

139. *See Christensen*, 120 S. Ct. at 1661 (requiring petitioners to prove violation of section 207) (citing 29 U.S.C. § 216(b) (1994)).

litigants,[140] it is probably more comfortable heightening the burden for the agency's interpretation than it would be were it reviewing the regulatory decision of a federal agency.

B. Sliding Scale Deference Based on Application of Institutional Factors

The *Christensen* majority's application of *Skidmore* effectively eviscerates any presumption of validity in favor of an agency's interpretation, instead inviting courts to make their own independent interpretations of statutes before applying any sort of *Skidmore* deference. Assessing the "persuasiveness" of an agency's legal interpretation, however, is not the same as an evaluation of its "power to persuade." Under *Skidmore*, agency interpretations are "not controlling upon the courts by reason of their authority,"[141] but they may still be persuasive by reason of their institutional source. *Skidmore* evaluates the power to persuade with respect to several factors, such as the agency's expertise, the thoroughness of its consideration and the consistency of its position.[142]

In support of its method, the *Christensen* majority relies on *EEOC v. Arabian American Oil Co. (Aramco)*.[143] *Aramco*, however, departs from the majority's method. Instead of conflating the "persuasiveness" of an interpretation with its "power to persuade," the *Aramco* Court separated the two inquiries. *Aramco* addressed the degree of deference the Court should afford the Equal Employment Opportunity Commission's position that Title VII applies extraterritorially to regulate the employment practices of U.S. companies employing U.S. citizens abroad.[144] The Court found Title VII ambiguous,[145] as it does the statute in *Christensen*.[146] Relying on a presumption against extraterritorial application of statutes absent Congressional intent to the contrary, the Court

140. *See supra* note 90 and accompanying text.
141. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).
142. *See id.*
143. *See Christensen*, 120 S. Ct. at 1662-63.
144. *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991).
145. *See id.* at 250-51.
146. *See supra* note 74 and accompanying text.

rejected the agency's position.[147] In this sense, the case bears similarity to the majority approach in *Christensen*.

Aramco did not, however, hold that the general burden of persuasion of a statutory interpretation under *Skidmore* is always on the agency, as the majority in *Christensen* suggests. To begin, *Aramco* can easily be limited to instances in which a countervailing presumption of statutory construction advises against the agency interpretation absent clear congressional intent to the contrary.[148] Notwithstanding its lip service to *expressio unius*—a position contested by Justice Stevens's dissent[149]—the majority in *Christensen* does rely on a presumption of statutory construction as compelling its interpretation over the agency's.

A further distinction between the application of *Skidmore* in *Aramco* and *Christensen* is that the *Aramco* majority, unlike the majority in *Christensen*, applied *Skidmore* deference even though it was not persuaded by the agency's interpretation. The *Christensen* majority would have held that no respect was due to the agency's interpretation under *Skidmore* because the interpretation is not persuasive to the majority. By contrast, the *Aramco* majority recognized that even though Congress had not conferred rulemaking authority on the EEOC, "the level of deference afforded 'will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all of those factors which give it the power to persuade, if lacking power to control.'"[150] In evaluating the level of deference applicable to the EEOC, the *Aramco* majority then evaluated each of the *Skidmore* factors. First, the majority observed, the position taken by the EEOC "'contradicts the position which [it] had enunciated at an earlier date, closer to the enactment of the governing statute.'"[151] Second, the majority noted, "[t]he EEOC offers no basis in its experience for the

147. *See Aramco*, 499 U.S. at 251.

148. *See id.* at 248 (citing Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957); Foley Bros. v. Filardo, 336 U.S. 281, 284-85 (1949)).

149. *See* Christensen v. Harris County, 120 S. Ct. at 1665, 1666 n.1 (Stevens, J., dissenting) ("It must be noted that neither petitioners' brief nor the brief for the United States as *amicus curiae* actually relies upon this canon [of *expressio unius*].").

150. *Aramco*, 499 U.S. at 257 (quoting Skidmore v. Swift, 323 U.S. 134, 140 (1944)).

151. *Id.* (alteration in original) (quoting General Elec. Co. v. Gilbert, 429 U.S. 125, 142 (1976)).

change."[152] The majority concluded "even when considered in combination with petitioners' other arguments, the EEOC's interpretation is insufficiently weighty to overcome the presumption against extraterritorial application."[153] Thus, *Aramco* separated the inquiries and applied *Skidmore* factors to assess the appropriate weight of the agency's interpretation even where the Court was not independently persuaded by the agency's interpretation. This application of *Skidmore* stands in stark contrast to that of the *Christensen* majority.

Aramco's approach to applying *Skidmore* finds support in other cases. In *General Electric Co. v. Gilbert*,[154] the case that purportedly revived *Skidmore* in the 1970s,[155] the Court also relied on *Skidmore* in refusing to agree with an EEOC guideline interpreting Title VII. The Court in *Gilbert* ultimately found the EEOC interpretation unpersuasive; however, it did not "wholly discount the weight" of the EEOC guideline, instead reasoning that the guideline "does not receive high marks when judged by the standards enunciated in *Skidmore*."[156] The Court observed that the EEOC guideline was not a contemporaneous interpretation of Title VII and that it contradicted an earlier EEOC position.[157] Thus, the Court reasoned, it lacked persuasive force pursuant to the *Skidmore* factors. The *Gilbert* case is significant for its adding of contemporaneousness to the *Skidmore* factors.

Under *Aramco* and *Gilbert*, *Skidmore* advises a sliding scale of deference, or "respect," based on its factors of agency expertise, consistency, contemporaneous, and thoroughness of consideration. This approach differs from the approach of the *Christensen* majority, which does not apply *Skidmore* deference unless an agency interpretation is deemed to be persuasive. The approach of *Aramco* and *Gilbert* is more consistent with the language of the *Skidmore* opinion, as well as the normative rationales for deference articulated in *Skidmore*. *Skidmore* deference is not as strong as the

152. *Id.*
153. *Id.* at 258.
154. 429 U.S. 125 (1976).
155. *See* Yavelberg, *supra* note 12, at 175 (asserting that *Gilbert* "revived a then-dormant *Skidmore* doctrine").
156. *Gilbert*, 429 U.S. at 143.
157. *See id.* at 142.

deference advised in other circumstances, such as where *Chevron* applies, but it is still deference for a reason. As the Court noted in *Skidmore*, agencies have more expertise than reviewing courts and there is also a uniformity interest in applying some deference even to agency interpretive statements.[158] *Skidmore* strikes a balance, by heightening the review standard to promote legitimacy without abandoning deference altogether.[159] The majority in *Christensen*, by contrast, throws the baby of deference out with the bathwater of agency legal interpretations outside of the notice-and-comment rulemaking or adjudication contexts. If courts follow the *Skidmore* approach of the *Christensen* majority, they risk eviscerating the presumption of validity for agency actions outside of notice-and-comment rulemaking, thrusting the judiciary into second guessing agency interpretations of statutes. While there may be small legitimacy gains to independent judicial review of questions of law with no presumption of validity, the uniformity and judicial resource costs are potentially high. The approach of the *Christensen* dissents, in considering the institutional factors without abandoning the presumption of validity, is sounder in light of the *Skidmore* case and its normative rationales, as well as later cases applying *Skidmore*.[160]

C. Skidmore *as Reasonableness With a Bite*

Although Justice Breyer's dissent is not inconsistent with the second approach to *Skidmore* deference—like Justice Stevens, he explicitly applies the *Skidmore* factors to assess the "persuasive force" of the agency's interpretation[161]—he also raises a third

158. *See supra* notes 57-58 and accompanying text.

159. *Cf.* Peter L. Strauss, *The Courts and the Congress: Should Judges Disdain Political History?*, 98 COLUM. L. REV. 242, 251 (1998) (asserting that *Skidmore* strikes a middle ground by giving agency interpretation influence without making them binding or giving them no weight).

160. *See, e.g.*, Warder v. Shalala, 149 F.3d 73, 83-84 (1st Cir. 1998) (applying *Skidmore* factors to uphold agency legal interpretation embodied in an interpretive rule); Mayburg v. Secretary of Health and Human Servs., 740 F.2d 100, 105-07 (1st Cir. 1984) (Breyer, J.) (finding agency interpretation unpersuasive in light of congressional intent, despite independent assessment of its "'power to persuade'" pursuant to the *Skidmore* factors (quoting Skidmore v. Swift, 323 U.S. 34, 140 (1944))).

161. *See supra* note 117 and accompanying text.

possibility. He hints, and implicitly endorses, that *Skidmore* can be understood within the architecture of *Chevron* deference, not as an alternative to *Chevron* deference. In particular, *Skidmore* might be conceptualized as a type of reasonableness inquiry at step two of *Chevron*.[162] The question, then, should be whether a court chooses to invoke reasonableness review pursuant to the *Skidmore* factors or to use strong deference without a hard look, not whether *Chevron* should apply.

Something similar to this approach was endorsed by a Third Circuit panel in *Cleary v. Waldman*.[163] *Cleary* addressed the appropriate deference for Health Care Financing Administration (HCFA) and Department of Health and Human Services (HHS) interpretations in the context of a private challenge to New Jersey's implementation of the Medicare Catastrophic Coverage Act (MCCA). The plaintiffs maintained that the MCCA precludes New Jersey from adopting a definition of "community spouse's income" for determining thresholds for Medicare allowances by any method other than the resource-first approach.[164] By contrast, "[b]oth HCFA and HHS [had] stated in policy memoranda and letters that states may adopt either the income-first or the resource-first method and that [the MCCA] permits consideration of potential income transfers from one spouse to another."[165] In assessing what weight to afford the agency interpretations, the court began by applying step one of *Chevron*, but found the definition of "community spouse's income" to be ambiguous.[166] The court then moved on to step two of *Chevron*, but it did not apply routine step-two reasonableness review. The agencies had not adopted their interpretations through notice-and-comment rulemaking.[167] Nevertheless, the court reasoned, the agencies have "delegated authority to administer the statute and the views are made 'in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come

162. This conceptualization stands in contrast to that advanced by Professor Michael Herz, who argues that *Skidmore* deference should apply at step one of *Chevron*. *See* Herz, *supra* note 13, at 208-09.

163. 167 F.3d 801 (3d Cir. 1999).

164. *See id.* at 804-07 (citing 42 U.S.C. § 1396r-5(e)(2)(C) (1994)).

165. *Id.* at 806.

166. *See id.* at 807.

167. *See id.*

to a judge,'" so *Skidmore* deference applies.[168] The court then tested the agencies' interpretations against *Skidmore* standards, noting that an agency legal interpretation "will be given deference as long as it is consistent with other agency pronouncements and furthers the purposes of the Act."[169] Instead of understanding *Chevron* and *Skidmore* as alternative tests, this approach synthesizes the two within *Chevron*'s architecture. The approach, implicit in Justice Breyer's dissent, has many advantages over the other approaches endorsed by the *Christensen* Court.

First, even when courts review the types of agency statements for which *Skidmore* would normally apply, they presumably engage in the *Chevron* step-one inquiry. In other words, if the statute speaks unambiguously to the question at hand, a court will gauge the legality of agency action without regard to deference. *Skidmore* or *Chevron* deference issues arise only when the statute is silent or ambiguous. Thus, at least insofar as step one of *Chevron* is concerned, the two tests are identical. Professor Michael Herz has argued that the *Skidmore* test should apply at *Chevron*'s step one,[170] but while this may enhance judicial oversight of agencies, it creates disincentives for accountable legislation by Congress. His argument is premised on the assertion that statutory ambiguity does not necessarily end the step-one inquiry because "Congress might mean to express something but do so ambiguously."[171] If *Chevron* had Congress's intent as its exclusive normative rationale, Professor Herz's argument would be convincing. However, even Justice Scalia, one of the strongest advocates of the congressional intent justification for *Chevron* deference,[172] has been inclined to treat ambiguous statutes at step two of *Chevron*.[173] The normative rationale for treating ambiguous statutes at step two is not based exclusively in congressional intent. It also recognizes the institutional incentives judicial deference creates for more

168. *Id.* at 807-08 (quoting Skidmore v. Swift, 323 U.S. 134, 140 (1944)).

169. *Id.* at 808 (citing E.I. du Pont de Nemours & Co. v. C.I.R., 41 F.3d 130, 135 (3d Cir. 1994); Sekula v. F.D.I.C., 39 F.3d 448, 453 (3d Cir. 1994)).

170. *See* Herz, *supra* note 13, at 208-09.

171. *Id.* at 207.

172. *See* The Honorable Antonin Scalia, *Judicial Deference to Agency Interpretations of Law*, 1989 DUKE L.J. 511, 516 (arguing that the theoretical justification for *Chevron* deference is based in Congress's intent).

173. *See* Christensen v. Harris, 120 S. Ct. 1655, 1664-65 (2000) (Scalia, J., concurring).

transparent and accountable congressional decision making. If Congress legislates with the expectation—reinforced by a legal rule—that courts will defer to agency interpretations of ambiguous statutes, Congress will use more precise language where it intends otherwise, enhancing the transparency and accountability of congressional law delegating authority to administrative agencies.[174] An architecture of deference that reads *Skidmore* deference into step one of *Chevron* completely undermines this incentive.

Second, the distinction between *Chevron* and *Skidmore* deference, as applied by the *Christensen* Court, is intertwined with an evaluation of whether the agency mode speaks with the "force of law"[175] or whether Congress intended to delegate interpretive authority to the agency.[176] The "force of law" inquiry is itself a function of Congress's intent regarding the scope of the agency's delegated power. For instance, where an interpretation binds parties as well as the agency—and Congress intended as much—courts are more likely to extend *Chevron* deference.[177] The inquiry into whether Congress intended to delegate interpretive powers is mentioned in *Chevron*,[178] and has been reiterated many times since.[179] Just as in other contexts where courts have attempted to evaluate the sufficiency of a congressional delegation,[180] however, courts are hardly predictable or consistent

174. The purpose of *Chevron*'s step one, in other words, is to give Congress an incentive to draft clear statutes—not to bail Congress out in those instances where it has failed to do so. *Cf.* American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 545-48 (1981) (Rehnquist, J., dissenting) (rejecting agency's construction of a statute, noting that where Congress had wanted to use clear language it did so); Industrial Union Dept., AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 682 (1980) (Rehnquist, J., concurring) (same).

175. *Christensen*, 120 S. Ct. at 1662 (noting that interpretation contained in policy statements, agency manuals and enforcement guidelines all "lack the force of law").

176. *See id.* at 1668 (Breyer, J., dissenting) (suggesting that there are circumstances of statutory ambiguity where *Chevron* may not apply, and that the inquiry hinges on whether "Congress actually intended to delegate interpretive authority to the agency").

177. *See id.* at 1662; Herz, *supra* note 13, at 193-200. Anthony, *supra* note 60, argues that the critical inquiry is whether Congress intends to bind the courts.

178. *See* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984).

179. *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 120 S. Ct. 1291, 1314 (2000); Smiley v. CitiBank, 517 U.S. 735, 740-41 (1996); Martin v. OSHRC, 499 U.S. 144, 151 (1991); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 213-15 (1988).

180. For example, many commentators argue that the constitutional nondelegation

in evaluating whether sufficient lawmaking authority has been delegated to agencies.[181] In evaluating intent, judges will disagree—as do members of the Court—on what interpretive aids are appropriate, as well as on the role of legislative history.[182] Inconsistencies in judicial decisions regarding the scope of *Chevron*'s application risk thwarting the uniformity advantages associated with either *Chevron* or *Skidmore* deference.[183] Instead of relying on a hopelessly indeterminate judicial inquiry into whether Congress intended to delegate interpretive authority to an agency—and whether agency modes of decision speak with the "force of law"—a synthetic approach adjusts the standard of reasonableness review based on a process consideration. The relevant touchstone is not Congress's intent, but the procedure the agency used in making its interpretation.[184] If the agency employed transparent processes lending themselves to open participation and deliberation, such as adjudication or notice-and-comment rulemaking, this will be reflected in the record subject to judicial inquiry on appeal. A reasonableness standard of review, embellished by the hard-look doctrine, would be appropriate. By

---

doctrine is unenforceable because courts are unable to provide principled ways of enforcement. *See* Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323, 324 (1987) (noting that there are no "judicially manageable and defensible criteria to distinguish permissible from impermissible delegations"); *see also* Carl McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119, 1128-30 (1977); Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391, 393-403 (1987); Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1244-47 (1989); Stewart, *supra*, at 325-28.

181. *Compare* Cleary v. Waldman, 167 F.3d 801, 808 (3d Cir. 1999) (requiring "a congressional delegation of administrative authority" as a precondition to the application of *Chevron*), *with Christensen*, 120 S. Ct. at 1668 (Breyer, J., dissenting) (stating that application of *Chevron* requires a clear delegation of interpretive authority).

182. For discussion of these disagreements, see Lars Noah, *Divining Regulatory Intent: The Place for a "Legislative History" of Agency Rules*, 51 HASTINGS L.J. 255 (2000).

183. *See* Asimow, *supra* note 9, at 1203-06 (noting uniformity concerns with *Skidmore* deference); Strauss, *supra* note 36.

184. In contrast to this approach, in *U.S. v. Mead* Professor Thomas Merrill filed an amicus brief urging the Court to use Congress's intent to delegate the authority to bind private parties as the "key variable" for application of *Chevron* deference. *See* Brief of Amicus Curiae of Professor Thomas Merrill In Support of Petitioner, United States v. Mead Corp., *cert. granted*, 120 S. Ct. 2193 (2000) (No. 99-1434). Merrill coupled this approach with an assessment of procedural mode, but the synthetic approach defended here hinges entirely on procedural mode, not an assessment of congressional intent to bind.

contrast, as in *Cleary*, where informal action, adopted through nontransparent procedures, is behind the agency's interpretive statement, application of the *Skidmore* factors provides courts with a heightened inquiry, adjusting to the nature of the action and quality of process, reasons, and explanations behind it.[185]

Third, a synthetic approach retains the heightened review necessary to promote the legitimacy of agency statements that have not undergone full notice-and-comment rulemaking. In applying *Skidmore*'s factors, courts consider factors that parallel those they consider in "hard look" reasonableness review. When an agency has not engaged in notice-and-comment rulemaking, it is not legally obligated under the APA to produce an explanation for its decision. Nevertheless, an agency's provision of documents or rationales, subject to judicial review, will enhance the legitimacy of the agency's decision.

Professor Mark Seidenfeld has argued that step-two *Chevron* review is so lenient that it is almost meaningless.[186] Incorporation of *Skidmore* criteria into the step-two inquiry will work to enhance the accountability of agency action where the adjudication or notice-and-comment process has not contributed to its legitimacy. The *Skidmore* factors provide a way for courts to focus their inquiry at step two in ways that are important in promoting the legitimacy of informal action, nudging more deliberative agency decision making where courts cannot take comfort with the protections provided by the notice-and-comment rulemaking or formal adjudication procedures.

---

185. *Cleary* itself falls short of this approach. As a precondition to invoking the *Chevron* framework, the court required "a congressional delegation of administrative authority." *Cleary*, 167 F.3d at 808 (citing Adams Fruit Co. v. Barrett, 494 U.S. 638, 649 (1990)).

186. *See* Seidenfeld, *supra* note 34, at 84; *see also* Ronald Levin, *The Anatomy of* Chevron: *Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1261 (1997) (noting that as of 1997 the Supreme Court had never struck down an agency interpretation by relying squarely on *Chevron*'s step two). In *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), however, the Supreme Court relied on *Chevron*'s step two to reverse the agency's decision. In *American Trucking*, the Court recently held an agency's interpretation of an ambiguous statutory provision to be unreasonable, *see* 121 S. Ct. 903, 916-17 (2001) (citing *Iowa Utils. Bd.*, 525 U.S. at 392), presumably also relying on step two of *Chevron*. Others might read *Iowa Utilities Board* and *American Trucking* as *Chevron* step-one cases. I am not inclined to agree with this interpretation, for policy reasons, *see supra* notes 170-74 and accompanying text, as well as that it leaves little consequence to *Chevron* step two.

In articulating the *Skidmore* factors, the Supreme Court portended some of the factors it would later endorse in its "hard look" approach to judicial review, applicable to a broader range of cases, including those involving rulemaking and adjudication. In "hard look" review, the Supreme Court has stated that a rule

> Would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[187]

The notice-and-comment process binds the agency legally to produce explanatory material in the form of a statement of general basis and purpose,[188] and the rigors of hard-look review work to promote deliberation and accountability in this process. *Skidmore*'s factors relating to agency expertise and thoroughness of consideration strongly parallel the considerations of the hard-look test at step two of *Chevron*. The hard-look test, for example, might provide courts additional guidance in assessing the "thoroughness of consideration" necessary to justify the agency action.

The *Skidmore* test, however, appears notably more rigorous than the routine reasonableness inquiry at *Chevron*'s step two. *Skidmore*'s other factors, relating to consistency and the contemporaneousness of a construction, add an additional layer of scrutiny to the hard-look inquiry for informal statements. *Skidmore*'s consistency factor, along with contemporaneousness, added by *Gilbert*,[189] serves three purposes. Reliance interests are protected, because regulated entities have some confidence in the certainty of the agency's position. Another purpose of requiring consistency is that agencies may be deterred from bypassing notice-and-comment rulemaking processes when they adopt a new interpretation, enhancing the legitimacy of the regulatory process. And a third purpose is to aid courts in assessing statutory meaning, because

187. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 43 (1983).
188. *See* 5 U.S.C. § 553(c) (1994).
189. *See supra* note 157 and accompanying text.

consistent and contemporaneous positions are more likely to reflect congressional intent or acquiescence than inconsistent or recent interpretations.[190]

Even where *Skidmore* does not apply, reasonableness review cases value consistency, suggesting that agencies must explain their departures from previous positions.[191] Given the additional legitimacy concerns of agency legal interpretations adopted in informal, nontransparent processes, however, the consistency and contemporaneous construction factors of *Skidmore* are notably stronger, detracting from the persuasive force of an agency's legal interpretation.

A significant advantage to conceptualizing *Skidmore* deference as a type of step-two inquiry is that it promotes legitimacy and uniformity without sacrificing flexibility.[192] Of all of the *Skidmore* factors, consistency seems most widely used by courts.[193] If the

190. Professor Asimow argues, for example, that *Skidmore*'s factors, as applied by California state courts, serve two purposes: judicial recognition of the agency's comparative institutional advantage, and an invocation of deference where the agency's interpretation is probably correct. The consistency and contemporaneous factors are particularly useful in evaluating the correctness of the agency's interpretation. *See* Asimow, *supra* note 9, at 1196-98.

191. *See* Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 808 (1973) (holding that the agency's ground for departing from previous decisions "must be clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate"). Justice Breyer, while a judge on the U.S. Court of Appeals for the First Circuit, explained this obligation:

> [T]he Board remains free to modify or change its rule; to depart from, or to keep within, prior precedent, as long as it focuses upon the issue and explains why change is reasonable. Unless an agency either follows or consciously changes the rules developed in its precedent, those subject to the agency's authority cannot use its precedent as a guide for their conduct; nor will that precedent check arbitrary agency action.

Shaw's Supermarkets, Inc. v. NLRB, 884 F.2d 34, 41 (1st Cir. 1989) (Breyer, J.) (citations omitted).

192. Professor Asimow, in urging California courts to adopt *Skidmore* "weak deference," argues that weak deference promotes accuracy, uniformity, efficiency, and creates desirable incentives for accountable decision making by agencies. *See* Asimow, *supra* note 9, at 1203-06. He falls short, however, of adopting weak deference in the context of *Chevron*, instead suggesting it as an alternative to the *Chevron* framework. His approach was adopted by the California Supreme Court in *Yamaha Corp. v. State Board of Equalization*, 960 P.2d 1031, 1038-39 (Cal. 1998), which applied *Skidmore* deference to an agency interpretation adopted outside of the rulemaking and adjudication processes.

193. *See, e.g.*, Cleary v. Waldman, 167 F.3d 801, 808 (3d Cir. 1999); West v. Bowen, 879 F.2d 1122, 1134 (3d Cir. 1989) (Mansmann, J., concurring and dissenting) (citing to Third Circuit cases on consistency); Wilcox v. Ives, 864 F.2d 915, 924-25 (1st Cir. 1988); Barnett v.

consistency factor is assessed independent of a reasonableness inquiry, however, courts will be more disposed to allowing a preexisting interpretation to hamstring an agency's regulatory policies, thwarting an agency's ability to change interpretations outside of formal regulatory processes. Even under *Skidmore*, though, an agency is not precluded from changing its interpretive position so long as the thoroughness of the explanation of the agency's consideration, reflected in the reasons it provides, is sufficient to override any inconsistency that might detract from the persuasive force of the agency's interpretation.[194] The consistency factor plays an important role in protecting the legitimacy of agency informal interpretations, but even *Skidmore* does not bind the agency to previous interpretations. If an agency has thoroughly considered and explained a change in policy, binding the agency to its initial interpretation would undermine the flexibility in the regulatory process. The cost of notice-and-comment rulemaking for agencies is well-documented.[195] Agencies need some degree of flexibility to adapt interpretations, even through informal procedures.[196] But if an agency makes a change in its legal interpretation through an informal procedure, it should be expected to thoroughly consider and explain its deviation from previous

---

Weinberger, 818 F.2d 953, 960-61 (D.C. Cir. 1987); St. Lukes Hosp. v. Secretary of Health and Human Servs., 810 F.2d 325, 331 (1st Cir. 1987); General Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 n.7 (D.C. Cir. 1984).

194. *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 257 (1991) (suggesting that an agency may offer reasons based on its experience for a change in a legal interpretation). One Third Circuit decision observes the distinction between a change and a "sharp" change, suggesting that the latter is entitled to less deference than the former. *See West*, 879 F.2d at 1134 (Mansmann, J., concurring and dissenting). Both types of changes, however, warrant *some* deference; a sharp change may just require a more complete and thorough explanation, everything else equal, to justify the interpretation.

195. *See* Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1419-20 (1992) (noting the impact judicial review may have on agency's willingness to use notice-and-comment rulemaking).

196. In addition to cohering with *Skidmore*, changes in agency legal interpretations do not necessarily require notice-and-comment rulemaking under the APA. In *Chief Probation Officers of California v. Shalala*, 118 F.3d 1327 (9th Cir. 1997), retired Justice White, siting by designation and writing for a panel of the Ninth Circuit, opined that an informal rule that changes agency policy does not necessarily require notice-and-comment rulemaking under the APA. Justice White reasoned, to trigger notice-and-comment, "the rule would have to be inconsistent with another rule having the force of law, not just any agency interpretation regardless of whether it had been codified." *Id.* at 1337. *Accord* Warder v. Shalala, 149 F.3d 73 (1st Cir. 1998).

positions. *Skidmore* allows this, but courts must take the thoroughness of consideration factor seriously in evaluating the reasonableness of the agency's decision. In this sense, *Skidmore* might be considered a hard look with a special emphasis on consistency and the depth of reasoning—rather than routine rationality review, which focuses more on coherence than the thoroughness or depth of the agency's reasoning—given the legitimacy concerns of informal agency interpretations. So, although an agency issuing an interpretive rule or opinion letter is not legally obligated under the APA to produce reasons supporting its decision, agencies expecting some type of reasonableness review incorporating the *Skidmore* factors will be more likely to do so. Conceptualizing *Skidmore* as reasonableness with a bite will enhance the accountability and deliberativeness of the agency interpretations in informal contexts. It promotes legitimacy without requiring de novo review of the issues of law, which potentially undermines the uniformity and accountability values of providing some deference to agency interpretations of law.

Of no small significance, this approach simplifies the judicial inquiry and holds promise to bridge the gap between the *Christensen* opinions issued by the Supreme Court's administrative law scholars, Justices Scalia and Breyer. Conceptualizing *Skidmore* as reasonableness with a bite at *Chevron*'s step two responds to Justice Scalia's concern with the resort to a judicial inquiry into congressional intent prior to the application of *Chevron* deference. At the same time, it endorses the approach implicit in Justice Breyer's dissent, while also recognizing that heightened reasonableness review contributes to the legitimacy of agency legal interpretations adopted through less transparent and deliberative procedures.

CONCLUSION

Christensen resolves a significant issue regarding when *Skidmore* as opposed to *Chevron* deference applies to agency legal interpretations, but it also creates uncertainty regarding how *Skidmore* should be applied. As courts are thrust into applying *Skidmore* deference, they should shy away from the approach of the *Christensen* majority, which gives no more than a brusque nod to

Skidmore. The approach of the majority, eviscerating the presumption of validity for agency action, is not supported by *Skidmore* or later cases and undermines the rationales for deference, even in the *Skidmore* context. An approach truer to precedent relies on institutional factors to gauge the persuasive force of the agency's interpretation. Courts applying *Skidmore* should favor this approach over that of the *Christensen* majority. Better still, a *Chevron/Skidmore* synthesis—reasonableness with a bite—holds promise to simplify the judicial review inquiry, simultaneously promoting uniformity and accountability without sacrificing the legitimacy of heightened review or the tradition of different types of deference. Even when it is not absolute, judicial review of informal agency legal interpretations can promote the legitimacy of agency statements adopted by procedures that are not as transparent as adjudication and notice-and-comment rulemaking.