CHRISTENSEN v. HARRIS COUNTY: WHEN REJECTING CHEVRON DEFERENCE, THE SUPREME COURT CORRECTLY CLARIFIED AN UNCLEAR ISSUE

INTRODUCTION

Congress delegates power to agencies under broad-spectrum directives. Agencies utilize this power to pass rules. Agencies pass two types of rules: interpretations that do not carry the force of law, and legislative rules that carry the force of law. Originally, the United States Supreme Court held that courts should grant deference to administrative rules because of the agency's expertise and experience. In 1984, in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court veered away from granting deference based on administrative experience and instead linked deference to the clarity of the statute. After *Chevron*, the question of the deference to be afforded agency interpretations not promulgated pursuant to the formal methods of rulemaking remained.

Recently, in *Christensen v. Harris County*, the Supreme Court answered this *Chevron* question. In *Christensen*, Harris County, Texas, imposed a policy on its employees forcing them to take accrued compensatory time. The United States Department of Labor ("DOL") issued an opinion letter stating that a public employer could direct employees to take accrued compensatory time only if a prior agreement provided for such. The *Christensen* Court determined that the DOL opinion letter and similar agency interpretations lacked

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11. *Christensen*, 529 U.S. at 580.
the force of law and did not warrant Chevron deference. Instead, the Court applied the form of deference in Skidmore v. Swift & Co., which was a lesser form of deference than Chevron deference. The Court determined that Harris County’s policy was not prohibited.

This Note will first examine the facts and holding of Christensen. Then this Note will detail the relevant provisions of the Administrative Procedure Act (“APA”), the statute agencies must follow. Next, this Note will review the fundamental types of deference courts grant to agency decisions by examining the United States Supreme Court opinions in Skidmore and Chevron. This Note will also discuss the application of deference afforded to agency opinions since the time the Court decided Chevron by examining the Supreme Court cases in which the Court granted deference to agency interpretations. Next, this Note will analyze Christensen’s holding. Specifically, this Note will criticize the Court for failing to acknowledge the APA. This Note will then commend the Supreme Court for clarifying confusion as to the standard of deference for different types of administrative rules. The Court was correct because it provided guidance for future decisions and is supported by case precedent. Finally, this Note will agree with the Court’s refusal to apply Chevron deference to agency interpretations, and will agree with the Court’s application of the lesser degree of deference established in Skidmore.

FACTS AND HOLDING

In Christensen v. Harris County, one hundred twenty-seven county deputy sheriffs (“employees”), employed by Harris County, Texas, sued Harris County and its sheriff, Tommy B. Thomas (collectively, “Harris County”). The employees sued Harris County for re-

12. Id. at 585.
14. Christensen, 529 U.S. at 587.
15. Id.
16. See infra notes 26-116 and accompanying text.
18. See infra notes 117-36 and accompanying text.
19. See infra notes 160-215 and accompanying text.
20. See infra notes 216-322 and accompanying text.
21. See infra notes 323-519 and accompanying text.
22. See infra notes 341-74 and accompanying text.
23. See infra notes 375-441 and accompanying text.
24. See infra notes 412-83 and accompanying text.
25. See infra notes 484-520 and accompanying text.
quiring them to take compensatory time off at Harris County's convenience.\textsuperscript{28} Harris County and the employees had executed an agreement to accept compensatory time as overtime in lieu of cash compensation.\textsuperscript{29}

Under the Fair Labor Standards Act of 1938 ("FLSA"),\textsuperscript{30} government employers may compensate employees for overtime work with

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\textsuperscript{28} Moreau v. Harris County, 945 F. Supp. 1067, 1068 (S.D. Tex. 1996), rev'd, 158 F.3d 241 (5th Cir. 1998), cert. granted, Christensen v. Harris County, 528 U.S. 926 (1999), and aff'd 529 U.S. 576 (2000). The Harris County sheriff's department employees composed a certified class. Moreau v. Harris County, 158 F.3d 241, 243 (5th Cir. 1998), cert. granted, Christensen v. Harris County, 528 U.S. 926 (1999), and aff'd, 529 U.S. 576 (2000). Compensatory time off is time off that employees may receive instead of overtime compensation; the time off is received at a rate not below one and one-half hours for every hour of employment which requires overtime compensation. 29 U.S.C. § 207 (1994).

\textsuperscript{29} Christensen, 529 U.S. at 580.


(o) Compensatory time

(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only —

(A) pursuant to —

(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and

(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3). In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

(3) (A) If the work of an employee for which compensatory time may be provided included work in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 480 hours of compensatory time for hours worked after April 15, 1986. If such work was any other work, the employee engaged in such work may accrue not more than 240 hours of compensatory time for hours worked after April 15, 1986. Any such employee who, after April 15, 1986, has accrued 480 or 240 hours, as the case may be, of compensatory time off shall, for additional overtime hours of work, be paid overtime compensation.
compensatory time if there is an agreement between the employee and the government which entitles the government to grant compensatory time off as a way to compensate for overtime work. When the employee requests to use the compensatory time, the government employer must honor the request within a reasonable time period, so long as it will not excessively disrupt the employer's operations. A cap is

(B) If compensation is paid to an employee for accrued compensatory time off, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives such payment.

(4) An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon termination of employment, be paid for the unused compensatory time at a rate of compensation not less than —
  (A) the average regular rate received by such employee during the last 3 years of the employee's employment, or
  (B) the final regular rate received by such employee, whichever is higher

(5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency —
  (A) who has accrued compensatory time off authorized to be provided under paragraph (1), 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.

(6) The hours an employee of a public agency performs court reporting transcript preparation duties shall not be considered as hours worked for the purposes of subsection (a) of this section if —
  (A) such employee is paid at a per-page rate which is not less than —
    (i) the maximum rate established by State law or local ordinance for the jurisdiction of such public agency,
    (ii) the maximum rate otherwise established by a judicial or administrative officer and in effect on July 1, 1995, or
    (iii) the rate freely negotiated between the employee and the party requesting the transcript, other than the judge who presided over the proceedings being transcribed, and
  (B) the hours spent performing such duties are outside of the hours such employee performs other work (including hours for which the agency requires the employee's attendance) pursuant to the employment relationship with such public agency.

For purposes of this section, the amount paid such employee in accordance with subparagraph (A) for the performance of court reporting transcript preparation duties, shall not be considered in the calculation of the regular rate at which such employee is employed.

(7) For purposes of this subsection —
  (A) the term “overtime compensation” means the compensation required by subsection (a), and
  (B) the terms “compensatory time” and “compensatory time off” mean hours during which an employee is not working, which are not counted as hours worked during the applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate.

31. Christensen, 529 U.S. at 579 (citing 29 U.S.C. § 207(o); 29 CFR § 553.23 (1999)).
32. Id. at 580.
set by the FLSA on the amount of compensatory time off hours an employee may accrue, and the government employer may substitute cash payment for accrued compensatory time.\footnote{Id. (citing 29 U.S.C. § 207(o); 29 CFR § 553.26(a) (1999)).}

Harris County became troubled that accumulated compensatory time would exceed monetary resources when employees reached the FLSA limit on accrued compensatory time or when employees left their jobs with significant amounts of accrued time.\footnote{Christensen, 529 U.S. at 580.} Therefore, Harris County wrote to the United States Department of Labor’s Wage and Hour Division to discover whether the Sheriff could schedule employees to take compensatory time.\footnote{Id. at 580-81.} In an opinion letter, the Department of Labor (“DOL”) replied with their position.\footnote{Id. at 580-81.} The DOL stated that a public employer could schedule its nonexempt employees to take their accrued compensatory time if the agreement explicitly provided such a clause and if the employees voluntarily and knowingly agreed to the provision.\footnote{Brief for Petitioners at 19, Christensen v. Harris County, 529 U.S. 576 (2000) (No. 98-1167).} The DOL determined that the statute and the regulations did not permit an employer to mandate that an employee take accrued compensatory time.\footnote{Id.} However, the accrued compensatory time may be cashed out to achieve the same objective.\footnote{Id.}

Following receipt of the letter, Harris County put into practice a policy limiting the number of accrued compensatory hours.\footnote{Id. at 580-81.} County supervisors forced the employees to use compensatory time when they accumulated a certain amount of hours.\footnote{Christensen, 529 U.S. at 581.} Once the employee’s accrued compensatory hours approached the limit, the employee’s supervisor notified the employee of the limit and asked the employee to reduce the accrued compensatory time.\footnote{Id.} If the employee refused, the supervisor ordered the employee to take the compensatory time.\footnote{Id.}

After Harris County supervisors forced employees to take their accrued time, the employees filed an action against Harris County in the United States District Court for the Southern District of Texas.\footnote{Moreau, 945 F. Supp. at 1068.} The employees alleged violations of the FLSA.\footnote{Id. at 1067-68.} The parties stipulated to a set of facts.\footnote{Christensen, 529 U.S. at 581.} The stipulated facts led the district court to
order a motion for summary judgment. In the district court’s opinion on summary judgment, the district court concluded that the Harris County policy violated the FLSA. The district court stated that governments were able to substitute compensatory time for overtime pay if the time credits were near equivalents and the compensatory time was consumable on the employee’s own terms. The district court noted that employees have a statutory right to use compensatory time when they request it unless the use of that time would disrupt operations. The court noted that the employees in this case did not attempt to exercise this right. The district court determined that by limiting the accrual of compensatory time, the County policy forced employees to take time off instead of receiving cash compensation for overtime.

The district court noted that if scheduling compensatory time became inconvenient, the government was always free to either compensate employees with cash or hire additional employees. The district court stated that compensatory time was much less open to management adjustment because the compensatory time was in exchange for mandatory cash compensation. The district court concluded that the government must avoid management problems with compensatory time without infringing on statutorily-protected employee rights.

Harris County appealed the district court’s grant of summary judgment to the employees to the United States Court of Appeals for the Fifth Circuit, arguing that Congress intended for government employers to control accrued compensatory time. Harris County reasoned that Congress must have planned for government control because Congress considered circumstances in which governments may elect to reduce accumulated compensatory time by making cash payments. The employees contended that Congress granted them the right to decide when to use accrued compensatory time because the undue disruption restriction was the only limitation on the use of compensatory time. Judge Patrick E. Higginbotham, writing for the majority, determined that, on its face, the FLSA was facially inappli-
cable to the dispute and did not cover the Harris County policy.59 Accordingly, the Fifth Circuit found that it was impossible to figure out what Congress would have legislated if it had confronted the issue.60

Next, the Fifth Circuit looked to case precedent before fashioning their solution to the conflict.61 The Fifth Circuit reasoned that an employee's ability to choose when to use their compensatory time did not relate to an employer's ability to require employees to reduce compensatory time levels.62 The court continued by noting that the court's obligation was to create a default rule, which the parties remained free to alter in future agreement negotiations.63 The court applied the general rule, that in the absence of an agreement, the employer can determine workplace rules.64 Therefore, the Fifth Circuit reversed the district court's decision and granted summary judgment for Harris County.65

Judge James L. Dennis concurred in part, agreeing that the case must be reversed, but dissented in part, contending that neither party demonstrated entitlement to summary judgment.66 Judge Dennis stated that the majority improperly applied a common law default rule instead of following the DOL opinion letter interpreting the FLSA.67 Judge Dennis reasoned that because the FLSA was silent with respect to the current issue, the questions for the court were whether the agency had addressed the issue and, if so, whether their answer was premised on a permissible statutory construction.68 Judge Dennis declared that if an administrative interpretation based on an allowable construction of the statute existed, the court could not simply impose the court's own construction upon the statute.69

Judge Dennis explained that the amount of deference the court owed to an agency's administrative regulations interpreting and implementing a federal statute depended upon whether the agency regulation was "interpretive" or "legislative."70 Judge Dennis noted that if

59. Id. at 243, 253.
60. Id. at 246.
61. Id.
62. Id.
63. Id. at 247.
64. Id.
65. Id.
66. Id. (Dennis, J., concurring in part and dissenting in part).
67. Id. (Dennis, J., concurring in part and dissenting in part).
68. Id. at 248 (Dennis, J., concurring in part and dissenting in part) (citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984)).
69. Id. (Dennis, J., concurring in part and dissenting in part) (citing Chevron, 467 U.S. at 843; Fort Hood Barbers Ass'n v. Herman, 137 F.3d 302, 307-08 (5th Cir. 1998)).
70. Id. (Dennis, J., concurring in part and dissenting in part) (citing Fort Hood, 137 F.3d at 307; Snap-Drape, Inc. v. Comm'r, 98 F.3d 194, 197 (5th Cir. 1996); Dresser Indus. v. Comm'r, 911 F.2d 1128, 1137-38 (5th Cir. 1990)).
the agency’s regulations were legislative, meaning they were issued according to a specific grant of authority, the regulation was controlling authority unless it was capricious, arbitrary, or clearly contrary to the statute.\textsuperscript{71} Judge Dennis defined an interpretive regulation as one executed according to a broad grant of authority to administer regulations.\textsuperscript{72} Further, Judge Dennis asserted that interpretive regulations were granted less deference, but they were valid as long as they were reasonable and consistent with the plain meaning of the statute, its source, and its purpose.\textsuperscript{73}

Judge Dennis reasoned that the DOL had promulgated regulations, pursuant to express statutory authorization, that interpreted the FLSA and clearly addressed the issue in the case at bar.\textsuperscript{74} Judge Dennis asserted that the DOL approach required an agreement between the employee and employer before the employer could require an employee to involuntarily use accumulated compensatory time.\textsuperscript{75} Judge Dennis determined that the DOL’s approach to the FLSA was clearly reasonable and consistent with the statutory language, as well as the statute’s origin and purpose.\textsuperscript{76} Therefore, Judge Dennis opined that the case should have been remanded for further proceedings.\textsuperscript{77}

The employees filed a petition for a writ of certiorari to the United States Supreme Court, which granted certiorari to consider whether a public agency controlled by the FLSA’s compensatory time provisions may, absent an agreement, mandate that its employees use compensatory time.\textsuperscript{78} The Supreme Court affirmed the decision of the Fifth Circuit.\textsuperscript{79} The Court found that there was nothing in the FLSA or the agency’s implementing regulations that forbade an employer from forcing the use of accrued compensatory time.\textsuperscript{80}

Justice Clarence Thomas, writing for the majority, began the Court’s analysis by applying the canon \textit{expressio unius est exclusio alterius}\textsuperscript{81} to the FLSA.\textsuperscript{82} First, the Court determined that the canon

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\item \textsuperscript{71} Id. (Dennis, J., concurring in part and dissenting in part) (quoting \textit{Snap-Drape}, 98 F.3d at 197-98).
\item \textsuperscript{72} Id. (Dennis, J., concurring in part and dissenting in part) (quoting \textit{Fort Hood}, 137 F.3d at 307 (citations omitted)).
\item \textsuperscript{73} Id. (Dennis, J., concurring in part and dissenting in part) (quoting \textit{Fort Hood}, 137 F.3d at 307).
\item \textsuperscript{74} Id. (Dennis, J., concurring in part and dissenting in part) (citations omitted).
\item \textsuperscript{75} Id. at 249 (Dennis, J., concurring in part and dissenting in part).
\item \textsuperscript{76} Id. (Dennis, J., concurring in part and dissenting in part).
\item \textsuperscript{77} Id. at 250 (Dennis, J., concurring in part and dissenting in part).
\item \textsuperscript{78} Christensen v. Harris County, 528 U.S. 926 (1999), aff’d, 529 U.S. 576 (2000).
\item \textsuperscript{79} \textit{Christensen}, 529 U.S. at 576, 578.
\item \textsuperscript{80} Id. at 578.
\item \textsuperscript{81} \textit{Expressio unius est exclusio alterius} means the expression of one thing implies the exclusion of another thing. \textit{Ballentine’s Law Dictionary} 442 (3d ed. 1969).
\item \textsuperscript{82} \textit{Christensen}, 529 U.S. at 582-83.
\end{itemize}
did not reconcile the case in Harris County's favor because the Court read the pertinent section of the FLSA as a nominal guarantee that an employee can utilize compensatory time when the employee requests to take the time off. Therefore, the Court found the correct "expressio unius" inference to be that, at least without an agreement, an employer could not refuse an employee's request to take compensatory time. The Court reasoned that the canon's application does not forbid an employer from compelling an employee to take compensatory time by scheduling work time off with full pay. The Court decided that the employees did not demonstrate that the Harris County policy violated the FLSA. The Court stated that the statute was silent on the matter and Harris County's course of action was entirely compatible with the FLSA.

Next, the Court addressed whether the deference announced in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* should apply to the DOL opinion letter, which stated that employers must have an agreement with employees in order to compel employees to use compensatory time. The Supreme Court declared that *Chevron*-style deference was not warranted. The Court stated that this agency interpretation was within an opinion letter, not an interpretation arrived at after notice-and-comment rulemaking or a formal adjudication. The Court stated that interpretations like those in opinion letters — such as interpretations contained in agency manuals, policy statements, and enforcement guidelines, all interpretations lacking the force of law — do not merit *Chevron*-style deference.

83. *Id.* at 583-84.
84. *Id.* at 583.
85. *Id.*
86. *Id.* at 585.
87. *Id.* The Court noted that the FLSA allowed employers to decrease employee's work hours and to cash out accrued compensatory time. *Id.* The Court determined that "it would make little sense to interpret § 207(o)(5) to make the combination of the two steps unlawful when each independently is lawful." *Id.* at 586.
89. *Christensen*, 529 U.S. at 586. The Court noted that "in *Chevron*, we held that a court must give effect to an agency's regulation containing a reasonable interpretation of an ambiguous statute." *Id.* at 586-87 (citing *Chevron*, 467 U.S. at 842-44).
90. *Christensen*, 529 U.S. at 587.
91. *Id.* Section 553 of the APA creates three different procedures for issuing a rule. *Kenneth C. Davis & Richard J. Pierce, Jr., Administrative Law Treatise*, § 7.1, 287 (3d ed. 1994)). First, interpretive rules can be issued without accordance to any statutory procedure other than issuance of the rule and publication in the Federal Registrar. *Davis & Pierce, Jr., supra* note 91, at 287. Second, notice-and-comment rulemaking is for issuing legislative rules and are issued by following steps in section 553 of the APA. *Id.* Third, formal adjudication or rulemaking, like the informal notice-and-comment rulemaking, starts with public notice of a proposed rule, includes the oral evidentiary hearings, and ends with issuance of a final rule. *Id.*
92. *Christensen*, 529 U.S. at 578.
Instead, the Court determined that the DOL opinion letter was entitled to *Skidmore v. Swift & Co.* deference. The Court noted that interpretations entitled to *Skidmore* deference are only entitled to respect if they are persuasive. The Court found the agency's interpretation in the DOL opinion letter unpersuasive. The Court declared that the statute did not prohibit an employer from compelling its employees to use their compensatory time.

The Court also stated that the DOL's interpretation was not entitled to the deference the Court previously provided to an agency's interpretations of its own regulations. The Court stated that the agency regulation itself was not ambiguous but, rather, it was clearly permissive. Accordingly, the Court declared that to defer to the DOL's opinion would be to allow the agency, under the appearance of interpreting a regulation, to form another regulation. Consequently, the Court determined that the DOL opinion letter's view was exactly backwards, and since the FLSA does not prohibit Harris County's policy, the employees could not show a violation of the FLSA.

Justice David H. Souter concurred with the Supreme Court's opinion. Justice Souter joined the opinion of the Court, but noted one additional assumption. Justice Souter's assumption was that the DOL was still allowed to issue FLSA regulations limiting compelled use of compensatory time.

Justice Antonin Scalia concurred with part of the opinion and with the judgment, but questioned the Court's reliance on *Skidmore* instead of *Chevron*. Justice Scalia asserted that the agency's interpretation was not an unreasonable interpretation of the statute. Justice Scalia maintained that applying *Skidmore* deference to reliable views was an anachronism, lingering from a time in which the Court declined to grant agency interpretations authoritative effect. Moreover, Justice Scalia noted that the Court had invoked *Chevron*
deference and applied its deference to interpretations not contained within agency regulations, including those interpretations contained in letters.\textsuperscript{108}

Justice John Paul Stevens, joined by Justice Ruth Bader Ginsburg and Justice Stephen G. Breyer, dissented, asserting that the agency's view merited respect.\textsuperscript{109} Justice Stevens noted that the statutory exception allowing the use of compensatory time instead of cash compensation was not applicable without an agreement between the public employer and the employee.\textsuperscript{110} Justice Stevens asserted that the Court mischaracterized the employee's main argument as focused in the canon \textit{expressio unius est exclusio alterius}.\textsuperscript{111} Justice Stevens reasoned that the majority missed the main thrust of the employees' position and determined that, under the canon, the correct "thing to be done" was for the parties to form an agreement.\textsuperscript{112} Furthermore, Justice Steven's dissent noted that the DOL shared his understanding and deserved respect as a thoroughly considered and constant position.\textsuperscript{113}

Justice Stephen G. Breyer, joined by Justice Ruth Bader Ginsburg, filed a separate dissent, stating that \textit{Skidmore} deference was the Court's way of granting particular attention to an expert agency's views where they had specialized experience, regardless of whether the agency's views did not constitute an action of delegated statutory authority.\textsuperscript{114} Justice Breyer noted that \textit{Chevron} deference did not change \textit{Skidmore} deference but, instead, focused on the fact that Congress delegated authority to the agency's determinations.\textsuperscript{115} Justice Breyer asserted that "the [DOL's] position in this matter is eminently reasonable, hence persuasive, whether one views that decision through \textit{Chevron}'s lens, through \textit{Skidmore}'s, or through both."\textsuperscript{116}

\textsuperscript{108} \textit{Id.} at 590 (Scalia, J., concurring).
\textsuperscript{109} \textit{Id.} at 592 (Stevens, J., dissenting).
\textsuperscript{110} \textit{Id.} (Stevens, J., dissenting).
\textsuperscript{111} \textit{Id.} at 593-94 (Stevens, J., dissenting).
\textsuperscript{112} \textit{Id.} at 594 (Stevens, J., dissenting).
\textsuperscript{113} \textit{Id.} at 594-95 (Stevens, J., dissenting).
\textsuperscript{114} \textit{Id.} at 596-97 (Breyer, J., dissenting).
\textsuperscript{115} \textit{Id.} (Breyer, J., dissenting). Justice Breyer stated that "to the extent there may be circumstances in which \textit{Chevron}-type deference is inapplicable — e.g., where one has doubt that Congress actually intended to delegate interpretive authority to the agency (an 'ambiguity' that \textit{Chevron} does not presumptively leave to agency resolution) — I believe that \textit{Skidmore} nonetheless retains legal vitality." \textit{Id.}
\textsuperscript{116} \textit{Christensen}, 529 U.S. at 597 (Breyer, J., dissenting).
BACKGROUND

A. THE ORIGINS OF ADMINISTRATIVE AGENCY'S NONLEGISLATIVE INTERPRETATIONS

Congress establishes administrative agencies to carry out many of the statutes Congress enacts.\textsuperscript{117} When Congress creates an agency it grants the agency various powers, including the power to make rules.\textsuperscript{118} Agency rules are either nonlegislative rules or legislative rules.\textsuperscript{119} Legislative rules have the force of law as though they were statutes, while nonlegislative rules do not possess the force of law.\textsuperscript{120} Nonlegislative rules are often referred to as interpretive rules, policy statements, or guidelines.\textsuperscript{121}

Congress framed the Administrative Procedures Act ("APA")\textsuperscript{122} against the background of a rapidly expanding administrative process.\textsuperscript{123} Enacted in 1946, the APA prescribes procedures that agencies must adhere to when exercising their powers.\textsuperscript{124} For agencies to enact legislative rules, they must exercise statutory lawmaking authority and follow specific procedures under the APA that incorporate public input.\textsuperscript{125} As such, the APA burdens the agencies because the APA requires them to contemplate public commentary.\textsuperscript{126} However, the APA provides an exception when agencies create nonlegislative rules.\textsuperscript{127}

\begin{footnotesize}
\item 118. Id. at 153.
\item 119. Id. Accordingly, "[t]he term 'legislative rules' does not appear in the [Administrative Procedures Act], but is commonly used among courts and scholars." Melanie E. Walker, Comment, Congressional Intent and Deference to Agency Interpretations of Regulations, 66 U. Chi. L. Rev. 1341, 1370 n.5 (1999).
\item 120. Hunnicutt, 41 B.C. L. Rev. at 153. Legislative rules are known as regulations.
\item 121. Hunnicutt, 41 B.C. L. Rev. at 153.
\item 122. 5 U.S.C. § 500-96 (1994).
\item 124. Hunnicutt, 41 B.C. L. Rev. at 154.
\item 125. Hunnicutt, 41 B.C. L. Rev. at 154 (noting that agencies also follow APA prescribed procedures when enacting legislative rules); Walker, 66 U. Chi. L. Rev. at 1370 n.5 (noting that agencies enact legislative rules by exercising statutory lawmaking authority). Legislative rules, except for those that are statutorily exempt, are issued by following three steps: (1) release of public notice of the planned rule, (2) consideration and receipt of comments from all concerned persons, and (3) issuance of the rule. Kenneth C. Davis & Richard J. Pierce, Jr., Administrative Law Treatise, § 7.1, 287 (3d ed. 1994)).
\item 126. Hunnicutt, 41 B.C. L. Rev. at 157.
\item 127. Id.
\end{footnotesize}
To create nonlegislative rules, an agency need not exercise delegated lawmaking authority, nor is the agency required to follow APA procedures. However, these nonlegislative rules do not possess the force of law. Nonlegislative rules are designed to explain an agency’s understanding of a statute, not create substantive law. Courts treat nonlegislative rules as influential agency thought that could factor into a case’s outcome.

1. APA Section 706 — the Scope of Review for Agencies

According to APA section 706, a reviewing court’s analysis of agency action is controlled by the APA. Section 706 states that the reviewing court must decide the relevant issues of law, interpret statutory and constitutional provisions, and decide the meaning and relevance of an agency action. Section 706 requires the reviewing court to force an agency to act when action is unlawfully withheld and find unlawful agency findings, actions, and conclusions if they are deter-
mined to meet one of several elements. According to section 706, these findings include action that is in disagreement with the law, contrary to the constitution, in excess of authority, against procedure, unsupported by substantial evidence, and unwarranted by facts. Section 706 requires the reviewing court to review the entire record or the parts of the record cited.

2. The Supreme Court Recognized the Court's Failure to Apply the APA

In Darby v. Cisneros, the United States Supreme Court recognized that the Court previously ignored APA section 704. In Darby, R. Gordon Darby, a real estate developer, contested the Department of Housing and Urban Development's ("HUD") issuance of a limited denial of participation ("LDP") that prohibited Darby from participating in HUD programs and HUD's proposal to debar Darby from further participation. Darby financed housing projects using HUD mortgage programs that evaded HUD minimum investment limitations and mortgage limits. Darby defaulted and HUD became responsible for insurance claims totaling over six million six hundred thousand dollars. After an investigation, the HUD Secretary determined that Darby's financing violated regulations and, therefore, issued the LDP. Darby disputed the LDP and the proposed debarment before an Administrative Law Judge ("ALJ"), but the ALJ upheld the LDP. Darby did not seek further administrative review, but brought an action in the United States District Court for the District of South Carolina arguing that the HUD sanctions violated regulations and the law.

The district court granted summary judgment, concluding that the debarment was in disagreement with the law because it was too

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134. Id.
135. 5 U.S.C. § 706(2).
139. Darby, 509 U.S. at 139-41.
141. Darby, 509 U.S. at 140.
142. Darby, 957 F.2d at 146.
143. Id.
144. Darby, 509 U.S. at 142.
punitive.\textsuperscript{145} The district court denied HUD’s motion to dismiss for Darby’s failure to exhaust his administrative remedies.\textsuperscript{146} The district court determined that the pertinent regulation did not explicitly contain an exhaustion requirement.\textsuperscript{147} Noting that exhaustion was usually required, the district court asserted that exhaustion rule exceptions applied.\textsuperscript{148} Specifically, the district court held that exhausting the remedies would have been futile, would have resulted in an insufficient remedy, and would have protected the ALJ’s order from review.\textsuperscript{149}

HUD appealed the decision of the district court to the United States Court of Appeals for the Fourth Circuit, arguing the existence of a statutory exhaustion requirement.\textsuperscript{150} The Fourth Circuit reversed, holding that this provision did not expressly require exhaustion of administrative procedures before filing a suit.\textsuperscript{151} The Fourth Circuit reasoned that in the absence of a statutory exhaustion requirement, the judicial doctrine of exhaustion applied.\textsuperscript{152} However, the Fourth Circuit determined that none of the exceptions to the doctrine applied because there was no evidence to determine that agency review would have been futile, and it was merely speculative that the agency would have abused its discretion.\textsuperscript{153} Darby filed a petition for a writ of certiorari with the United States Supreme Court, which granted certiorari to consider whether the federal courts have the power to force a plaintiff to exhaust accessible administrative remedies prior to judicial review under section 704 of the APA, when exhaustion is not required by statute or regulation.\textsuperscript{154} The Supreme Court reversed the decision of the Fourth Circuit, determining that courts were not allowed to inflict an exhaustion requirement where the APA applies.\textsuperscript{155} Justice Harry A. Blackmun, writing for the majority, reasoned that the judicially fashioned doctrine of exhaustion of administrative remedies conflicted with the statutory requirements of section 704 because section 704 limited the judicial doctrine by its

\textsuperscript{145} Id.
\textsuperscript{146} Darby, 957 F.2d at 146.
\textsuperscript{147} Id.
\textsuperscript{148} Id. at 146-47.
\textsuperscript{149} Id. at 147.
\textsuperscript{150} Id. at 145, 147. HUD cited 24 C.F.R. § 24.314(e) (1991) as the basis for its assertion. Id. at 147.
\textsuperscript{151} Darby, 957 F.2d at 148.
\textsuperscript{152} Id.
\textsuperscript{153} Id. at 147-48.
\textsuperscript{154} Id. at 138-39, 142.
\textsuperscript{155} Id. at 154.
The Supreme Court reasoned that the language of section 704 explicitly required the plaintiff to exhaust all intra-agency appeals required by statute or regulation. The Court asserted that for the courts to require exhaustion would be inconsistent with section 704's plain meaning. The Court noted that, surprisingly, the Court took over forty-five years to address the issue.

B. **The Court's Standard of Deference Granted to Agency Interpretations**

The United States Supreme Court opinions in *Skidmore v. Swift & Co.*, and *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, announce two different standards of deference the courts grant to agency interpretations. *Skidmore* deference is often referred to as “weak deference” in contrast to *Chevron* deference, which is often referred to as “strong deference.” *Skidmore* deference only affords respect to agency nonlegislative rules to the degree that the nonlegislative rule has persuasive power in light of the agency's expertise. Correspondingly, in *Chevron*, the Court held that courts must grant effect to agency regulations that reasonably interpret ambiguous statutes.

In *Skidmore*, the United States Supreme Court determined that an agency interpretation should guide the Court to the extent that the interpretation, in light of the agency's experience and informed judgment, has the power to persuade. In *Skidmore*, a group of employees at the Swift and Company packing plant (“Swift employees”) brought an action to recover overtime pay under the Fair Labor Standards Act (“FLSA”) in the United States District Court of the Northern District of Texas. The Swift employees sought overtime pay for the time when they stayed in the fire hall of the plant to an-
swer alarms and spent most of their time sleeping or in amusement.169

The district court found for Swift and Company packing plant.170 The district court concluded that the time the Swift employees spent in the fire hall on call did not compromise hours worked for which overtime pay was necessary under the FLSA.171 The district court reasoned that just because an employee’s home was at the place of business, it did not follow that the employee was working a twenty-four-hour day.172 Moreover, the district court determined that under these circumstances, since the employee was not working at all times, a reasonable compensation of hours worked was acceptable.173

The Swift employees appealed the decision of the district court to the United States Court of Appeals for the Fifth Circuit, arguing that they had a right to overtime compensation for all of the time they were available in the fire hall.174 The Fifth Circuit affirmed, reasoning that just because an employee was residing at work, did not mean the employee was working when he was at his place of work, even if his employer was engaged in commerce at that time.175 The Fifth Circuit declared that employees were not entitled to overtime compensation when they were sleeping.176 The Fifth Circuit asserted that the pertinent agency interpretive bulletin expressed the correct view that sleeping hours should be segregated from working hours.177 The Fifth Circuit determined that the Swift employees did not separate sleeping hours from non-sleeping hours thus, even if these non-sleeping hours were entitled to compensation, the employees did not meet their burden of separating the hours.178

The Supreme Court reversed and remanded the decision of the Fifth Circuit, holding that no rule of law according to statute or Court decisions excludes waiting time from also constituting working time.179 Justice Robert H. Jackson delivered the opinion of the Court, noting that the administrator of the Wage and Hour Division accumulated experience that allowed him to provide practical guides to the

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169. Skidmore, 323 U.S. at 135-36.
171. Skidmore, 323 U.S. at 136.
173. Id.
175. Skidmore, 136 F.2d at 113.
176. Id.
177. Id.
178. Id.
179. Skidmore, 323 U.S. at 136, 140.
workplace as to how the Division would apply the law. The Court found that the administrator issued an Interpretive Bulletin that suggested that the inactive duty cases required flexible solutions instead of all or nothing rules for overtime.

The Court then determined what type of deference courts should grant to the administrator's conclusions. The Court recognized that the administrator's conclusions were not binding. However, the Court noted that the administrator's policies were made based upon more expertise and information and investigation than a judge is likely to receive in a case. The Court determined that though the administrator's rulings, interpretations, and opinions were not controlling authority, they constituted guidance. The Court decided that the exact weight placed upon the interpretations would "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." Noting the new judicial guidance the administrator's conclusions provided to the courts, the Court found the district court's reasoning erroneous and reversed the case.

In Chevron the United States Supreme Court held that the term "source," as defined by the Environmental Protection Agency ("EPA") was an allowable statutory construction. In Chevron, the Court reviewed the EPA's regulation interpreting the Clean Air Act Amendments of 1977 ("CAA Amendments") that enacted requirements for States that had not met prior national air quality standards. Under the CAA Amendments, the EPA implemented a program that regulated stationary sources of air pollution through the use of permits. The dispute focused upon whether the EPA's interpretation of the term "stationary source" which allowed pollution-emitting devices to be grouped together within a single "bubble," was a reasonable construction of the CAA Amendments.

180. Id. at 135, 137-38.
181. Id. at 138.
182. Id. at 139. The Court noted that there were not any statutory provisions requiring deference. Id.
183. Skidmore, 323 U.S. at 139.
184. Id.
185. Id. at 140.
186. Id.
187. Id.
190. Chevron, 467 U.S. at 839-40, 842.
191. Id. at 840.
192. Id.
National Resources Defense Council, Inc., Citizens for a Better Environment, Inc., and North Western Ohio Lung Association, Inc. appealed for review of the EPA regulations to the United States Court of Appeals of the District Court of Columbia Circuit. The District of Columbia Circuit held that the “bubble” notion was inapplicable according to prior precedent and set aside the bubble concept. The District of Columbia Circuit noted that the CAA Amendments did not define the term “stationary source” and the issue was not addressed in the legislative history. The court adopted a static definition of “stationary source.” Referring to case precedent, the court determined that the bubble concept was inappropriate in air quality improvement programs. Chevron, U.S.A. Inc., an intervenor, filed a petition for writ of certiorari with the United States Supreme Court, which granted certiorari to consider whether the District of Columbia Circuit’s adoption of a static definition of “stationary source” was erroneous.

The Supreme Court reversed the decision of the District of Columbia Circuit. The Court held that the EPA regulation, that contained the definition of “stationary source,” was based upon a permissible construction of the term in the CAA Amendments. Justice John Paul Stevens delivered the opinion for the Court, reasoning that, if Congress has not addressed the issue, the Court should determine if the agency answered the issue based on an allowable construction of the statute. The Court asserted that great weight should be granted to an agency’s statutory construction.

Before addressing the EPA’s interpretation of the CAA Amendments, the Court explained the two questions a court must ask in order to determine the amount of deference the court must grant an agency. According to the Court, the first step when reviewing agency interpretation was to ask whether Congress has precisely spoken to the exact question at issue. The Court stated that if the clear intent of Congress was discernable, both the court and the

193. Id. at 840-41 & n.3.
194. Id. at 841-42.
195. Id. at 841.
196. Id. at 842.
197. Id. at 841.
198. Id. at 842.
199. Id. at 866.
200. Id. at 840-41, 866.
201. Id. at 839, 842-43.
202. Id. at 844.
203. Id. at 842-45. Generally, permissible agency constructions of statutes are entitled to deference or great weight by the courts. 2 Am. Jur. 2d Administrative Law B5 (1994).
204. Chevron, 467 U.S. at 842.
agency must give force to the unambiguously articulated intent of Congress.\footnote{205} However, the Court stated that if a statute was ambiguous or silent with regard to the pertinent issue, the court's inquiry was whether the agency's interpretation was based on an acceptable construction of the statute.\footnote{206}

Second, the Court declared that if the reviewing court determined that the language of the statute is ambiguous or silent, the court must defer to the agency's interpretation of the statute.\footnote{207} The Court noted that this controlling deference was granted unless the statutory interpretation was "arbitrary, capricious, or manifestly contrary to the statute."\footnote{208} The Court stated that a reviewing court cannot inflict its own interpretation on the statute.\footnote{209} In evaluating deference, the Court discussed the role agency expertise plays in statutory construction.\footnote{210} The Court noted that judges do not possess expertise in the field, and they are not part of the political branches of Government.\footnote{211} The Court declared that the Constitution did not vest the responsibility of assessing policy choices to the judicial branch but, rather, the Constitution vested these responsibilities with the political branches.\footnote{212} The Court recognized that the parsing of the generalized terms in the CAA Amendments did not reveal a Congressional intent.\footnote{213} The Court stated that the presence of overlapping explanatory terms in the statute might be evidence that Congress intended to regulate.\footnote{214} Thus, the Court held that the EPA's characterization of

\footnote{205. \textit{Id.} at 842-43.}
\footnote{206. \textit{Id.} at 843.}
\footnote{207. \textit{Id.} at 843-44. The Court stated, "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." \textit{Id.} at 843 (citations omitted).}
\footnote{208. \textit{Chevron}, 467 U.S. at 844.}
\footnote{209. \textit{Id.} at 843-44. The Court stated: We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations "has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subject to agency regulations." \textit{Id.} at 844-45 (quoting United States v. Shimer, 367 U.S. 374, 382 (1961)).}
\footnote{210. \textit{Chevron}, 467 U.S. at 865. The Court stated that "[i]n these cases the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference . . . ." \textit{Id.}}
\footnote{211. \textit{Chevron}, 467 U.S. at 865.}
\footnote{212. \textit{Id.} at 866 (quoting TVA v. Hill, 437 U.S. 153, 195 (1978)).}
\footnote{213. \textit{Id.} at 860-862.}
\footnote{214. \textit{Id.} at 862.}
the term “source” was a permissible interpretation of the CAA Amendments.215

C. CHEVRON DEFERENCE TO FORMAL AGENCY INTERPRETATIONS

In United States v. Haggar Apparel Co.,216 the Supreme Court held that Chevron deference applied to an agency regulation.217 In Haggar, Haggar Apparel Company (“Haggar”), a clothing manufacturer, brought suit in the International Court of Trade for a refund from duties imposed on trousers Haggar shipped to the United States from an assembly plant in Mexico.218 Garments that were only assembled in Mexico were eligible for the statutory duty exception Haggar claimed.219 However, the trousers were also permapressed at the Mexican plant, an additional step to the trousers’ assembly.220 The trade court declined to treat the regulation as controlling and ordered Customs to grant the duty allowance.221

The United States appealed the decision of the International Court of Trade to the United States Court of Appeals for the Federal Circuit, arguing that, although secondary to assembly, the curing process was still outside the tariff exception because the process caused a barred advancement in value, and that the Customs’ regulation was entitled to Chevron deference.222 The Federal Circuit affirmed the trade court’s opinion, determining that some minor operations are so intrinsic to the assembly process that they merge with it.223 The Federal Circuit reasoned that the advancement in value was not prohibited where the operation at issue was secondary to the assembly process.224 The Federal Circuit also noted that the argument for Chevron deference was without merit.225 The United States filed a petition for a writ of certiorari with the United States Supreme Court, which granted certiorari to consider whether the regulations, were entitled to judicial deference.226

The Supreme Court vacated the decision of the Federal Circuit, concluding that the regulations fell under the Chevron deference

215. Id. at 839-40, 866.
219. Id. at 383-84.
220. Id. at 384.
221. Id. at 874-75.
223. Haggar, 127 F.3d at 1461.
224. Id. at 1462.
225. Id.
framework. Justice Anthony M. Kennedy, writing for the majority, reasoned that Customs had the authority to issue regulations pursuant to the Secretary of Treasury's delegation and approval, and that Congress also authorized, at least in part, customs regulations. The Court determined that the statutes authorizing customs categorization regulations were consistent with the standard rule that administrative agency regulations warrant judicial deference. The Court noted that the point of the regulations was to ensure that statutes were applied consistently and properly. For purpose of applying the Chevron analysis, the Court declared the tariff schedule ambiguous. The Court asserted that the Court of International Trade must grant regulations Chevron deference when appropriate. The Court remanded the case for determination of whether the customs regulation met the Chevron deference reasonable interpretation requirement.

Justice John Paul Stevens, joined by Justice Ruth Bader Ginsburg, concurred in part and dissented in part, reasoning that the regulation was clearly valid. Justice Stevens stated that agencies must make decisions when Congress delegated to them the administration of legislation that includes ambiguous terms. Justice Stevens reasoned that just because there was support for the opposite side did not mean that the regulation was compromised, nor did it mean that the application of the regulations was compromised. Justice Stevens maintained that the regulation was a reasonable interpretation of the tariff schedule. Therefore, Justice Stevens determined that the proper disposition of the case was to simply reverse the District of Columbia Circuit.

D. VARYING LANGUAGE USED IN APPLYING DEFERENCE

After Chevron, the Supreme Court’s deference language and application of deference varied. For example, in Reno v. Koray, the United States Supreme Court, citing Chevron, determined that an in-

227. Id. at 395.
228. Id. at 387-88.
229. Id. at 390.
230. Id. at 392.
231. Id. at 386, 393.
232. Id. at 394.
233. Id. at 394-95.
234. Id. at 395-96 (Stevens, J., concurring in part and dissenting in part).
235. Id. at 396-97 (Stevens, J., concurring in part and dissenting in part).
236. Id. at 397 (Stevens, J., concurring in part and dissenting in part).
237. Id. at 395-97 (Stevens, J., concurring in part and dissenting in part).
238. Id. at 397 (Stevens, J., concurring in part and dissenting in part).
239. See infra notes 240-71 and accompanying text.
ternal agency guideline should receive "some deference." In *Koray*, Ziya Koray was arrested for laundering money. Koray, the prisoner, sought a writ of habeas corpus in the United States District Court for the Middle District of Pennsylvania after exhausting all of his administrative remedies. A federal magistrate judge ordered that Koray be released into the Pretrial Services Agency's custody and confined to the Volunteers of America halfway house ("treatment center"). Koray sought credit toward his sentence for the one hundred fifty days he spent in the treatment center while released on bail. The Bureau of Prisons ("BOP") relied on its established policy and denied Koray's claim.

The district court denied Koray's petition for a writ of habeas corpus, finding that, within the meaning of 18 U.S.C. § 3585(b), his stay at the treatment center was not "official detention." Koray argued that the BOP misapplied the statute by not crediting him with time while he was released to the halfway house. The district court declared that restrictive release conditions could never amount to official detention.

Koray appealed the decision of the district court to the United States Court of Appeals for the Third Circuit, arguing that the district court incorrectly interpreted section 3585. The Third Circuit reversed the district court's opinion, concluding that "official detention" according to section 3585 included time spent in jail-type confinement conditions. The court noted that a strong majority of the courts of appeals had concluded that under section 3585 the BOP is not required to credit pre-sentenced defendants for their confinement outside the BOP under their bail conditions.

The Third Circuit reasoned that the "official detention" language did not require that a defendant be held within the detention of the BOP, and that a defendant could be "detained" just as "officially" under the detention of the court. Therefore, the Third Circuit remanded the case for the district court to determine if Koray was in

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241. See *infra* notes 242-71 and accompanying text.
244. *Koray*, 21 F.3d at 559.
246. *Id.* at 53.
247. *Koray*, 21 F.3d at 559 (citing 18 U.S.C. § 3585(b) (1988)).
248. *Id.* at 559.
249. *Id.*
250. *Id.* at 558-59.
252. *Id.* at 53.
253. *Id.* at 53-54.
jail-type confinement while at the treatment center.\textsuperscript{254} The government filed a petition for a writ of certiorari with the United States Supreme Court, which granted certiorari to consider whether, under the Bail Reform Act of 1984, ("BRA")\textsuperscript{255} a federal prisoner should be granted credit toward his sentence for time spent while the prisoner was "released" on bail.\textsuperscript{256}

The Supreme Court reversed the decision of the Third Circuit, holding that Koray's time spent at the treatment center while he was "released" on bail under the BRA did not constitute "official detention" pursuant to the meaning of section 3585.\textsuperscript{257} Therefore, the Court provided that Koray could not be granted credit against his prison sentence.\textsuperscript{258} Chief Justice William H. Rehnquist, writing for the majority, reasoned that, according to the BRA, Koray suffered "detention" only when the Attorney General had custody of him.\textsuperscript{259} Hence, the Court reasoned that a defendant granted bail on restrictive conditions, such as Koray, was "released."\textsuperscript{260} The Court noted that sentencing provisions of section 3585, other provisions governing federal sentencing administration, and the history and context of section 3585 confirmed the Court's interpretation.\textsuperscript{261}

Furthermore, the Court stated that the BOP, the agency in charge of administering the credit statute, had interpreted the statute's "official detention" language in a program statement.\textsuperscript{262} The internal agency guideline required credit for time spent pursuant to a "detention order" but not credit for time spent pursuant to a "release order."\textsuperscript{263} The Court stated that the Program Statement was not a published regulation subject to the APA, and the Court noted that it

\textsuperscript{254} \textit{Id.}.
\textsuperscript{255} 18 U.S.C. § 3585 (1994). The BRA states:

(a) Commencement of sentence. — A sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served. A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences — (1) as a result of the offense for which the sentence was imposed; or (2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed; that has not been credited against another sentence.

\textit{Id.}

\textsuperscript{256} \textit{Koray}, 157 U.S. at 54.
\textsuperscript{257} \textit{Id.} at 65.
\textsuperscript{258} \textit{Id.}
\textsuperscript{259} \textit{Id.} at 52, 57.
\textsuperscript{260} \textit{Id.} at 57.
\textsuperscript{261} \textit{Id.} at 58-59.
\textsuperscript{262} \textit{Id.} at 60-61.
\textsuperscript{263} \textit{Id.} at 60.
was similar to an interpretive rule. As an interpretive rule, the Court determined that the agency interpretation was "entitled to some deference," since it was an acceptable construction of the statute.

Justice Ruth Bader Ginsburg concurred, noting that Koray did not argue that he misunderstood the consequences of his bail election. Justice Ginsburg also stated that Koray did not argue that he failed to comprehend that he would not receive credit for time spent in the treatment center. Justice Ginsburg maintained that the Court did not preclude that "due process" required defendants to receive notice and comprehend their pleadings.

Justice John Paul Stevens dissented, reasoning that the plain meaning of the "official detention" language effectuated the intent of Congress, and allowed for fair treatment of defendants who would otherwise spend more time restrained than required by Congress. Justice Stevens stated that Koray's confinement to the treatment center, though styled a "release," was undoubtedly both "official" and a "detention" pursuant to the meaning of section 3585. Justice Stevens also questioned the majority because the majority claimed to depend on some type of *Chevron* deference, but it was an odd type of deference given that the majority accepted an interpretation that the BOP had rejected.

Similarly, in *EEOC v. Arabian American Oil Co.* ("Aramco"), the United States Supreme Court applied *Skidmore* deference after recognizing that the EEOC did not have rulemaking authority. The issue was whether Title VII of the Civil Rights Act of 1964

264. Id. at 61.
265. Id. (quoting *Chevron*, 467 U.S. at 843).
266. Id. at 65 (Ginsburg, J., concurring).
267. Id. at 65 (Ginsburg, J., concurring).
268. Id. (Ginsburg, J., concurring).
269. Id. at 66, 69 (Stevens, J., dissenting).
270. Id. at 66 (Stevens, J., dissenting).
271. Id. at 68 (Stevens, J., dissenting).
274. 42 U.S.C. § 2000e (1994). The definition section of Title VII states:

For the purposes of this subchapter —

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as de-
applied extraterritorially.\textsuperscript{275} In \textit{Aramco}, Ali Boureslan, a naturalized United States citizen, sued Arabian American Oil Company ("Aramco"), and an Aramco subsidiary, Aramco Service Company ("ASC"), in the United States District Court for the Southern District of Texas, seeking relief under Title VII.\textsuperscript{276} Boureslan worked in Saudi Arabia for Aramco until he was fired.\textsuperscript{277} Boureslan claimed he was harassed because of his religion, race, and national origin.\textsuperscript{278}

The district court dismissed the claim for lack of subject matter jurisdiction because Title VII did not apply to United States citizens working abroad for American employees.\textsuperscript{279} The district court noted that Boureslan was a resident of Texas, Aramco was licensed to conduct business in Texas, and ASC's principal place of business was also in Texas.\textsuperscript{280} Further, the district court concluded that Title VII's language did not support application outside the United States.\textsuperscript{281} As such, the district court dismissed the claim.\textsuperscript{282} Boureslan appealed the decision of the district court to the United States Court of Appeals for the Fifth Circuit.\textsuperscript{283} A Fifth Circuit panel affirmed the district court.\textsuperscript{284} The Fifth Circuit then vacated the panel's decision and reheard the case \textit{en banc}.\textsuperscript{285}

On rehearing \textit{en banc}, the Fifth Circuit again held that Title VII did not apply outside the United States because Title VII's language did not express clear congressional intent for extraterritorial application.\textsuperscript{286} The Fifth Circuit noted that a presumption against extraterritorial application of statutes developed from respect of sovereignty.\textsuperscript{287} The Fifth Circuit concluded that the alien exemption provision fell short of the clear congressional expression required to

\textsuperscript{275} \textit{Aramco}, 499 U.S. at 246-47 (citing 42 U.S.C. §§ 2000(e)-2000(e)(17) (1994)).
\textsuperscript{277} \textit{Aramco}, 499 U.S. at 247.
\textsuperscript{278} Id.
\textsuperscript{279} Id.
\textsuperscript{280} Boureslan, 653 F. Supp. at 629.
\textsuperscript{281} Id. at 630.
\textsuperscript{282} Id. at 631.
\textsuperscript{283} Boureslan v. Aramco, 892 F.2d 1271 (5th Cir. 1990).
\textsuperscript{284} \textit{Aramco}, 499 U.S. at 247.
\textsuperscript{285} Id.
\textsuperscript{286} Boureslan, 892 F.2d at 1274.
\textsuperscript{287} Id. at 1272.
negate the presumption. Further, the Fifth Circuit declared that Title VII had a domestic focus and was silent in areas where Congress normally legislated when Congress desired extraterritorial application. Boureslan and the Equal Employment Opportunity Commission ("EEOC") petitioned for certiorari, and the United States Supreme Court granted certiorari to determine the issue of statutory interpretation.

The Supreme Court affirmed the decision of the Fifth Circuit, holding that Title VII did not cover American citizens employed abroad by United States corporations. The Court was unwilling to allow Title VII extraterritorial jurisdiction without clear evidence of the intent of Congress. Chief Justice William H. Rehnquist, writing for the majority, explained that a federal statute did not apply extraterritorially unless Congress affirmatively and clearly reveals an intention that the statute apply abroad.

The Court discussed the amount of deference the Court should grant an EEOC guideline. The Court recognized that in enacting Title VII, Congress did not grant the EEOC authority to make rules or regulations. The Court noted that the EEOC's interpretation was not contemporaneous with the enactment of Title VII, nor consistent with the plain language of Title VII. The Court stated that the persuasive value of the EEOC guideline was "limited when judged by the standards set forth in Skidmore." Consequently, the Court determined that the EEOC's position was not persuasive enough to outweigh a presumption against extraterritorial application.


288. Id. at 1273.
289. Id. at 1273-74.
290. Aramco, 499 U.S. at 247.
291. Id. at 246-47.
292. Id. at 255.
294. Id. at 256-58.
295. Id. at 257 (citations omitted). The Court noted that the Court "held that 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 those factors which give it power to persuade, if lacking power to control.'" Id.
297. Id. at 258.
298. Id.
("VALIC") challenged the Comptroller's approval of NationsBank's application to sell securities in the United States District Court for the Southern District of Texas.301 The Comptroller considered the sale of securities "incidental" to "the business of banking" according to the National Bank Act ("NBA")302 and concluded that the annuities were not "insurance" according to the NBA.303

The district court upheld the Comptroller's decision as a reasonable reading of the NBA.304 The district court deferred to the Comptroller's letter after inquiring under Chevron.305 The district court stated that Congress left a gap in the NBA for the Comptroller to satisfy.306 The district court found the Comptroller's interpretation of the term "insurance" reasonable.307 Therefore, the district court concluded that the Comptroller's interpretation of the statute was not incorrect and granted the Comptroller's motion for summary judgment.308

VALIC appealed the district court's decision to the United States Court of Appeals for the Fifth Circuit, arguing that NationsBank's proposed sale of annuities violated the NBA, which bans national banks from engaging in insurance sales in cities with a population greater than five thousand.309 The Fifth Circuit reversed, holding that the Comptroller's decision permitting NationsBank to sell annuities in cities with populations greater than five thousand violated the NBA.310 The Fifth Circuit noted that Congress clearly intended to only permit banks in cities with less than five thousand people to sell insurance, so the second step of Chevron analysis was not reached.311 The Fifth Circuit also noted that Chevron deference did not allow agencies to overrule case precedents.312 The Fifth Circuit opined that Chevron deference was inapplicable because case precedent ex-

304. Id. at 254.
307. Id. at 642.
308. Id.
310. Clarke, 998 F.2d at 1303.
311. Id. at 1299.
312. Id. at 1300.
The Fifth Circuit also asserted that annuities were also prohibited because they too were insurance products. Four judges dissented from the Fifth Circuit's rehearing decision, maintaining that the panel did not accord proper deference to the Comptroller's NBA interpretations. Nationsbank filed a petition for a writ of certiorari with the United States Supreme Court, and the Court granted certiorari to determine whether national banks may operate as agents for annuity sales.

The Supreme Court reversed the decision of the Fifth Circuit, ruling that the Comptroller's decision that national banks may serve as agents in sale of annuities was a reasonable construction of the NBA. Justice Ruth Bader Ginsburg, writing for the Court, reasoned that courts should grant "great weight" to reasonable constructions of statutes when the agency was delegated statutory enforcement. The Court provided that the Comptroller was delegated such authority. The Court noted that the Comptroller invoked the banks' power to broker many financial investment instruments in the Comptroller's Letter, and this interpretation was reasonable. The Court determined that since the interpretation was reasonable the letter warranted judicial deference.

ANALYSIS

In Christensen v. Harris County, the United States Supreme Court found Harris County, Texas's policy of forcing employees to take compensatory time valid and not in violation of the Fair Labor Stan-

313. Id.
314. Id. at 1301.
316. Id.
317. Id. at 254, 256.
318. Id. at 254, 256-57 (citations omitted). The Court stated that:

[W]hen we confront an expert administrator's statutory exposition, we inquire first whether "the intent of Congress is clear" as to "the precise question at issue." If so, "that is the end of the matter." But "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." If the administrator's reading fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, we give the administrator's judgment "controlling weight."

Id. at 257 (quoting Chevron, 467 U.S. at 842-44).
321. Id. at 257, 259.
322. Id. at 264. The Court noted that "any change in the Comptroller's position might reduce, but would not eliminate, the deference we owe his reasoned determinations." Id. at 263.
In doing so, the Christensen Court addressed the applicability of the deference granted in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., to the Department of Labor's ("DOL") opinion letter. The Christensen Court determined that Chevron deference was not applicable to an opinion letter. Instead, the Christensen Court asserted that the deference granted in Skidmore v. Swift & Co., should be applied to the DOL opinion letter and agency opinions similar to opinion letters. The Christensen Court did not find the DOL opinion letter persuasive.

Justice Antonin Scalia concurred, opining that Skidmore deference was an anachronism, and Chevron deference was the correct level of deference. However, Justice Scalia noted that the DOL opinion letter was unreasonable; therefore, Justice Scalia concurred with the majority. Justice John Paul Stevens dissented, but premised his dissent on whether the DOL opinion letter merited respect. Justice Stephen G. Breyer also dissented, maintaining that though Skidmore deference was proper, the DOL opinion letter was reasonable.

In Christensen, the Supreme Court neglected to consider the Administrative Procedures Act ("APA") when deciding the type of deference to apply to the DOL opinion letter. However, the Court finally answered the long unanswered question regarding the proper standard of deference to apply to agency interpretations. Christensen is a correct decision because it provides the much needed clarity by correctly rejecting Chevron deference for agency interpretations. In addition, contrary to Justice Scalia's suggestions, Christensen correctly suggests the continued viability of Skidmore deference.

327. Christensen, 529 U.S. at 586-87.
328. Id. at 587.
330. Christensen, 529 U.S. at 587.
331. Id.
332. Id. at 589-91 (Scalia, J., concurring).
333. Id. at 591 (Scalia, J., concurring).
334. Id. at 592, 595-96 (Stevens, J., dissenting).
335. Id. at 596-97 (Breyer, J., dissenting).
337. See infra notes 341-74 and accompanying text.
338. See infra notes 375-411 and accompanying text.
339. See infra notes 412-83 and accompanying text.
340. See infra notes 484-520 and accompanying text.
A. The Supreme Court Incorrectly Neglects to Consider the Administrative Procedures Act

The Supreme Court incorrectly neglected to consider the APA in determining that the DOL opinion letter and similar interpretations lacked the force of law. The APA is legislation Congress passed to promote clarity, public participation, and uniformity in the administrative agencies. To further those goals, the APA sets procedures the agency must follow in order to exercise rule-making power. The APA describes the scope of judicial review in section 706.

A significant amount of administrative legal doctrine is reasonable mainly as a means of advancing one goal, limiting agency judgment. Congress has delegated extensive powers to agencies, often with little consequential meaningful limit on the use of that power. Distinguished scholars and judges have viewed this phenomenon with alarm and have characterized it as the most significant threat to our governmental system, the greatest unsettled problem in the legal system, and as the end of the liberal democratic state. An agency whose authority is not limited with consequential statutory standards or with legislative rules creates a serious possible threat to democracy and liberty. However, agency action that comprises an inexplicable difference from precedent must be overturned as capricious and arbitrary by section 706's meaning. Section 706 makes it harder for any agency to adjudicate based on impermissible, undisclosed motives.

343. Hunnicutt, 41 B.C. L. Rev. at 154.
345. KENNETH C. DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE, § 11.5, 203 (3d ed. 1994)).
346. DAVIS & PIERCE, JR., supra note 345, at § 11.5, 203.
347. Id.
348. Id. at 204.
349. Id.
350. Id. Section 706 states:
   To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —
   (1) compel agency action unlawfully withheld or unreasonably delayed; and
   (2) hold unlawful and set aside agency action, findings, and conclusions found to be —
   (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
   (B) contrary to constitutional right, power, privilege, or immunity;
Section 706 requires the reviewing court to decide questions of law, interpret the statutory and constitutional provisions, and determine the applicability or meaning of an agency action's terms. Beyond these directives, section 706 specifically requires the reviewing court to set aside agency actions, conclusions, and findings that the court finds to be beyond statutory jurisdiction or the agency's authority. Even though this statute requires the reviewing court to conduct certain actions in reviewing agency actions or findings, the Christensen Court failed to acknowledge this statute in determining the amount of deference to grant the DOL opinion letter.

The Supreme Court has neglected the APA in the past. In Darby v. Cisneros, the Supreme Court acknowledged that the Court had neglected the pertinent APA section for forty-five years. The Darby Court noted that Professor Davis stated that the Supreme Court almost completely ignored section 704 in judicial opinions even though the section was applicable in hundreds of cases. Further, the Darby Court stated that only a few opinions of the Courts of Appeals considered the section.

The Darby Court determined that federal courts were able to apply other prudential doctrines of judicial direction, but section 704 required the courts to limit the availability of the prudential doctrine to cases which the statute or rule undoubtedly mandated. The Darby Court asserted that the APA clearly applied after looking to the specific language of the APA. The Darby Court declared that if courts

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

352. Id.
353. See infra notes 354-75 and accompanying text.
354. See infra notes 356-64 and accompanying text.
357. Darby, 509 U.S. at 145 (citing K. Davis, Administrative Law Treatise, § 20.08, 26.12 (2d ed. 1983)). The Darby Court referred to section 704 as section 10(c) of the Statutes at Large, noting the difference in the plurality of the "reconsideration" language. Id. at 138 n.1.
358. Darby, 509 U.S. at 145.
359. Id. at 146.
360. Id. at 146-47.
were allowed to inflict additional requirements beyond those supplied by Congress, the APA section would not make sense. The Darby Court maintained that the plain meaning of the statute was sufficient enough not to require an inquiry of the statute's legislative history. The Darby Court recognized that the courts were not free to impose their own rule with respect to actions brought under the APA because Congress codified the doctrine in section 704.

Similarly, the Supreme Court ignored section 706 of the APA in Christensen, and applied their own reasoning without acknowledging the Congressionally created statute. In Christensen, the Supreme Court determined that the DOL opinion letter should be granted Skidmore deference. The Christensen Court did not address section 706 in reviewing the reasonableness of the DOL opinion letter but, rather, the Court looked only at the applicability of Chevron deference and Skidmore deference.

Section 706 states that the reviewing court is to determine the applicability of an agency action and set aside findings and conclusions when they are in excess of statutory authority. The Christensen Court's review of the DOL opinion letter is governed by section 706, and the Court failed to acknowledge the statute. Therefore, the Christensen Court neglected APA section 706.

The Christensen Court incorrectly neglected APA section 706 because the courts must acknowledge the APA when it applies. The Darby Court acknowledged the Supreme Court's neglect of APA section 704. The statutory provision the Supreme Court previously neglected, section 704, is even in the same chapter of the APA as section 706. Just as the Darby Court determined that the plain meaning of section 704 required the courts to follow the APA, the Christensen Court should have addressed APA section 706 because the plain meaning of the statute directs the reviewing court's proce-
dures. The Christensen Court incorrectly neglected APA section 706, just as the Supreme Court previously ignored APA section 704 for forty-five years.

B. THE SUPREME COURT CLARIFIES THE TYPE OF DEFERENCE GRANTED TO AGENCY INTERPRETATIONS

In Christensen, the United States Supreme Court had an opportunity to clarify the type of deference the courts are required to grant to agency opinion letters and other agency interpretive rules and statements. The Supreme Court analyzed whether or not to apply the deference defined in Chevron to an agency opinion letter. The Court decided that interpretive rules are not to be granted the strong form of deference that the Court entitled legislative rules in Chevron.

Prior to Christensen, the Supreme Court had never answered the question of whether Chevron deference should extend from legislative rules to interpretations contained in informal formats that do not otherwise have the force of law. In NationsBank of North Carolina, N.A., v. Variable Annuity Life Insurance Co., the Supreme Court abruptly applied deference and cited Chevron without distinguishing the application of deference to formal agency actions from the application of deference to informal agency actions. Moreover, in Reno v. Koray, the Supreme Court confused language from both Chevron deference and Skidmore deference.

In Christensen, the Supreme Court cleared away confusion regarding deference to nonlegislative agency interpretations because the

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373. Compare Darby, 509 U.S. 147 (determining that the plain meaning of the statutory text limits the federal courts to the statute), with Christensen, 529 U.S. at 586-88 (failing to acknowledge APA section 706 in looking at the amount of deference), and 5 U.S.C. § 706 (requiring reviewing courts to determine the applicability of agency action and set aside agency actions and findings that are beyond the agency's authority).

374. Compare Christensen, 529 U.S. at 586-88 (failing to address APA section 706 in determining that the agency opinion letter receives Skidmore deference), with Darby, 509 U.S. at 147 (stating that the Court neglected section 704 for forty-five years).

375. See infra notes 377-412 and accompanying text.

376. Christensen, 529 U.S. at 586-88.

377. Compare Chevron, 467 U.S. at 844 (stating that legislative rules are entitled to "considerable weight"), with Christensen, 529 U.S. at 587 (stating that interpretations such as opinion letters do not warrant Chevron deference).

378. See infra notes 379-406 and accompanying text. See also Robert A. Anthony, The Supreme Court and The APA: Sometimes They Just Don't Get It, 10 ADMIN. L.J. AM. U. 18-19 (1996) (stating that "the Court has never settled the question of whether Chevron's form of 'deference' (acceptance if reasonable) should be extended to interpretations set forth in informal formats that do not otherwise carry the force of law").


382. See infra notes 393-406 and accompanying text.
Court addressed unclear judicial deference jurisprudence.\textsuperscript{383} For example, in \textit{NationsBank}, the Supreme Court was inconsistent because the Court accorded deference to an agency opinion letter without examining the difference between formal and informal agency actions.\textsuperscript{384} The \textit{NationsBank} Court declared that courts give great weight to agency constructions of regulations as long as they are reasonable.\textsuperscript{385} Then, the \textit{NationsBank} Court noted that the Comptroller of the Currency was delegated the authority to enforce the banking laws.\textsuperscript{386} Finally, the \textit{NationsBank} Court, utilizing a formulation that the Court was familiar with, inquired into Congressional intent.\textsuperscript{387} The \textit{NationsBank} Court cited \textit{Chevron} prior to granting deference to the opinion letter.\textsuperscript{388}

\textit{NationsBank} is dissimilar to \textit{Christensen}, in which the \textit{Christensen} Court discussed the application of deference to an opinion letter, because the \textit{Christensen} Court recognized that an opinion letter was different than formal agency actions.\textsuperscript{389} Therefore, the \textit{Christensen} Court answered the question of whether \textit{Chevron} deference was warranted to opinion letters by thoughtful consideration rather than simply granting deference.\textsuperscript{380} In so doing, the \textit{Christensen} Court cleared up the confusion surrounding the application of \textit{Chevron} deference to opinion letters.\textsuperscript{391}

\begin{itemize}
\item \textsuperscript{383} See infra notes 385-412 and accompanying text. See also Anthony, 10 Admin. L.J. Am. U. at 19 (stating that on several occasions the Supreme Court cited \textit{Chevron} without directly addressing the issue, making it unclear whether the Court was accepting the agency interpretation or just bolstering their own conclusion); Ernest Gellhorn and Paul Verkuil, \textit{Controlling Chevron-Based Delegations}, 20 Cardozo L. Rev. 989, 993 (1999) (stating:

The United States Supreme Court cases have limited the application of \textit{Chevron} more often than they have applied it and the cases often are difficult to reconcile. But we believe that some members of the present Court may be receptive to limiting \textit{Chevron} deference to narrower questions of legislative ambiguity where it is more likely that Congress both expected agencies to fill in the gaps and courts to defer to such agency determinations.);

2 Am. Jur. 2d, Administrative Law § 85 (1994) (stating that although some courts have determined that interpretive rules receive great deference, other courts are undecided as to whether the great deference applied to legislative rules applies to nonlegislative interpretive rules).

\item \textsuperscript{384} See infra notes 386-89 and accompanying text.

\item \textsuperscript{385} \textit{NationsBank}, 513 U.S. at 256.

\item \textsuperscript{386} \textit{NationsBank}, 513 U.S. at 256-57.

\item \textsuperscript{387} Id. at 257.

\item \textsuperscript{388} Id.

\item \textsuperscript{389} Compare id. (stating that when confronted with expert administrator's statutory expositions, the Court must first inquire into Congressional intent and citing \textit{Chevron}), with \textit{Christensen}, 529 U.S. at 586-87 (discussing that though the employees argued for \textit{Chevron} deference for an opinion letter, opinion letters do not warrant \textit{Chevron} deference).

\item \textsuperscript{390} See supra notes 384-90 and accompanying text.

\item \textsuperscript{391} See supra notes 384-91 and accompanying text.
\end{itemize}
Similarly, in *Koray*, the Supreme Court discussed the deference granted to an internal agency guideline. The *Koray* Court stated that its "task is strictly one of statutory interpretation." Then the *Koray* Court attempted to interpret the relevant statute and referred to the agency's internal guideline as expressing "the most natural and reasonable reading" of the statute. The *Koray* Court stated that the internal agency guideline was like an interpretive rule, and interpretive rules do not require notice and comment. The *Koray* Court declared that the guideline was still deserving of "some deference" because it was a permissible statutory construction. At this point, the *Koray* Court cited *Chevron*.

The Court's discussion in *Koray* has been described as chaotic. The *Koray* Court incorrectly jumbled the reasonable interpretation language when it cited to *Chevron*. In *Skidmore v. Swift & Co.*, the Supreme Court stated that agency interpretations may be looked at for guidance and that the weight granted to agency interpretations depends upon their reasonableness and persuasiveness. Comparatively, in *Chevron*, the Supreme Court stated that a court must defer to an agency interpretation if the interpretation was an acceptable construction of the statute. The *Koray* Court's statement that the policy was entitled to "some deference" was consistent with the type of deference accorded in *Skidmore*, not *Chevron* deference. However, the *Koray* Court cited *Chevron* when applying "some deference." Therefore, the Supreme Court in *Koray* confused the *Chevron* deference language with the *Skidmore* deference language making it unclear what the Court was reasoning.

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393. *Koray*, 515 U.S. at 54 n.2.
394. Id. at 57-58, 60-61.
395. Id. at 61.
396. Id.
397. Id. (citing *Chevron*, 467 U.S. at 843).
398. See Anthony, 10 ADMIN. L.J. AM. U. at 19-20 (describing the *Koray* Court’s discussion as jumbled, confusing, and ambivalent).
399. See infra notes 401-06 and accompanying text.
400. 323 U.S. 134 (1944).
402. *Chevron*, 467 U.S. at 842-44.
403. Compare Skidmore, 323 U.S. at 140 (stating interpretations are granted some weight depending upon reasoning, thoroughness, consistency, and it’s powers to persuade), with *Koray*, 515 U.S. at 61 (stating that the interpretation was deserving of "some deference"), and *Chevron*, 467 U.S. at 844 (stating that agency regulations are entitled to "considerable weight"). See also Anthony, 10 ADMIN. L.J. AM. U. at 19-20 (stating that the citation of *Chevron* could lead to the misinterpretation that a nonlegislative agency guideline shall be accepted if it is a reasonable construction).
404. See supra notes 397-98 and accompanying text.
405. See supra notes 393-405 and accompanying text.
When the Supreme Court decided Christensen, it clarified the previous confusion the Court created in Koray.\footnote{See infra notes 393-406 and accompanying text.} The Christensen Court plainly stated that interpretations contained in opinion letters, agency manuals, policy statements, and enforcement guidelines do not receive Chevron deference.\footnote{Christensen, 529 U.S. at 587.} The Christensen Court asserted that the interpretations of these types receive respect according to Skidmore.\footnote{Id.} Like Koray, the Christensen Court discussed deference to agency opinions.\footnote{Compare id. at 586-87 (discussing the type of deference to grant to an agency opinion letter), with Koray, 515 U.S. at 60-61 (discussing that an agency program statement received "some deference").} But unlike Koray, the Christensen Court did not intermingle Chevron deference with Skidmore deference.\footnote{Compare Christensen, 529 U.S. at 587 (declaring that certain interpretations do not receive Chevron deference but are entitled to Skidmore deference), with Koray, 515 U.S. at 60-61 (citing Chevron and determining that an agency interpretation received "some deference" because it was statutorily permissible).} Therefore, the Christensen Court properly created a clear answer to the question of deference to agency interpretations.\footnote{See supra notes 376-411 and accompanying text.}

C. THE SUPREME COURT CORRECTLY REJECTS CHEVRON DEFERENCE FOR AGENCY INTERPRETATIONS

In Christensen, the United States Supreme Court found that sections of the Fair Labor Standards Act of 1938 ("FLSA")\footnote{553 U.S.C. § 553 (1994).} requiring public employers to honor an employee's reasonable request to use compensatory time did not prohibit employers from forcing employees to use accrued compensatory time.\footnote{Christensen, 529 U.S. at 578-80.} In doing so, the Supreme Court addressed the amount of deference the Court must grant to an agency opinion letter.\footnote{Id. at 586-88.} The Court determined that an agency opinion letter was not entitled to Chevron deference, but rather agency opinion letters were only entitled to Skidmore style deference.\footnote{Id. at 587-88.} The Christensen Court correctly determined that agency interpretive rules and statements of policy do not receive Chevron deference.\footnote{See infra notes 417-83 and accompanying text.} Agency interpretations, like opinion letters, are not formal legislative rules and, therefore, they should not receive Chevron deference.\footnote{See infra notes 422-57 and accompanying text.} The Supreme Court's previous opinions that discuss agency interpretations and the amount of deference courts should afford the

\footnote{See infra notes 393-406 and accompanying text.}
\footnote{Christensen, 529 U.S. at 587.}
\footnote{Id.}
\footnote{Compare id. at 586-87 (discussing the type of deference to grant to an agency opinion letter), with Koray, 515 U.S. at 60-61 (discussing that an agency program statement received "some deference").}
\footnote{Compare Christensen, 529 U.S. at 587 (declaring that certain interpretations do not receive Chevron deference but are entitled to Skidmore deference), with Koray, 515 U.S. at 60-61 (citing Chevron and determining that an agency interpretation received "some deference" because it was statutorily permissible).}
\footnote{See supra notes 376-411 and accompanying text.}
\footnote{553 U.S.C. § 553 (1994).}
\footnote{Christensen, 529 U.S. at 578-80.}
\footnote{Id. at 586-88.}
\footnote{Id. at 587-88.}
\footnote{See infra notes 417-83 and accompanying text.}
\footnote{See infra notes 422-57 and accompanying text.}
interpretations also support the Court's decision to reject the application of *Chevron* deference for agency interpretations.\(^{418}\)

In *Chevron*, the Supreme Court articulated that statutory ambiguity created an implicit grant of legislative authority to the agency responsible for administering the statute.\(^{419}\) The *Chevron* Court determined that courts should grant considerable weight to agency regulations.\(^{420}\) Since the basis for *Chevron* deference was the implicit grant of legislative authority, only agency interpretations made pursuant to an exercise of delegated legislative authority, according to the methods required to exercise legislative authority, would warrant *Chevron* deference.\(^{421}\)

1. **Agency Interpretations Are Not Formal Legislative Rules**

   In *Christensen*, the Supreme Court determined that *Chevron* deference does not apply to interpretive rules.\(^{422}\) The Court noted that the DOL opinion letter and similar forms of agency opinions do not hold the force of law.\(^{423}\) In *Chevron*, the Court provided that great weight was given to legislative rules.\(^{424}\) The Supreme Court later applied *Chevron* deference to other agency rules that had the force of law because they complied with the APA.\(^{425}\) In *Christensen*, the Supreme Court correctly determined that interpretive rules are not accorded the same level of deference as legislative rules that comply with the APA.\(^{426}\) Legislative rules that comply with the APA, such as regulations, have the force of law and should be granted great weight, while informal agency actions like the DOL opinion letter should not be granted *Chevron* deference.\(^{427}\)

   In *Chevron*, the Supreme Court determined that agency's legislative rules are entitled to receive controlling weight.\(^{428}\) The *Chevron* Court addressed enforcement of the Environmental Protection Agency's ("EPA") Clean Air Act Amendment regulations ("CAA Amendments")\(^{429}\) that allowed a State to adopt a plantwide definition

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418. See infra notes 458-83 and accompanying text.
422. *Christensen*, 529 U.S. at 587.
423. Id.
424. Id.
425. See infra notes 441-49 and accompanying text.
426. See infra notes 434-40, 450-57 and accompanying text.
427. See infra notes 428-57 and accompanying text.
429. 40 C.F.R. §§ 51.18(j)(1)(i) and (ii) (1983). The EPA's CAA regulation states that:
of the term "stationary source."\textsuperscript{430} The \textit{Chevron} Court set out steps for courts to review an agency's construction of a statute the agency administers.\textsuperscript{431} The \textit{Chevron} Court stated that "legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."\textsuperscript{432} The \textit{Chevron} Court concluded that the EPA's regulation was reasonable.\textsuperscript{433}

The \textit{Christensen} Court correctly declined to apply \textit{Chevron} deference to the nonlegislative agency interpretations because they are not made pursuant to an exercise of delegated legislative authority.\textsuperscript{434} The \textit{Christensen} Court stated that interpretations contained in opinion letters, policy statements, enforcement guidelines, and agency manuals were not entitled to \textit{Chevron} deference.\textsuperscript{435} The \textit{Christensen} Court noted that opinion letters were not arrived at after formal adjudication nor were they arrived at after notice-and-comment rulemaking.\textsuperscript{436} Furthermore, the \textit{Christensen} Court noted that opinion letters and other similar interpretations do not hold the force of law.\textsuperscript{437} Unlike \textit{Chevron}, \textit{Christensen} did not address a formal regulation; rather, it addressed an interpretation.\textsuperscript{438} Therefore, the \textit{Christensen} Court's decision not to grant \textit{Chevron} deference to agency interpretations that are not made pursuant to formal methods is consistent with the theory originally developed in \textit{Chevron}.\textsuperscript{439} Hence, the \textit{Christensen} Court is correct because an opinion letter is not a formal legislative rule.\textsuperscript{440}

(i) Stationary source means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act.

(ii) Building, structure, facility, or installation means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel.

40 C.F.R. §§ 51.18(j)(1)(i) and (ii).

431. \textit{Id.} at 842-43.
432. \textit{Id.} at 844.
433. \textit{Id.} at 845.
434. \textit{See infra} notes 435-39 and accompanying text.
435. \textit{Christensen}, 529 U.S. at 587.
436. \textit{Id.}
437. \textit{Id.}
438. \textit{Compare id.} (declaring that agency opinion letters and similar interpretations do not hold the force of law and are not entitled to \textit{Chevron} deference), \textit{with Chevron}, 467 U.S. at 844 (recognizing that considerable weight should be granted to an agency's regulation).
439. \textit{Compare id.} (determining that agency opinion letters and similar interpretations are not entitled to \textit{Chevron} deference), \textit{with Chevron}, 467 U.S. at 844 (recognizing that considerable weight should be granted to an agency's regulation).
440. \textit{See supra} notes 428-39 and accompanying text.
Moreover, in United States v. Haggar Apparel Co., the Supreme Court accorded Chevron deference to an agency regulation. The Court held that an agency regulation was subject to Chevron analysis. Furthermore, the Court determined that if the regulation was a reasonable implementation and interpretation of an ambiguous legislative provision, the regulation must be granted judicial deference. The Haggar Court stated that the Commissioner of Customs adopted the regulation pursuant to notice-and-comment rulemaking after approval by the Treasury Department. The Haggar Court noted that the Secretary of the Treasury delegated authority to issue general regulations to the Commissioner of Customs subject to the Secretary's assent. The Haggar Court reasoned that the surplus language in the regulation was not to be disregarded, pointing once again to the agency's use of notice-and-comment rulemaking prior to issuing the regulation. Additionally, the Haggar Court maintained that Congress authorized the agency to make rules so that the tariff statute could be applied in unforeseen situations and different circumstances pursuant to Congressional intent. Therefore, the Haggar Court recognized the formality of the regulation at issue.

In Christensen, the Supreme Court correctly rejected Chevron deference for the DOL opinion letter, because the interpretation was not an interpretive rule issued pursuant to legislative authority. The Christensen Court decided not to apply Chevron deference in a manner consistent with Haggar. Haggar involved an agency regulation issued pursuant to formal notice-and-comment procedures and in accordance with legislative authority. Christensen, on the other hand, involved an agency interpretation issued in a DOL opinion letter that was not issued according to formal notice-and-comment procedures. The Christensen Court likened opinion letters to interpretations contained in agency manuals, policy statements, and

443. Haggar, 526 U.S. at 383.
444. Id.
445. Id. at 386.
446. Id. at 387-88.
447. Id. at 390.
448. Id. at 392-93.
449. See supra notes 441-48 and accompanying text.
450. See infra notes 451-57 and accompanying text.
451. Compare Haggar, 526 U.S. at 386-88 (declaring that the agency regulation was issued pursuant to Congressional authority and notice-and-comment rulemaking procedures), with Christensen, 529 U.S. at 587 (noting that the opinion letter and similar agency interpretations lacked the force of law).
452. See supra notes 441-48 and accompanying text.
453. Christensen, 529 U.S. at 587.
enforcement guidelines. Unlike Haggar, where the agency regulation was issued pursuant to legislative authority and formal procedures, the Christensen Court aptly recognized that the DOL opinion letter and other similar agency interpretations lacked the force of law. Therefore, the Court in Christensen correctly refused to apply Chevron deference to agency interpretations that are not issued pursuant to an exercise of delegated legislative authority. Thereby, the Court recognized the Supreme Court's view that legislative agency interpretations, like regulations, warrant Chevron deference while informal interpretations do not.

2. Prior Case Law Discussing Interpretive Regulations Supports the Court's Decision Not to Apply Chevron Deference

The decision in Christensen finds its support in cases in which the Supreme Court explicitly tied Chevron deference to the exercise of delegated legislative power. The Supreme Court's prior discussion of deference to interpretive rules was inconsistent. However, certain cases discuss the need for delegated legislative authority. With Koray and EEOC v. Arabian American Oil Co. ("Aramco"), the Christensen Court decided the issue before it in a consistent manner. Since the interpretations in Christensen lack legislative authority, the Supreme Court was correct in denying Chevron deference to the agency interpretations.

Though the Supreme Court used jumbled language in Koray when discussing deference, the case tied Chevron deference to the exercise of delegated legislative power. In Koray, the bureau charged with administering the proper statute had interpreted statutory language

454. *Id.*
455. Compare Haggar, 526 U.S. at 386-88 (declaring that the agency regulation was issued pursuant to Congressional authority and notice-and-comment rulemaking procedures), with Christensen, 529 U.S. at 587 (noting that the opinion letter and similar agency interpretations lacked the force of law).
456. See *supra* notes 450-55 and accompanying text.
457. See *supra* notes 434-40, and 450-55 and accompanying text.
458. See *infra* notes 459-83 and accompanying text.
459. See *supra* notes 376-412 and accompanying text.
460. See *infra* notes 464-83 and accompanying text.
462. Compare Koray, 515 U.S. at 61 (stating that internal agency guidelines are not subject to rigorous of the rule making procedures but are entitled to "some deference"), and EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 257-58 (1991) (finding interpretive guidelines do not receive deference), with Christensen, 529 U.S. at 587 (determining that an agency opinion letter does not warrant Chevron deference).
463. See *infra* notes 472-83 and accompanying text.
464. See *supra* notes 394-406 and accompanying text and *infra* notes 465-88 and accompanying text.
in a program statement. The program statement was an internal agency guideline. The Koray Court determined that the internal agency guideline was not subject to the procedures of the APA, including public notice and comment. Therefore, the Koray Court declared that the internal agency guideline was entitled to "some deference."

In Aramco, the Court concluded that agency guidelines do not receive Chevron deference. The Aramco Court noted that prior case law determined that Congress did not delegate to the EEOC the authority to make rules or regulations. This precedence provides further support for the Christensen Court's conclusion that interpretations such as those contained in opinion letters, lacking the force of law, are not entitled to Chevron deference.

Similarly, the DOL opinion letter in Christensen was not the product of notice-and-comment rulemaking or a formal adjudication. The Christensen Court paralleled the DOL opinion letter to other interpretations lacking the force of law like policy statements, enforcement guidelines, and agency manuals. The DOL opinion letter lacked the force of law, and the Christensen Court granted it Skidmore deference.

In Christensen, the Court correctly dealt with the deference issue by determining that the DOL opinion letter was not entitled to Chevron deference and focusing on the fact that the DOL opinion letter and other similar agency interpretations lacked the force of law. In both Koray and Aramco, the similarity lies in the failure to apply Chevron deference when the agency interpretation was without the force of law. Specifically, Koray involved an internal agency guideline. Similarly, in Christensen, the agency document requesting deference was an opinion letter. As in Koray, where the Court appropriately recognized that the internal agency guideline was not a

466. Id. at 61.
467. Id.
468. Id.
469. Aramco, 499 U.S. at 256-58, 259 (Scalia, J., concurring).
470. Id. at 257.
471. See infra notes 472-83 and accompanying text.
472. Christensen, 529 U.S. at 587.
473. Id.
474. Id.
475. See supra notes 472-74 and accompanying text and infra notes 475-83 and accompanying text.
476. Compare Koray, 515 U.S. at 61 (noting that internal agency guidelines are not subject to the procedures in the APA), with Aramco, 499 U.S. at 257 (recognizing that the EEOC was without authority to make rules and regulations).
478. Christensen, 529 U.S. at 587.
result of rulemaking, the Christensen Court aptly recognized that the DOL opinion letter was without the force of law.\textsuperscript{479} Therefore, the Christensen Court correctly refused to grant Chevron deference to the DOL opinion letter.\textsuperscript{480}

Similarly, the Aramco Court also recognized that interpretive agency guidelines were not entitled to Chevron deference.\textsuperscript{481} As in Aramco, where the Court recognized that the interpretive guidelines were not a congressional delegation of administrative authority, the Christensen Court reasonably recognized that the DOL opinion letter was without the force of law.\textsuperscript{482} As a result, the Supreme Court in Christensen correctly concluded that the DOL opinion letter did not warrant Chevron deference.\textsuperscript{483}

D. THE SUPREME COURT CORRECTLY GRANTED SKIDMORE DEFERENCE

The Court in Christensen also correctly concluded that the DOL opinion letter and similar agency interpretations should be granted a lesser degree of deference.\textsuperscript{484} The Court in Skidmore made evident that courts could give particular attention to agency views that represented specialized experience even when they did not comprise an exercise of lawmaking authority.\textsuperscript{485} Skidmore deference retains legal vitality where Chevron deference is inapplicable.\textsuperscript{486} Chevron deference was not warranted in Christensen.\textsuperscript{487}

The Christensen Court correctly applied Skidmore deference to the DOL opinion letter and is consistent with Koray and Aramco in determining that Skidmore deference was the correct type of deference.\textsuperscript{488} In both Koray and Aramco, the Supreme Court effectively ap-

\textsuperscript{479} Compare Koray, 515 U.S. at 61 (noting that internal agency guidelines are not subject to the procedures in the APA), with Christensen, 529 U.S. at 587 (declaring that interpretations like opinion letters do not hold the force of law).

\textsuperscript{480} See supra notes 456-80 and accompanying text.

\textsuperscript{481} Aramco, 499 U.S. at 256-58, 259 (Scalia, J., concurring).

\textsuperscript{482} Compare Aramco, 499 U.S. at 257 (recognizing that the EEOC was without Congressionally delegated authority to make rules and regulations), with Christensen, 529 U.S. at 587 (declaring that agency interpretations like opinion letters were without the force of law).

\textsuperscript{483} See supra notes 469-71 and accompanying text.

\textsuperscript{484} See infra notes 485-520 and accompanying text.

\textsuperscript{485} Christensen, 529 U.S. at 596 (Breyer, J., dissenting).

\textsuperscript{486} Id. at 596-97 (Breyer, J., dissenting).

\textsuperscript{487} See supra notes 412-83 and accompanying text.

\textsuperscript{488} Compare Koray, 515 U.S. at 61 (stating that interpretations not contained in regulations are entitled to "some deference"), and Aramco, 499 U.S. at 257-58 (stating that agency guidelines were promulgated without Congressional authority and were entitled to deference, but the guidelines were not persuasive when judged according to Skidmore), with Christensen, 529 U.S. at 587 (stating that agency interpretations lacking the force of law are entitled to respect according to Skidmore).
plied a form of Skidmore deference. Specifically, in Koray the Supreme Court stated that the agency guideline was like an interpretive rule because it appeared only in an agency program statement, not in a published regulation subject to the APA procedures. Even though the interpretation was not a regulation, the Koray Court determined that the interpretation was entitled to "some deference." The notion of "some deference" is in accordance with the Court's statements in Skidmore. The Skidmore Court determined that while the interpretations were not controlling authority, the interpretations were still a body of experience that the courts may look to for guidance. However, the Skidmore Court stated that the weight given to the interpretations would depend upon various factors including the validity of the interpretations' reasoning. The Court's deference required for interpretations is the same in Skidmore as the Court's determination of deference in Koray. Therefore, the Koray Court was essentially applying Skidmore deference.

In Koray, the Court determined that the internal agency guidelines were entitled to "some deference." Similarly, the Christensen Court applied Skidmore deference to the DOL opinion letter stating that interpretations such as the opinion letter were entitled to respect under Skidmore. Therefore, the Christensen Court was consistent with prior case law in which Chevron deference was rejected by applying Skidmore deference.

In Aramco, the Supreme Court also applied Skidmore deference. The Aramco Court noted that the agency guidelines were not enacted with Congressional authority. As such, the level of deference afforded to the guidelines was dependent upon the thoroughness in the guidelines' consideration, the consistency in the guidelines, and all factors influencing the guidelines' power to persuade when the

489. See infra notes 490-503 and accompanying text.
490. Koray, 515 U.S. at 61.
491. Id.
492. See infra notes 493-96 and accompanying text.
493. Skidmore, 323 U.S. at 140.
494. Id.
495. Compare id. (stating that reasonable interpretations that are not controlling upon the courts are entitled to be considered for guidance), with Koray, 515 U.S. at 61 (stating that interpretations are entitled to "some deference").
496. See supra notes 493-95 and accompanying text.
497. Koray, 515 U.S. at 61.
498. Compare id. (determining that the internal agency guideline was entitled to "some deference"), with Christensen, 529 U.S. at 587 (determining that the opinion letter and other similar interpretation formats were entitled to respect under Skidmore).
499. See supra notes 490-98 and accompanying text.
500. See infra notes 501-03 and accompanying text.
guidelines lacked the power to control. The Aramco Court decided that the guidelines' weight was not entirely discounted, but their value was limited when judged according to the Skidmore standards.

In sum, the Christensen Court correctly determined that the interpretations that lacked the force of law were entitled to respect according to Skidmore. Similar to Koray and Aramco, Christensen determined that Skidmore deference is the correct level of deference to be applied to agency interpretations that are not controlling authority. Therefore, the Supreme Court's conclusion that Skidmore deference should be applied to agency interpretations is correct and in accordance with prior case law.

In his concurrence in Christensen, Justice Antonin Scalia was incorrect in asserting that Skidmore deference is a mere anachronism. Justice Scalia contended that "Skidmore deference to authoritative agency views is an anachronism, dating from an era in which [the Court] declined to give agency interpretations... authoritative effect." Justice Scalia's reading of Skidmore deference is flawed for two reasons. First, Justice Scalia incorrectly determined that Skidmore deference is left over from a time when the Supreme Court declined to grant agency interpretations the force of law. Second, Justice Scalia incorrectly contended that Skidmore deference ended with the Supreme Court's Chevron decision.

Justice Scalia did not seem to sufficiently take into account the Supreme Court's recent application of Skidmore deference after the Court decided Chevron when he determined that Skidmore deference is an anachronism. Justice Scalia sought to justify that Skidmore deference was an anachronism by maintaining that in a previous era

502. Id. at 257 (citing General Elec., 429 U.S. at 142 (quoting Skidmore, 323 U.S. at 134)).
503. Id. at 258.
504. See infra notes 505-06 and accompanying text.
505. Compare Koray, 515 U.S. at 61 (stating that interpretations not contained in regulations are entitled to "some deference"), and Aramco, 499 U.S. at 257-58 (stating that agency guidelines were promulgated without Congressional authority and were entitled to deference, but the guidelines were not persuasive when judged according to Skidmore), with Christensen, 529 U.S. at 587 (stating that agency interpretations lacking the force of law are entitled to respect according to Skidmore).
506. See supra notes 488-505 and accompanying text.
507. See supra notes 508-18 and accompanying text.
508. Christensen, 529 U.S. at 589 (Scalia, J., concurring).
509. See infra notes 512-18 and accompanying text.
510. See infra notes 512-18 and accompanying text.
511. See infra notes 512-18 and accompanying text.
512. See infra notes 513-18 and accompanying text.
the Court declined to grant interpretations authoritative effect. In reflecting upon the prior era, Justice Scalia noted that this former judicial analysis took into account a provision of the 1946 APA that exempted interpretive rules from notice-and-comment requirements. Furthermore, Justice Scalia provided that the Skidmore era ended with the Court's decision in Chevron.

However, Justice Scalia's concurring opinion is incorrect because it ignores the Supreme Court's opinions decided since Chevron that utilize Skidmore deference. For example, the Supreme Court applied Skidmore deference in both Koray and Aramco. Both of the Court's opinions in Koray and Aramco were decided after the Court's opinion in Chevron. Therefore, Skidmore deference is not an anachronism, Skidmore deference did not end with Chevron, and the Court's decision to apply Skidmore deference in Christensen was correct.

CONCLUSION

In Christensen v. Harris County, the United States Supreme Court declined to grant strong Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. deference to agency interpretations that are not arrived at after notice-and-comment rulemaking or formal adjudication. The Supreme Court determined that these agency interpretations should receive Skidmore deference. The Supreme Court explained that these agency interpretations lacked the force of law. The Supreme Court's determination correctly clarified prior inconsistent case law and prevented administrative agency's statutory interpretations that were not enacted pur-

513. Christensen, 529 U.S. at 589 (Scalia, J., concurring). Justice Breyer noted that Chevron did not alter Skidmore. Christensen, 529 U.S. at 596 (Breyer, J., dissenting). Justice Breyer reasoned that Chevron simply focused on an additional legal reason for courts to defer to agency determinations. Id. (Breyer, J., dissenting).

514. Id. (Scalia, J., concurring).

515. Id. (Scalia, J., concurring). Justice Scalia noted that even though Chevron involved an interpretive regulation, the Court's reasoning was not limited to interpretive regulations. Id. at 589-90 (Scalia, J., concurring).

516. See infra notes 517-20 and accompanying text.

517. See supra notes 489-503 and accompanying text.

518. Compare Koray, 515 U.S. at 50 (stating that the case was decided in 1995), and Aramco, 499 U.S. at 244 (stating that the case was decided in 1991), with Chevron, 467 U.S. at 837 (stating that the case was decided in 1984).

519. See supra notes 484-519 and accompanying text.


523. 323 U.S. 134 (1944).

524. Christensen, 529 U.S. at 587.

525. Id.
suant to a congressional delegation of authority from gaining strong deference.

In determining the level of deference to grant the Department of Labor ("DOL") opinion letter, the Supreme Court incorrectly neglected to address the Administrative Procedures Act ("APA"). The Supreme Court has a history of neglecting Chapter Seven of the APA. When there is statutory law directing the Court, the Court must address the statute. Yet, the Supreme Court simply chose to ignore the APA. Further, the judicial review in the APA helps restrict agency discretion. Controls are needed to restrict agency discretion in order to maintain our delicate democratic system. Without restraint, such as the judicial review found in the APA, the agencies will be free to create law without regard to precedence, due process, or restraint.

However, even though the Supreme Court neglected the APA at least the Court clarified prior inconsistent case law. Prior to Christensen, the Supreme Court's opinions were critically inconsistent regarding the amount of deference courts should grant agency interpretations. Although the Court was previously chaotic when the Supreme Court decided Christensen, the Court was in line with prior case law that required the exercise of agency rulemaking power pursuant to delegated lawmaking authority. By deciding not to grant strong deference, the Court also correctly applied Skidmore deference to the agencies' interpretations. This level of lesser deference allowed the Court to take into account the agencies' expertise and experience, while at the same time exercising judicial discretion.

The Supreme Court correctly rejected Chevron deference because if the Court applied great weight to informal agency interpretations, the Court would have offset the balance of powers. Granting strong deference to an agency opinion when the agency did not follow congressionally created requirements when issuing the agency opinion would allow the agency to circumvent congressional mandates. Consequently, the legal system would have been overly burdened with the task of discovering the law because the informal opinions are not published or codified, and are difficult to research. Therefore, the Supreme Court correctly rejected Chevron deference in Christensen, maintaining judicial discretion in an area where the balance of powers is strained.

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