

***Chevron* Lite: How Much Deference Should Courts Give to State Agency Interpretation?**

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I. INTRODUCTION

Administrative law scholars and practitioners champion the *Chevron* doctrine as the touchstone for analyzing cases involving judicial review of a federal agency's interpretation of its federal enabling statute.¹ The facts of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,² the 1984 United States Supreme Court case in which the iconic Two Step test was first articulated, involved a federal court review of the Environmental Protection Agency's (EPA) interpretation of the Clean Air Act (CAA).³ What this landmark case has to say about the proper standard for judicial review of a state agency's interpretation of its state law enabling legislation can be discerned in three ways: (1) through state case

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1. *Chevron* is "the undisputed starting point for any assessment of the allocation of authority between federal courts and administrative agencies." Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 188 (2006).

2. 467 U.S. 837 (1984).

3. Natural Resources Defense Council, Inc. and other environmental groups challenged the EPA's interpretation of the key term "stationary source" in the Clean Air Act Amendments of 1977, Pub. L. 95-95, 91 Stat. 685. *Chevron* and other manufacturers affected by the EPA's air quality regulation, which interpreted the statutory term "stationary source" of air pollution, intervened. The Court of Appeals for the District of Columbia Circuit ruled against the EPA and set aside the regulation. The U.S. Supreme Court reversed, holding that "the EPA's definition of the term 'source' is a permissible construction of the statute." *Chevron*, 467 U.S. at 866.

law that applies the *Chevron* doctrine by analogy; (2) through state statutes that incorporate, modify, or reject *Chevron*'s Two Step test; or, of course, (3) through scholarly pronouncements about the extent to which the *Chevron* analysis should be applied.⁴

Before discussing the applicability of *Chevron*'s Two Step analysis at the state level, we should go back to the source. In *Chevron*, Justice Stevens, writing for a unanimous Court, enunciated the following standard, allowing for judicial deference in the federal arena:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, 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.⁵

Despite the apparent clarity of this analytical model, the Supreme Court itself has not applied the Two Step *Chevron* analysis consistently.⁶ However, as a starting point, let us assume

4. There is certainly no dearth of case law or law review articles discussing the *Chevron* doctrine. RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 140 (4th ed. 2002) ("*Chevron* is one of the most important decisions in the history of administrative law. It has been cited and applied in more cases than any other Supreme Court decision in history."). A search of Westlaw's "Journals and Law Reviews" data base yields 4,319 documents mentioning *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (last viewed Feb. 13, 2008).

5. *Chevron*, 467 U.S. at 842-43 (footnotes omitted).

6. See PIERCE, *supra* note 4, at 175-91 (discussing inconsistencies in the Supreme Court's application of the *Chevron* doctrine through the end of the Rehnquist Court era); see also Ann Graham, *Searching for Chevron in Muddy Watters: The Roberts Court and Judicial Review of Agency Regulations*, 60 ADMIN. L. REV. 229 (2008) (discussing eleven cases involving judicial review of

that the *Chevron* analysis is as simple as it sounds: Step One—Is the statutory language clear? Step Two—If the statutory language is not clear because it is silent or ambiguous, turn to the agency’s construction. If the agency’s interpretation is *permissible* (not the best or only reading), then a court should defer to the agency’s reading. This is the “strong” form of the *Chevron* doctrine⁷ and Justice Antonin Scalia is the chief advocate for this straightforward model.⁸

Gaps or, more politely, open questions with respect to this apparently rigid version of *Chevron* immediately spring to mind.⁹ For example, reasonable minds can differ about whether a word is clear. Can a court avoid application of *Chevron* deference altogether by finding no ambiguity and declaring that there is only one reading of the statute—the court’s reading—no matter what the agency says? Justice Scalia is particularly blunt about finding his definition of a statutory term to be the only one worth considering.¹⁰ Even though he supports the strong version of the

agency interpretation of federal statutes that were decided during the first two terms of the Roberts Court, and concluding that a classic *Chevron* analysis was followed in only one of the eleven cases). In its third term, the Roberts Court has delivered one *Chevron*-related opinion to date, issued February 27, 2008: *Federal Express Corp. v. Holowecki*, 128 S. Ct. 1147 (2008).

7. See Richard J. Pierce, Jr., *Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 302–03 (1988) (discussing the “strong” and “weak” forms of *Chevron* analysis).

8. Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 826 (2006).

9. Certain basic philosophical questions cry for resolution, but fall outside the scope of this article. For example: What is the appropriate line between the judicial responsibility to say what the law is and congressional delegation to an agency to implement a statute, which necessarily requires the agency to interpret and apply the statute? Must congressional delegation to an agency be express or may it be implied? What difference does the form of the agency interpretation make, on a continuum from internal agency memorandum to formal notice-and-comment rulemaking? Should the courts give closer scrutiny to an agency interpretation that preempts state law or expands the agency’s jurisdiction?

10. See, for example, *Rapanos v. United States*, 547 U.S. 715 (2006), in which Justice Scalia, writing for the Court, referred to “the only natural definition of the term ‘waters,’” *id.* at 731, “common sense and common usage,” *id.* at 732 n.5, “the commonsense understanding of the term,” *id.* at 734, and the “plain language of the statute,” *id.*, to support overturning the U.S. Army Corps of Engineers’ broad interpretation of the Clean Water Act (CWA) term

Chevron analysis, his opinions frequently fail to reach Step Two because he finds no ambiguity.¹¹

The textualist¹² or plain meaning¹³ version of the *Chevron* doctrine has its critics,¹⁴ not the least of which is Justice Stephen Breyer.¹⁵ He argued for a more flexible analysis before joining the Supreme Court¹⁶ and continues to express similar views today in cases that come before the Court. His preferred method has been called an intentionalist¹⁷ inquiry—focusing on the intent of Congress¹⁸ and allowing courts (at least the Supreme Court) to examine legislative history, the purpose of the statute, regulatory context, and other factors.

The logical extension of this “intentionalist” model is to throw out any real reliance on agency interpretation to the point of eliminating the need for *Chevron*’s Two Step analysis altogether. Indeed, the Roberts Court seems to be moving away from *Chevron* (even when its opinions cite it) and back to the earlier *Skidmore*

“waters,” which would have included wetlands not adjacent to any relatively permanent standing or flowing bodies of water.

11. “One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists.” Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 (1989). This article predates Justice Scalia’s appointment to the Supreme Court, but his viewpoint has not changed.

12. See generally Gregory E. Maggs, *Reconciling Textualism and the Chevron Doctrine: In Defense of Justice Scalia*, 28 CONN. L. REV. 393 (1996); Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351 (1994) (discussing an approach to judicial review in which the court conducts its reading of the words of the statute).

13. See generally Miles & Sunstein, *supra* note 8, at 828–29 (finding that Justices Scalia and Thomas are the major proponents of the “plain meaning” approach).

14. See, e.g., Richard J. Pierce, Jr., *The Supreme Court’s New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749 (1995).

15. See Graham, *supra* note 6, at 233–35 (contrasting Justice Breyer’s flexible or “weak” reading of *Chevron* with Justice Scalia’s “simple” or “strong” version).

16. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986).

17. See Linda Jellum, *Chevron’s Demise: A Survey of Chevron from Infancy to Senescence*, 59 ADMIN. L. REV. 725, 743–48 (2007).

18. *Chevron* itself says that if the intent of Congress is clear, that is the end of the matter. See *supra* note 5 and accompanying textual quotation from *Chevron*.

test.¹⁹ *Skidmore* calls for a case-by-case, facts-and-circumstances review of agency interpretation—and a return to this approach is not necessarily bad. In fact, if the Supreme Court is not following a clear version of the *Chevron* doctrine, the interest of predictability would be better served by declaring *Chevron* dead²⁰ and spelling out factors that are likely to give an agency interpretation the power to persuade under *Skidmore*.

The purpose of this article is to analyze state case law and statutes to determine the range of state court deference to state agency interpretation of state law. Initially, I hold up the basic *Chevron* Two Step doctrine as a template for exploring the range of deference given to state agencies. More importantly, since I find that the Roberts Court is not applying *Chevron* consistently,²¹ I argue that states could provide ideas for replacement of the *Chevron* doctrine at the federal level. The analytical approach in this article is threefold: (1) to examine existing state models for judicial review of state agency interpretations of state statutes; (2) to make recommendations about the most effective approach on a state level; and (3) to identify state concepts, procedures, and standards that could be imported to the federal arena.

II. A CONTINUUM OF STANDARDS FOR JUDICIAL DEFERENCE TO STATE AGENCIES

Existing state models range along a continuum from express adoption of the *Chevron* doctrine to outright rejection of *Chevron*'s applicability. A middle ground approach sounds very much like the federal *Skidmore* test²²—including the agency's viewpoint as

19. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (“[T]he rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”).

20. See *Graham*, *supra* note 6, at 270–72. See generally *Jellum*, *supra* note 17.

21. *Graham*, *supra* note 6.

22. Courts will weigh an agency interpretation of a statute in light of the facts and circumstances and grant judicial deference to the extent the agency interpretation has the power to persuade. See *supra* text accompanying notes 19–20.

one factor to be considered by a court reviewing an agency's interpretation. Several states in this middle category improve on *Skidmore* by listing factors, which include the state agency interpretation, to be considered in reviewing state statutes.

A. Texas Statutory Standard and Case Law: Specific State Factors for Judicial Deference to Agency Interpretations of State Law

Texas occupies the middle ground of our continuum, neither rejecting nor parroting the *Chevron* doctrine. A key point in the Texas standard is the statutorily enumerated factors to be considered by courts when reviewing state agency interpretation. The Texas Government Code contains two notable provisions.

First, as with the *Chevron* doctrine, the intent of the legislature is critical in determining the meaning of statutory terms: "In interpreting a statute, a court shall diligently attempt to ascertain legislative intent and shall consider at all times the old law, the evil, and the remedy."²³ This provision incorporates not only the *Chevron* focus on legislative intent but also the legislative history inquiry favored by Justice Breyer.²⁴

Second, Texas avoids the *Chevron* Step One problem of requiring the reviewing court to determine whether the statute is silent or ambiguous. This also eliminates any temptation for the court to adopt Justice Scalia's tactic of dodging *Chevron* deference by employing his own reading of a statutory term to find the statute unambiguous and excluding any question of deference to the agency.²⁵ The Texas Government Code provides courts and litigants with valuable predictability as it lists specific statutory construction aids—and provides that agency interpretation of a statute is only one factor:

In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the: object sought to be attained; circumstances under which the statute was enacted; legislative history; common law or former statutory

23. TEX. GOV'T CODE ANN. § 312.005 (Vernon 2005).

24. See *supra* text accompanying notes 15–18.

25. See *supra* text accompanying notes 10–11.

provisions, including laws on the same or similar subjects; consequences of a particular construction; administrative construction of the statute; and title (caption), preamble, and emergency provision.²⁶

The Texas Supreme Court has discussed the appropriate degree of deference owed to an agency's interpretation of the statute it administers in significant cases, beginning with the *Stanford v. Butler* standard established in 1944.²⁷ The level of deference afforded in subsequent cases ranges from "great weight"²⁸ to "some deference"²⁹ to "no deference."³⁰

In a 2007 opinion, the Texas Supreme Court issued its most recent consideration of state court deference to a state agency's interpretation of state statute. *Mid-Century Insurance Co. v. Ademaj*³¹ involved the Texas Insurance Commissioner's interpretation of provisions of the Texas Insurance Code embodied in a formal rule. In upholding the Insurance Commissioner's interpretation, the Texas Supreme Court quoted from its own 1993 opinion in *Tarrant Appraisal District v. Moore*: "Construction of a

26. TEX. GOV'T CODE ANN. § 311.023 (Vernon 2005).

27. "[C]ourts will ordinarily adopt and uphold a construction placed upon a statute by a . . . department charged with its administration if the statute is ambiguous or uncertain, and the construction . . . is reasonable." *Stanford v. Butler*, 181 S.W.2d 269, 273 (Tex. 1944) (involving Texas Supreme Court deference to the Texas Secretary of State's interpretation of a Texas statute regarding election procedures for presidential electors for the State of Texas).

28. *Tex. Ass'n of Long Distance Tel. Cos. v. Pub. Util. Comm'n*, 798 S.W.2d 875, 884 (Tex. App.—Austin 1990) (involving judicial deference to the PUC interpretation of a statute in a telephone rate setting case).

29. *TXU Elec. Co. v. Pub. Util. Comm'n*, 51 S.W.3d 275 (Tex. 2001) (involving judicial deference to the PUC's reasonable interpretation of provisions of the Public Utility Regulatory Act).

30. *City of Amarillo v. Martin*, 971 S.W.2d 426 (Tex. 1998) (involving interpretation of the Texas statutory standard of care for emergency vehicle drivers). In that case, the Texas Court of Appeals rejected the statutory interpretation put forward by the fire truck driver's employer, City of Amarillo, saying, "[W]e remain convinced that the City's proposed statutory construction is not supported by existing case law." *City of Amarillo v. Martin*, 912 S.W.2d 349, 353 (Tex. App.—Amarillo 1995). Although the Texas Supreme Court reversed the Court of Appeals decision, it also did not afford or discuss agency deference. Instead of deference, the Texas Supreme Court conducted its own statutory analysis, looking to traditional factors such as plain language, legislative history, the statute in its entirety, public policy, and interpretations from other states with similar statutes. *Martin*, 971 S.W.2d 426.

31. 243 S.W.3d 618 (Tex. 2007).

statute by the administrative agency charged with its enforcement is entitled to serious consideration, so long as the construction is reasonable and does not contradict the plain language of the statute.”³²

Note that the range of deference expressed in Texas case law accords with the Texas Government Code requirement that courts are to take account of agency interpretation as only one factor, even if it is to be given “serious consideration.” The Texas test also requires that the agency interpretation be “reasonable and not contradict the plain language of the statute.” The requirement of a reasonable interpretation is a greater check on agencies than the *Chevron* requirement of “permissible,” although the U.S. Supreme Court itself sometimes uses the term “reasonable.”³³ Indeed, the “permissible” yardstick has left federal courts between a rock and a hard place. Following the *Chevron* test can mean upholding an agency interpretation that the court believes to be incorrect, as long as the agency advances even a shred of justification for its interpretation. I believe that this dilemma is one root cause of the U.S. Supreme Court’s unwillingness to follow the *Chevron* analysis consistently.³⁴

32. 845 S.W.2d 820, 822 (Tex. 1993). By footnote, the Texas Supreme Court refers to its history of deference to state agency interpretation, including: *State v. Pub. Util. Comm’n*, 883 S.W.2d 190, 196 (Tex. 1994) (“[T]he contemporaneous construction of a statute by the administrative agency charged with its enforcement is entitled to great weight.”); *Tex. Employer’s Ass’n v. Holmes*, 196 S.W.2d 390, 395 (Tex. 1946) (“[T]he practical interpretation of the Act by the agency charged with the duty of administering it is entitled to the highest respect from the courts.”); *Stanford v. Butler*, 181 S.W.2d 269, 273, 322 n.7 (Tex. 1944) (“The contemporaneous construction of an act by those who are charged with the duty of its enforcement . . . is worthy of serious consideration as an aid to interpretation, particularly where such construction has been sanctioned by long acquiescence.” (quoting 39 TEX. JUR. STAT. § 125 (1936))).

33. See, e.g., *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Serv.*, 545 U.S. 967, 969 (2005) (in which Justice Thomas, writing for the Court, noted that “*Chevron* requires a federal court to defer to an agency’s construction, even if it differs from what the court believes to be the best interpretation, if the particular statute is within the agency’s jurisdiction to administer, the statute is ambiguous on the point at issue, and the agency’s construction is reasonable.” (citing *Chevron U.S.A., Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 & n. 11, 865–66 (2006))).

34. PIERCE, *supra* note 4, at 15, notes that there is “solid empirical evidence that judges and Justices continue to differ with respect to their interpretations of agency-administered statutes and of their willingness to substitute their interpretations for those of agencies.” Pierce refers to the 2006 Miles & Sunstein study, *supra* note 8, and concludes that it documents “the unfortunate

The U.S. Fifth Circuit opinion in *Wells Fargo Bank of Texas N.A. v. James*³⁵ is a good example of reluctant judicial support for an unpalatable federal agency interpretation. The case involved preemption of a Texas consumer protection statute³⁶ by an Office of the Comptroller of the Currency (OCC) interpretation. After finding that Congress had delegated to the OCC the authority to regulate fees charged by national banks, the Fifth Circuit determined that it was bound to defer to the agency's definition of fees chargeable to "customers," which included, according to the OCC, non-account holders who sought to cash "on-us" checks (precisely the type of wage-earner that the Texas "par value" statute was attempting to protect—one who has no bank account of his own but needs to cash his paycheck at his employer's bank without penalty).

The Fifth Circuit viewed its role as limited to discerning whether Congress had delegated rulemaking authority to the agency, "not whether we think such a delegation wise."³⁷ The court deferred to the OCC's strained interpretation of its own regulation under *Chevron* and *Auer v. Robbins*.³⁸ The court recognized that the OCC's interpretation "is not the only reasonable interpretation of [the regulation], and it is perhaps not even the most natural reading of 'customer.'"³⁹ The Fifth Circuit

tendency of judges and Justices to decide many administrative law statutory interpretation disputes based on their personal beliefs even in the presence of the consistency-enhancing *Chevron* test." PIERCE, *supra* note 4, at 15. On the basis of my study of Roberts Court opinions, I agree that the Justices do substitute their interpretations for those of agencies—while cloaking their opinions in *Chevron* terminology, or while dodging *Chevron* altogether. See Graham, *supra* note 6. With *Chevron*, we are merely pretending to limit judicial review with an overly deferential test that does not provide consistency and begs to be flouted. See conclusions *infra* Part III.

35. 321 F.3d 488 (5th Cir. 2003).

36. The Texas "par value" statute, TEX. BUS. & COM. CODE ANN. § 4.112(a) (Vernon 2005), required that a payor bank pay checks drawn on it at the full face value of the check (without deducting a check cashing fee) even if the payee was a non-account holder with the payor bank.

37. *Wells Fargo*, 321 F.3d at 494.

38. 519 U.S. 452 (1997). *Auer v. Robbins* represents the U.S. Supreme Court standard prescribing deference to an agency's interpretation of its own regulations, whereas *Chevron* prescribes deference to agency interpretation of statute.

39. *Wells Fargo*, 321 F.3d at 495.

seemed to invite Congress to step in and correct the resulting preemption of a state consumer protection statute: “Of course, should Congress be dissatisfied with the OCC’s decision concerning the fee at issue here, Congress is free to revisit the question with subsequent legislation.”⁴⁰

Had the *Wells Fargo* case been decided in accordance with Texas deference standards, with agency interpretation being only one factor in the analysis, the outcome could have been very different. The contrast between the Texas standard and the *Chevron* doctrine reflects two schools of thought about the proper role for judicial review: stringent substantive examination of agency decision-making or procedural review under a deferential standard of “reasonableness.”⁴¹ This is not a new debate, but one well worth revisiting. Ultimately, core issues regarding separation of powers among the legislative, executive (including administrative agencies), and judicial branches of government as well as the proper balance between the power of the federal government and the states need to be reevaluated.⁴²

Before concluding this overview of Texas’ jurisprudential deference standards regarding agency interpretations, I note the 2003 Austin Court of Appeals⁴³ opinion in *Phillips Petroleum Co. v. Texas Council on Environmental Quality*.⁴⁴ *Phillips* expressly cited and relied on the U.S. Supreme Court’s opinion in *Chevron* to support deference to a Texas administrative agency’s interpretation of a Texas environmental statute:

[I]f there is room for a policy determination in the rule, we will defer to the agency’s interpretation unless it is plainly erroneous or inconsistent with the language of the rule.

40. *Id.* at 494.

41. *See generally* RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW & PROCESS* 386–93 (3d ed. 1999).

42. Although I hope not to be accused of searching for a silver lining in the very dark cloud that is the subprime mortgage collapse, I suggest that this could be the trigger for a re-examination of judicial deference to aggressive federal agency preemption of state consumer protection statutes.

43. Because of its location in the state capital of Austin, the Austin Court of Appeals is to Texas administrative law as the D.C. Circuit Court of Appeals is to federal administrative law. This court is usually deemed an expert in administrative law because of the volume of administrative cases that come before it.

44. 121 S.W.3d 502 (Tex. App.—Austin 2003).

Our task is to determine whether an agency's decision is based on a permissible interpretation of its statutory scheme. Because the interpretation represents the view of the regulatory body that drafted and administers the rule, the agency interpretation, if reasonable, becomes a part of the rule itself.⁴⁵

Because Texas has such well-developed statutory and case law standards for appropriate judicial deference to agency interpretations without reference to a federal model, reliance on *Chevron* in the *Phillips Petroleum* case was unexpected. However, other states do expressly rely on importation of the *Chevron* doctrine.

B. Illinois: Using Chevron Deference if the Court Agrees with the Agency's Interpretation

Illinois courts have taken a page from the U.S. Supreme Court's playbook: citing *Chevron* but reaching the result the court believes to be correct. The Illinois Supreme Court used *Chevron* as its own standard for reviewing a state agency's statutory interpretation in *Church v. State of Illinois*.⁴⁶ Although the Illinois Supreme Court concluded that the Illinois Department of Professional Regulation was entitled to deference and had appropriately interpreted the state's Private Detective, Private Alarm and Private Security Act, it held the Act itself unconstitutional.

In two recent intermediate appellate court opinions,⁴⁷ *Chevron* and prior Illinois cases citing *Chevron* received mention. In both cases, however, the courts explained that if the statute is unambiguous (according to the court's reading), there is no deference. This sounds very much like the U.S. Supreme Court's application of the *Chevron* doctrine.

45. *Id.* at 508 (citations omitted).

46. *Church v. State*, 646 N.E.2d 572 (Ill. 1995).

47. *Quality Saw & Seal, Inc., v. Ill. Commerce Comm'n*, 871 N.E.2d 260 (Ill. App. 2d. Dist. 2007); *Dusthimer v. Bd. of Trustees*, 857 N.E.2d 343 (Ill. App. 4th Dist. 2006).

C. *Florida: Chevron or Nothing*

Florida would have been slotted into the “*Chevron* by adoption” column until the Florida Supreme Court weighed in with its 2006 opinion in *McKenzie Check Advance of Florida v. Betts*.⁴⁸ After *McKenzie*, lower courts are still following *Chevron*, but the Florida Supreme Court grants the agencies no deference.

The issue before the Florida Supreme Court in *McKenzie* was whether “deferred presentment checks” (a type of “payday lending” in which an individual gives a check cashing company a postdated check in exchange for an advance of the face amount of the check plus fees) were governed by Florida’s usury statutes. This case considered transactions that occurred after enactment of the 1994 Florida Money Transmitters’ Code, which was inconclusive concerning regulation of deferred presentment checks, and before legislative amendments in 2001, which expressly permit deferred presentment check transactions subject to certain limitations. During this interim period, the Florida Department of Banking and Finance, the state agency charged with interpreting and enforcing the Money Transmitters’ Code, adopted rules⁴⁹ that allowed deferred presentment checks and imposed limitations, which, if valid and complied with, would take the checks out of the coverage of general usury laws.

In *McKenzie*, the Florida Supreme Court ignored the state agency’s interpretation of the state statute and turned instead to a *de novo* review of the 1994 Florida statute, taking account of other factors including “plain language”⁵⁰ and interpretations by other state courts concerning deferred presentment transactions.⁵¹ The Florida Supreme Court came to a different conclusion than the Department of Banking and Finance about statutory authorization for—and regulation of—this type of loan under the 1994 state statute. The majority opinion barely acknowledged that the Department had a different interpretation; rather, it was the dissenting opinion that invoked “our many precedents deferring to

48. 928 So. 2d 1204 (Fla. 2006).

49. FLA. ADMIN. CODE ANN. r. 3C-560.801-4 (repealed 2001).

50. *McKenzie*, 928 So. 2d at 1208.

51. *Id.* at 1211.

an implementing agency's reasonable interpretation of a statute,"⁵² noting that "[t]his interpretation reasonably clarifies a statutory ambiguity and falls squarely within the Department's area of expertise."⁵³ While perhaps askew of Florida's precedents regarding deference, the majority opinion is not out of line with the federal standard inasmuch as my review of U.S. Supreme Court cases during the first two terms of the Roberts Court indicates that the U.S. Supreme Court itself frequently avoids a classic *Chevron* deference analysis in favor of its own independent review coupled with traditional factors such as plain language, legislative history, and purpose of the statutory scheme.⁵⁴

Florida's standard is characterized as "*Chevron* or nothing" because, while the Florida Supreme Court goes forth on its own with no reliance on deference, either under *Chevron* or under Florida case law, lower courts grant deference based explicitly on the U.S. Supreme Court opinion in *Chevron*. *State Department of Agriculture v. Sun Gardens Citrus, LLP*⁵⁵ is a clear example. In upholding the statutory interpretation of the state agency, the court quoted extensively from *Chevron*⁵⁶ and relied on 1983 and 1994 Florida Supreme Court opinions to support its conclusion that "[t]rial courts must afford great deference to an agency's or department's interpretation of a rule it promulgated concerning matters that are administered by that agency or department."⁵⁷

Even after the Florida Supreme Court opinion in *McKenzie*, the Florida Appeals Court for the Second District (the same court that issued the *Sun Gardens* opinion) has continued to defer to the Secretary of State as the agency to which the Florida Legislature has delegated authority to interpret the Florida Election Code. In *Browning v. Sarasota Alliance for Fair Elections, Inc.*⁵⁸ it announced that under Florida case law, "the administrative

52. *Id.* at 1212.

53. *Id.*

54. See Graham, *supra* note 6, at 271–72 (concluding, "In an unmistakable pattern, *Chevron* has become the argument for the losing side, with failure by the majority to adhere to a straightforward *Chevron* analysis emerging as a recurring criticism in dissenting opinions.").

55. 780 So. 2d 922 (Fla. App. 2d Dist. 2001).

56. *Id.* at 925–26.

57. *Id.* at 925 (citations omitted).

58. 968 So. 2d 637 (Fla. App. 2d Dist. 2007).

'construction of a statute by the agency charged with its enforcement and interpretation is entitled to great weight.'"⁵⁹

The *Browning* court was aware of the Florida Supreme Court opinion in *McKenzie*, citing it only for the proposition that "courts may consider later amendments to statutes in determining legislative intent."⁶⁰ The Florida Supreme Court does have another opportunity in this case to restate the Florida standard regarding deference to state agency interpretation of Florida statutes, because the *Browning* court certified a question concerning interpretation of the Florida Election Code to the Florida Supreme Court.⁶¹ If we watch this case, the Florida justices may tell us clearly whether it is *Chevron* or nothing in terms of deference under the Florida standard.

D. Delaware: An Explicit Rejection of Chevron

Delaware's Supreme Court struck a blow for independence from the *Chevron* doctrine in *Public Water Supply Co. v. DiPasquale*.⁶² In reviewing a challenge to the Delaware Department of Natural Resources and Environmental Control's interpretation of a Delaware statute governing potable water permits,⁶³ the Delaware Supreme Court overruled its own prior opinion in *Eastern Shore Natural Gas Co. v. Delaware Public Service Commission*,⁶⁴ which articulated an agency deference standard.⁶⁵ The Delaware Supreme Court found the prior standard "overly deferential and confusing."⁶⁶ Expressly declining to adopt the federal *Chevron* standard, the Delaware Supreme Court instead examined the state

59. *Id.* at 648 (quoting *PW Ventures, Inc. v. Nichols*, 533 So. 2d 283 (Fla. 1988); citing also *Harloff v. City of Sarasota*, 575 So. 2d 1324, 1327 (Fla. App. 2d Dist. 1991)).

60. *Id.* at 649 n.9. Oddly enough the Florida Court of Appeals for the Third District, in an as yet unreleased opinion, relied on the dissenting opinion in *McKenzie* to support judicial deference to an agency interpretation of the Florida statute governing certification of professional engineers. *Risov v. State Bd. of Prof'l Eng'rs*, No. 3D07-1929 (Fla. App. 3d Dist. Feb. 6, 2008).

61. *Browning*, 968 So. 2d at 654.

62. 735 A.2d 378 (Del. 1999).

63. DEL. CODE ANN. tit. 7 § 6077(b).

64. *Pub. Water Supply*, 735 A.2d at 382.

65. 637 A.2d 10 (Del. 1994).

66. *Pub. Water Supply*, 735 A.2d at 382.

agency interpretation of the state statutory provision at issue using a *de novo* review standard.

III. CONCLUSION

Predictability is the Holy Grail of the legal profession. Whether we as lawyers represent a state agency, a regulated entity, or an affected business or individual, we can best advise our clients if we can anticipate the outcome of litigation. At the federal level, predictability presently seems beyond the reach of the Roberts Court. The *Chevron* doctrine does not currently represent a coherent, consistent standard that federal courts can be expected to apply when reviewing a federal agency's interpretation of its enabling statute.

The states have been called laboratories for innovation, and confusion in the federal arena may present an opportunity not to simply lay *Chevron* out for a decent burial but to find a reliable replacement. I recommend consideration of the Texas model: a facts-and-circumstances review of agency interpretation like the federal *Skidmore* test, but with the relevant factors clearly enumerated. Factors should include: agency interpretation, plain language, legislative history, consistency with legislative purpose and the regulatory scheme, case law from other jurisdictions, and a catch-all category of "other considerations." We need to give our justices and judges in the states and in the hallowed halls of the U.S. Supreme Court, an opportunity to be honest. If judges are conducting their own interpretations of statutes behind a veil, we need them to step into the light. If *Chevron* is "out," say so and establish a clean new standard.

