FILLING IN THE GAPS: THE SCOPE OF ADMINISTRATIVE AGENCIES’ POWER TO ENACT REGULATIONS

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Agency regulation litigation presents a myriad of interesting and challenging cases for courts. The amount and type of deference to be afforded to the agency, the scope of the agency’s power to regulate, and the boundaries within which an agency may “flesh out” a statute all present unique and situation-specific analyses for courts to navigate. This article delves into the current state of agency law, including the interplay between Chevron deference and its limitations under Mead, across all jurisdictions. Once a summary of current law has been established, this article then applies these standards to an upcoming regulatory challenge against a set of proposed California Labor Code regulations that seek to define meal period requirements for all California employees. This article then concludes that the California agency has the power to enact the proposed regulations.

I. INTRODUCTION

Since the creation of agencies courts have been called upon to determine the limit of their powers. Agencies’ authority to create regulations has been particularly contested. Over thirty years ago, the Supreme Court decreed that “[t]he power of an administrative agency to administer a congressionally created . . . program” includes the ability to make rules “to fill any gap left, implicitly or explicitly, by Congress.”\(^1\) However, it was not until ten years later, in the seminal case, \textit{Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.},\(^2\) that the Supreme Court determined the scope of administrative and executive agencies’ power to fill in these gaps.\(^3\) \textit{Chevron} set out a detailed process of how courts should analyze an agency’s power to regulate generally and in relation to a specific statute.\(^4\) \textit{Chevron} considered two statutory scenarios: (1) When the relevant statute has specifically spoken on the issue the agency seeks to regulate, and (2) when the statute is silent or ambiguous with regard to the issue in question, which leaves a “gap” for the agency to fill.\(^5\)

In the first scenario, if the legislature has “directly spoken to the precise question at issue” and the legislature’s intent is clear, “the agency, must give effect to the unambiguously expressed intent of [the legislature].”\(^6\) To determine whether the regulations at issue fall into this first scenario, the legislature’s intent is used to “delineate the boundaries of authority bestowed by the [relevant] statute.”\(^7\) When examining the statute, courts should use traditional tools of statutory construction “to ascertain legislative

\(^{3}\) Prior to \textit{Chevron}, regulations were given a much less deferential and less defined standard of mere persuasiveness. As noted below, the Skidmore standard is still used in certain situations. See \textit{Skidmore v. Swift & Co.}, 323 U.S. 134, 139-40 (1944).
\(^{4}\) See \textit{Chevron}, 467 U.S. at 842-43.
\(^{5}\) Id.
\(^{6}\) Id.
\(^{7}\) Jason Nichols, Student Author, “‘Sorry! What the Regulation Really Means is . . .’: Administrative Agencies’ Ability to Alter an Existing Regulatory Landscape Through Reinterpretation of Rules, 80 Tex. L. Rev. 951, 963 (2002).
intent and to determine whether the agency interpretation comports with the plain meaning of the antecedent provision."\(^8\)

The second scenario applies when the legislature “has not directly addressed the precise question at issue,” and, therefore, the relevant statute “is silent or ambiguous with respect to the specific issue.”\(^9\) According to *Chevron*, in this scenario, because the legislature “has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.”\(^10\) In such a situation, the reviewing court must determine whether “the agency’s answer is based on a permissible construction of the statute.”\(^11\) If it is not, the court must reject the agency’s construction because it is contrary to the legislature’s intent.\(^12\) If it is, the regulation is “given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute.”\(^13\)

*Chevron* also holds that even if a legislative delegation is implicit and not explicit, “a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”\(^14\) Moreover, the “court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.”\(^15\) In other words, under *Chevron*, an agency is to be given deference and its interpretation of the statutory scheme it is entrusted to administer is entitled to “considerable weight.”\(^16\)

In addition to setting out two regulatory scenarios, *Chevron* notes that “[t]he judiciary is the final authority on issues of statutory construction.”\(^17\) *Chevron* underscores the agency’s inherent power to regulate and, therefore, further limits courts’ power to overturn these regulations.\(^18\) Critics have argued that *Chevron* gives agencies too much discretion, in effect, creating “a domain where an agency is free to craft its own rules and regulations in a congressionally-created vacuum of ambiguity.”\(^19\) According to critics, under *Chevron*, “courts [are] not inclined to ‘substitute [their] own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.’”\(^20\) Courts’ resulting reluctance to overturn regulations may have allowed agencies to regulate beyond their intended power with little fear of judicial interference.

In 2001, perhaps in response to these criticisms, *Chevron*’s two-step analysis was explicitly limited by the Supreme Court in *United States v. Mead Corp.* to situations where the legislature has “delegated authority to the agency generally to make rules carrying the force of law, [and where] the agency interpretation claiming deference was promulgated in the exercise of that authority.”\(^21\) Without a showing of general rule-making authority on the topic at issue, *Chevron* deference will not apply and the previously established *Skidmore*\(^22\) standard will be used.\(^23\) According to *Mead*, the legislature’s intent to

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8. *Id.*
10. *Id.* at 843-44; see also Melanie E. Walker, Student Author, *Congressional Intent and Deference to Agency Interpretations of Regulations*, 66 U. Chi. L. Rev. 1341, 1346 (1999).
12. *Id.* at 843 n. 9.
13. *Id.* at 844; see also Nichols, supra n. 7, at 963 (“The agency interpretation will be accepted so long as it is reasonable.”).
15. *Id.* at 843 n. 11.
16. *Id.* at 844; see also *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 239 (2004).
17. *Chevron*, 467 U.S. at 843 n. 9.
18. *Id.* at 862.
19. Nichols, supra n. 7, at 964 (footnote omitted).
22. *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944); see supra n. 3 (providing that prior to *Chevron* regulations were given a much less deferential and less defined standard of mere persuasiveness).
delegate such authority may be shown in a variety of ways, such as “by an agency’s power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.”

Accordingly, Mead essentially created a requirement that agencies demonstrate that the legislature “not only intended the agency to make rules but also to make rules that have the force of law.” However, Mead also emphasized that, once Chevron deference is found to apply,

[A] reviewing court has no business rejecting an agency’s exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency’s chosen resolution seems unwise . . . but is obliged to accept the agency’s position if Congress has not previously spoken to the point at issue and the agency’s interpretation is reasonable.

In fact, “[c]ourts . . . must respect the judgment of the agency empowered to apply the law to varying fact patterns, even if the issue with nearly equal reason [might] be resolved one way rather than another.”

In such an analysis, the circumstances surrounding the agency and the delegation of authority are key. The circumstances relevant to the legislature’s implicit delegation of authority are:

the agency’s generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which “Congress did not actually have an intent” as to a particular result.

Circumstances relevant to the agency itself are: “[T]he degree of the agency’s care, its consistency, formality, and relative expertness, and . . . the persuasiveness of the agency’s position.” Naturally, this wide range of circumstances has caused courts, even the Supreme Court, to “produce[] a spectrum of judicial responses [] from great respect at one end . . . to near indifference at the other.”

Since Chevron and Mead were decided, courts—both state and federal—have grappled with their mandate and they have been given ample opportunity to do so. Administrative regulations have been reviewed by every court in the nation and, each time, the reviewing court has attempted to apply Chevron to determine whether the agency acted beyond its authority. This article presents a review of state and federal case law that analyzes whether an agency’s regulations are beyond the scope of its enabling statute and how such analyses are conducted. Once a relatively clear picture has formed, this article then applies these principles and examples to a set of proposed California Labor Code regulations that are currently


24. Mead, 533 U.S. at 227. Mead also notes that although the overwhelming number of its cases applying Chevron deference were cases wherein the agency used notice-and-comment rulemaking or formal adjudication, “the want of that procedure here does not decide the case, for we have sometimes found reasons for Chevron deference even when no such administrative formality was required and none was afforded.” Id. at 230-31.

25. Langhauser, supra n. 20, at 14. For a more in-depth analysis of Mead’s effects on the Chevron standard, see id. at 17 (analyzing whether Mead actually replaces Chevron).

26. Mead, 533 U.S. at 229 (internal citation omitted); see Holly Farms Corp. v. NLRB, 517 U.S. 392, 398-99 (1996); Robert A. Anthony, Which Agency Interpretations Should Bind Citizens and the Courts? 7 Yale J. on Reg. 1, 3 n. 6 (1990) (“An agency interpretation ‘has the force of law’, and therefore is ‘binding’ upon the courts (as well as upon the public and upon the agency itself), when a court may not review it freely, but must accept it unless it is contrary to statute or unreasonable. . . . A legislative regulation issued pursuant to delegated statutory authority is an example of agency action possessing these characteristics.” (citing Chrysler Corp. v. Brown, 441 U.S. 281, 301-04 (1979); Batterton v. Francis, 432 U.S. 416, 425-26 (1977))).

27. Holly Farms Corp., 517 U.S. at 399 (internal citation and quotation marks omitted).


under attack.