RECTIFYING *RENDA*: AMENDING THE IOWA ADMINISTRATIVE PROCEDURE ACT TO REMOVE THE LEGAL FICTION OF LEGISLATIVE DELEGATION OF INTERPRETIVE AUTHORITY

*Melissa H. Weresh**

*Aaron W. Ahrendsen***

ABSTRACT

Under the Iowa Administrative Procedure Act, a court in Iowa is obligated to defer to an agency's statutory interpretation when the agency's enabling legislation vests interpretive authority in that agency. When there is no explicit delegation of interpretive authority, the court is expected to review the enabling legislation and statutory provisions at issue to determine whether it has a "firm conviction" that interpretive authority has been "clearly vested" in the agency's discretion. This requires the court to examine the enabling legislation and the specific terms at issue, as well as the functions and duties of the agency, to determine whether to imply an intention to delegate interpretive authority or to impute such an intention to the legislature. If the court finds that interpretive authority has been clearly vested in the agency's discretion, it will defer to the agency interpretation.

In Renda v. Iowa Civil Rights Commission*, the Iowa Supreme Court determined that its examination of whether to defer to an agency determination should not focus on whether the agency had been granted broad interpretive authority. Rather, the court's focus must be on the particular terms at issue. In order to warrant judicial deference, the court must have a firm conviction that the agency had been delegated interpretive authority over the specific terms at issue.*

Since the Renda *decision, the Iowa Supreme Court has decided many cases in which the court was obligated to consider whether interpretive authority had been clearly vested in an agency's discretion. In the vast majority of those cases,*

* Professor of Law, Drake University Law School; B.A., Wake Forest University, 1989; J.D. University of Iowa College of Law, 1992.

** B.A., Grand View University, 2012; J.D. Candidate, Drake University Law School, 2015. The Authors would like to thank Professors Arthur Bonfield, Jerry Anderson, and Karen Wallace for their thoughtful comments and helpful suggestions in reviewing this Article. Any errors that remain are the Authors'.

the court has concluded that interpretive authority had not been clearly vested in the discretion of the agency. As of this Article's publication, the court has found such discretion to be clearly vested in one case. Notwithstanding the deference therefore warranted to the agency interpretation, the court still overturned the agency interpretation, concluding that the interpretation of the agency was irrational, illogical, or wholly unjustifiable.

The framework for analyzing judicial deference to agency interpretations in the absence of explicit delegation of authority has been widely studied and criticized at the federal level. Iowa's approach to this analysis tracks the federal framework to some degree, utilizing the legal fiction of imputed intention to delegate interpretive authority as the cornerstone for judicial deference. The Authors assert, however, that the Iowa approach should be amended to obligate the court to defer to an agency interpretation only when the enabling legislation has explicitly delegated interpretive authority to the agency. In all other instances, the court should independently evaluate the agency's interpretation, taking into consideration persuasive aspects of the interpretation, including, among other things, the agency's expertise, the formality of the process employed by the agency in issuing the interpretation, and the validity of the agency's reasoning. The Authors assert that this would be a more transparent, effective, and efficient use of the court's resources. Moreover, there are particular differences between federal and state agencies and courts that warrant a departure from the federal approach in Iowa.

TABLE OF CONTENTS

I. INTRODUCTION

In 1974, the Iowa legislature passed the Iowa Administrative Procedure Act, which became effective in 1975.[1] The Act, together with its 1998 amendments,[2] establishes that Iowa courts should defer to agency interpretations of law when the agency's enabling legislation explicitly delegates interpretive authority to the agency.[3] Courts are also instructed to defer to agency interpretations when the court has a "firm conviction" that the legislature intended to delegate interpretive authority for particular terms to the agency.[4] In *Renda v. Iowa Civil Rights Commission*, the Iowa Supreme Court established a framework for determining whether deference should be accorded to an agency's interpretation, explaining that the court's focus "must always involve an examination of the specific statutory language at issue, as well as the functions of and duties imposed on the agency."[5]

Since *Renda*, the Iowa Supreme Court has decided many cases that required an examination of whether interpretive authority had been clearly vested in an agency.[6] Following *Renda* and as of this Article's publication,

1. Act of May 29, 1974, ch. 1090, 1974 Iowa Acts 165 (codified as amended at IOWA CODE §§ 17A.1–.34 (2013)).

2. Act of May 19, 1998, ch. 1202, 1998 Iowa Acts 611 (codified as amended at IOWA CODE §§ 17A.1–.34).

3. *See* IOWA CODE § 17A.19(11)(c).

4. Renda v. Iowa Civil Rights Comm'n, 784 N.W.2d 8, 11 (Iowa 2010) (quoting ARTHUR E. BONFIELD, AMENDMENTS TO IOWA ADMINISTRATIVE PROCEDURE ACT (1998), CHAPTER 17A, CODE OF IOWA (HOUSE FILE 667 AS ADOPTED): REPORT ON SELECTED PROVISIONS TO IOWA STATE BAR ASSOCIATION AND IOWA STATE GOVERNMENT 63 (1998)).

5. *Renda*, 784 N.W.2d at 12.

6. *See, e.g.*, SZ Enters., LLC v. Iowa Utils. Bd., 850 N.W.2d 441, 452 (Iowa 2014) (declining to afford deference to the board's legal interpretations); Hawkeye Land Co. v. Iowa Utils. Bd., 847 N.W.2d 199, 209 (Iowa 2014) (concluding that the board "lacks interpretive authority"); Rent-A-Center, Inc., v. Iowa Civil Rights Comm'n, 843 N.W.2d 727, 730 (Iowa 2014) (affording no deference to administrative interpretations); Staff Mgmt. v. Jimenez, 839 N.W.2d 640, 648 (Iowa 2013) (concluding "the legislature has not clearly vested the agency with interpretive authority"); Iowa Dental Assoc. v. Iowa Ins. Div., 831 N.W.2d 138, 145 (Iowa 2013) (declining to give deference to the Iowa Insurance Division because the legislature specifically defined the terms at issue); Gartner v. Iowa Dep't of Pub. Health, 830 N.W.2d 335, 344 (Iowa 2013) (finding no authority for the agency to interpret statutory terms "because the[] terms [we]re not exclusively within the expertise of the Department"); Waldinger Corp. v. Mettler, 817 N.W.2d 1, 7 (Iowa 2012) ("[W]e are not persuaded that the legislature clearly vested in the commissioner interpretive authority . . . ."); NextEra Energy Res. v. Iowa Utils. Bd., 815 N.W.2d 30, 38 (Iowa 2012) (concluding "the general assembly did not delegate to the Board

the court has determined that interpretive authority has been clearly vested in an administrative agency in only one case.[7] Notwithstanding the deference therefore warranted to the agency interpretation in that case, the court nevertheless overturned the agency interpretation.[8] Moreover, in the other cases, the court concluded that interpretive authority had *not* been vested

interpretive power with the binding force of law"); Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 519 (Iowa 2012) (deciding a particular statutory term was not "a specialized phrase within the expertise of the commissioner"); Burton v. Hilltop Care Ctr., 813 N.W.2d 250, 261 (Iowa 2012) (finding that a "grant of rule-making authority does not give the commissioner authority to determine when portions of those laws are applicable); Westling v. Hormel Foods Corp., 810 N.W.2d 247, 251 (Iowa 2012) (finding no "basis for concluding that the legislature clearly vested the workers' compensation commissioner with authority to interpret the subjection at issue"); Evercom Sys., Inc. v. Iowa Utils. Bd., 805 N.W.2d 758, 763 (Iowa 2011) (noting the statute evidences a "clear legislative intent to vest in the Board the interpretation of" a statutory provision (quoting Office of Consumer Advocate v. Iowa Utils. Bd., 744 N.W.2d 640, 643 (Iowa 2008)) (internal quotation mark omitted)); Naumann v. Iowa Prop. Assessment Appeal Bd., 791 N.W.2d 258, 260 (Iowa 2010) (finding that a statute "does not give explicit authority to the" board to interpret a particular statute); Sherwin-Williams Co. v. Iowa Dep't of Revenue, 789 N.W.2d 417, 423–24 (Iowa 2010) ("[W]e do not think the legislature intended that the department have discretion to interpret—give meaning to—this [statutory] term."); Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 133 (Iowa 2010) ("[W]e are not convinced the legislature intended to vest the commissioner with the authority to interpret" the code section at issue); Andover Volunteer Fire Dep't v. Grinnell Mut. Reinsurance Co., 787 N.W.2d 75, 80 (Iowa 2010) (finding no "indication the legislature intended to grant" interpretive authority over a certain phrase to the workers' compensation commissioner); Xenia Rural Water Dist. v. Vegors, 786 N.W.2d 250, 253 (Iowa 2010) (noting "[t]here is no language . . . indicating a desire by the legislature to vest the [workers' compensation] commissioner with authority to interpret the subsections at issue"); Iowa Network Servs., Inc. v. Iowa Dep't of Revenue, 784 N.W.2d 772, 775 (Iowa 2010) (finding that the Iowa Department of Revenue has not been vested with authority by the legislature "to interpret a section of the utilities code"); Clay Cnty. v. Pub. Emp't Relations Bd., 784 N.W.2d 1, 4–5 (Iowa 2010) (finding "[t]he legislature has not given the board the explicit authority to interpret the PERA [Public Employment Relations Act]"); *see also* KFC Corp. v. Iowa Dep't of Revenue, 792 N.W.2d 308, 312 (Iowa 2010) (declining to examine whether the department was "entitled to deference in its interpretation of [an] Iowa Code section . . . because, even if deference were not afforded . . . [the department] correctly interpreted the applicable statutes").

7. *See Evercom*, 805 N.W.2d at 762–63.

8. *See id.* at 767. In another surprising decision, the court determined it was not necessary to "reach the issue of whether [the agency was] entitled to deference in its interpretation of Iowa Code section 422.33(1) because, even if deference were not afforded, . . . [the agency] correctly interpreted the applicable statutes." *KFC*, 792 N.W.2d at 312.

and that deference was therefore *not* warranted.[9] In the cases in which the court found no interpretive authority had been vested, it upheld—after independent examination—the agency interpretation approximately 50 percent of the time.[10]

9. *See supra* note 6 (listing cases in which the Iowa Supreme Court declined to afford deference to the administrative agency since *Renda v. Iowa Civil Rights Commission* and identifying the sole case, *Evercom Systems Inc. v. Iowa Utilities Board*, in which the court did defer); *see, e.g.*, *SZ Enters.*, 852 N.W.2d at 450–51. In *SZ Enterprises, LLC v. Iowa Utilities Board*, the court emphasized the difficulty of establishing that interpretive authority is clearly vested in an agency:

> We begin our analysis with a recognition that principles established in *Renda* suggest we should not give interpretive deference to the [agency] in this case. *Renda* states that as a general proposition, agencies are not given deference by this court to an interpretation of law without some clear indication that the general assembly intended this result. In addition, we noted in *Renda* and a number of other cases that where the general assembly provides an agency with a definition of legal terms in a statutory provision, the use of definitions is a significant factor weighing against an interpretation requiring deference. Finally, in *Renda*, we noted that the use of statutory terms that are not highly specialized, but are used in other sections of the Code, point in the direction of lack of deference.

852 N.W.2d at 450–51 (citations omitted).

10. The Iowa Supreme Court disagreed with agency interpretations in nine cases, agreed with the interpretations in eight cases, declined to address the issue in one case, and agreed with the interpretation without addressing whether the agency had legislative authority in one case. *Compare SZ Enters.*, 850 N.W.2d at 470 (declining to adopt the agency's interpretation), *Hawkeye Land*, 847 N.W.2d at 219 (same), *Iowa Dental*, 831 N.W.2d at 149 (same), *Gartner*, 830 N.W.22 354 (declining to follow the agency's interpretation because the statute was unconstitutional as applied), *Sherwin-Williams Co.*, 789 N.W.2d at 434 (finding the agency's interpretation "wholly unjustifiable"), *Deutmeyer*, 789 N.W.2d at 138 (same), *Andover Fire Dep't*, 787 N.W.2d at 87 (declining to follow the agency's interpretation), *Vegors*, 786 N.W.2d at 260 (same), *and Clay Cnty.*, 784 N.W.2d at 7 (same), *with Rent-A-Center*, 843 N.W.2d at 741 (agreeing with the Iowa Civil Rights Commission that it has a right to investigate and rectify violations of the Iowa Civil Rights Act), *Jimenez*, 839 N.W.2d at 649 (agreeing with the agency's interpretation of a statutory definition), *Mettler*, 817 N.W.2d at 10 (agreeing with the agency's interpretation), *NextEra*, 815 N.W.2d at 40 (same), *Neal*, 814 N.W.2d at 527 (same), *Westling*, 810 N.W.2d at 254 (same), *Naumann*, 791 N.W.2d at 264 (same), *and Iowa Network Servs.*, 784 N.W.2d at 776–77 (same); *see also Burton*, 813 N.W.2d at 264 (declining to review the agency's interpretation because the court was "unable to determine whether the commissioner's final decision was based on his legal conclusion . . . or a factual determination); *KFC*, 792 N.W.2d at 312 (declining to examine whether the department was "entitled to deference in its interpretation of [an] Iowa Code section . . . because, even if deference were not afforded . . . [the department]

Thus, in the absence of an explicit delegation of interpretive authority, the court typically engages in a lengthy and cumbersome analysis of whether to impute a legislative intention to delegate interpretive authority to the agency and therefore afford the agency deference—in most cases concluding that it does not.[11] This is an unnecessary waste of judicial resources because, even where the court determines that deference is warranted, it must engage in an independent analysis of the agency's determination. Moreover, the court could easily use some of the evidence now deemed to demonstrate what is characterized as an implicit, but likely fictional, delegation to support a conclusion in favor of the agency. Removing the fiction of delegation would enable the court to simply identify persuasive aspects of the agency decision rather than cloak those aspects as some indication that the legislature implicitly intended to delegate authority. This would remove a lengthy, perhaps unnecessary, and certainly burdensome preliminary component of the court's ultimate consideration of the substantive issue. It would also enhance the transparency of the court's process. Finally, there are reasons why eliminating consideration of implicit delegation is appropriate in a state-specific context.

This Article asserts that the Iowa Administrative Procedure Act should be amended to require a court to defer to agency interpretations only when the agency enabling legislation explicitly delegates interpretive authority. In all other instances, the court should independently consider the agency's interpretation, taking into account persuasive aspects of the interpretation, such as the agency's special expertise or the formality of proceedings in which the interpretation was rendered. However, rather than cloaking those persuasive aspects of the interpretation in the guise of imputed or implied intent to delegate authority, the court should simply be able to acknowledge them as indicia of a reasonable interpretation.

Part I of this Article considers the development of judicial deference to agency interpretations. Part II traces the development of judicial deference in Iowa, beginning with the Iowa Administrative Procedure Act and culminating in the Iowa Supreme Court's decision in *Renda*. Part III transitions to a consideration of potential alternatives to the Iowa procedure for determining deference. Part IV offers the Authors' recommendation that deference only be given in situations where the legislature has explicitly bestowed interpretive authority on an agency, supported with reasons why it is preferable in a state-specific context.

correctly interpreted the applicable statutes").

11. *See* cases cited *supra* note 6.

II. THE DEVELOPMENT OF JUDICIAL DEFERENCE TO AGENCIES

A. *Federal Development of Judicial Deference*

The granting of judicial deference to agency interpretations has a long, storied, and controversial history. Seminal cases such as *Skidmore v. Swift & Co.*[12] and *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[13] represent judicial attempts to clarify the circumstances in which deference is warranted or appropriate.[14] Notwithstanding these attempts, there has been a tremendous amount of criticism of not only the approaches to determine when deference is warranted, but also whether deference is appropriate altogether. This Part will trace federal attempts to clarify the understanding of judicial deference to agency interpretations, demonstrating the complexity of approaches. It is against this backdrop that Part III considers the unique approach to deference that Iowa has taken.

While the Supreme Court's decision in *Skidmore* has been recognized as the Court's first clear expression of a framework for determining whether judicial deference should be given to agency interpretations, cases prior to *Skidmore* illustrate that the Court would defer to certain agency determinations made pursuant to a specific legislative grant of authority.[15]

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

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

14. *See id.* at 838 ("The EPA's interpretation of the statute here represents a reasonable accommodation of manifestly competing interests and is entitled to deference."); *id.* at 844 ("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 . . . ."); *Skidmore*, 323 U.S. at 139 ("[T]he Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case.").

15. Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1239 (2007). In tracing the development of federal judicial deference, the authors explain:

> Judicial deference to agency interpretations of law predates any of *Skidmore*, *Chevron*, or *Mead*. In cases such as *AT&T v. United States* and *Atchison, Topeka & Santa Fe Railway v. Scarlett*, the Supreme Court instructed that reviewing courts should uphold regulations adopted pursuant to a specific grant of legislative power unless the promulgating agency exceeded the scope of its statutory authority. The same principle of controlling deference also applied where an agency exercised a specific authority grant through formal adjudication.

Id. (footnote omitted).

For example, in *Atchison, Topeka & Santa Fe Railway Co. v. Scarlett* and *AT&T v. United States*, the U.S. Supreme Court made clear "that, so long as the delegation was constitutionally valid, reviewing courts must uphold legislative regulations unless it was clear that the agency exceeded the scope of its rulemaking authority."[16]

In *Skidmore*, seven employees filed suit against Swift and Company packing plant to recover overtime pay.[17] The issue in *Skidmore* was whether employee waiting time should be considered overtime under the Fair Labor Standards Act.[18] The employees were paid a weekly salary for their daytime work; however, they were not paid for staying on company premises three to four nights per week to answer alarms.[19] The Court examined the degree of deference that should be afforded to the interpretation of the issue that was provided in an interpretive bulletin by the Administrator of Labor.[20]

The *Skidmore* Court acknowledged that judicial deference had been appropriate in prior cases, noting that it had "long given considerable and in some cases decisive weight to Treasury Decisions and to interpretative regulations of the Treasury and of other bodies that were not of adversary origin."[21] In remanding the case, the Court guided the lower court's analysis of the agency interpretation by providing the following test for deference:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to

16. Kristin E. Hickman, *The Need for* Mead*: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1568 (2006) (citing Atchison, Topeka & Santa Fe Ry. Co. v. Scarlett, 300 U.S. 471, 474 (1937); AT&T v. United States, 299 U.S. 232, 236–37 (1936)); *see also id.* at 1568 n.152 ("The same principle of controlling deference applied as well where an agency exercised a specific authority grant through formal-adjudication processes.").

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

18. *See id.* at 135–36.

19. *Id.* at 135.

20. *See id.* at 138–40.

21. *Id.* at 140.

control.[22]

Several scholars refer to *Skidmore* deference as a weak form of deference,[23] noting that "*Skidmore* carefully disclaims an administrative interpretation's power to 'control' the court's decision, but it also suggests that the interpretation should have 'weight' in some cases."[24] The *Skidmore* factors continued to control the analysis of federal deference to agency determinations until the Court's landmark decision in *Chevron*.[25]

In *Chevron*, the Court was asked to determine "whether [the] EPA's decision to allow States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single 'bubble' [wa]s based on a reasonable construction of the statutory term 'stationary source.'"[26] Under the Clean Air Act Amendments of 1977, Congress set requirements for states that had yet to reach "the national air quality standards established by the Environmental Protection Agency . . . [which] required these 'nonattainment' States to establish a permit program regulating 'new or modified major stationary sources' of air pollution."[27]

In addressing the agency's interpretation, the Court identified a two-part test for evaluating agency interpretations. The Court explained,

> 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.[28]

22. *Id.*

23. Hickman & Krueger, *supra* note 15, at 1241 & n.22.

24. *Id.* at 1240–41 (citing *Skidmore*, 323 U.S. at 140).

25. *See generally* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

26. *Id.* at 840.

27. *Id.*

28. *Id.* at 842–43 (footnotes omitted).

While *Chevron* is perhaps best known for articulating this two-part test, it "is more significant but less often appreciated for expanding the applicability of the strong form of judicial deference."[29] Moreover, *Chevron* is significant insofar as it warrants "mandatory, controlling deference not only where Congress specifically calls for regulatory elaboration or formal adjudication, but also where Congress *implicitly delegates interpretive power* through the combination of statutory ambiguity and administrative responsibility."[30] This form of deference was deemed appropriate because of the agency's special expertise as compared to the limited expertise of federal judges, as well as the political accountability of agencies.[31]

However, *Chevron* was not without its critics in the years following the decision, as several aspects of the decision gave rise to uncertainty. As one argument explained,

> *Chevron* did not make clear when exactly courts should presume that Congress delegated interpretive authority to the agency, or concomitantly, when *Chevron*'s framework of controlling deference was appropriate. Some, most notably Justice Antonin Scalia, read *Chevron* broadly to govern any authoritative administrative interpretation of a statute the agency was charged with implementing. By this view, *Chevron*'s scope was vast, completely replacing the pre-*Chevron* multifactor approach—including *Skidmore*. Others, however, attempted to reconcile *Chevron* with the pre-*Chevron* case law. One group, including now-Justice Stephen Breyer, contended that the pre-*Chevron* factors remained relevant as part of *Chevron* analysis (or vice

29. Hickman & Krueger, *supra* note 15, at 1242; *see also* Jim Rossi, *Respecting Deference: Conceptualizing* Skidmore *Within the Architecture of* Chevron, 42 WM. & MARY L. REV. 1105, 1108 (2001) (recognizing *Chevron* as "a case commonly associated with strong deference to agency interpretations of law").

30. Hickman & Krueger, *supra* note 15, at 1242 (emphasis added) (citing *Chevron*, 467 U.S. at 844).

31. *See* Rossi, *supra* note 29, at 1114–15 ("An appreciation of agency expertise, the limits of the specialized knowledge of judges, and political accountability are at the normative core of Justice Stevens's rationale for deference to the agency in *Chevron*. 'Judges are not experts in the field,' Justice Stevens wrote in *Chevron*, and thus in interpreting statutory gaps courts should 'rely upon the incumbent administration's views of wise policy to inform its judgments. . . .' Implicit in Justice Stevens's accountability rationale is the recognition that agencies are institutionally superior to courts in their capacity for making accountable political decisions against the backdrop of ambiguous statutory terms. Agency legal interpretations will be subject to political oversight and thus are accountable to presidential politics, as well as congressional oversight." (footnotes omitted)).

> versa). Another camp advocated separate spheres for *Chevron* and *Skidmore* review. Under these conceptions, *Skidmore* retained some vitality, although just how much was not precisely clear.[32]

It was also unclear whether broad *Chevron* deference was appropriate for agency determinations that had been rendered in informal processes.[33] The Court effectively answered this question in *Christensen v. Harris County*. In *Christensen*, the Court evaluated whether, "[u]nder the Fair Labor Standards Act of 1938 (FLSA) . . . , States and their political subdivisions may compensate their employees for overtime by granting them compensatory time or 'comp time,' which entitles them to take time off work with full pay."[34] After seeking the advice and approval of the U.S. Department of Labor's Wage and Hour Division,[35] "Harris County adopted a policy requiring its employees to schedule time off in order to reduce the amount of accrued compensatory time"[36] because employers are obligated to pay cash for unused compensatory time in certain circumstances.[37]

The Court refused to afford the agency determination *Chevron* deference and instead extended the weaker *Skidmore* deference to the informal interpretation.[38] The Court explained,

> [W]e confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-

32. Hickman & Krueger, *supra* note 15, at 1242–43 (footnotes omitted).

33. *See* Rossi, *supra* note 29, at 1118–19 ("In the spirit of *Skidmore*, various cases decided since *Chevron* refused to extend *Chevron* deference to agency interpretations made in the context of informal agency decisions or statements, such as appellate briefs, manuals, and opinion letters; but, before *Christensen* these cases did not clearly address *Chevron*'s appropriate scope. Among scholars, Professor Robert Anthony has been the strongest proponent of the view that *Chevron* deference should not apply to agency interpretations adopted in informal decision-making procedures. As he argues, 'Where the format is an informal one, it ordinarily does not carry the force of law, and a reviewing court is not bound by the agency interpretation, though it should give special consideration to the agency opinion.' The key, according to Professor Anthony, is the delegation inquiry: 'whether Congress intended an interpretation in this format to have the force of law.' If so, *Chevron* applies; if not, a court should only afford the agency legal interpretation *Skidmore* consideration." (footnotes omitted)).

34. *See* Christensen v. Harris Cnty., 529 U.S. 576, 578 (2000) (citing 29 U.S.C. § 207(*o*) (1994 ed. & Supp. III)).

35. *Id.* at 580–81.

36. *Id.* at 578.

37. *Id.* (citing 29 U.S.C. § 207(*o*)(3)–(4)).

38. *Id.* at 587.

> comment rulemaking. Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.[39]

While this limited statement is given in support of the Court's decision to extend *Skidmore* rather than *Chevron* deference, Professor Rossi more fully examines three reasons that underscore the Court's determination. The first is that, as indicated by the Court, such statements

> "lack the force of law," presumably in the sense that Congress did not intend the informal mode of statement that the agency had chosen to be binding on courts or regulatees. By contrast, other more formal modes of agency decision, such as adjudication or rulemaking, are binding to the extent that Congress has formally delegated to the agency the authority to elucidate specific statutory provisions by these modes.[40]

The second reason is also reflected in the Court's brief analysis when it noted that "the interpretation was 'not one arrived at after' the type of vetting and deliberation afforded by other procedures."[41] For "more formal procedures, the Administrative Procedure Act (APA) imposes procedural requirements designed to enhance public participation and build an explanatory record for the agency's decision."[42]

Finally, Rossi asserts that the decision may have been impacted by separation of powers concerns.[43] He notes,

> Arguably, in *Christensen*, as in *Skidmore*, the Court exercises traditional Article III powers, since the agency's interpretation was before the Court in the context of review of an employment dispute between two nonagency parties, not in a context where a federal agency itself was exercising its regulatory authority. When a court is exercising traditional Article III powers in adjudicating a private dispute before it, as in

39. *Id.*

40. Rossi, *supra* note 29, at 1122 (footnote omitted); *see also id.* (noting that "[a]t least for the majority, the scope of *Chevron* deference is thus a function of the agency's delegated powers, not solely a function of silence or ambiguity in a statute").

41. *Id.* (quoting *Christensen*, 529 U.S. at 587).

42. *Id.* at 1123 (citing 5 U.S.C. § 553(c) (1994)); *see also id.* ("Where the agency's interpretation is adopted without such public participation and with no guarantee of an explanatory record, heightened judicial scrutiny of the agency's statutory interpretation enhances the legitimacy of the agency's action.").

43. *Id.*

> *Christensen*, for separation of powers reasons interpretative rules and policy statements might require independent judicial judgment.[44]

Thus, *Christensen* demonstrated the return to the weaker form of *Skidmore* deference for informal agency determinations.[45]

In the term following the *Christensen* decision, the Court revisited the issue of judicial deference in *United States v. Mead Corp*.[46] In *Mead*, the Court was presented with the question of "whether a tariff classification ruling by the United States Customs Service deserves judicial deference."[47] The Court cited *Chevron*, noting "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer."[48] Mandatory deference was also acknowledged as appropriate when it is

> apparent from 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.[49]

Reinforcing the *Christensen* theme that using formal administrative procedure to arrive at an agency interpretation may warrant heightened judicial deference,[50] the Court nonetheless concluded that "*Chevron* deference was inapposite for the tariff rulings because the statutory scheme and informality of the letters did not suggest that Congress would have intended the letters to hold the force of law."[51]

---

44. *Id.* at 1123–24 (footnote omitted).

45. *See Christensen*, 529 U.S. at 584 ("[I]nterpretations contained in formats such as opinion letters are 'entitled to respect' under our decision in *Skidmore* . . . ." (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944))).

46. *See* United States v. Mead Corp., 533 U.S. 218, 221 (2001).

47. *Id.*

48. *Id.* at 227–28 (quoting Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984)).

49. *Id.* at 229 (quoting *Chevron*, 467 U.S. at 845).

50. Hickman & Krueger, *supra* note 15, at 1246 ("As in *Christensen*, the *Mead* Court contended that agency positions reached through relatively formal procedures qualified for *Chevron*'s approach, since it is more plausible that Congress would expect the agency's action to carry the force of law when the agency engages in a deliberative, interpretive process." (citations omitted)).

51. *Id.* (citing *Mead*, 533 U.S. at 231–34).

Thus, while *Christensen* and *Mead* seem to clarify that *Chevron* deference is not appropriate in instances in which the agency interpretation or action is arrived at through informal processes, the decisions do not make the principles of judicial deference entirely clear.[52]

> Some have described *Mead*'s inquiry as a "step zero" in the overall analytical framework, coming before the application of either *Chevron*'s two steps or *Skidmore*'s multiple factors. Others view *Mead* as "sort of a *Chevron* step one-and-one-half," relevant only if the reviewing court first concludes that the statute's meaning is ambiguous.[53]

Federal case law thus illustrates both the complexity and lack of uniformity in approaches to the framework for discerning judicial deference. This Article now turns to both substantive and procedural criticisms of the approaches.

B. *Criticisms of the Judicial Deference Doctrine*

The foregoing demonstrates that the underlying rationale for judicial deference to agency interpretations is based on several normative considerations.[54] First, judicial deference acknowledges that agencies typically have some special expertise within their field that the court lacks.[55] Moreover, deference is deemed warranted because of the political accountability of agencies.[56] "[A]gencies are institutionally superior to courts in their capacity for making accountable political decisions against the backdrop of ambiguous statutory terms. Agency legal interpretations will be subject to political oversight and thus are accountable to presidential

52. *See id.*

53. *Id.* at 1247 (footnote omitted). The authors conclude, "[b]oth conceptualizations are technically correct. *Mead*'s two steps provide a threshold inquiry to determine which of two potential evaluative standards, *Chevron* or *Skidmore*, applies to a given case." *Id.*

54. Rossi, *supra* note 29, at 1114 ("An appreciation of agency expertise, the limits of the specialized knowledge of judges, and political accountability are at the normative core of Justice Stevens's rationale for deference to the agency in *Chevron*.").

55. *Id.* ("'Judges are not experts in the field,' Justice Stevens wrote in *Chevron*, and thus in interpreting statutory gaps courts should 'rely upon the incumbent administration's views of wise policy to inform its judgments.'" (quoting Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984))); *see also* Skidmore v. Swift & Co., 323 U.S. 134, 139 (1944) ("[T]he Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case.").

56. Rossi, *supra* note 29, at 1115.

politics, as well as congressional oversight."[57]

The approaches to judicial deference, however, have been criticized because of those normative considerations[58] and on the basis of complicated and inconsistent application.[59] With regard to the former, "[c]ritics argue that by insulating agencies from judicial scrutiny, '*Chevron* creates an anti-majoritarian force within agencies and allows them to move policy away from the actual policy intended by Congress.'"[60] The doctrine has also been criticized on separation of powers principles:

> Article III of the Constitution requires the judiciary to make independent interpretations of federal law, and a "fundamental principle of Constitutional law" is that it is "emphatically, the province and duty of the judicial department, to say what the law is." Thus, according to critics, *Chevron* deprives the judiciary of interpretive duties assigned to it under a separation of powers scheme. Consequently, *Chevron* is seen as shifting too much power from the courts to the executive branch. Furthermore, it moves an essential legislative function—the ability to make policy through the power to interpret statutes—"squarely into the President's domain."[61]

In terms of application, *Skidmore* has been criticized as setting forth an indeterminate totality of the circumstances test that provides little guidance to lower courts.[62] The *Christensen* and *Mead* frameworks have also been questioned. In *Christensen*, Justice Antonin Scalia's concurrence criticized a return to the *Skidmore*-type analysis and emphasized, "*Skidmore* deference

57. *Id.* (footnote omitted).

58. *See* Patrick M. Garry, *Accommodating the Administrative State: The Interrelationship Between the* Chevron *and Nondelegation Doctrines*, 38 ARIZ. ST. L.J. 921, 945 (2006).

59. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 241 (2001) (Scalia, J., dissenting).

60. Garry, *supra* note 58 (quoting J.B. Ruhl, *Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-Up Call for Legal Reductionism and the Modern Administrative State*, 45 DUKE L.J. 849, 925 (1996)).

61. *Id.* at 946–47 (footnotes omitted).

62. For example, Justice Scalia criticized the return to a *Skidmore*-type inquiry in his dissent in *Mead*. *See Mead*, 533 U.S. at 241 (Scalia, J., dissenting). Scalia wrote that the Court's decision in *Mead* "largely replaced *Chevron* . . . with that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th'ol' 'totality of the circumstances' test." *Id.* Scalia further warned, "It is hard to know what the lower courts are to make of today's guidance." *Id.* at 246.

to authoritative agency views is an anachronism."[63] In *Mead*, Justice Scalia dissented and predicted that dire consequences would flow from the Court's decision, asserting "[w]hat was previously a general presumption of authority in agencies to resolve ambiguity in the statutes they have been authorized to enforce has been changed to a presumption of no such authority, which must be overcome by affirmative legislative intent to the contrary."[64] He also predicted that the courts "will be sorting out the consequences of the *Mead* doctrine, which has today replaced the *Chevron* doctrine for years to come."[65]

Perhaps the most relevant criticism to the inquiry, however, is the legal fiction of legislative delegation—in other words, the process by which the court *imputes* an intention by the legislature to delegate interpretive authority to the agency. Scholars have referred to this fiction as "unsupportable."[66] One scholar observed, "[t]he law governing judicial deference to agency statutory constructions is a ghastly brew of improbable fictions and proceduralism."[67] Some have even classified the Court's attempt to discern imputed or implied interpretive authority as fraudulent:

> Although Congress has broad power to decide what kind of judicial review should apply to what kind of administrative decision, Congress so rarely discloses (or, perhaps, even has) a view on this subject as to make a search for legislative intent chimerical and a conclusion regarding that intent fraudulent in the mine run of cases.[68]

The criticisms of the fiction of legislative intent to delegate have been widely explored,[69] but this Article will focus on three. The following

63. Christensen v. Harris Cnty., 529 U.S. 576, 589 (2000) (Scalia, J., concurring).

64. *Mead*, 533 U.S. at 239 (Scalia, J., dissenting).

65. *Id*. (citation omitted).

66. Mark Seidenfeld, Chevron*'s Foundation*, 86 NOTRE DAME L. REV. 273, 311 (2011) ("Grounding *Chevron* in congressional intent to delegate interpretive primacy to agencies is an *unsupportable* fiction that distracts attention from judicial responsibility for the *Chevron* doctrine." (second emphasis added)).

67. Richard W. Murphy, *Judicial Deference, Agency Commitment, and Force of Law*, 66 OHIO ST. L.J. 1013, 1013 (2005).

68. David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 203 (2001).

69. *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 613–14 (1996) ("For more than a decade, *Chevron* deference has preoccupied administrative law scholarship in a way few issues ever have. Exhaustive academic commentary has scrutinized *Chevron*'s

criticisms were explored more fully by Professor Bressman, who defends the legal fiction of delegation.[70] This Article's discussion of those criticisms tracks, to a degree, Bressman's framework. This Article first focuses on the criticisms and then responds to Bressman's arguments, particularly as they impact the legislative fiction at the state level. The criticisms of the fiction are as follows: (1) congressional silence should not be viewed as an intention to delegate authority,[71] (2) because Congress is capable of explicitly delegating authority, obligating it to do so in order to warrant judicial deference is not impractical,[72] and (3) a judicial theory of imputed delegation "is inconsistent with the Administrative Procedure Act."[73]

The first criticism of imputing an intention to delegate interpretive authority is that silence should not be viewed as an intention to delegate.[74] Professor Merrill has argued that "in order to establish that Congress has mandated the practice of deference, the Court should be able to point to more than a debatable inference from congressional inaction."[75] Professor Beermann similarly asserts, "The problem with the first purported basis for the *Chevron* doctrine, that statutory ambiguity indicates congressional intent to delegate interpretive authority to the administering agency, is that in most circumstances it is false, a presumption that might be charitably called a legal fiction."[76] He concludes,

> except in those situations in which Congress explicitly delegates interpretive authority to an agency, or writes a provision that is so broad that it facially represents a delegation of policymaking authority to an agency, there is little reason to believe that ambiguity signals congressional intent to delegate interpretive authority to the

legitimacy, and explored the seemingly innumerable questions that arise from its application." (footnote omitted)).

70. *See generally* Lisa Schultz Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 VA. L. REV. 2009, 2025–30 (2011).

71. *See id.* at 2025.

72. *See id.* at 2026.

73. *See id.* at 2027.

74. *See id.* at 2025.

75. *Id.* at 2026 (quoting Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 995 (1992)) (internal quotation marks omitted).

76. Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 796 (2010) (citing Lisa Schultz Bressman, Chevron*'s Mistake*, 58 DUKE L.J. 549, 562 (2009)).

administering agency and not to the reviewing court.[77]

An additional criticism of imputed delegation asserts that because Congress is capable of explicitly delegating interpretive authority, it makes little sense to imply delegation in the absence of explicit language.[78] As Professor Duffy has observed, "Congress has no trouble writing express delegations to agencies when it wants."[79] He concludes, as this Article asserts, "Indeed, the ubiquity of express delegations raises the question: Is an implicit delegation theory even necessary to account for *Chevron*? The answer is no."[80]

A final criticism of the legal fiction of delegation relevant to this Article's proposal is its inconsistency with the APA.[81] Professor Merrill observes that because the APA "directs reviewing courts to 'decide *all* relevant questions of law'" it "suggests that Congress contemplated courts would always apply independent judgment on questions of law, reserving deference for administrative findings of fact or determinations of policy."[82] Professor Sunstein has observed, "Congress's fear of agency bias or even abdication makes it most doubtful that the legislature has sought deference to the agency under all circumstances."[83] "Professor Jack Beermann picked up where Sunstein left off in addressing Congress's perception of agencies, arguing that 'Congress does not usually view agencies as trusted partners, but rather views them as competing entities that need to be kept in line.'"[84] Duffy explains,

> Often overlooked, Section 558(b) of the APA forbids agencies from issuing "substantive rules . . . except [(1)] within jurisdiction delegated to the agency and [(2)] as authorized by law." The implicit delegation

77. *Id.* at 797–98 (footnotes omitted).

78. Bressman, *supra* note 70, at 2026. Bressman observes that "[b]ecause Congress knows how to write explicit delegations of regulatory authority, it is unlikely to make implicit delegations of interpretive authority." *Id.*

79. John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 199 (1998).

80. *Id.*

81. *See* Bressman, *supra* note 70, at 2027.

82. Merrill, *supra* note 75.

83. Bressman, *supra* note 70, at 2028 (quoting Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2090–91 (1990)) (internal quotation marks omitted).

84. Bressman, *supra* note 70, at 2030 (quoting Beermann, *supra* note 76, at 799) (internal quotation marks omitted).

> view of *Chevron* violates this provision because it allows an agency to assert a "de facto rule-making power" so long as only the first condition is satisfied—the agency has a jurisdiction over the statute.[85]

In defending the legal fiction of delegation, Professor Bressman explains,

> The fiction arises not because the Court does not *actually* inquire into whether Congress intended to delegate interpretive authority to an agency, as scholars believe. Rather, it arises because the Court does not inquire into whether Congress *actually* intended to delegate interpretive authority to an agency. The phrasing is very similar, but the effect is quite different. To determine whether Congress intended to delegate, the Court infers legislative intent from the available sources, including statutory text, statutory context, and legislative history. Thus, it employs a fictionalized notion of legislative intent.[86]

While this may justify what the Court is doing, it does not necessarily justify why the Court is doing it or whether the Court should be doing it. The Authors assert that nothing prevents a court from considering the sources noted by Bressman to evaluate the persuasiveness of the agency interpretation. The Authors merely assert that this analysis of the interpretation should be transparent, not cloaked as some search for delegated authority that warrants deference. While Bressman asserts that "the fiction of congressional delegation ensures judicial consideration of Congress's role in lawmaking, consistent with separation of powers,"[87] the Authors are not convinced this is the case. For example, Professors Barron and now-Justice Elena Kagan have argued,

> [S]eparation-of-powers law usually neither prohibits nor requires *Chevron* deference. Indeed, this law fails to suggest even a tiebreaking principle in the event of congressional silence, given the equally plausible (or implausible) constitutional claims made on both sides of the deference question. All the constitutional structure suggests is that Congress has control over the allocation of authority to resolve statutory ambiguity. But if that is so, the appeal to constitutional norms is a strategy of infinite regress, as the failure of Congress to exercise its power forces the Court to look to constitutional principles, which then

85. Duffy, *supra* note 79, at 198 (alterations in original) (footnotes omitted).

86. Bressman, *supra* note 70, at 2046.

87. *Id.* at 2049 (citing Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1790–91 (2007)).

merely point back to Congress.[88]

Barron and Kagan assert, "The only workable approach is the approach that *Chevron* took in the beginning: to fill in legislative silence about judicial review by making policy judgments based on institutional attributes, with Congress then free to overrule these conclusions."[89] Recognizing that the *Chevron* Court acknowledged delegation as a rationale for deference, the authors note that the Court "stressed more heavily the virtues of placing interpretive decisions in the hands of accountable and knowledgeable administrators."[90] They conclude that "[w]hen Congress has not spoken to the allocation of authority between courts and agencies, the choice inevitably falls to courts, and courts can do no better than assess how and when different institutions promote accountable and considered administrative governance."[91]

Further, Barron and Kagan argue that a court's determination of deference should turn on the entity within the agency that made the decision.[92] "Under this approach, *Chevron*'s question of institutional choice (should a judge or agency exercise interpretive power in areas of statutory ambiguity?) would turn on a question of institutional design (to whom has

88. Barron & Kagan, *supra* note 68, at 222 (footnote omitted); *see also id.* at 215 ("If *Chevron* arises from the Constitution because courts must refrain from 'policymaking,' or if, conversely, *Chevron* violates the Constitution because courts must possess dispositive power over 'legal interpretation' (the authority 'to say what the law is'), then Congress could have nothing to say about *Chevron* deference one way or the other. But both these arguments are fallacious. The functions of policymaking and legal interpretation in the context of statutory ambiguity (the only context in which *Chevron* operates) are so intertwined as to prevent any strict constitutional assignment of the one to agencies and the other to courts. And even to the extent that the Constitution dictates some separation of these functions, once Congress has designated either the courts or an agency to resolve statutory ambiguity, other constitutional interpreters should assume, if only by virtue of the doctrine of constitutional avoidance, that the resulting scheme involves the exercise of appropriate authority. In focusing on legislative intent, *Mead* thus clears away some constitutional underbrush associated with the *Chevron* doctrine and places Congress in its rightful position of control." (footnotes omitted)).

89. *Id.* at 223.

90. *Id.*

91. *Id.* at 224; *see also id.* at 224 n.84 ("The APA's provision on judicial review . . . fairly invites, though does not require, such policy-based analysis. The very open-endedness of this provision suggests that, in the absence of an organic statute to the contrary, courts should set the level of deference in accordance with common law methods, which (as the examples in the text suggest) may include consideration of comparative institutional attributes and their relation to interpretation.").

92. *Id.* at 235.

the agency assigned decision-making functions?)."[93]

Justice Stephen Breyer made the following observation about imputed intent to delegate interpretive authority:

> For the most part courts have used "legislative intent to delegate the law-interpreting function" as a kind of legal fiction. They have looked to practical features of the particular circumstance to decide whether it "makes sense," in terms of the need for fair and efficient administration of that statute in light of its substantive purpose, to imply a congressional intent that courts defer to the agency's interpretation.[94]

Barron and Kagan observe that when the Court evaluates formality of decisionmaking as indicative of intent, or when the Court "asks whether the agency interpretation 'bespeak[s] . . . legislative type of activity,'"[95] it is really "making its own determination of when agencies should be 'assume[d] generally' to make better interpretive decisions than can courts."[96] The authors explain,

> Perhaps the Court attributes its policy judgments to Congress to emphasize that Congress can reverse the decision. Perhaps the Court does so to emphasize the "judicial" nature of what it is doing. Perhaps, and least generously understood, the Court does so to cloak judicial aggrandizement; it may be no coincidence that when ceding power in *Chevron*, the Court spoke the language of policy, whereas when reclaiming power in *Mead*, the Court abandoned this language. The explanation, in the end, is of no great importance. What matters is that the Court's rhetoric not becloud the essential nature of its judgment, and that this judgment not escape evaluation on its actual, policy-based

93. *Id.* at 235–36 ("The agency would wrest primary interpretive authority from the courts if but only if a particular agency official—the official Congress named in the relevant delegation—personally assumed responsibility for the decision prior to issuance. The courts would retain primary interpretive authority (subject only to *Skidmore*-style deference) if, alternatively, this named person passed her decision-making authority to lower-level officials. In short, decisions that statutory delegatees make their own would receive *Chevron* deference, and decisions they delegate would not.").

94. *Id.* at 224 n.85 (quoting Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986)).

95. *Id.* at 225 (alterations in original) (quoting United States v. Mead Corp., 533 U.S. 218, 232 (2001)).

96. *Id.* (alteration in original) (quoting *Mead*, 533 U.S. at 230).

terms.[97]

This Article asserts that, in the absence of explicit delegation, courts should simply evaluate the agency interpretation independently, giving weight to institutional competence where warranted. The Authors argue that such an approach, while disregarding the fiction of imputed delegation, maintains the more important rationale advanced in *Chevron*: agency expertise. The Court in *Chevron* noted that "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."[98] The Authors question why, particularly in the state setting, the permissibility of the interpretation must be evaluated based on delegation, rather than simply the persuasiveness of the agency's interpretation. This could certainly hinge on the expertise of the agency, the formality of the process,[99] or the institutional competence of the decisionmaker.[100] The Authors would simply make those substantive determinations explicit in the state setting.

This suggested approach also comports, to a large degree, with the deference afforded under *Skidmore*. The *Skidmore* Court specifically reinforced this notion, indicating that

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, *while not controlling upon the courts by reason of their authority*, do constitute a body of experience and informed judgment to which courts and litigants *may properly resort for guidance*. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, *if lacking power to control*.[101]

97. *Id.*

98. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) (emphasis added).

99. Barron & Kagan, *supra* note 68, at 219–20 ("Nor does it aid in the effort to determine congressional intent respecting *Chevron* deference to ask, as the *Mead* Court did, whether the agency action possesses the attributes of proceduralism and generality. . . . But more significant, neither procedural formality nor generality has any apparent relevance to the question of actual (as opposed to fictive) legislative intent.").

100. *See id.* at 223.

101. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (emphasis added).

Thus, the search for legislative intention to delegate interpretive authority is a fiction. Indeed, in most instances, rather than looking for indications that the legislature implicitly intended to delegate authority, courts can more appropriately be described as looking for reasons to impute such an intention. The Authors therefore assert that a complicated[102] and illusory[103] search for implied or imputed legislative intent to delegate is an inefficient[104] and ineffective use of courts' time. While there are legitimate reasons to find an agency's determination persuasive, including agency expertise in certain instances,[105] the Authors believe that a more efficient and transparent analysis would label these as indications that the interpretation was correct and proper, rather than as evidence that the legislature implicitly intended to delegate or as evidence that such an intention should be imputed to the legislature. The Article now turns to the approach that Iowa has taken, which rests, in part, on the legal fiction of

102. *See* Hawkeye Land Co. v. Iowa Utils. Bd., 847 N.W.2d 199, 208 (Iowa 2014) (noting that "caselaw analyzing whether [the agency] has interpretive authority illustrates that this issue is 'not conducive to the development of bright-line rules'").

103. Duffy, *supra* note 79 (questioning whether "an implicit delegation theory [is] even necessary to account for *Chevron*" and asserting that "[t]he answer is no").

104. Adrian Vermeule refers to the Court's analysis of what form of deference to apply to an agency interpretation as the "predecision," noting: "The consequence is that what we might call the 'predecision'—the analysis, under *Mead*, of whether the advisory opinion receives *Chevron* deference—is far more elaborate than the ultimate statutory decision itself." Adrian Vermeule, *Introduction:* Mead *in the Trenches*, 71 GEO. WASH. L. REV. 347, 350 (2003).

> The point . . . is that resolving that uncertainty produces highly inefficient meta-litigation that precedes and in some respects hampers, rather than contributes to, the resolution of cases.
>
> The costs of the elaborate predecision required by *Mead* will be highest whenever the difference between *Chevron* deference and *Skidmore* deference will make no difference to the resolution of the ultimate statutory question.

Id. at 350–51.

105. *See* Aaron-Andrew P. Bruhl, *Hierarchically Variable Deference to Agency Interpretations*, 89 NOTRE DAME L. REV. 727, 738 (2013) ("In short, to the extent that doctrines of judicial deference are justified by legislative intent, that intent is a highly generalized and implicit one. Yet imputing to Congress the intent to have courts defer to agencies is defensible, for it is often sensible policy to defer. And it is sensible because of various institutional features of agencies, such as the fact that agencies possess expertise, promote national uniformity, and are more politically responsive than courts. Because of those and other institutional advantages of agencies, it makes sense that Congress would generally want agencies—and not courts—to have the authority to elaborate the details of regulatory schemes." (footnotes omitted)).

delegation.

III. IOWA'S APPROACH TO JUDICIAL DEFERENCE

The Iowa approach to judicial deference to agency interpretations has been codified in the Iowa Administrative Procedure Act (IAPA).[106] Iowa Code Section 17A.19(10) is a provision that was "calculated to ensure that judicial review is an effective check on illegal agency action."[107] That provision provides, in relevant part:

> The court may affirm the agency action or remand to the agency for further proceedings. The court shall reverse, modify, or grant other appropriate relief from agency action, equitable or legal and including declaratory relief, if it determines that substantial rights of the person seeking judicial relief have been prejudiced because the agency action is any of the following:
>
> . . . .
>
> *c*. Based upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency.
>
> . . . .
>
> *l*. Based upon an irrational, illogical, or wholly unjustifiable interpretation of a provision of law whose interpretation has clearly been vested by a provision of law in the discretion of the agency.[108]

This Section has been referred to "as 'a modified version of the Chevron doctrine.'"[109] Notably, the Section does not direct the court to

106. *See generally* IOWA CODE §§ 17A.1–.34 (2013). For a general discussion of the development of the IAPA, see Arthur Earl Bonfield, *The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, The Rulemaking Process*, 60 IOWA L. REV. 731, 732–54 (1975).

107. Anuradha Vaitheswaran & Thomas A. Mayes, *The Role of Deference in Judicial Review of Agency Action: A Comparison of Federal Law, Uniform State Acts, and the Iowa APA*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 402, 434 (2007) (quoting BONFIELD, *supra* note 4, at 59) (internal quotation marks omitted). The framework used for describing Iowa's approach to judicial deference in this Article parallels, to a certain extent, the framework employed by Vaitheswaran & Mayes.

108. IOWA CODE § 17A.19(10)(c), (*l*) (italics removed).

109. Vaitheswaran & Mayes, *supra* note 107, at 435 (quoting Pamela D. Griebel, New Standards of Judicial Review Under House File 667, Presentation to a Continuing

consider whether the legislature has explicitly or implicitly deferred to an agency, but rather whether authority has "clearly been vested" in the discretion of the agency.[110] In addressing this distinction, Judge Anuradha Vaitheswaran and Thomas A. Mayes explain,

> Professor Bonfield observes that "clearly" is a much less "restrictive" threshold than "explicitly." In determining whether a provision of law "clearly" commits a matter to an agency's discretion, he offers the following guidance:
>
> > This means that the reviewing court, using its own independent judgment and without any required deference to the agency's view, must have a firm conviction from reviewing the precise language of the statute, its context, the purpose of the statute, and the practical considerations involved, that the legislature actually intended (or would have intended had it thought about the question) to delegate to the agency interpretive power with the binding force of law over the elaboration of the provision in question.[111]

Section 17A.19(10), which must be read in conjunction with Section 17A.19(11), allows the court to "affirm [an] agency action or remand to the agency for further proceedings." [112] Section 17A.19(11) indicates:

> In making the determinations required by subsection 10, paragraphs "*a*" through "*n*", the court shall do all of the following:
>
> a. Shall not give any deference to the view of the agency with respect to whether particular matters have been vested by a provision of law in the discretion of the agency.
>
> b. Should not give any deference to the view of the agency with respect to particular matters that have not been vested by a provision of law in the discretion of the agency.
>
> c. Shall give appropriate deference to the view of the agency with

Legal Education Event Sponsored by the Legal Services Corporation of Iowa, at 19 (Oct. 22, 1999)).

110. *See* IOWA CODE § 17A.19(10)(c), (*l*); *see also* Vaitheswaran & Mayes, *supra* note 107, at 435 (citing BONFIELD, *supra* note 4).

111. Vaitheswaran & Mayes, *supra* note 107, at 435–36 (quoting BONFIELD, *supra* note 4) (footnote omitted).

112. IOWA CODE § 17A.19(10).

> respect to particular matters that have been vested by a provision of law in the discretion of the agency.[113]

Paragraph (a) confirms that the court *shall not* give deference to an agency's determination of the extent of its own authority.[114] This Section is consistent with Iowa law prior to the codification of the IAPA.[115] Professor Bonfield explains three bases for such a limitation:

> (1) the extent of an agency's power is a "purely legal issue that was determined finally by the General Assembly and therefore that was not delegated to the judgment of the agency;" (2) the interpretation of statutes does not require any special agency expertise; and (3) deferring to an agency's determination of its own powers would "give deference to the view of a self interested party . . . and lessen the effectiveness of the courts as a check on the exercise by agencies of unauthorized powers."[116]

Paragraph (b) notes that a court *should not* give deference to agency determinations in circumstances in which the court has not found the agency to be vested with discretion.[117] Professor Bonfield clarifies that "the 'should not' language of paragraph (b) clearly permits a reviewing court in some rare cases to voluntarily give whatever weight it thinks appropriate to the agency view, even though it generally urges courts to give no deference to the agency's view of the matter because the matter was not vested in agency discretion."[118] Bonfield explains that "[t]here will inevitably be some situations in which the matters being reviewed that have not been vested in agency discretion are highly technical, requiring special expertness for adequate comprehension, and the agency has that expertness and the reviewing court does not."[119]

113. *Id.* § 17A.19(11).

114. *Id.* § 17A.19(11)(a).

115. *See* Vaitheswaran & Mayes, *supra* note 107, at 428 (noting that "[p]aragraph 'a', stating an agency's view of its own power 'shall not' be granted deference, codifies the generally accepted prior rule in Iowa" (citing Griebel, *supra* note 109, at 16)).

116. *Id.* (alteration in original) (footnote omitted) (quoting BONFIELD, *supra* note 4, at 71).

117. IOWA CODE § 17A.19(11)(b).

118. BONFIELD, *supra* note 4, at 72.

119. Vaitheswaran & Mayes, *supra* note 107, at 429 (quoting BONFIELD, *supra* note 4, at 72).

Paragraph (c) similarly codifies prior law[120] and requires the court to defer to agency views on matters over which the agency has been vested with authority.[121] Bonfield explains that "[i]f the reviewing court did not do so it would be violating the statute making that delegation to the judgment of the agency."[122]

Prior to 2010, the analysis of whether an agency had been clearly vested with interpretive authority turned on whether "an examination of the phrases or statutory provisions to be interpreted, their context, the purpose of the statute, and other practical considerations to determine whether the legislature intended to give interpretive authority to an agency."[123] The court had found this intention, for example, in a case in which an agency's rulemaking authority and concomitant need to interpret statutory terms evidenced the requisite intent.[124] In *Renda*, the Iowa Supreme Court clarified the narrower focus of whether the agency had been given authority to consider the specific terms in question.[125]

In *Renda*, the court considered whether an inmate in a correctional facility could

> alleg[e] sexual harassment and retaliation in her employment and housing. The [Iowa Civil Rights Commission] (ICRC) concluded it did not have jurisdiction to hear Renda's complaint because the correctional facility was not a "dwelling," and, as an inmate, Renda was not an "employee" for purposes of the Iowa Civil Rights Act.[126]

The court acknowledged that its evaluation was "not whether the ICRC ha[d] the authority to interpret the entire Act."[127] Rather, the issue was "whether the interpretation of the specific terms 'employee' and 'dwelling' ha[d] been clearly vested in the discretion of the commission."[128] In determining whether discretion had been so vested, the court recognized that "[t]he question of whether interpretive discretion has clearly been

120. *Id.* at 430 (citing Griebel, *supra* note 109, at 16).

121. *See* IOWA CODE § 17A.19(11)(c).

122. BONFIELD, *supra* note 4, at 72.

123. *See* Renda v. Iowa Civil Rights Comm'n, 784 N.W.2d 8, 11–12 (Iowa 2010).

124. *See id.* at 12 (citing Auen v. Alcoholic Beverages Div., 679 N.W.2d 586, 590 (Iowa 2004)).

125. *See id.* at 10.

126. *Id.* at 9

127. *Id.* at 10.

128. *Id.*

vested in an agency is easily resolved when the agency's enabling statute explicitly addresses the issue."[129] The court acknowledged the difficulty, however, in discerning whether interpretive authority has been clearly vested in an agency's discretion:

> However, because the legislature does not usually explicitly address in legislation the extent to which an agency is authorized to interpret a statute, most of our cases involve an examination of the phrases or statutory provisions to be interpreted, their context, the purpose of the statute, and other practical considerations to determine whether the legislature intended to give interpretive authority to an agency. This sort of analysis has not proven conducive to the development of bright-line rules. It must always involve an examination of the specific statutory language at issue, as well as the functions of and duties imposed on the agency. It is conceivable that the legislature intends an agency to interpret certain phrases or provisions of a statute, but not others.[130]

Noting that the court had "not concluded that a grant of mere rulemaking authority gives an agency the authority to interpret all statutory language,"[131] the court "confirmed [its] belief that each case requires a careful look at the specific language the agency has interpreted as well as the specific duties and authority given to the agency with respect to enforcing particular statutes."[132] The court highlighted "certain guidelines . . . that may inform [the] analysis of whether the legislature has clearly vested interpretative authority with an agency," including instances "when the statutory provision being interpreted is a substantive term within the special expertise of the agency," and "[w]hen the provisions to be interpreted are found in a statute other than the statute the agency has been tasked with enforcing."[133] In contrast, "[w]hen a term has an independent legal definition that is not uniquely within the subject matter expertise of the agency, [the court] generally conclude[s] the agency has not been vested with interpretative authority."[134] Ultimately the court determined that because the terms at issue in *Renda* had "specialized legal definitions that extend beyond the civil rights context and are more appropriately interpreted by

129. *Id.* at 11.
130. *Id.* at 11–12.
131. *Id.* at 13.
132. *Id.*
133. *Id.* at 14.
134. *Id.*

the courts," it would not defer to the agency interpretation.[135]

In the Iowa cases decided since *Renda*, using the *Renda* framework to consider whether delegation has been clearly, rather than explicitly, vested, the court has rarely found that the agency had been vested with interpretive authority.[136] In a notable exception, *Evercom Systems, Inc. v. Iowa Utilities Board*, the court had to determine whether to give deference to the Iowa Utilities Board's "interpretation of the term 'unauthorized change in service' under Iowa Code section 476.103, and the Board's interpretation of the definition of 'cramming' as that term is defined in Iowa Administrative Code rule 199–22.23(1)."[137] Emphasizing "the fact that an agency has been granted rule making authority does not 'give[] an agency the authority to interpret all statutory language,'"[138] the court concluded "that the rule making requirement contained in section 476.103 'evidences a clear legislative intent to vest in the Board the interpretation of the unauthorized-change-in-service provisions in section 476.103.'"[139]

Finding that the board's interpretation was subject to deferential review,[140] the court acknowledged it would "only reverse the agency's interpretation of [the] term if it [was] irrational, illogical, or wholly unjustifiable."[141] The court then proceeded to independently analyze the terms within the relevant statutory framework[142] and ultimately reversed the findings of the agency, holding that the agency's determination was "irrational, illogical, or wholly unjustifiable."[143]

In far more cases, the court engages in a lengthy analysis of whether interpretive authority has been clearly vested in an agency's discretion, only

135. *Id.*

136. *See supra* note 6 and accompanying text; *see also infra* Appendix.

137. Evercom Sys., Inc. v. Iowa Utils. Bd., 805 N.W.2d 758, 762 (Iowa 2011).

138. *Id.* (alteration in original) (quoting *Renda*, 784 N.W.2d at 13).

139. *Id.* (quoting Office of Consumer Advocate v. Iowa Utils. Bd., 744 N.W.2d 640, 643 (Iowa 2008)).

140. *Id.* at 763.

141. *Id.* (citing *Renda*, 784 N.W.2d at 14).

142. *See generally id.* at 763–67.

143. *Id.* at 767 ("The acceptance of collect calls is one of the enumerated services that are explicitly excluded from the definition of cramming as the Board has defined it in its own rules. Cramming, as defined in rule 199–22.23(1), cannot include the mistaken or improper billing of collect calls, particularly when it is the result of third-party fraud. When the Board concluded it did, it rendered a decision that was irrational, illogical, or wholly unjustifiable in violation of section 17A.19(10)(l).").

to determine that it has not. For example, in *NextEra Energy Resources LLC v. Iowa Utilities Board*, the court considered whether the Iowa legislature had clearly vested the board with authority to interpret specific terms within Iowa Code Chapter 476.[144] The court emphasized that "[a]lthough '[t]he legislature may explicitly vest the authority to interpret an entire statutory scheme with an agency[,] . . . the fact that an agency has been granted rule making authority does not "give[] an agency the authority to interpret all statutory language."[145] Concluding that the legislature had granted the board "broad general powers to carry out the purposes of chapter 476 and granted it rulemaking authority,"[146] the court examined the language of the enabling statute[147] and the definition of the term "govern."[148] The court's examination of those terms led to two potential conclusions:

> The general assembly may have intended that the Board exercise sovereign authority in discharging its official function of effecting the purposes of chapter 476. However, the general assembly may also have intended that the Board merely implement or administer the laws contained in chapter 476 without sovereign authority. Furthermore, the general assembly expressly subjected the Board to chapter 17A, the Iowa Administrative Procedure Act, which specifically provides for "legislative oversight of powers and duties delegated to administrative agencies." Therefore, because of the ambiguous definition of "govern" and the express reference to chapter 17A, we conclude under Renda that the general assembly did not delegate to the Board interpretive power with the binding force of law.[149]

144. *See generally* NextEra Energy Res. LLC v. Iowa Utils. Bd., 815 N.W.2d 30, 36–40 (Iowa 2012); *see also id.* at 37 ("If the legislature clearly vested the agency with the authority to interpret specific terms of a statute, then [the court] defer[s] to the agency's interpretation of the statute and may only reverse if the interpretation is 'irrational, illogical, or wholly unjustifiable.'" (quoting Doe v. Iowa Dep't of Human Servs., 786 N.W.2d 853, 857 (Iowa 2010))).

145. *Id.* at 37 (second, third, fourth, and fifth alterations in original) (quoting *Evercom*, 805 N.W.2d at 762).

146. *Id.* at 38.

147. *See id.* ("In granting the Board rulemaking authority, the general assembly used the following language: 'The Board . . . shall establish all needful, just and reasonable rules . . . to govern the exercise of its powers and duties.'" (alterations in original) (quoting IOWA CODE § 476.2(1) (2009)).

148. *Id.* ("While 'govern' means, 'to exercise arbitrarily or by established rules continuous sovereign authority over,' it also means 'to rule without sovereign power.'" (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 982 (unabr. ed. 2002))).

149. *Id.* (citation omitted) (quoting IOWA CODE § 17A.1(3) (2009)).

The court determined the interpretation was not entitled to deference, and it examined the interpretation for errors of law.[150] Engaging in its independent analysis, the court concluded the board had properly construed the statute at issue.[151]

In another relatively lengthy analysis of the scope of review, the court examined whether the Iowa Utilities Board had interpretive authority over the terms "public utility" and "railroad corporation" in the context of the Iowa railroad crossing statute.[152] Recognizing that the court's "caselaw analyzing whether [the board] has interpretive authority illustrates that this issue is 'not conducive to the development of bright-line rules,'"[153] the court acknowledged that "section 476.27(1) contains definitions of 'public utility' and 'railroad,'" which the court considered "an obstacle to finding [the board] ha[d] authority to interpret these terms."[154] "Second, the fact that section 476.27 delegates the state's power of eminent domain has constitutional implications and therefore cuts against granting [the board] broad interpretative authority over the crossing statute."[155] Finally, the court determined that, because "section 476.27(2) empowers [the board] to adopt rules 'prescribing the terms and conditions for a crossing,' it requires [the board] to do so 'in consultation with' the Iowa Department of Transportation (IDOT)."[156] Therefore, the board did "not have the exclusive authority to administer the crossing statute, but rather, share[d] decision making authority with IDOT."[157]

Notwithstanding the court's general unwillingness to find that interpretive authority has been clearly vested in an agency's discretion,[158]

150. *See id.* (citing IOWA CODE § 17A.19(10)(c)).

151. *Id.* at 40.

152. Hawkeye Land Co. v. Iowa Utils. Bd., 847 N.W.2d 199, 207 (Iowa 2014). The court explained, "This statute was enacted to facilitate public utility crossings over railroad tracks. It authorizes a 'pay-and-go' procedure with a legislatively predetermined $750 standard crossing fee the utility pays to the owner of the railroad right-of-way." *Id.* at 201.

153. *Id.* at 208 (quoting Renda v. Iowa Civil Rights Comm'n, 784 N.W.2d 8, 11 (Iowa 2010)).

154. *Id.* (citing Sherwin–Williams Co. v. Iowa Dep't of Revenue, 789 N.W.2d 417, 423–24 (Iowa 2010)).

155. *Id.* (citing Hardy v. Grant Twp. Trs., 357 N.W.2d 623, 625 (Iowa 1984)).

156. *Id.* at 209.

157. *Id.*

158. *See Renda*, 784 N.W.2d at 13 ("It is generally inappropriate, in the absence of any explicit guidance from the legislature, to determine whether an agency has the

members of the Iowa judiciary have lamented the court's tendency to deny deference to agency interpretations. In *Waldinger Corp. v. Mettler*, the majority of the Iowa Supreme Court determined the workers' compensation commissioner had not clearly been vested with interpretive authority over terms in Iowa Code Section 85.34(1).[159] Nonetheless, the court upheld the commissioner's interpretation of the term as correct, overturning the court's own prior interpretation.[160] In a concurring opinion, Justice Thomas Waterman acknowledged the special expertise of the agency and indicated that, while he joined in the outcome, he would have reached the same result by deferring to the commissioner's interpretation under the *Renda* framework.[161]

Similarly, in *SZ Enterprises, LLC v. Iowa Utilities Board*, the court considered a solar energy company's appeal of an Iowa Utilities Board's decision determining that SZ Enterprises was a public utility.[162] Noting that the terms in question had been defined by the legislature, were "not very complex and [we]re not 'uniquely within the subject matter expertise of the agency,'" the court refused to afford deference to the agency interpretation.[163]

Justice Edward Mansfield dissented, taking issue with the court's analysis of deference.[164] Justice Mansfield's disagreement with the majority position on deference relies heavily on his view of the institutional competence of the agency.[165] In his dissenting opinion, joined by Justice

authority to interpret an entire statutory scheme.").

159. Waldinger Corp. v. Mettler, 817 N.W.2d 1, 7 (Iowa 2012). Specifically, the court noted that the provision "leaves undefined several statutory terms and phrases," and that, while "the commissioner is expressly directed to '[a]dopt and enforce rules necessary to implement' chapter 85, this directive standing alone did not constitute a clear vesting of interpretive authority." *Id.* (alteration in original) (citing Iowa Land Title Ass'n v. Iowa Fin. Auth., 771 N.W.2d 399, 402 (Iowa 2009)).

160. *See id.* at 8, 10.

161. *See id.* at 10 (Waterman, J., concurring specially) (emphasizing that the "decision turn[ed] on the interpretation of a term of art—'healing period'—that is unique to the workers' compensation law administered by the commissioner. The majority interprets that language itself without acknowledging the agency's interpretive authority or the deference owed to its interpretation of that specialized term within its expertise." (citing *Renda*, 784 N.W.2d at 11–12)).

162. SZ Enters., LLC v. Iowa Utils. Bd., 850 N.W.2d 441, 444 (Iowa 2014).

163. *Id.* at 452.

164. *Id.* at 470 (Mansfield, J., dissenting).

165. *Id.* at 470, 472.

Waterman, Justice Mansfield asserted,

> To my mind, the majority opinion is a good case study on the limits of judicial competence and why the legislature wanted us to defer, in large part, to the regulatory agency.
>
> As I read the majority opinion, my colleagues appear to be substituting their expertise on utility regulation for that of the Board.[166]

Justice Mansfield addressed the majority's assertion that the term at issue was not complex or technical and therefore not deserving of deference, stating that the majority had "missed the boat, or at least stepped aboard the wrong boat."[167] He clarified that "[t]he issue under *Renda* is not whether the term itself is technical or complex" but rather "whether [the term] appears to have a 'specialized' meaning."[168] Justice Mansfield argued that public utility was a technical term with a specialized meaning,[169] emphasizing that "[t]his seems to me the paradigm of something that should be decided by the regulatory agency that sees such matters every day and is in a better position to assess 'the public interest.'"[170] Moreover, he objected to the majority's reliance on the legislative definition of the term, observing that it was "largely circular" and of "little help."[171] This objection to the majority's failure to give deference is therefore firmly grounded in his reliance on agency expertise.[172] Similarly, this Article's proposed approach would allow the court to acknowledge and be persuaded by agency expertise. It would not, however, require the court to consider the agency's expertise within the analysis of the enabling legislation or, in determining whether to impute legislative intention, to delegate interpretive authority.

Relatedly, in *NextEra Energy Resources*, an independent wholesale energy producer sought the court's review of the Iowa Utilities Board's

166. *Id.* at 470.

167. *Id.* at 473.

168. *Id.*

169. *Id.*

170. *Id.* at 474.

171. *Id.* at 475. ("Indeed, the majority implicitly concedes this point by relying not on the statutory definition of public utility but rather on a 'practical approach' that features the majority's sundry observations on economics and energy. Contrary to the majority, I do not believe we can use the existence of a statutory definition as a reason not to defer to an agency interpretation unless we are prepared to apply that statutory definition.").

172. *See id.* at 470.

decision to grant advance ratemaking principles for a rate-regulated utility's proposed wind generation facility.[173] Evaluating whether the legislature had vested authority in the board to interpret the terms at issue, the court concluded that, while the board had been granted "authority to regulate the rates and services of public utilities to the extent and in the manner"[174] provided under the enabling legislation and that it had been granted "broad general powers to carry out the purposes" of the statutory scheme at issue,[175] "the general assembly did not delegate to the Board interpretive power with the binding force of law."[176] Granting the board's interpretation no deference, the court nonetheless concluded that the board's interpretation was appropriate.[177]

In a concurring opinion, Justice Mansfield explained his disagreement with the court's failure to grant deference to the board's interpretation, characterizing the refusal as "flawed and contrary to precedent."[178] Justice Mansfield noted prior cases in which the court had concluded the board had interpretive authority over specific terms within the statute.[179] He disagreed with the court's analysis of the enabling legislation, warning that "the majority['s] reli[ance] on dictionary definitions of 'govern' and 'exercise'"[180] made "a fortress out of the dictionary."[181] Justice Mansfield further emphasized the expertise of the agency as a reason to impute an intention to delegate interpretive authority.[182] Recognizing the court had historically "deferred to the Iowa Utilities Board's interpretation of the complex and technical laws that it administers,"[183] Justice Mansfield reasoned, "If the

173. NextEra Energy Res. LLC v. Iowa Utils. Bd., 815 N.W.2d 30, 35–36 (Iowa 2012).

174. *Id.* at 37 (quoting IOWA CODE § 476.1 (2009)) (internal quotation mark omitted).

175. *Id.* (citing IOWA CODE § 476.2(1)).

176. *Id.* at 38.

177. *Id.* at 40.

178. *Id.* at 50 (Mansfield, J., concurring specially).

179. *Id.* (noting that "in *City of Coralville v. Iowa Utilities Board*, we said that the Board 'has clearly been vested with authority to interpret the 'rates and services' provision of section 476.1, and we may therefore overturn its interpretation only if it is 'irrational, illogical, or wholly unjustifiable'" (quoting City of Coralville v. Iowa Utils. Bd., 750 N.W.2d 523, 527 (Iowa 2008))).

180. *Id.* at 51.

181. *Id.* (quoting Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945)) (internal quotation mark omitted).

182. *Id.* at 52.

183. *Id.* at 50.

Board has broad powers, it is logical to defer to the Board's legal interpretations of technical terms, as we have done in the past."[184] He noted further, "The majority also fails to take into account that the legal requirements at issue—the 'need' and 'consideration of alternatives' requirements of section 476.53—are technical matters as to which the Board has more expertise than ourselves,"[185] concluding that the combination of "everyday words with 'substantive term[s] within the special expertise of the agency'" obligated the court to defer to the agency's interpretation.[186]

Justice Mansfield's emphasis on the expertise of the agency as warranting deference corresponds with the theory—if not process—of the Authors' recommended approach. Rather than having the court analyze the enabling legislation for evidence of implied or imputed intent to delegate, the Authors' proposal would simply have the court recognize agency expertise as an indication of the persuasiveness of the interpretation. Indeed, Justice Mansfield observes that the court's "refusal to accord any deference to the Board's interpretation of utility law is troubling and, if continued, will have adverse implications in future cases."[187] However, he implies that the court was persuaded by the expertise of the agency, indicating that "[n]otwithstanding my colleagues' statements about not deferring to the Board's legal interpretation of section 476.53, *they may be according more deference than they let on*."[188]

The court's independent analysis of the agency interpretation, and its recognition of the agency expertise as noted above, represents the analytical framework the Authors suggest of being persuaded by the agency interpretation. This distinction eliminates the current search in the enabling legislation for imputed intent to delegate interpretive authority,[189] while

184. *Id.* at 51.

185. *Id.* at 52.

186. *Id.* (alteration in original) (quoting Renda v. Iowa Civil Rights Comm'n, 784 N.W.2d 8, 14 (Iowa 2010)).

187. *Id.*

188. *Id.* at n.2 (emphasis added) ("For example, the majority says, 'The Board correctly construed section 476.53 to *allow* it to consider compliance with future environmental regulations, fuel diversity, the volatility of fuel prices, and the supply of less-expensive energy to consumers.' (Emphasis added.) I agree that the Board may, *but is not required to*, consider these factors in determining whether advance ratemaking principles are appropriate. I support the deferential tone of this statement." (parenthetical in original)).

189. For example, while Justice Mansfield emphasizes the special expertise of the agency as warranting deference, he ties his deference analysis back to the enabling

maintaining the legitimate value of institutional competence that Justice Mansfield identifies.

This Article's position is therefore that these lengthy analyses[190] of the scope of review occasioned by the IAPA and the *Renda* decision are an inefficient and ineffective use of the court's time and resources. In the majority of these cases, the court does not find that interpretive authority has been delegated.[191] It then turns its attention to an independent consideration of the interpretation.[192] Indeed, even where such authority has been established, the court evaluates the interpretation independently and has, in one instance, overturned the agency interpretation notwithstanding the granting of deference.[193] In at least one instance in which the court held that the agency interpretation was not entitled to deference, the court nonetheless appeared to have been influenced by the expertise of the agency in upholding the agency interpretation.[194]

In terms of the efficiencies to be gained by eliminating an elusive search

legislation. *Id.* at 51. Noting that "the majority does not read section 476.2(1) in its entirety," Justice Mansfield explains that "[j]ust before the grant of rulemaking authority is a statement that '[t]he board shall have broad general powers to effect the purposes of this chapter.'" *Id.* (second alteration in original) (quoting IOWA CODE § 476.2(1) (2009)). Justice Mansfield asserts that "[i]f the Board has broad powers, it is logical to defer to the Board's legal interpretations of technical terms." *Id.* Citing a prior decision in which the court held "that the Board had 'clearly been vested with authority' to interpret a term in section 476.1," Justice Mansfield notes that the court had "not expressly state[d] where that authority came from, [but that] it could only have come from section 476.2(1)." *Id.* at 51–52 (discussing City of Coralville v. Iowa Utils. Bd., 750 N.W.2d 523, 527 (Iowa 2008)). Under the Authors' proposed approach, the analysis of the enabling legislation would be unnecessary beyond examining whether there was an *explicit* grant of interpretive authority. In the absence of such an explicit grant, the court would still be free to acknowledge the expertise of the agency as a reason to uphold the agency interpretation, rather than offering agency expertise as evidence to impute legislative intent to delegate interpretive authority.

190. *See, e.g.*, Iowa Dental Ass'n v. Iowa Ins. Div., 831 N.W.2d 138, 142–45 (Iowa 2013) (devoting three pages of the court's opinion to a consideration of whether interpretive authority had been vested in an agency and concluding that there was no such delegation).

191. *See* cases cited *supra* note 6; *see also infra* Appendix.

192. *See, e.g.*, Andover Volunteer Fire Dep't v. Grinnell Mut. Reinsurance Co., 787 N.W.2d 75, 80 (Iowa 2010) (noting that after no deference is found, the court reviews the interpretation for errors at law); Xenia Rural Water Dist. v. Vegors, 786 N.W.2d 250, 253 (Iowa 2010) (same).

193. *See* Evercom Sys., Inc. v. Iowa Utils. Bd., 805 N.W.2d 758, 767 (Iowa 2011).

194. *See supra* notes 173–77 and accompanying text.

for imputed or implied intent to delegate interpretive authority, the Authors assert that it would be more effective to simply independently evaluate the interpretation and acknowledge its persuasive qualities. For example, in the court's independent analysis of an interpretation not explicitly vested in the agency, the court could acknowledge that the agency's interpretation, guided, for example, by expertise or through a formal process, is *persuasive* for that reason. This is in contrast to devoting the court's time and attention to whether it should *defer* for reasons that might be characterized as a fiction, e.g., legislative intent to delegate. This Article turns now to a specific proposal to modify the IAPA and revise the court's framework for considering agency interpretations in the absence of an explicit delegation of interpretive authority.

IV. A PROPOSED SOLUTION TO IOWA'S CURRENT FORM OF JUDICIAL DEFERENCE

Changing the framework for analyzing when to defer to agency interpretations could arguably come through the judiciary. To the extent the search for evidence to impute legislative intent to delegate comes largely from Professor Bonfield's explanation of the "clearly vested" language in the Iowa Code,[195] the court could elect to heighten the inquiry to require explicit language evidencing legislative intent to clearly vest an agency with interpretive authority. The Authors assert that a more direct approach would be to amend the language of the IAPA to obligate the legislature to explicitly authorize delegated interpretive authority. This would modify the court's preliminary framework, eliminating the search for evidence to impute intent to delegate, while still allowing the court to take into consideration other persuasive aspects of an agency's interpretation, such as special agency expertise.

A. *Statutory Modification*

The Authors propose the IAPA be amended to eliminate the court's responsibility to attempt to discern whether the legislature clearly vested

195. *See* BONFIELD, *supra* note 4 (explaining that the general assembly's use of the term "clearly" requires "that the reviewing court, using its own independent judgment and without any required deference to the agency's view, must have a firm conviction from reviewing the precise language of the statute, its context, the purpose of the statute, and the practical considerations involved, that the legislature actually intended (or would have intended had it thought about the question) to delegate to the agency interpretive power . . . in question").

authority in an agency. This would necessitate a change to Iowa Code Section 17A.19(10)[196] and would obligate the legislature to explicitly delegate authority where appropriate. It would still enable the court to give weight, rather than deference, to aspects of an agency interpretation that are persuasive. There are also several reasons why this state-specific approach is more reasonable than the broad inquiry for deference that may be warranted at the federal level.

As noted, this proposal would not require a modification to Iowa Code Section 17A.19(11).[197] It would remain appropriate for the court to refuse to give deference to an agency's interpretation about the limits of its authority under Section 17A.19(11)(a), for the reasons noted previously.[198] It would also remain appropriate for the court to give appropriate deference to an agency's interpretation of a matter over which the legislature has vested interpretive authority in the agency under Section 17A.19(11)(c).[199] Finally, the proposal would not require a modification to Section 17A.19(11)(b) because it would still be appropriate for the court to consider, if warranted, aspects of an agency interpretation that were "highly technical, requiring special expertness for adequate comprehension, and [in which] the agency has that expertness and the reviewing court does not."[200]

The recommendation would, however, involve a modification to the language of Section 17A.19(10), primarily that of removing the "clearly vested" language to more specifically direct deference in situations in which the interpretive authority had been *explicitly* vested in the discretion of the agency. The amended 17A.19(10) would read as follows:

> The court may affirm the agency action or remand to the agency for further proceedings. The court shall reverse, modify, or grant other appropriate relief from agency action, equitable or legal and including declaratory relief, if it determines that substantial rights of the person seeking judicial relief have been prejudiced because the agency action is any of the following:
>
> . . . .
>
> c. Based upon an erroneous interpretation of a provision of law whose

196. *See generally* IOWA CODE § 17A.19(10)(c), (*l*) (2013).
197. *See generally id.* § 17A.19(11).
198. *See supra* text accompanying notes 122–24.
199. *See supra* text accompanying notes 126–28.
200. BONFIELD, *supra* note 4, at 72.

> interpretation has not explicitly ~~clearly~~ been vested by a provision of law in the discretion of the agency.
>
> . . . .
>
> l. Based upon an irrational, illogical, or wholly unjustifiable interpretation of a provision of law whose interpretation has explicitly ~~clearly~~ been vested by a provision of law in the discretion of the agency.[201]

These changes would allow the court to quickly and efficiently grant appropriate deference to interpretations that have been explicitly delegated to the agency. In instances where there is no explicit delegation, however, the changes would remove the court's obligation to search for

> a firm conviction from reviewing the precise language of the statute, its context, the purpose of the statute, and the practical considerations involved, that the legislature actually intended (or would have intended had it thought about the question) to delegate to the agency interpretive power with the binding force of law over the elaboration of the provision in question.[202]

Such a change would therefore eliminate the need to search for evidence to impute legislative intent to delegate interpretive authority but would still allow the court to acknowledge and give weight to persuasive aspects of the interpretation, such as agency expertise.

B. *State-Specific Support*

Obligating the court to defer to agency interpretation only where the enabling legislation explicitly delegates authority to the agency seems well justified in the state setting. As noted, one theoretical basis for judicial deference is the specialized nature of agencies as compared with that of the court.[203] Another basis for deference is the political accountability of agencies as compared to that of the court.[204] These bases, however, can be questioned in certain instances at both the state and federal level. The proposed approach would enable the court to take into consideration such

201. *Cf.* IOWA CODE § 17A.19(10)(c), (*l*).

202. Vaitheswaran & Mayes, *supra* note 107, at 435–36 (quoting BONFIELD, *supra* note 4).

203. *See supra* text accompanying notes 31, 55, 119.

204. *See supra* text accompanying notes 31, 56–57.

differences, acknowledging expertise and accountability where warranted.

It is possible that the special expertise of federal agencies, when contrasted with the more generalist nature of federal judges, is a compelling reason for deference at the federal level. However, in the state context, this might not always be the case. In some instances, federal agencies deal with more complicated and technical issues than state agencies.[205] Moreover, because of the relative size and budget of state agencies compared to federal agencies, state agencies may be more subject to capture than federal agencies.[206] As two authors observe, "State agencies generally have fewer resources at their disposal and pay their officials less, and it may be that corruption and capture are greater risks at the state level."[207] On the other

205. Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215, 1280 (2012). The authors assert that, with respect to state agencies, "there is reason to believe that they are not quite as technically impressive as their federal counterparts." *Id.* However, the authors also observe that "when one turns to the state courts, it seems that they too are less technically capable than their federal counterparts." *Id.*; *see also* D. Zachary Hudson, Comment, *A Case for Varying Interpretive Deference at the State Level*, 119 YALE L.J. 373, 378–79 (2009) ("There is less reason for state court deference to state agencies for technical reasons because the issues state agencies deal with are, on the whole, less technically complicated. . . . While the problems that state courts encounter on this front may be no less difficult from a factual or legal perspective, most states do not have agencies analogous to those existing at the federal level that deal with complex scientific issues that may be beyond the grasp of liberally educated judges.").

206. *See* William Funk, *Rationality Review of State Administrative Rulemaking*, 43 ADMIN. L. REV. 147, 172 (1991) (noting that "[p]robably the most obvious difference between state and federal agencies is the size and resources of those agencies"). Quoting Arthur Bonfield, Funk explains:

> Partly as a consequence of this underfinancing, state agencies usually cannot obtain the quantity or quality of technical expertise and legal assistance available to similar federal agencies. Because they are usually smaller, more poorly financed, and less technically competent, state agency staffs are often characterized by somewhat less professionalism than the staffs of most federal agencies.

Id. (quoting A. BONFIELD, STATE ADMINISTRATIVE RULE MAKING § 2.1.2, at 30–31 (1986)).

207. Bruhl & Leib, *supra* note 205; *see also* Hudson, *supra* note 205, at 380. Hudson argues that "[t]he threat of capture is greatest when an agency regulates a small group with limited interests, a situation much more common within the states than at the federal level." *Id.* (footnote omitted) (citing Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167, 169–70 (1990)).

hand, many state agencies deal with highly complicated and technical issues. Under the proposed approach, this expertise could be acknowledged as a persuasive basis to uphold an agency interpretation.

Reviewing the relationship between elected judges and statutory interpretation, Professors Bruhl and Leib assert that "the real question for purposes of determining the proper rule of deference is how the state entities compare to each other."[208] In their view, "[i]t seems . . . quite likely that state agencies fall short of federal agencies to a greater degree than state courts fall short of federal courts. If that is so, then the 'expertise gap'—the advantage agencies possess over courts—is smaller in the states than in the federal government."[209] While the Authors of this Article are not convinced that state agencies categorically deal with less complex issues than their federal counterparts,[210] this Article asserts that the court should have the authority to acknowledge agency expertise only where warranted. Professors Bruhl and Leib suggest a similar approach, observing that "although judges should defer when they are out of their domains of expertise, there is good reason for state judges to hesitate before embracing an across-the-board rule of strong deference on an expertise rationale."[211]

Moreover, the fact that many state judges stand for retention or election appears to weaken political accountability as a justification for deference to state agencies. As one scholar has noted, "state judges fare somewhat better than their federal counterparts when one compares their democratic legitimacy vis-à-vis that of the administrative agencies whose interpretations of statutes they are called upon to review."[212] Also,

208. Bruhl & Leib, *supra* note 205, at 1281.

209. *Id.*

210. *Cf. id.* ("The argument against deference is all the more compelling when, as is often the case, the state agency is not even dealing with matters that are technically complex."). In contrast, the Authors of this Article believe that many state agencies deal with highly technical and complex matters. As a result, the approach advanced in this Article would enable courts to independently consider the expertise of the agency making the interpretation as evidence of its persuasive value.

211. *Id.*

212. Bernard W. Bell, *The Model APA and the Scope of Judicial Review: Importing* Chevron *into State Administrative Law*, 20 WIDENER L.J. 801, 834 (2011). Bell explains that "[j]udicial selection and judicial powers arguably differ on the state and federal level in ways that appear to have obvious implications for an assumption that agencies enjoy a greater democratic pedigree than judges." *Id.* at 823. Additionally, Hudson argues,

> The assertion that agencies' interpretive efforts should be afforded deference at the federal level because they are more democratically accountable

> when facing questions of statutory interpretation, state judges "are more likely than their federal counterparts to know what the issues of public debate were when state legislation was proposed, what the state legislature thought it was doing when it passed the legislation, and what the situation in the State was before and after that legislation was passed."[213]

Because judges in Iowa are subject to retention elections, they are arguably as politically accountable as agency representatives.[214]

Additionally, while concerns about uniformity in interpretation might warrant deference at the federal level, these concerns are less acute in the state context. At the federal level, "[t]he greater the courts' deference to [federal] agencies, the greater the likelihood the agencies will create such uniform standards: Less deference means less likelihood such a nationally uniform standard will emerge."[215] In state situations, in contrast, "the state's

---

> than the courts lacks validity at the state level. State court judges are in most instances more politically accountable than state or federal agency decisionmakers, and certainly more accountable than federal judges.

Hudson, *supra* note 205, at 375.

213. Hudson, *supra* note 205, at 376 (quoting Marcia L. McCormick, *When Worlds Collide: Federal Construction of State Institutional Competenc*e, 9 U. PA. J. CONST. L. 1167, 1198 (2007)). Hudson continues,

> By comparison, federal judges are politically insulated to a much greater extent. Because they are removed from the electoral process, federal judges can often "ascertain current political preferences only from a cold record of legislative action." They serve life terms, are not removable except under extraordinary circumstances, and have salaries that cannot be lowered.

Id. at 376–77 (footnote omitted). Hudson concludes, "To the extent that having a democratically accountable authority interpreting certain statutes is desirable, as *Chevron* implies is appropriate in certain situations, state judges are likely better suited for the task than federal judges and state agency officials." *Id.* at 377.

214. *See* Tyler J. Buller, Note, *Framing the Debate: Understanding Iowa's 2010 Judicial-Retention Election Through a Content Analysis of Letters to the Editor*, 97 IOWA L. REV. 1745, 1747 (2012) (citing Grant Schulte, *Retention of Justices a Tossup*, DES MOINES REG., Oct. 4, 2010, at 1A) (examining the ousting of three Iowa Supreme Court justices during the state's 2010 retention election); *see generally* Aaron W. Ahrendsen, *A Red, White, and Blue Judiciary*, THE IOWA LAWYER, July 2014, at 10–12 (discussing the idea that judicial retention elections were adopted as a way to ensure judges would be accountable to the people).

215. John S. Kane, *Refining* Chevron*—Restoring Judicial Review to Protect Religious Refugees*, 60 ADMIN. L. REV. 513, 558 (2008) (citing Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial*

highest court can issue a unifying and authoritative interpretation of a state statute—at least in the intra-state sense."[216]

An additional reason that imputing legislative intention to delegate interpretive authority might not be appropriate at the state level, particularly in Iowa, is the existence of legislative review of agency interpretations.[217] In Iowa, "[t]he Iowa Administrative Procedure Act . . . created the Administrative Rules Review Committee (ARRC), a joint committee of both houses, which has jurisdiction to review all rules promulgated by the state's administrative agencies."[218] "Such legislative review suggests that state legislatures do not entrust to state agencies the type of policy discretion Congress entrusts to federal agencies and do not view statutory ambiguity as synonymous with policy discretion."[219] This appears to be explicitly true in Iowa. Professor Bonfield explained the impetus for legislative oversight as follows: "Implicit in that purpose is a certain amount of legislative distrust of administrative agencies' conduct, and an intention to retain a measure of control over the powers delegated to the various bodies in the administrative

Review of Agency Action, 87 COLUM. L. REV. 1093, 1112 (1987)). Professor Kane notes, "Because federal agencies practice nationwide, it is preferable to have one legal standard governing that practice, rather than a motley collection of standards that vary based on the happenstance of federal circuit jurisdiction." *Id.* (citing Strauss, *supra*). Notwithstanding, Kane confronts the uniformity argument and concludes that "this theory has its limits." *Id.* He acknowledges that the theory "fails to account for *Skidmore* deference," noting that "[t]he *Skidmore* line of cases involves agency decisions that would lead to greater uniformity under this theory, yet the courts refuse to grant substantial deference to the agencies despite that advantage." *Id.* Also, "the theory fails to account for the courts' interpretation of federal statutes not administered by any agency." *Id.* Finally, Kane demonstrates that while consistency may be achieved, "an agency decides matters in notice-and-comment rulemaking, ... But when the agency rules by adjudication, there is less reason to expect substantially greater uniformity than when courts adjudicate the same issues." *Id.* (citing Michael G. Heyman, *Judicial Review of Discretionary Immigration Decisionmaking*, 31 SAN DIEGO L. REV. 861, 865 n.19 (1994)).

216. Hudson, *supra* note 205, at 380.

217. *See generally* Jerry L. Anderson & Christopher Poynor, *A Constitutional and Empirical Analysis of Iowa's Administrative Rules Review Committee Procedure*, 61 DRAKE L. REV. 1, 7–8 (2012) (noting that "the Administrative Rules Review Committee . . ., which has jurisdiction to review all rules promulgated by the states administrative agencies," could potentially "be critiqued on both policy and constitutional grounds" (footnote omitted)).

218. *Id.* at 6–7 (footnote omitted).

219. Bell, *supra* note 212, at 843–44.

branch of government."[220]

The nature of adjudication in the state agency context may also support a refusal to extend deference to agency interpretation in cases where deference has not been explicitly authorized by the legislature.[221] "Agencies often construe statutes in the course of agency adjudications."[222] At the federal level, "[a]gencies, rather than Administrative Law Judges (ALJs), possess the ultimate authority to resolve adjudications."[223] In many states, including Iowa, administrative adjudication is conducted through central panels, with ALJs sitting outside the agencies.[224] In the case of an appeal from or review of an ALJ determination, an Iowa agency "has all the power which it would have in initially making the final decision except as it may limit the issues on notice to the parties or by rule."[225] Nonetheless, the determination of the ALJ may become the agency determination if it is not appealed or the agency adopts the determination of the ALJ.[226] There is no legitimate reason in this context for a state court to defer to the interpretation of a generalist ALJ interpretation.[227]

220. Bonfield, *supra* note 106, at 896.

221. *See generally* Bell, *supra* note 212, at 845–48.

222. *Id.* at 845.

223. *Id.* The author notes that "Congress, through the APA, and the federal courts, in numerous decisions, have recognized that adjudication may involve policy judgments that an agency is entitled to make, even if its conclusions differ from those of an ALJ." *Id.* at 846 (citing 2 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 11.2, at 780–81 (4th ed. 2002)).

224. *See id.* (citing William D. Schreckhise, *Administrative Law Judges and Agency Adjudication*, *in* ENCYCLOPEDIA OF PUBLIC ADMINISTRATION AND PUBLIC POLICY 13–14 (Jack Rabin ed. 2005)).

225. IOWA CODE § 17A.15(3) (2013).

226. *See* James F. Flanagan, *Redefining the Role of the State Administrative Law Judge: Central Panels and Their Impact on State ALJ Authority and Standards of Agency Review*, 54 ADMIN. L. REV. 1355, 1365 (2002) ("[T]he state ALJ's decision often becomes the final agency decision. If no party appeals, the ALJ's decision may become the final agency action. Alternatively, the agency may adopt the ALJ's decision. Even if appealed, there are incentives for the agency to affirm the ALJ's decision." (footnote omitted)).

227. *See* Bell, *supra* note 212, at 848 ("The reasons for applying *Chevron* deference hardly apply to interpretations by generalist ALJs insulated from political accountability. Indeed, different ALJs could adopt conflicting interpretations of a statute. Moreover, the agency may not consider the interpretive issue as thoroughly as it would if the final decision lay with the head of the agency rather than an ALJ. There is less reason for high level agency decisionmakers to focus on such determinations rather than leaving it to the lawyers to construct the interpretation the agency will offer to the ALJ. . . . In short, while *Chevron* may fit comfortably with many state adjudicatory

V. CONCLUSION

The justifications for deferring to agency interpretation may be less significant at the state court level than the federal level. This, coupled with the inefficiency associated with trying to either discern implicit interpretive authority or impute an intention to delegation, supports the Authors' contention that Iowa courts should only defer to agency interpretations when there is explicit delegation in the enabling legislation.

This proposal could be criticized as a return to the "th' ol' 'totality of the circumstances test'" so disparaged by Justice Scalia as introducing uncertainty into the analytical framework.[228] Critics could also argue that this approach enables the court to substitute its judgment for that of an agency's, or that it removes power or authority from the agency for matters that should fall within agency discretion.

On the contrary, the Authors assert that this approach preserves transparent recognition of agency expertise or formality of interpretive processes where warranted. Moreover, the approach does not force the court to shoehorn agency expertise or formality into an analysis of whether enabling legislation could be read to impute an intention of the legislature to vest interpretive authority in an agency. The Authors assert that an evaluation of agency expertise or accountability as a justification for upholding an agency interpretation, rather than as a justification to defer, is a more transparent framework. This proposal comports with the rationale that the court must defer to the agency when the enabling legislation is clear. Moreover, it upholds nondelegation principles while simplifying the court's analytical framework. It does not undermine an acknowledgment of institutional competence, largely because the court is free to articulate agency expertise or formality of process as an indication that the agency's determination was correct. To cloak this reasoning as an indication that the legislature intended to delegate authority to the agency is unnecessary and adds a complicated and unhelpful analytical endeavor to the work of the court.

As Judge Vaitheswaran and Thomas Mayes, both of whom considered the IAPA, noted,

systems (either because there is no central panel or because the agency retains significant power to alter a central panel ALJ's decision), in others it may not.").

228. United States v. Mead Corp., 533 U.S. 218, 241 (2001) (Scalia, J., dissenting) (characterizing the *Skidmore* approach as one "most feared by litigants who want to know what to expect").

> Given the importance of this concept to administrative law in general and to administrative law outcomes specifically, we believe it is critical for legislatures to codify the notion of deference so that courts and litigants know what to expect. "In the current state of affairs, deference doctrine simply does not help judges decide, counselors counsel, and regulators plan." The uncertainty and oscillations of the federal and state case law, in spite of "an avalanche of scholarly writing," suggests the need for legislative correction. . . . "[I]f confusions persist despite extensive critical analysis, we have an obligation to look harder for other solutions."[229]

This Article has been the Authors' attempt to both improve and simplify the court's framework for evaluating agency interpretations in Iowa.

229. Vaitheswaran & Mayes, *supra* note 107, at 442 (footnotes omitted).

APPENDIX

Iowa Supreme Court Case	Statute at Issue[vi]	State Agency	Deference[iv]	Interpretation[i]
SZ Enters., LLC v. Iowa Utils. Bd., 850 N.W.2d 441 (2014)	§§ 476.1, .22 (2011)	Utilities Board	No	Overturned
Hawkeye Land Co. v. Iowa Utils. Bd., 847 N.W.2d 199 (2014)	§ 476.27 (2009)	Utilities Board	No	Overturned
Rent-A-Center, Inc., v. Iowa Civil Rights Comm'n, 843 N.W.2d 727 (2014)	FAA / ICRA[vii]	Civil Rights Comm'n	No	Upheld
Staff Mgmt. v. Jimenez, 839 N.W.2d 640 (2013)	§ 85.61(11) (2013)	Workers' Comp.	No	Upheld
Iowa Dental Assoc. v. Iowa Ins. Div. 831 N.W.2d 138 (2013)	§ 514C.3B (2011)	Insurance Division	No	Overturned
Gartner v. Iowa Dep't of Pub. Health, 830 N.W.2d 335 (2013)	§ 144.13(2) (2011)	Public Health	No	Overturned
Waldinger Corp. v. Mettler, 817 N.W.2d 1 (Iowa 2012)	§ 85.34(1) (2011)	Workers' Comp.	No	Upheld
NextEra Energy Res. v. Iowa Utils. Bd., 815 N.W.2d 30 (2012)	§ 476.53 (2009)	Utilities Board	No	Upheld
Burton v. Hilltop Care Ctr., 813 N.W.2d 250 (2012)	§§ 85.36, .61(3) (2007)	Workers' Comp.	No	N/A[ii]
Neal v. Annett Holdings, Inc., 814 N.W.2d 512 (2012)	§85.33(3) (2009)	Workers' Comp.	No	Upheld
Westling v. Hormel Foods Corp., 810 N.W.2d 247 (2012)	§ 85.34(2) (2005)	Workers' Comp.	No	Upheld
Evercom Sys., Inc. v. Iowa Utils. Bd., 805 N.W.2d 758 (2011)	§ 476.103 (2005)	Utilities Board	Yes	Overturned[iii]
KFC Corp. v. Iowa Dep't of Revenue, 792 N.W.2d 308 (2010)	§ 422.33(1) (1997)	Dep't of Revenue	N/A[v]	Upheld
Naumann v. Iowa Prop. Assessment Appeal Bd., 791 N.W.2d 258 (2010)	§ 441.21(1)(d) (2007)	Prop. Assessment App.	No	Upheld
Sherwin-Williams Co. v. Iowa Dep't of Revenue, 789 N.W.2d 417 (2010)	§ 422.45(27)(a) (1999)	Dep't of Revenue	No	Overturned
Andover Volunteer Fire Dep't v. Grinnell Mut. Reinsurance Co., 787 N.W.2d 75 (2010)	§ 85.61(7)(a) (2009)	Workers' Comp.	No	Overturned
Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129 (2010)	§ 85.34(5) (2005)	Workers' Comp.	No	Overturned
Xenia Rural Water Dist. v. Vegors, 786 N.W.2d 250 (2010)	§§ 85.31, .16(3) (2003)	W Workers' Comp.	No	Overturned
Iowa Network Servs., Inc. v. Iowa Dep't of Revenue, 784 N.W.2d 772 (2010)	§ 476.1D(10) (2003)	Dep't of Revenue	No	Upheld
Clay Cnty. v. Pub. Emp't Relations Bd, 784 N.W.2d 1 (2010)	§ 20.8(3) (2003)	Public Emp't Relations	No	Overturned

[i] *See supra* note 10.

[ii] Burton v. Hilltop Care Ctr., 813 N.W.2d 250, 264 (Iowa 2012) (declining to review the agency's interpretation because the court was "unable to determine whether the commissioner's final decision was based on his legal conclusion . . . or a factual determination).

[iii] Evercom Sys., Inc. v. Iowa Utils. Bd., 805 N.W.2d 758, 767 (Iowa 2011).

[iv] *See supra* note 6.

[v] KFC Corp. v. Iowa Dep't of Revenue, 792 N.W.2d 308, 312 (Iowa 2010) (declining to examine whether the department was "entitled to deference in its interpretation of [an] Iowa Code section . . . because, even if deference were not afforded . . . [the department] correctly interpreted the applicable statutes").

[vi] Unless otherwise specified, all references are to the Iowa Code.

[vii] FAA: Federal Arbitration Act (codified as amended at 9 U.S.C. §§ 1–307 (2014)); ICRA: Iowa Civil Rights Act (codified as amended at IOWA CODE §§ 216.1–.21 (2013)).