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Cover Page Footnote

International Law; Commercial Law; Law

***Mississippi Poultry Ass'n v. Madigan*: How Congress, Without Quite Saying So, Can Erect a Trade Barrier**

I. Introduction

*Mississippi Poultry Ass'n v. Madigan*¹ reveals the bitterness of the debate within the judiciary over methodologies of statutory interpretation: functionalism versus formalism, activism versus restraint.² In *Mississippi Poultry* the Fifth Circuit splits eight to seven,³ the majority and dissent each accusing the other of judicial activism and of overstepping the proper bounds of the judiciary by seeking to decide matters of trade policy.⁴ The substance of the debate in *Mississippi Poultry* is regulation of foreign-produced imported poultry. Such a springboard opens up questions involving not only theories of judicial methodology, but also the very broad question of the proper balance of power between branches of our government.⁵ Who is actually taking, or being forced to take, responsibility for making trade policy in this case? Is it the executive branch, via the Secretary of Agriculture's regulations? Is it the court, by deciding the case? Has Congress fulfilled its role by clearly expressing the trade policy it desires? Or has it instead shirked some of its proper responsibility?

While the questions thus posed by *Mississippi Poultry* are broad indeed, the specific question before the Fifth Circuit was narrowly focused. The Poultry Products Inspection Act (PPIA)⁶ requires that imported poultry meet the "same" quality standards as domestically produced poultry, and be processed in facilities and under conditions that are the "same" as those in the United States.⁷ The Secretary of

¹ 31 F.3d 293 (5th Cir. 1994) (en banc).

² *Id.* These themes run throughout the case; the dissenting opinion in particular brings these dichotomies into focus. *Id.* at 310 (Higginbotham, J., dissenting).

³ Circuit Judge Wiener writes the majority opinion, joined by Circuit Judges King, Garwood, Smith, Duhe, Garza, De Moss, and Stewart. Circuit Judge Higginbotham writes the dissent, joined by Chief Judge Politz and Circuit Judges Reavley, Jolly, Davis, Jones, and Barksdale. Circuit Judges Benavides and Parker did not participate. *Id.* at 293-94.

⁴ *Id.* at 309-10 (majority indicating that they are the ones staying within the proper judicial role), and *id.* at 310 (Higginbotham, J., dissenting) (explicitly questioning the activist effect of the majority's methodologies).

⁵ *Id.*

⁶ 21 U.S.C. §§ 451-470 (1988 & Supp. V 1993).

⁷ *Id.* § 466(d).

Agriculture (Secretary), in charge of implementing this statute,⁸ interpreted this to mean that foreign poultry must meet quality standards and be produced in facilities and under conditions that are at least "equal" to those in the United States.⁹ The simple question then is whether the Secretary's interpretation, "equal," conflicts with Congress' intent when it said "same."¹⁰

Mississippi Poultry should have been just a simple application of the *Chevron U.S.A. v. Natural Resources Defense Council* two-part test for judicial review of an agency action.¹¹ Yet the Fifth Circuit's eight to seven split reveals that application of *Chevron* in this case was problematic at best. The eight-member majority invalidates the Secretary's regulation as outside the pale of what Congress intended; it says that the dissent seeks to make policy by ignoring the structure of the PPIA and subsequent enactments by Congress.¹² The seven-member dissent, on the other hand, would uphold the Secretary's regulation. The dissent maintains that it is the majority who overreaches its proper role and makes a policy decision and that, in order to do so, it makes use of methodologies from opposite extremes: it both ignores the text with a "flood of legalisms and words that abstract and shrink the visage of textual command," and also employs "an exacting literalism that refuses to read words in context."¹³

How could an interpretation of the words "same" and "equal" warrant such an evenly balanced division of opinion as the eight to seven split indicates, and in which the majority and dissent each defends its belief so zealously? One factor that cannot be overlooked is that the result of even so seemingly insignificant an inquiry as the meaning of the word "same" has a vast impact on international trade relations.¹⁴ Hinging on the interpretation of the word "same" are questions of protectionism for American business,¹⁵ a possible de facto ban on the importation of foreign-produced poultry,¹⁶ and the unknown effect of

⁸ "The Secretary [of Agriculture] may by regulations prescribe the conditions under which poultry products capable of use as human food, shall be stored or otherwise handled by any person engaged in the business of buying, selling, freezing, storing, or transporting, in or for commerce, or importing, such articles, whenever the Secretary deems such action necessary to assure that such articles will not be adulterated or misbranded when delivered to the consumer." *Id.* § 463(a).

⁹ 9 C.F.R. § 381.196 (1994).

¹⁰ *Mississippi Poultry Ass'n. v. Madigan*, 31 F.3d 293, 299 (5th Cir. 1994) (en banc).

¹¹ *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). See *infra* notes 179-86 and accompanying text for a discussion of the *Chevron* test.

¹² *Mississippi Poultry*, 31 F.3d at 301-02.

¹³ *Id.* at 310 (Higginbotham, J., dissenting).

¹⁴ The dissent said that the court's holding may result in a "virtual ban" on the importation of poultry. *Id.* at 311 (Higginbotham, J., dissenting). The majority conceded that the Secretary's interpretation, which it invalidates, may be the better policy and that Congress' decision may be "ill-advised." *Id.* at 309-10.

¹⁵ See *id.* at 311 (Higginbotham, J., dissenting).

¹⁶ *Id.* (Higginbotham, J., dissenting).

such a policy on the attitudes of those nations with whom we trade.¹⁷

Part II of this Note will analyze the means by which the majority and dissent arrive at their opinions, and Parts III and IV will explain the comparative strengths and weaknesses of these arguments in light of the history of the regulation of imported poultry and the relevant administrative law. Consideration will also be given, in Part IV, to questions of methodology, the proper role of the judiciary, and the balance of power issues. This Note will also address *Mississippi Poultry's* effect on international trade relations¹⁸ and will discuss the opinion's strength and staying power.¹⁹

II. Statement of the Case

The facts of *Mississippi Poultry* seem simple, centering squarely upon one phrase in an amendment to the Poultry Products Inspection Act²⁰ and one phrase in the PPIA's implementing regulations.²¹ Congress' amendment to the PPIA, as part of the Food Security Act of 1985 (1985 Farm Bill),²² provided that all imported poultry "shall . . . be subject to the same inspection, sanitary, [and] quality . . . standards applied to products produced in the United States," and shall be "processed in facilities and under conditions that are the same as those under which similar products are processed in the United States."²³ In 1989 the Secretary of Agriculture released the final rule interpreting the amendment and explaining that it means that foreign systems must provide standards "at least equal" to the federal system of poultry in-

¹⁷ *Id.* at 296-97. The majority noted that, in conjunction with the 1968 amendments to the Poultry Products Inspection Act (PPIA), the concern was expressed in a House Report that more stringent regulation of imports, when such regulation was unnecessary, might result "in the enactment of measures abroad which could hamper the exportation of U.S. slaughtered poultry and poultry products, the volume of which far exceeds the imports." H.R. REP. NO. 1333, 90th Cong., 2d Sess. 4 (1968), *reprinted in* 1968 U.S.C.C.A.N. 3426, 3428-29.

¹⁸ See discussion *infra* part V.

¹⁹ See discussion *infra* part V.

²⁰ 21 U.S.C. §§ 451-470 (1988 & Supp. V 1993).

²¹ 9 C.F.R. §§ 381.1-311 (1994).

²² 1985 Farm Bill, Pub. L. No. 99-198, § 1701, 99 Stat. 1354, 1633 (codified at 21 U.S.C. § 466(d) (1988 & Supp. V 1993)).

²³ 21 U.S.C. § 466(d)(1). This section reads as follows:

(1) Notwithstanding any other provision of law . . . all poultry, or parts or products thereof, capable of use as human food offered for importation into the United States shall-

(A) be subject to the same inspection, sanitary, quality, species verification, and residue standards applied to products produced in the United States; and

(B) have been processed in facilities and under conditions that are the same as those under which similar products are processed in the United States.

Id.

Prior to this statutory change, the PPIA did not provide the Secretary of Agriculture (Secretary) with specific standards to be imposed on foreign poultry products, but instead granted the Secretary broad discretion to ensure that imported poultry was "healthful, wholesome, [and] fit for human food." *Id.* § 466(a).

spection within the United States.²⁴

The Mississippi Poultry Association and the National Broiler Council (the Poultry Associations), contending that there was a difference between Congress' "same as" language in section 466(d) and the Secretary's "equal to" language,²⁵ filed suit in the Southern District of Mississippi seeking to have the regulation invalidated as arbitrary and capricious under the Administrative Procedure Act.²⁶ Judge Wingate held the Secretary's regulation invalid, reasoning that Congress' language was unambiguous and that its intent was clear.²⁷ He concluded that if dire trade implications occur, it is a matter for Congress, not for the courts.²⁸

On appeal to the Fifth Circuit Court of Appeals, a three-member panel split two to one, with Judges Wiener and King affirming the District Court's invalidation of the regulation and Judge Reavley filing a lengthy dissent.²⁹ Judges Wiener and King concluded, based on both the structure of the PPIA and on the subsequent enactment of the

²⁴ 9 C.F.R. § 381.196 (1994) reads in pertinent part:

(a)(2) The determination of acceptability of a foreign poultry inspection system for purposes of this section shall be based on an evaluation of the foreign program in accordance with the following requirements and procedures:

(i) The system shall have a program organized and administered by the national government of the foreign country. The system as implemented must provide standards *at least equal to* those of the Federal system of poultry inspection in the United States with respect to:

- (a) Organizational structure . . .
- (b) Ultimate control and supervision by the national government . . .
- (c) The assignment of competent, qualified inspectors . . .
- (d) Authority . . . to enforce law and regulations . . .
- (e) Adequate administrative and technical support;
- (f) The inspection, sanitation, quality, species verification, and residue standards applied to products produced in the United States . . .

iv) The foreign inspection system must maintain a program to assure that the requirements referred to in this section, *at least equal to* those applicable to the Federal system in the United States, are being met.

Id. (emphasis added).

²⁵ The plaintiffs, Mississippi Poultry Association and National Broiler Council (the Poultry Associations), contended specifically that the "at least equal to" standard would allow for subjective evaluation of foreign poultry requirements, would permit standards less than those in the United States, and would create an unfair competitive advantage for foreign poultry producers. *Mississippi Poultry Ass'n v. Madigan*, 790 F. Supp. 1283, 1284 (S.D. Miss. 1992), *aff'd*, 992 F.2d 1359 (5th Cir. 1993), *aff'd on reh'g*, 31 F.3d 293 (5th Cir. 1994) (en banc).

²⁶ 5 U.S.C. §§ 55-706 (1988). The Poultry Associations argued that the structure of the PPIA itself and Congress' subsequent action in the 1990 Farm Bill supported the conclusion that Congress intended foreign producers to be subject to identical, rather than equivalent, standards, facilities, and conditions as domestic producers. *Mississippi Poultry*, 790 F. Supp. at 1284. The Secretary, on the other hand, argued that Congress' requirement of "the same" standards and facilities was ambiguous, and that therefore due deference must be given to the agency's regulation, *id.*; and that a standard of identity would bring about dire trade implications, and would in effect preclude importation of any foreign poultry products into the United States. *Id.* at 1290.

²⁷ *Mississippi Poultry*, 790 F. Supp. at 1290.

²⁸ *Id.*

²⁹ *Mississippi Poultry Ass'n v. Madigan*, 992 F.2d 1359 (5th Cir. 1993), *aff'd on reh'g*, 31 F.3d 293 (5th Cir. 1994) (en banc).

1990 Farm Bill, that Congress has "made clear that 'the same as' requires *identical* inspection and processing procedures," and that "[r]egardless of whether Congress' choice should prove to be unwise or disruptive, that choice itself has been made absolutely."³⁰ Judge Reavley's dissent, on the other hand, maintained that Congress did not in fact choose between identity and equivalency when it said "same," and that Judges Wiener and King ignored evidence that would have established that fact.³¹

On rehearing en banc, the Fifth Circuit affirmed the invalidation of the Secretary's regulation in an eight to seven split.³² The majority reasoned that the Secretary's regulation must be invalidated because the structure of the PPIA, the text, and subsequent enactments all support the conclusion that Congress' intent was clear and unambiguous in requiring identity between foreign and domestic systems; and that under *Chevron*,³³ the court's inquiry is complete once clear intent is found.³⁴ Whether or not Congress has made a wise policy choice is beyond the power of either the court or the implementing agency to change.³⁵

The dissent, on the other hand, found that Congress' phrasing in the statute was ambiguous, and thus it would uphold the Secretary's regulation.³⁶ It reasoned that the majority had overstepped its proper judicial role by at one time submitting the text to a literalism that defies true intent, and at other times ignoring the text and relying instead on legislative history.³⁷ The majority, according to the dissent, ignored the common sense reading of "same" standards to refer to an already unified domestic standard system. By ignoring common sense, the majority produced an absurd result which will have a drastic consequence for international trade, namely, a virtual ban on importation of poultry from foreign producers.³⁸

Both the majority and the dissent address the same six issues in reaching their respective opinions: Standard of Review, Text, Structure/History of the PPIA, Legislative History, Subsequent Enactments, and Policy.³⁹

³⁰ *Id.* at 1367-68.

³¹ *Id.* at 1368 (Reavley, J., dissenting).

³² *Mississippi Poultry Ass'n v. Madigan*, 31 F.3d 293 (5th Cir. 1994) (en banc); see also *supra* note 3.

³³ *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

See discussion *infra* part III.B.1.

³⁴ *Mississippi Poultry*, 31 F.3d at 299 n.34.

³⁵ *Id.* at 310.

³⁶ *Id.* at 312, 316 (Higginbotham, J., dissenting).

³⁷ *Id.* at 310 (Higginbotham, J., dissenting).

³⁸ *Id.* (Higginbotham, J., dissenting).

³⁹ *Id.* at 295-316. Each side, as can be expected, puts emphasis on different arguments in trying to discern Congress' intent.

The majority relied most heavily on structural/historical analyses and subsequent enactments. *Id.* at 295-305. In fact, the majority began its opinion with a section it entitles "Back-

A. Reasoning of the Majority

The majority held that the Secretary's regulation must be invalidated because Congress' intent was clear and unambiguous in requiring identity between foreign and domestic systems,⁴⁰ and that under *Chevron U.S.A. v. Natural Resources Defense Council*,⁴¹ the court's inquiry is complete once clear intent is found.⁴² Whether or not Congress has made a wise policy choice is beyond the power of either the court or the implementing agency to change.⁴³

1. Standard of Review

The first factor examined by the majority was the standard of review. The majority stated that the standard to be used for reviewing an agency's interpretation of the statute it administers is set forth in *Chevron U.S.A. v. Natural Resources Defense Council*.⁴⁴ *Chevron* established a two-step test: (1) Has Congress clearly and unambiguously expressed its intent in the plain language of the statute? If so, that is the end of the matter and Congressional intent must be given effect. (2) But if the language of the statute is ambiguous or silent on the particular issue, the reviewing court asks only whether the agency's interpretation is reasonable.⁴⁵ Thus, the *Mississippi Poultry* majority phrased the question presented on appeal as "whether the Secretary's implementation of [section 466(d)] through an 'at least equal to' standard is unambiguously foreclosed by the statutory language 'the same.'"⁴⁶

2. Text

The second issue examined was textual interpretation. The majority presented two textual arguments to support its assertion that Congress meant identical when it said "same": The first relied on the dictionary meanings and on "common usage;"⁴⁷ the second relied on a

ground," which is in reality a lengthy structural analysis buttressed at the end by arguments from subsequent enactments. *Id.* at 295-98. It then proceeded to its "Discussion," in which it sets out the standard of review before taking up in turn "Text," "Structure and History," and "Subsequent Enactments." *Id.* at 298-305. The majority ends with a section entitled "Other Matters," in which it addresses and attempts to refute the Secretary's arguments concerning legislative history, the weight to be given to textual analysis, and the court's role in policy-making. *Id.* at 305-10.

The dissent relied mainly on textual arguments, structural arguments, and legislative history, and it is animated throughout by a "common sense" approach which reasons that an interpretation that brings about absurd policy results cannot have been intended by Congress. *Id.* at 310-16 (Higginbotham, J., dissenting).

⁴⁰ *Id.* at 308.

⁴¹ *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). See discussion *infra* part III.B.1.

⁴² *Chevron*, 467 U.S. at 842-43.

⁴³ *Mississippi Poultry*, 31 F.3d at 310.

⁴⁴ *Id.* at 298-99 (citing *Chevron*, 467 U.S. at 837).

⁴⁵ *Chevron*, 467 U.S. at 842-43.

⁴⁶ *Mississippi Poultry*, 31 F.3d at 299.

⁴⁷ *Id.* at 300.

reading of the term "the same" in the broader context of the statute.⁴⁸

First, the majority argued that even though the word "same" has a range of dictionary meanings stretching from "selfsame" and "identical" to "equal to," nevertheless common usage treats "same" and "identical" as synonyms; thus, common usage unambiguously excludes "at least equal to" as an acceptable definition.⁴⁹ As the basis for its reasoning, the majority stated that "of course common usage provides acceptable grounds on which to parse statutory terms into primary, secondary, and other meanings."⁵⁰

In his argument, the Secretary had relied on *National Railroad Passenger Corp. v. Boston & Maine Corp.*⁵¹ for the proposition that the presence of alternative dictionary definitions for a term, each making some sense under the statute, compels a conclusion that the term is ambiguous. The Secretary had argued that since there is a definition for "the same" that supports an equivalency standard, the court must find the term ambiguous and defer to the Secretary's interpretation.⁵² The majority responded first by stating that since almost any word in the dictionary was given more than one sense-making definition, such an approach would effectively make all statutory terms ambiguous, a result which would dramatically shift power from Congress to the administrative agencies.⁵³ Moreover, such a "dictionary rule" was ruled out by *Chevron* and *Boston & Maine* itself. Both cases "counsel reviewing courts to look at structure and other traditional tools of statutory construction" instead of putting all weight on the dictionary meanings.⁵⁴

Second, the majority, after a contextual reading, reasoned that it was clear that Congress has itself affirmatively acted to exclude "at least equal to" as a proper synonym for "the same."⁵⁵ The argument was that Congress used both the phrases "at least equal to" and "the same" in the PPIA and distinguished between them in meaning.⁵⁶ It used "at least equal to" as its term of art for "different but functionally equal or better," in the domestic intrastate context, and chose to use "the same" as its term of art for the standards to apply to imported poultry.⁵⁷ Therefore, the majority concluded, when the Secretary sought to use

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* (citing *Ardestani v. INS*, 502 U.S. 129, 133 (1991); *Mallard v. United States Dist. Court*, 490 U.S. 296, 301 (1989); and *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 153 (1989)).

⁵¹ 112 S. Ct. 1394, 1402 (1992). For a discussion of this case, see *infra* notes 187-91 and accompanying text.

⁵² *Mississippi Poultry*, 31 F.3d at 307.

⁵³ *Id.*

⁵⁴ *Id.*; see also *National R.R. Passenger Corp. v. Boston & Me. Corp.*, 112 S. Ct. 1394, 1402 (1992); *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843 n.9 (1984).

⁵⁵ *Mississippi Poultry*, 31 F.3d at 300.

⁵⁶ *Id.*

⁵⁷ *Id.* at 293, 300.

“at least equal to” as an interpretation for “the same,” he acted arbitrarily and capriciously.⁵⁸ This is because when Congress uses particular language in one section in a statute, but does not use it in another section of the same statute, it is an indication that Congress specifically intends to omit it.⁵⁹

3. *Structure/History of the PPIA*

Conceding that textual arguments alone are not enough to be conclusive,⁶⁰ the majority then turned to structural arguments. The crux of the argument was that, based on the way the PPIA is designed, if an “at least equal” standard is applied to foreign producers, it will result in a great advantage to foreign producers over domestic producers, an advantage that Congress did not intend. The majority made this argument in several steps. First, the majority asserted that the PPIA was designed not only to protect consumers from tainted products, but also “to protect the domestic poultry market from unfair competition.”⁶¹ Second, the PPIA created one uniform and detailed regulatory scheme for the national interstate market, which was to be distinguished from the system for regulating intrastate sales;⁶² imported poultry, however, could be sold domestically as long as it was not “unhealthful, unwholesome, [or] adulterated.”⁶³

When Congress amended the PPIA in 1968, it extended regulation to poultry sold intrastate; the states were not made to comply with the federal program itself, but their inspection programs were to be “at least equal to” the federal one before they could offer poultry for sale intrastate.⁶⁴ So for domestically produced poultry, the only products that could be sold interstate were those inspected “under THE federal program” and “according to THE uniform federal standards.”⁶⁵ The PPIA still regulated imported poultry without much detail from Congress, leaving the specifics to the Secretary,⁶⁶ and at this time the Secretary had promulgated regulations allowing poultry products to be imported only if the inspection standards used were the “substantial equivalent” of domestic ones.⁶⁷

In 1972, the Secretary revised the regulations for imported poultry and required that foreign inspection standards be “at least equal to”

⁵⁸ *Id.* at 300.

⁵⁹ *Id.* at 301 (citing *Russello v. United States*, 464 U.S. 16 (1983); *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1971)).

⁶⁰ *Id.* at 300.

⁶¹ *Id.* at 295 (citing 21 U.S.C. § 451 (1988)).

⁶² *Id.* at 296.

⁶³ 21 U.S.C. § 466(a) (1988).

⁶⁴ *Mississippi Poultry*, 31 F.3d at 296 (quoting 21 U.S.C. § 454(a) (1968)).

⁶⁵ *Id.* (referring to 9 C.F.R. §§ 381.1-311 (1994)).

⁶⁶ *See* 21 U.S.C. § 466(a) (1968).

⁶⁷ 7 C.F.R. § 18.301 (1972).

domestic ones.⁶⁸ The majority maintained that this regulation resulted in great unfairness because a foreign producer could sell interstate if the poultry was inspected under standards "at least equal to" the domestic ones, but domestic producers who met that same standard could only sell intrastate.⁶⁹ This gave foreign producers an advantage over domestic producers⁷⁰ which, according to the majority, Congress would certainly not do, considering its concern that domestic industry be protected from unfair trade practices.⁷¹

At this juncture, the majority points out, Congress amended the PPIA via the 1985 Farm Bill, stating that imported poultry "shall . . . be subject to the same . . . inspection standards" and "processed in facilities and under conditions that are the same as those under which similar products are processed in the United States."⁷² The majority reasoned that this was a clear mandate for regulating foreign poultry products identically to domestic poultry destined for the same market; that is, that it was a command to make foreign producers comply with the federal regulatory program.⁷³ Therefore, according to the majority, when the Secretary in 1989 retained the "at least equal to" standard, it was an act of "effrontery" on his part.⁷⁴

It was in response to this, said the majority, that Congress enacted the Food, Agriculture, Conservation and Trade Act (1990 Farm Bill), Section 2507 of which specifically addresses PPIA Section 466(d)'s "the same" language and the Secretary's regulation.⁷⁵ This section states that the regulation "does not reflect the intention of the Congress," and "urge[s] the Secretary . . . to repeal the Oct. 31, 1989 regulation and promulgate a new regulation reflecting the intention of the Congress."⁷⁶ When the regulations remained unaltered, the Poultry Associations sought certainty by turning to the judicial branch, filing suit in district court.⁷⁷

In sum, concluded the majority, the structure of the PPIA is plain:⁷⁸ Domestic poultry producers can sell their products, but only in intrastate commerce, if they comply with state inspection programs that provide standards "at least equal to" those of the federal program.⁷⁹ If a domestic poultry producer wishes to sell his product in interstate commerce, that producer must comply with the federal

⁶⁸ 9 C.F.R. § 381.196 (1994).

⁶⁹ *Mississippi Poultry*, 31 F.3d at 297.

⁷⁰ *Id.*

⁷¹ *See id.* at 295.

⁷² 1985 Farm Bill, Pub. L. No. 99-198, § 1701, 99 Stat. 1354, 1633 (codified at 21 U.S.C. § 466(d)(1988 & Supp. V 1993)).

⁷³ *Mississippi Poultry*, 31 F.3d at 297.

⁷⁴ *Id.* at 297-98.

⁷⁵ 1990 Farm Bill, Pub. L. No. 101-624, § 2507, 104 Stat. 3359, 4068-69.

⁷⁶ *Id.* at 4069.

⁷⁷ *Mississippi Poultry*, 31 F.3d at 298.

⁷⁸ *Id.* at 301.

⁷⁹ *Id.* (emphasis omitted) (citing 21 U.S.C. § 454 (1988)).

program.⁸⁰

Likewise the history of the PPIA regarding imports is plain, said the majority.⁸¹ The majority stated that the Secretary basically had two choices for regulation in 1972: "either to require imported poultry to comply with the standards applied to all poultry sold in interstate commerce—i.e., the federal standards—or to adopt an 'at least equal to' standard as used for the poultry sold in intrastate commerce under state programs."⁸² The majority then said it was to the "surprise and dismay" of all concerned that the Secretary followed the intrastate approach by choosing the "at least equal to" standard.⁸³

The majority reasoned from this that when Congress in 1985 rejected the "at least equal to" approach and explicitly provided that imported poultry must meet "the same" standards applied to products produced in the United States, only one "inescapable conclusion" could be drawn: That when Congress stated "the same" standards it intended imported poultry to be held to the federal standards.⁸⁴ The majority believed that the referent for the term "the same" was plain,⁸⁵ and that "by adopting the 'at least equal to' standard, the Secretary was or could be treating imported and domestic interstate poultry in a substantially different manner."⁸⁶

4. *Subsequent Enactments*

The majority also believed that two subsequent acts of Congress confirmed their conclusion that "the same" is an unambiguous reference to the federal program of regulations:⁸⁷ the 1990 Farm Bill⁸⁸ and the 1993 North American Free Trade Agreement Implementation Act (NAFTA Act Amendments).⁸⁹

After establishing that the value of the subsequent legislation, which can range anywhere from being "of great weight"⁹⁰ to having "persuasive value"⁹¹ to being "of little assistance,"⁹² was dependent on the facts of the case at hand, the majority turned to the 1990 Farm

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 302.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ 1990 Farm Bill, Pub. L. No. 101-624, § 2507, 104 Stat. 3359, 4068-69.

⁸⁹ North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, § 361(e), 107 Stat. 2057, 2123-24 (1993) [hereinafter NAFTA Act].

⁹⁰ *Mississippi Poultry*, 31 F.3d at 302 (citing *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81 (1969)).

⁹¹ *Id.* (citing *Bell v. New Jersey*, 461 U.S. 773, 784 (1983)).

⁹² *Id.* (citing *Public Employees Retirement Sys. v. Betts*, 429 U.S. 158, 168 (1989)).

Bill.⁹³

With respect to the 1990 Farm Bill, the majority found it "highly persuasive" because of four factors:

(1) substantial overlap in membership between the Congress that passed the 1985 Farm Bill and the Congress that passed section 2507 [of the 1990 Farm Bill];⁹⁴ (2) the close temporal proximity between the passage of the 1985 Farm Bill and of section 2507; (3) unmistakable specificity and directness with which section 2507 addressed the Secretary's interpretation; and (4) the alacrity with which Congress through section 2507 responded to the Secretary's interpretation.⁹⁵

The majority believed that Congress amended section 466(d) again with the enactment of the 1993 NAFTA Act Amendments, because the NAFTA amendment "by its very terms" distinguished "the same" from an "equivalency standard."⁹⁶ The majority reasoned that because Congress juxtaposed "the same" and "at least equal to" in the language of the NAFTA Act Amendments, Congress showed that the two were not meant to be synonyms.⁹⁷

⁹³ 1990 Farm Bill, Pub. L. No. 101-624, § 2507, 104 Stat. 3359, 4068-69. Section 2507 of the 1990 Farm Bill reads:

(a) FINDINGS. Congress finds that:

(1) in 1985 the [PPIA], an act to maintain the integrity and wholesomeness of this Nation's food supply, was amended by the Food Security Act of 1985;

(2) the 1985 amendment provided that poultry products offered for importation into the United States shall be subject to the same inspection, sanitary, quality, species verification, and residue standards applied to products produced in the United States and that such products shall have been processed in facilities and under conditions that are the same as those under which similar products are processed in the United States; and

(3) on October 30, 1989, the Secretary of Agriculture . . . promulgated a regulation implementing the 1985 amendment to that Act providing that a foreign inspection system seeking certification for export of poultry to the United States merely impose requirements at least equal to those applicable in the United States.

(b) SENSE OF CONGRESS. It is the sense of Congress that:

(1) the regulation promulgated by the Secretary of Agriculture . . . with respect to poultry products offered for importation into the United States does not reflect the intention of the Congress; and

(2) to urge the Secretary . . . to repeal the October 30, 1989 regulation and promulgate a new regulation reflecting the intention of the Congress.

Id.

⁹⁴ The court notes that 435 members of the Congress that passed Section 2507 of the 1990 Farm Bill were also members of the Congress that added the "same" language to Section 466(d) of the PPIA as part of the 1985 Farm Bill. *Mississippi Poultry*, 31 F.3d at 303 n.58.

⁹⁵ *Id.* at 303.

⁹⁶ *Id.* Section 361(e) of the NAFTA Act provides that:

(2)(A) . . . all poultry . . . [imported] into the United States from Canada and Mexico shall:

(i) comply with paragraph (1) [a reference to the phrase "the same" in section 466(d) of the PPIA]; or

(ii)(I) be subject to . . . standards that are equivalent to United States standards; and

(II) have been processed in facilities and under conditions that meet standards that are equivalent to United States standards.

NAFTA Act, *supra* note 89, Pub. L. No. 103-182, § 361(e), 107 Stat. 2057, 2123-24 (1993).

⁹⁷ *Mississippi Poultry*, 31 F.3d at 304.

Moreover, the majority found it even more significant that the application of the Secretary's interpretation to the NAFTA Act Amendments would violate the elementary canon of statutory construction that "a statute should be interpreted so as not to render one part inoperative."⁹⁸ The reasoning was that if "the same" and "equivalent to" were meant to be the same standard, then the NAFTA Act's use of the disjunctive "or" would render one of the two phrases in the Act "sheer surplusage."⁹⁹

5. *Legislative History*

Legislative history was taken up next. The majority, responding to the Secretary's contention that the legislative history of the 1985 Farm Bill supports his position that "the same" is ambiguous, sought to quash such a contention with two arguments. First, an appeal to legislative history was "not well taken" when the text was unambiguous to begin with.¹⁰⁰ And second, even if the court could consider legislative history despite the unambiguous language of the statute, its instructive value in this case was "not nearly as lucid as the Secretary would have us believe."¹⁰¹

The legislative history of the 1985 Farm Bill revealed that when the Bill was introduced to the Senate Committee on Agriculture, Nutrition, and Forestry, the amendment to section 17(d) (section 466(d) as codified) contained the "at least equal to" standard.¹⁰² It was at this point that Senator Jesse Helms, as Chairman of this Committee, deleted the phrase "at least equal to" and replaced it with "the same," explaining on the floor of the Senate that "the same" needed to be added as a "technical and clarifying amendment . . . to reflect the original intent of the committee."¹⁰³ The majority reasoned that because the Senators apparently accepted and understood this change without debate, it was "strong evidence that the sense of the committee knowingly and intentionally became the sense of the Senate."¹⁰⁴ The majority said that the Secretary, on the other hand, defied logic in his attempt to show that this bit of legislative history revealed anything but complete or nearly complete unanimity of Congress in its intent to require foreign producers to comply with the federal regulations

⁹⁸ *Id.* (quoting *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985)).

⁹⁹ *Id.*

¹⁰⁰ *Id.* (citing *Barnhill v. Johnson*, 112 S. Ct. 1386, 1392 (1992); *Railroad Comm'n v. Chicago, B. & Q. R.R.*, 257 U.S. 563, 589 (1992); and *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992)).

¹⁰¹ *Id.*

¹⁰² 1985 Farm Bill, S. REP. NO. 99-145, 99th Cong., 1st Sess. 339-40 (1985), reprinted in 1985 U.S.C.C.A.N. 1676, 2005-06.

¹⁰³ 131 CONG. REC. 33,358 (1985).

¹⁰⁴ *Mississippi Poultry*, 31 F.3d at 306.

themselves.¹⁰⁵

6. Policy

The Secretary had argued that from a policy standpoint, an equivalency standard is best because it “protects American consumers from unhealthful, unwholesome, or adulterated products while allowing foreign poultry products to be imported at reasonable costs.”¹⁰⁶ Imposition of standards identical with the federal program, the Secretary asserted, would raise costs to a prohibitive, protectionist level without any corresponding increase in the safety and quality of the imported product because they are already equal by his standard.¹⁰⁷

The majority responded by saying that what was to be eliminated by the invalidation of the regulation was the Secretary’s practice of “certifying foreign programs in globo as ‘at least equal to’ the federal one.”¹⁰⁸ Moreover, the majority argues, the holding does not proscribe all variations from the federal standards, for the Secretary can still “approve discrete, authorized variations of the type commonly approved under the federal standards.”¹⁰⁹ In contrast, the majority says, what the Secretary would do is to operate under a “wholly *different* scheme of regulation that—while it may arguably be a better scheme—is not the one authorized or established by Congress.”¹¹⁰

In addition, the majority pointed out that the Secretary’s policy arguments do not respond to Congress’ legitimate reasons for holding imported poultry to the exact federal standards: uniformity in the market, enhanced consumer confidence, and the “traditional advantage[s] associated with ‘bright line’ rules.”¹¹¹

The majority concluded its opinion by stating that “policy choices are for Congress—not the courts,” and even though the Secretary had advanced solid arguments that an equivalency standard is the better standard, “it simply is not the role of the court to decide which of the other two branches has proposed the preferable rule.”¹¹² The majority believed that Congress had clearly indicated that the language “the same” excluded an equivalency standard, and that even if it was a bad decision, Congress, not the Secretary, still had the right to make it.¹¹³

B. Reasoning of the Dissent

The dissent, on the other hand, found that the Secretary’s regula-

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 308.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 308-09.

¹¹⁰ *Id.* at 309.

¹¹¹ *Id.*

¹¹² *Id.* at 310.

¹¹³ *Id.*

tion clearly passed the *Chevron U.S.A. v. Natural Resources Defense Council* test,¹¹⁴ and thus would uphold it.¹¹⁵

Judge Higginbotham began the dissenting opinion with a discussion of methodology.¹¹⁶ He noted that there are “two tools of choice” for judges who seek to go beyond the text and act improperly in an activist capacity.¹¹⁷ The first is to ignore the text by using a “flood of legalisms and words that abstract and shrink the visage of textual command—often accompanied by unguided meanderings through legislative history.”¹¹⁸ The second and more dangerous way to escape the text is “to turn the enterprise on itself by an exacting literalism that refuses to read words in context.”¹¹⁹ He believed that the majority had overreached its bounds and, in doing so, used both of these methods.¹²⁰

The case is simple, the dissent maintained, yet the majority insisted on a literalism that produces absurd results, like demanding “identical processes and identical plants,” despite the common sense reading of “the same” to mean the same level of quality that *all* domestic poultry meets, whether by the federal program itself or by state programs that are equivalent.¹²¹ The dissent asked what the Department of Agriculture *can* do under the majority opinion, for “reading the statute to insist upon identical standards is a virtual ban on importation of poultry,” an absurdity that the majority does not address directly.¹²² The sheer physical impossibility of implementing and enforcing identical facilities and identical conditions caused the dissent to doubt the plausibility of the majority’s arguments.¹²³ The dissent concluded that the majority’s opinion thus harbors a “latent congressional purpose of trade protectionism”¹²⁴ which was never discussed directly by Congress.

1. Standard of Review

With respect to the proper standard of review to be used, the dissent stated that the question was not “whether we would select the definition of ‘same’ that the Secretary did . . . [but] whether Congress chose among the above definitions.”¹²⁵ *Chevron* dictates that it is only

¹¹⁴ See *infra* notes 179-86 and accompanying text for a discussion of the *Chevron* test.

¹¹⁵ *Mississippi Poultry*, 31 F.3d at 312 (Higginbotham, J., dissenting).

¹¹⁶ *Id.* at 310 (Higginbotham, J., dissenting).

¹¹⁷ *Id.* (Higginbotham, J., dissenting).

¹¹⁸ *Id.* (Higginbotham, J., dissenting).

¹¹⁹ *Id.* (Higginbotham, J., dissenting).

¹²⁰ *Id.* (Higginbotham, J., dissenting) (“Until today . . . I had never seen both techniques appear in a single opinion.”).

¹²¹ *Id.* (Higginbotham, J., dissenting).

¹²² *Id.* at 311 (Higginbotham, J., dissenting).

¹²³ *Id.* (Higginbotham, J., dissenting).

¹²⁴ *Id.* (Higginbotham, J., dissenting).

¹²⁵ *Id.* at 312 (Higginbotham, J., dissenting). The dissent identified three categories of

if the statute is ambiguous that the Secretary has the authority to elucidate a specific provision by regulation, and only if that interpretation is reasonable must a court defer to it.¹²⁶ "Under this approach," Judge Higginbotham wrote, "I would have thought the validity of the Secretary's definition of 'same' beyond question."¹²⁷ The dissent thus believed that the meaning of "same" in the statute was not clear, and that the Secretary's definition was a reasonable interpretation.¹²⁸

2. Text

The dissent began its discussion with a textual analysis and a statement of the crux of the case: "the PPIA subjects foreign poultry to the 'same' standards, and requires that such poultry be produced under the 'same' conditions and in the 'same' facilities as domestic poultry."¹²⁹ The Secretary's regulation defined "same" as "at least equal to."¹³⁰ Therefore, the dissent said that the decision before the court was whether the Act and the regulation conflict.¹³¹

The dissent proceeded by first analyzing the various dictionary definitions for "same" and deciding which would most plausibly have been used by Congress in the PPIA.¹³² The dissent recognized that one of Webster's definitions for "same" was "identical,"¹³³ but posited two practical and functional reasons for believing that Congress never intended this meaning. The first reason was that requiring identical standards and identical facilities would bar foreign poultry produced under conditions and in facilities superior to American ones.¹³⁴ Second, an identical standard, because of the cost involved in retooling foreign systems, would have the effect of banning imported poultry, and since Congress never indicated that it meant the PPIA to be a protectionist statute, it must not have intended such a result.¹³⁵

Webster's also defined "same" as "not different in relevant essentials," or "equivalent."¹³⁶ Again, the dissent applied a functionalist analysis to this definition, reasoning that requiring imported poultry to be produced under at least equal conditions, facilities, and standards as our own would result in imported products that are equally safe for

definition: (1) "selfsame," indicating unity of identity, (2) "identical," and (3) "not different in relevant essentials," "similar," "equivalent." *Id.* at 311-12 (Higginbotham, J. dissenting).

¹²⁶ *See id.* at 312 (Higginbotham, J., dissenting) (citing *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984)).

¹²⁷ *Id.* (Higginbotham, J., dissenting).

¹²⁸ *Id.* (Higginbotham, J., dissenting).

¹²⁹ *Id.* at 311 (Higginbotham, J., dissenting).

¹³⁰ *Id.* (Higginbotham, J., dissenting).

¹³¹ *Id.* (Higginbotham, J., dissenting).

¹³² *Id.* at 311-12 (Higginbotham, J., dissenting).

¹³³ *Id.* at 311 n.11 (Higginbotham, J., dissenting) (citing WEBSTER'S UNABRIDGED THIRD NEW INTERNATIONAL DICTIONARY 2007 (1st ed. 1961) [hereinafter WEBSTER'S]).

¹³⁴ *Id.* at 311-12 (Higginbotham, J., dissenting).

¹³⁵ *Id.* at 312 (Higginbotham, J., dissenting).

¹³⁶ *Id.* (Higginbotham, J., dissenting) (citing WEBSTER'S, *supra* note 133, at 2007).

consumption as domestic products.¹³⁷ The dissent believed that “[t]he Secretary’s definition therefore comports with the most plausible definition of the word ‘same’ as used in Section 466(d) of the PPIA.”¹³⁸

3. *Structure of the PPIA*

The structure of the PPIA was discussed next. The dissent contended that the majority committed a major error in its structural analysis, an error brought about by a tendency to overlook the plain and common sense meaning of the language.¹³⁹ According to the dissent, the PPIA does not set out two separate sets of standards, but in reality sets up a system in which *all* domestic poultry, whether interstate or intrastate, meets uniform standards. The only difference between interstate and intrastate is that one must operate under the direct supervision of federal regulators, whereas the other operates under the supervision of the states.¹⁴⁰ The key is that state systems and the federal program both result in the “same floor [of] quality.”¹⁴¹ Therefore, the dissent reasoned, the fact that the statute says “same” without indicating that there are more than one set of standards reveals that Congress recognized that there is, in fact, only one domestic standard.¹⁴² So when Congress demanded “the same,” it simply required that imported poultry meet that single floor of quality.¹⁴³

4. *Legislative History*

The dissent pointed out that the 1985 amendment to the PPIA originally contained the term “at least equal to,” and that it was Senator Jesse Helms’ initiative on the Senate floor that struck out the phrase and replaced it with “the same as.”¹⁴⁴ There are two reasons, according to the dissent, for the lack of debate or comment in the Senate. First, there already existed in the minds of Senators a unity in domestic standards; no one asked *which* domestic standard because there was only *one*. “It is a floor below which no domestic poultry . . . may fall.”¹⁴⁵ Second, Senator Helms stressed that his change was only a “technical” and “clarifying” change; if Senator Helms intended his amendment to create a protectionist measure in the bill, he did not indicate that in any way.¹⁴⁶ That is to say, if the Senate had realized

¹³⁷ *Id.* (Higginbotham, J., dissenting).

¹³⁸ *Id.* (Higginbotham, J., dissenting).

¹³⁹ *Id.* at 313 (Higginbotham, J., dissenting).

¹⁴⁰ *Id.* at 312-13 (Higginbotham, J., dissenting).

¹⁴¹ *Id.* at 313 (Higginbotham, J., dissenting).

¹⁴² *Id.* (Higginbotham, J., dissenting) (emphasis omitted).

¹⁴³ *Id.* (Higginbotham, J., dissenting).

¹⁴⁴ *Id.* (Higginbotham, J., dissenting) (quoting 131 CONG. REC. 33,358 (1985) (statement of Sen. Helms)).

¹⁴⁵ *Id.* (Higginbotham, J., dissenting).

¹⁴⁶ *Id.* at 313-14 (Higginbotham, J., dissenting). This is all that Senator Helms offered:

The amendment . . . changes the provision relating to inspection of imported

that Senator Helms was introducing a whole new protectionist barrier, surely such a change would have been mentioned and openly debated.

In addition, the dissent pointed out that Senator Helms' alteration did not in fact reflect the concerns of the Senate Agriculture Committee, since the Committee explicitly desired an equivalency standard.¹⁴⁷ The Committee's concern was to strengthen regulations on imported poultry which does not meet U.S. standards and has not "been processed in facilities and under conditions *at least equal to* those under which similar products are processed in the United States."¹⁴⁸

5. *Subsequent Enactments*

As for subsequent legislation, the dissent conceded that Congress responded to the Secretary's equivalency standard by stating in the 1990 Farm Bill that the regulation "does not reflect the intention of Congress" and urging the Secretary "to repeal the October 30, 1989 regulation."¹⁴⁹ But the dissent maintained that to have any effect on the Secretary's regulation, Congress should have either amended the PPIA directly or made a finding as to Congress' intentions at the time the 1985 amendment passed.¹⁵⁰ The dissent relied upon *Pierce v. Underwood*¹⁵¹ as providing the Supreme Court's answer on how to assess the value of subsequent legislation: "If th[e] language [of the 1990 Act] is to be controlling upon us, it must be either (1) an authoritative interpretation of what the [1985] statute meant, or (2) an authoritative expression of what the [1990] Congress intended."¹⁵²

NAFTA's effect was also taken up by the dissent. The majority had argued that because the NAFTA Act Amendments put "same" and "equivalent" in the disjunctive,¹⁵³ there must be a difference of meaning between the two terms or Congress would not have included both.¹⁵⁴ The dissent, however, maintained that even though they do mean the same thing, there was a reason for the superfluity of terms: "[NAFTA] could not stand still for an uncertain future day when we

poultry products to provide that imported poultry must have been processed in facilities and under conditions that are the same as those under which similar products are processed in the United States. This change clarifies the provision to reflect the original intent of the provision as adopted by the committee in markup.

131 Cong. Rec. 33,358 (1985) (statement of Sen. Helms).

¹⁴⁷ *Mississippi Poultry*, 31 F.3d at 314 n.22 (Higginbotham, J., dissenting).

¹⁴⁸ *Id.* (Higginbotham, J., dissenting) (citing S. REP. NO. 99-145, 99th Cong., 1st Sess. 339-40 (1985), reprinted in 1985 U.S.C.C.A.N. 1676, 2005-06).

¹⁴⁹ *Id.* at 314 n.23 (Higginbotham, J., dissenting) (citing Pub. L. No. 101-624, § 2507, 104 Stat. 3359, 4069 (1990)); see also *supra* notes 93-95.

¹⁵⁰ *Mississippi Poultry*, 31 F.3d at 314 n.22 (Higginbotham, J., dissenting).

¹⁵¹ 487 U.S. 552 (1988).

¹⁵² *Mississippi Poultry*, 31 F.3d at 315 (Higginbotham, J., dissenting) (citing *Pierce v. Underwood*, 487 U.S. 552, 566 (1988)).

¹⁵³ See *supra* notes 96-99 and accompanying text.

¹⁵⁴ *Mississippi Poultry*, 31 F.3d at 303-04.

would offer a final interpretation" of "same."¹⁵⁵ Because the interpretation of section 466(d) was still pending in the courts, the language in NAFTA had to cover all contingencies. Caution, therefore, was the reason for the superfluity.¹⁵⁶ Therefore, NAFTA is not conclusive proof that "same" and "equivalent" have separate meanings.¹⁵⁷

6. Policy

The dissent employed policy considerations throughout its opinion as a tool of statutory construction.¹⁵⁸ The question before the court was what Congress intended by "same." The reasoning was that if one interpretation of "same" produces an absurd result, Congress must not have meant that. Pointing out the absurdities that would result if "same" was interpreted as "identical," the dissent concluded that "identical" is too far from the realm of practicality to make any sense.¹⁵⁹

III. Background Law

Because the majority and dissenting opinions in *Mississippi Poultry* have such different views of the structural scheme of the Poultry Products Inspection Act, it is necessary to briefly summarize the history of the Act and the most important cases and precedents on which the Fifth Circuit relied.

A. History of Poultry Products Inspection Act (PPIA)

1. The Original Act

In 1957 Congress enacted the PPIA,¹⁶⁰ which established a comprehensive federal program for the regulation of poultry products.¹⁶¹ Its stated purposes were to protect consumers from diseased and unwholesome poultry and to protect domestic producers from being undercut by lower-quality and lower-priced products.¹⁶² Administration of the PPIA was placed under the control of the Secretary of Agriculture, who was authorized to promulgate regulations necessary for carrying out its provisions.¹⁶³ The PPIA did not extend to products sold in intrastate commerce, but only regulated those products destined for the national market.

¹⁵⁵ *Id.* at 315 (Higginbotham, J., dissenting).

¹⁵⁶ *Id.* (Higginbotham, J., dissenting).

¹⁵⁷ *Id.* (Higginbotham, J., dissenting).

¹⁵⁸ *Id.* at 310-12 (Higginbotham, J., dissenting).

¹⁵⁹ *Id.* (Higginbotham, J., dissenting).

¹⁶⁰ 21 U.S.C. §§ 451-470 (1988 & Supp. V 1993).

¹⁶¹ For example, the PPIA covers inspection, *id.* § 455; sanitation, *id.* § 456; labeling, *id.* § 457; prohibited acts, *id.* § 458; punishment, *id.* § 461; imports, *id.* § 466; and monitoring provisions, *id.* §§ 467-470.

¹⁶² *Id.* § 451.

¹⁶³ *Id.* § 463(b).

As for imported products, the PPIA set down a very broad standard, proscribing products that were found "unhealthful, unwholesome, or adulterated," and granted the Secretary broad discretion to promulgate regulations accordingly.¹⁶⁴

2. *The 1968 Amendments to the PPIA*

In 1968 Congress amended the PPIA to extend its regulation to poultry produced and sold in intrastate commerce.¹⁶⁵ Under the amendments, the Secretary was to offer state inspection programs, technical and laboratory assistance, training, and partial funding.¹⁶⁶ Poultry inspected under this type of program could then be offered for sale intrastate if the program was "at least equal to" the federal one.¹⁶⁷

The standards for imported poultry were not altered by the 1968 amendments; the PPIA retained only the "unhealthful, unwholesome, or adulterated" language.¹⁶⁸

3. *The 1972 Change in Regulations*

The Secretary revised the regulations regarding standards for imported poultry in 1972.¹⁶⁹ Under the new standard, imported poultry was to be proscribed unless the foreign standards, systems, and conditions were "at least equal to" the federal system of poultry inspection in the United States.¹⁷⁰

4. *The 1985 Farm Bill and Corresponding Regulations*

In 1985, Congress amended the PPIA as part of the Food Security Act (1985 Farm Bill) to provide that imported poultry "shall . . . be subject to the same inspection, sanitary, [and] quality . . . standards applied to products produced in the United States" and shall "have been processed in facilities and under conditions that are the same as those under which similar products are processed in the United States."¹⁷¹

¹⁶⁴ *Id.* § 466(a).

¹⁶⁵ Congress was able to include intrastate products by finding that the sale of any unwholesome, adulterated, or misbranded poultry "substantially affects" interstate commerce. Wholesome Poultry Products Act, Pub. L. No. 90-492, § 2, 82 Stat. 791 (1968) (codified at 21 U.S.C. § 451 (1988)).

¹⁶⁶ 21 U.S.C. § 454 (1988).

¹⁶⁷ *Id.* § 454(a), (c).

¹⁶⁸ *Id.* § 466(a). The House Report states the reason for this: "more stringent regulation of imports . . . could hamper the exportation of U.S. slaughtered poultry and poultry products, the volume of which far exceeds the imports." H.R. REP. No. 1333, 90th Cong., 2d Sess. 4 (1968), reprinted in 1968 U.S.C.C.A.N. 3426, 3428-29.

¹⁶⁹ Previously, the Secretary had used a "substantial equivalent of" standard. See 7 C.F.R. § 81.301 (1972).

¹⁷⁰ 7 C.F.R. § 81.301 (1972).

¹⁷¹ 1985 Farm Bill, Pub. L. No. 99-198, § 1701, 99 Stat. 1354, 1633 (codified at 21 U.S.C. § 466(d) (1988 & Supp. V 1993)). The Bill came into the Senate with the "at least equal to" language, but the chairman of the Senate committee, Senator Jesse Helms, made "technical

The Secretary published an interim regulation in 1987 in which the "at least equal to" standard was used,¹⁷² and two years later published the final rule with that same language.¹⁷³

5. *The 1990 Farm Bill*

In 1990, Congress enacted Section 2507 of the Food, Agriculture, Conservation and Trade Act (1990 Farm Bill),¹⁷⁴ in which it addressed the Secretary's interpretation, stating that "the regulation promulgated by the Secretary . . . with respect to poultry products offered for importation into the United States does not reflect the intention of the Congress."¹⁷⁵ Congress then urged the Secretary to "repeal the October 30, 1989 regulation and promulgate a new regulation reflecting the intention of Congress."¹⁷⁶

B. *Relevant Case Precedent*

The most important case bearing on *Mississippi Poultry* is *Chevron U.S.A. v. Natural Resources Defense Council*,¹⁷⁷ which sets the standard of review. *National Railroad Passenger Corp. v. Boston & Maine Corp.*¹⁷⁸ also plays a role in the opinion, it being relevant to textual analysis.

1. *Judicial Review*

In *Chevron*, the Court reviewed Environmental Protection Agency (EPA) regulations that allowed states to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single "bubble."¹⁷⁹ The unanimous view of the six participating members of the Court was that the EPA regulations were based on a reasonable construction of the term "stationary source."¹⁸⁰ In reaching this conclusion, the Court established a two-step method for judicial review of an agency's interpretation of a statute that it administers.¹⁸¹ The threshold inquiry is whether Congress clearly expressed its intent in the plain language of the statute.¹⁸² "If the intent

and clarifying" amendments to the Bill, striking the "at least equal to" standard and replacing it with "the same." See 131 CONG. REC. 33,358 (1985); see also *supra* note 146.

¹⁷² 52 Fed. Reg. 15,963 (1987).

¹⁷³ 54 Fed. Reg. 43,948 (1989). Specifically, the Secretary interpreted the language in section 466(d) of the Act to require that "the foreign inspection system must maintain a program to assure that the requirements referred to in this section, at least equal to those applicable to the Federal System in the United States, are being met." *Id.* at 43,951.

¹⁷⁴ 1990 Farm Bill, Pub. L. No. 101-624, § 2507, 104 Stat. 3359, 4068-69.

¹⁷⁵ *Id.* at 4069.

¹⁷⁶ *Id.*

¹⁷⁷ *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

¹⁷⁸ 112 S. Ct. 1394 (1992).

¹⁷⁹ *Chevron*, 467 U.S. at 840; see also 40 C.F.R. § 51.18(j)(1) (1983).

¹⁸⁰ *Chevron*, 467 U.S. at 866; see also Clean Air Act Amendments of 1977, § 172(b)(6), 42 U.S.C. § 7502(b)(6)).

¹⁸¹ *Chevron*, 467 U.S. at 866.

¹⁸² *Id.* at 842.

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."¹⁸³ In deciding whether the intent of Congress is clear, courts are to employ the traditional rules of statutory construction.¹⁸⁴ If, but only if, the language of the statute is determined to be either ambiguous or silent on the particular issue, is the reviewing court to proceed to the second *Chevron* inquiry: "whether the agency's answer is based on a permissible construction of the statute."¹⁸⁵ As long as the agency's interpretation is reasonable, the court should defer to that interpretation and not impose its own construction on the statute.¹⁸⁶

2. Textual analysis

*Boston & Maine*¹⁸⁷ plays an important part in the textual analysis that the Fifth Circuit employs. In *Boston & Maine*, the Interstate Commerce Commission (ICC) contended that the statutory term "required" meant "useful or appropriate," and not "indispensable or necessary" as understood by the railroad company.¹⁸⁸ The Court deferred to the ICC's interpretation under a *Chevron* analysis, saying that "[t]he existence of alternative dictionary definitions of the word 'required,' each making some sense under the statute, itself indicates that the statute is open to interpretation."¹⁸⁹ This does not mean, however, that *Boston & Maine* stands for a per se dictionary rule, in which any word with an alternative definition is automatically ambiguous;¹⁹⁰ rather, *Boston & Maine* itself instructs reviewing courts when interpreting a statute to look "to the structure and language of the statute as a whole."¹⁹¹

IV. Significance of the Case

If the Fifth Circuit's opinion in *Mississippi Poultry* withstands further review, it will indeed have great significance for the poultry industry. Whether the opinion will stand, however, may depend upon the relative strength of the arguments of the majority and the dissent.

The dissent is animated throughout its opinion by a concern for practicality and functionality. It looks at the language in question in the PPIA and the Secretary's regulation and assumes that Congress and the Secretary intend their actions to have practical effect.¹⁹² The

¹⁸³ *Id.* at 842-43.

¹⁸⁴ *Id.* at 843 n.9.

¹⁸⁵ *Id.* at 843.

¹⁸⁶ *Id.* at 844.

¹⁸⁷ *National R.R. Passenger Corp. v. Boston & Me. Corp.*, 112 S. Ct. 1394 (1992).

¹⁸⁸ *Id.* at 1402.

¹⁸⁹ *Id.*

¹⁹⁰ See *MCI Telecommunications Corp. v. AT&T Co.*, 114 S. Ct. 2223, 2229 (1994) (explicitly stating that *Boston & Maine* does not stand for a dictionary rule).

¹⁹¹ *Boston & Maine*, 112 S. Ct. at 1401 (citations omitted).

¹⁹² See generally *Mississippi Poultry Ass'n v. Madigan*, 31 F.3d 293, 310-12 (5th Cir. 1994)

majority on the other hand, is much less willing to assume that Congress is sensible in its actions, yet purports to be averse to making a "policy choice."¹⁹³ The question is which side is more persuasive in the end?

A. *Standard of Review*

Both the majority and the dissent accurately state the applicable standard of review of an agency's regulation: the *Chevron* test.¹⁹⁴ It is clear that both understand *Chevron's* basic mandate.¹⁹⁵

B. *Textual Analysis*

Both the majority and dissent apply a textual analysis and ask themselves what the dictionary and common usage have to say about the word "same." However, in the end, the dissent's practical approach seems to be the more persuasive analysis.

First, although the majority maintains that common usage excludes "equal to" as a meaning for "same,"¹⁹⁶ many would question the assertion.¹⁹⁷ To reason that "identical" has as a synonym "same," is not to rule out the fact that "same" can have as a synonym "equal." The majority seems to have confused itself when it maintains that "the phrase 'at least equal to' as used in the PPIA inescapably infers the existence of a difference."¹⁹⁸ Common usage simply does not unambiguously exclude the term "equal" as a definition for "same."

The majority's contextual reading, however, does have some persuasive power. The argument is that "same" is to be distinguished from "equal" for the reason that Congress has used "at least equal to" as its term of art in a different place in the PPIA, and chose not to use "equal to" in the section on imports when it could have chosen that language.¹⁹⁹ The weakness of such an argument is made apparent, however, by the functionalism of the dissent's approach: requiring "identical facilities" and "identical conditions" would be incredibly expensive for foreign producers, with the very real possibility that there will be no corresponding increase in safety or quality.²⁰⁰ The dissent questions why identical *process* need be demanded when we can get

(en banc) (Higginbotham, J., dissenting) (arguing that the majority's insistence on a literal interpretation of the "same" in the context of standards of quality is at odds with a more valid common sense interpretation).

¹⁹³ *Id.* at 310.

¹⁹⁴ See *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984) (setting forth a two-step analysis to determine the propriety of an agency's interpretation of a statute); see also *supra* part III.B.1.

¹⁹⁵ See, e.g., *supra* text accompanying notes 44-46 and 125-28.

¹⁹⁶ *Mississippi Poultry*, 31 F.3d at 300.

¹⁹⁷ See *supra* notes 132-38 and accompanying text.

¹⁹⁸ *Mississippi Poultry*, 31 F.3d at 295 (emphasis omitted).

¹⁹⁹ *Id.* at 300.

²⁰⁰ *Id.* at 311 (Higginbotham, J., dissenting).

identical *results* with an equivalency standard.²⁰¹ It then answers its own question: the only reason for such a provision is to protect not consumers, but profits for the domestic industry by effectively shutting out competition from abroad.²⁰²

C. Structure/History of the PPIA

The majority argues that the structure of the PPIA reveals that if the Secretary's interpretation is upheld, foreign producers would be given a great advantage over domestic producers, a result surely Congress did not intend.²⁰³ But this structural argument fails because of its faulty premise. The dissent appears correct in its analysis that "[t]he majority's interpretive problems arise because the complex regulatory scheme it envisions is the product of judicial inventiveness that denies effect to plain language."²⁰⁴

As the majority represented the matter, the Secretary had two choices with respect to imported poultry.²⁰⁵ In reality the Secretary had more. The majority says that he could have chosen either the interstate federal program itself or the intrastate standard, which is "at least equal to" the federal program.²⁰⁶ The fact is that Congress, in 1957, in 1968, in 1972, and right up until the 1985 amendment, always treated imported poultry as a category distinct from all domestic poultry.²⁰⁷ In fact, in the 1972 regulations the Secretary was actually tougher on foreign producers than Congress and the PPIA required.²⁰⁸ The majority represents the Secretary's move to an equivalency standard in 1972 as a decrease in stringency applied to foreign producers,²⁰⁹ when in reality he was strengthening a "substantially equivalent" standard to an "at least equal to" requirement.²¹⁰

The major error committed by the majority, however, is in failing to see the difference between standards and processes. The majority labors under the idea that there are two sets of standards which the Secretary oversees: federal standards and state standards. The truth is that there is only one set of standards, and they are equal, but that there are two different types of processes: the federal program, which provides for direct supervision of federal regulators, and state programs which are under the direct supervision of the states. All domestic poultry must meet the same standard; it is a basic floor of quality, as

²⁰¹ *Id.* (Higginbotham, J., dissenting).

²⁰² *Id.* (Higginbotham, J., dissenting).

²⁰³ *Id.* at 301-02.

²⁰⁴ *Id.* at 313 (Higginbotham, J., dissenting).

²⁰⁵ *Id.* at 301.

²⁰⁶ *Id.*

²⁰⁷ See *supra* part III.A.

²⁰⁸ See *supra* notes 169-70 and accompanying text.

²⁰⁹ *Mississippi Poultry*, 31 F.3d at 297.

²¹⁰ See *supra* notes 169-70 and accompanying text.

the dissent says.²¹¹ Poultry destined for the interstate market meets that floor by complying with the federal program, while poultry destined to remain intrastate meets it by complying with the state programs.

Moreover, because Congress in Section 466(d) of the PPIA says "same" standards without specifying federal or state, it would seem to indicate that there is only one set of standards.²¹² Section 466(d) does not distinguish between the two. The dissent, therefore, is correct in maintaining that the problematic nature of the majority's arguments is caused by creating a more complex regulation than is actually present.²¹³

D. Legislative History

The majority and dissent are in complete accord concerning the facts surrounding the legislative history of the 1985 Farm Bill; yet they draw diametrically opposite conclusions from it. The majority cannot understand how the fact that no debate or discussion took place can mean anything but complete unanimity in the minds of the Senators; the dissent cannot understand how the fact that no debate occurred on a change that would have major ramifications can mean anything but complete misunderstanding. The majority almost ridicules the conclusion drawn by the dissent,²¹⁴ yet it is the majority's conclusion that is more problematic.

Before section 466(d) was passed in Congress, there was no record of congressional criticism of the "at least equal to" standard, and no mention of any different standard. In fact, the Agriculture Committee sent the bill to the Senate with an equivalency standard.²¹⁵ The very first time that the phrase "the same" came into play was when Senator Helms, on the Senate floor, offered an amendment to the bill, changing "at least equal" to "the same as."²¹⁶ Senator Helms explained that his change was "purely technical" and was meant only to "clarif[y] the provision to reflect the original intent of the provision as adopted by the committee in markup."²¹⁷ If he meant his change to "same" to indicate "identical," which would certainly result in a major change in trade policy, then surely he would not have represented the change as "purely technical," and surely if anyone took his alteration as introducing a major trade change—a change which would make exportation to

²¹¹ *Mississippi Poultry*, 31 F.3d at 312 (Higginbotham, J., dissenting).

²¹² See *supra* note 23 for the text of § 466(d)(1).

²¹³ *Mississippi Poultry*, 31 F.3d at 313 (Higginbotham, J., dissenting).

²¹⁴ *Id.* at 306.

²¹⁵ S. REP. NO. 99-145, 95th Cong., 1st Sess. 516 (1985), reprinted in 1985 U.S.C.A.N. 1660, 2182.

²¹⁶ See *supra* notes 102-04 and accompanying text.

²¹⁷ See *Mississippi Poultry*, 31 F.3d at 313 (Higginbotham, J., dissenting) (citing 131 CONG. REC. 33,358 (1985)).

the United States prohibitively expensive—they would have discussed it or at least commented on it at this time.²¹⁸ The dissent is persuasive on its point that this congressional silence cannot be taken as unanimous approval for an identity standard, that is, for holding foreign producers to the U.S. federal regulatory program.²¹⁹ Senator Helms either did not intend an identity standard or brilliantly slipped in language which, by its equivocal nature would pass the Senate without debate, yet plant a seed for later destruction of the very standard for which it was passing itself off, the equivalency standard. In sum, the only effect that an identity standard has which is different from an equivalency standard is to force foreign producers to change their systems at great cost and with no guarantee that the foreign systems are not already equal or better. Since this is the only effect of an identity standard, surely it would have been debated on the floor. Because it was not, it must be questioned whether identity was really Congress' intent.²²⁰

E. Subsequent Enactments

The majority argued that both the NAFTA Act Amendments²²¹ and the 1990 Farm Bill²²² support the conclusion that Congress meant "identical" when it said "same." The majority's use of the NAFTA Act Amendment is unconvincing, but its use of the 1990 Farm Bill, on the other hand, is a persuasive argument. In attempting to discount the importance of the 1990 Farm Bill, the dissent seems to shift, for the first time, from common sense reasoning to more technically-based arguments.

1. The NAFTA Amendments

The NAFTA Amendments indicate that poultry imports from Canada and Mexico are to comply with standards that are "the same" as those in the United States, or be subject to standards that are "equivalent" to U.S. standards.²²³ The majority's argument, that because Section 361(e) of the NAFTA Act put "same" and "equivalent" in the disjunctive they must not mean the same thing,²²⁴ fails for two reasons. First, since Congress passed the Implementation Act in an expedited process, it is clear that there was no time to wait for a final determination from the courts as to whether "same" in Section 466(d)

²¹⁸ See *id.* at 313-14 (Higginbotham, J., dissenting).

²¹⁹ *Id.* (Higginbotham, J., dissenting).

²²⁰ *Id.* (Higginbotham, J., dissenting).

²²¹ NAFTA Act, *supra* note 89, Pub. L. No. 103-182, § 361(e), 107 Stat. 2057, 2123-24 (1993).

²²² 1990 Farm Bill, Pub. L. No. 101-624, § 2507, 104 Stat. 3359, 4068-69.

²²³ See *supra* note 96.

²²⁴ See *supra* notes 96-99 and accompanying text for the majority's argument.

of the PPIA meant identical or equivalent.²²⁵ Because NAFTA's conforming amendment to that section of the PPIA had to cover all contingencies, it is only natural that it covers "same" and "equivalent."²²⁶ The fact that the terms are put in the disjunctive, therefore, does not prove in itself that "the same" means "identical."

Moreover, even if the majority were correct in interpreting "same" as "identical," the NAFTA Act Amendment would produce an anomalous result with respect to Canada and Mexico which the majority does not address.²²⁷ If "same" and "equal" mean different things, then the very terms of section 361(e) give Canada and Mexico an option between two standards. Those two countries, therefore, would possess an advantage over producers from every other country if they alone are allowed to use a weaker standard.

2. *The 1990 Farm Bill*

The 1990 Farm Bill,²²⁸ on the other hand, is more difficult for the dissent to overcome, and it must rely on technical arguments. Congress stated in direct and unequivocal language in the Bill that the Secretary's "equal to" regulation does not reflect the intention of Congress, and that it should be repealed and replaced with a regulation that reflects section 466(d)'s "same" language.²²⁹ This legislation passed both houses.²³⁰ The dissent employs *Pierce v. Underwood*²³¹ to say that the Farm Bill is not controlling since it is neither an authoritative expression of what the 1985 statute meant by "same," nor an authoritative expression of what the current, 1990, Congress intended.²³² This is the one place in which the dissent is met with a strong, functionally-based argument from the majority. Why should Congress be expected to change or reaffirm its language if the statute is already clear and unambiguous as is?²³³

F. *Policy*

The majority does not distinguish between making a policy choice and using policy in coming to a reasonable judicial decision. The majority basically ignores policy considerations, on the ground that to consider such concerns would be to usurp the role of the legislative branch.²³⁴ The dissent's use of policy as a tool of statutory construc-

²²⁵ *Mississippi Poultry Ass'n v. Madigan*, 31 F.3d 293, 315 (5th Cir. 1994) (en banc) (Higginbotham, J., dissenting).

²²⁶ *Id.* (Higginbotham, J., dissenting).

²²⁷ *Id.* at 311 (Higginbotham, J., dissenting).

²²⁸ 1990 Farm Bill, Pub. L. No. 101-624, § 2507, 104 Stat. 3359, 4068-69.

²²⁹ See *supra* note 93 for the text of the Bill.

²³⁰ See *Mississippi Poultry*, 31 F.3d at 302; see also text accompanying notes 94-96.

²³¹ 487 U.S. 552 (1988).

²³² See *supra* notes 149-52 and accompanying text.

²³³ *Mississippi Poultry*, 31 F.3d at 302 n.51.

²³⁴ *Id.* at 310.

tion, on the other hand, is a proper use of policy, and one which in this case produces a more defensible result.

Ironically, it is the side which professes to take a more limited role, and professes aversion to making policy choices, that actually makes a choice in policy of the sort that should be made by the legislature as representative of the people.²³⁵ Conversely, it is the side that uses policy considerations in attempting to discern Congress' intent that actually retains its proper role in the judiciary and merely interprets law rather than making it.

V. Conclusion

It is tempting to see the eight to seven split in the Fifth Circuit as evidence in itself that the term "same" is unclear. The dissent makes some very strong points with respect to text, structure, legislative history, and policy which the majority simply cannot counter; one obvious conclusion to be drawn from this is that the language in section 466(d) is very problematic.

The real question presented by *Mississippi Poultry*, however, is whether Congress wants foreign producers to comply to the letter with the U.S. federal regulatory program for poultry inspection. If so, Congress should say so in a clear and unequivocal way. Since both the majority and the dissent in *Mississippi Poultry* agree that it would be virtually impossible for foreign producers to comply with the federal regulations,²³⁶ Congress should know that such an imposition will have the practical effect of banning foreign poultry from the U.S. market.

Congress has two choices with respect to imported poultry: (1) It can require it to meet an equivalency standard, which is the best policy decision since it will ensure quality without the draconian and inefficient imposition of regulations which will not ensure a difference in quality results anyway; or (2) It can unequivocally require foreign producers to make their plants identical to U.S. plants and use processes identical to those in U.S. plants; that is, openly set up a requirement whose practical effect is so expensive that it is prohibitive for foreign poultry producers.

But Congress has hit upon a third option, an option which is supported now by the Fifth Circuit's holding in *Mississippi Poultry*: simply have the courts invalidate a reasonable regulation and make a pronouncement that a very problematic statutory term is in fact a clear and unambiguous term. Senator Helms, on the Senate floor, has slipped language into the statute which sounds clear and reasonable and purports to be only a "technical" change, but which is in fact equivocal; where one of the meanings supports a drastic policy change.

²³⁵ As the dissent pointed out, the majority has "simply grafted onto the PPLA its own policy concern." *Id.* at 314 (Higginbotham, J., dissenting).

²³⁶ See *id.* at 301 n.45 (majority); *id.* at 311 (Higginbotham, J., dissenting).

The ambiguous term then provides plaintiffs with a textual basis upon which to argue that one of the meanings of the term is in fact the only meaning. Thus the courts are forced to decide. Here, the Fifth Circuit is duped, and so affirms as clear and unambiguous a phrase which should never have gotten into the statute in the first place. The practical effect is that the court has done for Senator Helms and the domestic poultry industry that which might not have been able to be done openly. And because it is the courts that have done Congress' dirty work, foreign nations hurt by the Fifth Circuit's holding will see the U.S. courts, rather than Congress, as the bad guys.

There is no reason that Congress cannot clear this whole problem up once and for all by debating the issue openly and choosing language that is clear; in fact, Congress could have avoided the problem from the beginning by simply using the term "identical" in section 466(d) rather than the ambiguous term "same."

To hold the statute clear and unambiguous as the Fifth Circuit does in *Mississippi Poultry* is to make the wrong decision and for the wrong reasons. The plaintiff Poultry Associations seem to have won. Yet, ironically, this opinion may produce the ultimate backlash against them. The Secretary knows it is bad policy; the dissenting members of the Fifth Circuit know it; even the majority implies that it is unsound.²³⁷ Bad policy cannot last very long. By winning, the Poultry Associations have forced the debate into the open, where the questioned language may be least able to withstand scrutiny. The absurd results of the Fifth Circuit's holding in *Mississippi Poultry* will provide an impetus for either the Supreme Court to reverse the Fifth Circuit and hold the language of section 466(d) ambiguous, or for Congress itself to debate the issue fully, and all its practical consequences, and make an open decision on its policy for imported poultry.

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²³⁷ *Id.* at 310.