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AGENCY INTERPRETATIONS AND JUDICIAL REVIEW: A SEARCH FOR LIMITATIONS ON THE CONTROLLING EFFECT GIVEN AGENCY STATUTORY CONSTRUCTIONS

Kevin W. Saunders*

Judicial oversight of the efforts of administrative agencies in construing the terms of the statutes they administer has declined steadily. Where courts once merely deferred to some degree to the agency view of the meaning of a statute, such agency interpretations are now granted controlling effect in most, if not all, cases. This shrinking role for the judiciary comes despite the courts' traditional and statutory[1] task of providing meaning for statutory terms.

Section I of this Article traces the development of the judiciary's grant of controlling effect to agency interpretations. Section II then suggests limitations on that grant. Those limitations would require that some statutory constructions, now accorded controlling effect, no longer be so insulated from judicial review.

I. THE DECLINE OF JUDICIAL REVIEW OF AGENCY STATUTORY CONSTRUCTIONS

When the administration of a statute is entrusted to an administrative agency, the agency is naturally faced with questions as to what the statutory terms mean.[2] Both the agency staff and the public must know how the agency plans to construe the statute. This ensures a consistent agency interpretation and permits the public to conform its actions to the dictates of the statute. The administrative agencies are thus regularly involved in issues of statutory construction.[3]

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1. *See infra* notes 10-14 and accompanying text.

2. *See* K. DAVIS, 2 ADMINISTRATIVE LAW TREATISE § 7:1, at 55 (2d ed. 1979 & 1982 Supp.)("When Congress enacts a statute and assigns the administration of it to an agency, the agency encounters questions the statute does not answer and the agency must answer them. The agency heads must instruct their staffs what to do about such questions. . . .").

3. *See* Bonfield, *Some Tentative Thoughts on Public Participation in the Making of Interpretative Rules and General Statements of Policy Under the A.P.A.*, 23 ADMIN. L. REV. 101, 118 (1971)("An active agency with a broad mandate . . . may formally or informally take positions on literally hundreds of questions with regard to the proper construction of the statutes or regulations it administers each month.").

The rules an agency issues in its efforts to inform its staff and the public in the course of its statutory construction are known as interpretative rules.[4] These interpretative rules, when subject to judicial review, have historically been accorded less binding effect than that enjoyed by legislative or substantive rules.[5] While legislative rules are set aside only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . [or] in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,"[6] courts historically have not been required to give effect to an interpretative regulation. Rather, "[v]arying degrees of deference [have been] accorded to administrative interpretations, based on such factors as the timing and consistency of the agency's position, and the nature of its expertise."[7]

While the degree of deference afforded interpretative rules historically may have varied, the trend is toward subjecting interpretative rules to less stringent judicial review. Developments in recent years have blurred the distinction between legislative and interpretative rules to the point where at least some,[8] and perhaps all,[9] interpretative rules are now accorded legislative effect and may be set aside only under the "arbitrary and capricious" standard.

This bestowing of controlling effect on some or all interpretative rules comes despite an early history that indicates that interpretative rules were to have very little, if any, effect on the later construction of a statute by a court. Section 10(e) of the Administrative Procedure Act (APA), in its original

4. In fact, the *Attorney General's Manual* definition of interpretative rules is limited to an agency's efforts at enlightening its staff and the public. *See* ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947) [hereinafter ATTORNEY GENERAL'S MANUAL] (defining interpretative rules as "rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers"). Professor Schwartz, while using the label "interpretive," rather than "interpretative," similarly defines such rules as "statements as to what the agency thinks a statute or regulation means; they are statements issued to advise the public of the agency's construction of the law it administers." B. SCHWARTZ, ADMINISTRATIVE LAW § 4.6, at 159 (2d ed. 1984)(footnote omitted). While Professor Davis appears to treat interpretative rules as having a broader extension, defining such rules as "any rule an agency issues without exercising delegated legislative power to make law through rules," K. DAVIS, *supra* note 2, § 7:8, at 36, he clearly includes agency constructions of statutes within the class of interpretative rules. *See* K. DAVIS, *supra* note 2, § 7:11, at 56 ("When an adminstrator either gives meaning to a statute or answers a question that cannot be answered by finding the meaning in the statute, and when he states in general terms what he is doing, the statement is called an 'interpretative rule,' whether or not anything is in fact interpreted.").

5. Professor Davis defines legislative rules as "the product of an exercise of delegated legislative power to make law through rules." K. DAVIS, *supra* note 2, § 7:8, at 36. Professor Schwartz uses the term "substantive rule" but also defines such rules as those that are "issued pursuant to statutory authority and implement the statute; they create law just as the statute itself does, by changing existing rights and obligations." B. SCHWARTZ, *supra* note 4, § 4.6, at 158 (footnote omitted). The *Attorney General's Manual* also uses the term "substantive rule," and defines such rules as "rules, other than organizational or procedural . . ., issued by an agency pursuant to statutory authority and which implement the statute. . . ." ATTORNEY GENERAL'S MANUAL, *supra* note 4, at 30 n.3.

6. 5 U.S.C. § 706(2) (1982).

7. Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977)(citing General Elec. Co. v. Gilbert, 429 U.S. 125, 141-45 (1976); Morton v. Ruiz, 415 U.S. 199, 231-37 (1974); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

8. *See* Saunders, *Interpretative Rules with Legislative Effect: An Analysis and a Proposal for Public Participation*, 1986 DUKE L.J. 346.

9. *See infra* note 77 and accompanying text.

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1946 form, provided that "[s]o far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action."[10]

While the language of the statute does not directly address the situation in which an administrative agency has already offered its view as to the meaning of a statutory provision, neither is such review exempted from the requirement that a court decide *all* questions of law and interpret statutory provisions. In such cases it is uncertain what effect the previous statutory construction by the agency should have on the court's determination; that is, what scope or standard of review is to be employed by a court in reviewing an agency's interpretative rules? The legislative history of the APA might be interpreted as indicating that the agency determination was to have little or no effect on the court's construction of the statute. The report of the Senate Committee on the Judiciary, in explaining section 10(e), states that the "subsection provides that questions of law are for courts rather than agencies to decide in the last analysis. . . ."[11] The report of the House Committee on the Judiciary contains the same explanation.[12]

Although even these reports do not state the standard of review to be employed by the court, they do indicate that it is the courts that decide on the construction of a statute. The Senate Committee's discussion of the bill supports this conclusion. In justifying the exemption of interpretative rules from the requirement that they be adopted only after notice and comment, while requiring such procedures in the adoption of legislative rules, the Senate Committee explained that " 'interpretative' rules—as merely interpretations of statutory provisions—are subject to *plenary judicial review*, whereas 'substantive' rules involve a maximum of administrative discretion."[13] A similar position was espoused, during the floor debate, by Senator McCarren, the Chairman of the Senate Committee on the Judiciary.[14] Accordingly, the legislative history could be taken to indicate that not even deference must be accorded the interpretative rules promulgated by an agency.

10. Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946). The current version of the Adminstrative Procedure Act leaves this provision essentially unchanged. *See* 5 U.S.C. § 706 (1982)("To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.").

11. S. REP. NO. 752, 79th Cong., 1st Sess. 28 (1945), *reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY 185, 214 (1946).

12. *See* H.R. REP. NO. 1980, 79th Cong., 2d Sess. 6 (1946), *reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY 233, 278 (1946).

13. *See* SENATE COMM. ON THE JUDICIARY, 79TH CONG., 2D SESS. (Comm. Print 1946), *reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY 18 (1946)(emphasis added).

14. *See* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY 313 (1946)(interpretative rules are exempt from notice and comment because "interpretative rules, being merely adaptations of interpretations of statutes, are subject to a more ample degree of judicial review"). While Senator McCarren's statement might not be viewed as being as strong as that found in the Senate Committee print, the Senator was clearly of the view that interpretative rules would receive more stringent review than that afforded legislative rules under the "arbitrary and capricious" standard.

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A. The Early Case Law

Despite what the legislative history may say, interpretative rules have not, of course, received plenary review.[15] In fact, the state of the law even at the time of the adoption of the APA did not provide for *plenary* review of interpretative rules. Prior to *Skidmore v. Swift & Co.*,[16] the Court had already examined the effect to be given an agency's interpretation. *Skidmore* concerned an interpretative bulletin and informal rulings promulgated by the Administrator of the United States Department of Labor's Wage and Hour Division. The Court held that the administrator's views provide guidance to the courts and have power to persuade.[17] While the Administrator's construction of a statute was not to have controlling effect on the courts, neither did the courts write on the clean slate that would exist without the prior construction and that might be expected in plenary review.[18]

Arguably, *Skidmore* lacked precedential value after the passage of the APA. The *Skidmore* Court noted, before determining that some deference would be paid to the Administrator's construction, that there was "no statutory provision as to what, if any, deference courts should pay to the Administrator's conclusions."[19] After the passage of the APA, courts might have determined that henceforth there was a statutory provision as to what deference was due, and that the APA required plenary review with no deference.[20] That, however, has not been the course of the law, and *Skidmore* enjoyed a long history as precedent for the grant of deference to statutory construction by administrative agencies.[21]

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15. *See infra* notes 16-94 and accompanying text.

16. 323 U.S. 134 (1944).

17. 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 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.

Skidmore, 323 U.S. at 140.

18. Professor Davis suggests that a court may be true to the APA provision that reviewing courts are to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action," 5 U.S.C. § 706 (1982), and still take into account the agency view.

> [E]ven when it makes its own decision, it may be influenced by the agency's view, and it may even say that it "defers" to that view. In making its own decision of a question of law, a court may rely on its esteem and respect for the specialized understanding of the agency, without violating the APA's requirement that "the reviewing court shall decide all relevant questions of law."

K. DAVIS, *supra* note 2, § 29:16, at 399. Nonetheless, it is at least questionable whether such review should be considered plenary review.

19. *Skidmore*, 323 U.S. at 139.

20. Whether or not this was the view of Congress in 1946, such a view was unable to muster the necessary support for passage in a later era. Congress, several times, considered but failed to pass the Bumpers Amendment, which would have required courts to decide de novo all questions of law and statutory construction with no presumption of validity given to agency views. *See, e.g.*, S. 1766 and H.R. 1776, 98th Cong., 1st Sess. (1983).

21. *See, e.g.*, Consumer Product Safety Comm'n v. GTE Sylvania, 447 U.S. 102, 120 (1980); General Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976); Morton v. Ruiz, 415 U.S. 199, 237 (1974); National Distrib. Co. v. United States Treasury Dep't, 626 F.2d 997, 1019 (D.C. Cir. 1980); British Caledonian Airways, Ltd. v. Civil Aeronautics Bd., 584 F.2d 982, 995 (D.C. Cir. 1978).

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Depending on the presence or absence of the factors presented in *Skidmore*, courts have granted more or less deference to agency statutory construction. Courts give some interpretations "the greatest deference."[22] On the other hand, "[d]eference for an agency's interpretation of law is typically unmentioned in Supreme Court opinions in which the Court substitutes its interpretation for the agency's."[23] In the view of Professor Davis, "deference seems to be absent whenever the Court disagrees with the agency's interpretation. 'Deference' thus becomes a concept that is useful when the Court is in doubt about an interpretation but is satisfied to let the agency's decision stand."[24] If Professor Davis is correct, courts after *Skidmore* clearly decided the relevant questions of law, and such review might even be viewed as having been plenary. If not, courts decided upon the relevant questions of law, but their review was less than plenary.

B. Express Delegations of Authority

Whatever may have been the role of deference after *Skidmore*, a court "always ha[d] power to substitute judgment for that of the agency in determining the content of interpretative rules."[25] That situation changed in 1977, at least for a class of interpretative rules, with *Batterton v. Francis*.[26] In *Batterton* the Court considered an interpretation of the Social Security Act by the Secretary of Health, Education and Welfare. The Act provides that the term "dependent child" includes a needy child "who has been deprived of parental support or care by reason of the unemployment (*as determined in accordance with standards prescribed by the Secretary*) of his father. . . ."[27] The dispute arose over whether persons out of work as the result of labor disputes are unemployed for purposes of the statute.

Rather than answer the question based on its own view of the meaning of statutory terms, the Court adopted the Secretary's view. Importantly, the Court did not do so out of mere deference to the Secretary. Rather, the Court noted that Congress had expressly delegated to the Secretary the power to determine what constitutes unemployment.

> In a situation of this kind, Congress entrusts to the Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term. In exercising that responsibility, the Secretary adopts regulations with legislative effect. A reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different manner.
>
> The regulation at issue in this case is therefore entitled to more

22. Board of Governors of the Fed. Reserve Sys. v. Investment Co. Inst., 450 U.S. 46, 56 (1981).
23. K. DAVIS, *supra* note 2, § 29:16, at 403.
24. *Id.*
25. K. DAVIS, *supra* note 2, § 7:13, at 59.
26. 432 U.S. 416 (1977). *Batterton* cited United States v. Mersky, 361 U.S. 431, 437-38 (1960); Atchison, Topeka & Santa Fe R.R. Co. v. Scarlett, 300 U.S. 471, 474 (1937); American Tel. & Tel. Co. v. United States, 299 U.S. 232, 235-37 (1936); and the *Attorney General's Manual*, *supra* note 4, at 30 n.3, as support for its conclusions regarding the scope of review. While the cited sources do support the Court's conclusion, *Batterton* presented a particularly clear statement of the law. *See infra* notes 28-29 and accompanying text.
27. 42 U.S.C. § 607(a) (1976)(emphasis added).

> than mere deference or weight. It can be set aside only if the Secretary exceeded his statutory authority or if the regulation is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[28]

Thus, the Court established that there was a sub-class of interpretative rules, for which authority to construe the statute in question had been expressly delegated to the administrative agency. The courts were to play a minimal role, affording the agency's view controlling weight.[29]

While Professor Davis may have correctly suggested that a court can adhere to the APA provision that reviewing courts are to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action,"[30] and still consider an agency view that was merely due deference,[31] his suggestion rings hollow when the agency's construction is given controlling weight. The court, rather than deciding what the law means, decides only whether the agency's view of what the law means is reasonable. The court, therefore, does not fulfill the role the APA envisioned.

Although the courts do not live up to their APA role in the *Batterton* class of cases,[32] there is at least a statutory basis for abdicating that role. *Batterton* rested on the express delegation to the agency of the authority to construe the statute in question. Thus, the APA directive that courts are to decide all questions of law and construe all statutory terms could be considered superceded by the explicit delegation of authority to the agency to construe particular statutes which by their own terms are excepted from the general APA rule.[33]

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28. *Batterton*, 432 U.S. at 425-26 (citations omitted)(quoting 5 U.S.C. § 706(2)(A), (C) (1982)).

29. *See* United States v. Morton, 467 U.S. 822, 834 (1984)("Because Congress explicitly delegated authority to construe the statute by regulation, in this case we must give the regulations legislative and hence *controlling* weight, unless they are arbitrary, capricious, or plainly contrary to the statute.")(emphasis added).

30. 5 U.S.C. § 706 (1982).

31. *See supra* note 18.

32. *See, e.g.*, United States v. Morton, 467 U.S. 822 (1984); Heckler v. Campbell, 461 U.S. 458 (1983); Herwig v. Ray, 455 U.S. 265 (1982); Schweiker v. Gray Panthers, 453 U.S. 34 (1981); INS v. Jong Ha Wang, 450 U.S. 139 (1981).

33. Professor Monaghan, in discussing the grant of deference to agency statutory constructions, pointed out that courts do not abdicate their judicial function.

> The court's task is to fix the boundaries of delegated authority, an inquiry that includes defining the range of permissible criteria. In such an empowering arrangement, responsibility for meaning is shared between court and agency; the judicial role is to specify what the statute cannot mean, and some of what it must mean, but not all that it does mean. In this context the court is not abdicating its constitutional duty to "say what the law is" by deferring to agency interpretations of law: it is simply applying the law as "made" by the authorized law-making entity. Indeed, it would be violating legislative supremacy by failing to defer to the interpretation of an agency to the extent that the agency had been delegated law-making authority.

Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 27-28 (1983).

Professor Monaghan's point applies with equal force to the grant of controlling effect to statutory interpretations issued under an express legislative grant to the administrative agency to construe. Where Congress has delegated such authority, and assuming the delegation is permissible (*see infra* notes 155-89 and accompanying text), a failure by the courts to grant the agency interpretation the same effect as that due a statute would be violative of legislative supremacy.

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C. Implicit Delegations of Authority

The next major erosion in the court's authority to overturn agencies' constructions of statutes came in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[34] *Chevron* concerned the Environmental Protection Agency's construction of the Clean Air Act.[35] Specifically, the Court determined whether the statutory term "stationary source" could be construed, as the agency had chosen, to include an entire industrial plant.[36] Natural Resources Defense Council, Inc. brought suit challenging the Environmental Protection Agency's "bubble concept" construction of "stationary source."

Once again, the Court did not grant the agency view mere deference, but instead granted controlling weight. More significantly, however, the Court did so without finding an explicit delegation to the agency of the authority to construe the statute. The Court first noted the need for administrative agencies to fill the gaps left in statutes, and that the gaps could have been left either implicitly or explicitly by Congress.[37] If Congress explicity left the gap for the agency to fill, then in line with *Batterton*, there would be express delegation of the authority to construe, and the construction would enjoy controlling weight.[38] The Court went further, however, and stated that "[s]ometimes the legislative delegation . . . is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[39]

While there is language in the opinion that might have limited the Court's holding to cases in which a court decided that Congress actually had no intent with regard to the point at issue,[40] there is other language that

34. 467 U.S. 837 (1984).

35. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, §§ 111(a), 129(b), 301(a), 91 Stat. 685, 704, 747, 770 (1977)(codified at 42 U.S.C. §§ 7411(a)(3), 7502(b)(6), 7602(j)(1982)).

42 U.S.C. § 7502(b)(6) (1982) provides:

> The plan provisions required by subsection (a) shall— . . .
>
> (6) require permits for the construction and operation of new or modified major stationary sources in accordance with section 7503 [regarding requirements for permits].

36. The Environmental Protection Agency's regulations allowed states to adopt the plantwide definition of "stationary source." The regulations provide:

> (i) "Stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act.
>
> (ii) "Building, structure, facility, or installation" means all of the pollution emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel.

40 C.F.R. §§ 51.18(j)(1)(i), (ii) (1983).

37. *Chevron*, 467 U.S. at 843 (citing Morton v. Ruiz, 415 U.S. 199, 231 (1974)).

38. *Id.* at 843-44.

39. *Id.* at 844 (footnote omitted).

40. *See id.* at 845.

> [T]he Court of Appeals misconceived the nature of its role in reviewing the regulations at issue. Once it determined, after its own examination of the legislation, that Congress did not actually have an intent regarding the applicability of the bubble concept to the permit program designed, the question before it was not whether in its view the concept is 'inappropriate' in the general context of a program to improve air quality, but whether the Administrator's view that it is appropriate in the context of this particular program is a reasonable one.

Id.

"The basic legal error of the Court of Appeals was to adopt a static judicial definition of the

indicates wider applicability. The Court established a two-part test. First, it must be determined whether Congress directly addressed the precise question at issue, and if the congressional intent is clear, the court and agency must give it effect.[41]

> 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.[42]

Chevron thus expanded the class of statutory constructions due controlling effect.[43] Not only was a court to give legislative effect to a statutory construction issued under explicit authority to construe, but such effect was also due constructions issued under implicit authority to construe. Furthermore, such implicit delegation to construe appeared to be found merely in the fact that the statute was ambiguous on the point at issue. Once again, the role of the courts had been scaled back from that envisioned in the APA. In still another class of cases the courts were not to provide *plenary* review of agency interpretations[44] and, at least with regard to substantive content,[45] were no longer to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[46]

Furthermore, the change in the courts' role was based on grounds more suspect than those on which the *Batterton* change stood. Whereas *Batterton* resulted from an explicit delegation to the agency to construe the statute, *Chevron* relied on an implicit delegation. In the *Batterton* line of cases Congress expressly provided that, for certain statutes, the general APA dictate to the courts to construe constitutional and statutory provisions had been

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term 'stationary source' when it had decided that Congress itself had not commanded that definition." *Id.* at 842.

41. *Id.* at 842-43.

42. *Id.* at 843.

43. *Chevron* did cite precedent for its view that implicit delegations of authority to construe leads to controlling effect. *See id.* at 844 n.13 (citing INS v. Jong Ha Wang, 450 U.S. 139, 144 (1981); Train v. Natural Resources Defense Council, Inc., 421 U.S. 60, 87 (1975)), but the precedent is not as clear as the *Chevron* position, and *Chevron* may be viewed as a "departure from precedent," *The Supreme Court, 1983 Term*, 98 HARV. L. REV. 87, 250 (1984).

44. *See supra* note 18.

45. *But see supra* note 33.

The court has, of course, interpreted for itself the procedural aspects of the statute in determining that it must grant controlling effect to the agency construction.

> Statutory law itself is a source of positive law that may offer courts guidance in determining the correct mode of statutory interpretation. . . . "The extent to which courts should defer to agency interpretations of law is ultimately 'a function of Congress' intent on the subject as revealed in the particular statutory scheme at issue.' " The courts must, in other words, follow the legislature's "interpretative intent" [sic] as much as its substantive intent.

Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 570 (1985)(quoting Process Gas Consumers Group v. United States Dep't of Agric., 694 F.2d 778, 791 (D.C. Cir. 1982)(en banc)(quoting Constance v. Secretary of Health & Human Serv., 672 F.2d 990, 995 (1st Cir. 1982), *cert. denied*, 461 U.S. 905 (1983), and Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 215-16 (1980)(using the phrase "interpretive intent"))).

46. 5 U.S.C. § 706 (1982).

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superceded by particular statutory provisions making certain statutory constructions the province of the agencies, subject only to "arbitrary and capricious" review. The implicit delegation of *Chevron* provides a much weaker basis for concluding that Congress had superceded the APA directive to the courts. Yet, so long as the delegation is real, though implicit, there is a basis for the courts' abandonment of the duty assigned by the APA. The question remains whether there really is an implicit delegation to the agency to construe when Congress has not directly addressed the point at issue, or has done so only ambiguously.

Even after the *Chevron* decision, it was still possible to argue that not every ambiguity would serve as the basis for finding an implicit delegation.[47] *Chevron* itself involved a technical question and the interpretation of what could be considered a technical term. Historically courts have granted deference to interpretative rulings involving technical areas requiring agency expertise.[48] Had *Chevron* been seen as merely a change from providing deference to providing controlling effect for that class of interpretative rules,[49] the change would not have been as drastic as that encompassed in a holding that controlling effect was due whenever there was silence or any ambiguity, technical or not.

Additionally, *Chevron* involved a conflict between the policies the statute was intended to address.[50] Again, it was already established that such a conflict invoked a greater degree of deference for the agency's interpretation.[51] Given the greater deference, and perhaps controlling weight,[52] al-

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47. *See* Saunders, *supra* note 8, at 358-67.

48. *See, e.g.*, Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977) ("[A] court is not required to give effect to an interpretative regulation. Varying degrees of deference are accorded to administrative interpretations, based on such factors as the timing and consistency of the agency's position, and the nature of its expertise.")(citing General Elec. Co. v. Gilbert, 429 U.S. 125, 141-45 (1976); Morton v. Ruiz, 415 U.S. 199, 231-37 (1974); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)); Rosado v. Wyman, 397 U.S. 397, 415 (1970)("While . . . HEW's construction commands less than the usual deference that may be accorded an administrative interpretation based on its expertise, it is entitled to weight as the attempt of an experienced agency to harmonize an obscure enactment with the basic structure of a program it administers."); Center for Auto Safety v. Ruckelshaus, 747 F.2d 1, 5 (D.C. Cir. 1984)("A high degree [of deference] is appropriate . . . when the agency's expertise can help in assessing the effects of competing interpretations upon the policies of the statute (and hence assessing the interpretation which a wise Congress should be presumed to have intended)."); National Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 170 (D.C. Cir. 1982)("[D]eference is not a unitary concept, to be applied with equal force to all issues in a case. If some issues involve scientific expertise and others do not, the agency will receive greater deference on the issues that do.").

49. *But see* Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283, 297 (1986)("[Earlier] decisions indicated that the degree of deference to which an interpretation would be entitled depended upon such factors as whether the agency's interpretation had been consistent over a long period, whether the agency had helped shepherd the legislation through Congress, whether the agency's interpretation was adopted near the time the statute was passed, and whether the agency possessed any special expertise. . . . *Chevron* . . . specifically found irrelevant the first of these commom-sense factors, and . . . has cast doubt upon the others."). Judge Starr did not, however, argue that *Chevron* eliminated any role for technical expertise. Furthermore, he was concerned with the continued existence of sliding scales of deference. While *Chevron* may well do away with such sliding scales in all instances in which it applies, the factors that once resolved the question of where on the sliding scale a court should stand in reviewing an agency interpretation might also serve as factors to determine whether *Chevron* applies to the interpretation at issue.

50. The *Chevron* Court identified, as competing policy concerns, allowing reasonable economic growth and protecting the environment. *Chevron*, 467 U.S. at 843.

51. More than a half-century ago this Court declared that "where Congress has committed to the head of a department certain duties requiring the exercise of judgment and discre-

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ready due constructions in such circumstances, *Chevron* would not have represented as great a change if it had been limited to those situations rather than applied whenever there was any silence or ambiguity.[53]

The early invocations of *Chevron* as requiring controlling weight, rather than merely deference,[54] for agency interpretations involved cases in which technical expertise was required or in which there was a conflict of policies.[55] A recent decision, however, calls that limitation into question.

D. The Final Erosion of Substantive Review

In *Young v. Community Nutrition Institute*[56] the Court considered the meaning of a portion of the Federal Food, Drug, and Cosmetic Act. The Act bans from interstate commerce any adulterated food,[57] and defines food as adulterated if it meets any of several criteria, including "if it bears or contains any added poisonous or added deleterious substance . . . which is unsafe within the meaning of section 346 of this title. . . ."[58] Section 346 in turn provides:

> Any poisonous or deleterious substance added to any food, except where such substance is required in the production thereof or cannot be avoided by good manufacturing practice shall be deemed to be unsafe for purposes of the application of clause (2)(A) of section 342(a) of this title; but when such substance is so required or cannot be so

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> tion, his action thereon, whether it involve questions of law or fact, will not be reviewed by the courts, unless he has exceeded his authority or this court should be of the opinion that his action was clearly wrong." This admonition has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subject to agency regulations.

United States v. Shimer, 367 U.S. 374, 381-82 (quoting Bates & Guild Co. v. Payne, 194 U.S. 106, 108-09 (1904), and citing NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953); SEC v. Chenery Corp., 332 U.S. 194 (1947); Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945); NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944); National Broadcasting Co. v. United States, 319 U.S. 190 (1943)).

52. *See supra* note 51.

53. *But see supra* note 49.

54. *Chevron* has also regularly been cited for a grant of deference to the agency construction of a statute, rather than for the controlling effect *Chevron* clearly provides. *See, e.g.*, North Am. Telecommunications Ass'n v. FCC, 772 F.2d 1282, 1291 (7th Cir. 1985); Lieberman v. FTC, 771 F.2d 32, 37 (2d Cir. 1985); American Cyanamid Co. v. Young, 770 F.2d 1213, 1217 (D.C. Cir. 1985); Maine v. United States Dep't of Labor, 770 F.2d 236, 240 (1st Cir. 1985); Western Oil & Gas Ass'n v. EPA, 767 F.2d 603, 606 (9th Cir. 1985).

55. *See, e.g.*, General Elec. Uranium Management Corp. v. United States Dep't of Energy, 764 F.2d 896, 905 (D.C. Cir. 1985)(applying *Chevron* to grant controlling effect because "the statute is ambiguous with respect to the specific method of calculating the one-time fee [for the disposal of spent nuclear fuel], and that DOE's rule 'represents a reasonable accommodation of conflicting policies' served by the Act")(quoting *Chevron*, 467 U.S. at 845); Association of Data Processing Serv. Org. v. Board of Governors, 745 F.2d 677, 697 (D.C. Cir. 1984)(Granting controlling effect to the Board's construction of "closely related to banking" in 12 U.S.C. § 1843(c)(8) (1982), the court stated that "attempting to exercise close and necessarily inexpert supervision of [the Board's] judgments . . . would be particularly inappropriate under a governing statute such as this one, which commits it to the Board to apply a standard of such inherent imprecision . . . that a discretion of almost legislative scope was necessarily contemplated.").

56. 476 U.S. 974 (1986).

57. 21 U.S.C. § 331(a) (1982).

58. 21 U.S.C. § 342(a)(2)(A) (1982).

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> avoided, the Secretary shall promulgate regulations limiting the quantity therein or thereon to such extent as he finds necessary for the protection of public health, and any quantity exceeding the limits so fixed shall also be deemed to be unsafe for purposes of the application of clause (2)(A) of section 342(a) of this title. While such a regulation is in effect . . . food shall not, by reason of bearing or containing any added amount of such substance be considered to be adulterated. . . .[59]

The substance at issue in *Community Nutrition* was aflatoxin, a carcinogenic product of molds growing on some foods. There was no dispute that aflatoxin was, for purposes of section 346, considered added and unavoidable. At issue was the procedure which the agency was required to follow before aflatoxin contaminated foods could escape the sweep of section 342(a)(2)(A) and the resultant ban from interstate commerce. Community Nutrition Institute argued that such foods were adulterated unless the Secretary established a tolerance for the presence of aflatoxin, and no such tolerances had been established. The FDA argued that section 346 did not require the establishment of such tolerances before foods with added, unavoidable, poisonous or deleterious substances could be shipped in interstate commerce.

The statutory construction question revolved around the clause "the Secretary shall promulgate regulations limiting the amount therein or thereon to such extent as he finds necessary for the protection of public health. . . ."[60] If "shall" were read to require the Secretary to promulgate tolerances, the failure of the Secretary to so act would by definition have left the food adulterated. If "shall" did not require such action, the FDA might be free to continue regulating aflatoxin contaminated foods using its informally adopted "action levels."[61]

The Court found the word "shall" to be ambiguous. While the word itself might appear to admit of no ambiguity and clearly to express a requirement, the Court held that the presence of the modifying phrase "to such extent as he finds necessary for the protection of public health" created an ambiguity. Under the Community Nutrition Institute's construction, the phrase modified "limiting the quantity" and indicated how the levels that would be tolerated were to be determined. Under the FDA's construction, the phrase modified "shall" and indicated that the Secretary was to make the determination as to whether it would require limiting regulations to protect public health. If the Secretary decided such regulations were necessary, the Secretary was then to set tolerances.

The Court began its analysis with *Chevron*'s holding 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. . . . [A] court may not substi-

59. 21 U.S.C. § 346 (1982).

60. *Id.*

61. The action levels were adopted without the notice and comment procedures that the APA section 706 would require for rulemaking. Since the District of Columbia Circuit had held that tolerances had to be formally adopted, it did not determine what formalities must be followed in the adoption of action levels. That issue, therefore, was not before the Supreme Court.

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> tute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.[62]

While agreeing with the Court of Appeals' conclusion that Community Nutrition Institute's reading of the statutory language was the more natural reading, the Court determined that the FDA's construction was also a permissible reading. The Court justified allowing the FDA's awkward construction by noting that

> [a]s enemies of the dangling participle well know, the English language does not always force a writer to specify which of two possible objects is the one to which a modifying phrase relates. A Congress more precise or more prescient than the one that enacted § 346 might, if it wished petitioner's position to prevail, have placed "to such extent as he finds necessary to the protection of public health" as an appositive phrase immediately after "shall" rather than as a free-floating phrase after "the quantity therein or thereon." A Congress equally fastidious and foresighted, but intending respondents' position to prevail, might have substituted the phrase "to the quantity" for the phrase "to such extent as." But the Congress that actually enacted § 346 took neither tack. In the absence of such improvements, the wording of § 346 must remain ambiguous.[63]

The Court then found the "FDA's interpretation of § 346 to be sufficiently rational to preclude a court from substituting its judgment for that of the FDA."[64]

Several points should be noted from *Community Nutrition*. First, assuming *arguendo* that there is a legitimate ambiguity in the statute, there is simply nothing to indicate that it is the sort of ambiguity which Congress would have delegated to an administrative agency for resolution. There is certainly no express delegation, as in the *Batterton* line of cases, that could be read as changing, for the specific statutes involved, the APA directive that the courts were to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[65]

Nor is the ambiguity technical or indicative of a need to resolve conflicting policies. The word "shall" is by no means a technical term requiring the expertise of an administrative agency to provide the proper construction. Furthermore, while a conflict might be found in policies regarding the safety of the food supply and the economic detriment caused by setting tolerances at too low a level, that policy conflict need not revolve around the meaning of "shall." Instead it might provide legislative effect for the tolerances the FDA established, but should not determine whether the FDA must take steps to establish tolerances. That determination is one of pure statutory construction not requiring any particular non-legal expertise. In construing

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62. *Community Nutrition*, 476 U.S. at 979-81 (quoting *Chevron*, 467 U.S. at 842-44).

63. *Id.* at 979-83.

64. *Id.* at 981-83. The Court preceeded the language quoted with its own quotation from a case affording considerable deference to an agency construction. However, given the Court's conclusion that a court would be precluded from substituting its judgment for that of the FDA, *Community Nutrition* clearly assigned controlling weight, rather than mere deference, to the view of the FDA.

65. 5 U.S.C. § 706 (1982).

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"shall," the court would not balance policies, but would merely require the FDA to formally, rather than informally, balance those policies.

Since the ambiguity was not technical or indicative of a policy conflict, it is more difficult to argue that Congress superceded the APA directive to the courts to construe. Where Congress used an ambiguous technical term or any ambiguous term requiring technical expertise to determine the best construction,[66] it might be reasonable to conclude that Congress intended the expert administrative agency to construe the term. Similarly, if construing the term requires a balancing of policies that Congress chose not to unambiguously and precisely balance, it might be reasonable to conclude that Congress did not mean for a lay court, rather than an expert agency, to fine-tune that balance. Thus, in the case of a technical ambiguity or one involving policy conflict, the *Chevron* finding of an implicit delegation to the agency to construe, and the implied superceding of the APA directive to the courts to construe, is within the realm of reason. Without such an ambiguity, there seems little or no basis to conclude that Congress' explicit directive to the courts to construe has been superceded.

Another problem presented by *Community Nutrition* is the weakness of the claim that there is any ambiguity at all. As Justice Stevens stated in dissent,

> [t]o one versed in the English language, the meaning of this provision is readily apparent. The plain language of the section tells us when the Secretary's duty to promulgate regulations arises . . . ; it tells us the purpose of the regulations . . . ; and it tells us what standard he should employ in drafting them—"to such extent as he finds necessary for the protection of public health."[67]

Justice Stevens went on to state that "[t]he Court's finding of ambiguity is simply untenable."[68] As Judge Starr, the author of the D.C. Circuit's unanimous opinion in *Community Nutrition Institute v. Young*,[69] said in reaction to the Supreme Court's approach, "[a]mbiguity seem[ed] to have taken on epidemic proportions."[70]

In addition to criticizing the majority's reading of the statutory lan-

66. In Association of Data Processing Serv. Org. v. Board of Governors, 745 F.2d 677 (D.C. Cir. 1984), the phrase at issue was "closely related to banking." Such a phrase does not involve any terms that are themselves technical, but technical expertise would be required to decide whether a particular service is closely related to banking for purposes of the statute.

67. *Community Nutrition*, 476 U.S. at 983-86 (Stevens, J., dissenting).

68. *Id.*, at 985-86.

69. 757 F.2d 354 (D.C. Cir. 1985).

70. Panel Discussion at the Fall Meeting of the Section of Administrative Law (Oct. 10, 1986, Washington, D.C.) *printed in* Starr, Sunstein, Willard & Morrison, *Judicial Review of Administrative Action in a Conservative Era*, 39 ADMIN. L. REV. 353, 362 (1987).

As is with some frequency the case with a purported epidemic, the seeming increase in incidence may be the result of a change in reporting rather than a spread of the disease. The blame may be not so much with a loss of congressional ability to write nonambiguous statutes as with the Supreme Court's willingness to find the disease in statutes bearing less than convincing symptoms. *But see* Ginsburg, *A Plea for Legislative Review*, 60 S. CAL. L. REV. 995, 996 (1987)("The will of the national legislature is too often expressed in commands that are unclear, imprecise, or gap-ridden. . . ."); Edwards, *The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication*, 32 CLEV. ST. L. REV. 385, 424-25 (1983)("We are choking, not on statutes in general, but on ambiguous and internally inconsistent statutes.").

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guage, Justice Stevens appeared to criticize the role the Court assumed in reviewing agency statutory constructions.

> The task of interpreting a statute requires more than merely inventing an ambiguity and invoking administrative deference. A statute is not "unclear unless we think there are decent arguments for each of the competing interpretations of it." Thus, to say that the statute is susceptible of two meanings, as does the Court, is not to say that either is acceptable.[71]

The first sentence quoted speaks to the weakness of the claim of ambiguity but perhaps unfairly suggests that the majority invented the ambiguity. The ambiguity, if there was one at all, was shown by the varying interpretations presented by the litigants. Perhaps the sentence should have read: "The task of interpreting a statute requires more than merely accepting the existence of varying interpretations as showing ambiguity and invoking administrative deference." That is, true ambiguity requires more than competing interpretations; the existence of those competing interpretations must be the result of a real ambiguity in the language.

The remainder of the quoted language is another way of observing that in applying *Chevron*,

> not just any silence or ambiguity should suffice. In any case involving statutory construction, the parties offer different interpretations. Even the most common words may admit of two or more meanings and thus be ambiguous. If Congress has not addressed which of the offered constructions was intended, Congress has been silent on the specific issue. Surely the *Chevron* Court did not mean that courts should grant controlling weight to the agency position in all statutory construction questions.[72]

Chevron did, after all, leave the judiciary with the final authority regarding statutory construction and stated that courts "must reject administrative constructions which are contrary to clear congressional intent."[73]

If the courts are to play any role at all, Justice Stevens may have set the minimum for that role by requiring that the Court examine the offered meanings to ensure that there are "decent arguments for each of two competing interpretations . . . [and] that either is acceptable."[74] Such an approach does not restrict *Chevron* to the cases of technical ambiguity or ambiguity representing a conflict of policies that better justify countering the APA mandate and granting the agency view controlling weight.[75] Nevertheless, such an approach presents an advantage over the majority approach in that at least only real ambiguities result in the grant of controlling weight.

The effect of the majority opinion in *Community Nutrition* is to grant controlling weight to any agency construction of a statute it administers.[76]

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71. *Community Nutrition*, 476 U.S. at 987-88 (Stevens, J., dissenting)(quoting R. DWORKIN, LAW'S EMPIRE 352 (1986)).
72. Saunders, *supra* note 8, at 359 (footnotes omitted).
73. *Chevron*, 467 U.S. at 843 n.9.
74. *See supra* text accompanying note 71.
75. *See supra* notes 47-53 and accompanying text.
76. *See* Note, *The* Chevron *Legacy:* Young v. Community Nutrition Institute *Compounds the Confusion*, 73 CORNELL L. REV. 113, 129-32 (1987).

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There appears to be no requirement that the resolution of the ambiguity require any agency expertise nor any requirement that there be any sign, other than silence, that Congress left the resolution of the ambiguity to the agency. Furthermore, even an extremely weak claim of ambiguity appears sufficient to invoke controlling weight. Presumably an "arbitrary and capricious" reading of the statute would not suffice to establish the existence of an ambiguity. But that, of course, is the standard under which the courts would review the agency's resolution of the ambiguity. Thus, any meaning an agency can read into a statute, without being arbitrary and capricious, serves to establish an ambiguity when contrasted with the reading offered by the adverse party. The agency view then has controlling effect, and since the reading would not be arbitrary and capricious, the agency construction will withstand review.

At this point the only issue becomes whether the agency's construction is arbitrary and capricious, the same issue presented in review of a legislative rule. The differences in review accorded the two types of rules in the APA are glossed over by the court, which takes away the lower courts' duty and authority, assigned to them by Congress, to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[77]

It is, of course, possible that *Community Nutrition* will not be read as strongly as suggested here.[78] But, if *Community Nutrition* is not to be taken as strongly as has been suggested, the Court has left lower courts with no guidance as to when an agency's construction is to control. The existence of a technical ambiguity or an ambiguity representing a conflict of policies was a viable standard,[79] but it is a standard not met by *Community Nutrition.* That the alternative readings not be arbitrary and capricious is also a standard, but, as has been shown, it is a standard that breaks down the distinction between the standards of review for interpretative rules and legislative rules. If the Court does not intend this total blending of the two types of rule, for the purpose of providing the standard of review, it is incumbent on the Court to establish a principle for distinguishing which interpretations are still to receive the higher scrutiny envisioned by the APA.

The Court arguably provided such a principle in *Immigration & Naturalization Service v. Cardoza-Fonseca.*[80] There, the Court compared the two methods through which an otherwise deportable alien who claims that his deportation will lead to persecution can seek relief. Section 243(h) of the Immigration and Naturalization Act[81] relieves the alien from deportation if

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77. 5 U.S.C. § 706 (1982).

78. *Community Nutrition* may, in fact, be a case of bad facts making bad law. The Grocery Manufacturers Association maintained that, under the District of Columbia Circuit opinion, "virtually the entire U.S. food supply would remain unlawful for decades to come." Leflar, *Toxins in the Food Supply: Must FDA Allow Public Participation in Setting Permissible Levels?,* 15 PREVIEW OF UNITED STATES SUPREME COURT CASES 446, 447 (1986). The Court might not see fit to extend *Community Nutrition* to cases in which the facts do not present such practical problems, by somehow seeking to distinguish cases.

79. *See supra* notes 47-53 and accompanying text.

80. 107 S. Ct. 1207 (1987).

81. 8 U.S.C. § 1253(h) (1982).

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he can show that, on account of one of various listed factors, his "life or freedom would be threatened."[82] The Court had earlier determined in *Immigration and Naturalization Service v. Stevic*[83] that this showing was made if the alien could demonstrate that "it is more likely than not that the alien would be subject to persecution" if returned to the country to which he was to be deported.[84] A second basis for relief from deportation is also available. Section 208(a) of the Refugee Act of 1980[85] provides discretion to the Attorney General to grant asylum to an alien who will not or can not return home "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[86]

In *Cardoza-Fonseca*, a Nicaraguan, who had illegally remained in the United States, sought to avoid deportation under both bases. She was unable to show that it was "more likely than not" that her "life or freedom would be threatened" as required by section 243. The Bureau of Immigration Appeals then imported the "more likely than not" standard of section 243 into the section 208 consideration of whether she had a well-founded fear. The Court decided it was *not* more likely than not that Cardoza-Fonseca would be persecuted. The Court held that the Immigration and Naturalization Service erred when it interpreted the "well-founded fear" standard of section 208 as being equivalent to the "more likely than not" standard of section 243 and that section 208 was, in fact, more generous to the alien.

The Court did not grant the Bureau of Immigration Appeals' construction controlling effect. The Court cited and relied on *Chevron*, but in discussing *Chevron* stated:

> The question whether Congress intended the two standards to be identical is a pure question of statutory construction for the courts to decide. . . .
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> . . .
>
> The narrow legal question whether the two standards are the same is, of course, quite different from the question of interpretation that arises in each case in which the agency is required to apply either or both standards to a particular set of facts. There is obviously some ambiguity in a term like "well-founded fear" which can only be given concrete meaning through a process of case-by-case adjudication. In that process of filling " 'any gap left, implicitly or explicitly, by Congress,' " the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program. . . . But our task today is much narrower, and is well within the province of the judiciary. We do not attempt to set forth a detailed description of how the well-founded fear test should be applied. Instead, we merely hold that the Immigration Judge and the

82. *Id.*

83. 467 U.S. 407 (1984).

84. *Stevic*, 467 U.S. at 429-30.

85. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).

86. Refugee Act of 1980, Pub. L. No. 96-212, § 101(a)(42), 94 Stat. 102 (1980) (codified at 8 U.S.C. § 1101(a)(42) (1982)).

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BIA were incorrect in holding that the two standards are identical.[87]

Justice Scalia, while concurring in the judgment on the grounds that Congress had clearly spoken and that the Immigration and Naturalization Service's construction was in conflict with that clearly expressed intent, criticized the Court's discussion of *Chevron*.[88]

Several lower court opinions treated *Cardoza-Fonseca* as changing the *Chevron* grant of controlling effect to agency interpretations.[89] In response, Justice Scalia, this time joined by Chief Justice Rehnquist and Justices White and O'Connor, stepped into the breach to show those courts the error of their ways. Concurring in *National Labor Relations Board v. United Food and Commercial Workers Union, Local 23,*[90] he explained how the Court's treatment of the case before it "demonstrates the continuing and unchanged vitality of the test for judicial review of agency determinations of law set forth in *Chevron*."[91]

The majority in *United Food Workers* stated that it would review the regulations in question under the *Cardoza-Fonseca* standard. "On a pure question of statutory construction, our first job is to try to determine congressional intent, using 'traditional tools of statutory construction.' If we can do so, then that interpretation must be given effect, and the regulations at issue must be fully consistent with it."[92] The Court also cited *Chevron* as support for that proposition and observed that "where '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.' "[93]

The Court appeared to treat *Cardoza-Fonseca* as not being a departure from *Chevron*. In fact, as Justice Scalia explained,

> [i]f the dicta of *Cardoza-Fonseca,* as opposed to its expressed adherence to *Chevron*, were applied here, surely the question whether dismissal of

87. *Cardoza-Fonseca,* 107 S. Ct. at 1220-21 (quoting *Chevron,* 467 U.S. at 843 (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)))(footnotes omitted).

88. The Court's discussion is flatly inconsistent with . . . well established interpretation. The Court first implies that courts may substitute their interpretation of a statute for that of an agency whenever, "[e]mploying traditional tools of statutory construction," they are able to reach a conclusion as to the proper interpretation of the statute. . . . But this approach would make deference [to authority] a doctrine of desperation, authorizing courts to defer only if they would otherwise be unable to construe the enactment at issue. This is not an interpretation but an evisceration of *Chevron*.

> The Court also implies that courts may substitute their interpretation of a statute for that of an agency whenever they face "a pure question of statutory construction for the courts to decide," . . . rather than a "question of interpretation [in which] the agency is required to apply [a legal standard] to a particular set of facts." . . . No support is adduced for this proposition, which is contradicted by the case the Court purports to be interpreting, since in *Chevron* the Court deferred to the Environmental Protection Agency's abstract interpretation of the phrase "stationary source."

Cardoza-Fonseca, 107 S. Ct. at 1225 (Scalia, J., concurring)(insertions by Justice Scalia).

89. *See, e.g.,* Union of Concerned Scientists v. Nuclear Regulatory Comm'n, 824 F.2d 108, 113 (D.C. Cir 1987); International Union, United Automobile, Aerospace and Agric. Implement Workers v. Brock, 816 F.2d 761, 764-65 (D.C. Cir. 1987); Adams House Health Care v. Heckler, 817 F.2d 587, 593-94 (9th Cir. 1987).

90. 108 S. Ct 413 (1987).

91. *United Food Workers,* 108 S. Ct. at 426 (Scalia, J., concurring).

92. *United Food Workers,* 108 S. Ct. at 421 (citing *Cardoza-Fonseca,* 107 S. Ct. 1207).

93. *Id.* at 421 (quoting *Chevron,* 467 U.S. at 843).

> complaints requires Board approval and thus qualifies for judicial review under 29 U.S.C. § 160(f) would be "a pure question of statutory construction" rather than the application of a "standard . . . to a particular set of facts," as to which "the courts must respect the interpretation of the agency." Were we to follow those dicta, therefore, we would be deciding this issue conclusively and authoritatively, rather than merely "decid[ing] whether the agency's regulatory placement is permissible. . . ."[94]

Thus, *Cardoza-Fonseca* may not be a departure from, or a limitation on, *Chevron*. If the Court does not intend the blending, for purposes of standard of review, of the two types of rule, seemingly complete with *Community Nutrition*, it is still incumbent upon the Court to establish some principle to distinguish those interpretations which are to receive the higher scrutiny envisioned by the APA from those due controlling effect.

II. A SEARCH FOR LIMITS

This Article suggests three limitations on the range of agency statutory interpretations that are afforded controlling effect when challenged in court. The first limitation is that when a statute contains congressional instructions to the agency as to how the agency is to function, the agency's construction of that statute should not control. The second limitation is based on the sort of ambiguity present in the statute. Arguably, that ambiguity must be technical or reflect a need to balance policies, so that there is a basis for concluding that the resolution of the ambiguity requires the agency's expertise. The contours of the third limitation are not developed within the confines of this Article. Instead, this Article simply points out that the nondelegation doctrine, should its recent stirrings lead to a rebirth, applies to agency statutory constructions in whatever form the reborn doctrine might take.

A. A Limitation Based on the Entity Toward Which the Statute Is Directed

Community Nutrition was viewed as representing a step towards expansion of the class of agency constructions due controlling effect, because the ambiguity, if indeed there was any real ambiguity, was non-technical and there was no reason to leave its resolution to the agency, other than the view that any ambiguity represents an implicit delegation of such authority to the agency. Even accepting the view that the existence of any ambiguity may generally be taken as a delegation to the agency to construe with controlling effect, that position should not apply to cases such as *Community Nutrition*. That case departs from the precedent of the other cases presented in another important way.

In each of the major cases addressing the development of agency authority to construe with controlling effect, the ambiguity at issue was not in a section of the statute directed at the agency as such. Instead, the agency construed how the statutory section in question applied to some other entity

94. *United Food Workers*, 108 S. Ct. at 426 (Scalia, J., concurring)(quoting *Cardoza-Fonseca*, 107 S. Ct. at 1221)(citations omitted).

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to which the section was directed. As will be seen, that was *not* the case in *Community Nutrition*.

In *Batterton v. Francis*,[95] the section at issue was a part of the statute governing the Aid to Families with Dependent Children program. The section "require[d] a participating State to provide assistance where a needy child 'has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father.' "[96] The standards prescribed by the Secretary of Health, Education and Welfare required the states to define "unemployed father" to include any father working less than 100 hours per month or who exceeded 100 hours in a particular month as the result of a temporary increase in work that had provided less than 100 hours the previous month and was likely to provide under 100 hours of work in the following month.[97] The regulations also, however, allowed an exception. States "need not include a father whose unemployment results from participation in a labor dispute or who is unemployed by reason of conduct or circumstances which result or would result in disqualification for unemployment compensation under the State's unemployment compensation law."[98] Maryland chose not to include such unemployed fathers.[99]

As previously noted, at issue in *Batterton* was whether or not the Secretary could define "unemployed" so as to allow the exception of fathers who were not working as a result of participation in a strike or as a result of a discharge for proper cause.[100] The Court found that Congress explicitly delegated the authority to define "unemployed" to the Secretary and granted the Secretary's definition controlling effect.

For purposes of the distinction being drawn in this section it is important to note that the dispute in *Batterton* was between the State of Maryland and several recipients of Aid to Families with Dependent Children. The statute the Secretary construed established the rights and duties of those parties with regard to one another. The statutory language in issue did not impose duties on the Secretary nor grant the Secretary any rights. It did, however, provide the Secretary with the power[101] to affect the rights and duties of the states and potential recipients of Aid to Families with Dependent Children.

Similarly, the focus of the statute at issue in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[102] was not directed at the administrative agency. Rather, the Clean Air Act Amendments of 1977[103] addressed a state's failure to comply with air quality standards adopted

95. 432 U.S. 416 (1977).
96. *Batterton*, 432 U.S. at 419 (quoting 42 U.S.C. § 607(a) (1976)).
97. *Id.* at 417 n.1 (citing 45 C.F.R. § 233.100(a)(1) (1976)).
98. *Id.*
99. *Id.* at 420 n.5 (citing COMAR § 07.02.09.10(A)(2) (1975)).
100. *See supra* notes 26-28 and accompanying text.
101. A power is the ability to bring about a change in legal relationships, e.g., the ability to create rights or duties. *See generally* Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 44-58 (1913).
102. 467 U.S. 837 (1984).
103. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (1977).

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pursuant to earlier legislation. The statute required non-conforming states to develop a permit program for every new or modified "stationary source"[104] of air pollution. In implementing the amendments, the Environmental Protection Agency allowed states to adopt plantwide definitions of "stationary source."

As in *Batterton,* the Court's finding of an implicit delegation to the agency to construe "stationary source", meant finding that the agency possessed express power to affect the rights and duties of others,[105] in this case states and owners of sources of emission. The power the agency enjoyed was not one that allowed it to define its own rights and duties. That is not to say that the administrative agency in *Chevron* or in *Batterton* did not have interests affected by its decision, nor that its rights and duties with regard to enforcement, for example, would not be affected indirectly. The rights and duties directly affected by the delegated power to construe the statutory term, however, were the rights and duties of others.

The situation was quite different in *Community Nutrition.* There the statutory language at issue directly addressed the administrative agency. The statute stated, "the Secretary shall promulgate regulations . . .,"[106] and the administrative agency had construed the term "shall." The statute imposed a duty on the agency. There may have been some question as to the scope of that duty,[107] but that the statute did place a duty on the agency is certain.

By granting the agency's construction of the statute controlling effect, the Court allowed the agency to establish its own rights and duties subject only to "arbitrary and capricious" review.[108] Such a power to establish one's own rights and duties goes far beyond the power granted in the statutes at issue in *Batterton* and *Chevron.* The Court's decision effectively made the agency the judge of its own case with regard to the nature of its duties, subject only to "arbitrary and capricious" review.

Allowing a party to be the judge of its own case cuts against the grain of American justice. As the Supreme Court stated in one of the earliest cases, "surely the legislature could not mean to make a man the judge both of fact and law in his own cause, and that without appeal."[109] Indeed, Justice

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104. *See supra* notes 34-43 and accompanying text.

105. *See supra* note 101.

106. 21 U.S.C. § 346 (1982).

107. That is, whether tolerances must be established limiting quantities of unavoidable deleterious substances to levels necessary for the protection of public health, or whether the tolerances need only be established if such establishment was necessary for the protection of public health. *See supra* notes 56-64 and accompanying text.

108. *Community Nutrition* thus bears out one of Professor Sunstein's criticisms of *Chevron.*

> *Chevron* suggests that administrators should decide the scope of their own authority. That notion flatly contradicts separation of power principles that date back to *Marbury v. Madison* and to *The Federalist No. 78.* The case for judicial review depends in part on the proposition that foxes should not guard henhouses—an injunction to which *Chevron* appears deaf.

Sunstein, *Constitutionalism After the New Deal,* 101 HARV. L. REV. 421, 467 (1987)(footnotes omitted).

109. Penman v. Wayne, 1 U.S. 241, 243 (1788). While there may be appeal in the case of an agency construction, the appeal under arbitrary-and-capricious review does little to keep the agency

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Chase, in *Calder v. Bull*,[110] opined that with regard to "a law that makes a man *a judge in his own cause* . . . : It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it."[111]

One may disagree with Justice Chase's views in *Calder* regarding substantive due process, and might argue that a rational constitution could grant the legislature the authority to make a man the judge of his own cause and might even presume that Congress in fact has such authority.[112] Yet, given the fundamental principle that a man should not be the judge of his own cause,[113] surely the legislature should not be presumed to have made the administrative agencies the judges of their own rights and duties. Even if Congress might *explicitly* delegate such authority, that authority should not be found in some *implicit* grant.

While *Community Nutrition* has been singled out as a departure from the earlier cases in the development of authority to construe statutes with controlling effect, it would be misleading to suggest that *Community Nutrition* stands alone. Another example of the Court making an administrative agency the judge of its own cause found in *Chemical Manufacturers Association v. Natural Resources Defense Council, Inc.*[114] This case arose after the Environmental Protection Agency, also a petitioner before the Court, was

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from being the judge of its own cause, so long as the agency's view of its rights and duties is reasonable.

110. 3 U.S. 386 (1798).

111. *Calder*, 3 U.S. at 388 (emphasis in original).

112. In fact, the Supreme Court appears, to some degree, to have treated Congress as the judge of its own cause in determining its authority under the commerce clause. For example, in Hodel v. Virginia Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981), and its companion case, Hodel v. Indiana, 452 U.S. 314, 324 (1981), the Court noted that its proper inquiry was merely whether Congress could rationally conclude that the activity it was regulating affected interstate commerce. If so, the legislation at issue would be within the commerce clause power. Thus, Congress was to determine its own authority with much the same scope of review as has here been criticized when afforded to agency determiniations of their authority. Congress is, in such cases however, finding legislative facts, as opposed to ruling on legal questions as to the meaning of statutory terms. Furthermore, the thesis of this section does not rest on the conclusion that Congress *could not* establish for itself and for the administrative agencies the authority to be the judges in their own causes, but merely that Congress should not be presumed to have placed the agencies in such a position by implication.

113. *See also, e.g.*, Arnett v. Kennedy, 416 U.S. 134, 197 (1974)(White, J., dissenting)("[W]e might start with a first principle: '[N]o man shall be a judge in his own cause.' ")(quoting Bonham's Case, 8 Co. 114a, 118a, 77 Eng. Rep. 646, 652 (1610)); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 170 n.17 (1951)(Frankfurter, J., concurring)("Three principles of 'natural justice' were stated to be that 'a man may not be a judge in his own cause'. . . .")(quoting Report on Committee on Ministers' Powers, Cmd. 4060, 75-80); Spencer v. Lapsley, 61 U.S. 264, 266 (1857)("The act of Congress proceeds upon an acknowledgment of the maxim, 'that a man should not be the judge in his own cause,'. . . ."); American Gen. Ins. Co. v. FTC, 589 F.2d 462, 464 (9th Cir. 1979)(" 'even an Act of Parliament made against Natural Equity, as to make a Man Judge in his own Cause, is void in itself . . .' ")(quoting Day v. Savadge, Hob. 84 (K.B. 1614)); NLRB v. Riverside Mfg. Co., 119 F.2d 302, 305 n.2 (5th Cir. 1941)(noting "principles, at once of natural right and of constitutional law, that no man may be a judge in his own cause . . ."); Magnolia Petroleum Co. v. NLRB, 112 F.2d 545, 547 (5th Cir. 1940)(same language); American Creosote Works, Inc. v. Powell, 298 F. 417, 422 (1924)("Courts have been ever jealous to assert and enforce the principle that no man can be a judge in his own cause. . . ."); Hodgson v. District No. Five, United Mine Workers of Am., 353 F. Supp. 108, 115 (W.D. Pa. 1973)("It is fundamental in our law that a man cannot judge his own cause. . . .").

114. 470 U.S. 116 (1985).

required by the Clean Water Act[115] to set effluent limits for various categories of pollutants. The Act also stated that the agency could not "modify" certain statutory requirements regarding toxic materials. The issue before the Court was what constituted modification. The Court, while using deferential language, held that the agency's "understanding of this very 'complex statute' is a sufficiently rational one to preclude a court from substituting its judgment for that of the EPA."[116]

The Court in *Chemical Manufacturers*, like the Court in *Community Nutrition*, allowed the agency to be the judge of its own case, subject only to "arbitrary and capricious" review. At issue in *Chemical Manufacturers* was a statutory section defining the authority of the agency, rather than one defining the rights and duties of other parties. While Congress might have implicitly delegated to the agency the authority to construe statutory sections setting the rights and duties of others, it is not reasonable to conclude that Congress would set limits on the agency's authority while, at the same time, implicitly delegating to the agency the authority to delineate those limits with preclusive effect. To have done so would be to have made the agency the judge of its own cause.

In both *Community Nutrition* and *Chemical Manufacturers* the Court applied principles of implicit delegation of authority to the agency to construe a statute without addressing the fact that the two cases were inherently different from the cases in which those principles developed. Even if Congress *may* delegate to an agency the authority to judge its own cause in such cases of statutory construction, it is unreasonable to presume that Congress has done so implicitly. Authority to construe with controlling effect should not be taken as implied when the agency construes a statutory section which is directed to the agency and sets the agency's powers, rights, duties and limitations.[117] In such cases, the agency may still be faced with situations in which it must offer its construction of a statute directed toward itself, and such a construction might even be due deference, but the construction should not be given controlling effect.[118]

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115. 33 U.S.C. § 1251 (1977).

116. *Chemical Manufacturers*, 470 U.S. at 105 (citing Train v. NRDC, 421 U.S. 60, 75, 87 (1975); *Chevron*, 467 U.S. 837 (1984)).

117. Judge Starr, *supra* note 70, at 363, finds in his reading of the cases a principle that is somewhat analogous to that argued for in the text. He notes that controlling weight is due interpretative rules based on managerial or regulatory judgment, but observes that such effect may not be due rules interpreting a congressional grant of jurisdiction. While sympathetic to the principle he would find, I do not agree, given the cases discussed in text, that such a principle can be taken as established. The arguments presented in text, however, show that his principle has merit, even if it does not yet have a following.

The principle presented by Judge Starr, as well as the principle argued for in this section, also finds support in the Supreme Court's treatment of preclusion of judicial review of agency decisions. "[E]ven when a statute cuts off judicial review, review will be afforded if the agency exceeds its statutory authority." B. MEZINES, J. STEIN & J. GRUFF, 5 ADMINISTRATIVE LAW § 44.02, at 44-10 (1987)(citing Automobile Workers v. Brock, 477 U.S. 274 (1986); Leedom v. Kyne, 358 U.S. 184 (1958)). The courts must be willing to decide whether the agency has the power it asserted, even in areas where Congress has said that the courts may not examine the substantive decisions of the agency. Thus, there is a difference between decisions made under a statute and decisions regarding the powers, rights, duties, etc. the statute grants the agency.

118. It may not always be easy to distinguish cases in which the statute is directed toward the agency and circumscribes the agency's rights and duties from cases in which the statute, while estab-

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B. A Limitation Based on the Administrative Procedure Act

Section 10(e) of the APA, when adopted in 1946, provided that "[s]o far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action."[119] This provision has remained in effect in essentially the same form since that time.[120]

The statute clearly states that it is the courts that are to decide questions of law and construe statutes, and does not exempt situations in which the administrative agency has already offered a statutory construction. Furthermore, the legislative history of the APA provides no grounds for the position that such agency constructions are to be given controlling effect and may be changed by a court only if found to be arbitrary and capricious. The Senate Committee on the Judiciary explained that "subsection [10(e)] provides that questions of law are for courts rather than agencies to decide in the last analysis."[121] The House Committee on the Judiciary offered the same explanation.[122] In fact, the Senate Committee's discussion of the bill noted that " 'interpretative' rules—as merely interpretations of statutory provisions—are subject to *plenary judicial review*."[123] This is a far cry from the controlling effect now given some, if not all, interpretative rules.

Given this early and consistent statement of congressional intent regarding who was to interpret the law, it is difficult to justify the Court's position in granting controlling effect to such a wide range of agency constructions. Cases such as *Batterton*[124] present little problem, since in such cases an explicit grant to the agency to construe the particular term or statute superceded the APA's explicit assignment to the courts of the task of construing statutes.[125] However, the range of statutes for which the agency's view is to be given controlling effect goes beyond such explicit dele-

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lishing rights and duties of others, has an incidental effect on the agency's powers. However, there are cases in which the statute is clearly directed toward setting rights and duties of agencies. *See, e.g., Community Nutrition*, 476 U.S. 974. In those cases, at least, the limitation should apply. In the more difficult cases, the decision might be made to deny controlling effect to those aspects of the interpretations that did affect the agency's powers in any more than a minimal, purely incidental way.

119. Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946).

120. The current version of the Adminstrative Procedure Act provides: "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." *See* 5 U.S.C. § 706 (1982).

121. S. REP. No. 752, 79th Cong., 1st Sess. 28 (1945), *reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY 185, 214 (1946).

122. *See* H.R. REP. No. 1980, 79th Cong., 2d Sess. 6 (1946), *reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY 233, 278 (1946).

123. *See* SENATE COMM. ON THE JUDICIARY, 79TH CONG., 2D SESS. (Comm. Print 1946) in ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY 11, 18 (1946)(emphasis added).

124. *Batterton*, 432 U.S. 416 (1977). *Batterton* does not stand alone. In various instances, the Court has found an explicit delegation of the authority to construe. *See, e.g.*, United States v. Morton, 467 U.S. 822, 834 (1984); Heckler v. Campbell, 461 U.S. 458, 466 (1983); Herwig v. Ray, 455 U.S. 265, 274-75 (1982); Schweiker v. Gray Panthers, 453 U.S. 34, 43-44 (1981); INS v. Jong Ha Wang, 450 U.S. 139, 144 (1981). In each such case, the APA's assignment of the role to the courts may be viewed as having been explicitly superceded by the statute at issue.

125. *See supra* notes 26-33 and accompanying text.

gation to construe.[126]

The extension of this line of cases from *Batterton* and its progeny[127] to *Chevron* and beyond is where the difficulty arises. *Chevron* rested on the existence of an implicit delegation to the administrative agency of the authority to construe a statute.[128] In effect, the Court found an ambiguity in the statute that implied repeal of the APA directive that the courts are to construe statutory terms. Yet, it is a firmly established principle of statutory construction that repeals by implication are disfavored.[129] That is not to say that a statute may never be repealed by implication, but that the implication must be necessary.[130] Moreover, the legislative intent to repeal must be clear and manifest.[131] This should be particularly so for any repeal by implication of APA provisions, since the APA itself provides that its provisions should not be held to have been superceded or modified by a later statute "except to the extent that it does so expressly."[132]

The mere existence of ambiguity in a statute falls short of demonstrating "clear and manifest" intention to repeal the APA assignment of the authority to construe to the judiciary.[133] Certainly, such an implication is not "necessary." Implicit repeal is found only where the two acts are in irreconcilable conflict, or where the latter statute "covers the whole ground occu-

126. *See supra* notes 34-66 and accompanying text.

127. *See supra* note 124.

128. *See Chevron*, 467 U.S. at 843-44 ("Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.") (footnotes omitted).

129. United States v. United Continental Tuna Corp., 425 U.S. 164, 168 (1976). *See also, e.g.*, TVA v. Hill, 437 U.S. 153, 189 (1978)("To find a repeal . . . under these circumstances would surely do violence to the 'cardinal rule . . . that repeals by implication are not favored.' ")(quoting Morton v. Mancari, 417 U.S. 535, 549 (1974)(quoting Posadas v. National City Bank, 296 U.S. 497, 503 (1936))); Radzanower v. Touche, Ross & Co., 426 U.S. 148, 154 (1976)(" 'It is, of course, a cardinal principle of statutory construction that repeals by implication are not favored.' ")(quoting United States v. United Continental Tuna Corp., 425 U.S. 164, 168 (1976) and citing Gordon v. New York Stock Exch., 422 U.S. 659, 682 (1975); Regional Rail Reorganization Act Cases, 419 U.S. 102, 133 (1974); Silver v. New York Stock Exch., 373 U.S. 341, 357 (1963); United States v. Borden Co., 308 U.S. 188, 198-99 (1939)); Rosencrans v. United States, 165 U.S. 257, 262 (1896)("[W]here Congress has expressly legislated in respect to a given matter that express legislation must control, in the absence of subsequent legislation equally express, and is not overthrown by any mere inferences or implications to be found in subsequent legislation."); Cope v. Cope, 137 U.S. 682, 686 (1891)("Nothing is better settled than that repeals . . . by implication, are not favored by the courts. . . ."); Osborn v. Nicholson, 80 U.S. 654, 662 (1871)("The doctrines of the repeal of statutes and the destruction of vested rights by implication, are alike unfavored in the law.").

130. Posadas v. National City Bank, 296 U.S. 497, 504 (1936).

131. TVA v. Hill, 437 U.S. 153, 189 (1978)(quoting Posadas v. National City Bank, 296 U.S. 497, 503 (1936), and citing Georgia v. Pennsylvania R.R. Co., 324 U.S. 439, 456-57 (1945)("Only a clear repugnancy between the old . . . and the new [law] results in the former giving way. . . ."); United States v. Borden Co., 308 U.S. 188, 198-99 (1939)("[I]ntention of the legislature to repeal 'must be clear and manifest'. . . . [A] positive repugnancy [between the old and new laws]' ")). *See also* Radzanower v. Touche, Ross & Co., 426 U.S. 148, 154 (1976)(" 'the intention of the legislature to repeal must be clear and manifest' ")(quoting Posadas v. National City Bank, 296 U.S. 497, 503 (1936)); Osborn v. Nicholson, 80 U.S. 654, 662 (1871)(repeal by implication is not to be admitted "unless the implication is so clear as to be equivalent to an explicit declaration").

132. 5 U.S.C. § 559 (1982).

133. It might be argued that the APA, rather than assigning the role to the judiciary, simply recognized the constitutional role of the judiciary in deciding cases arising under federal statutes. Such an argument would not weaken the argument presented here. Congress could not be supposed to have exercised its authority to define the jurisdiction of courts by implication through having left some ambiguity in a substantive statute.

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pied by the earlier and is clearly intended as a substitute for it."[134]

There is nothing irreconcilable between the existence of an ambiguity in a statutory term or provision and the APA's directive in section 10(e) to reviewing courts to interpret statutory provisions.[135] The later, substantive statute creates an ambiguity and the APA assigns the resolution of the ambiguity to the courts.

Neither would the existence of an ambiguity in a statute directed to, or administered by, an administrative agency "[cover] the whole ground occupied by [Section 10(e) of the APA] and [be] clearly intended as a substitute for it." As the name indicates, the Administrative Procedure Act implemented procedure for the administrative agencies. The sections at issue in *Chevron* and its progeny were substantive. The Court did not point to a procedural section in any of the statutes indicating that the statute was intended to cover the whole ground occupied by Section 10(e). If there had been such a procedural section, the Court would have faced a situation similar to *Batterton*, rather than having to find in the substantive portions of the statute an implied delegation to the agency to construe. Failing to point to a procedural section, the Court relied upon substantive sections that normally would not be expected to serve as a substitute for the APA provision.

There is simply nothing inherent in the existence of an ambiguity in the statute an agency administers that may serve to repeal the APA assignment of the authority to construe. It might, therefore, be argued that the entire line of cases, from *Chevron* on, conflicts with principles well established in an equally long line of Supreme Court cases.[136] To avoid such a conclusion, some factor must be identified in the ambiguities present in *Chevron* and its progeny that is not present in every statutory ambiguity. If some ambiguities are such as to make clear congressional intent to repeal the APA assignment of the task of statutory construction, at least some of the *Chevron* line of cases may not be in conflict with the law of implied repeals.

Two factors[137] representing the state of the law after *Chevron* and before *Community Nutrition*, might provide, either alone or in combination, a sufficiently clear, though implicit, repeal. The first instance is one in which

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134. Posadas v. National City Bank, 296 U.S. 497, 504 (1936) (quoting Red Rock v. Henry, 106 U.S. 596, 601 (1882)). *See also* TVA v. Hill, 437 U.S. 153, 190 (1978)(" '[i]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable' ")(quoting Morton v. Mancari, 417 U.S. 535, 550 (1974)); Rosenberg v. United States, 346 U.S. 273, 295 (1953)(Clark, J., concurring)("There must be a 'positive repugnancy between the provisions of the new law, and those of the old.' ")(quoting United States v. Borden Co., 308 U.S. 188, 198 (1939)); Cope v. Cope, 137 U.S. 682, 686 (1891)(citing McCool v. Smith, 66 U.S. (1 Black) 459 (1861); Bowen v. Lease, 5 Hill 221 (1843); *Ex parte* Yerger, 75 U.S. (8 Wall.) 85, 105 (1868); Furman v. Nichols, 75 U.S. (8 Wall.) 44 (1868); United States v. Sixty-seven Packages, 58 U.S. (17 How.) 85 (1854)); Red Rock v. Henry, 106 U.S. 596 (1882).

135. Administrative Procedure Act, ch. 24, 60 Stat. 237 (1946). *See also* 5 U.S.C. § 706 (1982)("To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.").

136. United States v. Fausto, 108 S. Ct. 668 (1988); Rodriguez v. United States, 107 S. Ct. 1391 (1987); Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974). United States v. United Continental Tuna Corp., 425 U.S. 164, 168 (1976). *See also supra* note 129.

137. *See* Saunders, *supra* note 8, at 360-67.

the ambiguity reveals congressional uncertainty as to which of two competing policies should control. If Congress expressed concern over both policies, but was not clear as to which is to be given greater weight, Congress might be seen as having left the task of balancing the competing policies to the agency.[138] While an explicit grant of rule-making authority or even a *Batterton*-like directive that the agency is to define the key term would be preferable, arguably the use of an ambiguous term reflecting the policy conflict is an implicit invitation to some entity to construe the term and balance the policies. If so, it is more likely that Congress meant for an expert agency, rather than the courts, to effect the balance.[139]

A second indicator of an implicit repeal of the APA assignment is an ambiguity in the use of a technical term.[140] The construction of such a term requires technical expertise. If a term is sufficiently technical, and Congress was unable or unwilling to define it with precision, Congress might be viewed as having decided to lay out the general contours of the legislation in question, while leaving it to the expert agency to fill in the details by defining any ambiguous technical terms. Even if Congress simply failed to recognize the existence of an ambiguity, arguably Congress intended that the experts resolve the unrecognized ambiguity.[141]

A case not completely on point, but presenting the sort of conclusion a court should be required to draw before holding the APA assignment to have been repealed, is presented by *Association of Data Processing Servicing*

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138. The existence of competing policies played a role in the Court's determination that there was an implicit delegation to the agency of the power to construe in *Chevron*. The Court recognized economic growth and protection of the environment as competing goals in the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, §§ 111(a), 129(b), 301(a), 91 Stat. 685, 704, 747, 770 (1977)(codified at 42 U.S.C. §§ 7411(a)(3), 7502(b)(6), 7602(j)(1982)). The Court then went on to state:

> In these cases, the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies. Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by this case. Perhaps that body consciously desired the administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes it matters not which of these things occurred.

Chevron, 467 U.S. at 865 (footnotes omitted). *See also* General Elec. Uranium Management Corp. v. United States Dep't of Energy, 764 F.2d 896, 905 (D.C. Cir. 1985)(applying arbitrary-and-capricious review because the court found the statute "ambiguous with respect to the specific method of calculating the one-time fee, and that DOE's rule 'represents a reasonable accommodation of conflicting policies' served by the Act")(quoting *Chevron*, 467 U.S. at 845).

139. Congress is as capable as a generalist court of resolving conflicts between competing policies, and each may be less capable than an agency with expertise or capable of developing such expertise. Agencies are also more politically accountable than the courts and between the two may be viewed as the better entity to make policy decisions. Pierce, Chevron *and its After-math: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 307-08 (1988).

140. The *Chevron* Court paid some heed to this factor, noting that the regulatory scheme there at issue was "technical and complex." *Chevron*, 467 U.S. at 865.

141. Such an argument is clearly weaker than the argument from the deliberate use of an ambiguous term. Since it will be difficult to determine whether or not Congress was aware of the existence of the ambiguity, the argument might better proceed on the assumption that Congress knew what it was saying, including the fact that the terms it used were ambiguous.

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Organizations v. Board of Governors.[142] That case concerned the Bank Holding Company Act of 1956[143] and the construction of "closely related to banking" in the requirement that bank holding companies obtain regulatory approval before engaging in activities not closely related to banking.[144] Judge (now Justice) Scalia, writing for the court, concluded that "attempting to exercise close and necessarily inexpert supervision . . . would be particularly inappropriate under a governing statute such as this one, which commits it to the Board to apply a standard of such inherent imprecision . . . that a discretion of almost legislative scope was necessarily contemplated."[145] If in determining what standard of review an agency statutory construction is due, a court is willing to conclude that technical ambiguity or the presence of policy conflict shows that a commitment to the agency to construe "was necessarily contemplated," then the interpretation might similarly merit legislative effect.[146]

Nevertheless, even in cases in which the construction resolves a technical ambiguity or a conflict between recognized policies, it is still not at all clear that "the two acts are in irreconcilable conflict, or [that] the latter statute covers the whole ground occupied by the earlier and is clearly intended as a substitute for it."[147] It is difficult to claim that the simple presence of a technical term covers the ground of section 10(e) of the APA and is intended to serve as a substitute for the section itself. The only available argument is that there is an irreconcilable conflict between the APA assignment of the task of statutory construction and the technical or policy nature of the term or section to be construed. While such an argument may be less than convincing, it does serve to avoid the conclusion that *Chevron* and all its progeny conflict with the law of implied repeal. If the existence of technical ambiguity or policy conflict is to provide such a basis, however, the *Chevron* line of cases must be limited to those cases in which the ambiguity is of the required sort.[148]

There are then, thus far, two sets of agency statutory constructions not

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142. 745 F.2d 677 (D.C. Cir. 1984).

143. 12 U.S.C. § 1843(c)(8) (1982).

144. The case involved imprecision, which may be viewed as a particular form of ambiguity. In some cases of ambiguity, a term admits of two meanings, each of which may be rather precise, and there is a question over which meaning was intended. Imprecision, at least in the context of the case discussed, is the result of what may be called a "fuzzy" term. Such a term sets a standard, but it is not a black-and-white standard. Instead, it requires distinctions to be made between shades of grey.

145. *Association of Data Processing Serv. Org.*, 745 F.2d at 697.

146. Saunders, *supra* note 8, argues that, even under such circumstances, legislative effect should be granted only if the agency has indicated that it wanted the rule to have legislative effect and has provided the notice and comment procedures required for legislative rules.

147. *Posadas*, 296 U.S. at 504 (quoting *Red Rock*, 106 U.S. at 601).

148. While this argument may be weak, when viewed as supporting *Chevron*, it has strength as a limitation on *Chevron*. That is, it may or may not be that the entire *Chevron* line conflicts with implied repeal principles, but surely those cases in which the ambiguity is not technical or policy-based conflict.

A recent note also takes the position that statutory ambiguity is not a sufficient basis to find a delegation. *See* Note, *Coring the Seedless Grape: A Reinterpretation of* Chevron U.S.A. Inc. v. NRDC, 87 COLUM. L. REV. 986, 993-99 (1987). The note suggests a "multifactor analysis" using "deference factors" similar to those well-established in *Skidmore* and its progeny. *See supra* notes 16-24 and accompanying text.

due controlling effect:[149] statutes that define agency rights, duties and powers, and statutes in which the ambiguity is not technical and does not represent a conflict in recognized policies. It should be noted that while the two sets are not mutually exclusive,[150] neither are they co-extensive. *Community Nutrition* demonstrates non-exclusivity; that is, *Community Nutrition* comes within both limitations. The statute there was directed to the agency and defined the rights and duties of the agency.[151] Furthermore, the term "shall," if it was ambiguous at all, did not represent a technical ambiguity or embody a conflict in policies.

In *Chemical Manufacturers*, on the other hand, while the term at issue represented a limitation of agency authority, the term might be held to present a technical ambiguity.[152] "Modify" might not seem to be a technical term, but since the Court was unwilling to read the ban on modification as a denial of the authority even to correct errors,[153] some judgment as to whether a change was substantial enough to be a modification would have to be made, and such a judgment might well be considered technical.[154]

C. A Limitation Based on the Nondelegation Doctrine

The nondelegation doctrine, which holds that the legislature may not delegate its power to administrative agencies,[155] has not been an important factor in American political or legal practice for quite some time. In fact, in 1978, Professor Davis concluded that "the statement that the nondelegation doctrine has failed needs no qualification. . . . The judicial effort to prevent legislative delegation has become a complete failure."[156] He noted that there were only two cases, both then over forty (and now over fifty) years old, in which the Supreme Court struck down a legislative delegation to any governmental body—*Panama Refining Co. v. Ryan*[157] and *A.L.A. Schechter Poultry Corp. v. United States*.[158] Since 1978, however, while there are no

149. Once again, it may be that only the *Batterton*-like cases of explicit delegations to the agency to construe should merit controlling effect.

150. Two sets are mutually exclusive, if they have no elements in common.

151. *See supra* notes 106-08 and accompanying text.

152. The statutory construction at issue in *Chemical Manufacturers* would then be within the class not due legislative effect because of the limitation based on the statute defining the agency's rights, duties and powers. It would not, however, be covered by the technical ambiguity limitation.

153. *Chemical Manufacturers*, 470 U.S. at 125.

154. In any case in which the statute at issue came within the limitation based on its being directed to the agency and defining the agency's rights, duties and powers, but in which the term at issue was technical, the court, if the first limitation was to have effect, would be forced to resolve a technical ambiguity. It was, however, argued that the presence of such an ambiguity might be viewed as presenting an irreconcilable conflict with the APA assignment to the courts of the task of construing. Thus, one could conclude that, in such a case, the agency construction is due controlling effect despite the fact that the statute defines the agency's authority. The best response to this argument is that, while the presence of technical ambiguity might conflict with the APA assignment and show Congressional intent to repeal that assignment, when the APA assignment is coupled with the principle that a party should not be the judge of its own cause, the combined weight is simply too great to be overcome by the technical nature of the ambiguity.

155. *See generally* K. DAVIS, *supra* note 2, § 10:6, at 149-223.

156. *Id.* at 150-51.

157. 293 U.S. 388 (1935).

158. 295 U.S. 495 (1935).

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additional holdings that a delegation is unconstitutional, there are some indications that interest in the nondelegation doctrine is enjoying a rebirth.

In *Industrial Union Department v. American Petroleum Institute*,[159] Justice Rehnquist's concurrence stated his position that section 6(b)(5) of the Occupational Safety and Health Act of 1970[160] was an unconstitutional delegation by Congress to the Executive of the authority to make "hard policy choices."[161] He restated his position that "the Act exceeds Congress' power to delegate legislative authority to nonelected officials" in his dissent in *American Textile Manufacturers Institute v. Donovan*.[162] This time Chief Justice Burger joined Justice Rehnquist.

The import of the *American Petroleum Institute* case goes beyond the existence of a dissent resting on the nondelegation doctrine. Four other members of the Court also voted to overturn an action taken under the Occupational Safety and Health Act. They did so after narrowly construing the Act so as to avoid a nondelegation doctrine problem.[163] Thus, for the first time since 1935, "a majority of the Court found delegation problems in a regulatory statute."[164] In addition, Justice Scalia, not a member of the Court at the time *American Petroleum Institute* was decided, expressed some respect for the doctrine, stating: "Even with all its Frankensteinlike warts, knobs, and (concededly) dangers, the unconstitutional delegation doctrine is worth hewing from the ice."[165]

An interest among commentators has accompanied the Court's newfound interest in the doctrine. Professors Aranson, Gellhorn, and Robinson[166] have called for a reinvigoration of the nondelegation doctrine as a means of reducing legislation aimed at the creation of purely private benefits[167] and to "[foster] only those regulatory structures that command a consensus and principally create public, not private goods."[168] Others, offering various rationales generally stress the desirability of returning the task of policy making to elected officials.[169]

It is not the purpose of this Article to join the growing chorus calling for a renewed recognition of the nondelegation doctrine. Nor does the scope of this Article include the question of what dimensions the reborn doctrine

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159. 448 U.S. 607 (1980).

160. Occupational Safety and Health Act, Pub. L. No. 91-596, 84 Stat. 1590 (1970)(codified at 29 U.S.C. § 651-78 (1982 & Supp. IV 1986)).

161. *American Petroleum Institute*, 448 U.S. at 672-76 (Rehnquist, J., concurring).

162. 452 U.S. 490, 543 (1981)(Rehnquist, J., dissenting)(citing J.W. Hampton & Co. v. United States, 276 U.S. 394 (1928); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935)).

163. *American Petroleum Institute*, 448 U.S. at 645-46 (plurality opinion).

164. Schoenbrod, *The Delegation Doctrine: Could the Court Give it Substance?*, 83 MICH. L. REV. 1223, 1235 (1985)(excluding from the analysis cases involving "protected freedoms" or personal rights, which the author discusses elsewhere).

165. Scalia, *A Note on the Benzene Case*, 4 REG. 25, 28 (July-Aug. 1980).

166. Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982).

167. *Id.* at 63-64.

168. *Id.* at 65.

169. *See, e.g.*, J. ELY, DEMOCRACY AND DISTRUST 131-34 (1980); J. FREEDMAN, CRISIS AND LEGITIMACY 78-94 (1978); Koslow, *Standardless Administrative Adjudication*, 22 ADMIN. L. REV. 407 (1970); T. LOWI, THE END OF LIBERALISM 297-303 (1969); Schoenbrod, *supra* note 164; Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 582 (1972).

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should have.[170] Rather, this Article merely notes that, should the nondelegation doctrine be reincarnated in any form that makes it a real limitation on delegation, that limitation applies to the determination whether a statutory construction by an administrative agency may enjoy controlling effect.

The claim that the nondelegation doctrine has some bearing on the grant of controlling weight to agency statutory constructions may, at first, seem odd. Professor Schwartz defines an "interpretive" rule as a rule clarifying or explaining existing laws or regulations, or a statement as to what the agency thinks a statute means, issued to advise the public of the agency's view.[171] An agency statutory construction would, then, appear to be an interpretative rule. However, in Schwartz's scheme, it is substantive rules that are issued pursuant to statutory authority,[172] so it would seem that only substantive rules, and not interpretative rules, would be subject to the nondelegation doctrine.

Professor Davis' distinction between legislative and interpretative rules presents the same difficulty in the applicability of the nondelegation problem. In Davis' view, "[a] legislative rule is the product of an exercise of delegated legislative power to make law through rules. An interpretative rule is any rule an agency issues without exercising delegated legislative power to make law through rules."[173] It follows that only legislative rules are subject to the nondelegation doctrine. Since Davis treats agency statutory constructions as interpretative rules,[174] it would appear that the nondelegation doctrine would have no application.

The *Attorney General's Manual*[175] presents the same problem. In its scheme, substantive rules are issued by an agency pursuant to statutory authority to implement the statute, while interpretative rules are issued by an agency to advise the public of the agency's construction of a statute it administers.[176] Once again, there is a gulf between rules that construe statutes and rules issued pursuant to statutory, and hence delegated, authority.[177]

Contrary to these indications that the nondelegation doctrine might not apply to statutory constructions by administrative agencies is the theory which justifies the grant of controlling effect to such constructions. When, in

170. *See, e.g.*, Pierce, *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 493-504 (1985); Schoenbrod, *supra* note 164, at 1249-89.

171. B. SCHWARTZ, *supra* note 4, § 4.6, at 159.

172. *Id.* at 158-59.

173. K. DAVIS, *supra* note 2, § 7:8, at 36.

174. *See, e.g.*, *id.* § 7:11, at 56 ("When an administator either gives meaning to a statute or answers a question that cannot be answered by finding the meaning in the statute, and when he states in general terms what he is doing, the statement is called 'an interpretative rule,'. . . .").

175. ATTORNEY GENERAL'S MANUAL, *supra* note 4.

176. *Id.* at 30 n.3.

177. While interpretative or interpretive rules are not issued pursuant to delegated authority, the authority of administrative agencies to issue such rules is generally recognized. The authority is found in the necessity of administrators informing their staffs on questions not answered directly by the statute. *See, e.g.*, Morton v. Ruiz, 415 U.S. 199, 231 (1974)("The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."); K. DAVIS, *supra* note 2, § 7:11, at 55 ("When Congress enacts a statute and assigns the administration of it to an agency, the agency encounters questions the statute does not answer and the agency must answer them. The agency heads must instruct their staffs what to do about such questions, and the instructions are interpretative rules.").

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Batterton v. Francis,[178] the Court firmly established the existence of a class of agency statutory constructions due controlling effect, it did so on the basis of a delegation. Since the term "unemployment" was followed in the statute by the parenthetical "as determined in accordance with standards prescribed by the Secretary,"[179] the Court concluded that "Congress . . . expressly *delegated* to the Secretary the power to prescribe standards for determining what constitutes 'unemployment' for purposes of Aid to Families with Dependent Children—Unemployed Fathers eligibility."[180] It was that delegation which led the Court to grant the standards adopted by the Secretary legislative or controlling effect.[181]

Similarly, when the Court established that an agency's construction of a statute may be due controlling effect even in the absence of an explicit delegation, the rationale still rested on the existence of a delegation. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[182] the Court stated:

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.[183]

Although the delegation was implicit rather than explicit, the Court's rationale for extending controlling effect requires that the delegation be viewed as a true delegation.[184]

The existence of a delegation to the agency to construe a statute might make the agency's interpretation a legislative rule.[185] The rule-making authority exercised would then be of the sort to which the nondelegation doctrine, however weakly, traditionally applies. Even if the rule-making is viewed as interpretative,[186] and therefore traditionally not the subject of the nondelegation doctrine, however,[187] the particular strength enjoyed by the

178. 432 U.S. 416 (1977).

179. 42 U.S.C. § 607(a) (1976).

180. *Batterton*, 432 U.S. at 425 (emphasis in original).

181. *Id.*

182. 467 U.S. 837 (1984).

183. *Chevron*, 467 U.S. at 843-44 (footnotes omitted).

184. *See, e.g.*, Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 570 (1985)(arguing that statutes are a source of law with regard to the proper mode of statutory construction and that the extent of deference to be granted is a function of Congressional intent); Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 27-28 (1983) (arguing that legislative supremacy requires deference in statutory construction "to the extent that the agency had been delegated law-making authority").

The grant of more than deference—controlling effect—would similarly be a function of law and the extent to which the agency has been delegated law-making authority.

185. *See* Saunders, *supra* note 8, at 382.

186. In General Motors Corp. v. Ruckelshaus, 742 F.2d 1561 (D.C. Cir. 1984)(en banc), the court held the agency statutory construction in question was an interpretative rule, so that notice and comment were not required. The court went on to grant, citing *Chevron*, at least great deference and possibly controlling effect.

187. Interpretative rules are regularly distinguished from legislative or substantive rules on the

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construction is due to the delegation to the agency to construe the statute. Under either view, there is a delegation, and the nondelegation doctrine, should it be revived, would have some application.

Given the doctrine's current impotence, it is unclear what the contours of a nondelegation doctrine limitation would be, should the principle ever be reinvigorated. Congress might simply be required to spell out the range of acceptable constructions or the policies that are to be balanced and the weights they are to be given. That is, Congress might be required merely to give more guidance to the agencies as they go about their exercise of delegated power to construe statutes.

At the extreme, the doctrine might be viewed as prohibiting the delegation to the agency of the authority to construe statutes with controlling effect. Such a conclusion would be extreme, but not as extreme as a strict application of the nondelegation doctrine to all areas of rule-making. Our government has become so complex that it could not function without granting rule-making authority to administrative agencies.[188] It is also necessary that agencies have the authority to issue their interpretations of statutes.[189] It is not necessary, however, that those interpretations enjoy controlling effect. The nondelegation doctrine, if reborn with sufficient vigor, might deny Congress the ability to pass to the agencies its authority to write the law and to define statutory terms, and at the same time pass to the agencies the judiciary's traditional authority to interpret the law.

CONCLUSION

The judiciary's role in the interpretation of statutes administered by administrative agencies has undergone a period of decline. In most if not all cases, the agency view as to the meaning of a statute is now due controlling effect, and a court may not substitute its view of the meaning of the statute unless it finds the agency view to be arbitrary and capricious or wholly unreasonable. Yet, judicial review is important in a government that relies so heavily on administrative agencies. "At least where private interests are sharply implicated, some measure of judicial review is a 'necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid.' "[190] The cursory system of judicial review now given agency constructions of statutes may not rise to the level required to afford that legitimacy and validity. Hopefully, the limitations this Article suggests will lead to increased judicial review and a concomitant increase in the legitimacy and validity of the administrative state.

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basis that they are not issued pursuant to delegated power. *See supra* notes 171-77 and accompanying text.

188. *See, e.g.*, Aranson, Gellhorn & Robinson, *supra* note 166, at 5 ("Locke's uncompromising formulation [of] the delegation . . . could not [be] appl[ied] . . . literally in a world of extensive interactions among [the] branches of government.").

189. *See supra* note 177.

190. Monaghan, *supra* note 33, at 1 (quoting L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 320 (1965)).

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