




1-1-2007

No Two-Stepping in the Laboratories: State Deference Standards and Their Implications for Improving the Chevron Doctrine

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United States Court of Appeals for the Fifth Circuit

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No Two-Stepping in the Laboratories: State Deference Standards and Their Implications for Improving the *Chevron* Doctrine

Michael Pappas*

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I. INTRODUCTION

The “*Chevron* two-step” is no simple dance. The doctrine’s apparent simplicity makes it easy to announce, but courts and commentators have shown that actually applying the standard is a much taller order. This Article compares the Federal *Chevron* procedure with its state equivalents, hoping that the experience of the states, the laboratories of democracy,¹ might teach federal courts to move more gracefully when considering agency interpretations.

*Chevron*² announces the well-known, two-step standard for federal review of agency interpretation of the law. When reviewing an agency’s statutory interpretation, step-one requires that the court look to the statute, inquiring “whether Congress has directly spoken to the precise question at issue” or “clear[ly]” and “unambiguously expressed” a specific intent.³ If the court finds these conditions satisfied, it simply applies the statute, but if not, the court proceeds to step-two, which requires deference to an agency’s “permissible construction of the statute.”⁴

Although there is little disagreement about the articulation of the *Chevron* test, the volumes of commentary⁵ devoted to the doctrine note the various complexities buried in these two famous steps. Many scholars, including Justices Scalia and Breyer, have weighed in on the substantive merits, legitimacy, and content of the *Chevron* doctrine.⁶ Additionally, and most relevant to this Article, academics have criticized the procedures and application of *Chevron*.⁷

1. “It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

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

3. *Id.* at 842-43.

4. *Id.* at 843.

5. Articles point to the enormous number of citations to *Chevron* as support for its continuing importance. See, e.g., Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 188 n.1 (2006). This Article, in turn, points to the enormous number of scholarly articles written on *Chevron* as support for its continuing complexity. A recent search showed 6,173 instances of law review articles citing *Chevron* and over a hundred articles with *Chevron* in the title. Westlaw Search, Apr. 2007 (on file with the *McGeorge Law Review*).

6. See Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 372-82 (1986) (characterizing the strong reading of *Chevron* as “seriously overbroad, counterproductive and sometimes senseless”); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516 (1989) (defending the *Chevron* rule on the grounds that it gives effect to congressional intent); see also

Despite the wealth of scholarship pertaining to the *Chevron* doctrine, no one has attempted to compare the federal approach to the various state *Chevron*-equivalent doctrines. Thus it seems that *Chevron* scholarship has missed an extraordinarily developed and accessible source of information and comparison. Regardless of whether this lack of attention to state deference schemes has resulted from a federal bias,⁸ perceived difficulty,⁹ or oversight, there is no reason to continue ignoring the state experience when analyzing federal principles of agency review. For that reason, this Article analyzes state courts' doctrines of judicial review of agency interpretation and compares them to the Federal *Chevron* doctrine. This Article does not explicitly compare the substance of these doctrines; it does not make normative judgments or suggest any amendment to the principle of deference. Rather, the Article takes the substantive principles underlying *Chevron*, as given, and examines the state approaches to inform or reform the federal procedures used in implementing *Chevron*.

Part II of the Article analyzes criticisms of the *Chevron* process and application, specifically focusing on the divergence between the *Chevron*

STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 106-08, 130 (2005) ("Deference to a reasonable agency interpretation of an ambiguous statutory provision often makes sense, but not always."); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992) [hereinafter Merrill, *Judicial Deference*] (examining both procedural and substantive problems with the *Chevron* doctrine and suggesting change in process and substance to correct these errors); Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522 (summarizing the arguments for and against judicial review of administrative action). See generally Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989) (arguing that the deference to the agency's interpretation called for by *Chevron* offers a false sense of security and in reality shifts the balance of power in favor of agencies and the executive); Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283 (1986) (arguing that the deference is appropriate because "the executive branch [should be] free to pursue, within appropriate bounds, what it perceives to be the will of the people"); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071 (1990) (suggesting that *Chevron* deference should not apply unless Congress has given law-interpreting power to an agency).

7. See Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 752 (1995); Merrill, *Judicial Deference*, *supra* note 6, at 990-93; Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 354 (1994) [hereinafter Merrill, *Textualism*].

8. For a criticism of federal law bias in the realm of constitutional law, see Hans A. Linde, *State Constitutions Are Not Common Law: Comments on Gardner's Failed Discourse*, 24 RUTGERS L.J. 927 (1993). According to Linde,

Constitutional specialists . . . need to overcome the ingrained assumptions that constitutional law means the decisions of the United States Supreme Court, that for a national career, in a "national" law school, professional scholarship means adding one more ream to each year's paper mountain of commentary on those decisions, and that attention to the constitutional law of a state, including the state where the law school happens to be located, or to the treatment of one issue in several states, is for ambitious professors and law review editors a distinctly minor league game. These self-perpetuating biases are hard to overcome.

Id. at 936.

9. "This variety among state administrative laws is the primary reason why law school casebooks and courses in administrative law almost never cover state administrative law in a meaningful way. It would simply be impossible to cover them in any depth . . ." WILLIAM F. FUNK & RICHARD H. SEAMON, ADMINISTRATIVE LAW: EXAMPLES AND EXPLANATIONS 20 (2001).

standard as announced versus how it is applied by the Supreme Court, the Supreme Court's emphasis on plain meaning versus ambiguity, and the two-step structure for applying *Chevron*. With these criticisms in mind, the Article then compiles and analyzes the various state doctrines for judicial review of an agency interpretation and compares these doctrines to their federal counterpart. Part III broadly considers the various states' announced standards, which fall into four general categories. Then Part IV more thoroughly analyzes the representative states from each of the four categories for insight into the practical application and development of these state standards. Drawing on the states' practice, Part V suggests that certain state doctrines not only allow for the same substantive deference principles underlying *Chevron* but also alleviate some of *Chevron*'s shortcomings, especially in the areas of (1) consistency between announced and applied standards and (2) handling of statutory ambiguity. Thus, these state doctrines may present more efficient alternatives to the *Chevron* approach because they can maintain the same deferential results without the problems of the *Chevron* process. Finally, Part VI considers the development of the state deference doctrines and analyzes how the various state-level administrative procedure acts (SLAPAs) have influenced state procedures. Based on these state experiences, as well as attempts to amend the Federal Administrative Procedure Act (APA), the Article concludes by considering possible routes to amending or altering the *Chevron* doctrine.

The findings from these state-law inquiries have promising implications for alleviating the problems identified with the *Chevron* doctrine. Most strikingly, since no state uses a two-step process akin to *Chevron*'s, the *Chevron* doctrine is unique to the federal system.¹⁰ While states do have substantive deference principles similar to those underlying *Chevron*, no state imposes those principles through a test that matches *Chevron*'s. Instead, most states employ some form of a reasonableness inquiry to determine whether deference is appropriate. Based on this finding, coupled with many of the criticisms levied at the *Chevron* process, application, and two-step structure, this Article suggests amending the *Chevron* test to match the reasonableness test employed by most states. This Article also finds that SLAPAs do not influence state deference standards; rather, these standards of review appear to be uniformly judge-made. Such a finding implies that any attempt to amend the *Chevron* doctrine would either have to originate with the judiciary or arise out of specific, targeted legislative efforts.

II. CRITICISM OF *CHEVRON*'S APPLICATION AND PROCEDURES

The *Chevron* literature demonstrates dissatisfaction with *Chevron*'s procedures and applications. Scholars have frequently criticized the inconsistency between the *Chevron* standards as announced versus as applied, particularly with *Chevron* step-

10. See *infra* Appendix A.

one. Commentators have also faulted *Chevron*'s two-step process for creating incentives against acknowledging statutory ambiguity and for encouraging the destructive union of *Chevron* and textualism.

One common criticism of *Chevron* does not call the two-step structure into question but challenges the Supreme Court's inconsistent application of the doctrine.¹¹ Particularly, the varied applications of *Chevron*'s step-one have concerned critics. For example, Thomas Merrill has noted:

Post-*Chevron* cases have in fact begun to change the formulation of the step-one inquiry. The first sign of change was when opinions began to drop any reference to "specific intentions" or whether Congress had "clearly spoken to" the issue at hand and instead described the threshold inquiry simply in terms of whether the statute was "ambiguous" or "unclear." Then . . . a more dramatic change emerged: the Court began to describe the inquiry at step one in terms of whether the statute has a "plain meaning." This rubric, an offspring of the "new textualism" . . . , has not been followed uniformly. Some opinions continue to quote the language of *Chevron* about whether Congress has spoken to the precise question at issue. The trend, however, has been strongly away from the original *Chevron* formulation of step one.¹²

Inconsistent formulations of the step-one inquiry, like those that Merrill describes, can destabilize the entire *Chevron* doctrine by leaving the relevant inquiry uncertain. Further, scholars have noted an even more troubling inconsistency—even when the Supreme Court settles on a step-one inquiry for a particular case, the Court does not necessarily follow the standard that it announces.¹³ According to the commentators, such a discrepancy leads to a messy

11. See, e.g., Merrill, *Judicial Deference*, *supra* note 6, at 970 ("It turns out that the Court does not regard *Chevron* as a universal test for determining when to defer to executive interpretations: the *Chevron* framework is used in only about half the cases that the Court perceives as presenting a deference question."); *id.* at 982 ("[I]t is clear that *Chevron* is often ignored by the Supreme Court. Although the *Chevron* opinion purports to describe a universal standard by which to determine whether to follow an administrative interpretation of a statute, the two-step framework has been used in only about one-third of the total post-*Chevron* cases in which one or more Justices recognized that a deference question was presented.")

12. *Id.* at 990-91.

13. For example, Sunstein categorizes some of the recent cases, in which the Supreme Court has employed a more de novo review than deference, as "evident attempt[s] to reassert the primacy of the judiciary in statutory interpretation"; he argues that these cases display "shocking readings" of *Chevron* and increase "uncertainty about the appropriate approach" for applying the doctrine. Sunstein, *Chevron Step Zero*, *supra* note 5, at 190. Sunstein points to *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000); *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687 (1995); and *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), as examples of cases demonstrating inconsistencies between the Court's announced and applied standards. *Id.* at 190 n.13. Merrill similarly identifies inconsistencies between the Supreme Court's announced and applied standards in *Chevron* cases. Merrill, *Judicial Deference*, *supra* note 6, at 985-90.

and confused *Chevron* doctrine that handicaps the underlying deference principles it is supposed to enact.¹⁴

Some critics identify *Chevron*'s "all-or-nothing"¹⁵ step-one as a potential cause of these inconsistent applications, arguing that the prospect of mandatory deference pressures the Court into altering step-one application to achieve certain results. For example, Merrill argues that "the failure of *Chevron* to perform as expected can be attributed to the Court's reluctance to embrace the draconian implications of the doctrine for the balance of power among the branches, and to practical problems generated by its all-or-nothing approach to the deference question."¹⁶ Expounding on this point, he states:

[T]he two-step inquiry as framed by *Chevron* [has] profound consequences for the way in which courts approach the deference question. . . .

First, in contrast to the previous approach, the two-step structure makes deference an all-or-nothing matter. If the court resolves the question at step one, then it exercises purely independent judgment and gives no consideration to the executive view. If it resolves the question at step two, then it applies a standard of maximum deference. In effect, *Chevron* transformed a regime that allowed courts to give agencies deference along a sliding scale into a regime with an on/off switch.¹⁷

Given numerous approaches to *Chevron*'s step-one, Merrill also discusses how the whole two-step framework shifts depending on which approach is taken:

Perhaps the most significant post-*Chevron* development, however, is a subtle but important modification in the statement of the relevant inquiry at step one. As we have seen, *Chevron* formulated that inquiry in terms of whether the court could "clearly" discern that Congress "had an intention on the precise question at issue." If this threshold requirement were faithfully followed, there is little doubt that it would mark a major shift of interpretative power toward the executive branch: it is a rare case where a court can fairly say that Congress thought about, let alone formulated a clear view on, the precise issue in controversy. The "specific intentions" formulation therefore operates as an engine of judicial deference. By the same token, however, if the threshold

14. "The Supreme Court . . . has not applied the *Chevron* test in a consistent manner. Its post-*Chevron* jurisprudence is so confused that it is difficult to determine what remains of the original, highly deferential test." Pierce, *supra* note 7, at 750. "On the whole, the overall picture suggests that the judicial understanding that informs the deference question is probably more confused today than it has ever been." Merrill, *Judicial Deference*, *supra* note 6, at 980.

15. Merrill, *Judicial Deference*, *supra* note 6, at 970.

16. *Id.*

17. *Id.* at 976-77.

determination for independent judicial resolution at step one were described differently—for example, if courts were instructed to ask whether the statute has a general meaning that resolves the controversy, even if Congress has not specifically addressed the issue at hand—then the balance might shift back toward independent judgment. In short, under the two-step *Chevron* framework, everything turns on the theory of judicial interpretation adopted at step one.¹⁸

Merrill argues that since *Chevron*'s step-one essentially determines the outcome of a case, the Supreme Court has demonstrated an inability or unwillingness to constrain itself to a consistent step-one inquiry.¹⁹

Commentators also charge the over-importance of step-one, along with the rise of textualism within the *Chevron* doctrine, with pressuring the Court not to acknowledge statutory ambiguity. This aversion to ambiguity can undermine both the principled statutory interpretation and the substantive deference ideal at the root of *Chevron*. For example, Merrill identifies textualism as being inconsistent with *Chevron*'s deference principles because “the merger of the two-step *Chevron* framework and Justice Scalia’s ‘plain meaning’ approach to statutory construction . . . dramatically transform[s] *Chevron* from a deference doctrine to a doctrine of antideference” because textualism places interpretive authority with the reader whereas *Chevron* places it with the agency.²⁰ Similarly, Richard Pierce has implied that *Chevron*'s incentives against finding statutory ambiguity force textualism to act as a completely manipulable and subjective interpretive technique.²¹ Ultimately, both Merrill and Pierce find textualism and *Chevron* to be mutually inconsistent and damaging.²² However, while Merrill claims that textualism withdraws *Chevron*'s deference, Pierce argues the opposite—that *Chevron* leads to unprincipled applications of textualism.²³

18. *Id.* at 990 (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)).

19. *See id.*

20. *Id.* at 992.

21. *See Pierce, supra* note 7, at 750 (“As the Court has changed the mix of ‘tools’ it uses and the ways in which it uses those tools, it has gradually ceased to apply step two of the *Chevron* test to uphold an agency construction of ambiguous statutory language, because it rarely acknowledges the existence of ambiguity.”).

22. Merrill suggests that *Chevron* is detrimental to textualism and vice versa, observing that “the general pattern in the Court appears to suggest something of an inverse relationship between textualism and use of the *Chevron* doctrine.” Merrill, *Textualism, supra* note 7, at 354. Merrill sees this relationship as based on a tension between the roles that the respective doctrines ask the court to play; “that *Chevron* is based on a model of courts as faithful agents [to the legislature and agency while]. . . . [t]extualism, in contrast, rejects the faithful agent model and instead adopts a model of courts as autonomous interpreters who seek answers to questions of statutory meaning through application of the ordinary reader perspective” *Id.* at 353. Thus, Merrill concludes that “textualism poses a threat to the future of the deference doctrine.” *Id.* at 354.

23. Pierce claims that, as applied in the *Chevron* context, “textualism resembles the extreme versions of intentionalism that the textualists have long criticized. Judge Leventhal’s characterization of the extreme versions of intentionalism applies equally well to the new textualists’ selective use of dictionary definitions, judicial opinions, and treatises to support their preferred resolutions of policy disputes.” *Pierce, supra* note 7, at

With these criticisms in mind, this Article now considers the deference principles of the various states to determine if the state approaches might allow for agency deference while avoiding these pitfalls.

III. BROAD SURVEY OF THE FIFTY STATES

A survey of the fifty states' equivalents to the *Chevron* doctrine shows an array of different announced standards, ranging from strong deference to an agency interpretation to completely de novo review explicitly discouraging deference.²⁴ Although the different state standards actually represent a continuous spectrum of possible approaches to agency interpretation, they generally fit into four categories: strong deference, intermediate deference, de novo review with the possibility of deference to agency expertise or experience, and de novo review with deference discouraged.²⁵

This survey is, of course, limited to considering only states' announced standards as derived from relatively few cases. Still, this should provide a useful overview of how state judiciaries review agency interpretations of the law. Also, the in-depth review of representative states will hopefully mitigate some of the broader survey's limitations.

752 (footnotes omitted). "The Court now rarely defers to an agency's construction of ambiguous statutory language because a majority of Justices have now begun to use textualist methods of construction that routinely allow them to attribute 'plain meaning' to statutory language that most observers would characterize as ambiguous or internally inconsistent." *Id.* (footnotes omitted). Pierce asserts that taming the hypertextualism and unprincipled application in the *Chevron* context is necessary to preserve the value of textualism in statutory interpretation in general. *See id.*

24. *See infra* Appendix A. In this survey, conducted in January 2007, I used only results from a single, consistent search method. I searched each Westlaw state digest under the digest entry "361k219" (361 is Westlaw's headnote devoted to "statutes" and k219 is the keynote for "executive construction") and limited the search using the terms and connectors phrase "'defer!' /15 'agency.'" From the results of this search, I determined the state's standard of review by considering the three to five most recent decisions. In Appendix A, I list not only my standard classifications but also the cases and specific language upon which I based my classification. For states with contradictory cases, I considered more decisions and classified the state according to the seemingly dominant standard. For states with multiple cases all announcing a consistent standard, I included a smaller number of cases in Appendix A.

While my survey method did provide some degree of consistency, it could be criticized as overly narrow. Still, it yielded a data set rich enough to classify the states with some confidence. My search method produced results from every state except South Dakota, as a result of which I omitted from consideration. Additionally, I did not consider Louisiana because its civil law system makes it incompatible with the rest of this comparison.

25. I acknowledge that the classification of some states' announced standards is debatable—so, in the interest of objectivity, I have included the citations and quotations upon which I based my classification in Appendix A.

This Article classifies the survey results into four broad categories,²⁶ and though such classification may risk overlooking the nuances of each different standard, these four categories seem to describe the states' announced standards accurately.²⁷

The "strong deference" category²⁸ includes states where courts will defer to the agency interpretation as long as it is not contrary to the statute. The main defining feature of this category is that such deference appears to be mandatory. Standards in this category often stress both legislative intent to delegate authority to agencies and efficiency in avoiding duplication of interpretive work. This category seems most consistent with the announced "*Chevron* two-step" because these standards imply that deference is mandatory when a statute is ambiguous and the agency's interpretation is reasonable.

The "intermediate deference" category²⁹ appears practically similar to the strong deference classification, but "intermediate deference" courts often explicitly assert authority to review matters of law *de novo*. Thus, this category differs from the last because it presents the option, rather than the obligation, of deference. While the "intermediate deference" courts do announce *de novo* review authority, they also note that they often defer as a practical matter. So, while these courts reserve the ultimate authority to determine matters of law, they generally defer to agency interpretations. This category may be most consistent with current federal application of *Chevron*³⁰ because it allows courts to engage in detailed review but with the practical result of frequent deference.

State courts applying the third approach, "de novo with the possibility of deference to agency expertise or experience," usually assert their *de novo* authority and imply that they will not often defer. These states acknowledge the importance of agency expertise and experience, recognizing that deference to such institutional competency can be proper, and just like the intermediate

26. While there has not been much work in this area, the past efforts to group states according to their deference principles have lumped states into either only three categories or four similar categories different from those that I chose. For example, one casebook divides state court approaches to judicial review of agency legal interpretation into three basic approaches: (1) strong, *Chevron*-style deference (taken by a minority of states), (2) weaker deference (taken by most states), and (3) no deference (taken by a few states). MICHAEL ASIMOW, ARTHUR EARL BONFIELD & RONALD M. LEVIN, *STATE AND FEDERAL ADMINISTRATIVE LAW* 557-64 (2d ed. 1998). A comprehensive article on state administrative law, a more in-depth review, divided states into high deference, no deference, variable deference, and no standard categories. William A. McGrath et al., *Project: State Judicial Review of Administrative Action*, 43 *ADMIN. L. REV.* 571, 763 (1991). The classifications in these sources are outdated, though, and I found that my four-category system better described the present range of state standards.

27. While practical application of these standards may blur their differences even further, the four-part grouping remains a handy principle for initial organization of states.

28. Including Alabama, Connecticut, Florida, Georgia, Hawaii, Indiana, Maine, Michigan, Mississippi, Montana, Pennsylvania, South Carolina, Tennessee, Vermont, West Virginia, and Wyoming.

29. Including Arizona, Arkansas, Colorado, Idaho, Illinois, Kansas, Kentucky, Massachusetts, Missouri, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, Texas, and Wisconsin.

30. See, e.g., *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687 (1995); *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218 (1994).

deference classification, here deference is neither mandatory nor forbidden. However, this category differs from the last because here de novo review is the default, whereas in the “intermediate deference” category, courts announced deference as the likely outcome. This category may be most akin to the Federal *Skidmore* doctrine³¹ because agency interpretations are valued only as far as they are persuasive.

Finally, the “de novo with deference discouraged” category³² features state courts that imply that de novo review is mandatory. As the category label indicates, these courts often expressly discourage deference to agency interpretation, asserting that the judiciary is the branch most capable of determining statutory meaning.

Interestingly, no state expressly adopts the “*Chevron* two-step.” The “strong deference” courts often express similar substantive principles to those underlying *Chevron*, but courts frequently announce their standard as a one-step reasonableness review. This one-step recast of the *Chevron* test is consistent with some scholars’ views,³³ but there is an important difference between *Chevron*, as currently practiced, and this equivalent one-step reasonableness test. The one-step tests employed by the states do not focus on “plain meaning” or “ambiguity” as the initial inquiry; rather, they ask whether the agency’s interpretation is reasonable.

As Merrill discusses,³⁴ this difference is meaningful³⁵ because when deference is mandatory, a federal court must find “plain meaning” to avoid deferring to an agency, whereas these state courts need only find that the agency

31. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (“We consider that the rulings, interpretations and opinions of the [agency], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”); *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (explaining the *Skidmore* principle that “[t]he fair measure of deference to an agency . . . has been understood to vary with circumstances, and courts have looked to the degree of the agency’s care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency’s position.” (footnotes omitted)).

32. Including Delaware, Nebraska, New York, Oklahoma, and Virginia.

33. See, e.g., Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313, 314 n.5 (1996).

The *Chevron* test can be formulated more simply as a one-step inquiry that asks whether the agency interpretation is reasonable. This one-step test would reach exactly the same results as the current two-step formulation, but with less room for misunderstanding, because an interpretation that is inconsistent with the clear meaning of the relevant statute is ipso facto unreasonable.

Id. But see Claire R. Kelly & Patrick C. Reed, *Once More Unto the Breach: Reconciling Chevron Analysis and De Novo Review after United States v. Haggard Apparel Company*, 49 AM. U. L. REV. 1167, 1171 n.20 (2000) (“*Chevron* analysis should not, however, be misunderstood to be a one-step method in which the court must accept the agency’s interpretation as controlling . . . if the court finds that agency’s interpretation is sufficiently reasonable.”).

34. Merrill, *Judicial Deference*, *supra* note 6, at 990-91.

35. Both this difference and its implications are discussed in detail below.

interpretation is unreasonable to avoid deference. Though this may appear to be the same decision under a different name, the difference is more than semantic. Finding “plain meaning” assigns a singular, exclusive meaning to statutory language, whereas finding an interpretation unreasonable eliminates one possible interpretation without pinning down an exact statutory meaning, thus allowing for a range of interpretations in the future.

IV. IN-DEPTH ANALYSIS OF REPRESENTATIVE STATES

A. Delaware—*De Novo* with Deference Discouraged

1. The Standard

Delaware has one of the least deferential announced standards for reviewing agency interpretations of the law. *Public Water Supply Co. v. DiPasquale*³⁶ stated:

Statutory interpretation is ultimately the responsibility of the courts. A reviewing court may accord due weight, *but not defer*, to an agency interpretation of a statute administered by it. A reviewing court *will not defer* to such an interpretation as correct merely because it is rational or not clearly erroneous.³⁷

In *DiPasquale*, the court “expressly decline[d]” to adopt the *Chevron* standard of deference, choosing instead to retain a “plenary standard of review.”³⁸

DiPasquale forbids deference but allows “due weight,” raising the question of the functional difference between the two concepts.³⁹ The answer seems to be in the next sentence of the holding, which states that the court need not uphold even a rational agency interpretation and may substitute whatever interpretation it finds most compelling.⁴⁰ Thus, an agency’s interpretation is only as weighted as the court finds it convincing.

A number of recent cases demonstrate that *DiPasquale* practically stands for a *de novo* standard of review that gives little attention to agency interpretation. Even when Delaware courts do consider agency interpretation, it is only after a *de novo* inquiry.⁴¹ Though courts applying this standard have not actually addressed *DiPasquale*’s prohibition on deference, they appear to read the standard as requiring full articulation of the reasoning underlying an

36. 735 A.2d 378 (Del. 1999).

37. *Id.* at 382-83 (emphasis added).

38. *Id.* at 383.

39. *Id.* at 382.

40. *Id.* at 382-83.

41. See, e.g., *McKinney v. Kent County Bd. of Adjustment*, No. Civ.A. 01A-11-002, 2002 WL 1978936 (Del. Super. Ct. July 31, 2002).

interpretation.⁴² For example, when courts choose to give weight to an agency interpretation, they first engage in a de novo review and then explain why the interpretation is persuasive.⁴³

In two recent cases, Delaware courts found statutory meaning to be contrary to agency interpretations and overturned agency actions based on plain meaning, legislative history, and canons of construction. For example, in *Hirneisen v. Champlain Cable Corp.*, the court applied the *DiPasquale* standard to overturn a state agency's interpretation of a workers' compensation statute.⁴⁴ At issue was whether death benefits applied to spouses of retired workers.⁴⁵ The court held that since the "plain language of the statute" contained no exception for spouses of retired workers, the agency and lower court had erred in interpreting the statute to have one.⁴⁶ In reaching its decision, the court announced a standard for statutory review similar to that in *DiPasquale*, noting that the court would not have been required to defer even to a reasonable agency interpretation.⁴⁷

New Castle County Department of Land Use v. University of Delaware provides another recent application of this standard, overturning an agency's decision that a bank on a college campus did not fit into a "school purpose" tax exemption.⁴⁸ In *New Castle*, in order to tax the bank, the agency effected a policy change and altered its interpretation of a tax exemption statute.⁴⁹ The superior court overturned the agency interpretation based on a statutory analysis, finding that the agency decision improperly failed to recognize the difference between "school" and "educational" purposes in the statute.⁵⁰

Dismissing the agency's argument that the court ought to defer to the agency's interpretation, the *New Castle* court held "[t]he construction of statutes is a purely legal determination that the Superior Court and this Court review de novo."⁵¹ The court then examined the legislative history of the statute, consulted a dictionary, and applied the canon against surplusage in interpreting the statute contrary to the agency's view.⁵²

42. *See id.*

43. *See infra* note 57 and accompanying text (discussing *McKinney*, 2002 WL 1978936, which gave weight to an agency interpretation only after de novo review and examination of agency's longstanding interpretation).

44. *Hirneisen v. Champlain Cable Corp.*, 892 A.2d 1056, 1057-58 (Del. 2006).

45. *Id.* at 1058.

46. *Id.* at 1059-60.

47. *Id.* at 1059 ("[S]tatutory interpretation is ultimately the responsibility of the courts. A reviewing court may accord due weight, but not defer, to an agency interpretation of a statute administered by it. A reviewing court will not defer to such an interpretation as correct merely because it is rational or not clearly erroneous." (quoting *Pub. Water Supply Co. v. DiPasquale*, 735 A.2d 378, 382-83 (Del. 1999))).

48. *New Castle County Dep't of Land Use v. Univ. of Del.*, 842 A.2d 1201, 1202 (Del. 2004).

49. *Id.* at 1204.

50. *Id.*

51. *Id.* at 1206 (emphasis omitted).

52. *Id.* at 1207-09.

Similarly, another recent pair of Delaware cases relied on both statutory language and precedent to overturn agency interpretations. In *Holowka v. New Castle County Board of Adjustment*, the court relied on *DiPasquale* and reviewed a zoning variance statute de novo by considering statutory language and case law.⁵³ The opinion determined the proper statutory standard for granting a variance without even referring to the agency's interpretation; instead, the court employed a four-part test completely derived from precedent.⁵⁴ Likewise, the court applied the same de novo standard in *Reserves Development Corp. v. State Public Service Commission*.⁵⁵ Again, the decision focused completely upon statutory language and case law, ignoring the agency interpretation.⁵⁶

Even in their de novo review, Delaware courts sometimes find agency interpretations persuasive. For example, in *McKinney v. Kent County Board of Adjustment*, the court applied the *DiPasquale* standard to uphold the agency's interpretation, determining that the agency's "long-standing and widely-enforced" interpretation was entitled to "great[] weight."⁵⁷ Here, the court once again considered a zoning ordinance, but, after consulting a dictionary in its full de novo inquiry, the court still found the statute ambiguous.⁵⁸ The court then examined the agency's interpretation and, finding the interpretation both reasonable and longstanding, accorded it enough weight to tip the interpretive balance in favor of upholding the agency's interpretation.⁵⁹

2. *How Delaware's Standard Came About: Its History and Relationship to Delaware's APA*

The Delaware SLAPA does not address the proper standard for judicial review of agency's statutory interpretation. The most relevant section merely provides for a "[r]eview of regulations," announcing the presumed validity of regulations and requiring reviewing courts to "take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency acted."⁶⁰ Despite the Delaware SLAPA's silence on the review of agency interpretation, *DiPasquale* referred to the statute in its

53. *Holowka v. New Castle County Bd. of Adjustment*, No. 02A-05-017-PLA, 2003 WL 21001026, at *3 (Del. Super. Ct. Apr. 15, 2003).

54. *Id.* at *5 (citing *Bd. of Adjustment of New Castle County v. Kwik-Check Realty, Inc.*, 389 A.2d 1289, 1291 (Del. 1978)).

55. *Reserves Dev. Corp. v. State Pub. Serv. Comm'n*, No. Civ.A. 02A-07-001HD, 2003 WL 139777, at *2 (Del. Super. Ct. Jan. 17, 2003).

56. *Id.* at *3-*4.

57. *McKinney v. Kent County Bd. of Adjustment*, No. Civ.A. 01A-11-002, 2002 WL 1978936, at *5, *6 (Del. Super. Ct. July 31, 2002) (internal quotations omitted).

58. *Id.* at *5-*6.

59. *Id.* at *5.

60. DEL. CODE ANN. tit. 29, § 10141(e) (2003).

reasoning.⁶¹ Though *DiPasquale* did not rely on the SLAPA to derive its standard, the court seemed to interpret the statute's silence as a statement that deference to the agency is not required.⁶²

The Delaware court used *DiPasquale* to reconcile two conflicting standards of agency deference. *DiPasquale* affirmed the *Stoltz* line of cases, which amounted to a judicial proclamation that courts have plenary power to review issues of law.⁶³ In the process, *DiPasquale* overruled *Eastern Shore*, which announced a highly deferential standard of review.⁶⁴ The *DiPasquale* court justified overruling *Eastern Shore* by stating that "it would be anomalous for this Court to accord a higher level of deference to the legal rulings of an administrative agency than that applied to trial courts."⁶⁵ In addition to citing *Eastern Shore*'s dubious precedential support and internal inconsistency,⁶⁶ the court further justified its holding by noting that "*Eastern Shore*'s standard evolved from a case dealing with application of a federal statute and which preceded Delaware's adoption of the Administrative Procedures Act in 1976."⁶⁷

While the court did not assert that the Delaware SLAPA compelled the *DiPasquale* standard, in the footnotes the court explained how this standard was consistent with Delaware's SLAPA.⁶⁸ The court also noted that the Delaware APA mandates deference to factual findings.⁶⁹ Attention to this detail implied that the APA's decision not to mandate deference to an agency's interpretation leaves that standard to be determined by common law. This reasoning, an extension of the *expressio unius est exclusio alterius* canon of statutory interpretation, infers that courts retain the "plenary standard of review"⁷⁰ of statutory interpretation from the Delaware SLAPA's silence on the matter.

61. Pub. Water Supply Co. v. DiPasquale, 735 A.2d 378, 383 n.9 (Del. 1998).

62. See *id.*

63. *DiPasquale* relied on *Stoltz* for the plenary review of statutory interpretation. *DiPasquale*, 735 A.2d at 381. *Stoltz*, in turn, relied on *E.I. du Pont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108 (Del. 1985), for the proposition. *Stoltz Mgmt. Co. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992). The court in *E.I. du Pont* asserted, without citation, that "[t]he question we must address is really one of construction and the application of law to the facts. Over such matters, we have plenary review." *E.I. du Pont de Nemours & Co.*, 498 A.2d at 1113.

64. *DiPasquale*, 735 A.2d at 382 (overruling *E. Shore Natural Gas Co. v. Del. Pub. Serv. Comm.*, 637 A.2d 10 (Del. 1994)).

65. *Id.* at 381.

66. *Id.* at 382-83.

67. *Id.* at 382.

68. See *id.* at 382-83 nn.8-9.

69. *Id.* at 383 n.9.

70. *Id.* at 383.

B. Mississippi—Strong Deference

1. The Standard

Contrary to the Delaware approach, the Mississippi courts have announced a highly deferential standard: “[W]hen an agency interprets a statute that it is responsible for administering, we must defer to the agency’s interpretation so long as the interpretation is reasonable.”⁷¹ Even though Mississippi courts ordinarily review questions of law *de novo*, the state’s courts have “accepted an obligation of deference to agency interpretation and practice in areas of administration by law committed to their responsibility.”⁷² Expressed in this way, Mississippi’s standard resembles a more deferential, single-step *Chevron* inquiry. In fact, Mississippi courts often equate the deference due to an agency’s statutory interpretation with that due to an agency’s interpretation of its own regulations.⁷³

Mississippi courts certainly invoke this deferential standard consistently, even when they need not apply it,⁷⁴ but it is debatable whether the courts’ application of this standard measures up to the announced principles of extraordinarily strong deference. With language like “must defer”⁷⁵ and “obligation of deference,”⁷⁶ one might expect courts to conduct a very limited statutory inquiry before deferring to the agency. While Mississippi courts seem to defer to agency interpretations, one could argue that their extensive statutory inquiries preceding deference do not accord with the strong wording of their standard.

Unfortunately, relatively few cases offer insight into Mississippi’s practice of this deference standard. Though courts frequently cite the standard,⁷⁷ they often do so in arbitrary and capricious challenges or in other cases that do not require them to actually apply deference. When one examines these cases for actual use

71. *Parkerson v. Smith*, 817 So. 2d 529, 534 (Miss. 2002) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)).

72. *Gill v. Miss. Dep’t of Wildlife Conservation*, 574 So. 2d 586, 593 (Miss. 1990).

73. See, e.g., *Elec. Data Sys. Corp. v. Miss. Div. of Medicaid*, 853 So. 2d 1192, 1204 (Miss. 2003) (“The Court has generally accorded great deference to an administrative agency’s construction of its own rules and regulations and the statutes under which it operates.”); *Miss. State Tax Comm’n v. Mask*, 667 So. 2d 1313, 1314 (Miss. 1995) (“This Court has generally accorded great deference to an administrative agency’s construction of its own rules and regulations and the statutes under which it operates.”).

74. Even in cases that turn on factual questions or arbitrary and capricious review, the courts often state the statutory interpretation standard as well. See, e.g., *Miss. Bureau of Narcotics v. Stacy*, 817 So. 2d 523, 528 (Miss. 2002); *Miss. Dep’t of Corr. v. Harris*, 831 So. 2d 1190, 1192 (Miss. Ct. App. 2002).

75. *Parkerson*, 817 So. 2d at 534.

76. *Gill*, 574 So. 2d at 593.

77. In fact, courts routinely cite the same chain of precedent: *Mask*, 667 So. 2d at 1314; *Melody Manor Convalescent Ctr. v. Miss. State Dep’t of Health*, 546 So. 2d 972, 974 (Miss. 1989); and *Gen. Motors Corp. v. Miss. State Tax Comm’n*, 510 So. 2d 498, 502 (Miss. 1987). These cases, in turn, cite back to *Grant Ctr. Hosp. of Miss. v. Health Group of Jackson, Miss., Inc.*, 528 So. 2d 804, 808 (Miss. 1988); *State Tax Comm’n v. Edmondson*, 196 So. 2d 873 (Miss. 1967); *Winston County v. Woodruff*, 187 So. 2d 299 (Miss. 1966); and *Briscoe v. Buzbee*, 143 So. 407 (Miss. 1932).

of the deference standard, there is not a great number of recent instances. This paucity of relevant cases could be the result of nearly a century of a consistently announced deferential standard, which might discourage challenges to agency interpretations. Still, while this line of precedent states the consistent and often cited proposition that Mississippi courts have “generally accorded great deference to an administrative agency’s construction of its own rules and regulations and the statutes under which it operates,”⁷⁸ when Mississippi courts have applied the standard, they have engaged in more than the minimum review before deferring to the agency.

For example, in *Gill v. Mississippi Dep’t of Wildlife Conservation*, the court thoroughly reviewed a statute protecting civil servants from political firings before upholding the agency’s interpretation.⁷⁹ After announcing a standard of “deference to agency interpretation and practice in areas . . . committed to [agency] responsibility,” the court examined the lower court’s opinion, the statutory language and purpose, and related precedent to determine whether the agency had exceeded its statutorily granted authority.⁸⁰ After this analysis, the court upheld the agency’s interpretation on mixed grounds of law and fact.⁸¹ Ironically, the court stated “we stay our hand in the face of [the agency’s interpretive authority]” only after conducting a rather probing review of statutory meaning.⁸²

Thus, despite announcing a standard of deference, the *Gill* court actually engaged in an extensive statutory review that could be considered *de novo*. While this probing statutory reexamination could have resulted from the court’s failure to completely separate the statutory interpretation and substantial evidence inquiries, the court’s actions may also demonstrate that an agency interpretation will not receive deference until the court is satisfied that it is correct.

Manufab, Inc. v. Mississippi State Tax Commission potentially stands for a similar principle.⁸³ In the dispute over the interpretation of a tax exemption statute, the court first examined the statutory language and statutory purpose.⁸⁴ The court then reviewed precedent to derive the rule that “tax exemptions [and credits] will be strictly construed against the taxpayer claiming [them].”⁸⁵ Finally, the court addressed and dismissed *Manufab*’s statutory interpretation arguments.⁸⁶ Only after all of this analysis did the court assert the principle of deference in upholding the agency’s interpretation, stating that “[a]n agency’s

78. *Mask*, 667 So. 2d at 1314.

79. *Gill*, 574 So. 2d at 593-95.

80. *Id.* at 593-94.

81. *See id.* at 593-95.

82. *Id.* at 595.

83. *Manufab, Inc. v. Miss. State Tax Comm’n*, 808 So. 2d 947 (Miss. 2002).

84. *Id.* at 949-50.

85. *Id.* at 949.

86. *Id.* at 949-50.

interpretation of the statute it is to enforce is given controlling weight unless it is manifestly contrary to the statute.”⁸⁷

The *Manufab* court announced a highly deferential standard but deferred only after an essentially de novo statutory review.⁸⁸ While the court, of course, must first interpret the statute to determine whether the agency interpretation is “manifestly contrary,”⁸⁹ here it appears that the court did much more. If the court truly intended to defer to any agency interpretation not “manifestly contrary” to the statute, the court could have announced the deference standard first and then determined whether deference was appropriate after a less involved statutory analysis.

Wheeler v. Mississippi Dep’t of Environmental Quality Permit Board provides an example of the court deferring after a less thorough statutory review.⁹⁰ Here, the court determined the statutory validity of an agency’s practice of treating similar permit evaluations as a single appealable decision.⁹¹ The court upheld the agency practice, stating that the agency had valid policy reasons for such an interpretation.⁹² Additionally, the court held that finding the statute to preclude the agency’s practice would require an “extremely narrow reading.”⁹³ In this short opinion, the court evaluated the statute and considered policy grounds before announcing the standard of deference, but this analysis did not appear to amount to full de novo review.

Finally, *Mississippi Gaming Commission v. Six Electronic Video Gambling Devices* is an example of the court declining to defer to agency interpretation, not because the interpretation was faulty, but because the interpretation was not officially established and could have been a mere litigating position.⁹⁴ Though the court upheld the agency’s interpretation of the definition of an illegal slot machine,⁹⁵ this case offers insight into the court’s process of review when the court explicitly does not defer. Ultimately, the court’s de novo review relied on the plain language of the statute, statutory history, and precedent to resolve the issue in the agency’s favor.⁹⁶

The court’s statutory review in *Six Electronic Gambling Devices*, where it expressly stated that it was not giving the agency deference, is no different than

87. *Id.* at 950 (internal quotations and citations omitted).

88. *Id.* at 949-50.

89. *Id.* (internal quotations omitted).

90. *Wheeler v. Miss. Dep’t of Env’tl. Quality Permit Bd.*, 856 So. 2d 700 (Miss. Ct. App. 2003).

91. *Id.* at 703.

92. *Id.* at 703-04.

93. *Id.* at 703.

94. *Miss. Gaming Comm’n v. Six Elec. Video Gambling Devices*, 792 So. 2d 321, 328-29 (Miss. Ct. App. 2001) (“The U.S. Supreme Court has rejected the principle that deference should be shown to *post hoc* agency litigating positions that are unsupported by regulations or administrative practices.”).

95. *Id.* at 329.

96. *See id.*

the supposedly deferential review in *Gill* and *Manufab*.⁹⁷ While the de novo review announced in *Six Electronic Gambling Devices* was more involved than the announced deference in *Wheeler*, even those two cases do not demonstrate a vast difference between deferential and de novo review.

Though these few cases are insufficient to allow conclusive inferences, it appears that Mississippi's statutory review goes beyond determining whether the agency was reasonable and more closely approximates de novo review. Then again, the agency's perfect victory record in this small four-case sampling might indicate that Mississippi courts do substantially defer despite their extensive statutory inquiries.

2. *How Mississippi's Standard Came About: Its History and Relationship to Mississippi's APA*

Mississippi's APA, which is similar to the Model State APA,⁹⁸ is completely silent on judicial review of agency statutory interpretation and is nearly silent on judicial review altogether. The most relevant sections refer to judicial review generally, but none offers any meaningful guidance for review of statutory interpretation.⁹⁹

Thus, it is no surprise that Mississippi's standard is based on common law. Noteworthy though is the continuous line of precedent for this standard, which dates back before the 1930s. In 1932, the court in *Briscoe v. Buzbee* held that "[w]here the construction of a statute is doubtful, the interpretation placed thereon and followed for a considerable course of time by the administrative departments should be followed."¹⁰⁰ *Briscoe*, which cited previous cases for this principle of deference,¹⁰¹ is still followed.¹⁰² *State Tax Commission v. Edmondson*¹⁰³ linked *Briscoe* and its contemporaries to the more modern Mississippi cases. *Edmondson* affirmed that an agency interpretation "is entitled to weight" except when that interpretation conflicts with the underlying statute.¹⁰⁴

This line of cases has evolved independently of Mississippi's SLAPA. Cases like *Briscoe* predate the SLAPA, but even more recent cases make no reference to the statute.¹⁰⁵ Thus, the Mississippi deference standard is grounded not in

97. *Id.* at 328.

98. MODEL STATE ADMINISTRATIVE PROCEDURES ACT (1981).

99. MISS. CODE ANN. §§ 25-43-3.110 to 25-43.3.111 (2003).

100. *Briscoe v. Buzbee*, 143 So. 407, 408 (Miss. 1932); *see also* *Gully v. Jackson Int'l Co.*, 145 So. 905, 907 (Miss. 1933) (announcing a deference standard similar to that in *Briscoe*).

101. *Briscoe*, 143 So. at 408.

102. *See, e.g.*, *Elec. Data Sys. Corp. v. Miss. Div. of Medicaid*, 853 So. 2d 1192, 1204 (Miss. 2003) (citing *Briscoe*, 143 So. 407).

103. *State Tax Comm'n v. Edmondson*, 196 So. 2d 873 (Miss. 1967).

104. *Id.* at 877.

105. *See, e.g.*, *Hayes v. Pub. Employees Ret. Sys.*, 960 So. 2d 471, 473 (Miss. 2007).

statutory mandate, but rather in judicially-determined prudential reliance on agency experience and expertise.¹⁰⁶

The similarities between the Federal *Chevron* standard and Mississippi's standard might also make one think that Mississippi actually adopted *Chevron*, but such is not the case. As *Briscoe* and *Edmondson* demonstrate, the Mississippi standard predated and grew independently of *Chevron*, and no subsequent cases have adopted *Chevron* as the new basis for the standard. However, Mississippi courts cite federal precedent as additional support for the deference standard.¹⁰⁷

Rather than being influenced by *Chevron*, the longstanding Mississippi standard seems to have influenced Mississippi courts' reading of *Chevron*. For example, instead of describing the standard as the traditional "*Chevron* two-step," Mississippi courts interpret it as a single step: "[w]hen an agency interprets a statute that it is responsible for administering, we must defer to the agency's interpretation so long as the interpretation is reasonable."¹⁰⁸ While *Chevron* does not appear to have changed the substance of Mississippi's standard, *Chevron* seems to have influenced the phrasing of Mississippi's standard, which shifted from "entitled to weight" in *Edmondson*¹⁰⁹ to "must defer" in *Parkerson*.¹¹⁰

C. Alaska—*De Novo* with the Possibility of Deference to Agency Expertise or Experience

1. The Standard

The court in *Tesoro Alaska Petroleum v. Kenai Pipe Line* announced Alaska's two possible standards for reviewing agency action.¹¹¹ The first standard, a rational basis review, calls for deference to reasonable agency judgment; this standard is applicable to "agency expertise or the determination of fundamental policies within the scope of the agency's statutory function."¹¹² The second standard, referred to as either "independent judgment" or "substitution of

106. For examples of Mississippi courts that rely on prudential and policy reasons (e.g., agency expertise and experience) for this standard, see *Gill v. Miss. Dep't of Wildlife Conservation*, 574 So. 2d 586, 593 (Miss. 1990); *Briscoe*, 143 So. at 408; *Wheeler v. Miss. Dep't of Env'tl. Quality Permit Bd.*, 856 So. 2d 700, 704 (Miss. Ct. App. 2003).

107. See, e.g., *Parkerson v. Smith*, 817 So. 2d 529, 534 (Miss. 2002) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)); *Gill*, 574 So. 2d at 593 (citing a similar string of federal precedent following a string of Mississippi precedent); *Grant Ctr. Hosp. of Miss., Inc. v. Health Group of Jackson, Miss., Inc.*, 528 So. 2d 804, 810 (Miss. 1988) (citing *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969), following a string of citations to Mississippi cases).

108. *Parkerson*, 817 So. 2d at 534 (citing *Chevron, U.S.A., Inc.*, 467 U.S. 837); see also *Titan Tire of Natchez, Inc. v. Miss. Comm'n on Env'tl. Quality*, 891 So. 2d 195, 200 (Miss. 2004).

109. *Edmondson*, 196 So. 2d at 877.

110. *Parkerson*, 817 So. 2d at 534.

111. 746 P.2d 896, 903 (Alaska 1987).

112. *Id.*

judgment,” applies de novo review.¹¹³ The court applies substitution of judgment “where the questions of law presented *do not* involve agency expertise or where the agency’s specialized knowledge and experience would not be particularly probative as to the meaning of the statute.”¹¹⁴ The *Tesoro* court asserted that substitution of judgment “‘is appropriate where the knowledge and experience of the agency is of little guidance to the court *or* where the case concerns ‘statutory interpretation or other analysis of legal relationships about which the courts have specialized knowledge and experience.’”¹¹⁵ Though *Tesoro* provided for two different standards of review depending on agency expertise, the vast majority of the cases applying *Tesoro* exercise a de novo review of agency statutory interpretation.¹¹⁶ Indeed, *Tesoro* implies that the substitution of judgment standard should always apply to cases of statutory interpretation, but at least one case has left open the possibility of applying rational basis review to interpretations that involve “agency expertise or the determination of fundamental policies.”¹¹⁷ Of course, even under the substitution of judgment standard, nothing prevents a court from relying on an agency’s expert interpretation.

State v. McCallion offers one example of Alaska’s de novo substitution of judgment standard.¹¹⁸ This case involved a challenge to the statutory validity of an agency’s computation of good behavior credit for shortening the length of prison sentences.¹¹⁹ The court announced the “substitution of judgment” standard and engaged in completely de novo review, and considered the statute’s language, history, and purpose.¹²⁰ Similarly, *United Parcel Service Co. v. State, Dep’t of Revenue* involved de novo review of an agency’s interpretation of a statutory provision for fuel tax.¹²¹ Applying the substitution of judgment standard,

113. *Id.*

114. *Id.* (emphasis in original).

115. *Id.* (quoting *Earth Res. v. State, Dep’t of Revenue*, 665 P.2d 960, 965 (Alaska 1983)) (emphasis in original).

116. See *United Parcel Serv. Co. v. State, Dep’t of Revenue*, 1 P.3d 83, 84 (Alaska 2000) (“[W]hen a case concerns ‘statutory interpretation or other analysis of legal relationships about which courts have specialized knowledge and experience,’ we substitute our judgment for that of the agency” and affirming “the substance of the department’s decision, if not . . . its precise legal theory”); *Fairbanks N. Star Borough Sch. Dist. v. NEA-Alaska, Inc.*, 817 P.2d 923, 926 n.4 (Alaska 1991) (reviewing statutory language de novo) (internal citation omitted); *Pub. Safety Employees Ass’n v. State*, 799 P.2d 315, 318 (Alaska 1990) (examining statutory language, legislative history, federal law, and the law of other states to evaluate agency statutory interpretation); *Noey v. Dep’t of Envtl. Conservation*, 737 P.2d 796, 800 (Alaska 1987) (“This issue involves basic principles of statutory interpretation and thus presents a question of law. Accordingly, no particular deference is owed to the agency’s interpretation of the applicable statutes.”); *State v. McCallion*, 875 P.2d 93, 98 (Alaska Ct. App. 1994) (applying substitution of judgment).

117. See *Sumner v. Eagle Nest Hotel*, 894 P.2d 628, 630 (Alaska 1995) (quoting *Tesoro*, 746 P.2d at 903).

118. *McCallion*, 875 P.2d 93.

119. *Id.* at 94.

120. *Id.* at 98-99.

121. *United Parcel Serv. Co.*, 1 P.3d at 84.

the court examined statutory language and legislative purpose before affirming the agency's interpretation.¹²²

The court in *Sumner v. Eagle Nest Hotel* also applied the *Tesoro* test, but held that either the substitution of judgment or the rational basis review could apply to the agency interpretation at issue.¹²³ The case involved determining whether a worker's disability payment was timely.¹²⁴ After explaining *Tesoro*'s two possible standards of review, the court declined to choose one to apply, holding that the agency's interpretation would satisfy either.¹²⁵ The court held the underlying statute ambiguous and, after examining statutory purpose and related precedent, concluded both that the agency interpretation would meet rational basis review and that the court reviewing de novo would agree with the agency.¹²⁶

The standard for applying *Tesoro* is well established, and there is little question that Alaska courts will review these issues de novo. To the extent that *Sumner* is an outlier, it still does not foreclose the court's de novo power of review; for example, at no point does *Sumner* imply mandatory deference to the agency's interpretation. So, while the court may choose to defer to an agency interpretation, nothing appears to limit its de novo authority.

2. *How Alaska's Standard Came About: Its History and Relationship to Alaska's APA*

Like other SLAPAs, Alaska's SLAPA does not prescribe standards for judicial review of agency interpretations of law. The most relevant provision allows for "[j]udicial review of validity," stating that "[a]n interested person may get a judicial declaration on the validity of a regulation," but it does not specify procedures for review of legal interpretation.¹²⁷

The roots of the *Tesoro* standard actually predate Alaska's SLAPA, which has had no apparent effect on the standard. Though most recent cases cite *Tesoro* for Alaska's standard of judicial review, *Tesoro* cited *Kelly v. Zamarello*¹²⁸ for the same standard.¹²⁹ Interestingly, *Kelly* actually borrowed the rational basis versus substitution of judgment scheme from the Oregon Supreme Court, though the Alaska court claimed to adopt the bifurcated review standard simply to describe the de facto bifurcation of recent Alaska precedents rather than to change the

122. *Id.* at 88-90.

123. *Sumner v. Eagle Nest Hotel*, 894 P.2d 628, 630 (Alaska 1995).

124. *Id.*

125. *Id.*

126. *Id.* at 631.

127. ALASKA STAT. § 44.62.300 (2006).

128. *Kelly v. Zamarello*, 486 P.2d 906 (Alaska 1971).

129. *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896, 903 (Alaska 1987).

practice.¹³⁰ While borrowing the Oregon court's framework, *Kelly* also cited the U.S. Supreme Court for additional policy justifications for the standard.¹³¹

D. Idaho—Intermediate Deference

1. The Standard

A single case, *J.R. Simplot Company v. Tax Commission*,¹³² contains Idaho's comprehensive four-prong test for determining whether an agency interpretation deserves deference:

- (1) "The court must first determine if the agency has been entrusted with the responsibility to administer the statute at issue. Only if the agency has received this authority will it be 'impliedly clothed with power to construe' the law."¹³³
- (2) "The second prong of the test is that the agency's statutory construction must be reasonable."¹³⁴
- (3) "The third prong for allowing agency deference is that a court must determine that the statutory language at issue does not expressly treat the precise question at issue."¹³⁵
- (4) If the agency has authority and has reasonably construed the statute, "a court must ask whether any of the rationales underlying the rule of deference are present."¹³⁶

To determine whether the fourth prong is satisfied, Idaho courts examine five separate rationales for deference: "(1) the rationale requiring that a practical interpretation of the statute exists, (2) the rationale requiring the presumption of legislative acquiescence, (3) the rationale requiring agency expertise, (4) the rationale of repose, and (5) the rationale requiring contemporaneous agency interpretation."¹³⁷ If an agency interpretation meets the test, Idaho courts accord the interpretation "considerable weight."¹³⁸ If the interpretation does not meet one of the prongs, it is "'left to its persuasive force'" and the court can decide the

130. *Kelly*, 486 P.2d at 915-16 (citing *Rogers Constr. Co. v. Hill*, 384 P.2d 219 (Or. 1963)).

131. *See id.* at 917-18.

132. *J.R. Simplot Co. v. Tax Comm'n*, 820 P.2d 1206 (Idaho 1991).

133. *Id.* at 1219.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Preston v. Idaho State Tax Comm'n*, 960 P.2d 185, 188 (Idaho 1998) (summarizing *Simplot's* deference rationales).

138. *Id.* at 187.

issue de novo.¹³⁹ Nearly without exception, Idaho courts explicitly and methodically apply these four prongs to determine deference.¹⁴⁰ At no point does the *Simplot* test mandate deference; it just calls on courts to give great weight to agency interpretations.¹⁴¹ Still, applications of the test show that an interpretation will receive deference when it fulfills all four prongs.

Mason v. Donnelly Club demonstrates a standard application of the *Simplot* test.¹⁴² In *Mason*, the court reviewed whether an agency regulation complied with the underlying statute regarding unemployment benefits.¹⁴³ With little inquiry, the court held that *Simplot* prong one was met and found that the regulation satisfied prong two because it was reasonably based on precedent.¹⁴⁴ The statute's lack of specificity met the third prong, and finally, in the fourth prong analysis, the court found that the rule was practical.¹⁴⁵ Though the regulation demonstrated no legislative acquiescence and was based on no particular expertise, the court found the rule's practicality and persuasiveness sufficient to satisfy the fourth prong.¹⁴⁶ Thus the court deferred to the regulations.¹⁴⁷

Both *Pearl v. Board of Professional Discipline of State Board of Medicine*¹⁴⁸ and *Canty v. Idaho State Tax Commission*¹⁴⁹ applied the *Simplot* test just as in *Mason*. Both cases cycled through the four prongs and found them fulfilled.¹⁵⁰

On the other hand, in *Westway Construction, Inc. v. Idaho Transportation Dep't* the court rejected an agency interpretation of the term "clerical mistake" at step-one of the *Simplot* test.¹⁵¹ The court held that since the agency had not been entrusted to administer the statute in question because "the statute applie[d] generally to any public entity receiving bids for public works construction," it failed step-one of *Simplot* and was entitled to no deference.¹⁵² The court went on to consider the question de novo.¹⁵³

However, a recent Idaho case did not apply the *Simplot* standard in pattern with the past cases. In *Sons & Daughters of Idaho, Inc. v. Idaho Lottery*

139. *Mason v. Donnelly Club*, 21 P.3d 903, 907 (Idaho 2001) (citing *Simplot*, 820 P.2d at 1219-20).

140. See, e.g., *Canty v. Idaho State Tax Comm'n*, 59 P.3d 983, 988-89 (Idaho 2002); *Pearl v. Bd. of Prof'l Discipline of Idaho State Bd. of Medicine*, 44 P.3d 1162, 1168 (Idaho 2002); *Hamilton ex rel. Hamilton v. Reeder Flying Serv.*, 21 P.3d 890, 893 (Idaho 2001); *Mason*, 21 P.3d at 905; *Preston*, 960 P.2d at 187; *Garner v. Horkley Oil*, 853 P.2d 576, 578 (Idaho 1993).

141. *Simplot*, 820 P.2d at 1219-20.

142. *Mason*, 21 P.3d 903.

143. *Id.* at 905.

144. *Id.* at 905-06.

145. *Id.* at 907.

146. *Id.*

147. *Id.*

148. *Pearl v. Bd. of Prof'l Discipline of State Bd. of Medicine*, 44 P.3d 1162 (Idaho 2002).

149. *Canty v. Idaho State Tax Comm'n*, 59 P.3d 983 (Idaho 2002).

150. *Canty*, 59 P.3d at 988-89; *Pearl*, 44 P.3d at 1168.

151. *Westway Constr., Inc. v. Idaho Transp. Dep't*, 73 P.3d 721, 730 (Idaho 2003).

152. *Id.*

153. *Id.*

Commission, the court paraphrased the *Simplot* test but did not expressly apply the four prongs.¹⁵⁴ Rather, the court stressed that legislative intent was the ultimate test of statutory interpretation and that, regardless of whether deference to the agency was appropriate, the judiciary was the ultimate interpreter of statutory meaning.¹⁵⁵ In the end, however, the court held that the agency's reasonable construction of the statute was entitled to deference.¹⁵⁶ Also, the court's failure to apply *Simplot* may be explained by the fact that the case was ultimately resolved on factual issues rather than on the statutory interpretation.¹⁵⁷ Overall, it appears unlikely that this case will undermine the otherwise unwavering *Simplot* standard.

2. *How Idaho's Standard Came About: Its History and Relationship to Idaho's APA*

Idaho's deference standard comes entirely from *Simplot* and does not rely on Idaho's SLAPA. Idaho's SLAPA provides for a right of judicial review¹⁵⁸ and mandates deference to agency fact finding,¹⁵⁹ but it does not announce a standard for review of agency interpretation. Even though *Simplot* was decided after Idaho's SLAPA came into effect, the holding does not mention the statute.¹⁶⁰

However, because *Simplot* represents the Idaho court's attempt to fashion a modern deference standard by examining elements from other courts, the court consulted nearly every other conceivable source of deference principles.¹⁶¹ Prior to *Simplot*, Idaho had a historically consistent highly-deferential standard, but a case decided shortly before *Simplot* undermined that deferential principle and left the standard of review uncertain.¹⁶² In *Simplot*, the court attempted to restore certainty by designing a new standard of review that would balance deference to the agency with the judicial responsibility for interpreting law.¹⁶³ Thus, the court comprehensively reviewed its own precedent, that of other states, and that of the U.S. Supreme Court.¹⁶⁴ From these sources, the court constructed the four-prong

154. *Sons & Daughters of Idaho, Inc. v. Idaho Lottery Comm'n*, 156 P.3d 524, 527 (Idaho 2007).

155. *Id.*

156. *Id.*

157. *Id.* at 527-32.

158. IDAHO CODE ANN. §§ 67-5270, 67-5278 (2006). However, judicial review is only available after an exhaustion of administrative remedies. *Id.* § 67-5271 (2006).

159. *Id.* § 67-5279(1) (2006).

160. *J.R. Simplot Co. v. Tax Comm'n*, 820 P.2d 1206, 1219 (Idaho 1991).

161. *Id.* at 1210-23.

162. *See id.* at 1211-12 (citing *Idaho Fair Share v. Pub. Utils. Comm'n*, 751 P.2d 107 (Idaho 1988)).

163. *See id.* at 1212 ("[T]he status of the rule of judicial deference in Idaho is currently tenuous and uncertain.").

164. *Id.* at 1212-19.

Simplot test that combined principles from Idaho precedent as well as from *Chevron*.¹⁶⁵

V. HOW THE STATE APPROACHES RELATE TO *CHEVRON*

A. *The Lack of Difference Between State and Federal Approaches and Deference Standards as Substantive Value Judgments*

Before exploring the differences between the state and federal approaches to agency interpretation, it is worth highlighting the similarities. All state and federal courts ultimately inquire into the same interpretive factors; the diverging standards differ only in the order of inquiry, relative importance of certain factors, and mandatory versus discretionary nature of deference. For example, courts from Alaska, Delaware, Idaho, and Mississippi all directly engaged the statutory language at some point in their analyses and often resolved interpretive issues based on plain language.¹⁶⁶ Similarly, the use of canons, legislative history, and statutory purpose were common across the different standards; both the most and the least deferential courts applied these techniques.¹⁶⁷

All of these standards use the same tools but assign them different relative importance. Courts with more deferential standards, like federal courts or those in Mississippi and Idaho, certainly emphasize textual meaning, but they also place great importance on agency expertise and experience. Further, they value legislative intent to delegate to agencies. Although the Alaska court also values agency expertise and experience, its substitution of a judgment standard places less emphasis on agency competencies and more emphasis on the court's own interpretive strength. While Delaware's standard encourages its courts not to rely on agency expertise and experience, *McKinney v. Kent County Board of Adjustment* shows that even these least deferential courts can find some value in agency experience.¹⁶⁸

The differences between the different state and federal standards really demonstrate the tension between competing values of interpretive techniques; thus, choosing the "proper" or "most correct" standard really amounts to ranking the relative value of these techniques. Put another way, a deferential standard elevates the value of agency expertise or interpretive efficiency over the court's

165. *Id.* at 1219-20.

166. *See, e.g.,* *United Parcel Serv. Co. v. State, Dep't of Revenue*, 1 P.3d 83, 84 (Alaska 2000); *New Castle County Dep't of Land Use v. Univ. of Delaware*, 842 A.2d 1201, 1204 (Del. 2004); *Mason v. Donnelly Club*, 21 P.3d 903, 905-07 (Idaho 2001); *Wheeler v. Mississippi Dep't of Envtl. Quality Permit Bd.*, 856 So. 2d 700, 703-04 (Miss. Ct. App. 2003).

167. *See, e.g.,* *State v. McCallion*, 875 P.2d 93, 98-99 (Alaska Ct. App. 1994); *New Castle County Dep't of Land Use*, 842 A.2d at 1207; *Mason*, 21 P.3d at 905-07; *Manufab, Inc. v. Miss. State Tax Comm'n*, 808 So. 2d 947, 949-50 (Miss. 2002).

168. *McKinney v. Kent County Bd. of Adjustment*, No. Civ.A. 01A-11-002, 2002 WL 1978936, at *5-*6 (Del. Super. Ct. July 31, 2002).

interpretive competence. Since development of a standard reflects substantive choices and valuations of techniques, this Article does not attempt to assert that a more or less deferential standard is an objectively better approach. Rather, the Article assumes that whatever choice a jurisdiction has made represents the best decision about that state's relative valuation of interpretive approaches. Thus, the Article assumes that Mississippi's and Delaware's respective deferential and de novo standards represent the best articulation of those states' interpretive valuations.

Working from this assumption, this Part examines whether the *Chevron* standard is articulated and executed to elevate the value of deferential interpretation without damaging other values noted in the criticisms¹⁶⁹ of *Chevron*. Specifically, this Part will compare the state standards with *Chevron* to examine how implementation of these standards affects (1) reasoned decision-making and consistency between announced and applied standards and (2) the broader integrity of textualism, statutory interpretation, and the Supreme Court as a whole.

B. Harmonizing Announced and Applied Standards to Achieve Reasoned Decision-Making

Consistency between announced and applied judicial standards is a value central to our legal system. In *Allentown Mack Sales and Service, Inc. v. NLRB*, the Supreme Court explained as much:

It is hard to imagine a more violent breach of [reasoned decision-making] than applying a rule of primary conduct or a standard of proof which is in fact different from the rule or standard formally announced. And the consistent repetition of that breach can hardly mend it.

Reasoned decisionmaking, in which the rule announced is the rule applied, promotes sound results, and unreasoned decisionmaking the opposite. The evil of a decision that applies a standard other than the one it enunciates spreads in both directions, preventing both consistent application of the law by subordinate agency personnel (notably ALJ's), and effective review of the law by the courts.¹⁷⁰

Similarly important is the concept of "transparency," the idea that a court's statement of its basis for a decision should match its actual basis for the decision.

169. See *supra* Part II.

170. *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374-75 (1998).

Arguably, recent Supreme Court applications¹⁷¹ of the *Chevron* doctrine are inconsistent with reasoned decision-making and transparency because these applications do not actually match the announced procedure. For example, Merrill, Sunstein, and a number of other scholars cite numerous cases showing the Court's application of *Chevron* step-one to be de novo review rather than a simple test for ambiguity.¹⁷²

The Supreme Court might resolve this inconsistency between announced and applied standards in two ways. First, the Court could change its practical application of *Chevron*, consistently limiting its step-one review to the actual inquiry announced in the standard. Such a self-imposed change is unlikely though, especially because the structure of *Chevron*'s two-step standard may pressure the Court into inconsistent applications of the test.¹⁷³ Second, the Court could change the announced *Chevron* standard to more accurately reflect the Court's practice. This course would not require any substantive change to the Court's practice; it would merely require a change to the articulated procedure (e.g., abandoning the "two-step" as currently articulated). It is in light of this second possibility that examples from state practice could inform the federal standard and help *Chevron* become more consistent with reasoned decision-making.

For the Delaware and Alaska courts, fidelity to the announced de novo standards is simple because independent review requires no specific processes. Delaware's prohibition on deference may be considered a formal requirement, but it is practically little more than an obligation that the court explained its reasoning, which is not really a burden beyond the justifications necessary for any judicial opinion. Thus, these state standards provide an easy means of achieving reasoned decision-making and transparency. But their examples are not applicable to *Chevron* without a change in the underlying substantive principle of deference to federal agencies. Thus, to find a standard that can inform *Chevron* without changing its substantive commitment to deference, we must examine Mississippi's and Idaho's standards.

Mississippi's standard is similar to a one-step *Chevron*, and consequently it seems to suffer from the "announced" versus "applied" problems similar to *Chevron*. Though Mississippi's announced standard is highly deferential, Mississippi courts appear to engage in nearly de novo review before deferring to

171. See, e.g., Pierce, *supra* note 7, at 749-52. Scholars have noted that while lower courts seem to apply *Chevron* fairly faithfully and consistently, the Supreme Court has applied the doctrine in an inconsistent and unprincipled way. *Id.* at 750. One might argue that since the lower courts, which apply the doctrine far more often than the Supreme Court, are consistently following the announced standard, the Supreme Court's lapses present more of a theoretical problem than a practical one. Pierce has responded to this argument, noting that although the D.C. Circuit probably applies *Chevron* more often than the Supreme Court, the Supreme Court's inconsistent precedents will inevitably influence both the lower courts and agencies, leading to "cacophony and incoherence throughout the administrative state." *Id.* at 752.

172. See *supra* text accompanying note 13.

173. See *supra* Part II.

agencies. Certainly courts must undertake some review before determining if the agency interpretation is reasonable, but Mississippi courts appear to review more than is necessary. It is challenging to gauge how much analysis is sufficient before deference is appropriate, and it is likely that judges hope to be thorough and err on the side of over-analysis. Still, Mississippi's consultation of canons and legislative purpose seems unnecessary if deference is truly afforded to any "reasonable" interpretation.

Whether Mississippi's degree of over-analysis constitutes an actual threat to reasoned decision-making is questionable, but Mississippi's application of its own standard may highlight an inherent problem with unguided standards like Mississippi's and *Chevron*. Operating under standards that limit the scope of judicial review, courts may always have a tendency to over-analyze.¹⁷⁴ Moreover, high stakes cases, like those often before the Supreme Court, will likely intensify the inherent difficulty of judicial restraint. As announced, the *Chevron* and Mississippi standards may place unrealistic expectations on well-intentioned judiciaries, which are accustomed to fully articulating their reasoning and are unlikely to curb their statutory review, particularly if just a little more interpretive work will resolve a case differently (i.e., "correctly" in a jurist's mind).

On the other hand, Idaho demonstrates that a guided standard may allow courts to defer substantively while still achieving reasoned decision-making. The first two steps of Idaho's standard quite closely approximate the Supreme Court's recent applications of *Chevron* because these steps amount to a guided de novo inquiry.¹⁷⁵ Particularly, Idaho's second prong allows the court to consider a full range of statutory interpretation techniques while inquiring whether the agency's interpretation was reasonable. This full consideration does not undermine Idaho's announced standard though, because Idaho maintains that, underlying its four-prong test, the courts are still the ultimate authority on statutory meaning. Thus Idaho cases seem to demonstrate that federal courts could continue practicing the *Chevron* doctrine just as they have been and reconcile this with reasoned decision-making by simply adopting a standard that allows them to engage in full de novo review before deferring.

174. Merrill makes a similar point; his criticism of *Chevron*'s "all-or-nothing" approach implies that courts faced with this approach have incentives to overanalyze or even ignore the prescribed inquiry at *Chevron* step-one. Merrill, *Judicial Deference*, *supra* note 6, at 970.

175. See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125-26, 161 (2000); *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 708 (1995); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-49 (1987). See also *supra* note 13 (discussing the Supreme Court's recent application of *Chevron*).

C. *Plain Meaning, Pressure Against Ambiguity, and the Costs to Statutory Interpretation*

Chevron requires that federal courts place a huge upfront emphasis on plain meaning because the finding of statutory ambiguity essentially determines the outcome of a case. Thus, *Chevron*'s structure places enormous pressure on the issue of ambiguity, and these high stakes make an otherwise simple question of statutory clarity quite complex.¹⁷⁶

As Merrill and Pierce point out,¹⁷⁷ *Chevron*'s emphasis on plain meaning and its incentives against recognizing ambiguity may have a number of damaging consequences. First, the focus on plain meaning, and the accompanying pressure on courts to find clear, exclusive statutory meanings, may frustrate legislative attempts to draft flexible, adaptable statutes. Additionally, courts supplying plain meaning in the face of ambiguity may also encourage sloppy legislative drafting or even legislative abdication of responsibility by drafting intentionally vague statutes and leaving politically-risky issues for the courts to sort out. Further, the pressure to deny statutory ambiguity may undermine the validity of textual analysis in general, and textualism specifically, because it may lead judges to thrust uncomfortable certainties upon ambiguous text.¹⁷⁸ Finally, it might hurt the broader enterprise of statutory interpretation, and ultimately a court's credibility, by forcing the court to appear politically motivated in its interpretive decisions.¹⁷⁹

This plain-meaning problem seems to arise not only from the intersection between textualism and *Chevron*, but also out of *Chevron*'s two-step inquiry structure. The federal system is unique in its immediate and conclusive stress on the question of ambiguity. None of the state standards adopt the *Chevron* two-step approach, and none place such stakes on the finding of ambiguity.¹⁸⁰ Instead, the deferential state standards focus on the reasonableness of the agency

176. "The Court now rarely defers to an agency's construction of ambiguous statutory language because a majority of Justices have now begun to use textualist methods of construction that routinely allow them to attribute 'plain meaning' to statutory language that most observers would characterize as ambiguous or internally inconsistent." Pierce, *supra* note 7, at 752; see also *Babbitt*, 515 U.S. at 708; *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 225-27 (1994); *supra* Part II.

177. See *supra* Part II.

178. See, e.g., *MCI Telecomms. Corp.*, 512 U.S. at 225-27. See also *supra* note 22 (noting the mutual inconsistency between the *Chevron* approach and textualism). Justice Scalia would likely disagree with this assessment, finding that there is no ambiguity in these situations. See, e.g., Scalia, *Judicial Deference*, *supra* note 6, at 521 ("One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists." (emphasis in original)). Of course, such a response leads to one of the criticisms of textualism: the idea that plain meaning is so subjective and that a term is unambiguous despite four of nine justices disagreeing as to its meaning. Cf. Merrill, *Textualism*, *supra* note 7, at 366-67 (responding to Justice Scalia's above quoted passage).

179. See, e.g., Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 828 (2006) (testing the hypothesis that "whatever *Chevron* says, political convictions actually continue to drive judicial review of agency interpretations of law").

180. See *supra* Part III.

interpretations. As noted above, this focus shifts the inquiry from defining the absolute, positive statutory meaning to rejecting a single negative meaning.¹⁸¹ The latter, far easier to accomplish, avoids the plain meaning problem entirely.

For example, Mississippi's standard, substantively similarly to *Chevron's* deference principle, defers to reasonable agency interpretation and thereby avoids the threshold debate over ambiguity. In adopting a federal standard that more closely mirrors Mississippi's standard, federal courts might be able to retain substantive deference principles akin to those announced in *Chevron*¹⁸² while avoiding the problem of dodging ambiguity. A federal standard that resembles Mississippi's standard would still suffer from the problems of consistency between the announced and the applied standards, as discussed above, but would resolve some of these plain meaning issues.

Idaho's standard also maintains deference principles while avoiding ambiguity problems. The third prong of Idaho's four-prong inquiry essentially asks the same question as *Chevron* step-one; in fact, Idaho's third prong is explicitly modeled after *Chevron*.¹⁸³ But in the Idaho cases, determining whether a statute "expressly treat[s] the precise question at issue" is not a contentious affair.¹⁸⁴ Rather, Idaho courts resolve the question fairly simply and without great debate.

Idaho courts can likely easily answer this question because this single inquiry is not issue-determinative.¹⁸⁵ While Idaho's standard is still highly deferential to agencies,¹⁸⁶ the determination of whether the statute expressly addresses an issue (i.e., the question of ambiguity) is just one of four inquiries,¹⁸⁷ so the outcome of the case does not turn on the court's finding of plain meaning.

181. *Id.*

182. Of course, as mentioned above, if federal courts chose to abandon the substantive principles underlying *Chevron*, a simple shift to a de novo standard, like Alaska's or Delaware's, could also solve this plain meaning problem because the court could decide the issue whether the meaning was plain or not. In fact, disregarding the loss of the substantive values underlying *Chevron*, this switch would probably benefit the court by allowing for easier opinion writing, or at least opinion writing focused on the merits rather than the presence or absence of ambiguity.

183. *J.R. Simplot Co. v. Tax Comm'n*, 820 P.2d 1206, 1219-20 (Idaho 1991).

184. *See, e.g., Canty v. Idaho State Tax Comm'n*, 59 P.3d 983, 988-89 (Idaho 2002); *Pearl v. Bd. of Prof'l Discipline of Idaho State Bd. of Medicine*, 44 P.3d 1162, 1168 (Idaho 2002); *Hamilton ex rel. Hamilton v. Reeder Flying Serv.*, 21 P.3d 890, 894-95 (Idaho 2001); *Mason v. Donnelly Club*, 21 P.3d 903, 905, 907 (Idaho 2001); *Preston v. Idaho State Tax Comm'n*, 960 P.2d 185, 187 (Idaho 1998); *Garner v. Horkley Oil*, 853 P.2d 576, 578-79 (Idaho 1993).

185. As Merrill notes, "the failure of *Chevron* to perform as expected can be attributed to the Court's reluctance to embrace the draconian implications of the doctrine for the balance of power among the branches, and to practical problems generated by its all-or-nothing approach to the deference question." Merrill, *Judicial Deference*, *supra* note 6, at 970.

186. While Idaho's standard never explicitly mandates deference, practically speaking, the courts have accorded deference every time an interpretation meets the four prongs, so deference may be de facto mandatory.

187. Not to mention the fact that the fourth prong involves a multi-factor balancing test which can provide hesitant courts with a huge pressure release.

The order of Idaho's four-prong inquiry might also help diffuse the plain meaning question. For Idaho courts, the real debate on statutory interpretation occurs at the second prong, which requires an inquiry into the reasonableness of an agency's interpretation.¹⁸⁸ In applying this prong, the courts use the full array of *de novo* statutory techniques,¹⁸⁹ which allows the full interpretation debate to play out under its proper label: a reasonableness inquiry.

D. *Changing Process, Not Substance, by Moving to a Reasonableness Inquiry*

As the Mississippi and Idaho examples illustrate, amending the *Chevron* standard need not change federal deference principles, and the values of reasoned decision-making, transparency, and propriety in statutory interpretation need not stand in tension with deference. Based on the examples of Mississippi and Idaho, it may make sense to shift from the *Chevron* two-step model to an explicit reasonableness inquiry similar to that employed by many of the states. While an unguided inquiry, like Mississippi's, may risk similar announced standard versus applied standard issues, it would at least diminish the problems that *Chevron* faces when dealing with statutory ambiguity. Idaho's guided model could alleviate both the announced standard versus applied standard and ambiguity problems of *Chevron*, but moving to such a model might represent too large a break from past practice. Even without the drastic move to adopt Idaho's lengthy standard, the federal system could incorporate aspects of Idaho's approach to improve *Chevron*. For example, Idaho demonstrates that rephrasing or changing the order of *Chevron* inquiry (i.e., eliminating the immediate, determinate pressure to find plain meaning) might improve workability of the standard. Regardless of what specific lessons the states might teach, overall open-mindedness to learn from state practice would likely improve the *Chevron* doctrine; after all, what good are laboratories if one disregards their findings?

VI. HOW DEFERENCE STANDARDS DEVELOP AND CHANGE

Assuming that one wished to amend *Chevron* to more closely resemble one of the state standards, the question would remain how best to do so. One might expect that legislative enactments would drive changes in the courts' principles of review, but both the state and federal experience have shown that statutes, particularly APAs, have played little role in shaping deference standards. Rather,

188. See, e.g., *Canty*, 59 P.3d at 988; *Hamilton ex rel. Hamilton*, 21 P.3d at 893-94; *Mason*, 21 P.3d at 906-07; *Garner*, 853 P.2d at 578-79.

189. The courts look at statutory language, legislative history, purpose, canons, and other interpretive devices. These are the same factors that the Supreme Court considers in *Chevron* step-one, that the Mississippi court considers in its reasonableness inquiry, and that the Alaska and Delaware courts consider in their undisguised *de novo* review. See, e.g., *State v. McCallion*, 875 P.2d 93, 98-99 (Alaska Ct. App. 1994); *New Castle County Dep't of Land Use v. Univ. of Del.*, 842 A.2d 1201, 1204, 1207 (Del. 2004); *Mason*, 21 P.3d at 905-07; *Manufab, Inc. v. Miss. State Tax Comm'n*, 808 So. 2d 947, 949-50 (Miss. 2002).

judicial prudential concerns seem to have played the largest role in molding state deference standards. Thus any reform of *Chevron* might have to come from the Supreme Court itself.

A. *Interaction Between Statutes and Deference Standards*

Legislation has not determined the states' deference standards. As the prior discussion illustrates, none of the state policies rely on positive SLAPA enactments as bases for their standards. In fact, Mississippi's, Alaska's, and Idaho's standards have developed so completely independent from their respective SLAPAs that none of the cases acknowledge the statutes' existence. For example, Mississippi's standards, developed prior to its SLAPA enactments, did not change in response to the statutory scheme, and Alaska's and Idaho's standards, developed subsequent to their SLAPA enactments, paid no attention to the statutes when crafting new deference principles. Of the states closely examined, Delaware may have been most influenced by its SLAPA because the Delaware courts at least reference it. Still, the Delaware courts' SLAPA references seem to be secondary justifications, at best, and hardly drive the state deference standard. In fact, the Delaware courts relied more on the SLAPA's statutory omissions than any positive enactment.

Given the vagueness or silence of most SLAPAs regarding the judicial review of administrative interpretations, it is hardly surprising that these statutes have had little effect on doctrinal development. Similarly, the Federal APA does not clearly mandate any particular standard of review for agency interpretations, and *Chevron* does not even cite the Federal APA. The State and Federal APAs' general silence on judicial review of statutory interpretation may reflect legislative intent to leave these deference doctrines to develop with common law. If this is the case, then the courts' shaping of their own standards is consistent with legislative intent. Whatever the legislative intent, the result is that the courts, rather than the legislatures, have shaped deference standards, so any legislative attempt to alter these standards would have to be clear in its intent and specifically worded to mandate certain standards.

If history is any indication, specific legislative action targeted to reform judicial review of agency interpretations will not be forthcoming. No such legislation shaped the state standards, and the Bumpers Amendment,¹⁹⁰ the only serious attempt to amend the Federal APA to mandate de novo judicial review, has long remained dead. Additionally, amending the *Chevron* procedure does not

190. See S. 2408, 94th Cong., 1st Sess., 121 CONG. REC. 29,956 (1975); 125 CONG. REC. 23,479-81, 23,499, 23,504 (1979). For more information on the Bumpers Amendment, see generally Ronald M. Levin, *Review of "Jurisdictional" Issues Under the Bumpers Amendment*, 1983 DUKE L.J. 355 (1983); James T. O'Reilly, *Deference Makes a Difference: A Study of Impacts of the Bumpers Judicial Review Amendment*, 49 U. CIN. L. REV. 739 (1980); David R. Woodward & Ronald M. Levin, *In Defense of Deference: Judicial Review of Agency Action*, 31 ADMIN. L. REV. 329 (1979).

seem to arouse popular attention, so it is unlikely to spur Congress into action. Thus, it appears that any change to the *Chevron* procedure will have to originate with the judiciary.

B. *Judicial Reform of Chevron*

The deference standards from Mississippi, Delaware, Alaska, and Idaho all represent judicial attempts to shape prudent and effective standards for reviewing agency interpretations. Particularly, Alaska's and Idaho's standards arose out of judicial decisions to improve review procedures by considering the standards and practices of other jurisdictions.¹⁹¹ However, none of these state standards sprung from spontaneous self-examination. Mississippi's standard simply continued from a tradition that predated the modern administrative state, and in Alaska, Delaware, and Idaho, contrary or diverging precedents led the courts to reshape their standards.

Most likely, the only way that the Federal *Chevron* standard will change is if the Supreme Court identifies similarly divergent precedents and initiates a self-reform procedure. Such an undertaking is probably unlikely without significant split or confusion in federal case law, but some scholars predict just such a result from the Supreme Court's present inconsistent application of *Chevron*.¹⁹² As the *Chevron* doctrine continues to develop, such a split may be possible but reconsideration of the principle seems unlikely in the near future. If the Supreme Court reconsiders its standard, though, the doctrine would likely benefit from a process like the one used in Idaho,¹⁹³ a thorough consideration and conscious attempt to forge a comprehensive standard. Such a standard could retain much of the substance of *Chevron* and alleviate many of its shortcomings.

191. See *J.R. Simplot Co. v. Tax Comm'n*, 820 P.2d 1206, 1211 (Idaho 1991); *Kelly v. Zamarello*, 486 P.2d 906, 915-16 (Alaska 1971).

192. See generally *Pierce*, *supra* note 7, at 752.

193. Indeed, the Idaho court's *Simplot* opinion shares many of the goals and techniques of this Article in its inter-jurisdictional quest for a workable deference standard.

APPENDIX A—STATE DEFERENCE TABLE

ALABAMA—Strong deference

“The traditional deference given an administrative agency’s interpretation of a statute appropriately exists (1) when the agency is actually charged with the enforcement of the statute and (2) when the interpretation does not exceed the agency’s statutory authority (i.e., jurisdiction).” *Ex parte* State Health Planning & Dev. Agency, 855 So. 2d 1098, 1102 (Ala. 2002).

“The interpretation placed on a statute by the executive or administrative agency charged with its enforcement is given great weight and deference by a reviewing court.” *McCullar v. Universal Underwriters Life Ins. Co.*, 687 So. 2d 156, 163 (Ala. 1996).

ALASKA—Announced *de novo* with the possibility of deference to agency expertise or experience

“Generally, we exercise independent judgment when reviewing issues of statutory interpretation. But this broad power of review does not necessarily preclude us from deferring to an agency’s reading of statutory language.” *Bartley v. State, Dep’t of Admin., Teacher’s Ret. Bd.*, 110 P.3d 1254, 1256 n.2 (Alaska 2005) (citations omitted).

“[W]hen a question of law involves agency expertise [an appellate court] will ‘defer to [an] agency’s interpretation of a law unless it is unreasonable.’” *Grimm v. Wagoner*, 77 P.3d 423, 433 (Alaska 2003).

“When a case concerns ‘statutory interpretation or other analysis of legal relationships about which courts have specialized knowledge and experience,’ we substitute our judgment for that of the agency, ‘adopt[ing] the rule of law that is most persuasive in light of precedent, reason, and policy.’” *United Parcel Serv. Co. v. State, Dep’t of Revenue*, 1 P.3d 83, 84 (Alaska 2000) (footnotes omitted).

ARIZONA—Intermediate deference

“[Where] the Arizona Legislature has addressed the precise question at issue in a clear and unequivocal manner[, the court that is construing the governing statute] need not defer to [the administrative] interpretation.” *Stearns v. Ariz. Dep’t of Revenue*, 131 P.3d 1063, 1066 (Ariz. Ct. App. 2006).

“In cases in which the [agency] has consistently interpreted a statute related to water rights, we will afford that interpretation ‘great weight in the absence of clear statutory guidance to the contrary.’” *Phelps Dodge Corp. v. Ariz. Dep’t of Water Res.*, 118 P.3d 1110, 1116 (Ariz. Ct. App. 2005).

“While we give the administrative interpretation of a statute or ordinance some weight, we need not defer to an agency’s legal conclusions and may substitute our own.” *Thomas & King, Inc. v. City of Phoenix*, 92 P.3d 429, 432 (Ariz. Ct. App. 2004).

“[E]ven though we resolve questions of law involving statutory construction *de novo*, we give great deference to the agency’s interpretation and application of the statute.” *E. Vanguard Forex, Ltd. v. Ariz. Corp. Comm’n*, 79 P.3d 86, 97 (Ariz. Ct. App. 2003).

ARKANSAS—Intermediate deference

“Issues of statutory construction are reviewed *de novo*.” Lamar Outdoor Adver. v. Ark. Highway & Transp. Dep’t, 184 S.W.3d 461, 466 (Ark. Ct. App. 2004).

“Ordinarily, agency interpretations of statutes are afforded great deference, even though they are not binding.” Ark. State Med. Bd. v. Bolding, 920 S.W.2d 825, 828 (Ark. 1996).

CALIFORNIA—Announced *de novo* with the possibility of deference to agency expertise or experience

“The amount of deference given to the administrative construction depends 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.” Hoechst Celanese Corp. v. Franchise Tax Bd., 22 P.3d 324, 335 (Cal. 2001) (emphasis and quotations omitted).

The agency interpretation was not entitled to judicial deference because “the [agency] was not operating in its area of expertise and did not consider all of the relevant rules of law.” Church v. Jamison, 50 Cal. Rptr. 3d 166, 174 (Cal. Ct. App. 2006).

“[W]hile interpretation of a statute or regulation is ultimately a question of law, we must also defer to an administrative agency’s interpretation of a statute or regulation involving its area of expertise, unless the interpretation flies in the face of the clear language and purpose of the interpreted provision.” Divers’ Envtl. Conservation Org. v. State Water Res. Control Bd., 51 Cal. Rptr. 3d 497, 501 (Cal. Ct. App. 2006) (quoting *Cmtys. For A Better Env’t v. State Water Res. Control Bd.*, 1 Cal. Rptr. 3d 76, 86-87 (Cal. Ct. App. 2003)).

“The interpretation of a labor statute is a legal question which we review independently from the determination of the [Board]. Nonetheless, we generally defer to the [Board’s] interpretation of labor statutes, unless the interpretation is clearly erroneous.” *Matea v. Workers’ Comp. Appeals Bd.*, 51 Cal. Rptr. 3d 314, 321 (Cal. Ct. App. 2006) (quoting *Boehm & Assocs. v. Workers’ Comp. Appeals Bd.*, 90 Cal. Rptr. 2d 486, 488 (Cal. Ct. App. 1999)) (alteration in original).

“The standard for judicial review of agency interpretation of law is the *independent judgment* of the court, giving *deference* to the determination of the agency *appropriate* to the circumstances of the agency action.” *Santa Clara Valley Transp. Auth. v. Rea*, 45 Cal. Rptr. 3d 511, 519 (Cal. Ct. App. 2006) (quoting *Judicial Review of Agency Action*, 27 CAL. L. REVISION COMM’N REPORTS 1, 81 (1997) (emphasis in original)).

COLORADO—Intermediate deference

“We extend deference to the Workers’ Compensation Division’s interpretation of the [Workers’ Compensation] Act . . . , although we are not bound by it.” *Sanco Indus. v. Stefanski*, 147 P.3d 5, 8 (Colo. 2006).

“While statutory construction is ultimately a judicial responsibility, [the Supreme Court] consult[s] and ordinarily defer[s] to the [administrative] agency’s guidance, rules, and determinations, if they are within the agency’s statutory authority and do not contravene constitutional requirements.” *Colo. Dep’t of Revenue v. Hibbs*, 122 P.3d 999, 1002 (Colo. 2005).

“[T]he construction of statutes by agencies charged with their enforcement is entitled to deference.” *Gallion v. Colo. Dep’t of Revenue, Motor Vehicle Div.*, 155 P.3d 539, 541 (Colo. Ct. App. 2006).

“When construing a statute, [courts] afford deference to the interpretation given the statute by the officer or agency charged with its administration.” *Rivera-Bottzeck v. Ortiz*, 134 P.3d 517, 521 (Colo. Ct. App. 2006).

CONNECTICUT—Strong deference

“‘Ordinarily, [the reviewing] court affords deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute’s purposes’” *Autotote Enters., Inc. v. State, Div. of Special Revenue*, 898 A.2d 141, 144 (Conn. 2006) (quoting *Wood v. Zoning Bd. of Appeals*, 784 A.2d 354, 360 (Conn. 2001)).

“‘Although ordinarily, this court affords deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute’s purposes . . . when a state agency’s determination of a question of law has not previously been subject to judicial scrutiny . . . the agency is not entitled to special deference [I]t is for the courts, and not administrative agencies, to expound and apply governing principles of law.’” *Rweyemamu v. Comm’n on Human Rights & Opportunities*, 911 A.2d 319, 327 (Conn. App. Ct. 2006) (quoting *Bd. of Educ. v. State Bd. of Educ.*, 898 A.2d 170, 173 (Conn. 2006)) (alterations omitted).

“‘Ordinarily, [the reviewing court] affords deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute’s purposes’ [A] ‘court that is faced with two equally plausible interpretations of regulatory language . . . properly may give deference to the construction of that language adopted by the agency charged with enforcement of the regulation’” *Trumbull Falls, LLC v. Planning & Zoning Comm’n of Trumbull*, 902 A.2d 706, 711 (Conn. App. Ct. 2006) (quoting *Cunningham v. Planning & Zoning Comm’n*, 876 A.2d 1257, 1261 (Conn. 2005)).

DELAWARE—Announced de novo with deference discouraged

“‘A reviewing court may accord due weight, but not defer, to an agency interpretation of a statute administered by it. A reviewing court will not defer to such an interpretation as correct merely because it is rational or not clearly erroneous.’” *Hirneisen v. Champlain Cable Corp.*, 892 A.2d 1056, 1059 (Del. 2006) (citing *Pub. Water Supply Co. v. DiPasquale*, 735 A.2d 378, 382-83 (Del. 1999)).

“‘[A]dministrative agencies and boards are afforded no such deference on questions of statutory construction.’” *New Castle County Dep’t of Land Use v. Univ. of Del.*, 842 A.2d 1201, 1211 (Del. 2004).

FLORIDA—Strong deference

“‘[A] reviewing court must defer to an agency’s interpretation of an operable statute as long as that interpretation is consistent with legislative intent and is supported by substantial, competent evidence.’” *Cagle v. St. Johns County Sch. Dist.*, 939 So. 2d 1085, 1089 (Fla. Dist. Ct. App. 2006) (quoting *Pub. Employees Relations Comm’n v. Dade County Police Benevolent Ass’n*, 467 So. 2d 987, 989 (Fla. 1985)).

“‘Generally, a reviewing court should defer to the interpretation given a statute or ordinance by the agency responsible for its administration. Of course, that deference is not absolute, and when the agency’s construction of a statute amounts to an unreasonable interpretation, or is clearly erroneous, it cannot stand.’” *Palm Beach Polo, Inc. v. Village of Wellington*, 918 So. 2d 988, 995 (Fla. Dist. Ct. App. 2006) (quoting *Las Olas Tower Co. v. City of Fort Lauderdale*, 742 So. 2d 308, 312 (Fla. Dist. Ct. App. 1999)).

GEORGIA—Strong deference

“‘[T]he interpretation of a statute by an administrative agency charged with enforcing its provisions is given great deference, unless contrary to law.’” *Metro. Atlanta Rapid Transit Auth. v. Reid*, 640 S.E.2d 300, 304-05 (Ga. Ct. App. 2006).

“‘We must defer to an administrative agency ‘in matters involving the interpretation of the statutes which [the agency] is empowered to enforce.’” *Piedmont Healthcare, Inc. v. Ga. Dep’t of Human Res.*, 638 S.E.2d 447, 450-51 (Ga. Ct. App. 2006) (quoting *Albany Surgical, P.C. v. Dep’t of Cmty. Health*, 572 S.E.2d 638, 641 (Ga. Ct. App. 2002)).

“‘Although [the appellate court] is ‘not bound to blindly follow’ an agency’s interpretation, we defer to an agency’s interpretation when it reflects the meaning of the statute and comports with legislative intent.’” *Moulder v. Bartow County Bd. of Educ.*, 599 S.E.2d 495, 497 (Ga. Ct. App. 2004) (quoting *Schrenko v. DeKalb County Sch. Dist.*, 582 S.E.2d 109, 114 (Ga. 2003)).

HAWAII—Strong deference

“‘To the extent that the legislature has authorized an administrative agency to define the parameters of a particular statute, that agency’s interpretation should be accorded deference.’” *Del Monte Fresh Produce (Haw.), Inc. v. Int’l Longshore & Warehouse Union, Local 142, AFL-CIO*, 146 P.3d 1066, 1076-77 (Haw. 2006).

“‘Where an agency is statutorily responsible for carrying out the mandate of a statute which contains broad or ambiguous language, that agency’s interpretation and application of the statute is generally accorded judicial deference on appellate review.’” *TIG Ins. Co. v. Kauhane*, 67 P.3d 810, 820 (Haw. Ct. App. 2003).

IDAHO—Intermediate deference

“In determining whether an agency interpretation of a statute is entitled to deference, we have adopted a four-prong test . . .” *Westway Constr., Inc. v. Idaho Transp. Dep’t*, 73 P.3d 721, 729 (Idaho 2003).

ILLINOIS—Intermediate deference

“While a court’s review of an agency’s statutory interpretation is *de novo*, the agency’s interpretation should receive deference because it stems from the agency’s expertise and experience.” *Niles Township High Sch. Dist. 219, Cook County v. Illinois Educ. Labor Relations Bd.*, 859 N.E.2d 57, 66 (Ill. App. Ct. 2006).

“‘[R]eviewing courts generally accord substantial deference to the interpretation placed on a statute by the agency charged with its administration and enforcement. An agency’s statutory interpretation will be rejected if it is unreasonable or erroneous.’” *Hawthorne Race Course, Inc. v. Ill. Racing Bd.*, 851 N.E.2d 214, 219 (Ill. App. Ct. 2006) (quoting *Metro. Alliance of Police v. Ill. Labor Relations Bd., Local Panel*, 803 N.E.2d 119, 124 (Ill. App. Ct. 2003)).

INDIANA—Strong deference

“[The Court of Appeals] will pay due deference to the interpretation of a statute by the administrative agency charged with its enforcement in light of its expertise in its given area.” *Bowles v. Griffin Indus.*, 855 N.E.2d 315, 320 (Ind. Ct. App. 2006).

“When a court is faced with two reasonable interpretations of a statute, one of which is supplied by an administrative agency charged with enforcing the statute, the court should defer to the agency.” *State v. Young*, 855 N.E.2d 329, 335 (Ind. Ct. App. 2006) (citing *Shaffer v. State*, 795 N.E.2d 1072, 1076 (Ind. Ct. App. 2003)).

“[A]n administrative agency’s interpretation of a statute it is charged with enforcing is given considerable deference.” *Villegas v. Silverman*, 832 N.E.2d 598, 605 n.10 (Ind. Ct. App. 2005).

IOWA—Announced *de novo* with the possibility of deference to agency expertise or experience

“[U]nder certain circumstances, [courts] are required to give some deference to the agency’s interpretation.” *City of Des Moines v. Employment Appeal Bd.*, 722 N.W.2d 183, 191 (Iowa 2006).

The Supreme Court “‘need not give the agency any deference regarding its interpretation and [is] free to substitute [its] judgment *de novo* for the agency’s interpretation.’” *Lee v. Iowa Dep’t of Transp., Motor Vehicle Div.*, 693 N.W.2d 342, 344 (Iowa 2005) (quoting *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 464 (Iowa 2004)).

“When we are reviewing the commissioner’s interpretation of the statutes governing the agency, we defer to the agency’s expertise, but reserve for ourself the final interpretation of the law.” *Grundmeyer v. Weyerhaeuser Co.*, 649 N.W.2d 744, 750 (Iowa 2002).

KANSAS—Intermediate deference

“Deference to an agency’s interpretation is particularly appropriate when the agency is one of special competence and experience.” *Estate of Pemberton v. John’s Sports Ctr., Inc.*, 135 P.3d 174, 186 (Kan. Ct. App. 2006) (quoting *In re Appeal of United Teleservices, Inc.*, 983 P.2d 250, 251 (Kan. 1999)).

“The interpretation of a statute by an administrative agency which is charged with the responsibility of enforcing that statute is generally entitled to judicial deference, and if there is a rational basis for the agency’s interpretation, it should be upheld on judicial review.” *Kan. Indus. Consumers Group, Inc. v. State Corp. Comm’n*, 138 P.3d 338, 351-52 (Kan. Ct. App. 2006).

“Although this court gives deference to the agency’s interpretation of a statute, the final construction of a statute lies with the appellate court.” *Id.* at 352.

KENTUCKY—Intermediate deference

“Although the courts give great deference to the agency interpretation of regulations and the law underlying the regulations, it is the responsibility of the courts to finally construe the statute.” *LWD Equip., Inc. v. Revenue Cabinet*, 136 S.W.3d 472, 475 (Ky. 2004).

“Although generally the courts give great deference to an agency interpretation of the regulations and the law underlying them, that does not give rise to an abdication of the court’s responsibility to finally construe the same statute or regulation.” *Delta Air Lines, Inc. v. Commonwealth, Revenue Cabinet*, 689 S.W.2d 14, 20 (Ky. 1985).

LOUISIANA—not considered because of its civil law system

MAINE—Strong deference

“[A]n ‘administrative agency’s interpretation of a statute administered by it . . . will be given great deference and should be upheld unless the statute plainly compels a contrary result.’” *Hannum v. Bd. of Envtl. Prot.*, 898 A.2d 392, 396 (Me. 2006) (quoting *Thacker v. Konover Dev. Corp.*, 818 A.2d 1013, 1019 (Me. 2003)).

“When a case concerns the interpretation of a statute that an administrative agency administers and that is within its area of expertise, our scope of review is to determine first whether the statute is ambiguous. If the statute is unambiguous, we do not defer to the agency’s construction, but we interpret the statute according to its plain language. If the statute is ambiguous, we defer to the agency’s interpretation, and we affirm the agency’s interpretation unless it is unreasonable.” *Cobb v. Bd. of Counseling Prof’ls Licensure*, 896 A.2d 271, 275 (Me. 2006).

MARYLAND—Announced de novo with the possibility of deference to agency expertise or experience

“When reviewing the agency’s legal conclusions, we must determine whether the agency interpreted and applied the correct principles of law governing the case and no deference is given to a decision based solely on an

error of law. We do, however, give deference to an agency's interpretation of its own rules and regulations, and we give the agency's interpretation and application of a statute it administers considerable weight." *Bereano v. State Ethics Comm'n*, 920 A.2d 1137, 1147 (Md. Ct. Spec. App. 2007) (internal quotations and citations omitted).

"We afford deference to an agency's consistent and long-standing construction of a statute because 'the agency is likely to have expertise and practical experience with the statute's subject matter.'" *Id.* at 1149 (quoting *Marriott Employees Fed. Credit Union v. MVA*, 697 A.2d 455, 459 (Md. 1997)).

MASSACHUSETTS—Intermediate deference

"The duty of statutory interpretation is for the courts, but an administrative agency's interpretation of a statute within its charge is accorded weight and deference.'" *E. Cas. Ins. Co. v. Comm'r of Ins.*, 856 N.E.2d 872, 875 (Mass. App. Ct. 2006) (quoting *Mass. Med. Soc'y v. Comm'r of Ins.*, 520 N.E.2d 1288, 1298 (1988)) (internal citations omitted).

"We give substantial deference to a reasonable interpretation of a statute by the administrative agency charged with its administration enforcement, but the duty of statutory interpretation rests in the courts." *Commerce Ins. Co. v. Comm'r of Ins.*, 852 N.E.2d 1061, 1064 (Mass. 2006) (internal citation omitted).

"[Judicial deference to an administrative agency's interpretation of] a statute it is charged with enforcing . . . is necessary to maintain the separation between the powers of the Legislature and administrative agencies and the powers of the judiciary." *Brackett v. Civil Serv. Comm'n*, 850 N.E.2d 533, 552 (Mass. 2006) (internal quotations omitted).

MICHIGAN—Strong deference

"[The Court of Appeals] generally defers to the interpretation of a statute provided by the administrative agency responsible for administering it, unless that interpretation is clearly wrong." *Bureau of Worker's & Unemployment Comp. v. Detroit Med. Ctr.*, 705 N.W.2d 524, 529 (Mich. Ct. App. 2005).

"While an agency's construction generally deserves deference, it is not controlling and cannot be used to overcome a statute's plain meaning." *Wolfe v. Wayne-Westland Cmty. Sch.*, 703 N.W.2d 480, 486 (Mich. Ct. App. 2005) (quoting *W. Mich. Univ. Bd. of Control v. State*, 565 N.W.2d 828, 834 (Mich. 1997)).

MINNESOTA—Announced de novo with the possibility of deference to agency expertise or experience

"When an agency statement does not reflect formal rules or agency adjudications, yet attempts to address an ambiguity in the law, deference to the agency under *Chevron* is not appropriate. Such agency interpretations are only entitled to respect . . . to the extent that those interpretations have the power to persuade." *Martin ex rel. Hoff v. City of Rochester*, 642 N.W.2d 1,

21 (Minn. 2002) (internal citation and quotations omitted).

“This Court need not defer to an administrative agency’s interpretation of a statute. But if the statutory language is technical in nature and the agency’s interpretation is longstanding, the agency’s interpretation is entitled to some deference.” *State ex rel. Guth v. Fabian*, 716 N.W.2d 23, 30 (Minn. Ct. App. 2006).

“[J]udicial deference . . . is extended to an administrative agency decision-maker in the interpretation of statutes that the agency is charged with administering and enforcing.” *Mattice v. Minn. Prop. Ins. Placement*, 655 N.W.2d 336, 340 (Minn. Ct. App. 2002) (quoting *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn. 2001)).

MISSISSIPPI—Strong deference

“When an agency interprets a statute that it is responsible for administering, [the court] must defer to the agency’s interpretation so long as the interpretation is reasonable. Rather than applying its own interpretation when the applicable statute is silent or ambiguous regarding a specific question, the court determines whether the agency’s interpretation was reasonable.” *Titan Tire of Natchez, Inc. v. Miss. Comm’n on Env’tl. Quality*, 891 So. 2d 195, 200 (Miss. 2004) (internal quotations and citations omitted).

“An agency’s interpretation of its own enabling statute is to be given deference. This is due to the practical understanding that an agency far better understands its daily operations needs than the judiciary ever could.” *Wheeler v. Miss. Dep’t of Env’t. Quality Permit Bd.*, 856 So. 2d 700, 704 (Miss. Ct. App. 2003) (internal citation omitted).

“An agency’s interpretations of statutes that it uniquely is to enforce or apply are entitled to deference. Unless the agency’s interpretation overrides a plain meaning that must be given to such a statute or is otherwise unreasonable, a court should accept the interpretation.” *Miss. Dep’t of Corr. v. Harris*, 831 So. 2d 1190, 1192 (Miss. Ct. App. 2002).

MISSOURI—Intermediate deference

“If the agency’s interpretation of a statute is reasonable and consistent with the language of the statute, it is entitled to considerable deference. However, when an administrative agency’s decision is based on the agency’s interpretation of law, the reviewing court must exercise unrestricted, independent judgment and correct erroneous interpretations.” *Morton v. Mo. Air Conservation Comm’n*, 944 S.W.2d 231, 236-37 (Mo. Ct. App. 1997) (internal citation omitted).

MONTANA—Strong deference

“[The Supreme Court] will defer to an agency’s legal determination where, as here, that agency is interpreting a statute that it has been authorized by the legislature to administer.” *Lewis v. B & B Pawnbrokers, Inc.*, 968 P.2d 1145, 1153 (Mont. 1998).

On “judicial review of an administrative agency’s decision . . . [t]he Court defers to an agency’s interpretation of a statute that it administers.” *Waste*

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Mgmt. Partners of Bozeman, Ltd. v. Mont. Dep't of Pub. Serv. Regulation, 944 P.2d 210, 213 (Mont. 1997).

NEBRASKA—Announced de novo with deference discouraged

“Interpretation of statutes presents a question of law, and an appellate court is obligated to reach an independent conclusion, irrespective of the decision made by the court below, with deference to the agency’s interpretation of its own regulations, unless plainly erroneous or inconsistent.” *Gracey v. Zwonechek*, 643 N.W.2d 381, 384 (Neb. 2002).

NEVADA—Intermediate deference

“The district court may decide purely legal questions without deference to an agency’s determination. Accordingly, the reviewing court may undertake independent review of the construction of a statute.” *Bacher v. Office of State Eng’r of Nev.*, 146 P.3d 793, 798 (Nev. 2006) (internal quotations omitted).

“[S]tatutory interpretation of a coordinate governmental branch or an agency that is authorized to execute that statute, unless it conflicts with the constitution or other statutes, exceeds the agency’s powers, or is otherwise arbitrary and capricious, is entitled to deference.” *Cable v. State ex rel. ITS Employers Ins. Co. of Nev.*, 127 P.3d 528, 532 (Nev. 2006).

“Although we review questions of statutory construction de novo, an administrative agency charged with the duty of administering an act is impliedly clothed with the power to construe the relevant laws . . . and the construction placed on a statute by the agency charged with the duty of administering it is entitled to deference.” *State, Dep’t of Bus. & Indus., Office of Labor Comm’r v. Granite Constr. Co.*, 40 P.3d 423, 428 (Nev. 2002) (internal quotations omitted).

NEW HAMPSHIRE—Announced de novo with the possibility of deference to agency expertise or experience

“Administrative interpretation of a statute is entitled to deference, but is not ordinarily controlling. However, where the legislature has entrusted the administrative agency with the primary authority for interpreting the statute, such interpretations may have persuasive effect.” *N.H. Dep’t of Revenue Admin. v. Pub. Employee Labor Relations Bd.*, 380 A.2d 1085, 1086 (N.H. 1977).

NEW JERSEY—Intermediate deference

“Although we are not obliged to defer to an agency decision on a question of law, substantial respect is accorded an agency decision interpreting and applying the statute the agency was created to enforce.” *In re Dennis*, 897 A.2d 399, 403 (N.J. Super. Ct. App. Div. 2006) (internal citation omitted).

“Ordinarily we will defer to an agency’s reasonable construction of its own enabling legislation.” *Pryce v. Scharff*, 894 A.2d 668, 679 (N.J. Super. Ct. App. Div. 2006).

“An agency’s interpretation of a statute is entitled to deference where agency expertise forms the basis for that interpretation, but no such deference is

warranted or appropriate where the agency has exceeded the scope or authority of the enabling legislation.” *T.H. v. Div. of Developmental Disabilities*, 886 A.2d 194, 199 (N.J. Super. Ct. App. Div. 2005) (internal citation omitted).

NEW MEXICO—Announced *de novo* with the possibility of deference to agency expertise or experience

“[W]e are therefore not bound by an agency’s interpretation of law and may substitute our own judgment for that of the agency. We are, however, more likely to defer to an agency interpretation if the relevant statute is unclear or ambiguous, the legal questions presented implicate special agency expertise or the determination of fundamental policies within the scope of the agency’s statutory function, and it appears that the agency has been delegated policy-making authority in the area.” *Dona Ana Mut. Domestic Water Consumers Ass’n v. N.M. Pub. Regulation Comm’n*, 139 P.3d 166, 169-70 (N.M. 2006) (internal alterations, quotations, and citations omitted).

“We give little or no deference to agencies engaged in statutory construction because they have no expertise in that area.” *Phelps Dodge Tyrone, Inc. v. N.M. Water Quality Control Comm’n*, 143 P.3d 502, 506 (N.M. Ct. App. 2006).

NEW YORK—Announced *de novo* with deference discouraged

“While as a general rule courts will not defer to administrative agencies in matters of pure statutory interpretation, deference is appropriate where the question is one of specific application of a broad statutory term.” *O’Brien v. Spitzer*, 851 N.E.2d 1195, 1196 (N.Y. 2006) (internal citations and quotations omitted).

“[When] the matter presented is one of pure statutory interpretation, no deference is accorded to the agency’s determinations.” *Kreitzer v. N.Y. City Dep’t of Bldgs.*, 806 N.Y.S.2d 532, 533 (N.Y. App. Div. 2005).

NORTH CAROLINA—Intermediate deference

“Although the interpretation of a statute by an agency created to administer that statute is traditionally accorded some deference by appellate courts, those interpretations are not binding. The weight of such [an interpretation] 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.” *Wake Forest Univ. Health Scis. v. N.C. Dep’t of Health & Human Servs.*, 638 S.E.2d 219, 221 (N.C. Ct. App. 2006) (quoting *Total Renal Care of N.C., LLC v. N.C. Dep’t of Health & Human Servs., Div. of Facility Servs., Certificate of Need Section*, 615 S.E.2d 81, 85 (N.C. Ct. App. 2005)) (internal quotations omitted).

“‘[W]hen a court reviews an agency’s interpretation of a statute it administers, the court should defer to the agency’s interpretation of the statute . . . as long as the agency’s interpretation is reasonable and based on a permissible construction of the statute.’” *Craven Reg’l Med. Auth. v. N.C.*

Dep't of Health & Human Servs., 625 S.E.2d 837, 844 (N.C. Ct. App. 2006) (quoting *Carpenter v. N.C. Dep't of Human Res.*, 419 S.E.2d 582, 584 (N.C. Ct. App. 1992)).

NORTH DAKOTA—Intermediate deference

“An administrative agency’s interpretation of a statute is entitled to deference if the statute is complex and technical in nature, or if the statute is reenacted after a contemporaneous and continuous construction of the statute by the administrative agency.” *Simon v. Simon*, 709 N.W.2d 4, 10 (N.D. 2006).

“Although an administrative construction of a statute by the agency administering the law is ordinarily entitled to some deference if that interpretation does not contradict clear and unambiguous statutory language, questions of law, including the interpretation of a statute, are fully reviewable on appeal from an administrative decision.” *Victor v. Workforce Safety & Ins.*, 711 N.W.2d 188, 192 (N.D. 2006) (quoting *Houn v. Workforce Safety & Ins.*, 698 N.W.2d 271, 273-74 (N.D. 2005)).

“We will ordinarily defer to a reasonable interpretation of a statute by the agency enforcing it, but an interpretation which contradicts clear and unambiguous statutory language is not reasonable.” *GO Comm. ex rel. Hale v. City of Minot*, 701 N.W.2d 865, 871 (N.D. 2005) (quoting *Lee v. N.D. Workers Comp. Bureau*, 587 N.W.2d 423, 425 (N.D. 1998)).

OHIO—Intermediate deference

“[W]e will give due deference to the director’s reasonable interpretation of the legislative scheme governing his agency.” *Sandusky Dock Corp. v. Jones*, 834 N.E.2d 786, 789 (Ohio 2005) (internal quotations omitted).

“Due deference should be given to statutory interpretations by an agency that has accumulated substantial expertise and to which the General Assembly has delegated enforcement responsibility.” *Ohio Consumers’ Counsel v. Pub. Util. Comm’n*, 856 N.E.2d 940, 950 (Ohio 2006) (quoting *Weiss v. Pub. Util. Comm’n*, 734 N.E.2d 775, 778 (Ohio 2000)).

OKLAHOMA—Announced de novo with deference discouraged

“We decide questions of law and do not defer to agency interpretation of the Constitution or the statutes.” *Metcalf v. Okla. Bd. of Med. Licensure & Supervision*, 848 P.2d 48, 50 (Okla. Civ. App. 1992).

OREGON—Intermediate deference

“[I]f the legislature granted authority to the agency to complete the meaning of a delegative term in a statute, we will defer to the agency’s interpretation so long as it is consistent with the legislature’s purpose.” *Qwest Corp. v. Pub. Util. Comm’n*, 135 P.3d 321, 326 (Or. Ct. App. 2006).

“When the issue involves an administrative agency’s construction of the relevant statute, the weight that we give to the agency’s construction depends on the nature of the statutory terms. If the terms are ‘delegative’ in nature, then judicial review of the agency’s construction is highly deferential.” *Gambie v. Dep’t of Forestry*, 81 P.3d 734, 739 (Or. Ct. App. 2003).

“An agency’s interpretation of a statute may be entitled to some measure of

deference, depending on whether the disputed terms are exact, inexact, or delegative in nature.” *Thomas Creek Lumber & Log Co. v. Bd. of Forestry*, 69 P.3d 1238, 1244 (Or. Ct. App. 2003).

PENNSYLVANIA—Strong deference

“An administrative agency’s interpretation of a statute for which it has enforcement responsibility is entitled to substantial deference.” *Rowland v. Commonwealth, Pub. Sch. Employees’ Ret. Sys.*, 885 A.2d 621, 628 (Pa. Commw. Ct. 2005).

“[W]hen [state courts] are faced with interpreting statutory language, they afford great deference to the interpretation rendered by the administrative agency overseeing the implementation of such legislation.’ Accordingly, ‘our courts will not disturb administrative discretion in interpreting legislation within an agency’s own sphere of expertise absent fraud, bad faith, abuse of discretion or clearly arbitrary action.’” *Universal Health Servs., Inc. v. Pa. Prop. & Cas. Ins. Guar. Ass’n*, 884 A.2d 889, 894 n.9 (Pa. Super. Ct. 2005) (quoting *Winslow-Quattlebaum v. Md. Ins. Group*, 752 A.2d 878, 881 (Pa. 2000)).

RHODE ISLAND—Intermediate deference

“Although factual findings of an administrative agency are afforded great deference, a dispute involving statutory interpretation is a question of law to which we apply *de novo* review.” *Rossi v. Employees’ Ret. Sys.*, 895 A.2d 106, 110 (R.I. 2006).

“[A]n administrative agency will be accorded great deference in interpreting a statute whose administration and enforcement have been entrusted to the agency.” *State v. Cluley*, 808 A.2d 1098, 1103 (R.I. 2002) (quoting *In re Lallo*, 768 A.2d 921, 926 (R.I. 2001)).

SOUTH CAROLINA—Strong deference

“The Court generally gives deference to an administrative agency’s interpretation of an applicable statute or its own regulation. Nevertheless, where, as here, the plain language of the statute is contrary to the agency’s interpretation, the Court will reject the agency’s interpretation.” *Brown v. Bi-Lo, Inc.*, 581 S.E.2d 836, 838 (S.C. 2003).

“The construction of a statute by the agency charged with its administration should be accorded great deference and will not be overruled without a compelling reason.” *Hall v. United Rentals, Inc.*, 636 S.E.2d 876, 883 (S.C. Ct. App. 2006) (quoting *Risinger v. Knight Textiles*, 577 S.E.2d 222, 224 (S.C. Ct. App. 2002)).

SOUTH DAKOTA—No cases available

TENNESSEE—Strong deference

“[I]nterpretations of statutes by administrative agencies are customarily given respect and accorded deference by courts.” *Riggs v. Burson*, 941 S.W.2d 44, 51 (Tenn. 1997).

TEXAS—Intermediate deference

“[W]e need not give as much deference to an agency’s interpretation of its statute if that interpretation deals with a non-technical question of law or a matter outside of the agency’s expertise.” *TXU Generation Co., L.P. v. Pub. Util. Comm’n of Tex.*, 165 S.W.3d 821, 830 (Tex. App. 2005).

“When the interpretation does not involve technical or regulatory matters within the agency’s expertise but requires the discernment of legislative intent, we give much less deference to the agency’s reading of a statute.” *Strayhorn v. Willow Creek Res., Inc.*, 161 S.W.3d 716, 720 (Tex. App. 2005).

“The construction of a statute by the administrative agency charged with its enforcement is entitled to substantial deference, as long as the construction is reasonable and does not contradict the plain language of the statute.” *Houston v. Nelson*, 147 S.W.3d 589, 591 (Tex. App. 2004).

UTAH—Announced *de novo* with the possibility of deference to agency expertise or experience

“Unless the legislature has granted discretion to an agency to interpret statutory language, we review an agency’s construction of statutory provisions under a correction of error standard, granting the agency no deference.” *Comm. of Consumer Servs. v. Pub. Serv. Comm’n of Utah*, 75 P.3d 481, 484 (Utah 2003).

“An exception to this general rule exists if the legislature has either explicitly or implicitly granted discretion to the agency. In these cases, an agency’s statutory construction should only be given deference when there is a grant of discretion to the agency concerning the language in question, either expressly made in the statute or implied from the statutory language.” *Wood v. Labor Comm’n*, 128 P.3d 41, 43 (Utah Ct. App. 2005) (citations and quotations omitted).

“‘[A]n agency’s interpretation of statutory provisions is entitled to deference when there is more than one permissible reading of the statute and no basis in the statutory language or the legislative history to prefer one interpretation over another.’” *Ekshteyn v. Dep’t of Workforce Servs.*, 45 P.3d 173, 175 (Utah Ct. App. 2002) (quoting *Morton Int’l Inc. v. Utah State Tax Comm’n*, 814 P.2d 581, 588 (Utah 1991)).

VERMONT—Strong deference

“Generally, this Court will defer to an agency’s interpretation of a statute it has been charged to execute.” *Butson v. Dep’t of Employment & Training*, 892 A.2d 255, 256 (Vt. 2006).

“Although we give deference to the construction of a statute by an agency responsible for administering it, statutory interpretation is a question of law, and we cannot affirm an unjust or unreasonable interpretation of a statute.” *In re Sleigh ex rel. Unnamed Motorists Accused of DWI Infractions*, 872 A.2d 363, 366 (Vt. 2005).

VIRGINIA—Announced de novo with deference discouraged

“[W]hen, as here, the question involves a statutory interpretation issue, little deference is required to be accorded the agency decision because the issue falls outside the agency’s specialized competence. Pure statutory interpretation is the prerogative of the judiciary.” *Brandt v. Maha Lakshmi Motors, Inc.*, 632 S.E.2d 628, 630 (Va. Ct. App. 2006) (internal citations and quotations omitted).

“Though we defer to an agency’s factual determinations, we afford no such deference to its legal interpretations of statutes.” *Mattaponi Indian Tribe v. Commonwealth*, 601 S.E.2d 667, 675 (Va. Ct. App. 2004).

“Although decisions by administrative agencies regarding matters within their specialized competence are entitled to special weight in the courts, when, as here, the question involves an issue of statutory interpretation, little deference is required to be accorded the agency decision because the issue falls outside the agency’s specialized competence.” *Virginia Imports Ltd. v. Kirin Brewery of Am., LLC*, 589 S.E.2d 470, 477 (Va. Ct. App. 2003) (internal quotations and citations omitted).

WASHINGTON—Announced de novo with the possibility of deference to agency expertise or experience

“[W]e accord deference to an agency interpretation of the law where the agency has specialized expertise in dealing with such issues, but we are not bound by an agency’s interpretation of a statute.” *Preserve Our Islands v. Shorelines Hearings Bd.*, 137 P.3d 31, 37 (Wash. Ct. App. 2006) (internal citations and quotations omitted).

“We do not defer to the Council’s interpretation of legislative intent or the statute’s meaning unless (1) the statute is ambiguous; or (2) the Council is charged with its administration and enforcement.” *Seattle Area Plumbers v. Wash. State Apprenticeship & Training Council*, 129 P.3d 838, 843 (Wash. Ct. App. 2006).

“[T]he courts retain the ultimate authority to interpret a statute.” *Starr v. Wash. State Dep’t of Employment Sec.*, 123 P.3d 513, 516 (Wash. Ct. App. 2005).

WEST VIRGINIA—Strong deference

“If [an agency’s] interpretation of statute is at least as plausible as competing ones, there is little, if any, reason not to defer to . . . [its] construction.” *Appalachian Power Co. v. State Tax Dep’t of W. Va.*, 466 S.E.2d 424, 444 (W. Va. 1995) (internal citations and quotations omitted).

“Deference to the [agency’s] interpretation is especially appropriate where the rule was adopted only after all interest[ed] persons were given notice and opportunity to comment.” *Id.* at 443 (internal citations and quotations omitted).

“Once this Court determines a statute’s clear meaning, we will adhere to that determination under the doctrine of *stare decisis*. An agency’s later determination of the statute is not entitled to deference but will be judged

against that prior judicial determination of the statute's meaning." *Id.* at 439 n.17.

WISCONSIN—Intermediate deference

"In assessing an administrative agency's interpretation of the statutes it enforces, we give it varying degrees of deference, depending on the agency's experience and expertise in implementing and applying those statutes." *State v. Harenda Enters., Inc.*, 724 N.W.2d 434, 438 (Wis. Ct. App. 2006).

"This court generally applies one of three standards of review, with varying degrees of deference, when reviewing an agency's legal conclusions under a statute: great weight deference, due weight deference or *de novo* review." *Patrick Cudahy Inc. v. Labor & Indus. Review Comm'n*, 723 N.W.2d 756, 762 (Wis. Ct. App. 2006).

"A reviewing court under due weight deference need not defer to an agency's interpretation which while reasonable, is not the interpretation which the court considers best and most reasonable." *Id.* at 762 (internal quotations omitted).

"When the question of law concerns the interpretation of a statute that the agency is charged with administering, we generally give either due weight or great weight deference to the agency's interpretation because the agency has some degree of experience or expertise." *Wis. Dep't of Workforce Dev. v. Labor & Indus. Review Comm'n*, 725 N.W.2d 304, 310 (Wis. Ct. App. 2006).

WYOMING—Strong deference

"An agency's interpretation of statutory language which the agency normally implements is entitled to deference, unless clearly erroneous." *Buehner Block Co. v. Wyo. Dep't of Revenue*, 139 P.3d 1150, 1153 (Wyo. 2006).

"We generally defer to the construction placed on a statute by the agency that is charged with its execution, provided, however, that the agency's construction does not conflict with the legislature's intent." *Qwest Corp. v. State ex rel. Wyo. Dep't of Revenue*, 130 P.3d 507, 511 (Wyo. 2006) (quoting *Petroleum Inc. v. State Bd. of Equalization*, 983 P.2d 1237, 1240 (Wyo. 1999)).