Journal of the National Association of Administrative Law Judiciary

Volume 29 | Issue 1 Article 1

3-15-2009

State Agency-Based v. Central Panel Jurisdiction: Is There a Deference?

A. Michael Nolan

State Agency-Based v. Central Panel Jurisdictions: Is There a Deference?

By A. Michael Nolan*

I. INTRODUCTION

When asked to address the student body of Duke Law School in June 1989, Supreme Court Associate Justice Antonin Gregory Scalia[1] planned to deliver a speech filled with commentary concerning some of the top legal issues of the day, including "Law and Astrology."[2] His plans unexpectedly were thwarted. In his presentation, Justice Scalia reflected:

---

* A. Michael Nolan was appointed, on January 1, 1990, as one of the original Administrative Law Judges to serve the Maryland Office of Administrative Hearings (OAH). In that capacity, Judge Nolan has conducted hundreds of hearings, as well as mediations and settlement conferences, in a wide range of administrative law subject areas. He is recognized as a specialist at the OAH in the areas of Motor Vehicle Administration law and Child Support Enforcement law. Prior to his appointment as an ALJ, Judge Nolan was a Hearing Officer for the Maryland Motor Vehicle Administration and, prior to that, a District Court Commissioner for the District Court of Maryland for Anne Arundel County. He graduated with a B.S. in Law Enforcement and Criminal Justice from the University of Baltimore and received his law degree from the University of Baltimore School of Law, *cum laude*. Judge Nolan has been active in the National Association of Administrative Law Judges (NAALJ). From 2001 through 2004 he served on the Board of Governors and then served as Secretary of that organization until 2006. I would like to thank my God, my wife for her patience and Judges Dewberry, Murray and Shaffer of OAH for their guidance and support. I couldn't have done this without them.

1. President Ronald Reagan appointed Justice Scalia to the Court on September 26, 1986.

2. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 511 (1989).

> I was advised . . . that the subject of this lecture series is administrative law, and so I have had to limit myself accordingly. Administrative law is not for sissies - so you should lean back, clutch the sides of your chairs, and steel yourselves for a pretty dull lecture. There will be a quiz afterwards.[3]

Thus forewarned about the potential for tedium in this paper, I will delve into the quagmire of administrative law, with a focus on the administrative agency decision-making function and, in particular, the judicial review of these decisions. The reviewing courts generally grant great favor to the agency's interpretation of statutory terms, or the validity of regulations promulgated by the agency based upon such interpretations. This is true in both the federal and state administrative systems. Not surprisingly, this trend has generated a huge body of law. Essentially, this favorable treatment, known as "deference," refers to the degree that a reviewing judge or court accepts an agency's interpretation of statutory terms, or regulations issued by the agency pursuant to a statute as a reasonable interpretation and application of the statute.

There are two primary types of deference in the administrative justice system. The first of these, which I will refer to as intra-executive deference, involves the level of deference that is given by an agency to proposed decisions rendered by hearing officers or Administrative Law Judges (ALJs) who conduct hearings on the agency's behalf. This varies widely from jurisdiction to jurisdiction. In some situations, the state's Administrative Procedure Act (APA) or the agency's enabling statutes actually require an agency to defer to factual findings the ALJ makes or to the legal conclusions the ALJ reaches. These APA provisions commonly require appellate court action to modify the agency's final order to enforce these intra-executive branch deference requirements.[4] An excellent example of this statutory control of intra-executive deference can be found in Florida's APA, which limits what an agency may modify in an ALJ

---

3. *Id.*

4. For example, a final order may be reversed for a material error in procedure that impaired the fairness of the proceedings. *See*, FLA. STAT. ANN. § 120.68(7)(c)

decision that is not a final order.[5] When an appellate court modifies an agency's final order that was based on statutory allocations of roles between agencies and ALJs, the court is actually enforcing a legislative choice, not choosing the level of deference an agency owes to the ALJ. This type of intra-executive deference is sufficiently involved that it should be the focus of an entirely separate article; I will not discuss it further here. This article addresses the second type of deference, which I will call extra-executive deference. This deference is afforded to administrative agencies by judicial courts reviewing the final administrative agency decisions. Before getting into the main discussion, however, I believe

---

5. The Florida APA significantly restricts modifications an agency may make in its final order to the ALJ's conclusions of law or to the findings of fact:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. The agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefore in the order, by citing to the record in justifying the action.
>
> FLA. STAT. ANN. § 120.57(1)(*l*).

The significant limitation on modifications to conclusions of law "over which [the agency] has substantive jurisdiction" precludes an agency from overruling a presiding ALJ's decision to grant a continuance or to exclude an expert opinion that hadn't been disclosed as the pretrial order required, by characterizing the ALJ's ruling as a legal conclusion the agency is free to change. Agencies have no "substantive jurisdiction" over trial procedure.

some discussion of the history of the development of administrative law would be informative and beneficial towards understanding the underlying concepts.

Simply put, an administrative agency is an entity established by the government, whether federal, state, or local, to carry out some part of that government's purpose. When the government perceives that there is a significant public need, the most likely governmental reaction is the creation of a new agency, or, more frequently, the expansion of the powers and responsibilities of an existing agency.[6] Clearly, when the government creates or modifies an agency, it implicitly grants to that agency the authority to carry out the public's purposes. As long as the initial delegation of authority by the legislature is proper and the administrative agency complies with the APA or other controlling legislation, it may adopt regulations to further its goals. It is important to remember that an agency has only the power and authority delegated to it by the creating body, and cannot exceed the scope of that power.

Agencies, whether federal or state, generally are established by a legislative body. The statute establishing an agency must clearly define the agency's purpose, powers, and procedures; its structure; and its location within the government. An administrative agency has three basic functions. First and foremost, as a component of the Executive branch of government, the agency must carry out effectively the function for which it was established. In the course of carrying out the legislative directive, however, the agency effectively functions in a quasi-legislative fashion, as it must further refine the statute through the adoption of policies and regulations. These have the effect of interpreting and clarifying the enabling statute and carrying out the agency's role (rulemaking). Finally, the agency also performs a quasi-judicial role, as it must apply evenly the regulations it creates to particular cases and enforce this application (adjudication).

The concept of an administrative agency possessing the power to act in a legislative capacity or, for that matter to act in a judicial capacity is, at first blush, somewhat troubling on a constitutional basis, as these functions are within the sole purview of the governmental branches. Questions regarding the constitutionality of

---

6. *See infra* note 8 and accompanying text.

the administrative agency system have been resolved consistently by the courts in the agency's favor for three basic reasons. First, agency rulemaking and adjudication have long pedigrees. In 1789, the first Congress created agencies with rule making power and the ability to render binding decisions. In addition, the agencies are comprised of persons with specialized knowledge in their area of authority and thus are better qualified to handle the agency's responsibilities than the legislative bodies. Finally, the government could not perform the variety of functions currently handled without agencies to make basic rules and handle disputes.[7]

The establishment of administrative agencies simplified the government's process, and enabled the government to complete its work more directly than if the legislature did the job by enacting a law and the courts applied that law in various cases. Government agencies regulate various and diverse actions of businesses and citizens. Some agencies are involved in determining the rights of citizens, such as professional and employee disciplinary actions; professional business licenses and driver's license suspensions; allegations of employment and housing discrimination; and workmen's compensation claims. Other agencies enable the operation of governmental programs, including government entitlement programs such as food stamps, medical assistance, etc.; public utilities, controlling utility rates etc.; retirement and pension systems; special education; public safety; and corrections activities, including inmate grievances and parole hearings.

Administrative law, as we know it, is a relatively recent development. Although the first administrative agency was created by Congress in 1789 to provide pensions for wounded Revolutionary War soldiers, and other agencies were created during the late 1700s to determine the amount of duties charged on imported goods, it was not until 1887 that the first permanent administrative agency was created. The Interstate Commerce Commission (ICC), created by the Interstate Commerce Act,[8] was enacted by Congress to regulate commerce among the states, especially the interstate transportation of persons or property by rail carriers. The ICC was designed to ensure

---

7. *See* RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW 2-3 (Foundation Press 2008).

8. Interstate Commerce Act of 1887, 49 U.S.C. § 10101 (2009).

that carriers involved in interstate commerce provided the public with fair and reasonable rates and services.[9]

In 1936, Supreme Court Justice Harlan Fiske Stone[10] addressed the Conference on the Future of the Common Law, which was presented as part of the Harvard Law School Tercentenary. Justice Stone noted that when the field of administrative law was developed, the legislative bodies took the unprecedented step of delegating official authority to boards and commissions comprised of non-judicial officers, rather than being handled by the court system. He noted that establishment of administrative agencies was perceived differently by other branches of law. He described the reception of the agency concept as follows:

> Under the civil law the rise of a system of administrative law, *independently of the courts*, came as a welcome formulation of principles for the

---

9. The Interstate Commerce Commission was created in response to pervasive and growing anti-railroad agitation. Western farmers, especially those in rural areas, believed that the railroads possessed economic power that they systematically abused. To prevent further escalation of the hostilities, Congress passed legislation enabling the creation of a five-member commission to monitor and control any abuses. This concept was relatively unheard of in government, as it placed power in the hands of a group of individuals rather than in a single person.

The ICA required the Commission to be politically diverse, with no more than three of the five commission members representing any single political party, and strict rules regarding length of the terms and limited bases for removal of commissioners. The agency was empowered to issue "cease-and-desist" orders, and to require "reparations" when a railroad violated the Act's terms. In creating the ICC, then, the ICA seems to have pioneered the concept of a truly independent government agency, but with obvious restrictions.

Although the Commission was empowered to issue orders and assess penalties, these actions were only permitted after affording the suspected violator due process, through a relatively formal trial-like proceeding. In addition, after the Commission completed the process and issued a properly authorized order, its authority ended; the agency had no enforcement role and only the courts had the authority to enforce remedial actions against the railroads.

The Interstate Commerce Commission Termination Act, 49 U.S.C. § 701 *et seq.* (2005), abolished the ICC and transferred its remaining regulatory duties to the Surface Transportation Board (STB).

10. Justice Stone served as an Associate Justice from March 2, 1925 through July 3, 1941, at which time President Franklin D. Roosevelt appointed him Chief Justice. He served in that capacity until his death on April 22, 1946.

> guidance of official actions where no control had existed before. To the common law the use of these administrative agencies came as an encroachment upon the established doctrine of the supremacy of the courts over official action.[11]

Justice Stone referred to the rise of administrative law since the establishment of the ICC, as "the most striking change in the common law of this country."[12]

The U.S. Constitution sets forth a framework for a system of checks and balances to assure equality among the three branches of the government. The specifics of these checks and balances, while hinted at, were not clearly defined. While the Constitution does not actually authorize judicial review of legislative or executive decisions, it does provide that the Court shall "interpret the law." When the Constitution was developed, the creation of administrative agencies had not even been contemplated. The concept of judicial review in the early days of this country referred to the courts having the power to void any legislative or executive act, or any part thereof, if the Court determines that the act was not consistent with the constitutional intent.

In 1803, the Supreme Court under Chief Justice John Marshall, considered *Marbury v. Madison*,[13] a landmark case that firmly established the concept of judicial review of the actions taken by the other government branches. *Marbury* was the first case in which the Supreme Court ruled an act of Congress unconstitutional.

The Court noted:

> *It is emphatically the province and duty of the judicial department [the judicial branch] to say what the law is.* Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

---

11. Harlan Fiske Stone, Supreme Court Justice, Address at the Conference on the Future of the Common Law at Harvard Law (1936) (emphasis added).

12. Harlan Fiske Stone, *The Common Law In The United States*, 50 HARV. L. REV. 4, 16 (1936).

13. Marbury v. Madison, 5 U.S. 137 (1803).

> So if a law [e.g., a statute or treaty] be in opposition to the constitution: if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law: the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. . . .
>
> If then the courts are to regard the constitution and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply. . . .
>
> Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law [e.g., the statute or treaty]. . . . This doctrine would subvert the very foundation of all written constitutions.[14]

The *Marbury* ruling is still valid law. It clearly set forth the role of the judiciary with regard to legislative utterances, and established that the law is not necessarily what the statutes say it is, but what the Court says it is. The concept of judicial deference to the legal and factual determinations of administrative agencies, the principal focus of this article, however, seemingly flies in the face of the *Marbury* holding. In his 1989 speech to Duke University,[15] Justice Scalia, perhaps the most avid supporter on the Court of the concept of reviewing courts deferring to the determinations of executive agencies in certain situations when the statute enacted by a legislative body is ambiguous, or otherwise has not clearly resolved a part of the statute, noted:

> It is not immediately apparent why a court should ever accept the judgment of an executive agency on a question of law. Indeed, on its face the suggestion

---

14. *Marbury,* 5 U.S. at 177-78 (emphasis added).

15. *See supra* note 1.

> seems quite incompatible with Marshall's aphorism that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[16] Surely the law, that immutable product of Congress, is what it is, and its content - ultimately to be decided by the courts cannot be altered or affected by what the Executive thinks about it. I suppose it is harmless enough to speak about "giving deference to the views of the Executive" concerning the meaning of a statute, just as we speak of "giving deference to the views of the Congress" concerning the constitutionality of particular legislation- the mealy-mouthed word "deference" not necessarily meaning anything more than considering those views with attentiveness and profound respect, before we reject them. But to say that those views, if at least reasonable, will ever be *binding*-that is, seemingly, a striking abdication of judicial responsibility.[17]

The law of administrative procedure has developed along with the agencies to ensure that agencies do not abuse their authority. In administrative adjudications, the strict rules observed in a courtroom generally do not apply. Evidentiary rules are relaxed, even to the extent that hearsay is often admissible. In all administrative hearings, regardless of the agency involved, it is crucial that even though they use simplified procedures, the process protect the public's due process rights.

Some challenges to an agency's policies or regulations arise when the rule or regulation is first proposed. More frequently, however, individuals challenge the agency's application when the agency attempts to enforce that rule or regulation. In most instances, when faced with such a dispute, the individual or entity involved has the right to request a hearing before the agency to dispute the proposed agency action. These hearings are conducted by the agency head, or more often, by hearing officers employed for that purpose. There is a significant difference in focus between administrative

---

16. *Marbury*, 5 U.S. at 177.
17. Scalia, *supra* note 2, at 513-14.

adjudication and traditional judicial determinations. The agency is obligated to represent the public interest in keeping with the enabling legislation. By contrast, courts must remain completely impartial to all of the parties before them.

II. THE HISTORY OF DEFERENCE[18]

From the outset, courts have been called upon to determine the limit of government bodies' powers and to consider the weight to be given to their decision-making. As early as 1810, the Supreme Court noted in *United States v. Vowell*, "If the question had been doubtful, the court would have respected the uniform construction which it is understood has been given by the treasury department of the United States upon similar questions."[19]

As the administrative agency system grew and became more widespread, the courts developed several principles designed to limit administrative action. These principles served to ensure that the governmental bureaucracy acted in the public interest. Primary among these principles was that of judicial review of decisions made by the agencies.[20] The approach favoring the agency interpretation is predicated on the belief that when the legislature establishes a government agency and grants that agency decision-making power, courts ought to defer to that agency's reasonable interpretation of any unclear terms of the statute that the agency administers.[21] An agencies' authority to establish regulations, and the true meaning and intent of those regulations, appears to be the most frequently contested area.

Development of the law in the area of deference has been sporadic, at best. Richard L. Pierce, a professor of law at George Washington University, noted that judicial review of agency

---

18. Although the primary focus of this article is on the state administrative law system, I have focused the portion discussing the history of deference on the federal system as the Supreme Court has spoken authoritatively on the applicable issues.

19. United States v. Vowell, 9 U.S. 368, 372 (1810).

20. This review differs substantially from the standard of review for legislative pronouncements.

21. *See generally*, Morton v. Ruiz, 415 U.S. 199 (1974).

interpretations of statutes, which the agency implemented, was "characterized by pervasive inconsistency and unpredictability."[22]

Professor Pierce provided, as support for his analysis, several of the Supreme Court's actions in 1944. In *NLRB v. Hearst Publications*,[23] a case involving the establishment of collective bargaining for the employees, a five-justice majority of the Court criticized the lower court for ignoring the agency's interpretation of the term "employee." The Court upheld the agency's interpretation of the term and instructed reviewing courts to uphold an agency's construction of a statute that is administered by the agency if it has a "reasonable basis in law."[24] The Court stated:

> Everyday experience in the administration of the statute gives it familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the workers for self organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employers. The experience thus acquired must be brought frequently to bear on the question who is an employee under the Act. Resolving that question, like determining whether unfair labor practices have been committed, 'belongs to the usual administrative routine' of the Board.[25]

In *Davies Warehouse Company v. Bowles*,[26] decided in the same term, a six-justice majority did precisely what the Hearst Court warned reviewing courts against. In *Davies*, the Court ignored the agency interpretation of a statutory term, and substituted the Courts own "reasonable view," even though the

---

22. RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW 87 (Foundation Press 2008).

23. NLRB v. Hearst Publ'ns, 322 U.S. 111 (1944).

24. *Id.* at 131.

25. *Id.* at 130.

26. Davies Warehouse Co. v. Bowles, 321 U.S. 144 (1944).

Court acknowledged that the statute was ambiguous, and the agency interpretation was sensible.[27] The Court reasoned:

> Lastly, it is contended that we should accept the Administrator's view in deference to administrative construction. The administrative ruling in this case was no sooner made than challenged. We cannot be certain how far it was determined by the considerations advanced, mistakenly as we think, in its defense in this case. It has hardly seasoned or broadened into a settled administrative practice. If Congress had deemed it necessary or even appropriate that the Administrator's order should in effect be final in construing the scope of the national price-fixing policy, it would not have been at a loss for words to say so. We do not think it should overweigh the considerations we have set forth as to the proper construction of the statute.[28]

Later in the same term, to muddy the waters even further, the Court decided *Skidmore v. Swift & Co.*[29] In *Skidmore,* the Court announced a somewhat confusing standard which courts have interpreted to be a deferential standard of review in some cases, but merely as an acknowledgement that the court would be open to agency persuasion in other cases.[30] The *Skidmore* Court stated:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity

27. *Id.* at 150.
28. *Id.* at 156.
29. Skidmore v. Swift & Co., 323 U.S. 134 (1944).
30. *Id.* at 140.

> 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.*[31]

In *Morton v. Ruiz,*[32] decided thirty years later, the Supreme Court clarified the issue regarding filling in gaps in the statutes when it decreed that "[t]he power of an administrative agency to administer a congressionally created . . . program" includes the ability to make rules "to fill any gap left, implicitly or explicitly, by Congress."[33]

In 1951, the Court considered a NLRB ruling where the Board considered the evidence presented, but which ignored the ALJ's fact finding and legal conclusions that were contrary to the Board's opinion. In *Universal Camera v. NLRB,*[34] the Court indicated its disapproval of this practice by adding an additional qualification to the substantial evidence test. The Court noted that the evidence supporting the agency's conclusion must be substantial in consideration of the record as a whole, and must include all of the record, including the evidence that is not consistent with the agency's conclusion.[35] The Court noted:

> [C]ourts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Congress has imposed on [reviewing courts] the responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed on the record as a whole ... The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate

---

31. *Id.* at 140 (emphasis added).
32. *Ruiz,* 415 U.S. at 199.
33. *Id.*
34. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).
35. *Id.*

> of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both.[36]

III. THE *CHEVRON* TWO-STEP

Finally, in 1984, the Supreme Court issued what many feel was the single most definitive instruction regarding deference to administrative agencies. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[37] the Supreme Court performed a detailed analysis of agency authority, and definitively determined the scope of administrative and executive agencies' power to fill in these statutory gaps. The Court set forth a detailed process and instructed that reviewing courts should apply this test when called upon to analyze an agency's power to regulate, both generally and in relation to a specific statute.[38] In *Chevron*, the Court considered whether the agency's definition of a term in the Clean Air Act was appropriate.[39] The primary issue involved the Environmental Protection Agency's "bubble" policy, which was designed to reduce costs to manufacturers for installing pollution control equipment.[40] The *Chevron* Court upheld the policy, and identified a two-step analysis that a reviewing court should consider when reviewing an agency's construction of a statute. First, the reviewing court should consider whether the controlling or enabling statute has specifically spoken on the exact issue that the agency seeks to regulate.[41] If "Congress has directly addressed the precise question at issue," then the "intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[42]

---

36. *Id.* at 490.

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

38. *Id.* at 842-43.

39. *Id.* at 859-62.

40. *Id.* at 855-56.

41. *Id.* at 842.

42. *Id.* at 843-44.

> If, however, the court determines that Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[43]

Effectively, *Chevron* established a presumption that that when Congress has delegated regulatory power to an agency, to whatever extent the statute is unclear or ambiguous, the reviewing court must assume that Congress has granted the agency authority to fill in the gaps in a reasonable way. There is no requirement that the agency's response be the best option available under the circumstances, merely that it be a reasonable interpretation under the circumstances.

Since its publication, *Chevron* has been the controlling case in the area of judicial deference to administrative interpretations and rules. The decision has become the basis for any evaluation of the allocation of authority among administrative agencies, the federal courts, and state courts. *Chevron* essentially proclaimed that when the plain words of a statute are ambiguous, it is the sole province of the administrative agency responsible for overseeing the implementation of that statute to determine precisely what the law says. From the beginning, however, there has developed an increasingly large body of law refuting the *Chevron* analysis.

Chevron deference does not apply to all agency interpretations of statutes. Many of the battles over the Chevron analysis have settled on whether the Chevron analysis should be applied, or whether another approach is indicated. Several commentators have referred to this as "Chevron Step Zero."[44] Clearly, when the interpretation in

---

43. *Id.* at 843.

44. *See* Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 224-26 (2006). (citing Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 GEO. L.J. 833, 836 (2001) ("[T]he inquiry that must be made in deciding whether courts should turn to the Chevron framework at all" can be called Chevron "step zero."). *See also* Pierce, *supra* note 22.

question results from formal adjudications or is agreed to after rulemaking proceedings, which provided notice and an opportunity for individuals or groups to comment, the Chevron analysis is applicable; beyond that, it is difficult to define a set rule.

In *Auer v. Robbins,*[45] the Court considered an interpretation of the Fair Labor Standards Act regarding which employees should be classified as overtime-exempt. Under regulations promulgated by the Secretary of Labor, one requirement for exempt status was that the employee was required to earn a specified minimum amount on a salary basis, rather than an hourly rate.[46] The Court held that an agency's interpretation of its own regulation was entitled to deference.[47]

In *Christensen v. Harris County,*[48] the Court considered the validity of an opinion letter from the Acting Administration of the Wage and Hour Division of the Department of Labor, and whether the opinion was due any deference. Finding that opinion letters were not entitled to Chevron deference, the Court explained:

> Here, however, we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters-like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law-do not warrant *Chevron*-style deference. Instead, interpretations contained in formats such as opinion letters are "entitled to respect" under our decision in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, (1944), but only to the extent that those interpretations have the "power to persuade." As explained above, we find unpersuasive the agency's interpretation of the statute at issue in this case.[49]

---

45. Auer v. Robbins, 519 U.S. 452 (1997).
46. *Id.* at 455.
47. *Id.* at 462-63.
48. Christensen v. Harris County, 529 U.S. 576 (2000).
49. *Id.* at 587 (citations omitted).

The *Christensen* Court acknowledged that the framework of deference set forth in *Chevron* applied to an agency's interpretation that was contained in a regulation. In the case before the Court, however, the Department of Labor's regulation itself did not address the issue of compelled compensatory time. In response to the agency position that deference was due under the *Auer* holding, the Court found that even though the opinion letter arguably presented an agency's interpretation of its own regulation, *Auer* deference was not warranted.[50] The Court clarified the *Auer* ruling, explaining that deference under *Auer* was warranted only when the language of the regulation under consideration was ambiguous.[51] The Court declared:

> The regulation in this case, however, is not ambiguous - it is plainly permissive. To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation. Because the regulation is not ambiguous on the issue of compelled compensatory time, *Auer* deference is unwarranted.[52]

Furthermore, in *United States v. Mead Corp.,* the Court reviewed a tariff classification ruling made by the United States Customs Service. [53] The Court concluded that the ruling was not entitled to *Chevron* deference.[54] Essentially, the *Mead* Court held that the *Chevron* analysis should only be applied "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[55]

The issue in *Mead* involved a determination of when a federal court is *required* to follow a federal agency's interpretation of a statute it administers. As hinted in *Christensen*, and made clear in

---

50. *Id.* at 588.
51. *Id.*
52. *Id.*
53. United States v. Mead Corp., 533 U.S. 218 (2001).
54. *Id.*
55. *Id.* at 223-24.

Mead, the court deliberately decided to substantially limit the *Chevron* holding that an agency's interpretation of an ambiguous statute should prevail, provided that it is "reasonable," effectively preventing federal courts from interpreting statutes *de novo*.

Considering the Court rulings in *Mead* and *Christensen*, the applicability of *Chevron*-style deference appears limited to situations where an agency's statutory interpretation emerged from a formal adjudication, a notice-and-comment rulemaking, or some other comparable exercise of law-making authority. Where *Chevron* does not apply, the agency's statutory interpretation is reviewed *de novo* and will be considered as persuasive, but not conclusive, under the provisions of the Court ruling in *Skidmore*. The amount of weight given to an agency's statutory interpretation under *Skidmore* 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."[56]

In *Barnhart v. Walton,* the Court considered the Social Security Administration's interpretation of statutory definition of "disability."[57] The agency held that the disabling condition must last, or be expected to last, for at least 12 months. The Court attempted to clarify the relationship between the rulings in *Chevron*, *Christensen,* and *Mead.* The Court explained:

> Regardless, the Agency's interpretation is one of long standing. . . . And the fact that the Agency previously reached its interpretation through means less formal than "notice and comment" rulemaking, see 5 U.S.C. § 553, does not automatically deprive that interpretation of the judicial deference otherwise its due. If this Court's opinion in *Christensen v. Harris County,* 529 U.S. 576 (2000), suggested an absolute rule to the contrary, our later opinion in *United States v. Mead Corp.,* 533 U.S. 218 (2001), denied the suggestion. Indeed, *Mead* pointed to instances in which the Court has applied *Chevron* deference to

56. *Skidmore,* 323 U.S. at 140.

57. Barnhart v. Walton, 535 U.S. 212 (2002).

> agency interpretations that did not emerge out of notice-and-comment rulemaking. It indicated that whether a court should give such deference depends in significant part upon the interpretive method used and the nature of the question at issue. And it discussed at length why *Chevron* did not require deference in the circumstances there present-a discussion that would have been superfluous had the presence or absence of notice-and-comment rulemaking been dispositive.[58]

In applying the *Chevron* analysis to the facts presented in the *Barnhart* case, and affirming the agency interpretation of the statute, the Court declared:

> In this case, the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue. . . . For these reasons, we find the Agency's interpretation lawful.[59]

Several other cases in the Supreme Court have considered the applicability of Chevron deference to specific interpretations by government agencies. In *National Cable & Telecommunication Association v. Brand X Internet Services,*[60] the Court considered the FCC interpretation that cable companies providing broadband Internet services were exempt from regulation under the Telecommunication Act, as they were information services, not telecommunication services.

---

58. *Id.* at 221-22 (citations omitted).

59. *Id.* at 222 (citations omitted).

60. Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

The Court determined that simply because a statute, in this case the Communications Act of 1934, as amended by the Telecommunications Act of 1996, had previously been considered and interpreted by other federal courts did not preclude a subsequent determination by an agency that was charged with execution and enforcement of the act.[61] The Majority theorized as follows:

> A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion. This principle follows from *Chevron* itself. *Chevron* established a "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." Yet allowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute, as the Court of Appeals assumed it could, would allow a court's interpretation to override an agency's. *Chevron's* premise is that it is for agencies, not courts, to fill statutory gaps. The better rule is to hold judicial interpretations contained in precedents to the same demanding *Chevron* step one standard that applies if the court is reviewing the agency's construction on a blank slate: Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.[62]

The Justices of the Supreme Court still remain sharply divided as to applicability of deference, and the degree of deference, which

---

61. *Id.* at 982-83.

62. *Id.* (citations omitted).

should be accorded, in any given situation. For example, in *Smith v. City of Jackson,*[63] a 2005 case considering an EEOC interpretation that the Age Discrimination in Employment Act (Act) permitted disparate-impact claims, the court ruled 8-0 that the case should be dismissed.[64] The Justices, however, took very different approaches in reaching the same result. The plurality, including Justice Stevens, Justice Ginsberg, Justice Souter, and Justice Breyer, held that the statute itself permitted disparate-impact actions, and only looked to the EEOC interpretation for support.

In a concurring opinion, Justice O'Connor, with Justice Kennedy and Justice Thomas, agreed with the plurality's final determination that the case must be dismissed for failure to state a claim, but disagreed with the plurality's conclusion that the Act allowed for disparate-impact claims, noting that age discrimination differed significantly from other forms of discrimination and that many legitimate employment practices would impact differently on the older workers.[65] The O'Connor concurrence also disagreed with Justice Scalia's contention that the EEOC interpretation was due *Chevron* deference, opining that "Quite simply, the agency has not actually exercised its delegated authority to resolve any ambiguity in the relevant provision's text, much less done so in a reasonable or persuasive manner. As to the specific question presented, therefore, the regulation is not entitled to any deference." [66]

In a concurring opinion, Justice Scalia, by far the most outspoken *Chevron* advocate on the court, urged that this was an "absolutely classic case for deference to agency interpretation."[67] Justice Scalia noted in support of his position that the EEOC had been delegated rulemaking authority, had promulgated a regulation after full opportunity for notice and comment, had published a statement with the regulation supporting disparate-impact claims, and had defended that application in several court cases. Justice Scalia then explained:

---

63. Smith v. City of Jackson, 544 U.S. 228, 228 (2005).
64. *Id.* Chief Justice Rehnquist took no part in the decision.
65. *Id.* (O'Connor, J., concurring).
66. *Id.* at 265 (O'Connor, J., concurring).
67. *Id.* at 243 (Scalia, J., concurring).

> The statement of the EEOC which accompanied publication of the agency's final interpretation of the ADEA said the following regarding this regulation: "Paragraph (d) of § 1625.7 has been rewritten to make it clear that employment criteria that are age-neutral on their face but which nevertheless have a disparate impact on members of the protected age group must be justified as a business necessity. . . . The regulation affirmed, moreover, what had been the longstanding position of the Department of Labor, the agency that previously administered the ADEA. . . . And finally, the Commission has appeared in numerous cases in the lower courts, both as a party and as *amicus curiae,* to defend the position that the ADEA authorizes disparate-impact claims . . . the EEOC's reasonable view that the ADEA authorizes disparate-impact claims is deserving of deference. . . . *A fortiori,* it is entitled to deference under the pre- *Mead* formulation of *Chevron,* to which I continue to adhere.[68]

IV. State and Local Agencies

State and local governments also create administrative agencies, many of which mirror federal agencies. Thus, the individual states have agencies that control transportation, public health, public assistance, education, natural resources, labor, law enforcement, agriculture, commerce, and revenue. State agencies often develop regulations that differ from those promulgated by their federal counterparts. In the spirit of administrative agency, state and local governments also create agencies that help address compelling, peculiarly local concerns.

In many cases, the ability to conduct hearings is delegated by the legislature to state and local administrative agencies regarding challenges to the agency's actions, or to provide information to assist the agency in carrying out its mission. Traditionally, these hearings were conducted by the agency head, an administrative board or tribunal, or by hearing officers employed by the agency involved.

---

68. *Id.* at 245 (citations omitted).

More recently, however, there is, at a state level, a trend toward creating a central panel of hearing officers, frequently called Administrative Law Judges (ALJs), who handle hearings for several different agencies, but who are employed by a separate and independent government agency. [69]

The Central panel concept is described on the webpage of the National Association of Administrative Law Judiciary (NAALJ) as follows:

> More than half of the states plus the cities of New York and Chicago, as well as the District of Columbia, in large part, have taken the administrative law judge function from the executive agency and have placed that function into a separate agency. This separate agency, created solely for the purpose of adjudication, is sometimes called a Central Panel, or, more specifically, a Central Hearing Agency (CHA) or Office of Administrative Hearings (OAH).
>
> Many CHA states have only two or three agencies within their jurisdiction, while other states have a full panoply of responsibility. Indeed, there may be states included which, upon scrutiny, may not have completely severed the adjudicatory function from executive agencies.[70]

In some of the appeals heard by the Central panel, the ALJ prepares a recommended decision, which then is presented to the agency with proposed findings of fact and proposed conclusions of law. The agency then evaluates the recommendations, and issues the

---

69. As of this writing twenty-six states have created central panels of various sizes and with varied jurisdiction. These states are: Alabama, Alaska, Arizona, California, Colorado, Florida, Georgia, Hawaii, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, North Carolina, North Dakota, Oregon, South Carolina, Tennessee, Texas, Washington, Wisconsin, and Wyoming. In addition three cities have developed central panel hearing agencies: Chicago, Illinois, the District of Columbia, and New York, New York.

70. National Association of Administrative Law Judiciary, http://www.naalj.org/panel.html (last visited Jan.14, 2009).

final agency decision on the appeal. In many of the central panel jurisdictions, however, or in at least a portion of the appeals considered by the central panel in a jurisdiction, the agency delegation includes the ability to render the final agency decision. If the agency disagrees with the ruling, it must appeal that decision as would any party to a dispute. In some cases, however, the agency is "stuck" with the central panel decision. In Louisiana, for example, the Division of Administrative Law (DAL) was created by the legislature in 1996. The enabling statute provides, in pertinent part, as follows:

> Louisiana Revised Statute (LRS) 49:992.
>
> B.
> 2. In an adjudication commenced by the division, the administrative law judge shall issue the final decision or order, whether or not on rehearing, and the agency shall have no authority to override such decision or order. Upon the issuance of such a final decision or order, the agency or any official thereof shall comply fully with the final order or decision of the administrative law judge.
>
> 3.Nothing in this Section shall affect the right to or manner of judicial appeal in any adjudication, irrespective of whether or not such adjudication is commenced by the division or by an agency. However, no agency or official thereof, or other person acting on behalf of an agency or official thereof, shall be entitled to judicial review of a decision made pursuant to this Chapter.[71]

The constitutionality of the prohibition of agency appeals was challenged in the Louisiana Supreme Court and subsequently upheld in *Wooley v. State Farm Fire and Casualty Ins. Co.*[72] The case involved an insurance form, which was found deficient by the

---

71. LA. REV. STAT. ANN. § 49:92 (2009).
72. Wooley v. State Farm Fire and Cas. Ins. Co. 893 So.2d 746 (La. 2005).

Commissioner of Insurance; therefore, the form could not be used in Louisiana. State Farm requested a hearing, which was subsequently conducted by an ALJ employed by the DAL.[73] After the hearing, the ALJ specifically found that the form complied in wording and meaning with the applicable law.[74] He issued a decision in favor of State Farm, ordering the Department of Insurance to approve the RCU form as submitted by State Farm.[75] The Commissioner petitioned for judicial review to the District Court.[76] The case worked its way through the system, and ultimately was decided by the Supreme Court of Louisiana. The Court held that the challenged statutory provisions complied with the State constitution, and denied the Commissioner's request.[77] The Court explained:

> Following the established principle that appeals by state agencies of decisions made by other agencies are disfavored in the absence of a statutory right of appeal, we conclude that the Commissioner is not entitled to appeal the decision of the ALJ. We see no constitutional impediment to the legislature's decision to deny such an appeal right to the Commissioner. We have already recognized that the ALJ did not exercise judicial power when he interpreted the law relating to a traditionally regulatory matter, and the Commissioner has not shown how the lack of a right to appeal changes the nature of the power exercised by the ALJ. We discern no violation of the requirement of separation of powers. Instead of viewing the Commissioner's lack of a right to appeal the ALJ's adverse decision as a usurpation of judicial power, we view it as a lack of procedural capacity on the part of the Commissioner. The legislature has chosen to deny the right of judicial review to one executive branch office when another executive branch office has ruled

73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*

> against it. Essentially, the legislature has chosen to allow the ALJs to adjudicate, and in some cases to finally adjudicate, various matters concerning the insurance industry in this state and to reduce the Commissioner's ability to regulate insurance by prohibiting him from overriding the ALJs decision or order and from seeking judicial review of an adverse decision or order. While we recognize that one may question the wisdom of this decision, it is within the legislature's prerogative to make this change. As we have stated repeatedly throughout this opinion, while the Commissioner of Insurance is a constitutionally-created office, the Commissioner has no constitutionally-defined powers and duties. He has the constitutional right to exist, but, in the absence of a constitutional amendment, it is the legislature that has the right to define his powers and duties.[78]

In most jurisdictions, however, regardless who makes the final agency decision, both the individual and the agency involved have the right to have that determination reviewed by the courts. This judicial review is one of the foundations of the administrative law system.

While the Supreme Court was busy developing the varied approaches to deference, each of the state courts was attempting to adapt and create its own approach to the question of what deference the reviewing court owes to the agency's decision. What has resulted is a scattered body of law wherein deference is granted or denied seemingly at the whim of the reviewing judge or panel. To illustrate this contention, in 2001, before the D.C. Central Panel was established, the District of Columbia Court of Appeals considered a case which required the court to review a decision that was made by the Director of the Department of Employment Services (DOES) denying the Appellant relief from a special fund created under the

78. *Id.* at 769-70 (citations omitted).

District of Columbia Workers' Compensation Act of 1979.[79] The ruling explained that jurisdiction's approach as follows:

> The precise question at issue here is ultimately a matter of law and this court remains "the final authority on issues of statutory construction." . . . However, it is a firmly established rule in this jurisdiction that "an agency's interpretation of its own regulations or of the statute which it administers is generally entitled to great deference from this court." . . . To this end, "[o]rdinarily, therefore, this court will not attempt to interpret the agency's statute until the agency itself has done so. . . . Instead, we will remand to permit the agency to engage in the necessary analysis of the legislation it is charged with carrying out." [80]

Although this approach seems relatively straight-forward and suggests that the courts generally will defer to the agency's interpretation, the Court enunciated a restrictive caveat applicable to the agency's interpretation. The Court stated:

> [T]he degree of deference to be accorded to such agency interpretation is a function of the process by which that interpretative ruling has been arrived at and the degree to which the agency's administrative experience and expertise have contributed to the process. For example, "[w]hen it appears that the agency (or, in this case, the Director) did not conduct any analysis of the language, structure, or purpose of the statutory provision, it would be incongruous to accord substantial weight to [the] agency's determination. . . . Likewise, "if the agency's decision

79. Genstar Stone Products Co. v. Dep't of Employment Servs., 777 A.2d 270 (D.C. 2001).

80. *Id.* at 272 -73 (citations omitted).

> is based upon a material misconception of the law, this court will reject it."[81]

On May 22, 2008, Judge Blackburne-Rigsby, writing for the D.C. Court of Appeals, seemed to indicate that decisions rendered by ALJs of the Office of Administrative Hearings would be entitled to deference based on the same standard applied to an agency head's decisions. The Court considered a student's petition for review of an ALJ's final decision denying his request for reimbursement from the District of Columbia Department of Human Services Rehabilitation Service Agency (RSA) for tuition and other costs for his Fall 2005 semester at Beacon College.[82] Finding that the ALJ's decision was not arbitrary or capricious and was based on substantial evidence, the court noted:

> In reviewing an OAH decision, we may reverse only if the findings are not supported by substantial evidence in the record or if the decision is grounded on a mistaken legal premise or is an abuse of discretion. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Substantial evidence may exist to support a conclusion different than the one reached by the ALJ, but this court may not substitute its review of the record for that of the ALJ.
>
> The law is also well settled that "an agency's interpretation of its own regulations or of the statute which it administers is generally entitled to great deference from this court."[83]

Two months later, however, a different panel of judges from the same court considered an ALJ's final decision regarding the Department of Public Works (DPW) allegation that a property owner

---

81. *Id.* at 273 (citations omitted).
82. Takahashi v. D.C. Dep't of Human Servs., 952 A.2d 869 (D.C. 2008).
83. *Id.* at 874 (citations omitted).

violated the Litter Control Act.[84] After an evidentiary hearing the ALJ found no violation of the Act, although she did impose a fine on the property owner for failing to timely respond to DPW's citation.[85] On appeal, Senior Judge Schweib held that no deference was due to OAH decisions. Judge Schweib noted:

> Although we accord appropriate weight to the interpretation of a statute by the agency which is charged with its enforcement, and which therefore ordinarily has specialized expertise, the OAH is vested with the responsibility for deciding administrative appeals involving a substantial number of different agencies. For this reason, it does not have the kind of subject matter expertise with respect to the Litter Control Act that would warrant deference on our part when we interpret the statute.[86]

It is apparent from these cases that the D.C. court is unsure which approach to take, and it remains to be seen which approach will prevail. While in most situations, each state is internally consistent, the states widely differ from each other in their overall approach. For example, the Michigan Supreme Court, in the decision of *In re Complaint of Rovas Against SBC Michigan,* considered the Public Service Commission's (PSC's) determination that a company violated the Michigan Telecommunications Act by making false statements to customers regarding the source of their telecommunications problems. [87] The Court reaffirmed its support of the holding rendered in *Boyer-Campbell v. Fry.*[88] That decision held that an agency's construction of a statute by those charged with the duty of executing it is entitled to "the most respectful consideration" and ought not to be overruled without sound reasons.[89] The Court clarified, however, that such constructions are not binding on the

---

84. Washington v. D.C. Dep't of Pub. Works, 954 A.2d 945 (D.C. 2008).

85. *Id.*

86. *Id.* at 948 (citations omitted).

87. *In re* Complaint of Rovas Against SBC Mich., 754 N.W.2d 259 (Mich. 2008).

88. Boyer-Campbell v. Fry, 260 N.W. 165 (Mich. 1935).

89. *Id.*

courts. The Court explained that these interpretations serve as "an aiding element" to be given weight in construing such laws and acknowledged that the interpretation is sometimes deferred to when not in conflict with the indicated spirit and purpose of the legislature.[90]

The *Rovas* court, while acknowledging that the agency decisions were due some deference, specifically refused to adopt the *Chevron* approach, stating:

> While the *Chevron* inquiries are comparatively simple to describe, they have proven very difficult to apply. This Court has never adopted *Chevron* for review of state administrative agencies' statutory interpretations, and we decline to adopt it now. The vagaries of *Chevron* jurisprudence do not provide a clear road map for courts in this state to apply when reviewing administrative decisions. Moreover, the unyielding deference to agency statutory construction required by *Chevron* conflicts with this state's administrative law jurisprudence and with the separation of powers principles discussed above by compelling delegation of the judiciary's constitutional authority to construe statutes to another branch of government. For these reasons, we decline to import the federal regime into Michigan's jurisprudence.[91]

The *Rovas* Court summarized Michigan's approach to agency interpretations of statutes in terms very similar to those contained in *Skidmore* as follows:

> This case concerns judicial review of an administrative agency's interpretation of a statute. This Court has not always been precise in articulating the proper standard for reviewing such interpretations. However, in accordance with longstanding Michigan

---

90. *Id.* at 170.

91. *In re* Complaint of Rovas Against SBC Mich., 754 N.W.2d 271-72 (Mich. 2008).

> precedent and basic separation of powers principles, we hold and reaffirm that *an agency's interpretation of a statute is entitled to "respectful consideration,"* but courts may not abdicate their judicial responsibility to interpret statutes by giving unfettered deference to an agency's interpretation. Courts must respect legislative decisions and interpret statutes according to their plain language. An agency's interpretation, to the extent it is persuasive, can aid in that endeavor.[92]

Other States, however, have approached the question from a different direction. The Texas Court of Appeals, in *Public Utility Commission of Texas v. Gulf States Utilities Co.*, applied a "plain error" standard regarding an agency's approach to one of its own regulations. [93] Considering a final order issued by the Public Utility Commission in contested rate case, the Court stated:

> The Commission's interpretation of its own regulations is entitled to deference by the courts. . . . Our review is limited to determining whether the administrative interpretation "is plainly erroneous or inconsistent with the regulation." . . . However, if the Commission has failed to follow the clear, unambiguous language of its own regulation, we must reverse its action as arbitrary and capricious.[94]

In *Combined Specialty Insurance Co. v. Deese,* the Court reviewed a decision by an appeals panel of the Texas Workers' Compensation Commission (TWCC) denying an appeal filed with the TWCC as untimely. [95] The court explained that it considered an agency's interpretation to be "plainly erroneous" if it is unreasonable.[96] By doing so, the Court expanded the deference threshold to include not only a requirement that the agency's

---

92. *Id.* at 272 (emphasis added).

93. Pub. Utility Comm'n of Tex. v. Gulf States Utilities Co., 809 S.W.2d 201 (Tex. 1991).

94. *Id.* at 207 (citations omitted).

95. Combined Specialty Ins. Co. v. Deese, 266 S.W.3d 653 (Tex. App. 2008).

96. *Id.*

interpretation not be arbitrary and capricious, but also that it be reasonable. The Court explained:

> Recently, we held that an agency's interpretation of a statute it is charged with enforcing is entitled to "serious consideration" by the courts, "so long as that construction is reasonable and does not contradict the plain language of the statute." . . . Similarly, we defer to an agency's interpretation of its own rules "as long as its interpretation is reasonable."[97]

The Texas Court of Appeals provided a clear example of what it considered to be an unreasonable interpretation of a rule by an agency, in this case the TWCC. The Court stated:

> [T]he principle of judicial deference does not require blind obeisance to every agency determination. ... TWCC rules required it to send copies of all orders both to the claimant and to the claimant's attorney, if any. Claimant Frank, who was represented by counsel, lost her hearing before a hearing officer, but the TWCC sent the hearing officer's order to Frank alone, and not to her attorney. Frank's attorney did not find out about the order until thirty-seven days after the TWCC mailed the decision to Frank. Even though he filed a request for review with the appeals panel that same day, the appeals panel dismissed the appeal as untimely, interpreting the fifteen-day deadline to run from Frank's receipt of the order. The trial court dismissed Frank's suit for judicial review, but the Austin Court of Appeals reversed, concluding that the TWCC's interpretation of the fifteen-day deadline was so unreasonable that it was not entitled to deference. The court noted that the dual-notice regulation was plainly intended to protect claimants' rights by ensuring that both the claimant and his or her attorney received copies of all written communications from

97. *Id.* at 661 (citations omitted).

> the TWCC. The appeals panel unreasonably eviscerated the purpose of the dual-notice regulation by holding that the fifteen-day appeal deadline was triggered when the TWCC sent the decision to the claimant without regard to when (or even if) it sent the decision to the claimant's counsel. Accordingly, the court of appeals rejected the TWCC's unreasonable interpretation of its regulations, concluding that the fifteen-day deadline did not begin to run until the TWCC sent the decision to both the claimant and her attorney.[98]

As do many of the States, the Texas courts treat an agency's interpretations of law differently from its interpretations of fact in determining what deference is due to an Administrative Law Judge's decision, as well as to which parts of that decision deference is due. In *Texas Department of Public Safety v. Alford*, the Texas Supreme Court considered an appeal challenging an ALJ's final decision and order authorizing the suspension of the licensee's commercial license for two years for refusing to submit to a chemical test. [99] The Court explained:

> [W]hether there is substantial evidence to support an administrative decision is a question of law, and on questions of law, neither the trial court nor the administrative law judge is entitled to deference on appeal. Irrespective of the administrative law judge's mistake in referencing the statute, there was substantive evidence to support his findings [of fact], which *are* entitled to deference, and his ultimate decision.[100]

The Wisconsin courts have instituted a multi-layer system of deference based on the agency's level of experience dealing with the

---

98. *Id.* at 661-62 (citations omitted).

99. Tex. Dep't of Pub. Safety v. Alford , 209 S.W.3d 101 (Tex. App. 2006).

100. *Id.* at 103.

area in question. The Wisconsin Supreme Court summarized its three levels of deference as follows:

> A reviewing court accords an interpretation of a statute by an administrative agency one of three levels of deference-*great weight, due weight* or *no deference*-based on the agency's expertise in the area of law at issue.
>
> An agency's interpretation of a statute is entitled to *great weight deference* when: (1) the agency was charged by the legislature with the duty of administering the statute; (2) the interpretation of the agency is one of long-standing; (3) the agency employed its expertise or specialized knowledge in forming the interpretation; and (4) the agency's interpretation will provide uniformity in the application of the statute.
>
> We grant an intermediate level of deference, *due weight*, "where an agency has some experience in the area, but has not developed any particular expertise in interpreting and applying the statute at hand" that would put the agency in a better position to interpret the statute than a reviewing court.
>
> We apply *de novo review* when "there is no evidence that the agency has any special expertise or experience interpreting the statute[,] . . . the issue before the agency is clearly one of first impression, or . . . the agency's position on an issue has been so inconsistent so as to provide no real guidance."[101]

Interestingly, the Wisconsin Court noted that under the "due weight" standard, there are times when a reviewing court is justified in replacing the agency's judgment with its own. The Court explained:

---

101. County of Dane v. Labor & Indust. Review Comm'n, 744 N.W.2d 613, 615-16 (Wis. 2007) (emphasis added).

> The deference allowed an administrative agency under due weight is not so much based upon its knowledge or skill as it is on the fact that the legislature has charged the agency with the enforcement of the statute in question. [Under the due weight standard] . . . a court will not overturn a reasonable agency decision that comports with the purpose of the statute unless the court determines that there is a more reasonable interpretation available. [102]

The Maryland courts have consistently supported deference to a final agency decision. Judge Eldridge, a recognized expert in Maryland administrative law described the Maryland approach as follows:

> A court's role in reviewing an administrative agency adjudicatory decision is narrow, it "is limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law."
>
> In applying the substantial evidence test, a reviewing court decides whether a reasoning mind reasonably could have reached the factual conclusion the agency reached. A reviewing court should defer to the agency's fact-finding and drawing of inferences if they are supported by the record. A reviewing court "must review the agency's decision in the light most favorable to it; . . . the agency's decision is prima facie correct and presumed valid, and . . . it is the agency's province to resolve conflicting evidence" and to draw inferences from that evidence.
>
> Despite some unfortunate language that has crept into a few of our opinions, a 'court's task on review is *not* to substitute its judgment for the expertise of those persons who constitute the administrative agency.

---

102. *Id.* at 834 (citations omitted).

> Even with regard to some legal issues, a degree of deference should often be accorded the position of the administrative agency. Thus, an administrative agency's interpretation and application of the statute, which the agency administers, should ordinarily be given considerable weight by reviewing courts. Furthermore, the expertise of the agency in its own field should be respected.[103]

In *Tabassi v. Carroll County Department of Social Services*, a case challenging the Office of Administrative Hearings' (OAH's) interpretation of a statute, the Appellant was an individual who had been accused of child neglect and as a result, his name would be entered in the State's central registry of child abusers and neglectors.[104] He sought judicial review of the (OAH's) dismissal of his appeal without the opportunity for a contested case hearing.[105] The dismissal under appeal resulted from the individual's conviction for reckless endangerment and child access to firearms in a related criminal proceeding.[106] Finding that the circumstances failed to satisfy the

---

103. Marzullo v. Kahl, 783 A.2d 169, 176-77 (Md. 2001) (citations omitted).

104. Tabassi v. Carroll County Dep't of Social Servs, 957 A.2d 620 (Md. 2008).

105. *Id.*

106. Md. Code Ann., Fam. Law § 5-706.1(b) provides, in pertinent part, as follows:

> (b)(1) In the case of a finding of indicated abuse or neglect, an individual may request a contested case hearing to appeal the finding in accordance with Title 10, Subtitle 2 of the State Government Article by responding to the notice of the local department in writing within 60 days.
>
> ...
>
> (3)(i) If a criminal proceeding is pending on charges arising out of the alleged abuse or neglect, the Office of Administrative Hearings shall stay the hearing until a final disposition is made.
>
> (ii) If after final disposition of the criminal charge, the individual requesting the hearing is found guilty of any criminal charge arising out of the alleged abuse or neglect, the Office of Administrative Hearings shall dismiss the administrative appeal.

MD. CODE ANN., FAM. LAW §5-706(1)(b) (West 2009).

statutory requirements for dismissal, the Maryland Court of Special Appeals noted:

> We apply a limited standard of review and will not disturb an administrative decision on appeal "if substantial evidence supports factual findings and no error of law exists." "[I]f the issue before the administrative body is 'fairly debatable', that is, that its determination involved testimony from which a reasonable man could come to different conclusions, the courts will not substitute their judgment for that of the administrative body." We are under no constraint, however, " 'to affirm an agency decision premised solely upon an erroneous conclusion of law.'"[107]

V. NON-CENTRAL PANEL STATES:

A sampling of the states which only employ agency-based hearing personnel rather than an independent central hearing panel used by many agencies, reveals that the approach taken by the appellate courts is similar to that taken by central-panel jurisdictions.

West Virginia takes a divided approach to the deference question, similar to that of Texas. It grants great deference to decisions of fact and credibility rendered by a Hearing Examiner or Administrative Law Judge, requiring a showing of clear error before the decision is set aside. Unlike Maryland, however, which still grants some deference, the courts require a de novo review of conclusions of law and application of the law to the facts, granting no deference to the agency determination whatsoever. In *Graham v. Putnam County Board of Education,* the court considered a final decision made by an ALJ for the Education and State Employee's Grievance Board finding that the county board of education had properly suspended a principal.[108] The Court found that the minimal due process requirements were satisfied and rationalized:

---

107. *Tabassi*, 957 A.2d at 1007 (citations omitted).

108. Graham v. Putnam County Bd. of Educ., 575 S.E.2d 134 (W. Va. 2002).

> Grievance rulings involve a combination of both deferential and plenary review. Since a reviewing court is obligated to give deference to factual findings rendered by an administrative law judge, *a circuit court is not permitted to substitute its judgment for that of the hearing examiner with regard to factual determinations.* Credibility determinations made by an administrative law judge are similarly entitled to deference. Plenary review is conducted as to the conclusions of law and application of law to the facts, which are reviewed de novo. . . . [W]e conclude that absent a showing of clear error, . . . the administrative law judge's factual findings must stand.[109]

Two years later, the West Virginia Supreme Court of Appeals clarified its reasoning regarding the standard to be applied in another case:

> Additionally, in W. Va. Code 18-29-7, the Legislature has indicated that the decision of a hearing examiner should be final unless it is contrary to the law or that the hearing examiner acted in excess of his statutory authority, or that the decision was a result of fraud or deceit, or was clearly wrong in view of the probative and substantial evidence in the record as a whole, or, finally, was arbitrary, capricious or characterized by an abuse of discretion or by a clearly unwarranted exercise of discretion.[110]

The Alabama Court of Civil Appeals recently noted that:

> Although the order of an ALJ is to be presumed prima facie correct in an appeal of that order in the circuit court, Ala. Code 1975, § 40-2A-9(g)(2), this court's standard of review does not require that it give

---

109. *Id.* at 141 (emphasis in original).

110. Crow v. Wayne County Bd. of Educ., 599 S.E.2d 822, 824 (W. Va. 2004).

> deference to either the ALJ's decision or the circuit court's judgment. Instead, because this is an appeal from a summary judgment and involves only questions of law, our review of the matter is de novo.[111]

The Court stressed that substantial deference was due to agency decisions, and that these interpretations "must stand" if they are reasonable.[112] The Court explained:

> The fact that Alabama's "bad debt" regulation is not a statute and is instead an administrative regulation does not negate the overriding principles that guide us to narrowly construe statutes providing for tax exemptions, credits, and refunds, because " 'regulations are regarded as having the force of law and, therefore, become a part of the statutes authorizing them." ' . . . In addition, " '[a]n agency's interpretation of its own regulation must stand if it is reasonable, even though it may not appear as reasonable as some other interpretation."[113]

Mississippi's Courts recently considered the deference question, and took an extremely hard-line constitutionally based approach in favor of the agencies right to interpret and apply their own rules and regulations as well as relevant statutes. The Court stated:

> In order to maintain the balance between the distinct branches of government, this Court employs a limited inquiry into administrative-agency decisions. "In reviewing an administrative agency's findings of fact, the [trial] court and this Court afford great deference to an administrative agency's construction of its own rules and regulations and the statutes under which it

---

111. State Dep't of Revenue v. Wells Fargo Fin. Acceptance Ala., Inc., 2008 WL 4952480, 6* (Ala. Civ. App. 2008).

112. *Id.*

113. *Id.* (citations omitted).

> operates." . . . However, an agency's interpretation of its own regulation must be overturned if "so plainly erroneous or so inconsistent with either the underlying regulation or statute as to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."[114]

New Hampshire, on the other hand, while acknowledging that some deference to agency decisions is due, recently held that all administrative decisions are reviewed by that Court de novo. In *Appeal of Vicky Morton*, the Court stated:

> We review the [agency's] interpretation of statutes and administrative rules *de novo*. . . . In both instances, we ascribe the plain and ordinary meanings to words used, . . . looking at the rule or statutory scheme as a whole, and not piecemeal. . . . Although we accord deference to the [agency's] interpretation, that deference is not absolute. We still examine its interpretation to determine if it is consistent with the language of the regulation and with the purpose the regulation is intended to serve.[115]

Colorado, although a central panel state, takes a similar approach, requiring de novo review of an agency's interpretation. In *Benuishis v. Industrial Claim Appeals Office of State,* the Colorado Court of Appeals stated:

> We review an agency's statutory and regulatory interpretations de novo. Our primary task in interpreting regulations is to give effect to the intent of the enacting body. To discern that intent, we first look at the plain language of the regulation and interpret its

---

114. Limbert v. Miss. Univ. for Women Alumnae Ass'n, Inc., 998 So.2d 993, 1000 (Miss. 2008).

115. Appeal of Vicky Morton, 960 A.2d 332, 334 (N.H. 2008) (citations omitted).

> terms in accordance with their commonly accepted meanings.[116]

In *Commissioner, Environmental and Public Protection Cabinet v. Sierra Club*, the Kentucky Appellate Court noted as follows:

> In reviewing an agency's decision, we must determine whether the action taken by the agency was arbitrary. . . . An action is arbitrary if it is not based on substantial evidence in the record. Substantial evidence is defined as evidence that "when taken alone or in the light of all the evidence, it has sufficient probative value to induce conviction in the minds of reasonable men." . . . If we determine that there is substantial evidence to support the agency's decision, we must determine whether the agency was correct in its application of the law to the facts.[117]

The Court, however, added this caveat:

> [C]ourts are . . . required to give the words of a statute their plain meaning, which prevents a court from adding language to the statute which does not presently exist." An agency is bound by the regulations it promulgates and regulations adopted by an agency have the force and effect of law. . . . An agency's interpretation of its regulations is valid, however, only if it complies with the actual language of the regulation.[118]

In a recent decision, the Virginia Court recognized the need for "great" deference to agency interpretations of its own regulations due to the expertise of the agency that created the regulation. In *Board of*

---

116. Benuishis v. Indus. Claim Appeals Office of State, 195 P.3d 1142, 1145 (Colo. App. 2008) (citations omitted).

117. Envtl. & Pub. Prot. Cabinet v. Sierra Club, 2008 WL 4270096, 3* (Ky. App. 2008) (depublished).

118. *Id.* (citations omitted).

Supervisors of Culpeper County v. State Building Code Technical Review Board, the Court noted that this did not release the reviewing courts from their responsibilities.[119] The court explained:

> The circuit court nonetheless deferred to the Technical Review Board's reasoning, correctly noting that courts give "great deference" to an agency's interpretation of its own regulations. This deference stems from Code § 2.2-4027, which requires that reviewing courts "take due account" of the "experience and specialized competence of the agency" promulgating the regulation.[120]

The Court continued:

> Even so, "deference is not abdication, and it requires us to accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ."[121]

Finally, the *Culpeper County* court cautioned agencies about the potential for overreaching their authority and responsibilities:

> No matter how one calibrates judicial deference, the administrative power to interpret a regulation does not include the power to rewrite it. When a regulation is "not ambiguous," judicial deference "to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." Though agencies may be tempted to adjudicate their way around unwanted regulations,

---

119. Bd. of Supervisors v. State Bldg. Code Tech. Review Bd., 663 S.E.2d 571, 574 (Va. App. 2008).

120. *Id. at* 574 (citations omitted).

121. *Id.* (citations omitted), *but compare* Justice Scalia's earlier concern about courts abdicating their responsibilities by accepting deference. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 514 (1989) ("But to say that those views, if at least reasonable, will ever be *binding*-that is, seemingly, a striking abdication of judicial responsibility.").

> such overreaching undermines the notice and public hearing procedures of the rulemaking process-thereby putting in jeopardy the "enhanced political accountability of agency policy decisions adopted through the rulemaking process" and the democratic virtue of allowing "all potentially affected members of the public an opportunity to participate in the process of determining the rules that affect them."[122]

VI. CONCLUSION

The remaining states approach deference in a similar manner to those listed above, applying a substantial evidence test, and requiring clear error before reversing the agency determination. Accordingly, individual discussion of each state would be cumulative. Surprisingly lacking from these decisions, other than those from Washington D.C., is any significant discussion of the nature of the decision maker. Courts review administrative decisions and grant deference in varied ways, but it seems that each jurisdiction applies an internally consistent approach, and it makes no difference whether a central panel ALJ, an agency-employed hearing officer, or an agency head makes the ultimate decision.

The entire justification for the concept of deference to an agency's determinations rests upon the individual agency's specialized knowledge of the subject matter area within which it functions. Obviously, constant exposure results in the development of expertise in the area. When an agency head delegates decision making authority to an independent agency, such as a central hearing panel, however, the actual decision maker frequently has no definitive experience in the field at issue, and makes the decision predicated solely upon the testimony presented and the controlling regulations and statutes and the manner in which these were applied to the facts of the case at hand. As the D.C. Court of Appeals pointed out in *Washington v. District of Columbia Department of Public Works*, an ALJ employed by an independent central panel hears appeals involving a substantial number of different agencies.[123] For

---

122. *Bd. of Supervisors*, 663 S.E.2d at 574 (citations omitted).

123. *D.C. Dep't of Pub. Works*, 954 A.2d at 945.

this reason, it seems incongruous to assume that an ALJ would have the same depth of subject matter knowledge and expertise with respect to the issues in question as would the agency itself. This is not as significant a concern when the ALJ renders a recommended decision and the agency, which presumably has expertise in the area, makes the final determination; it would seem to be, however, when the ALJ makes the final agency decision.

Many of the states do indicate that the level of experience and expertise is a significant factor in determining the level of deference the court will apply. The Virginia courts addressed the issue in *Culpepper County,* but referred to the agency itself, and there is no mention of the nature of the decision maker. ("This deference stems from Code § 2.2-4027, which requires that reviewing courts "take due account" of the "experience and specialized competence of the agency" promulgating the regulation.")[124] Similarly, the Maryland Court of Appeals, in *Trinity Assembly of God of Baltimore City, Inc. v. People's Counsel for Baltimore County,* noted that an agency's determination should always receive some consideration, but added that in analyzing whether an agency's decision was premised on an erroneous legal conclusion, the court must take into consideration the "relevant expertise of the agency."[125] In *County of Dane v. Labor and Industry Review Commission,* the Wisconsin courts provide that the level of deference granted depends on the agency's expertise in the area in question ("A reviewing court accords an interpretation of a statute by an administrative agency one of three levels of deference-great weight, due weight or no deference-based on the agency's expertise in the area of law at issue.").[126]

It is clear from this analysis that the concept of deference to decisions made by state administrative agencies is alive and well. It is equally clear, however, that the courts are "all over the place" with regard to whether, or how much weight to afford an agency decision in any given situation. Further, as the Central Panel approach grows, the appellate courts will be forced to develop an approach to the

---

124. *Bd. of Supervisors,* 663 S.E.2d at 574 (quoting Va. Real Estate Bd. v. Clay, 384 S.E.2d 622, 627 (Va. App. 1989) (interpreting former Code § 9-6.14:17)).

125. Trinity Assembly of God of Balt. City, Inc. v. People's Counsel, 962 A.2d 404 (Md. 2008).

126. *County of Dane,* 744 N.W.2d at 615.

amount of deference granted that appropriately reflects the decision-maker's level of expertise, whether that decision-maker be an independent ALJ or the agency itself. Until such time as the state courts, and eventually the Supreme Court of the United States, develop such guidelines for the reviewing courts, however, it seems that the level of deference will remain a matter of the reviewing court's individual preference.