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# **The Role of Deference in Judicial Review of Agency Action: A Comparison of Federal Law, Uniform State Acts, and the Iowa APA**

**By Anuradha Vaitheswaran & Thomas A. Mayes\***

Of all areas in administrative law, one of the more fertile areas for published scholarship<sup>1</sup> and judicial opinions<sup>2</sup> is the notion of deference. When, why, and how much should reviewing courts defer to administrative agency decisions? Should it matter what type of agency action is being reviewed? The authorities addressing these points are noticeably divided, even in jurisdictions that have adopted “model” administrative procedure acts.<sup>3</sup>

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1. See, e.g., William R. Andersen, *Against Chevron: A Modest Proposal*, 56 ADMIN. L. REV. 957 (2004); Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don’t Get It*, 10 ADMIN. L.J. AM. U. 1 (1996); Robert A. Anthony & Michael Asimow, *The Court’s Deferences – A Foolish Inconsistency*, ADMIN. & REG. L. NEWS, Fall 2000, at 10; Ellen P. Aprill, *The Interpretive Voice*, 38 LOY. L.A. L. REV. 2081 (2005).

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

3. See *infra* Part III.

In 1998, the Iowa legislature amended the Iowa Administrative Procedure Act (IAPA).<sup>4</sup> In one key provision, the legislature provided express guidance about when reviewing courts “shall,” “shall not,” and “should not” defer to an agency’s action on judicial review.<sup>5</sup> Additionally, the legislature made express references to deference to agency action in the statutory section on standard of review.<sup>6</sup> As consideration is being given to including a similar provision in revisions to the Model State Administrative Procedure Act,<sup>7</sup> this article explores the opinions construing the deference language from the 1998 amendments to the IAPA. First, it explores the general concept of deference.<sup>8</sup> Second, it discusses efforts by the Supreme Court of the United States to articulate when deference to agency interpretations of law is appropriate.<sup>9</sup> Third, it provides a brief overview of the treatment of deference by the 1961 and 1981 Model Acts, as well as cases applying those provisions.<sup>10</sup> Fourth, it provides an in-depth examination of the deference language from Iowa’s 1998 amendments,<sup>11</sup> as well as cases construing and applying that language.<sup>12</sup> Finally, it provides a look forward, should the Model State Administrative Procedure Act incorporate some or all of these amendments.<sup>13</sup>

## I. DEFERENCE: WHAT IS IT AND WHY DOES IT MATTER?

A plain-language, dictionary-derived definition of “deference” is “respect or esteem due to a superior or an elder.”<sup>14</sup> This definition

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4. Iowa House File 667, 1998 Iowa Acts ch. 1202.

5. IOWA CODE § 17A.19(11) (2007).

6. *Id.* § 17A.19(10).

7. *See, e.g.*, John L. Gedid, Jim Rossi, Ed Schoenenbaum, & Gregory Ogden, *The Past, Present, and Future of the Model State Administrative Procedure Act*, Presentation to the 2006 Midyear Meeting and Educational Program of the National Association of Administrative Law Judiciary (June 5, 2006).

8. *See infra* Part I.

9. *See infra* Part II.

10. *See infra* Part III.

11. *See infra* Part IV.A.

12. *See infra* Part IV.B.

13. *See infra* Part V.

14. WEBSTER’S NEW COLLEGIATE DICTIONARY 333 (9th ed. 1986).

helps illuminate the inevitable conceptual conflict embedded in any discussion of judicial deference to agency action: When a court is reviewing an agency action, the agency is the “superior or elder.” The question then becomes how much “respect or esteem” is “due.” In all instances of judicial review of agency action, this question should be answered by considering the agency’s enabling statute – the source of its power – and the agency action under review.<sup>15</sup> As a general rule, courts are admittedly “superior” concerning construction and interpretation of law<sup>16</sup> while administrative agencies admittedly are “superior” concerning policy-making and admittedly have “superior” knowledge and expertise in their respective content areas.<sup>17</sup> The point of conflict is where the claimed law-construing prerogative of the reviewing court intersects with the claimed policy-making prerogative and subject matter expertise of the agency which took the action that is under review. In the terms of Professor Aprill, the conflict is between the “judicial voice” and the “administrative voice.”<sup>18</sup> This Article’s primary focus will be agency interpretations of statutes or regulations, and, specifically, whether those interpretations are made in rule-making, policy development, or in contested cases.<sup>19</sup>

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15. See, e.g., Cooley R. Howarth, Jr., *United States v. Mead Corp.: More Pieces For the Chevron/Skidmore Deference Puzzle*, 54 ADMIN. L. REV. 699, 700 (2002); Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 920 (2001).

16. See, e.g., Randolph J. May, *Defining Deference Down: Independent Agencies and Chevron Deference*, 58 ADMIN. L. REV. 429, 434 (2006) (citing *Marbury v. Madison*, 5 U.S. 137, 177 (1803)); see also Andersen, *supra* note 1, at 962; Robert A. Anthony, *Which Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 2-3 (1990); Jim Rossi, *Respecting Deference, Conceptualizing Skidmore within the Architecture of Chevron*, 42 WM. & MARY L. REV. 1105, 1108 (2001); Doug Geysler, Note, *Courts Still “Say What the Law Is”*: *Explaining the Function of the Judiciary After Brand X*, 106 COLUM. L. REV. 2129, 2132-33 (2006).

17. See, e.g., May, *supra* note 16, at 435-36 (quoting *Chevron*, 467 U.S. 865-66); see also Andersen, *supra* note 1, at 962-63 (citing LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 572-73 (1965)).

18. Aprill, *supra* note 1, at 2128.

19. As the idea of “deference” to an agency’s findings of fact is well established; it will be a minor focus of this Article. For a discussion of an administrative agency’s fact-finding power, see Gregory L. Ogden, *The Role of*

The discussion of the nature of deference, and how that deference is articulated, has demonstrable consequences.<sup>20</sup> In a 1999 study of 200 judicial decisions reviewing agency decisions in special education cases under the Individuals with Disabilities Education Act (IDEA),<sup>21</sup> Newcomer and Zirkel found a statistically significant relationship between the quantity and quality of deference reviewing courts articulated they would give to agency decisions and the degree to which those courts altered the administrative decisions.<sup>22</sup> Newcomer and Zirkel explain: “Thus, when judges articulated a high degree of deference, generally little change occurred between the two decisions; likewise, when they expressed the intent to give no deference, more change generally occurred. In other words, as articulated deference increased, change decreased.”<sup>23</sup>

Judicial review of IDEA cases provides a unique opportunity to examine the power of deference because judicial review of IDEA cases differs significantly from judicial review in traditional administrative law cases.<sup>24</sup> In contrast to the traditional “substantial evidence” review,<sup>25</sup> state or federal courts reviewing IDEA administrative decisions must grant “appropriate relief” based “on the preponderance of evidence.”<sup>26</sup> According to the United States

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*Demeanor Evidence in Determining Credibility of Witnesses in Fact Finding: The View of ALJs*, 20 J. N.A.A.L.J. 1 (2000).

20. Rossi, *supra* note 16, at 1115-16; Eric R. Womack, *Into the Third Era of Administrative Law: An Empirical Study of the Supreme Court's Retreat from Chevron Principles in United States v. Mead*, 107 DICK. L. REV. 289, 291 (2002).

21. 20 U.S.C. §§ 1400 *et seq.*

22. James R. Newcomer & Perry A. Zirkel, *An Analysis of Judicial Outcomes of Special Education Cases*, 65 EXCEPTIONAL CHILDREN 469 (1999).

23. *Id.* at 477; *see also* Andersen, *supra* note 1, at 959 (discussing *Chevron's* influence on case outcomes, stating: “While the evidence is mixed, some studies have concluded that this change in the scope of review formula has in fact changed the outcome of cases.”).

24. Thomas A. Mayes, Perry A. Zirkel, & Dixie Snow Huefner, *Allocating the Burden of Proof in Administrative and Judicial Proceedings Under the Individuals with Disabilities Education Act*, 108 W. VA. L. REV. 27, 36, 41-42 (2005). The IDEA is not unique in this regard. For example, Congress adopted a similar procedure for the review of vocational rehabilitation decisions. *See, e.g.*, Thomas A. Mayes, *Rehabilitation Act of 1973*, in 2 ENCYCLOPEDIA OF EDUCATIONAL LEADERSHIP AND ADMINISTRATION 860, 861-62 (Fenwick W. English, ed., 2006).

25. Mayes et al., *supra* note 24, at 36, 41-42.

26. 20 U.S.C. § 1415(i)(2)(C)(viii).

Supreme Court, courts reviewing IDEA administrative decisions must give “due weight” to the administrative proceedings;<sup>27</sup> however, courts have differed in how much “weight” is “due.”<sup>28</sup>

From this discussion, it is clear that deference matters.<sup>29</sup> Whether a reviewing court decides to defer to agency action is important. Assuming a reviewing court decides to defer to agency action, the degree to which it does so matters. The task for reviewing courts and the litigants before them is to determine when and how much deference is in order.

Regardless of whether and how much deference is due in a particular situation, it is important to remember that the concept of judicial deference to agency interpretations of law is impossible to sever from administrative law and its principles. The key rationales for deferring to administrative agencies are the same reasons for the very existence of administrative agencies: agency subject matter expertise and policy-making prerogatives.<sup>30</sup> To question the idea of deference is, by inevitable extension, to question the very reason for administrative law.<sup>31</sup> To the extent a reviewing court accords little or no deference to an agency decision, that reviewing court must act within in its area of superiority and not trespass on the agency’s area of superiority.<sup>32</sup>

## II. DEFERENCE UNDER FEDERAL LAW

Although the concept of deference is key to an understanding of judicial review of agency action, the term is not defined in the federal Administrative Procedure Act (“APA”).<sup>33</sup> The APA instead refers to the role of the courts in interpreting statutory provisions, stating that

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27. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206 (1982).

28. *See, e.g., Newcomer & Zirkel, supra* note 22.

29. *See supra* notes 20 to 28 and accompanying text.

30. *See supra* notes 15 to 20 and accompanying text.

31. *Cf. May, supra* note 16, at 436.

32. *See, e.g., Elliott Greenfield, A Lenity Exception to Chevron Deference*, 58 BAYLOR L. REV. 1, 2-3 (2006) (discussing the “relative institutional competencies of courts and administrative agencies”); Note, *The Two Faces of Chevron*, 120 HARV. L. REV. 1562, 1563 (2007) (discussing lower courts’ adoption of the “agency expertise” aspect of *Chevron*).

33. 5 U.S.C. § 706 (1994).

“the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.”<sup>34</sup>

Elaboration on the deference concept has been left to the courts. The United States Supreme Court has articulated several approaches to determining whether deference is warranted and, if it is, the level of deference due to agency interpretations of law. These approaches shed light on state approaches to deference and on the deference provisions adopted by the Iowa legislature in 1998.

### A. *Skidmore*

More than half a century ago, the United States Supreme Court articulated an approach to deference that has continued to guide state courts. In *Skidmore v. Swift & Co.*,<sup>35</sup> the Court was asked to decide the correctness of an agency interpretation of the Fair Labor Standards Act. The Court held the agency’s interpretations were not controlling authority but persuasive authority entitled to respect.<sup>36</sup> The court reasoned that “the [a]dministrator’s policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case.”<sup>37</sup>

The same themes emerge in state case law. Courts defer to agency interpretations of their enabling statute because agencies, as arms of the executive branch, are in a better position to make policy

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34. *Id.* In attempting to reconcile this provision with the deference routinely afforded agencies in interpreting the law, Anthony states:

Only where the agency has complied substantively and procedurally with the statutes conferring lawmaking authority can the reviewing court’s interpretive authority under [section] 706 be diminished by the fact that the agency has made an interpretation. In the absence of such authority or its execution, the court must implement [section] 706 by making its own interpretation, according the agency view such weight as it may deserve under *Skidmore*.

Anthony, *supra* note 1, at 25-26.

35. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

36. *Id.*

37. *Id.* at 139.

choices;<sup>38</sup> agencies have expertise in these areas<sup>39</sup> and courts do not; and agencies have broad investigative powers that courts lack.<sup>40</sup>

At least one commentator has argued that an ad hoc application of the *Skidmore* factors, without affording any deference to an agency interpretation, is inadvisable. Professor Rossi maintains that this approach “has introduced even more confusion into the maze of cases regarding judicial review of agency interpretations of law.”<sup>41</sup> At the same time, he has recognized that the *Skidmore* test “appears notably more rigorous than the routine reasonableness inquiry at *Chevron’s* step two” and should be used in conjunction with that inquiry.<sup>42</sup> In his view, “*Skidmore’s* other factors, relating to consistency and the contemporaneousness of the construction, add an additional layer of scrutiny to the hard-look inquiry for informal statements.”<sup>43</sup>

The United States Supreme Court revived *Skidmore* in recent opinions, adopting an approach consistent with that advanced by Professor Anthony. He suggested that courts should apply the *Skidmore* factors where neither express nor implied Congressional authority has been delegated to agencies to interpret their statutes.<sup>44</sup>

Iowa’s amended APA reflects this approach. In Iowa Code section 17A.19(11)(b), the legislature afforded courts the opportunity to defer to agency views of matters, even in the absence of a statutory delegation of authority to consider those matters.<sup>45</sup> In commenting on this section, Professor Bonfield stated:

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38. See *Sterlingworth Condo. Ass’n v. Dep’t of Natural Res.*, 556 N.W.2d 791, 798-99 (Wis. Ct. App. 1996).

39. See, e.g., *Fogle v. H & G Rest., Inc.*, 654 A.2d 449, 458-59 (Md. 1995); *Consolation Nursing Home v. Comm’r of N.Y. State Dep’t of Health*, 648 N.E.2d 1326, 1328 (N.Y. 1995); *Lefton Iron & Metal Co. v. Ill. Commerce Comm’n*, 529 N.E.2d 610, 617 (Ill. App. Ct. 1988); *Morton v. Mo. Air Conservation Comm’n*, 944 S.W.2d 231, 236 (Mo. Ct. App. 1997).

40. See *Fletcher v. Pa. Prop. & Cas. Ins. Guar. Ass’n*, 914 A.2d 477, 485 (Pa. Commw. Ct. 2007).

41. Rossi, *supra* note 16, at 1110; see also *Womack*, *supra* note 20, at 294 (stating “the only certain result of the Supreme Court’s decision was the resulting uncertainty”). For a detailed discussion of *Chevron*, see *infra* Part II.B.

42. Rossi, *supra* note 16, at 1143.

43. *Id.*

44. Anthony, *supra* note 16, at 56.

45. IOWA CODE § 17A.19(11)(b) (2007).



There will inevitably be some situations in which the matters being reviewed that have not been vested in agency discretion are highly technical, requiring special expertness for adequate comprehension, and the agency has that expertness and the reviewing court does not. In those situations the reviewing court may feel that it must give some special weight to the agency's view in order to make a sound decision.<sup>46</sup>

These are the same factors cited in *Skidmore* as grounds for affording respect to agency interpretations of law.<sup>47</sup>

### B. *Chevron*

An oft-cited opinion on deference is *Chevron, USA Inc. v. Natural Resources Defense Council*.<sup>48</sup> Forty years after *Skidmore*, the Supreme Court again confronted the questions of whether and when to defer to an agency construction of law. The precise question before the Court was whether the Environmental Protection Agency reasonably construed a statutory term in the Clean Air Act Amendments of 1977.<sup>49</sup> For purposes of this article, the Court's answer to this substantive question is of less import than its articulation of an approach to arriving at an answer. The Court prescribed a test that has been variously referred to as the "two-part test,"<sup>50</sup> the "step-two reasonableness inquiry,"<sup>51</sup> the "three-stage analysis,"<sup>52</sup> and the "counter-*Marbury* test."<sup>53</sup> As an initial matter,

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46. ARTHUR E. BONFIELD, AMENDMENTS TO IOWA ADMINISTRATIVE PROCEDURE ACT (1998), CHAPTER 17A, CODE OF IOWA (HOUSE FILE 667 AS ADOPTED): REPORT ON SELECTED PROVISIONS TO IOWA STATE BAR ASSOCIATION AND IOWA STATE GOVERNMENT 72 (1998).

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

48. *Chevron, U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). For a discussion of the volume of scholarship citing *Chevron*, see Andersen, *supra* note 1, at 960.

49. *Chevron*, 467 U.S. at 839-40.

50. See, e.g., Womack, *supra* note 20, at 298.

51. Rossi, *supra* note 16, at 1112.

52. Anthony, *supra* note 16, at 17.

53. Richard W. Murphy, A "New" Counter-*Marbury*": Reconciling *Skidmore* Deference and Agency Interpretive Freedom, 56 ADMIN. L. REV. 1, 2 (2004).

the Court simply required courts and agencies to give effect to “unambiguously expressed” legislative intent.<sup>54</sup> Next, the Court addressed the question of what level of deference to afford agency interpretations where Congress “has not directly addressed the precise question at issue.”<sup>55</sup> Departing from the “persuasive authority” standard it articulated in *Skidmore*, the Court stated it “does not simply impose its own construction on the statute,” but determines “whether the agency’s answer is based on a permissible construction of the statute.”<sup>56</sup>

The Court articulated two levels of deference depending on the nature of the statutory delegation of authority to the agency.<sup>57</sup> Where Congress explicitly left a legislative gap for an agency to fill through regulations, the Court concluded the regulations would be “given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”<sup>58</sup> Where the legislative delegation was implicit, the Court stated “a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”<sup>59</sup>

It is worth noting that, although the Court began with a focus on the nature of statutorily delegated authority rather than the characteristics of an agency, and determined that an agency interpretation could be “controlling” rather than simply “persuasive,” the Court did not abandon the *Skidmore* factors. It reaffirmed those factors, including the role of legislators or administrators in formulating policy, the technical and complex nature of the regulatory scheme, and the agency’s ability to consider the matter in greater detail than courts.<sup>60</sup>

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54. *Chevron*, 467 U.S. at 842-43.

55. *Id.* at 843.

56. *Id.* at 842-43.

57. See, e.g., Thomas A. Mayes & Perry A. Zirkel, *Disclosure of Special Education Students’ Records: Do the 1999 IDEA Regulations Mandate that Schools Comply with FERPA?*, 8 J.L. & POL’Y 455, 463-64 n.30 (2000) (“The differing language suggests a different scope of judicial inquiry.”).

58. *Chevron*, 467 U.S. at 843-44.

59. *Id.* at 844.

60. *Id.* at 865.

State courts have regularly cited the *Chevron* test but have applied it in different ways.<sup>61</sup> *Chevron* is key to understanding Iowa's 1998 APA amendments. Those amendments,<sup>62</sup> prescribing when and how much to defer to agency views, clarify that the starting point for an analysis of deference is the agency's enabling statute.<sup>63</sup> Professor Bonfield's commentary on one of the judicial review provisions is instructive:

[W]here the General Assembly clearly delegates discretionary authority to an agency to interpret or elaborate a statutory term based on the agency's own special expertness, the court may not simply substitute its view as to the meaning or elaboration of the term for that of the agency but, instead, may reverse the agency interpretation or elaboration only if it is arbitrary, capricious, unreasonable, or an abuse of discretion—a deferential standard of review.<sup>64</sup>

### C. *Auer*

This brings us to *Auer v. Robbins*,<sup>65</sup> an opinion that expanded the deference afforded to agency interpretations of law. At issue was an agency's interpretation of its own ambiguous regulation.<sup>66</sup> The agency interpretation was not packaged in the usual rule format or indeed, in an informal ruling or bulletin. Instead, the interpretation was formulated in a legal brief filed with the United States Supreme

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61. See, e.g., *infra* Part III (discussing state cases); see also William R. Andersen, *Chevron in the States: An Assessment and A Proposal*, 58 ADMIN. L. REV. 1017 (2006).

62. Iowa House File 667, 1998 Iowa Acts ch. 1202.

63. BONFIELD, *supra* note 46, at 62 (explaining when a court should interpret a statute *de novo* and when a court may not simply substitute its interpretation for the interpretation of an agency). See also Anthony, *supra* note 16, at 26 (noting both prongs of the second step of *Chevron* [the express delegation prong and the implied delegation prong] call "for a reviewing court to find an appropriate delegation before the court becomes bound to accept an agency interpretation on the basis of its reasonableness").

64. BONFIELD, *supra* note 46, at 62.

65. *Auer v. Robbins*, 519 U.S. 452 (1997).

66. *Id.* at 454-55.

Court in pending litigation. Despite this fact, the Supreme Court stated the interpretation is “controlling” unless “plainly erroneous or inconsistent with the regulation.”<sup>67</sup>

Some federal circuit courts have declined to apply *Auer*. In *Eastman Kodak v. STWB, Inc.*,<sup>68</sup> for example, Judge Calabresi of the Second Circuit noted that *Auer* was “seemingly undercut” by the United States Supreme Court’s subsequent opinion in *Christensen v. Harris County*.<sup>69</sup> The Fifth Circuit accepted the agency interpretation after applying the “persuasive” standard of *Skidmore*.<sup>70</sup> Similarly, in *Houston Police Officers’ Union v. City of Houston*, Judge Jones of the Fifth Circuit questioned whether, after the post-*Auer* opinion of *Mead*, pronouncements contained in an opinion letter and an amicus brief “are sufficiently authoritative to merit *Chevron* deference.”<sup>71</sup> Likewise, in *Keys v. Barnhart*, Judge Posner of the Seventh Circuit commented, “[i]t is odd to think of agencies as making law by means of statements made in briefs, since agency briefs, at least below the Supreme Court level, normally are not reviewed by the members of the agency itself; and it is odd to think of Congress delegating lawmaking power to unreviewed staff decisions.”<sup>72</sup>

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67. *Id.* at 461. Contrast this holding with *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988). In *Bowen*, the Court explained that it never applied *Chevron* deference “to agency litigating positions that are wholly unsupported by regulations” because “Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands.” (quoting *Inv. Co. Ins. v. Camp*, 401 U.S. 617, 628 (1971)). *Cf. Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 150-51 (1991). *See also* Anthony & Asimow, *supra* note 1, at 10-11 (stating *Auer* “authorize[d] the agencies to make law through an informal format where Congress has not delegated such power either explicitly or by implication”). Anthony and Asimow further state that the standard was “even more deferential than *Chevron* because it seems to require the courts to uphold an agency interpretation of an ambiguous regulation without regard to whether it is reasonable.” *Id.* at 11.

68. *Eastman Kodak v. STWB, Inc.*, 452 F.3d 215, 222 n.8 (2d Cir. 2006).

69. *Christensen v. Harris County*, 529 U.S. 576 (2000). For a detailed discussion of the approach to deference taken in this opinion, *see* Rossi, *supra* note 16.

70. *Eastman Kodak*, 452 F.3d at 222 n.8.

71. *Houston Police Officers’ Union v. City of Houston*, 330 F.3d 298, 305 (5th Cir. 2003).

72. *Keys v. Barnhart*, 347 F.3d 990, 993-94 (7th Cir. 2003).

Other federal courts have had no trouble applying the *Auer* approach where they reviewed agency interpretations of their own ambiguous regulations rather than agency interpretations of statutes;<sup>73</sup> however, this rationale has been subject to criticism.<sup>74</sup>

In our view, there is little room for *Auer* in Iowa's approach to deference. As noted, that approach begins with the enabling statute and the concept of statutory delegation of authority to the agency,<sup>75</sup> a concept that is given short shrift in *Auer*. The commentary to Iowa's amended APA provides that a deferential standard of review is warranted only as follows:

[T]he reviewing court, using its own independent judgment and without any required deference to the agency's view, must have a firm conviction from reviewing the precise language of the statute, its context, the purpose of the statute, and the practical considerations involved, that the legislature actually intended (or would have intended had it thought about the question) to delegate to the agency interpretive power with the *binding force of law* over the elaboration of the provision in question.<sup>76</sup>

The view that agencies may exercise their delegated authority only in formats that have the binding force of law is one that the United States Supreme Court has since embraced, but not adopted, in *Mead*<sup>77</sup> and *Gonzales v. Oregon*.<sup>78</sup>

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73. See, e.g., *Bassiri v. Xerox Corp.*, 463 F.3d 927, 930-31 (9th Cir. 2006); *Humanoids Group v. Rogan*, 375 F.3d 301, 305 (4th Cir. 2004). It has been pointed out that this is a distinction without a difference. *The Supreme Court, 1999 Term—Leading Cases*, 114 HARV. L. REV. 369, 378 (2000) (suggesting there is little reason “to presume Congress intended one measure of deference for agency interpretations of statutes and another for agency interpretations of regulations.”).

74. See *supra* notes 68-72.

75. See, e.g., IOWA CODE § 17A.23.

76. BONFIELD, *supra* note 46, at 63 (emphasis added). See also, e.g., Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2139 (2002) (discussing “force of law” concept); Kristin Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537 (2006) (same).

77. See *infra* Part II.D.

*D. Mead*

In *United States v. Mead Corp.*,<sup>79</sup> the issue before the Court was whether a tariff classification ruling, issued by the United States Customs Service without notice and comment, deserved judicial deference.<sup>80</sup> The Court began by specifying the type of delegated authority that would trigger *Chevron* deference to an agency interpretation:

“We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference 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.”<sup>81</sup>

The Court continued, “[d]elegation of such authority may be shown in a variety of ways, as by an agency’s power to engage in adjudication or notice – and – comment rulemaking, or by some other indication of a comparable congressional intent.”<sup>82</sup> The Court emphasized, however, that the absence of such a formal process was not determinative on the delegation question.<sup>83</sup>

Applying these principles, the Court acknowledged that the statute at issue conferred rulemaking authority upon the Customs Service but concluded this authority was insufficient to find an implied delegation of authority to issue tariff classifications.<sup>84</sup> The

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78. See *infra* Part II.E.

79. *United States v. Mead Corp.*, 533 U.S. 218 (2001).

80. *Id.* at 221.

81. *Id.* at 226-27.

82. *Id.* at 227.

83. *Id.* at 231. One commentator has stated that *Mead* leaves open for further consideration two major questions: “[H]ow should the courts determine whether Congress has delegated to an agency the requisite administrative authority;” and “[E]ven if the requisite delegation exists, which interpretive processes represent exercises of such congressionally delegated authority?” Hickman, *supra* note 76, at 1601. We believe *Mead* establishes a framework that allows these holes to be filled on a case-by-case basis through an analysis of the enabling statute at issue and the agency action subject to review.

84. *Mead*, 533 U.S. at 231-32.

Court stated the classification rulings were “beyond the *Chevron* pale.”<sup>85</sup>

While declining to afford the ruling *Chevron* deference, the Court found *Skidmore* deference was warranted. It explained that agencies make a variety of “interpretive choices” in administering their own statutes that might warrant deference depending on “the degree of the agency’s care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency’s position.”<sup>86</sup> In the Court’s view, these reasons for affording deference, first articulated in *Skidmore*, are still viable.<sup>87</sup> In concert with Anthony’s view,<sup>88</sup> the court explained that “*Chevron* left *Skidmore* intact and applicable where statutory circumstances indicate no intent to delegate general authority to make rules with force of law, or where such authority was not invoked.”<sup>89</sup>

*Mead* begins with the concept of statutory delegation and ends with a recognition that, even without express or implied delegation, there may be cogent reasons to defer to an agency’s interpretations of its own statute.<sup>90</sup> The deference provisions of Iowa’s amended APA adopt the same approach.<sup>91</sup>

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85. *Id.* at 234.

86. *Id.* at 227-28.

87. *Id.* at 235.

88. Anthony states:

The way to reconcile *Chevron* with § 706 is to recognize in each case that other statutes may bear upon the court’s decisional duties under § 706. Since Congress in the APA has directed generally that the reviewing court interpret the statute, that court must interpret the statute unless Congress has directed otherwise through other statutes pertinent to the case. Statutes direct otherwise if they have delegated lawmaking authority to the agency and the agency has exercised it. Then the court under § 706 interprets those statutes and determines the effect of the agency’s action under them.

Anthony, *supra* note 1, at 24.

89. *Id.* at 237.

90. Womack refers to *Mead* as “a fault line in administrative law.” Womack, *supra* note 20, at 290.

91. *See, e.g.*, IOWA CODE § 17A.19(11)(b); BONFIELD, *supra* note 46, at 72.

*E. Gonzales v. Oregon*

We turn next to *Gonzales v. Oregon*.<sup>92</sup> The Court framed the issue as follows: “The question before us is whether the Controlled Substances Act allows the United States Attorney General to prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide, notwithstanding a state law permitting the procedure.”<sup>93</sup> As in *Chevron*, the answer to the substantive question is less pertinent for our purposes than the approach taken by the Court.<sup>94</sup>

The Court reaffirmed the limited applicability of *Auer*. As in *Auer*, the Court was reviewing a federal statute, interpreted by a federal rule which, in turn, was the subject of informal interpretation. Citing *Auer*, the Court reiterated that “[a]n administrative rule may receive substantial deference if it interprets the issuing agency’s own ambiguous regulation.”<sup>95</sup> However, the Court stated the regulation subject to interpretation in *Gonzales* was simply a restatement of the statute itself, rather than a regulation promulgated with the aid of the agency’s expertise and experience as was the case in *Auer*.<sup>96</sup> In the Court’s view, an interpretation of a “parroting regulation” such as this was not entitled to *Auer* deference because the agency was in fact simply interpreting the statute.<sup>97</sup> The Court cited *Chevron* but found *Chevron* deference unwarranted based on the rationale used in *Mead*, and ultimately chose to afford the Attorney General’s interpretive rule only *Skidmore* deference.<sup>98</sup>

*Gonzales* demonstrates a clear move away from the broad standard of deference articulated in *Auer*.<sup>99</sup> Notably, the Court distanced itself based on the content of the regulation subject to

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92. *Gonzales v. Oregon*, 546 U.S. 243 (2006).

93. *Id.* at 248.

94. For articles discussing the substance of the Gonzalez decision, see, e.g., George J. Annas, *Congress, Controlled Substances, and Physician-Assisted Suicide: Elephants in Mouseholes*, 354 N. ENG. J. MED. 1079 (2006); Theodore Ruger, *Gonzales v. Oregon and the Supreme Court’s (Re)Turn to Constitutional Theory*, 34 J.L. MED. & ETHICS 817 (2006).

95. *Gonzales*, 546 U.S. at 254-55.

96. *Id.*

97. *Id.* at 257.

98. *Id.* at 296-97.

99. *Christensen v. Harris County*, 529 U.S. 576, 588 (2000).



interpretation rather than the informal format of the interpretation.<sup>100</sup> The fact that the interpretation was in an interpretive rule format was apparently not deemed significant in the Court's analysis of *Auer*.

Equally instructive is the Court's consideration of *Chevron* deference. As in *Mead*, the Court expressed an unwillingness to read the statutory delegation of authority to promulgate rules as a delegation of authority to issue this particular interpretive rule.<sup>101</sup> Instead, the Court opted to afford the interpretive rule *Skidmore* deference and found the rule unpersuasive under that standard.<sup>102</sup> As Justice Scalia pointed out in his dissent, the majority again did not "take issue with the Solicitor General's contention that no alleged procedural defect, such as the absence of notice-and-comment rulemaking before promulgation of the Directive, renders *Chevron* inapplicable here."<sup>103</sup>

*Mead*, together with *Gonzales*, instructs that it is not simply enough to search for a provision that confers rule-making authority upon the agency. The reviewing court must also determine whether the agency interpretation falls within the ambit of that rule-making authority. Iowa's amended APA makes this distinction. To warrant a deferential standard of review, an agency must have "clearly" delegated "interpretive power with the binding force of law over the elaboration of the provision in question."<sup>104</sup>

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100. In *Christensen*, the Court declined to afford *Auer* deference to an agency's opinion letter, on the ground that the regulation the agency sought to interpret in that letter was not ambiguous. *Christensen*, 529 U.S. 576. For more information, see, e.g., Scott H. Angstreich, *Shoring Up Chevron: A Defense of Seminole Rock Deference for Agency Interpretations of Law*, 34 U.C. DAVIS L. REV. 49, 145-46 (2000) (discussing difference between interpretive rules and other informal formats).

101. See Robert Kundis Craig, *Supreme Court News*, ADMIN. & REG. L. NEWS, Spring 2006, at 22 (noting "the majority's profound skepticism that Congress had authorized the Attorney General to make independent judgments about the medical profession and to criminalize doctors' behavior when that behavior was legal under state law").

102. *Gonzales*, 546 U.S. at 268-69 see Joseph Cordaro, *Who Defers to Whom? The Attorney General Targets Oregon's Death with Dignity Act*, 70 FORDHAM L. REV. 2477, 2481 (2002) (advocating this standard).

103. *Gonzales*, 546 U.S. at 281 (Scalia, J., dissenting).

104. BONFIELD, *supra* note 46, at 63.

### F. Critique of the Supreme Court's Cases

The tests summarized above have all been subject to some criticism. In our view, the approach articulated in *Mead* is most consistent with Iowa's approach to deference, as clarified and codified in the 1998 amendments to the APA.<sup>105</sup> We recognize at least one commentator's critique of *Mead*. Professor Aprill suggests:

Insofar as *Mead* calls for rejecting *Seminole Rock* and *Auer*, it has the effect of limiting the administrative interpretive voice. The justification for deference to administrative interpretations of regulations rests in part on the need to hear the administrative voice and its distinctive accents. The reasoning of *Mead* mutes this point of view.<sup>106</sup>

In our view, *Mead* enhances the "administrative voice" by giving that voice deference only when it is truly the "administrative voice." In other words, when the agency speaks with authority delegated to it by a legislative body in a format that carries the force of law, the agency's voice is entitled to deference. On the other hand, if the format in which the agency interpretation is presented raises doubt about whether it is the agency speaking, that interpretation is entitled to limited or no deference.<sup>107</sup>

### III. DEFERENCE UNDER "MODEL" STATE LAWS

#### A. The Model State Administrative Procedure Act (1961)

The 1961 Model State Administrative Procedure Act (1961 MSAPA)<sup>108</sup> has been adopted, in whole or in part, in at least thirty

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105. Cf. Andersen, *supra* note 1, at 1032.

106. Aprill, *supra* note 1, at 2105 (citing *Keys v. Barnhart*, 347 F. 3d. 990 (7th Cir. 2003)).

107. See *Keys*, 347 F.3d at 993 (stating "[p]robably there is little left of *Auer*"); see also Anthony, *supra* note 16, at 5 (stating "[t]he touchstone in every case is whether Congress intended to delegate to the agency the power to interpret with the force of law and the particular format that was used.").

108. Model State Administrative Procedure Act, Revised 1961 Act, 15 U.L.A. 174 (2000) (hereinafter "1961 MSAPA").

states.<sup>109</sup> Like its predecessor, the 1946 MSAPA, the 1961 Act provides a framework “with only enough detail to support general principals.”<sup>110</sup> The 1961 MSAPA contains the following section on scope of review, with operative but not always necessarily explicit “deference” language:

The court shall not substitute its judgment for that of the agency as to the weight of the evidence or questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) in violation of constitutional or statutory provisions;
- (2) in excess of the statutory authority of the agency;
- (3) made upon unlawful procedure;
- (4) affected by other error of law;
- (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) arbitrary and capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.<sup>111</sup>

The 1961 MSAPA is a “model act,” not a “uniform act”, with an understanding that the adopting states would fashion it to their own needs.<sup>112</sup> The states have not been “uniform” in their adoption of the “model” language.<sup>113</sup>

Along with variety in the adoption of the 1961 MSAPA, there has been variance in judicial interpretation of the state statutes drawn from or based upon the 1961 MSAPA. Among this variety, one may

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109. Gedit et al., *supra* note 7 (citing 1 FRANK COOPER, STATE ADMINISTRATIVE LAW 13 (1965)).

110. *Id.*

111. 1961 MSAPA § 15(g), 15 U.L.A. 12 (2000).

112. Gedit et al., *supra* note 7 (citing Revised Model State Administrative Procedure Act, Draft for Discussion Only, at 1 (2006)).

113. 15A U.L.A. 1 (2000).

discern certain themes. The cases generally state the action of the agency under review is presumed to be correct.<sup>114</sup> The showing required to disturb an agency decision varies among the states.

Concerning findings of fact, the cases, following the statute's language,<sup>115</sup> indicate courts will defer to an agency's findings in an area of its expertise.<sup>116</sup> The cases also reflect that courts will give deference to agency answers regarding mixed questions of law and fact,<sup>117</sup> although this is not a unanimous view.<sup>118</sup> One court stated agency conclusions of law that are closely related to findings of fact are entitled to deference and are not disturbed if supported by substantial evidence.<sup>119</sup> The cases indicate courts will defer to an agency's assessment of witness credibility,<sup>120</sup> unless there are "strong reasons" not to do so,<sup>121</sup> and will defer to agency decisions that are interwoven with determinations of policy and value.<sup>122</sup>

Concerning deference to conclusions of law, the decisions under the various adoptions of the 1961 MSAPA are less uniform. Some courts hold that agency conclusions of law receive no deference on judicial review,<sup>123</sup> including interpretations of appellate case law.<sup>124</sup>

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114. *Erb v. Md. Dep't of Env'tl. Quality*, 676 A.2d 1017 (Md. Ct. Spec. App. 1996).

115. 1961 MSAPA § 15(g)(5), 15A U.L.A. 395 (2000).

116. *See, e.g., Lefton Iron & Metal Co. v. Ill. Commerce Comm'n*, 529 N.E.2d 610 (Ill. App. Ct. 1988); *Morton v. Mo. Air Conservation Comm'n*, 944 S.W.2d 231 (Mo. Ct. App. 1997).

117. *See, e.g., XL Disposal Corp. v. Zehnder*, 709 N.E.2d 293 (Ill. App. Ct. 1999); *accord S. Foods Group, L.P. v. State Dep't of Educ.*, 974 P.2d 1033 (Haw. 1999); *Ashleson v. Labor & Indus. Rev. Comm'n*, 573 N.W.2d 554 (Wisc. Ct. App. 1997).

118. *Ottema v. State ex rel. Wyo. Workers' Comp. Div.*, 968 P.2d 41 (Wyo. 1998) (will defer to findings of fact but will correct applications of law).

119. *Campbell v. Nev. Tax Comm'n*, 853 P.2d 717 (Nev. 1993).

120. *See, e.g., Envirotest Sys. Corp. v. Freedom of Info. Comm'n*, 757 A.2d 1202 (Conn. App. Ct. 2000); *Kennedy v. District of Columbia*, 654 A.2d 847 (D.C. 1994).

121. *Dep't of Mental Health & Hygiene v. Shrieves*, 641 A.2d 899, 905 (Md. Ct. Spec. App. 1994).

122. *See, e.g., Stirlingworth Condo. Ass'n v. Dep't of Natural Res.*, 556 N.W.2d 791, 799 (Wisc. Ct. App. 1996).

123. *See, e.g., Rouse-Fairwood Ltd. P'ship v. Supervisor of Assessments*, 708 A.2d 19 (Md. Ct. Spec. App. 1998); *Kurtenbach v. Frito-Lay*, 563 N.W.2d 869 (S.D. 1997); *Haynes v. State ex rel. Wyo. Workers' Comp. Div.*, 962 P.2d 876

One court provided the following test: an agency's conclusions of law receive no "special deference," at least where those conclusions have not been subject to prior "judicial scrutiny."<sup>125</sup>

These cases aside, the weight of authority suggests courts will defer to an agency's interpretation of a statute it is tasked with administering (assuming such interpretation is necessary<sup>126</sup>) that is both reasonable and consistent with the statute,<sup>127</sup> especially when that interpretation is rooted in the agency's expertise.<sup>128</sup> One court indicated it would defer to an agency's interpretation of the statute it is to administer unless a party made a "compelling" showing the agency misinterpreted the statute.<sup>129</sup> The deference owed to an agency interpretation of law is heightened when the agency draws on its expertise.<sup>130</sup> Other authorities grant deference to an agency's decision whether to issue new regulations,<sup>131</sup> and to an agency's interpretation of its existing regulations.<sup>132</sup> Some authorities suggest

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(Wyo. 1998); *see also* *Nessel v. Bd. of Fire & Police Comm'rs*, 664 N.E.2d 207, 208 (Ill. App. Ct. 1996) (not bound to give deference); *Tex-Con Oil & Gas Co. v. Batchelor*, 634 So.2d 902, 907 (La. Ct. App. 1993) ("little or no deference").

124. *Motola v. Labor & Indus. Review Comm'n*, 580 N.W.2d 297, 300 (Wis. 1998).

125. *Casey v. Ne. Utils.*, 731 A.2d 294, 297 (Conn. 1999). It is not clear from the text of this opinion whether or how special deference is distinguishable from garden variety deference.

126. *See, e.g., Wis. Dep't of Indus., Labor & Human Relations v. Labor & Indus. Review Comm'n*, 456 N.W.2d 162, 164 (Wis. Ct. App. 1990) (no need to consider an agency's interpretation when a statute is unambiguous).

127. *See, e.g., Boer v. District of Columbia Rental Hous. Comm'n*, 564 A.2d 54 (D.C. 1989); *Hewet v. Asker's Thrift Shop*, 814 P.2d 424 (Idaho 1991); *Parasi v. Jenkins*, 603 N.E.2d 566 (Ill. App. Ct. 1992); *Adrian Sch. Dist. v. Mich. Pub. Sch. Employees Ret. Bd.*, 582 N.W.2d 767 (Mich. 1998).

128. *See, e.g., Ontario County v. Capital Dist. Reg'l Off-Track Betting Corp.*, 545 N.Y.S.2d 643 (Sup. Ct. 1989).

129. *Lemieaux v. Tri-State Lotto Comm'n*, 666 A.2d 1170, 1172 (Vt. 1995).

130. *See, e.g., Ontario County*, 545 N.Y.S.2d 643.

131. *Fogle v. H & G. Rest., Inc.*, 654 A.2d 449 (Md. 1995); *accord Consolation Nursing Home v Comm'r of N.Y. State Dep't of Health*, 648 N.E.2d 1326 (N.Y. 1995).

132. *See, e.g., Conservation Law Found. v. Burke*, 645 A.2d 495 (Vt. 1993).

an agency conclusion of law is entitled to “great bearing” when the question is one of first impression.<sup>133</sup>

Nevertheless, even jurisdictions that generally defer to agency interpretations of law set limits on this deference. For example, an agency’s decision is afforded less deference when it “drastically” departs from that agency’s prior practice.<sup>134</sup> One court indicated the concept of deference to agency interpretations of law did not encompass arguments the agency makes in litigation.<sup>135</sup> Other cases do not grant deference to agency regulations outside of the agency’s sphere of special expertise.<sup>136</sup> Finally, an irrational determination is entitled to no deference.<sup>137</sup>

When the question of law under review turns from one of “substance” to one of “procedure,” the courts in jurisdictions adopting the 1961 MSAPA are less likely to grant deference. While an agency’s procedural rules are generally entitled to deference,<sup>138</sup> an agency’s determination of whether it complied with the administrative procedure act is not entitled to deference.<sup>139</sup> Similarly, an agency’s determination of its own powers is entitled to no deference.<sup>140</sup>

The recent cases construing the 1961 MSAPA illustrate the tension between Professor Aprill’s “administrative voice” and “judicial voice,”<sup>141</sup> which may occur within the same jurisdiction.<sup>142</sup>

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133. *See, e.g.,* *Finnel v. Dep’t of Indus., Labor & Human Relations*, 519 N.W.2d 731, 734 (Wis. Ct. App. 1994).

134. *See, e.g.,* *Bus. & Prof’l People for Pub. Int. v. Ill. Commerce Comm’n*, 555 N.E.2d 693, 709 (Ill. App. Ct. 1989); *but see* *Viking Pump, Inc. v. Employment Appeal Bd.*, 522 N.W.2d 310 (Iowa Ct. App. 1994) (agency precedent does not bind reviewing court).

135. *Martin v. Randolph County Bd. of Educ.*, 465 S.E.2d 399 (W. Va. 1995).

136. *Indus. Liaison Comm. v. Williams*, 527 N.E.2d 274 (N.Y. 1988); *Pickering v. Labor & Indus. Review Comm’n*, 456 N.W.2d 874 (Wis. Ct. App. 1990).

137. *Paramount Comm’n v. Gibraltar Cas. Co.*, 685 N.E.2d 1214 (N.Y. 1997).

138. *See, e.g.,* *Biddleford Bd. of Educ. v. Biddleford Teachers Ass’n*, 688 A.2d 922 (Me. 1997).

139. *See, e.g.,* *Gasoline Marketers of Vt., Inc. v. Agency of Natural Res.*, 739 A.2d 1230 (Vt. 1999).

140. *See, e.g.,* *GTE N., Inc. v. Pub. Serv. Comm’n*, 500 N.W.2d 284, 286 (Wisc. 1993).

141. Aprill, *supra* note 1, at 2128.

For example, in one case the Illinois Appellate Court states that courts are not bound to give deference to agency conclusions of law.<sup>143</sup> In a different case, the same court stated the judiciary should give “great weight” to an agency’s reasonable interpretation of a statute.<sup>144</sup> While these two cases are not necessarily inconsistent, they do appear to have different starting points: the former giving primacy to the “judicial voice” and the latter giving primacy to the “administrative voice.” Furthermore, both cases can lay claim to having a foundation in the statute’s text, as the express language of the statute<sup>145</sup> is silent on when or whether to defer to agency conclusions of law and, if deference is due, how much deference is due.

### *B. The Model State Administrative Procedure Act (1981)*

The 1981 Model State Administrative Procedure Act (1981 MSAPA)<sup>146</sup> has been adopted, in whole or in part, in three states, with other states adopting selected provisions.<sup>147</sup> The 1981 MSAPA is more detailed than its 1961 predecessor.<sup>148</sup>

The 1981 MSAPA contains the following operative “deference” language:

The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by any one or more of the following:

(1) The agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied.

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142. See *supra* notes 123, 127 and accompanying text.

143. *Nessel v. Bd. of Fire & Police Comm’rs*, 664 N.E.2d 207 (Ill. App. Ct. 1996).

144. *Parasi*, 603 N.E.2d at 566.

145. 1961 MSAPA § 15(g)(5), see generally 15A U.L.A. 1 (2000).

146. Model State Administrative Procedure Act (1981), 15 U.L.A. 1 (2000) (hereinafter “1981 MSAPA”).

147. *Gedid et al.*, *supra* note 7 (citing Revised Model State Administrative Procedure Act, Draft for Discussion Only, at 2).

148. *Id.*

- (2) The agency has acted beyond the jurisdiction conferred by any provision of law.
- (3) The agency has not decided all issues requiring resolution.
- (4) The agency has erroneously interpreted or applied the law.
- (5) The agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure.
- (6) The persons taking the agency action were improperly constituted as a decision-making body, motivated by improper purpose, or subject to disqualification.
- (7) The agency action is based on a determination of fact, made or implied by the agency, that is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this Act.
- (8) The agency action is:
  - (i) outside the range of discretion delegated to the agency by any provision of law;
  - (ii) agency action, other than a rule, that is inconsistent with a rule of the agency; [or]
  - (iii) agency action, other than a rule, that is inconsistent with the agency's prior practice unless the agency justifies the inconsistency by stating facts and reasons to demonstrate a fair and rational basis for the inconsistency. [; or] [.]
  - (iv) [otherwise unreasonable, arbitrary or capricious.]<sup>149</sup>

The cases construing this language tend toward greater oversight of administrative agency conclusions of law. While the judiciary will not interfere with a matter vested in the agency's discretion, absent a

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149. 1981 MSAPA § 5-116(c), 15 U.L.A. 145 (2000).



showing of abuse,<sup>150</sup> and while agency action is presumed to be correct,<sup>151</sup> that presumption does not apply to questions of law.<sup>152</sup> In these jurisdictions, an agency's conclusions of law are reviewed de novo,<sup>153</sup> including independently determining the law in mixed questions of law and fact.<sup>154</sup> A court gives "weight" to an agency's interpretation of a statute "*only* where the law is ambiguous *and* the matter falls within the agency's expertise."<sup>155</sup> If an agency's interpretation is outside of the agency's expertise, the agency's interpretation is entitled to no deference.<sup>156</sup>

Like the 1961 MSAPA,<sup>157</sup> the cases construing the 1981 MSAPA<sup>158</sup> appear to reflect the discord between the "judicial voice" and the "administrative voice."<sup>159</sup> Like the 1961 MSAPA,<sup>160</sup> the conflict between the two voices is, in large part, attributable to the 1981 Act's lack of express language about whether or when courts should defer to agency interpretations of law.<sup>161</sup>

#### IV. DEFERENCE UNDER THE 1998 AMENDMENTS TO IOWA'S ADMINISTRATIVE PROCEDURE ACT

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150. *Concerned Citizens of Hosp. Dist. No. 304 v. Bd. of Comm'rs*, 897 P.2d 1267 (Wash. Ct. App. 1995).

151. *See, e.g., Multicare Med. Ctr. v. State Dep't of Soc. & Health Servs.*, 790 P.2d 124 (Wash. 1990).

152. *Id.*

153. *See, e.g., RenalWest L.C. v. Ariz. Dep't of Revenue*, 943 P.2d 769 (Ariz. Ct. App. 1997); *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 860 P.2d 390 (Wash. 1993).

154. *See, e.g., Whiteco Outdoor Adver. v. City of Tucson*, 972 P.2d 647 (Ariz. Ct. App. 1998); *Valentine v. Dep't of Licensing*, 894 P.2d 1352 (Wash. Ct. App. 1995).

155. *See, e.g., Boeing Co. v. Gelman*, 10 P.3d 475, 477 (Wash. Ct. App. 2000) (emphases added).

156. *See, e.g., Cascade Court Ltd. P'ship v. Noble*, 20 P.3d 997 (Wash. Ct. App. 2001).

157. *See supra* notes 114-45.

158. *See supra* notes 150-56.

159. *Aprill, supra* note 1, at 2128.

160. *See supra* Part III.A.

161. 1981 MSAPA § 5-116(c), *see generally* 15 U.L.A. 144 (2000).

The 1998 Amendments to the Iowa Administrative Procedure Act were intended to address several inadequacies of the 1974 IAPA,<sup>162</sup> which, like the 1961 MSAPA on which it was partially based, was a “first generation” APA.<sup>163</sup> While the Iowa State Bar Association’s taskforce on revision of the IAPA recommended repealing the 1974 IAPA and adopting a new act in its stead,<sup>164</sup> Iowa’s Attorney General and “several agencies then responded that they believed the current IAPA was satisfactory and, therefore, that it should not be replaced by an entirely new IAPA.”<sup>165</sup> From this dispute came a compromise: “a series of discrete amendments to” the IAPA.<sup>166</sup>

A crucial portion of this compromise was a revision of the IAPA’s provisions concerning the scope of judicial review.<sup>167</sup> While these provisions were “completely re-written” in the 1999 amendments, these revisions were not intended to “significantly alter the delicate balance of judicial review in Iowa”<sup>168</sup> or to “increase the intensity of review by the courts beyond that originally contemplated by the language of the [1974] IAPA.”<sup>169</sup> Rather, the 1999 IAPA amendments were a response to evidence that reviewing courts were not applying the level of scrutiny intended by the 1974 IAPA.<sup>170</sup> The 1999 IAPA amendments provided “much more specificity”<sup>171</sup> to reviewing courts, which “may mildly increase the intensity of judicial review of agency action by the District Court.”<sup>172</sup> According to Professor Bonfield:

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162. BONFIELD, *supra* note 46, at 1.

163. *Id.*

164. *Id.* at 2-6.

165. *Id.* at 6-7.

166. Pamela D. Griebel, New Standards of Judicial Review Under House File 667, Presentation to a Continuing Legal Education Event Sponsored by the Legal Services Corporation of Iowa, at 3 (Oct. 22, 1999); *see also* BONFIELD, *supra* note 46, at 7-8.

167. BONFIELD, *supra* note 46, at 59-73; Griebel, *supra* note 166, at 8-27.

168. Griebel, *supra* note 166, at 9.

169. BONFIELD, *supra* note 46, at 59.

170. *Id.* at 59-60.

171. *Id.* at 60.

172. *Id.*

The greater specificity is sought to be achieved by elaborating in much more detail the substantive content of the current standards of review to be applied by the District Court, by stating explicitly the exact circumstances in which the District Court is or is not required to give deference to an agency's view of a matter, and by filling in with express language some of the legal principals applicable to the scope of review that are not dealt with by the language of the [1974] IAPA.<sup>173</sup>

In subsequent sections, this Article explores these more specific provisions, with a view to whether this "greater specificity"<sup>174</sup> preserved the "delicate balance"<sup>175</sup> between the "administrative voice" and the "judicial voice."<sup>176</sup>

*A. Iowa Code section 17A.19(11)*

The 1974 IAPA was silent on when courts were to defer to administrative agencies, and "some of the cases appear unclear and sometimes inconsistent."<sup>177</sup> The 1998 amendments to the IAPA codified prior law.<sup>178</sup> Iowa Code section 17A.19(11) provides what Pamela Griebel termed the "three golden rules" of judicial review of agency action.<sup>179</sup>

Section 17A.19(11) provides:

In making the determinations required by subsection 10, paragraphs "a" through "n", the court shall do all of the following:  
a. Shall not give any deference to the view of the agency with respect to whether particular matters have

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173. *Id.*

174. *Id.*

175. Griebel, *supra* note 166, at 9.

176. Aprill, *supra* note 1, at 2128.

177. BONFIELD, *supra* note 46, at 70.

178. *Id.*; Griebel, *supra* note 166, at 15-16.

179. Griebel, *supra* note 166, at 14.

been vested by a provision of law in the discretion of the agency.

b. Should not give any deference to the view of the agency with respect to particular matters that have not been vested by a provision of law in the discretion of the agency.

c. Shall give appropriate deference to the view of the agency with respect to particular matters that have been vested by a provision of law in the discretion of the agency.<sup>180</sup>

Paragraph “a”, stating an agency’s view of its own power “shall not”<sup>181</sup> be granted deference, codifies the generally accepted prior rule in Iowa.<sup>182</sup> Professor Bonfield provides three reasons why this is so: (1) the extent of an agency’s power is a “purely legal issue that was determined finally by the General Assembly and therefore that was not delegated to the judgment of the agency;”<sup>183</sup> (2) the interpretation of statutes does not require any special agency expertise; and (3) deferring to an agency’s determination of its own powers would “give deference to the view of a self interested party . . . and lessen the effectiveness of the courts as a check on the exercise by agencies of unauthorized powers.”<sup>184</sup>

Paragraph “b”, stating that a reviewing court “should not”<sup>185</sup> defer to an agency’s views on matters that have not been vested in its discretion by a provision of law,<sup>186</sup> discourages but does not prohibit

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180. IOWA CODE § 17A.19(11) (2007).

181. *Id.* § 17A.19(11)(a).

182. Griebel, *supra* note 166, at 16 (citing *Moderate Income Hous. v. Bd. of Review*, 393 N.W.2d 324, 326 (Iowa 1986)).

183. BONFIELD, *supra* note 46, at 71.

184. *Id.*

185. IOWA CODE § 17A.19(11)(b).

186. Griebel, *supra* note 166, at 15, notes “provision of law” is defined by the 1998 IAPA amendments as follows: “the whole or part of the Constitution of the United States of America or the Constitution of the State of Iowa, or any federal or state statute, court rule, executive order of the governor, or agency rule.” IOWA CODE § 17A.2(10n).

courts from granting deference to agencies in such situations.<sup>187</sup> Deference in such circumstances should rarely be granted.<sup>188</sup> Professor Bonfield provides one example:

There will inevitably be some situations in which the matters being reviewed that have not been vested in agency discretion are highly technical, requiring special expertness for adequate comprehension, and the agency has that expertness and the reviewing court does not. In those situations the reviewing court may feel that it must give some special weight to the agency's view in order to make a sound decision.<sup>189</sup>

In nearly all other cases, reviewing courts should give no deference to an agency's views on a subject.

In *Mosher v. Iowa Department of Inspections and Appeals*, the supreme court determined that the Department was not vested with the authority to interpret the state's statute on dependent adult abuse.<sup>190</sup> Citing Iowa Code section 17A.19(11)(b), the Department asserted that the court should still give deference to its interpretation of the statute.<sup>191</sup>

The court rejected that argument, stating:

We do not think this appeal is one of those rare cases in which we should ignore the legislature's general directive to give no deference to the agency's view in matters not involving agency discretion. The statutory definitions are clear and detailed. They are not "highly technical," and do not require "special expertness for adequate comprehension." Therefore,

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187. Griebel, *supra* note 166, at 16 ("Note that the operative word is "should" not "shall."); *see also* BONFIELD, *supra* note 46, at 71 (same).

188. BONFIELD, *supra* note 46, at 72; *see also* Griebel, *supra* note 166, at 16 ("Most decisions should not confer deference in this context.").

189. BONFIELD, *supra* note 46, at 72. On the similarity of this analysis to *Skidmore*, *see supra* notes 45-47.

190. *Mosher v. Iowa Dep't of Inspections & Appeals*, 671 N.W.2d 501 (Iowa 2003).

191. *Id.* at 510.

we give no deference to the agency's view on the issue of statutory interpretation.<sup>192</sup>

Paragraph "c" of the Iowa Code states that the reviewing courts "shall give appropriate deference" to agency views on a matter, when that matter has been vested by a provision of law.<sup>193</sup> This codifies prior law.<sup>194</sup> According to Professor Bonfield, a reviewing court that did not give appropriate deference in such instances would be violating the statute that committed the subject to the agency's discretion.<sup>195</sup> This paragraph does not quantify the amount of deference a reviewing court is to give; rather, it states only that appropriate deference must be given.<sup>196</sup> The amount of deference that is appropriate will depend on the nature of the agency action under review and the specific grounds for judicial review.<sup>197</sup>

In *City of Marion v. Iowa Department of Revenue and Finance*,<sup>198</sup> the Iowa Supreme Court applied Iowa Code section 17A.19(11) in resolving a dispute about whether an Iowa city owed state sales tax on revenues from the city's public swimming pool.<sup>199</sup> State law exempted "gross receipts from sales or services rendered, furnished, or performed by a county or city" from state sales tax, but "fees" paid to a county or city for "participating in any athletic sports" were subject to state taxation.<sup>200</sup> The state had adopted an administrative rule stating that swimming pool revenue was taxable, as swimming

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192. *Id.* at 510-11 (quoting BONFIELD, *supra* note 46, at 72, and citing *Harrison v. Employment Appeal Bd.*, 659 N.W.2d 581, 586 (Iowa 2003) (giving no deference to Employment Appeal Board's interpretation of workplace drug testing law)).

193. IOWA CODE § 17A.19(11)(c).

194. Griebel, *supra* note 166, at 16 (citing, e.g., *Madrid Home for the Aging v. Iowa Dep't of Human Servs.*, 557 N.W.2d 507, 511 (Iowa 1996)).

195. BONFIELD, *supra* note 46, at 72.

196. Griebel, *supra* note 166, at 14.

197. *Id.*; see also BONFIELD, *supra* note 46, at 72.

198. *City of Marion v. Iowa Dep't of Revenue & Fin.*, 643 N.W.2d 205 (Iowa 2002). For a brief discussion of this case, see *Iowa City Had to Pay State's Sales Tax On Admissions to Town Pool*, J. MULTISTATE TAX'N & INCENTIVES, Oct. 2002, at 45.

199. *Id.* at 205-06.

200. *Id.* at 206 (citing IOWA CODE 422.45(20) (1997)). This section was recodified in 2003, and is now at IOWA CODE section 423.3(32) (2007).

was an “athletic sport.”<sup>201</sup> The City of Marion had not paid sales tax on admissions fees to its municipal pool, and the state sought to collect over \$23,000 in tax, penalties, and interest from the City. The City sought judicial review, and the district court affirmed the agency’s decision.<sup>202</sup>

The City argued the state’s rule was an incorrect interpretation of the statute.<sup>203</sup> The supreme court turned to Iowa Code section 17A.19(11) to analyze the City’s argument. The court noted it “shall not” give deference to the agency’s view of its own powers,<sup>204</sup> but “should” give “appropriate deference” to the agency’s view of a matter “that [has] been vested by a provision of law in the discretion of the agency.”<sup>205</sup> The court noted that Iowa Code section 422.68(1) granted the agency responsible for state sales tax “the power and authority to prescribe all rules not inconsistent with the provisions of this chapter, necessary and advisable for its detailed administration and to effectuate its purposes.”<sup>206</sup> The court determined this statute vested the state with the discretion to enact the rule at issue.<sup>207</sup> Giving the agency’s view deference, the supreme court affirmed the judgment of the district court.<sup>208</sup>

*City of Marion* may reveal some tension between the administrative and the judicial “voices.”<sup>209</sup> Section 17A.19(11)(c) states that courts “shall” give “appropriate deference” to an agency’s views about matters vested by law in the agency’s discretion.<sup>210</sup> Under Iowa law, “shall” in a statute “imposes a duty.”<sup>211</sup> In *City of Marion*, the court stated it merely “should” give deference in such cases.<sup>212</sup> Whether intentional or not, the court in *City of Marion*

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201. *Id.* (citing Iowa Admin. Code r. 701—18.39 (1997)).

202. *Id.* at 206.

203. *Id.* at 207.

204. *Id.* (quoting IOWA CODE § 17A.19(11)(a)).

205. *Id.* (quoting and construing IOWA CODE § 17A.19(11)(c)).

206. *Id.* (citing IOWA CODE § 422.68(1)).

207. *Id.*

208. *Id.*; see also *ABC Disposal Sys., Inc. v Dep’t of Natural Res.*, 681 N.W.2d 596, 601-03 (Iowa 2004) (employing a similar analysis).

209. See *Aprill*, *supra* note 1, at 2128.

210. IOWA CODE § 17A.19(11)(c).

211. *Id.* § 4.1(30)(a).

212. *City of Marion*, 643 N.W.2d at 207.

subtly but appreciably departed from the statutory framework and created potential for uncertain application of section 17A.19(11)(c), the very confusion section 17A.19(11) was intended to eliminate.<sup>213</sup> While the amount of “appropriate deference” refers to review based on “the unreasonable, arbitrary, capricious, or abuse of discretion standard,”<sup>214</sup> section 17A.19(11) imposes a duty on reviewing courts to give such “appropriate deference.”<sup>215</sup>

In contrast to the outcome in *City of Marion*, in *Auen v. Alcoholic Beverages Division*,<sup>216</sup> the Iowa Supreme Court was confronted by a challenge to an amendment to an agency rule concerning the ability (or, rather, the lack thereof) of an alcohol manufacturer, bottler, or wholesaler to have an ownership interest in a business that retails alcohol.<sup>217</sup> The Alcoholic Beverages Division’s proposed regulation was purportedly implementing Iowa Code section 123.45, which read:

A person engaged in the business of manufacturing, bottling, or wholesaling alcoholic beverages, wine, or beer, or any jobber, representative, broker, employee, or agent of such a person, shall not . . . directly or indirectly be interested in the ownership, conduct, or operation of the business of another licensee or permittee authorized under this chapter to sell at retail, nor hold a retail liquor control license or retail wine or beer permit.<sup>218</sup>

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213. BONFIELD, *supra* note 46, at 72.

214. *Id.*

215. IOWA CODE §§ 4.1(30)(a), 17A.19(11)(c). In *Becker v. Iowa Department of Human Services*, 661 N.W.2d 125 (Iowa 2003), the court cited IOWA CODE section 4.6(6) (stating courts “may consider” “the administrative construction of the statute” when construing an ambiguous statute) in upholding the Department’s rule implementing the state’s adoption subsidy statute. The court did not engage in the analysis found in IOWA CODE section 17A.19(10)-(11). There is a quantum difference between “may consider” (IOWA CODE § 4.6(6)) and “shall give appropriate deference” (*Id.* § 17A.19(11)(c)).

216. *Auen v. Alcoholic Beverages Div.*, 679 N.W.2d 586 (Iowa 2004).

217. *Id.* at 587-88.

218. IOWA CODE § 123.45(1999).



The Alcoholic Beverages Division amended its implementing rule<sup>219</sup> to “narrowly define ‘interest’ and to exclude remote corporate connections that do not affect retail businesses directly or indirectly.”<sup>220</sup> A group of beer distributors challenged the rule, which the district court upheld.<sup>221</sup>

On appeal, the supreme court reversed.<sup>222</sup> The court noted the legislature had vested the agency with the authority to “adopt rules governing ‘the conditions and qualifications necessary for the obtaining of licenses and permits,’” which includes the authority to interpret section 123.45.<sup>223</sup> The court concluded, however, that the division’s “narrow” proposed rule was inconsistent with section 123.45’s “bright line” rule.<sup>224</sup> If a different standard for what constitutes impermissible producer or wholesaler control of retail alcoholic beverage outlets would be a public policy improvement, that is a matter for the legislature, not the agency.<sup>225</sup> The court held: “Because we conclude amended rule 185–16.2(2) is an illogical interpretation of Iowa Code section 123.45, the district court erred in upholding the rule.”<sup>226</sup>

While section 17A.19(11)(c) describes when a court shall give “appropriate deference” to the views of an agency, Iowa Code section 17A.19(10) describes the level of deference that is appropriate under different situations.<sup>227</sup> The two sections, which are inseparable parts of a coherent whole, should be read together.<sup>228</sup> The next section of this article reviews section 17A.19(10).<sup>229</sup>

### *B. Iowa Code 17A.19(10)*

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219. IOWA ADMIN. CODE r. 185—16.2(2) (2000).

220. Adopted and Filed, 23 Iowa Admin. Bull. 724 (2000).

221. *Auen*, 679 N.W.2d at 589.

222. *Id.* at 587.

223. *Id.* at 590 (quoting IOWA CODE § 123.21(11) (1999)); *see also City of Marion*, 643 N.W.2d at 207, cited by the *Auen* court.

224. *Auen*, 679 N.W.2d at 592.

225. *Id.*

226. *Id.* at 592-93.

227. IOWA CODE § 17A.19(10).

228. BONFIELD, *supra* note 46, at 61.

229. *See infra* Part IV.B.

Iowa Code section 17A.19(10) is one of the provisions “calculated to ensure that judicial review is an effective check on illegal agency action.”<sup>230</sup> It provides, in relevant part:

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

....

c. Based upon an *erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency.*

....

f. Based upon a *determination of fact clearly vested by a provision of law in the discretion of the agency that is not supported by substantial evidence in the record before the court when that record is viewed as a whole.* . . .

....

h. Action other than a rule that is inconsistent with the agency's prior practice or precedents, unless the agency has justified that inconsistency by stating credible reasons sufficient to indicate a fair and rational basis for the inconsistency.

....

l. Based upon an irrational, illogical, or wholly unjustifiable interpretation of a provision of law *whose interpretation has clearly been vested by a provision of law in the discretion of the agency.*

m. Based upon an irrational, illogical, or wholly unjustifiable application of law to fact that *has clearly*

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230. BONFIELD, *supra* note 46, at 59.

*been vested by a provision of law in the discretion of the agency.*

n. Otherwise unreasonable, arbitrary, capricious, or an abuse of discretion.<sup>231</sup>

The provisions “generally elaborate with further detail and specificity” the scope of review provisions in the 1974 IAPA.<sup>232</sup> They make no significant substantive changes.<sup>233</sup>

One commentator refers to Iowa’s standard of review as “a modified version of the *Chevron* doctrine.”<sup>234</sup> Rather than focusing on whether a legislative delegation of interpretive power to an agency is “explicit” or “implied,”<sup>235</sup> the 1998 IAPA amendments direct the reviewing courts to consider whether a provision of law “clearly vested” that power in the agency’s discretion.<sup>236</sup> Professor Bonfield observes that “clearly” is a much less “restrictive” threshold than “explicitly.”<sup>237</sup> In determining whether a provision of law “clearly” commits a matter to an agency’s discretion, he offers the following guidance:

This means that the reviewing court, using its own independent judgment and without any required deference to the agency’s view, must have a firm conviction from reviewing the precise language of the statute, its context, the purpose of the statute, and the practical considerations involved, that the legislature actually intended (or would have intended had it thought about the question) to delegate to the agency

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231. IOWA CODE § 17A.19(10) (emphases added).

232. BONFIELD, *supra* note 46, at 61.

233. *Id.*

234. Griebel, *supra* note 166, at 19.

235. *See supra* Part II.B (discussing *Chevron*).

236. BONFIELD, *supra* note 46, at 63 (discussing IOWA CODE § 17A.19(10)).

237. *Id.* Griebel states this distinction, “as a practical matter ... is necessary.” Griebel, *supra* note 166, at 19. She notes: “Few statutes are as “express” as the following example from the Consumer Fraud Act: “To accomplish the objectives and to carry out the duties prescribed by this section, the attorney general ... may promulgate such rules as may be necessary, which rules shall have the force of law.” *Id.* (quoting IOWA CODE § 714.16(4)(a) (1999)).

interpretive power with the binding force of law over the elaboration of the provision in question.<sup>238</sup>

The Iowa Supreme Court addressed the issue of a “firm conviction” in *Mosher*.<sup>239</sup> There, the Department of Inspections and Appeals (DIA) asserted the legislature had vested it with the discretion to interpret a statute on dependent adult abuse.<sup>240</sup>

DIA argues it has been granted discretion to interpret the statutory definitions set forth in chapter 235B for two reasons: (1) it has broad regulatory authority over licensed health care facilities pursuant to Iowa Code chapter 135C; and (2) section 235B.3(1) places responsibility for “the evaluation and disposition of dependent adult abuse cases within health care facilities” on DIA. In considering DIA’s contention, we give no deference to its view that it has been accorded discretion in this area. See Iowa Code § 17A.19(11)(a).<sup>241</sup>

The court rejected this argument. It first noted the authority to regulate health facilities, conferred in Iowa Code chapter 135C, “does not qualify as a legislative delegation of discretion to DIA” to interpret the dependent adult abuse provisions contained in an entirely different Code chapter.<sup>242</sup> Next, the court determined the DIA’s power to decide contested cases concerning dependent adult abuse did not create a “firm conviction” the DIA had the discretion to interpret the dependent adult abuse statute.<sup>243</sup> In fact, the court concluded the legislature had “clearly vested” the Department of Human Services with the authority to “elaborate on the statutory definition of ‘dependent adult,’”<sup>244</sup> a fact wholly inconsistent with the DIA’s argument.

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238. BONFIELD, *supra* note 46, at 63.

239. *Mosher*, 671 N.W.2d at 508-10.

240. *Id.*

241. *Id.* at 509.

242. *Id.*

243. *Id.*

244. *Id.* at 510 (citing IOWA CODE § 235B.2(4)). For cases, in addition to *City of Marion*, 643 N.W.2d 205, where the court found an agency to be “clearly vested” with interpretive authority, see, e.g., *City of Des Moines v. Employment*

In contrast, in *Robinson v. State*, the supreme court was confronted by an agency rule stating the statute of limitations for filing an action under the state's tort claims act would commence after service of a notice of denial of the claim upon the claimant or the claimant's attorney.<sup>245</sup> The court concluded the legislature did not clearly vest the agency with the "agency with interpretive powers with respect to what type of notice is required to commence the statute of limitations."<sup>246</sup> Even though the agency was not vested with the discretion to interpret the tort claims act, the supreme court, applying its own independent judgment, arrived at the same result as the agency.<sup>247</sup> Just as being "clearly vested" with discretion is no guarantee that an agency's interpretation will be affirmed,<sup>248</sup> a lack of such vesting is no guarantee the reviewing court will disagree with the agency's interpretation.<sup>249</sup>

When the matter purportedly vested in the agency's discretion is interpretation of the common law, the same analysis applies. In *ABC Disposal Systems, Inc. v. Department of Natural Resources*, the supreme court concluded the legislature did not empower the Department of Natural Resources to "interpret or apply the common law doctrine of equitable estoppel."<sup>250</sup> Also in *ABC*, the court concluded it would give no deference to an agency's interpretation of the state or federal constitution, "because it is exclusively up to the judiciary to determine the constitutionality of legislation and rules enacted by the other branches of the government."<sup>251</sup>

The court's decision in *ABC* stands in marked contrast to its decision in *Zomer v. West River Farms, Inc.*<sup>252</sup> There, the issue was whether the agency that administers the state's workers' compensation program had the authority to reform the employer's

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Appeal Bd., 722 N.W.2d 183, 193-94 (Iowa 2006); *Thoms v. IPERS*, 715 N.W.2d 7, 11 (Iowa 2006).

245. *Robinson v. State*, 687 N.W.2d 591, 595-96 (Iowa 2004).

246. *Id.* at 596.

247. *Id.*

248. *See Auen*, 679 N.W.2d 586.

249. *Robinson*, 687 N.W.2d at 595-96.

250. *ABC Disposal Sys., Inc. v Dep't of Natural Res.*, 681 N.W.2d 596, 606 (Iowa 2004).

251. *Id.* at 605 (citing IOWA CODE § 17A.19(11)(b)).

252. *Zomer v. W. River Farms, Inc.*, 666 N.W.2d 130 (Iowa 2003).

workers' compensation insurance policy.<sup>253</sup> The court, with only an oblique and passing reference to Iowa Code chapter 17A (and no reference to subsections 17A.19(10) or 17A.19(11)),<sup>254</sup> concluded the agency had such equitable powers.<sup>255</sup> It did so relying on Iowa Code section 86.14(1), which states that, in a workers' compensation contested case, "all matters relevant to a dispute are subject to inquiry."<sup>256</sup> From this "all matters" phrase, the court concluded the agency had the ability to decide the meaning of a contract and, if equitable principles warrant, reform the contract.<sup>257</sup>

In dissent, Justice Neuman stated: "I think it will come as a great surprise to the workers' compensation commissioner that the agency has not only the power to determine the legal effect of a contract ... but to take the next step of reforming contracts based on equitable principles."<sup>258</sup>

*Zomer* is an unusual case. While not necessarily disagreeing with the *Zomer* court's ultimate conclusion, we disagree with the methodology it employed. The *Zomer* court's ultimate conclusion would have been strengthened by a more express reference to the analysis contained in Iowa Code section 17A.19(10) and to Iowa Code section 17A.23, which states agencies only have powers conferred by law.<sup>259</sup>

While in *Zomer* the supreme court concluded the state's workers' compensation agency had the authority to reform a contract, the court in *Mycogen Seeds v. Sands* concluded the same agency's under certain provisions of the workers' compensation statute were not entitled to deference.<sup>260</sup> The court stated:

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253. *Id.* at 130.

254. *Id.* at 133.

255. *Id.* at 134-35.

256. *Id.* at 134 (citing IOWA CODE § 86.14(1)) (emphasis omitted).

257. *Id.* at 134-135.

258. *Id.* at 135 (Neuman, J., dissenting) (emphasis omitted). Compare *Zomer*, 666 N.W.2d at 130, with *Van Meter Indus. v. Mason City Human Rights Comm'n*, 675 N.W.2d 503 (Iowa 2004) (stating agency had no statutory authority to award punitive damages under the Iowa Civil Rights Act).

259. IOWA CODE § 17A.23. According to Professor Bonfield, this section "clearly and firmly restates current law. Agencies have no inherent powers." BONFIELD, *supra* note 46, at 73.

260. *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 464 (Iowa 2004).

Here, the commissioner's decision regarding apportionment of disability benefits, reimbursement of lost wages, and penalty benefits is based upon statutory interpretation. We see nothing in Iowa Code chapter 85 that convinces us that the legislature has delegated any special powers to the agency regarding statutory interpretation in these areas. So such interpretation has not "clearly been vested by a provision of law in the discretion of the agency." . . . We therefore need not give the agency any deference regarding its interpretation and are free to substitute our judgment de novo for the agency's interpretation.<sup>261</sup>

The court, while giving no deference, ultimately arrived at the same conclusion as the agency.<sup>262</sup>

*Mycogen Seeds* is also subject to criticism. While nothing in Iowa Code chapter 85 grants any discretion to interpret the workers' compensation statutes to the agency, section 86.14(1) grants the agency the power to inquire into "all matters relevant" to a workers' compensation contested case.<sup>263</sup> Chapter 86 also grants the agency the power to "adopt and enforce rules necessary to implement this chapter and chapters 85, 85A, 85B, and 87."<sup>264</sup> In our view, the *Zomer* court may have strayed by over-reading section 86.14(1), while the *Mycogen Seeds* court may have strayed by not considering section 86.14(1) at all.

As in *Zomer*, we do not necessarily disagree with the *Mycogen Seeds* court's ultimate conclusion. We disagree with the route employed by the court in arriving at its ultimate conclusion. In searching for whether the agency was "clearly vested" with the discretion to interpret chapter 85, the court should have considered relevant provisions of chapter 86. Confining its search to chapter 85 was too restrictive. Had it expanded the scope of its inquiry to chapter 86, the *Mycogen Seeds* court would have had at least two statutory sections to consider when determining whether the legislature "clearly vested" the agency with the discretion to interpret the statutes on apportionment, lost wages, and penalty benefits.

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261. *Id.*

262. *Id.* at 468-69.

263. IOWA CODE § 86.14(1); *see also* *Zomer*, 666 N.W.2d at 133-34 (Iowa 2003) (construing this section).

264. IOWA CODE § 86.8(1) (1998).

Section 86.8(1),<sup>265</sup> giving the agency the power to issue rules, would not appear to apply to the interpretations of law at issue, as those interpretations were not made through rule-making.<sup>266</sup> Section 86.14(1), on which the *Zomer* majority placed so much reliance, does not appear to be a clear vesting of authority for the agency to interpret the workers' compensation statute outside the context of rulemaking in a way that would be entitled to deference. Section 86.14(1) refers to inquiries into relevant matters.<sup>267</sup> This statute outlines the nature of the record in a contested case and the agency's duty to inquire about and evaluate "relevant" evidence.<sup>268</sup> It is difficult to sensibly read this statute as doing anything else. It is doubtful that the text of the statute, when it is read in its context (including the statutory authority for the agency to make rules concerning the workers' compensation statutes),<sup>269</sup> the statute empowers the agency to interpret the workers' compensation statutes in a manner entitled to deference or to equitably reform an insurance policy.<sup>270</sup>

Had Iowa's workers' compensation agency promulgated its interpretations that were at issue in *Mycogen Seeds* in the form of a rule, the interpretation would have been entitled to deference<sup>271</sup> in light of section 86.8(1).<sup>272</sup> This is one of many, reasons why

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265. *Id.*

266. *Mycogen Seeds* cites no agency rules on these topics, *Mycogen Seeds*, 686 N.W.2d at 464, and the agency's administrative rules make scant mention of the topics, *see* IOWA ADMIN. CODE rr. 1.1 *et seq.* *Cf.* *United States v. Mead Corp.*, 533 U.S. 218, 231-32 (2001) (stating statute authorizing an agency to make rules does not provide sufficient implied authority to issue tariff classification decisions that are entitled to deference).

267. IOWA CODE § 86.14(1).

268. *Id.*

269. *Id.* at § 86.8(1).

270. *Cf. Zomer*, 666 N.W.2d at 131-34.

271. IOWA CODE § 17A.19(11)(c).

272. *Id.* § 86.8(1). In *P.D.S.I. v. Peterson*, 685 N.W.2d 627, 633 (Iowa 2004), the supreme court stated: "We see nothing in the workers' compensation statutes that convinces us that the legislature has delegated any special powers to the agency regarding its interpretation of case law or statutes." In our view, this assertion, to the extent the agency promulgates regulations interpreting the workers' compensation statutes, is suspect.



agencies should, whenever possible, make law by rule rather than in contested case decisions.<sup>273</sup>

In the years governed by the 1998 IAPA amendments, there have been some areas of confusion and uncertainty,<sup>274</sup> especially in areas where the 1998 amendments restated and clarified prior law. This confusion and uncertainty reveals a tension<sup>275</sup> between the “administrative” and “judicial” voices.<sup>276</sup> However, it has been our impression<sup>277</sup> that the 1998 IAPA amendments have accomplished the purpose of “providing much greater specificity”<sup>278</sup> and eliminating “confusion”<sup>279</sup> by courts, administrative agencies, and litigants.

## V. LOOKING FORWARD

We began this article with the assertion that deference matters and the level of deference may be outcome determinative.<sup>280</sup> Recent

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273. See, e.g., Arthur Earl Bonfield, *State Administrative Policy Formulation and The Choice of Lawmaking Methodology*, 42 ADMIN. L. REV. 121 (1990). See also *Finch v. Schneider Specialized Carriers*, 700 N.W.2d 328 (Iowa 2005) (construing IOWA CODE § 17A.19(10)(h)) (“The controlling legal standards are those set out in the workers’ compensation statutes and in this court’s opinions, not in prior agency decisions.” *Id.* at 332.). We question whether the issue is as stated by the *Finch* court. The issue under section 17A.19(10)(h) might not be whether the agency precedent was “controlling” but whether the agency’s actions were consistent – that is, whether the agency was treating similarly situated individuals in a similar manner. Professor Dotan explains why this is vital to the administrative state: “In addition, consistency in decisionmaking serves as a vital precondition for guaranteeing public faith in government. Finally, consistency in administrative decisionmaking is congruent with the need to protect reasonable expectations and reliance interests on behalf of members of the public.” Yoav Dotan, *Making Consistency Consistent*, 57 ADMIN. L. REV. 995, 1001 (2005).

274. See *supra* notes 252-73.

275. See *supra* notes 209-15.

276. Aprill, *supra* note 1, at 2128.

277. The primary author has been a judge on the Iowa Court of Appeals since 1999. The secondary author, prior to joining the Iowa Department of Education, was a staff attorney for the Iowa Court of Appeals.

278. BONFIELD, *supra* note 46, at 60.

279. *Id.* at 72.

280. See *supra* Part I.

federal precedent supports this assertion.<sup>281</sup> In both *Mead*<sup>282</sup> and *Gonzales*,<sup>283</sup> the Court determined that the agency interpretation was simply persuasive authority under *Skidmore*.<sup>284</sup> In both instances, the result was that the interpretation was struck down.<sup>285</sup> Similarly, state courts that afforded less deference to the agency interpretation of law were more likely to find that interpretation unreasonable.<sup>286</sup>

Given the importance of this concept to administrative law in general and to administrative law outcomes specifically,<sup>287</sup> we believe it is critical for legislatures to codify the notion of deference so that courts and litigants know what to expect.<sup>288</sup> “In the current state of affairs, deference doctrine simply does not help judges decide, counselors counsel, and regulators plan.”<sup>289</sup> The uncertainty and oscillations of the federal<sup>290</sup> and state<sup>291</sup> case law, in spite of “an avalanche of scholarly writing,”<sup>292</sup> suggests the need for legislative correction.<sup>293</sup> As Andersen states, “[i]f confusions persist despite extensive critical analysis, we have an obligation to look harder for other solutions.”<sup>294</sup>

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281. See *supra* Part II.

282. See *supra* Part II.D (discussing *Mead*).

283. See *supra* Part II.E (discussing *Gonzales*).

284. See *supra* Part II.A (discussing *Skidmore*).

285. See *supra* Parts II.D, II.E.

286. See *supra* Part III (discussing state cases).

287. See *supra* notes 20-32 and accompanying text.

288. See, e.g., Andersen, *supra* note 1, at 961 (“Other than litigation, there does not seem to be any practical way of predicting what a court will do with an agency legal interpretation.”); see also Andersen, *supra* note 61, at 1018 (stating “the same problems of indeterminacy and confusion plaguing the federal *Chevron* doctrine also exists at the state level”).

289. Andersen, *supra* note 61, at 1030.

290. See *supra* Part II.

291. See *supra* Part III.

292. Andersen, *supra* note 1, at 960.

293. See, e.g., BONFIELD, *supra* note 46 (discussing Iowa’s 1998 IAPA amendments); Andersen, *supra* note 1 (proposing amendment to federal APA); Andersen, *supra* note 61 (proposing additions to model state APA); Gedid et al., *supra* note 7 (discussing proposals for model state APA).

294. Andersen, *supra* note 1, at 961.

Iowa has taken such a step in its amended APA,<sup>295</sup> providing express and concrete guidance on when courts “shall” defer, “shall not” defer, and “should not” defer to agency matters under consideration.<sup>296</sup> The amendments also provide express and concrete guidance on the levels of deference that should be afforded in varying circumstances.<sup>297</sup> The amendments clarify for Iowans that judicial review must begin with an analysis of: (1) the statute delegating authority to the agency to administer the subject-matter of that statute, and (2) the nature of the agency action subject to review.

We believe that Iowa’s 1998 APA amendments may serve as a model for other states.<sup>298</sup> As Professor Bonfield stated, Iowa’s case law contained seemingly inconsistent statements,<sup>299</sup> reflecting the acknowledged tension between a court’s traditional role as arbiter of the law and agencies’ acknowledged role as experts in their fields. Iowa’s amendments provide a workable means of accommodating this tension<sup>300</sup> (which is also reflected in the case law of many other states),<sup>301</sup> and they attempt to harmonize the administrative and judicial voices.<sup>302</sup>

In a recent discussion draft of a proposed model state APA, the drafters included language from Iowa Code section 17A.19(10) as one of the scope-of-review options for states to consider.<sup>303</sup> We believe the drafters should consider including language from Iowa Code section 17A.19(11) as well. While the discussion draft indicates that courts, under either scope-of-review options, could defer to the agency legal conclusions,<sup>304</sup> we believe this does not

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295. IOWA CODE § 17A.19(10)-(11) (2007).

296. *Id.* § 17A.19(11).

297. *Id.* § 17A.19(10).

298. *See, e.g.,* Gedid et al., *supra* note 7 (noting proposed MSAPA contains language adopted from IOWA CODE section 17A.19(10)).

299. BONFIELD, *supra* note 46, at 70.

300. *Id.* at 72.

301. *See supra* Part III; *see also* Andersen, *supra* note 61.

302. Aprill, *supra* note 1, at 2128.

303. Gedid et al., *supra* note 7 at 72-75 (citing Revised Model State Administrative Procedure Act, Draft for Discussion Only, at 72-75). The other option would provide for a “skeletal” scope of review. *Id.*

304. *Id.* (citing Revised Model State Administrative Procedure Act, Draft for Discussion Only, at 76).

clearly prescribe limitations for reviewing courts. There are some instances in which deference is not an option a reviewing court may select; rather, it is the only option available. In certain instances, the legislature commands deference. If a reviewing court fails to give deference when a statute commands it, the court would be “violating the statute making that delegation to the judgment of the agency.”<sup>305</sup> Section 17A.19(11)(c) acknowledges this, as it requires reviewing courts to give “appropriate deference” to agency views in such situations.<sup>306</sup> Likewise, section 17A.19(11)(a) states that courts need not give deference to an agency’s determination of its own powers,<sup>307</sup> and section 17A.19(11)(b) does not require deference where the law does not require it,<sup>308</sup> but allows courts to do so in special cases,<sup>309</sup> such as when the matter under review is within the agency’s special expertise.<sup>310</sup>

A scientist would tell us that binocular vision helps attain depth perception.<sup>311</sup> Viewing a subject from multiple vantage points and through multiple lenses is vital to gaining a full and rich perspective of the subject. In our view, the issues of discretion and deference, for a proper understanding, need to be viewed through multiple lenses: Iowa Code sections 17A.19(10) and 17A.19(11). These provisions, when read together,<sup>312</sup> provide the required depth of analysis to fully understand the complex issues of discretion and deference.<sup>313</sup> We encourage the drafters of the proposed model state APA to consider including the language from Iowa Code section 17A.19(11), and states to consider adopting it.

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305. BONFIELD, *supra* note 46, at 72.

306. IOWA CODE § 17A.19(11)(c).

307. *Id.* § 17A.19(11)(a).

308. *Id.* § 17A.19(11)(b).

309. *See supra* notes 45-47 and 185-89 and accompanying text.

310. *See, e.g., Mosher v. Dep’t of Inspections & Appeals*, 671 N.W.2d 501, 510 (Iowa 2003); BONFIELD, *supra* note 46, at 72.

311. *See, e.g.,* SCOTT B. STEINMAN, BARBARA A. STEINMAN & RALPH PHILIP GARZIA, FOUNDATIONS OF BINOCULAR VISION: A CLINICAL PERSPECTIVE (2000).

312. *See* BONFIELD, *supra* note 46, at 61.

313. For two examples of 17A.19(10) and 17A.19(11) being read and applied as a coherent whole, *see Mosher*, 671 N.W.2d at 501, and *Auen v. Alcoholic Beverages Div.*, 679 N.W.2d 586 (Iowa 2004).

Professor Andersen has recognized the need for statutory amendments to the federal APA and to the model state APA to specifically address deference, as a reaction to the lack of consistency in the case law.<sup>314</sup> While we agree with his aim, we do not believe his specific proposals will attain it. First, both of his proposals state that courts “may” defer to an agency’s interpretation of law if certain conditions are met.<sup>315</sup> We do not see how this solves the problem of inconsistency. By the terms of Andersen’s proposed language, a court need not defer to an agency’s views even if certain conditions are met. This would apparently allow courts to elect not to defer on a matter even in instances where the matter was committed by law to the discretion of the agency.<sup>316</sup> In contrast, Iowa Code section 17A.19(11)(c) would require “appropriate” deference in such instances,<sup>317</sup> with appropriateness being determined based on the facts of each case.<sup>318</sup>

In not linking mandatory deference to legislative delegation, Andersen states the idea of legislative delegation is “fictitious.”<sup>319</sup> This characterization may be correct in cases where legislative will is unclear, but is unhelpful and counterproductive in cases where the legislature’s will was clear. If the legislature commanded deference to an agency’s view on a matter, it is no answer that other expressions of legislative will concerning deference have been unclear.

Second, the preconditions for the optional deference that Andersen proposes (e.g., authoritative, agency expertise<sup>320</sup>), while perfectly adequate for determining whether to defer in cases where the legislature did not vest the agency with discretion

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314. Andersen, *supra* note 1; Andersen, *supra* note 61.

315. Andersen, *supra* note 1, at 964 (proposed amendment to federal APA); Andersen, *supra* note 61, at 1037 (proposed language for model state APA).

316. *See supra* note 315.

317. IOWA CODE § 17A.19(11)(c).

318. *Cf.* BONFIELD, *supra* note 46, at 72. This is not an “all or nothing” formulation to deference about which Andersen complains. *See* Andersen, *supra* note 1, at 966. Rather, it is “appropriate-or-nothing,” a much different construct.

319. Andersen, *supra* note 61, at 1034; *see also* Andersen, *supra* note 1, at 963 (“convenient fiction”).

320. Andersen, *supra* note 1, at 964 (proposed amendment to federal APA); Andersen, *supra* note 61, at 1037 (proposed language for model state APA).

concerning a matter<sup>321</sup> or determining how much deference an agency's view is due, are unnecessary to consider when the legislature clearly vested the agency with discretion concerning a matter. If the legislature has spoken, the courts must listen. The idea of deference is essential to a "separated powers model,"<sup>322</sup> and judicial review is necessary to police agency action<sup>323</sup> in order to ensure agencies exercise only those powers conferred on them by statute.<sup>324</sup> We think, however, symmetry is required. If an agency is only to exercise the powers that are delegated to it, it must also be permitted to exercise every power it is delegated. Failure to give deference to an agency's views on the topic, when the legislature has determined as a matter of law and policy that such deference is required, "would be violating the statute making that delegation to judgment of the agency."<sup>325</sup> In policing agencies for illegal action, courts must self-police so they do not themselves act illegally.<sup>326</sup>

We recognize that, even if states adopt deference language similar to Iowa's statute, courts will continue to face issues concerning the nature of the delegated authority and whether and to what extent that authority encompasses the agency interpretation being reviewed.<sup>327</sup> In fact, Iowa's courts have had some of these difficulties in implementing these amendments.<sup>328</sup> However, the amendments establish a framework for analysis and, in our experience, have resulted, as intended,<sup>329</sup> in increased clarity and ease of application. The revised Model State Administrative Procedure Act would benefit from an addition of this language, and the states would benefit from its adoption.

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321. *See supra* Parts II, IV.A.

322. Andersen, *supra* note 61, at 1036.

323. *Id.*; *see also* BONFIELD, *supra* note 46, at 59.

324. *See, e.g.*, IOWA CODE § 17A.23 (2007).

325. BONFIELD, *supra* note 46, at 72.

326. *See, e.g.*, *supra* notes 30-32 and accompanying text.

327. *Cf.* Andersen, *supra* note 1, at 975 ("This proposal will not end all uncertainties arising in determining the meaning and effect of agency legal interpretations.").

328. *See supra* notes 209-15, 252-73 and accompanying text.

329. BONFIELD, *supra* note 46, at 59-73.