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# Deference To Agency Interpretations of Regulations: A Post-*Chevron* Assessment

RUSSELL L. WEAVER\* AND THOMAS A. SCHWEITZER\*\*

## I. INTRODUCTION

Even before the Supreme Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,<sup>1</sup> the federal courts applied deference principles to an agency's interpretation of its own regulations.<sup>2</sup> In its 1945 decision in *Bowles v. Seminole Rock & Sand Co.*,<sup>3</sup> the Supreme Court stated flatly that an agency's interpretation of its own regulations is entitled to deference, provided the interpretation is not "plainly erroneous or inconsistent."<sup>4</sup> In other pre-*Chevron* cases, the courts also applied deference principles.<sup>5</sup> These principles were not always consistent with each other, and they were sometimes supplanted by other interpretive rules. Nevertheless, the Court applied strong deference principles in this context.<sup>6</sup>

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1. 467 U.S. 837 (1984).

2. See, e.g., *Jewett v. Commissioner*, 455 U.S. 305, 318 (1982); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565-66 (1980); *United States v. Larionoff*, 431 U.S. 864, 872-73 (1977); *Thorpe v. Housing Auth.*, 393 U.S. 268, 276 (1969); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). The Court continues to apply that standard. See also *Martin v. Occupational Safety & Health Review Comm'n*, 111 S. Ct. 1171, 1178 (1991) (suggesting that deference is particularly due when an agency interprets regulations that it has promulgated).

3. 325 U.S. 410 (1945).

4. *Id.* at 414.

5. Russell L. Weaver, *Judicial Interpretation of Administrative Regulations: The Deference Rule*, 45 U. PITT. L. REV. 587, 591-97 (1984).

6. *Id.* at 590-91, 601-02. But see *United States v. Swank*, 451 U.S. 571, 583-85 (1981) (rejecting an administrative interpretation without any discussion of the deference rule). In *Swank*, Justice White, dissenting, stated, "I dissent from the Court's opinion which is nothing more than a substitution of what it deems meet and proper for the wholly reasonable views of the Internal Revenue Service as to the meaning of its own regulations and of the statutory provisions." *Id.* at 595 (White, J., dissenting). In *Industrial Union Dep't., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607 (1980), Justice Marshall, dissenting, stated,

Even though *Chevron* involved an agency's interpretation of a statute rather than its interpretation of a regulation, *Chevron* is widely regarded as having had far-reaching implications.<sup>7</sup> One commentator stated that *Chevron* dominates "[t]he law governing judicial acceptance of agencies' interpretations."<sup>8</sup> Another commentator described *Chevron* as "one of the most important administrative law decisions in recent memory"<sup>9</sup> and concluded that it had brought about "a revolution in administrative law."<sup>10</sup> Thus, it is quite possible that *Chevron* affected the Court's approach to agency interpretations of regulations.

*Chevron* may have affected deference principles, as they apply to regulations, in any of several ways. First, in light of *Chevron*, the courts may have become more deferential by consistently using

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The plurality ignores applicable canons of construction, apparently because it finds their existence inconvenient . . . . Can it honestly be said that the Secretary's interpretation of the Act is "unreasoned" or "unsupportable?" . . . The plurality's disregard of these principles gives credence to the frequently voiced criticism that they are honored only when the Court finds itself in substantive agreement with the agency action at issue.

*Id.* at 712 (Marshall, J., dissenting). See also *M. Kraus & Bros., Inc. v. United States*, 327 U.S. 614, 622 (1946) ("Not even the Administrator's interpretations of his own regulations can cure an omission or add certainty and definiteness to otherwise vague language.").

7. See Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 373 (1986) ("*Chevron* offers a simpler view of proper judicial attitude . . . . Despite its attractive simplicity, however, this interpretation seems unlikely in the long run, to replace the complex approach described above for several reasons. . . . To read *Chevron* as laying down a blanket rule, applicable to all agency interpretations of law, such as 'always defer to the agency when the statute is silent,' would be seriously overbroad, counterproductive and sometimes senseless."); Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of Chevron's Step Two*, 2 ADMIN. L.J. 255, 255 (1988); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 456-57 (1989) ("*Chevron* . . . did more than merely declare the victor in a forty-year war between advocates of the deferential model and defenders of independent judgment. First, *Chevron* defined deference in a way that, while not entirely unprecedented, was far more extreme than earlier articulations of the model had been."); Abner J. Mikva, *How Should the Courts Treat Administrative Agencies*, Address Before the American University Law Review Banquet (Apr. 17, 1986), 36 AM. U. L. REV. 1, 6 (1986) (referring to *Chevron*'s holding as "a far-reaching development"); Richard Pierce, *Chevron and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 303 (1988); Kenneth W. Starr et al., *Judicial Review of Administrative Action in a Conservative Era*, 39 ADMIN. L. REV. 353, 356 (Ronald M. Levin moderator, (1987)) (describing *Chevron* as "the leading case on the subject . . . of deference to agencies on statutory issues"); Cass R. Sunstein, *Law and Administration after Chevron*, 90 COLUM. L. REV. 2071, 2087-88 (1990).

8. Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 3 (1990).

9. Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 312 (1986).

10. *Id.* at 307.

strong deference standards, such as the “plainly erroneous” standard articulated in *Bowles*, rather than weaker standards. In addition, the courts may have begun to use deference principles more regularly, and, therefore, to less frequently supplant those principles with other interpretive rules. Of course, it is always possible that *Chevron* had little effect on judicial conduct. Judicial rhetoric may not have changed, or, it may have changed, but courts continued to apply deference principles in an inconsistent fashion.

This Article examines deference principles insofar as they apply to an agency’s interpretation of its own regulations. Attention is given to the evolution of those standards since *Chevron* and to *Chevron*’s impact on the scope of review.

## II. PRE-*Chevron* CASE LAW

### A. Deference Standards

In the pre-*Chevron* era, the Supreme Court applied diverse deference standards to interpretations of regulations.<sup>11</sup> During this time, the Court would sometimes use “controlling” deference standards. These standards, if applied literally, were outcome-determinative. Thus, a reviewing court’s function was limited—it was only supposed to determine whether the specified standard had been satisfied. These controlling standards included the *Bowles* “plainly erroneous or inconsistent” standard,<sup>12</sup> as well as the “reasonable, consistently applied”<sup>13</sup> and “demonstrably irrational” standards.<sup>14</sup> During this time, the Court also applied several non-controlling deference standards. Under these standards, the Court did not suggest that agency interpretations should be accepted. Rather, the Court only accorded them “respect”<sup>15</sup> or the “greatest weight.”<sup>16</sup>

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11. See *Weaver*, *supra* note 5, at 591-97.

12. See, e.g., *United States v. Larionoff*, 431 U.S. 864, 872 (1977); *Immigration & Naturalization Serv. v. Stanisic*, 395 U.S. 62, 72 (1969); *Thorpe v. Housing Auth.*, 393 U.S. 268, 276 (1969); *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965).

13. See, e.g., *Northern Ind. Pub. Serv. Co. v. Porter County Chapter of the Izaak Walton League of Am., Inc.*, 423 U.S. 12, 15 (1975); *Ehlert v. United States*, 402 U.S. 99, 105 (1971).

14. See, e.g., *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980).

15. See, e.g., *Jewett v. Commissioner*, 455 U.S. 305, 318 (1982).

16. See, e.g., *United States v. Eaton*, 169 U.S. 331, 343 (1898).

In the pre-*Chevron* era, the lower federal courts applied a variety of deference standards, as well. Although courts most frequently applied the "plainly erroneous" standard,<sup>17</sup> they also applied the "reasonable, consistently applied" standard,<sup>18</sup> as well as other standards. For example, courts stated that agencies' interpretations were entitled to "deference,"<sup>19</sup> "special deference,"<sup>20</sup> "great deference,"<sup>21</sup> "great weight,"<sup>22</sup> or "substantial weight."<sup>23</sup> Other courts stated only that agencies' interpretations should be "considered."<sup>24</sup>

Prior to *Chevron*, there was serious doubt about the extent to which the federal courts adhered to any of these standards. When either the Supreme Court or the lower federal courts used deference principles, they often did so in a perfunctory manner. The courts made it appear that they were doing nothing more than comparing the agency's interpretation against the language of a regulation. If the interpretation satisfied the requirements of the chosen standard, i.e., if it was not plainly erroneous or inconsistent with the regulation's language, the court deferred.<sup>25</sup>

But the appearance of simplicity was deceiving. Although the courts often invoked deference principles, they also used many other

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17. See, e.g., *Abbott-Northwestern Hosp., Inc. v. Schweiker*, 698 F.2d 336, 340 (8th Cir. 1983); *United States Nuclear Regulatory Comm'n v. Radiation Technology, Inc.*, 519 F. Supp. 1266, 1292 (D.N.J. 1981); *Roberts v. Secretary of Dep't of Hous. and Urban Dev.*, 473 F. Supp. 52, 55 (N.D. Miss. 1979).

18. See, e.g., *Allen v. Bergland*, 661 F.2d 1001, 1004 (4th Cir. 1981) (reciting both the "plainly erroneous" and the "reasonable, consistently applied" standards); *PPG Indus., Inc. v. Harrison*, 660 F.2d 628, 633 (5th Cir. 1981) (same).

19. See, e.g., *West Virginia v. Secretary of Educ.*, 667 F.2d 417, 420 (4th Cir. 1981); *White Memorial Medical Ctr. v. Schweiker*, 640 F.2d 1126, 1129 (9th Cir. 1981); *Energy Reserves Group, Inc. v. Department of Energy*, 589 F.2d 1082, 1092 (Temp. Emer. Ct. App. 1978).

20. See, e.g., *Sun Towers, Inc. v. Schweiker*, 694 F.2d 1036, 1038 (5th Cir. 1983).

21. See, e.g., *Yiu Tsang Cheung v. District Director*, 641 F.2d 666, 669 (9th Cir. 1981); *United States v. Exxon Corp.*, 628 F.2d 70, 76 (D.C. Cir. 1980), *cert. denied*, 446 U.S. 964 (1980).

22. See, e.g., *Brennan v. Southern Contractors Serv.*, 492 F.2d 498, 501 (5th Cir. 1974); *United States v. Lieb*, 462 F.2d 1161, 1166 (Temp. Emer. Ct. App. 1972); *Koch Ref. Co. v. Department of Energy*, 504 F. Supp. 593, 598 (D. Minn. 1980), *aff'd*, 658 F.2d 799 (Temp. Emer. Ct. App. 1981); *Phillips Petroleum Co. v. Department of Energy*, 449 F. Supp. 760, 783 (D. Del. 1978) (recognized the standard but did not apply in that case), *aff'd sub nom.*, *Standard Oil Co. v. Department of Energy*, 596 F.2d 1029 (Temp. Emer. Ct. App. 1978).

23. See, e.g., *Irvington Moore v. Occupational Safety & Health Review Comm'n*, 556 F.2d 431, 434 (9th Cir. 1977); *Pabst Brewing Co. v. Kalmanovitz*, 551 F. Supp. 882, 888 (D. Del. 1982).

24. See, e.g., *Quincy Oil, Inc. v. Federal Energy Admin.*, 468 F. Supp. 383, 388 (D. Mass. 1979).

25. See, e.g., *United States v. Larionoff*, 431 U.S. 864, 872-73 (1977); *Thorpe v. Housing Auth.*, 393 U.S. 268, 276 (1969).

interpretive principles,<sup>26</sup> including the canons of construction.<sup>27</sup> These other principles were not always consistent with deference principles.<sup>28</sup> For example, courts stated that regulations that carry

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26. See, e.g., *Jay v. Boyd*, 351 U.S. 345, 360 (1956) (stating that regulations should be construed to give effect to all their provisions); *Pennzoil Co. v. Federal Energy Regulatory Comm'n*, 645 F.2d 360, 383 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982) (stating that a regulation should be liberally construed to effectuate its purpose); *Chrobak v. Metropolitan Life Ins. Co.*, 517 F.2d 883, 886 (7th Cir. 1975) (stating that the construction should normally be that of the ordinary meaning of the words used); *Northern Natural Gas Co. v. O'Malley*, 277 F.2d 128, 134 (8th Cir. 1960) (stating that a construction should be avoided if it casts doubt on the meaning of a regulation); *Weissglass Gold Seal Dairy Corp. v. Butz*, 369 F. Supp. 632, 636 (S.D.N.Y. 1973) (stating that, as between two or more possible interpretations of a regulation, the reasonable one should be chosen).

27. These canons serve a variety of purposes. Some canons have nothing to do with actual intent, but provide that statutes should be construed in particular ways: strictly, liberally, or in accordance with certain other principles. Other canons are intended to reflect language patterns, and, therefore, may assist a court in discovering actual legislative intent.

In this century, many commentators have criticized the canons. As Judge Posner recognized, "[t]o exaggerate slightly, it has been many years since any legal scholar had a good word to say about any but one or two of the canons. . . ." Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 805 (1983). Some argue that particular canons are wrong or misleading. See Frederick J. De Sloove're, *Extrinsic Aids In the Interpretation of Statutes*, 88 U. PA. L. REV. 527, 528-29 (1940); Quintin Johnstone, *An Evaluation of the Rules of Statutory Interpretation*, 3 KAN. L. REV. 1, 12-13 (1954); James M. Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886, 892 (1930); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 873-75 (1930). Others argue that the canons conflict. Karl Llewellyn once asserted that the canons come in inconsistent pairs. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395 (1950). To prove his point, Llewellyn matched twenty-eight canons in one column against their opposites in a second column. *Id.* at 401-06.

Nevertheless, the Court continues to use the canons. See, e.g., *Rust v. Sullivan*, 111 S. Ct. 1759, 1771 (1991); *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (stating that "[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895))). It does so, in part, because many of them have value. As Justice Frankfurter recognized, "[i]nsofar as canons of construction are generalizations of experience, they all have worth." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 544 (1947). Of course, the canons rarely drive decision-making, and they must be applied with discretion. Frankfurter went on to argue that "[d]ifficulties emerge when canons compete in soliciting judgment, because they conflict rather than converge. For the demands of judgment underlying the art of interpretation, there is no *vade-mecum*." *Id.*

28. Compare *M. Kraus & Bros, Inc. v. United States*, 327 U.S. 614, 622 (1946) (rejecting an administrative interpretation on the basis that regulations that carry criminal sanctions should be strictly construed), with *Ehlert v. United States*, 402 U.S. 99, 100, 107 (1971) (using deference principles to sustain a criminal conviction based on an unpublished interpretation).

criminal sanctions should be strictly construed,<sup>29</sup> and that regulations should be construed in accord with certain other principles.<sup>30</sup> Moreover, courts often used these other rules to supplant deference principles.<sup>31</sup>

Because the courts used multiple deference standards, and because the courts sometimes supplanted deference principles with other interpretive rules, there was doubt about whether deference principles actually drove judicial decision-making, or whether they simply provided a rationalization for decisions already made. There was strong evidence for the proposition that courts discussed deference only when they wanted to sustain an administrative interpretation.<sup>32</sup>

In the pre-*Chevron* era, courts struggled with deference principles in other respects, as well. For example, the courts often disagreed about whether they should defer when an agency had taken inconsistent positions regarding the meaning of its regulations. In most instances, the federal courts were reluctant to defer.<sup>33</sup> In *Ehlert v. United States*,<sup>34</sup> for example, the Supreme Court stated that an agency's interpretation of its own regulations should only be accepted if it was "reasonable" and had been "consistently applied."<sup>35</sup> In *North Haven Board of Education v. Bell*,<sup>36</sup> the agency had changed its interpretation of a regulatory provision several times, and had even done so during the course of the litigation. Because of these position changes, the Court held that there was no regulatory interpretation to which to defer, and the Court chose to determine the meaning of the regulation itself.<sup>37</sup>

Of course, even under pre-*Chevron* case law, courts sometimes allowed agencies to change their interpretations, and they deferred

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29. See, e.g., *Kraus & Bros.*, 327 U.S. at 622.

30. See, e.g., cases cited *supra* note 26; see also *Northwest Hosp., Inc. v. Hospital Serv. Corp.*, 687 F.2d 985, 989 (7th Cir. 1982) ("[R]egulations must be rational and nonarbitrary, and must further the purposes of the [governing] statute."); *Yandell v. United States*, 550 F. Supp. 572, 575 (N.D. Miss. 1982), *aff'd*, 712 F.2d 218 (5th Cir. 1983) ("[A] court must seek an interpretation which supports the regulation's constitutionality.").

31. See *supra* note 28.

32. See *Weaver*, *supra* note 5, at 601-02.

33. See *id.* at 593 n.33.

34. 402 U.S. 99 (1971).

35. *Id.* at 105; see also *Northern Indiana Pub. Serv. Co. v. Porter County Chapter of the Izaak Walton League of Am., Inc.*, 423 U.S. 12, 15 (1975).

36. 456 U.S. 512 (1982).

37. *Id.* at 538-39 n.29.

nonetheless.<sup>38</sup> For example, in *Andrus v. Sierra Club*,<sup>39</sup> a case involving statutory interpretation, the Court considered an advisory guideline issued by the Council on Environmental Quality. This guideline, which interpreted the National Environmental Policy Act, was the agency's second interpretation of the Act. Nevertheless, the Court noted that the President had ordered the Council to review its guidelines and transform them into mandatory regulations, and that the new guideline resulted from that review. Because the Council was able to justify its change of position, the Court chose to defer.<sup>40</sup>

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38. See *Morrison-Knudsen Constr. Co. v. Director, Office of Workers' Compensation Programs*, 461 U.S. 624, 634 (1983) (although noting that the agency's position had generally been consistent, except for the position taken in that case, the Court chose to treat the agency's interpretation as a consistent practice and, thus, deferred); *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 264-67 (1975) (accepting an administrative interpretation even though the agency had changed positions); *Atchison T. & S.F. Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973) (holding that an agency may depart from previously declared norms, but it has a "duty to explain its departure" from those norms).

39. 442 U.S. 347 (1979).

40. The Court stated:

It is true that in the past we have been somewhat less inclined to defer to "administrative guidelines" when they have "conflicted with earlier pronouncements of the agency. . . ." But CEQ's reversal of interpretation occurred during the detailed and comprehensive process, ordered by the President, of transforming advisory guidelines into mandatory regulations applicable to all federal agencies.

*Id.* at 358.

Even though the prohibition against inconsistency was not absolute, an inconsistency might cause the Court to more closely scrutinize an interpretation. See, e.g., *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 538-39 n.29 (1982); see also *General Elec. Co. v. Gilbert*, 429 U.S. 125, 143 (1976) ("We have declined to follow administrative guidelines in the past where they conflicted with earlier pronouncements of the agency."); *Pacific N.W. Newspaper Guild v. NLRB*, 877 F.2d 998, 1001 (D.C. Cir. 1989) ("Despite the Supreme Court's recent reiteration that the courts of appeal must defer . . . to a Board interpretation of ambiguous statutory language . . . the Board has not asked us for *Chevron* deference. Perhaps that is because the Board's application of the terms . . . has been so inconsistent and inadequately explained as not to warrant deference."); *Cross-Sound Ferry Servs., Inc. v. ICC*, 873 F.2d 395, 398-99 (D.C. Cir. 1989); *Allen v. Bergland*, 661 F.2d 1001, 1004 (4th Cir. 1981); *PPG Indus., Inc. v. Harrison*, 660 F.2d 628, 633-35 (5th Cir. 1981).

In a case involving the application of the federal securities laws, the United States Supreme Court stated its attitude towards inconsistency:

The SEC has filed an *amicus curiae* brief urging us to hold the federal securities laws applicable to this case. Traditionally the views of an agency charged with administering the governing statute would be entitled to considerable weight. But in this case the SEC's position flatly contradicts what appears to be a rather careful statement of the Commission's views in a recent release. . . . In view of this unexplained contradiction in the Commission's position we accord no special weight to its views.

*United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 858-59 n.25 (1975) (citation omitted).



### III. *Chevron's* HOLDING

In order to understand how *Chevron* affected the court's approach to agency interpretations of regulations, it is first necessary to examine *Chevron's* holding. *Chevron's* rhetoric was strongly stated and very pro-deference.

#### A. *Pre-Chevron* Statutory Standards

In terms of rhetoric, *Chevron's* formulation involved a substantial departure from pre-*Chevron* case law. Prior to *Chevron*, the Supreme Court had applied deference principles to an agency's interpretation of a statute. *Skidmore v. Swift & Co.*,<sup>41</sup> one of the leading cases, suggested that a reviewing court need not treat an agency's interpretation of a statute as "controlling."<sup>42</sup> Rather, the Court should render an independent interpretive decision.<sup>43</sup> If the responsible agency had interpreted the statute, the court could consider the agency's interpretation. But the courts should give the interpretation the weight it deserves based on its persuasiveness. In evaluating the interpretation, a reviewing court might consider a variety of factors including "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all [other] factors which give it power to persuade, if lacking power to control."<sup>44</sup>

The courts drew a fairly clear distinction between an agency's interpretation of a statute, and its interpretation of a regulation. In *Udall v. Tallman*,<sup>45</sup> the Court emphasized that deference was due an agency's interpretation of a statute: "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration."<sup>46</sup> The Court, however, stated that deference was

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Because of this inconsistency, the Court might be somewhat less likely to defer. See *Northern Ind. Pub. Serv. Co. v. Porter County Chapter of the Izaak Walton League of Am., Inc.*, 423 U.S. 12, 15 (1975); *Ehlert v. United States*, 402 U.S. 99, 105 (1971).

41. 323 U.S. 134 (1944).

42. *Id.* at 140.

43. Of course, whether the court would actually defer or render an independent decision depended on circumstances. When an agency stated its interpretation in the form of a legislative rule, most courts would actually defer. See, e.g., *Batterton v. Francis*, 432 U.S. 416, 424-26 (1977). On the other hand, when an agency stated its interpretation in some other format, most courts would make an independent interpretive decision. See, e.g., *Skidmore*, 323 U.S. at 140.

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

45. 380 U.S. 1 (1965).

46. *Id.* at 16.

particularly appropriate when a court was confronted with an agency's interpretation of its own regulation: "When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order."<sup>47</sup>

Prior to *Chevron*, the Supreme Court would apply a "controlling" standard to an agency's interpretation of its governing statute, but it did so only in limited situations, such as when an agency stated its interpretation in the form of a legislative rule.<sup>48</sup> When an agency stated its interpretation in other formats, the Court would often make an independent interpretive decision.<sup>49</sup>

### B. Chevron

*Chevron* substantially altered the rhetoric of deference. In *Chevron*, the Court recognized that the agency responsible for administering a regulatory scheme is often in the best position to interpret that scheme. The Court noted that many regulatory schemes involve specialized issues, and that the agencies administering those schemes often develop expertise.<sup>50</sup> Because of this expertise, an agency may be better able to resolve an interpretive problem than a reviewing court.<sup>51</sup>

*Chevron* was premised on other considerations as well. The Court recognized that the interpretive process often involves or requires policy making. In many instances, regulatory provisions are susceptible to differing interpretations,<sup>52</sup> more than one of which may be

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47. *Id.* The Court went on to state that:

Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. . . . [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.

*Id.* at 16-17 (quoting *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 413-14 (1945)).

48. *See, e.g.*, *Batterton v. Francis*, 432 U.S. 416, 424-26 (1977).

49. *See, e.g.*, *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

50. *See Securities Indus. Ass'n v. Board of Governors of the Fed. Reserve*, 468 U.S. 137, 161 (1984) (O'Connor, J., dissenting) ("Because of the Board's expertise and experience in this complicated area of law, and because of its extensive responsibility for administering the federal banking laws, the Board's interpretation of the Glass-Steagall Act must be sustained unless it is unreasonable."); *see also* Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 372; Breyer, *supra* note 7, at 368-72.

51. *See Pension Benefit Guar. Corp. v. LTV Corp.*, 110 S. Ct. 2668, 2679 (1990) ("[P]ractical agency expertise is one of the principal justifications behind *Chevron* deference.").

52. *Weaver*, *supra* note 5, at 609.

reasonable and permissible.<sup>53</sup> In such instances, the choice between competing interpretations may involve a policy choice regarding which interpretation best serves the regulatory scheme's underlying objectives. In *Chevron*, the Court recognized that such policy choices should be made by the agency responsible for the regulatory scheme.<sup>54</sup> The agency's expertise,<sup>55</sup> as well as the often specialized

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53. *Id.* at 607-09:

Courts have traditionally construed statutes and regulations in a manner designed to effectuate the intent of the enacting body (although they often state that they should be construed in accordance with the enacting body's purpose). In some instances, the proper interpretation of a regulation will be clear. In most cases, though, there may be no interpretation that is necessarily correct, exclusive of all others. This may occur for any number of reasons, but two are usually suggested. First, regulations can be vague because they are phrased in general terms, and their application to specific situations can be uncertain. Second, regulations can be ambiguous. In fact, a degree of ambiguity is inherent in language. Words are not precise instruments; their meaning is derived from the context in which they are used. Regulations, simply a compilation of words, are even less precise. In the typical case, this imprecision results in a regulation susceptible to more than one reasonable interpretation.

*Id.* (footnotes omitted).

54. 467 U.S. at 866. *See also* *Pauley v. Bethenergy Mines, Inc.*, 111 S. Ct. 2524, 2534 (1991):

Judicial deference to an agency's interpretation of ambiguous provisions of the statutes it is authorized to implement reflects a sensitivity to the proper roles of the political and judicial branches. As *Chevron* itself illustrates, the resolution of ambiguity in a statutory text is often more a question of policy than of law.

*Id.* (citations omitted). *See also* Sunstein, *supra* note 7, at 2086-87.

55. *See Pension Benefit Guar.*, 110 S. Ct. at 2679 ("Indeed, the judgments about the way the real world works that have gone into the PBGC's anti-follow-on policy are precisely the kind that agencies are better equipped to make than are courts. This practical agency expertise is one of the principal justifications behind *Chevron* deference.")

A prior article, discussing the concept of deference, as applied to an agency's interpretation of its own regulations, noted that:

The proper interpretation cannot be derived from a mechanistic formula; it must rather be derived from consideration of the language of the regulation, the objectives of the regulatory scheme, and the function of the regulation in that scheme. An agency is more qualified to decide between the interpretive alternatives. Its expertise, including its greater appreciation of the subtleties and intricacies of its regulatory program, make an agency eminently more capable than a court to make the choice. Furthermore, when an agency interprets its own regulations, it acts under discretionary authority delegated by Congress. Although an agency's express authority may only allow it to promulgate, amend and/or enforce regulations, that authority carries with it the implied authority to interpret regulations as necessary to the effectuation of the agency's authorized duties. When an agency issues an interpretation pursuant to its implied authority, that interpretation, if reasonable, should be accepted.

Weaver, *supra* note 5, at 609-10 (citations omitted).

nature of regulatory problems,<sup>56</sup> give the agency a decided edge over a reviewing court.<sup>57</sup> In addition, the agency had a greater claim to political legitimacy.<sup>58</sup>

Even though *Chevron* created a presumption in favor of administrative expertise, this presumption was limited. The Court recognized that it, as well as the responsible agency, was obligated to follow Congress's wishes to the extent that those wishes could be ascertained.<sup>59</sup> Thus, a reviewing court was required first to determine whether Congress had specifically addressed the interpretive question at issue.<sup>60</sup> If so, then the court should follow Congress's wishes. If Congress failed to specifically address the issue, then the court should attempt to determine whether the responsible administrative

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56. See James D. DeLong, *New Wine For a New Bottle: Judicial Review in the Regulatory State*, 72 VA. L. REV. 399, 441 (1986); Pierce, *supra* note 7, at 303-05; Sunstein, *supra* note 7, at 2087-88.

57. But see William S. Jordan, *Deference Revisited: Politics as a Determinant of Deference Doctrine and the End of the Apparent Chevron Consensus*, 68 NEB. L. REV. 454, 470 (1989).

58. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 864-66 (1984). The Court stated that:

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices - resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with administration of the statute in light of everyday realities.

*Id.* at 865-66. In the Court's view, it does not matter whether Congress explicitly delegated the particular interpretive issue to the agency:

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

*Id.* at 865.

59. *Id.* at 862.

60. *Id.* at 842.

agency had resolved the issue.<sup>61</sup> If so, the court should not decide the interpretive question on its own. Instead, the court should defer to the agency's interpretation if it "is based on a permissible construction of the statute."<sup>62</sup>

*Chevron* suggested that the degree of deference to be given depends on the situation. If Congress delegates interpretive authority to an agency, as when it leaves a gap in a statutory scheme and requires or permits an agency to promulgate regulations to fill that gap, then there has been an express delegation of interpretive authority.<sup>63</sup> In this situation, the agency's interpretive decisions—its regulations—are given "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."<sup>64</sup> In some instances, Congress gives agencies implicit authority to render interpretations.<sup>65</sup> The Supreme Court indicated that, even in this situation, a reviewing court is not free to "substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."<sup>66</sup> The court must determine whether the agency's interpretation "'represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute.'" <sup>67</sup>

Although *Chevron's* rhetoric suggested a major change in review principles, *Chevron's* actual impact was far more limited. As Chief Justice John Marshall explicitly recognized in *Marbury v. Madison*,<sup>68</sup> the judiciary has the final authority to "say what the law is."<sup>69</sup> *Chevron* did not override *Marbury*; on the contrary, it reaffirmed that decision. In *Chevron*, the Court reaffirmed that "[t]he

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61. *Id.* at 842-43.

62. *Id.* at 843 (footnote omitted).

63. *Id.*

64. *Id.* at 844 (footnote omitted). The Court stated:

"The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

*Id.* at 843-44 (footnote omitted).

65. *Id.* at 844.

66. *Id.*

67. *Id.* at 845 (quoting *United States v. Shimer*, 367 U.S. 374, 382-83 (1961)).

68. 5 U.S. (1 Cranch) 137 (1803).

69. *Id.* at 177. *Marbury's* holding is reinforced by the Administrative Procedure Act, which states that a reviewing court shall "decide all relevant questions of law." 5 U.S.C. § 706

judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.”<sup>70</sup> Thus, courts remained free to review agency interpretations. As Justice Scalia recognized, “deference is not abdication, and it requires us to accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ.”<sup>71</sup>

In its post-*Chevron* deference decisions, the Court has engaged in an extensive review process, which involves consideration of the various tools and principles of statutory construction.<sup>72</sup> As the Court stated in *NLRB v. United Food & Commercial Workers Union*,<sup>73</sup> “On a pure question of statutory construction, our first job is to try to determine congressional intent, using ‘traditional tools of statutory construction.’ If we can do so, then that interpretation must be given

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(1988); see also *Zuber v. Allen*, 396 U.S. 168, 193 (1969), *cert. denied sub nom.*, *Allen v. Hardin*, 396 U.S. 1013 (1970); *Trust of Bingham v. Commissioner*, 325 U.S. 365, 371-72 (1945). Of course, the courts have not always exercised their interpretive authority. See, e.g., *Goldwater v. Carter*, 444 U.S. 996 (1979). This is especially true in the administrative law area. The federal courts have frequently been willing to defer to administrative interpretations of regulatory provisions. As a result, they willingly relinquish some of their interpretive authority to other branches of government.

70. *Chevron*, 467 U.S. at 837, 843 n.9.

71. *EEOC v. Arabian Am. Oil Co.*, 111 S. Ct. 1227, 1237 (1991) (Scalia, J., concurring) (stating that, although he would have applied deference principles, he rejected the agency’s interpretation because it was unreasonable); see also *Pattern Makers’ League of N. Am. v. NLRB*, 473 U.S. 95, 131 (1985) (Blackmun, J., dissenting) (“‘The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.’” (quoting *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965))); *Securities Indus. Ass’n v. Board of Governors*, 468 U.S. 137, 142-43 (1984) (“We also have made clear, however, that deference is not to be a device that emasculates the significance of judicial review. Judicial deference to an agency’s interpretation of a statute “only sets ‘the framework for judicial analysis; it does not displace it.’” (quoting *United States v. Vogel Fertilizer Corp.*, 455 U.S. 16, 24 (1982) (quoting *United States v. Cartwright*, 411 U.S. 546, 550 (1973)))).

72. *Chevron*, 467 U.S. at 843 n.9 (“If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.”); accord *Pension Benefit Guar. Corp. v. LTV Corp.*, 110 S. Ct. 2668, 2677 (1990); *University of Cal. v. Public Employment Relations Bd.*, 108 S. Ct. 1404, 1413 (1988) (White, J., concurring); *NLRB v. United Food & Commercial Workers*, 484 U.S. 112, 123 (1987); *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987). At least one commentator has argued that it is inappropriate for the Court to consider such tools. See Anthony, *supra* note 8, at 19 (“[I]f it fails to find such intent, the court should not then use the ‘traditional tools’ to perform an independent interpretation of the ambiguous statute. Instead, it should move to Step 2 and evaluate the agency’s interpretation.”).

73. 484 U.S. 112 (1987).

effect, and the regulations at issue must be fully consistent with it."<sup>74</sup>

In undertaking this review, the Court has considered a statute's language,<sup>75</sup> structure,<sup>76</sup> purposes,<sup>77</sup> and legislative history.<sup>78</sup> The Court has also considered the canons of construction.<sup>79</sup>

Thus, even though *Chevron* demanded greater deference, it did not profoundly alter basic judicial review concepts. This conclusion is

74. *Id.* at 123; *see also* *Chemical Mfr. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 152 (1985) (Marshall, J., dissenting) ("*Chevron's* deference requirement, however, was explicitly limited to cases in which congressional intent cannot be discerned through the use of the traditional techniques of statutory interpretation.").

75. *See, e.g.*, *Presley v. Etowah County Comm'n*, 112 S. Ct. 820, 823 (1992); *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 429-32 (1987); *Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 386 (1986); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131-32 (1985); *see also* *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 110 S. Ct. 2759, 2769 (1990); *Dole v. United Steelworkers of Am.*, 110 S. Ct. 929, 934 (1990).

76. *See, e.g.*, *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 110 S. Ct. 2759, 2769 (1990); *Dole v. United Steelworkers of Am.*, 110 S. Ct. 929, 938 (1990) (rejecting the agency's interpretation noting that, because "the statute, as a whole, clearly expresses Congress' intention, we decline to defer to OMB's interpretation")(footnote omitted); *EEOC v. Commercial Office Prod. Co.*, 108 S. Ct. 1666, 1674 (1988); *Bethesda Hosp. Ass'n v. Bowen*, 108 S. Ct. 1255, 1259 (1988) ("While the express language of subsection (a) requires the result we reach in the present case, our conclusion is also supported by the language and design of the statute as a whole."); *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 514 (1988) ("[T]he language, structure, and legislative history of the Act fail to support the petitioners in this case . . ."); *NLRB v. Food & Commercial Workers Union*, 484 U.S. 112, 124 (1987) ("The words, structure, and history of the LMRA amendments to the NLRA clearly reveal that Congress intended to differentiate between the General Counsel's and the Board's 'final authority' along a prosecutorial versus adjudicatory line."); *Chemical Mfr. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 126 (1985) (A court is obligated to defer to "the Agency's view of the statute . . . unless the legislative history or the purpose and structure of the statute clearly reveal a contrary intent on the part of Congress.").

77. *See, e.g.*, *Commercial Office Prod.*, 108 S. Ct. at 1671; *United States v. City of Fulton*, 475 U.S. 657, 671 (1986); *Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 373 (1986); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985) ("Accordingly, our review is limited to the question whether it [the agency's interpretation] is reasonable, in light of the language, policies, and legislative history of the Act for the Corps to exercise jurisdiction . . .").

78. *See, e.g.*, *Commercial Office Prod.*, 108 S. Ct. at 1671; *University of Cal. v. Public Employment Relations Bd.*, 108 S. Ct. 1404, 1409-11 (1988); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 108 S. Ct. 1392, 1401 (1988); *ETSI Pipeline*, 484 U.S. at 514 ("[T]he language, structure, and legislative history of the Act fail to support the petitioners in this case . . ."); *Cardoza-Fonseca*, 480 U.S. at 432-43; *Riverside Bayview*, 474 U.S. at 132 ("[A]n agency may appropriately look to the legislative history . . ."); *Chemical Mfr. Ass'n*, 470 U.S. at 126; *see also* Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing An Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1256 (1989).

79. *See, e.g.*, *Dole*, 110 S. Ct. at 935 ("The traditional canon of construction, *noscitur a sociis*, dictates that "words grouped in a list should be given related meaning."') (quoting *Massachusetts v. Morash*, 109 S. Ct. 1668, 1673 (1989) (quoting *Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 8 (1985))).

reflected in the Court's post-*Chevron* decisions. The Supreme Court frequently invokes *Chevron*,<sup>80</sup> but it rarely defers without carefully scrutinizing agency interpretations. Moreover, the Court has been quite willing to reject agency interpretations.<sup>81</sup>

#### IV. *Chevron's* IMPLICATIONS FOR AGENCY INTERPRETATIONS OF REGULATIONS

How did *Chevron* affect deference principles as they apply to an agency's interpretation of its own regulations? As illustrated below, the changes were, by and large, fairly subtle.

##### A. *Standard of Review*

*Chevron* did not have much impact on the standard of review. Prior to *Chevron*, the Supreme Court usually applied a "controlling" deference standard, such as the "plainly erroneous or inconsistent" standard, to an agency's interpretation of its own regulations. *Chevron* seemed to mandate the continuation of such a standard. After all, the Court was now applying a controlling standard to statutory interpretations, and, of course, "[w]hen the construction of an administrative regulation rather than a statute is at issue, deference is

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80. See, e.g., *Pension Benefit Guar. Corp. v. LTV Corp.*, 110 S. Ct. 2668, 2676 (1990); see also *American Hosp. Ass'n v. NLRB*, 111 S. Ct. 1539, 1544 (1991) ("In sum, we believe that the meaning of § 9(b) . . . is clear and contrary to the meaning advanced by petitioner. Even if we could find any ambiguity in § 9(b) after employing the traditional tools of statutory construction, we would still defer to the Board's reasonable interpretation of the statutory text."); *Norfolk & W. Ry. Co. v. American Train Dispatchers Ass'n*, 111 S. Ct. 1156, 1163 (1991); *Mobil Oil Exploration & Prod. S.E. Inc. v. United Distrib. Cos.*, 111 S. Ct. 615, 624 n.5 (1991) ("Even had we concluded that §§ 104(b)(2) and 106(c) failed to speak unambiguously to the ceiling price question, we would nonetheless be compelled to defer to the Commission's interpretation."); *Fort Stewart Sch. v. Federal Labor Relations Auth.*, 110 S. Ct. 2043, 2046 (1990).

81. See, e.g., *Lechmere, Inc. v. NLRB*, 112 S. Ct. 841, 850 (1992); *Presley v. Etowah County Comm'n*, 112 S. Ct. 820, 831-32 (1992); *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 110 S. Ct. 2759, 2768 (1990) ("The ICC argues that its conclusion is entitled to deference because § 10701 does not specifically address the types of practices that are to be considered unreasonable and because its construction is rational and consistent with the statute . . . . We disagree."); *Dole v. United Steelworkers of Am.*, 110 S. Ct. 929, 938 (1990); *Sullivan v. Zebley*, 110 S. Ct. 885, 897 (1990); *Public Employees Retirement Sys. of Ohio v. Betts*, 109 S. Ct. 2854, 2863 (1989); *Bethesda Hosp. Ass'n v. Bowen*, 108 S. Ct. 1255, 1258 (1988) ("The strained interpretation offered by the Secretary is inconsistent with the express language of the statute."); *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 505 (1987); *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 443 (1987); *Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 645-47 (1986); *Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986); see also *University of Cal. v. Public Employment Relations Bd.*, 108 S. Ct. 1404 (1988).



even more clearly in order.”<sup>82</sup>

*Martin v. Occupational Safety & Health Review Commission*<sup>83</sup> illustrates the Court’s post-*Chevron* approach. In *Martin*, the Court stated flatly that an agency has inherent authority to interpret its own regulations, and that this authority falls within the ambit of the agency’s delegated lawmaking authority: “Because applying an agency’s regulation to complex or changing circumstances calls upon the agency’s unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency’s delegated lawmaking powers.”<sup>84</sup> Despite *Martin*’s strong language, neither the Supreme Court nor the lower federal courts have developed or applied consistent deference standards.

### 1. Supreme Court Standards

In the post-*Chevron* era, the Supreme Court has stated the deference requirement in various ways, using many of the pre-*Chevron* standards. It has, for example, invoked the “plainly erroneous or inconsistent” standard,<sup>85</sup> as illustrated in *Mullins Coal Co. v. Director*.<sup>86</sup> In *Mullins Coal*, the Court deferred to an agency’s interpretation of its own regulation, emphasizing that, “[i]n the end, the Secretary’s view is not only eminently reasonable but also is strongly supported by the fact that Labor wrote the regulation.”<sup>87</sup> The Court concluded that the agency’s interpretation “is deserving of substantial deference” and should be upheld “‘unless it is plainly erroneous or inconsistent with the regulation.’”<sup>88</sup>

The Court also applied the *Bowles* test in *Robertson v. Methow Valley Citizens Council*,<sup>89</sup> which involved a challenge to the Forest Service’s decision to grant a special use permit for development and operation of a ski resort in the Methow Valley of the State of Washington.<sup>90</sup> Forest Service regulations required a permit applicant to

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82. *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

83. 111 S. Ct. 1171 (1991).

84. *Id.* at 1176.

85. *See, e.g., Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (“This interpretation of the agency’s own regulation is not ‘plainly erroneous or inconsistent with the regulation,’ and is thus controlling.” (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945))); *Mullins Coal Co. v. Director*, 484 U.S. 135, 159 (1987).

86. 484 U.S. 135 (1987).

87. *Id.* at 159.

88. *Id.* (quoting *Bowles*, 325 U.S. at 410).

89. 490 U.S. 332 (1989).

90. *Id.* at 337.

include a "mitigation" plan setting forth "measures and plans for the protection and rehabilitation of the environment during construction, operation, maintenance, and termination" of a project.<sup>91</sup> In granting the permit, the Forest Service construed the regulation and concluded that the applicant had included a sufficient mitigation plan.<sup>92</sup>

The court of appeals concluded that the Forest Service's construction of its own regulations was "arbitrary and capricious" because the mitigation plan failed to deal with the permit's effect on off-site development and, therefore, was too "vague and undeveloped."<sup>93</sup> The Supreme Court disagreed, noting that the Forest Service construed its regulation as applying only to on-site environmental effects.<sup>94</sup> The Court concluded that this construction was reasonable.<sup>95</sup> Thus, applying the *Bowles* test, the Court deferred: "This interpretation of the agency's own regulation is not 'plainly erroneous or inconsistent with the regulation,' and is thus controlling."<sup>96</sup>

In their post-*Chevron* decisions, the justices have not always agreed regarding the application of the "plainly erroneous" standard. In *Mullins Coal*, the majority affirmed an interpretation on the basis that it was not "plainly erroneous."<sup>97</sup> Justice Marshall, dissenting, would have rejected the agency's interpretation on the basis that "the Director's interpretation of the regulation contravenes its plain language and creates a regulatory scheme that is unnecessarily complex and internally inconsistent."<sup>98</sup>

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91. 36 C.F.R. § 251.54(e)(4) (1988).

92. *Robertson*, 490 U.S. at 345.

93. *Id.* at 357 (quoting *Methow Valley Citizens Council v. Regional Forester*, 833 F.2d 810, 814 n.3 (1987)).

94. *Id.* at 358-59.

95. *Id.*

96. *Id.* at 359 (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). In *Jean v. Nelson*, 472 U.S. 846, 856-57 n.3 (1985), the Court was confronted by the Immigration and Naturalization Service's governing statute and the Court deferred to the Solicitor-General's assertion that its regulations were applied in a nondiscriminatory manner. The Court did not refer to any deference standard. Justice Marshall, dissenting, cited *Bowles*. He argued, however, that *Bowles*'s "plainly erroneous" standard did not apply because its "presumptions do not apply . . . to representations of appellate counsel." *Id.* at 865 (Marshall, J., dissenting). Justice Marshall went on to note that "Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands. It is the administrative official and not appellate counsel who possess the expertise that can enlighten and rationalize the search for the meaning and intent of Congress." *Id.* (quoting *Investment Co. Inst. v. Camp*, 401 U.S. 617, 628 (1971)).

97. See *supra* note 88 and accompanying text.

98. *Mullins Coal Co. v. Director*, 484 U.S. 135, 161 (1987) (Marshall, J. dissenting).

Since *Chevron*, the Court has also continued to use the "reasonable, consistently applied" test. In *Immigration & Naturalization Service v. National Center for Immigrants' Rights*,<sup>99</sup> the Court agreed with the agency's interpretation,<sup>100</sup> noting that "an agency's reasonable, consistently held interpretation of its own regulation is entitled to deference."<sup>101</sup> In accepting the agency's interpretation, the Court noted that "the Government has consistently maintained" its position.<sup>102</sup>

But, even though the Court has used the "plainly erroneous" and "reasonable, consistently applied" standards in post-*Chevron* decisions, it has done so infrequently. The Court has invoked the *Bowles* standard only three times,<sup>103</sup> has used the "reasonable, consistently applied" standard only infrequently,<sup>104</sup> and has not used the "demonstrably irrational" test at all.

Interestingly, in some post-*Chevron* decisions, the Court has actually used less deferential rhetoric than it used in pre-*Chevron* decisions. In *Lyng v. Payne*,<sup>105</sup> the Court stated only that "an agency's construction of its own regulations is entitled to substantial deference."<sup>106</sup> In *Martin v. Occupational Safety & Health Review Commission*,<sup>107</sup> the Court also used the "substantial deference" standard,<sup>108</sup> but explained it by suggesting that an agency's interpretation of its own regulations should be upheld provided it is "reasonable."<sup>109</sup> The Court also used this "reasonableness" standard

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99. 112 S. Ct. 551 (1991).

100. *Id.* at 556.

101. *Id.*

102. *Id.* The Court also based its decision to defer on other considerations:

Our conclusion that the regulation does not contemplate the inclusion of no-work conditions in bonds issued to aliens who are authorized to work is further supported by the text of the regulation, the agency's comments when the rule was promulgated, the operating instructions issued to INS personnel, and the absence of any evidence that the INS has imposed such a condition on any such alien. We therefore accept the Solicitor General's representation that the INS does not intend to apply the bond condition to prohibit authorized employment.

*Id.* at 556-57 (footnote omitted).

103. See, e.g., *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 358 (1989); *Mullins Coal Co. v. Director*, 484 U.S. 135, 159 (1987); *Jean v. Nelson*, 472 U.S. 846, 865 (1985) (Marshall, J., dissenting).

104. See, e.g., *Immigration & Naturalization Serv.*, 112 S. Ct. at 556.

105. 476 U.S. 926 (1986).

106. *Id.* at 939.

107. 111 S. Ct. 1171 (1991).

108. *Id.* at 1175.

109. *Id.* at 1176 (quoting *Northern Ind. Pub. Serv. Co. v. Porter County Chapter of the Izaak Walton League of Am., Inc.*, 423 U.S. 12, 15 (1975)).

in *Pauley v. Bethenergy Mines, Inc.*<sup>110</sup>

Although the Court uses less deferential language in some post-*Chevron* decisions, it is doubtful that much weight should be attributed to this change in rhetoric. A “plainly erroneous” standard theoretically differs from a “substantial deference” or a “reasonableness” standard, but, the practical difference may be limited or nonexistent. In *Lyng*, even though the Court used the “substantial deference” rhetoric, the Court cited two pre-*Chevron* decisions that invoked the “plainly erroneous” standard.<sup>111</sup> Thus, the Court’s rhetoric on deference is not susceptible to minute dissection.

In fact, it may be inappropriate to attach too much importance to any deference standard. Even after *Chevron*, there is doubt about whether the Court uses any deference standard to drive decision-making. Indeed, there is strong evidence for the proposition that all standards are applied inconsistently. Long before *Chevron* was decided, a leading commentator argued that the Court does not have a principled approach to statutory interpretation. Rather, the Court uses a plethora of rules, a virtual “bag of tricks” from which it “pull[s] respectable-sounding rules to justify any possible result.”<sup>112</sup> Judge Harold Leventhal of the Court of Appeals for the D.C. Circuit emphasized this point in regard to the Court’s use of legislative

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110. 111 S. Ct. 2524 (1991). The decision in *Pauley* was a bizarre one. The Court deferred to the Department of Labor’s interpretation of interim regulations promulgated by the Department of Health, Education and Welfare. The Court concluded that deference was required so long as the Labor Department’s interpretation was “reasonable.” *Id.* at 2539. The holding was unusual because, as a general rule, deference principles have only been applied to an agency’s interpretation of its own regulations. See Russell L. Weaver, *Deference to Regulatory Interpretations: Inter-Agency Conflicts*, 43 ALA. L. REV. 35, 38-44 (1991). In *Pauley*, the Court gave deference to one agency’s interpretation of another agency’s regulation. Justice Scalia, who argued that deference principles should not have been applied in this context, would have refused to defer. He stated that:

[E]ven if the regulations were ambiguous, it would not follow that the Secretary of Labor is entitled to deference. Nothing in our *Chevron* jurisprudence requires us to defer to one agency’s interpretation of another agency’s ambiguous regulations. We rejected precisely that proposition in *Martin v. OSHRC*, 499 U.S. \_\_\_, 111 S. Ct. 1171, 113 L.Ed.2d 177 (1991), in holding that the Occupational Safety and Health Review Commission was not entitled to deference in interpreting the Secretary of Labor’s regulations. Having used *Chevron* to rebuff OSHRC’s incursions there, it seems a bit greedy for the Secretary to use *Chevron* to launch the Labor Department’s own cross-border attack here. In my view, the only legitimate claimant to deference with regard to the present regulations is the agency that drafted them.

*Id.* at 2540 (Scalia, J., dissenting).

111. The court cited *United States v. Larionoff*, 431 U.S. 864, 872 (1977), and *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965).

112. Johnstone, *supra* note 27, at 5.

history, stating that it is "akin to 'looking over a crowd and picking out your friends.'" <sup>113</sup>

One might reach similar conclusions regarding the Court's application of deference principles to regulations. There is doubt about whether the Court ever actually "defers" in the sense that it accepts a reasonable agency interpretation when it prefers an alternative interpretation.<sup>114</sup> In *Martin*, the Court indicated that deference was not automatic. Instead, a reviewing court must first examine the regulation's language to make sure that it "is not free from doubt."<sup>115</sup> Only if there is doubt should the court consider the agency's interpretation. Moreover, even when a regulation is in doubt, the Court has been willing to reject agency interpretations of regulations.<sup>116</sup>

Thus, the review process seems to be fairly pragmatic. When a party raises serious doubt about the validity of an administrative interpretation, the reviewing court is more likely to scrutinize and overturn that interpretation.<sup>117</sup> On the other hand, when a court agrees with the agency's interpretation, or generally feels comfortable with it, the court is likely to defer, or at least to use deference concepts to justify its decision.

## 2. Lower Court Decisions

*Chevron* does not appear to have altered the lower courts' approach concerning the degree of deference due agencies' interpretations of their own regulations. Indeed, only a small minority of cases considering this issue even mention *Chevron*: the courts in most cases

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113. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (footnote omitted).

114. See Breyer, *supra* note 7, at 379-80:

[O]ne can find many cases in which the opinion suggests the court believed the agency's legal interpretation was correct and added citations to "deference" cases to bolster the argument. One can also find cases in which the court believed the agency's interpretation was wrong and overturned the agency, often citing non-deference cases. But, it is more difficult to find cases where the opinion suggests the court believed the agency was wrong in its interpretation of a statute and nonetheless upheld the agency on "deference" principles.

*Id.* (footnotes omitted).

115. *Martin*, 111 S. Ct. at 1176 (quoting *Ehlert v. United States*, 402 U.S. 99 (1971)).

116. See *EEOC v. Arabian Am. Oil Co.*, 111 S. Ct. 1227, 1246 (1991) ("The majority's insistence that the EEOC was contradicting itself fails to give the agency the deference that it is due on the interpretation of its own regulations.") (Stevens, J., dissenting).

117. See *Caiola v. Carroll*, 851 F.2d 395, 399-400 (D.C. Cir. 1988) (concluding that respondents have been subjected to disparate treatment, and rejecting the agency's interpretation as unreasonable).

assume that the *Bowles* “plainly erroneous” standard<sup>118</sup> applies to regulations<sup>119</sup> and that *Chevron* is irrelevant. Significantly, even some of the courts that applied the “plainly erroneous” standard rejected the agencies’ interpretations of their own regulations.<sup>120</sup>

Of course, many courts do not apply the plainly erroneous standard, applying, instead, other standards. Some courts hold that an agency’s interpretation of its own regulations is entitled to “great deference,”<sup>121</sup> “substantial deference,”<sup>122</sup> a “high level of deference,”<sup>123</sup> “considerable deference,”<sup>124</sup> or merely “deference.”<sup>125</sup> Others hold that the agency’s interpretation is entitled to “substantial weight”<sup>126</sup> or “controlling weight.”<sup>127</sup> Still others consider an

118. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

119. *E.g.*, *Hazardous Waste Treatment Council v. Reilly*, 938 F.2d 1390, 1395 (D.C. Cir. 1991); *Shoshone Indian Tribe v. Hodel*, 903 F.2d 784, 787 (10th Cir. 1990); *University of Vt. v. State of Vt.*, 748 F. Supp. 235, 242 (D. Vt. 1990). The courts in *Federal Labor Relations Auth. v. United States Dep’t of Treasury, Fin. Management Serv.*, 884 F.2d 1446, 1454 (D.C. Cir. 1989) *cert. denied sub nom. National Treasury Employees Union v. Department of Treasury Fin. Management Serv.*, 493 U.S. 1055 (1990); *City of Alma v. United States*, 744 F. Supp. 1546, 1560 (S.D. Ga. 1990); and *Lamkin v. Bowen*, 721 F. Supp. 263, 268 (D. Colo. 1989) cited *United States v. Larionoff*, 431 U.S. 864 (1977), for the same proposition, and the court in *Jensen v. United States*, 743 F. Supp. 1091, 1112 (D.N.J. 1990) cited *Udall v. Tullman*, for the same proposition. *Udall* was also cited by *Hazardous Waste Treatment Council*, *Shoshone Indian Tribe*, and *City of Alma*. Of these cases, only *Hazardous Waste Treatment Council* cited *Chevron* in this context, although *Federal Labor Relations Authority v. United States Dep’t of Treasury* cited it later. 884 F.2d at 1455.

120. *Jensen*, 743 F. Supp. at 1112 (“The court finds here that NOAA’s interpretation is at odds with the regulation . . . .”); *Lamkin*, 721 F. Supp. at 269-70 (“[I]t would be inappropriate to defer to the [Social Security Administration] appeals council’s determination [regarding application of 20 C.F.R. § 404.1592(b) (1988)]. It ignores facts found by the administrative law judge. It is contrary to the defendant’s previous interpretations. It is not supported by either statute or regulation and it violates express congressional intent.”).

121. *Criger v. Becton*, 902 F.2d 1348, 1351 (8th Cir. 1990); *South Cent. Terminal Co. v. United States Dep’t of Energy*, 920 F.2d 27, 28 (Temp. Emer. Ct. App. 1990) (citing *Thriftway Co. v. United States Dep’t of Energy*, 867 F.2d 1577, 1580 (Temp. Emer. Ct. App. 1989); *Exxon Corp. v. United States Dep’t of Energy*, 802 F.2d 1400, 1413-14 (Temp. Emer. Ct. App. 1986)); *Lopez v. Louisiana Nat’l Guard*, 733 F. Supp. 1059, 1066 n.17 (E.D. La.), *aff’d*, 917 F.2d 561 (5th Cir. 1990).

122. *Norfolk Energy, Inc. v. Hodel*, 898 F.2d 1435, 1439 (9th Cir. 1990) (citing *Chevron*); *Yellow Freight Sys., Inc. v. Amestoy*, 736 F. Supp. 44, 48 (D. Vt. 1990).

123. *Star Lake R.R. v. Lujan*, 737 F. Supp. 103, 107 (D.D.C. 1990), *aff’d*, 925 F.2d 490 (D.C. Cir. 1991).

124. *University of Cincinnati v. Bowen*, 875 F.2d 1207, 1209 (6th Cir. 1989); *Thomas v. Baker*, 717 F. Supp. 878, 881 (D.D.C. 1989), *aff’d*, 925 F.2d 1523 (D.C. Cir. 1991).

125. *Rasco v. Beeler*, 732 F. Supp. 75, 77 (N.D. Ill. 1990).

126. *Dole v. Occupational Safety & Health Review Comm’n*, 891 F.2d 1495, 1499 (10th Cir. 1989), *rev’d sub nom.*, *Martin v. Occupational Safety & Health Review Comm’n* 111 S.Ct. 1171 (1991).

127. *Capital Cities/ABC, Inc. v. Brady*, 740 F. Supp. 1007, 1014 (S.D.N.Y. 1990).

agency's interpretation deserving of deference if it is "reasonable."<sup>128</sup> One court held that deference to the agency's interpretation "is particularly appropriate where the resource to be managed and the act, regulations, and case law are complicated, thus calling for agency expertise."<sup>129</sup> Another court stated that it was "not compelled or inclined to defer" to an interim agency interpretation which had not gone through the review and comment process.<sup>130</sup>

A majority of courts state the deference standard briefly and then quickly reach a decision to uphold or reject the challenged agency interpretation without much discussion. Accordingly, it is difficult to assess whether the different deference standards would lead to different results regarding the validity of an agency's interpretation. Despite the difference in terminology among the various standards, the caselaw offers no indication that, as applied, the standards actually lead to differing results.

### B. *Function of the Canons of Construction*

Prior to *Chevron*, the courts frequently used deference principles in conjunction with, or as substitution for, other interpretive rules. Since *Chevron*, there is no indication that this practice has changed. There are, however, few post-*Chevron* decisions in which the Court actually supplants deference principles, insofar as they apply to an agency's interpretation of its own regulations, with other interpretive rules.

In at least one post-*Chevron* decision, the Court has suggested that it may be inappropriate to use other interpretive principles to supplant deference principles. In *Pauley v. Bethenergy Mines, Inc.*,<sup>131</sup> the claimants disputed the Department of Labor's interpretation of regulations, claiming that the Department's reading was not the "most natural" one.<sup>132</sup> Unwilling to allow the canons to override deference principles, the Court rejected this argument:

While it is possible that the claimants' parsing of these impenetrable regulations would be consistent with accepted canons of

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128. *Detsel v. Sullivan*, 895 F.2d 58, 63 (2d Cir. 1990) (citing *Chevron*); *City of Alma v. United States*, 744 F. Supp. 1546, 1560 (S.D. Ga. 1990); *Monongahela Valley Hosp., Inc. v. Bowen*, 728 F. Supp. 1172, 1176 (W.D. Pa. 1990), *aff'd in part, rev'd in part sub nom.*, *Monongahela Valley Hosp., Inc. v. Sullivan*, 945 F.2d 576 (3d Cir. 1991).

129. *Washington Crab Producers, Inc. v. Mosbacher*, 924 F.2d 1438, 1447 (9th Cir. 1990) (citation omitted).

130. *Martinson v. Federal Land Bank*, 725 F. Supp. 469, 471 (D.N.D. 1988).

131. 111 S. Ct. 2524 (1991).

132. *Id.* at 2537.

construction, it is axiomatic that the Secretary's interpretation need not be the best or most natural one by grammatical or other standards. . . . Rather, the Secretary's view need be only reasonable to warrant deference.<sup>133</sup>

This language suggested a major change in approach from the pre-*Chevron* era.

This change, however, may be solely rhetorical. In its post-*Chevron* statutory decisions, the Court has continued to use the canons of construction<sup>134</sup> and has invoked them in a number of cases.<sup>135</sup> Of

133. *Id.* (citations omitted).

134. *See, e.g., Dole v. United Steelworkers of Am.*, 494 U.S. 26, 36 (1990) ("The traditional canon of construction, *noscitur a sociis*, dictates that 'words grouped in a list should be given related meaning.'" (quoting *Massachusetts v. Morash*, 490 U.S. 107, 114-15 (1989) (quoting *Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 8 (1985)))).

135. In *Norfolk & W. Ry. Co. v. American Train Dispatchers Ass'n*, 111 S. Ct. 1156 (1991), the Court affirmed an agency's interpretation as correct. *Id.* at 1166. But, it did so only after analyzing various canons of construction. The Court began by noting that the rule of *ejusdem generis* seemed applicable. *Id.* at 1163. This rule provides that, "when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration." *Id.* The Court refused to invoke the canon, noting that it "does not control, however, when the whole context dictates a different conclusion." *Id.* The Court then reached a conclusion inconsistent with the canon, *id.*, and it did so by invoking another canon of construction: "'[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored.'" *Id.* (quoting *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350 (1963)).

The Court has invoked other canons as well, including the following:

- (1) "It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum." *Traynor v. Turnage*, 485 U.S. 535, 547-48 (1988).
- (2) Sometimes, as an addendum to the prior canon, the Court states the following proviso: "unless the later statute 'expressly contradicts the original act'" or is absolutely necessary for the words of the later statute to have meaning. *Id.* at 548 (citation omitted).
- (3) "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Id.* (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).
- (4) "[I]f the language of a statute is clear, that language must be given effect - at least in the absence of a patent absurdity." *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 452 (Scalia, J., concurring) (citation omitted).
- (5) "Going behind the plain language of a statute in search of a possibly contrary congressional intent is a step to be taken cautiously even under the best of circumstances." *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 553 (1987) (quoting *United States v. Locke*, 471 U.S. 84, 95-96 (1985)).
- (6) Under the traditional canon of construction, *noscitur a sociis*, "words grouped in a list should be given related meaning." *See, e.g., Dole v. United Steelworkers of Am.*, 494 U.S. 26, 36 (1990) (quoting *Massachusetts v. Morash*,



course, in some respects, *Chevron* itself represents nothing more than a canon of construction: when Congress has been silent or ambiguous with respect to an interpretive issue, courts should defer to the interpretation of the agency responsible for administration of the statute.<sup>136</sup> The same can be said of the *Bowles* standard: when an agency interprets its own regulations, that interpretation is entitled

490 U.S. 107, 114-15 (1989); *Schreiber v. Burlington N. Inc.*, 472 U.S. 1, 8 (1985)).

(7) "[I]n expounding a statute, [a court should] not [be] guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and [to] its object and policy." *Id.* 35 (citation omitted).

(8) "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, [a] court [should] construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

(9) "[W]hen a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration." *Norfolk & W. Ry. Co. v. American Train Dispatchers Ass'n*, 111 S. Ct. 1156, 1163 (1991).

(10) "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

(11) A court should "assume that the legislative purpose is expressed by the ordinary meaning of the words used." *Id.* at 431 (quoting *Immigration & Naturalization Serv. v. Phinpathya*, 464 U.S. 183, 189 (1984)).

(12) There is a "strong presumption that Congress expresses its intent through the language it chooses." *Id.* at 432 n.12.

(13) "[L]ingering ambiguities in deportation statutes [should be construed] in favor of the alien." *Id.* at 449 (citation omitted).

(14) Statutes that impose criminal penalties should be strictly construed. *See, e.g., University of Cal. v. Public Employment Relations Bd.*, 485 U.S. 589, 604 (1988) (Stevens, J., dissenting).

(15) "[R]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored." *Norfolk & W. Ry. Co. v. American Train Dispatchers Ass'n*, 111 S. Ct. 1156, 1163 (1991) (quoting *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350 (1963)).

(16) Unless a contrary intent appears, we assume that Congress intends for legislation to apply only within the territorial jurisdiction of the United States. *E.g., EEOC v. Arabian Am. Oil Co.*, 111 S. Ct. 1227, 1230 (1991).

(17) Before deference will be given, the Court must first determine whether the agency's interpretation is consistent with its prior decisions. *See, e.g., Lechmere, Inc. v. NLRB*, 112 S. Ct. 841, 847 (1992).

(18) Once a Court has determined a statute's clear meaning, it should adhere to that determination under the doctrine of *stare decisis*, and judge an agency's later interpretation of the statute against the court's prior determination of the statute's meaning. *See, e.g., id.* at 847-48.

136. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984).

to deference provided it is not "plainly erroneous" or inconsistent with the regulation.

In several cases involving statutory construction, the Court has used canons to displace the *Chevron* doctrine. In *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*,<sup>137</sup> the Court cited *Chevron* and noted that the NLRB's interpretation "would normally be entitled to deference unless that construction were clearly contrary to the intent of Congress."<sup>138</sup> The Court concluded, however, that "[a]nother rule of statutory construction . . . is pertinent here."<sup>139</sup> The Court then invoked the canon that states that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."<sup>140</sup> The Court concluded that the agency's interpretation posed serious questions under the First Amendment.<sup>141</sup> As a result, the Court decided to "independently inquire whether there is another interpretation, not raising these serious constitutional concerns, that may fairly be ascribed to [section] 8(b)(4)(ii)."<sup>142</sup> Finding such an interpretation, the Court refused to defer to the agency.<sup>143</sup>

Likewise, in *Immigration & Naturalization Service v. Cardoza-Fonseca*,<sup>144</sup> the Court refused to defer to the Immigration and Naturalization Service's (INS) interpretation of the Immigration and Nationality Act (INA).<sup>145</sup> Instead, the Court, itself, interpreted the INA, resorting to general principles of statutory construction,<sup>146</sup> and it invoked one of the canons of construction: "[W]here Congress

137. 485 U.S. 568 (1988).

138. *Id.* at 574.

139. *Id.* at 575.

140. *Id.*

141. The Court stated:

We agree with the Court of Appeals and respondents that this case calls for the invocation of the *Catholic Bishop* rule, for the Board's construction of the statute, as applied in this case, poses serious questions of the validity of § 8(b)(4) under the First Amendment . . . . [T]he Court of Appeals was plainly correct in holding that the Board's construction would require deciding serious constitutional issues.

*Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575-76 (1988).

142. *Id.* at 578.

143. *Id.* at 577.

144. 480 U.S. 421 (1987).

145. See discussion accompanying *infra* notes 169-76 for a detailed discussion of the issues before the Court.

146. *Cardoza-Fonseca*, 480 U.S. at 431-32.

includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”<sup>147</sup>

As one might expect, the justices do not always agree regarding the application of the various canons. In *Rust v. Sullivan*,<sup>148</sup> the Court addressed arguments that regulations “must be invalidated because they raise serious questions of constitutional law.”<sup>149</sup> The Court observed that, “out of respect for Congress,”<sup>150</sup> which the Court “assume[s] legislates in the light of constitutional limitations,”<sup>151</sup> “a decision to declare an act of Congress unconstitutional ‘is the gravest and most delicate duty that this Court is called on to perform.’”<sup>152</sup> As a result, “an Act of Congress ought not to be construed to violate the Constitution if any other possible construction remains available,”<sup>153</sup> and “‘[t]he elementary rule is that every reasonable construction must be resorted to in order to *save a statute* from unconstitutionality.’”<sup>154</sup> In the Court’s view, these principles led to the conclusion that “‘as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act.’”<sup>155</sup> At the same time, the Court observed that “‘avoidance of a difficulty will not be pressed to the point of disingenuous evasion.’”<sup>156</sup> The Court concluded that the Secretary’s regulations did not present “the sort of ‘grave and doubtful constitutional questions,’ . . . that would lead . . . [it] to assume Congress did not intend to authorize their issuance.”<sup>157</sup> Therefore, the Court concluded that it

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147. *Id.* at 432 (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972))).

148. 111 S. Ct. 1759 (1991).

149. *Id.* at 1771.

150. *Id.*

151. *Id.*

152. *Id.* (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927)).

153. *Id.* (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)); see also *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499 (1979).

154. *Rust*, 111 S. Ct. at 1771 (quoting *DeBartolo Corp.*, 485 U.S. at 575). In addition, the Court observed that “‘[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.’” *Id.* (quoting *United States v. Tin Fuel Nov*, 241 U.S. at 401).

155. *Id.* (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927)).

156. *Id.* (quoting *Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933)).

157. *Id.* (quoting *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)).

need not invalidate the agency's regulations in order to save the statute from unconstitutionality.<sup>158</sup>

Justice Blackmun, joined by three other justices, vigorously disagreed:

Casting aside established principles of statutory construction and administrative jurisprudence, the majority in these cases today unnecessarily passes upon important questions of constitutional law . . . .

The majority does not dispute that "[f]ederal statutes are to be so construed as to avoid serious doubt of their constitutionality." *Machinists v. Street*, 367 U.S. 740, 749, 81 S. Ct. 1784, 1790, 6 L.Ed.2d 1141 (1961) . . . . Nor does the majority deny that this principle is fully applicable to cases such as the instant one, in which a plausible but constitutionally suspect statutory interpretation is embodied in an administrative regulation. Rather, in its zeal to address the constitutional issues, the majority sidesteps this established canon of construction with the feeble excuse that the challenged Regulations "do not raise the sort of 'grave and doubtful constitutional questions,' . . . that would lead us to assume Congress did not intend to authorize their issuance." *Ante*, at 1771, quoting *United States v. Delaware and Hudson Co.*, 213 U.S. 366, 408 29 S.Ct. 527, 536, 53 L.Ed. 836 (1909).

This facile response to the intractable problem the Court addresses today is disingenuous at best. Whether or not one believes that these Regulations are valid, it avoids reality to contend that they do not give rise to serious constitutional questions. The canon is applicable to this case not because "it was likely that [the Regulations] . . . would be challenged on constitutional grounds," *ante*, at 1771, but because the question squarely presented by the Regulations - the extent to which the Government may attach an otherwise unconstitutional condition to the receipt of a public benefit—implicates a troubled area of our jurisprudence in which a court ought not entangle itself unnecessarily.<sup>159</sup>

### C. Requirement of Consistency

*Chevron* may have altered the law in one respect—application of the requirement of consistency.

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158. *Id.*

159. *Id.* at 1778-79.

### 1. Supreme Court Decisions

*Chevron's* rhetoric on consistency was bold and involved a major departure from prior case law. In *Chevron*, the respondents argued that "[t]he EPA's interpretation is not entitled to deference because it represents a sharp break with prior interpretations of the Act."<sup>160</sup> The Court rejected this argument, stating, "The fact that the agency has from time to time changed its interpretation of the term 'source' [did] not, as respondents argue[d], lead [the Court] to conclude that no deference should be accorded the agency's interpretation of the statute."<sup>161</sup> The Court went on to hold that "[a]n initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rule-making, must consider varying interpretations and the wisdom of its policy on a continuing basis."<sup>162</sup>

The Court's position on inconsistency logically flows from its underlying assumptions. The Court assumes that agencies have interpretive discretion because interpretation involves policy choices and agencies should be free to make those choices. If this is true, then agencies should have some ability to alter their choices. *Chevron* may require a reviewing court to accept an agency's interpretation,

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160. *Chevron*, 467 U.S. at 862. The Court was not convinced that the agency had taken inconsistent positions:

Our review of the EPA's varying interpretations of the word "source"— both before and after the 1977 Amendments — convinces us that the agency primarily responsible for administering this important legislation has consistently interpreted it flexibly — not in a sterile textual vacuum, but in the context of implementing policy decisions in a technical and complex arena.

*Id.* at 863.

161. *Id.*

162. *Id.* at 863-64.

but the agency itself is free to alter its interpretations.<sup>163</sup> As the Supreme Court stated in its post-*Chevron* decision in *Rust v. Sullivan*,<sup>164</sup> “[t]his Court has rejected the argument that an agency’s interpretation ‘is not entitled to deference because it represents a sharp break with prior interpretations of the statute in question.’”<sup>165</sup>

*Chevron*’s rhetoric has not been consistently applied, however. In some post-*Chevron* decisions, the Court has followed *Chevron* and upheld agency position changes.<sup>166</sup> In other cases, the Court has

163. Under *Chevron*’s analysis, agency interpretations assume a status comparable to that of precedent. See Russell L. Weaver, *Chevron: Martin, Anthony and Format Requirements*, 40 KAN. L. REV. (forthcoming 1992). Legislative regulations are binding on both the promulgating agency and regulated entities. See *United States v. Nixon*, 418 U.S. 683, 696 (1974) (“So long as this regulation remains in force the Executive Branch is bound by it . . . .”); *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 536 (D.C. Cir. 1986) (“It is axiomatic that an agency must adhere to its own regulations . . . .”); *American Fed’n of Gov’t Employees, Local 3090 v. NLRB*, 777 F.2d 751, 759 (D.C. Cir. 1985) (“[U]nless and until it amends or repeals a valid legislative rule or regulation [by legislative means], an agency is bound by such a rule or regulation.”); *North Ga. Bldg. & Constr. Trades Council v. Goldschmidt*, 621 F.2d 697, 710 (5th Cir. 1980) (“[An] agency is bound to comply with the regulations it promulgates.”). On the other hand, most interpretations, other than those stated in the form of legislative rules, are not binding even on the agency. Granted, *Chevron* suggests that a reviewing court should accept agency interpretations, but it expressly states that the agencies themselves are free to change their own interpretations.

164. 111 S. Ct. 1759 (1991).

165. *Id.* at 1769 (quoting *Chevron*, 467 U.S. at 862). The Court went on to state that:

In *Chevron*, we held that a revised interpretation deserves deference because “[a]n initial agency interpretation is not instantly carved in stone” and “the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.” *Id.*, at 863-864, 104 S. Ct., at 2792. An agency is not required to “‘establish rules of conduct to last forever,’” but rather “must be given ample latitude to ‘adapt [its] rules and policies to the demands of changing circumstances.’”

*Id.* The Court concluded that “the Secretary amply justified his change of interpretation with a ‘reasoned analysis.’” *Id.*; see also *Pauley v. Bethenenergy Mines, Inc.*, 111 S. Ct. 2524, 2535 (1991).

166. *Chevron* was followed in *Rust v. Sullivan*, 111 S. Ct. 1759, 1769 (1991), a case involving the interpretation of a statute rather than a regulation. In particular, it involved the Department of Health and Human Services’s “gag rule”—the rule providing that federal funds could not be used to “provide counseling concerning the use of abortion as a method of family planning.” 42 C.F.R. § 59.8(a)(1) (1988). Petitioners argued that the gag rule constituted an impermissible interpretation of the Public Health Service Act. The Court disagreed. In its view, the statute was ambiguous. Accordingly, the Court concluded that deference was appropriate: “If a statute is ‘silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.’” *Rust*, 111 S. Ct. at 1767 (quoting *Chevron*, 467 U.S. at 842-43).

The petitioners tried to undercut the assumption of deference by arguing that the Secretary had taken inconsistent positions regarding the statute’s meaning. *Id.* at 1768-69. They viewed the Secretary’s interpretation as a “sharp b[r]eak from the Secretary’s prior construction of the statute,” and urged the Court to defer to the agency’s prior “consistent” interpretation. *Id.*

carved out exceptions to *Chevron*. In *Mullins Coal*, the Court deferred to an administrative interpretation of a regulation, noting that the agency's position had been "consistently maintained."<sup>167</sup> The Court suggested, however, that, had there been an inconsistency, it would have found "reason to downgrade the normal deference accorded to an agency's interpretation of its own regulation."<sup>168</sup>

The Court has used this "downgrade" approach in several post-*Chevron* statutory cases. *Immigration & Naturalization Service v. Cardoza-Fonseca*<sup>169</sup> involved the interpretation of a statute rather than a regulation. In *Cardoza-Fonseca*, the Court reverted to pre-

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The Court rejected the petitioners' arguments, and deferred to the Secretary's later interpretation. The Court concluded that the presence of inconsistency, by itself, was not sufficient to override the presumption of deference: "This Court has rejected the argument that an agency's interpretation 'is not entitled to deference because it represents a sharp break with prior interpretations' of the statute in question." *Id.* at 1769 (quoting *Chevron*, 467 U.S. at 862). The Court quoted *Chevron* at length:

In analyzing the agency's change of position, the Court emphasized that "the Secretary [had] amply justified his change of interpretation with a 'reasoned analysis.'" *Id.* (quoting *Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983)). The Court was impressed by the fact that, when the Secretary altered his position, he did so based on critical reports by watchdog agencies suggesting that his prior policy was inconsistent with the Act. *Id.* In addition, the Secretary acted based on his belief that the new interpretation was "more in keeping with the original intent of the statute." *Id.* The Court concluded that "these justifications [were] sufficient to support the Secretary's revised approach," and decided that it "must defer to the Secretary's permissible construction of the statute." *Id.*

Justice Stevens, dissenting, argued that the Court should have rejected the agency's interpretation based on the presence of inconsistency. *Id.* at 1786 (Stevens, J., dissenting). He noted that the agency's prior interpretation had been maintained through four different presidential administrations over a period of eighteen years, and argued that this prior interpretation constituted a "'contemporaneous construction of [the] statute by the men charged with the responsibility of setting its machinery in motion.'" *Id.* at 1787 (quoting *Power Reactor Dev. Co. v. Electrical Workers*, 367 U.S. 396, 408 (1961) (quoting *Norwegian Nitrogen Prod. Co. v. United States*, 288 U.S. 294, 315 (1933))). In Stevens's view, this interpretation was entitled to "particular respect." *Id.* In addition, he concluded that the Secretary's later interpretation constituted an impermissible construction of the statute. *Id.* at 1788.

Similarly, in *Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana*, 472 U.S. 237 (1985), the Court accepted an administrative interpretation. Without citing *Chevron*, the Court concluded that "[t]he uniform contemporaneous view of the Executive Officer responsible for administering the statute and the District Court with exclusive jurisdiction over the quiet title actions brought under the Pueblo Lands Act 'is entitled to very great respect.'" *Id.* at 254.

Justice Brennan, dissenting, argued that the Court should not have deferred because the agency had taken inconsistent positions regarding the statute's meaning. *Id.* at 270 (Brennan, J., dissenting). If the agency had in fact changed positions, something which the majority did not discuss, the Court was unconcerned about the change.

167. *Mullins Coal*, 484 U.S. at 159.

168. *Id.* at 160.

169. 480 U.S. 421 (1987).

*Chevron* analysis on the issue of inconsistency.<sup>170</sup> The agency had shifted its position,<sup>171</sup> but, in analyzing the shift, the Court did not rely on *Chevron's* statement that agency interpretations are "not instantly carved in stone"<sup>172</sup> and that an agency must be free to "consider varying interpretations and the wisdom of its policy on a continuing basis."<sup>173</sup> Instead, the Court rejected the agency's later interpretation. Although the Court focused on a number of considerations,<sup>174</sup> it stated that "[a]n additional reason for rejecting the

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170. *Id.* at 423. Under the Refugee Act of 1980, the Attorney General was authorized to grant asylum to an alien who was unable or unwilling to return to his home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42) (1983). The Attorney General interpreted the "well-founded fear of persecution" language to require that it be "more likely than not" that the alien will be subject to persecution. *Cardoza-Fonseca*, 480 U.S. at 423.

171. *Cardoza-Fonseca*, 480 U.S. at 447 n.30 ("The decision in *Acosta* and the long pattern of erratic treatment of this issue make it apparent that the BIA has not consistently agreed, and even today does not completely agree, with the INS's litigation position that the two standards are equivalent.").

172. *Rust v. Sullivan*, 111 S. Ct. 1759, 1769 (1991) (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863-64 (1984)).

173. *Id.*

174. The Court's principal justification for refusing to defer was that the case presented only a "pure question of statutory construction." The Court acknowledged that Congress had given the Immigration and Naturalization Service (INS) responsibility for administering the Immigration and Nationality Act (INA), and for "filling 'any gap left, implicitly or explicitly, by Congress.' " " *Cardoza-Fonseca*, 480 U.S. at 448 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)). But, even though the Court concluded that there was "some ambiguity" in the INA, the Court refused to defer, concluding that the case involved a narrower task that was "well within the province of the [j]udiciary." *Id.*

The basis for the Court's decision was not entirely clear. The Court suggested that, ordinarily, it would have deferred to the INS's interpretation of the INA. But the Court noted that *Cardoza-Fonseca* involved a dispute about whether two legal standards meant the same thing, and the Court viewed this question as a "narrow legal question." *Id.* In the Court's view, deference was only required when "the agency is required to apply either or both standards to a particular set of facts." *Id.* Apparently, "narrow legal questions" did not require application and, therefore, the Court found it unnecessary to defer.

Justice Powell, joined by Chief Justice Rehnquist and Justice White, dissented, arguing that the Court should have deferred to the INS's conclusions:

The Attorney General has delegated the responsibility for making these determinations to the BIA. That Board has examined more of these cases than any court ever has or ever can. It has made a considered judgment that the difference between the "well-founded" and the "clear probability" standards is of no practical import: that is, the evidence presented in asylum and withholding of deportation cases rarely, if ever, will meet one of these standards without meeting both. This is just the type of expert judgment - formed by the entity to whom Congress has committed the question - to which we should defer.

*Id.* at 460 (Powell, J., dissenting).

Justice Scalia, concurring in the judgment, castigated the Court for its discussion of *Chevron*. In his view, there was no need to discuss *Chevron* because "the INS's interpretation is



INS's request for heightened deference to its position is the inconsistency of the positions the BIA has taken through the years."<sup>175</sup> Relying on pre-*Chevron* decisions, the Court stated that "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view."<sup>176</sup> In a number of other post-*Chevron* decisions, the Court has made similar statements.<sup>177</sup>

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clearly inconsistent with the plain meaning" of the statutory language and the INA's structure. *Id.* at 453 (Scalia, J., concurring). Moreover, he felt that the Court's treatment of *Chevron* was wrong. He termed the Court's "use of this superfluous discussion" as having expressed "controversial" and "erroneous . . . views on the meaning of this Court's decision in *Chevron*." *Id.* at 454 (Scalia, J., concurring). In Scalia's view, *Chevron* held that "courts must give effect to a reasonable agency interpretation of a statute unless that interpretation is inconsistent with a clearly expressed congressional intent." *Id.* (Scalia, J., concurring). He flatly rejected the Court's conclusion that it should decide "a pure question of statutory construction." *Id.* at 454-55 (Scalia, J., concurring).

175. *Id.* at 446 n.30.

176. *Id.* (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)). The Court also cited *General Elec. Co. v. Gilbert*, 429 U.S. 125, 143 (1976).

177. See, e.g., *Immigration & Naturalization Serv. v. National Ctr. for Immigrants' Rights, Inc.* 112 S. Ct. 551, 556 (1991) ("In this case, the Government has consistently maintained that the contested regulation only implicates bond conditions barring unauthorized employment."); *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 124 n.20 (1987) ("We also consider the consistency with which an agency interpretation has been applied."); see also *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 389 n.\* (1988) (Brennan, J., dissenting) ("FERC has certainly not demonstrated a consistent agency interpretation, nor one that was contemporaneous with the enactment of the Federal Power Act.").

In *Pauley v. Bethenergy Mines, Inc.*, 111 S. Ct. 2524, 2535 (1991), the claimants argued that no deference was due the Secretary of Labor's interpretation "because that interpretation has changed without explanation throughout the litigation of these cases." The Court disagreed on the basis that the Secretary's interpretation had been consistently maintained. *Id.* But the Court suggested that, had there been inconsistency, it might have accepted the claimants' argument: "As a general matter, of course, the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views." *Id.*

*Mullins Coal Co. v. Director*, 484 U.S. 135 (1987), involved regulations governing the processing of claims for black lung benefits. The Court concluded that the agency's position had been "consistently maintained," and deferred. *Id.* at 159. The Court suggested in dicta, however, that, had there been an inconsistency, there might have been "reason to downgrade the normal deference accorded to an agency's interpretation of its own regulation." *Id.* at 160.

Interestingly, in support of its dicta, *Mullins* cited *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983), *cert. denied sub nom.*, *New York v. Dole*, 480 U.S. 951 (1987). Although the *Motor Vehicle* decision was rendered prior to *Chevron*, that decision was consistent with *Chevron*'s holding. The Court flatly stated that "[r]egulatory agencies do not establish rules of conduct to last forever." *Id.* at 42 (quoting *American Trucking Ass'ns., Inc. v. Atchison T. & S.F. Ry. Co.*, 387 U.S. 397, 416 (1967)). As a result, they "must be given ample latitude to 'adapt their rules and policies to the demands of changing circumstances.'" *Id.* (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968)). The Court imposed a presumption that, when an agency announces a policy, it will follow that policy absent a "reasoned analysis" for the change.

*Mullins Coal's* statements regarding inconsistency, as well as *Cardoza-Fonseca's* holding, conflict with *Chevron's* rhetoric. *Chevron* suggested that agencies have discretion about how to interpret regulatory provisions and about whether to alter their interpretations. Under *Chevron's* analysis, there is no reason to downgrade the normal degree of deference even though the agency has been inconsistent. An administrative interpretation should still be accepted provided it is "reasonable," and an agency can act reasonably but inconsistently.<sup>178</sup>

## 2. Lower Court Decisions

The lower courts do not seem to have followed *Chevron's* rhetoric regarding inconsistency. In *Massachusetts v. United States*,<sup>179</sup> Massachusetts challenged a penalty that the United States Department of Agriculture had levied because of the state's allegedly excessive rate of errors in administering the food stamp program.<sup>180</sup> The dispute turned on whether the federal authorities had properly interpreted an obscure and poorly drafted regulation concerning the number of food stamp recipients to be sampled in determining the state's "payment error rate."<sup>181</sup> The State Food Stamp Appeals Board of

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178. In *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986), a case decided shortly after *Chevron* was rendered, the Court suggested that a contemporaneously issued interpretation is entitled to more weight than one that was not contemporaneously issued. *Id.* at 844 ("[A]s the CFTC's contemporaneous interpretation of the statute it is entrusted to administer, considerable weight must be accorded the CFTC's position."). The Court used similar language in *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 124 n.20 (1987) ("We also consider . . . whether the interpretation was contemporaneous with the enactment of the statute being construed."); see also *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 389 n.\* (1988) (Brennan, J., dissenting) ("FERC has certainly not demonstrated a consistent agency interpretation, nor one that was contemporaneous with the enactment of the Federal Power Act.").

The Court's rhetoric in these cases seems inconsistent with *Chevron*. "Contemporaneousness" was a factor used by the pre-*Chevron* Court under the *Skidmore* standards, and seems to have little place in the *Chevron* analysis. An interpretation can be reasonable even though it was not contemporaneously issued. In the pre-*Chevron* era, the Court gave special weight to a contemporaneous interpretation because they believe that it more accurately reflected Congress's intent regarding the meaning of a statute. Whether this assumption is correct is debatable. Of course, a later interpretation may still be consistent with congressional intent, and may therefore be entitled to deference. If a later interpretation is inconsistent with congressional intent, then it can be rejected on that basis without considering the element of contemporaneousness.

179. 737 F. Supp. 120 (D. Mass. 1990).

180. *Id.* at 121.

181. *Id.* at 123; 7 C.F.R. § 275.3(c)(1) (1988).

the Department of Agriculture's Food and Nutrition Service had issued an interpretation of the regulation in question that diametrically opposed the Secretary of Agriculture's interpretation.<sup>182</sup> Because of this divergence, the district court, relying on *Immigration & Naturalization Service v. Cardoza-Fonseca*,<sup>183</sup> held that the Secretary's current interpretation was entitled to less deference and rejected it in favor of the Board's earlier interpretation.<sup>184</sup>

Another court, while citing both *Chevron* and *Cardoza-Fonseca*, similarly declined to defer to a rather abrupt change in its regulations by the Department of Housing and Urban Development.<sup>185</sup> Congress had established a program to provide below-market forty-year mortgages at below-market interest rates to private owners of low-income housing.<sup>186</sup> In return, the Department of Housing and Urban Development regulated rents and limited the owner's profits during the life of the mortgage.<sup>187</sup> Department regulations permitted owners to prepay these mortgages after twenty years, and thus to terminate federal regulation of their properties.<sup>188</sup>

In 1987, however, Congress, concerned about the diminution of low-cost housing, enacted the Emergency Low-Income Housing Preservation Act, which required owners to apply for HUD permission to prepay their mortgages and provided that HUD could only grant approval after making a written finding that prepayment would not materially affect current residents or the local supply of low-income housing.<sup>189</sup>

Pursuant to an express provision in its forty-year mortgage note, the owner of a federally assisted apartment building in Chicago notified HUD on October 22, 1987, that he intended to exercise the prepayment option.<sup>190</sup> On December 21, 1987, both houses of Congress approved the final version of the Emergency Low-Income Housing

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182. *Massachusetts*, 737 F. Supp. at 124.

183. 480 U.S. 421, 446-47 n.30 (1987) ("An agency interpretation . . . which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view.").

184. *Massachusetts*, 737 F. Supp. at 124. The court went on to conclude that the Board's interpretation, which it deemed the authoritative departmental interpretation of 7 C.F.R. § 275.3(c)(1) (1988), was "inconsistent with the purpose of the regulation." *Id.* at 126. Its use, however, had in no way prejudiced *Massachusetts*, so the penalty stood. *Id.* at 127. The case does not mention *Chevron*.

185. *Orrego v. 833 West Buena Joint Venture*, 943 F.2d 730, 736 (7th Cir. 1991).

186. *Id.* at 731.

187. See 12 U.S.C. § 1715(d)(3) (1988).

188. *Orrego*, 943 F.2d at 731-32.

189. Pub. L. No. 100-242, tit. II, 101 Stat. 1815, 1877 (1988).

190. *Orrego*, 943 F.2d at 732.

Preservation Act, and President Reagan signed it into law on February 5, 1988.<sup>191</sup> Meanwhile, the Chicago building owner had tendered his prepayment, which HUD officials accepted on January 4, 1988. The owner subsequently sent rent increase and eviction notices to the building's tenants, who sued him and HUD, claiming that the prepayment was illegal, because Congress had intended, through the new statute, to make the prepayment restrictions retroactive to November 1, 1987.<sup>192</sup>

At this stage, HUD, citing its interim regulations,<sup>193</sup> argued that retroactive application of the law would produce "absurd results," requiring regulation of deregulated housing and discouraging future investment in the federally assisted program by private investors.<sup>194</sup> The district court, citing *Cardoza-Fonseca* and *Chevron*, concluded that HUD's interpretation deserved no deference because it "directly conflict[ed] with the express intent of Congress."<sup>195</sup> The court granted the tenants' motion for summary judgment, voided HUD's acceptance of the owner's prepayment, and ordered HUD to resume regulation of the apartment building.<sup>196</sup> The court also rejected the owner's argument that the ELIHPA violated the Fifth Amendment.<sup>197</sup>

On appeal to the Seventh Circuit, HUD defended the constitutionality of the statute but took no position on the retroactivity of the regulations.<sup>198</sup> Eight days after the argument, HUD issued final regulations, which reversed the position on retroactivity it had taken in the district court.

The Seventh Circuit rejected the government's new position on retroactivity. The court stated that statutes should not be given retroactive effect unless their language or legislative history clearly indicated this intent, and that "[t]he degree of deference [of courts to the views of agencies entrusted with implementing complex federal statutes] . . . depends on the thoroughness, validity, and consistency of the agency's reasoning."<sup>199</sup> The court concluded, "HUD's post-

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191. *Id.*

192. *Id.* at 732-33.

193. Prepayment of a HUD-Insured Mortgage by an owner of Low Income Housing, 53 Fed. Reg. 11,224 (1988).

194. *Orrego*, 943 F.2d at 733.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* at 736.

199. *Id.* (quoting *United States v. Markgraf*, 736 F.2d 1179, 1184 (7th Cir. 1984), *cert. dismissed sub nom.*, *Markgraf v. United States*, 469 U.S. 1199 (1985)).

litigation turnaround certainly displays no thorough analysis or consistency, and we see no need to defer to its new position."<sup>200</sup> Accordingly, it held in favor of the defendant owner and reversed the district court judgment giving the new regulations retroactive effect.<sup>201</sup>

While the above two cases are a small sample, they indicate that lower courts have felt free to reject *Chevron's* increased tolerance of agency inconsistency when the agency failed to furnish a reasoned explanation for its change in position with regard to interpretation of one of its regulations. In this area, as with the standards of deference and canons of regulatory construction which lower courts apply, *Chevron* scarcely seems to have sparked a revolution.

### 3. Is Consistency Desirable?

Is it preferable for the Court to use the *Chevron* approach to inconsistency or the *Mullins* and *Cardoza-Fonseca* approaches? *Chevron's* logic seems compelling. In *Chevron*, the Court suggested that, when the choice between competing interpretations involves a policy choice, the agency should have discretion about which interpretation to choose.<sup>202</sup> The agency's expertise and authority make it the proper entity to make the interpretive decision. If this logic is accepted, then the courts should not override the agency's interpretation merely because the agency has taken inconsistent positions. The agency's authority and expertise do not disappear merely because it has changed its interpretation of a provision's meaning. On the contrary, the agency's change of position may be attributable to its expertise. As the agency learns more about its regulatory scheme, it may decide that its original position was unsound.

If an agency were required to adhere to its prior interpretations, "it would lose its necessary discretionary flexibility to act in its field of expertise, and would become burdened with fossilized errors."<sup>203</sup> As a leading commentator noted many years ago:

[T]he doctrine involves the assumption that the administrator will seek to carry out his original intent, unmodified by subsequently occurring attitudes, circumstances, and needs, an assumption which is not borne out by the frequency with which administrative rulings and practices are changed and reversed. The doctrine thus implies a theory of administration which

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200. *Id.*

201. *Id.* at 737.

202. See *supra* notes 54-58 and accompanying text.

203. *Jets Servs., Inc. v. Hoffman*, 420 F. Supp. 1300, 1308 (M.D. Fla. 1976).

would impose upon administration a rigidity destructive of one of its most valuable qualities, for the doctrine hypothesizes that alteration will not be made in the light of experience and in-veighs against adjustment to developing needs.<sup>204</sup>

Moreover, a reviewing court, which will often know substantially less about the regulatory scheme than the agency, may not be in a better position to make the interpretive decision.

Although there may be sound reasons for allowing agencies to alter regulatory policy, there are equally sound reasons for limiting their authority. In some instances, when an agency changes its interpretation of a regulatory provision, it does so because of uncertainty about the proper interpretation of a statutory or regulatory provision. This uncertainty may cause a reviewing court to have less confidence in the agency's interpretation. Sometimes, this decrease in confidence is warranted. In *North Haven Board of Education v. Bell*,<sup>205</sup> wherein the agency had changed its interpretation of a regulatory provision on several occasions, and even changed it during the course of the litigation, the Court reasonably concluded that the agency did not have a defined position.<sup>206</sup>

Courts might also be reluctant to allow an agency to alter an existing interpretation when it appears that the alteration was politically motivated. There can be significant policy shifts from one administration to another. As a result, a later administration may interpret a regulatory provision differently than a prior one. Evidence of alternating political philosophies appears in the transition from the Johnson administration to the Nixon, Ford, Carter, and Reagan administrations.<sup>207</sup> Moreover, a later administration may be inclined

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204. Jacobus TenBroek, *Interpretive Administrative Action and the Lawmaker's Will*, 20 OR. L. REV. 206, 208-09 (1941). Numerous examples of this phenomenon exist. In *National Muffler Dealers Ass'n, Inc. v. United States*, 440 U.S. 472, 480-82 (1979), the Supreme Court detailed the various shifts by the Internal Revenue Service in its definition of the term "business leagues." Other agencies have suffered from this problem. See LOUIS LOSS, *FUNDAMENTALS OF SECURITIES REGULATION* 163-64 (1983) (discussing changes by the SEC in its interpretation of regulations).

205. 456 U.S. 512 (1982).

206. *Id.* at 522-23 n.12.

207. See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983). The Reagan Administration's philosophy differed from that of the Carter Administration on a variety of issues including the rights of the handicapped, Charles R. Babcock, *Handicapped Policy Undergoing a Rewrite*, WASH. POST, Mar. 4, 1982, at A27; the environment, Joanne Omaug, *EPA Prepares to Loosen Clean Air Rules*, WASH. POST, Dec. 16, 1981, at A29; Sandra Sugawara, *Landfill Safety Oozes Away, Critics Charge*, WASH. POST, Mar. 3, 1982, at A25; Sandra Sugawara, *EPA Keeps Reducing the Hazards of Waste*, WASH. POST, Mar. 26, 1982, at A29; coal leasing, Joanne Omang, *U.S. Coal Policy to Be Revised*, WASH. POST, Dec. 17, 1981, at

to interpret a regulatory provision differently than the promulgating administration would have done.

*Chevron* suggests that such policy shifts are permissible. Indeed, the Court stated that "an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments."<sup>208</sup> The Court also noted that "federal judges - who have no constituency - have a duty to respect legitimate policy choices made by those who do."<sup>209</sup> The courts, however, often suggest that regulations should be interpreted according to the "intent" of the promulgating agency.<sup>210</sup> Under this approach, if a later interpretation conflicts with the agency's "original intent," that interpretation may be invalid.

Courts may also be reluctant to accept agency policy changes when such changes have retroactive impact. Retroactivity concerns arise, most commonly, when an agency alters its interpretation of a regulatory provision and tries to apply the new interpretation to prior conduct.<sup>211</sup> Courts are reluctant to allow agencies to apply their interpretations retroactively, especially when the position change upsets settled expectations regarding a provision's meaning and prevents those subject to the provision from having notice of the new interpretation and an opportunity to comply therewith.<sup>212</sup>

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A29; energy standards for home appliances, Sandra Sugawara, *DOE Opposing Energy Standards for Home Appliances*, WASH. POST, Apr. 12, 1982, at A13; regulation of nursing homes, Lawrence Meyer, *Turning to the States on Nursing Homes*, WASH. POST, Jan. 11, 1982, at A11; school lunch regulations, Charles R. Babcock, *Add the Relish, Stir Up an Embarrassment*, WASH. POST, Jan. 7, 1982, at A21; *Reagan Gets New School-Lunch Plan*, WASH. POST, Nov. 18, 1981, at A17; food stamp regulations, WASH. POST, Feb. 16, 1982, at A17; and disaster aid for farmers, *Disaster Aid for Farmers Cancelled*, WASH. POST, Mar. 24, 1982, at A19.

208. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984).

209. *Id.* at 866.

210. See, e.g., *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 154 (1982); *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1332 (10th Cir. 1982); *Rucker v. Wabash R.R.*, 418 F.2d 146, 149 (7th Cir. 1969); *Harnischfeger Corp. v. EPA*, 515 F. Supp. 1310, 1314 (E.D. Wis. 1981); *Honeywell Inc. v. United States*, 661 F.2d 182, 186 (Ct. Cl. 1981).

211. See, e.g., *McDonald v. Watt*, 653 F.2d 1035, 1044-45 (5th Cir. 1981); *Runnells v. Andrus*, 484 F. Supp. 1234, 1237 (D. Utah 1980); see also *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Bd.*, 336 U.S. 301, 327 (1949) (Black, J., dissenting) ("I would not make a trap of this settled administrative interpretation by subjecting this employer to penal damages for his good faith reliance on it."); *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966).

212. See *Daughters of Miriam Ctr. for the Aged v. Mathews*, 590 F.2d 1250, 1260 (3d Cir. 1978) ("[R]etroactive laws interfere with the legally-induced and settled expectations of private parties to a greater extent than do prospective enactments."); *Adams Nursing Home of*

None of these concerns are significant enough to preclude an agency from altering its interpretations. Even though courts allow agencies to alter their interpretations, they can deal with impermissible interpretations or those that have unfair retroactive effect. If the Court is concerned about whether the agency really has a defined position, or whether that position is improperly motivated, the Court can closely scrutinize the agency's change of position<sup>213</sup> and demand that the agency explain the reasons for the change. As noted above, *Chevron* did not preclude this scrutiny, but suggested only that courts should exercise restraint. *Chevron* did not deprive them of their independent, interpretive authority.

Thus, courts can carefully scrutinize an agency's change of position. The Court took this approach in some of its pre-*Chevron* decisions. In *Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade*,<sup>214</sup> the Court held that an agency may depart from previously declared norms, but it has a "duty to explain its departure from prior norms."<sup>215</sup> Similarly, in *NLRB v. J. Weingarten, Inc.*,<sup>216</sup> the Court accepted an administrative interpretation even though the agency had changed positions.<sup>217</sup> The NLRB argued that its prior

*Williamstown, Inc. v. Mathews*, 548 F.2d 1077, 1080-81 (1st Cir. 1977); *Leedom v. Int'l Bhd. of Elec. Workers*, 278 F.2d 237, 240 (D.C. Cir. 1960) ("The vice inherent in retroactivity is, of course, that it tends to destroy predictability and to undercut reliance—both important aims of the law."); *Local 719, Int'l. Prod., Serv. & Sales Employees Union v. McLeod*, 183 F. Supp. 790, 793 (E.D.N.Y. 1960).

213. See, e.g., *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982); *Office of Personnel Management v. Federal Labor Relations Auth.*, 864 F.2d 165, 170-71 (D.C. Cir. 1988).

214. 412 U.S. 800 (1973).

215. *Id.* at 808. The Court stated that:

There is, then, at least a presumption that those policies [articulated in prior decisions] will be carried out best if the settled rule is adhered to. From this presumption flows the agency's duty to explain its departure from prior norms. *Secretary of Agriculture v. United States*, *supra*, 347 U.S., at 653, 74 S.Ct., at 831. The agency may flatly repudiate those norms, deciding, for example, that changed circumstances mean that they are no longer required in order to effectuate congressional policy. Or it may narrow the zone in which some rule will be applied, because it appears that a more discriminating invocation of the rule will best serve congressional policy. Or it may find that, although the rule in general serves useful purposes, peculiarities of the case before it suggest that the rule not be applied in that case. Whatever the ground for the departure from prior norms, however, it must be clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate.

*Id.*

216. 420 U.S. 251 (1975).

217. *Id.* at 264-65 (noting that the NLRB flatly stated that some of its own precedents "may be read as reaching a contrary conclusion").



interpretations did not involve "a considered analysis of the issue."<sup>218</sup> In addition, the NLRB argued that the later interpretation did represent a considered analysis and had evolved from prior policies.<sup>219</sup> The Court agreed with the NLRB:<sup>220</sup> "The use by an administrative agency of the evolutionary approach is particularly fitting. To hold that the Board's earlier decisions froze the development of this important aspect of the national labor law would misconceive the nature of administrative decisionmaking."<sup>221</sup> The Court held that the lower court exceeded its authority in rejecting the agency's later interpretation.<sup>222</sup>

Although a reviewing court can scrutinize an agency interpretation, deference is still required—provided the requirements for deference are satisfied. If Congress has failed to adequately express its

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218. *Id.* at 264.

219. *Id.* at 264-65.

In respect of its own precedents, the Board asserts that even though some "may be read as reaching a contrary conclusion," they should not be treated as impairing the validity of the Board's construction because, "[t]hese decisions do not reflect a considered analysis of the issue." Brief for Petitioner 25. In that circumstance, and in the light of significant developments in industrial life believed by the Board to have warranted a reappraisal of the question, the Board argues that the case is one where "[t]he nature of the problem, as revealed by unfolding variant situations, inevitably involves an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer. And so, it is not surprising that the Board has more or less felt its way . . . and has modified and reformed its standards on the basis of accumulating experience." *Electrical Workers v. NLRB*, 366 U.S. 667, 674, 677, 81 S.Ct. 1285, 1290, 6 L.Ed.2d 592 (1961).

*Id.* (footnote omitted) (alteration in original).

220. *Id.* at 265 ("We agree that its earlier precedents do not impair the validity of the Board's construction. That construction in no wise exceeds the reach of § 7, but falls well within the scope of the rights created by that section.").

221. *Id.* at 265-66. The Court went on to state that:

"'Cumulative experience' begets understanding and insight by which judgments . . . are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process."

*Id.* at 266 (quoting *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 349 (1953)).

222. *Id.* at 266-68.

The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board. The Court of Appeals impermissibly encroached upon the Board's function in determining for itself that an employee has no "need" for union assistance at an investigatory interview. . . . It is the province of the Board, not the courts, to determine whether or not the "need" exists in light of changing industrial practices and the Board's cumulative experience in dealing with labor-management relations. For the Board has the "special function of applying the general provisions of the Act to the complexities of industrial life."

*Id.* (quoting *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963)).

intent, and the agency's interpretation represents a sensible construction, the court should accept the agency's interpretation if it is, depending on the context, reasonable or is not "arbitrary, capricious, or manifestly contrary to the statute."<sup>223</sup>

If the Court is concerned about retroactivity problems, those problems are easily solved. When it would be unfair to allow an agency to apply its interpretation retroactively, the Court can accept the agency's interpretation, but use retroactivity analysis to force the agency to apply the interpretation prospectively.<sup>224</sup> In a number of cases, the Supreme Court has used the Due Process Clause in this way.<sup>225</sup> The Court's most famous decision is *SEC v. Chenery Corp.*,<sup>226</sup> in which the Court suggested that a reviewing court should balance:

such retroactivity . . . against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law.<sup>227</sup>

In *Chenery*, the Court upheld the SEC's decision to apply a new legislative rule retroactively.<sup>228</sup>

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223. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). The Court stated that:

"The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231, 94 S.Ct. 1055, 1072, 39 L.Ed.2d 270 (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

*Id.* at 843-44 (footnote omitted).

224. See *NLRB v. Bufo Corp.*, 899 F.2d 608, 611-12 (7th Cir. 1990); *Quincy Oil, Inc. v. Federal Energy Admin.*, 468 F. Supp. 383 (D. Mass. 1979).

225. See *Marks v. United States*, 430 U.S. 188, 191 (1977); *Bouie v. City of Columbia*, 378 U.S. 347, 352-55 (1964); see also *Weaver v. Graham*, 450 U.S. 24, 28 (1981).

226. 332 U.S. 194 (1947).

227. *Id.* at 203.

228. *Id.* at 209.

## CONCLUSION

*Chevron* altered the Court's rhetoric on deference principles in the statutory context. But, the decision seems to have had less impact on the Court's approach to interpreting regulations. In some respects, this result was predictable. *Chevron* was decidedly pro-deference. Prior to *Chevron*, however, the courts had been quite deferential to agencies' interpretations of their own regulations. As the court stated in *Udall v. Tallman*,<sup>229</sup> "[w]hen the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order."<sup>230</sup>

*Chevron* also did not affect the relationship between deference principles and the various canons of construction. In the pre-*Chevron* era, the courts used many different canons, and they often invoked those canons to displace deference principles. In its post-*Chevron* decision in *Pauley*, the Court suggested that it was reluctant to use the canons to displace deference principles. If an agency's interpretation of its own regulations is reasonable, it should receive deference. But it is doubtful that either *Chevron* or *Pauley* signaled the demise of the canons, and it is doubtful that the courts will ever apply deference principles without regard to the canons. In a number of post-*Chevron* statutory decisions, the Court has used the canons to displace deference principles.

If *Chevron* affected the Court's approach to regulatory interpretation, it did so with regard to the consistency requirement. Prior to *Chevron*, there was some doubt about whether a reviewing court should defer when an agency has changed its interpretation of a regulation. Indeed, some deference standards specifically provided that courts should only defer when an agency's interpretation was reasonable and had been consistently applied. *Chevron* suggests that these earlier cases are no longer valid, and that a court should be reluctant to reject an interpretation merely because the agency has taken inconsistent positions. There is, however, doubt about whether the Court is following *Chevron*'s rhetoric in subsequent cases.

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229. 380 U.S. 1 (1965).

230. *Id.* at 16.