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Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,[1] is widely regarded as a "landmark" administrative law decision.[2] One commentator claimed that it produced "a revolution in administrative law"[3] and is "one of the most important administrative law decisions in recent memory."[4] A second commentator declared that it dominates "the law governing judicial acceptance of agencies' interpretations,"[5] while a third described it as "*the* leading case on the subject . . . of deference to agencies on statutory issues."[6]

These evaluations are certainly supportable.[7] In the first three and a half years after it was decided, *Chevron* was cited more than 600 times.[8] It has now been cited more than 2,500 times. Moreover, *Chevron* altered the rhetoric of judicial decisionmaking. Prior to *Chevron*, the Supreme Court generally refused to "defer" to an agency's interpretation of a statute in the sense that it treated that interpretation as "controlling."[9] In most cases, the Court would make an independent interpretive decision.[10] If the responsible

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* Herff Distinguished Visiting Professor, Cecil C. Humphreys School of Law, Memphis State University, & Professor of Law, University of Louisville.

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

2. *See* 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."); The Honorable Abner J. Mikva, *How Should the Courts Treat Administrative Agencies?*, 36 AM. U. L. REV. 1, 6 (1986) (Referring to *Chevron's* holding, he notes that "[t]his is a far reaching development.").

3. Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283, 307 (1986).

4. *Id.* at 312.

5. Robert A. Anthony, *Which Agency Interpretations Should Bind the Courts?*, 7 YALE J. ON REG. 1, 3 (1990). *But see* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 373 (1986).

6. Ronald M. Levin, *Judicial Review of Administrative Action in a Conservative Era*, 39 ADMIN. L. REV. 353, 356 (1987); *see also* Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of* Chevron's *Step Two*, 2 ADMIN. L.J. 255 (1988); Richard J. Pierce, Jr., Chevron *and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 303 (1988); Cass R. Sunstein, *Law and Administration after Chevron*, 90 COLUM. L. REV. 2071, 2087-88 (1990).

7. *But see* William S. Jordan, III, *Deference Revisited: Politics as a Determinant of Deference Doctrine and the End of the Apparent* Chevron *Consensus*, 68 NEB. L. REV. 454, 458-77 (1989).

8. Byse, *supra* note 6.

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

10. Of course, whether the Court actually deferred or whether it would render an

agency had interpreted the statute, the Court would "consider" the agency's interpretation using standards developed in *Skidmore v. Swift & Co.*,[11] and give that interpretation the weight it deserved considering a variety of factors.[12] *Chevron* differed from these earlier cases because it stated the obligation to defer in powerful terms,[13] and it suggested that reviewing courts should actually defer.[14] In other words, they should accept agency interpretations that are "reasonable" or that are not "arbitrary, capricious, or manifestly contrary to the statute."[15]

Whether *Chevron* actually brought about a change in judicial conduct is less clear. Some argue that it did produce a change. One commentator began by asking a rhetorical question: "Does this doctrine [the *Chevron* doctrine] result in fewer occasions in which a court may interpret independently?"[16] He answered that question in the affirmative: "Manifestly it does . . . ."[17]

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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, 425-26 (1977). On the other hand, when an agency stated its interpretation in some alternative format, most courts would make an independent interpretive decision. *See, e.g.*, *Skidmore*, 323 U.S. at 140.

11. 323 U.S. 134, 140 (1945).

12. *Skidmore* suggested that a reviewing court should consider "the thoroughness evident in its [the agency's] 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." *Id.* at 140.

13. 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." 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.

Chevron, 467 U.S. at 843-44 (quoting Morton v. Ruiz, 415 U.S. 199, 213 (1974)). When there is an implicit delegation, the agency's interpretation should be accepted provided that it is "reasonable." *Id.*

14. *Id.* at 844. The Court stated:

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

Id. at 845.

15. *Id.* at 844.

16. Anthony, *supra* note 5, at 19.

17. *Id.* He goes on to note:

> [P]rior cases showed a tendency for the courts to interpret independently when pure questions or major questions were involved and primary interpretive authority had

Judge Abner Mikva agreed and expressed concern about the fact that *Chevron* "could lead to an erosion of the judiciary's duty: to ensure that the law is obeyed by all, including agencies."[18] Another commentator observed that "*Chevron's* language so narrowly circumscribed the judicial function in statutory interpretation that it was difficult, at first, to believe Justice Stevens' opinion could be taken literally."[19] A recent study supports these conclusions. It notes that, outside the D.C. Circuit, *Chevron* seems to have significantly affected judicial conduct.[20]

While these assessments may be supportable, my sense is that *Chevron's* importance has been exaggerated. *Chevron* did not profoundly alter either the Supreme Court's conduct, or that of the lower federal courts. The Supreme Court frequently invokes *Chevron*,[21] but it rarely defers without carefully scrutinizing agency interpretations. Moreover, the Court has been quite willing to reject agency interpretations,[22] and the Court is often reluctant to

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not been delegated to the agencies. But now such issues seem less likely to be determined independently. . . . *Chevron* seems to tell the reviewing court to review the agency interpretation only for reasonableness rather than to decide independently, as it might have done in a similar case before *Chevron* was decided.

Id. at 19-20.

18. Mikva, *supra* note 2, at 7.

19. Farina, *supra* note 2, at 460. She went on to argue:

[O]ne need not have a deconstructionist's belief in the indeterminacy of language or a public choice theorist's conviction in the inevitability of statutory vagueness to appreciate that, if the court's independent role ends, whenever ambiguity is discovered or analogy must be employed, the agency's judgment will virtually always control the interpretive outcome.

Id. at 460-61.

20. Peter H. Schuck & E. Donald Elliott, *To The* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984.

21. *See, e.g.*, 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. v. American Train Dispatchers Ass'n, 111 S. Ct. 1156, 1162-63 (1991); Mobil Oil Exploration & Prod. S.E., Inc. v. United Distrib. Co., 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."); Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633 (1990); *see also* Fort Stewart Sch. v. Federal Labor Relations Auth., 495 U.S. 641, 645 (1990).

22. *See, e.g.*, Lechmere, Inc. v. NLRB, 112 S. Ct. 841, 849-50 (1992); Presley v. Etowah County Comm'n, 112 S. Ct. 820, 831-32 (1992); Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 130 (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."); Sullivan v. Stroop, 496 U.S. 478, 483-85 (1990); Dole v. United Steelworkers of Am., 494 U.S. 26, 41-43 (1990); Sullivan v. Zebley, 493 U.S. 521, 541 (1990); Public Employees Retirement Sys. of Ohio v. Betts, 492 U.S. 158, 171-72 (1989); Bethesda Hosp. Ass'n v. Bowen, 485 U.S. 399, 404 (1988) ("The strained interpretation offered by the Secretary

"defer" in the sense of accepting a reasonable agency interpretation when it prefers an alternative interpretation.[23] Thus, although *Chevron's* rhetoric differed from *Skidmore's*, the scope of review remains essentially unchanged. This Article examines recent Supreme Court decisions applying *Chevron*, and offers insight into how the Court limits that decision's impact. In addition, it also examines competing doctrines that the Supreme Court has used to displace *Chevron*.

I. *CHEVRON'S* HOLDING ONLY SEEMS BOLD

Chevron's holding was fairly straightforward. The Court held that administrative officials ought to have discretion about how to interpret regulatory provisions, and limited the scope of judicial authority.[24] In doing so, the Court recognized that agencies act under congressionally delegated authority.[25] Moreover, as courts and agencies interpret regulatory provisions,

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is inconsistent with the express language of the statute."); ETSI Pipeline Project v. Missouri, 484 U.S. 495, 505-09 (1987); Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 443-50 (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., 485 U.S. 589, 601-02 (1988).

23. *See* Breyer, *supra* note 5, at 379-80. Breyer argues:

> [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.

24. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 866 (1984).

25. According to the Court,

> In these cases the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is therefore 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.
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> 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,

they are often forced to make policy choices.[26] The Court held that, in most situations, the agency responsible for a regulatory scheme should have the freedom to make those choices.[27] Agency officials usually have more

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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 the administration of the statute in light of everyday realities.

When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."

Id. at 865-66 (quoting TVA v. Hill, 437 U.S. 153, 195 (1978)).

26. The Court stated:

> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."
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> We hold that the EPA's definition of the term "source" is a permissible construction of the statute which seeks to accommodate progress in reducing air pollution with economic growth. "The Regulations which the Administrator has adopted provide what the agency could allowably view as . . . [an] effective reconciliation of these twofold ends . . . ."

Id. at 866.

27. The Court stated:

> 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; 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 837.

expertise than courts and they are often better positioned to make interpretive decisions.[28]

Based on these considerations, the Court directed the lower courts to engage in a two-step review process. They should first try to determine whether Congress has been silent with respect to an interpretive issue, or whether it has expressed its intent ambiguously.[29] As the Court stated in *Chevron*, the first question in every case is whether "Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[30]

Chevron's second step provided that if Congress has in fact been silent or ambiguous on an interpretive issue, a reviewing court should exercise only limited review.[31] The Court distinguished between two different situations. In the first, Congress explicitly leaves a "gap [in the regulatory scheme] for the agency to fill,"[32] and directs it to promulgate regulations transforming the generalities into specifics.[33] In this "explicit authority" situation, the agency has "an express delegation of authority to . . . elucidate a specific provision of the statute by regulation,"[34] and its interpretation is entitled to deference if it is not "arbitrary, capricious, or manifestly contrary to the statute."[35]

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28. According to the Court:

> We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations "has been consistently followed by the Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations."

Id. at 844.

29. *Id.* at 842-43.

30. *Id.*; *see also* Presley v. Etowah County Comm'n, 112 S. Ct. 820, 831-32 (1992); Norfolk & W. Ry. v. American Train Dispatchers Ass'n, 111 S. Ct. 1156, 1163 (1991); Fort Stewart Sch. v. Federal Labor Relations Auth., 495 U.S. 641, 645 (1990); Sullivan v. Everhart, 494 U.S. 83, 84 (1990); K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 290 (1988) ("'The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress'" (quoting Board of Governors v. Dimension Fin. Corp., 474 U.S. 361, 368 (1986))); NLRB v. United Food & Commercial Workers, 484 U.S. 112, 123 (1987) (Congress' intent "must be given effect, and the regulations at issue must be fully consistent with it.").

31. *Chevron*, 467 U.S. at 843.

32. *Id.* at 844.

33. *Id.*

34. *Id.* at 843-44.

35. *Id.* at 844. 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." 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

When Congress has not intentionally left a gap, but rather has done so unintentionally, deference is required nonetheless.[36] The "question for the court is whether the agency's answer is based on a permissible construction of the statute"[37] and a reviewing court is not free to "substitute its own construction of a statutory provision for a reasonable interpretation by the administrator of an agency."[38]

Did *Chevron's* two-step formulation severely limit and constrain the scope of judicial review? Some commentators believe that *Chevron* did alter the scope of review,[39] and argue that the Court may have gone too far.[40] One commentator went so far as to argue that *Chevron* made agency interpretations binding and gave them the "force of law."[41] Based on these assumptions, this last commentator urged courts to place strict limits on *Chevron*, applying it only when agencies issue their interpretations under expressly delegated authority:[42] "A delegation, express or implied, must be the foundation for any interpretation that can bind the courts in this fashion. 'The principle is nothing less than the principle that distinguishes democratic government from dictatorship.'"[43]

These assessments have exaggerated *Chevron's* importance.[44] *Chevron's*

> 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 (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)).

36. *Id.* at 844. The Court cited Immigration & Naturalization Service v. Jong Ha Wang, 450 U.S. 139, 144 (1981), and Train v. Natural Resources Defense Council, Inc., 421 U.S. 60 (1975), as examples of this situation. *Jong Ha Wang* involved deference to the Board of Immigration appeals, and *Train* involved the EPA's approval of a variance program.

37. *Chevron*, 467 U.S. at 843; *see also* Fort Stewart Sch. v. Federal Labor Relations Auth., 495 U.S. 641, 645 (1990) (quoting *Chevron*, 467 U.S. at 842-43); Sullivan v. Everhart, 494 U.S. 83, 84 (1990); K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 290 (1988); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131 (1985); Chemical Mfr. Ass'n v. Natural Resources Defense Council, Inc., 470 U.S. 116, 124 (1985).

38. *Chevron*, 467 U.S. at 844; *see also* Presley v. Etowah County Comm'n, 112 S. Ct. 820 (1992).

39. Anthony, *supra* note 5, at 4; Farina, *supra* note 2, at 460-61.

40. Mikva, *supra* note 2, at 7.

41. Anthony, *supra* note 5, at 4.

42. He would have courts ask whether "*Congress intended to delegate to the agency the power to interpret with the force of law in the particular format that was used.*" *Id.* at 4.

43. *Id.* at 40.

44. Briefly, the phrase "force of law" is a term of art that carries with it certain legal consequences. Valid legislative rules carry the "force of law." This means that they are binding on both the promulgating agency and regulated entities and must be followed. *See* United States v. Nixon, 418 U.S. 683, 695-96 (1974); Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 536 (D.C. Cir. 1986); American Fed'n of Gov't Employees, Local 3090 v. Federal Labor Relations Auth., 777 F.2d 751, 759 (D.C. Cir. 1985).

rhetoric, though it seemed bold, was hardly revolutionary. For nearly half-a-century, the Supreme Court had applied a similar deference standard to an agency's interpretation of its own regulations. The leading case was, and still is, *Bowles v. Seminole Rock & Sand Co.*[45] In that case, the United States Supreme Court stated that an agency's interpretation of its own regulations is entitled to deference provided that the interpretation is not "plainly erroneous or inconsistent" with the regulation's language.[46] Courts may be more justified in deferring when an agency interprets its own regulations,[47] but *Bowles* contemplated a limited judicial function like that envisioned in *Chevron*.[48] Moreover, even when the interpretation of a statute was at issue, the Supreme Court had sometimes applied a controlling standard in the pre-*Chevron* era, especially when an agency stated its interpretation in the form of a legislative rule.[49]

Indeed, "an agency's failure to follow its own binding regulations is a reversible abuse of discretion." Carter v. Sullivan, 909 F.2d 1201, 1202 (8th Cir. 1990). An agency may only amend such a rule by approved procedures. *See* American Fed'n of Gov't Employees v. Federal Labor Relations Auth., 777 F.2d 751, 759 (D.C. Cir. 1985); Consumer Energy Council of Am. v. FERC, 673 F.2d 425, 445-46 (D.C. Cir. 1982). *Chevron* gives most agency interpretations, other than those stated in legislative rules, a status like that of precedent. *See* Russell L. Weaver, Chenery II: *A Forty-Year Retrospective*, 40 ADMIN. L. REV. 161, 198-207 (1988). Such interpretations are not binding even on the agency. Granted, *Chevron* suggests that a reviewing court should accept agency interpretations, but the agencies themselves are free to disregard their own interpretations provided that they give a reasoned explanation for their actions. *Chevron*, 467 U.S. at 863-64. As the Supreme Court stated in Rust v. Sullivan, 111 S. Ct. 1759, 1769 (1991), "[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." *Id.* at 1769 (quoting *Chevron*, 467 U.S. at 862). The Court went on to state that "'[a]n initial agency interpretation is not carved in stone.'" *Id.* (quoting *Chevron*, 467 U.S. at 863-64). An agency is not required to "establish rules of conduct to last forever," but rather must be allowed to "adapt its rules and policies to the demands of changing circumstances." Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983).

45. 325 U.S. 410 (1945).

46. *Id.* at 414.

47. *See* Russell L. Weaver, *Judicial Interpretation of Administrative Regulations: The Deference Rule*, 45 PITT. L. REV. 587, 610 (1984). The author argues:

> 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.

Id.

48. *Id.* at 592-93.

49. *See, e.g.*, Batterton v. Francis, 432 U.S. 416, 425-26 (1977). "Congress in § 407(a)

In some respects, *Chevron's* holding was misunderstood. *Chevron* deference had nothing to do with the dividing line between "democratic government" and "dictatorship." On the contrary, *Chevron* was fully consistent with traditional principles of judicial review. Courts retained their authority, first recognized by Chief Justice John Marshall in *Marbury v. Madison*,[50] to "say what the law is."[51] This authority continues to be reinforced by the Administrative Procedure Act which states that a reviewing court shall "decide all relevant questions of law."[52] It is also reinforced by *Chevron* itself which explicitly stated that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."[53]

The Supreme Court's application of *Chevron* bears out these conclusions. The Court's attitude is summed up by Justice Scalia's statement in *Equal Employment Opportunity Commission v. Arabian American Oil Co.*:[54] "[D]eference 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."[55] The Supreme Court has given life to Justice Scalia's words by overriding administrative interpretations in numerous cases.[56]

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expressly delegated to the Secretary the power to prescribe standards for determining what constitutes 'unemployment.'" *Id.* at 425. When such delegations exist, the agency's interpretation is "entitled to more than mere deference or weight. It can be set aside only if the Secretary exceeded his statutory authority or if the regulation is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Id.* at 426.

50. 5 U.S. (1 Cranch) 137, 177-78 (1803).

51. *Id.* 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.

52. 5 U.S.C. § 706 (1988); *see also* Zuber v. Allen, 396 U.S. 168, 193 (1969), *cert. denied*, 396 U.S. 1013 (1970); Trust of Bingham v. Commissioner, 325 U.S. 365, 371-72 (1945).

53. *Chevron*, 467 U.S. at 843 n.9; *see also* Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 446-48 (1987).

54. 111 S. Ct. 1227 (1991).

55. *Id.* at 1237 (Scalia, J., concurring) (He would have applied deference principles, but would have rejected the agency's interpretation because it was unreasonable.); *see also* Presley v. Etowah County Comm'n, 112 S. Ct. 820, 831 (1992) ("Deference does not mean acquiescence").

56. *See, e.g.*, Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 130 (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."); Sullivan v. Stroop, 496 U.S. 478, 483-85 (1990); Dole v. United Steelworkers of Am., 494 U.S. 26, 41-43 (1990); Sullivan v. Zebley, 493 U.S. 521, 541 (1990); Public Employees Retirement Sys. of Ohio v. Betts, 492 U.S. 158, 171-72 (1989); University of Cal. v. Public Employment Relations Bd., 485 U.S. 589, 602 (1988) ("Because we have been able to ascertain Congress' clear intent based on our analysis of the statutes and their legislative history, we need not address the issue of deference to the agency."); Bethesda Hosp. Ass'n v. Bowen, 485 U.S. 399, 404 (1988) ("The

How has the Supreme Court been able to reject interpretations despite *Chevron*'s strong, pro-deference language? The answer lies in *Chevron* itself. The *Chevron* doctrine does not require reviewing courts to automatically accept all administrative interpretations that come before them. It requires, instead, that they carefully examine and evaluate those interpretations. In other words, it requires them to exercise judgment. Of course, the necessity for judgment is *Chevron's* strength as well as its weakness. Reviewing courts have much freedom to override or reject administrative interpretations. As Judge Abner Mikva noted, *Chevron's* test is "ad hoc and malleable," and is "like the length of the chancellor's foot in equity court; it varies from chancellor to chancellor."[57] In a number of cases, the Supreme Court has exercised its discretion and has rejected agency interpretations.

II. *CHEVRON*: THE DISCRETION REVEALED

Analysis of the Supreme Court's post-*Chevron* decisions offers much insight into how the Court limits *Chevron's* impact.

A. Chevron's *Focus On Congressional Intent*

Under *Chevron*, agencies have not been given unfettered discretion to interpret regulatory provisions. On the contrary, in *Chevron*, the Supreme Court explicitly recognized that both courts and agencies are bound by congressional intent.[58] While this approach may be both necessary and desirable, it has created many problems. In many instances, congressional intent cannot be precisely ascertained.[59] Professor Max Radin once argued that the concept of legislative intent is nonsense: a legislature "has no intention whatsoever in connection with words which some two or three men drafted, which a considerable number rejected, and in regard to which many of the approving majority might have had, and often demonstrably did have,

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strained interpretation offered by the Secretary is inconsistent with the express language of the statute."); ETSI Pipeline Project v. Missouri, 484 U.S. 495, 516-17 (1988); Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 446-49 (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).

57. Mikva, *supra* note 2, at 8-9; *see also* Pierce, *supra* note 6, at 314. According to Pierce, "The conceptual framework established by *Chevron* will not eliminate all difficult cases; nor will it eliminate completely the influence of each judge's personal political philosophy on the process of judicial review of agency actions. Those goals are unattainable through any means." *Id.* He goes on to note that "[t]hey are important goals, however, and the *Chevron* framework provides a means to further those goals incrementally." *Id.*

58. *Chevron*, 467 U.S. at 842-43; *see also* Presley v. Etowah County Comm'n, 112 S. Ct. 820 (1992); Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc., 470 U.S. 116, 125 (1985) ("if Congress has clearly expressed an intent contrary to that of the Agency, our duty is to enforce the will of Congress.").

59. *See* REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 68 (1975); Warren Lehman, *How To Interpret a Difficult Statute*, 1979 WIS. L. REV. 489, 500.

different ideas and beliefs."[60] Charles Curtis agreed: It "is a hallucination, this search for intent. The room is always dark. The hat we are looking for is often black. If it is there at all, it is on our own head."[61] Even Justice Frankfurter questioned the intent concept: "All these years I have avoided speaking of 'legislative intent' and I shall continue to be on my guard against using it."[62]

Despite these concerns, the Supreme Court has never been able to completely avoid or escape the intent concept.[63] There are good reasons. The Constitution vests primary lawmaking authority in Congress.[64] When courts construe statutes, they have much discretion.[65] But the Court has

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60. Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930). He went on to state:

> The chances that of several hundred men each will have exactly the same determinate situations in mind as possible reductions of a given determinable, are infinitesmally small. The chance is still smaller that a given determinate, the litigated issue, will not only be within the minds of all these men but will be certain to be selected by all of them as the present limit to which the determinable should be narrowed.

Id. For a response to these arguments, see DICKERSON, *supra* note 59, at 67-102; James M. Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886 (1930).

61. Charles P. Curtis, *A Better Theory of Legal Interpretation*, 3 VAND. L. REV. 407, 409 (1950).

62. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 538 (1947). Justice Holmes agreed: "Only a day or two ago when counsel talked of the intention of a legislature, I was indiscreet enough to say I don't care what their intention was. I only want to know what the words mean." *Id.*

63. *See* Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc., 470 U.S. 116, 125 (1985) ("if Congress has clearly expressed an intent contrary to that of the Agency, our duty is to enforce the will of Congress."); *Chevron*, 467 U.S. at 842-43 ("[T]he court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

64. *See* DICKERSON, *supra* note 59, at 7:

> The first assumption is that the general powers of government are constitutionally allocated among the three central branches in such a way that, although it does not enjoy an exclusive power to make substantive law, the legislative branch exercises lawmaking power that takes precedence over the lawmaking powers respectively exercised by the executive and judicial branches.

65. Justice Frankfurter argued that "[t]he area of free judicial movement is considerable." Frankfurter, *supra* note 62, at 533. There are many reasons:

> Anything that is written may present a problem of meaning, and that is the essence of the business of judges in construing legislation. The problem derives from the very nature of words. They are symbols of meaning. But unlike mathematical symbols, the phrasing of a document, especially a complicated enactment, seldom attains more than approximate precision. If individual words are inexact symbols, with shifting variables, their configuration can hardly achieve invariant meaning or assured definiteness. Apart from the ambiguity inherent in its symbols, a statute suffers from dubieties. It is not an equation or a formula representing a clearly marked process, nor is it an expression of individual thought to which is imparted the definiteness a single authorship can give. A statute is an instrument of government partaking of its practical purposes but also of its infirmities and

generally assumed that respect for legislative authority limits the Court's discretion. Justice Frankfurter, despite his concerns about the intent concept, believed that courts were not "at large":

> They are confined by the nature and scope of the judicial function . . . . They are under the constraints imposed by the judicial function in our democratic society. As a matter of verbal recognition certainly, no one will gainsay that the function in construing a statute is to ascertain the meaning of words used by the legislature. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature.[66]

Because of these concerns, the intent concept keeps resurfacing. Even those who purport to reject the concept are often found "resorting to euphemisms to describe it."[67] According to Justice Frankfurter, "[o]ur problem is not what do ordinary English words mean, but what did Congress mean them to mean."[68] Radin argued that a legislature may "foreclose any attempt by the administration and judiciary to displace what the legislature *regards* as the more important of the purposes to be achieved."[69] This statement produced a retort from Professor Dickerson: "If hundreds of men can subjectively 'regard' something, it may not strain credulity to conclude that they could also 'intend' it."[70] As a result, the Supreme Court has continued to use the intent concept.[71]

But the mere fact that the Court feels itself bound by congressional intent does not eliminate the difficulty, identified by Radin and others, of ascertaining that intent.[72] As the justices interpret statutes, they usually have some

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limitations, of its awkward and groping efforts.

Id. at 528.

66. *Id.* at 533.

67. DICKERSON, *supra* note 59, at 77.

68. Commissioner v. Acker, 361 U.S. 87, 95 (1959) (Frankfurter, J., dissenting).

69. Max Radin, *A Short Way With Statutes*, 56 HARV. L. REV. 388, 412 (1942) (emphasis added).

70. DICKERSON, *supra* note 59, at 78.

71. Justice Holmes summed up the Court's attitude when he quipped, "If my fellow citizens want to go to Hell I will help them. It's my job." 1 HOLMES-LASKI LETTERS 249 (Mark Howe ed., 1953).

72. Professor Dickerson suggests that the act of interpretation may involve a greater or lesser degree of creativity depending on the extent to which legislative intent is ascertainable:

> Perhaps a happier analogy to a court's function of disposing of an authentic problem of meaning would be that of the restorer who makes a substitute for a small piece missing from the body of an ancient vase. Here, he is guided by the adjacent contours and, if he is skillful, the result blends well enough to attract little or no attention and the vase can be enjoyed as an integrated whole. His job is harder if the vase has been decorated, but the difficulty is small if the decoration follows a discernible pattern.
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> . . . .
>
> On the other hand, suppose that the craftsman has only the piece that was missing in the first example and the decoration is free and nonrecurrent. Suppose that he

indicia of intent at their disposal—such as committee reports and other historical materials—but individually or cumulatively those indicia are often inconclusive. In addition, the justices do not always agree about how congressional intent is to be determined,[73] or which materials may be considered in the interpretive process.[74] They take divergent approaches that lead them to disagree about what Congress did and did not intend.

B. Intent and Chevron

The Court's focus on legislative intent, and the difficulties the Court has experienced in ascertaining that intent, have severely limited the *Chevron* doctrine. The logic behind this statement may not be readily apparent. In fact, one might assume the opposite: if legislative intent is difficult to ascertain, then agency authority ought to be enhanced. A reviewing court might more readily conclude that Congress has been silent or ambiguous with respect to an interpretive issue, and therefore might conclude that it is required to defer. This has not been the case. In its post-*Chevron* deference decisions, the Court has engaged in an extensive review process.

The "*Chevron*" process involves consideration of the various tools and principles of statutory construction.[75] As the Court stated in *NLRB v. United*

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wishes to incorporate it into a projected vase with which it will be aesthetically and culturally compatible. Suppose that, drawing on his imaginative understanding of the relevant cultural context, he produces such a vase.

DICKERSON, *supra* note 59, at 26.

73. Judge Patricia Wald observed:

> Today, there appear to be few, if any, restrictions on what judges may look at to discern legislative intent or purpose. Yet, if legislative history is now scanned in every case of statutory construction, rarely is it determinative of the outcome. It competes with presumptions and canons of construction: some old, some newly derived, and many reflecting the policies in our wide-ranging legal and constitutional system that most commend themselves to the majority of judges. The legislative materials at our disposal of course do not, and probably never will, accurately and comprehensively record what actually took place during the convoluted process of enactment. Ironically, records of some of the most vital phases are not generally available, and the presumption that legislators know all about past laws and the interpretations agencies put upon them must increasingly be viewed with skepticism. Language never seems plain enough in its meaning to forestall the hunt for enlightenment in the legislative context. The work of the courts and of the legislature becomes more difficult, not easier. In the final analysis, we must count on Congress itself—cumbersome as its processes may be—to correct us through new legislation when we read it wrong on the issues it cares about most.

Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 216 (1983).

74. *See id.* at 215-16.

75. *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., 496 U.S. 633, 647 (1990); University of Cal. v. Public Employment Relations Bd., 485

Food & Commercial Workers Union,[76] "On a pure question of statutory construction, our first job is to try to determine congressional intent, using 'traditional tools of statutory construction.' If we can do so, then that interpretation must be given effect, and the regulations at issue must be fully consistent with it."[77]

Because the Court uses these "tools of construction" in applying *Chevron*, the Court has retained much discretion about when deference is required. The "tools" themselves are supposed to aid the Court in ascertaining Congress' intent, but the justices have not always been able to agree about how they apply.

1. Statutory Language

Under *Chevron*, the Court usually begins its analysis by examining a statute's language.[78] In some instances, the Court concludes that the statute suffers from neither silence nor ambiguity. As a result, the Court refuses to defer to an administrative interpretation, especially if it is inconsistent with the Court's assumptions regarding congressional intent. Illustrative is the holding in *ETSI Pipeline Project v. Missouri*.[79] In that case, the Supreme Court rejected the Secretary of the Interior's interpretation of the Flood Control Act.[80] The Secretary had held that he could enter into a contract without the approval of the Army.[81] The Court disagreed, holding that the Act "[spoke] directly to the dispute in [the] case, and congressional intent as expressed in the Act indicate[d] clearly that the Interior Secretary [could] not enter into a contract to withdraw water from an Army reservoir for industrial use" without

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U.S. 589, 603 (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, 446-48 (1987). At least one commentator has argued that it is inappropriate for the Court to consider such tools. *See* Anthony, *supra* note 5, at 19 ("But if 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 interpretations.").

76. 484 U.S. 112 (1987).

77. *Id.* at 123; *see also* Chemical Mfrs. 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.").

78. *See, e.g.*, Presley v. Etowah County Comm'n, 112 S. Ct. 820, 831-32 (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, 368-71 (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., 497 U.S. 116, 133 (1990); Dole v. United Steelworkers of Am., 494 U.S. 26, 35 (1990).

79. 484 U.S. 495 (1988).

80. *Id.* at 506.

81. *Id.* at 505.

approval.[82] As a result, the Court rejected the agency's interpretation holding that, because the Act was clear, "[t]hat [was] 'the end of the matter.'"[83]

In applying *Chevron*, the Court frequently invokes the so-called "plain meaning" rule.[84] This rule states that "[w]ords should be read as saying what they mean,"[85] and it "reaffirms the preeminence of the statute over materials extrinsic to it."[86] The Court applied this rule in *Bethesda Hospital Ass'n v. Bowen*.[87] That case involved the Provider Reimbursement Review Board's ("Board") conclusion that it lacked jurisdiction to hear petitioners' claims.[88] The Board's conclusion was based on its own construction of its governing statute.[89] The Supreme Court disagreed with the agency's construction. In the Court's view, "[t]he plain meaning of the statute decides the issue presented."[90] The Court concluded that the agency's interpretation was "strained" and "inconsistent with the plain language of the statute."[91]

But the Court's use of the plain meaning rule is fraught with problems. As Justice Frankfurter once observed, "[t]he notion that because the words of a statute are plain, its meaning is also plain, is merely a pernicious oversimplification."[92] Many "hard" cases are presented in which a statute's text seems plain, but other considerations suggest that the statute should be differently interpreted. For these reasons, some view "the plain meaning rule . . . [as] a 'soft' rule—the plainest meaning can be trumped by contradictory legislative history."[93] Indeed, one Canadian writer jestingly claimed that U.S. courts are

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82. *Id.* at 517.

83. *Id.* (quoting *Chevron*, 467 U.S. at 842).

84. *See, e.g.*, K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988); Bethesda Hosp. Ass'n v. Bowen, 485 U.S. 399, 403 (1988) ("The plain meaning of the statute decides the issue presented."); Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 429-32 (1987); Board of Governors v. Dimension Fin. Corp., 474 U.S. 361, 371 (1986).

85. DICKERSON, *supra* note 59, at 229.

86. *Id.*

87. 485 U.S. 399 (1988).

88. *Id.* at 402.

89. *Id.*

90. *Id.* at 403.

91. *Id.* at 404. The Court also concluded that the agency's interpretation was inconsistent with "the language and design of the statute as a whole." *Id.* at 405.

92. United States v. Monia, 317 U.S. 424, 431 (1943) (Frankfurter, J., dissenting); *see also* FBI v. Abramson, 456 U.S. 615, 625 n.7 (1982) (quoting Frankfurter's statement in *Monia*); William N. Eskridge, Jr., *The New Contextualism*, 37 UCLA L. REV. 621 (1990).

93. Eskridge, *supra* note 92, at 626. Judge Patricia Wald agrees. After examining the Court's use of legislative history during its 1982 term, she concluded that "[n]o occasion for statutory construction now exists when the Court will *not* look at the legislative history." Wald, *supra* note 73, at 195. She went on to state that

> although the Court still refers to the "plain meaning" rule, the rule has effectively been laid to rest. No occasion for statutory construction now exists when the Court will *not* look at the legislative history. When the plain meaning rhetoric is invoked, it becomes a device not for ignoring legislative history but for shifting onto legislative history the burden of proving that the words do not mean what they appear to say.

so inclined to examine historical materials that they use the opposite rule: only when the legislative history is ambiguous is it permissible to refer to the statute.[94]

These problems manifest themselves in the Court's post-*Chevron* decisions.[95] Rarely will the Court find that language is plain and therefore conclude that there is no need to examine legislative history. In *Immigration & Naturalization Service v. Cardoza-Fonseca*,[96] the Court found that the Act's plain language required it to reject the agency's interpretation: "As we have explained, the plain language of this statute appears to settle the question before us."[97] But the Court proceeded to examine historical materials: "Therefore, we look to the legislative history to determine only whether there is 'clearly expressed legislative intention' contrary to that language, which would cause us to question the strong presumption that Congress expresses its intent through the language it uses."[98]

In some cases, the justices find that statutory language is not "plain" even though it appears to be quite plain. In, for example, *United States v. Riverside Bayview Homes, Inc.*,[99] the Court concluded that, "[o]n a purely linguistic

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Id.

94. DICKERSON, *supra* note 59, at 164 (quoting J.A. Corry, *The Use of Legislative History in the Interpretation of Statutes*, 32 CAN. BAR REV. 624, 636 (1954)).

95. *See, e.g.*, Norfolk & W. Ry. v. American Train Dispatchers Ass'n, 111 S. Ct. 1156 (1991); University of Cal. v. Public Employment Relations Bd., 108 S. Ct. 1404 (1988); NLRB v. United Food & Commercial Workers, 484 U.S. 112, 123 (1987); Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421 (1987).

96. 480 U.S. 421 (1987).

97. *Id.* at 432 n.12.

98. *Id.* In Board of Governors v. Dimension Finance Corp., 474 U.S. 361 (1986), the Court concluded early in its opinion that the Federal Reserve Board's interpretation was not an "accurate or reasonable interpretation of" the Bank Holding Company Act. *Id.* at 368. The Court reached that conclusion based on the Act's language. *Id.* The Court stated:

> By the 1966 amendments to § 2(c), Congress expressly limited the Act to regulation of institutions that accept deposits that "the depositor has a legal right to withdraw on demand." 12 U.S.C. § 1841(c). The Board would now define "legal right" as meaning the same as "a matter of practice." But no amount of agency expertise—however sound may be the result—can make the words "legal right" mean a right to do something "as a matter of practice." A *legal* right to withdraw on demand means just that: a right to withdraw deposits without prior notice or limitation. Institutions offering NOW accounts do not give the depositor a legal right to withdraw on demand; rather, the institution itself retains the ultimate legal right to require advance notice of withdrawal. The Board's definition of "demand deposit," therefore, is not an accurate or reasonable interpretation of § 2(c).

Id. Nevertheless, the Court continued to analyze the issue for five more pages. In its analysis, the Court examined the Act's legislative history. Only after this discussion, was the Court able to conclude that "[n]othing in the statutory language or the legislative history, therefore, indicate[d] that the term 'commercial loan' meant anything different from its accepted ordinary commercial usage." *Id.* at 373.

99. 474 U.S. 121 (1985).

level," the agency's interpretation appeared to be unreasonable.[100] But the Court decided not to resolve the case on a "purely linguistic" basis. According to the Court, this view "does justice neither to the problem faced by the Corps in defining the scope of its authority under § 404(a) nor to the realities of the problem of water pollution that the Clean Water Act was intended to combat."[101] Similarly, in *Chemical Manufacturers Ass'n v. Natural Resources Defense Council, Inc.*,[102] the Court was asked to interpret the word "modify."[103] The Court refused to read the word "in its broadest sense,"[104] concluding that such a reading would not make sense.[105] Instead, the Court construed the word in light of the statute's purpose and structure, as well as in light of its legislative history.[106]

In a number of cases, some justices find that language is "plain," while others do not.[107] In the *Chemical Manufacturers* case, the majority found that the word "modify" was not plain and deferred to the EPA's interpretation of the word.[108] Justice Marshall, joined by several other justices, argued that the "plain meaning" rule required the Court to reject that interpretation:

> The Court today defers to EPA's interpretation of the Clean Water Act even though that interpretation is inconsistent with the clear intent of Congress,

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100. *Id.* at 132.

101. *Id.*

102. 470 U.S. 116 (1985).

103. *Id.* at 125-26.

104. *Id.* at 125.

105. *Id.* at 125-26. According to the Court,

> If the word "modify" in § 301(l) is read in its broadest sense, that is, to encompass any change or alteration in the standards, NRDC is correct. But it makes little sense to construe the section to forbid EPA to amend its own standards, even to correct an error or to impose stricter requirements. Furthermore, reading § 301(l) in this manner would forbid what § 307(b)(2) expressly directs: EPA is there required to "revise" its pretreatment standards "from time to time, as control technology, processes, operating methods, or other alternatives change." As NRDC does and must concede, . . . , § 301(l) cannot be read to forbid every change in the toxic waste standards. The word "modify" thus has no plain meaning as used in § 301 (l), and is the proper subject of construction by EPA and the courts.

Id.

106. *Id.* at 126.

107. *See, e.g.*, Norfolk & W. Ry. v. American Train Dispatchers Ass'n, 111 S. Ct. 1156 (1991). In University of Cal. v. Public Employment Relations Bd., 485 U.S. 589 (1988), the majority concluded that it was able to "ascertain Congress' clear intent" based on its analysis of the statutes and their legislative history. *Id.* at 602. Justice White, concurring, found that "the language of neither exception settles the matter." *Id.* at 603. In Immigration & Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421 (1987), the majority declared, "[T]he plain language of this statute appears to settle the question before us." *Id.* at 432 n.12. As a result, the Court rejected the Immigration and Naturalization Service's interpretation of the Immigration and Nationality Act. Justice Powell, joined by two other justices, dissented, arguing that he found "the language far more ambiguous than the Court [did]." *Id.* at 459.

108. *Chemical Mfrs.*, 470 U.S. at 125.

> as evidenced by the statutory language, history, structure, and purpose. I had not read our cases to permit judicial deference to an agency's construction of a statute when that construction is inconsistent with the clear intent of Congress.[109]

Similarly, in *Dole v. United Steelworkers of America*,[110] the majority concluded that a statute was "plain" and therefore rejected the Office of Management and Budget's (OMB) interpretation of the statute.[111] Justices White and Rehnquist disagreed. In their view, the statute did not clearly

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109. *Id.* at 135.

110. 494 U.S. 26 (1990).

111. *Id.* at 34-40. The case involved the Paperwork Reduction Act of 1980 (Act), 44 U.S.C. §§ 3501-3520 (1988, Supp. I 1989 & Supp. II 1990). Under that Act, "information collection requests" had to be submitted to the Office of Management and Budget (OMB) for review. *Id.* § 3507(a)(2). If OMB fails to approve the request, the agency may not collect the information. *Id.* § 3507(a)(3).

The Department of Labor (DOL) promulgated a disclosure rule requiring employers to disclose certain health risks to their employees. OMB rejected the disclosure requirement. It reasoned that the rules were not necessary to protect employees. *Dole*, 494 U.S. at 30-31.

In *Dole*, the Supreme Court was forced to determine whether Congress intended to apply the Act to such disclosure rules. In other words, when an agency requires employers to disclose health risks to its employees, has the agency imposed an "information collection request?" Petitioner argued that the Act's operative provisions, applicable to "obtaining or soliciting of facts by an agency through . . . reporting or recordkeeping requirements," applied to such disclosure rules. *Id.* at 34-35. In other words, the agency is "soliciting facts" when it "requires someone to communicate specified data to a third party." *Id.* The Court rejected this contention: "Petitioner's interpretation of 'obtaining or soliciting facts by an agency through . . . reporting or recordkeeping requirements' is not the most natural reading of this language." *Id.* The Court found that the "common sense" interpretation of this language was that it applies to "reports to be made to the government, not training and labels to be given to someone else altogether." *Id.* at 35-36. As a result, because the Court found "that the statute, as a whole, clearly expresse[d] Congress' intention, [it] decline[d] to defer to OMB's interpretation." *Id.* at 42.

express Congress' intent.[112] Thus, they would have deferred to the agency's interpretation of the statute:[113]

> Since the statute itself is not clear and unambiguous, the legislative history is muddy at best, and [since] OMB has given the statute what I believe is a permissible construction, I cannot agree with the outcome the Court reaches. If *Chevron* is to have meaning, it must apply when a statute is as ambiguous on the issue at hand as [this statute] is on the subject of disclosure requirements.[114]

When the Court finds that language is "plain," it often uses that language to reject agency interpretations. In *Public Employees Retirement System of Ohio v. Betts*,[115] an EEOC regulation defined the term "subterfuge."[116]

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112. *Id.* at 44-46 (White, J., dissenting). According to Justice White,

> The Court concedes that the Act does not expressly address "whether Congress intended the Paperwork Reduction Act to apply to disclosure rules as well as information-gathering rules." Curiously, the Court then almost immediately asserts that interpreting the Act to provide coverage for disclosure requests is untenable. The plain language of the Act, however, suggests the contrary. Indeed, the Court appears to acknowledge that Petitioners' interpretation of the Act, although not the one the Court prefers, is nonetheless reasonable: "Petitioner's interpretation . . . is not the *most* natural reading of this language." The Court goes on to arrive at what it believes is the *most* reasonable of plausible interpretations; it cannot rationally conclude that its interpretation is the *only* one that Congress could possibly have intended. The Court neglects to even mention that the only other Court of Appeals besides the Third Circuit in this case to address a similar question rejected the interpretation the Court now adopts. In addition, there is evidence that for years OMB has been reviewing proposals similar to the standard at issue in this case routinely and without objection from other agencies. As I see it, by independently construing the statute rather than asking if the agency's interpretation is a permissible one and deferring to it if that is the case, the Court's approach is clearly contrary to *Chevron*.

Id. (citations omitted).

113. *Id.* at 43. According to Justices White and Rehnquist:

> The Court's opinion . . . requires more than ten pages, including a review of numerous statutory provisions and legislative history, to conclude that the Paperwork Reduction Act of 1980 (PRA or Act) is clear and unambiguous on the question of whether it applies to agency directives to private parties to collect specified information and disseminate or make it available to third parties. On the basis of that questionable conclusion, the Court refuses to give *any* deference to the Office of Management and Budget's (OMB's) longstanding and consistently applied interpretation that such requirements fall within the Act's scope. Because in my view the Act is not clear in that regard and deference is due OMB under *Chevron* . . . I respectfully dissent.

Id. at 43-44.

114. *Id.* at 53. In Sullivan v. Everhart, 494 U.S. 83, 103 (1990) (Stevens, J., dissenting), the four justices voted to reject an administrative interpretation.

115. 492 U.S. 158 (1989).

116. *Id.* at 170-72.

The majority refused to defer on the basis that the agency's interpretation was "at odds with the plain language of the statute itself."[117] The Court went on to state that, "[b]ut of course, no deference is due to agency interpretations at odds with the plain language of the statute itself. Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language."[118]

Justice Brennan, dissenting, strongly disagreed with the majority's conclusion: "To reach the result it does, the majority uses an interpretive methodology, purportedly one parsing § 4(f)(2)'s "plain language," which is so manipulative as virtually to invite the charge of result-orientation."[119] He went on to state that:

> Ordinarily, we ascertain the meaning of a statutory provision by looking to its text, and if the statutory language is unclear, to its legislative history. *Blum v. Stenson*, 465 U.S. 886, 104 S. Ct. 1541, 1547, 79 L.Ed.2d 891 (1984). Where these barometers offer ambiguous guidance as to Congress' intent, we defer to the interpretations of the provision articulated by the agencies responsible for its enforcement, so long as these agency interpretations are "based on a permissible construction of the statute." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S. Ct. 2778, 2782, 81 L.Ed.2d 694 (1984) . . . .
>
> Eschewing this approach, the majority begins its analysis not by seeking to glean meaning from the statute, but by launching a no-holds-barred attack on the business purpose reading of § 4(f)(2). *Ante*, at 2862 into two portions, the majority concludes that the business purpose test is irreconcilable with the "plain language" of the "subterfuge" portion, *ante*, at 2862-2864, and also cannot be inferred from the text of the portion enumerating types of employee benefit plans. *Ante*, at 2864-2865. En route to interring the consensus interpretation of § 4(f)(2), the majority pauses not a moment on the provision's purposes or legislative history. Only after burial, and almost by afterthought, does the majority attempt to come up with its own interpretation of the exemption, hastily proceeding to divine the capacious alternative reading outlined earlier.
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> There are deep problems with the majority's interpretive methodology, chief among them its unwillingness to apply the same unforgiving textual analysis to its reading of the § 4(f)(2) exemption as it does to the consensus reading . . . .[120]

117. *Id.* at 171.

118. *Id.*

119. *Id.* at 185.

120. *Id.* at 185-86 (quoting *Chevron*, 467 U.S. at 843) (citations omitted).

2. The Statutory Scheme

In deciding whether to apply *Chevron*, the justices also consider a provision's language in reference to the entire "statutory scheme."[121] In *K Mart Corp. v. Cartier, Inc.*,[122] the Court flatly stated that a reviewing "court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."[123]

This approach to statutory interpretation, referred to by Judge Kenneth Starr as "structuralism,"[124] provides a useful interpretive technique.[125] It treats the interpretive process as a "holistic endeavor,"[126] and suggests that "different answers may emerge from a study of the whole that might not be suggested by a narrowly focused parsing of a solitary provision in a complex statute."[127] Some have hailed this new "structuralism" as portending "somewhat greater consistency and predictability in the interpretive process."[128]

In *Chevron* itself, the Court invoked structuralism. The Court was forced to define the term "stationary source." In doing so, the Court refused to "parse" general terms in the statute.[129] The Court flatly stated that "the meaning of a word must be ascertained in the context of achieving particular objectives, and the words associated with it may indicate [that] the true meaning of the series is to convey a common idea."[130] Although the Court found that congressional intent was unclear, it noted that "to the extent that congressional 'intent' can be discerned from this language, it would appear

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121. *See, e.g.*, Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 110 S. Ct. 2759, 2768 (1990); Dole v. United Steelworkers of Am., 494 U.S. 26, 41-42 (1990) (rejecting the agency's interpretation noting that, since "the statute, as a whole, clearly expresses Congress' intention, we decline to defer to OMB's interpretation."); EEOC v. Commercial Office Prod. Co., 486 U.S. 107, 121 (1988); Bethesda Hosp. Ass'n v. Bowen, 485 U.S. 399, 405 (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) ("the language, structure, and legislative history of the Act fail to support the petitioners in this case . . . ."); NLRB v. United 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) (Court 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.").

122. 486 U.S. 281 (1988).

123. *Id.* at 291; *see also* Fort Stewart Sch. v. Federal Labor Relations Auth., 495 U.S. 641, 645 (1990); Sullivan v. Everhart, 494 U.S. 83, 89 (1990).

124. Starr, *supra* note 3, at 706.

125. *Id.*

126. United Sav. Ass'n v. Timbers of Inwood Forest Assocs, 484 U.S. 365, 371 (1988).

127. Starr, *supra* note 3, at 708.

128. *Id.* at 707.

129. *Chevron*, 467 U.S. at 861.

130. *Id.*

that the listing of overlapping, illustrative terms was intended to enlarge, rather than to confine, the scope of the agency's power to regulate particular sources in order to effectuate the policies of the Act."[131]

But, just as the justices can disagree about whether a statute's language is plain, they can also disagree about the implications to be derived from analysis of a statute's structure.[132] In addition, they can use structuralism to reject agency interpretations. In *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*,[133] one provision of the Interstate Commerce Commission Act (ICC Act)[134] required carriers to charge reasonable, nondiscriminatory rates.[135] Another provision prohibited them from charging a rate different than that previously filed with the ICC. Some shippers had negotiated new rates with carriers that were below the filed rates. These negotiated rates were never filed. When some of the carriers went into bankruptcy, the bankruptcy trustee billed the carrier for the difference between the filed rate and the rate actually charged. The ICC viewed the billing as an "unreasonable" practice that, under the terms of the ICC Act, precluded collection of the additional amount.

The Supreme Court had to decide whether the ICC's interpretation was entitled to deference. The ICC, after pointing out that the Act did "not specifically address the types of practices that are to be considered unreasonable," argued that its interpretation was "rational and consistent with the statute," and urged the Court to defer to that interpretation.[136] A majority of the Court disagreed, concluding that the ICC's position "rests on an interpretation of the Act that is contrary to the language and structure of the statute as a whole and the requirements that make up the filed rate doctrine in particular."[137] In doing so, the Court relied on its prior interpretations of the statute.[138] But the Court also relied on its assessment of the regulatory scheme. The Court concluded that "[a]lthough the Commission has both the authority and expertise generally to adopt new policies when faced with new

131. *Id.* at 862.

132. In *Betts*, 492 U.S. 158 (1989), the Court used structuralism. But the justices viewed that structure differently. The majority viewed the Act's structure as requiring a particular result, *id.* at 180, while the dissenters viewed the structure as requiring the opposite result, *id.* at 187.

133. 497 U.S. 116 (1990).

134. 49 U.S.C. §§ 10101-11917 (1988).

135. *Id.* §§ 10101(a), 10701(a), 10741(b).

136. *Maislin Indus.*, 110 S. Ct. at 2968.

137. *Id.*

138. *Id.* The Court stated:

> 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. For a century, this Court has held the Act, as it incorporates the filed rate doctrine, forbids as discriminatory the secret negotiation and collection of rates lower than the filed rate . . . . By refusing to order collection of the filed rate solely because the parties had agreed to a lower rate, the ICC has permitted the very price discrimination the Act by its terms seeks to prohibit.

Id. at 2768 (citations omitted).

developments in the industry, . . . it does not have the power to adopt a policy that directly conflicts with its governing statute."[139]

Dissenting, Justice Stevens argued that "no particular provision of the statute support[ed] the Court's position . . . ."[140] He contended that the Court had failed to adhere to *Chevron*:

> Four Courts of Appeals have expressly invoked *Chevron* in the course of upholding the agency action challenged in this case, but this Court does not deem *Chevron*—or any other case involving deference to agency action—worthy of extended discussion. The Court dismisses *Chevron* by means of a conclusory assertion that the agency's interpretation is inconsistent with "the statutory scheme as a whole."[141] Justice Stevens concluded, quoting Mr. Justice Black, that "I am unable to understand why the Court strains so hard to reach such a bad result."[142]

3. Statutory Purposes

In applying *Chevron*, the Court also considers the "policies underlying . . . [an] Act."[143] "Purposes" or "policies" have long been considered in statutory construction. As Justice Frankfurter stated:

> Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of government. That aim, that policy is not drawn, like nitrogen, out of the air; it is evinced in the language of the statute, as read in the light of other external manifestations of purpose. That is what the judge must seek and effectuate, and he ought not be led off the trail by tests that have overtones of subjective design.[144]

In numerous post-*Chevron* deference decisions, the Court has considered an Act's purposes.[145] For example, in *United States v. Riverside Bayview Homes, Inc.*,[146] the Court deferred to an interpretation by the Army Corps

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139. *Id.* at 2770.

140. *Id.* at 2775 (Stevens, J., dissenting).

141. *Id.* at 2779.

142. *Id.* at 2780 (quoting T.I.M.E., Inc. v. United States, 359 U.S. 464, 481 (1959) (Black, J., dissenting)).

143. *See, e.g.*, EEOC v. Commercial Office Prod. Co., 486 U.S. 107, 116 (1988); 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 . . . .").

144. Frankfurter, *supra* note 62, at 538-39.

145. *See, e.g.*, Dole v. United Steelworkers of Am., 494 U.S. 26, 36-40 (1990); *Dimension Fin. Corp.*, 474 U.S. at 73-74; *Riverside Bayview Homes, Inc.*, 474 U.S. at 32 "[A]n agency may appropriately look to the . . . underlying policies of its statutory grants of authority.").

146. 474 U.S. 121 (1985).

of Engineers after noting that the "legislative history and underlying policies" "support the reasonableness of the Corps' approach . . . ."[147]

But, even though the concept of "legislative purpose" can be useful, it has its limits. Radin, as part of his attack on the concept of intent, similarly attacked the purpose concept: "If by the purpose of a statute we mean the actual purpose entertained by those who framed it or voted it, the purpose is indistinguishable from the intention."[148] As a result, he concluded "that this purpose is practically undiscoverable and would be irrelevant if discovered."[149]

Part of the problem stems from the fact that the most legitimate way to ascertain legislative purposes is by examining a statute's language. In *Board of Governors v. Dimension Financial Corp.*,[150] the Court stated that "[t]he 'plain purpose' of legislation, however, is determined in the first instance with reference to the plain language of the statute itself."[151] But the Court also recognized that, if a court tries to go beyond "the language of the statute itself," there is always the potential for abuse:

> Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard fought compromises. Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.[152]

As a result, as the Court recognized in *Dimension Financial*, the use of "'broad purposes' at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action."[153] But, if the Court limits itself to a statute's language, the usefulness of the purpose concept diminishes.

Disagreements about congressional purposes have been evident in the Court's post-*Chevron* deference decisions.[154] The justices often differ about which purposes are relevant, and how those purposes affect a case's resolution. In the *Chemical Manufacturers*[155] case, the majority considered a statute's purposes in holding that an agency's interpretation was entitled to deference: "EPA's construction, fairly understood, is not inconsistent with the

147. *Id.* at 132; *see also Dimension Fin.*, 474 U.S. at 373 (stating that "[t]he 'plain purpose' of legislation, however, is determined in the first instance with reference to the plain language of the statute itself.").

148. Radin, *supra* note 60, at 875.

149. *Id.*

150. 474 U.S. 361 (1986).

151. *Id.* at 373.

152. *Id.* at 374.

153. *Id.* at 373-74.

154. *See, e.g.*, Presley v. Etowah County Comm'n, 112 S. Ct. 820 (1992).

155. Chemical Mfr. Ass'n v. Natural Resources Defense Council, Inc., 470 U.S. 116 (1985).

language, goals, or operation of the Act."[156] Justice Marshall, joined by three other justices, took issue with the Court's decision to defer noting that his "disagreement with the Court does not center on its reading of *Chevron*, but instead on its analysis of the congressional purposes behind § 301(l)."[157] Justice Marshall concluded, "It is readily apparent that a complete ban on modifications would most directly and completely accomplish the congressional goal."[158]

In *Dole v. United Steelworkers of America*,[159] the justices also disagreed about the purpose of an act. In rejecting the Office of Management and Budget's construction of a statutory provision,[160] the majority placed great emphasis on Congress' stated purposes: "Disclosure rules present none of the problems Congress sought to solve through the Paperwork Reduction Act (PRA), and none of Congress' enumerated purposes would be served by subjecting disclosure rules to the provisions of the Act."[161] Justice White, joined by Justice Rehnquist, disagreed: "Contrary to the Court's assertions, disclosure requests do present some of the problems Congress sought to solve through the PRA."[162] They concluded by arguing that the Court's "distinction [was] flawed because it promote[d] a secondary objective of the PRA and ignore[d] . . . Congress's primary objective in enacting the statute."[163]

156. *Id.* at 134.

157. *Id.* at 152 (Marshall, J., dissenting).

158. *Id.* at 142.

159. 494 U.S. 26 (1990).

160. The question was whether the OMB had the right to review the Secretary of Labor's rule requiring employers to make certain disclosures" to their employees. For a fuller discussion of the issues presented in *Dole*, see *supra* note 111.

161. *Dole*, 494 U.S. at 37.

162. *Id.* at 52 (White, J., dissenting).

163. *Id.*

4. Legislative History

In most instances, the Court's decision to apply *Chevron* turns on the Court's analysis of a statute's legislative history.[164] In the *Chemical Manufacturers* case,[165] the Court held that the agency's interpretation of a regulatory provision was reasonable.[166] As a result, the Court concluded that deference was required "unless the legislative history or the purpose and structure of the statute clearly reveal a contrary intent."[167] The Court took a similar position in *Rust v. Sullivan*,[168] concluding that deference is only appropriate when "the legislative history is ambiguous and unenlightening on the matters with respect to which the regulations deal . . . ."[169]

The Court's reliance on legislative history is fraught with difficulties. The justices frequently differ about when it is proper to resort to such history. For example, Justice Scalia has openly questioned the permissibility of using legislative materials when the language of a statute is plain: "[I]f the language of the statute is clear, that language must be given effect—at least in the absence of a patent absurdity."[170] One commentator refers to this approach as "the new textualism" which he defines as meaning that "once the Court has ascertained a statute's plain meaning, consideration of legislative history becomes irrelevant."[171] But, as noted earlier, most justices are more willing to use legislative materials.[172]

Even when the justices agree about the permissibility of using legislative materials, they do not always agree about how to evaluate such materials. The problem lies with the materials themselves. Although historical materials can

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164. *See, e.g.*, EEOC v. Commercial Office Prod. Co., 486 U.S. 107, 115-16 (1988); University of Cal. v. Public Employment Relations Bd., 485 U.S. 589, 594-99 (1988); DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 574 (1988); ETSI Pipeline Project v. Missouri, 484 U.S. 495, 514 (1988) ("the language, structure, and legislative history of the Act fail to support the petitioners in this case"); Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 432-43 (1987); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 132 (1985) ("an agency may appropriately look to the legislative history"); Chemical Mfr. Ass'n v. Natural Resources Defense Council, Inc., 470 U.S. 116, 126 (1985); *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).

165. 470 U.S. 116 (1985).

166. *Id.* at 126.

167. *Id.*

168. 111 S. Ct. 1759 (1991).

169. *Id.* at 1768.

170. Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 452 (1987) (Scalia, J., concurring).

171. *See* Eskridge, *supra* note 92, at 623.

172. *See* text accompanying *supra* notes 92-98.

be useful,[173] they can also be inaccurate[174] and misleading.[175] Judge Kenneth Starr flatly stated, "It is well known that technocrats, lobbyists and attorneys have created a virtual cottage industry in fashioning legislative history so that the Congress will appear to embrace their particular view in a given statute."[176] Thus, "[l]egislative history . . . has the potential to mute (or indeed override) the voice of the statute itself. In terms of democratic theory, the use of legislative history can distort the proper voice of each branch of our constitutional government."[177]

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173. *See* Pierce, *supra* note 164, at 1258 ("Sometimes statements in legislative history are more reliable than statutory language because members of Congress are more familiar with a committee or conference report than with the language of the statute.").

174. *See* Wald, *supra* note 73, at 200 (quoting Corry, *supra* note 94, at 631). She states:

> As a former congressional liaison, I can verify many of the traditional objections to profligate use of legislative history. Much of the pertinent legislative discussion is unrecorded or inadequately recorded and thus only random fragments are preserved. Often, what is said by the opponents of a proposed bill cannot be trusted and many proponents will not have read or understood the bill. Those who do understand the bill may be impulsive and careless speakers, and the "cool heads" may be more concerned with winning strategy than with giving a precise explanation of what the bill means. As one scholar has said, "[t]he process of enacting new legislation is not an intellectual exercise in pursuit of truth; it is an essay in persuasion, or perhaps almost seduction!"

175. *See* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 318-19 (1897). The Court stated:

> [I]t is impossible to determine with certainty what construction was put upon an act by members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed.

Id. See also Pierce, *supra* note 164, at 1257. He argues:

> Congress does not enact committee reports, hearings, or floor debates; it votes only on bills with specific language. Statements in legislative history usually are manufactured by some combination of lobbyists, staff members sympathetic to special interests, and a few members of Congress sympathetic to those interests. These participants in the legislative process usually plan statements of intent in legislative history because they lack confidence that they could convince a majority of Congress to reflect their preferences in statutory language.

Id. See generally Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371; Wald, *supra* note 73.

176. Starr, *supra* note 175, at 377. He goes on to note that, "[w]hile some aspects of this occupation are legitimate, this history-making can also work an abuse of the legislative process." *Id.*

177. *Id.* at 375. Starr further argues:

> The enacted statute definitively represents the avowed "intent" of the Congress as a *whole*. Legislative materials abound with records of the myriad of congressional "subdivisions"—subcommittees, committees, and ultimately

The justices often resort to a variety of materials,[178] none of which is necessarily conclusive and all of which may be subject to differing interpretations.[179] There is some order to the process. The justices seem to give more weight to committee reports, conference committee reports, and statements by floor managers.[180] But committee reports do not always exist,[181] and the justices consider an array of other historical materials,[182]

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two-house conference committees. These records, however, at best can shed light only on the "intent" of that small portion of Congress in which such records originate; they therefore lack the holistic "intent" found in the statute itself. Thus, although congressional committees are reservoirs of expertise and technical knowledge, by the same token committees may be narrow and parochial in their outlook, less balanced on the subject in question than the Congress as a whole. Relying on extrastatutory materials therefore raises the danger that unrepresentative materials will be accepted as authoritative.

Id.

178. *See* DICKERSON, *supra* note 59, at 200 ("Academics complain that courts are indiscriminate in their use of legislative materials—that they are scavengers rummaging through 'the ashcans of the legislative process.'"); *see also* Wald, *supra* note 73, at 195:

> [T]he Court has greatly expanded the types of materials and events that it will recognize in the search for congressional intent. Floor debates and hearings, for example, are now routinely cited, as is evidence that the legislature did not act to override or alter administrative or judicial interpretation at either the time of passage or later.

179. Judge Abner Mikva offers the following story involving Representative Morris Udall's passage of the strip-mining law:

> Representative Udall fashioned a compromise and got it out of the committee and onto the floor. At one point, in his effort to shepherd the compromise through the House of Representatives, Udall, as a floor manager, was explaining why it was a great bill and why it ought to be passed. One of the congressmen from West Virginia, a strip-mining state, arose and asked if the gentleman from Arizona would assure him that this bill would carefully protect states' rights and state sovereignty and that the states would continue to perform their role in managing strip mining within their borders. Representative Udall solemnly assured the gentleman that he was absolutely correct, that the bill very carefully preserved the role of the states in the process—state sovereignty was not impinged upon in any form. Twenty minutes later a pro-environmentalist congressman arose and asked if the gentleman from Arizona would assure him that the bill, once and for all, set single standards for strip mining and ensured that one federal law would cover strip mining throughout the country. Representative Udall assured the gentleman that he was absolutely correct, that this bill, once and for all, set uniform federal standards. Some of us were sitting in the cloakroom during this exchange; when Representative Udall came out for a drink of water one of the congressmen who had been listening in told him that both positions could not be right. Udall then assured the gentleman that *he* was absolutely correct.

The Honorable Abner J. Mikva, *A Reply to Judge Starr's Obervations*, 1987 DUKE L.J. 380, 381.

180. Wald, *supra* note 73, at 201.

181. *Id.*

182. *See id.* at 202 ("The hornbook rule that hearings are relevant only as background to show the purpose of the statute no longer holds. In many cases the best explanation of what the

the usefulness of which vary from case-to-case.[183] As a result, some commentators have argued that historical materials encourage the Court to engage in "high fiction in interpreting statutes."[184] Judge Patricia Wald concluded that, it "sometimes seem[s] that citing legislative history is still, as my late colleague Harold Leventhal once observed, akin to 'looking over a crowd and picking out your friends.'"[185]

These problems are evident in the Supreme Court's post-*Chevron* deference decisions.[186] The justices often disagree about the implications to be derived from a statute's legislative history.[187] In the *Chemical Manufacturers* case,[188] the majority concluded that it was 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."[189] Petitioner argued that the legislative materials evinced such a contrary intent, and urged the Court to overturn that interpretation.[190] The majority refused.[191] Justice Marshall, joined by several other justices, disagreed. He would have overturned the agency's interpretation based on the Act's legislative history: "If I agreed with the Court's analysis of the statute and the legislative history, I too would conclude that *Chevron* commands deference to the administrative construction."[192]

The Court often relies on historical materials in rejecting agency interpretations. In *University of California v. Public Employment Relations Board*,[193] the majority found, after examining a statute's language and legislative history, that Congress had clearly expressed its intent. As a result, they found it unnecessary to consider the agency's interpretation.[194] Justice White, concurring, took exception to the holding. He argued that courts

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legislation is about comes from the executive department or outside witnesses at the hearing.").

183. *See id.* at 201-02 ("The value of floor debate varies. Statements of sponsors or managers of legislation are worthy of weight, but ad lib comments by marginal participants are not.").

184. Starr, *supra* note 175, at 378.

185. Wald, *supra* note 73, at 214. She goes on to note that "consistent and uniform rules for statutory construction and use of legislative materials are not being followed today." *Id.*

186. *See, e.g.*, Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 647-50 (1990) (discussing legislative history of Act at some length); Dole v. United Steelworkers of Am., 494 U.S. 26, 34-40 (1990); EEOC v. Commercial Office Prod. Co., 486 U.S. 107, 121-22 (1988); University of Cal. v. Public Employment Relations Bd., 485 U.S. 589, 594-99 (1988); Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 432-43 (1987); *see generally* Marshall J. Breger, *Introductory Remarks—Conference on Statutory Interpretation*, 1987 DUKE L.J. 362; Mikva, *supra* note 179; Starr, *supra* note 175, at 378.

187. *See, e.g.*, Presley v. Etowah County Comm'n, 112 S. Ct. 820 (1992).

188. 470 U.S. 116 (1985).

189. *Id.* at 126.

190. *Id.*

191. *Id.*

192. *Id.* at 152 (Marshall, J., dissenting).

193. 485 U.S. 589 (1988).

194. *Id.* at 594-99.

should rely on legislative histories in only limited situations: "Where the statute itself is not determinative and is open to more than one construction, the legislative history must be quite clear if it is to foreclose the agency's construction as expressed in its regulations, which is surely not the case here."[195] He concluded that the agency's interpretation was entitled to deference.[196]

In *Betts*, the justices again disagreed about the conclusions to be drawn from historical materials. The majority felt that the legislative history supported its interpretation of the Age Discrimination in Employment Act, and therefore rejected the EEOC's interpretation of that Act.[197] Justice Marshall, joined by Justice Brennan, would have deferred to the agency's interpretation. In their view, the Act's history "convincingly support[ed] the holistic reading" adopted by the agency.[198] Likewise, in *Communications Workers of America v. Beck*,[199] the majority rejected an interpretation. Justice Blackmun, joined by Justices Scalia and O'Connor, chastised the majority:

> Under our settled doctrines of statutory construction, were there any ambiguity in the meaning of § 8(a)(3)—which there is not—the Court would be constrained to defer to the interpretation of the NLRB, unless the agency's construction were contrary to the clear intent of Congress . . . . Although the Court apparently finds such ambiguity, it fails to apply this doctrine. By reference to a narrow view of congressional "purpose" gleaned from isolated statements in the legislative history, and in reliance upon this Court's interpretation of another statute, the Court constructs an interpretation that not only finds no support in the statutory language or legislative history of § 8(a)(3), but also contradicts the Board's settled interpretation of the statutory provision. The Court previously has directed: "Where the Board's construction of the Act is reasonable, it should not be rejected 'merely because the courts might prefer another view of the statute.'" Here, the only apparent motivation for holding that the Board's interpretation of § 8(a)(3) is impermissible, is the Court's view of *another* statute.[200]

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195. *Id.* at 603 (White, J., dissenting).

196. Justice White stated:

> Inquiry into that history may lead a court to conclude that the agency's interpretation is not only permissible but is also the only acceptable construction of the law. But even on the majority's own description of the statutory background, I am unable to conclude that the agency could not have adopted, and could not now adopt, a view of the exceptions that would, on the facts of this case, have reflected the views urged by appellees, particularly with respect to the private mail exception.

Id. at 603-04.

197. Public Employees Retirement Sys. of Ohio v. Betts, 492 U.S. 158, 178-80 (1989).

198. *Id.* at 189 (Marshall, J., dissenting).

199. 487 U.S. 735, *cert. denied*, 487 U.S. 1233 (1988).

200. *Id.* at 768 (quoting Pattern Makers League of N. Am. v. NLRB, 473 U.S. 95, 114 (1985), quoting Ford Motor Co. v. NLRB, 441 U.S. 488, 497 (1979)).

5. Canons of Construction

The justices have also been willing to invoke the canons of construction in applying *Chevron*.[201] 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,[202] liberally,[203] or in accordance with certain other principles.[204] Other canons are supposed to reflect

201. *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)).

202. *See, e.g.*, University of Cal. v. Public Employment Relations Bd., 485 U.S. 589, 604 (1988) (Stevens, J., dissenting); M. Kraus & Bros., Inc. v. United States, 327 U.S. 614, 621 (1946) (provisions that impose criminal sanctions should be strictly construed).

203. *See, e.g.*, Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987) (lingering ambiguities in deportation statutes should be construed in favor of the alien); Pennzoil Co. v. Federal Energy Regulatory Comm'n, 645 F.2d 360, 383 (5th Cir. 1981) (regulatory provisions should be liberally construed to effectuate their purposes), *cert. denied*, 454 U.S. 1142 (1982).

204. *See, e.g.*, EEOC v. Arabian Am. Oil Co., 111 S. Ct. 1227, 1230 (1991) (unless a contrary intent appears, congressional legislation is meant to apply only within the territorial jurisdiction of the United States); Norfolk & W. Ry. v. American Train Dispatchers Ass'n, 111 S. Ct. 1156, 1163 (1991) ("repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored") (quoting United States v. Philadephia Nat'l Bank, 374 U.S. 321, 350 (1963)); DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) ("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") (citing NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 499-501 (1979)); Traynor v. Turnage, 485 U.S. 535, 548 (1988) (A statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum unless the later statute expressly contradicts the original act or is absolutely necessary for the words of the later statute to have any meaning at all); *Chevron*, 467 U.S. at 842-44 (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.).

language patterns,[205] and therefore may assist a court in discovering actual legislative intent.[206]

In this century, many commentators have criticized the canons.[207] As Judge Posner recognized, "to exaggerate slightly, it has been many years since any legal scholar has had a good word to say about any but one or two of the canons."[208] Some argue that particular canons are wrong or misleading.[209] Others argue that the canons conflict. Karl Llewellyn once asserted that the canons come in inconsistent pairs.[210] To prove his point, Llewellyn matched twenty-eight canons in one column against their opposites in a second column.[211]

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205. *See, e.g., Norfolk*, 111 S. Ct. at 1163 ("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"); Dole v. United Steelworkers of Am., 494 U.S. 26, 36-37 (1990) (Court applied *noscitur a sociis* which dictates that "words grouped in a list should be given related meaning", and it also applied the canon which states that 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); *Cardoza-Fonseca*, 480 U.S. at 431-32 (1987) ("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 purposefully in the disparate inclusion or exclusion," and the legislative purpose is expressed by the ordinary meaning of the words used, and there is a strong presumption that Congress expresses its intent through the language it uses.) (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972).

206. *See* DICKERSON, *supra* note 59, at 228.

207. Wald, *supra* note 73, at 215 ("[W]e recognize the fallacy of generalities and absolute rules of construction.").

208. Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 805 (1983).

209. Radin disliked the *expressio unius* canon:

> The rule that the expression of one thing is the exclusion of the other is in direct contradiction to the habits of speech of most persons. To say that all men are mortal does not mean that all women are not, or that all other animals are not. There is no such implication, either in usage or in logic, unless there is a very particular emphasis on the word *men*. It is neither customary nor convenient to indicate such emphasis in statutes, and without this indication, the first comment on the rule is that it is not true.

Radin, *supra* note 60, at 873-74. He also disliked the *ejusdem generis* rule. *Id.* at 874-75; *see also* Frederick J. De Sloovere, *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); Landis, *supra* note 60, at 892.

210. 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, 401-06 (1950).

211. Included were the following pairs:

THRUST	PARRY
1. A statute cannot go beyond its text.	1. To effect its purpose[,] a statute may be implemented beyond its text.
. . .	
2. Statutes in derogation of common law will not be extended by construction.	2. Such acts will be the liberally construed if their nature is remedial.

Nevertheless, the Court continues to use the canons.[212] It does so, in part, because many of them have value.[213] As Justice Frankfurter recognized, "[i]nsofar as canons of construction are generalizations of experience, they all have worth."[214] Of course, the canons rarely drive decisionmaking, 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."[215]

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7. A statute imposing a new penalty or forfeiture, or a new liability or disability, or creating a new right of action will not be construed as having a retroactive effect.	7. Remedial statutes are to be liberally construed and if a retroactive interpretation will promote the ends of justice, they should receive such construction.
8. Where design has been distinctly stated no place is left for construction.	8. Courts have the power to inquire into real—as distinct from ostensible—purpose.
. . .	
24. Punctuation will govern when a statute is open to two constructions.	24. Punctuation marks will not control the plain and evident meaning of language.
25. It must be assumed that language has been chosen with regard to grammatical and is not interchangeable on mere conjecture.	25. "And" and "or" may be read interchangeably whenever the due change is necessary to give propriety the statute sense and effect.

Id. (footnotes omitted).

212. *See, e.g.*, Rust v. Sullivan, 111 S. Ct. 1759 (1991); DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (According to the Court, the "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)).

213. In EEOC v. Arabian American Oil Co., 111 S. Ct. 1227, 1238 (1991), Justice Marshall referred to certain canons which he described as "clear statement" rules. He described these rules as follows:

> Clear-statement rules operate less to reveal *actual* congressional intent than to shield important values from an *insufficiently strong* legislative intent to displace them. . . . When they apply, such rules foreclose inquiry into extrinsic guides to interpretation, . . . , and even compel courts to select less plausible candidates from within the range of permissible constructions.

Id. In the *Arabian American* case, the Court had applied the following rule which states that, unless a contrary intent appears, congressional legislation is meant to apply only within the territorial jurisdiction of the United States. *Id.* at 1230. Justice Marshall concluded that this was not a clear statement rule.

214. Frankfurter, *supra* note 62, at 544.

215. *Id.*

In its post-*Chevron* deference decisions, the Court has invoked a variety of canons including the following:

1. If the language of a statute is clear, that language must be given effect—at least in the absence of a patent absurdity.[216]
2. 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.[217]
3. Under the traditional canon of construction, *noscitur a sociis*, words grouped in a list should be given related meaning.[218]
4. In 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.[219]
5. Lingering ambiguities in deportation statutes should be construed in favor of the alien.[220]
6. Before deference will be given, the Court must first determine whether the agency's interpretation is consistent with its prior decisions.[221]
7. 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.[222]

The Court has also applied other canons.[223] Indeed, the *Chevron* decision

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216. *See, e.g.*, Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 452 (Scalia, J., concurring).

217. Amoco Prod. Co. v. Village of Gambell, Alaska, 480 U.S. 531, 553 (1987) (quoting United States v. Locke, 471 U.S. 84, 95-96 (1985)).

218. Dole v. United Steelworkers of Am., 494 U.S 26, 36 (1990).

219. *Id.* at 35 (citing Massachusetts v. Morash, 490 U.S. 107, 115 (1989)).

220. *Cardoza-Fonseca*, 408 U.S. at 449.

221. Lechmere, Inc. v. NLRB, 112 S. Ct. 841, 847 (1992).

222. *Id.* at 847-48 (quoting Maislin Indus., U.S., Inc. v. Primary Stell, Inc., 497 U.S. 116, 131 (1990)).

223. These canons of statutory construction include:

8. 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) (quoting Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976)).

9. [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.

10. 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)).

11. Where an otherwise acceptable construction of a statute would raise serious constitutional problems, a court should construe the statute to avoid such problems unless such intention is plainly contrary to the intent of Congress. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

provides its own canon: "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."[224]

In its post-*Chevron* decision in *Norfolk & Western Railway v. American Train Dispatchers Ass'n*,[225] the Court affirmed an agency's interpretation as correct.[226] But it did so only after analyzing various canons of construction. The Court began by noting that the rule of *ejusdem generis* seemed applicable.[227] 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."[228] The Court refused to invoke the canon noting that it "does not control, however, when the whole context dictates a different conclusion."[229] The Court then reached a conclusion inconsistent with the canon,[230] and it did so by invoking another canon of construction:

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12. 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. Norfolk & W. Ry. v. American Train Dispatchers Ass'n, 111 S. Ct. 1156, 1163 (1991).

13. When 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 purposefully in the disparate inclusion or exclusion. *Cardoza-Fonseca*, 480 U.S. 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)).

14. 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), quoting American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982), quoting Richards v. United States, 369 U.S. 1, 9 (1962)).

15. There is a strong presumption that Congress expresses its intent through the language it uses. *Id.* at 432 n.12.

16. Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored. *Norfolk & W. Ry.*, 111 S. Ct. at 1163 (quoting United States v. Philadephia Nat'l Bank, 374 U.S. 321, 350 (1963)).

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

224. *Chevron*, 467 U.S. at 842-45.

225. 111 S. Ct. 1156 (1991).

226. *Id.* at 1166.

227. The Court noted:

> By itself, the phrase "all other law" indicates no limitation. The circumstances that the phrase "all other law" is in addition to coverage for "the antitrust laws" does not detract from this breadth. There is a canon of statutory construction which, on first impression, might seem to dictate a different result.

Id.

228. *Id.* at 1163.

229. *Id.*

230. *Id.* ("[t]here are several reasons the immunity provision cannot be interpreted to apply only to antitrust laws and similar statutes.").

"'Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored.'"[231]

In several cases, the Court has used canons to displace the *Chevron* doctrine. In *DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*,[232] 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."[233] But the Court concluded that "[a]nother rule of statutory construction . . . is pertinent here."[234] According to the Court, "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."[235] The Court concluded that the agency's interpretation posed serious questions under the First Amendment.[236] As a result, the Court decided to "independently determine whether there is another interpretation, not raising these serious constitutional concerns, that may fairly be ascribed to § 8(b)(4)(ii)."[237] Finding such an interpretation, the Court refused to defer to the agency.[238]

Likewise, in *Immigration & Naturalization Service v. Cardoza-Fonseca*,[239] the Court refused to defer to the Immigration and Naturalization Service's (INS) interpretation of the Immigration and Nationality Act (INA).[240] Instead the Court interpreted the Act itself, by resorting to general principles of statutory construction.[241] It invoked one of the canons of construction: "'[W]here 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 purposefully in the disparate inclusion or exclusion.'"[242]

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231. *Id.* (quoting United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350 (1963)).

232. 485 U.S. 568 (1988).

233. *Id.* at 574.

234. *Id.* at 575.

235. *Id.*

236. The Court stated in full:

> 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.

Id. at 575-76.

237. *Id.*

238. *Id.* at 577.

239. 480 U.S. 421 (1987).

240. See *infra* text accompanying notes 251-64 for a fuller discussion of the issues before the Court.

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

242. *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)).

As one might expect, the justices do not always agree regarding the application of the various canons. *Rust v. Sullivan*[243] involved the Department of Health and Human Services (HHS) regulation prohibiting recipients of funds under Title X of the Public Health Service Act from engaging in abortion counseling, referral, and activities advocating abortion as methods of family planning. Petitioners argued that the regulations "must be invalidated because they raise serious questions of constitutional law."[244] In resolving this issue, the Court discussed various related canons of construction.[245]

The Court concluded that the Secretary's regulations did not present "the sort of 'grave and doubtful constitutional questions,'. . . that would lead . . . [us] to assume Congress did not intend to authorize their issuance,"[246] and so the Court refused to invalidate the agency's regulations in order to save the statute from unconstitutionality.[247]

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243. 111 S. Ct. 1759 (1991).

244. *Id.* at 1771.

245. The Court stated:

> [Petitioners] rely on *Edward J. Debartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 108 S. Ct. 1392, 99 L.Ed.2d 645 (1988), and *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 99 S. Ct. 1313, 59 L. Ed. 2d 533 (1979), which hold that "an Act of Congress ought not to be construed to violate the Constitution if any other possible construction remains available. *Id.* at 5. Under this canon of statutory construction, "[t]he elementary rule is that every reasonable construction must be resorted to in order to *save a statute* from unconstitutionality." *Debartolo Corp., supra*, 485 U.S., at 575, 108 S. Ct., at 1397 (emphasis added) *quoting Hooper v. California*, 155 U.S. 648, 657, 15 S. Ct. 207, 211, 39 L. Ed. 297 (1895).
>
> The principle enunciated in *Hooper v. California, supra*, and subsequent cases, is a categorical one: "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." *Blodgett v. Holden*, 275 U.S. 142, 148, 48 S. Ct. 105, 107, 72 L. Ed. 206 (1927) (opinion of Holmes, J.). This principle is based at least in part on the fact that a decision to declare an act of Congress unconstitutional "is the gravest and most delicate duty that this Court is called on to perform." *Id.* Following *Hooper, supra*, cases such as *United States v. Delaware and Hudson Co.*, 213 U.S. 366, 408, 29 S. Ct. 527, 535, 53 L. Ed. 836, and *United States v. Jin Fuey Moy*, 241 U.S. 394, 401, 36 S. Ct. 658, 659, 60 L. Ed. 1061, developed the corollary doctrine 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." *Jin Fuey Moy, supra*, at 401, 36 S. Ct., at 659. This canon is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations. *FTC v. American Tobacco Co.*, 264 U.S. 298, 305-07, 44 S. Ct. 336, 337, 68 L. Ed. 696 (1924). It is qualified by the proposition that "avoidance of a difficulty will not be pressed to the point of disingenuous evasion." *Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379, 53 S. Ct. 620, 622, 77 L. Ed. 1265 (1933).

Rust, 111 S. Ct. at 1771.

246. *Rust*, 111 S. Ct. at 1771 (quoting United States v. Delaware & Hudson Co., 213 U.S. 366, 408 (1904)).

247. *Id.*

Mr. 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 (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 . . . .[248]

6. Implying Intent

In at least one instance, a justice has been willing to forge beyond the "traditional tools" of statutory constuction, and to "infer" congressional intent based on his own conception of policy. In *Rust*, dissenting Justice Stevens argued that *Chevron* deference was inappropriate. He noted that "[i]n a society that abhors censorship and in which policymakers have traditionally placed the highest value on the freedom to communicate, it is unrealistic to conclude that statutory authority to regulate conduct implicitly authorized the Executive to regulate speech."[249] He concluded: "Because I am convinced that the 1970 Act did not authorize the Secretary to censor the speech of grant recipients or their employees, I would hold the challenged regulations invalid and reverse the judgment of the Court of Appeals."[250]

248. *Id.* at 1778-79 (citations omitted).

249. *Id.* at 1788.

250. *Id.*

III. *CHEVRON* AVOIDED

In the aforementioned cases, the Court invoked principles of statutory construction, and used them to hold that the requirements for deference were not satisfied. In the cases discussed below, the Court took a different approach: it declared *Chevron* inapplicable. Thus, the Court held that even though a statute may be silent or ambiguous, and even though the agency's interpretation may be reasonable, deference is not required.

A. Pure Questions of Statutory Construction

In *Immigration & Naturalization Service v. Cardoza-Fonseca*,[251] the Court displaced *Chevron* by holding that it need not defer when presented only with "pure questions of statutory construction."[252] In *Cardoza-Fonseca*, the Court rejected the Immigration and Naturalization Service's (INS) interpretation of the Immigration and Nationality Act (INA).[253] The Court acknowledged that Congress had given the INS responsibility for administering the INA, and for "filling '"any gap left, implicitly or explicitly, by Congress."'"[254] But, even though the Court concluded that there was "some ambiguity" in the INA,[255] the Court refused to defer concluding that the case involved a narrower task that was "well within the province of the judiciary."[256]

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. But the Court concluded that *Cardoza-Fonseca* involved a dispute about whether two legal standards meant the same thing,[257] and the Court viewed

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251. 480 U.S. 421 (1987).

252. *Id.* at 446. In a pre-*Chevron* case, Piper v. Chris-Craft Industries, Inc., 430 U.S. 1 (1977), the Supreme Court held that it need not defer to the Securities and Exchange Commission's determination that a private right of action should be implied under the Securities and Exchange Act of 1934. The Supreme Court noted that the matter was a "narrow one for judicial resolution":

> Even if the agency spoke with a consistent voice, however, its presumed "expertise" in the securities-law field is of limited value when the narrow legal issue is one peculiarly reserved for judicial resolution, namely whether a cause of action should be implied by judicial interpretation in favor of a particular class of litigants. Indeed, in our prior cases relating to implied causes of action, the Court has understandably not invoked the "administrative deference" rule, even when the SEC supported the result reached in the particular case . . . . That rule is more appropriately applicable in instances where, unlike here, an agency has rendered binding, consistent, official interpretations of its statute over a long period of time . . . .

Id. at 41 n.27.

253. For further discussion of this case, see *supra* text accompanying notes 239-42.

254. *Cardoza-Fonseca*, 480 U.S. at 448.

255. *Id.*

256. *Id.*

257. The INA provides two methods by which an alien can avoid deportation. Under § 208(a), an alien who can demonstrate a "well founded fear of persecution" if forced to return

this issue as a "narrow legal question."[258] In the Court's view, deference is only necessary when "the agency is required to apply either or both standards to a particular set of facts,"[259] and "narrow legal questions" did not require such application.

Justice Powell, joined by Chief Justice Rehnquist and Justice White, dissented. Justice Powell argued 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 can. It has made a considered judgment that the difference between the "well-founded" and the "clear probability" standard 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.[260]

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 clearly inconsistent with the plain meaning" of the statutory language and the INA's structure.[261] 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*."[262] In his 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."[263] He flatly rejected the Court's conclusion that it should decide "a pure question of statutory construction."[264]

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to the country of his nationality must be granted refugee status. 8 U.S.C. § 1158(a) (1982). In addition, deportation can be avoided under § 243(h) by aliens who show that their "life or freedom would be threatened" if they are forced to return to their country of nationality. 8 U.S.C. § 1253(h)(i) (1982). The INS, as well as the courts, had interpreted § 243(h) to require aliens to show that it was "more likely than not that the alien would be subject to persecution." *Cardoza-Fonseca*, 480 U.S. at 423. The INS decided to apply the same standard to § 208(a) arguing that there is no difference between a "well founded fear" standard and a "would be threatened" standard." *Id.* at 425. In *Cardoza-Fonseca*, the Court disagreed and rejected the agency's interpretation.

258. *Cardoza-Fonseca*, 480 U.S. at 448.

259. *Id.*

260. *Id.* at 460.

261. *Id.* at 453.

262. *Id.* at 453-54.

263. *Id.* at 454.

264. *Id.* According to Justice Scalia:

> [T]he Court's discussion is flatly inconsistent with this well-established interpretation [that deference is required]. The Court first implies that courts may substitute their

B. EEOC Cases

In *EEOC v. Arabian American Oil Co.*,[265] the Court placed another gloss on *Chevron*. In *Arabian American*, the Court refused to apply *Chevron* to interpretive statements made by the EEOC in a compliance manual.[266] The manual was supported by testimony from the EEOC's Chairman, an adjudicative decision and a letter by the Chairman. The Court concluded that *Chevron* deference was inappropriate because of the nature of the EEOC's powers: "'Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations.'"[267] The Court concluded that only *Skidmore* deference should apply[268] and ultimately rejected the EEOC's interpretation noting that it was unpersuasive.[269]

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interpretation of a statute for that of an agency whenever, "[e]mploying traditional tools of statutory construction," they are able to reach a conclusion as to the proper interpretation of the statute. But this approach would make deference a doctrine of desperation, authorizing courts to defer only if they would otherwise be unable to construe the enactment at issue. This is not an interpretation but an evisceration of *Chevron*.

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

In my view, the Court badly misinterprets *Chevron*. More fundamentally, however, I neither share nor understand the Court's eagerness to refashion important principles of administrative law in a case in which such questions are completely unnecessary to the decision and have not been fully briefed by the parties.

Id. at 454-55 (citations omitted).

265. 111 S. Ct. 1227, 1235 (1991).

266. *Id.*

267. *Id.* at 1235.

268. *Id.*

269. *Id.* The Court stated:

The EEOC's interpretation does not fare well under these standards. As an initial matter, the position taken by the Commission "contradicts the position which [it] had enunciated at an earlier date, closer to the enactment of the governing statute." The EEOC offers no basis in its experience for the change. The EEOC's interpretation of the statute here thus has been neither contemporaneous with its enactment nor consistent since the statute came into law. As discussed above, it also lacks support in the plain language of the statute. While we do not wholly discount the weight to be given to the 1988 guideline, its persuasive value is limited when judged by the standards set forth in Skidmore. We are of the view that, even when considered in combination with petitioners' other arguments, the EEOC's interpretation is insufficiently weighty to overcome the presumption against extraterritorial application.

Justice Scalia concurred in the result, but took issue with the Court's construction of *Chevron*.[270] He construed *Arabian American* as holding only that, because the EEOC lacked rulemaking power, its interpretations were not entitled to *Chevron* deference. Thus, if the EEOC had held such power, its interpretations would have been entitled to deference. Justice Scalia viewed this distinction as ill-conceived.[271] He argued that the Court's distinction between "legislative rules" and "other action" was an "anachronism" "in an era when our treatment of agency positions is governed by *Chevron*."[272] He noted that, in its prior holding in *EEOC v. Commercial Office Products Co.*,[273] the Court had flatly stated that "the EEOC's interpretation of ambiguous language need only be reasonable to be entitled to deference."[274] He concluded by suggesting that the Court's present decision left the state of the law "unsettled."[275]

The *Commercial Office Products* case dealt with the meaning of the word "terminate" in the Civil Rights Act of 1964.[276] The EEOC, the agency responsible for enforcing the Act, had previously interpreted the provision. At the beginning of his majority opinion, Justice Marshall flatly stated that the EEOC's interpretation of the Civil Rights laws was entitled to deference: "It is axiomatic that the EEOC's interpretation of Title VII, for which it has primary enforcement responsibility, need not be the best one by grammatical or any other standards. Rather, the EEOC's interpretation of ambiguous language need only be reasonable to be entitled to deference."[277] Justice Marshall found that the EEOC's interpretation was, in fact, reasonable: "The reasonableness of the EEOC's interpretation of 'terminate' in its statutory context is more than amply supported by the legislative history of Title VII's

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Id. (citations omitted).

270. *Id.* at 1236.

271. *Id.* According to Justice Scalia,

> The case relied upon for the proposition that the EEOC's interpretations have only the force derived from their "power to persuade" was decided in an era when we were disposed to give deference (as opposed to "persuasive force") only to so-called "legislative regulations." The reasoning of *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976) was not that the EEOC (singled out from other agencies) was not entitled to deference, but that the EEOC's guidelines, like the guidelines of all agencies without explicit rulemaking power, could not be considered legislative rules and therefore could not be accorded deference.
>
> In an era when our treatment of agency positions is governed by *Chevron*, the "legislative rules vs. other action" dichotomy of *Gilbert* is an anachronism and it is not even a correct description of that anachronism to say that Gilbert held that the EEOC (as opposed to all agency action other than legislative rules) is not entitled to deference.

Id. (citations omitted).

272. *Id.*

273. 486 U.S. 107 (1988).

274. *Id.* at 115.

275. *Arabian Am. Oil*, 111 S. Ct. at 1236.

276. 42 U.S.C. § 706(c) (1982).

277. *Commercial Office Products*, 486 U.S. at 115.

deferral provisions, the purposes of those provisions, and the language of other sections of the Act, as described in detail below. Deference is therefore appropriate."[278] As a result, the Court decided to defer.[279] Interestingly, not a single justice suggested that *Chevron* should not be applied to EEOC interpretations.[280]

C. *Inconsistency With Prior Judicial Decisions*

The Court has also avoided *Chevron* by holding that deference is not required when an agency's interpretation conflicts with the Court's prior decisions. In a case decided just last year, *Lechmere, Inc. v. NLRB*,[281] the Court used this principle to reject an administrative interpretation. The case involved the question of whether a company could preclude union organizers from entering the company's parking lot to place handbills on the windshields of employee cars. The employer denied the organizers access to the lot. The employer did allow the organizers to distribute handbills from a grassy strip, as well as to picket from that same area. In addition, the organizers were able to directly contact some twenty percent of the employees. The NLRB had held that, in denying union organizers access to its lot, the employer had engaged in an unfair labor practice prohibited by the National Labor Relations Act (NLRA).

In *Lechmere*, the Court rejected the NLRB's interpretation. Justice Thomas, writing for the majority, began by stating, "Before we reach any issue of deference to the Board, we must first determine whether *Jean Country*—at least as applied to nonemployee organizational trespassing—is consistent with our past interpretation of § 7."[282] He justified this position by noting, "'Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of stare decisis, and judge an agency's later interpretation of the statute against our prior determination of the

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278. *Id.* at 115-16.

279. The majority viewed the agency's interpretation as follows:

> To be sure, "terminate" also may bear the meaning proposed by respondent. Indeed, it may bear that meaning more naturally or more frequently in common usage. But it is axiomatic that the EEOC's interpretation of Title VII, for which it has primary enforcement responsibility, need not be the best one by grammatical or any other standards. Rather, the EEOC's interpretation of ambiguous language need only be reasonable to be entitled to deference .... The reasonableness of the EEOC's interpretation of "terminate" in its statutory context is more than amply supported by the legislative history of the deferral provisions of Title VII, the purposes of those provisions, and the language of other sections of the Act, as described in detail below. Deference is therefore appropriate.

Id.

280. Justice Stevens, joined by Justices Rehnquist and Scalia, felt that the majority's decision was inconsistent with the statute's "plain language." *Id.* at 126. Justice O'Connor concurred but disagreed with the majority's conclusion that the agency's interpretation was "the only one permissible." *Id.* at 125.

281. 112 S. Ct. 841 (1992).

282. *Id.* at 847.

statute's meaning.'"[283] Finding that the agency's interpretation conflicted with the Court's prior interpretation, the Court refused to defer.

Justice White, joined by Justice Blackmun, dissented. They argued that the Board's interpretation was entitled to deference "'so long as it [was] rational and consistent with the Act, . . . even if [the Court] would have formulated a different rule had [it] sat on the Board.'"[284] They argued that the Court's role was "narrow": "The Board's application of the rule, if supported by substantial evidence on the record as a whole, must be enforced."[285]

The Court has refused to defer in other cases on similar grounds. In its recent decision in *Presley v. Etowah County Commission*,[286] the Court first interpreted the statute in question. Only after the Court had reached its own conclusions regarding the statute's meaning and only after taking into account its prior decisions, did the Court turn its attention to the agency's interpretation. Finding that the agency's interpretation conflicted with the Court's position, the Court rejected the agency's position. Similarly, in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*,[287] the Court rejected an administrative interpretation holding that "[f]or a century," the Court interpreted the statute differently.[288]

Justice White, dissenting in *Lechmere*, argued that the Court's decision seemed inconsistent with *Chevron* and some of the Court's later decisions. He argued that, if the prior interpretation had been rendered by the Board rather than by the Court, the Board would have been free to change its interpreta-

283. *Id.* at 847-48 (quoting Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 131 (1990)).

284. *Id.* at 850 (White, J., dissenting) (quoting NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 787 (1990)).

285. *Id.*

286. 112 S. Ct. 820 (1992).

287. 497 U.S. 116 (1990).

288. *Id.* at 130-31.

tion.[289] He wondered why the Board should not be similarly free to alter the Court's interpretation.[290]

Justice White based his argument on several post-*Chevron* decisions which suggested that, if an interpretive question involves a policy choice, then the agency responsible for the regulatory scheme should be free to make that choice. He also based his argument on decisions like *Chevron*, which had held that regulatory interpretations were not binding.[291] Thus, if an agency makes a policy choice and later determines that its choice was ill-advised, the agency is free to make a different choice (provided, of course, that it offers a reasoned explanation for its change of position).[292] In *Rust v. Sullivan*,[293] for example, the Court stated that "[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."[294] The Court went on to state that "'[a]n initial agency interpreta-

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289. *Lechmere*, 112 S. Ct. at 853 (White, J., dissenting). Justice White stated:

> Had a case like *Babcock* been first presented for decision under the law governing in 1991, I am quite sure that we would have deferred to the Board, or at least attempted to find sounder ground for not doing so. Furthermore, had the Board ruled that third parties must be treated differently than employees and held them to the standard that the Court now says *Babcock* mandated, it is clear enough that we also would have accepted that construction of the statute. But it is also clear, at least to me, that if the Board later reworked that rule in the manner of *Jean Country*, we would also accept the Board's change of mind . . . .
>
> As it is, the Court's decision fails to recognize that *Babcock* is at odds with the current law of deference to administrative agencies and compounds that error by adopting the substantive approach *Babcock* applied lock, stock and barrel. And unnecessarily so, for, as indicated above, *Babcock* certainly does not require the reading the Court gives it today, and in any event later cases have put a gloss on *Babcock* that the Court should recognize.

Id.

290. *Id.*

291. *See, e.g.*, Rust v. Sullivan, 111 S. Ct. 1759, 1769 (1991). In *Chevron*, the Court stated:

> The fact that the agency has from time to time changed its interpretation of the term "source" does not, as respondents argue, lead us to conclude that no deference should be accorded the agency's interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis. Moreover, the fact that the agency has adopted different definitions in different contexts adds force to the argument that the definition itself is flexible, particularly since Congress has never indicated any disapproval of a flexible reading of the statute.

Chevron, 467 U.S. at 863-64.

292. *Rust*, 111 S. Ct. at 1769.

293. 111 S. Ct. 1759 (1991).

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

> 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

tion is not carved in stone.'"[295] An agency is not required to 'establish rules of conduct to last forever,' but rather must be allowed to "adapt its rules and policies to the demands of changing circumstances."[296]

IV. CONCLUSION

As the foregoing discussion illustrates, the Supreme Court does not apply *Chevron* in a routine or mechanical way. The Court examines a statute's language, purpose, structure, and legislative history. The Court also uses various canons of construction. As a result, in order for an administrative interpretation to receive *Chevron* deference, it must survive an involved process of judicial review. Many interpretations perish during that process. The Court finds that Congress has not been silent or ambiguous with respect to an interpretive issue[297] or it rejects the agency's interpretation as unreasonable.[298]

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engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis. 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. (citations omitted). The Court concluded that "the Secretary amply justified his change of interpretation with a 'reasoned analysis.'" *Id.*; *see also* Pauley v. Bethenergy Mines, Inc., 111 S. Ct. 2524, 2535 (1991).

295. *Rust*, 111 S. Ct. at 1769 (quoting *Chevron*, 467 U.S. at 863-64).

296. Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983); *see also* Rust v. Sullivan, 111 S. Ct. 1759, 1769 (1991) ("We find that the Secretary amply justified his change of interpretation with a "reasoned analysis.").

297. *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., 496 U.S. 633, 648 (1990); University of Cal. v. Public Employment Relations Bd., 485 U.S. 589, 602 (1988) (White, J., concurring); NLRB v. United Food & Commercial Workers, 484 U.S. 112, 123 (1987); *see also* Anthony, *supra* note 5, at 18.

298. In Sullivan v. Zebley, 493 U.S. 521 (1990), the Court concluded that the agency's interpretation was "'manifestly contrary to the statute'" and therefore exceeded its authority. *Id.* at 541 (quoting *Chevron*, 467 U.S. at 844). Justice White, joined by the Chief Justice, disagreed. *Id.* at 541-48. After engaging in extensive analysis, he stated: "In sum, because I cannot conclude that the Secretary's method for evaluating child-disability claims is an impermissible construction of the Act, I dissent." *Id.* at 548.

Similarly, in Sullivan v. Stroop, 496 U.S. 478 (1990), the majority concluded that the agency's interpretation was reasonable: "Since the Secretary's interpretation of the § 602(a)(8)(A)(vi) disregard rule incorporates the definition of 'child support' that we find plain on the face of the statute, our statutory inquiry is at end." *Id.* at 485. Three justices, led by Justice Blackmun, disagreed: "Since the Secretary's interpretation of the § 602(a)(8)(A)(vi) disregard is not compelled by the language of the statute, and is not supported by its purpose and legislative history, it is not entitled to deference and should be rejected by this Court." *Id.* at 493. At the beginning of his dissent, Justice Blackmun noted:

> Today the Court holds that the plain language of a statute applicable by its terms to "any child support payments" compels the conclusion that the statute does

In many instances, despite *Chevron's* rhetoric, the Court seems fairly undeferential. Although the Court talks about deference, it is quite willing to reject administrative interpretations. Often the justices disagree about how *Chevron* should be applied. A majority of justices may conclude that a statute is plain, or that the agency's interpretation conflicts with the statute's structure or legislative history, while other justices reach different conclusions. Of course, the potential for disagreement is enhanced by the vagaries of the interpretive process.

Thus, *Chevron* did not make agency interpretations "binding" or give them the "force and effect of law." Indeed, one might argue about whether courts ever really defer—in the sense that they accept an interpretation with which they disagree. The justices themselves often contend that deference principles are applied in a result-oriented manner. In *Betts*, the dissenters argued:

> The majority's derogation of this dual agency interpretation leaves one to wonder why, when important civil rights laws are at issue, the Court fails to adhere with consistency to its so often espoused policy of deferring to expert agency judgment on ambiguous statutory questions . . . .

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not apply to benefits paid to the dependent child of a disabled, retired, or deceased parent for the express purpose of supporting that child. Because I am unpersuaded that this crabbed interpretation of the statute is neither compelled by its language nor consistent with its purpose, and arbitrarily deprives certain families of a modest but urgently needed welfare benefit, I dissent.

Id. at 485-86.

In Board of Governors v. Dimension Financial Corp., 474 U.S. 361, 368 (1986), the Court rejected the Federal Reserve Board's interpretation of the Bank Holding Company Act. The case turned on the definition of a "demand deposit." The Board promulgated a rule under which it provided that a demand deposit was one, "not that the depositor has a 'legal right to withdraw on demand,' but a deposit that as a matter of practice is payable on demand.'" *Id.* The Court rejected this interpretation noting that "[t]he Board's definition of 'demand deposit,' therefore, is not an accurate or reasonable interpretation of § 2(c)." *Id.* In the Court's extended analysis, it noted that "the traditional deference courts pay to agency interpretations is not to be applied to alter the clearly expressed intent of Congress." *Id.* The Court concluded that the agency had acted contrary to that intent:

> Application of this standard to the Board's interpretation of the "demand deposit" element of § 2(c) does not require extended analysis. By the 1966 amendments to § 2(c), Congress expressly limited the Act to regulation of institutions that accept deposits that "the depositor has a legal right to withdraw on demand." 12 U.S.C. § 1841(c). The Board would now define "legal right" as meaning the same as "a matter of practice." But no amount of agency expertise—however sound may be the result—can make the words "legal right" mean a right to do something "as a matter of practice." A *legal* right to withdraw on demand means just that: a right to withdraw deposits without prior notice or limitation. Institutions offering NOW accounts do not give the depositor a legal right to withdraw on demand; rather, the institution itself retains the ultimate legal right to require advance notice of withdrawal. The Board's definition of "demand deposit," therefore, is not an accurate or reasonable interpretation of § 2(c).

Id.

> The majority today puts aside conventional tools of statutory construction and, relying instead on artifice and invention, arrives at a draconian interpretation of the ADEA which Congress most assuredly did not contemplate, let alone share, in 1967, in 1978, or now . . . .[299]

In *Maislin*, the dissenters argued that "[f]our Courts of Appeals have expressly invoked *Chevron* in the course of upholding the agency action challenged in this case, but this Court does not deem *Chevron* . . . worthy of extended discussion."[300] The dissenters concluded by noting that "[t]he Court dismisse[d] *Chevron* by means of a conclusory assertion that the agency's interpretation [was] inconsistent with 'the statutory scheme as a whole.'"[301]

Whether *Chevron* is applied mechanically by the lower federal courts is more debatable. Obviously, the *Chevron* decision, as it has been interpreted and applied by the Supreme Court, does not preclude the lower courts from exercising discretion. But whether the lower courts do, in fact, exercise that discretion is another matter. In a recent study, Professors Peter Schuck and Donald Elliott empirically analyzed post-*Chevron* lower court decisions.[302] In this study, they sought to determine "how the Court's *Chevron* decision, as clarified and reaffirmed eight months later in *Chemical Manufacturers Association v. NRDC*, had affected appellate court review of agency action."[303] Their conclusion, after examining numerous decisions, was that the lower courts heeded *Chevron's* rhetoric: "We are reassured to learn from our study that the Supreme Court's law does indeed matter to reviewing courts, and that their law, in turn, matters to agencies."[304] However, they found a significant statistical disparity between the D.C. Circuit and the other circuits. The D.C. Circuit was decidedly less deferential than the other circuits.[305]

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299. Public Employees Retirement Sys. of Ohio v. Betts, 492 U.S. 158, 193-94 (1989).

300. Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 152 (1990).

301. *Id.* at 116.

302. Schuck & Elliott, *supra* note 20.

303. *Id.* at 991.

304. *Id.* at 1061.

305. The study noted:

> When we compare the D.C. Circuit's affirmance rate with the national circuit court average in 1985, just after *Chevron*, we find that the Supreme Court's message did not immediately induce greater deference by the D.C. Circuit. Between 1984 and 1985, while the national average affirmance rate rose from 70.9% to 81.3%, the affirmance rate in the D.C. Circuit actually *declined* from 58.6% to 52.6%. Further analysis using our research methodology could shed light on the particular techniques that the D.C. Circuit used to buck the national post-*Chevron* trend of increasing deference, although our dataset may be too small to permit drawing statistically significant conclusions on this issue. In any event, by 1988 the gap between the D.C. Circuit and the other circuit courts had narrowed (61.5% versus 75.5%). Still, affirmance rates remained almost 15% lower in the D.C. Circuit than the average for the other circuits.

Id.

The results of this study are not surprising. Indeed, they confirm another important fact: even before *Chevron*, the federal courts were "deferential" to agency interpretations. The study notes that, in 1975, almost ten years before *Chevron* was decided, all circuits (including the D.C. Circuit) were affirming agency action about sixty percent of the time. There are good reasons. Judges are busy people, and they are burdened by clogged dockets. Moreover, judges can be intimidated by administrative cases which often involve highly complex and specialized issues. Thus, even though most judges will find a way to reject agency interpretations with which they are dissatisfied, they will ordinarily defer.

In the pre-*Chevron* era, Senator Dale Bumpers of Arkansas alleged that courts routinely defer to agency interpretations thereby making it difficult or impossible to successfully challenge administrative action.[306] In his view, deference principles forced citizens to "play with a deck [that was] legally stacked" against them.[307] Because of his concerns about the deference rule, Senator Bumpers promoted a legislative initiative designed to abolish the deference rule but later modified to restrict the rule's application.[308] Most

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306. The Senator argued:

> There is a long-standing doctrine of administrative law that courts will defer to the interpretation adopted by an agency of its governing statute. Although the doctrine was well founded in its inception, in practice, at least in recent years, it has led to courts virtually rubber-stamping every agency action that comes before them for review. Chief Justice Marshall said that it is emphatically the province of the judicial department to declare what the law is, and S. 2408 would simply amend the Administrative Procedure Act to declare that principle unequivocally. The bill provides that courts shall review de novo all questions of law that come before them in suits to review agency action, and that rules and regulations issued by an agency shall not be upheld unless the court is persuaded clearly and convincingly that the rules are within the power that Congress intended the agency to exercise.

122 Cong. Rec. 22,012 (1976).

307. 125 Cong. Rec. 414 (1979). The Committee on the Judiciary, in a report on The Regulatory Reform Act, agreed:

> When a citizen challenges an agency's rule or order in the courts, the odds should not be stacked against him by judicial presumptions in favor of the agency. The judicially created doctrine of deference to agency interpretations of law, which some courts have elevated to a virtual presumption of correctness, places the bureaucratic thumb on the scales of justice, weighing them against the citizen. We intend this amendment to reestablish an equal balance.

S. REP. NO. 274, 97th Cong., 1st Sess. 170 (1981).

308. The 1982 version of the Bumpers Amendment would have amended the Administrative Procedure Act's judicial review provisions to read as follows:

> (a) To the extent necessary to decision and when presented, the reviewing court shall independently decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of agency action. . . .
>
> (c) In making determinations concerning statutory jurisdiction or authority under subsection (a)(2)(C) of this section, the court shall require that action by the agency is within the scope of the agency jurisdiction or authority on the basis of the language of the statute or, in the event of ambiguity, other evidence of ascertainable

legal commentators disagreed with Senator Bumpers, and argued that the amendment should not be adopted.[309] The Amendment did not pass.

There is, in fact, little need for the Bumpers' Amendment. The lower courts never give unquestioning deference. On the contrary, they are surprisingly creative about how they limit doctrines like *Chevron*. They use all of the techniques employed by the Supreme Court, as well as some others of their own invention. In some cases, courts have avoided *Chevron* by holding that certain issues are committed to the courts because they involve "pure questions of statutory interpretation,"[310] jurisdictional questions,[311] or preemption questions.[312] Courts also refuse to defer on many other

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> legislative intent. In making determinations on other questions of law, the court shall not accord any presumption in favor of or against agency action, but in reaching its independent judgment concerning an agency's interpretation of a statutory provision, the court shall give the agency interpretation such weight as its warrants, taking into account the discretionary authority provided to the agency by law.

S. 1080, 98th Cong., 1st Sess. (1983).

309. *See* Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1 (1983); James T. O'Reilly, *Deference Makes a Difference: A Study of Impacts of the Bumpers Judicial Review Amendment*, 49 U. CINN. L. REV. 739 (1980); Weaver, *supra* note 47, at 597-600; David R. Woodward & Ronald M. Levin, *In Defense of Deference: Judicial Review of Agency Action*, 31 ADMIN. L. REV. 329 (1979).

310. In other cases, they hold that deference is only required when agencies are making policy decisions and is not required when an agency decides a purely legal issue. *See, e.g.*, American Mining Congress v. EPA, 824 F.2d 1177, 1183 n.5 (D.C. Cir. 1987) ("This court recently construed the *Cardoza-Fonseca* opinion as teaching that 'courts need not defer to agency opinions on 'pure questions' of interpretation.'"); International Union, United Auto., Aerospace & Agric. Implement Workers Union of Am. v. Brock, 816 F.2d 761, 764 (D.C. Cir. 1987); Veterans Admin. Med. Ctr. v. Federal Labor Relations Auth., 732 F.2d 1128, 1132 (2d Cir. 1984); March v. United States, 506 F.2d 1306, 1316 (D.C. Cir. 1974) (The court noted that "administrative construction of the statutory language under scrutiny in no way drew upon the experience or expertise of the Defense Department. The interpretive problem before the Department was the meaning of statutory language pertinent to a matter completely outside its field of specialty, but well within the area entrusted to the courts."); Tocci Corp. v. Yankee Bank for Fin. & Sav., 690 F. Supp. 1127, 1130-31 (D. Mass. 1988) (the court refuses to defer noting that the FDIC is acting as receiver and should not be allowed to adjudicate claims made against it.); A.L. Labs, Inc. v. EPA, 674 F. Supp. 894, 899 (D.D.C. 1987) (where the court notes that, on questions of law, "administrative judgment is subject to plenary review." The court also notes that "[g]reater reliance on the EPA's understanding would be proper only if construction of the statute depended on the agency's expertise.").

311. *See, e.g.*, Michigan Consol. Gas Co. v. Federal Energy Regulatory Comm'n, 883 F.2d 117, 122 n.3 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1079 (1990); New York Shipping Ass'n v. Federal Maritime Comm'n, 854 F.2d 1338, 1363 n.9 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1041 (1989); Kokechik Fishermen's Ass'n v. Secretary of Commerce, 839 F.2d 795, 807 (D.C. Cir. 1988) (Starr, J., dissenting), *cert. denied*, 488 U.S. 1004 (1989).

312. Some courts have held that, if the question is whether federal law preempts state law, no deference is due. *See* Illinois Commerce Comm'n v. ICC, 879 F.2d 917, 921 (D.C. Cir. 1989) ("We have recognized that the necessity and propriety of *Chevron* deference in contests over preemption remain open questions, and we have no occasion to resolve them here. For on

grounds: that interpretations conflict with the Constitution;[313] that they are incorrect;[314] that the governing statute is clear so that there is no need for interpretation;[315] that the official who issued the interpretation is not one entitled to deference;[316] that the agency's interpretation conflicts with one of the canons of construction;[317] that an interpretive question lies outside the

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each of the two statutory provisions upon which the Commission relies, we find that it fails to meet either set of standards."); Barrett v. Adams Fruit Co., 867 F.2d 1305, 1307 (11th Cir. 1989), *aff'd*, 494 U.S. 638 (1990); City of New York v. FCC, 814 F.2d 720, 726 (D.C. Cir. 1987), *aff'd*, 486 U.S. 57 (1988).

313. *See, e.g.*, Keeffe v. Library of Congress, 777 F.2d 1573, 1579-82 (D.C. Cir. 1985) (A Library of Congress employee was a delegate to the Democratic National Convention. Library officials concluded that she had violated the Library's conflict of interest prohibitions and took disciplinary action. The employee argued that the agency's disciplinary decision violated her First Amendment right to freedom of speech, and that the policy was unconstitutionally vague. The court reversed the disciplinary decision on vagueness grounds.); L.R. Willson & Sons, Inc. v. Donovan, 685 F.2d 664, 674-77 (D.C. Cir. 1982); Brennan v. Occupational Safety & Health Rev. Comm'n, 513 F.2d 713, 716 (8th Cir. 1975) ("Moreover, we decline to adopt the Secretary's interpretation of the regulation for reasons of due process. Where, as here, the interpretation derives little support from the language of the regulation, it would be fundamentally unfair to impose upon an employer civil penalties for its violation."); *see also* United States v. Thomas, 864 F.2d 188 (D.C. Cir. 1988); Fluor Constructors, Inc. v. Occupational Safety & Health Rev. Comm'n, 861 F.2d 936, 941 (6th Cir. 1988).

314. *See, e.g.*, Donovan v. Castle & Cooke Foods, 692 F.2d 641 (9th Cir. 1982).

315. *See, e.g.*, Consolidated Rail Corp. v. United States, 855 F.2d 78, 83 (3d Cir. 1988); Drake v. Pierce, 698 F. Supp. 1523, 1530 (W.D. Wash. 1988) ("Given the plain meaning of the statutory language, the structure of the NHA, and the legislative history, the court finds Congress' intent clear and unambiguous with respect to the primacy of federal preferences in the selection of *each* family-participant in the Certificate and Voucher Programs. Because the Court finds Congress' intent easily ascertainable, the court cannot defer to the Secretary's interpretation of the statute.").

316. *See, e.g.*, Caiola v. Carroll, 851 F.2d 395, 399 (D.C. Cir. 1988) (court notes that interpretation is not to be given "dispositive weight," but rather is to be accorded only a "modicum of respect."); American Fed'n of Gov't Employees, AFL-CIO v. Federal Labor Relations Auth., 840 F.2d 947, 952 (D.C. Cir. 1988) (court noted that counsel's interpretation "plainly lacks the credentials of a position that agency heads have staked out after adjudicative or rulemaking procedures allowing a full vetting of alternatives"); Ames v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 567 F.2d 1174, 1177 n.3 (2d Cir. 1977) ("We cannot accept the Commission's current litigating position as an 'interpretation' by the Commission, which the dissenting opinion calls it."); *see also* Church of Scientology of Cal. v. IRS, 792 F.2d 153, 162 n.4 (D.C. Cir. 1986), *aff'd*, 484 U.S. 9 (1987) ("There is some question, to begin with, whether an interpretive theory put forth only by agency counsel in litigation, which explains agency action that could be explained on different theories, constitutes an 'agency position' for purposes of *Chevron*."). *But see* Eastern Paralyzed Veterans Ass'n of Pa., Inc, v. Sykes, 676 F. Supp. 597, 602-04 (E.D. Pa. 1987) (court forced to construe Department of Transportation regulations relying on an *amicus curiae* brief submitted by DOT and treating the brief as an administrative interpretation and defers to it.).

317. *See, e.g.*, United States v. Mersky, 361 U.S. 431, 440-41 (1960).

agency's authority;[318] that the agency has taken inconsistent positions regarding the meaning of regulatory provisions;[319] that the agency should have rendered its interpretation using legislative procedures;[320] or that the agency's interpretation is impermissibly retroactive.[321] Thus, if *Chevron* makes agency interpretations "binding" and gives them the "force and effect of law," thereby creating a virtual "rubber stamp" for agency action, it is fairly clear that judges often misplace the stamp. The recent study of lower courts does not contradict this conclusion. It shows that, despite the tendency for deference, the lower courts overturn agency action a significant percentage of the time.[322]

In the final analysis, *Chevron* did not fundamentally reshape administrative law. Some lower courts may have been intimidated by *Chevron's* rhetoric, but those courts may gradually reassert themselves as they realize that *Chevron* did not strip them of their interpretive powers. As the foregoing discussion suggests, "[t]he judiciary . . . [remains] the final authority on issues

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318. *See, e.g.*, Fort Knox Indep. Sch. v. Federal Labor Relations Auth., 875 F.2d 1179, 1180 (6th Cir. 1989) (stating that "[i]t is clear that we need not defer to the FLRA's interpretations and legal conclusions in this case, because 'such deference only applies when the FLRA interprets the FSLMRA.'" (quoting Fort Stewart Sch. v. Federal Labor Relations Auth., 860 F.2d 396, 419 (11th Cir. 1988))); West Point Elementary Sch. Teachers Ass'n v. Federal Labor Relations Auth., 855 F.2d 936, 940 (2d Cir. 1988); Department of the Treasury v. Federal Labor Relations Auth., 838 F.2d 1341, 1342 (D.C. Cir. 1988); Department of the Navy v. Federal Labor Relations Auth., 836 F.2d 1409, 1410 (3d Cir. 1988) ("[A]n agency decision is not entitled to such deference when it interprets another agency's statute."); American Fed'n of Gov't Employees v. Federal Labor Relations Auth., 803 F.2d 737, 740 n.1 (D.C. Cir. 1986); Corning Glass Works v. United States Int'l Trade Comm'n, 799 F.2d 1559, 1565 n.5 (Fed. Cir. 1986) (noting its obligation to defer to an agency's interpretation of its governing statute, but concluded that "the Commission is not charged with administration of the patent statute." Therefore, the court need not "defer to its interpretation of patent law.").

319. *See, e.g.*, American Mining Congress v. EPA, 824 F.2d 1177, 1181-82 (D.C. Cir. 1987). The court stated:

> We observe at the outset of our inquiry that EPA's interpretation of the scope of its authority under RCRA has been unclear and unsteady. As previously recounted, EPA has shifted from its vague "sometimes discarded" approach of 1980 to a proposed exclusion from regulation of all materials used or reused as effective substitutes for raw materials in 1983, and finally, to a very narrow exclusion of essentially only materials processed within the meaning of the "closed loop" exception under the final rule. We emphasize, therefore, that we are confronted with neither a consistent nor a longstanding agency interpretation. Under settled doctrine, "[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."

Id.

320. *See, e.g.*, First Bancorp. v. Board of Governors of Fed. Reserve Sys., 728 F.2d 434 (10th Cir. 1984); Ford Motor Co. v. FTC, 673 F.2d 1008, 1009 (9th Cir. 1981), *cert. denied*, 459 U.S. 999 (1982).

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

322. Schuck & Elliott, *supra* note 20.

of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."[323] "[D]eference is not abdication."[324]

323. *Chevron*, 467 U.S. at 843 n.9.

324. *Arabian Am. Oil*, 111 S. Ct. at 1237 (Scalia, J., concurring) (He would have applied deference principles, but rejected the agency's interpretation because it was unreasonable.); *see also* Presley v. Etowah County Comm'n, 112 S. Ct. 820, 831 (1992) ("Deference does not mean acquiescence").