DISCARDED DEFERENCE: JUDICIAL INDEPENDENCE IN INFORMAL AGENCY GUIDANCE

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I. INTRODUCTION

In earlier generations, statutory schemes were not nearly as complex and intricate as the those administered by agencies today. Seventy years ago, the instructions to complete a tax return were two pages. Today, those same instructions are 157 pages, more than double the number of pages of instructions since 1985, the year before that last

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time that the Tax Code was simplified.[1] The Internal Revenue Code itself is approximately 1.5 million words long,[2] and in excess of 9,500 pages of text, not counting five volumes of regulations.[3]

Courts have much less familiarity with complex statutory schemes with only infrequent ability to understand the intricacies of a specific aspect of that scheme as may arise through litigation. Agencies, on the other hand, are focused on the resolution of specific issues, but in the context of its impact on an entire statutory scheme because the responsibility of an agency is to administer and enforce a statutory scheme over which it contributes substantial expertise.

Agencies make policy choices and courts make decisions. Those decisions should respect the policy choices considered by agencies in their capacity as experts in a

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[1] See Instructions for Form 1040, U.S. Individual Income Tax Return, General Instructions, Schedules A & B, C, D, E, F, H, J, R, SE (2005).

[2] *See* Staff of the Joint Committee on Taxation, 107th Cong., Study of the Overall State of the Federal Tax System and Recommendations for Simplification, Pursuant to Section 8022(3)(B) of the Internal Revenue Code of 1986 (vol. I), 4 (Comm. Print 2001). Since 2001, the number of words has grown considerably.

[3] The Complete Internal Revenue Code - All the Income, Estate & Gift, Employment, Excise, Procedure and Administrative Provisions, Research Institute of America, (December 2004); Federal Tax Regulations - Complete text of all final, temporary and proposed Treasury Regulations pertaining to income tax, estate tax, gift tax, employment tax, procedure, administration, and excise taxes, Research Institute of America, (January 2004).

Members of Congress claim even greater complexity. *See* Mark Kennedy (R-MN), Much-Needed Tax Relief, http://markkennedy.house.gov/cgi-data/news/files/12.shtml (April 8, 2003) ("The federal tax code, with its 44,000 pages, 5.5 million words, and 721 different forms, is a patchwork of complexity and a testament to confusion over common sense."); Dave Hobson (R-OH), Working for Tax Relief and Fairness, http://www.house.gov/hobson/taxweek.htm (April 11, 2000) ("[T]he current tax code, which at 1.3 million pages is twice the length of Tolstoy's War and Peace") (April 11, 2000); John Hostettler (R-IN), Taxing America's Patience, http://www.house.gov/hostettler/Issues/Hostettler-issues-1997-04-08-taxes-and-irs.htm (April 8, 1997) ("the Internal Revenue Code and regulations add up to one million words and is nearly seven times the length of the Bible"); Vito Fossella (R-NY), Press Announcement: Outraged Over Shocking Abuses By IRS, Fossella Cosponsors Bill to Abolish Tax Code, http://www.house.gov/fossella/Press/pr_50698a.htm (May 6, 1998) ("[T]he tax code runs 17,000 pages and contains a mind-boggling 5.5 million words. By way of comparison, War and Peace is only 1,444 pages and the Bible checks in at 1,291 pages").

specialized area of law. The manner in which those policy choices are respected is through deference to agency interpretations.

Deference, then, is a choice between an agency charged with administering a statute and judicial independence in reviewing policy choices by agencies. In many cases, if a statute does not identify a particular result, an agency attempts to fill the gaps in the statute through formal and informal guidance. The question of deference considers the ambiguity and either directs a court to defer to an agency interpretation or to substitute its judgment for the judgment of an agency if it believes that its reading of a statute better fills the gaps left by Congress than the interpretation by an agency.

In 1984, the United States Supreme Court decided *Chevron*,[4] determining that a reasonable interpretation of an agency should trump independent judicial determination. At the time, this decision was viewed as a path breaking decision in administrative law. Seventeen years later, the Supreme Court, in *United States v. Mead*,[5] declined to extend the same type of deference under *Chevron* to more informal agency pronouncements.[6] Instead, *Mead* resurrected the long-forgotten, intermediate standard of deference originally announced by the Supreme Court in 1944 in *Skidmore v. Swift & Co.*[7] Combined with *Chevron*, *Skidmore* directs courts along a sliding scale of deference in an effort to quantify the degree to which courts defer to agency interpretations of law, with the quantity of deference ranging from de novo review to deference based on

[4] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[5] *United States v. Mead Corporation*, 533 U.S. 218 (2001).

[6] *United States v. Mead Corporation*, 533 U.S. 218, 234 (2001).

[7] *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

persuasiveness to deferring to the views of an agency as long as its interpretation is reasonable.

As agencies disseminate more informal guidance and more frequently, the discretion given to agency determinations becomes more and more significant. For example, the following table lists four of the 39 distinct categories of guidance issued to taxpayers by the Internal Revenue Service and the number of each specific type of informal guidance issued for the last five years.[8]

Year	Revenue Rulings[9]	Revenue Procedures[10]	Notices[11]	Announcements[12]	Private Letter Rulings[13]

[8] *Inventory of IRS Guidance Documents -- A Draft,* 88 TAX NOTES (TA) 305 (July 17, 2000).

[9] Revenue rulings describe a set of hypothetical facts, apply those facts to the law, and offer a legal conclusion for all taxpayers concerning what the Internal Revenue Service believes the result would be in such a situation. *See Rev. Proc* 89-14, 1989-1 C.B. 814. "Revenue rulings . . . are published to provide precedents to be used in the disposition of other cases, and may be cited and relied upon for that purpose." *Id*. Moreover, revenue rulings involve substantive law and reflect conclusions responsive to the facts addressed in the ruling. *Id*. Finally, a revenue ruling is an official interpretation by the Service and is published in the Internal Revenue Bulletin. Treas. Reg. § 601.201(a)(6).

[10] Revenue procedures describe a "statement of procedure that affects the rights and duties of taxpayers or other members of the public under the Code and related statutes or information that, although not necessarily affecting the rights and duties of the public, should be a matter of public knowledge." Treas. Reg. § 606.601(d)(2)(i)(b).

[11] Notices describe a "public announcement that may contain guidance that involves interpretations of the Code or other provisions of the law. Notices may also be used for materials that would be appropriate for an announcement but for the need to preserve the guidance in the Cumulative Bulletin. For example, notices can be used to relate what regulations will say in situations where the regulations may not be published in the immediate future." Internal Revenue Manual 30.15.10. Moreover, a taxpayer may rely on a notice to avoid penalties. Treas. Reg. § 1.6661-3(b)(2).

[12] An announcement is a public pronouncement that can be used to summarize the law or regulations without making an independent, substantive interpretation. An announcement can be used to relate what regulations will say in situations where the regulations may not be published in the immediate future or may be used to notify taxpayers of the possibility of an election or the existence of a deadline to make an election. Announcements are not published in the Cumulative Bulletin. Moreover, a taxpayer may rely on an announcement to avoid penalties. Revenue Ruling 90-91.

[13] A private letter ruling is a written determination issued to a taxpayer by the Internal Revenue Service that interprets and applies the tax laws to the specific set of facts provided by the taxpayer. *Rev. Proc.* 2005-1, 2005-1 I.R.B. 1. Private letter rulings are issued to specific taxpayers and are binding on the Internal Revenue Service only with respect to the taxpayer that requested the private letter ruling. *Rev. Proc.* 2005-1, 2005-1 I.R.B. 1. Private letter rulings are often utilized by taxpayers to provide a degree of certainty regarding the tax consequences of a proposed transaction and are generally requested prior to completing the transaction. *See* Treas. Reg. § 601.201(b)(1) (Internal Revenue Service "issues rulings on prospective transactions and on completed transactions before the return is filed"). A taxpayer may not rely on a private letter ruling issued to another taxpayer. 26 U.S.C. § 6110(k)(3).

2001	66[14]	61[15]	84[16]	124[17]	1,990[18]
2002	91[19]	75[20]	115[21]	80[22]	2,011[23]
2003	128[24]	86[25]	81[26]	89[27]	1,792[28]
2004	113[29]	73[30]	83[31]	103[32]	1,810[33]
2005	79[34]	78[35]	101[36]	89[37]	1686[38]

[14] *See* 2001-53 I.R.B. 637.

[15] *See* 2001-53 I.R.B. 653.

[16] *See* 2001-53 I.R.B. 642.

[17] *See* 2001-52 I.R.B. 630.

[18] Based on a search of Westlaw database FTX-PLR from January 1, 2001 to December 31, 2001.

[19] *See* 2002-52 I.R.B. 991.

[20] *See* 2002-52 I.R.B. 997.

[21] *See* 2002-52 I.R.B. 999.

[22] *See* 2002-51 I.R.B. 980.

[23] Based on a search of Westlaw database FTX-PLR from January 1, 2002 to December 31, 2002.

[24] *See* 2003-52 I.R.B. 1247.

[25] *See* 2003-50 I.R.B. 1211.

[26] *See* 2003-51 I.R.B. 1223.

[27] *See* 2003-52 I.R.B. 1256.

[28] Based on a search of Westlaw database FTX-PLR from January 1, 2003 to December 31, 2003.

[29] *See* 2004-52 I.R.B. 1024.

[30] *See* 2004-51 I.R.B. 999.

[31] *See* 2004-52 I.R.B. 1030.

[32] *See* 2004-52 I.R.B. 1036.

[33] Based on a search of Westlaw database FTX-PLR from January 1, 2004 to December 31, 2004.

[34] *See* 2005-52 I.R.B. 1197.

[35] *See* Rev. Proc. 2005-78, 2005 WL 3257518 (Dec. 19, 2005).

[36] *See* 2005-52 I.R.B. 1219.

[37] *See* 2005-50 I.R.B. 1149.

[38] Based on a search of Westlaw database FTX-PLR from January 1, 2005 to December 31, 2005.

Like the Administrative Procedure Act in 1946, the intermediate persuasiveness standard was created in 1944 as a political solution and not a comprehensive evaluation of administrative efficiency or a debate over the fundamental role of the expansive administrative structure born of New Deal politics. The result was a political compromise between the proponents and opponents of the New Deal within the current system – a system which viewed the role of the court system as sole interpreters of the law.

The Supreme Court was not immune from the politics of the 1930s and 1940s and the 1944 intermediate deference standard was based on an open-ended factor analysis used by the courts when the views of an agency paralleled the views of the court. In other words, the system articulated by the Supreme Court favored judicial independence over administrative discretion.

There are, of course, a number of academic articles devoted to judicial review of agency interpretation of statutes.[39] This paper, however, focuses on the methodology courts use in determining the extent to which informal agency determinations should be given judicial deference. The factors articulated by the Supreme Court in 1944 to provide intermediate deference were arguably consistent with the state of the law in 1944 but are now based on considerations that no longer conform to a modern view of the law. These factors skew the deference issue in favor of de novo determinations by the

[39] *See e.g.* Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005); Torrey A. Cope, *Judicial Deference to Agency Interpretations of Jurisdiction After Mead*, 78 S. CAL. L. REV. 1327 (2005); Ryan C. Morris, *Substantially Deferring to Revenue Rulings After Mead*, 2005 B.Y.U. L. REV. 999 (2005); Cooley R. Howarth, Jr., *United States v. Mead Corp.: More Pieces for the Chevron/Skidmore Deference Puzzle*, 54 ADMIN. L. REV. 699 (2002); Michael P. Healy, *Spurious Interpretation Redux: Mead and the Shrinking Domain of Statutory Ambiguity*, 54 ADMIN. L. REV. 673 (2002); Russell L. Weaver, *The Emperor Has No Clothes: Christensen, Mead and Dual Deference Standards*, 54 ADMIN. L. REV. 173 (2002); John F. Coverdale, *Court Review or Tax Regulations and Revenue Rulings in the Chevron Era*, 64 GEO. WASH. L. REV. 35, 37 (1995).

judiciary at the expense of deference to agencies whose expertise and experience allow them to consider the entirety of a statutory scheme.

Finally, the persuasiveness intermediate level of deference – a standard in name only – should be abandoned in favor of an intermediate standard that considers appropriate factors in light of the advances in the law. Moreover, the intermediate deference standard should provide a more meaningful deference standard beyond mere persuasiveness to be applied by the courts in reviewing informal determinations of agencies charged with administering a body of law under the scope of their expertise.

This article considers informal guidance by the Internal Revenue Service as the basis for application of an intermediate deference doctrine that is equally applicable to other administrative agencies. In fact, the tax arena expands the consideration of deference beyond the three sphere progression of no deference, *Skidmore* deference, and *Chevron* deference. This fourth possibility resonates from the 1979 Supreme Court decision in N*ational Muffler Dealers Association, Inc. v. U.S.*[40] and is a second type of intermediate deference fitting on the sliding deference scale between *Skidmore* and *Chevron*.

National Muffler follows the similar factor process in determining whether deference is due to an administrative agency. These factors provide for a more appropriate methodology emerges for a determination of the amount of deference due to an administrative agency and a more appropriate standard is created for a determination of the amount of deference due to informal agency guidance.

II. THE SLIDING SCALE OF DEFERENCE – SKIDMORE TO CHEVRON

[40] 440 U.S. 472 (1979).

A. DEFERENCE STANDARDS

In general, there are three levels of deference a court may give agency determinations. One side of the spectrum provides no deference to an agency determination. At the opposite end is *Chevron* deference which accords broad deference to agency determinations. The recently re-energized intermediate step provides for deference under *Skidmore v. Swift &. Co.*[41]

B. DEFERENCE UNDER SKIDMORE

In *Skidmore*, seven employees of the Swift & Co. packing plant at Fort Worth, Texas, brought an action under the Fair Labor Standards Act[42] to recover overtime, liquidated damages, and attorneys' fees, totaling approximately $77,000.[43] The District Court rendered judgment denying this claim, and the Fifth Circuit Court of Appeals affirmed.[44] Central to the reasoning of both the District Court and the Fifth Circuit was the Administrator's interpretation of "working time" employed by the Administrator in Interpretive Bulletin No. 13.[45]

Under *Skidmore*, informal pronouncements such as rulings, interpretations, and agency opinions are entitled to deference based on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[46] Seventy years after *Skidmore*, the Supreme Court in *Mead* expanded the

[41] *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

[42] *29 U.S.C. § 201 et seq.*

[43] *Skidmore v. Swift & Co.*, 323 U.S. 134, 135 (1944).

[44] *Skidmore v. Swift & Co.*, 136 F.2d 112 (5th Cir. 1943).

[45] *Skidmore v. Swift & Co.*, 136 F.2d 112, 113 (5th Cir. 1943).

[46] *Skidmore*, 323 U.S. at 140.

open-ended factor analysis under *Skidmore* to include "the merit of [the] writer's thoroughness, logic, and expertness, its fit with prior interpretations, and any other sources of weight."[47] The result of *Skidmore* deference is that informal agency guidance is "not controlling upon the courts by reason of their authority, [but] do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[48] Thus, "[t]he default rule [is] one of independent judicial judgment. Deference to the agency interpretation [is] appropriate only if a court could identify some factor or factors that would supply an affirmative justification for giving special weight to the agency views."[49]

Skidmore, as opposed to *Chevron*, allows the reviewing court to choose a better rule, even if the agency interpretation is reasonable.[50] This rationale is confirmed by *Christensen v. Harris County*[51] in which the Supreme Court adopted the long-dormant and reemerging *Skidmore* deference doctrine, rejecting the agency's view and adopting a view that it thought reflected a better reading of the statute.[52] As a result, intermediate deference is determined based on array of factors developed by the Supreme Court in

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[47] *United States v. Mead Corp.*, 533 U.S. at 220.

[48] *Skidmore*, 323 U.S. at 140.

[49] Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 972 (1992).

[50] Interpretations by courts are nonetheless enforced by invoking an administrative agency to make a decision of the courts effective. Roscoe Pound, *The Limits of Effective Legal Action*, 27 INTERNATIONAL J. OF ETHICS 150, 153 (1917).

[51] 529 U.S. 576 (2000).

[52] *Christensen v. Harris County*, 529 U.S. 576 (2000). *See United States v. Mead Corp.*, 533 U.S. at 228 ("a court is free to accept or reject a position set forth in a revenue ruling on the basis of its evaluation of such factors as "the degree of the agency's care, its consistency, formality, and relative expertness, and . . . the persuasiveness of the agency's position."). Professor Ellen P. Aprill refers to this dichotomy as a choice of interpretative voices in which, under *Chevron*, if Congress has not spoken on a particular issue, the interpretative voice of an administrative agency fills the void while under *Skidmore*, the abyss is filled by the judicial voice that has final interpretative authority. Ellen P. Aprill, *The Interpretative Voice*, 38 LOY. L.A. L. REV. ___ (2006), Loyola Law School (Los Angeles) Legal Research Series, Research Paper 2005-3, http://ssrn.com/abstract=665829, at 2-3.

Skidmore and supplemented by subsequent Supreme Court decisions in *Mead* and *Christensen*.

C. WEAKNESSES OF SKIDMORE INTERMEDIATE DEFERENCE

Skidmore is problematic for a number of reasons. First, it is non-limiting. *Skidmore* provides little guidance to the courts and little refuge for agencies. Under *Skidmore*, an agency throws darts at moving targets with its aim insufficient to produce a predictable result. This open ended factor test ensures that an interpretation of a court and not an administrative agency takes precedence because the consideration of undefined, limitless elements justifies any result that a court reaches.[53] Under *Skidmor*e, deference has to be earned by an administrative agency by satisfying a list of undefined factors. As such, *Skidmore* deference is a matter of judicial discretion.

Second, even if an agency determination was given deference under the enumerated and undefined factors of *Skidmore*, it is deference in name but not in practice. Deference is, in a sense, a judicial gloss on an agency interpretation, emphasized by a court when its interpretation coincides with the interpretation of the agency and de-emphasized, avoided, or ignored when its interpretation is contrary to an agency interpretation.[54] In many cases, the factors serve as a guise upon which a court can rely if the factors produce the "correct result."[55]

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[53] *See Missouri ex rel. S.W. Bell Tel. Co. v. Public Service Comm'n*, 262 U.S. 276, 295 (1923) (Brandeis, J., concurring).

[54] Paul L. Caron, *Tax Myopia Meets Tax Hyperopia: The Unproven Case of Increased Judicial Deference to Revenue Rulings*, 57 OHIO ST. L.J. 637, 644-45 (1996). *See* Russell L. Weaver, *A Foolish Consistency is the Hobgoblin of Little Minds*, 44 BAYLOR L. REV. 529, 553 (1992). *See also* Quintin Johnstone, *An Evaluation of the Rules of Statutory Interpretation*, 3 U. KAN. L. REV. 1, 5 (1954) (courts "pull respectable-sounding rules to justify any possible result."); Jim Rossi, *Respecting Deference: Conceptualizing Skidmore Within the Architecture of Chevron*, 42 WM. & MARY L. REV. 1105, 1105-06 (2001) (inviting "ad hocery by lower courts"); Scoot H. Angstreich, *Shoring Up Chevron: A Defense of Seminole Rock*

Skidmore provides deference to an agency if the agency can persuade a court that its interpretation is correct. The power to persuade, however, is exactly what every litigant attempts to do at trial, at oral argument, and on brief.[56] The result is that *Skidmore* deference is exactly that which is accorded a litigant – nothing more and nothing less.[57] While *Skidmore* has an open-ended factor analysis, a number of these considerations ought to be eliminated as outdated and should not be utilized in a reformulated intermediate deference standard. Finally, the enumerated factors considered in *Skidmore* are tilted against allowing any deference that would otherwise be due to an administrative agency.

1. THE FLAWED FACTOR ANALYSIS OF SKIDMORE

Under *Skidmore*, informal pronouncements such as rulings, interpretations, and agency opinions are entitled to deference based on a number of factors. In 1944,

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Deference to Agency Regulatory Interpretations, 34 U.C. DAVIS L. REV. 49, 59 (2000) (the "division of interpretation of statutory responsibility . . . would be undermined if courts reviewed an agency's informal regulatory interpretation under Skidmore").

[55] Paul L. Caron, *Tax Myopia Meets Tax Hyperopia: The Unproven Case of Increased Judicial Deference to Revenue Rulings*, 57 OHIO ST. L.J. 637, 644-45 (1996) ("The precise verbal formulation used by a court is mere window-dressing that does not have any effect on the ultimate resolution of the case."); Richard J. Pierce, Jr., *Legislative Reform of Judicial Review of Agency Actions*, 44 DUKE L.J. 1110, 1110 (1995) ("a court can often write an opinion that reverses a major agency action as easily as it can write an opinion that upholds the same action."). *See also* Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric*, 62 U. CHI. L. REV. 1371, 1391 (1995).

[56] Professor Aprill argues that, while the deference accorded an agency under *Skidmore* is uncertain, it "seems to require at a minimum that courts at least consider the possibility of deference to [an administrative agency] by engaging in an analysis of the factors that could lead to accepting the administrative interpretation." Ellen P. Aprill, *The Interpretative Voice*, 38 LOY. L.A. L. REV. ___ (2006), Loyola Law School (Los Angeles) Legal Research Series, Research Paper 2005-3, http://ssrn.com/abstract=665829, at 28.

[57] *See* Linda Galler, *Emerging Standards for Judicial Review of IRS Revenue Rulings*, 72 B.U. L. REV. 841 (1992). The Internal Revenue Service is non-neutral party and is expected to favor a construction for the collection of revenue while private parties are biased against construction for the collection of revenue. As a result, courts provide neutral forums in which either party has an opportunity to persuade the court of the correctness of its version of statutory construction. *Id.* at 856. *See also* Randolph E. Paul, *Use and Abuse of Treasury Regulations in Statutory Construction,* in Studies in Federal Taxation No. 3, at 420-21 (1940); Note, *Judicial Review of Regulations and Rulings Under the Revenue Acts*, 52 HARV. L. REV. 1163, 1163 (1939).

Skidmore created an non-limiting factor analysis that considered "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[58] In *Mead*, the Supreme Court expanded the previously vague standards to include consideration of "the merit of [the] writer's thoroughness, logic, and expertness, its fit with prior interpretations, and any other sources of weight."[59]

Under *Skidmore*, two facts should be irrelevant: (1) the consistency with earlier and later pronouncements, and (2) the "fit" of the guidance with prior agency interpretations.[60] These two factors drive many decisions to counsel against administrative deference and should be abandoned.[61] However, these two factors should not be relevant to the deference inquiry because both factors no longer conform to a modern view of the law. As Justice Scalia notes –

> [T]here is no longer any justification for giving "special"' deference to "'long-standing and consistent"' agency interpretations of law. That venerable principle made a lot of sense when we assumed that both court and agency were searching for the one, permanent, "correct"' meaning of the statute; it makes no sense when we acknowledge that the agency is free to give the statute whichever of several possible meanings it thinks most conducive to accomplishment of the statutory purpose. Under the latter regime, there is no apparent justification for holding the agency to its first answer, or penalizing it for a change of mind.[62]

While there may be no value to long and consistent agency interpretations, the problem arises when the agency does reverse course. Such a change of course, in effect,

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[58] *Skidmore*, 323 U.S. at 140.

[59] *United States v. Mead Corp.*, 533 U.S. at 220.

[60] *Skidmore*, 323 U.S. at 140.

[61] *See Watt v. Alaska*, 451 U.S. 259, 273 (1981).

[62] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (1989).

eliminates agency discretion. *Chevron* recognized it.[63] *Skidmore* did not because, at the time *Skidmore* was decided, consistency was paramount but its importance continues today because of osmosis rather than theoretical underpinnings.[64] While deference to consistent interpretations over an extended period of time offers certainty and predictability, such considerations should be outweighed by the need of agencies to react in a flexible manner based on market considerations.[65] Moreover, an abuse of discretion

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[63] In upholding a regulation that differed dramatically from a prior regulation, the Court in *Chevron* did not negatively view the change: "The fact that the agency has from time to time changed its interpretation of the term "source" does not . . . 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." *Chevron U.S.A, Inc. v. National Resources Defense Council, Inc.*, 467 U.S. at 863-64. In addition, the Supreme Court in *Chevron* flatly rejected the consistent interpretations of an agency over an extended period of time was entitled to more deference than newly issued interpretations. *Id.* Moreover, the *Chevron* Court concluded that an agency should be able to disregard judicial interpretation based on policy choice. *Id.* at 864. *See Rust v. Sullivan*, 500 U.S. 173 (1991) (deference given to agency interpretation that reversed previous agency policy); *Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana*, 472 U.S. 237 (1985) (deference to inconsistent interpretation by agency). *See also Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 698-99 (1991). While *Chevron* finds irrelevant inconsistent interpretations of a statute inasmuch as deference to agency determinations are unaffected by prior interpretations, a few post-*Chevron* cases found *Chevron* irrelevant. *Cf. Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504 (1994) (change in agency policy merits less deference that consistent policy); *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 537 (1992) (no deference if agency interpretation inconsistent with prior interpretation by Court); *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.,* 497 U.S. 116 (1990) (same); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) ("[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."). Justice Stevens dissented in *Rust v. Sullivan*, principally on grounds of inconsistency, noting a change from the "consistent interpretation accorded the statute by the responsible cabinet officers during four different Presidencies and 18 years." *Rust v. Sullivan*, 500 U.S. 173, 220 (1991). Accordingly, Justice Stevens concluded that the inconsistent interpretation by the Secretary was not a permissible construction of the statute at issue. *Id.* at 221-22.

[64] Pre-Chevron cases followed the *Skidmore* rationale in penalizing an agency's discretion if an agency altered a prior position. *North Haven Board of Education v. Bell*, 456 U.S. 512, 522 n.12 (1982) (change in position several times militates against deference to agency interpretation, especially considering position changed during course of litigation); *Southeastern Community College v. Davis*, 442 U.S. 397, 411 n.13 (1979) (change in position "substantially diminishes the deference to [the agency's] present interpretation of the statute); *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 858-59 (1975) (because the position of the SEC "flatly contradicts what appears to be a rather careful statement of the Commission's views in a recent release . . . we accord no special weight to its views."). *But see Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979) (Court deferred to agency interpretation notwithstanding that agency changed its interpretation).

[65] Linda Galler, *Emerging Standards for Judicial Review of IRS Revenue Rulings*, 72 B.U. L. REV. 841, 881 (1992). *See* Erwin N. Griswold, *A Summary of the Regulations Problem*, 54 HARV. L. REV. 398-408-10 (1941). *See also* Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV.

standard to alter retroactively an agency interpretation eliminates arbitrary agency action.[66]

D. THE INTERPLAY BETWEEN BLACKSTONE AND CONSISTENCY IN DECISIONS

Skidmore was decided at a time when Blackstone's theories were still very much lurking in the shadows of American judicial philosophy. More specifically, Blackstone provided a sharp line of demarcation between the role of the lawmaker and the role of an administrative agency wherein it is Congress and not an administrative agency that prescribes the law.[67] As a result, by its very nature, administrative determinations cannot be the law and cannot alter the law.[68] Instead, a change in administrative position determines what the law always was and how it was always meant to be interpreted.[69]

1179, 1198 (1990); Randolph E. Paul, *Use and Abuse of Tax Regulations in Statutory Construction*, in Studies in Federal Taxation No. 3, at 430 (1940).

[66] Christopher M. Pietruszkiewicz, *Does the Internal Revenue Service Have a Duty to Treat Similarly-Situated Taxpayers Similarly?*, 74 U. CINN. L. REV. ___ (2006).

[67] 1 WILLIAM BLACKSTONE , COMMENTARIES ON THE LAWS OF ENGLAND 69-79 (1765). *See Dixon v. United States*, 381 U.S. 68, 73 (1965) (It is "Congress, not the Commissioner, that prescribes the tax laws.").

[68] *See* David W. Ball, *Retroactive Application of Treasury Rules and Regulations*, 17 N.M. L. REV. 139, 142 (1987). This is not to say that a law should be modified retroactively under this theory but only interpretations of law that define what the law always was. In the case of a modification of law by one authorized to change the law – i.e. Congress, then such changes should be applied prospectively only because "it is impossible that a party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law: he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust. All laws should therefore made to commence *in futuro*, and be notified before their commencement; which is implied in the term '*prescribed*.'" 1 WILLIAM BLACKSTONE COMMENTARIES ON THE LAWS OF ENGLAND 46 (1803). As applied in the United States, Article I of the Constitution provides that "[n]o . . . ex post facto Law shall be passed." U.S. CONST. ART. I, § 9.

[69] According to Blackstone, "[f]or if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*." 1 WILLIAM BLACKSTONE COMMENTARIES ON THE LAWS OF ENGLAND 70 (1803). *See* David W. Ball, *Retroactive Application of Treasury Rules and Regulations*, 17 N.M. L. REV. 139, 142 (1987).

According to this theory, the statute is the law while administrative guidance provides a mechanism to interpret law.[70] This theory caused havoc every time an administrative agency would rethink a position inasmuch as "an incorrect interpretation was . . . a nullity [such that] a correct interpretation necessarily operated retroactively to the date of adoption of the legislation."[71]

The result of this application was that it caused significant hardship on those who considered the current state of the law in conducting their affairs only to subsequently determine that, based on a change in agency position, the prior interpretation on which they relied was a nullity and that the newly minted correct interpretation necessarily operated retroactively to the date that the statute became effective.[72] Necessarily, then, consistency in agency position was favored by the courts in light of the significant disadvantage created by a reversal of an agency position by those who incorrectly believed that they have resolved a matter based on a prior administrative determination.[73]

Skidmore derives from time when consistency was thought necessary to avoid the harsh results of retroactive application. After all, *Skidmore* was decided in 1944 and

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[70] *See* David W. Ball, *Retroactive Application of Treasury Rules and Regulations*, 17 N.M. L. REV. 139, 142 (1987).

[71] Paul Gordon Hoffman, *Limits on Retroactive Decision Making by the Internal Revenue Service: Redefining Abuse of Discretion under § 7805(b)*, 23 U.C.L.A. L. Rev. 529, 531 (1976).

[72] David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 933 (1965). *See Schuster v. Commissioner*, 312 F.2d 311, 317 (9th Cir. 1962). Based on this theory, retroactive application is necessary; otherwise one would be entitled to demand an incorrect interpretation of law, thereby obtaining a benefit not intended by the law as promulgated by Congress as lawmaker.

[73] *See* 1 WILLIAM BLACKSTONE COMMENTARIES ON THE LAWS OF ENGLAND 70 (1803) ("The doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust: for through their reason be not obvious at first view, yet we owe such a deference to former times, as not to suppose that they acted wholly without consideration."). Such a perception ties neatly with Blackstone's view of custom. For a custom to be a legality, it must be used for a long period of time, must have continued, and must be consistent with each other custom. 1 WILLIAM BLACKSTONE COMMENTARIES ON THE LAWS OF ENGLAND 76-79 (1803). *See also* H.R. REP. NO. 350, 67th Cong., 1st Sess. 15-16 (1921) (causing the Internal Revenue Service to reopen "thousands of settled cases").

Blackstone's theory that "the law is the law" was not rejected by the Supreme Court until 1965 in *Linkletter v. Walker*.[74]

Blackstone's theory and its attraction to consistency provided a solid foundation for *Skidmore*. While the *Skidmore* consistency factor was eminently reasonable in 1944, it no longer serves the purpose for which it was created. The impact of Blackstone permeates through *Skidmore* but, a mere two years after Blackstone's theory was rejected, the Supreme Court, in a judicial deference case of *Correll v. United States*,[75] failed to cite *Skidmore* or mention the *Skidmore* factors, instead beginning to formulate an intermediate deference standard announced eleven years later by the Supreme Court in *National Muffler*.[76] Recently, however, the Supreme Court appears to have resurrected *Skidmore* long after it was properly buried.[77]

Consistency of an agency position, or lack thereof, should not influence whether an agency's interpretation is or is not given deference.[78] The negative impact of a change in position deprives an agency of the flexibility necessary based on updated or new

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[74] *Linkletter v. Walker*, 381 U.S. 618, 628 (1965), *overruled on other grounds*, *Griffith v. Kentucky,* 479 U.S. 314 (1987). In *Linkletter*, the Supreme Court considered the question of whether the rule announced by the Court in *Mapp v. Ohio* should apply retroactively. *Id.* at 636. In *Mapp*, the Supreme Court determined that illegally seized evidence that violated the constitutional rights of a defendant was not admissible in a prosecution of the defendant in state court. *Mapp v. Ohio*, 367 U.S. at 654-55 (1965). The *Linkletter* Court rejected the retroactive application theory of Blackstone and applied its decision prospectively, determining that the previously entered state convictions should not be disturbed. *Linkletter v. Walker*, 381 U.S. 618, 639-40 (1965).

[75] *United States v. Correll*, 389 U.S. 299 (1967).

[76] 440 U.S. 472 (1978). For a detailed discussion of the evolution of the *National Muffler* factors, see *infra* notes 205-242 and accompanying text.

[77] *Gonzales v. Oregon*, 126 S. Ct. 904 (2006); *United States v. Mead Corp.*, 533 U.S. 218 (2001); *Christensen v. Harris County*, 529 U.S. 576 (2000). *See Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1 (2004); *Pharmaceutical Research and Mfrs. of America v. Walsh*, 538 U.S. 644 (2003); *Clackamas Gastroenterology Associates, P. C. v. Wells*, 538 U.S. 440 (2003); *Washington State Dept. of Social and Health Services v. Guardianship Estate of Keffeler*, 537 U.S. 371 (2003).

[78] *See* John F. Coverdale, *Court Review or Tax Regulations and Revenue Rulings in the Chevron Era*, 64 GEO. WASH. L. REV. 35, 47 (1995); *Chevron*, 467 U.S. at 864 (agencies should be given discretion to adjust policies of time without negative impact).

information, its continued understanding of a body of law and its effect, the consideration of the advancement of social norms, and the need to adjust its policies based on "appropriate political participation, in the administrative process."[79]

As between an agency and the courts, policy making should be viewed as the dominion of the agency.[80] In that sense, it should make no difference that the agency previously advanced a policy that was inconsistent with its current policy.[81] If inconsistency is a basis upon which a court can override a policy determination by an agency, then, in effect, the court creates policy.[82] In such an instance, it is likely that the court "will often know substantially less about a specialized scheme than the responsible agency" and, as a result, may make a substantially less informed decision.[83]

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[79] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517, 518-19 (1989). Of course, consistent positions over an extended period of time with different agency personnel and likely different political philosophies may add confidence to the strength of a particular position. John F. Coverdale, *Court Review or Tax Regulations and Revenue Rulings in the Chevron Era*, 64 GEO. WASH. L. REV. 35, 76 (1995). However, it does not take into account the emergence of new ideas nor does it reflect changing social norms. *See generally*, Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 297 (1986); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2102 (1990). *See also* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517, 518-19 (1989) (modification by agency of position on a particular issue does not necessarily reflect on whether the initial interpretation was incorrect, but rather that a change of position by the agency reflect changes in social attitudes and/or the receipt of new information). *See Jet Serv., Inc. v. Hoffman*, 420 F. Supp. 1300, 1308 (M.D. Fla. 1976) ("an administrative agency is not bound to an interpretation or guideline when it becomes evident from experience that changes are required to keep pace with present conditions."); *See also Maxwell Co. v. NLRB*, 414 F.2d 477, 479 (6th Cir. 1969); *Flotill Prods, Inc. v. FTC*, 358 F.2d 224, 230 (9th Cir. 1966); *Dubrow v. SBA*, 345 F. Supp. 4, 7 (C.D. Cal.1972).

[80] Courts make decisions on particular cases in relatively isolated circumstances while agencies make decisions based on a integrated policy consideration in the context of its delegated administrative responsibilities. Ellen P. Aprill, *The Interpretative Voice*, 38 LOY. L.A. L. REV. ___ (2006), Loyola Law School (Los Angeles) Legal Research Series, Research Paper 2005-3, http://ssrn.com/abstract=665829, at 3.

[81] Russell L. Weaver, *A Foolish Consistency is the Hobgoblin of Little Minds*, 44 BAYLOR L. REV. 529, 558 (1992).

[82] Russell L. Weaver, *A Foolish Consistency is the Hobgoblin of Little Minds*, 44 BAYLOR L. REV. 529, 558 (1992).

[83] Russell L. Weaver, *A Foolish Consistency is the Hobgoblin of Little Minds*, 44 BAYLOR L. REV. 529, 558 (1992).

Congress, based on its nature, is unable to account for every change in social norm, technological advancement, or adjustment based on common law. Instead, the administrative structure is in a far better position than courts to modify their thinking in light of the changed circumstances.[84] Just because an agency modified its thinking does not modify its policy-making role. An agency, therefore, should not be penalized for new interpretation based on changing conditions. As long as the interpretation is reasonable in light of the factors for determining deference, a change in agency position should be encouraged, not discouraged through a factor favoring consistency.[85]

There are, of course, arguments contrary to this view. For example, inconsistent agency positions may be the hallmark of confusion by the agency of a correct interpretation, exhibiting a wavering concept of how a particular policy fits within a complex, statutory scheme.[86] This is not insurmountable in light of the discretionary standard proposed under *National Muffler.*

Under *National Muffler*, a court is not required to accept any agency interpretation but one that is reasonable. This standard permits a court to monitor agency interpretation through the remainder of *National Muffler* factors such as whether the

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[84] Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2088 (1990). The Supreme Court recognized the "changing conditions" rationale in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 110 S. Ct. 2759 (1990). In such circumstances, a change in agency position may make reasonable what was unreasonable before the changing circumstance. Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2103 n.149 (1990).

[85] Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2104 (1990). Professor Sunstein, however, would limit deference for "new departures" from longstanding interpretations based on the stare decisis rationale in judicial decisions. Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2104 (1990). Such a limitation, however, creates disincentive to exactly what an administrative agency is supposed to do that a court cannot – be flexible in light of changing circumstances. Stare decisis is an important consideration in a judicial context, but determining what is reasonable in filling congressional gaps is not only necessary, but essential to agency expertise in creating a cohesive regulatory scheme.

[86] Russell L. Weaver, *A Foolish Consistency is the Hobgoblin of Little Minds*, 44 BAYLOR L. REV. 529, 559 (1992).

interpretation "harmonizes with the plain language of the statute, its origin, and its purpose."[87] Moreover, under *National* Muffler, a court can consider whether the guidance was a "a substantially contemporaneous construction of the statute" and the manner in which the guidance evolved, as well as the degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute."[88]

Since specific agencies are responsible for maintaining and enforcing a regulatory framework created by Congress, agencies should be given the necessary discretion to make those policy choices.[89] If, indeed, consistency trumps policy, the agency "would lose its necessary discretionary flexibility to act in its field of expertise, and would become burdened by fossilized errors."[90] Moreover, agencies, in comparison to the courts, possess the expertise in fact-finding, policy making, and are more accountable to the electorate.[91] More specifically, an administrative structure is in a better position to determine how to best implement a statute.[92]

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[87] *National Muffler*, 440 U.S. at 477.

[88] *Id*. This scrutiny would be less meaningful under *Chevron* because *Chevron* requires more judicial restraint than *National Muffler*.

[89] *Chevron*, 467 U.S. at 837.

[90] *Jet Serv., Inc. v. Hoffman*, 420 F. Supp. 1300, 1308 (M.D. Fla. 1976). *See* Russell L. Weaver, *A Foolish Consistency is the Hobgoblin of Little Minds*, 44 BAYLOR L. REV. 529, 558 (1992). *See also Jacobus tenBroek, Interpretive Administrative Action and the Lawmaker's Will*, 20 OR. L. REV. 206, 208-09 (1941):

> [T]he assumption that the administrator will seek to carry out his original intent, unmodified by subsequently occurring attitudes, circumstances, and needs, an assumption which is not borne out by the frequency with which administrative rulings and practices are changed and reversed. The doctrine implies a theory of administration which would impose upon administration a rigidity destructive of one of its most valuable qualities, for the doctrine hypothesizes the alteration will not be made in light of experience and against adjustment to developing needs.

Id.

[91] Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2084 (1990).

[92] Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2088 (1990).

This is particularly true in the tax area, an area in which Congress frequently delegates specific discretion to the Secretary of the Treasury[93] and also provides general delegation authority to the Secretary to "prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue."[94]

In many instances, Congress delegates concepts, not rules, leaving it to an administrative agency to sort out the details.[95] In such a case, the law, as written by Congress, creates certain fundamental interests by defining those rights and providing a mechanism to enforce those rights while comfortable in leaving the regulation of all other interests to agencies as are necessarily created to address specific interests.[96]

For example, in response to the proliferation of tax shelters in the late 1970s and early 1980s, Congress adopted the passive activity loss rules under § 469 of the Internal Revenue Code.[97] Section 469 contains 4,484 words and defines the concepts of passive

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[93] *See E.g.* 26 U.S.C. § 469(l) which provides that "[t]he Secretary shall prescribe such regulations as may be necessary or appropriate to carry out provisions of this section."

[94] 26 U.S.C. § 7805(a).

[95] See e.g. Sidney A. Shapiro, *Outsourcing Government Regulation*, 53 Duke L.J. 389, 398 (2003). *See also* Bradford C. Mank, *Suing Under § 1983: The Future After Gonzaga University v. Doe*, 39 HOUS. L. REV. 1417, 1459 (2003) ("it [is] common for Congress to write statutes that address broad goals and then delegate the remaining details to executive agencies."). The Internal Revenue Code contains over 1,000 grants of regulatory authority, more than 250 grants of authority to prescribe appropriate regulations to carry out a specific statutory provision and a number which authorize the Secretary to establish tax policy. John F. Coverdale, *Court Review or Tax Regulations and Revenue Rulings in the Chevron Era*, 64 GEO. WASH. L. REV. 35, 52 (1995); Lawrence Zelenak, *Should Courts Require the Internal Revenue Service to Be Consistent?*, 40 TAX L. REV. 411, 416 n.27 (1985).

[96] Roscoe Pound, *The Limits of Effective Legal Action*, 27 INTERNATIONAL J. OF ETHICS 150, 158 (1917).

[97] Pub. L. No. 99-514, 100 Stat. 2085 (1986). Section 469 permits a taxpayer to deduct losses only if a taxpayer materially participates in that activity and "prevents a taxpayer from reducing income from wages, interest and dividends by tax sheltered losses incurred thorough partnerships. Christopher M. Pietruszkiewicz, *Of Summonses, Required Records, and Artificial Entities: Liberating the IRS from Itself*, 73 MISS. L.J. 921, 922 (2004).

activity, passive activity losses, and material participation.[98] Moreover, Section 469 provides special guidance for determining whether income or loss is from a passive activity for taxpayers who are involved in rental real estate activities, and an exception for the offsetting of a certain amount of rental real estate losses against active income.[99] Notwithstanding ten pages of statutory text, Congress explicitly provides in § 469(l) that "[t]he Secretary shall prescribe such regulations as may be necessary or appropriate to carry out provisions of this section" and provides a list of items in which the Secretary shall interpret the statutory provision through regulation.[100]

Indeed, if Congress delegates broadly to administrative agencies, it is necessary for the agency to have the ability to adjust its thinking without being penalized for a change in its interpretation.[101] In such a case, agency competence is indeed the principal reason for a delegation in the first place and deference is particularly appropriate

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[98] 26 U.S.C. § 469(c), (d), (h).

[99] 26 U.S.C. § 469(c), (d), (h), (i).

[100] 26 U.S.C. § 469(l). This section provides that the Secretary shall prescribe regulations to –

> (1) which specify what constitutes an activity, material participation, or active participation for purposes of this section,
>
> (2) which provide that certain items of gross income will not be taken into account in determining income or loss from any activity (and the treatment of expenses allocable to such income),
>
> (3) requiring net income or gain from a limited partnership or other passive activity to be treated as not from a passive activity,
>
> (4) which provide for the determination of the allocation of interest expense for purposes of this section, and
>
> (5) which deal with changes in marital status and changes between joint returns and separate returns.

Id.

[101] Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2089 (1990) ("In light of the wide variety of contexts to which statutes must be applied, a degree of flexibility in implementation is quite healthy.").

considering that it is Congress itself that delegated the role of statutory interpretation.[102] If an agency adopts a new position or alters a questionable, existing position, there exists a mechanism to regulate an agency's irrational or illogical changes.[103] Such arbitrary deviations may be remedied by the courts through defined factors bearing on whether an agency acted arbitrarily.

E. THE IRRELEVANCY OF A LONG STANDING AGENCY POLICY

Judicial opinions seem to follow judicial opinions that seem to follow other judicial opinions. Frequently, an opinion follows another without consideration of the legal landscape upon which the original opinion was based. A longstanding interpretation without challenge or reaffirmance by an agency since an initial interpretation is no different in effect than a newly issued interpretation. If a court is determining whether a policy is permissible, a change is policy should not be more or less permissible than the old policy[104]

With the proliferation of agency guidance, the mere issuance without more should have no effect on whether deference is due. Just as consistency should be irrelevant in a deference determination, whether a position held by an agency is longstanding is likewise irrelevant. Because only a case and controversy provides standing to bring an action to challenge an interpretation of an agency, an interpretation issued long ago should not be a factor in determining whether deference should be due.[105] The coincidence that

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[102] Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2084 (1990).

[103] 4 Kenneth Culp Davis, ADMINISTRATIVE LAW TREATISE § 20.11 at 38-39 (2d ed. 1983).

[104] John F. Coverdale, Court Review or Tax Regulations and Revenue Rulings in the Chevron Era, 64 GEO. WASH. L. REV. 35, 76 (1995).

[105] The Anti-Injunction Act provides that ". . . no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 7421. The Anti-Injunction Act has been

particular facts either arise or not immediately after an agency issues an interpretation should not have any bearing on whether the interpretation is entitled to deference.

F. NEW DEAL POLITICS AND ITS INFLUENCE ON ADMINISTRATIVE DEFERENCE

In addition to the decline of the influence of Blackstone in 1946, the timing of the *Skidmore* decision lends support to its necessary abandonment in modern administrative law. *Skidmore* was decided in 1944, a time of proliferation of new executive agencies as part of President Roosevelt's New Deal. *Skidmore* was solution to a political problem, not a legal problem. It was a judicial reaction to the political climate of the 1940s and a self-created, feigned response to the New Deal, creating the appearance of deference but with open-ended factors to provide deference only when the views of an agency paralleled the views of the reviewing court. The Attorney General's Committee on Administrative Procedure recognized that the debate over administrative reform that

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"broadly construed to prohibit courts from granting equitable relief that would have the effect of enjoining the assessment or collection of taxes and to prevent judicial intermeddling in the tax collection process" and is designed to "to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require the legal right to the disputed sums be determined in a suit for refund." See Bob Jones University v. Simon, 416 U.S. 725, 736-737 (1974); Enochs v. Williams Packing & Nav. Co., 370 U.S. 1, 7 (1962); United States v. First Family Mortgage Corp., 739 F.2d 1275, 1278 (7th Cir. 1984). Suits to restrain the collection of federal taxes are barred by § 7421(a) of the Internal Revenue Code (the Anti-Injunction Act) unless they fall within one of the exceptions to that Act.

Moreover, the Declaratory Judgment Act provides that "[i]n a case of actual controversy within its jurisdiction, except with respect to Federal taxes . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. 28 U.S.C. § 2201(a). See Bob Jones University v. Simon, 416 U.S. at 742 n.15; Flora v. United States, 362 U.S. 145, 164 (1960). The language prohibiting declaratory judgments with respect to federal taxes was added to the statute in 1935 because of "[t]he congressional antipathy for premature interference with the assessment and collection of any federal taxes." Bob Jones Univ. v. Simon, 416 U.S. at 732 n.7. Moreover, the federal tax exception under the Declaratory Judgment Act is at least as broad as the Anti-Injunction Act. *Alexander v. "Americans United" Inc.*, 416 U.S. 752, 759 n.10 (1974). Thus, insofar as an action is barred by the Anti-Injunction Act, it also would be barred by the Declaratory Judgment Act. Combined, these statutes prevent a taxpayer from litigating an interpretation by the Internal Revenue Service unless that interpretation affects that particular taxpayer. *See* Linda Galler, *Emerging Standards for Judicial Review of IRS Revenue Rulings*, 72 B.U. L. REV. 841, 852 (1992).

preceded and post-dated *Skidmore* was motivated by politics and not science.[106] In essence, the fight over administrative reform that played out over the next decade was a referendum on the New Deal and not the most efficient way to provide a workable administrative structure, including the scope of judicial review[107] The Supreme Court was not immune from these politics and, in fact, was a significant part of the political solution.

1. THE NEW DEAL

Franklin Delano Roosevelt was elected President in November 1932 and the New Deal was his attempt to counteract the Great Depression through the creation of various administrative agencies that would greatly influence the economy.[108] The New Deal also created a political showdown between the scope of authority of these newly created executive agencies and the traditional role of courts. The New Deal endorsed administrative self-sufficiency, perhaps even administrative sovereignty, while judicial independence resulted from over 100 years of separation between the role of the executive and the role of the courts, originally endorsed in *Marbury v. Madison*[109] that it is for judges and only judges to "say what the law is."[110]

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[106] George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 NW. U. L. REV. 1557, 1595 (1996).

[107] George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 NW. U. L. REV. 1557, 1595 (1996).

[108] The establishment of the Interstate Commerce Commission in 1887 began the creation of the modern administrative agency and one-third of present day administrative agencies were created by 1900. The modern administrative structure expanded exponentially under the New Deal. Robert J. Pushaw, Jr., *Bridging the Enforcement Gap in Constitutional Law: A Critique of the Supreme Court's Theory That Self-Restraint Promotes Federalism*, 46 WM. & MARY L. REV. 1289, 1325 (2005); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 456 (1996); *Henry J. Friendly, Federalism: A Foreword*, 86 YALE L.J. 1019, 1022-25 (1977). *See* Kenneth Culp Davis, Administrative Law Treatise § 1.04 at 24 (1958).

[109] 5 U.S. (1 Cranch) 137 (1803).

[110] *Id*. at 177.

Initially, a divided Supreme Court supported New Deal legislation.[111] Legislative action attempted to curb the power of the administrative structure that the Supreme Court refused to keep in check. For example, Senator Mills Logan introduced a bill in which he sought to restrict the scope of the administrative structure in favor of the judiciary by granting to the judiciary a broad appellate function in review of agency action.[112] The American Bar Association's Special Committee on Administrative Law also objected to the usurpation of authority by the administrative structure that was not explicitly subject to a system of checks and balances and over which the Supreme Court refused to limit its authority.[113]

Shortly thereafter, with the reversal of the New Deal supporting position of Justice Roberts, a divided Supreme Court stuck down a number of President Roosevelt's reforms that reflected this power struggle.[114] In 1936, President Roosevelt was overwhelmingly re-elected. With this popular endorsement, Justice Roberts again reversed course, upholding New Deal programs.[115] With a perceived popular mandate in

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[111] *Perry v. United States*, 294 U.S. 330 (1935); *Nebbia v. New York*, 291 U.S. 502 (1934); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

[112] George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 NW. U. L. REV. 1557, 1560 (1996).

[113] 1933 American Bar Association Annual Report 199 (statement of Louis G. Caldwell).

[114] *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 618 (1936) (holding unconstitutional a New York statute authorizing the fixing of women's wages); *Carter v. Carter*, 298 U.S. 238, 309-11 (1936) (labor provisions of Bituminous Coal Conservation Act held unconstitutional as regulating production and distribution of bituminous coal with only an indirect effect on interstate commerce); *United States v. Butler*, 297 U.S. 1, 68-72 (1936) (Agricultural Adjustment Act held invalid as invading reserved powers of states by regulating agricultural production within the states and as not a valid exercise of federal taxing and spending power under general welfare clause); *Schechter Poultry Co. v. United States*, 295 U.S. 495, 541-42 (1935) (declaring unconstitutional the discretion of the President in approving or prescribing trade and industry codes); *Railroad Retirement Board v. Alton R.R.*, 295 U.S. 330 (1935) (pension provisions of Railroad Retirement Act held invalid as arbitrary); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935) (declaring unconstitutional the President's power to restrict interstate transportation of petroleum under the National Industrial Recovery Act).

[115] *See e.g. Helvering v. Davis*, 301 U.S. 619 (1937) (upholding Social Security Act); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937) (upholding Social Security Act); *NLRB v. Jones & Laughlin Steel Corp.*, 301

hand, President Roosevelt sought legislation to enlarge the Supreme Court, which had been invalidating key New Deal measures.[116] Now, the Supreme Court narrowly supported New Deal legislation but Roosevelt nonetheless continued to press his Court-packing initiative.[117] The Supreme Court now supported New Deal initiatives and Roosevelt lost his Court-packing initiative; however, this incompatible combination invigorated the debate on judicial review of the now burgeoning administrative structure.

2. THE NEW DEAL AND THE SCOPE OF JUDICIAL REVIEW

Before this massive increase in the administrative structure, courts were the clear interpreters of statutory mandates, resolving ambiguity, filling gaps in legislation, and ultimately creating a common law. The New Deal sought to change the power structure of interpretation, moving ambiguous resolution from the judiciary to the newly minted administrative structure.[118] For the New Deal proponents, courts did not possess the expertise required to resolve the massive social problems indicative of the 1930s and 1940s.[119] And, more significantly, courts lacked the flexibility necessary to address those

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U.S. 1 (1937) (upholding authority of National Labor Relations Board); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding Washington state minimum wage statute).

[116] Roosevelt proposed his Court-enlarging plan to combat the anti-New Deal Supreme Court majority on February 5, 1937. James T. Patterson, *Congressional Conservatism and the New Deal* 125 (1967).

[117] William E. Leuchtenburg, Franklin D. Roosevelt's Supreme Court "Packing" Plan, in Essays on the New Deal 67, 74, 98 (Harold M. Hollingsworth ed., 1969).

[118] See *FTC v. Ruberoid*, 343 U.S. 470, 487 (1952):

> The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart. They also have begun to have important consequences on personal rights. They have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking. Courts have differed in assigning a place to these seemingly necessary bodies in our constitutional system. Administrative agencies have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution.

[119] James M. Landis, The Administrative Process 6 (1938). *See* Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1496 (1983) (agencies were staffed by specialists and "the watchword

problems effectively by deciding issues resulting only from litigation on a case by case basis.[120]

A shift in interpretative power created advantages in considering an entire statutory scheme, a component lacking in case by case review by courts in matters arising only in litigation. The administrative structure, on the other hand, was not bound by the confines of a case in controversy or the narrow focus of the statute subject to litigation. Instead, resolution of statutory questions could focus on the broad impact of a statutory scheme without consideration of specific parties to litigation and distinct legal questions. The New Deal, therefore, created a power shift in ambiguous interpretation from the judiciary to the administrative structure and challenged the traditional notions of the system of checks and balances.[121]

3. THE SCOPE OF JUDICIAL REVIEW THROUGH NEW DEAL LEGISLATION

In 1937, New Deal opponents determined that the Supreme Court made is final reversal and was unresponsive to their criticism of the New Deal.[122] Attention of New Deal opponents focused principally on legislation rather than litigation and the hallmark

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of administration became expertise, and the key doctrine of judicial review of administrative action became deference to that expertise. Discretion and expertise became synonymous.")

[120] Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2079 (1990).

[121] Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2088-89 (1990). Changed circumstances create ambiguity and agencies are uniquely positioned to resolve such ambiguities more timely that the case and controversy requirement for judicial review. Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2079, 2088 n.85 (1990); Douglas J. Feeney-Gallagher, *Battle on the Benches: The Wagner Act and the Federal Circuit Courts of Appeals, 1935-1942*, 23 SEATTLE U. L. REV. 503, 514 (2000) (The rise of powerful administrative agencies during the New Deal . . . sparked a counterattack in the lower federal courts against these dangerous tendencies in the deformation of the American system of governance.")

[122] George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 NW. U. L. REV. 1557, 1565 (1996).

of its legislative agenda was a heightened review of agency interpretation.[123] With Roosevelt weakened politically based in large part on his failed Court-packing plan,[124] he sought to reorganize the administrative structure to maintain his power.[125] His weakness was evident in its legislative defeat.[126]

While New Deal opponents sought to restrict administrative power, the opponents were not without their detractors. In criticizing the view of the American Bar Association as "judicial overlordship," Professor Gelhorn, a later member of the Attorney General's Committee on Administrative Procedure, noted --

> The judiciary has by myriad ways sought to foster the illusions that it alone is capable of governing justly and dispassionately, that the entrusting of responsibilities to the administrative agencies is fraught with danger unless their exercise is ultimately subject to judicial supervision, and that the supremacy of law is synonymous with the supremacy of the judges. . . . [S] poradic, inexpert, and superficial dictation by the courts will never produce methods of administration which are both workable and fair. On the contrary, such dictation serves chiefly to obstruct the development of sound administrative processes. Those processes need the detailed study of persons who are conversant with the problems of government and who are sympathetic not only to private and individual interests but also to the realization of popular aspirations as recorded in laws adopted by representative legislatures.[127]

In 1939, Senator Mills Logan again sponsored a bill to increase the availability of judicial review of agency decisions.[128] While not an open war on the New Deal, its effect was an indirect assault on the scope of agency power through its focus on the standard of

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[123] George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 NW. U. L. REV. 1557, 1560 (1996).

[124] Roosevelt continued to pursue his Court-packing plan even after Justice Roberts again reversed course and supported Roosevelt's New Deal programs. William E. Leuchtenburg, Franklin D. Roosevelt's Supreme Court "Packing" Plan, in Essays on the New Deal 67, 74, 98 (Harold M. Hollingsworth ed., 1969).

[125] James T. Patterson, Congressional Conservatism and the New Deal 214-15 (1967).

[126] George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 NW. U. L. REV. 1557, 1585 (1996).

[127] Walter Gelhorn, *The Improvement of Public Administration*, 2 NAT'L LAW. GUILD Q., 20, 23 (1940).

[128] S. 915, 76th Cong., 1st Sess. (1939).

judicial review of agency action.[129] This bill would change the scope of review from the previous "scintilla of evidence rule" to the "substantial evidence rule."[130] According to Senator Logan, a reviewing court had a limited role in reviewing of agency action inasmuch as the scope of review by a reviewing court was that the agency action was upheld if a "scintilla of evidence" supported the agency action.[131] His proposal instead inserted more judicial control in which a court reviewing an agency action is required to uphold the agency action only if the decision of the agency was grounded in substantial evidence.[132]

Opponents of the bill objected to the scope of judicial review, but as was customary during this period, their arguments were based principally on politics. According to the opponents of strict judicial control of administrative agencies, the judiciary still contained many judges opposed to New Deal reforms and a very strong anti-New Deal minority on the Supreme Court.[133] This combination, at a minimum, could delay implementation of agency policy and consume agency resources and, at most, could paralyze agency efforts to shape policy.[134]

Roosevelt vetoed the bill in late 1940. Shortly thereafter, the Attorney General's Committee on Administrative Procedure issued a report, fractured between liberals and

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[129] George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 NW. U. L. REV. 1557, 1631 (1996).

[130] 84 CONG. REC. 7075 (1939).

[131] 84 CONG. REC. 7075 (1939).

[132] 84 CONG. REC. 7075 (1939).

[133] 86 CONG. REC. 4530 (1940). *See* George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 NW. U. L. REV. 1557, 1613-14 (1996).

[134] George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 NW. U. L. REV. 1557, 1613-14 (1996).

conservatives with two proposed bills.[135] The majority bill, supported by seven members, imposed little constraint on the administrative structure and did not increase the level of administrative review of agency action.[136] The minority bill, supported by three conservative members, provided for enhanced judicial review of agency action, requiring reviewing courts to uphold agency action only if the agency action was supported "on the whole record, by substantial evidence."[137] The minority bill would therefore replace the "scintilla" rule with a congressionally mandated substantial evidence test.[138]

Viewing some type of reform as inevitable, agencies sought to ease the impact of the legislation instead of simple opposition.[139] The war weakened Roosevelt's allies in Congress, losing forty-seven seats in the House and nine seats in the Senate in 1942.[140]

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[135] United States Attorney General's Committee on Administrative Procedure, Final Report, S. Doc. 8, 77th Cong., 1st Sess. at 191. The Report was issued on January 22, 1941 and a month after the House failed to override President Roosevelt's veto. George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 NW. U. L. REV. 1557, 1632-34 (1996).

[136] George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 NW. U. L. REV. 1557, 1634 (1996). This bill was introduced in the Senate as S. 675. S. 675, 77th Cong., 1st Sess. (1941).

[137] George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 NW. U. L. REV. 1557, 1632, 1636 (1996). A third bill was proposed in the Attorney General's Final Report that was supported by only one member that was even more restrictive of agency action than the minority bill. United States Attorney General's Committee on Administrative Procedure, Final Report, S. Doc. 8, 77th Cong., 1st Sess. at 248. This bill was introduced as S. 918 and required a court to reject an agency's factual findings that were "unsupported, upon the whole record, by substantial evidence having probative value." S. 918, 77th Cong., 1st Sess. (1941). *Id.* at § 805(4). *See* George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 NW. U. L. REV. 1557, 1637 (1996).

[138] George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 NW. U. L. REV. 1557, 1636 (1996). The minority bill also proposed public notice and comment rulemaking and the publication of all rules and regulations in the Federal Register. George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 NW. U. L. REV. 1557, 1635 (1996). The minority bill was introduced as S. 674. S. 674, 77th Cong., 1st Sess. (1941).

[139] George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 NW. U. L. REV. 1557, 1638 (1996).

[140] George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 NW. U. L. REV. 1557, 1643 (1996).

Moreover, by 1943, public support of agencies was dwindling, regarded as the cause of increased inflation, unpopular agricultural price controls, and the rationing of goods.[141] The result was a congressional movement to restrict New Deal programs not directly associated with the war effort, all without major opposition from the Administration.[142] Nonetheless, Roosevelt won reelection to a fourth term in 1944.

In 1944, the ABA drafted a new reform bill that granted significant judicial review of agency action, providing that a court could reject an agency decision that was "arbitrary or capricious [or] unsupported by competent, material, and substantial evidence, upon the whole record as reviewed by the court."[143] This bill was revised and introduced as S. 7. After extensive negotiations and the death of President Roosevelt, President Truman signed the Administrative Procedure Act of June 11, 1946.[144] New Deal proponents, New Deal opponents, and the administrative agencies themselves were not especially pleased about the new legislation because no group received precisely what they sought. Significantly, all interested groups were apprehensive about how courts would interpret the new legislation.[145]

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[141] Otis L. Graham, Jr., The Democratic Party: 1932-1945, in 3 History of U.S. Political Parties 1939, 1953 (Arthur M. Schlesinger, Jr. ed., 1973); Report of the Special Committee on Administrative Procedure, 1943 A.B.A. Ann. Rep. 251.

[142] George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 NW. U. L. REV. 1557, 1613-14 (1996).

[143] S. 2030, 78th Cong., 2d Sess. § 9(f) (1944).

[144] George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 NW. U. L. REV. 1557, 1674 (1996).

[145] S. Rep. No. 752, 79th Cong., 1st Sess. App. B (1945), reprinted in Administrative Procedure Act: Legislative History, 79th Congress, 1944 - 46 at 224 (1946); George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 NW. U. L. REV. 1557, 1674 (1996).

Two years after *Skidmore*, the Administrative Procedure Act reflected the same attraction of *Skidmore*.[146] The Administrative Procedure Act was the culmination of the fight for the New Deal. As initially conceived, administrative reform was to restrict the power of New Deal administrative agencies.[147] Just as in *Skidmore*, the Administrative Procedure Act represented a compromise between judicial interpretative considerations and the administrative policystructure. [148] The compromise was to "effectuate[] needed reforms in the administrative process and at the same time preserve[] the effectiveness of laws which are enforced by the administrative agencies of the Government.[149] The Administrative Procedure Act reconciled the two competing political interests of judicial

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[146] The Administrative Procedure Act was approved on May 24, 1946 without a recorded vote and without dissent. The Administrative Procedure Act was signed by President Truman on June 11, 1946. United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 5 (1947).

[147] George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 NW. U. L. REV. 1557, 1560 (1996). In particular, the administrative reform movement was designed to limit the power of the National Labor Relations Board and the Securities and Exchange Commission. *Id.* A 1938 ABA Report sought additional judicial controls on the administrative structure in large part based on the pro-labor and anti-business slant of the National Labor Relations Board and the Securities and Exchange Commission. Report of the Special Committee on Administrative Law, 1938 American Bar Association's Annual Report 342. *See* B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 NW. U. L. REV. 1557, 1590-91 (1996).

[148] The Administrative Procedure Act was designed to address four principal purposes:

> 1. To require agencies to keep the public currently informed of their organization, procedures and rules . . . .
>
> 2. To provide for public participation in the rule making process. . . .
>
> 3. To prescribe uniform standards for the conduct of formal rule making . . . and adjudicatory proceedings . . . , i.e., proceedings which are required by statute to be made on the record after opportunity for an agency hearing. . . .
>
> 4. To restate the law of judicial review. . . .

United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 9 (1947).

[149] United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 5 (1947).

independence in statutory interpretation with the administrative self-sufficiency sought by proponents of the New Deal at a time of political stalemate. [150]

> The APA was the armistice of a fierce political battle over administrative reform. The forces in the battle fought over the degree to which Congress would permit Roosevelt, through his agencies, to implement the New Deal. [151]

It is not surprising, therefore, that because the battle over administrative reform was political rather than principled, groups that favored or disfavored reform of the administrative structure paralleled those groups that favored ordisfavored the New Deal.[152]

4. THE ADMINISTRATIVE PROCEDURE ACT AND JUDICIAL REVIEW

The Administrative Procedure Act lends support to according some weight to agency guidance but does not position an administrative agency or the court as a super-legislature. In 1941, the question was how much independent judicial judgment is the right amount of independent judgment. Three choices, of course, exist. First is that administrative action is reviewed by a court de novo and a judicial review is one in which a court answers with what it believes is the "right interpretation."[153] Second is judicial abdication to interpretations of administrative agencies. Third, and most properly, is whether an "administrative interpretation has substantial support."[154]

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[150] Conservatives could defeat liberal legislation and President Roosevelt could veto the conservative agenda. George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 NW. U. L. REV. 1557, 1675 (1996).

[151] George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 NW. U. L. REV. 1557, 1680 (1996).

[152] George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 NW. U. L. REV. 1557, 1680 (1996).

[153] S. Doc. No. 8, 77th Cong., 1st Sess. 90-91 (1941).

[154] *Id.* S. Doc. No. 8, 77th Cong., 1st Sess. 90-91 (1941).

The Administrative Procedure Act favors the later view – "[w]here the statute is reasonably susceptible of more than one interpretation, the court may accept that of the administrative body."[155] Such a view would further the goal of "achiev[ing] relative uniformity in the administrative machinery of the Federal Government."[156] The Administrative Procedure Act does provide that "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action."[157] Specifically, a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ."[158] The standard of review thus favors judicial deference to agency determinations with a reviewing court imposing its own view only when an agency acts in an arbitrary or capricious manner.

The rationale for deference is based on the standing of the administrative agency that it is "not merely as the opinion of some men or even of a lower tribunal, but as the

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[155] S. Doc. No. 8, 77th Cong., 1st Sess. 90-91 (1941).

[156] United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 5 (1947).

[157] United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 107 (1947).

[158] United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 107 (1947). Moreover, a reviewing court "hold unlawful and set aside agency action, findings, and conclusions found to be:

(1) "contrary to constitutional right, power, privilege, or immunity;"

(2) "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;"

(3) "without observance of procedure required by law;

(4) "unsupported by substantial evidence in any case subject to [specific] requirements . . . or otherwise reviewed on the record of an agency hearing provided by statute; or

(5) "unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court."

Id. Finally, a review court may "compel agency action unlawfully withheld or unreasonably delayed" *Id.*

opinion of the body especially familiar with the problems dealt with by the statute and burdened with the duty of enforcing it. This may be because legislation deals with complex matters calling for expert knowledge and judgment."[159] When dealing with multifaceted, competing policy interests, administrative agencies can consider a particular issue in the context of the statutory scheme while courts consider a particular issue in the context of the precise issue originating in litigation.

The Administrative Procedure Act was a political war on the New Deal and the resulting compromise, without dissent, was a peace treaty that favored the terms of the New Deal proponents.[160] *Skidmore* represents a similar compromise – without opposition by a partisan Supreme Court -- that provides deference, but in circumstances that persuade a court that the reasoning of the agency is sound. The open-ended factor

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[159] S. Doc. No. 8, 77th Cong., 1st Sess. 90-91 (1941). The Administrative Procedure Act was based, in part, the Report of the Attorney General's Committee on Administrative Procedure. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 513 (1989). Further, *Chevron* notes that agency officials have more expertise than court. "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. . . . 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 . . . . *Id.* at 837; Ellen P. Aprill, *The Interpretative Voice*, 38 LOY. L.A. L. REV. ___ (2006), Loyola Law School (Los Angeles) Legal Research Series, Research Paper 2005-3, http://ssrn.com/abstract=665829, at 6) (administrative agency possess technical expertise and interpret specific statutory provision by taking into account an entire statutory scheme). *Cf.* Linda Galler, *Emerging Standards for Judicial Review of IRS Revenue Rulings*, 72 B.U. L. REV. 841, 852 (1992) ("While the IRS undoubtedly employs many intelligent, experienced, and accomplished individuals, it is far from clear that the individual or collective dexterity of this group distinguishes it from tax practitioners in the private sector.").

There is, however, a body of legislative history that suggests that judicial independence was preserved in the Administrative Procedure Act at the expense of administrative self-sufficiency. *See* Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2080-81 and n.46 (1990) ("the APA appeared to endorse judicial control of administration and to direct courts to interpret statutes on their own.") (text and underlying purpose of the APA "argue in favor of independent review."). *See also* Administrative Procedure Act, S. Doc. No. 248, 79th Cong., 2d Sess. 305 (1946) (remarks of Sen. McCarran, Chairman, House Judiciary Comm.) ("I desire to emphasize the . . . provisions for judicial review. . . ."; id. at 217 (Report of the Senate Judiciary Comm.) ("the enforcement of the bill, by the independent judicial interpretation and application of its terms, is a function which is clearly conferred upon the courts. . . . Judicial review is of utmost importance. . . .")

[160] Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 448 (1986).

analysis, however, provides refuge for an interpretation of an administrative agency only if it is persuasive to a reviewing court. In this sense, a court weighs an argument and the more persuasive one wins. That simply does not provide deference to an administrative agency. It does not suggest, however, that *Chevron* deference should apply to informal agency guidance. It nonetheless is significant as a starting point in re-formulating an intermediate deference standard.

G. DEFERENCE UNDER CHEVRON

For 20 years, courts have looked to *Chevron* to determine the extent to which a policy interpretation by an agency should be respected. In *Chevron*, the Supreme Court upheld a determination of the Environmental Protection Agency as a permissible construction of the Clean Water Act of 1977, reversing the decision of the United States Court of Appeals for the D.C. Circuit. The *Chevron* Court held:

> [T]he Court of Appeals misconceived the nature of its role in reviewing the regulations at issue. Once it determined, after its own examination of the legislation, that Congress did not actually have an intent . . . the question before it was not whether in its view the concept is "inappropriate" . . . but whether the Administrator's view that it is appropriate in the context of this particular program is a reasonable one."[161]

In reaching its decision, the Supreme Court rejected the de novo review employed by the D.C. Circuit (and permitted under *Skidmore*), concluding that Congress did not have an "intent" regarding the matter under consideration.[162] Rather than using a de novo standard, a court must consider the determination of the agency charged with the administration of the statute at issue and give such a determination deference provided

[161] *Chevron*, 467 U.S. at 845.

[162] *Chevron*, 467 U.S. at 843.

that the interpretation is permissible.[163] As a result, the Supreme Court created what Kenneth W. Starr called the Chevron "two step" where a court first determines whether Congress has directly spoken on the issue and if not, whether the agency interpretation is a permissible one.[164]

In the first step, the courts must consider whether Congress intended to resolve the matter. According to *Chevron*, a court considers whether Congress "has directly spoken to the precise question at issue."[165] Step one, thus, requires a two-fold inquiry. The initial inquiry under step one is whether the inquiry is answered directly by the plain language of the statute.[166] The inquiry ends if the intent of Congress is found in the plain language of the statute. As a result, the intent of Congress must be followed. However, if the plain language fails to resolve the matter, a second inquiry under step one examines the legislative history of the statute.[167] Again, the inquiry ends if the legislative history deciphers congressional intent which must be followed. Thus, if either inquiry under step one reveals Congressional intent, the inquiry ends without consideration of step two.[168]

As a result, if the answer to the precise question is resolved through step one and if the interpretation of the agency is consistent with Congressional intent, the interpretation of the agency is upheld. If, however, an administrative construction is contrary to the intent of Congress, a court should reject the construction offered by the

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[163] *Chevron*, 467 U.S. at 843.

[164] *See* Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 287-88 (1986).

[165] *Chevron*, 467 U.S. at 841.

[166] Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 288 (1986).

[167] Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 288 (1986).

[168] Step one does not consider an the viewpoint of an agency because step one presupposes that there is enough congressional attention and specificity that any agency interpretation contrary to the congressional mandate must fail. Ellen P. Aprill, *The Interpretative Voice*, 38 LOY. L.A. L. REV. ___ (2006), Loyola Law School (Los Angeles) Legal Research Series, Research Paper 2005-3, http://ssrn.com/abstract=665829, at 11.

agency.[169]

Step one resolves all issues in which Congress expresses its intention. The second step addresses matters in which Congress did not express its intention on a particular issue or its intention is ambiguous. As a result, step two directs a court to determine whether the agency's interpretation is a permissible construction of the statute.[170]

The Court uses the term "permissible," but it is apparent that this is intended to be synonymous with "reasonable."[171] The Court considers whether the interpretation of the agency is reasonable, and "the court does not simply impose its own construction."[172] As a result, the primary impetus of *Chevron* is a choice between two branches of government.[173] In interpreting rules promulgated by Congress and not answered by Congressional intent as expressed in the plain language of the statute or expressed through legislative history, *Chevron* favors the Executive Branch over the Judicial

[169] *Chevron*, 467 U.S. at 842-43 n.9. *See, e.g.*, *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981); *SEC v. Sloan*, 436 U.S. 103, 117-18 (1978); *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 745-746 (1973); *Volkswagenwerk v. FMC*, 390 U.S. 261, 272 (1968); *NLRB v. Brown*, 380 U.S. 278, 291 (1965); *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965); *Social Security Board v. Nierotko*, 327 U.S. 358, 369 (1946); *Burnet v. Chicago Portrait Co.*, 285 U.S. 1, 16 (1932); *Webster v. Luther*, 163 U.S. 331, 342 (1896).

[170] *Chevron*, 467 U.S. at 843.

[171] *Chevron*, 467 U.S. at 844 ("a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency"). *See INS v. Yong Ha Wang*, 450 U.S. 139, 144 (1981); *Train v. Natural Resources Defense Council, Inc.*, 421, U.S. 60, 87 (1975). *See also* Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 288 (1986).

[172] *Chevron*, 467 U.S. at 843. *See* Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 288 (1986).

[173] Policy choices should be left to the discretion of an agency and not formulated by the judiciary. *Chevron*, 467 U.S. at 866. The Court stated – "[F]ederal 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." *TVA v. Hill*, 437 U.S. 153, 195 (1978)." *Id.*

Branch.[174] Under *Chevron*, choices of interpretation of statutes are necessary and those choices involve policy determinations.[175]

The second step in *Chevron* focuses on determining whether an agency overstepped its authority. The application of step two instructs courts to limit its determination to whether the policy choice made by the agency is permissible.[176] Once a court reaches the second step in *Chevron*, an administrative interpretation is likely to prevail.[177] Under this second step, the primary role is that of the agency in which the agency adopts what it considers the optimum solution, and the secondary role is that of

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[174] *Chevron*, 467 U.S. at 866. *See* Linda Galler, *Judicial Deference to Revenue Rulings: Reconciling Divergent Standards*, 56 OHIO ST. L.J. 1037, 1051 (1995). *See also* Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2097-88 (1990); Laurence H. Silberman, *The Intersection of Law and Policy*, 58 GEO. WASH. L. REV. 821, 822-24 (1990). A number of scholars, however, argue that *Chevron* does not accomplish a shift in interpretative power from the judiciary to administrative agencies. Paul L. Caron, *Tax Myopia Meets Tax Hyperopia: The Unproven Case of Increased Judicial Deference to Revenue Rulings*, 57 OHIO ST. L.J. 637, 639 (1996); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 981 (1992); Russell L. Weaver, *Some Realism About Chevron*, 58 MO. L. REV. 129, 181 (1993); Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up to be Tax Lawyers*, 13 VA. TAX REV. 517, 562 (1994). While *Chevron*-type deference should not apply to revenue rulings issued by the Internal Revenue Service because the nature of the guidance is informal, research suggests that courts of appeals accepted the determination of the Internal Revenue Service in revenue rulings 92% of the time in the eleven years prior to *Chevron* but only 71% of the time in the eleven years post *Chevron*. Paul L. Caron, *Tax Myopia Meets Tax Hyperopia: The Unproven Case of Increased Judicial Deference to Revenue Rulings*, 57 OHIO ST. L.J. 637, 639 (1996). While the point is well-taken, this research self-admittedly was a small part of a larger point and used limited data in response to an earlier article with 21 cases as part of the data set pre-*Chevron* and 13 cases post-*Chevron*.

[175] *Chevron*, 467 U.S. at 866. Specifically, the Court determined:

> 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 once: "Our Constitution vests such responsibilities in the political branches." *TVA v. Hill*, 437 U.S. 153, 195 (1978).

Id. at 866.

[176] *Chevron*, 467 U.S. at 842-43. *See* John F. Coverdale, *Chevron's Reduced Domain: Judicial review of Treasury Regulations and Revenue Rulings After Mead*, 55 ADMIN. L. REV. 29, 44 (2003); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 978-79 (1992); Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 96-97 (1994).

[177] Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHIC.-KENT L. REV. 1253, 1262 (1997).

the courts in which a court may review the solution of an agency and overturn it only if unreasonable.[178]

Chevron was followed by two additional cases that set the boundaries for application of *Chevron* deference. In *Christensen v. Harris County*the Supreme Court restricted *Chevron* deference in a case involving an opinion letter of the Department of Labor.[179] The Court held that *Chevron* deference did not apply because the interpretation by the Department of Labor was "an interpretation contained in an opinion letter," not an interpretation "arrived at after, for example, a formal adjudication or notice-and-comment rulemaking."[180] As such, the Court held that "[i]nterpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference."[181]

In *Mead*, the United States Customs Service urged *Chevron* deference in the issuance of a tariff classification ruling.[182] According to the Customs Service, a letter ruling is "the official position of the Customs Service with respect to the particular

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[178] *Chevron*, 467 U.S. at 837.

> [T]he 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 reasonable 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. *See Schweiker v. Gray Panthers*, 453 U.S. 34, 44 (1981).

[179] 529 U.S. 576 (2000).

[180] *Christensen*, 529 U.S. at 587.

[181] *Christensen*, 529 U.S. at 587.

[182] *Mead*, 533 U.S. at 221.

transaction or issue described therein and is binding on all Custom Service personnel."[183] Moreover, the "principle" cited in the ruling "may be cited as authority in the disposition of transactions involving the same circumstances."[184]

While *Mead* resulted in further restricting application of *Chevron* deference, the Court focused principally on whether Congress intended *Chevron* to apply.[185] *Mead* cites two factors to determine whether *Chevron* deference should apply. First, "Congress delegated authority to the agency generally to make rules carrying the force of law…"[186] Second, "the agency interpretation claiming deference [was] promulgated in the exercise of that authority."[187] Courts must then determine whether Congress intended to "delegate general authority to make rules with force of law."[188] *Mead* reasons that absent the express delegation, a court must consider its general authority.[189]

While the decisions of the Supreme Court in *Christensen* and *Mead* "continue[] to leave open the possibility of granting *Chevron* deference to agency positions reached

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[183] *Mead*, 533 U.S. at 222 n.1 (citing 19 C.F.R. § 177.9(a) (2000).

[184] *Mead*, 533 U.S. at 222 (citing 19 C.F.R. § 177.9(a) (2000)).

[185] Ellen P. Aprill, *The Interpretative Voice*, 38 LOY. L.A. L. REV. ___ (2006), Loyola Law School (Los Angeles) Legal Research Series, Research Paper 2005-3, http://ssrn.com/abstract=665829, at 5 (*Mead* further restricts *Chevron* and intensifies judicial review and promotes "micromanagement of agency decisions."). *See* John F. Coverdale, *Chevron's Reduced Domain: Judicial review of Treasury Regulations and Revenue Rulings After Mead*, 55 ADMIN. L. REV. 29, 49 (2003); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 545 (2003).

[186] *Mead*, 533 U.S. at 226-27.

[187] *Mead*, 533 U.S. at 227.

[188] *Mead*, 533 U.S. at 227 (quoting *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. at 837, 843-44 (1984)). Under I.R.C. § 7805(b), Congress made an express delegation to the Internal Revenue Service to utilize its discretion in determining whether to apply a ruling without retroactive effect. 26 U.S.C. § 7805(b).

[189] *Mead*, 533 U.S. at 229. Guidance issued under § 7805 of the Internal Revenue Code does not have the force of law and regulations issued under that authority is a general grant of authority as opposed to a specific grant of authority.

outside of notice-and-comment rulemaking,"[190] informal guidance should be construed not under the *Chevron* deference standard applicable to formalized guidance, but rather something more than the "litigation position" persuasiveness of *Skidmore*. *National Muffler* provides an appropriate level of review.[191]

H. DEFERENCE UNDER NATIONAL MUFFLER

In *National Muffler*, the Supreme Court offered an alterative an view of deference to agency guidance. While considering the deference due to a general authority tax regulation of the Department of Treasury, the Court considered a list of factors that diverge from the ill-defined deference factors under *Skidmore*.[192] In *National Muffler*, the Court considered whether the guidance "harmonizes with the plain language of the statute, its origin, and its purpose."[193] Moreover, the Court concluded that greater deference was due if the guidance was issued as "a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent."[194] If the guidance is not contemporaneously issued, then a court should consider the manner in which it evolved in order to determine if deference is warranted.[195] Finally, the Court considered appropriate an inquiry into the "length of time the

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[190] John F. Coverdale, *Chevron's Reduced Domain: Judicial review of Treasury Regulations and Revenue Rulings After Mead*, 55 ADMIN. L. REV. 29, 54 (2003).

[191] A number of cases and scholars argue that informal guidance and general authority regulations are entitled to no more than *Skidmore* deference. John F. Coverdale, *Chevron's Reduced Domain: Judicial Review of Treasury Regulations and Revenue Rulings After Mead*, 55 ADMIN. L. REV. 39 (2003); Mitchell M. Gans, *Deference and the End of Tax Practice*, 36 REAL PROP., PROB. & TRUST J. 731 (2002); *Robinson v. Commissioner*, 119 T.C. 44 (Vasquez, J. dissenting). Others argue that at least general authority regulations issued under § 7805 should be entitled to *Chevron* deference. *Hospital Corp. of America v. Commissioner*, 348 F.2d 136 (6th Cir. 2003).

[192] 440 U.S. 472 (1978).

[193] *National Muffler*, 440 U.S. at 477.

[194] *Id*.

[195] *Id*.

[guidance] has been in effect, the reliance placed on it, the consistency of the Commissioner's interpretation, and the degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute."[196]

It appears that both the consistency factor and the length of time a policy has, in effect, permeated from *Skidmore*. Length of time, just as consistency in position, would favor applying deference to administrative guidance while the inverse would favor an independent judicial assessment. For the same reasons described above, the consistency of an agency interpretation and the length of time an agency has followed a particular position should not be part of the deference equation.[197] The other *National Muffler* factors do, however, provide a valid framework for considering the extent to which agency guidance should be given deferential treatment.

The first *National Muffler* factor – whether the guidance "harmonizes with the plain language of the statute, its origin, and its purpose" – is broader than the first step under *Chevron*. In step one under *Chevron*, the inquiry is whether the plain language of the statute provides an answer to the question.[198] If the plain language of a statute provides an answer, the plain language is followed and a court never arrives at step two – a step that favors administrative discretion as long as the administrative determination is reasonable.[199]

Under *National Muffler*, the inquiry does not end with the "plain language" but looks at whether the administrative guidance harmonizes with the "plain language."[200]

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[196] *Id*.

[197] *See supra* notes 74-112 and accompanying text.

[198] Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 288 (1986).

[199] *Chevron*, 467 U.S. at 843.

[200] *National Muffler*, 440 U.S. at 477.

While the harmonization with the plain language of a statute is a factor, it should be elevated above the remaining *National Muffler* factors. *Chevron* requires a more formalized process for heightened deference than the more informal guidance at issue in *National Muffler*. If *Chevron* provides greater deference than *National Muffler* and administrative discretion is not part of the *Chevron* equation if the administrative construction is at odds with the plain language of the statute, certainly the less deferential standard under *National Muffler* cannot provide greater administrative discretion than *Chevron*.

It is appropriate, however, to consider the origin and purpose of the statute to determine whether deference is given an agency determination.[201] While harmonization with the plain language should be a superior factor, harmonization with the origin and purpose does not hold the same cache. Instead, harmonization with the origin and purpose should be considered discretionary chips just as they are considered in *Chevron* under step two to determine whether the administrative construction is reasonable.[202]

Moreover, the Court concluded that greater deference was due if the guidance was issued as "a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent."[203] In the tax area, agency officials are often

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[201] 1 WILLIAM BLACKSTONE COMMENTARIES ON THE LAWS OF ENGLAND 61 (1803) ("[T]he most universal and effectual way of discovering the true meaning of law, when the words are dubious, is by considering the *reason* and *spirit* of it; or the cause which moved the legislator to enact it.").

[202] *Chevron*, 467 U.S. at 842-43. *See* John F. Coverdale, *Chevron's Reduced Domain: Judicial review of Treasury Regulations and Revenue Rulings After Mead*, 55 ADMIN. L. REV. 29, 44 (2003); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 978-79 (1992); Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 96-97 (1994).

[203] *National Muffler*, 440 U.S. at 477. *See* Erwin N. Griswold, *A Summary of the Regulations Problem*, 54 HARV. L. REV. 398, 405-06 (1941). *See also General Elec. Co. v. Gilbert*, 429 U.S. 125, 142 (1976); *NLRB v. United Food and Commercial Workers Union*, 484 U.S. 112, 124 n.20 (1987); *State of Ohio Dept. of Human Services v. U.S. Dept. of Health & Human Services, Health Care Financing Administration*, 862 F.2d 1228, 1234-36 (6th Cir. 1988); *Hydrocarbon Trading & Transp. Co. v. Exxon Corp.*, 89 F.R.D. 650,

involved in the legislative process and contemporaneous agency guidance assures or at least assumes that the officials issuing the agency guidance are familiar with the background of the enacted or amended statute.[204] Because of this participation, a contemporaneous interpretation by agency officials is more likely to consider and implement legislative intent at the time of the enactment of the statutory provision.[205]

On the other hand, guidance not contemporaneously issued does not likely have the benefit of knowledge of the specific implementation of particular congressional policy. In such an instance, *National Muffler* correctly recognizes that if the guidance is not contemporaneously issued, then a court should look behind the guidance to consider the manner in which it was enacted to determine if deference is warranted.[206] Finally, the *National Muffler* Court considered appropriate an inquiry into the "length of time the

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655 (S.D.N.Y. 1981); *United States v. Exxon Corp.*, 87 F.R.D. 624, 630-33 (D.D.C. 1980); *Tenneco Oil Co. v. Department of Energy*, 475 F. Supp. 299, 318 (D. Del. 1979); 1 WILLIAM BLACKSTONE COMMENTARIES ON THE LAWS OF ENGLAND 59 (1803) ("The fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made. . . .").

[204] *See* John F. Coverdale, *Court Review or Tax Regulations and Revenue Rulings in the Chevron Era*, 64 GEO. WASH. L. REV. 35, 75 (1995). *See also* Bradford L. Ferguson, *Reexamining the Nature and Role of Tax Legislative History in Light of the Changing Realities of the Process*, 67 TAXES 804, 812 (1989); *Augustus v. Commissioner*, 118 F.2d 38, 43 (6th Cir.), *cert. denied*, 313 U.S. 585 (1941) ("The first administrative interpretation of a provision as it appears in a new act often expresses the general understanding of the time or the actual understanding of those who played an important part when the statute was drafted."). This factor has endured criticism because collective legislative intent is unachievable and even if the agency has been involved in the process, it does not ensure that the agency properly implements that intent. Linda Galler, *Emerging Standards for Judicial Review of IRS Revenue Rulings*, 72 B.U. L. REV. 841, 877-80 (1992). According to Professor Galler, "[b]y its very nature, the legislative process is one of mediation, compromise, and reconciliation of differing views and opinions. If a court chooses to utilize legislative history in the process of interpreting a statutory ambiguity, it is the function of the court itself, not an administrative agency, to ascertain the purpose or intent of the legislature." *Id.* at 879.

[205] Linda Galler, *Emerging Standards for Judicial Review of IRS Revenue Rulings*, 72 B.U. L. REV. 841, 876-77 (1992). *See United States v. Vogel Fertilizer*, 455 U.S. 16, 31 (1982) (participation in the legislative process by agency officials entitles interpretation by those agency officials to "great" deference).

[206] *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 477 (1979). *See Oakland County Bd. of Comm'rs v. United States Dep't of Labor*, 853 F.2d 439, 444 (6th Cir. 1988)(Guy, J., dissenting); *Hydrocarbon Trading & Transp. Co. v. Exxon Corp.*, 89 F.R.D. 650, 655 (S.D.N.Y. 1981); *United States v. Exxon Corp.*, 87 F.R.D. 624, 630-33 (D.D.C. 1980); *Tenneco Oil Co. v. Department of Energy*, 475 F. Supp. 299, 318 (D. Del. 1979).

[guidance] has been in effect, the reliance placed on it, the consistency of the Commissioner's interpretation, and the degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute."

Congressional scrutiny in reenactment of a statute also forms a valid basis on which deference to agency determinations may be given. In many cases, this factor is neutral because congressional interpretation of a statutory provision provides little assistance in interpreting the intent of an earlier Congress.[207] If, however, Congress was aware of agency policy through the issuance of agency guidance, reenactment should provide greater comfort that the agency was implementing congressional policy. At a minimum, this tacit acceptance of agency guidance should provide greater discretion to the perspective of an agency on a particular matter.[208]

While it may be argued that mere reenactment of a statute provides tacit approval of agency policy,[209] it is unlikely if not impossible to assume that Congress is aware of all agency guidance in all administrative agencies.[210] In the area of tax legislation, Congress enacts or modifies provisions with increasing frequency.[211] In this circumstance,

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[207] *See Central Bank v. First Interstate Bank*, 511 U.S. 164, 185-86 (1994) (quoting *Public Employees Retirement System of Ohio v. Betts,* 492 U.S. 158, 168 (1989)). *See also Weinberger v. Rossi,* 456 U.S. 25, 35 (1982); *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. 102, 118, and n. 13 (1980).

[208] *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 477 (1979). *See* John F. Coverdale, *Court Review or Tax Regulations and Revenue Rulings in the Chevron Era*, 64 GEO. WASH. L. REV. 35, 78 (1995).

[209] *Davis v. United States*, 495 U.S. 472, 482 (1980). *See Cammarano v. United States*, 358 U.S. 498 (1959); *McCughan v. Hershey Chocolate Co.*, 283 U.S. 488-492-93 (1931).

[210] Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up to be Tax Lawyers*, 13 VA. TAX REV. 517, 566 (1994). See Robert C. Brown, Regulations, Reenactment and the Revenue Acts, 54 Harv. L. Rev. 377 (1941); Erwin N. Griswold, A Summary of the Regulations Problem, 54 Harv. L. Rev. 398 (1941); Randolph E. Paul, Use and Abuse of Tax Regulations in Statutory Construction, 49 Yale L.J. 600 (1940).

[211] Between 1976 and 1989, Congress passed 138 bills modifying the federal tax laws. David Burnham, A LAW UNTO ITSELF 303 (1989). Through the enactment of three Taxpayer's Bills of Rights from 1988 to 1998, Congress added some 140 non-substantive, procedural provisions to the Internal Revenue Code. Technical and Miscellaneous Revenue Act of 1988 (Taxpayer Bill of Rights), Pub. L. No. 100-647, 102

deference based on congressional reenactment may have theoretical application but less practical significance.[212] In this circumstance, heightened deference to agency consideration of an issue should not follow.

National Muffler evokes more of a balancing between the judicial independence and deferential treatment to informal agency guidance. While *Skidmore* grants to an agency nothing more than the power to persuade, and *Chevron* upholds an interpretation of an agency as long as it is reasonable, *National Muffler* suggests a more balanced, meaningful deference standard. This standard requires courts to consider close-ended factors to determine deference. In adopting such a test, deference then fits within the broad parameters of more than a litigating position of an agency charged with administration of a particular area of the law and less than an abdication of the principles of *Marbury v. Madison*.[213]

Stat. 3342, 3730 contained 21 provisions. Taxpayer Bill of Rights 2, Pub. L. No. 104-168, 110 Stat. 1452 (1996) contained more than 40 provisions. Internal Revenue Service Restructuring and Reform Act of 1998 (Taxpayer Bill of Rights 3), Pub. L. No. 105-206, 112 Stat. 685 (1998) contained more than 70 provisions. *See* Leandra Lederman, *Of Taxpayer Rights, Wrongs, and a Proposed Remedy*, Tax Notes, May 22, 2000, 1133 n.2; Christopher M. Pietruszkiewicz, *A Constitutional Cause of Action and the Internal Revenue Code: Can You Shoot (Sue) the Messenger?*, 54 SYR. L. REV. 1, 5-6 (2004). In 2004 alone, the American Jobs Creation Act, Pub. L. No. 108-357, 118 Stat. 1417 (2004), added 173 provisions to the Internal Revenue Code, amended another 274 provisions, created 44 major tax changes effective immediately and deferred the effective date to another 35 major tax changes until January 1, 2005, and included a 663 page conference report. CCH Tax Briefing, American Jobs Creation Act of 2004 Special Report (Oct. 11, 2004). Moreover, the Working Families Tax Relief Act of 2004, Pub. L. No. 108-311, 118 Stat. 1165 (2004), amended 175 Internal Revenue Code Provisions and included a 150 page Conference Report. CCH Tax Briefing, Working Families Tax Relief Act of 2004 Special Report (Oct. 4, 2004).

[212] Linda Galler, *Emerging Standards for Judicial Review of IRS Revenue Rulings*, 72 B.U. L. REV. 841, 889 (1992).

[213] 5 U.S. 137 (1803). *See* Presley v. Etowah County Comm'n, 502 U.S. 491 (1992); EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991) (Scalia, J., concurring); Zuber v. Allen, 396 U.S. 168, 193 (1969); Trust of Bingham v. Commissioner, 325 U.S. 365, 371-72 (1945).

While *National Muffler* has been described as granting "serious deference" to an administrative agency,[214] it appears that the true range of deference standards is that *Skidmore* provides no deference, *Chevron* provides strong deference, and *National Muffler* simply provides deference. Under *National Muffler*, a court should defer to an interpretation of an agency if the interpretation "implements the congressional mandate in some reasonable manner."[215] This is because "Congress has delegated to the [Internal Revenue Service], not the courts, the task of prescribing 'all needful rules and regulations for the enforcement' of the Internal Revenue Code.[216] Under this standard, discretion (and deference) is given to those responsible for implementing the rules and helps to assure consistency under a statutory scheme with "limitless factual variations."[217] Deference, and more particularly, an appropriate level of deference, provides a suitable balance between agencies and courts and favors agency construction over judicial independence as long as the choice of the agency for implementation is reasonable under the statutory scheme at issue.[218]

I. ORIGINS OF NATIONAL MUFFLER

The deference to general authority regulations in *National Muffler* is an outgrowth of the deference to a ruling of the Internal Revenue Service eleven years earlier in *United*

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[214] Ellen Aprill, *Muffled Chevron: Judicial Review of Tax Regulations*, 3 FLA. TAX REV. 51, 77 (1996).

[215] *National Muffler Dealers Ass'n, Inc. v. United States*, 440 U.S. 472, 476-77 (1979). *See United States v. Cartwright*, 411 U.S. 546, 550 (1973); *United States v. Correll*, 389 U.S. 299, 307 (1967).

[216] *National Muffler Dealers Ass'n, Inc. v. United States*, 440 U.S. 472, 477 (1979), *quoting* 26 U.S.C. § 7805(a). *See United States v. Correll*, 389 U.S. at 307. *See Davis v. United States*, 495 U.S. at 484 ("Although the Service's interpretive rulings do not have the force and effect of regulations, . . . we give an agency's interpretations and practices considerable weight where they involve the contemporaneous construction of a statute and where they have been in long use.").

[217] *National Muffler Dealers Ass'n, Inc. v. United States*, 440 U.S. 472, 477 (1979). *See United States v. Moore*, 95 U.S. 760 (1878).

[218] *See* Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2090 (1990).

States v. Correll.[219] The decision of the Supreme Court in *Correll* was issued in 1967 and *National Muffler* in 1978, decades after *Skidmore* in 1944. *National Muffler* was an extension of *Correll* and provides support for expanding the application of *National Muffler* deference beyond general authority regulations to more informal agency guidance.[220]

In *Correll*, the Supreme Court, in considering whether the Internal Revenue Service is entitled to deference regarding a ruling, fails to cite *Skidmore* or its factors, instead focusing on an analysis consistent with a number of the factors it later employed in *National Muffler*. In *Correll*, the Supreme Court considered whether the Commissioner implemented the "congressional mandate in a reasonable manner" and weighed that inquiry in favor of the Commissioner because the interpretation of the Commissioner "long continued without substantial change" even after Congress substantially reenacted the statute.[221]

Correll foreshadowed the deference standard of *National Muffler* and heightened the deference under *Skidmore* commenting that "[i]mprovements might be imagined. But we do not sit as a committee of revision to perfect the administration of the tax laws"

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[219] *United States v. Correll*, 389 U.S. 299 (1967).

[220] A revenue ruling describes a set of hypothetical facts, apply those facts to the law, and offer a legal conclusion for all taxpayers concerning what the Internal Revenue Service believes the result would be in such a situation. *See Rev. Proc* 89-14, 1989-1 C.B. 814. "Revenue rulings . . . are published to provide precedents to be used in the disposition of other cases, and may be cited and relied upon for that purpose." *Id*. Moreover, revenue rulings involve substantive law and reflect conclusions responsive to the facts addressed in the ruling. *Id*. Finally, a revenue ruling is an official interpretation by the Service and is published in the Internal Revenue Bulletin. Treas. Reg. § 601.201(a)(6). *See* Christopher M. Pietruszkiewicz, *Does the Internal Revenue Service Have a Duty to Treat Similarly-Situated Taxpayers Similarly?*, 74 U. CINN. L. REV. ___ n. ___ (2006).

[221] *United States v. Correll*, 389 U.S. 305-07. *See Helvering v. Winmill*, 305 U.S. 79 (1938); *Fribourg Nav. Co. v. Commissioner*, 383 U.S. 272 (1966). *Cf. National Muffler v. United States*, 440 U.S. at 477 that considers whether the guidance "harmonizes with the plain language of the statute, its origin, and its purpose[,]" . . . the "length of time the [guidance] has been in effect, . . . the consistency of the Commissioner's interpretation, and the degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute."

because it is the "Commissioner, not the courts that Congress has delegated to ability to prescribe 'all needful rules and regulations for the enforcement' of the Internal Revenue Code."[222] The Supreme Court defined the role of the judiciary -- "[t]he role of the judiciary in cases of this sort begins and ends with assuring that the Commissioner's regulations fall within his authority to implement the congressional mandate in some reasonable manner."[223]

Davis v. United States[224] and *Cottage Savings Association v. Commissioner*,[225] follow the tax trend of utilizing the deference standard under *National Muffler* instead of applying *Chevron* or *Skidmore*. In deciding the amount of deference given a revenue ruling issued by the Internal Revenue Service, the Supreme Court in *Davis* sidestepped *Chevron* and *Skidmore*, instead focusing on three of the *National Muffler* standards, considering whether the revenue ruling was a contemporaneous construction of the statute, the length of time the revenue ruling was in effect, and the degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute.[226]

Cottage Savings followed *Davis* in which the Commissioner sought deference to a general authority regulation under *Chevron*.[227] In applying *National Muffler* to the regulation to determine whether the regulation merited deference, the Court again simply

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[222] *United States v. Correll*, 389 U.S. at 306-07; 26 U.S.C. § 7805(a).

[223] *United States v. Correll*, 389 U.S. at 307.

[224] 495 U.S. 472 (1990).

[225] 499 U.S. 554 (1991).

[226] *Davis v. United States*, 495 U.S. at 484.

[227] *Cottage Savings Ass'n v. Commissioner*, 499 U.S. at 560-61.

ignored *Chevron* and did not apply *Chevron* to the regulation determining that it was not applicable. [228]

J. DEFERENCE IN THE CONTEXT OF A STATUTORY SCHEME

Deference to agency guidance should be based, in large part, on a statutory scheme devised by Congress[229] and whether that scheme delegates authority to an agency.[230] The Internal Revenue Code is a good example. Section 7805(a) provides:

> "[t]he Secretary shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue."[231]

In short, I.R.C. § 7805(a) prescribes a general grant of authority provided by Congress to enforce the internal revenue laws.[232] Through this authority, the Internal

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[228] *Cottage Savings Ass'n v. Commissioner*, 499 U.S. at 560-62.

[229] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 513 (1989) (citing *Process Gas Consumers Group v. United States Dept. of Agriculture*, 694 F.2d 778, 791 (D.C. Cir. 1982) (quoting *Constance v. Secretary of Health & Human Servs.,* 672 F.2d 990, 995 (1st Cir. 1982), *cert. denied*, 461 U.S. 905 (1983)); *Ford Motor Credit. Co. v. Milhollin*, 444 U.S. 555, 566-68 (1980)). *See* Ellen P. Aprill, *The Interpretative Voice*, 38 LOY. L.A. L. REV. ___ (2006), Loyola Law School (Los Angeles) Legal Research Series, Research Paper 2005-3, http://ssrn.com/abstract=665829, at 8 (judges do not have a responsibility to administration of a complex statutory scheme; they are responsible to resolved specific cases with specific factual backgrounds).

[230] "[A]n 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." Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516 (1989) (citing *Process Gas Consumers Group v. United States Dept. of Agriculture*, 694 F.2d 778, 791 (D.C. Cir. 1982) (quoting *Constance v. Secretary of Health & Human Servs.,* 672 F.2d 990, 995 (1st Cir. 1982), *cert. denied*, 461 U.S. at 865.96 (1983)); *Ford Motor Credit. Co. v. Milhollin*, 444 U.S. 555, 566-68 (1980)).

[231] 26 U.S.C. § 7805(a). The Secretary of the Treasury has delegated the authority to the Commissioner of Internal Revenue to issue private letter rulings. Treas. Reg. § 301.7805-1(a).

[232] With the exception of tax law, congressional grants of authority similar to a grant delegated under § 7805 carry the force and effect of law and are subject of *Chevron*-type deference. *See* Thomas W. Merrill and Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467 (2002). *See also United States v. Haggar Apparel Co.*, 526 U.S. 380 (1999). In tax law, specific grants of rulemaking authority are provided under a specific code provision providing for a delegation. Irving Salem, Ellen P. Aprill, & Linda Galler, *ABA Section of Taxation Report of the Task Force on Judicial Deference*, Tax Lawyer, Vol. 57, No. 3 at 728-29. I do not contest this assertion for purposes of this article and do not argue that informal guidance under § 7805 should be accorded *Chevron* deference.

Revenue Service issues various types of informal guidance including revenue rulings, revenue procedures, notices, announcements, and private letter rulings.

Section 7805 provides not only that the Secretary proscribe regulations under this general grant of authority but also any rules necessary to carry out the provisions of the Internal Revenue Code. While the amount of deference given does not and should not be equal, it does mean that Congress delegated that authority to the Commissioner and not the courts.[233] Such informal guidance, while not meriting the deference accorded regulations that carry the force of law and subject to notice and comment, should be given meaningful deference based on the delegation such as under § 7805(a) – a standard consistent with deference under *National Muffler*.

III. CONCLUSION

The degree of deference accorded to the interpretation of a statute by an agency charged by Congress with administering the statute has been "like quicksand . . . constantly shifting [and] steadily sinking."[234] Courts have been instructed to review agency interpretations of statutes de novo,[235] to give "some deference" to an interpretation by an agency,[236] and to defer to an interpretation of an agency as long as it is reasonable.[237] Moreover, courts have been directed to give "considerably less deference" to an interpretation of an agency if that interpretation conflicts with a prior

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[233] *United States v. Correll*, 389 U.S. 299, 306-07 (1967) ("Congress has delegated to the Commissioner, not to the courts, the task of prescribing all needful rules and regulations for the enforcement of the Internal Revenue Code.")

[234] *Ohio State Univ. v. Secretary,* 996 F.2d 122, 123 n. 1 (6th Cir.1993), *vacated on other grounds,* 512 U.S. 1231 (1994).

[235] *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944).

[236] *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 454 (1986).

[237] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984).

agency interpretation[238] and that they should not follow an interpretation of an agency that violates specific statutory language or is otherwise contrary to law.[239]

The focus of discussion has been the degree to which formal agency guidance carrying the force of law should be given deference. However, informal agency guidance accounts for an overwhelming component of guidance issued by administrative agencies. It is, therefore, appropriate to consider the impact of informal guidance and to utilize a standard that recognizes the expertise of those charged by Congress with implementation of a statutory scheme.

Skidmore was based on political compromise that "awards" deference to administrative agencies if and only if the interpretation corresponds with what a court believes is the best reading of a statute. Moreover, *Skidmore* lacks a solid foundation inasmuch as the open-ended factor analysis is based in large part on principles of law consistent with the state of the law in the 1930s and 1940s. The law has itself been modernized but the re-emergence of the *Skidmore* standards suggests that the deference standard has not.

Skidmore grants an agency nothing more than the power to persuade, allowing courts to substitute their judgment for the judgment of an administrative agency if its reading of a statute is a better reading of the statute. *National Muffler* deference, on the other hand, permits a court to substitute its judgment for the judgment of an agency, but only if the reading of an agency does not implement a congressional mandate in a reasonable manner. *National Muffler*, therefore, is a more appropriate balance between the judicial independence and deferential treatment to informal agency guidance. In

[238] *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447 (1987).

[239] *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994).

applying complex statutory schemes, greater understanding yields better results and deference is an appropriate vehicle to utilize that understanding.