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## ***Chevron*, Take Two: Deference to Revised Agency Interpretations of Statutes**

David M. Gossett<sup>†</sup>

In the modern regulatory state, federal administrative agencies wield immense power. Congress not only explicitly grants agencies authority, it also passes ambiguous statutes; the opportunity to interpret these ambiguous statutes provides an additional source of power. The Supreme Court, under the well known *Chevron* doctrine,<sup>1</sup> implicitly extended this power by holding that courts must defer to reasonable agency interpretations of ambiguous statutes. According to the *Chevron* Court, agencies should interpret ambiguous statutes because they bring more expertise to bear on such questions, because they are politically accountable, and because Congress, by leaving a statute ambiguous, has delegated interstitial policy-making to the agencies.

What happens if an agency decides to revise its interpretation of an ambiguous statute? Before *Chevron*, courts traditionally gave revised interpretations less deference than they gave to agencies' initial interpretations of statutes.<sup>2</sup> It is unclear, however, whether this tradition can or should survive *Chevron*, especially since *Chevron* itself involved a revised agency interpretation of a statute.<sup>3</sup> Furthermore, the reasons the *Chevron* Court offered to justify deferring to agency interpretations of statutes also justify deference to revised agency interpretations.

In the decade since *Chevron*, courts have struggled over whether to give "*Chevron* deference" to revised interpretations: the Supreme Court has proffered several seemingly inconsistent views,<sup>4</sup> while lower courts seem to focus on one or another of these views without grasping the problem in its

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<sup>†</sup> B.A. 1991, Reed College; M.A. 1993, The University of Pennsylvania; J.D. Candidate 1997, The University of Chicago.

<sup>1</sup> *Chevron USA Inc v NRDC*, 467 US 837 (1984). See text accompanying notes 31-37 for a description of the *Chevron* doctrine.

<sup>2</sup> See, for example, *United Transportation Union v Lewis*, 711 F2d 233, 242 (DC Cir 1983) ("A statutory construction to which an agency has not consistently adhered is owed no deference."); *Frank Diehl Farms v Secretary of Labor*, 696 F2d 1325, 1330 (11th Cir 1983) ("We are more reluctant to defer to an agency's more recent interpretation as authoritative when it conflicts with earlier pronouncements of the agency."); *Watt v Alaska*, 451 US 259, 273 (1981) ("The Department [of the Interior]'s current interpretation, being in conflict with its initial position, is entitled to considerably less deference.")

<sup>3</sup> *Chevron*, 467 US at 853-59 (EPA changed its interpretation of the statutory term "source.")

<sup>4</sup> See Part I.

entirety.<sup>5</sup> At first glance, the case law seems utterly unpredictable, a real morass.

This Comment attempts to explain what courts do when confronted with revised agency interpretations of statutes. Further investigation of the case law reveals that courts, despite claiming otherwise, seem to be equally deferential to revised agency interpretations of statutes as to initial interpretations. This Comment first shows that courts treat revised interpretations the same way they treat original interpretations, and then explains why this practice makes sense in terms of the policies behind *Chevron*. Part I traces the Supreme Court's (somewhat inconsistent) statements on deference to revised agency interpretations. Part II briefly reviews *Chevron*, and the developing understanding of deference, as background to explaining what courts are actually doing when confronted with revised agency interpretations. Part III then shows that revised interpretations receive as much deference as other agency interpretations of ambiguous statutes. Finally, Part IV attempts to justify this result by arguing that the theoretical reasons for deferring to an initial agency interpretation of a statute equally mandate deferring to a revised interpretation.<sup>6</sup>

## I. REVISED AGENCY INTERPRETATIONS OF STATUTES: A MORASS?

This Part will present the “doctrine” of deference, and the Court's reasons for deferring to revised agency interpretations of statutes. The Court's approach to deferring to revised interpretations has been quite inconsistent. In *Chevron* itself, the Court acknowledged that the agency had revised its interpretation, but did not view this as a problem:

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.<sup>7</sup>

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<sup>5</sup> See notes 72-76.

<sup>6</sup> This Comment does not argue that courts *should* defer to agency interpretations of statutes. Instead, it makes a narrow claim—if courts are going to defer to initial agency interpretations of statutes, they should also defer to revised interpretations. The rationales for *Chevron* deference apply with equal force to revised interpretations of statutes. Thus, the aversion courts show to acknowledging their deference to these revised interpretations is misplaced.

<sup>7</sup> *Chevron*, 467 US at 863-64.

This language from *Chevron* suggests that agencies not only have the power to revise their interpretations of statutes, but “*must consider*”<sup>8</sup> revising their interpretations regularly to be “informed”<sup>9</sup> in future rulemaking.

In *INS v Cardoza-Fonseca*, the Court “employ[ed] traditional tools of statutory construction” to hold that the statute at issue was not ambiguous and that deference to the agency’s interpretation was therefore not appropriate.<sup>10</sup> In a footnote, though, the Court discussed the fact that the agency had changed its interpretation of the statute. The Court’s approach differed radically from that taken in *Chevron*:

An additional reason for rejecting the INS’s request for heightened deference to its position is the inconsistency of the positions the [Board of Immigration Appeals] has taken through the years. An agency interpretation of a relevant provision which conflicts with the agency’s earlier interpretation is “entitled to considerably less deference” than a consistently held agency view.<sup>11</sup>

Several years later, the Court revisited the issue. The Department of Health and Human Services (HHS) had changed its interpretation of a provision of Title X of the Public Health Services Act to bar funding for family planning clinics that mention abortion, rather than only those that actually perform abortions.<sup>12</sup> In *Rust v Sullivan*, the Court upheld this new “gag rule”:

This Court has rejected the argument that an agency’s interpretation “is not entitled to deference because it represents a sharp break with prior interpretations” of the statute in question. In *Chevron*, we held that a revised interpretation deserves deference because “[a]n initial agency interpretation is not instantly carved in stone” and “the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.” An agency is not required to “establish rules of conduct to last forever,” but rather “must be given ample latitude to ‘adapt [its] rules and policies to the demands of changing circumstances.’”<sup>13</sup>

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<sup>8</sup> Id at 863 (emphasis added).

<sup>9</sup> Id.

<sup>10</sup> 480 US 421, 446 (1987). Justice Scalia, concurring in the judgment, agreed that the statute was unambiguous, but disputed the use of such “tools” as a means of interpreting statutes, claiming that such use “would make deference a doctrine of desperation, authorizing courts to defer only if they would otherwise be unable to construe the enactment at issue. This is not an interpretation but an evisceration of *Chevron*.” Id at 454 (Scalia concurring).

<sup>11</sup> Id at 446 n 30 (majority opinion), quoting *Watt v Alaska*, 451 US 259, 273 (1981).

<sup>12</sup> “[N]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.” *Rust v Sullivan*, 500 US 173, 184 (1991) (citation omitted).

<sup>13</sup> Id at 186-87 (citations omitted), quoting *Chevron*, 467 US at 862, 863-64, and *Motor Vehicle Mfrs Assn v State Farm Mutual Auto Ins Co*, 463 US 29, 42 (1983) (“*State Farm*”).

The Court proceeded to hold that “the Secretary amply justified his change of interpretation with a ‘reasoned analysis.’”<sup>14</sup>

While this seems straightforward, the Court, later the same term in *Pauley v BethEnergy Mines, Inc.*, stated in dicta that “[a]s a general matter, of course, the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views.”<sup>15</sup>

The next time the Court directly confronted the issue, in *Good Samaritan Hospital v Shalala*,<sup>16</sup> it came up with yet another standard—or at least further muddied the waters. This case involved HHS’s interpretation of a reimbursement provision under the Medicare program. The Court first declared that:

The Secretary is not estopped from changing a view she believes to have been grounded upon a mistaken legal interpretation. Indeed, an administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statutes.<sup>17</sup>

However, the Court then proceeded to quote the language in *Cardoza-Fonseca* cited above,<sup>18</sup> thereby undermining this newer standard. To confuse the reader further, the Court also stated that “[h]ow much weight should be given to the agency’s views in such a situation . . . will depend on the facts of individual cases, in particular where [the agency’s] shifts might[, as was possible in this case,] have resulted from intervening and possibly erroneous judicial decisions and its current position from one of our own rulings.”<sup>19</sup> The court also concluded that:

In the circumstances of this case, where the agency’s interpretation of a statute is at least as plausible as competing ones, there is little, if any, reason not to defer to its construction. We should be especially reluctant to reject the agency’s current view which, as we see it, so closely fits the design of the statute as a whole and its object and policy.<sup>20</sup>

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<sup>14</sup> *Rust*, 500 US at 187, quoting *State Farm*, 463 US at 42. See text accompanying notes 94-96 (discussing how requiring an explanation for a change is different from refusing to defer equally to revised interpretations).

<sup>15</sup> 501 US 680, 698 (1991) (citation omitted). The Court found no inconsistency in the agency’s interpretation in this case. *Id.*

<sup>16</sup> 508 US 402 (1993).

<sup>17</sup> *Id.* at 417 (citations and internal quotation marks omitted).

<sup>18</sup> See text accompanying note 11.

<sup>19</sup> *Good Samaritan*, 508 US at 417.

<sup>20</sup> *Id.* (citations and internal quotation marks omitted). It is unclear how upholding an agency’s interpretation, given the facts described in this quotation, would count as “deference.” See also *Thomas*

The Court did not face a revised agency interpretation in the 1995 term, but set forth in dictum yet another standard for deferring to them. In *Smiley v Citibank (South Dakota), N.A.*,<sup>21</sup> the Court held that the Comptroller of the Currency had not changed his interpretation of a statute. It further stated, however, that:

Of course the mere fact that an agency interpretation contradicts a prior agency position is not fatal. Sudden and unexplained change, or change that does not take account of legitimate reliance on prior interpretation, may be “arbitrary, capricious [or] an abuse of discretion.” But if these pitfalls are avoided, change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.<sup>22</sup>

The Court’s precedents since *Chevron*, then, do not paint a straightforward picture of how much deference a revised interpretation of a statute is due. The Court in *Chevron*, *Rust*, and *Smiley* seems to indicate that these interpretations are due as much deference as any other interpretation. In *Good Samaritan* the Court seems to mandate somewhat less deference, however, and in *Cardoza-Fonseca* and *Pauley* the Court clearly states that revised interpretations should receive less deference. Thus, either the Supreme Court has been inconsistent in its view of how much deference revised agency interpretations deserve, or these various statements do not adequately describe what is really going on. Part III of this Comment will look at what courts actually do when confronted with revised agency interpretations of statutes. But first, Part II will provide some background on *Chevron* deference and its justifications.

## II. CHEVRON AND THEORIES OF DEFERENCE

*Chevron* is one of the most important Supreme Court decisions dealing with the administrative state.<sup>23</sup> In a single blow, the Court granted agencies the power to resolve questions of law, arguably undermining the classic

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*Jefferson University v Shalala*, 114 S Ct 2381 (1994), which arguably involved an HHS reinterpretation of a regulation. The Court held that the interpretation had not changed, but, citing *Good Samaritan*, held that the interpretation still deserved deference even if it had.

<sup>21</sup> 116 S Ct 1730 (1996).

<sup>22</sup> Id at 1734 (citations omitted, brackets in original). See text accompanying notes 94-96 for a discussion of requiring an explanation for change; see also text accompanying notes 106-07, disputing the applicability of “reliance” interests to agency statutory interpretation.

<sup>23</sup> Many have made this claim; see, for example, Cass R. Sunstein, *Law and Administration After Chevron*, 90 Colum L Rev 2071, 2074-75 (1990) (“In view of the breadth and importance of the decision . . . *Chevron* promises to be a pillar in administrative law for many years to come.”); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L J 511, 512 (“*Chevron* has proven a highly important decision . . .”).

view of the role of the courts as expressed in *Marbury v Madison*.<sup>24</sup> Although *Chevron* remains controversial,<sup>25</sup> it is settled law and this Comment does not question it. Before further investigating how *Chevron* applies to revised interpretations, this Part explains how *Chevron* applies to consistently held interpretations. This Part will first describe the “*Chevron* two-step,”<sup>26</sup> then present the classic justifications for *Chevron* deference, and finally discuss various types of agency interpretations that are not considered to warrant deference.

### A. The *Chevron* Two-Step

In 1981, the Environmental Protection Agency (EPA) changed its interpretation of the term “stationary source” as used in the Clean Air Act Amendments of 1977.<sup>27</sup> Under the Clean Air Act, the EPA could require states to institute programs obligating pollution-emitting facilities to get approval whenever a modification to a “stationary source” would increase that source’s total emissions.<sup>28</sup> The EPA revised its definition so that an entire plant, rather than each individual piece of pollution-emitting equipment, counted as a “stationary source.”<sup>29</sup> The D.C. Circuit set aside the revised regulation,<sup>30</sup> but, in *Chevron USA Inc v NRDC*,<sup>31</sup> the Supreme Court reversed. In so doing, the Court outlined the following methodology for reviewing agency interpretations of statutes:

When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the

<sup>24</sup> 5 US (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”). See also Sunstein, 90 Colum L Rev at 2075 (cited in note 23) (“[*Chevron*] has become a kind of *Marbury*, or counter-*Marbury*, for the administrative state.”).

<sup>25</sup> See, for example, Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post-Chevron Era*, 32 BC L Rev 757, 761-62 (1991) (*Chevron* unconstitutional and bad policy); Kevin W. Saunders, *Agency Interpretations and Judicial Review: A Search for Limitations on the Controlling Effect Given Agency Statutory Constructions*, 30 Ariz L Rev 769, 786, 800 (1988) (expressing dismay over the decline of judicial review); Keith Werhan, *The Neoclassical Revival in Administrative Law*, 44 Admin L Rev 567, 568-69 (1992) (*Chevron* inconsistent with history and with the traditional purposive approach to statutory interpretation).

<sup>26</sup> Kenneth W. Starr, et al, *Judicial Review of Administrative Action in a Conservative Era*, 39 Admin L Rev 353, 360 (1987) (panel discussion) (Starr speaking).

<sup>27</sup> The term appears at 42 USC § 7411(a)(3) (1994).

<sup>28</sup> *Chevron*, 467 US at 839-40; 42 USC § 7502(b)(6) (1977) (repealed 1990).

<sup>29</sup> *Chevron*, 467 US at 853-56. The revised regulation was part of President Reagan’s attempt at deregulation, “a ‘Government-wide reexamination of regulatory burdens and complexities.’” Id at 857 (citation omitted). The new regulation prescribed a “bubble” concept of source, whereby an entire plant, rather than each individual piece of machinery, could be considered a source. Under this regime, a plant could alter machinery however it wanted, so long as total emissions released by the plant did not rise. Thus, a plant could choose the most cost-effective method for keeping its pollution under a prescribed level.

<sup>30</sup> *NRDC v Gorsuch*, 685 F2d 718, 728 (DC Cir 1982).

<sup>31</sup> 467 US 837 (1984).

question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.<sup>32</sup>

The Court continued in a footnote: "The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."<sup>33</sup> Thus, if a statute is ambiguous and an agency's interpretation of the statute is reasonable, a court must defer to the agency even if, in the court's view, the agency is wrong.<sup>34</sup>

Most commentators agree that *Chevron* represented a shift in the law of deference.<sup>35</sup> Prior to *Chevron*, courts deferred only to certain agency interpretations. For example, courts would not defer to agency interpretations of "pure questions of law."<sup>36</sup> More-over, many commentators claim that pre-*Chevron* courts deferred intermittently, a practice *Chevron* seems to have ended.<sup>37</sup> Whether or not *Chevron* actually represented such a shift, it did set forth a clear methodology for deference decisions and explain the policies the Supreme Court viewed as relevant to such decisions.

<sup>32</sup> Id at 842-43 (footnotes omitted).

<sup>33</sup> Id at 843 n 11.

<sup>34</sup> This is precisely what the Court ordered in *Chevron*:

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

Id at 845.

<sup>35</sup> See, for example, Richard J. Pierce, Jr., *Chevron and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 Vand L Rev 301, 302 (1988) ("In the three years since the Court decided *Chevron*, the case has transformed dramatically the approach taken by courts in reviewing agency interpretations of statutory provisions."); Scalia, 1989 Duke L J at 512-13 (cited in note 23) (*Chevron* was not completely new law, but a choice between conflicting lines of Supreme Court precedent). But see Russell L. Weaver, *Some Realism about Chevron*, 58 Mo L Rev 129, 130-32 (1993) (*Chevron* changed the terms of the debate, but was not a radical doctrinal shift).

<sup>36</sup> See, for example, *NLRB v Hearst Publications*, 322 US 111, 130 (1944). See also Sunstein, 90 Colum L Rev at 2094-96 (cited in note 23).

<sup>37</sup> Sunstein, 90 Colum L Rev at 2081-82 & nn 47-48 (cited in note 23) (collecting cases); Scalia, 1989 Duke L J at 512-13 (cited in note 23).

## B. Reasons for *Chevron* Deference

Courts and scholars typically explain the *Chevron* analysis with at least one of three justifications for *Chevron* deference: agency expertise, political accountability, and congressional intent.<sup>38</sup> The Court in *Chevron* identified two of these. First, the agency will have expertise in the area of law under consideration that the court will probably lack.<sup>39</sup> Second, the agency is politically accountable, whereas the court is not. As the Court put it:

[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. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices. . . .<sup>40</sup>

A third reason for deferring to agency interpretations is implicit in *Chevron*, and underlies the first two reasons: By leaving a statute ambiguous, Congress is indicating that it *wants* the courts to defer to agency interpretations.<sup>41</sup> If facts change, or the administration's priorities change, the agency

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<sup>38</sup> Few list the justifications in exactly this form, but most identify either subsets of these or subdivide them further. See, for example, Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 Yale J Reg, 283, 309-12 (1986) (identifying four: expertise, accountability, requiring Congress to be more precise in drafting statutes, and requiring parties to take administrative agency proceedings more seriously); Scalia, 1989 Duke L J at 516-17 (cited in note 23) (focusing on one: real or presumed congressional intent); Quincy M. Crawford, Comment, *Chevron Deference to Agency Interpretations that Delimit the Scope of the Agency's Jurisdiction*, 61 U Chi L Rev 957, 958-60 (1994) (identifying three justifications—that *Chevron* created a default rule against which Congress can legislate, legislative intent, and political accountability—that together parallel two of the rationales identified in the text).

<sup>39</sup> *Chevron*, 467 US at 865.

<sup>40</sup> *Id.* See also Laurence H. Silberman, *The D.C. Circuit Review—Foreword: Chevron—The Intersection of Law & Policy*, 58 Geo Wash L Rev 821, 822 (1990) (“*Chevron*’s rule . . . is simply sound recognition that a political branch, the executive, has a greater claim to make policy choices than the judiciary.”). This rationale for deference is often called the “Separation of Powers” rationale. See, for example, Maureen B. Callahan, *Must Federal Courts Defer to Agency Interpretations of Statutes?: A New Doctrinal Basis for Chevron* U.S.A. v. Natural Resources Defense Council, 1991 Wis L Rev 1275, 1286. Note that this would imply that independent agencies might not deserve *Chevron* deference, though no commentary seems to have explored this idea.

<sup>41</sup> For versions of the argument that deference depends on congressional will, see, for example, Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin L Rev 363, 372 (1986) (Courts should defer based on “Congress’ intent that courts give an agency’s legal interpretations special weight.”); Scalia, 1989 Duke L J at 516-17 (cited in note 23) (best justification for *Chevron* is presumed legislative intent to confer discretion on the agency); Sunstein, 90 Colum L Rev at 2090 (cited in note 23) (same). See also *Smiley v Citibank (South Dakota), N.A.*, 116 S Ct 1730, 1733 (1996):

We accord deference to agencies under *Chevron*, not because of a presumption that they drafted the provisions in question, or were present at the hearings, or spoke to the principal sponsors; but rather because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discre-

can do something new simply by reinterpreting existing ambiguities. For example, by using the ambiguous term “stationary source” in the Clean Air Act, Congress implicitly told the Court that it was perfectly appropriate for different administrations to interpret this term in different fashions; the Reagan Administration could therefore use this ambiguity to lessen regulatory burdens on industry.<sup>42</sup>

### C. Exceptions to *Chevron* Deference

In the decade since *Chevron*, courts have recognized a number of exceptions to the doctrine of deference.<sup>43</sup> These exceptions involve situations where deference is inappropriate regardless of the substance of the agency’s interpretation, and regardless of whether the agency’s interpretation is an initial or revised one.<sup>44</sup> In almost all of the situations discussed here, refusing to defer is either consistent with, or a necessary implication of, the justifications the *Chevron* Court gave for deferring. In order to understand what courts do when confronted with revised agency interpretations of statutes, one must first understand these exceptions and the rationales underlying them; they explain many of the seemingly inconsistent results from courts faced with revised interpretations of statutes.<sup>45</sup>

#### 1. Unambiguity.

Strictly speaking, cases in which statutes are unambiguous are not exceptions to *Chevron* deference because they come under the first step of *Chevron*, the question of whether Congress has “directly spoken to the precise question at issue[, thus requiring] the court . . . [to] give effect to the unambiguously expressed intent of Congress.”<sup>46</sup> In these cases the courts never reach the question of deference, and thus these cases are analytically

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tion the ambiguity allows.

A similar argument can be made regarding the institutional role of courts; Justice Scalia’s judicial minimalism, that is, his view that courts should interpret things so as to make as few subjective choices as possible, see Michael J. Perry, *The Constitution and the Courts: Law or Politics?* 84-85 (Oxford 1994), leads to the conclusion that agencies rather than courts should interpret ambiguity.

<sup>42</sup> See *Chevron*, 467 US at 840.

<sup>43</sup> See, for example, Sunstein, 90 Colum L Rev at 2093-2104 (cited in note 23) (discussing various exceptions implicit in the *Chevron* framework for deference); Theodore L. Garrett, *Judicial Review After Chevron: The Courts Reassert Their Role*, 10 Nat Resources & Envir 59, 61-63 (1995) (also discussing exceptions to *Chevron*). The list of exceptions in the text is not identical to that in any other source; it is consistent with, but more complete than, these others.

<sup>44</sup> In the end, the court might interpret the statute in the same way that the agency had. In these situations, though, the court decides on an interpretation while completely ignoring the agency’s interpretation.

<sup>45</sup> See Part III.

<sup>46</sup> *Chevron*, 467 US at 842-43.

parallel to other exceptions to *Chevron* deference: the court will refuse to defer without looking at the interpretation proffered by the agency.

The crucial insight here is that the logic of *Chevron* supports not deferring to agency interpretations in these cases; the reasons given for deference in *Chevron* don't apply. Interpreting unambiguous statutes is a skill that neither expertise nor political accountability will improve.<sup>47</sup> In fact, the statute's clarity can be taken as a sign that Congress did not want to delegate interpretation to the agency—it spelled the answer out itself.<sup>48</sup>

## 2. Litigation positions.

Arguments that an agency makes in the course of litigation are a classic example of a type of “interpretation” that does not receive deference under *Chevron*. These “convenient litigating positions” never receive deference, regardless of whether the interpretation adopted during litigation is a change from prior interpretations or concerns a question that the agency has never previously considered.<sup>49</sup> The problem with these interpretations, whether or not they are revisionary, is that they are inherently suspect; needless to say, an agency is going to try to win litigation in which it has become involved.<sup>50</sup>

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<sup>47</sup> See text accompanying notes 39-40.

<sup>48</sup> There is a current debate among scholars and Justices over how extensively to use “traditional tools of statutory construction” to determine if a statute is ambiguous. Compare *Cardoza-Fonseca*, 480 US at 446-48 (endorsing use of such tools), with *id.* at 454-55 (Scalia concurring) (disputing the use of such tools). See also Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 Colum L Rev 749 (1995) (arguing for more deference and less usage of such tools). One's view of this debate does not differentially affect revised interpretation of statutes, however, except insofar as those who are more in favor of deference in one situation may be more in favor of deference generally.

<sup>49</sup> *Bowen v Georgetown University Hospital*, 488 US 204, 212-13 (1988) (“Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate.”); *Florida Manufactured Housing Assn v Cisneros*, 53 F3d 1565, 1574 (11th Cir 1995) (no deference to changed interpretation when the new interpretation is a mere litigation position); *USX Corp v Office of Workers' Compensation Programs*, 978 F2d 656, 658 (11th Cir 1992) (no deference to agency's litigating position absent prior interpretation). See also Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 Yale J Reg 1, 60-61 (1990) (Litigation positions do not and should not get deference.).

<sup>50</sup> Judge Learned Hand once said that “a public officer, charged with the enforcement of a law, is different from one who must decide a dispute. If there is a fair doubt, his duty is to present the case for the side which he represents. . . . Since such [positions] . . . may properly carry a bias, it would seem that they should not be as authoritative. . . .” *Fishgold v Sullivan Drydock & Repair Corp.*, 154 F2d 785, 789 (2d Cir 1946), *affd.*, 328 US 275 (1946).

Another worry about litigation positions is that they are not general statements of agency policy, and there is no guarantee that the agency will use the same interpretation in other cases. General positions are less worrisome, since there is a reduced fear of bias. See, for example, *Lawrence v Chater*, 116 S Ct 604 (1996), in which the Court granted “GVR” (grant of certiorari, vacatur, and remand) for the appellate court to consider a new, generally applicable regulation reinterpreting the statute in question, where the new regulation was issued while certiorari was *pending*. Given that the new interpretation was generally applicable, the Court was less concerned that it was issued for improper motives.

If courts deferred to litigation positions, agencies would almost never lose cases. All that an agency would have to do to win a case would be to “interpret” the statute in its brief, regardless of the agency’s actual interpretation of that statute or the position it had argued to the court in a previous case. Furthermore, the reasons for deferring to agency interpretations underlying *Chevron* are inapposite here. Congress has no authority to delegate the power to decide specific cases; that is the constitutional purview of the courts.<sup>51</sup>

### 3. Stare decisis.

Courts also refuse to defer to new agency interpretations when the Supreme Court has previously interpreted the statute. If the Court has already defined the meaning of an arguably ambiguous statutory term, that interpretation remains the law until and unless Congress changes the statute.<sup>52</sup>

While this exception may not be completely sensible,<sup>53</sup> it does not imply that revised agency interpretations do not deserve deference. The main reason for the stare decisis exception is the institutional relationship between Congress and the courts. As the Court put it, “[o]ur reluctance to overturn precedents derives in part from institutional concerns about the relationship of the judiciary to Congress. . . . ‘Congress is free to change this Court’s interpretation of its legislation.’”<sup>54</sup> This rationale applies independently of the justifications for *Chevron*, and does not affect revised agency interpretations in the absence of Court precedent.

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<sup>51</sup> Furthermore, the most direct route to agency accountability for interpretations is through the notice and comment period usually required prior to the adoption of a rule. 5 USC § 553 (1994). By contrast, no one reads all the briefs an agency files in all cases it is involved with.

<sup>52</sup> *Neal v United States*, 116 S Ct 763, 766, 768-69 (1996) (holding that court must follow prior Supreme Court decision defining LSD mixture to include carrier medium, despite new Sentencing Commission guideline stating that it does not). At least one circuit court has held that the same rule of stare decisis applies to circuit court interpretations of statutes as well. *EEOC v Metropolitan Educational Enterprises, Inc.*, 60 F3d 1225, 1229-30 (7th Cir 1995) (refusing to defer when prior Seventh Circuit precedent existed), *revd* on other grounds, 117 S Ct 660 (1997).

<sup>53</sup> There are three scenarios where the question of deferring despite precedent can arise: where a court interpreted a statute before *Chevron* was decided; where a court interpreted a statute after *Chevron* and deferred to the agency; and where a court interpreted a statute after *Chevron* and, for one reason or another, refused to defer to the agency’s interpretation. It is clear that, in this last case, the agency should not be able to alter its interpretation contrary to the court’s controlling precedent. It remains unclear why an agency should not be able to change its interpretation when the “precedent” being enforced against its new interpretation is simply a prior court having deferred to the agency’s then-current interpretation, see Rebecca Hanner White, *The Stare Decisis “Exception” to the Chevron Deference Rule*, 44 Fla L Rev 723, 726-28 (1992), nor why precedent from before the *Chevron* deference rule was promulgated should control, see Jahan Sharifi, Comment, *Precedents Construing Statutes Administered by Federal Agencies After the Chevron Decision: What Gives?*, 60 U Chi L Rev 223, 229, 244-47 (1993) (Precedent from before *Chevron* should be viewed as merely “informative—not as binding precedent.”).

<sup>54</sup> *Neal*, 116 S Ct at 769, quoting *Illinois Brick Co v Illinois*, 431 US 720, 736 (1977).

#### 4. Constitutionality.

Courts do not defer to agency interpretations that tread close to constitutional issues. Though many have criticized the doctrine that statutes should be interpreted to avoid constitutional questions,<sup>55</sup> the doctrine does apply to agency interpretations.<sup>56</sup> Again, this exception to the *Chevron* doctrine is consistent with the reasons for *Chevron* deference, because resolving these cases requires interpreting the Constitution, not just the statute at hand. Courts undoubtedly have more expertise to do this than agencies. Furthermore, courts are more visible than agencies with regard to constitutional issues, and we expect courts to decide these issues.<sup>57</sup>

#### 5. Jurisdictional questions.

Finally, courts seem to refuse to defer to an agency's interpretation of a statute when that statute defines the limits of the agency's jurisdiction.<sup>58</sup> This exception is also sensible in light of the underlying principles of *Chevron*—limitations on an agency's jurisdiction are, in a sense, a direct refutation of the agency's expertise. This is an exception that, like the refusal to defer to litigation positions, makes sense as an effort to prevent agencies from exercising limitless discretion.

### III. CLEARING THE WATER: DEFERENCE TO REVISED AGENCY INTERPRETATIONS OF STATUTES IN PRACTICE

The previous Part has provided a fairly uncontroversial exposition of *Chevron*, its rationales, and its exceptions. The question at hand, though, is how courts deal with revised agency interpretations of statutes. This Part attempts to answer that question by examining Supreme Court and federal appellate court practice since *Chevron*.

<sup>55</sup> See, for example, Richard A. Posner, *The Federal Courts: Crisis and Reform* 284-86 (Harvard 1985) (Doctrine allows courts to interpret constitutional statutes in ways contrary to congressional intent.).

<sup>56</sup> *DeBartolo Corp v Florida Gulf Coast Trades Council*, 485 US 568, 575 (1988) (“[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems. . . .”). See also Eric M. Braun, Note, *Coring the Seedless Grape: A Reinterpretation of Chevron U.S.A. Inc. v. NRDC*, 87 Colum L Rev 986, 1002-03 (1987) (“[A]gency interpretations that raise constitutional issues are less likely to merit deference.”); *Kent v Dulles*, 357 US 116, 130 (1958) (Absent explicit terms, the Court will assume that Congress did not intend to raise constitutional questions.).

<sup>57</sup> See Braun, Note, 87 Colum L Rev at 1003 (cited in note 56) (“Congress is likely to entrust constitutionally charged statutory issues to the judiciary. Agencies have little expertise in constitutional interpretation. . . .”).

<sup>58</sup> Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 Admin L J 187, 216-21 (1992). But see Crawford, Comment, 61 U Chi L Rev at 958 (cited in note 38) (disputing that this exception exists and arguing that it should not).

### A. Supreme Court Cases

Since *Chevron*, the Court has decided few cases involving revised agency interpretations of statutes—and in those few cases it set forth inconsistent standards.<sup>59</sup> Yet, in most of these cases, the Court deferred to the agency's interpretation, no matter what standard for deference it set forth. Moreover, in those cases where the Court did not defer to a revised interpretation, there were independent reasons not to defer, apart from the revision in the agency's interpretation. The exceptions to *Chevron* deference discussed in Part II explain *all* cases where the Court failed to defer to an agency's revised statutory interpretation. In other words, in *no* case since *Chevron* has the revision of an interpretation been dispositive of whether the Court deferred to that interpretation.

Of the cases discussed in Part I where the agency's interpretation changed, the Court deferred in all but *Cardoza-Fonseca*.<sup>60</sup> In *Good Samaritan*<sup>61</sup> and *Rust*,<sup>62</sup> the Court deferred to revised agency interpretations, as it did, of course, in *Chevron*.<sup>63</sup> In *Cardoza-Fonseca*, however, the Court mentioned the change in the agency's interpretation only in a footnote. The Court's main holding was that the statute involved was not ambiguous—and no one has argued that courts should defer to agency interpretations of unambiguous statutes.<sup>64</sup>

In no case has the Court refused to defer to a revised interpretation of a statute when that interpretation did not also come within a clear exception to the principle of *Chevron* deference.<sup>65</sup> While telling, this assertion must be

<sup>59</sup> See Part I.

<sup>60</sup> 480 US 421.

<sup>61</sup> 508 US 402.

<sup>62</sup> 500 US 173.

<sup>63</sup> 467 US 837. Likewise, in *Thomas Jefferson University v Shalala*, 114 S Ct 2381, 2389 (1994), discussed in note 20, the Court, while claiming the agency had not changed its interpretation, argued that the interpretation would have deserved deference anyway.

<sup>64</sup> See Part II.C.1.

There have been a few other cases involving revised interpretations in addition to *Cardoza-Fonseca*—all involving *stare decisis*—in which the Court did not defer. See, for example, *Neal v United States*, 116 S Ct 763, 769 (1996) (discussed in note 52); *Lechmere, Inc v NLRB*, 502 US 527, 536-37 (1992) (“Once we have determined a statute’s clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency’s later interpretation of the statute against our prior determination of the statute’s meaning.”) (citations omitted). But again, this is not at all inconsistent with the principle that agencies are allowed to change their interpretations of statutes.

The Court has also discussed deference to revised interpretations in several cases where it held that the agency had not changed its interpretation, see, for example, *Pauley v BethEnergy Mines, Inc*, 501 US 680, 698 (1991); *Smiley v Citibank (South Dakota), N.A.*, 116 S Ct 1730, 1733 (1996), but these, as dicta, do not inform an analysis of the Court’s *behavior* where there is a revised interpretation.

<sup>65</sup> Compare Russell L. Weaver, *A Foolish Consistency Is the Hobgoblin of Little Minds*, 44 Baylor L Rev 529, 545-50 (1992). Weaver identifies three cases where the Court refused to defer to new interpretations, and argues that the Court is “avoiding” *Chevron* in these cases. These three cases, however, were *Cardoza-Fonseca* and two cases involving *stare decisis*. That these cases are ones in which the Court did not defer for independent reasons seems more likely than that the court was simply “avoiding”

limited in two ways. First, it ignores the Court's rhetoric. Given the inconsistencies in what the Court has said, however,<sup>66</sup> it seems likely that something else underlies these decisions. Second, the Court has faced relatively few cases involving revised agency interpretations of statutes; it is thus possible that this result is simply a fluke. One way to investigate this second problem is to see what lower courts have done when faced with revised interpretations.

## B. Appellate Court Cases

This section examines how lower courts have dealt with revised agency interpretations of statutes in the years since *Chevron*. Given that *Chevron* has been cited in over 3,500 federal decisions,<sup>67</sup> an exhaustive inquiry into all such cases would be impossible. Unbiased samples of these cases, however, are readily available,<sup>68</sup> and an exhaustive look at all 1995 appellate cases and selected earlier cases supports the claim that courts are deferring fully to revised interpretations.<sup>69</sup> Between the investigations of all

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its precedent.

<sup>66</sup> See Part I.

<sup>67</sup> A LEXIS search conducted on December 5, 1996, in the GENFEDS:COURTS database, generated 3,567 cases citing *Chevron*. The results of the LEXIS search are on file with U Chi L Rev.

<sup>68</sup> Unbiased in the technical sense that the samples discussed have no systematic bias towards any result.

<sup>69</sup> *Chevron* was cited in 206 federal appellate cases in 1995, all of which were examined. Twenty-four of these cases involved revised interpretations of statutes. Summaries of all cases involving revised agency interpretations of statutes are on file with U Chi L Rev.

In several other cases in 1995 the courts discussed the amount of deference due to revised interpretations, but determined that the agency's interpretations had been consistently held. See, for example, *Zhang v Slattery*, 55 F3d 732, 750 (2d Cir 1995) (noting that revised interpretations may be due less deference, but that here the agency did not change its interpretation), cert denied, 116 S Ct 1271 (1996). These cases are not further analyzed, since the courts' actions in them do not indicate how they would respond to revised interpretations.

It would be almost impossible to look at all relevant cases before 1995, i.e., all cases that discuss *Chevron*. The group of pre-1995 cases investigated here is a set that would be the most likely *not* to support the claim in the text, however, and at the same time include the most relevant cases. These cases, nineteen in all, were gathered from headnotes. All cases since 1987 which were filed under the headnotes "Statutes: Executive Construction: In General" or "Statutes: Executive Construction: Long Continuance of Construction," and where the headnote discussed the effect of a change in agency interpretation on deference, were examined; in nineteen cases the agency's interpretation had actually changed. This group of cases should be especially relevant, in that the cases all involved some *discussion* of the amount of deference accorded to revised interpretations. It seems logical that cases in which there was little or no discussion of the deference accorded to revised interpretations would receive more such deference, given the overall bias towards deference mandated by *Chevron*.

The main problem with this analysis is that there is no way, given the immense variability among cases involving agency interpretations of statutes, to make any sort of empirical claim that courts would have behaved differently if an interpretation had not changed. A seemingly parallel set of cases involving consistently held interpretations might involve statutes that differ radically from those underlying these cases, and there is no method with which to measure, let alone control, this variability.

Other problems include the focus on appellate cases. Although appellate courts review district court decisions of law de novo, by focusing exclusively on appellate decisions this analysis would not show if

1995 cases and selected earlier cases, a total of forty-three cases involved revised agency interpretations of statutes.<sup>70</sup>

1. Cases in which the court deferred.

In the majority of cases examined, the courts—whatever their rhetoric—deferred to the interpretation offered by an agency.<sup>71</sup> In some of these cases, the courts tried to avoid the issue by arguing that the agency’s interpretation might not actually be inconsistent with prior interpretations.<sup>72</sup> In many others, the courts claimed to be according the agency less deference, but still deferred.<sup>73</sup> In still other cases, courts held that the agency was required to provide an explanation for why it had changed its view,<sup>74</sup> at which point the new interpretation deserved deference.<sup>75</sup> These courts seemed to consider the requirement of an explanation to be a rather low hurdle.<sup>76</sup> But,

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lower courts were actually deciding cases differently. Likewise, any case that did not cite *Chevron* would not have been examined. See Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L J 969, 980-82 (1992) (arguing that the Court does not always cite *Chevron* when it could). It is also quite likely that some cases which were excluded from further analysis due to a lack of any evidence of a revised interpretation actually involved one. At the same time, the lack of discussion of such revisions presumably indicates either that the judge did not know that the interpretation had changed or that she found this fact irrelevant. In both cases the revision presumably would not affect the outcome.

<sup>70</sup> See summaries on file with U Chi L Rev.

<sup>71</sup> The court deferred in twenty-three of the forty-three cases.

<sup>72</sup> See, for example, *Queen of Angels v Shalala*, 65 F3d 1472, 1480-81 (9th Cir 1995) (“[E]ven if these scattered statements suggest that the Secretary has been somewhat inconsistent in her view of the PRO Payment Rule, . . . [and] even if we . . . assume the statute is ambiguous, the Secretary’s inconsistency is probably insufficient alone to invalidate her interpretation.”); *National Classification Committee v United States*, 22 F3d 1174, 1177 (DC Cir 1994) (“[T]he ICC’s current position appears to be consistent with its past decisions. . . . Even if the ICC’s interpretation of [the] section [ ] has changed since 1988, no rule of law prevents such a change. Rather an agency may depart from its past interpretation so long as it provides a reasoned basis for the change.”) (citation omitted).

<sup>73</sup> See, for example, *Norwest Corp v Commissioner of Internal Revenue*, 69 F3d 1404, 1410 (8th Cir 1995) (“shift in position can be relevant to determining reasonableness, [but] is not determinative”), cert denied, 116 S Ct 1704 (1996); *Mobil Oil Corp v EPA*, 871 F2d 149, 152 (DC Cir 1989) (“Although the consistency of an agency’s interpretation is one relevant factor in judging its reasonableness, an agency’s reinterpretation of statutory language is nevertheless entitled to deference, so long as the agency acknowledges and explains the departure from its prior views.”) (citation omitted).

<sup>74</sup> See *Rust*, 500 US at 187. See also text accompanying notes 94-96.

<sup>75</sup> See, for example, *Torrington Extend-A-Care Employee Assn v NLRB*, 17 F3d 580, 589 (2d Cir 1994) (“[A]n agency may alter its interpretation of a statute so long as the new rule is consistent with the statute, applies to all litigants, and is supported by a ‘reasoned analysis.’ Such a new rule must be upheld by the courts ‘regardless of how we might have decided the matter in the first instance [if the Board] . . . has arrived at one reasonable resolution of the problem in a reasonable matter.”) (citations omitted); *Strickland v Commissioner, Maine Dept of Human Services*, 48 F3d 12, 18 (1st Cir) (“[A]n explained modification, even one that represents a sharp departure from a longstanding prior interpretation, ordinarily retains whatever deference is due.”), cert denied, 116 S Ct 145 (1995).

<sup>76</sup> See, for example, *Sacred Heart Medical Center v Sullivan*, 958 F2d 537, 545 (3d Cir 1992) (Where the agency “contend[ed] that . . . its [new] construction is in full accord with the language of the [statute] and the legislative intent that motivated its enactment,” the court held that “[t]his surely constitutes a ‘reasoned justification’ for the Secretary’s departure from its prior interpretation.”); *Detroit/Wayne County Port Authority v ICC*, 59 F3d 1314, 1317 (DC Cir 1995) (“Because the Commission

regardless of the rhetoric, the fact remains that in over half the cases in the survey, the courts deferred to the agency's changed interpretation of a statute, despite the revision. Even before looking at those cases where the courts did not defer, it seems that courts are being rather deferential to revised agency interpretations.

2. Cases in which the court did not defer for reasons other than the revision.

The striking thing about the next fourteen cases in the survey is that the courts consistently stated that the change in agency interpretation was a reason for giving the agency less deference, while at the same time ruling against the agency on grounds that would have obligated the courts to reach the same result even if the agency's interpretation had been consistently held.<sup>77</sup> All of these cases involved statutory interpretations that, under *Chevron*, would not be deferred to even had they never changed. For example, some cases involved arguably unconstitutional interpretations, which never deserve deference under *Chevron*.<sup>78</sup> Similarly, in several cases the courts observed that revised interpretations deserve less deference, but then held that the statute in question was not ambiguous at all.<sup>79</sup>

The same pattern of declaring revised interpretations to be due less deference, while deciding the case on other grounds, applied to those cases where the agency's interpretation of a statute was inconsistent with prior

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has 'provide[d] a reasoned analysis indicating that [its] prior policies and standards are being deliberately changed, not casually ignored,' we can defer to its new interpretation . . .") (citation omitted).

<sup>77</sup> This claim must be qualified by the fact that it involves a prediction of what the court would have done if, counter-factually, the interpretation had never changed. There is no way to *prove* that the court would have refused to defer to the agency interpretation in these cases were that interpretation not altered. In other words, courts may be using these alternative grounds for refusing deference as a "back door" to refusing to defer to revised interpretations. The point, however, is that under *Chevron* deference doctrine they should not have deferred to these interpretations even were they not revisions, given the courts' holdings.

<sup>78</sup> See, for example, *Chamber of Commerce v FEC*, 69 F3d 600, 604-05 (DC Cir 1995). In this case, the Federal Elections Commission interpreted a term defining who counted as members of "membership organizations" for purposes of a ban on solicitations from non-members. The court held that the interpretation proffered arguably violated the First Amendment, and stated that "[w]e are obliged to construe the statute to avoid constitutional difficulties if such a construction is not plainly contrary to the intent of Congress. Accordingly, the Commission is not entitled to *Chevron* deference with regard to its interpretation of the statute." *Id.* at 605 (citations omitted). See also *Yeung v INS*, 76 F3d 337, 339 (11th Cir 1996) (current interpretation of statute by Board of Immigration Appeals violates Equal Protection Clause); Part II.C.4.

<sup>79</sup> See, for example, *Madison Galleries, Ltd v United States*, 870 F2d 627, 631 (Fed Cir 1989) (citing *Cardoza-Fonseca* for proposition that changing interpretations deserve less deference, but holding that a statute was not ambiguous); *St Luke's Hospital v Secretary of Health and Human Services*, 810 F2d 325, 331 (1st Cir 1987) (holding that the statute involved was unambiguous, but also claiming that the inconsistency in interpretation "detracts considerably from the force of the Secretary's present view").

court precedent,<sup>80</sup> or seemed to have been adopted solely as a litigation position.<sup>81</sup> These are all cases that the courts would have decided exactly as they did even if the interpretations involved had been the initial interpretations proffered by the agencies.

### 3. Other cases.

Six cases remain out of the forty-three investigated. Two of these cases are straightforward: the appellate court refused to defer to a revised agency interpretation, and the Supreme Court reversed.<sup>82</sup> In two other cases the courts determined that the agencies had not given adequate reasons for revising their interpretations of statutes. For example, in *Cross-Sound Ferry Services, Inc v ICC*,<sup>83</sup> the Interstate Commerce Commission (ICC) had altered its interpretation of the term “ferry” in a statute. The court agreed that the term was ambiguous,<sup>84</sup> and was not averse to the agency altering its interpretation of the statute.<sup>85</sup> The court, however, could not determine why the agency had changed its interpretation nor exactly what the new definition was; the court therefore held that it “[could not] defer to what [it could not] perceive,”<sup>86</sup> and remanded the case to the agency for clarification.<sup>87</sup>

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<sup>80</sup> There was only one such case in the sample. In *EEOC v Metropolitan Educational Enterprises, Inc*, 60 F3d 1225 (7th Cir 1995), rev'd on other grounds, 117 S Ct 660 (1997), the agency's definition of employer under Title VII differed from the established Seventh Circuit definition. The court's response was clear, and showed that its refusal to defer had nothing to do with any change in the agency's interpretation. “While we afford deference to legitimate agency interpretations of statutory language made before we have ruled on an issue, the converse is not true: the judiciary, not administrative agencies, is the final arbiter of statutory construction.” Id at 1229-30 (citations omitted).

<sup>81</sup> See, for example, *Florida Manufactured Housing Assn v Cisneros*, 53 F3d 1565, 1574 (11th Cir 1995) (holding that HUD's claim that an appeal of a regulation was untimely was a litigating position, but also stating that “the consistency of [an agency's] interpretation is an important factor in determining the amount of deference owed” (citations omitted)); *Wolpaw v Commissioner of Internal Revenue*, 47 F3d 787, 790-91 (6th Cir 1995) (IRS litigation position not due deference; also quotes *Cardoza-Fonseca*, however, for proposition that changed interpretations are due less deference).

<sup>82</sup> These cases were challenges to the same agency interpretation creating the “gag rule” that the Court confronted in *Rust v Sullivan*, 500 US 173 (1991). In these two cases, the appellate courts had refused to defer to the agency's interpretation; the Court vacated both decisions, citing *Rust. Massachusetts v Secretary of Health and Human Services*, 899 F2d 53 (1st Cir 1990), vacated by 500 US 949 (1991); *Planned Parenthood v Sullivan*, 913 F2d 1492 (10th Cir 1990), vacated by 500 US 949 (1991). While these cases were both vacated without opinion, the Court's opinion in *Rust* mandated deference to this interpretation. See text accompanying notes 12-14.

<sup>83</sup> 873 F2d 395 (DC Cir 1989).

<sup>84</sup> Id at 398.

<sup>85</sup> “The Commission has great latitude in determining the scope of the ferry exemption [to ICC jurisdiction] and in modifying it from time to time as the Commission sees fit.” Id.

<sup>86</sup> Id at 400 (citation omitted).

<sup>87</sup> Id at 402. See also *Salameda v INS*, 70 F3d 447 (7th Cir 1995), where the INS altered its interpretation of a statute, without explanation. “Agencies do not have the same freedom as courts to change direction *without acknowledging and justifying the change*.” Id at 450 (emphasis added and citations omitted). Compare id at 456 (Easterbrook dissenting) (INS position did not change, so court should defer.). While it is possible that courts are using the hard look doctrine as a substitute for not deferring, this does not differentiate revised agency interpretations from initial ones. But see note 77,

In the remaining two cases,<sup>88</sup> despite the lack of an independent reason not to defer, the courts did not defer to altered agency interpretations. These were two of the earliest cases in the survey, however. Both pre-date *Rust*, which arguably reinvigorated *Chevron* after *Cardoza-Fonseca*.<sup>89</sup> Furthermore, they both cite mainly pre-*Chevron* precedent. Were these cases to be decided today, it seems plausible that the courts would have deferred.<sup>90</sup>

Thus, of the forty-three appellate court cases examined, courts refused to defer to an acknowledged changed interpretation, not independently problematic, in exactly two cases. It seems plausible that courts today might have deferred in these two cases. Even if not, one could easily argue that an equivalent percentage of original interpretations might also have been found unreasonable and not due deference.<sup>91</sup> Thus, there is no evidence that

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does not differentiate revised agency interpretations from initial ones. But see note 77, discussing the possibility that courts are using this as a “back door” route to not defer specifically to revised interpretations.

<sup>88</sup> *Barnett v Weinberger*, 818 F2d 953 (DC Cir 1987); *Peters v United States*, 853 F2d 692 (9th Cir 1988).

<sup>89</sup> See Part I.

<sup>90</sup> *Peters*, 853 F2d at 700 (“[I]nterpretation is entitled to less weight when it represents an abrupt change from longstanding practice.”) (citing *International Brotherhood of Teamsters v Daniel*, 439 US 551, 565-69 (1979)); *Barnett*, 818 F2d at 960-61 (“It is well established that the prestige of a statutory construction by an agency depends crucially upon whether it was promulgated contemporaneously with enactment of the statute, and has been adhered to consistently over time.”) (citations omitted); *id* at 961 n 74 (citing an extremely long list of precedents, all predating *Chevron*).

These two cases were also interesting factually: one involved a rather implausible interpretation, and the other seems almost certainly to have been driven by sympathy, not law.

In *Peters*, the INS issued a “John Doe” summons requiring the director of a farm labor camp to produce records on all current residents, in connection with an ongoing criminal investigation of illegal immigrants. *Peters*, 853 F2d at 694-95. The lower court imputed IRS “John Doe Summons law,” *id*, to the INS, thus allowing this summons, but the appellate court reversed. The court clarified that “[a] ‘John Doe’ summons is, in essence, a direction to a third party to surrender information concerning taxpayers whose identity is currently unknown to the IRS.” *Id* at 695 n 3 (citation omitted). The appellate court relied on the fact that, after Congress had acted to explicitly allow the IRS to issue such a summons, the Supreme Court questioned whether such a summons could arise by implication, in the context of the IRS. See *id* at 696-98. No such provisions existed for the INS, however, and the INS could not point to any prior instances where it had even asked for such a summons. *Id* at 700. In essence, the INS’s interpretation in this case was simply very weak.

*Barnett* seems, for all intents and purposes, to be a case of judicial insubordination. The completely and permanently disabled daughter of a member of the military was covered under her father’s federal health insurance program. That insurance program forbade coverage of mere “custodial care,” however, and the question to be decided was whether her permanent hospital care counted as such. *Barnett*, 818 F2d at 954-56. Decision in the case took over five years, involved almost 150 footnotes (citing precedent back to 1877), and eventually reached the conclusion—motivated, it seems, by sympathy towards the family—that the Secretary of Defense’s 1977 interpretation of the statutory exclusion for “custodial care,” significantly broader than his 1966 interpretation, was not due deference. See *id* at 968-70. While this opinion is factually interesting, it is questionable precedent.

<sup>91</sup> A full investigation of *Chevron* cases not involving revised interpretations is beyond the scope of this Comment. A quick investigation of the 206 federal appellate cases decided in 1995, however, found several in which agency interpretations, neither revised nor independently problematic under the various theories of Part II, were overturned by courts. See, for example, *American Trucking Associations, Inc v Federal Highway Administration*, 51 F3d 405, 409 (4th Cir 1995) (holding the FHWA’s interpretation of

either the Supreme Court or appellate courts, despite their rhetoric, are deferring to revised interpretations any less than they defer to any other agency interpretation of a statute. This strongly suggests that they are deferring equally.

#### IV. DO REVISED AGENCY INTERPRETATIONS DESERVE DEFERENCE?

It seems, then, that revised agency interpretations may be receiving full *Chevron* deference. Should they be? Building on the framework of *Chevron* doctrine and theory described earlier,<sup>92</sup> this Part will show how, unlike other acknowledged exceptions to *Chevron* deference, deferring to revised interpretations is completely consistent with the reasons underlying *Chevron* deference.<sup>93</sup>

After briefly discussing one uncontroversial limitation on an agency's power to revise its interpretation of a statute—that the agency must acknowledge that it is changing its interpretation—this Part will create an explanatory typology of revised interpretations that shows that revised interpretations deserve deference under the rationales for *Chevron*. Finally, it will discuss possible policy reasons for not deferring to revised agency interpretations, concluding that, if anything, these arguments challenge *Chevron* deference in general, not deference to revised interpretations in particular. This suggests that if *Chevron* deference is ever appropriate (a question left to other commentators), it should apply with equal force to revised agency interpretations.

##### A. Agencies Must Give an Explanation for Changing Interpretations

It is a commonplace that agencies must justify their policies and actions; they must also justify revising their interpretation of a statute.<sup>94</sup> Under the “Hard Look” doctrine, an agency action is arbitrary and capricious if not explained.<sup>95</sup> This does not imply that agencies cannot change their interpretations; it only means that they cannot do so without admitting what

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the Omnibus Transportation Employee Testing Act of 1991 to be “plainly unreasonable”); *Parisi by Cooney v Chater*, 69 F3d 614, 619 (1st Cir 1995) (Commissioner’s interpretation of the Social Security Act is “supported neither by the language of the statute nor by reason”).

<sup>92</sup> See Part II.

<sup>93</sup> Justice Scalia put it straightforwardly, “[After *Chevron*], there is no longer any justification for giving ‘special’ deference to ‘long standing and consistent’ agency interpretations of law.” Scalia, 1989 Duke L J at 517 (cited in note 23).

<sup>94</sup> See, for example, *Smiley v Citibank (South Dakota), N.A.*, 116 S Ct 1730, 1734 (1996) (“Sudden and unexplained change . . . may be arbitrary, capricious, or an abuse of discretion. But if [this pitfall is] avoided, change is not invalidating.”) (citations omitted).

<sup>95</sup> See, for example, *Motor Vehicle Mfrs Assn v State Farm Mutual Auto Ins Co*, 463 US 29, 46-57 (1983) (applying the doctrine but not referring to it by name). See also Stephen G. Breyer and Richard B. Stewart, *Administrative Law and Regulatory Policy: Problems, Text, and Cases* 363-64 (Little, Brown 3d ed 1992) (summarizing the doctrine).

they are doing.<sup>96</sup> Requiring an explanation for a change in no way mandates that, once an agency has provided such an explanation, the interpretation does not deserve as much deference as any other.

#### B. A Typology of Reasons for an Agency to Revise Its Interpretation of a Statute

There are only a few reasons why an agency might change its interpretation of a statute: (1) The agency could become convinced that its initial interpretation was inconsistent with congressional intent, regardless of how that prior interpretation was functioning (“Initial Mistake”). (2) The agency could decide that its prior interpretation, while one of several reasonable ones, led to a slew of unfortunate side effects, whereas a different, textually reasonable interpretation would not do so (“Better Alternative”). (3) The agency could determine that its prior interpretation was leading to horrific unintended consequences, and that, though the agency did not know the full implications of an alternative interpretation, side effects of that interpretation could not be worse than those of the current interpretation (“Agency Flailing”). Or (4) the agency could decide that a different interpretation of the statute would better fit with new overarching agency (or administration) goals, while still implementing the statute acceptably (“Policy Change”).<sup>97</sup>

The striking thing about this list of possible reasons for altering an interpretation of a statute is that, although the reasons differ radically from each other, they are all fully acceptable and justifiable under the policies behind *Chevron* deference.<sup>98</sup>

##### 1. Initial mistakes.

Possibly the least obvious case for *Chevron* deference is when an agency’s explanation for a change is that the agency simply “got it wrong” the first time and misinterpreted the congressional mandate. Yet the very act of revising an earlier interpretation must be based at least partially on the agency’s expertise in the area regulated by the statute. Perhaps the agency

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<sup>96</sup> See *Smiley*, 116 S Ct at 1734; Sunstein, 90 Colum L Rev at 2104 (cited in note 23) (“[A]gencies should be allowed to depart from interpretations . . . . What is necessary is that the new interpretation be explained as reasonable in light of statutorily permissible factors.”); Scalia, 1989 Duke L J at 518 (cited in note 23) (“[S]o long as [ ] limitations [on sudden, irrational, or unexplained change] are complied with, there seems to me no reason to value a new interpretation less than an old one.”).

<sup>97</sup> Left off this list are manifestly inappropriate reasons for altering an interpretation, such as knowing that a particular company would benefit from an alternative interpretation or wanting to “do the right thing” regardless of congressional mandate. Note, however, that these, too, do not differentiate revised interpretations from initial interpretations. Likewise, while any of these changes could be the result of unacceptable lobbying by persons affected by the statute, initial interpretations might also be the result of such pressures.

<sup>98</sup> Note also that agencies can, and often do, change their interpretations of statutes within the context of their initial rulemaking process.

realizes that it is interpreting the same term differently under two parts of the same statute; perhaps it comes to understand that an exception in the statute must be read more broadly than initially thought in order for the exception to have the intended effect. In either case, agency expertise justifies judicial deference.

### 2. Better alternatives.

An agency also should be able to change its interpretation of a statute when it realizes an alternative interpretation is superior, even though both interpretations are plausible. A priori, this alternative interpretation of the statute would have been accepted by a court had it been initially proffered; the fact that a different interpretation was previously offered does not change this. Two justifications for deferring to agency interpretations are that agencies are politically accountable and that Congress wanted to delegate these decisions to agencies. In other words, Congress implicitly granted the agency interstitial policy-making authority. By revising an interpretation, the agency is simply carrying out Congress's mandate.<sup>99</sup>

### 3. Agency flailing.

When an agency is either obviously or avowedly struggling to find a workable interpretation of a statute, one might think that the agency's interpretations should not be entitled to deference. The appropriate question to ask under *Chevron*, though, is not whether the agency is successful in this enterprise, but who is more likely to succeed—the agency or the court. Just because the agency has not provided a workable interpretation does not mean that the court will identify a better one. If an agency is having difficulty, the statute may be poorly written, inconsistent with other agency mandates, or fail to take into account vital yet unanticipated side effects. Once one is willing to presume that Congress implicitly delegated policy-making power to agencies for reasons of accountability and expertise, however, it follows that in these cases it is particularly appropriate for a court to defer. Either the agency is going to have to make a choice among bad options, or the statutory term in question has no “best” interpretation. The agency, after realizing how bad a previous interpretation was, is trying again; unless one rejects the rationales underlying *Chevron*, an agency deserves deference when it does so.

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<sup>99</sup> See text accompanying notes 41-42.

#### 4. Policy changes.

One of the standard reasons for deferring to an agency is the agency's expertise.<sup>100</sup> After all, when attempting to define a "stationary source," an EPA specialist will surely better understand the possibilities and implications of different definitions than a court made up of non-scientists. The same argument from expertise suggests the same deference is appropriate when an agency changes its interpretation of "stationary source," having decided that as a matter of policy it dislikes the prior interpretation. Given the congressional mandate to the agency to fill in the ambiguity,<sup>101</sup> and given the fact that the agency is politically accountable while the judiciary is not, there is no reason why a court should tell the agency that its revised interpretation is wrong.<sup>102</sup>

Thus it seems that the courts are getting it right, whatever they claim to be doing. Under *Chevron*, revised agency interpretations of statutes deserve the same deference as all other interpretations. So long as agencies do not change their interpretations for no reason at all—a possibility that is reduced by the requirement that agencies provide reasons—agencies should be allowed to change their interpretations without receiving less deference.

#### C. Arguments Against Deferring to Revised Interpretations

One might object that revised interpretations should not receive *Chevron* deference because they are not consistent with Congress's intentions. One of the classic rationales for deferring to agency interpretations of stat-

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<sup>100</sup> See *Chevron*, 467 US at 865. See also Breyer, 38 Admin L Rev at 368-69 (cited in note 41).

<sup>101</sup> Recall the Court's statement in *Smiley v Citibank (South Dakota), N.A.*, 116 S Ct 1730, 1733 (1996), that under *Chevron* there is a "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows."

<sup>102</sup> If this claim seems a little strong, recall that this is *exactly* what the *Chevron* Court said. *Chevron*, 467 US at 865-66. See also *Rust v Sullivan*, 500 US 173 (1991) (deferring to government reinterpretation of Title X so as to impose a "gag rule" preventing doctors at family planning clinics receiving federal funds from discussing abortion with their clients).

Professor Weaver has attempted to limit this rationale for deference, arguing that courts should not defer if "a later administration is hostile to a prior regulatory scheme," since in that case the new "interpretation [might be] inconsistent with the purpose or function of that scheme." Weaver, 44 Baylor L Rev at 560 (cited in note 65). Of course it is possible that a future administration might attempt to change the interpretation of a statute in ways that are textually impossible, but this is not a reason for less deference to the revision. First, Weaver is assuming that the initial interpretation was that of an administration favorable to the statute, which, while likely, is not necessarily the case. Moreover, if one assumes that Congress delegated this particular policy decision to the agency, as one must under *Chevron*, one must also assume that Congress knew that future administrations might be more or less hostile to Congress's current goals, and thus it is Congress's role to set forth a statute that appropriately cabins the agency. Furthermore, the court must still determine that an interpretation of the statute is reasonable under *Chevron*; deference is not the same as abdication.

utes is that the interpretation is a strong indication of what Congress intended the statute to mean.<sup>103</sup> Under this rationale, it follows that contemporaneous interpretations, those which were issued in the immediate wake of the passage of the statute, would deserve deference. The agency was quite possibly involved in drafting the statute, and, if not, would presumably know the impetus for the statute and have access to the congressional staff members who wrote it. Similarly, if Congress does not overrule an agency interpretation, that inaction might be taken as indirect evidence that this long-standing interpretation is reasonable.

While this is a perfectly coherent view of why courts should defer to agency interpretations of statutes, it is fundamentally inconsistent with the rationales underlying *Chevron*.<sup>104</sup> The above arguments necessarily assume, first, that Congress had an intent with regard to the question at hand, of which the agency's interpretation is only evidence; and second, that Congress did not intend to delegate the question to the agency so it could make a policy judgment on its own. These might be reasonable assumptions, but they are not the assumptions of the *Chevron* Court.<sup>105</sup> Further, they are not assumptions that truly differentiate cases of revised agency interpretations from others; these assumptions rely on agency expertise, which does not necessarily correlate with whether an interpretation has been revised.

The strongest argument against deferring to revised agency interpretations is that parties have a right to rely on agency interpretations of statutes, and to have agencies interpret those statutes consistently, similar to the principle of stare decisis in courts.<sup>106</sup> For reasons of predictability and planning, agencies should consistently interpret statutes. Furthermore, it seems plausible that shifts in interpretation may be the result of political pressure.

This argument misinterprets the issue, however; agencies are not courts, and are not subject to stare decisis. The agency is acting as a stand-in for Congress, by setting policies in areas where Congress either explicitly or implicitly wanted the agency to do so. There is no requirement that Congress be constant, especially when it sees better policy alternatives. Given *Chevron's* interpretation of statutory ambiguity as a delegation of policy-making authority to agencies, there should likewise be no such requirement that they be consistent.<sup>107</sup>

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<sup>103</sup> See Herz, 6 Admin L J at 194 (cited in note 58).

<sup>104</sup> See id at 194-95 (agreeing, though arguing that pre-*Chevron* deference is preferable).

<sup>105</sup> Recall the Court's most recent statement, in *Smiley*, 116 S Ct at 1733; see notes 41 and 101.

<sup>106</sup> See Merrill, 101 Yale L J at 1018-19 (cited in note 69) (duration of executive interpretation leads to reliance interests parallel to court interpretations); Sunstein, 90 Colum L Rev at 2102 (cited in note 23) (same); *Smiley*, 116 S Ct at 1734 (“[C]hange that does not take account of legitimate reliance on prior interpretation may be arbitrary, capricious [or] an abuse of discretion.”) (citations and internal quotation marks omitted).

<sup>107</sup> For a similar argument, see Pierce, 41 Vand L Rev at 313 (cited in note 35) (arguing that since interpretations are policy decisions, they should trump even stare decisis). Note also that, given the system

There are, however, two situations in which revised interpretations deserve less deference: when an agency interpretation is inconsistent with prior court precedent,<sup>108</sup> and when an agency assumes an interpretation for purposes of pending litigation.<sup>109</sup> In both of these situations, an agency's current interpretation is likely to be inconsistent with past agency interpretations. This supports rather than undermines the thesis of this Comment, however. In these situations, courts should not defer, regardless of whether the agency's interpretation is a revision of a previous one.<sup>110</sup> In the absence of these situations, however, courts should defer to revised interpretations.

#### CONCLUSION: RETURNING TO *CHEVRON*

Although *Chevron* is immensely important, cited in over 3,500 cases in twelve years,<sup>111</sup> the underlying premise of the case remains unclear. If the case stands for what the Court said—that agencies are presumed more expert than courts, have more political accountability than courts, and have been implicitly delegated to by Congress when Congress leaves a statute ambiguous—then there is no reason to defer any less to an acknowledged revised interpretation of a statute than to any other agency interpretation. For a court to do otherwise undermines the essence of *Chevron* deference and makes deference into either a “doctrine of desperation”<sup>112</sup> or a truly revolutionary doctrine, undermining the *Marbury* view of the role of the courts in interpreting laws.<sup>113</sup> Both options seem less attractive than complying with the *Chevron* doctrine as originally announced.

Luckily, such a reinvigoration would not be difficult. As this survey demonstrates, the courts have actually been deferring to revised interpretations anyway, despite what they say. Perhaps courts do not acknowledge this practice because they are uncomfortable with *Chevron* itself. But if this is true, the courts should be explicit about it, rather than focusing on a small subset of cases that are no more or less likely to be problematic under the rationales for *Chevron* than any other case. Other exceptions to *Chevron* deference make sense under the *Chevron* doctrine; excepting revised interpretations does not.

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of rule-making under the Administrative Procedure Act, 5 USC §§ 553 et seq (1994), it seems fatuous to presume that agencies do not face political pressure in arriving at their initial interpretations of statutes.

<sup>108</sup> See Part II.C.3.

<sup>109</sup> See Part II.C.2.

<sup>110</sup> See text accompanying notes 50-51 and note 53 (discussing why these exceptions are not inconsistent with deferring to revised interpretations).

<sup>111</sup> See note 67.

<sup>112</sup> *JNS v Cardoza-Fonseca*, 480 US 421, 454 (1987) (Scalia concurring).

<sup>113</sup> Sunstein, 90 Colum L Rev at 2075 (cited in note 23).