Georgia Law Review

Volume 46 | Number 4 Article 3

2012

The Chevron Two-Step in Georgia's Administrative Law

David E. Shipley
University of Georgia School of Law

GEORGIA LAW REVIEW

VOLUME 46 SUMMER 2012 NUMBER 4

ARTICLES

THE *CHEVRON* TWO-STEP IN GEORGIA'S ADMINISTRATIVE LAW

David E. Shipley[*]

TABLE OF CONTENTS

* Thomas R.R. Cobb Professor of Law, University of Georgia School of Law; J.D., 1975, University of Chicago; B.A., 1972, Oberlin College.

I. INTRODUCTION

The Georgia Supreme Court and Court of Appeals have long accepted the General Assembly's authority to enact legislation that establishes administrative agencies and empowers those agencies to promulgate rules and regulations to implement the governing statutes.[1] In addition, the Georgia constitution provides that the General Assembly may authorize agencies to exercise quasi-judicial powers.[2] Administrative agencies with broad powers enjoy a secure position under Georgia law.[3]

Like federal and state administrative agencies throughout the nation, Georgia's many boards, commissions, and authorities make policy when they apply their governing statutes in promulgating regulations of general applicability[4] and in ruling on specific matters like granting or denying an application for a permit or determining the residency of a candidate for public office.[5] Sometimes the governing statutes are clear, but sometimes ambiguity exists. When there is ambiguity in its governing statute, the agency must interpret that statute when it promulgates regulations or decides a particular contested matter.[6] This article asks and answers the question of what deference, if

---

[1] David E. Shipley, *The Status of Administrative Agencies Under the Georgia Constitution*, 40 GA. L. REV. 1109, 1128 (2006).

[2] GA. CONST. art. VI, § 1, ¶ 1 ("The judicial power of the state shall be vested exclusively in the following classes of courts . . . . In addition, the General Assembly may establish or authorize the establishment of municipal courts and may authorize administrative agencies to exercise quasi-judicial powers."); *see also* Shipley, *supra* note 1, at 1152 (discussing delegation of judicial authority under the Georgia Constitution).

[3] *See* Shipley, *supra* note 1, at 1170 (noting that the Georgia Supreme Court places "administrative agencies on a solid foundation under the Georgia Constitution").

[4] The Georgia Administrative Procedure Act sets out the process for promulgating regulations. O.C.G.A. § 50-13-4 (2009).

[5] *See, e.g.*, Ctr. for a Sustainable Coast v. Coastal Marshlands Prot. Comm., 670 S.E.2d 429, 429 (Ga. 2008) (involving an environmental group's challenge to a permit the Coastal Marshlands Protection Committee granted to a developer); Handel v. Powell, 670 S.E.2d 62, 63 (Ga. 2008) (involving a dispute over the Secretary of State's determination of residence of a candidate for election to the Public Service Commission). The Administrative Procedure Act also sets forth procedures for the adjudication of contested cases. O.C.G.A. §§ 50-13-13 to -18 (2009).

[6] MICHAEL ASIMOW & RONALD M. LEVIN, STATE AND FEDERAL ADMINISTRATIVE LAW 519 (3d ed. 2009).

any, must a Georgia court afford to an agency's interpretation of its governing statute when the court reviews an agency's decision in a contested case or considers a challenge to the validity or applicability of an agency's regulation.

The issue of appropriate deference is a fundamental administrative law question for federal and state courts because it concerns the allocation of authority over the interpretation of statutes and policy making between agencies and the judiciary.[7] Legislatures establish agencies in part because our elected representatives recognize that some issues are too complex for them to deal with on a day-to-day basis or require expertise that elected representatives and courts do not have and cannot acquire.[8] The basic authority of state and federal agencies to carry out their delegated duties is rarely questioned. However, when agencies interpret and apply their governing statutes, they are making policy and arguably making law, especially when they fill gaps or resolve ambiguities left by the legislative branch in such governing statutes.[9] This is the source of the deference debate because our nation's creed has long been, according to *Marbury v. Madison*,[10] that courts decide questions of law.[11] Accordingly, the

---

[7] William R. Andersen, Chevron *in the States: An Assessment and a Proposal*, 58 ADMIN. L. REV. 1017, 1017 (2006); *cf.* WILLIAM F. FOX, UNDERSTANDING ADMINISTRATIVE LAW 313–14 (5th ed. 2008) (noting that agencies often make policy when they adjudicate or make rules and that they frequently must interpret their own rules to do so); Thomas Merrill, *The Story of* Chevron: *The Making of an Accidental Landmark*, *in* ADMINISTRATIVE LAW STORIES 398, 399 (Peter L. Strauss ed., 2006) (calling *Chevron* the "leading statement about the division of authority between agencies and courts in interpreting statutes").

[8] *See, e.g.*, Bentley v. Chastain, 249 S.E.2d 38, 40 (Ga. 1978) (noting that "agencies provide a high level of expertise and an opportunity for specialization unavailable in the judicial or legislative branches"); Ga. Real Estate Comm'n v. Accelerated Courses in Real Estate, Inc., 214 S.E.2d 495, 500 (Ga. 1975) (discussing the allocation of responsibility to the agency); Dep't of Cmty. Health v. Gwinnett Hosp. Sys., Inc., 586 S.E.2d 762, 765 (Ga. Ct. App. 2003) (explaining that the legislature allocates responsibility to agencies because of agencies' expertise). Each of these cases explains why the General Assembly establishes administrative agencies.

[9] *Cf.* William A. McGrath et al., *Project: State Judicial Review of Administrative Action*, 43 ADMIN. L. REV. 571, 759–60 (1991) (discussing agency authority in resolving "contested cases" and questioning whether that authority is consistent with *Marbury v. Madison*).

[10] 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

[11] *Id.* at 177–78; *see also* Andersen, *supra* note 7, at 1017 ("The orthodox *Marbury v.*

question of whether a court should defer to an agency's interpretation of its governing statute implicates the judiciary's role in deciding questions of law and policy making. This represents "one of the most complex aspects of administrative law,"[12] and the most frequently cited and analyzed United States Supreme Court decision dealing with administrative law, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[13] concerns this question.[14]

In *Chevron*, the Supreme Court of the United States established a two-step analysis for judicial review of "an agency's construction of the statute which it administers."[15] The Court did most of this in a relatively simple paragraph:

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

---

Madison view was that courts should decide questions of law." (footnote omitted)).

[12] CHARLES H. KOCH JR., 3 ADMINISTRATIVE LAW AND PRACTICE § 12.31 (2d ed. 1997); *see also* McGrath et al., *supra* note 9, at 759 (noting that this is a "confusing and controversial area").

[13] 467 U.S. 837 (1984).

[14] Merrill, *supra* note 7, at 399 & n.2. In addition, it "has generated an enormous volume of critical literature in the . . . years since its formulation." Andersen, *supra* note 7, at 1018. "[F]orests have been laid waste to publish the outpouring of legal commentary on [*Chevron*] and its progeny." Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501 (2005).

[15] *Chevron*, 467 U.S. at 842.

> is whether the agency's answer is based on a permissible construction of the statute.[16]

This affords a very deferential standard because in deciding whether to affirm the agency "[t]he 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."[17] The reviewing court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the . . . agency."[18] Instead, the court must defer and affirm if the agency's construction of its ambiguous statute is reasonable.[19]

Chevron is, of course, a federal decision that does not bind any state's courts in how they review rulings from that state's agencies.[20] Some scholars have concluded that there are three general approaches to answering or resolving the deference issue.[21] A court can defer by accepting the agency's interpretation if the interpretation is reasonable even though the court might have read the statute differently.[22] This is strong deference as in *Chevron*. The opposite approach is for the court to give no weight or deference to the agency's interpretation and resolve the issue on its own.[23] The third general approach falls in between, with the court affording deference to the agency but retaining authority to

---

[16] *Id.* at 842–43 (footnotes omitted).

[17] *Id.* at 843 n.11. This is strong deference. ASIMOW & LEVIN, *supra* note 6, at 532 n.2.

[18] *Chevron*, 467 U.S. at 844 (footnote omitted).

[19] *See* McGrath et al., *supra* note 9, at 761 (noting that a court cannot reverse an agency because it believes a different result is preferable); FOX, *supra* note 7, at 315 ("[I]f the statutory language is either silent or ambiguous . . . [t]he court must defer to the agency's position if the court concludes that the agency's action is reasonable.").

[20] *See* ASIMOW & LEVIN, *supra* note 6, at 538 n.7 (explaining that a few states have adopted *Chevron* but most have not); McGrath et al., *supra* note 9, at 763 (pointing out that "[e]ach state has developed its own scope of review standards"). There are, however, questions about the Supreme Court's consistency in applying *Chevron*. FOX, *supra* note 7, at 316.

[21] ASIMOW & LEVIN, *supra* note 6, at 519–20; *see also* KOCH, *supra* note 12, § 12.36 (discussing three approaches to judicial deference); McGrath et al., *supra* note 9, at 763 (discussing four general approaches).

[22] ASIMOW & LEVIN, *supra* note 6, at 519–20.

[23] *Id.* at 519.

substitute its judgment for that of the agency.[24] One scholar states that "[m]ost state courts exercise independent judgment when reviewing any agency interpretation of the law."[25]

Many decisions by Georgia's appellate courts discuss judicial deference to agency interpretations of the statutes they administer and enforce. In 2008 alone the Georgia Supreme Court announced four rulings in which the issue of deference was paramount.[26] These relatively recent decisions, consistent with earlier Georgia jurisprudence on judicial deference, confirm that Georgia is a strong deference state where the "courts will defer to the agency interpretation as long as it is not contrary to the statute."[27] This Article analyzes those 2008 decisions along with many other Georgia Supreme Court and Court of Appeals opinions in which a question existed as to whether there should be deference to an agency's interpretation of its governing statute. The Article's thesis is that Georgia's appellate courts have adopted and follow an approach that is similar to the famous *Chevron* two-step.[28]

It is important to acknowledge that Georgia's appellate courts have said that "judicial review of an administrative decision is a

---

[24] *Id.* at 520; *see also* McGrath et al., *supra* note 9, at 763 ("The third, and largest, group consists of those states that vary the level of deference to agency action with the type of problem decided by the agency.").

[25] KOCH, *supra* note 12, § 12.36.

[26] *See* Ctr. for a Sustainable Coast v. Coastal Marshlands Prot. Comm., 670 S.E.2d 429, 433 (Ga. 2008) (holding that deference is warranted where statute authorized agency to determine its jurisdiction); Handel v. Powell, 670 S.E.2d 62, 65 (Ga. 2008) (emphasizing that under the relevant statute, a court may modify agency determinations where those decisions violate Georgia law or are affected by other error of law); Pruitt Corp. v. Ga. Dep't of Cmty. Health, 664 S.E.2d 223, 226 (Ga. 2008) (reversing Court of Appeals holding that an agency's decision "was entitled to affirmance if there was any evidence to support it"); Ga. Dep't of Revenue v. Owens Corning, 660 S.E.2d 719, 720 (Ga. 2008) (explaining "[t]he standards for reviewing taxation statutes" and determinations).

[27] Michael Pappas, *No Two-Stepping in the Laboratories: State Deference Standards and Their Implications for Improving the* Chevron *Doctrine*, 39 MCGEORGE L. REV. 977, 985 & n.28, 1013 (2008); *see also* McGrath et al., *supra* note 9, at 763 & n.257 (discussing the high deference standard and the states that apply it). Strong deference is sometimes referred to as high deference.

[28] "*Chevron* is by far the most prominent federal case on judicial review of agencies' statutory interpretations." ASIMOW & LEVIN, *supra* note 6, at 531 n.1. The Court's two-step inquiry prescribes a strong deference. In essence, if the reviewing court determines that the governing statute is ambiguous and that the agency's interpretation is reasonable then deference is mandatory. *Id.* at 532 n.2.

two-step process."[29] The steps are as follows: the reviewing court first determines whether sufficient evidence exists to support the agency's finding of fact, and second, examines the soundness of the agency's conclusions of law.[30] The focus of this Article and its thesis about judicial deference concerns what the Georgia courts do on that second step when they review the agency's interpretation of its governing statute; as stated in *Chevron*, how the appellate courts review "an agency's construction of the statute which it administers."[31] Georgia courts have not acknowledged the influential *Chevron* decision in their opinions even though their approach to the issue parallels the *Chevron* two-step approach. The fact that Georgia's strong deference jurisprudence pre-dates *Chevron* by many years might explain the courts' silence on the point.[32]

More particularly, the decisions discussed in this Article show that Georgia's appellate courts, like their federal counterparts, have used "traditional tools of statutory construction"[33] in analyzing and applying what is called *Chevron* "step one": determining whether the legislature has directly addressed the

---

[29] *Handel*, 670 S.E.2d at 65; Lamar Co. v. Whiteway Neon-Ad., 693 S.E.2d 848, 851 (Ga. Ct. App. 2010); Ne. Ga. Med. Ctr. v. Winder HMA, Inc., 693 S.E.2d 110, 114 (Ga. Ct. App. 2010).

[30] *Pruitt Corp.*, 664 S.E.2d at 226.

[31] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842 (1984).

[32] Only two reported Georgia Court of Appeals decisions mention *Chevron*, and neither is directly on point. *See* Ga. Dep't of Revenue v. Chemistry Council, Inc., 607 S.E.2d 207, 208–09 & n.7 (Ga. Ct. App. 2004) (citing *Chevron* for policies behind deference, not the test); Schneider v. Susquehanna Radio Corp., 581 S.E.2d 603, 606 & n.10 (Ga. Ct. App. 2003) (applying *Chevron* briefly to claims brought under the federal Telephone Consumer Protection Act). According to one scholar, no state expressly adopts the *Chevron* two-step test, and "strong deference" states often go with a one-step reasonableness review. Pappas, *supra* note 27, at 986. On the other hand, Professors Michael Asimow and Ronald Levin state that "[a] few state courts have adopted the *Chevron* test for use in evaluating the actions of state agencies." ASIMOW & LEVIN, *supra* note 6, at 538–39 n.7 (referencing several articles addressing the pros and cons of recognizing *Chevron* in particular states—Texas and California—and in the states generally). It is relevant to note that the Supreme Court of the United States itself has struck down an agency's interpretation of its governing statute without citing *Chevron*. *See* Bhd. of Locomotive Eng'rs v. Atchison, Topeka & Santa Fe R.R. Co., 516 U.S. 152, 160–61 (1996) (reviewing the Federal Railroad Administration's interpretation of the Hours of Service Act without employing the *Chevron* test); FOX, *supra* note 7, at 315 n.35 (noting the significance of the Supreme Court's holding in *Bhd. of Locomotive Eng'rs*).

[33] *Chevron*, 467 U.S. at 843 n.9.

question at issue. The techniques used by Georgia's courts include those used by the federal courts: ascertaining the meaning of statutes and legislative intent through canons and principles of statutory interpretation, examining the text of the legislation, closely reading dictionary definitions, and weighing available legislative history.[34]

Like the federal courts, Georgia's appellate courts also use these techniques on "step two": deciding whether or not the agency's interpretation is reasonable.[35] Moreover, as with the many federal cases applying *Chevron,* the Georgia decisions show that a litigant's chance of success often turns on how the first step is resolved. If the reviewing court determines that the governing statute is ambiguous or does not address the issue, then it will defer to the agency's reasonable interpretation. This standard affords considerable weight to the agency's determination. On the other hand, if the appellate court determines that the governing statute is clear, it will then say exactly what the statute means and often conclude that the agency's interpretation is contrary to the statute or the clear intent of the General Assembly.[36]

This Article first discusses the federal approach to judicial deference, including the United States Supreme Court's decision in *United States v. Mead Corp.*[37] that imposed limits on the sweep of *Chevron* deference and resurrected the venerable *Skidmore v.*

---

[34] ABA Section of Admin. Law & Regulatory Practice, *A Blackletter Statement of Federal Administrative Law,* 54 ADMIN. L. REV. 1, 37 (2002).

[35] ASIMOW & LEVIN, *supra* note 6, at 536–37 n.5.

[36] The issue for resolution on the second step—whether the agency's interpretation is reasonable—is where the deference comes into play. A study of how the EPA fared in the United States Courts of Appeals showed that the agency lost 59% of the time on step one, but that it won 92% of the time when it got beyond the first step. Christopher H. Schroeder & Robert L. Glicksman, Chevron, State Farm, *and the EPA in the Courts of Appeals During the 1990s,* 31 ENVTL. L. REP. 10,371, 10,375–77 (2001). Another study analyzed 223 published United States Courts of Appeals decisions between 1995 and 1996; where the *Chevron* doctrine was applied 38% of the cases were resolved on step one with 58% being reversals, and 62% of the cases were decided on step two, with only 11% being reversals. Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals,* 15 YALE J. ON REG. 1, 30–31 (1998). Uncertainty persists though about how step two is meant to work. ASIMOW & LEVIN, *supra* note 6, at 536 n.5.

[37] 533 U.S. 218 (2001).

Swift & Co.[38] decision with its totality of the circumstances approach to deference. It then provides a thorough analysis of Georgia's jurisprudence on deference to agency interpretations of their governing statutes, focusing especially on four 2008 decisions by the Supreme Court of Georgia. Finally, this Article presents a synthesis of what comes out of these Georgia appellate decisions dealing with judicial deference.

II. THE FEDERAL APPROACH: *CHEVRON*, *MEAD* AND *SKIDMORE*

The United States Supreme Court's decision in *Chevron* has been described as the "most important decision about the most important issue in modern administrative law—the allocation of power between courts and agencies 'to say what the law is.' "[39] As noted in this Article's introduction, the Court established a two-step analysis for judicial review of "an agency's construction of the statute which it administers."[40] This "two-step framework . . . has taken the judicial world by storm."[41]

Chevron involved a challenge to regulations promulgated by the Environmental Protection Agency in 1981 to implement permit requirements under the Clean Air Act.[42] These regulations allowed a state to adopt a plant wide definition of the statutory term "stationary source."[43] This definition would allow an existing facility with several pollution emitting sources like smokestacks to install a new furnace or modify a stack without going through the permitting process so long as the total emissions from the entire

---

[38] 323 U.S. 134 (1944).

[39] Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 809 (2002) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)). As noted previously, *Chevron* is the most frequently cited case in administrative law. Merrill, *supra* note 7, at 399; *see also* ASIMOW & LEVIN, *supra* note 6, at 531 ("*Chevron* is by far the most prominent federal case on judicial review of agencies' statutory interpretations . . . . [I]t is a landmark decision.").

[40] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842 (1984); *see supra* notes 13–19 and accompanying text.

[41] Merrill, *supra* note 7, at 399.

[42] *Chevron*, 467 U.S. at 840–41; FOX, *supra* note 7, at 314.

[43] *Chevron*, 467 U.S. at 840.

facility were not increased by the additions or modifications.[44] In essence, the rule allowed a state to treat a facility with all of its smokestacks as under a single bubble. The D.C. Circuit Court of Appeals held the regulation was invalid but the Supreme Court ultimately reversed, holding that the EPA's construction of "stationary source" was permissible.[45]

The Court reached this conclusion after describing and going through a two-step process.[46] Step one requires the reviewing court to scrutinize what the statute says and determine "whether Congress has directly spoken to the precise question at issue" because, if it has, the court and the agency "must give effect to the unambiguously expressed intent" of the legislature.[47] The Court emphasized in a footnote that the Judiciary has the last word on statutory construction and that agency interpretations contrary to clear congressional intent have to be rejected. It also instructed courts to ascertain whether Congress had an intention on the precise question at issue by "employing traditional tools of statutory construction."[48] The Supreme Court did not list those traditional tools.[49] However, in finding that Congress did not have an intent regarding the term "stationary source" and the applicability of the bubble concept to the permit program, and concluding that the EPA's use of the bubble concept was a reasonable policy choice, the Court closely examined the applicable legislation and its legislative history.[50]

The step one inquiry leaves a great deal of judgment to the reviewing court. Some courts take a perfunctory look at the governing statute and others engage in a much more searching

---

[44] *Id.*

[45] *Id.* at 841, 866. There is a tremendous volume of scholarly commentary on *Chevron* that will not be summarized in this article. *See* ASIMOW & LEVIN, *supra* note 6, at 533 n.3 (remarking that the number of law review articles on the case is "voluminous").

[46] 467 U.S. at 842–43.

[47] *Id.* Although *Chevron* involved a challenge to agency rulemaking, it has also been accepted as applying to adjudication. McGrath et al., *supra* note 9, at 761 n.249.

[48] 467 U.S. at 843 n.9.

[49] Step one does not dictate that courts use a particular method of statutory interpretation. ABA Section of Admin. Law & Regulatory Practice, *supra* note 34, at 37.

[50] 467 U.S. at 845.

analysis.[51] Moreover, the Supreme Court's Justices often disagree vigorously on whether a statute or congressional intent is clear and whether strong deference is appropriate.[52] Indeed, "all the nuances of *Chevron* have not yet been explored."[53]

Step one recognizes the primacy of the legislative branch by holding "unambiguously expressed" congressional intent "must be given effect."[54] However, if the reviewing court concludes after the step one inquiry that the statute is ambiguous on the issue presented, then *Chevron* places lawmaking primacy in the agency; specifically, the agency's interpretation is to be upheld if it is reasonable.[55] This is a very deferential standard[56] because "[t]he 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."[57] In other words, the agency's construction only needs to be reasonable—"a court may

---

[51] ASIMOW & LEVIN, *supra* note 6, at 534–35 n.4.

[52] *See, e.g.*, Talk Am., Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254, 2265–66 (2011) (Scalia, J., concurring) (giving deference to an agency's interpretation of its regulations, even in a legal brief, and agreeing that the interpretation was reasonable but questioning the wisdom of deference to such interpretations); Carcieri v. Salazar, 555 U.S. 379, 380–81, 400 (2009) (holding 6-to-3 that the Secretary of the Interior could not take land into trust for a tribe not recognized in 1934 when the Indian Reorganization Act was passed because the term "now" in the statute was not ambiguous); Christensen v. Harris Cnty., 529 U.S. 576, 594–95 (2000) (Stevens, J., dissenting) (according deference to Department of Labor opinion letters and guidance documents pertaining to the Fair Labor Standards Act to which the majority gave none); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 191–92 (2000) (Breyer, J., dissenting) (disagreeing with the majority's assertion that statutes deprive the Food and Drug Administration of jurisdiction to regulate tobacco); Holly Farms Corp. v. NLRB, 517 U.S. 392, 414 (1996) (O'Connor, J., dissenting) (discussing whether certain categories of workers in poultry business came within an exclusion from the NLRA's coverage); MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 219, 229 (1984) (holding 5-to-3 that the FCC's interpretation was not entitled to deference because its interpretation went beyond the meaning that the statute could bear); INS v. Cardoza-Fonseca, 480 U.S. 421, 422, 443, 459 (1987) (exhibiting disagreement in a 6-to-3 decision about the ambiguity of the Immigration and Naturalization Act).

[53] FOX, *supra* note 7, at 317.

[54] 467 U.S. at 842–43.

[55] Michael Healy, *Spurious Interpretation Redux:* Mead *and the Shrinking Domain of Statutory Ambiguity*, 54 ADMIN. L. REV. 673, 675 (2002).

[56] ASIMOW & LEVIN, *supra* note 6, at 532 n.2 (emphasizing that the decision prescribes strong deference—if an agency's interpretation is reasonable, "deference is mandatory").

[57] *Chevron*, 467 U.S. at 843 n.11.

not substitute its own construction of a statutory provision for a reasonable interpretation made by the . . . agency."[58]

The Supreme Court explained that the authority explicitly and implicitly delegated to agencies by the legislative branch justified this strong deference to the agency's interpretation:

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.[59]

The Supreme Court also explained the appropriateness of agencies making difficult policy choices because of their accountability to the public in contrast to the accountability of the Judiciary:

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may . . . properly rely upon the incumbent

---

[58] *Id.* at 844. *Chevron* emphasizes that a court should not reverse simply because it feels that another decision would have been preferable. McGrath et al., *supra* note 9, at 761.

[59] *Chevron*, 467 U.S. at 843–44 (footnotes omitted). Later in the opinion, the Court explained that it did not matter why Congress did not resolve the issue; perhaps Congress tried but without sufficient specificity, perhaps it consciously desired the agency to answer the question, perhaps it did not consider the issue at all, or perhaps it was not able to forge a coalition so both sides decided to take their chances with the agency. *Id.* at 865.

> administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with administration of the statute in light of everyday realities.[60]

The message from the Supreme Court in *Chevron* is clear: federal judges "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" but are vested in the political branches.[61]

The Court did not, however, provide clear guidance for how a court should determine whether an agency's interpretation of an ambiguous provision in a statute is reasonable.[62] Post-*Chevron* decisions show that step two deference is not total capitulation or unprincipled,[63] but predictions are dicey other than saying that the

---

[60] *Id.* at 865–66.

[61] *Id.* at 866 (internal citations and quotations omitted). "*Chevron* relies on constitutional structure, Congress's legitimate authority to delegate lawmaking power to administrative agencies, and the political accountability of those agencies to the President and to Congress." Mashaw, *supra* note 14, at 505; *see also* ASIMOW & LEVIN, *supra* note 6, at 532–33 (suggesting that concerns for political accountability justify *Chevron*). *But see* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is, emphatically, the province and duty of the judicial department, to say what the law is."). Moreover, winning or losing on step one does not necessarily dictate the ultimate result. There are some decisions where the appellate court determined that the governing statute was ambiguous but that the agency's interpretation of the statute was not reasonable. *See* Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 481 (2001) (concluding that the EPA's interpretation of the Clean Air Act was unreasonable because it went beyond the limits of what was ambiguous); *cf.* AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 390 & n.11 (1999) (showing disagreement on the Court over the meaning of the word "impair"); ASIMOW & LEVIN, *supra* note 6, at 536 n.5 (analyzing the Court's decision in *Am. Trucking*). Still, one study showed an affirmance rate of 89% at step two. Kerr, *supra* note 36, at 31.

[62] "There is more than a little uncertainty about how the second step is supposed to work." ASIMOW & LEVIN, *supra* note 6, at 536 n.5.

[63] FOX, *supra* note 7, at 317; *see also* Kerr, note 36, at 31 (describing results of an

agency's chances of being affirmed are fairly good if the reviewing court proceeds to step two.[64] In *Chevron* itself the tools of statutory construction the Court used to determine that "stationary source" was ambiguous also seemed to be the tools the Court used in deciding that the "bubble concept" was reasonable.[65] Perhaps the safest proposition to state is that the step two inquiry overlaps with the Administrative Procedure Act's "arbitrary and capricious" test.[66]

The Supreme Court's 2001 decision in *United States v. Mead Corp.*[67] imposed some uncertain limits on the applicability of *Chevron*.[68] The parties contested whether tariff-classification rulings issued by the U.S. Customs Service were entitled to strong judicial deference under *Chevron*.[69] The Customs Service issues 10,000 to 15,000 of these rulings every year from its forty-six offices around the nation without going through either notice-and-comment rulemaking or a formal adjudication process.[70] The Court concluded that the rulings were not entitled to *Chevron*

---

empirical study showing only 11% of cases decided on step two resulted in reversal).

[64] Judge Wald of the D.C. Circuit concluded that the bulk of reversals came on step one and also relied on Professor Orin Kerr's determination that the agency was reversed on step two only 11% of the time. Patricia M. Wald, *A Response to Tiller and Cross*, 99 COLUM. L. REV. 235, 242–43 n.28 (1999).

[65] *See supra* notes 48–50 and accompanying text (detailing the *Chevron* Court's instructions on statutory interpretation).

[66] *See, e.g.*, Shays v. FEC, 414 F.3d 76, 96–97 (D.C. Cir. 2005) (explaining that the court would not conduct analysis under step two because the agency gave no rational explanation for its interpretation as required by the arbitrary and capricious standard); Nat'l Ass'n of Regulatory Util. Comm'rs v. ICC, 41 F.3d 721, 726 (D.C. Cir. 1994) ("[T]he inquiry at the second step of *Chevron* overlaps analytically with a court's task . . . in determining whether agency action is arbitrary and capricious (unreasonable)."); Gen. Am. Transp. Corp. v. ICC, 872 F.2d 1048, 1053 (D.C. Cir. 1989) (collecting cases holding that deference is warranted only where an agency's interpretation is rational); JOHN M. ROGERS ET AL., ADMINISTRATIVE LAW 572 (2d ed. 2008) ("The analysis of reasonableness required by [step two] of *Chevron* may perhaps best be thought of as arbitrary-or-capricious review.").

[67] 533 U.S. 218 (2001). *Mead* has also generated a huge volume of scholarly commentary. *See, e.g.*, ASIMOW & LEVIN, *supra* note 6, at 561 n.3 ("Like *Chevron*, *Mead* has triggered voluminous commentary."); David Parlett, *Introduction: Administrative Law Discussion Forum*, 54 ADMIN. L. REV. 565 (2002) (listing scholarship on *Mead*).

[68] Healy, *supra* note 55, at 673. *See also Mead*, 533 U.S. at 239 (Scalia, J., dissenting) (asserting that the courts will be sorting out the consequences of *Mead* for years to come).

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

[70] *Id.* at 233.

deference because they did not have "the force of law."[71] The Court treated them "like 'interpretations contained in policy statements, agency manuals, and enforcement guidelines' " which are "beyond the *Chevron* pale."[72]

The explanation for the *Mead* qualification on *Chevron* is as follows:

> [A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.[73]

Even though the evidence was not sufficient to show that Congress had intended tariff classification rulings to have the force of law, this was not the end of the matter.[74] The Court remanded the case with instructions that the lower court afford *Skidmore* deference to the ruling.[75] This gave new life to the Court's 1944 decision in *Skidmore v. Swift & Co.*[76] and its "sliding

---

[71] *Id.* at 221.

[72] *Id.* at 234 (quoting Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000) (6-to-3 decision) (declaring that opinion letters and guidance documents issued by the Department of Labor's Wage and Hour Division concerning the Fair Labor Standards Act did not warrant deference under *Chevron*)).

[73] *Id.* at 226–27.

[74] *Id.* at 231–34.

[75] *Id.* at 237–39. On remand, the Federal Circuit applied *Skidmore* deference and concluded that the Customs ruling should be set aside—it lacked the power to persuade. Mead Corp. v. United States, 283 F.3d 1342, 1344 (Fed. Cir. 2002).

[76] 323 U.S. 134 (1944). FLSA cases can be brought in state or federal court without an initial administrative proceeding. The parties in *Skidmore* disputed whether "on call" firefighters in Swift's employment were entitled to compensation for the time they spent at the plant waiting for a fire call. *Id.* at 136. "Congress did not utilize the services of an administrative agency to find facts and to determine in the first instance whether particular

scale" approach to deference[77]—an approach to deference based not on delegated authority and accountability as in *Chevron*, but on the capacity and expertise of agencies responsible for the day-to-day implementation of their governing statutes.[78]

One of the issues in *Skidmore* was what weight, if any, should a court in a Fair Labor Standards Act case afford to interpretative bulletins issued by the Department of Labor's Wage and Hour Division.[79] These bulletins "provide a practical guide to employers and employees."[80] The Supreme Court said that these bulletins were not controlling upon the Judiciary but that it was appropriate for the courts to resort to them for guidance: "The weight of such a judgment in a particular case will depend upon 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."[81]

Justice Scalia wrote a forceful dissent in *Mead* that decried the resurrection of *Skidmore* and said that the majority opinion had made "an avulsive change in judicial review of federal administrative action."[82] He argued that the tariff rulings were entitled to *Chevron* deference but that the Court had replaced it "with that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th'ol' 'totality of the circumstances' test."[83] He said that the Court's criteria were "flabb[y]" and looked like a "grab bag" of

---

cases fall within or without the Act. Instead, it put this responsibility on the courts." *Id.* at 137.

[77] ASIMOW & LEVIN, *supra* note 6, at 560 n.2; Cooley R. Howarth, Jr., United States v. Mead Corp.*: More Pieces for the* Chevron/Skidmore *Deference Puzzle*, 54 ADMIN. L. REV. 699, 702 (2001); *see also* Kristin E. Hickman & Matthew B. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1251–59 (2007) (discussing competing conceptions of *Skidmore* review).

[78] Mashaw, *supra* note 14, at 505.

[79] *See* 323 U.S. at 138–40 (discussing deference due to the relevant bulletin and informal ruling).

[80] *Id.* at 138.

[81] *Id.* at 140.

[82] United States v. Mead Corp., 533 U.S. 218, 239 (2001).

[83] *Id.* at 241.

factors.[84] The consequences of the *Mead* doctrine, according to Justice Scalia, would be "almost uniformly bad."[85] He wanted the Court to discard *Skidmore* as an "anachronism."[86]

Notwithstanding Justice Scalia's attack, courts apply *Skidmore* regularly, and its sliding scale runs from being almost as deferential as *Chevron* to virtually no deference at all.[87] It is as if the federal courts have two deference doctrines—"the more rule-like *Chevron* and the more standard-like *Skidmore*," with the attendant problem of determining when one stops and the other begins.[88] However, as explained in the following Part discussing the decisions of Georgia's appellate courts, there are not two deference doctrines in the Peach State's administrative law jurisprudence. *Skidmore* has not had an impact on judicial review of a Georgia agency's interpretation of its governing statute, and Georgia remains very much a strong deference state.[89]

III. THE GEORGIA JUDICIARY'S APPROACH TO DEFERENCE

A. THE EARLY DECISIONS

The Georgia Supreme Court's willingness to afford considerable deference to the interpretation of a statute by the administrative agency charged with that statute's enforcement and administration pre-dates not just *Chevron* but also *Skidmore*. The court's 1935 ruling in *Eason v. Morrison* upheld a regulation adopted by the State Board of Barber Examiners that required previously licensed barbers seeking renewal to submit a laboratory report and a doctor's certificate to show they were free from infections and contagious diseases.[90] The Georgia Supreme Court

---

[84] *Id.* at 245.

[85] *Id.* at 261.

[86] *Id.* at 250.

[87] *See* Hickman & Krueger, *supra* note 77, at 1295–99 (discussing courts' application of *Skidmore*).

[88] Merrill, *supra* note 39, at 808.

[89] In fact, it appears that *Skidmore* has been cited only once by a Georgia appellate court. *See infra* notes 199–205 and accompanying text (explaining the context in which the Georgia Court of Appeals cited *Skidmore*).

[90] 182 S.E. 163, 164, 166 (Ga. 1935).

did not discuss deference as such in concluding the regulation was reasonable, but its analysis of the statutes regulating barbers and the licensing agency's clear rulemaking authority under the statute's original and amended versions is consistent with *Chevron*.

The legislation was not explicit on whether the Board of Barber Examiners could require a licensed barber to submit the laboratory report and health certificate with a renewal application, so the court had to determine whether this agency action was in accord with the legislature's grant of power to the Board to "adopt reasonable rules and regulations."[91] Given the statute's silence on the issue coupled with the explicit grant of rulemaking power, the court went directly to what today would be called step two in order to determine whether the regulation was reasonable. The court first examined the titles of the acts to aid its statutory construction[92] and noted that the preambles from both the original and revised versions of the statute said the Board was to regulate barbers, ensure proper sanitary conditions in barbershops, and prevent the spread of disease.[93] The court also emphasized the principle that laws protecting the public health should be liberally construed and observed it was common knowledge that barbershops could be the source of infection and disease.[94] It concluded that the regulation was not just "reasonable" but "salutary."[95]

The court may not have followed two distinct steps, but it did use traditional tools of statutory construction—such as carefully reading the statutory preambles and noting the principle that statutes protecting health should be liberally construed—to ultimately decide that the regulation was reasonable. Today, federal courts on *Chevron* step two often examine the same statutory materials they relied upon in step one and engage in conventional statutory construction to determine the

---

[91] *Id.* at 165.
[92] *Id.*
[93] *Id.* at 165–66.
[94] *Id.* at 163–66.
[95] *Id.* at 166.

reasonableness of the agency's interpretation of an ambiguous provision.[96]

In *State v. Camp*, a 1939 decision concerning the interpretation and application of Georgia's inheritance tax by the State Revenue Commissioner, the Georgia Supreme Court made several statements about deference and statutory construction.[97] The State Revenue commissioner issued an execution for a small amount against the executors of an estate valued at just over $50,000 after the executors paid federal estate taxes but did not file a state return.[98] The executors challenged this tax because the Georgia law, passed in 1926, referred to the federal act of 1926 with its $100,000 exemption, not the federal acts of 1932 and 1934 that reduced the exemption to $50,000.[99] And it was not clear whether the changes to federal law altered the Georgia statute. The trial court ruled in favor of the estate and the Georgia Supreme Court affirmed.[100] After discussing the several changes in the pertinent federal and state tax statutes in the 1920s and early 1930s, the court said that construing the code as urged by the state would have "the unreasonable effect of taking 92[%], of all inherited property under the higher-bracket schedule."[101] It noted the principle that ambiguous tax statutes should be construed in favor of citizens and emphasized that the trial court's interpretation was "in accord with the interpretation which has been given by the State administrative authorities for a number of years, during which time there have been several sessions of the General Assembly without any disturbance of such administrative interpretation."[102] Accordingly, the supreme court determined that the trial court had properly construed Georgia's tax code as referring to the 1926 federal statute with its higher exemption.[103]

---

[96] KEITH WERHAN, PRINCIPLES OF ADMINISTRATIVE LAW 340 (2008); ABA Section of Admin. Law & Regulatory Practice, *supra* note 34, at 38.

[97] 6 S.E.2d 299, 303–04 (Ga. 1939).

[98] *Id.* at 301.

[99] *Id.* at 301, 303.

[100] *Id.* at 304.

[101] *Id.*

[102] *Id.*

[103] *Id.*

This conclusion was consistent with the court's statement in its Syllabus "that the contemporaneous practical construction of *ambiguous or doubtful provisions of an act* by the department of the State empowered with its administration or supervision will be given great weight, and will not be disturbed except for weighty reasons."[104] This statement is very similar to step two in *Chevron,* to the effect that courts should uphold reasonable interpretations even if the agency's interpretation is not the one the court would have made, and it emphasizes the Georgia Supreme Court's willingness to defer to a state agency's interpretation of ambiguous provisions in the legislation that the agency is charged to administer and enforce.

Over thirty years after *Camp*, the Georgia Court of Appeals in *Belton v. Columbus Finance* cited several federal district court decisions for the proposition that "[i]nterpretations of a law made by those who are administering it, while not conclusive, are to be given great weight."[105] It also cited one of its own decisions for a similar proposition: administrative rulings are not binding on the court of appeals, but the court of appeals will adopt such rulings "when they conform to the meaning [of the governing statute] which [the appellate court] deems should properly be given."[106] This case focused on whether a particular procedure followed under a state statute violated Regulation Z in the Federal Truth in Lending Act.[107] The court found no violation of the federal statute, in part because the form used under the state statute was similar to that recommended by federal authorities.[108]

---

[104] *Id.* at 300 (emphasis added); *see also* Sawnee Elec. Membership Corp. v. Ga. Pub. Serv. Comm'n, 544 S.E.2d 158, 162 (Ga. 2001) (Hunstein, J., dissenting) (citing and quoting *Camp* for the same axiom of statutory construction).

[105] Belton v. Columbus Fin. & Thrift Co., 195 S.E.2d 195, 197 (Ga. Ct. App. 1972); *see also* Nat'l Adver. Co. v. Dep't of Transp., 254 S.E.2d 571, 573 (Ga. Ct. App. 1979) (repeating this proposition, citing *Belton*, and noting that the DOT's interpretation reconciled statutory provisions without straining words, did not pervert legislative intent, and that even though the DOT had never issued a ruling on the Code section in question, the DOT's rejection of application would stand).

[106] *Belton*, 195 S.E.2d at 197.

[107] *Id.* at 196.

[108] *Id.* at 196–97; *see also* Mason v. Serv. Loan & Fin. Co., 198 S.E.2d 391, 394 (Ga. Ct. App. 1973) (giving great weight to the rule promulgated by the Industrial Loan

In a 1975 decision, *Georgia Real Estate Commission v. Accelerated Courses in Real Estate,* the Georgia Supreme Court cited its 1935 ruling in *Eason v. Morrison* for the proposition "that the test of validity of an administrative rule is twofold: (1) Is it authorized by statute, and (2) is it reasonable?"[109] Among other things, the statute said: "Each applicant for a salesman's license shall (1) furnish evidence of completion of twenty-four in-class hours in a course of study approved by the commission . . . ."[110] Shortly after this statute became effective the Commission adopted rules for its implementation, one of which stated that "[n]o course offering of between [twenty-four] and [forty-eight] hours in duration will be approved unless the schedule calls for three or less hours per day of classroom study."[111] Accelerated applied to become an acceptable provider of real estate courses but was rejected because it did not comply with this rule; it wanted to offer a twenty-four hour course consisting of three, eight-hour days of instruction—well in excess of the rule's three hour daily maximum.[112]

Accelerated challenged the rule but the Georgia Supreme Court held that it was valid. The court examined the language of the statute, noted that it explicitly empowered the agency to adopt rules not inconsistent with its provisions, explained that this rule was not contrary to the law, and said that it was reasonable.[113] The court explained that the test of reasonableness in this context focused not on the impact of the rule upon a particular educational format or school but on the impact of the rule on students and the public.[114] The Commission submitted evidence "showing that the 'distributed learning' method has recognized educational value" and asserted that this demonstrated that the rule was not arbitrary, capricious, or unreasonable.[115] The court also

---

Commissioner under the Industrial Loan Act).

[109] 214 S.E.2d 495, 498 (1975).

[110] *Id.* at 496 (emphasis omitted) (quoting O.C.G.A. § 84-14-11(b)).

[111] *Id.* at 497 (emphasis omitted).

[112] *Id.*

[113] *Id.* at 499–500.

[114] *Id.*

[115] *Id.* at 500.

acknowledged that Accelerated had evidence showing the benefits of its compressed format but said that "the courts of this State are not in the position of promulgating educational policy," and "[e]ven though the Real Estate Commission may not be expert in educational matters, the responsibility in this area is the Commission's and not the courts'," and evidence existed that justified the Commission's decision.[116]

This rationale for deference to the Real Estate Commission's judgment is very similar to one of the explanations that the Supreme Court of the United States offered nine years later in *Chevron*.[117] Moreover, in deciding the second step—determining that the regulation was reasonable—the Georgia Supreme Court, like federal courts today applying *Chevron* step two, went with the arbitrary and capricious test.[118]

In a 1978 decision, *Bentley v. Chastain*, the Georgia Supreme Court stated additional reasons for deferring to agencies when striking down a statute and ordinance providing for de novo jury review of a zoning board of appeals' decisions.[119] The court emphasized that agency "decisions are not to be taken lightly or minimized by the judiciary. Review overbroad in scope would have the effect of substituting the judgment of a judge or jury for that of the agency, thereby nullifying the benefits of legislative delegation to a specialized body."[120] This statement sounds much like one of the Supreme Court's explanations for deference offered six years

---

[116] *Id.*

[117] *See supra* notes 59–61 and accompanying text.

[118] *See Ga. Real Estate*, 214 S.E.2d at 500 (holding that agency's interpretation "was not arbitrary, capricious, or unreasonable"); ASIMOW & LEVIN, *supra* note 6, at 536–37 n.5 (explaining the overlap between step two and the arbitrary and capricious test); WERHAN, *supra* note 96, at 342 (noting that one approach to step two incorporates elements of arbitrary and capricious review). *See also supra* notes 62–66 and accompanying text (describing courts' uncertainty about the operation of step two).

[119] 249 S.E.2d 38, 41 (Ga. 1978) (explaining that the statute and ordinance unconstitutionally burdened the courts with nonjudicial functions); *see also* Shipley, *supra* note 1, at 1159–60 (analyzing the Georgia Supreme Court's decision in *Bentley*).

[120] *Bentley*, 249 S.E.2d at 40; Dep't of Cmty. Health v. Gwinnett Hosp. Sys., Inc., 586 S.E.2d 762, 765 (Ga. Ct. App. 2004) (quoting same language from *Bentley*).

later in *Chevron*.[121] The Georgia Supreme Court in *Bentley* also stated:

> [A]gencies provide a high level of expertise and an opportunity for specialization unavailable in the judicial or legislative branches. They are able to use these skills, along with the policy mandate and discretion entrusted to them by the legislature, to make rules and enforce them in fashioning solutions to very complex problems.[122]

This is yet another rationale for deference similar to that offered by the United States Supreme Court in *Chevron*.[123]

The Georgia Court of Appeals repeated the legislative delegation and expertise rationales for deference in 2003, 2008, 2010, and again in 2011 in explaining why it should defer to the Department of Community Health's (DCH) interpretations of its governing statute and administrative rules. The 2003 case involved Gwinnett Hospital and the grant of a Certificate of Need (CON);[124] the 2008 decision concerned Medicaid benefits;[125] the 2010 litigation was about a Winder facility objecting to the agency's grant of a CON to a Hall County enterprise;[126] and the 2011 decision involved an unsuccessful challenge by hospitals in Albany and Sumter County to the grant of a CON for a new hospital in Dougherty County.[127]

In affirming the grant of a CON by DCH's Division of Health Planning in the *Gwinnett Hospital* case, the court of appeals said

---

[121] *See supra* notes 58–61 and accompanying text (stating that concerns about separation of powers in part justify *Chevron*).

[122] 249 S.E.2d at 40; Palmyra Park Hosp., Inc. v. Phoebe Sumter Med. Ctr., 714 S.E.2d 71, 75 (Ga. Ct. App. 2011) (quoting same language from *Bentley*); Dep't of Cmty. Health v. Gwinnett Hosp. Sys., 586 S.E.2d 762, 765 (Ga. Ct. App. 2003) (same); Albany Surgical, P.C. v. Dep't of Cmty. Health, 572 S.E.2d 638, 641 (Ga. Ct. App. 2002) (same).

[123] *See supra* notes 58–61 and accompanying text.

[124] *Gwinnett Hosp. Sys.*, 586 S.E.2d at 765.

[125] Ga. Dep't of Cmty. Health v. Medders, 664 S.E.2d 832, 833–34 (Ga. Ct. App. 2008).

[126] Ne. Ga. Med. Ctr., Inc. v. Winder HMA, Inc., 693 S.E.2d 110, 114–15 (Ga. Ct. App. 2010).

[127] *Palmyra Park Hosp.*, 714 S.E.2d at 72.

that the agency was "responsible for interpreting and applying the statute, the state health plan, and its rules and regulations in order to fulfill its functions as established by the legislature."[128] The court then offered the following "expertise" explanation for the creation of the DCH and for deference:

> The legislature cedes this authority to the Division because the public is better served by having experts in the complexities of health care planning make these decisions. The issues are complicated, and the applicable laws, rules, regulations, and precedents require much study, especially for a decision-maker who is not already familiar with them.[129]

In summary, since long before the United States Supreme Court's *Chevron* decision the Georgia Supreme Court has been following a two step approach in reviewing agencies' interpretations of governing statutes that shows great deference to that interpretation on the second step. Moreover, the supreme court's delegation and expertise justifications for this strong deference are very similar to the explanations the Supreme Court of the United States offered for deference in *Chevron*.

B. GEORGIA DECISIONS AFTER 1984 AND THE *CHEVRON* DECISION

The Supreme Court's 1984 decision in *Chevron* may have brought about a significant change in how federal courts, lawyers who practice before federal agencies, and administrative law scholars analyze the merits of an administrative agency's rule or order,[130] but the jurisprudence of Georgia's Supreme Court and Court of Appeals on deference has been unaffected by *Chevron*

---

[128] 586 S.E.2d at 765.

[129] *Id.*; *see also Palmyra Park Hosp.*, 714 S.E.2d at 75 (discussing industry specialization among agency staff).

[130] "Many, probably most, lower courts regularly treat [*Chevron*] as the starting point for their analysis of the merits of an administrative rule or order. By any measure it is a landmark decision with which every administrative lawyer must be familiar." ASIMOW & LEVIN, *supra* note 6, at 531 n.1.

even as it took on canonical status.[131] Georgia's appellate courts continue to repeat the "well-settled principle of law that even though an interpretation of a statute by an agency charged with the duty of enforcing it is not conclusive, it is entitled to great weight."[132]

For instance, in *Kelly v. Lloyd's of London* the Georgia Supreme Court decided three certified questions from the United States Court of Appeals for the Eleventh Circuit.[133] One question was whether a policy of aircraft and aerial application insurance issued by Lloyd's of London to a crop dusting business was exempt from the filing requirement in O.C.G.A. § 33-24-9(a).[134] The court quoted the code section, highlighted the exclusion from filing for policies and "forms of unique character designed for . . . insurance upon a particular subject," noted that only nine companies provided coverage for the roughly 120 aerial pesticide contractors

---

[131] *See* Merrill, *supra* note 7, at 402 (asserting that *Chevron* is approaching *Erie* as the "overall citation champion"); ASIMOW & LEVIN, *supra* note 6, at 531 n.1 (describing *Chevron* as a "landmark decision").

[132] Kelly v. Lloyd's of London, 336 S.E.2d 772, 774 (Ga. 1985) (quoting Nat'l Adver. Co. v. Dep't of Transp., 254 S.E.2d 571, 573 (Ga. Ct. App. 1979)) (internal quotation marks omitted) (giving deference to the Insurance Commission); *see also* Ga. Dep't of Cmty. Health v. Medders, 664 S.E.2d 832, 833–34 (Ga. Ct. App. 2008) (giving deference to the DCH); Piedmont Healthcare, Inc. v. Ga. Dep't of Human Res., 638 S.E.2d 447, 450–51 (Ga. Ct. App. 2006) (giving deference to the Office of Regulatory Services within the Department of Human Resources); Dep't of Cmty. Health v. Gwinnett Hosp. Sys., 586 S.E.2d 762, 765 (Ga. Ct. App. 2003) (giving deference to DCH's Division of Health Planning); Albany Surgical, P.C. v. Dep't of Cmty. Health, 572 S.E.2d 638, 641 (Ga. Ct. App. 2002) (noting deference to policy decisions by executive agencies and holding regulations reasonable); Colquitt Elec. Membership Corp. v. City of Moultrie, 399 S.E.2d 497, 499 (Ga. Ct. App. 1990) (giving deference to Public Service Commission); N. Ga. Elec. Membership Corp. v. City of Calhoun, 393 S.E.2d 510, 513 (Ga. Ct. App. 1990) (giving deference to the Public Service Commission); City of LaGrange v. Ga. Power Co., 363 S.E.2d 286, 288 (Ga. Ct. App. 1987) (giving deference to the Public Service Commission). *But see* Sawnee Elec. Membership Corp. v. Ga. Pub. Serv. Comm'n, 544 S.E.2d 158, 162 (Ga. 2001) (Hunstein, J., dissenting) (arguing that nothing in the case justified the majority's failure to give appropriate deference); Ga. Power v. Ga. Pub. Serv. Comm'n, 675 S.E.2d 294, 297 (Ga. Ct. App. 2009) (emphasizing that while courts generally give deference, that deference is not absolute).

[133] 336 S.E.2d at 774–76.

[134] *Id.* at 774. Lloyd's sought declaratory relief that the policy it issued did not apply because the employee's death occurred in the course of his employment and thus fell under the policy's workers' compensation exclusion. *Id.* Lloyd's had not filed the policy, so the court had to deal with the argument that this voided the coverage exclusion and made it unenforceable. *Id.*

in Georgia, and said that these statistics "militate[d] toward the conclusion" that this coverage was unique and thus within the statute's exclusionary language.[135] The court said that its conclusion was buttressed by the interpretation of the statute by the Insurance Commissioner.[136] It quoted the familiar language about the great weight courts give to agency interpretations and stated:

> Mr. Ralph W. Terry, Chief Deputy Insurance Commissioner . . . expressly stated in an affidavit, that Lloyd's is not required to file this particular policy with the Insurance Commissioner pursuant to [O.C.G.A.] § 33-24-9(a). He added that none of the other insurance companies issuing policies for aerial pesticide contractors had forms on file with the insurance commissioner's office.[137]

It is fair to say that the court gave great weight to the agency's interpretation of the exclusionary language in the Code rather than resolving the issue on its own. The statute itself did not define a policy or form of "unique character designed for . . . insurance upon a particular subject" other than saying such policies were excluded from the filing requirement. Accordingly, the statute was ambiguous, so the court turned to the agency. It was clear that the Insurance Commission treated this kind of coverage as unique because it had never required filing by Lloyd's of London and the eight other insurers for Georgia's 120 aerial pesticide contractors.[138] This was a reasonable interpretation and application of the statute by the Insurance Commissioner.

There are many appellate cases discussing deference and the Public Service Commission (PSC).[139] For instance, in *City of*

---

[135] *Id.* (emphasis omitted).

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *E.g.*, Sawnee Elec. Membership Corp. v. Ga. Pub. Ser. Comm'n, 544 S.E.2d 158, 161–62 (Ga. 2001); Ga. Power Co. v. Ga. Pub. Serv. Comm'n, 675 S.E.2d 294, 299 (Ga. Ct. App. 2009); Colquitt Elec. Membership Corp. v. City of Moultrie, 399 S.E.2d 497, 499 (Ga. Ct.

LaGrange v. Georgia Power Co. the court of appeals affirmed the PSC's interpretation and application of the Georgia Territorial Service Act in ruling that LaGrange did not have the exclusive right to provide power to a facility in a new industrial park.[140] The court summarized the statute, reviewed the facts, explained its rejection of the City's interpretation of the statute, said the PSC's interpretation harmonizing the statute's sections was reasonable and sensible, and then stated:

> In interpreting [O.C.G.A.] § 46-3-8, it is our duty to consider the subsections in pari materia, and to reconcile them, if possible, so that they may be read as consistent and harmonious with one another. . . . The construction given the statute by the PSC is consistent with these established principles of statutory construction. Moreover, the PSC, as the agency charged with oversight and supervision of electric power companies in this State, [O.C.G.A.] § 46-2-20(a), including the enforcement and administration of the Georgia Territorial Electric Service Act, is entitled to great deference in its interpretation of the Act. The administrative interpretation of a statute by an administrative agency which has the duty of enforcing or administering is to be given great weight.[141]

Three judges dissented.[142] They asserted that the majority and the PSC had misconstrued plain and unambiguous language in the statute, failed to follow the Georgia Supreme Court's construction of the statute, and thwarted the purpose and intent of the Georgia

---

App. 1990); N. Ga. Elec. Membership Corp. v. City of Calhoun, 393 S.E.2d 510, 513 (Ga. Ct. App. 1990); City of LaGrange v. Ga. Power Co., 363 S.E.2d 286, 288 (Ga. Ct. App. 1987). There also are several cases that discuss deference to the DCH. *E.g.*, Ga. Dep't of Cmty. Health v. Medders, 664 S.E.2d 832, 833–34 (Ga. Ct. App. 2008); Dep't of Cmty. Health v. Gwinnett Hosp. Sys., 586 S.E.2d 762, 766 (Ga. Ct. App. 2004).

[140] 363 S.E.2d at 288–89.

[141] *Id.* at 288 (internal citations and quotations omitted).

[142] *Id.* at 289.

legislature.[143] Notwithstanding this vigorous dissent, the language from the *City of LaGrange* decision about deference is frequently cited and quoted in other decisions which uphold rulings made by the PSC.[144]

Sawnee Electrical Membership Corp. v. Georgia Public Service Commission[145] is an oft-cited 2001 decision by the Georgia Supreme Court that is especially instructive, in part because of another spirited dissent. Like *City of LaGrange*, this case involved a disagreement over the interpretation and application of the Georgia Territorial Electrical Service Act.[146] In a nutshell, Sawnee Electrical Membership Cooperative (EMC) filed a complaint with the PSC that Georgia Power was unlawfully supplying power to a large apartment complex in Sawnee's territory. An administrative law judge ruled for Sawnee but the full PSC went with Georgia Power, holding that the statute's large-load customer choice exception applied. The superior court reversed and then the court of appeals reversed, agreeing with the PSC that the exception applied.[147] The supreme court granted certiorari and, notwithstanding the acknowledged deference to the PSC, it ultimately reversed the agency in a 4-to-3 decision.[148]

The fundamental disagreement within the Georgia Supreme Court was whether the language of the large-load exception in the statute was ambiguous.[149] Justice Hunstein's dissent said that the agency's interpretation of ambiguous language in the statute, in particular the term "one consumer," was entitled to deference and that the majority offered no "weighty reasons" for substituting its judgment for the reasoned expertise of the agency.[150] In contrast, Justice Thompson's majority opinion started with the cardinal rule of statutory construction: a court is to ascertain legislative intent

---

[143] *Id.* at 289–90.

[144] *E.g.*, *City of Calhoun*, 393 S.E.2d at 513; *City of Moultrie*, 399 S.E.2d at 499.

[145] 544 S.E.2d 158 (Ga. 2001).

[146] *Id.* at 159.

[147] *Id.* at 160.

[148] *Id.* at 160, 162.

[149] *See id.* at 163 (Hunstein, J., dissenting) (disagreeing with the majority's finding "that no ambiguities exist in defining 'one electric consumer' ").

[150] *Id.* at 162.

and give the statute the construction that will effectuate that intent.[151] He then turned to the statute's declaration of intent and the statute's definition of "premises" and noted, by contrast, that the word "consumer" was not defined.[152] He therefore turned to Webster's Third New World Dictionary and Black's Law Dictionary to give that word meaning.[153] In contrast to Justice Hunstein, he determined that the statute's language was unambiguous and that deference was not appropriate because "[a]dministrative rulings are not binding on this Court, and will only be adopted when they conform to the meaning which the appellate court deems should properly be given."[154] The majority also observed that "administrative rulings are adopted only after the court has made an independent determination that they correctly reflect the meaning of the statute."[155]

The several statements from *Sawnee* about deference emphasize that a Georgia appellate court first has to make an independent determination about the meaning of the statute by looking at its plain language and determining legislative intent. If the agency interpretation is at odds with unambiguous statutory language and the intent of the General Assembly, then it will not be adopted.[156] Another way this has been expressed by the Georgia Court of Appeals is that "erroneous applications of law to undisputed facts, as well as decisions based on erroneous theories of law, are subject to the de novo standard of review."[157] This is similar to *Chevron* step one: when the intent of the legislature is clear, "that is the end of the matter; for the court, as well as the

---

[151] *See id.* at 160 (describing the cardinal rule of statutory construction).

[152] *Id.* at 161.

[153] *Id.*

[154] *Id.* The apartment complex in question, with 380 tenses, each with separate meters, did not constitute "one consumer" with "single metered service" as contemplated by the statute in view of the law's declaration of intent and the meaning of the plain language of the statutory exception. *Id.*

[155] *Id.* at 162 (quoting Nat'l Adver. Co. v. Dep't of Transp., 254 S.E.2d 571, 574 (Ga. Ct. App. 1979)).

[156] *See Sawnee*, 544 S.E.2d at 161–62 (rejecting the agency's interpretation of the statute because the statutory language was unambiguous).

[157] McLendon v. Adver. That Works, 665 S.E.2d 370, 371 (Ga. Ct. App. 2008) (quoting Trent Tube v. Hurston, 583 S.E.2d 198, 200 (Ga. Ct. App. 2003)).

agency, must give effect to the unambiguously expressed intent of Congress."[158] Moreover, it is clear that the Georgia judiciary, like the federal Judiciary, is the final authority on issues of statutory construction and must reject agency interpretations and constructions that are contrary to clear legislative intent.[159]

Moreover, the strong disagreements within the Georgia Supreme Court and the Georgia Court of Appeals in *Sawnee* and in *City of LaGrange* on whether the statutes were ambiguous are hardly unique. Those courts' justices and judges have the same traditional tools of statutory construction available to them, but they do not always select the same tools. As a result, what is clear and unambiguous for some might be vague and ambiguous for others.[160] The same thing holds true for the Supreme Court of the United States. The Justices are sometimes in sharp disagreement over the meaning of a statute and the clarity of congressional intent even though they have the same tools of statutory construction at their disposal.[161] The late Professor Karl Llewellyn was correct when he wrote in 1950 that "there are two opposing canons on almost every point."[162]

---

[158] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

[159] *Compare id.* at 843 n.9, *with Sawnee*, 544 S.E.2d at 161–62 (stating that courts must make independent determinations of the reasonableness of agency interpretations).

[160] *See, e.g.*, Ctr. for a Sustainable Coast v. Coastal Marshlands Prot. Comm., 670 S.E.2d 429, 430 (Ga. 2008) (5-to-2 decision) (holding that the regulation did not extend to residential activities in upland areas); Ga. Dep't of Revenue v. Owens Corning, 660 S.E.2d 719, 722 (Ga. 2008) (4-to-3 decision) (holding that an amendment to the statute did not create a sales tax exemption for machine repair parts).

[161] *See, e.g.*, Carcieri v. Salazar, 555 U.S. 379, 396 (2009) (6-to-3 decision) (Breyer, J., concurring) (acknowledging disagreement over the degree of ambiguity in the statutory phrase "now under Federal jurisdiction" as used in the Indian Reorganization Act); Christensen v. Harris Cnty., 529 U.S. 576, 588, 592 (2000) (6-to-3 decision) (disagreeing over whether the language of a Department of Labor regulation governing compelled compensatory time is ambiguous); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132, 161 (2000) (5-to-4 decision) (disagreeing over whether the Food, Drug, and Cosmetic Act gave the FDA jurisdiction to regulate tobacco); Holly Farms Corp. v. NLRB, 517 U.S. 392, 410 (1996) (O'Connor, J., concurring in part and dissenting in part) (disagreeing with majority and asserting the language of statutory exclusion for workers "on the farm" was unambiguous); MCI Telecomm. Corp. v. AT&T Co., 512 U.S. 218, 220 (1994) (5-to-3 decision) (disagreeing over whether the term "modify" under the Communications Act is ambiguous); INS v. Cardoza-Fonseca, 480 U.S. 421, 448, 459 (1987) (6-to-3 decision) (disagreeing over whether the term "well-founded fear" is ambiguous).

[162] Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons*

C. THE 2008 DECISIONS

The Georgia Supreme Court's first discussion of deference in 2008 was in *Georgia Department of Revenue v. Owens Corning.*[163] The taxpayer, Owens Corning, claimed a sales tax exemption for machinery repair parts, so it sought a refund.[164] The Department of Revenue failed to rule on the request, and in response, Owens Corning sued for the refund.[165] The superior court granted summary judgment for the agency but the court of appeals reversed, holding that the 1997 version of the state tax code clearly and unambiguously created an exemption from sales tax for machinery repair parts.[166] The supreme court granted certiorari to determine whether or not the statute was clear and ultimately reversed the court of appeals and agreed with the agency.[167] The supreme court stated: "Based on the applicable standards of review, the legislative history of the statute, and the Legislature's expressed intent that machinery repair parts not be extended a sales tax exemption prior to 2000, we find that no clear, unambiguous exemption for machinery repair parts existed in 1997."[168]

Consistent with *Chevron*, the Georgia Supreme Court used several canons of statutory interpretation in concluding that the statute was ambiguous. For example, the court observed, "Taxation is the rule, and exemption from taxation [is] the exception[,] . . . but every exemption, to be valid, must be expressed in clear and unambiguous terms."[169] It also explained how Georgia's sales-and-use tax statutes had evolved since 1951: the first statute did not exempt machinery repair parts, the 1994

About How Statutes Are to Be Construed, 3 VAND. L. REV. 395, 401 (1950).

[163] 660 S.E.2d 719 (Ga. 2008); *see also* Martin M. Wilson & Jennifer A. Blackburn, *Administrative Law*, 60 MERCER L. REV. 1, 15–16 (2008) (discussing generally the *Owens Corning* case).

[164] *Owens Corning*, 660 S.E.2d at 720.

[165] *Id.*

[166] *Id.*

[167] *Id.* at 720, 722 (analyzing the 1997 and 2000 versions of O.C.G.A. § 48-8-3(34)(A)).

[168] *Id.* at 720.

[169] *Id.* (quoting Collins v. City of Dalton, 408 S.E.2d 106, 108 (Ga. 1991)). The supreme court said that the standards for reviewing tax structures are well-settled. *Id.*

amendments made no reference to machinery repair parts, and the 1997 amendments did not create an explicit exemption but instead created ambiguity by using language suggesting "replacement components" may be included.[170] The court said that "if the Legislature wished to reverse this historical trend in the 1997 amendment, it would have done so explicitly."[171] Moreover, amendments passed in 2000 showed legislators wished that the language would "eradicate any ambiguity caused by the 1997 statute."[172] Finally, because the 1997 version of the statute was ambiguous, it was appropriate for the court to repeat the well-established principle that "the interpretation of a statute by an administrative agency which has the duty of enforcing or administering it is to be given great weight and deference."[173]

Three justices dissented.[174] They asserted, among other things, that the majority had not adhered to the "golden rule" of statutory construction: "to follow the literal language of the statute unless it produces contradiction, absurdity or such an inconvenience as to insure that the legislature meant something else."[175] They believed that the statute was clear in providing a sales tax exemption for Owens Corning's machinery repair parts and that the majority had dispensed with the usual rules of statutory construction to erroneously find ambiguity in an otherwise clear statute.[176] In any event, this decision, like *City of LaGrange* and *Sawnee*, drives home the point that winning often turns on the strength of the arguments regarding the clarity of the statute at issue. Here the agency won; deference was appropriate because the court's majority regarded the statute as ambiguous and the agency's position was reasonable.

---

[170] *Id.* at 720–21.

[171] *Id.* at 721. The court also repeated the canon that in cases of ambiguity tax statutes are interpreted "in favor of the tax, not the exemption." *Id.*

[172] *Id.*; *see also* Wilson & Blackburn, *supra* note 163, at 16 (discussing the legislature's intent to eliminate any ambiguity by passing the 2000 amendment).

[173] *Owens Corning*, 660 S.E.2d at 720 (citing Kelly v. Lloyd's of London, 336 S.E.2d 772, 744 (Ga. 1985)).

[174] *Id.* at 722 (Carley, J., dissenting) (joined by Justices Hines and Thompson).

[175] *Id.* at 722–23 (internal citations and quotations omitted).

[176] *Id.* at 725.

The Georgia Supreme Court's next discussion of deference in 2008 was in *Pruitt Corp. v. Georgia Department of Community Health*.[177] The dispute was over how to calculate the reimbursement formula under the state Medicaid program applicable to a nursing facility that had changed ownership with less than six months remaining in the fiscal year.[178] In particular, there was disagreement over the meaning of the phrase "last approved cost report" found in the policy-and-procedures manual used by the DCH.[179] The manual did not define this phrase,[180] and the manual was not promulgated by DCH pursuant to the rulemaking procedures specified in the Georgia Administrative Procedures Act.[181]

The facts of the case revolve around DCH's reimbursement of participating facilities according to a per diem rate specific to each facility.[182] In order to participate in the program, nursing facilities must enter into an agreement with DCH, and that agreement incorporates the policy-and-procedures manual by reference.[183] It contains a reimbursement formula based on the facility's annual cost report, and with respect to a new owner—like Pruitt Corp.—the agency interpreted "last approved cost report" as being the prior owner's cost report for the preceding fiscal year.[184] An ALJ reversed, saying that the phrase was ambiguous and that Pruitt should benefit from a more favorable interpretation.[185] The DCH commissioner reversed the ALJ, concluding that "approved" should

---

[177] 664 S.E.2d 223 (Ga. 2008); *see also* Martin M. Wilson & Jennifer A. Blackburn, *Administrative Law*, 61 MERCER L. REV. 1, 23 (2009) (describing the supreme court's opinion in *Pruitt* as a correction of a "mistaken application of agency deference").

[178] *Pruitt*, 664 S.E.2d at 224.

[179] *Id.*

[180] *Id.*

[181] *Id.* at 225. Under the federal Administrative Procedure Act, this manual might be considered an interpretative rule or a general statement of policy. *See* 5 U.S.C. § 553(b)(3)(A) (2006) (excepting interpretative rules and general statements of policy from requirements of notice-and-comment rulemaking).

[182] *Pruitt*, 664 S.E.2d at 224.

[183] *Id.*

[184] *Id.*

[185] *See* Dep't of Cmty. Health v. Pruitt Corp., 645 S.E.2d 13, 15 (Ga. Ct. App. 2007) (setting out case's procedural history); Martin M. Wilson & Jennifer A. Blackburn, *Administrative Law*, 59 MERCER L. REV. 1, 12 (2007) (discussing the ALJ decision in *Pruitt*).

be equated with "audited" and noting that the last audited cost report was for the prior owner.[186] Pruitt sought review and the superior court reversed the DCH commissioner and agreed with the ALJ.[187]

The agency then took the matter to the court of appeals. That court found evidence to support the agency's decision and said that the superior court failed to defer properly to DCH's interpretation of its own rules (the manual).[188] The agency's interpretation of the manual was not unreasonable, so the court of appeals reversed and thus affirmed the commissioner.[189]

The supreme court vacated and remanded this ruling, stating that it disagreed with the intermediate court's "holding that judicial deference had to be afforded DCH's interpretation of the phrase 'last approved cost report.' "[190] The court repeated the familiar language about deferring to an agency's interpretation of the statutes it is charged with administering.[191] It also said that it was appropriate to defer to an "agency's interpretation of rules and regulations it has enacted to fulfill the function given it by the legislative branch."[192] Notwithstanding these settled principles, the supreme court next explained why DCH's interpretation of the manual was not entitled to deference:

> The Court of Appeals gave the deference due a statute, rule or regulation to a term in a departmental manual,

---

[186] *Pruitt*, 645 S.E.2d at 15.

[187] *Id.*; Wilson & Blackburn, *supra* note 185, at 12.

[188] *Pruitt*, 645 S.E.2d at 16; *see* Wilson & Blackburn, *supra* note 185, at 12–13.

[189] *Pruitt*, 645 S.E.2d at 16–17.

[190] Pruitt Corp. v. Ga. Dep't of Cmty. Health, 664 S.E.2d 223, 225 (Ga. 2008).

[191] *Id.*

[192] *Id.* (citing Atlanta J. & Const. v. Babush, 364 S.E.2d 560, 562 (Ga. 1988)). *Atlanta Journal* was an open meetings case involving the State Personnel Board and that agency's interpretation of the words "hearing" and "review" in its Rules; the court said that in construing administrative rules, "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the [rule]." 364 S.E.2d at 562 (alteration in original) (quoting United States v. Larionoff, 431 U.S. 864, 872 (1977)). In the absence of an unambiguous statute or regulation, the Supreme Court of the United States also defers to an agency's interpretation of its own regulations. Auer v. Robbins, 519 U.S. 452, 461 (1997); Talk Am., Inc. v. Mich. Bell Tel. Co., 131 Sup. Ct. 2254, 2260–61 (2011).

> the terms of which had not undergone the scrutiny afforded a statute during the legislative process or the adoption process through which all rules and regulations must pass. . . . Inasmuch as the manual was not entitled to judicial deference since it was not a duly-enacted statute, rule or regulation, the Court of Appeals erred in affording judicial deference to DCH's interpretation of the manual's phrase in question.[193]

The Georgia Supreme Court's refusal in *Pruitt* to defer to DCH regarding its interpretation of the manual is in line with the United States Supreme Court's refusal in *Mead* to afford *Chevron* deference to tariff classification rulings issued by the U.S. Customs Service. The *Mead* Court concluded that Congress did not intend those rulings to carry the force of law in part because 10,000 to 15,000 are issued every year by the nation's forty-six Customs offices without following a formal, deliberative process.[194] Similarly, the manual at issue in *Pruitt* was not adopted through the rulemaking procedures in Georgia's APA.[195]

At this point in its opinion, however, the Georgia Supreme Court did not follow *Mead* and say that a lower degree of deference, as expressed in *Skidmore*,[196] might be appropriate.[197] Instead, it stated that since the DCH manual is incorporated by reference into the nursing facility's agreement with the agency, it would treat the phrase "last approved cost report" as a contractual provision and determine its meaning "by application of the rules of contract construction."[198] The court said it did not have to decide

---

[193] *Pruitt*, 664 S.E.2d at 225 (citations omitted). The Georgia Supreme Court held in 1991 that a departmental publication with policies and procedures for nursing home services was not a "rule" as defined in the Georgia APA. Ga. Dep't of Med. Assistance v. Beverly Enters., Inc., 401 S.E.2d 499, 500 (Ga. 1991).

[194] United States v. Mead Corp., 533 U.S. 218, 233–34 (2001). The tariff classification rulings were not issued pursuant to a relatively formal and deliberate process like rulemaking or formal adjudication. *Id.*

[195] *Pruitt*, 664 S.E.2d at 225.

[196] Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944).

[197] *Mead*, 533 U.S. at 238 (citing *Skidmore*, 323 U.S. at 139).

[198] *Pruitt*, 664 S.E.2d at 225–26. The court also disagreed with the court of appeals' acceptance of the agency's assertion that its final decision "was entitled to affirmance if

whether the agency's decisions on policy, as reflected in the manual, were entitled to deference.[199]

After *Pruitt* it is reasonable to ask whether a second standard of deference exists in Georgia that is similar to *Skidmore's* multi-factored, sliding scale. It appears not, but it is worth noting that the Georgia Court of Appeals cited *Skidmore* in a 1953 decision, *Yearty v. General Wholesale Co.*,[200] which concerned an employee's federal claim for overtime compensation arising under the Fair Labor Standards Act (FLSA).[201] In *Yearty*, the claimant cited an interpretive bulletin of the United States Department of Labor in support of his argument that he was covered by the FLSA.[202] *Skidmore* was also an FLSA case, so it is not surprising that the court of appeals cited it for the following statement:

> While applicable interpretations by the Wage and Hour Administrator must be given considerable weight in arriving at a proper definition of the scope of a provision of the Fair Labor Standards Act . . . it is for the courts, in the final analysis, to determine the coverage of the act.[203]

Notwithstanding the bulletin the court held that the employee did not come within the FLSA.[204] This case arose under federal law, so the fact the court of appeals cited *Skidmore* should not be interpreted to mean that Georgia's appellate courts would use *Skidmore's* sliding scale approach to deference in reviewing

---

there was any evidence to support it." *Id.* at 226. The court stated that it is not enough that findings of fact are supported by evidence; a court enjoys the authority "to reverse or modify the agency decision upon a determination that the agency's application of the law to the facts is erroneous." *Id.*

[199] *Id.* at 225.

[200] 76 S.E.2d 715, 717 (Ga. Ct. App. 1953).

[201] *Id.* at 716.

[202] *Id.* at 717.

[203] *Id.* (citations omitted).

[204] *Id.* at 721. In another FLSA case, a court of appeals panel noted that "[b]ulletins seeking to construe the meaning of Acts of Congress by Federal Administrative Offices" did not bind that court. Perwitz v. Irvindale Farms, Inc., 53 S.E.2d 196, 197 (Ga. Ct. App. 1949). When such a bulletin conforms to the meaning a court should properly give such an act, however, the meaning of the bulletin may bind the court. *Id.*

decisions of state agencies. To the contrary, the Georgia Supreme Court had the opportunity to go with a *Skidmore*-like sliding scale in *Pruitt* but said that it did not have to decide whether the agency's decisions on policy, as reflected in a manual that was not adopted as a regulation under the Georgia APA, were entitled to deference.[205]

The Georgia Supreme Court's third discussion of deference in 2008 was in its unanimous affirmation of a superior court ruling that Secretary of State Karen Handel had committed error of law in her application of statutory residency requirements to a candidate for election to the State PSC.[206] Handel had determined that James Powell was not qualified to run for the PSC because he did not reside in the district he sought to represent.[207] Three statutes were pertinent to the Secretary's determination. First, O.C.G.A. § 42-2-1(b) requires candidates to have resided in the district they seek to represent for twelve months prior to election to that office.[208] Second, O.C.G.A. § 21-2-217(a) sets out fifteen rules to be followed in determining the residency of a person seeking to qualify to run for elective office.[209] This code section does not spell out how the several rules are to be applied or what weight should be afforded to some rules as opposed to others. Third, O.C.G.A. § 21-2-2(32) defines "residence" as meaning "domicile."[210]

Powell declared his candidacy for PSC District 4 and claimed residence in Towns County.[211] Handel then challenged his qualifications, asserting that he resided outside that district because he still enjoyed a homestead exemption on property he owned in Cobb County.[212] One of the qualifications listed in

---

[205] Pruitt Corp. v. Ga. Dep't of Cmty. Health, 664 S.E.2d 223, 225 (Ga. 2008).

[206] Handel v. Powell, 670 S.E.2d 62, 63, 66 (Ga. 2008). The case involved Handel's interpretation of the homestead exemption codified at O.C.G.A. § 21-2-217(a)(14).

[207] *Id.* at 63.

[208] *See id.* (describing application of residency requirement); Wilson & Blackburn, *supra* note 163, at 21–22 (discussing the *Handel* case and the effect on judicial review of agency decisions).

[209] *Handel*, 607 S.E.2d at 63.

[210] *Id.*

[211] *Id.* at 63–64.

[212] *Id.* at 64.

O.C.G.A. § 21-2-217(a) is where the candidate has a homestead exemption, if at all.[213] An ALJ ruled that Powell "presented persuasive evidence that he had moved to Towns County with the intent to make his home there" even though he still had the homestead exemption in Cobb County, outside District 4.[214] The ALJ, guided by other statutory rules for determining residency in O.C.G.A. § 21-2-217(a), cited evidence that the candidate spent about 60% of his time in Towns County where he was attending church, paying taxes, had registered two cars, had registered to vote and had voted, owned and operated a boat, obtained his driver's license, and was receiving some of his mail.[215] Moreover, the candidate's wife, who then resided at the Cobb County address, would be moving there upon her retirement from a job in Atlanta.[216]

The Secretary of State reversed the ALJ's ruling and asserted that the address in which a person has declared a homestead exemption is deemed to be that person's residence.[217] She asserted the exemption establishes an irrebuttable presumption of legal residence and domicile for all purposes.[218]

The Georgia Supreme Court said that the Secretary of State's analysis of the pertinent statutes had the effect of elevating the homestead exemption rule in O.C.G.A. § 21-2-217(a) above the remaining fourteen rules in that section, "effectively eviscerating their application in any case questioning the qualifications of a candidate for elective office should the candidate own a home on which a homestead exemption is enjoyed."[219] The court applied the principle of interpretation that "[a] statute must be construed 'to give sensible and intelligent effect to all [its] provisions and to refrain from any interpretation which renders any part of the

---

[213] O.C.G.A. § 21-2-217(a)(14) (2008) ("The specific address in the county . . . in which a person has declared a homestead exemption, if a homestead exemption has been claimed, shall be deemed the person's residence address.").

[214] *Handel*, 670 S.E.2d at 64.

[215] *Id.* at 64 n.2.

[216] *Id.*

[217] *Id.* at 64.

[218] *Id.*

[219] *Id.* at 66.

statute meaningless.' "[220] If the legislature had meant for the homestead exemption to be controlling in determining residency of a person running for elective office, it would have so stated in the statute.[221]

If this case had involved federal law and had been litigated in federal court, then it is evident that the Georgia Supreme Court correctly stopped at *Chevron* step one—the relevant statutes were not ambiguous, the General Assembly's intent was clear, and the agency charged with the administration of the statutes, here the Secretary of State, interpreted those statutes incorrectly. The Secretary of State argued that the superior court was obligated to defer to her interpretation of these statutes since she was charged with enforcing them,[222] but under these circumstances, it would have been inappropriate to move to *Chevron* step two and consider whether she had interpreted and applied the statutes reasonably. After all, if the intent of the legislative branch 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 the legislature.[223]

Of course, this was the Georgia Supreme Court, not the United States Supreme Court, and the *Handel v. Powell* opinion does not cite *Chevron* or any other decision from the federal courts. However, the Georgia Supreme Court had this to say about judicial deference:

> While judicial deference is afforded an agency's interpretation of statutes it is charged with enforcing or administering, the agency's interpretation is not binding on the courts, which have the ultimate authority to construe statutes. . . . It is the role of the judicial branch to interpret the statutes enacted by the legislative branch and enforced by the executive branch . . ., and administrative rulings will be adopted

---

[220] *Id.* (quoting R.D. Brown Contractors, Inc. v. Bd. of Educ., 626 S.E.2d 471, 474 (Ga. 2006)).

[221] *Id.*

[222] *Id.* at 65.

[223] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

> only when they conform to the meaning which the court deems should properly be given. . . . The judicial branch 'make[s] an independent determination as to whether the interpretation of the administrative agency correctly reflects the plain language of the statute and comports with the legislative intent.'[224]

This statement can be seen as another way of expressing *Chevron* step one. If the intent of the legislature is clear, that is the end of the matter; the courts and the agency must give effect to the unambiguously expressed intent of the legislative branch.[225] Moreover, the Georgia Supreme Court's statement reads like an important footnote in *Chevron* that makes clear, in regard to step one, that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."[226]

In addition, the Georgia Supreme Court, in construing the Georgia Code's provision on determining a candidate's residency, used a traditional tool of statutory construction to ascertain the General Assembly's intent. It attempted to give sensible and intelligent effect to all the provisions of the statutory scheme and to refrain from an interpretation that rendered any provision meaningless.[227] This is consistent with the Supreme Court's explanation in that *Chevron* footnote about how courts should approach step one; "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."[228]

The Georgia Supreme Court's 2008 decision in *Center for a Sustainable Coast v. Coastal Marshlands Protection Committee*[229] (*CSC*) stands in contrast to the *Pruitt* decision in which the court

---

[224] *Handel*, 670 S.E.2d at 65 (citation omitted) (quoting Sawnee Elec. Membership Corp. v. Ga. Pub. Serv. Comm'n, 544 S.E.2d 158, 161 (2001)).

[225] *Chevron*, 467 U.S. at 842–43.

[226] *Id.* at 843 n.9.

[227] *Handel*, 670 S.E.2d at 66.

[228] *Chevron*, 467 U.S. at 843 n.9.

[229] 670 S.E.2d 429 (Ga. 2008).

stated it would not defer to an agency's manual that had not been adopted as a regulation. In *CSC*, the court held that judicial deference is properly afforded to an agency's interpretation of its governing statute as contained in a properly promulgated regulation even when the agency promulgates that regulation during litigation of the underlying dispute.[230] However, one might regard the court's discussion of deference as dicta because it followed a de novo review of alleged errors of law made by an ALJ regarding the agency's jurisdiction.[231] In addition, the fact that the agency promulgated its new regulation while the court of appeals was reviewing the ALJ's ruling seems to make agency action appear like a self-serving afterthought undeserving of deference.[232] Finally, two justices dissented, asserting that the court of appeals erred in granting review and in addressing the merits because there was not a final agency decision subject to review.[233] Without final agency action, the superior court would lack subject matter jurisdiction to review the ALJ's order.[234] Notwithstanding these red flags, the decision merits discussion.

The Coastal Marshlands Protection Act[235] (CMPA) authorizes the creation of the Coastal Marshlands Protection Committee (the Committee) to consider permit applications in coastal

---

[230] *Id.* at 433–34 & n.4.

[231] *Id.* at 431–33; *see also* Coastal Marshlands Prot. Comm. v. Ctr. for a Sustainable Coast, 649 S.E.2d 619, 624 (Ga. Ct. App. 2007) (discussing noncompliance of parties with Georgia's APA).

[232] *Coastal Marshlands*, 649 S.E.2d at 623, 626–27 n.9 (stating that the Department of Natural Resources adopted regulations, effective March 26, 2007, dealing with several issues involved in the dispute well after the ALJ issued a contested ruling in February 2006); *Ctr. for a Sustainable Coast*, 670 S.E.2d at 434 n.4 (refusing to "declare an exception to the normal rules of deference merely because an administrative agency issues a rule or regulation at a time when there is a pending dispute regarding the subject of that rule or regulation"). This parallels *Barnhart v. Walton*, in which the Supreme Court of the United States held that a legislative rule the Social Security Administration adopted after the claimant's case reached the courts was not too late to receive *Chevron* deference. 535 U.S. 212, 221–22 (2002). It should be noted that the agency had long espoused the same interpretation in informal announcements. *Id.*

[233] *Ctr. for a Sustainable Coast*, 670 S.E.2d at 435 (Sears, C.J., dissenting) (joined by Hunstein, J.).

[234] *Id.*

[235] O.C.G.A. §§ 12-5-280 to -297 (2006).

marshlands.[236] The Committee includes the Commissioner of Natural Resources and four other persons selected by the Board of Natural Resources.[237] The Commissioner also supervises and executes the functions vested in the Department of Natural Resources, while the Board is the policy making and governing body of the Department.[238]

The proceeding that led to the supreme court's discussion of deference started with a residential developer's application for a permit to construct docks and a marina on marshlands near St. Mary's, Georgia.[239] The Committee granted the permit subject to several conditions, and the Center for a Sustainable Coast and other organizations challenged the permit on a number of grounds including the Committee's failure to regulate the upland portions of the proposed development.[240] An ALJ agreed with the Center and remanded the permit application to the Committee for additional consideration.[241] The developer and the Committee sought immediate review and, after the ALJ's decision was affirmed by operation of law due to a superior court's failure to act in the time specified in the statute, the court of appeals granted a discretionary appeal.[242] The court of appeals ultimately held that the permitting power of the Committee did not extend to regulating the upland portions of the development.[243]

The court of appeals conducted what appears to be a de novo review in concluding that "[n]othing in the CMPA . . . can be construed to require or authorize the Committee, as part of the permit application process, to consider or regulate any aspect of [the applicant's] adjacent high land or upland residential development."[244] The construction of the CMPA sought by the

---

[236] *Ctr. for a Sustainable Coast*, 670 S.E.2d at 430.

[237] *Id.* at 430–31 (citing O.C.G.A. § 12-5-283).

[238] Coastal Marshlands Prot. Comm. v. Ctr. for a Sustainable Coast, 649 S.E.2d 619, 622 n.3 (Ga. Ct. App. 2007).

[239] *Ctr. for a Sustainable Coast*, 670 S.E.2d at 431; *Coastal Marshlands*, 649 S.E.2d at 622.

[240] *Coastal Marshlands*, 649 S.E.2d at 622.

[241] *Id.* at 622–23.

[242] *Id.* at 623.

[243] *Id.* at 627.

[244] *Id.*

Center for a Sustainable Coast was "so broad that [the Committee] could regulate all storm water runoff generated by upland development," and this "far exceed[ed] the legislature's intended scope for the CMPA."[245]

The Georgia Supreme Court affirmed. The majority opinion quotes extensively from the court of appeals decision. Like that court, it devoted considerable attention to the meaning of the words "otherwise alter" in the governing statute and accepted use of the *ejusdem generis* canon of statutory construction[246] to define that phrase in the context of the CMPA.[247] The court stated that there was no ambiguity in the statute but that "considerable ambiguity would arise if the phrase 'otherwise alter' was given the reading the ALJ applied."[248] It pointed out that the ALJ's reading would require an upland project located miles from marshlands to obtain a permit "if it could be shown that storm water runoff from the project would affect the marshlands," and such an interpretation would create an ambiguity when read with other provisions in the statute.[249] The structure of the statute and its language showed that the legislature intended the Committee to have a more limited role than that asserted by the Center and the ALJ.[250]

The supreme court then turned its attention to a Department of Natural Resources regulation issued while the litigation was pending. It did this because "it is particularly instructive to examine the interpretation of the CMPA adopted by the Department," since interpretations of a statute by the agency which has the duty of enforcing it ordinarily are "given great

---

[245] *Id.* at 628.

[246] The rule, meaning literally "of the same kind or class," holds "that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed." BLACK'S LAW DICTIONARY 594 (9th ed. 2009).

[247] Ctr. for a Sustainable Coast v. Coastal Marshlands Prot. Comm., 670 S.E.2d 429, 431–32 (Ga. 2008).

[248] *Id.* at 432.

[249] *Id.*

[250] *Id.* at 432–33. The court said that "if an upland residential development was built without any structures being placed in the marshlands, no permit would be required, and that development would be completely beyond review by the Committee." *Id.* at 433.

weight and deference."[251] The court explained that it does not blindly follow the agency's reading, but it does defer when that reading "reflects the meaning of the statute and comports with legislative intent."[252] In this case, deference was particularly warranted because the General Assembly authorized the Department of Natural Resources to determine jurisdiction under the CMPA, and the Department issued a rule that addressed the Committee's jurisdiction to regulate upland areas.[253] The court found that a reasonable statutory basis existed for the manner in which the Department construed its jurisdiction, no evidence indicated the Department acted arbitrarily to limit the Committee's jurisdiction to less than what the legislature intended in the CMPA, and nothing in the statute showed a legislative intent for the Committee to be the "super regulator" of all development on the Georgia coast.[254] In reaching this conclusion, the supreme court cited and quoted from the CMPA as well as the court of appeals opinion.[255]

Comparing the Supreme Court's analysis in *CSC* with that in *Pruitt* illustrates Georgia's *Chevron*-like approach. In *Pruitt*, the court declined to defer to the agency's interpretation of its manual because the manual's terms "had not undergone the scrutiny afforded a statute during the legislative process or the adoption process through which all rules and regulations must pass."[256] In contrast, in *CSC* the Department's properly promulgated rule defining the Committee's limited jurisdiction to regulate upland areas was entitled to deference. After all, the General Assembly had authorized the agency to determine its jurisdiction under the CMPA, and the agency promulgated the rule pursuant to that authority and in compliance with required administrative

---

[251] *Id.* at 433.

[252] *Id.* (quoting Schrenko v. DeKalb Cnty. Sch. Dist., 582 S.E.2d 109, 114 (Ga. 2003)).

[253] *Id.*

[254] *Id.* at 434.

[255] *Id.*

[256] Pruitt Corp. v. Ga. Dep't of Cmty. Health, 664 S.E.2d 223, 225 (Ga. 2008) (citing O.C.G.A. § 50-13-4); *see also supra* notes 191–93 and accompanying text (analyzing the *Pruitt* decision).

procedures.[257] In *Chevron* terms, the court determined on step one that the CMPA did not define the Committee's jurisdiction precisely, so it was appropriate for the court to move to step two and defer to the agency's reasonable interpretation of its jurisdiction over upland areas. In determining that the interpretation was reasonable, the court turned to traditional tools of statutory interpretation.

D. LATER DEVELOPMENTS IN GEORGIA'S DEFERENCE JURISPRUDENCE

1. Step One Decisions. The court of appeals cited and quoted from *Handel* in *Georgia Power Co. v. Georgia Public Service Commission*,[258] a 2009 decision overturning the PSC's interpretation of the Georgia Territorial Service Act.[259] The underlying dispute involved Georgia Power's petition to the PSC to block Sumter EMC from providing electricity to two new office buildings in Georgia Power's service area under what is termed a "corridor right."[260] Georgia Power asserted that the PSC and the superior court had fundamentally misinterpreted the controlling statute, O.C.G.A. § 46-3-4(4), and the court of appeals agreed.[261] The court of appeals first noted that it generally deferred to the PSC's interpretation of this statute but that deference is not absolute and then quoted from *Handel*:

> [A]dministrative rulings will be adopted only when they conform to the meaning which the court deems should properly be given. The judicial branch makes an independent determination as to whether the interpretation of the administrative agency correctly

---

[257] *Ctr. for a Sustainable Coast*, 670 S.E.2d at 434.
[258] 675 S.E.2d 294, 297 & n.11 (Ga. Ct. App. 2009).
[259] *Id.* at 298; Wilson & Blackburn, *supra* note 177, at 26.
[260] *Georgia Power*, 675 S.E.2d at 296–97.
[261] *Id.* at 297.

> reflects the plain language of the statute and comports with the legislative intent.[262]

The court of appeals looked at the statute, said the legislation's prefatory language shed light on when corridor rights arise, and followed the canon of reading the statute as a whole to conclude that the PSC misinterpreted and misapplied the statute.[263]

The Georgia Supreme Court affirmed, concluding that the court of appeals had not erred in its interpretation of the statute.[264] While acknowledging that the PSC's interpretation of its statute is entitled to respect, the court said, "[T]his case does not involve interpretation of a technical question necessary to the administration of a law. It simply requires a judicial determination as to whether the PSC correctly interpreted the plain meaning of the statute. . . . We conclude that it did not."[265] In essence, these appellate courts stopped at step one. The statute was clear when read as a whole, and the agency's interpretation of the statute was wrong so deference to the agency would be inappropriate.[266]

---

[262] *Id.* (quoting Handel v. Powell, 670 S.E.2d 62, 65 (Ga. 2008)); *see also* McLendon v. Adver. That Works, 665 S.E.2d 370, 371 (Ga. Ct. App. 2008) ("[E]rroneous applications of law to undisputed facts, as well as decisions based on erroneous theories of law, are subject to the de novo standard of review." (quoting Trent Tube v. Hurston, 583 S.E.2d 198, 200 (Ga. Ct. App. 2003))).

[263] *Georgia Power*, 675 S.E.2d at 297–98. The specific canon is that language in one part of the statute must be interpreted in light of the legislature's intent as found in the whole statute. *Id.* at 298 n.13 (citing Ins. Dep't v. St. Paul Fire & Cas. Ins. Co., 559 S.E.2d 754, 756 (Ga. Ct. App. 2002)).

[264] Sumter Elec. Membership Corp. v. Ga. Power Co., 690 S.E.2d 607, 608–09 (Ga. 2010); Martin M. Wilson & Jennifer A. Blackburn, *Administrative Law*, 62 MERCER L. REV. 1, 19 (2010).

[265] *Sumter*, 690 S.E.2d at 608–09 (citations omitted).

[266] The Georgia Supreme Court quoted the statute's corridor-rights provision, explained the statute's plain terms, and then described how considering the provision in context and looking at the entire statute reinforced its reading of the statute. *Id.* at 608. The Georgia Court of Appeals undertook similar analysis in *Georgia Department of Community Health v. Fulton–DeKalb Hospital Authority* when it refused to defer to DCH after hospitals challenged the retroactive application of DCH's manual on reimbursements. 669 S.E.2d 233, 237 (Ga. Ct. App. 2008). The hospitals challenged the retroactively adopted rules as unlawful during an administrative proceeding and then as unconstitutional on judicial review. *Id.* The appellate court affirmed the superior court's ruling that the agency was applying the manual in an unconstitutionally retroactive way and rejected the agency's

Similarly, the court of appeals—while repeating the familiar maxim about deference to an agency's interpretation of the statute the agency enforces and citing *Owens Corning*—reversed the Department of Revenue's interpretation of a statute allowing sales tax exemptions or refunds under certain circumstances.[267] At issue in *ChoicePoint Services, Inc. v. Graham* was the term "computer equipment," defined in the statute as "any individual computer or organized assembly of hardware or software."[268] The Department of Revenue, ruling against a refund request, said this definition did not include purchases by electronic means.[269] The court of appeals said that it was "not bound to blindly follow an agency's interpretation of a statute," that "the statutory language [was] clear," and that the Department's interpretation did not reflect the statute's plain language or the legislature's intent.[270] This was another step one case; the statute was clear and the agency's construction was wrong, so no deference was appropriate.[271]

Carolina Tobacco Co. v. Baker is a step one case in which the court of appeals concluded that the administrative body—here the Attorney General—correctly concluded that the term "tobacco product manufacturer," as defined by the General Assembly, was plain and unequivocal.[272] The court analyzed the statute while adhering to rules of statutory construction, noted that because the

---

exhaustion argument. *Id.*; Wilson & Blackburn, *supra* note 177, at 20–21.

[267] ChoicePoint Servs., Inc. v. Graham, 699 S.E.2d 452, 453, 456 n.21 (Ga. Ct. App. 2010). The statute at issue, O.C.G.A. § 48-8-3(68)(A), "essentially allows certain companies to claim exemptions from or refunds of sales tax where they have purchased more than $15 million" of computer equipment in a calendar year. *Id.* at 453.

[268] *Id.* at 454–55 (quoting O.C.G.A. § 48-8-3(68)(C)(i) (2009)).

[269] *Id.* at 454.

[270] *Id.* at 456.

[271] *See* Ga. Soc'y of Ambulatory Surgery Ctrs. v. Ga. Dep't of Cmty. Health, 710 S.E.2d 183, 187 (Ga. Ct. App. 2011) (affording no deference to an agency that issued an annual survey seeking information beyond its statutory authorization).

[272] 670 S.E.2d 811, 814 (Ga. App. 2008). The Attorney General had determined that Carolina Tobacco did not qualify as a "tobacco product manufacturer" under Georgia's legislation implementing the master tobacco settlement because it outsourced the fabrication of its cigarettes overseas. It did not directly manufacture cigarettes, and the legislature unambiguously intended that term apply only to those who directly—rather than through affiliates—manufactured cigarettes. *Id.* at 813–14.

term "manufactures" was not defined it should be given its natural signification, referred to Black's Law Dictionary, cited Webster's for the definition of "directly," and quoted the definition in the Attorney General's regulations.[273] After repeating the familiar language about deference to agency interpretations, the court stated that "even if an ambiguity existed in the statute, we would defer to the [Attorney General's] interpretation as stated in the regulation."[274] This statement is arguably dicta because the statute's meaning was plain and unambiguous, and the Attorney General construed it properly.

2. Step Two Decisions. In a 2008 decision, *Morrison v. Claborn*, the court of appeals cited *Owens Corning* when it upheld the Jasper County Board of Tax Assessor's interpretation of the word "any" in the applicable statute.[275] The court concluded that the word's meaning was not plain and that the rules of statutory construction required it to adopt the Board's interpretation because when there is ambiguity, tax statutes should be interpreted in favor of the tax, not the exemption.[276] Here—a *Chevron* step two case—the court deferred to the agency's reasonable interpretation of the ambiguous statutory term.

In another step two decision, the court of appeals deferred to the Judicial Retirement System's (JRS) interpretation of the statutory term "salary" for purposes of calculating retirement benefits in *McKelvey v. Georgia Judicial Retirement System*.[277]

---

[273] *Id.* at 814–15.

[274] *Id.* at 815. The court cited the *Pruitt* decision in support of its statement about deference. *Id.* at n.29; *see also* Palmyra Park Hosp., Inc. v. Phoebe Sumter Med. Ctr., 714 S.E.2d 71, 74–75 (Ga. Ct. App. 2011) (citing *Pruitt* to support proposition the courts defer to agencies because, in exercising their discretion, agencies fulfill function given them by the legislative branch).

[275] *Morrison*, 669 S.E.2d 492, 495 (Ga. Ct. App. 2008). The applicable statute was O.C.G.A. § 48-5-7.4(b)(5), governing the qualification of conservation use property for valuation and taxation. *Id.* at 494–95. The underlying dispute was whether Morrison's property could qualify as a bona fide conservation use property notwithstanding restrictive covenants that prevented him from conducting some of the activities listed in the statute. *Id.* at 495. The Board said "any" meant "any one" of the listed activities while Morrison said "any" meant "all" so that his land qualified as conservation use property so long as the covenants did not prevent him from conducting "all" of the listed activities. *Id.*

[276] *Id.* (quoting Ga. Dep't of Revenue v. Owens Corning, 660 S.E.2d 719, 721 (Ga. 2008)).

[277] 678 S.E.2d 120, 121 (Ga. Ct. App. 2009).

Salary is defined in the statute as the retiree's "average earnable monthly compensation,"[278] which is then defined as "the full rate of regular monthly compensation payable to a member employee for his or her full working time."[279] The claimant, a retired solicitor general, argued that the agency improperly excluded from its calculations of his monthly compensation sums the agency paid to him as reimbursement for administrative expenses he incurred, as well as sums paid for health and dental insurance.[280] The court acknowledged that "compensation" could be given an expansive interpretation but that based on the statute and its definitions it was clear that the agency was authorized to exclude from "salary" those sums paid as reimbursement for expenses and fringe benefits.[281] The court of appeals recognized that pension statutes should be construed liberally and that the JRS might have construed the relevant code sections in a broader manner, but it then repeated the familiar maxim about giving great deference to an agency's interpretation of the statute it is charged with enforcing and stated that the agency's interpretation found support in the language of the legislation.[282]

Citing both the *Handel* and *Pruitt* decisions, the court of appeals in *Northeast Georgia Medical Center v. Winder HMA, Inc.* deferred to DCH's interpretation and application of its own rules.[283] This step two case involved a competitor's challenge to the agency's decision to award a certificate of need to the Northeast Georgia Medical Center for a new 100-bed hospital in southern Hall County.[284] After concluding that the agency's decision was based on substantial evidence, the court focused on the soundness of the conclusions of law.[285] It explained deference

---

[278] *Id.* at 122 (quoting O.C.G.A. § 47-23-100(a)(3) (2008)).

[279] *Id.* (quoting O.C.G.A. § 47-23-1(9) (2008)). The same definition is now found at O.C.G.A. § 47-23-1(10) (2010), having been amended by 2009 Ga. Laws. 947, 968.

[280] *Id.* at 122–23.

[281] *Id.* at 123.

[282] *Id.*

[283] 693 S.E.2d 110, 115–16 (Ga. Ct. App. 2010); Wilson & Blackburn, *supra* note 264, at 15.

[284] *Ne. Ga. Med. Ctr.*, 693 S.E.2d at 112.

[285] *Id.* at 114 (citing Handel v. Powell, 670 S.E.2d 62, 65 (Ga. 2008), and Pruitt Corp. v. Ga. Dep't of Cmty. Health, 664 S.E.2d 223, 226 (Ga. 2008)).

was appropriate because agencies have expertise and can be much more specialized than courts and the legislature and because "in construing administrative rules, the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the rule."[286]

In *City of LaGrange v. Georgia Public Service Commission* the court of appeals affirmed an agency decision approving a hearing officer's ruling that an electricity provider other than the City of LaGrange could supply power to a school's new ball field and auditorium.[287] The basic issues in this step two case involved the interpretation of a statute that assigns electrical power for new premises within particular geographic areas to particular suppliers and whether Diverse Power Inc. (DPI) or the city should provide that power.[288] The premises at issue were next to and used by Troup County High School, and it was undisputed that the City of LaGrange had provided electrical service to the high school since 1987.[289] There was testimony at the hearing about how and when the city learned about the school's plans for the new auditorium and ball field, DPI's involvement in these projects, whether these were expansions of existing facilities under the Territorial Electrical Service Act, and about the Troup County Board of Education's decision to award the contract to DPI instead of the City of LaGrange.[290] The hearing officer ruled for DPI, the PSC affirmed, and the superior court affirmed.[291]

The court of appeals, in affirming, repeated the familiar maxims regarding deference to the PSC's enforcement and administration of its governing statute and emphasized that the PSC's interpretations of that statute were entitled to great

---

[286] *Id.* at 115 (quoting Atlanta J. & Const. v. Babush, 364 S.E.2d 560, 562 (Ga. 1988)); *see also* Palmyra Park Hosp., Inc. v. Sumter Med. Ctr., 714 S.E.2d 71, 79 (Ga. Ct. App. 2011) (giving deference to the DCH's grant of a certificate of need after concluding that the agency had not exceeded its authority in interpreting the governing statute).

[287] 675 S.E.2d 525, 527 (Ga. Ct. App. 2009). The superior court had also affirmed PSC's decision. *Id.*; Wilson & Blackburn, *supra* note 177, at 11–12.

[288] *City of LaGrange*, 675 S.E.2d at 526–27.

[289] *Id.*

[290] *Id.* at 527–29.

[291] *Id.* at 527.

weight.[292] Three code sections were at issue regarding electrical service for the new auditorium: one allowing a consumer to choose a different supplier where service is provided to one or more new premises,[293] a grandfather clause that gives suppliers the exclusive right to continue service at any premises the supplier already lawfully served,[294] and the statute's definition of "premises."[295] The Commission, after evaluating the evidence and assessing the credibility of witnesses, determined that the auditorium and the school were separate premises under the definition, so the grandfather section did not apply and the school was allowed to select DPI as its supplier instead of the City of LaGrange.[296] The court of appeals said this decision was supported by the evidence and was not arbitrary and capricious.[297] In regard to the agency's decision that DPI could continue to provide service for the ball field lights, the court agreed with the Commission's interpretation of the governing legislation that a code section pertaining to transfers of service did not apply to preclude DPI's continuation of electrical service.[298] The court, in affirming, utilized traditional tools of statutory interpretation: it followed the plain meaning of the statute's language on continuations and transfers of service; assigned the statute's words their ordinary, logical, and common meanings; and read the sections on continuations and transfers *in pari materia*, reconciling them where possible so that they were consistent and harmonious with one another.[299] In the end, the court found no merit to the City of LaGrange's argument that the Code section on transfers applied.[300]

---

[292] *Id.* at 529.

[293] *Id.* (citing O.C.G.A. § 46-3-8(a)).

[294] *Id.* (citing O.C.G.A. § 46-3-8(b)).

[295] *Id.* (citing O.C.G.A. § 46-3-3(6)).

[296] *Id.*

[297] *Id.* at 529–30.

[298] *Id.* at 530.

[299] *Id.*

[300] *Id.* The court had to reconcile O.C.G.A. §§ 46-3-8(c)(1) and 46-3-8(c)(2). The first permits transfer of service if current service is inadequate, undependable, or unreasonable, and the latter permits transfer out of public convenience and necessity. *Id.*

IV. GEORGIA'S TOOLS OF STATUTORY INTERPRETATION

There is some risk in generalizing about the Georgia judiciary's strong, *Chevron*-like deference to agency interpretations of the statute the agency administers. First, as explained in the introduction,[301] one must recognize that Georgia's appellate courts have stated that "judicial review of an administrative decision is a *two-step process*."[302] In Georgia, this means that the reviewing court first determines whether there is sufficient evidence to support the agency's finding of fact and then, second, examines the soundness of the agency's conclusions of law.[303] The focus of this Article, and its thesis about judicial deference in Georgia, is the practice of the state's appellate courts in applying that second step—reviewing the agency's interpretation of its governing statute. Second, there is no statement from either the Georgia Supreme Court or the Georgia Court of Appeals as clear as that key paragraph from *Chevron* announcing the United States Supreme Court's two-step approach. Third, just as some scholars have questioned how consistently the Supreme Court of the United States has applied *Chevron*,[304] whether Georgia's appellate courts are consistently adhering to the judicial review standards announced in the many decisions discussed in this Article is not always clear either.[305]

Nevertheless, based on the Georgia cases, it is reasonable to conclude that Georgia employs a two-step approach to deference issues that parallels the *Chevron* two-step. Furthermore, the rationale or justifications for deference offered by Georgia's appellate courts are the same as those offered by the Supreme

---

[301] *See supra* notes 28–32 and accompanying text.

[302] Handel v. Powell, 670 S.E.2d 62, 65 (Ga. 2008) (emphasis added); Lamar Co. v. Whiteway Neon-Adver., 693 S.E.2d 848, 851 (Ga. Ct. App. 2010) (quoting *Handel*, 670 S.E.2d at 65); Ne. Ga. Med. Ctr. v. Winder HMA, Inc., 693 S.E.2d 110, 114 (Ga. Ct. App. 2010) (same).

[303] Pruitt Corp. v. Ga. Dep't of Cmty. Health, 664 S.E.2d 223, 226 (Ga. 2008).

[304] *See, e.g.*, FOX, *supra* note 7, at 316 (discussing Supreme Court of the United States decisions that some regard as a retreat from *Chevron* deference).

[305] The fact that there are forceful dissenting opinions in many of the reported cases supports this statement. *See supra* notes 139–77 and accompanying text (analyzing various Georgia cases in which there were dissenting opinions).

Court of the United States in *Chevron*: respect for explicit and implicit legislative delegations of policy-making authority to agencies, appreciation of agency expertise and the opportunity for agencies to specialize, and recognition that agencies are more politically accountable than courts.[306]

A. THE FIRST STEP IN GEORGIA

As a general matter, Georgia courts look first to the plain language in the agency's governing statute to determine whether the statute addresses the question at issue. If the statute does, and the agency read the statute correctly, then the court should affirm the agency decision assuming the agency's application of the statute is reasonable. On the other hand, if the agency's interpretation violates the plain language of the statute or is contrary to the statute's clear meaning, then there is no deference and reversal is appropriate.[307] In fact, in four of the nineteen cases which are discussed and analyzed in the text of this Article, Georgia's appellate courts stopped at this point, saying that the agency misconstrued plain and unambiguous language[308] or that it

---

[306] *Compare* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 864–66 (1984) (identifying these concerns, among others, as the policy basis for judicial deference to agency decision making), *with* Bentley v. Chastain, 249 S.E.2d 38, 40 (Ga. 1978) (emphasizing that agency expertise supports deference); Ga. Real Estate Comm'n v. Accelerated Courses in Real Estate, 214 S.E.2d 495, 500 (Ga. 1975) (asserting that explicit and implicit delegations support deference); *Ne. Ga. Med. Ctr.*, 693 S.E.2d at 115 (explaining that courts defer to agencies because of agency expertise and the opportunity for specialization); Dep't of Cmty. Health v. Gwinnett Hosp. Sys., 586 S.E.2d 762, 765 (Ga. Ct. App. 2003) (observing that agency expertise justifies judicial deference).

[307] RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW 90 (2008) ("There is broad agreement that the plain meaning of the language of a statute can trump *Chevron* deference . . . ."); *see, e.g.*, Dozier v. Hanes, 696 S.E.2d 503, 504 (Ga. Ct. App. 2010) ("The first rule of statutory construction is to construe the statute to effectuate the intent of the legislature. To that end, '[w]here the language of a statute is plain and unambiguous, judicial construction is not only unnecessary[,] but forbidden.' " (alteration in original) (quoting Wheeler Cnty. Bd. of Tax Assessors v. Gilder, 568 S.E.2d 786, 788 (Ga. Ct. App. 2002))); Ga. Power Co. v. Ga. Pub. Serv. Comm'n, 675 S.E.2d 294, 297 (Ga. Ct. App. 2009) (finding, after reading the statute as a whole that the statute was clear, concluding that the agency's decision was wrong, and therefore refusing deference).

[308] Sumter Elec. Membership Corp. v. Ga. Power Co., 690 S.E.2d 607, 608–09 (Ga. 2010); Sawnee Elec. Membership Corp. v. Ga. Pub. Serv. Comm'n, 544 S.E.2d 158, 162 (Ga. 2001); ChoicePoint Servs. v. Graham, 699 S.E.2d 452, 456 (Ga. Ct. App. 2010).

gave too much weight to one of a statute's several terms.[309] In another decision, the Georgia Supreme Court stopped at step one and would not defer because the agency's position appeared in a manual not promulgated as a regulation,[310] and in a sixth step one case there was no discussion of deference because the court of appeals concluded that the Attorney General had properly interpreted plain and unambiguous statutory terms.[311]

The explanations offered by Georgia's appellate courts for what happens on this first step are familiar. "[E]rroneous applications of law to undisputed facts, as well as decisions based on erroneous theories of law, are subject to the de novo standard of review" under Georgia case law,[312] and administrative rulings are "adopted only after the court has made an independent determination that they correctly reflect the meaning of the statute."[313] Also, "[Georgia's] judicial branch 'make[s] an independent determination as to whether the interpretation of the administrative agency correctly reflects the plain language of the statute and comports with legislative intent.' "[314] If a statute's language "is plain and susceptible of but one natural and reasonable construction, the court has no authority to place a different construction upon it, but must construe it according to its terms."[315] These statements are similar to the United States Supreme Court's statement in *Chevron* regarding step one that "[t]he judiciary is the final authority on

---

[309] Handel v. Powell, 670 S.E.2d 62, 66 (Ga. 2008).

[310] Pruitt Corp. v. Ga. Dep't of Cmty. Health, 664 S.E.2d 223, 225 (Ga. 2008).

[311] Carolina Tobacco Co. v. Baker, 670 S.E.2d 811, 814 (Ga. Ct. App. 2008).

[312] McLendon v. Adver. That Works, 665 S.E.2d 370, 371 (Ga. Ct. App. 2008) (quoting Trent Tube v. Hurston, 583 S.E.2d 198, 200 (Ga. Ct. App. 2003)).

[313] *Sawnee*, 544 S.E.2d at 162 (quoting Nat'l Adver. Co. v. Dep't of Transp., 254 S.E.2d 571, 574 (Ga. Ct. App. 1979)).

[314] Handel v. Powell, 670 S.E.2d 62, 65 (Ga. 2008) (alteration in original) (quoting *Sawnee*, 544 S.E.2d at 162); *see also* Eagle W. LLC v. Ga. Dep't of Trans., 720 S.E.2d 317, 322–23 (Ga. Ct. App. 2011) (affirming the DOT's interpretation of the statutory phrase "within 500 feet of an interchange" after determining that "interchange" was not plain or unambiguous).

[315] Lowry v. McDuffie, 496 S.E.2d 727, 730 (Ga. 1998) (internal quotations and citations omitted). In another step one decision, the Georgia Court of Appeals reversed the agency's decision that the claimant had voluntarily quit and was thus ineligible for benefits because the court's construction of several statutory provisions made clear that an otherwise eligible claimant should not be deemed ineligible under the particular circumstances. Robinson v. Thurmond, 711 S.E.2d 430, 432 (Ga. Ct. App. 2011).

issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."[316] If no ambiguity exists, the federal court decides independently whether the agency's interpretation is in line with the statute's meaning.[317]

The first inquiry in Georgia's approach to deference, like *Chevron* step one, leaves a great deal of judgment to the reviewing court.[318] Georgia's courts, like the federal courts, use traditional and established tools of statutory construction to ascertain whether the Georgia General Assembly had a clear intention on the question at issue. As just discussed, the courts first look to the language of the statute to determine its plain meaning. However, the statute's text is often just a starting point, and saying when the courts will go beyond the terms of the statute is difficult. For example, Georgia's courts have also looked to the title of the legislation at issue—as well as a statute's preamble—in order determine legislative purpose.[319] The supreme court has said the cardinal rule of statutory construction is to ascertain the legislature's intent and purpose and then construe the statute to effectuate that intent.[320] A slight variation of this rule is called the "golden rule" of statutory construction: "to follow the literal language of the statute unless it produces contradiction, absurdity or such an inconvenience as to insure that the legislature meant something else."[321] All of this is similar to what federal courts

---

[316] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984); *see also* INS v. Cardoza-Fonseca, 480 U.S. 421, 447–49 (1987) (rejecting an INS interpretation of an immigration statute because it was contrary to clear legislative intent).

[317] NLRB v. United Food & Commercial Workers Union Local 23, 484 U.S. 112, 123 (1987).

[318] ASIMOW & LEVIN, *supra* note 6, at 534 n.4; *see also* PIERCE, *supra* note 307, at 90 (observing that some of the traditional tools of statutory interpretation are malleable and judges disagree about which ones are appropriate); WERHAN, *supra* note 96, at 339 (stating the "eclectic approach to statutory interpretation at *Chevron* Step One has reintroduced a good measure of the analytical flexibility that had characterized the traditional *Skidmore* regime").

[319] Eason v. Morrison, 182 S.E. 163, 165 (Ga. 1935).

[320] Sawnee Elec. Membership Corp. v. Ga. Pub. Serv. Comm'n, 544 S.E.2d 158, 160 (Ga. 2001); Palmyra Park Hosp., Inc. v. Phoebe Sumter Med. Ctr., 714 S.E.2d 71, 77 (Ga. Ct. App. 2011).

[321] Ga. Dep't of Revenue v. Owens Corning, 660 S.E.2d 719, 722–23 (Ga. 2008) (Carley, J.,

have done on *Chevron* step one: to read statutes in context, not in isolation, and to examine contested language in light of the entire statutory and regulatory scheme.[322]

In particular, Georgia's courts have stated the principle that a "statute must be construed to give sensible and intelligent effect to all [its] provisions and refrain from any interpretation which renders any part of the statute meaningless."[323] This statement was made in the context of the supreme court's unanimous reversal in *Handel* of the Secretary of State's interpretation of a candidate's eligibility statute.[324] The erroneous interpretation made one qualification paramount and eviscerated the other fourteen rules.[325]

In another opinion, the court of appeals stated a related principle of interpretation; the court stated that it had a duty to consider a statute's "subsections in *pari materia*, and to reconcile them, if possible, so that they may be read as consistent and harmonious with one another."[326] Courts are to avoid constructions "that makes some language mere surplusage."[327] Statutory exceptions are to be construed strictly and are to "be applied only so far as their language fairly warrants."[328]

A specific statute is to prevail over a general statute, absent a contrary legislative intent, to resolve any inconsistency between them.[329] Both of Georgia's appellate courts have used the *ejusdem*

---

dissenting) (internal quotation marks omitted); *cf.* Ctr. for a Sustainable Coast v. Coastal Marshlands Prot. Comm., 670 S.E.2d 429, 432–33 (Ga. 2008) (arguing that construing the statute as plaintiff wanted would have enabled the agency to regulate all storm water runoff generated by upland development far in excess of what the legislature intended).

[322] *E.g.*, Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 86 (2002); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132–33 (2000); WERHAN, *supra* note 96, at 338.

[323] Handel v. Powell, 670 S.E.2d 62, 66 (Ga. 2008) (internal quotation marks omitted).

[324] *Id.*

[325] *Id.* at 66; *see also* Eagle West LLC v. Ga. Dep't of Transp., 720 S.E.2d 317, 323 (Ga. Ct. App. 2011) (construing the word "interchange" within the context of the statute in a way that harmonizes the surrounding provisions).

[326] City of LaGrange v. Ga. Power Co., 363 S.E.2d 286, 288 (Ga. Ct. App. 1987) (upholding the agency's interpretation of the Territorial Service Act as reasonable and sensible).

[327] Blue Moon Cycle, Inc. v. Jenkins, 642 S.E.2d 637, 638 (Ga. 2007).

[328] Sawnee Elec. Membership Corp. v. Ga. Pub. Serv. Comm'n, 544 S.E.2d 158, 160 (Ga. 2001) (internal quotations omitted).

[329] Ga. Mental Health Inst. v. Brady, 436 S.E.2d 219, 221 (Ga. 1993).

generis canon of statutory construction to give clear meaning to statutory terms that might otherwise be regarded as ambiguous—the terms are read in the context of the rest of a governing statute.[330] In addition, judges have turned to dictionaries to give meaning to terms left undefined in legislation,[331] they have discussed legislative history,[332] and they have analyzed how statutes have been amended by the General Assembly.[333]

The approach of Georgia's appellate courts to determine whether an agency's governing statute is clear may not be as eclectic as the approach developed by the federal courts under *Chevron* step one for ascertaining ambiguity or clarity, but the difference is just a matter of degree. Like the disagreements between Justices on the Supreme Court of the United States seen in many of the decisions addressing *Chevron* deference,[334] what is a sensible reading of a governing statute according to some of Georgia's justices and judges might be seen as wrong or thwarting legislative purposes according to other members of an appellate panel.[335] Such is evidenced in this Article's summaries of several decisions where Georgia's appellate judges sharply disagreed over the meaning of a statute and whether its terms were ambiguous;

---

[330] Ctr. for a Sustainable Coast v. Coastal Marshlands Prot. Comm., 670 S.E.2d 429, 431–32 (Ga. 2008) (accepting use of this canon by the court of appeals to give unambiguous meaning to the terms "otherwise alter" in the context of the rest of the Coastal Management Protection Act).

[331] *E.g.*, *Sawnee*, 544 S.E.2d at 161 (turning to Webster's and Black's law dictionaries for natural and ordinary signification of certain statutory terms); Carolina Tobacco Co. v. Baker, 670 S.E.2d 811, 814 (Ga. Ct. App. 2008) (turning to Black's Law Dictionary for natural and ordinary signification of certain statutory terms).

[332] Ga. Dep't of Revenue v. Owens Corning, 660 S.E.2d 719, 720 (Ga. 2008). Legislative history of the Clean Air Act Amendments was also critical in *Chevron* and to the Supreme Court's conclusion that the contested statutory provision was ambiguous. WERHAN, *supra* note 96, at 338.

[333] *Owens Corning*, 660 S.E.2d at 720–21 (discussing the evolution of Georgia's sales-and-use taxes since 1951).

[334] *See supra* note 52 and accompanying text (collecting cases revealing disagreement among the Justices).

[335] *See, e.g.*, *Owens Corning*, 660 S.E.2d at 725 (Carley, J., dissenting) (asserting, in a dissent joined by two other justices, that the majority opinion circumvented the legislature's intent).

the dissents often expressed strikingly different interpretations of the same governing statute.[336]

B. GEORGIA'S SECOND STEP

As a practical matter, a litigant challenging an agency will most likely win or lose at the first step, where the governing statute's clarity versus ambiguity is the central issue. This is because once the court determines on step one that statutory terms are ambiguous, deference comes into play and that, of course, favors the agency and its reasonable interpretation of the governing statute. Things have played out exactly this way in the federal courts, with the agency winning the vast majority of the time when a court of appeals gets beyond step one.[337]

With Georgia's strong deference approach, it is very hard for a challenger to win on step two. In fact, in each of the thirteen cases discussed in the text of this Article in which Georgia's appellate courts got to the second step, the agency was affirmed.[338] The courts state that they do not blindly follow the agency's reading, but at the same time, they emphasize that agency interpretations are entitled to great weight and deference. The courts say they

---

[336] *See, e.g., id.* at 720, 725 (finding the sales tax exemption statute ambiguous and deferring to the agency, while dissenters contended that the exemption was clear and that the agency misconstrued the statute); *Sawnee*, 544 S.E.2d at 162, 164 (holding that statute was unambiguous and reversing the agency, while dissenters found ambiguity and that deference was appropriate); City of LaGrange v. Ga. Power Co., 363 S.E.2d 286, 288–90 (Ga. Ct. App. 1987) (affirming the agency's interpretation and application of the statute, while dissenters asserted that the agency had misconstrued plain, unambiguous language).

[337] *See supra* notes 36, 61 and accompanying text (collecting empirical research on affirmance rates).

[338] Ctr. for a Sustainable Coast v. Coastal Marshlands Prot. Comm., 670 S.E.2d 429, 434–35 (Ga. 2008); *Owens Corning*, 660 S.E.2d at 721–22; Kelly v. Lloyd's of London, 336 S.E.2d 772, 774 (Ga. 1985); Ga. Real Estate Comm'n v. Accelerated Courses in Real Estate, 214 S.E.2d 495, 500 (Ga. 1975); State v. Camp, 6 S.E.2d 299, 305 (Ga. 1939); Eason v. Morrison, 182 S.E. 163, 165–66 (Ga. 1935); Ne. Ga. Med. Ctr. v. Winder HMA, 693 S.E.2d 110, 117–18 (Ga. Ct. App. 2010); McKelvey v. Ga. Ret. Sys., 678 S.E.2d 120, 123–24 (Ga. Ct. App. 2009); Morrison v. Claborn, 669 S.E.2d 492, 496 (Ga. Ct. App. 2009); City of LaGrange v. Ga. Pub. Serv. Comm'n, 296 S.E.2d 525, 530 (Ga. Ct. App. 2009); Dep't of Cmty. Health v. Gwinnett Hospital, 586 S.E.2d 762, 770–71 (Ga. Ct. App. 2004); City of LaGrange v. Ga. Power Co., 363 S.E.2d 286, 288 (Ga. Ct. App. 1987); Belton v. Columbus Fin. & Thrift Co., 195 S.E.2d 195, 197 (Ga. Ct. App. 1972).

will defer when the interpretation reflects the meaning of the statute and comports with legislative intent,[339] and to determine reasonableness, the Georgia courts sometimes ask whether the agency's ruling or regulation is arbitrary and capricious.[340]

Georgia's courts, like the federal courts,[341] turn to principles of statutory interpretation and canons of construction in making the determination of reasonableness, just as they do on the first step in determining whether a statute is clear or ambiguous. The familiar maxims about considering subsections in *pari materia*, reconciling them, and reading statutory provisions so they are consistent and harmonious with each other have been repeated by the courts while upholding an agency interpretation.[342]

For instance, in *Eason v. Morrison*, a 1935 decision, the supreme court upheld regulations adopted by the State Board of Barber Examiners as reasonable.[343] In reaching this decision, the court examined the title of the acts and the preambles from both the original and amended versions of the statutes authorizing the Board to regulate barbers.[344] It also noted the canon that laws

---

[339] *Ctr. for a Sustainable Coast*, 670 S.E.2d at 433; *see also* Eagle West LLC v. Ga. Dep't of Transp., 720 S.E.2d 317, 322 (Ga. Ct. App. 2011) (holding that because the word "interchange" in the statute was not modified by terms "paved," "planned," "proposed," or "future," it was ambiguous and DOT's decision to deny a permit for erecting a billboard within 500 feet of a proposed interchange was reasonable). As explained earlier, *supra* notes 36 and 61, reversals of agency action on step two of *Chevron* are much less frequent than reversals on step one. Still, federal courts have found agency action to be unreasonable on step two. *See, e.g.*, Republican Nat'l Comm. v. FEC, 76 F.3d 400, 406–07 (D.C. Cir. 1996) (finding the relevant statute's best efforts language ambiguous and the agency's interpretation of it requiring a mandatory statement unreasonable); ASIMOW & LEVIN, *supra* note 6, at 536–37 (discussing other cases where courts have found agencies' interpretations unreasonable on step two).

[340] *Ga. Real Estate*, 214 S.E.2d at 500.

[341] WERHAN, *supra* note 96, at 340–41 (discussing the Court's application of the reasonableness requirement in Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687 (1995), and AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999)).

[342] *See, e.g.*, *City of LaGrange*, 363 S.E.2d at 288 (exercising the courts' duty to consider "these established principles of statutory interpretation" and determining that the PSC's interpretation is consistent with these principles).

[343] 182 S.E. at 166.

[344] *Id.* at 165.

protecting public health should be liberally construed and observed that barbershops can be the source of infections.[345]

Similarly, in the 2008 *CSC* decision the supreme court said that a regulation promulgated by the Department of Natural Resources regarding the Coastal Marshlands Protection Committee's authority to regulate upland areas was reasonable; the manner in which the agency construed its jurisdiction was based on the governing statute, there was no evidence it acted arbitrarily to limit the committee's jurisdiction to less than what the General Assembly intended, and nothing in the statute showed that the legislature wanted the agency to be a "super regulator."[346]

State v. Camp provides another example of the supreme court turning to canons of construction while deferring to an agency's reasonable interpretation of its statute.[347] The court—while noting a long accepted administrative interpretation of a tax statute—said that it would not construe statutes to produce an unreasonable or absurd result, such as putting 92% of inherited property into the highest tax bracket.[348] It also said that courts should construe ambiguous tax statutes in favor of citizens.[349]

In the *Owens Corning* case, decided almost seventy years after *Camp*, the supreme court again upheld an agency's interpretation of what the majority deemed an ambiguous exemption in a sales tax statute.[350] However, in contrast to *Camp*, the court said that in cases of ambiguity tax statutes are interpreted to favor the tax not the exemptions, that taxation is the rule and exemptions are the exception, and that exemptions must be clear and unambiguous in order to be valid.[351] At the same time, the dissent

---

[345] *Id.* at 165–66.

[346] *Ctr. for a Sustainable Coast*, 670 S.E.2d 429, 433–34 (Ga. 2008); *see also* Palmyra Park Hosp., Inc. v. Phoebe Sumter Med. Ctr., 714 S.E.2d 71, 79 (Ga. Ct. App. 2011) (finding that the DCH had not exceeded its authority in its interpretation of the governing statute).

[347] 6 S.E.2d 299, 304 (Ga. 1939).

[348] *Id.*

[349] *Id.* Other decisions have said that courts must construe pension laws liberally and in favor of employees. McKelvey v. Ga. Judicial Ret. Sys., 678 S.E.2d 120, 123 (Ga. Ct. App. 2009) (collecting cases).

[350] Ga. Dep't of Revenue v. Owens Corning, 660 S.E.2d 719, 720 (Ga. 2008).

[351] *Id.* (citing Collins v. City of Dalton, 408 S.E.2d 106, 108 (Ga. 1990)); *see also* Morrison v. Claborn, 669 S.E.2d 492, 495 (Ga. Ct. App. 2008) (applying the same cannons of

asserted that the tax statute was clear and unambiguous in providing the tax exemption and that the agency's interpretation was in error.[352]

In *Kelly*, the supreme court relied on statistics when it upheld as reasonable the Insurance Commissioner's ruling that a particular kind of policy fell under a statutory filing exclusion.[353] The policy was "of unique character designed for . . . insurance upon a particular subject," and the coverage was unique because only nine companies provided coverage for approximately one hundred contractors in the state.[354]

The Georgia judiciary's strong deference to agency interpretations of the statutes they administer is consistent with, and reinforced by, the judiciary's considerable deference to agency findings of fact. Section 50-13-19(h) of Georgia's Administrative Procedure Act provides:

> *The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.* The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
>
> (2) In excess of the statutory authority of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

---

interpretation).

[352] *Owens Corning*, 660 S.E.2d at 725 (Carley, J., dissenting).

[353] Kelly v. Lloyd's of London, 336 S.E.2d 772, 774 (Ga. 1985).

[354] *Id.* (citing and discussing O.C.G.A. § 33-24-9(a)).

> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.[355]

The clear statement in this section's preamble that a court must not substitute its judgment for that of the agency on the weight of the evidence on questions of fact—and its explanation of the scope of review in subsection (5)—have been interpreted to state the "any evidence" standard. Georgia's appellate courts have stated repeatedly that "[t]he superior court's review of evidentiary issues is limited to determining whether factual findings are supported by any evidence."[356] This is a very deferential standard of review.

Moreover, an appellate court's "duty is not to review whether the record supports the superior court's decision but whether the record supports the initial decision of the local governing body or administrative agency."[357] The court is to "affirm if any evidence on the record substantiates the administrative agency's findings of fact and conclusions of law."[358] The court gives "deference to the factual findings of the agency" and "may reject those findings only if they are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record[ ] or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."[359] Decisions are not reviewed de novo.[360]

---

[355] O.C.G.A. § 50-13-19(h) (2009) (emphasis added).

[356] Bd. of Regents of the Univ. Sys. of Ga. v. Hogan, 680 S.E.2d 518, 520 (Ga. Ct. App. 2009) (internal quotation marks omitted) (citing Prof'l Standards Comm'n v. Smith, 571 S.E.2d 443, 444 (Ga. Ct. App. 2002)); *see also* DeKalb Cnty. v. Bull, 672 S.E.2d 500, 501 (Ga. Ct. App. 2009) (stating that a reviewing court must affirm an agency fact-finder's decision if there is "*any evidence* to support it").

[357] *Hogan*, 680 S.E.2d at 520 (quoting City of Atlanta Gov't v. Smith, 493 S.E.2d 51, 53 (Ga. App. Ct. 1997)); *see also* Robinson v. Thurmond, 711 S.E.2d 430, 432 (Ga. Ct. App. 2011) (observing that an appellate court is to determine whether the record supports the finding of the administrative agency, not the appellate court); City of LaGrange v. Ga. Pub. Serv. Comm'n, 675 S.E.2d 525, 527 (Ga. Ct. App. 2009) (same); Unified Gov't of Athens–Clarke Cnty. v. Pub. Serv. Comm'n, 668 S.E.2d 296, 297 (Ga. Ct. App. 2008) (same).

[358] *Government of Athens–Clarke*, 668 S.E.2d at 297 (internal quotation marks omitted).

[359] *City of LaGrange*, 675 S.E.2d at 527 (quoting Douglas Asphalt Co. v. Ga. Pub. Serv. Comm'n, 589 S.E.2d 292, 294 (Ga. Ct. App. 2003)).

[360] *Id.* (citing *Douglas Asphalt*, 589 S.E.2d at 294).

This deference is explained by the fact that the person who has the duty of hearing the initial proceeding "is charged with weighing the evidence and judging the credibility of witnesses."[361] Neither the superior court nor the court of appeals is allowed to reweigh those credibility determinations.[362] Accordingly, the superior court and the court of appeals "must view the evidence in the light most favorable to the fact[-]finder's decision and must affirm the decision if there is *any evidence* to support it, even when the party challenging the fact[-]finder's conclusions presented evidence during the initial proceedings that conflicted with those conclusions."[363]

The relationship between the administrative law judge or hearing officer and the agency is important to an appellate court's review of an agency's decision. An administrative law judge's role at the hearing is to act as a representative of the agency and make a recommendation.[364] The any evidence standard does not apply to an internal agency appeal; that is, to the agency's review of the ALJ's decision.[365] The board or commission can allow the ALJ's recommendation to become the final decision—affirm—or it can modify or reverse the appealed decision.[366] In reviewing the initial decision of an ALJ, the Georgia Administrative Procedure Act provides that the agency "shall have all the powers it would have [had] in making the initial decision and, if deemed advisable, the agency may take additional testimony or remand the case to the [ALJ] for such purpose."[367] The agency must "give due regard to the [ALJ's] opportunity to observe witnesses" and make credibility assessments,[368] but it is clear that agencies, as the ultimate fact-finders, are not bound by an ALJ's findings and reviewing courts

---

[361] *DeKalb Cnty.*, 672 S.E.2d at 501.
[362] *Id.* (citing Jamal v. Thurmond, 587 S.E.2d 809, 811 (Ga. Ct. App. 2003)).
[363] *Id.*
[364] Greene v. Dep't of Cmty. Health, 666 S.E.2d 590, 592 (Ga. Ct. App. 2008).
[365] *Id.* at 591.
[366] *Id.* at 592.
[367] O.C.G.A. § 50-13-17(a) (2009).
[368] *Id.* § 50-13-41(d).

are not to reject an agency's findings in favor of an ALJ's findings.[369]

V. CONCLUSION

Georgia's Supreme Court and Court of Appeals have often said that they defer to agency interpretations of the statutes that the agencies are charged with administering and enforcing. These statements are not simply dicta. The many decisions discussed in this Article support the proposition that Georgia is a strong deference jurisdiction. Moreover, these decisions also support the conclusion that Georgia's appellate courts have adopted and follow an approach to judicial deference that is similar to the United States Supreme Court's *Chevron* two-step analysis, without having acknowledged that iconic decision in their opinions. Georgia's strong deference jurisprudence pre-dates *Chevron*.

On step one, Georgia's courts utilize traditional tools of statutory construction to determine whether the General Assembly has directly addressed the question at issue, and the courts retain the ultimate authority to determine whether a statute is plain or ambiguous. In the event the statute is not clear or if the legislature's intent is not evident in the governing statute, then Georgia's courts, on step two, determine whether the agency's interpretation of the ambiguous statute is reasonable. This is where and when Georgia's strong deference to the agency's interpretation of its governing statute comes into play. In practice, this standard affords great weight to the agency's determination. The expressed rationale for Georgia's strong deference parallels the rationale for deference that the Supreme Court of the United States offered in *Chevron*: (1) respecting the legislature's explicit and implicit delegation of policy-making authority to agencies, (2) acknowledging that agencies have expertise in particular areas of regulation and have the opportunity to specialize, and (3) recognizing that overbroad review has the effect of substituting a court's judgment for that of

---

[369] *See Greene*, 666 S.E.2d at 592 (discussing agency's review of ALJ decision in context of termination of medical assistance benefits).

the agency, thereby nullifying the benefits of the legislative delegation to the specialized body.[370]

[370] *See supra* note 306 and accompanying text (collecting cases demonstrating that the Supreme Court of the United States and Georgia courts identify the same policy rationales to support strong deference).