1-1-2012

The Chevron Two-Step in Georgia's Administrative Law

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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 their enabling 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 there is ambiguity. When there is ambiguity in its governing statute, the agency must interpret that legislation when it promulgates regulations or decides a particular contested matter.[6] This article asks and answers the question of what deference,

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[1] David Shipley, *The Status of 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 Ga. Const. art. VI, § 1, ¶ 1).

[3] Shipley, *supra* note 1, at 1170.

[4] The Georgia Administrative Procedure Act sets out the process for promulgating regulations. OCGA § 50-13-4.

[5] *See, e.g.*, Center for a Sustainable Coast v. Coastal Marshlands Prot. Comm., 670 S.E.2d 429 (Ga. 2008)(involving environmental group's challenge to permit granted to a developer by the Coastal Marshlands Protection Committee); Handel v. Powell, 670 S.E.2d 62 (Ga. 2008)(involving dispute over 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. OCGA §§ 50-13-13 to 18 (2009).

[6] Michael Asimow & Ronald Levin, STATE AND FEDERAL ADMINISTRATIVE LAW 519 (3d ed. 2009).

if any, must a Georgia court afford to an agency's interpretation of its governing statute when it 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 deal with on a day-to-day basis and/or require expertise that they 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 are filling gaps or resolving ambiguities left in those governing statutes by the legislative branch.[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 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 "is one of the most complex aspects of

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[7] William R. Anderson, Chevron *in the States: An Assessment and a Proposal*, 58 Admin. L. Rev. 1017, 1017 (2006). *Cf.* Thomas Merrill, *The Story of* Chevron: *The Making of an Accidental Landmark*, in ADMINISTRATIVE LAW STORIES 399 (Peter Strauss, ed., 2006); William Fox, Understanding Administrative Law 313-14 (5th edition 2008).

[8] *See*, *e.g.*, Georgia Real Estate Commission v. Accelerated Courses in Real Estate, 214 S.E.2d 495, 500 (Ga. 1975); Bentley v. Chastain, 249 S.E.2d 38, 40-41 (Ga. 1978); Department of Community Health v. Gwinnett Hospital System, 586 S.E.2d 762, 765 (Ga. App. 2004). Each of these cases explains why the General Assembly establishes administrative agencies.

[9] William McGrath *et al., Project: State Judicial Review of Administrative Action,* 43 Admin. L. Rev. 571, 759 (1991).

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

[11] *Id.* at 177-78; s*ee also* Anderson, *supra* note 7, at 1017.

administrative law,"[12] and the most frequently cited and analyzed U.S. 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 U.S. Supreme Court 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 is whether the agency's answer is based on a permissible construction of the statute.[16]

This is 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

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[12] Charles Koch, ADMINISTRATIVE LAW AND PRACTICE, VOL. 3, § 12.31, p. 235 (2d ed. 1997): McGrath, *supra* note 9, at 759 (this is a confusing and controversial area).
[13] 467 U.S. 837 (1984).
[14] Merrill, *The Story of* Chevron, *supra* note 7, at 399 & note 2. In addition, it "has generated an enormous volume of critical literature in the . . . years since its formulation." Anderson, *supra* note 7, at 1018. "[F]orests have been laid waste to publish the outpouring of legal commentary on [*Chevron*] and its progeny." Jerry Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry Into Agency Statutory Interpretation,* 57 Admin. L. Rev. 501 (2005).
[15] 467 U.S. at 842.

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] The court can defer by accepting the agency's interpretation if it is reasonable even though the court might have interpreted the statute differently. 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. The third general approach falls in between, with the court affording deference to the agency but retaining authority to substitute its judgment for the agency.[22] One scholar states that "[m]ost state courts exercise independent judgment when reviewing any agency interpretation of the law.[23]

There are many decisions by Georgia's appellate courts discussing 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

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[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.
[19] McGrath, *supra* note 9, at 761 (a court cannot reverse an agency because it believes a different result is preferable); Fox, *supra* note 7, at 315.
[20] McGrath, *supra* note 9, at 763 (pointing out that each state has developed its own scope of review standards); Asimow & Levin, *supra* note 6, at 538 n.7 (explaining that a few states have adopted *Chevron* but most have not). There are, however, questions about the U.S. Supreme Court's consistency in applying *Chevron.* Fox, *supra* note 7, at 316.,
[21] Asimow & Levin, *supra* note 6 , at 519-20;). *See also* McGrath, *supra* note 9, at 763; Koch, *supra* note 12, at 285-86..
[22] Asimow & Levin, *supra* note 6 , at 519-20;). *See also* McGrath, *supra* note 9, at 763.

was paramount.[24] 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."[25] This article analyzes those 2008 decisions along with many other Georgia Supreme Court and Court of Appeals opinions in which there was a question of 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.[26]

It is important to acknowledge that Georgia's appellate courts have said that "[j]udicial review of an administrative decision is a two-step process."[27] The steps are as follows; 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.[28] The focus of this article and its thesis about judicial deference concerns what the 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

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[23] Koch, *supra* note 12, at 285.
[24] *See* Georgia Dept. of Revenue v. Owens Corning, 660 S.E.2d 719 (Ga. 2008); Pruitt Corp. v. Georgia Dept. of Community Health, 664 S.E.2d 223 (Ga. 2008); Handel v. Powell, 670 S.E.2d 62 (Ga. 2008); Center for a Sustainable Coast v. Coastal Marshlands Prot. Comm. 670 S.E.2d 429 (Ga. 2008).
[25] 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, 985 n.28 & 1013 (2008). *See also* McGrath, *supra* note 9, at 763 & n.257. Strong deference is sometimes referred to as high deference.
[26] "*Chevron* is by far the most prominent federal case on judicial review of agencies' statutory interpretations." 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, deference is mandatory. Asimow & Levin, *supra* note 6, at 531 n.1 & 532 n.2.
[27] Handel v. Powell, 670 S.E.2d 62, 65 (2008); Pruitt Corp. v. Georgia Department of Community Health, 664 S.E.2d 223 (2008); Lamar Co. v. Whiteway Neon-Ad, 693 S.E.2d 848, 851 (Ga. App. 2010); Northeast Georgia Medical Center v. Winder HMA, Inc., 693 S.E.2d 110, 114 (Ga. App. 2010).
[28] Pruitt Corp. v. Georgia Dept. of Community Health, 664 S.E.2d 223, 226 (2008).

review "an agency's construction of statute which it administers."[29] 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. This might be explained by the fact that Georgia's strong deference jurisprudence pre-dates *Chevron* by many years.[30]

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"[31] in analyzing and applying what is called *Chevron* step one; determining whether the General Assembly (Congress) has directly addressed the question at issue. The tools used by Georgia's courts include those used by the federal courts: canons and principles of statutory interpretation to ascertain the meaning of statutes and legislative intent, examining the text of the legislation, closely reading dictionary definitions, and weighing available legislative history.[32]

Like the federal courts, Georgia's appellate courts also use these tools on the second step; deciding whether or not the agency's interpretation is reasonable.[33] Moreover, as with the many federal cases applying *Chevron*, the Georgia decisions show

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[29] 467 U.S. at 842.

[30] *Chevron* is mentioned and cited in only two reported Georgia Court of Appeals decisions that are not directly on point. *See* Georgia Dept. of Revenue v. Chemistry Council, Inc., 607 S.E.2d 207, 208-09 & n.7 (Ga. App. 2005)(citing *Chevron* for policies behind deference, not the test); Schneider v. Susquehanna Radio Corp., 581 S.E.2d 603, 606 & n.10 (Ga. App. 2003)(applying *Chevron* briefly to federal Consumer Protection Act). According to one scholar, no state expressly adopts the Chevron two step and that strong deference states often go with a one-step reasonableness review. Pappas, *supra* note 25, 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 n.7 (this note also references several articles dealing with 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 U.S. Supreme Court itself has struck down an agency's interpretation of its own statute without citing *Chevron. See* Brotherhood of Locomotive Engineers v. A.T. & S.F. RR. Co., 516 U.S. 152 (1996); Fox, *supra* note 7, at 315.

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

that a litigant's chances of success often turn 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.[34]

This article first discusses the federal approach to judicial deference, including the U.S. Supreme Court's decision *United States v. Mead Corp*.[35] that imposed limits on the sweep of *Chevron* deference and resurrected the venerable *Skidmore*[36] 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 Georgia Supreme Court. Third, this article presents a synthesis of what comes out of these Georgia appellate decisions dealing with judicial deference.

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[32] ABA Section of Administrative Law and Regulatory Practice (Michael Herz), *A Blackletter Statement of Federal Administrative Law*, 54 Admin. L. Rev. 1, 37 (2002).
[33] Asimow & Levin, *supra* note 6, at 536-37 note 5.
[34] 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 U.S. Courts of Appeals showed that it lost 59% of the time on Step One, but that the agency won 92% of the time when it got beyond the first step. Christopher Schroeder & Robert 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 of 223 published U.S. Court of Appeals decisions between 1995 and 96, 38% were resolved on Step 1 with 58% being reversals, and 62% were decided on Step 2, with only 11% of being reversals. Orin 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). There is uncertainty about how step two is meant to work. Asimow & Levin, *supra* note 6, at 536 n.5.
[35] 533 U.S. 218 (2001).

I. The Federal Approach: *Chevron, Mead and Skidmore*

The U.S. Supreme Court's decision in *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*[37] 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.'"[38] As noted in this article's introduction, the Court established a two-step analysis for judicial review of "an agency's construction of statute which it administers."[39] This "two-step framework . . . has taken the judicial world by storm."[40]

Chevron involved a challenge to regulations promulgated by the Environmental Protection Agency in 1981 to implement permit requirements under the Clear Air Act.[41] These regulations allowed a State to adopt a plant-wide definition of the statutory term 'stationary source.' This definition would allow an existing facility with several pollution emitting sources like smoke stacks to install a new furnace or modify a stack without going through the permitting process so long as the total emissions from the entire facility were not increased by the additions or modifications.[42] A facility with all of its smoke stacks was treated as being in under a bubble. The D.C. Circuit Court of Appeals held the

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[36] Skidmore v. Swift & Co., 323 U.S. 134 (1944).
[37] 467 U.S. 837 (1984).
[38] Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 Admin. L. Rev. 807, 809 (2002). As noted previously, it is the most frequently cited case in administrative law. Merrill, *The Story of* Chevron, *supra* note 7, at 399. *See also* Asimow & Levin, *supra* note 6, at 531 (*Chevron* is "the most prominent federal case on judicial review of agencies' statutory interpretations … it is a landmark decision").
[39] Chevron, 467 U.S. at 842; s*ee supra* notes 11 to 17 and accompanying text.
[40] Merrill, *The Story of* Chevron, *supra* note 7, at 399.
[41] Chevron, 467 U.S. at 840. Fox, *supra* note 7, at 314.
[42] 467 U.S. at 840.

regulation was invalid but the Supreme Court ultimately reversed, holding that the EPA's construction of 'stationary source' was permissible.[43]

The Court reached this conclusion after describing and going through a two-step process.[44] 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.[45] 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."[46] The Supreme Court did not list those traditional tools.[47] 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.[48]

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

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[43] 467 U.S. 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 (the number of law review articles on the case is 'voluminous').
[44] 467 U.S. at 842-66.
[45] *Id.* at 842-43. Although *Chevron* involved a challenge to agency rulemaking. it has been accepted as applying as well to adjudication. McGrath, *supra* note 9, at 761.
[46] 467 U.S. at 843 n. 9.
[47] Step one does not dictate that courts use a particular method of statutory interpretation. *A Blackletter Statement of Federal Administrative Law, supra* note 32, at 37.
[48] 467 U.S. at 845-48.

searching analysis.[49] Moreover, it is relatively common to see the U.S. Supreme Court's justices disagreeing vigorously on whether a statute and/or congressional intent is clear and whether strong deference is appropriate.[50] "[A]ll the nuances of *Chevron* have not yet been explored."[51]

Step one recognizes the primacy of the legislative branch by holding "unambiguously expressed" congressional intent "must be given effect." 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.[52] This is a very deferential standard[53] 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."[54] In other words, the agency's construction only needs to be reasonable.

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[49] Asimow & Levin, *supra* note 6, at 534-35, note 4.

[50] *See, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421, 422, 443 (1987)(holding 6-3 no deference to the INS); MCI Telecommunications Corp. v. AT&T Co., 512 U.S. 218, 219, 229 (1984)(holding 6-3 no deference to FCC because its interpretation went beyond meaning that statute could bear); Holly Farms Corp. v. NLRB, 517 U.S. 392, 413-14 (1996)(O'Connor, J, dissenting - discussing whether certain categories of workers in poultry business came within the "on the farm" exclusion from the NLRA's coverage); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 191-92 (2000)(Breyer, J., dissenting - disagreeing with the majority's assertion that statutes had deprived the Food & Drug Administration of jurisdiction to regulate tobacco); Christensen v. Harris County, 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); Carcieri v. Salazar, 129 S. Ct. 1058, 1060-61, 1066 (2009)(holding 6-3 that Secretary of the Interior could not take land into trust for a tribe not recognized in 1934 when Indian Reorganization Act was passed – term 'now' in the statute is not ambiguous); Talk America, Inc. v. Michigan Bell Telephone Co., 564 U.S. __ (2011)(deference to an agency's interpretation of its regulations, even in a legal brief, with Scalia, concurring, agreeing that the interpretation was reasonable but questioning the wisdom of deference to such interpretations).

[51] Fox, *supra* note 7, at 317.

[52] Michael Healy, *Spurious Interpretation Redux:* Mead *and the Shrinking Domain of Statutory Ambiguity*, 54 Admin. Law Rev. 673, 675 n.6 (2002).

[53] Asimow & Levin, *supra* note 6, at 532 n.2 (decision prescribes strong deference – if agency's interpretation is reasonable, deference is mandatory).

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

"[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the … agency."[55]

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

> 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.[56]

The Supreme Court also explained that it was appropriate for agencies to make 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

[55] *Id.* at 844. *Chevron* emphasizes that a court should not reverse simply because it feels that another decision would have been preferable. William McGrath *et al, supra* note 9, at 761.
[56] 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 it tried but without sufficient specificity, perhaps it consciously desired the agency to answer the question, perhaps it did not consider the issue at all, and perhaps it was not able to forge a coalition so both sides decided to take their chances with the agency. "For judicial purposes, it matters not which of these things occurred." *Id.* at 865.

> responsibilities may . . . properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices – resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with administration of the statute in light of everyday realities.[57]

The message from the Supreme Court was 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.[58]

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.[59] Post-*Chevron* decisions show that step two deference is not total

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[57] *Id.* at 865-66.

[58] *Id.* at 866. "*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. *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. American Trucking Ass'n, Inc., 531 U.S. 457, 481 (2001) (concluding that EPA's interpretation of Clean Air Act was unreasonable because it went beyond the limits of what was ambiguous); *cf.* AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 390 & n. 11 (1999) (disagreement on the Court over the meaning of the work 'impair'); Asimow & Levin, *supra* note 6, at 536 n.5. Still, one study showed that an affirmance rate of 89 percent at step two. Kristin E. Hickman & Matthew B. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 Colum. L. Rev. 1235, 1276 & n.214 (2007) (citing a study by Professor Orin S. Kerr).

[59] There is uncertainty about how step two should work. Asimow & Levin, *supra* note 6, at 536 n.5.

capitulation or unprincipled [60] but predictions are dicey other than saying that the agency's chances of being affirmed are fairly good if the reviewing court proceeds to step two.[61] 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.[62] Perhaps the safest proposition to state is that the step two inquiry overlaps with the Administrative Procedure Act's arbitrary and capricious test.[63]

The U.S. Supreme Court's 2001 decision in *United States v. Mead*[64] imposed some uncertain limits on the applicability of *Chevron.*[65] The contested issue was whether tariff classification rulings issued by the U.S. Customs Service were entitled to strong judicial deference under *Chevron.*[66] The Customs Service issues 10,000 to 15,000 of these rulings every year from its 46 offices around the nation without going through either notice and comment rulemaking or a formal adjudication process.[67] The Court concluded that the rulings were not entitled to *Chevron* deference because they did not have the force of law.[68] The Court treated them "like 'interpretations contained in policy

[60] Fox, *supra* note 7, at 317. *See also* note 55 *supra.*
[61] Judge Wald on the D.C. Circuit concluded that the bulk of reversals came on Step One, Patricia Wald, *A Response to Tiller and Cross*, 99 Colum. L. Rev. 235, 243 (1999), and that the agency was reversed on Step Two only 11% of the time. Patricia Wald, *Judicial Review in Mid-Passage: The Uneasy Partnership Between Courts and Agencies Plays On*, 32 Tulsa L.J. 221, 242 (1996).
[62] *See* text and notes at notes 44 to 48 *supra.*
[63] *See ,e.g,* Shays v. FEC, 414 F.3d 76, 96-97 (D.C. Cir. 2005); National Association of Regulatory Utility Commissioners v. ICC, 41 F.3d 721 (D.C. Cir. 1994); General American Transportation Corp. v. ICC, 872 F.2d 1048, 1053 (D.C. Cir. 1989). John Rogers, Michael Healy & Ronald Krotoszynski, Administrative Law 572-73 (2d ed. 2008)
[64] 533 U.S. 218 (2001). *Mead* has also generated a huge volume of scholarly commentary. *See, e.g., Administrative Law Discussion Forum,* 54 Admin. L. Rev. 565 (2002); Asimow & Levin, *supra* note 6, at 561 n.3.
[65] Michael Healy, *supa* note 52, at 673. *See also* Mead, 533 U.S. at 239 (Scalia J., dissenting, saying that the courts will be sorting out the consequences of *Mead* for years to come).
[66] Mead, 533 U.S. at 221.
[67] *Id.* at 233.
[68] *Id.* at 221.

statements, agency manuals, and enforcement guidelines'" which are "beyond the *Chevron* pale."[69]

> The explanation for the *Mead* qualification on *Chevron* is as follows:
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> [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.[70]

Even though there was not sufficient evidence showing that Congress had intended tariff classification rulings to have the force of law, this was not the end of the matter.[71] The Court remanded the case with instructions that the lower court afford *Skidmore* deference to the ruling.[72] This gave new life to the Court's 1944 decision in *Skidmore v. Swift & Co.*[73] with its sliding scale approach to deference;[74] an approach to deference based not on delegated authority and accountability as in *Chevron*, but on the

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[69] *Id.* at 234, *quoting* Christensen v. Harris County, 529 U.S. 576, 587 (2000)(6-3 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*).
[70] 533 U.S. at 226-27.
[71] *Id.*at 231-34.
[72] *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. 283 F.3d 1342 (Fed. Cir. 2002).
[73] 323 U.S. 134 (1944). FLSA cases can be brought in state or federal court. There is not an initial administrative proceeding. The dispute in *Skidmore* was 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 cases fall within or without the Act. Instead, it put this responsibility on the courts." *Id.* at 137.

capacity and expertise of agencies responsible for the day-to-day implementation of the their governing statutes.[75]

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.[76] These bulletins are practical guides to employers and employees.[77] 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 the power to persuade, if lacking power to control.[78]

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."[79] 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."[80] He said that the Court's criteria were flabby and looked like a grab bag of factors.[81]The consequences of the *Mead*

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[74] Cooley Howarth, Jr., United States v. Mead Corp,: *More Pieces for the* Chevron/Skidmore Deference Puzzle, 54 Admin. L. Rev. 699,702 (2001); Hickman & Krueger, *supra* note 58, at 1251-59. Asimow & Levin, *supra* note 6, at 560 n.2.
[75] Mashaw, *supra* note 14, at 505.
[76] *See* 323 U.S. at 138-40 (discussing deference due the bulletin)
[77] *Id.* at 163.
[78] *Id.* at 140.
[79] 533 U.S. at 239.
[80] *Id.* at 241.
[81] *Id.* at 245.

doctrine, according to Justice Scalia, would be uniformly bad[82] He wanted *Skidmore* to be discarded as an anachronism.[83]

Notwithstanding Justice Scalia's attack, *Skidmore* is being applied regularly and its sliding scale runs from being almost as deferential as *Chevron* to virtually no deference at all.[84] It is as if the federal courts have two deference doctrines; "the more rule-like *Chevron* and the more standard-like *Skimore*," with the attendant problem of determining when one stops and the other begins.[85] However, as explained in the following sections that discuss 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.[86]

II. 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.[87] The Georgia Supreme Court did not discuss deference as such in

[82] *Id.* at 261.
[83] *Id.* at 250.
[84] Hickman & Krueger, *supra* note 58, at 1295-99.
[85] Merrill, *The* Mead *Doctrine supra* note 38, at 808.
[86] In fact, it appears that *Skidmore* has been cited only once by a Georgia appellate court. *See* text and notes at notes 183 to 186 *infra.*
[87] 182 S.E. 163, 164, 166 (Ga. 1935).

concluding the regulation was reasonable, but its analysis of the statutes regulating barbers and the licensing agency's clear rule-making 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" regulations.[88] Given the statute's silence on the issue coupled with the explicit grant of rule-making power, the court went directly to what today we would call step two in order to determine whether the regulation was reasonable. The court first examined the title of the acts to aid its statutory construction,[89] 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.[90] 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. It concluded that the regulation was not just reasonable, but salutary.[91]

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

[88] *Id.* at 166.
[89] *Id.* at 165.
[90] *Id.*
[91] *Id.*at 165-166.

examine the same statutory materials they relied upon in step one, and engage in conventional statutory construction to determine the reasonableness of the agency's interpretation of an ambiguous provision.[92]

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.[93] The executors of an estate valued at just over $50,000, who had paid federal estate taxes but did not file a state return, were issued an execution for a small amount by the State Revenue Commissioner.[94] They 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.[95] 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 supreme court affirmed.[96] 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 per cent of all inherited property under the higher-bracket schedule."[97] 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

[92] A Blackletter Statement, *supra* note 32, at 38; Keith Werlan, Principles of Administrative Law 340 (2008).
[93] 6 S.E.2d 299, 299 (Ga. 1939).
[94] *Id.*
[95] *Id.* at 301 & 303.
[96] *Id* at 304.
[97] *Id.*

disturbance of such administrative interpretation."[98] Accordingly, it determined that the trial court had properly construed Georgia's tax code as referring to the 1926 federal statute with its higher exemption.

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."[99] This statement is very similar to step two in *Chevron*, to the effect that reasonable interpretations are to be upheld 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 law made by those who are administering it, while not conclusive, are to be given great weight."[100] It also cited one of its own decisions for a similar proposition: administrative rulings are not binding on the court of appeals but "they will be adopted when they conform to the meaning [of the governing statute] which this court

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[98] *Id.*

[99] *Id.* at 300 (emphasis added); s*ee also* Sawnee Elec. Membership Corp. v. Georgia Pub. Serv. Comm'n, 544 S.E.2d 158, 162 (Ga. 2001)(Hunstein J., dissenting), *citing and quoting* State of Georgia v. Camp, 6 S.E.2d 299 (Ga. 1939).

[100] Belton v. Columbus Finance & Thrift Co., 195 S.E.2d 195, 197 (Ga. App. 1972). *See also* National Advertising Co. v. Department of Transportation, 254 S.E.2d 571, 573 (Ga. App. 1979) (repeating this proposition, citing *Belton*, noting that DOT's interpretation reconciled statutory provisions without straining words, that legislative intent was not perverted, and that even though DOT had never issued a ruling on the Code section in question, DOT's rejection of application would stand).

deems should properly be given."[101] This case focused on whether a particular procedure followed under a state statute violated Regulation Z in the federal Truth in Lending Act.[102] 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.[103]

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?"[104] 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."[105] Shortly after this statute became effective the Commission adopted rules for its implementation, one of which stated that "[n]o course offering of between 24 and 48 hours in duration will be approved unless the schedule calls for three or less hours per day of classroom study."[106] 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 days of instruction of eight hours each day – well in excess of the rule's three hour daily maximum.[107]

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[101] Belton, 195 S.E.2d at 197.
[102] *Id.*at 196.
[103] *Id.* at 196-97. *See also* Brown v. Quality Finance Co., 145 S.E.2d 99, 100 (Ga. App. 1965) (stating that "[w]here the method of calculating the insurance refund is not specified by statute, it would properly be a subject for clarification under the rule-making power of the Industrial Loan Commissioner … which rules, if consistent with the provisions of the Act, would then have the force and effect of law."); Mason v. Serv. Loan & Fin. Co., 198 S.E.2d 391, 394 (Ga. App. 1973)(giving great weight to rule promulgated by Industrial Loan Commissioner under Industrial Loan Act).
[104] 214 S.E.2d 495, 498 (1975)
[105] *Id.* at 495-96 *quoting* OCGA § 84-1411(b) (emphasis removed from original).
[106] *Id.* at 497 (emphasis removed from original).
[107] *Id.*

Accelerated challenged the rule but the supreme court held that it was valid; it 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.[108] 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.[109] 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.[110] The court also 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. Even 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 there was evidence to justify the commission's decision.[111]

This rationale for deference to the Real Estate Commission's judgment is very similar to one of explanations that the U.S. Supreme Court offered 9 years later in *Chevron.*[112] 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.[113]

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[108] *Id.* at 499.
[109] *Id.* at 499-500.
[110] *Id.* at 500.
[111] *Id.*
[112] *See* text and notes at notes 55 to 58 *supra.*
[113] 214 S.E.2d at 500. *See also* Michael Asimow & Ronald Levin, *supra* note 6, at 537 note 5; Werhan, *suupa* note 92, at 342. *See also* text and notes at notes 59 to 63 *supra.*

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.[114] 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."[115] This statement sounds much like another one of the U.S. Supreme Court's explanations for deference offered six years later in *Chevron.*[116] The Georgia Supreme Court 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.[117]

This is yet another rationale for deference that is similar to what the U.S. Supreme Court said in *Chevron*.[118]

The legislative delegation and expertise rationales for deference were repeated by the Georgia Court of Appeals in 2004, 2008, 2010 and again in 2011 in explaining why it

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[114] 249 S.E.2d 38, 41 (1978)(the statute and ordinance unconstitutionally burdened the courts with nonjudicial functions). *See also* Shipley, *supra* note 1, at 1159-60.
[115] *Id.* at 40. *See also* Dept. of Cmty. Health v. Gwinnett Hosp. Sys., 586 S.E.2d 762, 765 (Ga. App. 2004)(*quoting* and *citing* this language from *Bentley v. Chastain*).
[116] *See* text and notes at notes 55 to 58 *supra.*
[117] 249 S.E.2d at 40. *See also* Albany Surgical PC v. Department of Community Health, 572 S.E.2d 638, 641 (Ga. App. 2003)(*quoting* this language from Bentley v. Chastain); Department of Community Health v. Gwinnett Hospital System, 586 S.E.2d 762, 765 (2004)(*quoting* this language from Bentley v. Chastain); Palmyra Park Hospital, Inc. v. Phoebe Sumter Medical Center, 714 S.E.2d 71, 75 (Ga. App. 2011)(*quoting* this language from Bentley v. Chastain).
[118] *See* text and notes at notes 55 to 58 *supra.*

should defer to the Department of Community Health (DCH) interpretations of its governing statute and administrative rules. The 2004 case involved Gwinnett Hospital and the grant of a Certificate of Need (CON), the 2008 decision concerned Medicaid benefits, the 2010 litigation was about a Winder facility objecting to the agency's grant of a CON to a Hall County enterprise, 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.[119]

In affirming the grant of a CON by DCH's Division of Health Planning in the *Gwinnett Hospital* case, the court of appeals said that the agency was responsible for interpreting and applying the statute, the state health plan, and its rules and regulations in order to carry out its duties as established by the General Assembly.[120] 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.[121]

B. Georgia Decisions After 1984 and U.S. Supreme Court's *Chevron* Decision

The U.S. Supreme Court's 1984 decision in *Chevron* may have brought about a significant change in how federal courts, lawyers who practice before federal agencies,

[119] Department of Community Health v. Gwinnett Hospital System, 586 S.E.2d 762, 765 (2004); Georgia Department of Community Health v. Medders, 664 S.E.2d 832, 833-34 (Ga. App. 2008); Northeast Georgia Medical Center v. Winder HMA, Inc., 693 S.E.2d 110 (Ga. App. 2010); Palmyra Park Hospital v. Sumter Medical Center, 714 S.E.2d 71 (Ga. App. 2011).

and administrative law scholars analyze the merits of an administrative agency's rule or order,[122] but the jurisprudence of Georgia's Supreme Court and Court of Appeals on deference has been unaffected by *Chevron* even as it took on canonical status.[123] 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 is not conclusive, it is entitled to great weight."[124]

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.[125] 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 OCGA § 33-24-9(a).[126] 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

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[120] 586 S.E.2d at 765.
[121] *Id. See also,* Palmyra Park Hospital, 714 S.E.2d at 75.
[122] "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.
[123] *Cf.* Merrill, *The Story of* Chevron, *supra* note 7, at 402; Asimow & Levin, *supra* note 6 , at 531 note 1.
[124] Kelly v. Lloyd's of London, 336 S.E.2d 772, 774 (Ga. 1985) (giving deference to the Insurance Commission). *See also* Albany Surgical, PC v. Department of Community Health, 572 S.E.2d 638, 641 (Ga. App. 2003)(noting deference to policy decisions by executive agencies while holding regulations reasonable); Department of Community Health v. Gwinnett Hospital System, 586 S.E.2d 762, 765 (Ga. App. 2004)(giving deference to DCH's Division of Health Planning); Piedmont Healthcare, Inc. v. Georgia Department of Human Resources, 638 S.E.2d 447, 451 (Ct. App. 2006)(giving deference to the Office of Regulatory Services within the Department of Human Resources); Georgia Department of Community Health v. Medders, 664 S.E.2d 832, 833-34 (Ga. App. 2008) (giving deference to the agency); City of LaGrange v. Ga. Power Co., 363 S.E.2d 286 (Ga. App. 1987) (giving deference to the Public Service Commission); North Georgia EMC v. City of Calhoun, 393 S.E.2d 510 (Ga. App. 1990) (giving deference to the Public Service Commission) ; Colquitt EMC v. City of Moultrie, 399 S.E.2d 497 (Ga. App. 1990); Sawanee Electrical Membership Corp. v. Georgia Public Service Commission, 544 S.E.2d 158 (2001); Georgia Power v. Georgia Public Service Commission, 675 S.E.2d 294 (Ga. App. 2009).
[125] 336 S.E.2d 772, 774-76 (Ga. 1985).
[126] *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 it fell under the policy's workers'

for the roughly 120 aerial pesticide contractors 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.[127] The court said that its conclusion was buttressed by the interpretation of the statute by the Insurance Commissioner.[128] 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 OCGA § 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.[129]

Did the supreme court give great weight to the agency's interpretation of the exclusionary language in the Code or did it resolve the issue on its own? It is fair to say that the court gave great weight to the agency. 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. This was a reasonable interpretation and application of the statute by the Insurance Commissioner.

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compensation exclusion. *Id.* Lloyd's had not filed the policy so it had to deal with the argument that this voided the coverage exclusion and made it unenforceable. *Id.*at 774-75.

[127] *Id* at 774 (emphasis removed).

[128] *Id.*

[129] *Id.*

There are many appellate cases discussing deference and the Public Service Commission (PSC).[130] For instance, in *City of 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 the LaGrange did not have the exclusive right to provide power to a facility in a new industrial park.[131] 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 OCGA § 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, OCGA § 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.[132]

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[130] *See, e.g.,* City of LaGrange v. Ga. Power Co., 363 S.E.2d 286 (Ga. App. 1987); North Georgia EMC v. City of Calhoun, 393 S.E.2d 510 (Ga. App. 1990); Colquitt EMC v. City of Moultrie, 399 S.E.2d 497 (Ga. App. 1990); Sawanee Electrical Membership Corp. v. Georgia Public Service Commission, 544 S.E.2d 158 (2001); Georgia Power v. Georgia Public Service Commission, 675 S.E.2d 294 (Ga. App. 2009). There also are several cases the discuss deference to the Department of Community Health. *See,e.g.*,Department of Community Health v. Gwinnett Hospital System, 586 S.E.2d 762, 765 (2004); Georgia Department of Community Health v. Medders, 664 S.E.2d 832, 833-34 (Ga. App. 2008).

[131] 363 S.E.2d 286, 289 (Ga. App. 1987).

[132] *Id.* at 288 (citations omitted).

Three judges dissented.[133] They asserted that the majority and the PSC had misconstrued plain and unambiguous language in the statute, failed to follow the supreme court's construction of the statute, and were thwarting the purpose and intent of the Georgia legislature.[134] 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.[135]

Sawnee Electrical Membership Corp. v. Georgia Public Service Commission[136] 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.[137] 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 customer choice exception was applicable. The superior court reversed and then the court of appeals reversed, agreeing with the PSC that the exception applied.[138] The supreme court granted certiorari and, notwithstanding the acknowledged deference to the PSC, it ultimately reversed the agency in a 4-3 decision.[139]

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[133] *Id.* at 289.
[134] *Id.* at 289-90.
[135] *See, e.g.*, North Georgia EMC v. City of Calhoun, 393 S.E.2d 510 (Ga. App. 1990); Colquitt EMC v. City of Moultrie, 399 S.E.2d 497 (Ga. App. 1991).
[136] 544 S.E.2d 158 (Ga. 2001)
[137] *Id.* at 159.
[138] *Id.* at 160.
[139] *Id*. at 160 and 162.

The fundamental disagreement within the supreme court was whether the language of the large-load exception in the statute was ambiguous.[140] 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.[141] In contrast, Justice Thompson's majority opinion started with the cardinal rule of statutory construction; a court is to ascertain legislative intent and to give the statute the construction that will effectuate that intent.[142] He then turned to the statute's declaration of intent and the statute's definition of 'premises' and, after noting that the word 'consumer' was not defined, he turned Webster's Third New World Dictionary and Black's Law Dictionary to give that word meaning.[143] 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."[144] The majority also said "administrative rulings are adopted only after the court has made an independent determination that they correctly reflect the meaning of the statute."[145]

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

[140] *Id.* at 163 (Hunstein J., dissenting).
[141] *Id.*at 162.
[142] *Id.* at 160 (majority opinion)
[143] *Id.* at 160-61 (majority opinion).
[144] *Id.* at 161. The apartment complex in question, with 380 units, 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.*
[145] *Id.* at 162 *citing and quoting from* National Advertising Co. v. Department of Transportation, 254 S.E.2d 571, 574 (1979).

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.[146] 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."[147] 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 agency, must give effect to the unambiguously expressed intent of Congress."[148] 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.[149]

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 is 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.[150] The same thing holds true for the U.S. Supreme Court. 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

[146] Sawnee, 544 S.E.2d at 161-62.
[147] McLendon v. Advertising That Works, 665 S.E.2d 370, 371 (Ga. App. 2008) *citing and quoting from* Trent Tube v. Hurston, 583 S.E.2d 198 (Ga. App. 2003).
[148] Chevron, 467 U.S. at 842-43.
[149] *Id.* at 482 n.9. Compare this paraphrase from *Chevron* to the language in *Sawnee.*
[150] *See, e.g.*, Georgia Department of Revenue v. Owens Corning, 660 S.E.2d 719 (2008)(4-3 decision); Center for a Sustainable Coast v. Coastal Marshlands Protection Committee, 670 S.E.2d 429 (Ga. 2008)(5-2)

their disposal.[151] The late Karl Llewelyn was correct when he wrote in 1950 that "there are two opposing canons on almost every point."[152]

C. The 2008 Decisions

The Georgia Supreme Court's first discussion of deference in 2008 was in *Georgia Department of Revenue v. Owens Corning.*[153] The taxpayer, Owens Corning, claimed a sales tax exemption for machinery repair parts so it sought a refund. The Department of Revenue failed to rule on the request so Owens Corning sued for the refund. 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[154] clearly and unambiguously created an exemption from sales tax for machinery repair parts.[155] 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.[156] 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

[151] *See, e.g.*, INS v. Caroza-Fonseca, 480 U.S. 421 (1987)(6-3 decision with the majority holding no deference to the INS); MCI Telecommunications Corp. v. AT&T Co., 512 U.S. 218 (1984)(6-3 decision with the majority holding no deference to the FCC because its interpretation went beyond the meaning that the statute could bear). Holly Farms Corp. v. NLRB, 517 U.S. 392 (1996)(disagreement over whether certain categories of workers in the poultry business came within the "on the farm" exclusion from the NLRA's coverage); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000)(disagreement over whether the Food & Drug Administration had jurisdiction to regulate tobacco); Christensen v. Harris County, 529 U.S. 576 (2000)(disagreement over whether Department of Labor opinion letters and guidance documents pertaining to the Fair Labor Standards Act are entitled to *Chevron* deference); Carcieri v. Salazar, U.S. (2009)(6-3 decision holding 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 – term 'now' in the statute is not ambiguous)..

[152] Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 Vand. L. Rev. 395, 401 (1950).

[153] 660 S.E.2d 719 (Ga. 2008). *See also* Martin Wilson & Jennifer Blackburn, *Administrative Law*, 60 Mercer L. Rev. 1, 15-16 (2008)(discussing generally the *Owens Corning* case).

[154] OCGA § 48-8-3 (34) (A).

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

[156] *Id.* at 720, 722.

tax exemption prior to 2000, we find that no clear, unambiguous exemption for machinery repair parts existed in 1997."[157]

Consistent with *Chevron*, the Georgia Supreme Court used several canons of statutory interpretation in concluding that the statute was ambiguous. For example: "[t]axation is the rule, and exemption from taxation [is] the exception," and "every exemption, to be valid, must be expressed in clear and unambiguous terms."[158] It also explained how Georgia's sales and use tax statutes had evolved since 1951; the first statute did not exempt machinery repair parts, 1994 amendments made no reference to machinery repair parts, and the 1997 amendments did not create an explicit exemption but instead created ambiguity by using the phrase 'replacement components.'[159] The court said "if the Legislature wished to reverse this historical trend in the 1997 amendment, it would have done so explicitly."[160] Moreover, amendments passed in 2000 clarified the statute and "eradicate[d] any ambiguity caused by the 1997 statute."[161] 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."[162]

Three justices dissented.[163] They asserted, among things, that the majority had not adhered to the 'golden rule' of statutory construction; "to follow the literal language of

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[157] *Id.*at 720
[158] *Id.* The supreme court said that the standards for review tax statutes are settled. *Id. citing* Collins v. City of Dalton, 408 S.E.2d 106, 108 (Ga. 1991).
[159] 660 S.E.2d at 720-21.
[160] *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.*
[161] *Id. See also* Wilson & Blackburn, *supra* note 153, at 16.
[162] *Id.citing* Kelly v. Lloyd's of London, 336 S.E.2d 772 (Ga. 1985).
[163] *Id.*at 722. (Carley, J., dissenting, joined by Justices Hines and Thompson).

the statute 'unless it produces contradiction, absurdity or such an inconvenience as to insure that the legislature meant something else.'"[164] 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.[165] 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 on the clarity of the statute at issue. Here the agency won; deference was appropriate because the majority regarded the statute as ambiguous and the agency's position was reasonable.

The Georgia Supreme Court's next discussion of deference in 2008 was in *Pruitt Corporation v. Georgia Department of Community Health.*[166] 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. 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 Department of Community Health (DCH). The manual did not define this phrase,[167] and the manual was not promulgated by DCH pursuant to the rule-making procedures specified in the Georgia Administrative Procedures Act.[168]

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[164] *Id.* at 722-23.
[165] *Id.* at 725.
[166] 664 S.E.2d 223 (Ga. 2008). *See also* Martin Wilson & Jennifer Blackburn, *Administative Law*, 61 Mercer L. Rev. 1, 23-34 (2009).
[167] 664 S.E.2d at 223.
[168] *Id.* at 225. Under the federal Administrative Procedure Act this manual might be considered a interpretative rule or a general statement of policy. 5 U.S.C. § 553(b)(3)(A).

DCH reimburses participating facilities according a per diem rate specific to each facility.[169] 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. It contains a reimbursement formula based on the facility's annual cost report and in respect to a new owner, like Pruitt Corporation, the agency interpreted 'last approved cost report' as being the prior owner's cost report for the preceding fiscal year. An ALJ reversed, saying that the phrase was ambiguous and that Pruitt should benefit from a more favorable interpretation.[170] The commissioner reversed the ALJ, concluding that 'approved' should be equated with 'audited' and noting that the last audited cost report was for the prior owner. Pruitt sought review and a superior court reversed the commissioner and agreed with the ALJ.[171]

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 give "proper deference to DCH's interpretation of its own rules."[172] The agency's interpretation of the manual was not unreasonable so the court of appeals reversed and thus affirmed the commissioner.[173]

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.'"[174] The court repeated the familiar language about deferring to an agency's interpretation of the statutes it is charged with

[169] 664 S.E.2d .at 224.
[170] *See* Martin Wilson & Jennifer Blackburn, *Administrative Law*, 59 Mercer L. Rev. 1, 12 (2007)(discussing the court of appeals decision in *Pruitt*).
[171] 645 S.E.2d at 14-15 (court of appeals opinion); Wilson & Blackburn, *supra* note 170, at 12.
[172] 664 S.E.2d at 225. *See* Wilson & Blackburn, *supra* note 170, at 11-12.
[173] 645 S.E.2d at 16-17.
[174] 664 S.E.2d at 225.

administering.[175] 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."[176] 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, 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. See OCGA § 50-13-4. 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.[177]

The Georgia Supreme Court's refusal in *Pruitt* to defer to DCH regarding its interpretation of the manual is in line with the U.S. Supreme Court's refusal in *United States v. Mead Corporation*[178] to afford *Chevron* deference to tariff classification rulings issued by the U.S. Customs Service. The U.S. Supreme 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,

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[175] *Id.*
[176] *Id. citing and quoting from* The Atlanta Journal & Constitution v. Babush, 364 S.E.2d 560, 562 (Ga. 1988) (this 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]' *citing and quoting from* U.S. v. Larionoff, 431 U.S. 864, 872 (1977)). In the absence of an unambiguous statute or regulations, the U.S. Supreme Court also defers to an agency's interpretation of its regulations. Auer v. Robbins, 519 U.S. 452, 461, 462 (1997); Talk America, Inc. v. Michigan Bell Telephone Co., 564 U.S. __, __ (2011).
[177] Pruitt, 664 S.E.2d at 225. The Georgia Supreme Court held in 1991 a department publication with policies and procedures for nursing home services was not a 'rule' as defined in the Georgia APA. Georgia Department of Medical Assistance v. Beverly Enterprises, 401 S.E.2d 499 (Ga. 1991).
[178] 533 U.S. 218 (2001)

deliberative process.[179] Similarly, the manual at issue in *Pruitt* was not adopted through the rule-making procedures in Georgia's APA.[180]

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,*[181] might be appropriate. Instead, it stated that since the DCH manual is incorporated by reference into the nursing facility's agreement with the agency, the phrase should be treated as a contractual provision and "its meaning is determined by application of the rules of contract construction."[182] The court said it did not have to decide whether the agency's decisions on policy, as reflected in the manual, were entitled to deference.[183]

After *Pruitt* it is reasonable to ask whether there is a second standard of deference in Georgia that is similar to *Skidmore's* multi-factored, sliding scale. I do not think so but it is worth noting that the Georgia Court of Appeals cited *Skidmore* in a 1953 decision, *Yearty v. General Wholesale Co.*[184] which concerned an employee's federal claim for overtime compensation arising under the Fair Labor Standards Act (FLSA).[185] The claimant cited an interpretive bulletin of the U.S. Department of Labor in support of his argument that he was covered by the FLSA.[186] *Skidmore* was 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

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[179] *Id.* at 233-34. The tariff classification rulings were not issued pursuant to a relatively formal and deliberate process like rule-making or formal adjudication.
[180] 664 S.E.2d at 225.
[181] 533 U.S. 238-39 *citing* Skidmore v. Swift & Co., 323 U.S. 134, 139 (1944).
[182] 664 S.E.2d. at 226. The court also disagreed with the court of appeals' agreement with the agency's assertion that its final decision was entitled to affirmance if there was any evidence to support it. *Id.* The court stated it is not enough that findings of fact are supported by evidence. A court is authorized to reverse or modify a determination that the agency's application of the law to the facts is clearly erroneous. *Id.*
[183] *Id.* at 225.
[184] 76 S.E.2d 715, 717 (Ga. App. 1953).
[185] *Id.* at 716.
[186] *Id.* at 717.

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." [187] Notwithstanding the bulletin the court held that the employee did not come within the FLSA.[188] This old 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 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.[189]

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 OCGA § 21-2-217. She had determined that James Powell was not qualified to run for the Public Service Commission because he did not reside in the district he sought to represent.[190] The pertinent statutes are; OCGA § 42-2-1(b) which requires candidates to have resided in the district they seek to represent for twelve months prior to election to that office, and OCGA § 21-2-217(a) which sets out fifteen rules to be followed in determining the residency of a person seeking to qualify to run for elective office. This code section does not spell out how the several

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[187] *Id.*at 716.
[188] *Id.*at 721 *See also* Perwitz v. Irvindale Farms, Inc., 53 S.E.2d 196, 197 (Ga. App. 1949)(noting in another FLSA case that "[b]ulletins seeking to construe the meaning of acts of Congress by Federal Administrative offices are not binding on this court. However, when such a bulletin conforms to the meaning which this court deems should properly be given such an act, it will be adopted.")
[189] *Id.* at 225.
[190] Handel v. Powell, 670 S.E.2d 62, 63 (Ga. 2008). *See also,* Martin Wilson & Jennifer Blackburn, *Administrative Law,* 61 Mercer L. Rev. 1, 21-22 (2009).

rules are to be applied or what weight should be afforded to some rules as opposed to others. Finally, OCGA § 21-2-2(32) defines residence as meaning domicile.[191]

Powell declared his candidacy for PSC District 4 and claimed residence in Towns County. Secretary of State Handel challenged his qualifications, asserting that he resided outside that district because he still enjoyed a homestead exemption on property he owned in Cobb County.[192] One of the qualifications listed in OCGA § 21-2-217(a) is where the candidate has a homestead exemption.[193] An ALJ ruled that Powell had moved to Towns County with the intent to make it his home even though he still had the homestead exemption in Cobb County, outside District 4.[194] The ALJ, guided by other statutory rules for determining residency in OCGA § 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. Moreover, the candidate's wife would be moving there upon her retirement from a job in Atlanta.[195]

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. She asserted the exemption establishes an irrebuttable presumption of legal residence and domicile for all purposes.[196]

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[191] 670 S.E.2d .at 63.
[192] *Id.* at 64.
[193] O.C.G.A. § 21-2-217(a)(14) ("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").
[194] Handel, 670 S.E.2d at 64.
[195] *Id.* at 64 n.2.
[196] *Id.* at 64.

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 OCGA § 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."[197] 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 statute meaningless.'"[198] 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.[199]

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,[200] 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

[197] *Id.* at 66.
[198] *Id. quoting* R.D. Brown Contractors, Inc. v. Bd. of Ed. of Columbia County, 626 S.E.2d 471, 474 (Ga. 2006).
[199] *Id.* at 66.
[200] *Id.* at 65.

end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent" of the legislature.[201]

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 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.'[202]

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.[203] 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

[201] Chevron, 467 U.S. at 842-43.
[202] Handel, 670 S.E.2d at 65, *quoting from* Sawnee Elec. Membership Corp. v. Ga. Pub. Serv. Comm'n., 544 S.E.2d 158, 161 (2001) (other citations omitted).
[203] *Cf.* Chevron, 467 U.S. at 842-43.

statutory construction and must reject administrative constructions which are contrary to clear congressional intent."[204]

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 read the statute so as "to give sensible and intelligent effect to all of [its] provisions and to refrain from an interpretation which render[s] any part of the statute meaningless."[205] This is consistent with the U.S. 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."[206]

The Georgia Supreme Court's 2008 decision in *Center for a Sustainable Coast v. Coastal Marshlands Protection Committee*[207] stands in contrast to the *Pruitt* decision in which the court stated it would not defer to an agency's manual that had not been adopted as a regulation. In *Center for a Sustainable Coast (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 that regulation is promulgated while the underlying dispute is being litigated.[208] However, the court's discussion of deference might be regarded as dicta because it followed a de novo review of alleged

[204] Chevron, 467 U.S. at 843 n.9.
[205] Handel, 670 S.E.2d at 66 *quoting* R.D. Brown Contractors, Inc. v. Bd. of Ed. of Columbia County, 626 S.E.2d 471, 474 (Ga. 2006).
[206] Chevron, 467 U.S. at 843 n.9.
[207] 670 S.E.2d 429 (Ga. 2008)(hereinafter CSC).
[208] *Id.* at 433-34 & n.4.

errors of law made by an ALJ regarding the agency's jurisdiction.[209] In addition, the fact the agency's new regulation was promulgated while the ALJ's contested ruling was being reviewed by the court of appeals seems to make agency action appear like a self-serving after-thought that should not be given much weight.[210] 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. This meant that the superior court arguably lacked subject matter jurisdiction to review the ALJ's order.[211] Notwithstanding these red flags, the decision merits discussion.

The Coastal Marshes Protection Act[212] (CMPA) authorizes the creation of the Coastal Marshes Protection Committee (the Committee) to consider permit applications in coastal marshlands.[213] The Committee includes the Commissioner of Natural Resources and four other persons selected by the Board of Natural Resources.[214] The Commissioner also supervises and executes the functions vested in the Department of Natural Resources and the Board is the policy-making and governing body of the Department.[215]

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

[209] *Id.*at 431-33. *See also* Coastal Marshlands Prot. Comm. v. Center for a Sustainable Coast, 649 S.E.2d 619, 624 (Ga. App. 2007)(discussing non-compliance of parties with Georgia's APA).
[210] 649 S.E.2d at 626 n.9 (Department of Natural Resources adopted regulations, effective March 26, 2007, dealing with several issues involved in the dispute well after contested ALJ ruling that was appealed); 670 S.E.2d at 433-34 n.4. This is parallel to *Barnhart v. Walton*, 535 U.S. 212 (2002) in which the U.S. Supreme Court 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. It should be noted that the agency had long espoused the same interpretation in informal announcements. *Id.* at 221-22.
[211] 670 S.E.2d at 435 (Sears, C.J. dissenting, joined by Hunstein, J.).
[212] OCGA §§ 12-5-280 *et seq.*
[213] 670 S.E.2d at 430
[214] *Id.* at 430-31, *citing* OCGA § 12-5-283.
[215] 649 S.E.2d at 622 n.3

marshlands near St. Mary's, Georgia.[216] 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. An ALJ agreed with the Center and remanded the permit application to the Committee for additional consideration.[217] 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.[218] It ultimately held that the permitting power of the Committee did not extend to regulating the upland portions of the development.[219]

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."[220] The construction of the CMPA sought by the CSC was "so broad that [the Committee] could regulate all storm water runoff generated by upland development" and this "far exceeds the legislature's intended scope for the CMPA."[221]

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 to define that phrase in the context

[216] 670 S.E.2d at 431; 649 S.E.2d at 622.
[217] 649 S.E.2d at 622-23.
[218] *Id.*at 623.
[219] 670 S.E.2d at 431.

of the CMPA.[222] 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."[223] 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 might affect the marshes, and this would create an ambiguity when read with other provisions in the statute. 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 CSC and the ALJ.[224]

The supreme court then turned attention to a Department of Natural Resources regulation that was issued while the litigation was pending.[225] 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 weight and deference."[226] The court explained that it does not blindly follow the agency's reading, but it does defer "when it reflects the meaning of the statute and comports with legislative intent."[227] In this case deference was particularly warranted because the General Assembly authorized the Department of

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[220] 649 S.E.2d at 627.
[221] *Id.* at 628.
[222] 670 S.E.2d at 431-32.
[223] *Id.* at 432.
[224] *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 the development would be well beyond the purview of the Committee. *Id.* at 433.
[225] *Id.* at 433-34. The Center for a Sustainable Coast argued that the rule was adopted to influence the litigation so it was not a genuine interpretation. *Id.* at 434 n.4. The court noted that there was nothing in the record to support that contention and said it "will not 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." *Id. See also Barnhart v. Walton*, 535 U.S. 212 (2002) in which the U.S. Supreme Court 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. In addition, the agency had long espoused the same interpretation in informal announcements. *Id.* at 221-22.
[226] CSC, 670 S.E.2d at at 433.

Natural Resources to determine jurisdiction under the CMPA, and the Department issued a rule that addressed the Committee's jurisdiction to regulate upland areas.[228] The court found that there was a reasonable statutory basis for the manner in which the Department construed its jurisdiction, there was no evidence that the Department acted arbitrarily to limit the Committee's jurisdiction to less than what the legislature intended in the CMPA, and there was nothing in the statute showing a legislative intent for the Committee to be the 'super regulator' of all development on the Georgia coast.[229] In reaching this conclusion the supreme court cited and quoted from the CMPA as well as the court of appeals opinion.

It is interesting to note that in the *Pruitt* opinion the Georgia Supreme Court 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."[230] However, the court concluded that the court of appeals was wrong to give deference to DCH's interpretation of the manual because it had not been adopted as a rule or regulation; 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. See OCGA § 50-13-4."[231] In contrast, in *Center for a Sustainable Coast* the Department's properly promulgated rule, defining the Committee's limited jurisdiction to regulate

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[227] *Id. quoting* Schrenko v. DeKalb County School Dist., 582 S.E.2d 109, 114 (Ga. 2003).
[228] *Id.*at 433.
[229] *Id.* at 434.
[230] Pruitt Corp. v. Ga. Dep't of Community Health, 664 S.E.2d at 225 *quoting* The Atlanta Journal & Constitution v. Babush, 364 S.E.2d 560, 562 (Ga. 1988)(this 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]'*quoting* U.S. v. Larionoff, 431 U.S. 864, 872 (1977))
[231] Pruitt, 664 S.E.2d at 225. The Georgia Supreme Court held in 1991 that a department publication with policies and procedures for nursing home services was not a 'rule' as defined in the Georgia APA. Georgia Department of Medical Assistance v. Beverly Enterprises, 401 S.E.2d 499 (Ga. 1991).

upland areas, was entitled to deference. After all, the General Assembly had authorized the agency to determine jurisdiction under the CMPA and the agency promulgated the rule.[232] 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 v. Powell* in *Georgia Power v. Georgia Public Service Commission,* a 2009 decision overturning the PSC's interpretation of the Georgia Territorial Service Act.[233] 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.[234] Georgia Power asserted that the PSC and the superior court had fundamentally misinterpreted the controlling statute, OCGA § 46-3-4(4), and the court of appeals agreed.[235] It noted that it generally deferred to the PSC's interpretation of this statute but that deference is not absolute and then quoted from *Handel* that "administrative rulings

[232] CSC, 670 S.E.2d at 434. The court found that there was a reasonable statutory basis for the manner in which the Department construed its jurisdiction, that there was no evidence that the Department acted arbitrarily to limit the Committee's jurisdiction to less than what the legislature intended in the CMPA, and that there was nothing in the statute showing a legislative intent for the Committee to be the 'super regulator' of all development on the Georgia coast.
[233] 675 S.E.2d 294, 297 (Ga. App. 2009). *See also,* Martin Wilson & Jennifer Blackburn, *Administrative Law,* 61 Mercer L. Rev. 1, 25 (2009).
[234] 675 S.E.2d at 296-97.
[235] *Id.*at 296.

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 reflects the plain language of the statute and comports with the legislative intent."[236] 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.[237]

The Georgia Supreme Court affirmed, concluding that the Court of Appeals had not erred in its interpretation of the statute.[238] While acknowledging that the PSC's interpretation of its statute is entitled to respect, it said "this case does not involve interpretation of a technical question necessary to the administration of the 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."[239] 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 there was no deference.[240]

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[236] *Id.* at 297 *quoting* Handel v. Powell, 670 S.E.2d at 65.*See also* McLendon v. Advertising That Works, 665 S.E.2d 370, 371(Ga. App. 2009) *quoting* Trent Tube v. Hurston, 583 S.E.2d 198 (Ga. App. 2003)("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").

[237] 675 S.E.2d at 298. 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 *quoting* Ins. Dep't v. St. Paul Fire & Cas. Ins. Col, 559 S.E.2d 754, 756 (Ga. App. 2002)..

[238] Sumter Elec. Membership Corp. v. Georgia Power Co., 690 S.E.2d 607 (2010). *See also,* Martin Wilson & Jennifer Blackburn, *Administrative Law*, 62 Mercer L. Rev. 1, 18-19 (2010).

[239] 690 S.E.2d at 608-09 (citations omitted).

[240] The Supreme Court quoted the statute's corridor rights provision, explained what the statute's plain terms provide, and then explained how its reading of the statute was reinforced by considering the provision in context – looking at the entire statute. 690 S.E.2d at 608. *Cf.* Ga. Dept. of Community Health v. Fulton-DeKalb Hosp. Authority, 669 S.E.2d 233 (Ga. App. 2008)(no deference to DCH when hospitals challenged the retroactive application of DCH's manual on reimbursements as unlawful during the administrative proceeding and then as unconstitutional on judicial review – the appellate court held it was appropriate for the superior court to rule that the agency was applying the manual in an unconstitutionally retroactive way and affirmed, rejecting the agency's exhaustion argument). *See also* Martin Wilson & Jennifer Blackburn, *Annual Survey of Georgia Law, Administrative Law,* 61 Mercer L. Rev. 1, 20 (2009).

Similarly, the Court of Appeals, while repeating the familiar maxim about deference to an agency's interpretation of the statute it enforces and citing *Owens Corning*, reversed the Department of Revenue's interpretation of a statute allowing sales tax exemptions or refunds under certain circumstances.[241] At issue in *ChoicePoint Services v. Graham* was the term "computer equipment" defined in the statute as "any individual computer or organized assembly of hardware or software."[242] The Department of Revenue, ruling against a refund request, said this definition did not include purchases by electronic means.[243] 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.[244] This was another step one case; the statute was clear and the agency's construction was wrong so no deference was appropriate.[245]

Carolina Tobacco Co. v. Baker is a step one case in which the Court of Appeals concluded that the agency – here the Attorney General – got it right in concluding that the term "tobacco product manufacturer, as defined by the General Assembly, was plain and unequivocal.[246] The court analyzed the statute while adhering to rules of statutory construction, noted that because the term "manufactures" was not defined it should be

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[241] ChoicePoint Services, Inc. v. Graham, 699 S.E.2d 452 (Ga. App. 2010). The statute at issue, OCGA § 48-8-3(68)(A) essentially allows certain companies to claim exemptions from or refunds of sales tax when they have purchased more $15 million in computer equipment in a calendar year.

[242][242] 699 S.E.2d at 254-55 *citing and quoting from* OCGA § 48-8-3(68)(C)(1).

[243] *Id.* at 255.

[244] *Id.* at 258.

[245] *See also* Georgia Soc. of Ambulatory Surgery Centers v. Georgia Department of Community Health, ___ S.E.2d __ (Ga. App. 2011)(no deference to the agency in regard to a disputed information request as part of the agency 's annual survey because the request was too broad in seeking information that was beyond what was permitted by the statute's plain and literal provision on health care information).

[246] 670 S.E.2d 811 (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 as the legislature unambiguously intended. *Id.* at 813.

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.[247] After repeating the familiar language about deference to agency interpretations, the court stated that "even if ambiguity existed in the statute, we would defer to that AG's interpretation as stated in the regulation."[248] 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 2009 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.[249] The court concluded that 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.[250] 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 interpretation of the statutory term 'salary' for purposes of

[247] *Id.* at 814-15.
[248] *Id.* at 815. The court cited the *Pruitt* decision in support of its statement about deference. *See also,* Palmyra Park Hospital, 714 S.E.2d at 75 (citing *Pruitt* in support of its statement about deference),
[249] Morrison v. Claborn, 669 S.E.2d 392 (Ga. App. 2009). The applicable statute is OCGA § 48-5-7.4(b)(5). 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. 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. 669 S.E.2d at 495.
[250] 669 S.E.2d at 495 *quoting* Owens Corning, 660 S.E.2d at 720.

calculating retirement benefits in *McKelvey v. Georgia Retirement System.*[251] Salary is defined in the statute as the retiree's "average earnable monthly compensation," which is then defined as the "full rate of regular monthly compensation payable to a member employee for his or her full working time."[252] The claimant, a retired Solicitor General, argued that the agency improperly excluded from its calculations of his monthly compensation sums paid to him as reimbursement for administrative expenses he incurred as well as sums paid for health and dental insurance. 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' sums paid as reimbursement for expenses and fringe benefits.[253] The Court of Appeals recognized that pension statutes should be construed liberally and that that the JRS might have given construed the relevant code sections in a broader manner but it then repeated the familiar maxim about great deference to an agency's interpretation of the statute it is charge with enforcing, and stated that the agency's interpretation found support in the language of the legislation.[254]

Citing both the *Handel* and *Pruitt* decisions, the Court of Appeals, in *Northeast Georgia Medical Center v. Winder HMA, Inc.*, deferred to the Department of Community Health's interpretation of and application of its own rules.[255] 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 to for a 100 bed hospital in southern Hall County. After concluding that the agency's decision was based on substantial evidence, the court

[251] 678 S.E.2d 120 (Ga. App. 2009).
[252] *Id.* at 121 *citing and quoting from* OCGA §§ 47-23-1(1) and 1(9).
[253] *Id.* at 123.
[254] *Id.*

focused on the soundness of the conclusions of law.[256] It explained deference was appropriate because agencies have expertise and can be much more specialized than courts and the legislature, and "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."[257]

In *City of LaGrange v. Georgia Public Service Commission* the court of appeals affirmed an agency decision that had approved a hearing officer's ruling that an electricity provider other than the City of LaGrange could supply power to a school's ball field and new auditorium.[258] The basic issues in this step two case involved 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. The premises at issue were connected to Troup County High School and it was undisputed that the City of LaGrange had provided electrical service to the high school since 1987. 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 or not these were expansions of existing facilities under the territorial electrical service act, and about the Troup County Board of Education's

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[255] 693 S.E.2d 110,115-16 (Ga. App. 2010). *See also* Martin Wilson & Jennifer Blackburn, *Administrative Law* 62 Mercer L. Rev. 1, 13-14 (2010).
[256] *Id.* at 114 *citing* Handel v. Powell *and* Pruitt.
[257] *Id.* at 115 *quoting from* The Atlanta Journal v. Babush, 364 S.E.2d 560 (1988). *See also,* Palmyra Park Hospital v. Sumter Medical Center, 714 S.E.2d 71, 79 (Ga. App. 2011)(deference to the Department of Community Health's grant of a certificate of need after concluding that the agency had not exceeded its authority in interpreting the governing statute).
[258] City of LaGrange v. Georgia Public Service Commission, 675 S.E.2d 525 (Ga. App. 2009)(the PSC decision had been affirmed by the superior court). *See also,* Martin Wilson & Jennifer Blackburn, *Administrative Law,* 61 Mercer L. Rev. 1, 11-12 (2009).

decision to award the contract to DPI instead of the City of LaGrange. The hearing officer ruled for DPI, the PSC affirmed, and the superior court affirmed.[259]

The Georgia Court of Appeals, in affirming, repeated the familiar maxims regarding deference to the PSC's enforcement and administration of its governing statute, and that its interpretations of that statute were entitled to great weight.[260] Three code sections were at issue in regard 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, a grandfather clause that gives suppliers the exclusive right to continue service at premises already being served, and the statute's definition of premises.[261] 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 school was allowed to select DPI as its supplier instead of the City of LaGrange. The court of appeals said this decision was supported by the evidence and not arbitrary and capricious.[262] 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 for the ball field. The court, in affirming, utilized traditional tools of statutory interpretation, 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

[259] 675 S.E.2d at 527-29.
[260] *Id.* at 529.
[261] *Id.* at 529 *citing* OCGA §§ 46-3-8(a), - 8(b) & -3(c).
[262] *Id.* at 529-30.

transfers in *pari materia* to reconcile them so that were consistent and harmonious with one another. It said that there was no merit to the City's argument that the Code section on transfers applied.[263]

III. 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 statutes they administer. First, as explained in the introduction,[264] it must be recognized that Georgia's appellate courts have stated that "[j]udicial review of an administrative decision is a *two-step process*."[265] 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.[266] The focus of this article, and its thesis about judicial deference in Georgia, is on what this state's appellate courts have been doing on that second step when they review 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 U.S. Supreme Court's two step approach. Third, just as some scholars have questioned how consistently the U.S. Supreme Court has applied *Chevron*,[267] it is not always clear

[263] *Id.* at 530. The court had to reconcile OCGA §§ 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.
[264] *See* text and notes at notes 26 to 30 *supra.*
[265] Handel v. Powell, 670 S.E.2d 62, 65 (2008) (emphasis added); Lamar Co. v. Whiteway Neon-Ad, 693 S.E.2d 848, 851 (Ga. App. 2010); Northeast Georgia Medical Center v. Winder HMA, Inc., 693 S.E.2d 110, 114 (Ga. App. 2010).
[266] Pruitt Corp. v. Georgia Dept. of Community Health, 664 S.E.2d 223, 226 (2008).
[267] *See, e.g.*, William Fox, *supra* note 7, at 316 *discussing* U.S. Supreme Court decisions that some regard as a retreat from *Chevron* deference.

whether Georgia's appellate courts are consistently adhering to the judicial review standards announced in the many decisions which are discussed in this article.[268]

Nevertheless, based on the Georgia cases it is reasonable to conclude there is 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 U.S. Supreme Court in *Chevron*; respecting explicit and implicit legislative delegations of policy-making authority to agencies, appreciation of agency expertise and opportunity for agencies to specialize, and recognition that agencies are more political accountable than courts.[269]

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 it addresses the question at issue. If it does, and the agency read the statute correctly, then the agency should be affirmed assuming its 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.[270] 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

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[268] This statement is supported by the fact that there are forceful dissenting opinions in many of the reported cases. *See, e.g.*, the cases discussed at notes 130 to 166 *supra*.

[269] *Compare* Chevron, 467 U.S. at 843-45 & 864-66 *with* Georgia Real Estate Commission v. Accelerated Courses in Real Estate, 214 S.E.2d 495, 500 (1975); Bentley v. Chastain, 249 S.E.2d 38, 40 (1978); Department of Community Health v. Gwinnett Hospital System, 586 S.E.2d 762, 765 (Ga. App. 2008); Northeast Georgia Med. Ctr. V. Winder HMA, Inc., 693 S.E.2d 110, 115 (Ga. App. 2010).

[270] Richard 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.*, Georgia Power v. Georgia Public Service Commission, 675 S.E.2d 294, 297 (Ga. App. 2009(reading the statute as a whole, the court of appeals found it was clear, and concluded that the agency's decision was wrong, so no deference); Dozier v. Hanes, 696 S.E.2d 503 (Ga. 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'"quoting Wheeler County Board of Tax Assessors v. Gilder, 568 S.E.2d 786, (Ga. App. 2002))

misconstrued plain and unambiguous language,[271] or that it gave too much weight to one of a statute's several terms.[272] In another decision the Supreme Court stopped at step one and would not defer because the agency's position was contained in a manual that had not been promulgated as a regulation,[273] 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.[274]

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,[275] and administrative rulings are "adopted only after the court has made an independent determination that they correctly reflect the meaning of the statute."[276] "[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."[277] 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

[271] Sawnee Electrical Membership Corp. v. Georgia Public Service Commission, 544 S.E.2d 158 (Ga. 2001); Sumter Electrical Membership Corp. v. Georgia Power Co., 690 S.E.2d 607 (Ga. 2010); ChoicePoint Services v. Graham, 699 S.E.2d 452 (Ga. App. 2010).
[272] Handel v. Powell, 670 S.E.2d 62 (Ga. 2008).
[273] Pruitt Corporation v. Georgia Department of Community Health, 664 S.E.2d 223 (Ga. 2008).
[274] Carolina Tobacco Co. v. Baker, 670 S.E.2d 811 (Ga. App. 2008).
[275] McLendon v. Advertising That Works, 665 S.E.2d 370, 371 (Ga. App. 2008) *quoting from* Trent Tube v. Hurston, 583 S.E.2d 198 (Ga. App. 2003).
[276] Sawnee Electrical Membersip Corp. v. Georgia Public Service Commission, 544 S.E.2d 158, 163 (Ga. 2001).
[277] Handel v. Powell, 670 S.E.2d 62, 65 (Ga. 2008). *See also*, Eagle West LLC v. Georgia Dep't of Trans., __ S.E.2d __ , ___ (Ga. App. 2011)(the Department of Transportation's interpretation of the statutory phrase "within 500 feet of an interchange" was affirmed with the court determining that "interchange" was not plain or unambiguous).

terms."[278] 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 issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."[279] If there is no ambiguity, the federal court decides independently whether the agency's interpretation is in line with the statute's meaning.[280]

The first inquiry in Georgia's approach to deference, like *Chevron* step one, leaves a great deal of judgment to the reviewing court.[281] 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 it is difficult to say when the courts will go beyond the terms of the statute. 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.[282] The supreme court has said that the cardinal rule of statutory construction is to ascertain the legislature's intent and purpose and then give

[278] Lowry v. McDuffie, 496 S.E.2d 727, 730 (1998). *See, e.g.*, Robinson v. Thurmond, 711 S.E.2d 430 (Ga. App. 2011)(the agency's decision that the claimant had voluntarily quit and was thus ineligible for benefits was reversed because the court's construction of several provisions in the statute made clear that an otherwise eligible claimant should not be deemed ineligible under the particular circumstances – this is another step one decision).

[279] *Chevron*, 467 U.S. at 843 n. 9. *See also* Immigration and Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421 (1987) (rejecting an INS interpretation of immigration statute because it was contrary to clear legislative intent).

[280] *See also* NLRB v. United Food & Commercial Workers Union Local 23, AFL-CIO, 484 U.S. 112, 123 (1987).

[281] Asimow & Levin, *supra* note 6, at 534 note 4; Pierce, *supra* note 270, at 90 (some of the traditional tools of statutory interpretation are malleable and there is disagreement among judges about which ones are appropriate); Werhan, *supra* note 92, at 339 (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.").

[282] Eason v. Morrison, 182 S.E. 163, 164 (Ga. 1935).

the statute a construction that will effectuate that intent.[283] A slight variation of this rule is called the golden rule of statutory construction: "to follow the literal language of the statute 'unless is produces contradiction, absurdity or such an inconvenience as to insure that the legislature meant something else."[284] All of this is similar to what federal courts 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.[285]

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."[286] This statement was made in the context of the supreme court's unanimous reversal in *Handel v. Powell* of the Secretary of State's interpretation of a candidate eligibility statute. The erroneous interpretation made one qualification paramount and eviscerated the other fourteen rules.[287] In another opinion the Georgia Court of Appeals stated a related principle of interpretation; that they have 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."[288] Courts are to avoid constructions "that make some language mere surplusage."[289] Statutory exceptions are to be construed strictly and are to "be applied

[283] Sawnee Electrical Membership Corp. v. Georgia Public Service Commission, 544 S.E.2d 158, 160 (Ga. 2001); Palmyra Park Hospital, 714 S.E.2d 71, 77 (Ga. App. 2011).
[284] Georgia Department of Revenue v. Owens Corning, 660 S.E.2d 719, 722-23 (Ga. 2008)(dissenting opinion); *cf.* Center for a Sustainable Coast v. Coastal Marshlands Protection Committee, 670 S.E.2d 429, 432-33 (Ga. 2008)(construing the statute as CSC wanted would have enabled the agency to regulate all storm water runoff generated by upland development far in excess of what the legislature intended).
[285] *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000); Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 86 (2002); Werhan, *supra* note 92, at 338.
[286] Handel v. Powell, 670 S.E.2d 62, 66 (Ga. 2008).
[287] *Id.* at 66. *See also,* Eagle West LLC v. Georgia Dept. of Transp., __ S.E.2d ___ (Ga. App. 2011).
[288] City of LaGrange v. Georgia Power Co., 363 S.E.2d 286, 288 (Ga. App. 1987)(upholding the agency's interpretation of the Territorial Service Act as reasonable and sensible).
[289] Blue Moon Cycle v. Jenkins, 642 S.E.2d 637 (2007).

only so far as their language fairly warrants."[290] A specific statute is to prevail over a general statute, absent a contrary legislative intent, to resolve any inconsistency between them.[291] Both of Georgia's appellate courts have used the 'ejusdem generis' canon of statutory construction in order 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.[292] In addition, judges have turned to dictionaries to give meaning to terms left undefined in legislation,[293] they have discussed legislative history,[294] and they have analyzed how statutes have been amended by the General Assembly.[295]

The approach of Georgia's appellate courts to determine whether an agency's governing statute is clear may not be as eclectic as the what has developed in the federal courts under *Chevron* step one for ascertaining ambiguity or clarity, but it just a matter of degree. Like the disagreements between justices on the U.S. Supreme Court seen in many of decisions with *Chevron* deference issues,[296] 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.[297] This is evidenced in this article's summaries of several decisions where Georgia's appellate

[290] Sawnee Elec. Membership Corp. v. Georgia PSC, 544 S.E.2d 158, 160 (2001).
[291] Ga. Mental Health Institute v. Brady, 436 S.E.2d 219, 221 (1993).
[292] Center for a Sustainable Coast v. Coastal Marshlands Protection Committee, 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).
[293] Sawnee Electrical Membership Corp. v. Georgia Public Service Commission, 544 S.E.2d 158, 160-61 (Ga. 2001); Carolina Tobacco Co. v. Baker, 670 S.E.2d 811, (Ga. App. 2008)(turning to Black's Law Dictionary and Webster's for natural and ordinary signification of certain statutory terms).
[294] Georgia Department of Revenue v. Owens Corning, 660 S.E.2d 719, 720 (Ga. 2008). Legislative history of the Clean Air Act Amendments was critical in *Chevron* and the Supreme Court's conclusion that 'stationary source' was ambiguous. Werhan, *supra* note 92 , at 338.
[295] Owens Corning, 660 S.E.2d at 720-21(the supreme court discussed how Georgia's sales and use taxes had evolved since 1951).
[296] *See* cases cited at note 50 *supra.*
[297] *See, e.g.,* Owens Corning, 660 S.E.2d 719 (Ga. 2008) (three judge's dissented and disagreed strongly with the majority's reading of the statute).

judges were in sharp disagreement over the meaning of a statute and whether its terms were or were not ambiguous; the dissents often expressed strikingly different interpretations of the same governing statute.[298]

B. Georgia's Second Step. As a practical matter, the first step, where the governing statute's clarity versus ambiguity is the central issue, is where a litigant challenging agency action will most likely win or lose. 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. This is exactly the way things have played out in the federal courts, with the agency winning the vast majority of the time when a U.S. Court of Appeals gets beyond step one.[299]

With Georgia's strong deference approach, it is very hard for a challenger to win on step two. In fact, in 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.[300] 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 will defer when the interpretation reflects the meaning of the statute and

[298] *See, e.g.*, Sawnee Electrical Membership Corp. v. Georgia Public Service Commission 544 S.E.2d 158 (Ga. 2001)(majority feels statute unambiguous and reversed the agency while the dissent said there was ambiguity and deference was appropriate); City of LaGrange v. Georgia Power Co., 363 S.E.2d 286 (Ga. App. 2008)(majority affirms the agency's interpretation and application of the statute while the dissenting judges asserted that the PSC had misconstrued plain, unambiguous language): Georgia Department of Revenue v. Owens Corning, 660 S.E.2d 719 (Ga. 2008)(the majority found the sales tax exemption statute ambiguous and deferred to the agency while the dissent contended that the exemption was clear and that the agency misconstrued the statute)

[299] *See* notes 34 and 86 *supra* and the articles and studies cited therein.

[300] The thirteen decisions I have categorized as step two cases are Eason (1935), Camp (1939), Belton (1972), Accelerated Real Estate (1975), Kelly (1985), City of LaGrange (1987), Gwinnett Hospital (2004), Owens Corning (2008), Center for a Sustainable Coast (2008), Claborn (2009), City of LaGrange (2009), McKelvy (2009), and Winder HMA (2010).

comports with legislative intent,[301] and to determine reasonableness the Georgia courts sometimes ask whether the agency's ruling or regulation is arbitrary and capricious.[302]

Georgia's courts, like the federal courts,[303] 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.[304]

For instance, in *Eason v. Morrison*, a 1935 decision, the supreme court upheld regulations adopted by the State Board of Barber Examiners as reasonable.[305] 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. It also noted the canon that laws protecting public health should be liberally construed, and observed that barbershops can be the source of infections.[306]

Similarly, in the 2008 *Center for a Sustainable Coast* decision the supreme court said that a regulation promulgated by the Department of Natural Resources regarding the

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[301] Center for a Sustainable Coast v. Coastal Marshes Protection Act, 670 S.E.2d 429, 432-34 (Ga. 2008). *See also,* Eagle West LLC v. Georgia Dept. of Transp., __ S.E.2d __ (Ga. App. 2011)(since 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* at notes 34 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.,* AT&T Corp. v. Iowa Public Utilities Board, 525 U.S. 366 (1999)(Court agrees that the governing statute is ambiguous but concludes that the agency's rules were at odds with a reasonable interpretation of the statute).
[302] Georgia Real Estate Commission v. Accelerated Courses in Real Estate, 214 S.E.2d 495, 498 (1975)
[303] Werhan, *supra* note 92, at 340-41 *discussing,* Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995) *and* AT & T Corp. v. Iowa Utilities Board, 525 U.S. 366 (1999).
[304] *See, e.g.*, City of LaGrange v. Georgia Power Co., 363 S.E.2d 286, 288 (Ga. App. 1987)(Beasley, J. dissenting)(asserting that the agency has misconstrued plain, unambiguous language).
[305] 182 S.E.163 (Ga. 1935).
[306] *Id.* at 165-66.

Coastal Marshes 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.'[307]

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.[308] 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.[309] It also said that ambiguous tax statutes should be construed in favor of citizens.[310]

In the *Owens Corning* case, decided almost 60 years after *Camp*, the supreme court again upheld an agency's interpretation of what the majority deemed to be an ambiguous exemption in a sales tax statute.[311] 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.[312] At the same time, the

[307] Center for a Sustainable Coast v. Coastal Marshes Protection Committee, 670 S.E.2d 429, 433 (Ga. 2008). *See also*, Palmyra Park Hospital v. Phoebe Sumter Medical Center, 714 S.E.2d 71, 79 (Ga. App. 2011)(the court found that the Department of Community Health had not exceeded its authority in its interpretation of the governing statute).
[308] 6 S.E.2d 299 (Ga. 1939).
[309] State v. Camp, 6 S.E.2d 299, 304 (1939)
[310] *Id.* Other decisions have said that pension laws should be liberally construed in favor of employees. McKelvey v. Ga. Judicial Ret. Sys., 678 S.E.2d 120, 123 (Ga. App. 2009)(citing several other decisions).
[311] Georgia Department of Revenue v. Owens Corning, 660 S.E.2d 719, 720 (Ga. 2008).
[312] *Id.*. *See also* Morrison v. Claborn, 669 S.E.2d 492, 495 (Ga. App. 2009).

dissent asserted that the tax statute was clear and unambiguous in providing the tax exemption and that the agency's interpretation was in error.[313]

In *Kelly* case, the supreme court relied on statistics in upholding as reasonable the Insurance Commissioner's ruling that a particular kind of policy fell under a statutory filing exclusion. It was seen as a form "of unique character designed for … insurance upon a particular subject" – the coverage was unique because only 9 companies provided coverage for the 120 contractors in the state.[314]

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

[313] *Id.* at 722-25.
[314] Kelly v. Lloyd's of London, 336 S.E.2d 772, 774 (1985)(citing and discussing OCGA § 33-24-9(a)).

(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.[315]

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 state repeatedly that the "superior court's review of evidentiary issues is limited to determining whether factual findings are supported by 'any evidence.'"[316] 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."[317] The court is to affirm if any evidence on the record substantiates the agency's findings of fact and conclusions of law.[318] 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 an abuse of discretion of clearly unwarranted exercise of discretion."[319] Decisions are not reviewed de novo.[320]

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[315] Ga. Code § 50-13-19(h)(emphasis added).
[316] Board of Regents of the University System of Georgia v. Hogan, 680 S.E.2d 518, 520 (Ga. App. 2009) *citing* Professional Standards Comm. v. Smith, 571 S.E.2d 443 (Ga. App. 2002). *See also,* DeKalb County v. Bull, 672 S.E.2d 500, 501 (Ga. App. 2009).
[317] Board of Regents of the University System of Georgia v. Hogan, 680 S.E.2d 518, 520 (Ga. App. 2009).*citing* City of Atlanta Govt. v. Smith, 493 S.E.2d 51 (Ga. App. 2002). *See also* City of LaGrange v. Georgia Public Service Commission, 675 S.E.2d 525, 527 (Ga. App. 2009); Government of Athens-Clarke v. Public Service Commission, 668 S.E.2d 296, 297 (Ga. App. 2008); Robinson v. Thurmond, 711 S.E.2d 430 (Ga. App. 2011).
[318] Government of Athens-Clarke v. Public Service Commission, 668 S.E.2d 296, 297 (Ga. App. 2008).
[319] City of LaGrange v. Georgia Public Service Commission, 675 S.E.2d 525, 527 (Ga. App. 2009).
[320] *Id. citing* Douglas Asphalt Co. v. Georgia Public Service Commission, 589 S.E.2d 292 (Ga. App. 2003).

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."[321] The superior court and the court of appeals are not allowed to re-weigh those credibility determinations.[322] Accordingly, the superior court and the court of appeals "must view the evidence in the light most favorable to the factfinder's decision and must affirm the decision is there is any evidence to support it, even when the party challenging the factfinder's conclusions presented evidence during the initial proceedings that conflicted with those conclusions."[323]

The relationship between the administrative law judge or hearing officer and the agency is important in regard to an appellate court's review of an agency's decision. The court of appeals has stated that an administrative law judge's role at the hearing is to act as a representative of the agency and make a recommendation. The any evidence standard does not apply to an internal agency appeal; that is, the agency's review of the ALJ's decision. The board or commission can allow the ALJ's recommendation to become the final decision (to affirm) or it can modify or reverse the appealed decision.[324] The Georgia Administrative Procedure Act provides that in reviewing the initial decision of an ALJ the agency "shall have all the powers it would have [had] in making the initial decision and, if deemed advisable, the agency my take additional testimony or remand the case [to the ALJ for that purpose]."[325] The agency must give due regard to the ALJ's opportunity to observe witnesses and credibility assessments,[326] but it is clear that

[321] DeKalb County v. Bull, 672 S.E.2d 500, 501 (Ga. App. 2009) *citing and quoting from* Jamal v. Thurmond, 587 S.E.2d 809 (Ga. App. 2003).
[322] *Id.*
[323] DeKalb County v. Bull, 672 S.E.2d 500, 501 (Ga. App. 2009).
[324] Greene v. Dep't of Community Health, 666 S.E.2d 590, 592 (Ga. App. 2008).
[325] Ga. Code § 50-13-17(a).
[326] *See also* Ga. Code § 50-13-41(d).

agencies, as the ultimate factfinders, are not bound by an ALJ's findings and reviewing courts are not to reject an agency's findings in favor of an ALJ's findings.[327]

Conclusion

Georgia's Supreme Court and Court of Appeals have often said that they defer to agency interpretations of the statutes that they 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 my thesis 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 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 retain the ultimate authority to determine whether or not 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 U.S. Supreme Court offered in *Chevron*; respecting the legislature's explicit and implicit delegation of policy making authority to agencies, acknowledging that agencies have

[327] Greene v. Dep't of Community Health, 666 S.E.2d 590, 592 (Ga. App. 2008).

expertise in particular areas of regulation and have the opportunity to specialize, and recognizing that overbroad review has the effect of substituting a court's judgment for that of the agency thereby nullifying the benefits of the legislative delegation to the specialized body.[328]

[328] *Compare* Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44 & 865-66 (1984) *with* Georgia Real Estate Commission v. Accelerated Courses in Real Estate, 214 S.E.2d 495. 500 (1975); Bentley v. Chastain, 249 S.E.2d 38, 40 (1978); Department of Community Health v. Gwinnett Hosp. Sys., 586 S.E.2d 762, 765 (Ga. App. 2004); Carolina Tobacco Co. v. Baker, 670 S.E.2d 811, 815 (Ga. App. 2008).