Chevron Deference in the States: Lessons from Three States

Carrie Townsend Ingram

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Chevron Deference in the States: Lessons from Three States

By Carrie Townsend Ingram*

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I. *Chevron* Doctrine

The *Chevron* doctrine was established by the U.S. Supreme Court in 1984 and is notably the most influential case in administrative law.\(^1\) The doctrine, also known as *Chevron* deference, considers the judiciary’s role in interpreting a statute which an administrative agency administers.\(^2\) The Court determined that the first question to consider is whether Congress’ intent on the issue is clear.\(^3\) If the intent of Congress is clear and unambiguous, the judiciary and the administrative agency must give effect to Congress’ intent.\(^4\) If, however, the statute is ambiguous or is silent on the issue, the judiciary is to determine if the agency’s interpretation of the statute is a permissible construction of the statute.\(^5\) A court should not impose its own construction on the statute.\(^6\)

A. *Chevron* Explained

The *Chevron* doctrine established a two-step analysis that has been widely utilized when analyzing the appropriate interpretation of a statute that an administrative agency is charged with enforcing.\(^7\) An additional step was added to the analysis by *U.S. v. Mead Corp.* in 2001.\(^8\) This additional step is commonly called *Chevron* Step

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\(^{\text{\textsuperscript{2}}}\) *Id.* at 842.

\(^{\text{\textsuperscript{3}}}\) *Id.*

\(^{\text{\textsuperscript{4}}}\) *Id.* at 842–43.

\(^{\text{\textsuperscript{5}}}\) *Id.* at 843.

\(^{\text{\textsuperscript{6}}}\) *Id.*

\(^{\text{\textsuperscript{7}}}\) *Id.* at 842–43.

\(^{\text{\textsuperscript{8}}}\) *U.S. v. Mead Corp.*, 533 U.S. 218 (2001).
Zero.\textsuperscript{9} \textit{Mead} holds that \textit{Chevron} deference is only appropriate when Congress delegated authority to the agency to make rules carrying the force of law and that the agency interpretation was promulgated in the exercise of that authority.\textsuperscript{10} If Congress has not delegated authority to the agency to make rules carrying the force of law, the courts should then apply deference established in \textit{Skidmore v. Swift and Co.}\textsuperscript{11}

\textbf{B. The Current State of Chevron}

The current controversy of the \textit{Chevron} doctrine often overlooks the facts surrounding the case and the reasoning for the Court’s decision. \textit{Chevron} involved differing interpretations of the term “stationary source,” which was adopted by rule through the Environmental Protection Agency in response to the Clean Air Act Amendments of 1977.\textsuperscript{12} These amendments were a “lengthy, detailed, technical, complex, and comprehensive response to a major social issue.”\textsuperscript{13} The Court humbly recognized that “[j]udges are not experts in the field.”\textsuperscript{14} The judiciary is not a political branch of government that is directly accountable to the people and is not responsible for resolving the struggle between competing views of public interest.\textsuperscript{15} Those responsibilities are vested by the Constitution to the executive and legislative branches of the government.\textsuperscript{16} When Congress is inadvertently silent on the issue or


\textsuperscript{10} \textit{Mead}, 533 U.S. at 226–27.

\textsuperscript{11} \textit{Id.} at 238. See \textit{Skidmore v. Swift & Co.}, 323 U.S. 134, 140 (1944) (“We consider that the rulings, interpretations, and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”).

\textsuperscript{12} Merrill & Hickman, supra note 9, at 859.

\textsuperscript{13} \textit{Id.} at 848.

\textsuperscript{14} \textit{Id.} at 865.

\textsuperscript{15} \textit{Id.} at 866.

\textsuperscript{16} \textit{Id.} (citing Tenn. Valley Auth. v. Hill, 437 U.S. 153, 195 (1978)).
intentionally leaves the issue to be resolved by the agency charged with administering the statute, the Court must determine that it is necessary for the judiciary to defer to an agency’s reasonable interpretation of the statute.\textsuperscript{17}

Justice Antonin Scalia, who wrote the dissent in \textit{Mead}, is a champion for the \textit{Chevron} doctrine.\textsuperscript{18} Justice Scalia wrote that the \textit{Mead} majority opinion collapses the \textit{Chevron} doctrine.\textsuperscript{19} Specifically, any ambiguity left by Congress to agencies is not to be resolved by judges.\textsuperscript{20} The majority holds that the legislative instructions to agencies are to be resolved not by agencies, but instead by judges, which is completely contrary to the intent of \textit{Chevron}.\textsuperscript{21} The dissent states that the flexibility given to administrative agencies will cease with the first judicial resolution of the statute.\textsuperscript{22}

During Justice Gorsuch’s confirmation period, the media was reporting on whether the \textit{Chevron} doctrine would become obsolete.\textsuperscript{23} One year after his appointment, Justice Gorsuch wrote the majority opinion in \textit{SAS Institute, Inc. v. Iancu} and left no doubt that the Court will likely consider this issue, when appropriate.\textsuperscript{24} In \textit{SAS Institute}, the Court considers a statute administered by the U.S. Patent and Trademark Office.\textsuperscript{25} The petitioner, SAS Institute, calls on the court

\begin{itemize}
\item\textsuperscript{17} \textit{Id.} at 865–66.
\item\textsuperscript{18} U.S. v. Mead Corp., 533 U.S. 218, 239 (2001) (Scalia, J., dissenting).
\item\textsuperscript{19} \textit{Id.} at 240.
\item\textsuperscript{20} \textit{Id.}
\item\textsuperscript{21} \textit{Id.} at 243.
\item\textsuperscript{22} \textit{Id.} at 247.
\item\textsuperscript{24} SAS Inst., Inc. v. Iancu, 138 S. Ct. 1348, 1358 (2018) (J. Gorsuch).
\item\textsuperscript{25} \textit{Id.} at 1353–60.
\end{itemize}
to abandon *Chevron*.\(^{26}\) The Court, however, does not take the bait and advises that “whether *Chevron* should remain is a question we may leave for another day.”\(^{27}\) The Court holds that even under *Chevron*, if a statute’s meaning is clear, no deference to the agency’s interpretation is appropriate.\(^{28}\) In this case, the majority opinion found that the statute was unambiguous and had a clear meaning.\(^{29}\) The dissent, delivered by Justice Stephen Breyer,\(^{30}\) states that the statute in question is ambiguous and that more than one interpretation could be made when the terminology is read in harmony with the entire act passed by Congress.\(^{31}\) The justices in the dissent apply the *Chevron* doctrine and give deference to the agency’s interpretation.\(^{32}\)

II. THE THREE STATES

A. Delaware

1. The History of Delaware’s Standard of Review

   A 1947 case from the Supreme Court of Delaware started the chain of events that led to the current standard for administrative agency interpretation of statutes the agency enforces.\(^{33}\) In *Connell v. Delaware Aircraft Industries*, the court made its decision on the case and justified its decision by finding that it was consistent with the administrative agency’s interpretation.\(^{34}\) The court provided a disclaimer that the administrative agency interpretation was not controlling on the judiciary, but the agency interpretation was entitled to some weight unless the interpretation was clearly wrong.\(^{35}\) In

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\(^{26}\) *Id.* at 1358.

\(^{27}\) *Id.*

\(^{28}\) *Id.*

\(^{29}\) *Id.*

\(^{30}\) *Id.* at 1360 (Breyer, J., dissenting, joined by Ginsburg, J., and Sotomayor, J., and joined in part by Kagan, J.).

\(^{31}\) *Id.* at 1362.

\(^{32}\) *Id.* at 1364–65.


\(^{34}\) *Id.* at 645.

\(^{35}\) *Id.*
1979, the Connell disclaimer appeared in Nationwide v. Krongold. The Supreme Court of Delaware again justified an interpretation of a statute by leaning on the interpretation of the administrative agency. In Krongold, the court was comfortable with its interpretation of a section of the Motorist Protection Act because the State Insurance Commissioner, whose office was actively involved in passing the act, interpreted the section of the statute consistent with the court's interpretation.

The Connell disclaimer disappeared from judicial decisions for a few years until it resurfaced in 1994. In the meantime, the standard of review for interpretation of statutes administered by a government agency was being developed. It started not with a case involving an administrative agency interpretation, but with a case involving the standard of review for the interpretation of any statute. In 1985, the standard of review for “construction and the application of law to the facts” was found to be a plenary review in E.I. du Pont de Nemours v. Shell Oil Co.

The Delaware judiciary continued to use a plenary standard of review for interpretation of statutes and extended the plenary standard to statutes that administrative agencies enforce. In 1989, the court decided New Castle County Council v. BC Dev. Associates. This case did not involve an administrative agency, but the court likened the actions of the New Castle County Council to that of an administrative agency. Much like administrative agencies, the New Castle County Council was delegated legislative authority over zoning. The New Castle County Council made a zoning regulation that was adverse to BC Development’s interest. The zoning ordinance was challenged in court and ultimately decided by the

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37 Id.
38 Id.
41 Id.
43 Id. at 1275.
44 Id.
45 Id. at 1271.
Supreme Court of Delaware.46 For a zoning regulation, the court found that “the standard for review is whether the action is in compliance with applicable statutes.”47 The court cited to E.I. du Pont de Nemours and held that there is a plenary standard of review for interpretation of statutes.48 While this case does not directly involve an administrative agency, because the New Castle County Council was likened to an administrative agency, this case was an important development for administrative law in Delaware.

In 1992, the Supreme Court of Delaware was presented with a fact pattern that made it consider its role for interpretation of statutes that an administrative agency administers.49 In Stoltz v. Consumer Affairs Bd., the court held that when reviewing a decision of an administrative agency, the court’s review is plenary when the issue involves construction of statutory law and the application of that law to undisputed facts.50 The standard established by Stoltz was clear, until 1994 when, once again, the Connell disclaimer materialized in Eastern Shore National Gas Co. v. Delaware Public Service Comm’n.51 Only this time, the disclaimer was no longer just a disclaimer, but instead it had transformed into a new standard of review that combined Stoltz and Connell.52 The result was a new standard of review that the court has plenary review of an administrative agency’s decision. The court is not bound by the agency’s conclusion, but the court does give substantial weight to the agency’s interpretation of a statute the agency enforces, unless the interpretation is clearly erroneous.53 The appellate courts began utilizing the Eastern Shore standard and the judiciary gave deference

46 Id.
47 Id. at 1276.
48 Id.
50 Id. at 1207.
to administrative agencies in cases involving interpretations of the statutes the agency was charged with enforcing.\textsuperscript{54}

2. Delaware’s Current Standard of Review

\textit{Public Water v. DiPasquale} recognized the confusion that had been created by the \textit{Eastern Shore} standard of review because it had created two inconsistent standards for statutory construction.\textsuperscript{55} A court cannot have a true plenary review and at the same time give deference to an agency interpretation of a statute it enforces.\textsuperscript{56} As a result, the court overruled the \textit{Eastern Shore} standard of review for statutory construction.\textsuperscript{57} The court established that the judiciary will use a plenary review for statute construction and application to undisputed facts.\textsuperscript{58} The courts were not to defer to agency interpretation of a statute it administers, but may give it due weight.\textsuperscript{59} That weight, however, does not mean that the agency’s statutory interpretation is correct merely because it is rational or not clearly erroneous.\textsuperscript{60} The appellate courts should not provide a higher level of deference to the administrative agency’s legal conclusion than it does to the trial courts’ legal conclusions.\textsuperscript{61} The judicial interpretation may match the administrative agency’s interpretation, but the courts should not confuse the correct standard of review because both interpret and apply the statute the same.\textsuperscript{62} Indeed an administrative agency is a member of the executive branch of government, and statutory construction is the judicial branch’s ultimate responsibility.\textsuperscript{63}


\textsuperscript{56} \textit{Id}.

\textsuperscript{57} \textit{Id.} at 382-83.

\textsuperscript{58} \textit{Id.} at 381; Stoltz Mgmt. Co. v. Consumer Affairs Bd., 616 A.2d 1205, 1208 (Del. 1992).

\textsuperscript{59} \textit{DiPasquale}, 735 A.2d at 382.

\textsuperscript{60} \textit{Id.} at 383.

\textsuperscript{61} \textit{Id.} at 381.

\textsuperscript{62} See \textit{id.} at 383.

However, the Delaware Supreme Court does distinguish between statute and agency regulation interpretation.64 For agency regulation interpretation, courts defer to administrative agency’s regulation construction, unless the construction is clearly erroneous.65 The regulation must be sound and consistent with the governing statute.66 For statute interpretation, the court does not defer to agency interpretation.67

3. Delaware’s Rule Compared to Chevron

The administrative agency in Public Water argued that Delaware should adopt Chevron’s standard of review.68 The Supreme Court of Delaware rejected the administrative agency’s argument.69 In doing so, the court recognized that the Chevron decision was based on the U.S. Supreme Court’s history of deference to administrative agency interpretation of statutes the agency enforced70. No such history of deference existed in Delaware.71 In fact, the issue of administrative agency interpretation of statutes the agency administered did not fully develop until 1992.72 The standard of review was unclear until DiPasquale clearly addressed it in 1999.73

A comparison of the Chevron doctrine is more likely found in Delaware with interpretation of regulations created by an agency.74

67 Id.
68 DiPasquale, 735 A.2d at 383.
69 Id.
70 Id.
72 Stoltz, 616 A.2d at 1208.
73 DiPasquale, 735 A.2d at 382–83.
However, even this standard of review does not mirror that of *Chevron*.'s.\(^{75}\) The Delaware judiciary defers to the agency's interpretation of its regulations, unless the interpretation is clearly erroneous.\(^{76}\) While this standard of review is akin to *Chevron*’s step two, it is lacking two other considerations.\(^{77}\) First, the standard does not require the judiciary to consider *Chevron* step zero, where the legislature has delegated the agency authority to make regulations that are promulgated consistent with the legislature’s delegation.\(^{78}\) Second, the standard does not require the judiciary to consider *Chevron* step one, which necessitates regulatory ambiguity.\(^{79}\) The standard of review for interpretation of agency regulations has not been litigated in the Delaware appellate courts to provide further definition.\(^{80}\)

**B. Indiana**

1. Indiana’s History of Giving Great Weight to State Agencies

Indiana’s change in 2018 to its standard of review for agency interpretation of statutes and regulations\(^{81}\) demonstrates the importance of looking at Indiana’s history on this issue.\(^{82}\) Indiana’s history stems back to 1952 when the Supreme Court of Indiana decided *Blair v. Gettinger*.\(^{83}\) *Blair* involved regulation construction

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\(^{75}\) See *Chevron*, 467 U.S. at 842–43; *DiPasquale*, 735 A.2d at 383 n.9; *Krongold*, 318 A.2d at 609; *Francis*, No. 69, slip op. at 15 n.40.

\(^{76}\) See *Chevron*, 467 U.S. at 842–43; *DiPasquale*, 735 A.2d at 383 n.9; *Krongold*, 318 A.2d at 609; *Francis*, No. 69, slip op. at 15 n.40.

\(^{77}\) See *Mead*, 533 U.S. at 226–27.

\(^{78}\) See *Chevron*, 467 U.S. at 842–43; *DiPasquale*, 735 A.2d at 383 n.9; *Krongold*, 318 A.2d at 609; *Francis*, No. 69, slip op. at 15 n.40.

\(^{79}\) See *DiPasquale*, 735 A.2d at 383 n.9; *Krongold*, 318 A.2d at 609; *Francis*, No. 69, slip op. at 15 n.40.

\(^{80}\) In Indiana, agency regulations are commonly called administrative rules. See IND. CODE § 4-22 (2016). For consistency in this article, rules will be referred to as regulations.


\(^{82}\) State *ex rel.* Blair v. Gettinger, 105 N.E.2d 161 (Ind. 1952).
and application for granting and denying teacher licenses. In that case, the court cited to the famous standard of review established in the 1944 U.S. Supreme Court case, *Boyles v. Seminole Rock*. The Indiana standard of review required that the regulation first be adopted in compliance with the statutory requirements for promulgating regulations. Second, if the regulation was unambiguous, the judiciary should not consider the administrative agency interpretation. If the regulation was ambiguous, “the administrative interpretation of [the regulation] will have much weight unless it is plainly erroneous or inconsistent with the [regulation] itself.”

The *Blair* standard’s application continued and was expanded in 2000. In *LTV Steel Co. v. Griffin*, the Indiana Department of Labor interpreted statutes that the Indiana State Ethics Commission were charged with enforcing. The Indiana Supreme Court found that the appropriate agency to interpret that statute was the State Ethics Commission, not the Department of Labor. The specific standard established was: “[a]n interpretation of a statute by an administrative agency charged with the duty of enforcing the statute is entitled to great weight, unless this interpretation would be inconsistent with the statute itself.” Up until this point, the judiciary had only afforded great weight to an agency’s own regulation interpretation. *LTV Steel* became the case that subsequent decisions cited to for the standard of review concerning agency interpretation of statutes and regulations enforced by that agency.

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84 *Id.* at 161–68.
85 *Id.* at 168.
86 *Id.*
87 *Id.*
88 *Id.*
90 *Id.*
91 *Id.*
92 *Id.*
94 *Ind. Alcohol & Tobacco Comm’n v. Lebamoff Enters.*, 27 N.E.3d 802, 806 (Ind. Ct. App. 2015); Comm’r of Ind. Dep’t of Ins. v. Putman, 98 N.E.3d 98, 104 (Ind. Ct. App. 2018); 255 Morris, LLC v. *Ind. Alcohol & Tobacco Comm’n*, 93
2. Indiana’s Current Standard of Review

*LTV Steel’s* standard of review appeared to be put to a halt in 2018. In *NIPSCO Industrial Group v. Northern Indiana Public Service Co.*, the Indiana Supreme Court, in a unanimous decision written by Justice Slaughter, addressed the issue of statutory interpretation of a statute enforced by an administrative agency. The court held that questions of law are reviewed de novo and provide no deference to the administrative agency’s interpretation. Interestingly enough, to support its standard of review, the court cites to *Marbury v. Madison* and an Indiana Supreme Court case decided in 1999. The Indiana Supreme Court did not just stop at establishing this standard of review; it went on to pontificate about separation of powers:

Separation-of-powers principles do not contemplate a "tie-goes-to-the-agency" standard for reviewing administrative decisions on questions of law. In discharging our constitutional duty, we pronounce the statutory interpretation that is best and do not acquiesce in the interpretations of others. Deciding the scope of the Commission’s authority under the TDSIC Statute falls squarely within our institutional charge. Crafting our State’s utility law is for the legislature; implementing it is for the executive acting through the Commission; and interpreting it is for the courts.

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96 Id. at 239.

97 Marbury v. Madison, 5 U.S. 137, 176 (1803)

98 NIPSCO, 100 N.E. 3d at 241 (“We review questions of law de novo, Ind. Bell Tel. Co. v. Ind. Util. Regulatory Comm’n, 715 N.E.2d 351, 354 (Ind. 1999) (citation omitted), and accord the administrative tribunal below no deference. To do otherwise would abdicate our duty to say what the law is.” (citing Marbury, 5 U.S. at 176)).

99 Id.
The court does not reference the standard of review *LTV Steel* established.\(^{100}\) *NIPSCO* only addresses statutes and makes no mention of the standard of review for regulations that Blair established in 1952.\(^{101}\) The reasoning behind this drastic change in the standard of review are unclear, but this shift mirrors Justice Thomas and Justice Gorsuch’s concerns.\(^{102}\)

A few months after *NIPSCO*, the Indiana Supreme Court decided *Moriarity v. Ind. Dep’t of Nat. Res.*, which also addressed the standard of review for agency statutory interpretation.\(^{103}\) The majority opinion of the court in *Moriarity* held that the standard used in *NIPSCO* was not different than the *LTV Steel* standard.\(^{104}\)

Rather than effecting a sea change in *NIPSCO*, we applied a specific, controlling portion of the same standard we recite today. Both in *NIPSCO* and here, we note that we ordinarily review legal questions addressed by an agency de novo. [*NIPSCO*, 100 N.E. 3d at 241]. In *NIPSCO*, that was our primary focus. *Id.* We did not continue our discussion of the standard of review to address an agency’s interpretation of the relevant statute because there was no need; we found the agency’s interpretation contrary to the statute itself and, thus, necessarily unreasonable.\(^{105}\)

In the dissenting opinion, Justice Slaughter wrote that the *LTV Steel* standard had been “laid to rest for good in *NIPSCO*.\(^{106}\) Justice Slaughter raised significant concerns with separation of powers for

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\(^{100}\) *LTV Steel*, 730 N.E.2d at 1257.

\(^{101}\) *NIPSCO*, 100 N.E.3d at 241; see *State ex rel. Blair v. Gettinger*, 105 N.E.2d 161, 168 (Ind. 1952).


\(^{104}\) *Id.*

\(^{105}\) *Id.*

\(^{106}\) *Id.* at 625 (Slaughter, J., dissenting).
the application of the LTV Steel standard.\textsuperscript{107} Furthermore, providing deference to agency statutory interpretation is in direct conflict with the judiciary’s “‘duty to act as the final and ultimate authority’ in pronouncing Indiana law.”\textsuperscript{108} Despite Justice Slaughter’s concerns, the courts continue to provide a de novo standard of review to agency statute and regulation interpretation, but give great weight to that interpretation unless it is clearly erroneous.\textsuperscript{109}

3. Indiana’s Rule Compared to Chevron

While Indiana’s standard of review may sound comparable \textit{Chevron}, the distinctions are significant.\textsuperscript{110} \textit{Chevron} Step Zero, found in \textit{Mead}, requires Congress to delegate the agency authority to make regulations that are promulgated consistent with such authority.\textsuperscript{111} Indiana does not require that an agency’s interpretation of a statute be promulgated through a regulation, but an agency is not permitted to promulgate a regulation unless it is authorized under the statute.\textsuperscript{112}

\textit{Chevron} requires the judiciary to consider whether Congress’ intent on the issue is clear.\textsuperscript{113} If Congress’ intent is clear, the court and the administrative agency are required to adopt Congress’

\textsuperscript{107} Id. (“These rival standards of review—‘only the best’ vs. ‘reasonable will do’—are not only irreconcilable but proceed from very different visions of the role of the judiciary within our constitutional scheme. NIPSCO regards the judiciary as a vital, co-equal branch within our tripartite system of government with ultimate responsibility for interpreting the law. Today’s decision, however, treats the judiciary as a bit player with a limited role vis-à-vis the other two branches. To be sure, judicial modesty has its place. But we should not confuse modesty with abdication. Our job is to interpret the law fully and faithfully—no more, no less. Today’s standard does much less. It is a standard where judicial review is plenary in theory, deferential in name, and a rubberstamp in fact. We do not give similar deference to other actors who wield executive power. For example, we afford zero deference to prosecuting attorneys, who exercise an essential aspect of the State’s executive power,\textsuperscript{[\textsuperscript{1}]},\textsuperscript{[\textsuperscript{2}]}\textsuperscript{[\textsuperscript{3}]}\textsuperscript{[\textsuperscript{4}]}."

\textsuperscript{108} Id. (quoting Troue v. Marker, 252 N.E.2d 800, 803 (1969)).


\textsuperscript{112} \textit{See} IND. CODE § 4-22 (2016).

\textsuperscript{113} \textit{Chevron}, 467 U.S. at 842–43.
intent. If the language is unambiguous, the court will not consider the administrative agency’s interpretations. There is a distinction between *Chevron* and Indiana’s standard. *Chevron* permits the judiciary to determine if both the statute’s language and Congressional intent are clear. Indiana simply looks at whether the regulations’ language itself is unambiguous, without considering the administrative agency’s intent.

If Congress’ intent is not clear, *Chevron* requires the judiciary to defer to the agency’s interpretation so long as it is a reasonable and permissible interpretation of the statute. In Indiana, the judiciary is to give great weight to the agency interpretation, unless the interpretation is plainly erroneous or inconsistent with the statute or regulation itself. While these standards may sound similar, the distinctions are important. The federal judiciary only considers whether the agency’s interpretation is reasonable and permissible. If it is, courts are required to adopt the agency’s interpretation. In Indiana, courts give great weight to the agency’s interpretation but remain able to adopt its own interpretation.

C. Arizona

1. Arizona’s History of Deference to State Agencies

In 1957, the Supreme Court of Arizona decided *Bohannan v. Corp. Commission of Arizona*. The court was considering a statute...
that an administrative agency was empowered to enforce. The statute was a mere reinstatement of a section in the Arizona state constitution. As a result, the court analyzed the language of the constitution. The court determined that there were two plausible interpretations of the language and therefore the language was ambiguous. In the forty-five years of its existence, the section of the Arizona constitution in question had not been challenged. As a result, the court found that “uniform acquiescence of meaning, if it is not manifestly erroneous, will not be disturbed . . . .” The agency’s interpretation of the statute and constitution was ultimately upheld.

The courts continued to apply the rule established in Bohannan and either gave weight to an administrative agency’s long-standing interpretations of statutes or found that the interpretation was manifestly erroneous. In 1983, the appellate court was charged with interpreting a regulation promulgated by an administrative agency. The court utilized portions of the rule established in Bohannan and clearly established the appropriate standard of review. First, the court must determine if the regulation is ambiguous. If it is, the court must look at the intent of the agency that promulgated the regulation. The responsibility for interpreting

\[126 \text{ Id. at 380.} \]
\[127 \text{ Id.} \]
\[128 \text{ Id. at 380–82.} \]
\[129 \text{ Id. at 381.} \]
\[130 \text{ Id.} \]
\[131 \text{ Id. at 382.} \]
\[132 \text{ Id.} \]
\[133 \text{ See Indus. Comm’n v. Harbor Ins. Co., 449 P.2d 1, 4 (Ariz. 1968) (upholding the administrative agency’s long-standing interpretation of the statute); } \]
\[ \text{Golder v. Dep’t of Revenue, State Bd. of Tax Appeals, 599 P.2d 216, 220 (Ariz. 1979) (reversing the administrative agency’s interpretation of the statute because it was manifestly erroneous).} \]
\[135 \text{ Id. at 510–11 (the court found that the regulation was ambiguous, and deference is given to an agency’s long-standing interpretation of its regulations).} \]
\[136 \text{ Id.} \]
\[137 \text{ Id.} \]
\[138 \text{ Id. at 510.} \]
a statute or regulation ultimately rests with the judiciary.\textsuperscript{139} The court then extended the *Bohannan* rule to regulations and held that deference is given to an agency’s long-standing interpretation of its own regulations.\textsuperscript{140}

In 2004, the Supreme Court of Arizona, in *Arizona Water Co. v. Arizona Dep’t of Water Res.*,\textsuperscript{141} utilized *Chevron* for statutory interpretation. Because the case involved statutory interpretation, the court held that standard of review was *de novo*.\textsuperscript{142} The court found that the statute at issue to be ambiguous and then cited to the second step established in *Chevron* to complete its analysis.\textsuperscript{143} From 2004 to 2017, cases cited to *Arizona Water* and *Chevron* when interpreting statutes and regulations that an agency is charged with enforcing.\textsuperscript{144}

2. Legislative Change in Arizona

The thirteen year streak of the Arizona judiciary providing deference to administrative agencies was sought to be ended by the Arizona legislature in 2018.\textsuperscript{145} On January 17, 2018, a bill was introduced into the Arizona House of Representatives that intended to make all questions of law interpreted by the judiciary, with no

\textsuperscript{139} Id. at 511.

\textsuperscript{140} Id. (referencing Indus. Comm’n v. Harbor Ins. Co., 449 P.2d 1, 4 (Ariz. 1968)).


\textsuperscript{142} Id. at 994.

\textsuperscript{143} Id. at 997.

\textsuperscript{144} See Pima Cty. v. Pima Cty. Law Enf’t Merit Syst. Counsel, 119 P.3d 1027, 1031 (Ariz. 2005) (citing to *Arizona Water* and *Chevron* in finding that “[w]e defer to an agency’s reasonable interpretations of its own regulations.”); Stearns v. Ariz. Dep’t of Revenue, 131 P.3d 1063, 1066 (Ariz. Ct. App. 2006) (citing to *Arizona Water* and *Chevron* to find that the statute was clear and therefore there was no need to defer to the agency interpretation); Sw. Sand & Gravel, Inc. v. Cent. Ariz. Water Conservation Dist., 212 P.3d 1, 9 (Ariz. Ct. App. 2008) (citing to *Arizona Water* and *Chevron* in finding that “[w]e accord great weight to an agency’s interpretation of the statutes it is entrusted to administer.”); Wade v. Ariz. State Ret. Sys., 390 P.3d 799, 803 (Ariz. 2017) (citing to *Arizona Water* and *Chevron* in finding that the language of the statute is clear and therefore deference to the agency interpretation is not warranted).

deference to administrative agencies. Essentially, it appeared as if the bill was written to ensure that the judiciary did not use *Chevron* when interpreting statutes or regulations that administrative agencies were charged with enforcing. The bill was very political and although it passed, it did so primarily along party lines in both the house and the senate, with Republicans favoring the bill and Democrats opposing the bill. The bill was signed into law by Arizona’s Governor on April 11, 2018, and became effective August 3, 2018. The bill amended Arizona Revised Statutes section 12-910(E) and included the following language:

In a proceeding brought by or against the regulated party, the court shall decide all questions of law, including the interpretation of a constitutional or statutory provision or a rule adopted by an agency, without deference to any previous determination that may have been made on the question by the agency. Notwithstanding any other law, this subsection applies in any action for judicial review of any agency action that is authorized by law.

3. Judiciary Interpretation of Legislative Change in Arizona

Six days after Arizona Revised Statutes section 12-910 was amended, the Supreme Court of Arizona, in *Silver v. Pueblo Del Sol Water Co.*, 423 P.3d 348 (Ariz. 2018), issued its first decision utilizing the new standard found in the statute. The case had four opinions: the opinion of the court (hereinafter majority opinion),

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146 *Id.*

147 *Id.*


150 *Id.*


152 *Id.* at 351–61 (Lopez, J., joined by Brutinel, Vice C.J.; Timmer, Gould, JJ.).
an opinion concurring in part and dissent in part ("Bales opinion"),\textsuperscript{153} a second opinion concurring in part and dissenting in part ("Bolick opinion"),\textsuperscript{154} and an opinion concurring in the partial dissents ("Pelander opinion").\textsuperscript{155} The case involved interpretation of a statute that an administrative agency was charged with enforcing.\textsuperscript{156} Specifically, the court was determining the meaning of the term "legally available."\textsuperscript{157}

The majority opinion looked at the statute to determine whether the term "legally available" was ambiguous.\textsuperscript{158} In finding that it was ambiguous, the majority opinion looked to secondary tools of statutory construction to issue its decision.\textsuperscript{159} The specific secondary tool that was primarily used was found in a canon explained in a book coauthored by Justice Scalia.\textsuperscript{160} "According to that canon, if a statute uses words or phrases that have already received . . . uniform construction by . . . a responsible administrative agency, they are to be understood according to that construction."\textsuperscript{161} This language sounds very similar to the rule established in Bohannan;\textsuperscript{162} however, there is no citation to Bohannan or any other Arizona case law established on the premise of the Bohannan standard.\textsuperscript{163} Instead, the majority opinion cites to two cases from the U.S. Supreme Court that apply this canon and give great weight to the longstanding interpretations of statutes by an agency charged with its enforcement.\textsuperscript{164} The recent amendments to Arizona Revised Statutes section 12-910 were briefly addressed by the majority opinion.\textsuperscript{165}

\textsuperscript{153} Id. at 361–66 (Bales, C.J.; joined by Pelander, J., concurring in part and dissenting in part).
\textsuperscript{154} Id. at 366–69 (Bolick, J.; joined by Pelander, J., concurring in part and dissenting in part).
\textsuperscript{155} Id. at 369–70 (Pelander, J., concurring in partial dissents).
\textsuperscript{156} Id. at 354.
\textsuperscript{157} Id. at 351.
\textsuperscript{158} Id. at 355.
\textsuperscript{159} Id.
\textsuperscript{160} Id.
\textsuperscript{161} Id.
\textsuperscript{163} Silver, 423 P.3d at 355.
\textsuperscript{164} Id.
\textsuperscript{165} Id. at 356.
The majority found that although the amendment did not allow the judiciary to give deference to an agency interpretation of a statute, it did not prohibit the legislature from adopting an agency’s interpretation of the language in question. 166 Here, the legislature adopted the agency’s interpretation of “legally available” and as a result, the majority opinion ultimately upheld the agency’s interpretation of the statute. 167

The Bales opinion determined that the term “legally available” was not ambiguous and found that the majority opinion “squints to find statutory ambiguity.” 168 Given the plain language of the statute, no further analysis of the statute was necessary. 169 In addressing the amended language in Arizona Revised Statutes section 12-910, the Bales opinion finds that the majority opinion’s interpretation of the new statute misses the entire point of the amendments. 170 Justice Bales asks the rhetorical question: “If it is objectionable to cede the power to interpret statutes or rules to an agency, isn’t it even more objectionable to cede to an agency . . . the very power to pass statutes by inferring, from legislative silence, an intent to enact preexisting agency regulations?” 171 In answering his own question, Justice Bales determines that the majority opinion has combined “deference and delegation with a vengeance.” 172

Like the Bales opinion, the Bolick opinion finds the term “legally available” to be unambiguous. 173 A concern is raised in the Bolick opinion with the majority opinion’s use of only one of three canons available for statutory construction. 174 The first canon is that a textually permissible interpretation that furthers rather than obstructs that statute’s purpose should be favored. 175 The second cannon is intended to prevent not only the disregard of a provision, but also an

166 Id.
167 Id.
168 Id. at 362 (Bales, J., concurring in part and dissenting in part).
169 Id.
170 Id. at 363.
171 Id.
172 Id.
173 Id. at 366 (Bolick, J. concurring in part and dissenting in part).
174 Id. at 367.
175 Id.
interpretation that renders it pointless.\textsuperscript{176} The third canon is the one that is relied upon by the majority.\textsuperscript{177} The Bolick opinion questions how far the third canon should logically extend.\textsuperscript{178} As an example, the court poses a question of whether the court should give weight to the agency, if its long-term rule was for the Director to determine legal availability by eating a jelly sandwich.\textsuperscript{179} Obviously, a court should not give weight to that methodology, but on the scale of absurdity, how far does the prior construction canon extend?\textsuperscript{180} The Bolick opinion analyzes the term using the first two canons.\textsuperscript{181} It also addresses the amendments to Arizona Revised Statutes section 12-910 and finds that no deference or weight should be given to an agency’s interpretation of a statute.\textsuperscript{182} Given the amendments to Arizona Revised Statutes section 12-910, Justice Bolick is of the opinion that the third canon of construction must yield to the first two.\textsuperscript{183}

The Pelander opinion concurs with the Bales opinion’s view of the term “legally available” as unambiguous.\textsuperscript{184} Assuming, however, that the term is ambiguous, the Pelander opinion concurs with the Bolick opinion on statutory construction.\textsuperscript{185} The Pelander opinion then calls for the legislature to rewrite the statute if the majority opinion is incorrect on the legislature’s meaning of the term “legally available.”\textsuperscript{186}

4. Arizona’s Rule Compared to 

\textit{Chevron}

\textsuperscript{176} \textit{Id.}  
\textsuperscript{177} \textit{Id.}  
\textsuperscript{178} \textit{Id.}  
\textsuperscript{179} \textit{Id.}  
\textsuperscript{180} \textit{Id.}  
\textsuperscript{181} \textit{Id.} at 368–69.  
\textsuperscript{182} \textit{Id.}  
\textsuperscript{183} \textit{Id.} at 368.  
\textsuperscript{184} \textit{Id.} at 369 (Pelander, J. concurring in the partial dissents).  
\textsuperscript{185} \textit{Id.}  
\textsuperscript{186} \textit{Id.} at 370.
The Arizona judiciary has utilized *Chevron* when interpreting acts of Congress.\(^{187}\) Other than that, the standard in Arizona is a mystery. After Arizona’s Governor signed the bill that amended Arizona Revised Statutes section 12-910, it seemed as if there would be some major changes in the way that the judiciary ruled on cases involving agency interpretation of its statutes. Despite that, the majority opinion in *Silver* did not utilize Arizona Revised Statutes section 12-910 as one might expect, given the clear language of the statute.\(^{188}\) Instead, the majority opinion utilized canons of statutory construction and cited a book coauthored by Justice Scalia to justify the position of providing deference to an agency’s long-standing interpretation of a statute.\(^{189}\)

### III. The Future of *Chevron*

#### A. *Chevron* and Separation of Powers

The policy reason to justify the finding in *Chevron* hinged on the concept of separation of powers.\(^{190}\) The theory was that the political branches of government are responsible to a constituency.\(^{191}\) That constituency influences personal policy reasons for statutory change.\(^{192}\) Agencies, in carrying out a statute enacted by Congress, consider the ramifications of the statute at a deeper level.\(^{193}\) If the constituency does not like the statute or the ramifications of the statute, the people can elect new leaders to these two political branches to change the agenda.\(^{194}\) This is not true of the federal judiciary.\(^{195}\) The judiciary does not have a constituency and has a duty to respect the legitimate policy choices of the political branches.


\(^{189}\) *Silver*, 423 P.3d at 354–56.


\(^{191}\) *Id.* at 865.

\(^{192}\) *Id.*

\(^{193}\) *Id.*

\(^{194}\) *Id.*

\(^{195}\) *Id.*
of government. That choices, however, must be legitimate, which the judiciary ultimately determines. Before applying Chevron deference to the agency, the court must first determine that the statute is ambiguous, in other words, the statute has more than one meaning. A judge could be tempted to place an interpretation on a statute that is based upon personal policy preferences, but Chevron limits that power within the judiciary. Instead, Chevron requires that a judge determine if the agency’s interpretation is based on a permissible construction of the statute. If the interpretation is reasonable, the court has a duty to respect agency interpretation and leave the policy making in the hands of the political branches that have a constituency.

While the doctrine of separation of powers might have established Chevron, it might too be its ultimate demise. In 2015, Justice Scalia issued the opinion of the Court in Michigan v. EPA. The Court utilized Chevron, but recognized that “[e]ven under this deferential standard . . . agencies must operate within the bounds of reasonable interpretation.” In applying Chevron, the Court found that the term “appropriate” to be ambiguous and turned to whether the agency made a reasonable interpretation of the term. The Court ultimately found that the agency “strayed far beyond” its bounds and, therefore, the interpretation was not reasonable. In doing so, the Court utilized Chevron, but also put limits on the agency. The Court made it clear that Chevron did not stand for the premise that a “tie goes to the agency,” as the Supreme Court of Indiana suggests, because the Court’s responsibility, under the

196 Id. at 866.
197 Id. at 842.
198 Id. at 843.
199 Id.
200 Id.
201 Id. at 866.
203 Id. at 2707 (citing to Util. Air Regulatory Group v. EPA, 573 U.S. 302, 321 (2014)) (internal quotation marks omitted).
204 Michigan v. EPA, 135 S. Ct. at 2707.
205 Id. at 2708.
system of separation of powers, required it to determine whether the agency’s interpretation was reasonable.\textsuperscript{207} Justice Thomas wrote a compelling concurring opinion in \textit{Michigan v. EPA}.\textsuperscript{208} In it, Justice Thomas raises concerns with whether \textit{Chevron} takes the judiciary’s responsibilities of interpreting the law and gives it to the executive.\textsuperscript{209} Justice Thomas notes that the judiciary is charged with the responsibility of exercising independent legal judgment when interpreting statutes, and \textit{Chevron} requires the judiciary to “abandon what they believe is the best reading of an ambiguous statute” in favor of an agency’s construction.\textsuperscript{210} This was not just about giving power back to the judiciary, because he also raised a concern with Congress delegating its legislative responsibilities to an executive branch agency.\textsuperscript{211} If the Court permits \textit{Chevron} to continue, it must be willing to permit an entity other than Congress to exercise legislative powers, in direct violation of the United States Constitution.\textsuperscript{212} The bigger concern for Justice Thomas was that the agency “felt sufficiently emboldened . . . to make the bid for deference that it did here”\textsuperscript{213} and that the judiciary “seem[ed] to be straying further and further from the Constitution without so much as pausing to ask why.”\textsuperscript{214} To Justice Thomas, it would be prudent for the Court to consider the Constitution before giving deference to any other agency interpretation of statutes.\textsuperscript{215}

Justice Gorsuch raised similar concerns in 2016 when he was on the U.S. Court of Appeals, Tenth Circuit.\textsuperscript{216} In \textit{Gutierrez-Brizuela v. Lynch}, Justice Gorsuch wrote the opinion of the court, but also wrote a concurring opinion.\textsuperscript{217} The case involved an administrative agency interpreting a statute one way in 2005 and a different way in 2007.\textsuperscript{218}

\textsuperscript{207} \textit{Michigan v. EPA}, 135 S. Ct. at 2709–12.
\textsuperscript{208} \textit{Id.} at 2712 (Thomas, J., concurring).
\textsuperscript{209} \textit{Id.} at 2712–13.
\textsuperscript{210} \textit{Id.} at 2712.
\textsuperscript{211} \textit{Id.} at 2713.
\textsuperscript{212} \textit{Id.} at 2712 (citing to U.S. CONST., art. I., § 1).
\textsuperscript{213} \textit{Id.} at 2713.
\textsuperscript{214} \textit{Id.}
\textsuperscript{215} \textit{Id.} at 2714.
\textsuperscript{216} See \textit{Gutierrez-Brizuela v. Lynch}, 834 F.3d 1142, 1142.
\textsuperscript{217} \textit{Id.} at 1143, 1149.
\textsuperscript{218} \textit{Id.} at 1144.
Both interpretations were upheld by the Tenth Circuit because the statute was ambiguous and the agency made a reasonable interpretation of the statute.\textsuperscript{219} The problem in this case happened when the agency sought to apply the 2007 interpretation retroactively upon persons who had relied, to their detriment, on the 2005 interpretation.\textsuperscript{220} The opinion of the court held that an administrative agency cannot promulgate administrative rules and apply them retroactively.\textsuperscript{221} Doing so raises potential violations of due process\textsuperscript{222} and equal protection.\textsuperscript{223}

Justice Gorsuch’s concurring opinion dealt little with the retroactive application of the interpretation of the statute and more with the concerns for separation of powers that \textit{Chevron} had created in this situation.\textsuperscript{224} Justice Gorsuch calls this the “elephant in the room” and considers whether it is time to “face the behemoth.”\textsuperscript{225} Although not specifically stated, the behemoth that has been created is the executive branch through administrative agencies. The violations were more egregious in \textit{Gutierrez-Brizuela} than they were in \textit{Michigan v. EPA}.\textsuperscript{226} Despite that, the concerns raised were similar to the concerns raised by Justice Thomas.\textsuperscript{227}

Justice Gorsuch was concerned that \textit{Chevron} had allowed administrative agencies to overtake powers specifically vested to the judicial and legislative branches of government.\textsuperscript{228} Justice Gorsuch artfully explains his concerns with the executive branch acting in a judicial capacity:

\textsuperscript{219} \textit{Id.}
\textsuperscript{220} \textit{Id.} at 1146.
\textsuperscript{221} \textit{Id.} at 1148.
\textsuperscript{222} \textit{Id.} at 1146 (finding that there was no notice of the interpretation of the law that the agency sought to apply).
\textsuperscript{223} \textit{Id.} (“[I]f the agency were free to change the law retroactively based on shifting political winds, it could use that power to punish politically disfavored groups or individuals for conduct they can no longer alter.”).
\textsuperscript{224} \textit{Id.} at 1149 (Gorsuch, J., concurring).
\textsuperscript{225} \textit{Id.}
\textsuperscript{226} \textit{See id.} at 1144; \textit{Michigan v. EPA}, 135 S. Ct. 2699, 2704–06 (2015).
\textsuperscript{227} \textit{Gutierrez-Brizuela v. Lynch}, 834 F.3d 1142, 1149–58 (10th Cir. 2016); \textit{Michigan v. EPA}, 135 S. Ct. at 2712–14.
\textsuperscript{228} \textit{Gutierrez-Brizuela}, 834 F.3d at 1150–51.
Quite literally then, after this court declared the statutes’ meaning and issued a final decision, an executive agency was permitted to (and did) tell us to reverse our decision like some sort of super court of appeals. If that doesn’t qualify as an unconstitutional revision of a judicial declaration of the law by a political branch, I confess I begin to wonder whether we’ve forgotten what might.229

This language says it all. When the administrative agency is provided with so much power, the consequences are violations of due process and equal protection.230 The checks and balances that the judiciary provide on the executive ensure that those violations are limited.231 The judiciary is designed to look at a law with a different perspective and transferring that power to the executive comes at a cost. That cost has been well documented throughout history with an executive interpreting laws that are unclear and using them to their advantage to exploit its citizens.232

The concern with the executive procuring legislative powers is equally concerning to Justice Gorsuch.233 “When the political branches disagree with a judicial interpretation of existing law, the Constitution prescribes the appropriate remedial process. It’s called legislation.”234 While many believe that the legislative process is laborious, Justice Gorsuch believes that this is the purpose of the constitutional design, the reason for three branches of government, and the reason why all three branches have unique responsibilities.235

B. Lessons from the States

1. Change with Purpose

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229 Id. at 1150.
230 Id. at 1151.
231 Id.
232 Id.
233 Id.
234 Id.
235 Id.
Government employees know all too well that the only constant is change. Changes in the executive bring changes in agenda. Changes in legislators bring changes to the statute. Changes to the statute often bring new case law interpreting those statutes. Changes to statute and case law mean molding the agenda around those changes. The circle is well worn by the long-lived government employee. It is also well known that too often change just requires people to hold their seat and wait for it to unfold.

All three states have had change to its standard of review for interpreting statutes and regulations that an agency is charged with enforcing.\textsuperscript{236} The change in Delaware was clean and defined\textsuperscript{237} Some might like it, some might not, but at least there is little confusion about it.\textsuperscript{238} It is very clear that the review is plenary, and the judiciary does not give deference to agency interpretations of the statutes it enforces.\textsuperscript{239} On the other hand, the change in Indiana and Arizona will require more definition. For example, in Indiana, \textit{NIPSCO} appeared to change the standard established in \textit{LTV Steel}.\textsuperscript{240} However, \textit{NIPSCO}'s lack of reference to \textit{LTV Steel}, allowed the court in \textit{Moriarity} to conclude that \textit{NIPSCO} had not changed the standard of review.\textsuperscript{241} The change in Arizona has clear statutory language, but lacks clarity in application.\textsuperscript{242} The very first decision issued after the change in statutory language resulted in four separate opinions.\textsuperscript{243} The court seemed unsure how to handle this new statute that told the court that it could not defer to agency interpretations of a statute.\textsuperscript{244} The people in both Indiana and Arizona will be forced to wait to see how this unfolds as more definition is provided by the legislature or the judiciary.

\textsuperscript{237} \textit{See id.}
\textsuperscript{238} \textit{See id.}
\textsuperscript{239} \textit{Id.} at 382.
\textsuperscript{243} \textit{Silver}, 423 P.3d at 351, 361, 366, 369.
\textsuperscript{244} \textit{See id.} at 554–56.
The U.S. Supreme Court will need to consider whether it is necessary to make a change. If the Court can work within the bounds of *Chevron*, it probably should. If change, however, is necessary it needs to be made with purpose. The Court might consider looking at the issues that have arose in Indiana and Arizona to determine if it wants to have the lower courts in flux, like they are in Indiana. On the other hand, the Court can pull from Delaware’s experience to ensure that the outcome is clean and addresses all relevant standards.

2. Strong Foundation

Having a strong foundation in a case is key to providing necessary direction and definition. Indiana and Delaware both had cases that made statements that should not have been construed to be the rule but ended up becoming the rule. The strong foundation was not set. In Indiana, *LTV Steel* created an inadvertent rule on a set of facts that were not logically tied to the rule. The facts involved an administrative agency interpreting a statute that a different administrative agency was charged with enforcing. But the rule that has been repeatedly cited is that the judiciary would give great weight to an administrative agency’s interpretation of its statutes. In Delaware, the court attempted to justify its decision by issuing a disclaimer as an afterthought. This disclaimer then seemed to

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245 See Company v. Rev. Bd. of the Ind. Dep’t of Workforce Dev., 113 N.E.3d 1214, 1218 (Ind. Ct. App. 2018) (citing to *NIPSCO* and finding the standard of review to be de novo with no deference to the administrative tribunal); Comm’r of Ind. Dep’t of Ins. v. Schumaker, 118 N.E.3d 11, 20 (Ind. Ct. App. 2018) (citing to LTV Steel Co. v. Griffin, 730 N.E.2d 1251, 1257 (Ind. 2000) and finding that if a statute is ambiguous, deference should be afforded to the administrative agency’s interpretation, so long as it is not inconsistent with the statute itself).


247 *LTV Steel*, 730 N.E.2d at 1257.

248 Id.


250 Connell, 55 A.2d at 645.
surface in cases, which ultimately led to the Supreme Court of Delaware overruling *Eastern Star* because *Connell* was used in a manner that was not logical.\textsuperscript{251}

As the U.S. Supreme Court looks at how it will address issues related to *Chevron* and separation of powers, it will be important to remember the unclarity that might loom from a case that does not provide the proper foundation. In *SAS Institute*, Justice Gorsuch recognized the importance of having the right set of facts to address the concerns he raises in *Gutierrez-Brizuela*.\textsuperscript{252} This strong foundation is the key to providing clarity and direction for the future. Without it, confusion will arise, and future cases will easily be able to distinguish itself to avoid its application.

3. Ignorance is Not Bliss

Ignoring precedent and creating new rules without recognizing or addressing the old can lead to disarray. It remains unclear what will happen in Indiana because *NIPSCO* overlooked the current standard of review in Indiana.\textsuperscript{253} This oversight led to confusion and unclarity to the lower courts.\textsuperscript{254} It is also unclear if this was intentional or not, but the fact that it happened does not go unnoticed. In Arizona, the majority opinion in *Silver*, too, seemed to skirt around the fact that the judiciary had previously given deference to agency interpretation of statutes, unless clearly erroneous, and now the legislature prevented the judiciary from doing so.\textsuperscript{255} The court did this by using canons of construction that were similar to the standard found in *Bohannon*, and by citing to U.S. Supreme Court cases that also used


\textsuperscript{254} See *Company v. Rev. Bd. of the Ind. Dep’t of Workforce Dev.*, 113 N.E.3d 1214, 1218 (Ind. Ct. App. 2018) (citing to *NIPSCO* and finding the standard of review to be *de novo* with no deference to the administrative tribunal); *Comm’t of Ind. Dep’t of Ins. v. Schumaker*, 118 N.E.3d 11, 20 (Ind. Ct. App. 2018) (citing to *LTV Steel Co. v. Griffin*, 730 N.E.2d 1251, 1257 (Ind. 2000) and finding that if a statute is ambiguous, deference should be afforded to the administrative agency’s interpretation, so long as it is not inconsistent with the statute itself).

that canon.\textsuperscript{256} Much like \textit{NIPSCO} in Indiana, this did not go unnoticed.

Ignoring \textit{Chevron}’s existence will not address the valid underlying issues raised by Justice Gorsuch and Justice Thomas.\textsuperscript{257} In certain instances, \textit{Chevron} has invited administrative agencies to truly believe that a “tie-goes-to-the-agency.”\textsuperscript{258} This tie can be stretched to agencies believing it is ok to violate basic concepts of due process and equal protection. It is highly unlikely that this was the intent of the Court when it unanimously issued its decision in \textit{Chevron}.\textsuperscript{259} Executive branch employees need to be mindful of due process, equal protection and other constitution rights in every decision made. If administrative agencies continue to give the judiciary reasons to distrust the executive, \textit{Chevron} will be slowly eroded or outright overruled.

\textbf{IV. Conclusion}

Delaware, Indiana and Arizona have all taken different paths to determine how to interpret statutes and regulations that administrative agencies are charged with enforcing. Each method has come with challenges and obstacles—some good, some bad. Now that Justice Gorsuch is on the U.S. Supreme Court, \textit{Chevron} will be addressed. Based upon him clearly stating in \textit{SAS Institute} that \textit{Chevron} may be an issue to be addressed another day, it is clear that this is on Justice Gorsuch’s mind. It is likely on Justice Thomas’ mind as well. How \textit{Chevron} might change or be limited, whether it will be overruled or whether it will stay the same, is a question for another day. The hope, though, is that the federal government can look to the states for guidance, pulling from the good and learning from the bad. Interpretation of statutes that agencies are charged with enforcing should be something that allows the judicial,

\textsuperscript{256} Id. at 355.

\textsuperscript{257} Michigan v. EPA, 135 S. Ct. at 2712–14; Gutierrez-Brizuela, 834 F.3d at 1149–58.

\textsuperscript{258} See \textit{NIPSCO}, 100 N.E. 3d at 241.

executive and legislative branches to work in harmony, recognizing their responsibilities, knowing their limits, providing checks on each other, honoring their duty under the Constitution and serving this great democracy to protect and honor its constituency.