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THE STANDARDS OF REVIEW FOR AGENCY INTERPRETATIONS OF STATUTES IN WISCONSIN

SALVATORE MASSA*

Historically, the Wisconsin Legislature has delegated to administrative agencies the task of interpreting and implementing many broad mandates through the regulatory process.¹ In many instances, this delegation has led adversely affected parties to challenge an agency's interpretation of a statute in the state court system. Wisconsin courts have analyzed agency interpretations of statutes under varying levels of review, granting an agency great deference in some cases and none at all in others.² This varied approach has created some confusion with how

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1. See George Bunn, et al., No Regulation Without Representation: Would Judicial Enforcement of a Stricter Nondelegation Doctrine Limit Administrative Lawmaking? 1983 Wis. L. Rev. 341, 346. The authors observe that the Wisconsin Supreme Court recognized the legislature's ability to delegate legislative power as early as 1928, when the legislature had given the Insurance Commissioner discretionary authority to disapprove industry regulations that were offered by the insurance industry. The court reasoned:

The power to declare whether or not there should be a law; to determine the general purpose or policy to be achieved by the law; to fix the limits within which the law shall operate-is a power which is vested by our Constitution in the Legislature, and may not be delegated. When, however, the Legislature has laid down these fundamentals of a law, it may delegate to administrative agencies the authority to exercise such legislative power as is necessary to carry into effect the general legislative purpose . . . .

It only leads to confusion and error to say that the power to fill up the details and promulgate rules and regulations is not legislative power.


much deference an agency's interpretation is due.

Nowhere has the standard of review played as critical a role in the outcome of a case as it has in challenges to administrative interpretations of ambiguous statutes. This Article explores the contours of the standard of review for interpretations of statutes by administrative agencies. The first section provides a framework for the rationale supporting a varied standard of review. The second section catalogs the criteria Wisconsin courts apply in determining the appropriate standard of review. The third section illustrates some of the conflicts and difficulties courts have encountered in applying those criteria. The fourth section offers some concluding remarks.

I. THE RATIONALE FOR GRANTING DEFERENCE TO ADMINISTRATIVE AGENCIES

When a court reviews an agency action, it can either defer to the agency or review the action de novo. When it defers, it transfers more of its discretionary and decision-making authority to the agency than when it reviews an agency action de novo. The exercise of judicial deference changes which institution acts as the "decision-maker" for the interpretation of a statute—moving it from courts to administrative agencies. Thus, when a Wisconsin court elects to grant an agency "great deference," an agency's interpretation need only be reasonable for the court to uphold the interpretation. In contrast, under de novo review, a court searches for the most appropriate interpretation of a statute, regardless of the agency's position.

As institutions, courts and agencies each have strengths and
weaknesses which may place one institution in a better position to resolve a particular case. An agency has significant and constant oversight of a body of regulatory law that a court lacks. In addition, an agency interpretation of an ambiguous statute may also possess greater political legitimacy than a court’s interpretation because the legislature may have intentionally left the statute’s meaning open-ended, giving the agency flexibility to choose how to best achieve the policy goal of the legislature. The legislature may elect to leave a statute ambiguous to permit an agency to weigh and balance the political interests involved to reach a compromise unavailable in the legislature. Furthermore, great specificity and detail in statutory language is often burdensome because the legislature may have great difficulty in foreseeing the regulatory issues that may arise—events that agencies are often best equipped to consider. Finally, agencies have vast resources to handle a large volume of administrative cases.

In contrast, courts are generalists, with a broad-based set of legal principles embodied in the common law and experience in reviewing a larger body of statutes. Courts are somewhat removed from the political process that generates legislation. Because of ethical constraints, courts are unable to broker the legislative compromises agencies can reach with the affected interest groups. Moreover, courts have greater constraints in managing growing caseloads. Thoroughly reviewing all administrative decisions would prove quite burdensome on the court system.

7. See Hofer, supra note 2, at 239-40, discussing the institutional advantages and disadvantages of these institutions, used the term "better position." He observed that state agencies may be in a "better position" to determine the meaning of a statute in some instances. Id.

8. See KOMESAR, supra note 5, at 139-40.

9. See id. at 96-97. Komesar, speaking in the context of federal institutions, suggests that delegation can be an "attractive political strategy" because of the ability to satisfy different constituent groups. For example, the legislature may pass a broad mandate for policies supported by environmentalists while allowing the agency to implement the statute in a way that supports industry groups. Thus, "delegation provides a way for congressional representatives to serve both influences." Id. at 96.


11. See KOMESAR, supra note 5, at 142-49.

12. See WIS. STAT. ANN. S.C.R. 20:3.5(b), 60.03 and 60.04(1)(g) (West 1999). See also Judicial Disciplinary Proceedings Against Tessmer, 580 N.W.2d 307 (Wis. 1998).

13. See Matthew E. Gabrys, Comment, A Shift in the Bottleneck: The Appellate Caseload Problem Twenty Years After the Creation of the Wisconsin Court of Appeals, 1998 WIS. L. REV. 1547, 1567. Gabrys notes that the legislature initially anticipated that the court of appeals would adjudicate 1,200 appeals annually. By 1997, 3,763 appeals had been filed with
Both institutions also face different political pressures which may affect the outcomes of their decisions. Because administrative agencies oversee a narrower body of the law, they interact more directly with the interest groups that their policies affect. Thus, interest group lobbying through an agency may be quite effective in shaping that agency's position, even in situations where it may prove to be ineffective in the legislature. In addition, the legislature and the governor may directly pressure the agency to satisfy the needs of constituent groups. Unlike their federal counterparts, Wisconsin state courts are not insulated from the political process. State judges serve finite terms and must eventually campaign for election. Judges face a larger, more broadly based

the court. Since its inception, the court of appeals's caseload has grown 300% while staffing has grown 33%. See id. at 1589. Gabrys concludes that the increased caseload has overburdened the court, requiring added staff. As a symbol of an overburdened court, he points to the correlation between the increase in caseload and an increase in affirmances. See id. at 1593. If Gabry's theory is correct, the addition of more cases reviewing administrative actions would further strain the integrity of the court system.

14. See KOMESAR, supra note 5, at 141. Richard Posner discusses this issue with respect to federal agencies and courts from a law and economics perspective, stating:

The regulatory function could have just as well been delegated to the courts whose traditional role is precisely to formulate and apply rules regulating activities that are often complex, using the criterion of efficiency. One can argue that the case method constrains the rulemaking effectiveness of courts but since most of the agencies have relied heavily on the case method as their legislative technique, the argument provides little basis for preferring agencies to courts. Certainly the agencies have proved more susceptible to political influence than courts. Their more specialized jurisdiction subjects them to closer scrutiny by congressional appropriations subcommittees, through which the political influences that play on Congress are transmitted to the agency, and to closer attention by the industries that the agency regulates. The political independence of agencies is also less than that of judges because their members serve for limited terms and turnover is in fact rapid.


15. Anecdotal evidence of lobbying efforts in the state abounds. For example, the Wisconsin Department of Natural Resources has faced lobbying pressures from various interest groups and influence from the governor and the legislature. See Tom Vanden Brook, Lawmaker Seeks To Restore DNR Autonomy, MILWAUKEE J. SENTINEL, Jan. 22, 1999, at MLWK 2; Ron Seely, Cranberry Boom Has a Downside: Expansion Has Brought Environmental Damage, Wis. St. J., Nov. 22, 1998, at 1A (discussing political clout of cranberry growers in thwarting efforts at environmental regulation).

16. See KOMESAR, supra note 5, at 141; POSNER, supra note 14, at 605. See also supra note 15.

constituency in elections, because they must campaign in the area of their jurisdiction. The need for greater constituent support may make Wisconsin judges less susceptible to the smaller subset of special interest groups that lobbies an agency over a particular statute. And, while supreme court justices enjoy longer tenure in office than state legislators, elections can become quite contentious over politically unpopular decisions.

In addition to the transfers of decision-making ability between courts and agencies, judicial deference or de novo review may also create interplay with other institutions. A court’s review of an agency’s interpretation of a statute can spur the legislature to clarify the statute’s meaning. Similarly, federal institutions may become involved—preempting a state statute or a court’s or agency’s interpretation of one. The interplay with other institutions acts as a critical check in instances where an agency becomes captive to interest groups or the courts become out of touch with the social goals encompassing a particular statute.

Recognizing that comparative advantages exist in different institutions, the court system’s use of deference can act as a device to determine which institution is better suited to decide a particular matter. Indeed, the legislature has specifically instructed courts to give

19. Popular lore suggests that the last supreme court justice incumbent who lost an election, Chief Justice George Currie, was unseated because voters “blamed” him “for casting the deciding vote in a court ruling that allowed in 1967 the Milwaukee Braves to leave Wisconsin.” Daniel Callender, High Court Race: Can Restraint Win War of the Rose, CAP. TIMES, Mar. 20, 1999, at 1A. This election took place in 1967. See also Craig Gilbert, Low-Profile Races Will Have Big Impact, MILWAUKEE J. SENTINEL, Mar. 20, 1999, at MLWK 2.
20. The legislature has sometimes re-evaluated court interpretations of the common law. For example, Fullerton Lumber Co. v. Torborg involved common law principles guiding the reasonableness of the time and scope of a covenant not to compete in an employment contract. 70 N.W.2d 585 (Wis. 1955). The court in Torborg changed its approach to reviewing such contracts. After the decision, the Wisconsin legislature passed a bill which effectively nullified the court’s change of the common law. See WIS. STAT. ANN. § 103A65 (West 1999). This case and the subsequent legislative action are discussed in RICHARD DANZIG, THE CAPABILITY PROBLEM 44-67 (1978).
21. This interaction is quite evident in state cases that address federal pre-emption. See, e.g., State v. Wisconsin Cent. Transp. Corp., 546 N.W.2d 206 (Wis. Ct. App. 1996), aff’d per curiam, 562 N.W.2d 152 (Wis. 1997).
"due weight" to agency interpretations of statutes in light of "the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it."23 Courts have similarly justified deference by recognizing the importance of institutional choice.24 Indeed, courts have often justified the standard of review along two important attributes that capture both the political and practical characteristics of both agencies: (1) the political legitimacy and authority of the agency's determination; and (2) the existence of a comparative advantage of agency expertise over the courts in the specific issue being challenged.

As a prerequisite to granting deference, a court must find that "the agency was charged by the legislature with the duty of administering the statute."25 The court also considers whether "the agency employed its expertise or specialized knowledge in forming the interpretation" to determine how much deference is appropriate.26 When an agency has "some experience" over the disputed statute, but has not acquired an "expertise" that would place it "in a better position to make judgments" than a court, the agency receives less deference.27 However, the court's experience in interpreting a statutory provision diminishes the agency's comparative advantage and reduces the level of deference the agency will receive.28

The other legal factors affecting the appropriate level of deference reflect concern over both the political legitimacy and expertise of the agency. Before granting "great deference" review to an agency, courts


23. WIS. STAT. ANN. § 227.57(10) (West 1999).
24. See, e.g., UFE, Inc. v. LIRC, 548 N.W.2d 57, 61 (Wis. 1996) ("Which level [of deference] is appropriate depends on the comparative institutional capabilities of the court and the administrative agency.") (citation and quotations omitted); Sauk County v. Wisconsin Employment Relations Comm'n, 477 N.W.2d 267, 274 (Wis. 1991) (J. Abrahamson, dissenting) ("[T]he weight that is due an agency's interpretation of the law depends on the comparative institutional capabilities and qualifications of the court and the administrative agency in deciding the issue"); West Bend Educ. Ass'n v. Wisconsin Employment Relations Comm'n, 357 N.W.2d 534, 539 (Wis. 1984); Sawyer Zoning Bd. v. Wisconsin Dep't of Workforce Development, 1999 WL 1059931 *2 (Wis. Ct. App. Nov. 23,1999) (quoting UFE passage cited above).
25. Harnischfeger Corp. v. Labor & Indus: Review Comm'n, 539 N.W.2d 98, 102 (Wis. 1996); see also UFE, 548 N.W.2d at 62 (requiring a finding that "the legislature has charged the agency with the enforcement of the statute in question" before granting an intermediate level of deference).
26. Harnischfeger, 539 N.W.2d at 102.
27. UFE, 548 N.W.2d at 62.
examine whether the agency's interpretation is "long-standing." This "long-standing" requirement addresses the political legitimacy of the agency's interpretation because the legislature would have had a greater opportunity to become aware of the agency's interpretation and to modify it if it did not comport with the legislature's view of the statute. The "long-standing" requirement also reflects a rough estimation of agency expertise, if one is willing to assume that the passage of time engenders specialized knowledge in an agency.

Yet another prerequisite for granting "great deference," that the agency's interpretation "will provide uniformity and consistency in the application of the statute," also reflects the political legitimacy of the agency's interpretation as well as its expertise over the regulatory statutes in its field. An interpretation that provides greater consistency and uniformity within a greater statutory scheme may represent a proxy for legislative intent because it does not contravene or obscure other legislative mandates. Furthermore, such an interpretation suggests that the agency has carefully considered the meaning of the statute in light of the overall goals of the legislation in that field of law.

II. THE WISCONSIN APPROACH TO AGENCY DETERMINATIONS

While the courts have recognized the fundamental institutional question of who is better able to decide a particular matter, formalistic requirements for varying levels of deference exist. This formalistic approach channels the reviewing court's inquiry over various factors that first address the threshold issue of when an agency interpretation of a statute is relevant, and then address which standard is appropriate to the given set of facts. This section is divided into two parts that discuss the legal rules relevant to both steps of this legal inquiry.

A. The Threshold Question: When Deference Becomes Relevant

As a preliminary matter, an agency's interpretation of a statute is an "extrinsic source" used to "determine the intent of the legislature." A

29. Harnischfeger, 539 N.W.2d at 102.
30. See, e.g., Hacker v. Wisconsin Dept' of Health & Soc. Serv., 541 N.W.2d 766, 772 (Wis. 1995); Layton Sch. of Art & Design v. Wisconsin Employment Review Comm'n, 262 N.W.2d 218, 226 (Wis. 1978) ("Long-standing administrative construction of a statute is accorded great weight in the determination of legislative intent because the legislature is presumed to have acquiesced in that construction if it has not amended the statute.")(emphasis added).
31. Harnischfeger, 539 N.W.2d at 102.
32. UFE, 548 N.W.2d at 61.
court's reliance on an extrinsic aid, like an agency interpretation, is unnecessary when the statute is unambiguous. When the statute is unambiguous, a court's interpretation turns on the "plain meaning" of the language. When a court can ascertain a clear, prescient meaning, it will not uphold an agency interpretation that directly contravenes the language of the statute even assuming that the agency's position is granted the highest level of deference. Thus, an agency's interpretation begins to influence a court's interpretation of a statute only when the statute is ambiguous. Ambiguity exists in the language of a statute when "reasonable minds could differ as to its meaning." While the party appealing any agency interpretation may dispute the meaning of statutory language, Wisconsin courts have equated "reasonableness" with "sensible interpretations."

Once a court is satisfied that a statutory provision is ambiguous, the parties face another issue: determining whether the agency in question is the appropriate entity which to grant deference. While agency expertise in a particular matter is the ostensible rationale supporting court deference, formal legislative empowerment to make ultimate legal conclusions as a policymaking entity is a crucial requirement. This distinction is vital in situations where two agencies may implement the same statutory scheme and may challenge each other's views. Because

33. See id. at 60.

34. Id.; MCI Telecomm. Corp. v. State, 553 N.W.2d 284, 288 (Wis. Ct. App. 1996), aff'd 562 N.W.2d 594 (Wis. 1997) ("If the plain meaning is clear, we do not look to rules of statutory construction or other extrinsic aids. Instead, we simply apply the language of the statute to the facts before us." (citing State Historical Soc'y v. Maple Bluff, 332 N.W.2d 792, 795 (Wis. 1983))).

35. See UFE, 548 N.W.2d at 61; Harnischfeger, 539 N.W.2d at 102-03. For an example of a situation where a court finds that the agency interpretation contravenes the clear meaning of the statute, see Lincoln Savings Bank, S.A. v. Wisconsin Dep't of Rev., 573 N.W.2d 522, 528 (Wis. 1998) ("Because we conclude that the transitional rule is clear and unambiguous, we will not give any deference to the Commission's interpretation of [the statute at issue] which directly contravenes that clear meaning.").

36. See UFE, 548 N.W.2d at 60. Nonetheless, sometimes a reviewing court will first determine the deference it accords an agency before determining whether the statutory provision at issue is ambiguous. See, e.g., Coutts v. Wisconsin Retirement Bd., 562 N.W.2d 917, 922 (Wis. 1997). In Coutts, the supreme court opinion determined the appropriate standard of review for the agency before turning to the question of whether the statute is ambiguous. The court stated: "Having determined the appropriate standard of review, we turn next to interpreting the statutory provision at issue in these cases." Id. Furthermore, the court ultimately found the statute at issue to be "unambiguous," but "assume[d] solely for the sake of the inquiry that the statutory language is ambiguous." Id. at 923.

37. Harnischfeger, 539 N.W.2d at 103 (quoted in UFE, 548 N.W.2d at 61).

38. Id.
of specific legislative mandates, reviewing courts may find themselves in the curious position of granting deference to agencies such as the Wisconsin Tax Appeals Commission or the Wisconsin Labor and Industry Review Commission, but unable to grant deference to the Wisconsin Department of Revenue or the Wisconsin Department of Industry, Labor and Human Relations.39

This distinction is also significant in referrals to an administrative body not responsible for administering a statute. For example, a decision rendered by a hearing examiner in the Wisconsin Department of Administration, which provides management assistance to other agencies, will not be granted deference if it opines on the definition of a term in the International Fuel Tax Agreement administered by the Wisconsin Department of Transportation.40 Similarly, courts have refused to grant deference for questions surrounding an agency's jurisdiction over a particular matter.41 And, because intermediate appellate review remains steadfastly focused on the administrative decision, a lower court's conclusion and analysis are never given deference.42

An additional important legal demarcation exists for reviewing "factual" findings of an administrative agency and legal conclusions that rely on statutory interpretation. "Questions of fact concern 'a person's acts, or his [or her] intent in doing such acts,' while questions of law involve 'whether the facts fulfill a particular legal standard.'"43 One


40. See Roehl Transport, Inc. v. Wisconsin Division of Hearings and Appeals, 570 N.W.2d 864, 868 (Wis. Ct. App. 1997). But see Sea View Estates Beach Club, Inc. v. Wisconsin Dep't of Natural Resources, 588 N.W.2d 667, 670-71 (Wis. Ct. App. 1998) (concluding that deference is appropriate to the Division of Hearing and Appeals when an agency formally adopts the decision as it may in Wis. Stat. Ann. § 227.46(3)(a) (West 1999)).


42. Sterlingworth Condominium Ass'n v. Wisconsin Dep't. of Natural Resources, 556 N.W.2d 791, 794 (Wis. Ct. App. 1996).

43. Paul B. Hewitt, Comment, The Scope of Judicial Review of Administrative Agency Decisions in Wisconsin, 1973 Wis. L. Rev. 554, 556 (citing Cheese v. Industrial Comm'n, 123 N.W.2d 553, 557 (Wis. 1963); Milwaukee County v. Department of Indus., Labor & Human
commentator has argued that the distinction between “fact” and “law” represents another form of institutional choice where it is recognized that lower tribunals are more apt at determining “facts” and appellate tribunals are better positioned to determine “law.” Administrative agency adjudications, like those with respect to workers’ compensation determinations, often mix fact-finding with the application of statutes. Where fact-finding ends and legal interpretation begins, however, has sometimes been difficult for Wisconsin courts to discern when reviewing agency determinations. In earlier cases, the distinction between fact and law became so confused that the Wisconsin Supreme Court treated an identical issue as one of fact in one case and one of law in another.

44. See Hofer, supra note 2, at 238. Hofer argues that labels such as “question of fact” and “question of law” have outlived their usefulness in appellate law as a tool for determining the appropriate standard of review. Id. at 250. Instead, Hofer contends, “an appellate court defers to a determination made below when it has reason to believe the lower tribunal was, for whatever reason, in a better position to make that particular determination.” Id. Hofer also cites to State v. Peppin which states:

The rationale behind all appellate review may be fairly characterized in two extremes: an appellate court will defer in large part to a trial court’s determination where the lower court is in a better position to make the determination than is the appellate court; conversely, little or no deference is accorded where the appellate court is as capable of determining the question as is the trial court. Questions of fact are accorded deference because the trial court was present at the reception of evidence and had an opportunity to view the demeanor of witnesses and assess their credibility. . . . Questions of law, on the other hand, are traditionally accorded little or no deference because there is nothing intrinsic to their determination which gives the trial court any advantage over an appellate court.


46. In Madison Teachers, Inc. v. Wisconsin Employment Review Commission, the agency interpreted the applicability of a mandatory collective bargaining statute. 580 N.W.2d 375 (Wis. Ct. App. 1998). The language of the statute required mandatory collective bargaining when labor issues were “primarily related” to “wages, hours and conditions of employment.” WIS. STAT. ANN. § 111.70 (1) (a) (West 1999). The court of appeals concluded that the agency’s decision of whether a particular issue satisfied the “primarily related” language was a factual one. Madison Teachers, 580 N.W.2d at 379.

47. In Department of Taxation v. Pabst, the central dispute involved whether the Pabst family trusts were “administered” within the meaning of a statute. 112 N.W.2d 161 (Wis. 1961). The Wisconsin Supreme Court reviewed the administrative agency’s determination of this issue as one of fact, applying an entirely different standard of review. Two years later in Pabst v. Department of Taxation, the court confronted essentially the same issue: whether a trust had been “administered” under the applicable statute. 120 N.W.2d 77 (Wis. 1963).
Factual determinations are reviewed differently and will be overturned only when "[u]nsupported by substantial evidence in view of the record as submitted." 48 Review under the "substantial evidence" test tips strongly in favor of the agency. Courts will set aside such determinations only if no "reasonable person" could have reached the agency's conclusion. 49 As the Wisconsin Supreme Court explained on one occasion: "Substantial evidence does not mean a preponderance of the evidence. Rather, the test is whether, taking into account all the evidence in the record, 'reasonable minds could arrive at the same conclusion as the agency.'" 50 Thus, court review of administrative findings of facts is uniformly deferential, unlike the more varied approach applied to agency interpretations of statutes.

B. The Three Standards of Review

Wisconsin courts apply three different standards of review to agency interpretations: (1) "great deference"; (2) "due weight"; and (3) de novo. As the name suggests, great deference provides the agency the greatest level of deference while de novo review provides no deference at all. Due weight deference falls between these extremes. This section discusses each level of review, beginning with great deference and concluding with de novo review.

When a Wisconsin court uses the great deference standard of review, judicial review of an agency's interpretation is at its weakest. The court need only determine that an agency's interpretation of a statute is reasonable for the agency's position to prevail. 51 In order to prevail, the party challenging the agency must satisfy the onerous burden of showing that the agency's interpretation is "clearly contrary to legislative intent or it is without rational basis." 52 Thus, even if another, more reasonable

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51. See Harnischfeger, 539 N.W.2d at 102.
52. Id. at 103. The Harnischfeger court also noted that an agency's statutory interpretation could be shown to be unreasonable if it "directly contravenes the words of the statute." Id. See also Lisney v. Labor & Indus. Review Comm'n, 493 N.W.2d 14, 16 (Wis. 1992) ("An agency's interpretation of a statute is reasonable if it accords with the language of the statute, the statute's legislative history, and the legislative intent; if the interpretation is
interpretation of a statute exists, a court will still uphold the agency's interpretation as long as it is reasonable.53

The Wisconsin Supreme Court's decision in *Harnischfeger v. Labor and Industry Review Commission* sets out the present criteria for great deference.54 Courts grant this deferential review only if four criteria are met: (1) the agency is charged by the legislature to administer the statute in question; (2) the agency's interpretation is long-standing; (3) the agency employed its expertise in interpreting the statute; and (4) the interpretation will provide a uniform and consistent application of the statute.55 *Harnischfeger* provides an excellent example of a situation where all four of these factors are present.

The Harnischfeger Corporation challenged the Wisconsin Labor and

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53. See *Harnischfeger*, 539 N.W.2d at 103.

54. 539 N.W.2d 98 (Wis. 1996). *Harnischfeger* represented a departure from earlier cases which had a lower threshold for granting great deference review. The case that *Harnischfeger* cites that provides its criteria for great deference states:

Courts will give varying degrees of deference to an agency's interpretation of a statute when they have concluded that the legislature charged the agency with the duty of administering the statute; that the agency's interpretation is of long standing; that the agency's interpretation entails its expertise, technical competence and specialized knowledge; and that through interpretation and application of the statute, the agency can provide uniformity and consistency in the field of its specialized knowledge.

*Lisney*, 493 N.W.2d at 16 (cited by *Harnischfeger*, 539 N.W.2d at 102). *Harnischfeger* suggested that all these criteria must be met before a court will grant great deference, while *Lisney* did not require all these criteria to be met. The Wisconsin Supreme Court failed to indicate that it was changing the law in *Harnischfeger* and, indeed, cited *Lisney* for the proposition that

> great weight deference is appropriate once a court has concluded that: (1) the agency was charged by the legislature with the duty of administering the statute; (2) that the interpretation of the agency is one of long-standing; (3) that the agency employed its expertise or specialized knowledge in forming the interpretation; and (4) that the agency's interpretation will provide uniformity and consistency in the application of the statute.

*Harnischfeger*, 539 N.W.2d at 102.

55. See *Harnischfeger*, 539 N.W.2d at 102.
Industry Commission's ("LIRC") workers' compensation award and finding that three employees suffered hearing loss as a result of their employment. LIRC interpreted a Wisconsin statutory provision that extended workers' compensation liability when "employment has contributed" to hearing loss, but not for "previous deafness." The statute, however, did not define "previous deafness" or address the threshold question of when "hearing loss" should become compensable. During the mid-1950s, the Department of Industry, Labor and Human Relations developed an administrative rule to clarify compensation for occupational hearing loss. The rule set a threshold requiring a hearing loss exceeding thirty decibels before compensation was appropriate under the Worker's Compensation Act. LIRC developed a system where each loss of a decibel of hearing above thirty decibels would result in an incremental occupational deafness of 1.6%, until the loss reaches 100%. After the adoption of the LIRC rules, the Wisconsin legislature had apparently considered the impact of the rules and let them stand.

Harnischfeger challenged LIRC's application of the statute to employees who had a previous level of hearing loss exceeding thirty decibels. In such cases, LIRC subtracted the previous level of hearing loss from the current level. Thus, an employer hiring a worker with some hearing impairment would not enjoy the thirty-decibel buffer that it would with an employee with perfect hearing.

The Harnischfeger court granted great deference to the agency, reasoning that:

LIRC and its predecessors have long been charged with the duty of administering Chapter 102 [which governs workers' compensation] and have exercised their expertise in analyzing and interpreting its various sections for over 80 years. Furthermore, both Wis. Stat. § 102.555 and the administrative rules which interpreted § 102.555 had—prior to LIRC's decisions in this proceeding—been the subject of active and careful consideration by both the legislature and DIHLR. Finally, LIRC has consistently interpreted § 102.555(8) so as to provide

57. WIS. ADM. CODE § IND 80.25 (1993) (now found in WIS. ADM. CODE. § 80.25).
58. See Harnischfeger, 539 N.W.2d at 101.
60. See Harnischfeger, 539 N.W.2d at 101.
uniformity in the application of Chapter 102.  

Agency challengers attempting to avoid great deference review often argue that the agency interpretation is not long-standing because of altered factual circumstances.  For example, in *Barron Electric Cooperative v. Public Service Commission of Wisconsin*, the party challenging the Public Service Commission’s interpretation of a statute governing electric service extensions to new customers argued that the agency had not decided a case whose facts were wholly analogous in applying the statute.  However, the focus of the court’s inquiry turned more on the length of time the agency had interpreted the statute under various factual settings. The court explained:

The test is not, however, whether the commission has ruled on the precise—or even substantially similar—facts in prior cases. If it were, given the myriad factual situations to which the provisions of chapter 196, Stats., may apply, deference would indeed be a rarity. Rather, the cases tell us that the key in determining what, if any, deference courts are to pay to an administrative agency’s interpretation of a statute is the agency’s experience in administering the particular statutory scheme—and that experience must necessarily derive from consideration of a variety of factual situations and circumstances.

Even when an agency fails to attain great deference review, a court may grant an intermediate level of deference: due weight deference. The Wisconsin Supreme Court has noted that this intermediate level of deference “is appropriate when the agency has some experience in an area, but has not developed the expertise which necessarily places it in a better position to make judgments regarding the interpretation of the

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61. *Id.* at 102 (citations omitted).
64. *Id.; see also Drummond v. Wisconsin Employment Relations Comm’n, 352 N.W.2d 662, 663 (Wis. Ct. App.), aff’d, 358 N.W.2d 285 (Wis. 1984) (concluding that “agency expertise” does not require experience with the exact fact situation—expertise in related fields is sufficient).
65. In the cases, “due weight” is also synonymous with a “great bearing” standard of review. *See Sauk County v. Wisconsin Employment Relations Comm’n, 477 N.W.2d 267, 270 (Wis. 1991).*
statute than a court.”

Given this justification for an intermediate level of deference, it is unsurprising to find that the two criteria for due weight deference are: (1) the agency has gained some experience in administering the statute; and (2) “the legislature has charged the agency with the enforcement of the statute in question.”

Due weight deference extends the scope of review for a court: a court need not defer to an agency’s “reasonable” interpretation if it finds another interpretation which is the “best and most reasonable.” The “important difference” between great deference and due weight deference is that “a more reasonable interpretation overcomes an agency’s interpretation under due weight deference, while under great weight deference, a more reasonable interpretation will not overcome an agency’s interpretation, as long as the agency’s interpretation falls within a range of reasonableness.” Thus, if a reviewing court finds “an alternative interpretation more reasonable,” it is free to reject the agency’s interpretation. However, when the competing interpretations of a statute appear equally reasonable, an agency determination should not be reversed—presumably because the agency is entitled to deference.

The key characteristic defining due weight deference cases is the recognition that but for the paucity of decisions interpreting the statute under various factual settings, the agency’s interpretation would have likely received great deference review. In UFE, Inc. v. Labor and Industry Review Commission, the statute at issue dealt with employer obligations to pay employee health expenses incurred outside Wisconsin for work related injuries. The statute gives employees injured during

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67. Id.
68. Harnischfeger, 539 N.W.2d at 102. The Wisconsin Supreme Court has described this standard of review as “very different than the deference granted to an agency under the great weight standard.” UFE, 548 N.W.2d at 62.
69. UFE, 548 N.W.2d at 63, n.3.
70. Id. at 63.
71. See id. at 63, n.3.
72. The statute at issue provides in part:

Where the employer has notice of an injury and its relationship to the employment the employer shall offer to the injured employee his or her choice of any physician, chiropractor, psychologist or podiatrist licensed to practice and practicing in this state for treatment of the injury. By mutual agreement, the employee may have the choice of any qualified practitioner not licensed in this state. . . . Treatment by a practitioner on referral by another practitioner is deemed to be treatment by one practitioner.
the course of work the right to select a Wisconsin physician to attend to their injuries, and the employer is financially responsible. However, if an employee selects a doctor "not licensed in this state," the employer must consent before becoming liable for the costs of the doctor's services.\textsuperscript{73}

In \textit{UFE}, an injured employee selected a Wisconsin physician who eventually recommended treatment at a clinic in Minnesota.\textsuperscript{74} UFE contended that it had to consent before it could become liable for the employee's medical bills in Minnesota.\textsuperscript{75} However, LIRC disagreed, relying on another provision of the statute which stated that "[t]reatment by a practitioner on referral by another practitioner is deemed to be treatment by one practitioner."\textsuperscript{76} According to LIRC, because the Wisconsin physician referred the employee to an out-of-state clinic, "one practitioner" provided the treatment—the Wisconsin doctor whom the employee had the right to select without employer consent.\textsuperscript{77}

The Wisconsin Supreme Court elected to give the agency due weight deference, reasoning that "[a]lthough it has not developed the expertise and specialized knowledge necessary to be accorded great weight deference, this case is not the first time LIRC has interpreted [the statutory provision]."\textsuperscript{78} After recognizing that the agency had "some experience in determining the proper medical expenses for which an employer is responsible," the court evaluated the Wisconsin legislature's "basic purpose" in enacting the Worker's Compensation Act—of which the statute was a part.\textsuperscript{79} The court noted that the purpose of the Act was "to ensure that employees who become injured or ill through their employment receive the prompt and comprehensive medical treatment that is necessary for their well-being."\textsuperscript{80}

The court then examined both UFE's and the agency's interpretation of the statute in light of the purpose of the statute and concluded that the agency's interpretation "promotes the underlying
The court observed that LIRC's interpretation "allowed employees to more readily receive the treatment that they need." Once an employee selects a Wisconsin physician, that physician has "more flexibility" when deciding the appropriate treatment for the injury "without being concerned that the employer will refuse to consent to the suggested care." And, while UFE apparently made public policy arguments criticizing the agency's position, the court noted that to the extent such arguments have "any merit" they cannot "overcome both the fact that LIRC's interpretation is entitled to due weight deference and the fact that LIRC's interpretation more readily effectuates the purpose of the Act."  

The UFE court's reliance on the "basic purpose" of the Worker's Compensation Act to justify the agency's interpretation demonstrates the expanded scope of review in due weight deference cases that allows a reviewing court to search for more reasonable interpretations of a statute by using other extrinsic sources. While a court is free to use such extrinsic sources whenever a statute is ambiguous, these alternative sources play a greater role when an agency's determination receives less deference. Other due weight deference cases have explored the purpose of a statute or turned to other forms of legislative history to scrutinize the agency's interpretation.

When an agency fails to satisfy the requirements for due weight deference or other circumstances exist that undermine the justification for deference, courts review the agency's interpretation de novo. There are at least five possible circumstances when de novo review becomes appropriate: (1) the agency's decision is one of "first impression"; (2)

81. Id. at 63.
82. Id. at 64.
83. Id.
84. Id.
85. See, e.g., Wisconsin Dep't of Rev. v. Heritage Mut. Ins. Co., 561 N.W.2d 344, 347 (Wis. Ct. App. 1997) (noting that when a statute is ambiguous, a court may "examine the scope, history, context, subject matter, and purpose of the statute.").
86. In Gould v. Department of Health and Soc. Services, the court of appeals examined the purpose of a statute designed to prevent individuals from receiving payments from the Aid to Families with Dependent Children (AFDC) program and Supplemental Security Income (SSI) simultaneously before concluding that the agency's decision was at least equally reasonable to Gould's interpretation. 576 N.W.2d 292 (Wis. Ct. App. 1998); 42 U.S.C. § 602(a)(24)(1994). In Telemark Development, Inc. v. Department of Rev., another case where the court of appeals gave due weight deference to the agency, it examined both the language of the statute at issue and additional legislative history. 581 N.W.2d 585, 590 (Wis. Ct. App. 1998).
the agency is not charged with interpreting the statute at issue; (3) the statute interpreted raises a jurisdictional question, such as the constitutional limits of its conduct; (4) the agency’s prior decisions are so inconsistent that they provide a court little or no guidance; and (5) prior appellate court decisions have interpreted the same statute that the agency has interpreted.

When an agency’s interpretation “is clearly one of first impression,” courts grant de novo review. As the name suggests, in a case of first impression the agency confronts the statutory ambiguity for the first time and can rely on no agency precedent directly on point for its interpretation. Cases of first impression are sometimes difficult to distinguish from cases where an agency has “some experience” and is accorded due weight deference. A fine line exists between due weight deference and de novo review in that due weight deference is appropriate even “if the agency decision is “very nearly” one of first impression.” In Zignego Co. v. Wisconsin Department of Revenue, the court of appeals concluded that due weight deference was appropriate because the legislature had charged the agency, the Tax Appeals Commission, with enforcement of the statute and the agency “had at least one opportunity to analyze that statute and formulate a position.” However, when an agency’s interpretation of a statute rendered other decisions on the same issue that were issued simultaneous to the decision that forms the basis of the case before the court, the agency decision is one of first impression.

De novo review is also appropriate when the legislature has not charged the agency to enforce the disputed statute. This problem arises when a “substitute” agency decides a matter or when two agencies may potentially have overlapping jurisdiction. These situations have been discussed earlier in this Article.

A court may also grant de novo review when an agency’s interpretation of a statute leads it to regulate a new subject matter which raises a jurisdictional issue. The jurisdiction question grows more

87. UFE, 548 N.W.2d at 62.
88. See, e.g., Sauk County v. Wisconsin Employment Relations Comm'n, 477 N.W.2d 267, 277 (Wis. 1991).
89. Tannler v. Department of Health & Soc. Serv., 564 N.W.2d 735, 738 (Wis. 1997).
92. See supra notes 39-40 and accompanying text.
93. See, e.g., Klingeisen v. Department of Natural Resources, 472 N.W.2d 603 (Wis. Ct.
complicated where the agency interprets a federal statute. Generally, Wisconsin courts will conclude that the legislature has charged an agency with interpreting a federal statute when the agency’s mission is related to implementing federal laws. Thus, no jurisdictional problem exists when the Department of Health and Social Services interprets federal directives for Aid to Families with Dependent Children programs or the Department of Revenue interprets portions of the federal tax code as they affect the Wisconsin taxing scheme.

With that said, some difficulty arises when a state agency begins to interpret its jurisdictional bounds under federal statutes. For example, in *American Family Mutual Insurance Co. v. Wisconsin Department of Revenue*, the court of appeals refused to grant deference to the Tax Appeals Commission’s decision interpreting a federal statute which barred taxing practices that favored state tax exempt bonds over federal ones. The effect of the commission’s decision would have expanded the potential reach of the Wisconsin Department of Revenue’s taxing authority and interpreted the scope of taxing immunity under the United States Constitution.

Courts have also held that de novo review is appropriate when an agency’s “position on an issue has been so inconsistent so as to provide no real guidance.” *Marten Transport, Ltd. v. Department of Industry*, App. 1991). The court of appeals reviewed the agency’s determination that it had jurisdiction to regulate de novo “[b]ecause a question of law is involved and there is no evidence in the record or by reported cases of the [agency’s] special expertise in determining jurisdiction in this case of first impression.” See id. at 605.

94. Some earlier cases adopted the view that agencies should be reviewed de novo when the dispute involved an interpretation of a federal statute. See, e.g., *Swanson v. Department of Health & Soc. Serv., 312 N.W.2d 833, 835 (Wis. Ct. App. 1981).*


97. The bar against state taxation of federal obligations codified in 31 U.S.C. § 3124(a) has been described by the United States Supreme Court as a “restatement of the constitutional rule . . . of tax immunity established in *McCulloch v. Maryland.*” Memphis Bank & Trust Co. v. Garner, 459 U.S. 392, 397 (1983) (quoted in *American Family, 571 N.W.2d at 714*).

98. *UFE, 548 N.W.2d at 62; see also Coutts, 562 N.W.2d at 921; Marten Transp., Ltd. v. Department of Indus., Labor & Human Relations, 501 N.W.2d 391, 394 (Wis. 1993).*
Labor and Human Relations provides an illustration of a case where this scenario exists. In Marten, an administrative law judge issued a decision that awarded back pay, reinstatement and other relief to a former employee of Marten. The administrative law judge ("ALJ") found that Marten had discriminated against the former employee in violation of the Wisconsin Fair Employment Act and that the back pay and reinstatement award was appropriate even though the employee had left Marten voluntarily. Marten appealed to an agency review board, and the board affirmed the ALJ's decision.

Two months later, the agency reached the opposite result in another case, concluding that neither an award of back pay nor reinstatement was an appropriate remedy when a former employee who suffered discrimination was not discharged. The agency did little to explain or justify the reversal of its previous position in the subsequent administrative proceeding. In viewing the two rulings, the court said, "Although LIRC awarded back pay and reinstatement in the present case, LIRC did not award either [in the subsequent agency decision]. Such inconsistency leads us to give no weight to either decision."

While inexplicable changes in an agency's position over the interpretation of a statute have led courts to grant de novo review, agency modifications of existing policies that have a reasoned basis are not treated in the same manner.

Courts may view such changes in agency position as a modification or a reasonable extension of an existing policy and may grant due weight or great weight deference.

Finally, "no deference is given to an agency's interpretation of a statute when that interpretation conflicts with a prior appellate

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99. 501 N.W.2d 391.
100. WIS. STAT. §§ 111.31 - 111.395 (1993-94).
101. The court of appeals and supreme court decisions in Marten both fail to discuss any agency justifications for the disparate outcomes in the administrative proceedings. See Marten Transp., Ltd. v. Department of Indus., Labor & Human Relations, 491 N.W.2d 96 (Wis. Ct. App. 1992), rev'd, 501 N.W.2d 301 (Wis. 1993).
102. Marten, 501 N.W.2d at 393. Significantly, the court also noted another factor that may have led to de novo review: the agency's withdrawal of its brief supporting the administrative decision in Marten. See id. at 394.
103. See, e.g., Jefferson County v. Wisconsin Employment Relations Comm'n, 523 N.W.2d 172, 175-76 (Wis. Ct. App. 1994). It should be noted, however, that the party challenging the agency's interpretation sought de novo review on the grounds that the agency's decision was one of "first impression." The court of appeals disagreed because the agency's interpretation "represent[ed] a modification or extension of a rule the [agency] has long followed, and the modified rule itself has been in existence and applied for nearly a decade." See id. at 176.
decision." Under these circumstances, the court determines de novo whether the agency properly applied the holding of the appellate decision. Because the courts have addressed the statute previously, the agency is bound by these precedents unless the legislature rewrites the statute or the courts modify their interpretation. Thus, an agency interpretation that is "inconsistent with...judicial authority...is, by definition, unreasonable." Heightened scrutiny to determine the agency's application of appellate court precedents seems logical, even if the agency has significant experience in administering the statute.

III. DIFFICULTIES WITH THE FORMALISTIC APPROACH

While the formalistic approach has identified several factors that consider the institutional strengths and weaknesses of courts and agencies, the factors form a complex set of rules that obscure the institutional issues. Rather than examining the institutional questions surrounding a particular case, the courts have applied the factors rigidly, often trying to fit proverbial "square pegs" into "round holes." Invariably, this approach has created conflicts in the case law over such matters as whether a particular agency interpretation is one of first impression requiring de novo review or, alternatively, one based on some experience permitting due weight deference.

Cases that have reviewed statutory interpretations of the Tax Appeals Commission illustrate this particular tension. In Zignego, a case discussed earlier, the court of appeals concluded that the agency was entitled to due weight deference because it had at least one prior opportunity to analyze the statute at issue and formulate a position. In

104. Local 60, Am. Federation of State, County and Mun. Employees v. Wisconsin Employment Relations Comm'n, 579 N.W.2d 59, 62 (Wis. Ct. App. 1998); see also Doering v. Labor & Indus. Review Comm'n, 523 N.W.2d 142, 144 (Wis. Ct. App. 1994) (noting that "it is well established that the general deference given to an agency's application of a particular statute does not apply when the agency's determination conflicts with prior case law established by our supreme court").

105. See Local 60, 562 N.W.2d at 62.

106. As the supreme court noted, an agency's interpretation should "not conflict with the statute's legislative history, prior decisions of this court, or constitutional prohibitions." Pabst v. Wisconsin Dep't of Taxation, 120 N.W.2d 77, 82 (Wis. 1963).

107. Local No. 695 v. LIRC, 452 N.W.2d 368, 372 (Wis. 1990); also cited in Jefferson County, 523 N.W.2d at 175.

108. See supra notes 90-91 and accompanying text. Another unpublished opinion from the court of appeals follows the logic of Zignego, concluding the Tax Appeals Commission had previously interpreted the statutory provision at issue. See Ameritech Mobile Communications, Inc. v. Wisconsin Dep't of Rev., 1997 WL603432 (Wis. Ct. App. 1997). And, although that prior commission decision "did not decide the precise question at issue in
another case challenging the Tax Appeals Commission's interpretation of a statute, the appellate court went further and granted the tax appeals commission due weight deference in *Wisconsin Department of Revenue v. Heritage Mutual Insurance Co.*, "recognizing that the issue [presented] is one of first impression." 109 *Heritage Mutual* involved the commission's interpretation of a state "add back" provision for a federal tax deduction that is computed for state tax purposes. 110 The court observed that the agency's clarification of the ambiguity in the statute "invokes the agency's expertise and experience in construing the tax laws generally, and the interrelationship between the federal and state tax laws specifically." 111 The court justified this standard of review for the commission's jurisdictional powers, stating that it "has primary responsibility for policy determinations." 112

*Zignego* and *Heritage Mutual* suggest that the threshold for "some experience" is met when the commission has considered one prior analogous case or has extensive experience in promulgating a statutory scheme that generally requires the interpretation of a federal statute. However, the supreme court held exactly the opposite in *La Crosse Queen, Inc. v. Wisconsin Department of Revenue*, 113 which involved an interpretation of the term "interstate commerce" in a taxing statute. 114 It wrote:

> [T]his court will accord due weight [deference] to an agency decision where the agency possesses particular expertise in an area of law. In the case at bar, the Commission possesses no special expertise because it has faced the task of interpreting the term "interstate commerce" in light of [a Wisconsin statutory provision] on only one previous occasion. Therefore we owe the

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110. *See* Wis. STAT. § 71.45 (2) (1987-88).
111. *Heritage Mut.*, 561 N.W.2d at 347.
112. *Id.* Another earlier case, *Wisconsin Dep't of Rev. v. Lake Wisconsin Country Club*, follows a similar rationale stating that the court "should" defer to the Tax Appeals Commission because the legal question is "intertwined with value or policy determinations" even though the commission's interpretation was one of first impression. 365 N.W.2d 916, 918 (Wis. Ct. App. 1985).
113. 561 N.W.2d 686 (Wis. 1997).
114. WIS. STAT. ANN. § 77.54(13) (West 1999).
decision of the Commission no deference.\textsuperscript{115}

Courts are similarly mired in the question of whether an agency’s decision is “longstanding”—a critical requirement for great deference review. As the court of appeals observed in Barron Electric, an agency need not rule on the “precise” or even a “substantially similar” factual situation for an interpretation to be longstanding.\textsuperscript{116} Instead, a court should examine whether “the agency’s experience in administering the particular statutory scheme” is derived “from consideration of a variety of factual situations and circumstances.”\textsuperscript{117} Yet, in Local Number 695 v. Labor and Industry Review Commission—a case decided prior to Harnischfeger—the supreme court reached the opposite conclusion.\textsuperscript{118}

Local Number 695 involved a dispute over whether refunds of union dues and reimbursement to union stewards for work time lost because of union duties were “wages subject to the contribution requirements of the unemployment compensation law.”\textsuperscript{119} The commission concluded that such forms of compensation were “wages” under § 108.02(26) of the Wisconsin Statutes.\textsuperscript{120} It cited “no legal authority” and had never addressed squarely the question of whether such reimbursements to union stewards were “wages.”\textsuperscript{121} In addition, through the appeals process, both in the courts and the agency, each tribunal overruled the one below it.\textsuperscript{122} From these facts, the majority opinion in Local Number 695 concluded that the “standard of review must necessarily be de novo.”\textsuperscript{123}

However, as the dissenting opinion in Local Number 695 notes, the commission had extensive experience in determining what constituted “wages” in a variety of cases as far back as the 1940s.\textsuperscript{124} The dissent

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\bibitem{115} 561 N.W.2d at 688 (citations omitted) (emphasis added).
\bibitem{117} \textit{Id.}
\bibitem{118} 452 N.W.2d 368 (Wis. 1990).
\bibitem{119} \textit{Id.} at 371.
\bibitem{120} The relevant part of the statutory language reads: “Wages means every form of remuneration payable for a given period . . . to an individual for personal services.” Wis. STAT. § 108.02(26) (1985-86).
\bibitem{121} Local No. 695, 452 N.W.2d at 371.
\bibitem{122} \textit{See id.} at 372.
\bibitem{123} \textit{Id.}

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concluded that the commission had "expertise in applying the statutory definition of wages and that the application of the statutory definition of wages to the facts of this case is intertwined with the facts of the case and values and policy determinations."125 Under the analysis of Barron Electric, the court should have adopted the dissent's position because the commission had extensive experience in administering this particular provision and, over the years, it had interpreted the statute under "a variety of factual situations and circumstances."126

Courts have also ignored the impact of certain criteria to determine which level of deference is appropriate. For example, while some of the cases have held that de novo review of an agency interpretation of a statute is appropriate when the appellate courts have previously interpreted the statute,127 other courts have disregarded this exception and have granted some deference to the agency's interpretation.128 In Margoles v. Labor and Industry Review Commission, a case involving a statutory provision that the court of appeals had interpreted eight years earlier, the court granted the agency great deference.129 In another case granting great deference to LIRC, the court of appeals found the agency's interpretation of the statute at issue unreasonable, stating:

We are mindful of our obligation to give great weight deference to LIRC's decision, but affirming its logic in this case would totally eviscerate the statute's exception and case law interpreting it... As the supreme court cautioned in [a case decided the prior year], that is not the current state of the law.130

Even if one concedes that the legal outcome is the same however the court chooses to interpret the impact on the standard of review in its own prior case law, this approach provides little assistance to future

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125. Local 695, 452 N.W.2d at 374 (dissenting).
126. Barron Elec., 569 N.W.2d at 732.
127. See supra notes 100-02 and accompanying text.
128. See, e.g., Sauk County v. Wisconsin Employment Relations Comm'n, 477 N.W.2d 267, 272 (Wis. 1991) (granting great deference to WERC's interpretation of a statute in spite of county's claim that WERC misinterpreted prior case law that dealt with the same statute). See also Margoles v. Labor & Indus. Review Comm'n, 585 N.W.2d 596 (Wis. Ct. App. 1998); Kannenberg v. Labor & Indus. Review Comm'n, 571 N.W.2d 165, 172 (Wis. Ct. App. 1997) ("LIRC has developed experience and expertise in deciding claims of sexual harassment under the [Wisconsin Fair Employment Act], using the standards from federal cases . . . .").
129. 585 N.W.2d at 599 (Wis. Ct. App. 1998).
litigants in cases that fall into more uncertain legal waters. Compounding this particular problem even more, other courts have declined to determine the appropriate standard of review entirely. Instead, these courts have analyzed cases on the premise that the outcome would be the same under any standard of review.131

Underlying the inconsistent application of the formalistic approach in the cases is a recognition by the courts that this approach fails to capture the true institutional interaction between courts and administrative agencies. Many cases have also considered another relevant factor of whether to grant deference in addition to those applied in Harnischfeger and UFE. Addressing this alternate factor in West Bend Education Association v. WERC, the Wisconsin Supreme Court stated that where “a legal question is intertwined with factual determinations or with value or policy determinations... a court should defer to the agency which has primary responsibility for determination of fact and policy.”132 Subsequent cases have repeated this factor as a consideration in determining the appropriate standard of review.133 This factor extends beyond other formal distinctions in the standard of review, such as that between “question of fact” and “question of law.”134 However, this approach is inherently institutional; it recognizes that an administrative agency may be in a better position to determine the meaning of a statute that has significant policy ramifications.

Other cases discuss the standard of review question with an even greater emphasis on institutional choice. As discussed earlier, the La Crosse Queen court confronted a situation where the Tax Appeals Commission had extended its taxing authority in its interpretation of


132. 357 N.W.2d 534, 539-40 (Wis. 1984). This passage is similarly cited in Sauk County, 477 N.W.2d at 270.

133. See, e.g., Kannenberg, 571 N.W.2d at 171; Barron Elec., 569 N.W.2d at 731 (“We will also pay great deference to an agency’s interpretation ‘if it is intertwined with value and policy determinations’ inherent in the agency’s decisionmaking function.” (citation and quoted source omitted)); Sterlingworth Condominium Ass’n v. Department of Natural Resources, 556 N.W.2d 791, 798-99 (Wis. Ct. App. 1996). These cases do not agree on the appropriate standard of review when the agency interpretation is indeed intertwined with a policy or value judgment. The Barron court suggested great deference, while others have granted due weight deference. See, e.g., Department of Rev. v. Heritage Mut. Ins. Co., 561 N.W.2d 344, 347 (Wis. Ct. App. 1997) (applying due weight deference and stating “[b]ecause the [agency] has primary responsibility for policy determinations, we conclude that the agency determination is properly accorded some degree of deference”).

134. See supra notes 43-50 and accompanying text.
“interstate commerce.” The commission had decided the same issue in one prior decision. However, the La Crosse Queen court specifically observed that the agency “possessed no special expertise.” Significantly, the commission had interpreted a widely used legal term which the Wisconsin courts have applied for years. In reviewing the commission interpretation de novo, it is clear that the court concluded that the agency had no institutional advantage over it to ascertain the meaning of the statute.

In another case, the supreme court also viewed the issue of the appropriate standard of review through an institutional perspective. In Byers v. LIRC, the court conceded that the agency had some experience in interpreting the statute at issue, but decided not to accord deference. As the court explained:

In some cases involving issues of statutory interpretation the courts give deference to the interpretation of the administrative agency because of the agency’s expertise in the area. But although [the agency] has experience in resolving questions about the exclusive remedy provision of the [Wisconsin Fair Employment Act] the courts also have significant experience with this subject matter.

In yet another supreme court case that discusses de novo review, the court noted that if it has expertise equal to an agency, no deference should be accorded to the agency’s determination. Thus, while the

135. See supra notes 109-11 and accompanying text.
136. 561 N.W.2d at 688.
138. 561 N.W.2d 678 (Wis. 1997).
139. Id. at 680 (citations omitted) (emphasis added).
140. See Coutts v. Wisconsin Retirement Bd., 562 N.W.2d 917, 921 (Wis. 1997). The court, however, treated the question of whether an agency’s determination is “clearly one of first impression” and the issue of the agency’s expertise relative to the court as two different matters. The court held:

An agency's interpretation of a statute will be reviewed de novo if any of the following are true: (1) the issue before the agency is clearly one of first impression; (2) a legal question is presented and there is no evidence of any special agency
formalistic approach may provide a proxy for how a court should review an agency interpretation, it does not mirror it.

IV. CONCLUSION

Recognizing that state agencies may have a comparative advantage over courts in interpreting ambiguous statutes in certain contexts, Wisconsin courts have accorded agencies deference in certain circumstances. In the determination of the appropriate level of deference, a complex set of cases has evolved that emphasize multifactored legal rules for three different standards of review. These legal rules represent a formalistic approach that strives to select the institution in the better position to determine the meaning of an ambiguous statute. However, these rules represent a rough proxy for an institutional comparison. As a result, courts have sometimes elected not to follow the logical outcome of the rules, because the rules sometimes fail to recognize which institution is in a better position to interpret the statute.

Putting aside the various rules of the formalistic approach and its apparent conflicts, the decision of whether a court should grant deference to an administrative agency is primarily one of institutional choice that requires two separate inquiries. One concerns authority and the other concerns experience. The first inquiry begins with the question of whether the legislature has conferred upon the agency the authority to interpret and enforce the statute. The formalistic approach addresses this concern by considering such factors as whether the

expertise or experience; or (3) the agency's position on an issue has been so inconsistent that it provides no real guidance.

Id. at 239-40 (observing that state agencies may be in a "better position" to determine the meaning of a statute). Hofer states:

"Better position" may also account for a notable exception to the principle that appellate courts do not defer to lower tribunals on questions of law. Where an administrative agency has significant expertise in applying a statutory concept to a concrete fact situation, the court reviewing that decision should give weight to the agency's value judgment. Here, the initial tribunal's better position is not based upon its witnessing some particular litigant, witness, or trial. Rather, deference is paid to expertise developed through an agency's experience in implementing the statute. Hence, an administrative agency may be put in a better position than an appellate court by virtue of the agency's repeated administering of a statute.

Id. at 240.
legislature charged the agency to administer the statute and whether the interpretation will provide a uniform and consistent application of the statute. If the evidence indicates that no such delegation has occurred, no deference should be given. If, however, administration of the statute does fall within the ambit of the agency's authority, the court must then examine whether the agency has had more experience in interpreting the statute than the court has had. When a court has had greater experience in interpreting the terms of the statute or the general principles that apply to the statute from previous cases, no deference should be given to the agency's interpretation. However, courts should defer to an agency when it is better placed to interpret the statute.

The formalistic approach recognizes a number of scenarios under which an agency may be in a better position to interpret the statute. The agency's specialized expertise may make it better qualified to interpret the statute than a court that is by nature a generalist. Thus, whether an agency's interpretation of the statute is longstanding and based on its experience is clearly relevant.

However, the formalistic approach fails to adequately capture all the situations where deference should or should not be applied. Courts have often reached divergent results in very similar cases. Moreover, the three tiers of deference under the formalistic approach magnify the complexity of the review process. An approach that more directly addresses the institutional issues could only lift the shroud of fog that obscures this field of law.