

The End of Deference: How States (and Territories and Tribes) Are Leading a (Sometimes Quiet) Revolution Against Administrative Deference Doctrines

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Deference doctrines such as *Chevron* and *Auer* continue to receive attention and criticism by members of the judiciary including members of the Supreme Court. In *Kisor*, the Supreme Court recently considered whether to overturn *Auer* and stop deferring to administrative interpretations of their own regulations. Supporters of deference to administrative agencies issued dire warnings that without deference the administrative state would be unable to properly function. Ultimately, a fractured Supreme Court issued a decision which retained *Auer* deference, but sharply limited the circumstances when it would apply.

However, while the Supreme Court has chosen incremental reform rather than a more dramatic rejection of deference doctrines, several states in recent years have made a different and more dramatic decision. At least eight state supreme courts have issued decisions that seem to reject either *Chevron* or *Auer* like deference (or both). And at least two more states have rejected deference via legislation or referendum. There are also other signs that the anti-deference momentum is continuing at the state level. Vocal deference critics have increasingly popped up on several state supreme courts. Other states have followed the incremental pathway of the Supreme Court in growing increasingly skeptical towards claims of deference. All of this can be described as a (sometimes quiet) revolution.

Despite all of these changes, at the time when I first wrote this article there had not been an article conducting a thorough state-by-state survey of state deference doctrines since 2008.¹ This article fills in that significant gap.²

¹ See Michael Pappas, *No Two-Stepping in the Laboratories: State Deference Standards and Their Implications for Improving the Chevron Doctrine*, 39 McGeorge L. Rev. 977, 987 (2008). Having a more detailed and up to date roadmap is a necessary first step for further scholarship, and so I hope that this article will inspire more scholarship on deference at the state level. In particular, proponents of deference often argue that without deference the administrative state will struggle to operate in an increasingly complex world. Does agency experience in states that have rejected deference bear out the skeptics concerns? On the other hand, deference critics have argued that the elimination of deference will inure to the benefit of individual liberties. Is there evidence that bears out these conclusions? Comparing the outcomes of similar states that have different attitudes towards deference might provide some of the answers.

² After this article was originally published in draft form on SSRN, Luke Phillips a student at the University of Mississippi published a student note which similarly conducted a 50 state survey. Phillips article is valuable and I have consulted it and made a few refinements to my list as a result. . Having two surveys shows some of the challenges in coding how states engage in deference and consulting both articles will give practitioners in any given state a better sense of the lay of the land. We largely agree on the substance even if we differ on our labels. But there are a few places where I think that Philips conclusions are not sustainable and may be likely to mislead anyone relying on his study. I refer to Philips article in places where our categorizations meaningfully diverge.

This article offers a few things that Phillips article does not. First of all, I more thoroughly examine the shift away from deference in the states that have abandoned it since 2008 and place these decisions in the context of federal decision making on *Chevron*. Second, grouping the states into categories rather than a list of states allows for similar states to be analyzed together and placed in broader context. Third, I pick up on a couple of nuances that Phillips did not note such as the existence of states that engage in *Auer* like deference but not *Chevron* like deference. Fourth, this article is more up-to-date and includes recent and significant decisions from Arkansas and Mississippi as well as Justice DeWine's recent and noteworthy Ohio Supreme Court concurrence.

In this survey, I categorize states into six categories:³ 1) States that have expressly rejected deference;⁴ 2) States that expressly employ *Skidmore* deference; 3) States that employ some types of deference but not other types of deference; 4) States that have grown more skeptical of deference in recent years as evidenced by either narrowing decisions or vocal voices of opposition; 5) States whose decisions are woefully inconsistent such that it is hard to categorize them; and 6) States that fully extend Chevron and Auer deference.⁵

³ It is also worth noting what category is not contained in my list. Namely, there are no states which have gotten appreciably more deferential in the past 20 years. There are two states that could arguably be classified as growing less deferential if one extended the timeline to the past 30 years. First, before 1991, Idaho appears to have grown more skeptical of deference. But in 1991 in a thoroughly reasoned decision the Idaho Supreme Court refused to reject deference and embraced a four part test that remains in use today. *J.R. Simplot Co. v. Idaho State Tax Comm'n*, 120 Idaho 849, 862, 820 P.2d 1206, 1219 (1991). Second, in Oklahoma, there is a stray decision by the Court of Appeals from 1992 which states that “[w]e decide questions of law and do not defer to agency interpretation of the Constitution or the statutes” and cites to *Marbury v. Madison*. *Metcalf v. Oklahoma Bd. of Med. Licensure & Supervision*, 1992 OK CIV APP 174, 848 P.2d 48, 50. But this decision seems to be an outlier and has not been cited for this proposition since. Decisions both predating and postdating it apply deference. *W.R. Allison Enterprises, Inc. v. CompSource Oklahoma*, 2013 OK 24, ¶ 15, 301 P.3d 407, 412. So in my judgment only Idaho qualifies, and this shift happened a long time ago.

⁴ It is likely that these states will in practice apply some kind of *Skidmore* like deference based on the persuasiveness of agency arguments. But these states have expressly considered and rejected deference which is what sets them apart.

⁵ See Michael Pappas, *No Two-Stepping in the Laboratories: State Deference Standards and Their Implications for Improving the Chevron Doctrine*, 39 McGeorge L. Rev. 977, 987 (2008). Pappas categorized his states somewhat differently. He separated states that claim to employ de novo review but nevertheless defer into their own separate category. I find Pappas’s categorization less than helpful. Rhetoric can matter, but in practice there is very little setting apart some of the states in different tiers on his list. States may refer to their review as “de novo,” but if broad deference is extended then this label is inaccurate. My choice of labels should be more helpful for figuring out how likely a state court is

My key finding is that not only have a large number of states abandoned deference but that a significant number of states have also moved away from deference in less dramatic respects. And with vocal and prominent voices of dissent in several other states it seems likely that more states will soon follow.

1) Attacks on deference at the federal level

In the last decade there has been a sustained attack on deference doctrines like *Chevron* and *Auer* deference.⁶ At the federal level, this attack has been multifaceted. Members of the Supreme Court have increasingly spoken out against deference,⁷ even those who once were its proponents like the late Justice Scalia. Other members of the federal bench and members of the academy have similarly issued withering attack on deference.⁸ There has also been an intense academic attack on the administrative state as a whole, led by Philip Hamburger's highly influential *Is Administrative Law Unlawful?*.

to actually defer to an agency. Pappas also failed to distinguish between types of deference.

Phillips' recent note goes through each state alphabetically. This is useful for quickly locating information about a particular state. But I find that grouping states into categories is more valuable, particularly when discussing all of the states that have moved away from deference in recent years.

⁶ Christopher Walker's recent literature review does an excellent job of summarizing all of the relevant arguments and recent scholarship. I merely touch on these issues lightly and refer the reader to his thorough summary.

⁷ See *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring);

⁸ *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1153–54 (10th Cir. 2016) (Gorsuch, J., concurring); *Egan v. Del. River Port Auth.*, 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring in the judgment) (“*Chevron* . . . [is] contrary to the roles assigned to the separate branches of government . . .”).

The most intense critiques have been levelled against the deference doctrine known as *Auer* or *Seminole Rock* deference—that is deference for an agency's interpretation of its own regulation. This doctrine has been attacked for decades as incompatible with the separation of powers.⁹ It is also argued that this type of deference creates perverse incentives for agencies to draft vague regulations. Justice Scalia, the author of the *Auer* decision, came to regret the decision and became a powerful voice of opposition, arguing that it “seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well.”¹⁰ As a result, many predicted the demise of *Auer* when in 2018 the Supreme Court granted Cert to consider whether to eliminate *Auer*. Surprisingly to many, the doctrine narrowly survived in *Kisor*, but was narrowed by the Supreme Court and cabined in a variety of ways.

Chevron deference, deference to an agency's statutory interpretations, appears to be more widely supported among the federal bench, although there are undoubtedly

⁹ John F. Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 COLUM. L. REV. 612, 617 (1996); 1 WILLIAM BLACKSTONE, COMMENTARIES *142; accord JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 143, at 76 (C.B. MacPherson ed., 1980) (1690) (arguing that it is “too great a temptation to human frailty, apt to grasp at power, for the same persons, who have the power of making laws, to have also in their hands the power to execute them, whereby they exempt themselves from obedience to the laws they make”); MONTESQUIEU, THE SPIRIT OF THE LAWS bk. XI, ch. 6, at 157 (Anne Cohler et al. eds. & trans., 1989) (1768) (“When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically.”)

¹⁰ . *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2265–66 (2011) (Scalia, J., concurring) (citations omitted).

critics.¹¹ For instance, Justice Thomas has argued that *Chevron* deference is incompatible with the role of the judiciary to “say what the law is.”¹² Others such as Third Circuit judge Kent Jordan have argued that deference harms the legislative branch by creating perverse incentives to delegate broad swathes of discretion to administrative agencies.¹³ On the other hand, Justice Scalia continued to defend *Chevron* deference, arguing that *Chevron* deference did not raise the same concerns of one branch of government serving as both lawmaker and interpreter.¹⁴ Finally, critiques on Chevron have also focused on its incompatibility with the Federal Administrative Procedures Act.¹⁵ The Supreme Court has adopted several restraints on *Chevron* deference including the requirement that agency’s actually

¹¹ See, e.g., Jack M. Beermann, *Chevron at the Roberts Court: Still Failing After All These Years*, 83 FORDHAM L. REV. 731 (2014); Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779 (2010).

¹² *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring).

¹³ *Egan*, 851 F.3d at 279 (Jordan, J., concurring). Naomi Rao has called this process “administrative collusion.” Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1504 (2015).

¹⁴ *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1212 (2015) (Scalia, J., concurring) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 243 (2001) (Scalia, J., dissenting)). But there is emerging evidence that administrative officers are much more closely involved in the process of drafting legislation than Justice Scalia once supposed. See Christopher J. Walker, *Federal Agencies in the Legislative Process: Technical Assistance in Statutory Drafting* (Final Report to the Admin. Conference of the U.S. 303, 2015), <https://ssrn.com/abstract2655901> [<https://perma.cc/5NHY-FLHA>]; Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. 1377, 1407–19 (2017); But see James J. Brudney, *Contextualizing Shadow Conversations*, 166 U. PA. L. REV. ONLINE 37, 38–45 (2017).

¹⁵ See 135 S. Ct. at 1211-12 (Scalia, J., concurring in the judgment).

exercise delegated authority (known as *Chevron* step zero or *Mead* deference), and the rejoinder that deference will not apply to so called “major questions.”¹⁶

1) Chevron in the States

a. A Brief History of Deference in the states

It would be impossible to highlight in a single paper the history of deference in each of the states. But a brief look at the development of deference in a few states may nevertheless be useful both to provide context and to prompt future study contrasting the development of these doctrines at the state and federal level.

Wisconsin

In its *Tetra Tech* decision that will be discussed below, the Wisconsin Supreme Court thoroughly examined the history of deference in that state and so a brief look at that history is especially instructive.¹⁷ In Wisconsin the practice of looking to an agency’s interpretation of a statute gradually became more and more deferential over time. Deference was “derived from two different sources”¹⁸

The first is “great weight deference” In 1871, the Court noted that “long and uninterrupted practice under a statute, especially by the officers whose duty it was

¹⁶ *King v. Burwell*, 135 S. Ct. 2480, 2488-89 (2015).

¹⁷ *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶ 19, 382 Wis. 2d 496, 521, 914 N.W.2d 21, 33. Justice Roggensack of the Wisconsin Supreme Court also published a law review article in 2006 that examined the development of the doctrine. The Honorable Patience Drake Roggensack, *Elected to Decide: Is the Decision-Avoidance Doctrine of Great Weight Deference Appropriate in This Court of Last Resort?*, 89 Marq. L. Rev. 541, 553 (2006).

¹⁸ *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶ 17, 382 Wis. 2d 496, 520

to execute it, is good evidence of its construction , and such practical construction will be adhered to, even though, were it *res integra* it might be difficult to maintain it” and would be given “great weight.”¹⁹ As the *Tetra Tech* court would later explain, in some respects this was “not the language of deference, but of persuasion.”²⁰ But it is not difficult to see how this language was interpreted as mandatory rather than merely persuasive.²¹ In 1963, the Court took this deference to another level by “import[ing] the concept of deference’ from federal precedent.²² At first this kind of deference applied only to application of a statute to a set of facts but it gradually expanded to include statutory interpretation as well.²³ Finally in 1995 the Court made a further step and turned this doctrine into a mandatory and binding one.²⁴ The second source, “due weight” deference was derived from statute but largely followed a similar development pattern in a truncated fashion.²⁵

¹⁹ *Harrington v. Smith*, 28 Wis. 43, 68 (1871).

²⁰ *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶ 20, 382 Wis. 2d 496, 522

²¹ *See State ex rel. State Ass'n of Y.M.C.A. of Wis. v. Richardson*, 197 Wis. 390, 393, 222 N.W. 222 (1928) (“If we were in doubt as to the proper construction to be placed upon the statute, we should have to give much weight to the practical construction which has been placed upon the statute ever since its enactment.”);

²² *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶ 23, 382 Wis. 2d 496, 524.

²³ *Bucyrus-Erie Co. v. State, Dep't of Indus., Labor & Human Relations, Equal Rights Div.*, 90 Wis. 2d 408, 410, 280 N.W.2d 142, 144 (1979)

²⁴ *Harnischfeger Corp. v. Labor & Indus. Review Comm'n*, 196 Wis. 2d 650, 539 N.W.2d 98 (1995)

²⁵ *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶¶ 34-40, 382 Wis. 2d 496, 531-35.

Other States

Although Wisconsin likely has some eccentricities, this development pattern of gradual accretion of deference seems to be a rather common phenomenon. For instance, the Utah Supreme Court described a slightly different but related creep of deference from fact based determinations to mixed questions of law and fact to even certain fact intensive driven legal questions.²⁶ And Justice Dewine of the Ohio Supreme Court recently noted that the state “bumbled into, more than adopted, *Auer*-style deference.”²⁷

This very brief history illustrates three principles. First of all, in many states deference emerged gradually. Second, in many states it emerged without any detailed discussion of the underlying separation of powers or other concerns surrounding deference. Third, because deference accrued gradually over time there tends to be a lot of inconsistent or incompatible decisions. This history helps to explain why many states have been so ripe for a reexamination of deference and why so many states remain inconsistent in their application of deference.

States that have expressly rejected deference (9 states):

- i. Judicial rejection of deference (Arkansas, Delaware, Kansas, Michigan, Mississippi, Utah, and Wisconsin)

²⁶ *Murray v. Utah Labor Comm'n*, 2013 UT 38, ¶ 14, 308 P.3d 461, 467

²⁷ <https://www.yalejreg.com/nc/a-few-thoughts-on-administrative-deference-in-ohio-by-justice-r-patrick-dewine/>

Of the seven states on this list, Delaware has been skeptical of deference the longest. More than twenty years ago, Delaware rejected *Chevron* deference, overturned past decisions to the contrary, and “reaffirmed [its] plenary standard of review.”²⁸ Delaware Courts routinely overturn agency construction²⁹ and there is no indication of any shift away from his kind of exacting review.³⁰ All of the other states on this list have only shifted away from deference since 2008.

In 2008, the Michigan Supreme Court rejected the call to adopt *Chevron* deference. The Court raised both pragmatic and substantive objections to *Chevron*. Pragmatically it noted that “[w]hile the *Chevron* inquiries are comparatively simple to describe, they have proven very difficult to apply” and that it would “not provide a clear road map for courts in this state to apply when reviewing administrative decisions.”³¹ Substantively, it declared that “the unyielding deference to agency statutory construction required by *Chevron* conflicts with this state's administrative law jurisprudence and with the separation of powers principles discussed above by compelling delegation of the judiciary's constitutional authority to construe statutes to another branch of government.”³²

²⁸ *Pub. Water Supply Co. v. DiPasquale*, 735 A.2d 378, 383 (Del. 1999).

²⁹ Michael Pappas, *No Two-Stepping in the Laboratories: State Deference Standards and Their Implications for Improving the Chevron Doctrine*, 39 McGeorge L. Rev. 977, 987 (2008) (collecting Delaware cases);

³⁰ See e.g., *Hegadorn v. Dep't of Human Servs. Dir.*, 503 Mich. 231, 244–45, 931 N.W.2d 571, 577 (2019).

³¹ *In re Complaint of Rovas Against SBC Michigan*, 482 Mich. 90, 111, 754 N.W.2d 259, 272 (2008)

³² *Id.*

The Kansas Supreme Court was the next Court to reject deference in 2013. As recently as 2007, the Court had held that judicial interpretations of law were “entitled to judicial deference if there is a rational basis for the ... interpretation,” although it also explained that the “interpretation is not conclusive and, though persuasive, is not binding on this court.”³³ Lower courts applying this standard went so far as to call this a law of “operative construction” and to suggest that those challenging an agency’s interpretation bore the burden of proof.³⁴ But shortly afterwards came a series of skeptical decisions.³⁵ Less than five years later, Kansas sharply reversed course and declared that the doctrine of deference “has been abandoned, abrogated, disallowed, disapproved, ousted, overruled, and permanently relegated to the history books where it will never again affect the outcome of an appeal.”³⁶ Subsequent decisions have clarified that this rejection of deference applies to both statutory and regulatory interpretations.³⁷

³³ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 521, 154 P.3d 494, 503 (2007).

³⁴ *Douglas v. Ad Astra Info. Sys., L.L.C.*, 42 Kan. App. 2d 441, 448, 213 P.3d 764, 770 (2009), *rev’d*, 296 Kan. 552, 293 P.3d 723 (2013), and *abrogated by Redd v. Kansas Truck Ctr.*, 291 Kan. 176, 239 P.3d 66 (2010)

³⁵ *Fort Hays State Univ. v. Fort Hays State Univ. Chapter, Am. Assoc. of Univ. Professors*, 290 Kan. 446, 457, 228 P.3d 403, 410 (2010) (collecting decisions).

³⁶ *Douglas v. Ad Astra Info. Sys., L.L.C.*, 296 Kan. 552, 559, 293 P.3d 723, 728 (2013).

³⁷ *Woessner v. Labor Max Staffing*, No. 119,087, 2020 WL 5083418, at *6 (Kan. Aug. 28, 2020). But this does not appear to have been fully internalized by members of the Court of Appeals of Kansas who recently suggested that deference should still be extended to an agency’s regulatory interpretation. *STEPHEN D. GOLDMAN, Appellant, v. THE UNIVERSITY OF KANSAS & JEFFREY P. KRISE, Appellees.*, No. 122,060, 2020 WL 7635985, at *9 (Kan. Ct. App. Dec. 23, 2020).

The Utah Supreme Court followed suit that same year. In *Murray v. Utah Labor Comm'n*, the Court distinguished between the distinct concepts of “discretion” and³⁸ “deference,” and noted that while an agency may be given discretion in matters of policy, it could not be delegated deference in matters of law since the correct interpretation of a statute “has a single ‘right’ answer in terms of the trajectory of the law” and is best resolved by the judiciary without deference. The next year, the Court followed up *Murray* with a more explicit rejection of Chevron deference, explaining that it had “openly repudiated” *Chevron*.³⁹ The Court noted that “A key justification for *Chevron* deference to federal agencies is national uniformity—the avoidance of a patchwork of federal standards among the numerous federal circuit courts of appeals,” and that this concern was inapplicable in the state where there is “a single line of appellate courts and thus no real prospect for a split of judicial authority.”⁴⁰

A few years later, the Utah Supreme Court followed up with a decision rejecting *Auer* deference which went significantly further in its criticism of deference. The Court explained that an agency’s regulation is law and therefore “parties have a right to read and rely on the term of these regulations” and agencies lack the “right to revise them by a later ‘interpretation.’”⁴¹ The agencies “[p]rivately

³⁸ *Murray v. Utah Labor Comm'n* 2013 UT 38, ¶ 33, 308 P.3d 461, 472,

³⁹ *Hughes Gen. Contractors, Inc. v. Utah Labor Comm'n*, 2014 UT 3, ¶ 25, 322 P.3d 712, 717.

⁴⁰ *Id.*

⁴¹ *Ellis-Hall Consultants v. Pub. Serv. Comm'n*, 2016 UT 34, ¶ 31, 379 P.3d 1270, 1275.

held intentions that contradict [its] rules are not law.”⁴² To defer would raise serious separation of powers concerns, since it “makes little sense for [the court] to defer to the agency’s interpretation of law of its own making” because doing so “would place the power to write the law and the power to authoritatively interpret it into the same hands” and “[t]hat would be troubling, if not unconstitutional.”⁴³

The Wisconsin Supreme Court rejected deference in a lengthy and highly detailed 2018 opinion. The Court recognized that it had for decades applied a highly deferential standard of review for agency interpretations modelled after federal law. However, the Court also found alarmingly that it had never “determin[ed] whether this was consistent with the allocation of governmental power amongst the three branches.”⁴⁴ The Court then found that deference results in the abdication of core judicial powers. Indeed, “[n]o aspect of the judicial power is more fundamental than the judiciary’s exclusive responsibility to exercise judgment in cases and controversies arising under the law.”⁴⁵ Furthermore, deference unjustly “deprives the non-governmental party of an independent and impartial tribunal”⁴⁶ The Court also rejected even the more modest concept of according any kind of controlling “due

⁴² *Id.*

⁴³ *Id.* at ¶ 32. The decision also quoted Philip Hamburger’s book *Is Administrative Law Unlawful?*, 33–63 (2014), a stridently anti-administrative state text.

⁴⁴ *Tetra Tech EC, Inc. v. Wisconsin Dep’t of Revenue*, 2018 WI 75, ¶ 42, 382 Wis. 2d 496, 535, 914 N.W.2d 21, 40.

⁴⁵ *Id.* at ¶ 54.

⁴⁶ *Id.* at ¶ 67.

weight” to the decisions of administrative agencies,⁴⁷ and instead insisted that agency decisions should only be accorded weight according to their persuasiveness.⁴⁸

Also in 2018, the Mississippi Supreme Court reversed its past precedent and rejected the use of *Chevron* deference. It noted that the Court had for years “backed away” from showing deference, and emphasized that “the ultimate authority and responsibility to interpret the law, including statutes, rests with this Court.”⁴⁹ The Court emphasized that saying that the court applied “*de novo* but deferential review” was deeply contradictory and confusing.⁵⁰ Moreover, deference was problematic “under Mississippi’s strict constitutional separation of powers.”⁵¹ Accordingly the Court repudiated *Chevron* like deference in order to “step fully into the role the Constitution of 1890 provides for the courts and the courts alone, to interpret statutes.”⁵² Since the case only dealt with a question of statutory interpretation, the Court cabined its analysis to only agency interpretations of statutes.⁵³ In a follow up decision in May 2020, the Mississippi Supreme Court took its anti-deference stance a step further and concluded that not only would it not defer to an agency’s statutory interpretation, but that any attempt by the

⁴⁷ *Id.* at ¶¶ 71-74,

⁴⁸ *Id.* at ¶¶ 79-80

⁴⁹ *King v. Mississippi Military Dep’t*, 245 So. 3d 404, 407 (Miss. 2018).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 408.

⁵³ Accordingly, I also place Mississippi in the category of states that currently applies Auer but not *Chevron* like deference. But because of how forcefully the Court rejected deference, the state belongs in this category.

legislature to require deference was incompatible with the Mississippi Constitution because ““interpreting statutes is reserved exclusively for courts.”⁵⁴ ⁵⁵

Finally (for now), in April 2020, the Arkansas Supreme Court rejected deference.⁵⁶ The Arkansas Supreme Court had applied deference in a highly inconsistent manner. At times, it had emphasized the need for *de novo* review, but at other times it had applied a highly deferential “clearly wrong” standard for agency interpretations. The Court “acknowledge[d] confusion in prior cases regarding the standard of review for agency interpretations of a statute” and set out to clarify its doctrine. It explained that it was “concern[ed]” with “the risk of giving core judicial powers to executive agencies in violation of the constitutional separation of powers.” When the Court granted deference it “effectively transfers the job of interpreting the law from the judiciary to the executive.” Accordingly, the Court emphasized that agency interpretations of statutes would be conducted de

⁵⁴ *HWCC-Tunica, Inc. v. Mississippi Dep’t of Revenue*, 296 So. 3d 668 ¶¶ 33-34 (Miss. 2020).

⁵⁵ Daniel Ortner, State Court Docket Watch: *HWCC-Tunica Inc. v. Mississippi Dep’t of Revenue*, Federalist Society (Aug. 28, 2020), <https://fedsoc.org/commentary/publications/state-court-docket-watch-hwcc-tunica-inc-v-mississippi-dep-t-of-revenue>.

⁵⁶ *MARY KATHERINE MYERS, WIDOW OF [MICHAEL EARL MYERS] AND ADMINISTRATRIX OF THE ESTATE OF MICHAEL EARL MYERS, DECEASED APPELLANT V. YAMATO KOGYO COMPANY, LTD.; SUMITOMO CORPORATION; ARKANSAS STEEL ASSOCIATES; SUMITOMO CORPORATION OF AMERICAS D/B/A SUMITOMO CORPORATION OF AMERICA; SC STEEL INVESTMENT, INC.; SC STEEL INVESTMENT, LLC; YAMATO KOGYO (U.S.A.) CORPORATION; AND YAMATO KOGYO AMERICA, INC. APPELLEES*, 2020 Ark. 135 (2020)

novo and that “the agency’s interpretation will be one of our many tools used to provide guidance.”

Before moving on, it is worth considering briefly why these states are the ones where justices have abandoned deference. At first glance they do not share much in common. Of the seven states, 4 have nonpartisan elections for supreme court justices and 3 have gubernatorial appointments under the modified Missouri plan.⁵⁷ Most are smaller states but Michigan is a very large state. Most are more conservative but Delaware is a liberal state and Michigan and Wisconsin are purple states. One possibility is that these states might have strong traditions of enforcement of the separation of powers, but there are many states that are well known for their separation of powers enforcement like Kentucky or Texas that do not make the list. It seems to me that it is most likely that two more haphazard factors are at work. First, the presence of a vocal justice or two willing to reexamine a long history of deference such as Justice Lee of Utah. And second, a case that brings the issue squarely before the Court.

One other issue that is largely beyond the scope of this survey but merits a brief comment concerns the justifications that state Courts have relied on to abandon deference. By and large these decisions have paralleled the arguments made by federal courts except for relying on state separation of powers doctrines.

⁵⁷ https://ballotpedia.org/Judicial_selection_in_the_states

Few have touched on unique facets of state law such as the state APA or the unique role states play in our republic.⁵⁸

- ii. Statutory or constitutional rejection of deference (Florida, Arizona, Wisconsin)⁵⁹

In 2018, Florida voters voted in favor of a Constitutional amendment that eliminated deference to agency interpretation. Amendment 6 was put on the ballot by the Constitutional Revision Commission alongside several unrelated legal and judicial reforms.⁶⁰ Proponents of this provision argued that deference was incompatible with the separation of powers and that deference unduly elevates the executive branch and favors the government. Opponents argued that without deference it would be harder for agencies to express their expertise and to ensure consistency in agency action. Amendment 6 passed with nearly 62% of the vote. The amendment is codified in Fla. Const. art. V, § 21 and reads:

In interpreting a state statute or rule, a state court or an officer hearing an administrative action pursuant to general law may not defer to an administrative agency's interpretation of such statute or rule, and must instead interpret such statute or rule de novo.

⁵⁸ These are topics worthy of a far more detailed discussion, and I begin that process in my working paper “Ending Deference?: Why Some State Supreme Courts have Chosen to Reject Deference and Others Have Not”

⁵⁹ At least one additional state (Kentucky) has considered a bill to eliminate deference elimination of deference, but that effort has so far been unsuccessful. <https://apps.legislature.ky.gov/record/19RS/sb217.html>. In summer 2020 the State Policy Network adopted a model deference bill which would

⁶⁰ <http://flaadminlaw.org/wp-content/uploads/2019/06/Adm-06-19.pdf>

Of all of the states to reject deference in recent years, Florida may be the most significant of them all. First of all, it is the only state where the people of the state have directly voted and ratified an amendment that abolished deference.⁶¹ Second, Florida is one of the largest states in the country and so what impact this amendment has in Florida will be particularly influential in other states considering abolishing deference. And perhaps most importantly of all, while some of the states to judicially reject deference were somewhat skeptical or tepid about deference for a long time, Florida was one of the most deferential states in the country right up until the passing of the amendment.⁶² A recent article in the Florida Bar Journal⁶³ points to the long and storied history of deference in Florida. Since 1949, Florida Courts had given “great weight” to agency interpretations.⁶⁴ From 2000 to the enactment of the amendment, deference was applied over 100 times. Florida was particularly deferential, with a “clearly erroneous” standard, and a willingness to apply deference even without formal rulemaking process. Judges in Florida had begun expressing criticism of the doctrine, but it was still well

⁶¹ The predictive value of this overwhelming win for the abolition of deference is limited, however, since the other provisions of the Amendment such as a victim’s rights amendment were more high profile and received more attention.

⁶² However, in tax law, agency interpretations were at times ignored in the face of the presumption that tax law must be construed against the government and in favor of taxpayers. See <https://www.deanmead.com/2018/11/how-amendment-6-will-impact-florida-tax-law/>; <https://www.floridabar.org/the-florida-bar-journal/the-demise-of-agency-deference-florida-takes-the-lead/>

⁶³ <https://www.floridabar.org/the-florida-bar-journal/the-demise-of-agency-deference-florida-takes-the-lead/>

⁶⁴ *City of St. Petersburg v. Carter*, 39 So. 2d 804, 806 (Fla. 1949); *Canada Dry Bottling Co. of Florida*, 59 So. 2d 788, 790 (Fla. 1952).

established in Florida law.⁶⁵ The Constitutional amendment was therefore a dramatic shift in the legal framework. And Fla. Const. art. V, §21 has already been cited dozens of times since it went into effect on January 8, 2019.⁶⁶ Of course, it is also possible that many cases will come out the same way as before, since Courts can take an agency's interpretation into account and rule that it is the best reading of the law, and so further study will help to determine whether this amendment actually has had a long-term impact on judicial behavior.⁶⁷

On April 11, 2018, Arizona Governor Doug Ducey became the first Governor in the country to sign into law a statute (HB 2238) which curtails judicial deference for administrative agencies. The statute declares that “[i]n 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

⁶⁵ *Housing Opportunities Project v. SPV Realty, LC*, 212 So. 3d 419, 426 (Fla. 3d DCA 2016). (The “great deference” mantra cited by the dissent...seems to have become so much a part of our legal culture as to be incontestable. An important separation-of-powers issue lurks just below the surface, however. There is no reason for the rule when we are as capable of reading the statute or rule as the agency, which may well have its own...agenda); *Pedraza v. Reemployment Assistance Appeals Commission*, 208 So. 3d 1253, 1256 (Fla. 3d DCA 2017) (“In my view, deference to an agency’s construction or application of a statute implicates important due process and separation of powers questions deserving of serious contemplation by future members of this and other courts around the state”)

⁶⁶ <https://www.floridabar.org/the-florida-bar-journal/the-demise-of-agency-deference-florida-takes-the-lead/> N. 43 (compiling cases). The shift appears to have been decisive in at least one controversial decision involving whether a landowner would be allowed to drill for oil in the everglades. *See* <https://www.jacksonville.com/news/20190207/court-clears-way-for-drilling-in-everglades>.

⁶⁷ <http://flaadminlaw.org/wp-content/uploads/2019/06/Adm-06-19.pdf>

agency, without deference to any previous determination that may have been made on the question by the agency.”⁶⁸ This bill was advanced by the Goldwater Institute a libertarian public interest law firm and policy organization. Goldwater argued that the bill would “level the playing field for private,” remove[] the thumb from the scale for agencies” and “curb[] their immense , abusive power.”⁶⁹

So far, the only decision by the Arizona Supreme Court discussing the new law has emphasized that it “prohibits courts from deferring to agencies’ interpretations of law,” but does not prohibit the court from applying the doctrine of legislative adoption whereby long standing agency interpretation can be implicitly ratified through legislative reenactment of a law.⁷⁰ Two justices each wrote separately dissenting from the Court’s decision to apply the legislative adoption doctrine. One of the dissenting opinions argued that the Court missed the “deeper point:”

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—as the majority effectively does—the very power to pass statutes by inferring, from legislative silence, an intent to enact preexisting agency regulations? ... Doing so combines deference and delegation with a vengeance.

The other justices similarly argued that continued application of the doctrine of legislative adoption was problematic, arguing that “[w]hatever continuing vitality, if

⁶⁸ Ariz. Rev. Stat. Ann. § 12-910.

⁶⁹ <https://goldwaterinstitute.org/article/arizona-passes-groundbreaking-legislation-to-curb-agency-abuses/>

⁷⁰ *Silver v. Pueblo Del Sol Water Co.*, 244 Ariz. 553, 561, 423 P.3d 348, 356 (2018).

any, the prior-construction canon has in Arizona with regard to agency interpretations or definitions, it must yield to enforcement of the statute's language and context and the evident purpose that we derive from it.⁷¹ A third justice joined both of these dissenting opinions, but wrote separately noting that this was “a close and important case” but that the doctrine of legislative adoption was particularly inappropriate given the importance of the issue at stake in the case.⁷² Given this uncertain decision, it will be particularly interesting to see what the Arizona Supreme Court does in the next couple of years and how it interprets the new law. Finally, even though the state judiciary in Wisconsin had already rejected deference by judicial opinion, the Wisconsin Legislator followed suit and put the rejection of deference into state law in December 2018. The Wisconsin law tersely and succinctly states:”

No agency may seek deference in any proceeding based on the agency's interpretation of any law.”⁷³ Courts citing this statute so far have done so cursorily while also citing to the *Tetra Tech* decision.⁷⁴ In July 2020, the Wisconsin Supreme Court rejected a Constitutional challenge to the validity of the law, noting “Given our own decision that courts should not defer to the legal conclusions of an agency, a

⁷¹ *Silver v. Pueblo Del Sol Water Co.*, 244 Ariz. 553, 573, 423 P.3d 348, 368 (2018).

⁷² *Id.*

⁷³ Wis. Stat. Ann. § 227.10.

⁷⁴ *Lamar Cent. Outdoor, LLC v. Div. of Hearings & Appeals*, 2019 WI 109, ¶ 9, 389 Wis. 2d 486, 494, 936 N.W.2d 573, 576; *Lee Quality Home Care LLC v. Dep't of Health Servs.*, 2019 WI App 8, ¶ 12, 385 Wis. 2d 846, 926 N.W.2d 501.

statute instructing agencies not to ask for such deference is facially constitutional.”⁷⁵

B) Skidmore Deference only (3 states)

North Carolina courts will accord “some deference” to an agency’s interpretation but this deference is expressly “not binding.”⁷⁶ Instead, the weight that courts given them “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.”⁷⁷ This type of deference is expressly contrasted against “the deference afforded a federal agency’s interpretation of its own statutes.”⁷⁸ So in North Carolina, an agency’s recommendation would be taken into account but with no more deference than a private interpretation barring factors mitigating in favor of deference.⁷⁹

⁷⁵ *Serv. Employees Int’l Union , Local 1 v. Vos*, 2020 WI 67, ¶ 84

⁷⁶*Total Renal Care Of N. Carolina, LLC v. N. Carolina Dep’t of Health & Human Servs., Div. of Facility Servs., Certificate of Need Section*, 171 N.C. App. 734, 740, 615 S.E.2d 81, 85 (2005)

⁷⁷ 194 N.C.App. 716, 720, 670 S.E.2d 629, 632.

⁷⁸ *Id.* Even though North Carolina is the only state that consistently applies *Skidmore* like deference in all circumstances, it is worth noting that many of the states that have recently rejected *Chevron* like deference likely apply some kind of *Skidmore* like deference depending on the persuasiveness of the agency’s pronouncement. Likewise, many of the states in the mixed or improving categories also apply *Skidmore* like deference in some circumstances and more deferential review in other circumstances.

⁷⁹ Philips categorizes North Carolina as having “chevmore” deference because it has the rhetoric of *Chevron* but in practice is akin to *Skidmore*. Philips at 349. I do not favor the “chevmore” label but agree with his analysis.

The Virginia Supreme Court has distinguished between “deference” which it describes as “acquiescence to an agency's position without stringent, independent evaluation of the issue,” and “weight” which is the degree of consideration a court will give an agency's position in the course of the court's wholly independent assessment of an issue.”⁸⁰ The Court explained that it would “not defer to an agency's construction of a statute because the interpretation of statutory language always falls within a court's judicial expertise.” Virginia gives “great weight” to an agency’s interpretation when a law falls into an agencies “specialized competence.”⁸¹ But because the Court has sharply distinguished this from deference, I will place it into this category rather than the category of states that only defer when there is expertise involved.

I have also placed West Virginia into this category,⁸² although the situation there is complicated.⁸³ In West Virginia there is Chevron like deference for a

⁸⁰ *Nielsen Co. (US), LLC v. Cty. Bd. of Arlington Cty.*, 289 Va. 79, 88, 767 S.E.2d 1, 4 (2015)

⁸¹ *Jones v. Commonwealth ex rel. Von Moll*, 295 Va. 497, 503, 814 S.E.2d 192, 194 (2018).

⁸² Phillips does not appear to touch on these nuances of West Virginia law and therefore lists West Virginia as having *Chevron* like deference. He also does not cite the recent *Appalachian Power* decision. I believe my categorization better captures how deference in West Virginia operates. In practice, anything that is not ratified or endorsed by the legislature gets *Skidmore* deference and anything endorsed by the legislature cannot be said to be an instance of agency deference in any meaningful sense of the term.

⁸³ One could also argue that West Virginia belongs in the category of states that apply deference to agency rules but not interpretations of statutes. The key deciding factor for me is that in West Virginia every single agency rule must go through the

“legislative rule” but not for “interpretive rules” which only get *Skidmore* like deference.⁸⁴ In practice, however, all legislative rules in West Virginia are actually authorized by the legislature, which means that the body being deferred to is actually the West Virginia legislature rather than the executive.⁸⁵ More recent decisions make clear that outside of these legislative rules deference is limited to the “inherent persuasiveness” of the regulation, which is akin to *Skidmore*.⁸⁶ There are also decisions stating that no deference is given to an interpretation adopted by an agency as part of its litigation position, which further limits the scope of deference in a manner akin to *Barnhart* or *Kisor* at the federal level.⁸⁷

C) Some types of deference but not others (14 states)⁸⁸

This category of states employs deference in certain specific contexts but not in others. I have further broken down these states into several sub-categories. A few states are placed in more than one category when necessary to fully explain the scope of deference

i. Chevron like deference but not Auer like deference (0 States)

legislature before deference is due, which is substantially different than deference to an agency’s rule that has not been through legislative ratification.

⁸⁴ *Appalachian Power Co. v. State Tax Dep’t of W. Virginia*, 195 W. Va. 573, 581–82, 466 S.E.2d 424, 432–33 (1995).

⁸⁵ *Id.* at 439-40.

⁸⁶ *Pioneer Pipe, Inc. v. Swain*, 237 W. Va. 722, 726, 791 S.E.2d 168, 172 (2016).

⁸⁷ *Virginia Health Care Cost Review Auth. v. Boone Mem’l Hosp.*, 196 W. Va. 326, 334, 472 S.E.2d 411, 419 (1996).

⁸⁸ Philips analogizes these limitations as being akin to *Chevron* step-zero or mead- (at 316) This is an apt comparison for some of these limitations, but others are more structural and turn on particular nuances of state law rather than the method and means of agency action.

It is first worth commenting on a category that surprisingly does not appear to currently exist. I could find no states that have Chevron deference but not Auer deference. This surprised me, since the Supreme Court appears far more likely to limit or curtail Auer deference than Chevron deference, since even Justices who defended Chevron such as Justice Scalia were Auer skeptics.⁸⁹ Auer also raises some significant separation of powers concerns above and beyond those raised by Chevron deference, since under Auer the same agency is allowed to enact a regulation and give a binding interpretation of that regulation, while with Chevron deference that authority is split up between the legislative and executive

⁸⁹ Kevin O. Leske, *A Rock Unturned: Justice Scalia's (Unfinished) Crusade Against the Seminole Rock Deference Doctrine*, 69 Admin. L. Rev. 1, 42 (2017); Decker, 568 U.S. at 620 (Scalia, J., concurring in part and dissenting in part) ("Congress cannot enlarge its own power through Chevron— whatever it leaves vague in the statute will be worked out by someone else."); Perez, 135 S. Ct. at 1212 (Scalia, J., concurring).

branches.⁹⁰ And the federal judicial assault on Auer has been especially pronounced.⁹¹

ii. Auer like deference but not Chevron like deference (5 states)⁹²

Courts that afford Auer but Chevron deference appear to do so primarily out of a sense that agencies are more likely to possess specialized knowledge or insight into their own regulations, but that Courts are equally or better suited to interpret statutes.

In Louisiana, Courts have deferred to an agency's "interpretation of its own *regulations* provided that the regulations are promulgated pursuant to statutory grants of authority and the procedures of the Louisiana Administrative

⁹⁰ See John F. Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 Colum. L. Rev. 612, 641 (1996) ("[T]he founders took special pains to limit Congress's direct control over the instrumentalities that implement its laws."); Jonathan H. Adler, Auer Evasions, 16 Geo. J.L. & Pub. Pol'y 1, 14 (2018) ("The combination of the law-making and law-interpreting functions was viewed with suspicion at the time of the nation's founding because it was feared that such concentration of power facilitated the abuse of government power."); Douglas H. Ginsburg & Steven Menashi, Our Illiberal Administrative Law, 10 N.Y.U. J.L. & Liberty 475, 513 (2016) ("Because interpretation may work a significant change, the agency's power to interpret—subject only to deferential review—is akin to the power to rewrite the rule. [¶] This [is a] violation of the separation between lawmaking and law elaboration . . ."); Michael P. Healy, The Past, Present and Future of Auer Deference: Mead, Form and Function in Judicial Review of Agency Interpretations of Regulations, 62 U. Kan. L. Rev. 633, 681 (2014);

⁹¹ Egan, 851 F.3d at 280 (Jordan, J., concurring) ("Auer deference further accentuates the shift of power to the executive branch by encouraging agencies to promulgate regulations vague enough to allow administrators wide latitude in deciding how to govern.")

⁹² Because Philips did not consider at *Auer*-like deference these states are all listed as having de novo review on his list.

Procedure Act.”⁹³ This is because an agency is considered to be “an expert within its own specialized field and its interpretation and application of its *own* General Orders” and “because the [agency] is in the best position to apply its own General Orders.”⁹⁴

Similarly, the Tennessee Supreme Court has explained that agencies receive “great deference” for regulatory interpretation “because the agency possesses special knowledge, expertise, and experience with regard to the subject matter of the rule.”⁹⁵ In contrast, an agency’s interpretation of a statute is just “entitled to consideration and respect and ... appropriate weight.” *Id.*

Nebraska has long accorded deference “to an agency's interpretation of its own regulations unless that interpretation is plainly erroneous or inconsistent.”⁹⁶ In contrast, courts in Nebraska “determine[] the meaning of a statute independently of the determination made by an administrative agency.”⁹⁷ But one member of the Nebraska Supreme Court recently critiqued this practice as unfounded in any reasoned analysis. As Justice Papik noted, the use of *Auer* like deference emerged

⁹³ *Davis v. State Bd. of Certified Pub. Accountants of Louisiana*, 2013-0514 (La. App. 4 Cir. 12/18/13), 131 So. 3d 391, 399.

⁹⁴ *Dixie Elec. Membership Corp. v. Louisiana Pub. Serv. Comm'n*, 441 So. 2d 1208, 1211 (La. 1983)

⁹⁵ *Pickard v. Tennessee Water Quality Control Bd.*, 424 S.W.3d 511, 522 (Tenn. 2013).

⁹⁶ *CenTra, Inc. v. Chandler Ins. Co.*, 248 Neb. 844, 855, 540 N.W.2d 318, 328 (1995); *accord Prokop v. Lower Loup Nat. Res. Dist.*, 302 Neb. 10, 23–24, 921 N.W.2d 375, 389 (2019).

⁹⁷ *Aline Bae Tanning, Inc. v. Nebraska Dep't of Revenue*, 293 Neb. 623, 627, 880 N.W.2d 61, 65 (2016).

by “decades ago uncritically adopting a dubious proposition of federal law that itself may not stand the test of time.”⁹⁸ Justice Papik called for the Court to reexamine this standard in appropriate case and suggested that he sees the principle “to be in tension, if not at outright odds, with Nebraska’s version of the Administrative Procedure Act (APA).”⁹⁹

California also may fall into this category, as some California courts (not necessarily the California Supreme Court) have recognized that they are “more likely to defer to an agency's interpretation of its own regulation than to its interpretation of a statute, since the agency is likely to be intimately familiar with regulations it authored, and sensitive to the practical implications of one interpretation over another.”¹⁰⁰ The deference accorded agencies in California is particularly complex, and so California is discussed further in the following category as well.¹⁰¹

Finally, Mississippi is an outlier in this category because it is unlikely to remain in this category for long. As discussed above, the Mississippi Supreme Court

⁹⁸ *Prokop v. Lower Loup Nat. Res. Dist.*, 302 Neb. 10, 43, 921 N.W.2d 375, 400 (2019) (Papik J., concurring).

⁹⁹ *Id.*

¹⁰⁰ *Pac. Gas & Elec. Co. v. Pub. Utilities Com.*, 237 Cal. App. 4th 812, 840, 188 Cal. Rptr. 3d 374, 394 (2015); *Stanford Vina Ranch Irrigation Co. v. State*, 50 Cal. App. 5th 976 (2020), reh'g denied (July 6, 2020), as modified (July 8, 2020). *See also* Michael Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157, 1196 (1995).

¹⁰¹ California avoids placement in the category of inconsistent states, because even though its rules are complex, they appear to be applied with relative consistency.

soundly rejected *Chevron* like deference in 2018 but did not consider *Auer* like deference. In a decision in February 2020, the Court stated that it gave “great deference to the agency's interpretation” of its own regulations.¹⁰² But at least two Justices wrote separately to voice their disagreement with deference. Justice Kitchens wrote a brief concurrence stating that he “would end the practice of extending judicial deference to an executive agency's interpretation of its rules and regulations.”¹⁰³ Justice Coleman dissented and emphasized that the standard of deference was “inherently self-contradicting” and that just as the Court ended *Chevron* like deference so to “the practice of the courts deferring to an executive-branch interpretation of agency regulations should likewise end.”¹⁰⁴ Justice Coleman expressed his concern that deference to agency interpretations would “put all or part of all three functions of government—rule making, rule enforcement, and rule interpretation—in the hands of one branch.”¹⁰⁵ In light of these two votes against deference, it seems likely that the Mississippi Supreme Court is bound to at the very least confront the question in the near future.¹⁰⁶

¹⁰² *Cent. Mississippi Med. Ctr. v. Mississippi Div. of Medicaid*, No. 2018-SA-01410-SCT, 2020 WL 728806, at *6 (Miss. Feb. 13, 2020).

¹⁰³ *Id.* at ¶ 26.

¹⁰⁴ *Id.* at ¶ 28.

¹⁰⁵ *Id.* at ¶ 31.

¹⁰⁶ In its most recent decisions, the Court has continued to emphasize that no deference is given to interpretation of law but great deference is given to interpretations of rules. Methodist Specialty Care Ctr. v. Mississippi Div. of Medicaid, No. 2019-CC-00037-SCT, 2020 WL 2764241, at *5 (Miss. May 28, 2020). But there continue to be voices of dissent arguing that this practice should stop. Mississippi Div. of Medicaid v. Windsor Place Nursing Ctr., Inc., No. 2018-SA-

- iii. Deference for agency rules but not interpretations of statutes (2 States)¹⁰⁷

This category is distinguishable from the above category, in that the dividing line is not whether the agency is interpreting a statute or its own regulation, but instead whether the agency is exercising its rulemaking authority or merely acting as an interpreter of an existing statute or statutory term.

The California Supreme Court distinguishes between “quasi-legislative regulations adopted by an agency to which the Legislature has confided the power to ‘make law’” which “bind this and other courts as firmly as statutes themselves,” and “an agency’s *interpretation* of statute or regulation” whose “power to persuade I both circumstantial and dependent on the presence or absence of factors that support the merit of the interpretation.”¹⁰⁸ The Court further contrasted the two, emphasizing that “quasi-legislative rules” were entitled to deference because they were an exercise of delegated authority, while interpretation “does not implicate the exercise of a delegated lawmaking power” and any deference is therefore based solely on the agency’s expertise.¹⁰⁹ Accordingly, interpretative rules should be

01263-SCT, 2020 WL 2487330, at *5 (Miss. May 14, 2020) (Coleman J., concurring joined by King and Griffis J.).

¹⁰⁷ Before its broader rejection of deference in *Hughes*, the Utah Supreme Court’s position arguably fit into this category as well, as the distinction between delegation (where there is no deference) and discretion (where there is deference) is similar to the distinction between interpretation and rulemaking. See *Murray v. Utah Labor Comm’n*, 2013 UT 38, ¶ 33, 308 P.3d 461, 472

¹⁰⁸ *Yamaha Corp. of Am. v. State Bd. of Equalization*, 19 Cal. 4th 1, 7, 960 P.2d 1031 (1998).

¹⁰⁹ *Id.* at 11.

accorded only *Skidmore* like deference. California courts have described this kind of deference as “weak” deference.¹¹⁰

In practice it is not entirely clear whether this is meaningfully different from Chevron step-zero/*Mead*. Or put another way, it isn’t clear whether an interpretation which is promulgated through formal rulemaking processes would receive this heightened type of deference. Some decisions recognize this tension and decide to apply both types of scrutiny.¹¹¹ In a recent decision the California Supreme Court once again refused to directly answer this question and explained that its test is best interpreted as being on “a continuum measuring the breadth of

¹¹⁰ *Spanish Speaking Citizens' Found., Inc. v. Low*, 85 Cal. App. 4th 1179, 1216, 103 Cal. Rptr. 2d 75, 101 (2000), *as modified on denial of reh'g* (Jan. 25, 2001); *Cty. of Sonoma v. Cohen*, 235 Cal. App. 4th 42, 47, 184 Cal. Rptr. 3d 911, 915 (2015)

¹¹¹ *See e.g., Ramirez v. Yosemite Water Co.*, 20 Cal. 4th 785, 799, 978 P.2d 2, 11 (1999) (“The regulation at issue in the present case, as in *Moore*, has both quasi-legislative and interpretive characteristics.”); *Megrabian v. Saenz*, 130 Cal. App. 4th 468, 479, 30 Cal. Rptr. 3d 262, 269 (2005) (“Consequently, we analyze the DSS's interpretation of section 18938 under both the more deferential standard for quasi-legislative acts, and under the less deferential standard for purely interpretive ones.”) *Megrabian v. Saenz*, 130 Cal. App. 4th 468, 479, 30 Cal. Rptr. 3d 262, 269 (2005).

the authority delegated by the legislature.”¹¹² So the degree of deference that an agency receives is still somewhat uncertain and complicated in California.¹¹³

In Oregon the distinction between statutory interpretation and the exercise of delegated authority is a lot clearer. Statutory terms are placed in three categories: exact, inexact, or delegative.¹¹⁴ Exact terms are precise and so agency interpretations do not receive deference. Inexact terms “express a complete legislative meaning but with less precision.”¹¹⁵ No deference is accorded here either. On the other hand, delegative terms “express incomplete legislative meaning that

¹¹² *Ass'n of California Ins. Companies v. Jones*, 2 Cal. 5th 376, 397, 386 P.3d 1188, 1201 (2017). This is consistent with what some scholars have postulated actually happens in federal courts where deference may be granted on a spectrum despite *Chevron*'s binary language. See e.g., William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008); Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727 (2010); Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YaleJ. on Reg. 1, 59-60 (1998)

¹¹³ Further complicating matters, California accords certain agencies that are “constitutional entit[es] such as the Public Utilities Commission additional deference. This type of deference is known as “*Greyhound* deference” after the case where this deference originated. *Pac. Gas & Elec. Co. v. Pub. Utilities Com.*, 237 Cal. App. 4th 812, 839, 188 Cal. Rptr. 3d 374, 394 (2015)(“ The special respect accorded the PUC as a constitutional entity also appears in the considerable deference extended to what might otherwise appear purely judicial functions. Courts have long accepted the principle that the commission's interpretation of the Public Utilities Code should not be disturbed unless it fails to bear a reasonable relation to statutory purposes and language” (internal quotation marks and citations omitted)); *New Cingular Wireless PCS, LLC v. Pub. Utilities Com.*, 246 Cal. App. 4th 784, 807, 201 Cal. Rptr. 3d 652, 671 (2016).

¹¹⁴ *Oregon Occupational Safety & Health Div. v. CBI Servs., Inc.*, 356 Or. 577, 585, 341 P.3d 701, 706 (2014).

¹¹⁵ *Id.*

the agency is authorized to complete” such as “good cause,” “fair,” “undue,” “unreasonable,” and “public convenience and necessity.” Such agency interpretations are reviewed “to ensure that the interpretation is ‘within the range of discretion allowed by the more general policy of the statute.’”¹¹⁶ Although this three part distinction sounds complex, in practice it means that when an agency is engaged in statutory interpretation there is no room for deference, but when the agency is filling in the meaning for broad delegated terms through rulemaking, it is entitled to significant deference.¹¹⁷

This distinction between interpretive and delegated exercises of executive authority may be a way to disentangle *Chevron*. Critics of *Chevron* have at times conflated these two types of agency actions and so have struggled to explain how policy making is in the judicial realm. Defenders of *Chevron* have on the other hand attempted to awkwardly and unsatisfyingly explain how an agency interpreting a

¹¹⁶ *Id.*

¹¹⁷ To distinguish between inexact and delegative terms, the Oregon supreme court has taken four factors into account. “First, the court often has compared a disputed term to those the court already has concluded are delegative in nature. Second, the court has asked whether the disputed term is defined by statute or instead is readily susceptible to multiple interpretations. Third, the court has inquired whether the term in contention requires the agency to engage in policy determination or make value judgments, as opposed to interpreting the meaning of the statute. Fourth and finally, the court has looked to the larger context of the statute in dispute, to determine whether other provisions suggest that the legislature did or did not intend a term to be regarded as delegative.” *Oregon Occupational Safety & Health Div. v. CBI Servs., Inc.*, 356 Or. 577, 590, 341 P.3d 701, 708-09 (2014)

statute is actually exercising delegated authority.¹¹⁸ The success of Oregon (and to a lesser extent California) in disentangling interpretive and delegated actions might suggest a path forward to clear away some of the applications of *Chevron* that are most objectionable because they invade the judicial domain of statutory interpretation, while leaving those that are less objectionable from a judicial power perspective.¹¹⁹

iv. Deference when there is agency expertise/a high degree of specialization (4 states)

Some courts distinguish between the subject matter of a rule or interpretation, and find that deference is appropriate only when the issue in question is highly technical or beyond the scope of judicial expertise.

For instance, the Alaska Supreme Court has held that it will defer “when the interpretation at issue implicates agency expertise or the determination of

¹¹⁸

https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2586&context=faculty_publications at 942 (defending *Chevron* by arguing that “where an agency statute is ambiguous, the court is to interpret the statute as creating a menu of permissible actions and delegating to the agency the power to choose among them”); https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1217&context=faculty_scholarship; See also Eric R. Womack, *Into the Third Era of Administrative Law: An Empirical Study of the Supreme Court's Retreat from Chevron Principles in United States v. Mead*, 107 Dick. L. Rev. 289, 337 (2002) (critiquing the judiciary for “resting its bases for deference on a fiction of delegation through ambiguity”).

¹¹⁹ Broad delegations of lawmaking authority to agencies may remain objectionable in many other respects, but the problem with this kind of broad delegation lies not in judicial abdication of interpretive power, but in legislative abdication of authority through an overly broad delegation.

fundamental policies within the scope of the agency's statutory function.”¹²⁰ In contrast, there is no need for deference “where the agency’s specialized knowledge and experience would not be particularly probative on the meaning of the statute.” *Id.*

Similarly in New Mexico, most agency actions receive *Skidmore* like deference, but there is heightened deference “to legal questions that ‘implicate special agency expertise or the determination of fundamental policies within the scope of the agency's statutory function.’”¹²¹

Same with Washington where “[g]reat weight” is given to agency’s interpretation when a statute is within the agency’s “special expertise.”¹²² The Washington Supreme Court also emphasizes that it “may substitute [its] interpretation of the law for that of the agency” even if it does fall into that category. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wash. 2d 568, 593, 90 P.3d 659, 672 (2004). But because Washington does not have strong language requiring such independent review as Virginia does, I place *Washington* into this category.¹²³

¹²⁰ *Marathon Oil Co. v. State, Dep't of Nat. Res.*, 254 P.3d 1078, 1082 (Alaska 2011).

¹²¹ *Morningstar Water Users Ass'n v. New Mexico Pub. Util. Comm'n*, 1995-NMSC-062, ¶ 11, 120 N.M. 579, 583, 904 P.2d 28, 32; *Active Sols., Incorporated v. New Mexico Taxation & Revenue Dep't*, No. A-1-CA-37632, 2020 WL 4459109, at *2 (N.M. Ct. App. Aug. 3, 2020).

¹²² *Postema v. Pollution Control Hearings Bd.*, 142 Wash. 2d 68, 77, 11 P.3d 726, 733 (2000).

¹²³ Philips interprets this standard as not really being deference in the *Chevron* sense. (Page 361). This is a close judgment call and I do not find fault in his categorization even as I choose differently. I make the judgment call based on how I would describe the state of affairs to a practitioner in the state. If I were discussing the situation in Virginia I would emphasize that the Court always is required to

Iowa is similar, as deference is only due when the language of a statute is “alien to the legal lexicon” and is wholly outside of the competency of the court.¹²⁴

Ditto North Dakota, which has explained that “an administrative agency's construction of a statute is accorded much less weight when the only issue to be resolved by a court is a nontechnical question of law.”¹²⁵ It isn't clear exactly how much deference is given to nontechnical questions of law,¹²⁶ but only matters involving expertise are entitled to “appreciable deference.”¹²⁷

Finally, in New York an agency is not accorded deference when the question “does not implicate knowledge and understanding of underlying operational practices or ... evaluation of factual data”¹²⁸ In contrast, no deference is allotted to

conduct independent review no matter the degree of expertise. But if I were describing the situation in Washington I would say that if an agency claims great expertise the Court may choose to defer rather than conducting a thorough independent review.

¹²⁴ *Banilla Games, Inc. v. Iowa Dep't of Inspections & Appeals*, 919 N.W.2d 6, 14 (Iowa 2018); *Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 14 (Iowa 2010). Courts in Iowa defer when the legislature gives an agency “express authority to interpret the language,” *Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 11 (Iowa 2010), and highly specialized language is seen as one of the implicit indicators that authority was given. *Id.* at 14.

¹²⁵ *State ex rel. Clayburgh v. Am. W. Cmty. Promotions, Inc.*, 2002 ND 98, ¶ 7, 645 N.W.2d 196, 200.

¹²⁶ Recent decisions laying out the standard of review emphasize that review is *de novo* in contrast to the “great deference” given to an agency's factual determination. But it isn't clear whether these cases signal any kind of a meaningful departure. *Hewitt v. Henke*, 2020 ND 102, ¶ 7, 942 N.W.2d 459, 461; *McClintock v. Dep't of Transportation*, 2021 ND 26, ¶ 6

¹²⁷ *Nat'l Parks Conservation Ass'n v. N. Dakota Dep't of Envtl. Quality*, 2020 ND 145, ¶ 12, 945 N.W.2d 318.

¹²⁸ *Guido v. New York State Teachers' Ret. Sys.*, 94 N.Y.2d 64, 68, 721 N.E.2d 947 (1999).

pure questions of statutory interpretation, because “where the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency.”¹²⁹ Some Justices of the New York Court of Appeals have at times argued that this standard is not adequately deferential.¹³⁰ On the other hand, in a recent decision one Justice expressed his concern that the Court had rubber stamped an agency’s statutory interpretation without adequate statutory review, warning that “it would be an error of constitutional dimension for us to delegate our statutory construction role to any agency under the guise of deference.”¹³¹ There is therefore some significant internal debate among members of the judiciary in New York and we might see some shifting in either direction in the next few years.¹³²

v. Deference for longstanding interpretations (2 states)

¹²⁹ *Claim of Gruber*, 89 N.Y.2d 225, 231, 674 N.E.2d 1354 (1996).

¹³⁰ *See Claim of Gruber*, 89 N.Y.2d 225, 241, 674 N.E.2d 1354 (1996) (Levine J., dissenting)(citing *Chevron* and arguing that “statutory interpretation often involves subsets of policy choices” and that deference was appropriate in resolving such questions of statutory interpretation, especially where the legislature left an “interpretive gap.”) *Id.* (citing *Chevron*). *See also Kurcsics v. Merchants Mut. Ins. Co.*, 49 N.Y.2d 451, 462, 403 N.E.2d 159 (1980) (“This policy of deference, in my view, represents a proper balancing of the respective functions of the judicial and the executive branches of government.”).

¹³¹ *Wegmans Food Markets, Inc. v. Tax Appeals Tribunal of State*, 33 N.Y.3d 587, 604–07, 131 N.E.3d 876, 888–90 (2019).

¹³² *See Peyton v. New York City Bd. of Standards & Appeals*, No. 88, 2020 WL 7390864, at *9 (N.Y. Dec. 17, 2020).

Some states will accord deference based on whether an interpretation has been in place for a significant period of time. In Alaska more deference is granted to “longstanding and continuous” interpretations.¹³³ And in Connecticut, there is no deference unless an interpretation has either “been subjected to judicial scrutiny” or “been time tested.”¹³⁴ The formulation in Connecticut is particularly unlikely to lead to deference, as if an interpretation has “been subjected to judicial scrutiny” then there will likely already be an authoritative judicial construction.

Montana is more complex state to place. One recent decision expressly distinguished between federal *Chevron* deference and the state’s deference doctrine implying something much more narrow than *Chevron*. The Court emphasized that under the Montana APA, “[a]ny excursion by an administrative body beyond the legislative guidelines is treated as an usurpation of constitutional powers vested only in the major branch of government” including “additional, noncontradictory

¹³³ *Marathon Oil Co. v. State, Dep’t of Nat. Res.*, 254 P.3d 1078, 1082 (Alaska 2011).

¹³⁴ Philips classifies Connecticut as having *Chevron* type deference but with some “skidmore-ish language”(p. 325). But even following his own categories Connecticut seems misplaced, as he acknowledges that the state employs a step-zero like analysis which turns on whether an interpretation is longstanding. Based on the Court’s most recent decisions I read Connecticut’s standard as being that deference only applies to longstanding interpretations that have been subject to judicial scrutiny and that all other interpretations are only entitled to *Skidmore*. *Christopher R. v. Commissioner of Mental Retardation*, 277 Conn. 594, 603, 893 A.2d 431 (2006); *Brennan v. City of Waterbury*, 331 Conn. 672, 682–83, 207 A.3d 1, 7–8 (2019); *Vitti v. City of Milford*, No. 20350, 2020 WL 4980187, at *3 (Conn. Aug. 24, 2020).

requirements”¹³⁵ Accordingly, the Court implied that it would strictly construe a statute and invalidate any regulations that either imposed exemptions or expanded the scope of the statute. In another recent decision the Court suggested that it would only defer to an interpretation that “has stood unchallenged for a considerable length of time” and that even then “reliance may nevertheless yield to a judicial determination that construction is nevertheless wrong, based on compelling indications.”¹³⁶ On the other hand, some equally recent decisions have appeared to be far more deferential.¹³⁷ Nevertheless, it seems likely that an interpretation that is not time tested will be subject to *Skidmore* like review while a more time tested interpretation may be treated more deferentially.¹³⁸

It isn’t certain exactly what is motivating this distinction between long-standing and newer interpretations. It is possible that this greater deference stems from judicial recognition of the reliance interest that parties place on longstanding interpretations.¹³⁹ It is also possible that Courts are assuming that a longstanding

¹³⁵ *Gold Creek Cellular of Montana Ltd. P'ship v. State*, 310 P.3d 533, 535 (Mont. 2013)

¹³⁶ *Montana Power Co. v. Montana Pub. Serv. Comm'n*, 2001 MT 102, ¶ 25, 305 Mont. 260, 266, 26 P.3d 91, 94

¹³⁷ *Upper Missouri Waterkeeper v. Montana Dep't of Env'tl. Quality*, 2019 MT 81, ¶ 13, 395 Mont. 263, 270, 438 P.3d 792, 797 (“We defer to an agency’s interpretation of its rule unless it is plainly inconsistent with the spirit of the rule; however, neither this Court nor the district court must defer to an incorrect agency decision.”)

¹³⁸ Philips places Montana as having *de novo* review and says that courts in Montana are “entirely free to adopt a different construction the court believes is the best.” Philips at 344. This likely goes a bit too far given the language in cases like *Upper Missouri Waterkeeper*.

¹³⁹ *Montana Power Co. v. Montana Pub. Serv. Comm'n*, 2001 MT 102, ¶ 25, 305 Mont. 260, 266, 26 P.3d 91, 94 (“Thus, the foregoing rule of deference applies,

interpretation has been subject to legislative ratification through inaction.¹⁴⁰

Alternatively, it may be that longstanding and contemporaneous interpretations are assumed to accurately reflect the original meaning of a statute or regulation, a dubious assertion that nevertheless may be most compatible with the historical federal practice before *Chevron*.¹⁴¹

D) States that have grown more skeptical of deference in recent years as evidenced by either narrowing decisions or vocal voices of opposition (7 States)

i. More thorough statutory review before deferring (3 States)

In some states the shift away from deference has been subtle. This approach is most similar to that recently taken by the Supreme Court in *Kisor*. Just as the Supreme Court has reduced its reliance on deference doctrines through the more rigorous use of tools of statutory construction, so too have some states reduced deference by more thoroughly engaging in the judicial function of statutory review.

generally speaking, where the particular meaning of a statute has been placed in doubt, and where a particular meaning has been ascribed to a statute by an agency through a long and continued course of consistent interpretation, resulting in an identifiable reliance”)

¹⁴⁰ *Alaska Judicial Council v. Kruse*, 331 P.3d 375, 381 (Alaska 2014) (“A longstanding agency interpretation may also be viewed as legislative acquiescence to that interpretation.”)

¹⁴¹ See, e.g., Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 985–94 (2016) (relying on 1 Joseph Story, *Commentaries on the Constitution of the United States* § 408, at 392 (Leonard W. Levy ed., Da Capo Press 1970) (1833)).

Georgia is the most pronounced example of this.¹⁴² In a recent decision the Court explained that “After using all tools of construction, there are few statutes or regulations that are truly ambiguous” and that therefore deference will almost never apply.¹⁴³

Texas is also a particularly striking example, as the Texas Supreme Court has repeatedly engaged in very elaborate statutory review rather than employ deference.¹⁴⁴ For instance, the Court has emphasized that it will not find an ambiguity until it has engaged in a through contextual examination of the statute and will “apply the definition most consistent with the context of the statutory scheme” rather than simply concluding that a statute is ambiguous and engaging in deference.¹⁴⁵ So Texas at times employs elements of deference but does so in a rather skeptical or limiting manner

The Colorado Supreme Court has similarly not expressly voiced its skepticism or disquiet with deference, but its decisions have nevertheless put serious caveats or

¹⁴² Philips does not pick up on this shift away from deference in Georgia (P. 329)

¹⁴³ *City of Guyton v. Barrow*, 305 Ga. 799, 804, 828 S.E.2d 366, 370 (2019).

¹⁴⁴ *Brazos Elec. Power Coop., Inc. v. Texas Comm'n on Env'tl. Quality*, 576 S.W.3d 374, 384 (Tex. 2019); *Harris Cty. Appraisal Dist. v. Texas Workforce Comm'n*, 519 S.W.3d 113, 118 (Tex. 2017). See also Manuel H. Hernandez, *Running Out of Gas: Why Texas Must Distance Itself Completely from the Chevron Doctrine of Administrative Deference*, 14 Tex. Tech Admin. L.J. 225, 232 (2012).

¹⁴⁵ *Thompson v. Tex. Dep't of Licensing & Regulation*, *Thompson v. Tex. Dep't of Licensing & Regulation*, 455 S.W.3d 569, 571 (Tex.2014)

limitations on agency deference.¹⁴⁶ For instance, in *BP Am. Prod. Co.*, the Court listed a lengthy list of caveats to deference such as not deferring if an interpretation has not been uniform, or not promulgated through formal rulemaking.¹⁴⁷ Interpretations must also be within an “agency's special expertise.”¹⁴⁸ Similarly, the Court has suggested that a variety of substantive canons of construction will apply rather than deference, such as the canon that “courts will construe all doubts regarding interpretation of language in a tax statute in favor of the taxpayer.”¹⁴⁹ Nevertheless, the Court has continued to apply something approximating *Chevron* even very recently.¹⁵⁰ And so Colorado tentatively fits into this category, but may slip into a different category if these limitations are not observed in practice.

ii. Voices of dissent (6 States)

In 2019 the Georgia Supreme Court granted certiorari to determine whether deference “is in tension with our role as the principal interpreter of Georgia law.”¹⁵¹ But the court ultimately decided that the regulation in question was not ambiguous. Accordingly, it did not resolve the question. Instead, as discussed above, it explained the need for extremely thorough an exhaustive statutory review. A judge

¹⁴⁶ See *Dep't of Revenue v. Agilent Techs., Inc.*, 2019 CO 41, ¶ 16, 441 P.3d 1012, 1016–17; *BP Am. Prod. Co. v. Colorado Dep't of Revenue*, 2016 CO 23, 369 P.3d 281, 285. Accord Phillips at 325 (“While Colorado’s standard is similar to *Chevron*, courts have used more limiting language in opinions that suggest the deference is not quite as strong.”).

¹⁴⁷ *Id.* at ¶15 & n. 5.

¹⁴⁸ *Huddleston v. Grand Cty. Bd. of Equalization*, 913 P.2d 15, 17 (Colo. 1996).

¹⁴⁹ *Id.* at ¶ 16.

¹⁵⁰ *Destination Maternity v. Burren*, 463 P.3d 266, 274 (Colo. 2020).

¹⁵¹ *City of Guyton v. Barrow*, 305 Ga. 799, 799, 828 S.E.2d 366, 367 (2019).

on the Georgia Court of Appeals recently noted that its state still gives judicial deference “for the time being.”¹⁵² However, the same judge also noted that “[s]ome judges of this Court believe the time has come to reconsider such deference.”¹⁵³

Members of the Texas Supreme Court have also expressed some skepticism regarding agency deference,¹⁵⁴ and especially against the idea that agencies are entitled to deference when they change their interpretations or upset existing reliance interests.¹⁵⁵

Ohio is a state that generally applies deference akin to *Chevron*. But At least four members of the Ohio Supreme Court have expressed sharp skepticism of deference. In *In re 6011 Greenwich Windpark, L.L.C.*, the Ohio Supreme Court

¹⁵² *UHS of Anchor, L.P. v. Dep't of Cmty. Health*, 351 Ga. App. 29, 33, 830 S.E.2d 413, 418 (2019), *cert. granted* (Feb. 10, 2020).

¹⁵³ *Id.* at n 16.

¹⁵⁴ *Liberty Mut. Ins. Co. v. Adcock*, 412 S.W.3d 492, 493 (Tex. 2013) (“A fundamental constraint on the courts' role in statutory interpretation is that the Legislature enacts the laws of the state and the courts must find their intent in that language and not elsewhere. Under the guise of agency deference, an agency asks us to judicially engraft into the Texas Workers' Compensation Act a statutory procedure to re-open determinations of eligibility for permanent lifetime income benefits—a procedure the Legislature deliberately removed in 1989. The Legislature's choice is clear, and it is not our province to override that determination.”)

¹⁵⁵ *Mosley v. Texas Health & Human Servs. Comm'n*, No. 17-0345, 2019 WL 1977062, at *14 (Tex. May 3, 2019) (“Such rules have the force of law, we are told. ... The government routinely insists that courts should trust state agencies to correctly interpret statutes through formal rulemaking. ... And if the government thinks *judges* should defer to agency rules, then surely the government also thinks *regular citizens* can safely follow agency rules without worrying about whether they contradict the underlying statute. Apparently not.”).

deferred to an interpretation of two statutes by the Ohio Power Siting Board.¹⁵⁶ Justice Kennedy dissented joined by Justices DeWine and Stewart. He declared that “the majority abdicates this court’s judicial duty and authority.”¹⁵⁷ He acknowledged that some of the Court’s past decisions had accorded deference for agency interpretations of highly specialized issues, but expressed his sharp concern that deference in this case would mean the court had “abandon[ed] [its] role as an independent check for the executive branch.”¹⁵⁸ And Justice Lynch noted his “concern with the unchecked power of administrative agencies” and emphasized that “[c]ourts must interpret and apply law rather than allowing agencies to do so.”¹⁵⁹

But the most consistent voice of *Chevron* skepticism on the Ohio Supreme Court has been Justice Dewine who has taken a hardline stance against deference in both published opinions and in academic and other writing. Justice DeWine has declared that “deference is unwarranted; it is out job, not the [agency’s] to issue final

¹⁵⁶ 2019-Ohio-2406, 157 Ohio St. 3d 235, 252–53, 134 N.E.3d 1157, 1173.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ STATE OF OHIO ex rel. DAVE YOST, OHIO ATTORNEY GENERAL,

Plaintiff-Appellee, v. OSBORNE CO., LTD., et al., Defendants-Appellants.

Additional Party Names: Estate of Jerome T. Osborne, Jerome T. Osborne, 2020-Ohio-3090.

interpretations of the law.”¹⁶⁰ In that same opinions, Justice DeWine referenced the growing criticism of Chevron and Auer and revealed that he “share[d] the ... concerns that have been expressed about judicial deference to agency interpretations of laws.”¹⁶¹ In yet another concurrence, Justice DeWine again declared that he was “skeptical of our deference doctrines generally and think[s] the court ought to take a hard look at those doctrines in an appropriate case.”¹⁶² And in a blog post featured on the Yale Journal on Regulation Notice and Comment blog Justice DeWine criticized Ohio’s approach as being haphazard and inconsistent and called for the state to “abandon the practice of plucking bits and pieces of federal doctrine and haphazardly applying them in particular cases.”¹⁶³ Given the influence of Justice DeWine and the other dissenting voices, Ohio seems to be moving from a reliable deference state to one that is more skeptical of deference or even likely to abandon it in the next few years.

Pennsylvania may be following a similar pattern. In some of its older decisions, the Pennsylvania Supreme Court spoke of the “great deference” due to agency statutory interpretations.¹⁶⁴ But the Court’s most recent decisions place significant

¹⁶⁰ *State ex rel. McCann v. Delaware Cty. Bd. of Elections*, 2018-Ohio-3342, 155 Ohio St. 3d 14, 21, 118 N.E.3d 224, 231.

¹⁶¹ *Id.*

¹⁶² *In re Ohio Edison Co.*, 2019-Ohio-2401, 157 Ohio St. 3d 73, 88, 131 N.E.3d 906, 922.

¹⁶³ <https://www.yalejreg.com/nc/a-few-thoughts-on-administrative-deference-in-ohio-by-justice-r-patrick-dewine/>

¹⁶⁴ *Alpha Auto Sales, Inc. v. Dep't of State, Bureau of Prof'l & Occupational Affairs*, 537 Pa. 353, 357, 644 A.2d 153, 155 (1994).

limitations on the circumstances where deference applies.¹⁶⁵ One Justice noted that “[t]his Court has consistently shown a willingness to chip away at the administrative deference rule” and expressed his desire for a reconsideration “[i]n lieu of slowly moving this court’s jurisprudence away from the administrative deference rule and leaving litigants with limited guidance as to the rule’s applicability.”¹⁶⁶ And three members of the Court have expressed their concern with deference and their desire to reconsider whether deference should still be applied.¹⁶⁷ Justice Wecht has also persuasively critiqued the Court’s deference precedent for its

¹⁶⁵ *Gen. Motors, LLC v. Bureau of Prof'l & Occupational Affairs*, 212 A.3d 40, 47–48 (Pa. 2019) (“This Court has also indicated, however, that the principle of deference applies with greater force to longstanding agency interpretations, only when the language of a statute is ambiguous, and only within the range of agency authority and expertise. In all events, this Court has maintained its role as the final arbiter in matters of statutory construction.”).

¹⁶⁶ *Id.* at 52 n. 2 (Mundy J., concurring and dissenting).

¹⁶⁷ *Id.* at 52 n. 2 (Mundy J., concurring and dissenting); *Harmon v. Unemployment Comp. Bd. of Review*, 207 A.3d 292, 310 (Pa. 2019) (Wecht J., concurring) (“As I have explained in the past, I do not agree that reviewing courts should afford what often amounts to unqualified deference—*i.e.*, *Chevron* deference—to an executive-branch agency’s interpretation of an ambiguous statute”); *CROWN CASTLE NG EAST LLC AND PENNSYLVANIA-CLE LLC, Appellees v. PENNSYLVANIA PUBLIC UTILITY COMMISSION, Appellant*, No. 2 MAP 2019, 2020 WL 4154767 (Pa. July 21, 2020) (Wecht J., concurring) (“When we consider an **agency’s** interpretive rule, it is probity, rather than **deference**, that should dictate the success or failure of an **agency’s** position, whether that position is embodied in an **agency** course of conduct and stability of **interpretation** or in interpretive documents issued after a process lacking the hallmarks of formal rule-making pursuant to a statutory grant of authority. Courts should respond to agency requests for deference by saying: “Don’t command me. Convince me.”).

“fundamental lack of clarity.”¹⁶⁸ And in a concurring opinion in December 2020 Justice Donohue sharply critiqued the court both for deferring to an agency and also for deferring to an agency as to whether a statute was ambiguous in the first place.¹⁶⁹ But it isn’t clear whether Pennsylvania will reach a critical mass of dissenting voices to lead to significant strides away from deference.

The South Carolina Supreme Court has been quite deferential towards administrative agencies but there is at least one voice of some limited skepticism on the Court.¹⁷⁰ Justice Toal has expressed his concerns that

¹⁶⁸*CROWN CASTLE NG EAST LLC AND PENNSYLVANIA-CLE LLC, Appellees v. PENNSYLVANIA PUBLIC UTILITY COMMISSION, Appellant*, No. 2 MAP 2019, 2020 WL 4154767 (Pa. July 21, 2020)

¹⁶⁹ *Woodford v. Ins. Dep’t*, 243 A.3d 60, 79 (Pa. 2020) (Donohue, J., concurring) (“When a reviewing court finds that a statute is ambiguous, in my view an agency’s interpretation is entitled to deference only in the sense of a recognition that the agency’s view should be considered for its persuasive value. This position is distinct from deferring to the agency’s view as a matter of law. “)

¹⁷⁰ *Compare Kiawah Dev. Partners, II v. S.C. Dep’t of Health & Envtl. Control*, 411 S.C. 16, 34–35, 766 S.E.2d 707, 718 (2014) (“As repeatedly stated in our decisions, our deference doctrine provides that courts defer to an administrative agency’s interpretations with respect to the statutes entrusted to its administration or its own regulations unless there is a compelling reason to differ.”), *with Id.* at 729-30 (Toal J.,dissenting) (“[I]n my opinion, judicial deference is best articulated as the attachment of ‘great weight’ to an agency’s understanding of its own responsibilities, and applying that understanding absent a convincing or persuasive reason for the reviewing court to diverge. ... In my opinion, the terms ‘defer’ and “compelling” should not be used to disrupt the critical balance between the courts’ role in interpreting the law and the administrative agencies’ duty to execute the law. This balance is not reflected in a standard which implies that bureaucratic interpretations serve as a snare to judicial and administrative courts in their ability to review agency decisions using all constitutionally and statutorily conferred powers.”).

“bureaucratic interpretations serve as a snare to judicial and administrative courts in their ability to review agency decisions using all constitutionally and statutorily conferred powers.”¹⁷¹ Justice Toal’s critique is, however, a far milder and narrower critique of deference than some of the other decisions from other courts that we have already discussed.¹⁷²

Similarly, as noted above there is at least one voice of skepticism on the New York Court of Appeals who has warned that failing to “delegate our statutory construction role to any agency under the guise of deference” would “be an error of constitution dimension.” *Wegmans Food Markets, Inc. v. Tax Appeals Tribunal of State*, 33 N.Y.3d 587, 604–07, 131 N.E.3d 876, 888–90 (2019). But this attack seems quite timid, and we will have to wait and see if this stray decision becomes a sustained attack on deference.

Before moving on from this category, it is worth asking what value is there in these dissenting opinions. After all, in most of these states deference continues to be applied despite these voices of dissent. And in some states like New York these dissenters seem like solitary voices in the wilderness. But it nevertheless appears to me that these dissents serve several important functions. First of all, it does not appear to be a coincidence that there is significant overlap between voices of dissent and the strict and narrow application of deference doctrines. Voices of dissent seem

¹⁷¹ *Id.* at 729-30

¹⁷² Philips did not pick up on Justice Toal’s critique and therefore lists South Carolina as a state that generally employs *Chevron* like deference. But for Justice Toal’s critique I would agree. Philips at 356-57.

to keep the Court honest and thorough in its application of deference. Accordingly, even if there is not a significant shift away from deference I predict that voices of dissent on deference make it less likely that deference gets over applied. Relatedly, few states appear to have adopted deference in a considered manner. Accordingly, voices of dissent help to reveal inconsistencies in application and to push their states to more fully explain when and under what circumstances deference is proper. Third, deference dissenters repeatedly draw on the opinions and writings of their fellow state court dissenters as well as the writings of notable federal dissenters such as Justice Gorsuch, Judge Strass, and Judge Jordan. Accordingly, the trend of dissenting voices is self-reinforcing and makes it more likely that other judges may choose to dissent. Furthermore, a strong voice of opposition to deference can make a big difference as in the example of Utah where Justice Lee was likely instrumental in the shift away from deference. And in a state like Kansas several years of critical or skeptical decisions came before outright abolition of difference. Accordingly, it seems likely that strong voices of dissent are predictive of both greater skepticism towards deference and perhaps towards the abolition of deference.

E) Inconsistent States (9 States)

This category contains a number of states that have either inconsistently declared that deference applied, or have veered back and forth from deference and non-deference in a manner that is hard to parse or understand.

If this article were being written a few years ago, I would have placed Indiana in the category of states that had fully repudiated deference.¹⁷³ In 2018, the Court explained that “Separation-of-powers principles do not contemplate a ‘tie-goes-to-the-agency’ standard for reviewing administrative decisions on questions of law” and that “[i]n discharging our constitutional duty, we pronounce the statutory interpretation that is best and do not acquiesce in the interpretations of others.”¹⁷⁴ Surprisingly, despite that strong rebuke, the Court walked this back the next year in *Moriarty*.¹⁷⁵ Justice Slaughter, the author of *NIPSCO* dissented in *Moriarty*. He expressed his frustrating that he “had thought this discredited standard, which the Court resurrects today, had been laid to rest for good in *NIPSCO*” and that “there is no principled reason, consistent with separation of powers, for according fundamentally different treatment to the statutory interpretations of different agencies within the executive branch of state government.”¹⁷⁶ For Justice Slaughter,

¹⁷³ Philips picks up on neither the *NIPSCO* decision nor its walk back in *Moriarty* and so he ranks *Indiana* as having one of the most deferential friendly standards in the country. Philips at 333. Even if the state has walked back from *NIPSCO* it strongly suggests that will no longer be the case.

¹⁷⁴ *NIPSCO Indus. Grp. v. N. de Pub. Serv. Co.*, 100 N.E.3d 234, 241 (Ind. 2018), modified on reh'g (Sept. 25, 2018).

¹⁷⁵ *Moriarity v. Indiana Dep't of Nat. Res.*, 113 N.E.3d 614, 619–20 (Ind. 2019) (“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. In *NIPSCO*, that was our primary focus. 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.”).

¹⁷⁶ *Moriarity v. Indiana Dep't of Nat. Res.*, 113 N.E.3d 614, 625 (Ind. 2019) (Slaughter J., dissenting)

it is never appropriate to “allow[] an agency’s reasonable interpretation to prevail to prevail over out best interpretation.”¹⁷⁷ Deference would render judicial review “plenary in theory, deferential in name, and a rubberstamp in fact.”¹⁷⁸ Because of Justice Slaughter’s sharp dissent, it will be worth following the decisions of the Indiana Supreme Court and Court of Appeals closely to see how deference is applied moving forward.¹⁷⁹

In Kentucky, some recent Supreme Court decisions seem to reject deference.¹⁸⁰ However, another recent decision suggests that deference still applies and does not acknowledge any tension.¹⁸¹ There is a lengthy tradition of deference in Kentucky, and so I predict that these deference skeptical decisions are merely rhetorical departures from the norm of deference, but I would like to see some more decisions to be certain.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *See Golden Gate Nat'l Senior Care, LLC v. Indiana Family & Soc. Servs. Admin.*, No. 19A-PL-1269, 2020 WL 610884, at *7 (Ind. Ct. App. Feb. 10, 2020) (citing *Moriarty* and applying deference); *Webb Ford, Inc. v. Indiana Dep't of Fin. Institutions*, 133 N.E.3d 136, 142 (Ind. Ct. App. 2019).

¹⁸⁰ *Roach v. Kentucky Parole Bd.*, 553 S.W.3d 791, 793 (Ky. 2018) (“[U]pon judicial review, deference extends to agency fact-finding. However, matters of law, including the interpretation and construction of statutes[,] are ... within the province of the judicial branch of government.”); *Bd. of Educ. of Fayette Cty. v. Hurley-Richards*, 396 S.W.3d 879, 885–86 (Ky. 2013) (“Issues of statutory construction are matters of law for the courts to resolve, and the reviewing court is not bound by an administrative body’s interpretation of a statute.”).

¹⁸¹ *Louisville Gas & Elec. Co. v. Kentucky Waterways All.*, 517 S.W.3d 479, 489–90 (Ky. 2017) (“Kentucky courts give substantial deference to an administrative agency’s construction of applicable statutes and regulations as long as that interpretation is consistent with the statutory or regulatory language at issue.”).

Wyoming is difficult to place. On first glance, it appear to be a state that has rejected deference. As of October 2020, there are 47 decisions from the Wyoming Supreme Court declaring that it “do[es] not afford any deference to the agency's determination” of the meaning of a law. The earliest of these decisions is from 1998 and the most recent is from 2019.¹⁸² On the other hand, some older decision embrace a very robust form of deference and even some more recent decisions suggest that some deference is due to an agency in matters of statutory interpretation.¹⁸³ But the Court does not appear to have actually deferred to an agency's statutory interpretation in at least a decade. On the other hand, the Court appears to much more frequently invoke deference in cases involving “an agency's interpretation of its own rules” where several recent decisions suggest that

¹⁸² *Camacho v. State ex rel. Dep't of Workforce Servs., Workers' Comp. Div.*, 2019 WY 92, 448 P.3d 834 (Wyo. 2019); *Wright v. State ex rel. Wyoming Workers' Safety & Comp. Div.*, 952 P.2d 209 (Wyo. 1998).

¹⁸³ *Pub. Serv. Comm'n of Wyoming v. Qwest Corp.*, 2013 WY 48, ¶ 23, 299 P.3d 1176, 1182 (Wyo. 2013) (There is no question that one measure of a statute's meaning is the interpretation placed on it by the agency charged with its administration. This Court will defer to that interpretation when it does not conflict with legislative intent.”) *Exxon Mobil Corp. v. State, Dep't of Revenue*, 2009 WY 139, ¶ 38, 219 P.3d 128, 140 (Wyo. 2009) (“While we generally defer to an agency's interpretation of the statutes it administers, an agency's statutory interpretation is entitled to little when it is contrary to prior practice and precedent.”); *Buehner Block Co. v. Wyoming Dep't of Revenue*, 2006 WY 90, ¶ 11, 139 P.3d 1150, 1153–54 (Wyo. 2006) (“An agency's interpretation of statutory language which the agency normally implements is entitled to deference, unless clearly erroneous.”). *See also Laramie Cty. Bd. of Equalization v. Wyoming State Bd. of Equalization*, 915 P.2d 1184, 1190 (Wyo. 1996) (“The construction placed on a statute by the agency charged with its execution is entitled to deference as long as it does not conflict with the legislature's intent.”).

deference is due “unless that interpretation is clearly erroneous or inconsistent with the plain language of the rules.”¹⁸⁴ So Wyoming is arguably in the category of states that have abolished *Chevron* like deference but retained *Auer* like deference. But the Court’s inconsistent pronouncements on *Chevron* like deference and the lack of a decision clearly discussing this tension means that I am going to place Wyoming in the inconsistent tier of states.¹⁸⁵

Some of the Maryland Court of Appeals decisions, including a quite recent one, describe a very weak form of deference akin to *Skidmore* where a court “may accord some weight to an agency’s interpretation and application of a statute that it administers.” On the other hand, other decisions including a similarly recent one sound much more deferential.¹⁸⁶ Overall, it is more likely than not that Maryland courts employ something akin to *Skidmore* deference, but there is enough uncertainty to warrant placement in this category.

¹⁸⁴ *Tayback v. Teton Cty. Bd. of Cty. Commissioners*, 2017 WY 114, ¶ 25, 402 P.3d 984, 990 (Wyo. 2017); *N. Laramie Range Found. v. Converse Cty. Bd. of Cty. Comm’rs*, 2012 WY 158, ¶ 37, 290 P.3d 1063, 1077 (Wyo. 2012)

¹⁸⁵ Philips does not appear to pick up on this tension and so he places Wyoming in the category of having abandoned deference. Philips at 364. His placement is defensible and indeed I went back and forth on how to place Wyoming myself. But he does not point out any of these recent contrary cases which may be misleading to litigators.

¹⁸⁶ *Compare Motor Vehicle Admin. v. Krafft*, 452 Md. 589, 603, 158 A.3d 539, 547 (2017) (“This standard accords less deference to an agency’s legal conclusions than to its fact findings, although a reviewing court may accord some weight to an agency’s interpretation and application of a statute that it administers.”) *with* *Owusu v. Motor Vehicle Admin.*, 461 Md. 687, 698, 197 A.3d 35, 42 (2018) (“Additionally, purely legal questions are reviewed *de novo* with ‘considerable weight’ to the agency’s interpretation and application of the statute which the agency administers.”)

Similarly, in Rhode Island, a recent decision suggests that only *Skidmore*-like deference is due.¹⁸⁷ Another recent decision emphasizes that the Court “always has the final say” and that deference is not given when “considering a pure question of law, which does not require special expertise beyond what the members of this Court possess.”¹⁸⁸ But other recent decisions suggest much more robust deference.¹⁸⁹ Rhode Island seems to be trapped in the contradiction of claiming to engage in *de novo* but also deferential review, and it isn’t clear how Rhode Island courts will navigate this quagmire.

South Dakota has declared that it grants no deference to agency interpretations.¹⁹⁰ But in one recent decision the South Dakota Supreme Court cited

¹⁸⁷ *Mancini v. City of Providence*, 155 A.3d 159, 167–68 (R.I. 2017) (“However, it should not be forgotten that we have also expressly stated that an agency’s interpretation is not controlling and, further, that regardless of deference due, this Court always has the final say in construing a statute. We certainly have never suggested that we owe any administrative agency’s interpretation blind obedience; rather, the true measure of a court’s willingness to defer to an agency’s interpretation of a statute ‘depends, in the last analysis, on the persuasiveness of the interpretation, given all the attendant circumstances.’”)

¹⁸⁸ *Providence Teachers’ Union Local 958, AFT, AFL-CIO v. Hemond*, No. 2018-326-APPEAL, 2020 WL 2537676, at *7 (R.I. May 19, 2020)

¹⁸⁹ *See Endoscopy Assocs., Inc. v. Rhode Island Dep’t of Health*, 183 A.3d 528, 533–34 (R.I. 2018) (“It is well settled that Rhode Island courts accord great deference to an agency’s interpretation of its rules and regulations and its governing statutes, provided that the agency’s construction is neither clearly erroneous nor unauthorized.”).

¹⁹⁰ *Fredekind v. Trimac Ltd.*, 1997 S.D. 79, ¶ 4, 566 N.W.2d 148, 150 (“Conclusions of law are given no deference and are fully reviewable.”); *Midwest Railcar Repair, Inc. v. S. Dakota Dep’t of Revenue*, 2015 S.D. 92, ¶ 22, 872 N.W.2d 79, 85 (“Conclusions of law are given no deference. Questions of statutory interpretation are reviewed *de novo*.”).

Chevron and declared that the “same analysis applies here,” even though the decision itself seemed to imply a less deferential *Skidmore* like analysis.¹⁹¹ And one decision goes so far as to suggest that an agency’s interpretation must be upheld if the interpretation is reasonable.¹⁹² Other decisions suggest that deference would only apply “when the agency charged with its administration is given express statutory authority to interpret a statute necessary for its efficient administration.”¹⁹³ In fact you could find decisions by the South Dakota Supreme Court that would put it into most of the categories used in this article. About the only conclusion I can safely draw is that South Dakota rarely defers to administrative agencies, except when it does.¹⁹⁴

Missouri appears to be even more polarized. Some of its decisions emphasize that “when an administrative agency's decision is based on the agency's interpretations of law, the reviewing court must exercise unrestricted, independent judgment and correct erroneous interpretations” which sounds like *de novo*

¹⁹¹ *Croell Redi-Mix, Inc. v. Pennington Cty. Bd. of Commissioners*, 2017 S.D. 87, ¶ 20, 905 N.W.2d 344, 350 (“[I]n passing on the meaning of a zoning ordinance, the courts will consider and give weight to the construction of the ordinance by those administering the ordinance. However, an administrative construction is not binding on the court, which is free to overrule the construction if it is deemed to be wrong or erroneous. (internal quotation marks omitted)).

¹⁹² *Mulder v. S. Dakota Dep't of Soc. Servs.*, 2004 S.D. 10, ¶ 5, 675 N.W.2d 212, 214.

¹⁹³ *Matter of Change of Bed Category of Tieszen Mem'l Home, Inc., Marion*, 343 N.W.2d 97, 98 (S.D. 1984). Or that *Auer* like deference should apply but not *Chevron* like deference. *Paul Nelson Farm v. S. Dakota Dep't of Revenue*, 2014 S.D. 31, ¶ 22, 847 N.W.2d 550, 557.

¹⁹⁴ Philips does not pick up on any of this and places South Dakota into the category of *de novo* review. Philips at 357. This is likely to mislead litigators who may be surprised to see agencies persuasively seeking deference based on recent precedent.

review.¹⁹⁵ And this language has been cited quite recently by courts in Missouri.¹⁹⁶ But decisions in Missouri applying deference among the most deferential and agency friendly anywhere in the country. Thus, in Missouri, “[r]ules and regulations are to be sustained unless unreasonable and plainly inconsistent with the act, and they are not to be overruled except for weighty reasons.”¹⁹⁷ And Missouri even puts the burden “upon those challenging the rules to show that they bear no reasonable relationship to the legislative objective”¹⁹⁸ which is likely a very difficult burden. It is therefore not clear to what degree deference applies in Missouri, but that if deference does apply a litigant will have a very difficult time prevailing.¹⁹⁹

But the award for the most incoherent and incompatible body of precedent has to go to Nevada, or as one judge on the court of appeals labelled it, a “Pandora's box of complications” *Vasquez v. State*, 468 P.3d 886 (Nev. App. 2020). For decades, decisions from this Court have been inconsistent in their approach towards agency deference. On the one hand, agencies seeking deference for their statutory or

¹⁹⁵ *Burlington N. R.R. v. Dir. of Revenue*, 785 S.W.2d 272, 273 (Mo. 1990)

¹⁹⁶ *Hallam v. Missouri Dep't of Soc. Servs., Family Support Div.*, 564 S.W.3d 703, 707 (Mo. Ct. App. 2018), as modified (Oct. 23, 2018); *Big River Tel. Co., LLC v. Sw. Bell Tel., L.P.*, 440 S.W.3d 503, 508 (Mo. Ct. App. 2014);

¹⁹⁷ *Pen-Yan Inv., Inc. v. Boyd Kansas City, Inc.*, 952 S.W.2d 299, 303 (Mo. Ct. App. 1997); *State ex rel. Pub. Counsel v. Pub. Serv. Comm'n of State*, 397 S.W.3d 441, 450 (Mo. Ct. App. 2013)

¹⁹⁸ *Foremost-McKesson, Inc. v. Davis*, 488 S.W.2d 193, 197 (Mo. 1972).

¹⁹⁹ Philips places Missouri in the category of De Novo review. Philips at 342. This placement ignores however decisions applying extremely deferential standards and seems likely to mislead litigants.

regulatory interpretations can point to a variety of cases declaring that they are to receive “great deference,” e.g., *Clark Cty. Sch. Dist. v. Local Gov’t Emp. Mgmt. Relations Bd.*, 90 Nev. 442, 446, 530 P.2d 114, 117 (1974); *State v. Morros*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988); *United States v. State Eng’r*, 117 Nev. 585, 589, 27 P.3d 51, 53 (2001). Such language can be found in decisions as recent as 2020. *Smith v. Bd. of Wildlife Commissioners, Order of Affirmance*, Docket No. 77485, 461 P.3d 164, 2020 WL 1972791 (Nev. April 23, 2020) (unpublished disposition). Even those decisions, however, are not unreservedly deferential, as they frequently caveat the “great deference” standard by declaring that an agency’s interpretation is “not controlling” and merely “persuasive.” *Morros*, 104 Nev. at 713; *see also Nev. Pub. Emps. Ret. Bd. v. Smith*, 129 Nev. 618, 625, 310 P.3d 560, 565 (2013).²⁰⁰

On the other hand, several decisions of the Nevada Supreme Court flatly appear to reject deference. For example, in 2019 *Sierra Pacific Industries v. Wilson*, the State Engineer argued for deference to its view of whether the anti-speculation doctrine applies to extensions of the time for putting water to beneficial use. 135 Nev. 105, 108, 440 P.3d 37, 40. The Court emphasized that because that is a question of law, the State Engineer’s ruling on the issue “is persuasive, but not

²⁰⁰ Another further wrinkle might be a distinction between “pure legal questions” where no deference is appropriate and conclusions of law that “will necessarily be closely related to the agency’s view of the facts” which are entitled to deference. *Associated Risk Mgmt., Inc. v. Ibanez*, 136 Nev. Adv. Op. 91, 478 P.3d 372, 374 (2020).

entitled to deference.” *Id.*²⁰¹ The Court was even more emphatic in *Town of Eureka v. Office of State Engineer*, holding that courts are “free to decide purely legal questions . . . without deference to the agency’s decision,” including by “undertak[ing] independent review of the construction of a statute.” *Town of Eureka v. Office of State Eng’r of State of Nev., Div. of Water Res.*, 108 Nev. 163, 165, 826 P.2d 948, 949 (1992). I cannot reconcile these decisions and in late 2020 filed an amicus brief urging the Nevada Supreme Court to resolve the tension between these conflicting lines of authority that have coexisted in Nevada for at least twenty-eight years.²⁰²

F) Full deference – 11 States

Finally, 11 states (and the District of Columbia) apply deference that appears to be at least as vigorous as Federal case law. Rather than discuss each in depth, I will briefly highlight a few patterns and trends.²⁰³

First, the broader anti-regulatory effort underway in some states may have a significant impact on the future development of deference doctrines that has not yet been reflected in judicial opinion. For instance, Idaho in the past few years has enacted a broad anti-regulatory agenda which includes requiring all regulations to

²⁰¹ The District Court in this matter relied on *Sierra Pacific Industries* to conclude that the State Engineer’s interpretation was “persuasive, but not entitled to deference.” JA 2392.

²⁰² *Diamond Nat. Res. Prot. and Cons. Ass’n v. Diamond Valley Ranch No. 81224*, Brief of *Amicus Curiae* of Pacific Legal Foundation in Support of Respondents.

²⁰³ I cite to at least one decision from each state, either here or in an earlier section.

be reconsidered and reauthorized by the state annually.²⁰⁴ It is not yet clear what impact this change will have on the degree of deference granted to agencies, as the Idaho Supreme Court has not yet considered the issue. If deference is being accorded not to the agency but the legislature (which must ratify any agency action for it to be valid), then Idaho would move out of this category and actually be very similar to West Virginia which I placed in the Skidmore deference category

Second, even in this category, some of the states have emphasized the need for more thorough statutory interpretation before deferring.²⁰⁵ For instance, in one recent case the Alabama Supreme Court emphasized that it “will not blindly follow an administrative agency's interpretation but will interpret the statute to mean exactly what it says.”²⁰⁶ And some states like New Hampshire have shown willingness to use tools like substantive canons of construction and legal policy considerations to defeat an agency's determination.²⁰⁷ So litigants should not

²⁰⁴ Daniel Ortner , Smart Regulatory Reform is an Achievable Goal—Idaho has Shown the Way, The Hill (July 21, 2020), <https://thehill.com/opinion/finance/507864-smart-regulatory-reform-is-an-achievable-goal-idaho-has-shown-the-way>

²⁰⁵ See e.g., *In re Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater*, 731 N.W.2d 502, 516 (Minn. 2007).

²⁰⁶ *Ex parte Chesnut*, 208 So. 3d 624, 640 (Ala. 2016).

²⁰⁷ See *In re Weaver*, 150 N.H. 254, 256, 837 A.2d 294, 296 (2003) (relying on the canon of construing the Workers' Compensation Law in favor of the injured employee” as a basis for rejecting the agency's interpretation). Philips places New Hampshire into the de novo review category because the court does not give “total” deference. Philips at 346. This is a reasonable judgment call. But even though the court says it is not “bound” by an interpretation this standard still seems more deferential than strict *Skidmore* only review and so I am placing New Hampshire in this category.

assume that deference will automatically be accorded to an agency or that courts will merely serve as a rubber stamp.

Third, state courts seem especially likely to defer to an agency's interpretation of its own regulations (Auer-like deference) than to an agency's interpretation of a statute (Chevron-like deference). I already discussed this curious fact in the section on states that apply deference in some circumstances but not others. But it is worth restating because it was one of the more surprising discoveries of my survey. For instance, the Hawaii Supreme Court has stated that the need to defer is “particularly true where the law to be applied is not a statute but an administrative rule promulgated by the same agency interpreting it.”²⁰⁸

Vermont also fits into this category. The Court has suggested that *Chevron*-like deference is particularly appropriate only in certain circumstances such as 1) when agencies are statutorily authorized to interpret a statute; 2) when complex methodologies are applied; or 3) when an interpretation falls into the agency's “area of expertise.”²⁰⁹ But it appears to apply *Auer* deference more broadly because its goal is “to discern the intent of the drafters” and therefore an agency's interpretation “may be overcome only by compelling indications of error.”²¹⁰ And the District of Columbia Courts have similarly emphasized that when the construction

²⁰⁸ *Camara v. Agsalud*, 67 Haw. 212, 216, 685 P.2d 794, 797 (1984).

²⁰⁹ *In re Korrow Real Estate, LLC Act 250 Permit Amendment Application*, 2018 VT 39, ¶ 21, 207 Vt. 274, 284, 187 A.3d 1125, 1132 (2018).

²¹⁰ *In re Musto Wastewater Sys.*, 2014 VT 103, ¶ 10, 197 Vt. 514, 520, 106 A.3d 929, 934 (2014).

of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.”²¹¹

Fourth, there are quite a few states that do not appear to have thought carefully about the justifications for deference. For instance in Maine it appears that deference can be traced back to a decision in 1978 which quoted a 1933 Supreme Court decision.²¹² Over the years, this case and subsequent cases have been cited without any further analysis or discussion, despite the attention this topic has received by scholars and federal courts.

Fifth, limits or caveats on deference appear to be forgotten over time. For instance, the Massachusetts Supreme Judicial Court emphasized that deference was particularly appropriate in two circumstances: where “(1) the statute itself vests broad powers in the agency to fill in the details of the legislative scheme” or where “(2) the agency has participated in the actual drafting of the legislation.”²¹³ But more recent decisions do not appear to discuss any such limitations or caveats

²¹¹ *1330 Connecticut Ave., Inc. v. D.C. Zoning Comm'n*, 669 A.2d 708, 714–15 (D.C. App. 1995)

²¹² *See Maine Human Rights Comm'n v. Local 1361, United Paperworkers Int'l Union AFL-CIO*, 383 A.2d 369, 378 (Me. 1978) (“Administrative interpretations ... are entitled to great deference, ... especially where that interpretation involves a reasonably ‘contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new.’” (quoting *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933))).

²¹³ *Amherst-Pelham Reg'l Sch. Comm. v. Dep't of Ed.*, 376 Mass. 480, 492, 381 N.E.2d 922, 930 (1978).

and instead speak broadly of the “generous” deference due to agencies.²¹⁴ This entropic trend towards greater judicial deference is part of why the shift in other states away from deference is so striking.²¹⁵

Sixth, when states do explain the rationale for deference, an agency’s expertise is the most commonly proffered one. For instance, the New Jersey Supreme Court has explained that deference “stems from the recognition that agencies have the specialized expertise necessary to enact regulations dealing with technical matters and are ‘particularly well equipped to read and understand the massive documents and to evaluate the factual and technical issues that ... rulemaking would invite.’”²¹⁶

Finally, some particularly deferential go beyond the federal standard. In Illinois,²¹⁷ not only are agencies entitled to “substantial weight and deference” but “a reasonable construction of an ambiguous statute by the agency charged with that statute's enforcement, if contemporaneous, consistent, long-continued, and in concurrence with legislative acquiescence, creates a presumption of correctness that

²¹⁴ *Massachusetts Fine Wines & Spirits, LLC v. Alcoholic Beverages Control Comm'n*, 482 Mass. 683, 687, 126 N.E.3d 970, 975 (2019).

²¹⁵ Philips places Massachusetts as a state with *de novo* review. Philips at 338. But I cannot square that with decisions discussing the need to apply “generous” deference and “considerable weight” to the agency.

²¹⁶ *J.H. v. R&M Tagliareni, LLC*, 239 N.J. 198, 216, 216 A.3d 169, 179 (2019). See also *In re Election Law Enf't Comm'n Advisory Opinion No. 01-2008*, 201 N.J. 254, 262, 989 A.2d 1254, 1258 (2010) (“ This deference comes from the understanding that a state agency brings experience and specialized knowledge to its task of administering and regulating a legislative enactment within its field of expertise. ”).

²¹⁷ Philips places Illinois in the category of a “*Chevmore* hybrid rule” but I cannot agree with his characterization. It is true that Illinois courts consider factors such as whether an interpretation is long-standing or contemporaneous but these are gateways for even more controlling deference, not a prerequisite for deference.

is only slightly less persuasive than a judicial construction of the same act.”²¹⁸ Also in Illinois an interpretation is entitled to deference “even where no ambiguity is found if the interpretation is consistent with the general statutory scheme established by the legislature.”²¹⁹

2) Chevron in Territories and Tribes

Just as the States have shown a pattern of moving away from deference, the same is true among territories and, to a lesser degree, Indian tribes.²²⁰

In 2014, the Supreme Court of the Virgin Islands considered whether it would follow federal precedent and defer to administrative agencies.²²¹ The Court cited to Utah, Montana, Michigan, and Delaware decisions rejecting deference. It noted that the territorial legislature was fully capable of calling for more deferential review when warranted. And it explained that “the policy considerations” that justified *Chevron* were not present in the Virgin Islands since there was no danger of a lack of uniformity resulting for plenary review. And the Court expressed its serious concern that under *Chevron* fundamental questions of law would “be subject to

²¹⁸ *Citibank, N.A. v. Illinois Dep't of Revenue*, 2017 IL 121634, ¶ 39, 104 N.E.3d 400, 410.

²¹⁹ *In re Cty. Treasurer & ex officio Cty. Collector of Cook Cty.*, 2020 IL App (1st) 190722, ¶ 22

²²¹ *Bryan v. Fawkes*, No. S.CT.CIV. 2014-0046, 2014 WL 4244046, at *10 (V.I. Aug. 28, 2014).

change based solely on the judgment of whoever happens to serve as [the head of an agency] at a given time.” The Court also went even further and rejected even the application of *Skidmore* deference in the Island’s courts.²²²

The Guam Supreme Court has not gone quite as far as the Virgin Islands, but it has also largely rejected *Chevron* like deference and instead embraced *Skidmore* deference. In a 2018 decision, the Court noted that its past decisions were inconsistent and that it had applied *Chevron* deference on at least one occasion and cited to it on numerous other occasions.²²³ However, the Court explained that deference was only appropriate with “an ambiguous statute that the Legislature intended to leave to the [agency’s interpretation.” And it concluded that with “a pure question of statutory interpretation” there was no such evidence and *de novo* review was proper. The Court found that “*De novo* review and *Chevron* deference, as it is fully understood, are competing ideas” that are irreconcilable and clarified that it would only extend *Skidmore* deference going forward.

²²² *Bryan v. Fawkes*, No. S.CT.CIV. 2014-0046, 2014 WL 4244046, at *10 n. 16. (V.I. Aug. 28, 2014) (“the same considerations that cause us to reject *Chevron* also lead us to decline to extend *Skidmore* to the Virgin Islands”

²²³ *Port Auth. of Guam v. Civil Serv. Comm’n*, 2018 Guam 9, ¶ 10 (Guam July 26, 2018). However, at least one member of the Virgin Islands Supreme Court has continued to call for *Chevron* deference. *NANDI SEKOU, MARTIAL WEBSTER, & TERRENCE JOSEPH, as members of the Virgin Islands Bd. of Educ., on their own behalf & on behalf of the Bd. of Educ., Appellants/Plaintiffs, v. MARY MOORHEAD, JUDY GOMEZ, & JENNIFER JONES, Appellees/Defendants.*, No. 2018-0011, 2020 WL 1970723, at *13 (V.I. Apr. 24, 2020) (Swan, J., concurring in part and dissenting in part).

The Supreme Court of the Commonwealth of the Northern Mariana Island has not rejected deference formally, but it quite recently noted the Supreme Court’s narrowing construction in *Kisor* and refused to overturn a lower court decision which refused to grant deference. *Triple J Saipan, Inc. v. Muna*, No. 2017-SCC-0033-CIV, 2019 WL 5578881, at *7 (N. Mar. I. Oct. 23, 2019). And its other decisions have similarly been skeptical of deference.²²⁴

On the other hand, the Puerto Rican Supreme Court has deferred to agencies based on the belief that agencies are able to leverage their expertise to create and adjust rules responsive to public policy concerns.²²⁵

Tribal courts have also grappled with the question of deference. The Mashantucket Pequot Tribal Court considered the question of deference and delivered a rather muddled equivocal response. In one decision the Court applied *Chevron* in full.²²⁶ In another decision a few years later, the Court emphasized that “the judiciary is the final authority on issues of statutory construction” and that agency determinations that have never been subject to judicial interpretation are

²²⁴ *Calvo v. N. Mariana Islands Scholarship Advisory Bd*, No. 07-0026E, 2009 WL 614773, at *6 (N. Mar. I. Feb. 20, 2009).

²²⁵ *Buono Correa v. Srio. Rec. Naturales*, 2009 TSPR 166 (P.R. Oct. 28, 2009); *De Jesus v. Depto. Servicios Sociales*, No. CE-88-316, 1989 WL 607317 (P.R. Mar. 8, 1989).

²²⁶ *Magee v. Mashantucket Pequot Gaming Enter.*, No. MPTC-CV-AA-2006-150, 2007 WL 2728333, at *14 (Aug. 31, 2007).

“not entitled to special deference”, but also quoted *Chevron* favorably.²²⁷ But in an even more recent decision the Court rejected deference when it had not previously considered the judicial interpretation of a statute and did not seem particularly favorably disposed to deference.²²⁸ So is some inconsistency but the trend is away from deference.²²⁹

The Supreme Court of the Ho-Chunk nation has also emphasized that it was required to review an agency’s interpretations *de novo* because to do otherwise would “essentially abandon its constitutional mandate to interpret” and would “violate separation of powers principles, since the legislature would then have the power to not only make the law but interpret it as well.”²³⁰ The Trial Court of the

²²⁷ *Sebastian v. Mashantucket Pequot Gaming Enter.*, No. MPTC CV-AA-2008-0187, 2010 WL 1027797, at *9 (Mash. Pequot Tribal Ct. Mar. 15, 2010) (relying on Connecticut precedent).

²²⁸ *Jones v. Mashantucket Employment Rights Office*, No. CV-AA-2014-168, 2015 WL 3500526, at *4 (Mash. Pequot Tribal Ct. June 3, 2015)

²²⁹ The Mohegan Gaming Disputes Trial Court reached a similar conclusion regarding limits on deference, emphasizing that “where there are pure questions of law, which have not been previously subject to judicial scrutiny, the Agency’s determination is not entitled to special deference.” *Mohegan Tribal Gaming Authority v. Mohegan Tribal Employment Rights Comm’n*, No. GDTC-AD-02-136, 2003 WL 25795207 (Mohegan Gaming Trial Ct. Mar. 12, 2003), rev’d sub nom. *Mohegan Tribal Gaming Auth. v. Mohegan Tribal Employment Rights Comm’n*, No. GDCA-AD-03-501, 2003 WL 25795197 (Mohegan Gaming C.A. Nov. 20, 2003) This decision was overturned, but the Mohegan Gaming Disputes Court of Appeals does not appear to have squarely considered the deference question.

²³⁰ *Lone Tree v. Garvin*, No. SU 07-04, 2007 WL 5256873 (Ho-Chunk Oct. 6, 2007)

Ho-Chunk Nation also raised concerns about agency deference. The Court explained that some of the key rationales for deference are “diminished in the tribal setting” because of the constitutional authority given to the judiciary, the lack of clear rulemaking, and the at times secretive nature of tribal adjudications.²³¹

On the other hand, other tribes such as the Navajo Nation and Tulalip Tribe have applied deference without any significant reservations.²³²

G) Conclusion

While only a small number of states have fully rejected deference, many of those that have done so have done so with significant fanfare and a vocal rejection of the notion that the judiciary can delegate the power of judicial interpretation to the executive branch. Even states that have not gone so far as to reject deference have shown increasing skepticism and apply deference in only a narrow and narrowing category of circumstances. And there are deference skeptics sitting on many other courts across the country. This move away from deference has the force of momentum and powerful arguments in its favor. On the other hand, Courts supporting deference are doing so largely out of inertia with largely cursory opinions justifying the need for deference. And even Courts continuing to apply deference are doing so apologetically and hesitantly. These transformations suggest

²³¹ *Ho-Chunk Nation v. Ho-Chunk Nation Grievance Review Bd.*, No. CV 10-07, 2010 WL 5128358 (Ho-Chunk Trial Ct. Nov. 2, 2010).

²³² *Barton v. Navajo Nation Ethics & Rules Office*, No. SC-CV-48-2001, 2003 WL 25794138 (Navajo Sept. 15, 2003); *C.S. v. Tulalip Tribes Hous. Dep't*, No. TUL-CV-ET-2009-0458, 2011 WL 576065 (Tulalip C.A. Feb. 8, 2011)

that a quiet revolution is well underway in courts throughout the nation as well as in Indian tribes and federal territories.

This article and its findings open up several areas for further research and study. Defenders of deference have argued that deference is inevitable and that without it agencies will be unable to function.²³³ The experience of several states that have rejected it suggests otherwise.²³⁴ But what impact has the abolition of deference actually had on agency effectiveness. Are agencies in states like Florida suddenly unable to carry out their functions? A thorough examination of the impact of the end of deference may clear up misconceptions about the role that deference plays. Relatedly, scholars²³⁵ (and Justices) have argued that *stare decisis* justifies

²³³ Barrett and Vinson in a recent article thoroughly discuss various arguments regarding Chevron's inevitability. Many of these arguments boil down to a sense that it is ultimately impossible to distinguish between law and policy in order to know when deference is appropriate. See https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3544868 at 14. See also Jeffrey A. Pojanowski, Without Deference, 81 MO. L. REV. 1075, 1076 (2016) (arguing that some kind of deference would be necessary even if not *Chevron*); Nicholas R. Bednar & Kristin E. Hickman, Chevron's Inevitability, 85 GEO. WASH. L. REV. 1392, 1444 (2017). ADRIAN VERMEULE, LAW'S ABNEGATION 29–30 (2016).

²³⁴ Kent Barnett and Lindsey Vinson recently published an article looking at deference internationally. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3544868. They looked at five countries and found that only one of them has something analogous to *Chevron* deference but that most of the countries had some form of limited deference. According to Barnett and Vinson, Germany employs deference only to highly technical matters with express delegation. Similarly, the UK defers only for "special" matters. This is analogous to the practice in at least seven states. And Australia appears to only defer to very specific delegations of exclusive jurisdiction, which finds state law parallels as well. The findings of this article support their conclusions that *Chevron* deference as currently applied is far from inevitable.

²³⁵ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3032248 at 111.

the continuation of deference. So what impact has the rather sudden abolition of deference had on past precedent? Third, many states have narrowed deference to only apply in certain circumstances. Further study into the justifications for these limited kinds of deference would be extremely valuable. Fourth, how do the rationale that states use to justify deference compare to those used by federal courts? As suggested above, the agency expertise rationale appears to predominate at the state level rather than some of the other rationale offered for federal deference which are less applicable at the state level (such as the need for uniformity).²³⁶ What accounts for this difference and does it significantly impact how cases are decided? Fifth, has abolishing deference impacted the legislative drafting process in these states and led to clearer statutes, and does it matter if abolition came judicially or from the legislator? Finally, those opposed to deference have argued that abolishing deference will benefit individual litigants. Is there evidence of this happening in states that have abolished deference such as an overall reduction in the regulatory load or greater success for those challenging administrative action?²³⁷

²³⁶ Compare *Hughes Gen. Contractors, Inc. v. Utah Labor Comm'n*, 2014 UT 3, ¶ 25, 322 P.3d 712, 717; *With City of Arlington v. FCC*, 569 S. Ct. 290 (2013). In contrast, it appears that a delegation theory is the predominant argument used in favor of deference at the federal level. Kent H. Barnett & Lindsey Vinson, *Chevron Abroad* at 10 n. 40; Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 192 (2006) Kent Barnett, *Codifying Chevmore*, 90 N.Y.U. L. REV. 1, 15 (2015);

²³⁷ Some empirical scholarship in the federal courts has suggested that agencies still prevail in a large portion of cases when courts are applying *Skidmore* deference. Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore*

Appendix

Simple list of States by Category (underlined states are listed in more than one category and therefore the totals add up to more than 5)

- 1) Express rejection of deference (10 states)
 - a. Judicial (8 States)
 - i. Arkansas, Delaware, Kansas, Michigan, Mississippi Utah, Wisconsin, and Wyoming
 - b. Statutory or Constitutional (3 States)
 - i. Arizona , Florida, Wisconsin
- 2) Skidmore deference only (3 states)
 - a. North Carolina, Virginia, and West Virginia
- 3) Some Types of Deference but not others (13 states)
 - a. Chevron but not Auer
 - i. None
 - b. Auer but not Chevron (5 States)
 - i. California, Louisiana, Mississippi, Nebraska, and Tennessee
 - c. Rules but not interpretations (2 States)
 - i. California and Oregon,

Standard, 107 Colum. L. Rev. 1235 (2007) Since that study examines cases where a regulation fails *Chevron*-step zero by not being promulgated through formal process, I predict that the rate of agency success will be higher than that in states with *Skidmore* only deference since regulations promulgated through a more formal process may be given greater deference under *Skidmore*.

- d. Deference for High Degree of Expertise (6 States)
 - i. Alaska, Iowa, New Mexico, New York, North Dakota, and Washington
- e. Longstanding interpretations (2 States)
 - i. Alaska, Connecticut
- 4) States Growing More Skeptical (7 states)
 - a. Especially thorough statutory review (3 States)
 - i. Colorado, Georgia, and Texas
 - b. Voices of dissent (6 States)
 - i. Georgia, New York, Ohio, Pennsylvania, South Carolina, and Texas
- 5) Inconsistent (7 states)
 - a. Indiana, Kentucky, Maryland, Montana, Nevada, Rhode Island, and South Dakota,
- 6) Full Deference (12 states)
 - a. Alabama, Hawaii, Idaho, Illinois, Maine, Massachusetts, Minnesota, Missouri, New Hampshire, New Jersey, Oklahoma, Vermont,

Appendix B – Map by State

