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Ending Deference? Why Some State Supreme Courts Have Chosen to Reject Deference and Others Have Not

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CSAS Working Paper 21-29

Administrative Law in the States: Laboratories of Democracy



ANTONIN SCALIA
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In my article *The End of Deference: How States (and Territories and Tribes) Are Leading a (Sometimes Quiet) Revolution Against Administrative Deference*

Doctrines, I conducted a survey of all 50 states to look at how state deference doctrines had developed over the past several years. I found a striking trend away from deference and towards either a wholesale or partial rejection of deference.

At the end of that survey, I outlined several additional areas for research and exploration on the topic of state deference. In particular, I suggested the need for additional research into how the justifications for deference at the state and federal level differ and whether this difference in rationale has an impact on why deference is either embraced or rejected.

In this article I catalogue and highlight arguments against deference at both the federal and state level. Because there is a lack of scholarly focus on state deference, I also briefly catalogue and highlight some arguments made in favor of deference. Ultimately, there are a few unique arguments that are made at the state level, in particular a focus on the unique separation of powers demands of various state constitutions. But overall, what is most striking is how closely the arguments at the state level parallel and expand on those made on the federal level. The arguments in favor of deference are similarly arguments that would not be out of place in federal opinions. There are accordingly still a whole range of arguments both for

and against deference at the state level that have not yet been carefully examined by the judiciary.¹

I. Arguments at the Federal Level Against deference

In the last decade there has been a sustained attack on deference doctrines like *Chevron* and *Auer* deference.² The academic assault on deference has been especially blistering.³ But perhaps because *Chevron* and *Auer* have been on the books for decade and serve as binding precedent, there are actually remarkably few judicial decisions developing a detailed critique of deference. Members of the Supreme Court have increasingly spoken out against deference,⁴ even those who once were its proponents like the late Justice Scalia. But with the exception of a few notable Circuit Court Judges like then Judge Gorsuch when he served on the 10th Circuit, Judge Strass of the 8th Circuit, or Kent Jordan of the 3rd Circuit, there have

¹ In writing this article, I am grateful for discussion I have had with several colleagues at the Pacific Legal Foundation including Steve Simpson, Glenn Roper, Ethan Blevins, Jessica Thompson, Todd Gaziano, and Luke Wake. In October 2020 I helped organize a webinar for the ABA entitled *The State of Deference in the States: The End of Deference?*, and that panel discussion was lively and extremely informative, and I am indebted to the contributions and thoughts of Aaron Saiger, Adi Dynar, and Matthew R. Byrne. Saiger in particular focused his remarks on the notion that states have failed to grapple with unique state specific arguments and his thoughts have influenced my own in this article.

² Christopher Walker's recent literature review does an excellent job of summarizing all of the relevant arguments and recent scholarship. For more details on these federal deference arguments, I refer the reader to his thorough summary. <https://www.law.georgetown.edu/public-policy-journal/wp-content/uploads/sites/23/2018/05/16-1-Attacking-Auer-and-Chevron-Deference.pdf>

³ CITES

⁴ See *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring);

been surprisingly few judicial opinions carefully analyzing the need for deference. But the number of these opinions appears to be increasing.

The most intense critiques have been levelled against the deference doctrine know as *Auer* or *Seminole Rock* deference—that is deference for an agencies interpretation of its own regulation. There are roughly 4 primary arguments – Separation of Powers, Other Theoretical Objections, Concerns regarding perverse incentives, and other practical objections.. *Chevron* deference, deference to an agency’s statutory interpretations, appears to be more widely supported among the federal bench, although there are nevertheless some very strong critics.⁵ The criticisms largely follow similar lines to the criticism of *Auer* with the addition of a statutory argument rooted in the text of the APA.

1) Separation of Powers Concerns

This doctrine has been attacked for decades as incompatible with the separation of powers.⁶ Justice Scalia, the author of the *Auer* decision, came to regret the

⁵ 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).

⁶ 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,

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.”⁷ He explained that ““deferring to an agency’s interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases. This frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government.”⁸

Justice Thomas has also argued that *Chevron* deference is incompatible with the role of the judiciary to “say what the law is.”⁹ According to Justice Thomas, the judiciary is the only one intended to have “the authority and obligation to interpret the law” in an authoritative fashion.¹⁰

Judge Stras from the Eighth Circuit Court of Appeals focused his separation of powers argument on “[t]he threat to the judiciary’s interpretive power.” He emphasized that the over the last century, the growth of the administrative state has chipped away at it” and that this development was “a marked departure from both historical practice and the Framers’ constitutional design.”¹¹

there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically.”)

⁷ . *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2265–66 (2011) (Scalia, J., concurring) (citations omitted).

⁸ *Id.*

⁹ *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring).

¹⁰ *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 119, 135 S. Ct. 1199, 1217, 191 L. Ed. 2d 186 (2015).

¹¹ *Voigt v. Coyote Creek Mining Co., LLC*, 980 F.3d 1191, 1203–04 (8th Cir. 2020) (Stras J., dissenting)

b. Judges have life tenure and so are less susceptible to pressure and more objective

A related argument points to the relative position and qualifications of judges compared with other government officers. Justice Thomas has emphasized that the founders ensured that “judicial independence” would rule by insulating judges from both internal and external pressures. *Perez*, 575 U.S. at 121–22, 135 S.Ct. 1199 (Thomas, J., concurring in *1205 the judgment). In contrast, executive officials are expressly tied to political pressures because they are subject to removal by the President who is himself an elected official.

Judge Stras has similarly observed that the “structural protections afforded to judges, like life tenure and non-diminishment of salary” prevent judges from being swayed by political pressure and personal bias.¹²

2) Other Theoretical objections

a. Differential treatment of judges and agency officials

Judge Stras has noted that there would be an odd incongruity with granting deference to agencies but refusing to grant a similar deference to judicial judgments of lower Court judges. After all, judges are “bound to interpret and apply” the law just as Court of Appeals judges are. So it is peculiar to grant greater comity to the decisions of executive officials than to fellow judicial officials.¹³

¹² This decisions actually dealt with the question of deference given to *state* agencies in their interpretation of federal law. *Voigt v. Coyote Creek Mining Co., LLC*, 980 F.3d 1191, 1204–05 (8th Cir. 2020) (Stras Dissenting)

¹³ *Voigt v. Coyote Creek Mining Co., LLC*, 980 F.3d 1191, 1205 (8th Cir. 2020) (Stras, J.dissenting)

3) Perverse Incentives

a. Congress incentivized to draft poorly drafted laws

Justice Scalia led the way in highlighting what he saw as the perverse incentives that *Auer* deference creates. He explained that “deferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases.”¹⁴ According to Justice Scalia this incentive “frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government.”¹⁵

Justice Scalia did not believe that *Chevron* like deference created a perverse incentive to enact vague statutes.¹⁶ Other judges have, however, advanced the argument that *Chevron* like deference creates precisely this incentive. Third Circuit Judge Kent Jordan argued that deference harms the legislative branch by creating perverse incentives to delegate broad swathes of discretion to administrative

¹⁴ *Talk Am., Inc. v. Michigan Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia J., dissenting).

¹⁵ *Id.*

¹⁶ *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).

agencies.¹⁷ And Judge Carson from the Tenth Circuit explained that deference facilitates a more “expedient” approach to lawmaking than that contemplated by the United States Constitution by allowing Congress to pass poorly conceived laws with the assurance that the executive branch will “remedy an unpopular or poorly drafted law through an administrative regulation.”¹⁸

4) Practical Harms

a) Risk of Unfair Surprise/ Difficulty for people to keep up with the law

Justice Gorsuch recently focused on the risk of unfair surprise that *Chevron* can produce. In a concurrence from the denial of certiorari in a case involving a federal ban on the sale of bump stocks, Justice Gorsuch noted that “these days it sometimes seems agencies change their statutory interpretations almost as often as elections change administrations.” It was therefore impossible for “ordinary citizens [to] be expected to keep up—required not only to conform their conduct to the fairest reading of the law they might expect from a neutral judge, but forced to guess whether the statute will be declared ambiguous; to guess again whether the agency's initial interpretation of the law will be declared ‘reasonable’; and to guess *again* whether a later and opposing agency interpretation will *also* be held

¹⁷ Egan, 851 F.3d at 279 (Jordan, J., concurring). Naomi Rao has called this process “administrative collusion.” Naomi Rao, Administrative Collusion: How Delegation Diminishes the Collective Congress, 90 N.Y.U. L. REV. 1463, 1504 (2015).

¹⁸ Aposhian v. Barr, 958 F.3d 969, 991 (10th Cir.), reh'g en banc granted, judgment vacated, 973 F.3d 1151 (10th Cir. 2020) (Carson J., dissenting)

‘reasonable’?” This expectation was fundamentally unfair and deprived individuals of the ability to fully conform their behavior to the text of the law.¹⁹

5) Statutory incompatibility

Critiques of deference have also focused on its incompatibility with the Federal Administrative Procedures Act.²⁰ Justice Scalia noted that the APA provides that “the *reviewing court* shall ... interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.”²¹

Accordingly, the APA takes into account robust judicial review “because it remains the responsibility of the court to decide whether the law means what the agency says it means.” Justice Scalia saw this as a problem that was “perhaps insoluble” so long as *Chevron* remained in effect, but continued to hold that *Auer* type deference was even more egregious in this respect.

II. Arguments at the state level against deference

The situation at the state level is in some ways the mirror opposite of the debate over deference at the federal level. There is a paucity of scholarship focused on either defending or critiquing deference at the state level.²² But over the past 12 years a very extensive body of judicial opinion has developed. This body of judicial opinion encompasses an attack on deference that is at least as thorough as what can

¹⁹ *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 790–91, 206 L. Ed. 2d 266 (2020) (Gorsuch J., concurring in the denial of certiorari)

²⁰ See 135 S. Ct. at 1211-12 (Scalia, J., concurring in the judgment).

²¹ *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 109, 135 S. Ct. 1199, 1211, 191 L. Ed. 2d 186 (2015)

²² CITE Florida law review article. Any others?

be found in federal case law. But what is similarly striking is that the arguments on the state level are broadly parallel to those made on the federal level. Just as with the federal case law the arguments broadly fall into 5 categories: Separation of powers, other theoretical objections, perverse incentives, practical harms, and statutory or constitutional arguments

1) Separation of Powers

a. Role of judiciary

Unsurprisingly, the lead argument in every single decisions objecting to deference has been a focus on the ways that deference infringes on the judicial power. Almost all of the Courts to pick up this issue have linked this objection back to *Marbury v. Madison*'s language regarding “the province and duty of the judicial department to say what the law is.”²³ But despite the similarity with arguments made at the federal level, there are some interesting nuances to the way this argument is framed at the state level. One striking note is the focus on the power of judicial review as the “most central” or core aspect of judicial authority. The Wisconsin Supreme Court made this point most forcefully, noting that ““No 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” and that this meant that “only the judiciary may authoritatively interpret and apply the law in

²³ Ellis-Hall Consultants v. Pub. Serv. Comm'n, 2016 UT 34, ¶¶ 32-33, 379 P.3d 1270, 1275; In re Complaint of Rovas Against SBC Michigan, 482 Mich. 90, 98–99, 754 N.W.2d 259, 265 (2008); Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue, 2018 WI 75, ¶ 54, 382 Wis. 2d 496, 544–45, 914 N.W.2d 21, 45; Myers v. Yamato Kogyo Co., Ltd., 2020 Ark. 135, 5, 597 S.W.3d 613, 617 (2020)

cases before our courts.”²⁴ Another theme is that the judiciary has allowed some of its power to lapse by deferring and that the Court is engaged in a process of reclamation of its prerogatives and authority. This restorative narrative provides a lot of rhetorical force to a decision by the Mississippi Supreme Court which declared that it would “step fully into the role” that the state Constitution “provides for the courts and the courts alone to interpret statutes.”²⁵

b. There is only one right answer about what a law means

A closely related point regarding the necessity of undeferential judicial review is that there is ultimately only one correct answer as to what the law means. This is a theme that Justice Lee of the Utah Supreme Court has repeatedly turned to in rejecting deference. In 2013 he explained that while mixed questions of fact and law may sometimes benefit from the “institutional competency” of agencies, there is simply no “discretion to reach anything other than the ‘right’ answer.”²⁶ The following year Justice Lee continued this theme by noting “the interpretive function for us is not to divine and implement the statutory purpose, broadly defined. It is to construe its language.” It would accordingly be inappropriate to defer to any other interpretation.²⁷

²⁴ Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue, 2018 WI 75, ¶ 54, 382 Wis. 2d 496, 544–45, 914 N.W.2d 21, 45

²⁵ King v. Mississippi Military Dep't, 245 So. 3d 404, 408 (Miss. 2018)

²⁶ Murray v. Utah Labor Comm'n, 2013 UT 38, ¶ 33, 308 P.3d 461, 472

²⁷ Hughes Gen. Contractors, Inc. v. Utah Labor Comm'n, 2014 UT 3, ¶ 29, 322 P.3d 712, 718

The Wisconsin Supreme Court focused on the naturally corollary of this doctrine. It concluded that “deference (especially great weight deference), if correctly and honestly applied, leads to the perverse outcome of courts often affirming inferior interpretations of statutes.”²⁸

c. . Guardrails of final judicial review are inadequate

If the judiciary ultimately gets to review agency interpretations, then how can deference be said to violate the role of the judiciary? The Wisconsin Supreme Court provided an extremely detailed explanation of why even a form of a deference which is not strictly binding on the judiciary is nevertheless contrary to the judiciary’s role as the arbiter of what the law means. Unsurprisingly, this explanation focused on judicial review as the core function of the judiciary.

After rejecting a highly deferential form of “great weight deference,” that Court further considered whether it could retain a lesser form of “due weight deference.” But the Court rejected even that type of deference. In doing so, it rejected an argument that it had previously advanced that “granting deference did not abandon our judicial power because we retained the authority to establish the guardrails within which the agency exercised that power.” The Court explained that “providing the agency with even the most exacting tutelage on how to exercise our power does not change the fact that it is exercising our power.” Because this judicial

²⁸ Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue, 2018 WI 75, ¶ 86, 382 Wis. 2d 496, 565, 914 N.W.2d 21, 55

function was so central, the Court could not “parcel it out in even the smallest of doses.”²⁹

d. Separation of powers – Legislative

State courts have also explored how deference violates the separation of powers in another respect, by placing legislative power in the hands of the executive branch. Neither the executive nor the judiciary can “revise, amend, deconstruct, or ignore [the Legislature's] product.”³⁰ Overly deferential review of agency interpretations places what the executive branch says a law means above what the law actually says, which therefore “infringe[s] on the Legislature's lawmaking authority”³¹

e. Placing rulemaking, enforcement and interpretation in the same hand

Finally, by way of separation of powers concerns, surprisingly few decisions in the current wave of deference skeptical state court decisions have dealt squarely with *Auer* like deference. And given the hostility directed towards *Auer* at the federal level and in academic literature the continued prevalence of *Auer* like deference even in states that have abandoned *Chevron* like deference remains puzzling.

²⁹ Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue, 2018 WI 75, ¶ 74, 382 Wis. 2d 496, 558–59, 914 N.W.2d 21, 51–52

³⁰ In re Complaint of Rovas Against SBC Michigan, 482 Mich. 90, 98, 754 N.W.2d 259, 264 (2008)

³¹ *Id.*

But a few Courts have noted that *Auer*-like deference raises the troubling specter of legislative, executive, and judicial power all being placed in the hands of executive agencies. The Utah Supreme Court noted that in rulemaking the agency “is in the position of lawmaker” and that it therefore “makes little sense for us to defer to the agency's interpretation of law of its own making.” Indeed, doing so would place the power to write the law and the power to authoritatively interpret it in the same hands” which “would be troubling, if not unconstitutional.”³²

The Mississippi Supreme Court a few years ago abandoned Chevron-like deference but has surprisingly maintained *Auer* –like deference. Justice Coleman of the Mississippi Supreme Court has bemoaned this continuing practice and in doing so offered some very sharp criticism of this type of deference: “In ceding the rule- interpreting power of the courts to the executive branch by giving deference to agency interpretation of regulations, the Court in the past has put all or part of all three functions of government—rule making, rule enforcement, and rule interpretation—in the hands of one branch.” *Cent. Mississippi Med. Ctr. v. Mississippi Div. of Medicaid*, 294 So. 3d 1121, 1131 (Miss. 2020), reh'g denied (May 7, 2020) (Coleman J., dissenting)

2) Other theoretical objections

a. Results in the differential treatment of agencies and lower court judges

³² Ellis-Hall Consultants v. Pub. Serv. Comm'n, 2016 UT 34, ¶¶ 32-33, 379 P.3d 1270, 1275

The Delaware Supreme Court argued that it would be quite “anomalous” for the Court to defer to an agency’s interpretation of the law but not to the decisions by lower trial courts.³³ Other courts have noted that by abandoning deference they are restoring review of agency decisions to “the same standard we apply to a circuit court’s conclusions of law—de novo.”³⁴ Equality of treatment therefore seems to be a significant concern.

b. Deference would be taking sides in a debate of interpretation in favor of a biased party and in violation of due process of law.

The Wisconsin Supreme Court explored at depth the problem with tipping the scales in favor of agencies in matters of interpretation especially when the agency is a party to the case. The Court raised two related concerns with this phenomenon. First, agencies have “an obvious interest in the outcome of a case” when it is party and it is therefore “entirely unrealistic to expect the agency to function as a ‘fair and impartial decision maker.’”³⁵ Second, and an individual will invariably feel that deference “will deprive him of an impartial decision maker’s exercise of independent judgment, and, thereby, the due process of law.”³⁶

c. Parties must be allowed to rely on the terms of rules and regulations

³³ *Pub. Water Supply Co. v. DiPasquale*, 735 A.2d 378, 381 (Del. 1999)

³⁴ *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶ 84, 382 Wis. 2d 496, 564, 914 N.W.2d 21, 54

³⁵ *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶ 69, 382 Wis. 2d 496, 556, 914 N.W.2d 21, 50

³⁶ *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶¶ 63 69, 382 Wis. 2d 496, 552, 914 N.W.2d 21, 48

A related due process concern stems from the fact that deference makes it difficult or impossible for individuals to rely on the terms of laws, rules, and regulations as written. But because the text of a statute or a regulation is law, individuals “have a right to read and rely on the terms of these [laws and] regulations.”³⁷ If an agency is given the ability to override the law or regulation by reliance on “privately held intentions, then it will subvert the rule of law and violate fundamental due process.

3) Perverse incentive

a. Allows judiciary to avoid making hard interpretive decisions

Judicial deference is said to encourage sloppy judicial decision making as courts are able to avoid making hard interpretive decisions. The Wisconsin Supreme Court explained that “[w]hen the court employs judicially created doctrines that limit the scope of its review instead of applying the collective knowledge that the seven justices were elected to exercise, it avoids the real work of appellate decision making: explaining to the public why the application of the law to the facts of the case resulted in the court's decision and why that result is fair under the law.”³⁸ Accordingly, the doctrine of deference results not only in a paucity in the development of judicial doctrines of statutory interpretation but also an inadequate effort to try to explain the equity and correctness of judicial outcomes. Deference in

³⁷ Ellis-Hall Consultants v. Pub. Serv. Comm'n, 2016 UT 34, ¶ 31, 379 P.3d 1270, 1274–75

³⁸ Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue, 2018 WI 75, ¶ 57, 382 Wis. 2d 496, 547, 914 N.W.2d 21, 46

other words becomes a form of judicial outsourcing that cheapens the development of the law and undermines public confidence in judicial outcomes.

4) Practical

a. Inconsistency of past precedent

A major theme in state court decisions critiquing or abrogating deference is the problem of past inconsistencies in the application of deference. For instance, the Arkansas Supreme Court observed that there had been “confusion in prior cases.”³⁹

Numerous courts also noted that their past decisions created mutually incompatible strands of authority which in the words of the Delaware Supreme Court “cannot co-exist in the same process of statutory review.”⁴⁰ For instance in Mississippi past decisions had created “*de novo* but deferential review,”⁴¹ an impossible contradiction of terms and concepts. It was better to reexamine deference altogether than to continue to engage in the linguistic and theoretical contortions needed to maintain the façade of both engaging in deference and not at the same time.

b. Past applications of deference never thoughtfully considered

SOP concerns

³⁹ Myers v. Yamato Kogyo Co., Ltd., 2020 Ark. 135, 4, 597 S.W.3d 613, 616 (2020)

⁴⁰ Pub. Water Supply Co. v. DiPasquale, 735 A.2d 378, 382 (Del. 1999)

⁴¹ King v. Mississippi Military Dep't, 245 So. 3d 404, 407 (Miss. 2018)
Cent. Mississippi Med. Ctr. v. Mississippi Div. of Medicaid, 294 So. 3d 1121, 1130 (Miss. 2020), reh'g denied (May 7, 2020)

On a related note courts found the lack of introspection in past decisions about the potential problems of deference troublesome. For instance, the Wisconsin Supreme Court bemoaned the lack of thoughtful consideration of the separation of powers concerns in past decisions. It noted that nowhere in a long line of cases had it “determined whether this was consistent with the allocation of governmental power amongst the three branches.”⁴² The shallowness of past decisions provided a way for the court to avoid the need to grapple with stare decisis impacts and to treat the question of deference as a matter of first impression.⁴³

c. Application of deference required very context specific determinations

Another similar objection is that the application of deference was actually highly context specific or perhaps fact specific and that it therefore was confusing and unclear to determine in any given case whether deference would apply. This objection was primarily raised by the Wisconsin Supreme Court. Whether deference applied in that state had hinged on whether or not “the agency has particular competence or expertise in the matter at hand.”⁴⁴ But this determination was actually quite opaque and the outcome uncertain. Accordingly, while deference is premised on simplifying judicial decision making the Wisconsin Supreme Court

⁴² *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶ 42, 382 Wis. 2d 496, 535–36, 914 N.W.2d 21, 40

⁴³ *Id.*

⁴⁴ *Wisconsin Dep't of Revenue v. A. O. Smith Harvestore Prod., Inc.*, 72 Wis. 2d 60, 65–66, 240 N.W.2d 357, 359 (1976), abrogated by *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21.

recognized that it had just shifted the debate to the question of expertise without meaningful benefits in clarity or simplicity.

d. Question of whether agencies are truly experts after all

Finally, one of the core suppositions of deference is that agencies are truly expert in some meaningful respect which entitles them to deference. At least some jurists have called this supposition into question. For instance, Justice Gableman of the Wisconsin Supreme Court in his concurring opinion which called for deference to be overturned but not on constitutional grounds argued that it is merely “a matter of speculation” that agencies possess greater expertise in matters of statutory interpretation.⁴⁵ Such a speculative expertise is a poor basis for the elaborate edifice of deference

5) Statutory

a. Constitutional Provisions encouraging or requiring Judicial Review

Finally, state constitutions are invoked as the basis for eliminating or curtailing deference. In some instances courts can look to highly specific language which seems to require thorough judicial review without deference. For instance, the Michigan Constitution requires that the judiciary reviews whether an agency’s “final decisions, findings, rulings and orders are authorized by law”⁴⁶ In other

⁴⁵ Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue, 2018 WI 75, ¶ 87, 382 Wis. 2d 496, 566–67, 914 N.W.2d 21, 55–56

⁴⁶ *In re Complaint of Rovas Against SBC Michigan*, 482 Mich. 90, 99–100, 754 N.W.2d 259, 265 (2008).

instances the focus is on the more explicit separation between branches of Government that many state constitutions contain. Hence, the Mississippi Supreme Court looked at two separation Constitutional provisions which established a “strict separation of powers.”⁴⁷ In either event, state constitutions played a key role in the determination that the judiciary could not compromise on its judicial role by continuing to defer to agencies.

b. Statutes encouraging or requiring Judicial Review

There have been surprisingly few decisions looking at state statutes such as state a state’s administrative procedures act equivalent. Of course, if deference is contrary to the separation of powers set out in a state constitution then it may not matter what a state statute says about deference. Indeed, this is the conclusion that was reached by the Mississippi Supreme Court in *HWC Tunica*.⁴⁸ But most states have not gone so far and therefore the lack of analysis of state statutes is somewhat puzzling.

In an article published in the Yale Journal on Regulation last year, Justice DeWine of the Ohio Supreme Court did briefly consider how state law informed when deference might be appropriate. He noted that the “[o]ne thing that has been overlooked in our previous discussions on deference is what our state legislature has

⁴⁷ *King v. Mississippi Military Dep't*, 245 So. 3d 404, 408 (Miss. 2018)

⁴⁸ *HWCC-Tunica, Inc. v. Mississippi Dep't of Revenue*, 296 So. 3d 668 ¶¶ 33-34 (Miss. 2020). 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>

directly said on the topic.”⁴⁹ Justice DeWine pointed to R.C. 1.49 which sets out what a Court “may consider” when a statute is ambiguous. Justice DeWine observed that this statute lists “the administrative construction of the statute” as one element that it could look at if and only if a statute is ambiguous. But consideration of this factor was not mandatory. Instead, “where a statute is ambiguous, examination of an agency construction is a possible tool a court may use in interpreting the statute’s meaning.” For Justice DeWine this permitted at most “respectful consideration” or “due weight” akin to *Skidmore* and not more deferential *Chevron* like deference.

III. Arguments at the state level for deference

In the states that have eliminated deference there has been surprisingly little pushback by way of dissenting opinions. And most states have not articulated a thorough and persuasive case for deference. Nevertheless, there are a few predominant arguments that emerge. In this brief section I am going to largely focus on the pro-deference arguments made by the Courts in a single state, Wisconsin, because this state had some of the more detailed explanations and analysis.

A. Interpretation is part of administering a statute

⁴⁹ <https://www.yalejreg.com/nc/a-few-thoughts-on-administrative-deference-in-ohio-by-justice-r-patrick-dewine/>

First of all, interpretation is conceptualized as an “necessary and inherent function of an agency in its administration or application of that statute.”⁵⁰ Indeed, since “[e]very executive officer in the execution of the law must of necessity interpret it in order to find out what it is he is required to do,” it does not make sense to strictly declare that statutory interpretation is solely a judicial function.⁵¹ And an agency that is allowed to interpret a law is not “thereby vested with judicial power in the constitutional sense.”⁵²

B. Longstanding interpretations have force equivalent to a judicial decision

Going even a step further, agency opinions and interpretations that are long standing are seen as “evidence of what the law is ... equal to a decision of [the] court.”⁵³ Longevity is seen as equal to legitimacy, and “such practical construction will be adhered to, even though, were it *res integra*, it might be difficult to maintain it.”⁵⁴

C. There is a risk of negative outcomes if courts deviate from longstanding precedent/Res Judicata

⁵⁰ *Mitchell v. Liberty Mut. Ins. Co.*, 271 Kan. 684, 684, 24 P.3d 711, 713 (2001) (Court subsequently rejected deference)

⁵¹ *State v. Whitman*, 196 Wis. 472, 220 N.W. 929, 938 (1928)

⁵² *Borgnis v. Falk Co.*, 147 Wis. 327, 358, 133 N.W. 209 (1911)

⁵³ *Harrington v. Smith*, 28 Wis. 43, 69 (1871)

⁵⁴ *Id.*

Res Judicata or the fear of negative outcomes from deviating from longstanding precedent plays a significant role as well. The dissenting opinion from the Wisconsin Supreme Court argued that with the elimination of deference “great mischief would follow” and that it could not “shake a principle which in practice has so long and so extensively prevailed.”⁵⁵

Justice Ziegler of the Wisconsin Supreme Court similarly voiced concern that the elimination of deference for constitutional reasons would “affect the finality of past cases”⁵⁶ This concern is somewhat puzzling. As the Majority points out, there isn’t a mechanism in the law that would allow parties to draw into questions long settled cases for this reason.

A more grounded concern is that voice by Justices Bradley and Ziegler that the elimination of deference “will adversely affect the precedential authority of cases decided pursuant to our now-discarded deference doctrine.”⁵⁷ In this respect the Wisconsin Supreme Court majority’s response seems a bit disingenuous, suggesting that a past decision’s “precedential and controlling effect will be the same as if the court had based the decision on its own interpretation.”⁵⁸ But surely if the Court is tasked with determining what the law means, it must do so rather

⁵⁵ Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue, 2018 WI 75, ¶ 21, 382 Wis. 2d 496, 523, 914 N.W.2d 21, 34

⁵⁶ Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue, 2018 WI 75, ¶ 89, 382 Wis. 2d 496, 567–68, 914 N.W.2d 21, 56

⁵⁷ Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue, 2018 WI 75, ¶ 89, 382 Wis. 2d 496, 567–68, 914 N.W.2d 21, 56

⁵⁸ *Id.*

than deferring to a precedent which relied on an inferior interpretation of law? Surely stare decisis would then play some role, but shouldn't a decision's "controlling effect" be diminished by the dubious origins? But if the end of deference produces better decisions which more carefully examine the meaning of statutes, then isn't that a positive rather than a negative?

D. Comparative expertise of agency and Court

Courts have also unsurprisingly played up the "the comparative qualification of court and agency to decide the particular issue."⁵⁹ Indeed, this is probably the predominant rationale for deference in the states that continue to apply it in full force. 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."⁶⁰

E. Statutes require some kind of deference

Finally, some courts have suggested that certain statutes may require some measure of deference. For instance, Wisconsin law requires that "due weight shall

⁵⁹⁵⁹ Pabst v. Wisconsin Dep't of Taxation, 19 Wis. 2d 313, 323, 120 N.W.2d 77, 82 (1963), abrogated by Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue, 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21

⁶⁰ *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. ").

be accorded the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it.”⁶¹ Critiques of deference have argued that this does not include interpretations of law, but defenders see this language as requiring at least some kind of deference.

IV. Conclusions from the Arguments that Have Been Made

What is most striking is how closely the arguments against (and also for) deference at the state level parallel those at the federal level. There are a few exceptions worth discussing in greater details

. As discussed above, Justice Lee offered a unique argument focused on the fact that you do not have the risk of split authority in state courts. That argument is not relevant in federal courts for obvious reasons, and so there is no direct parallel (it may also not be true in some larger states).

On the other hand, I was also not able to find a state decision suggesting that *Chevron* like deference results in vague or inferior legislative output. It might be that the more functional legislative process in most states means that state legislators are more likely to be able to respond or take corrective action which makes it less likely that vague legislation is an open-ended invitation to executive agencies. It is also however possible that this argument simply has not been picked up in any of the existing decisions. The absence of this argument could also reflect the fact that decisions to date have not grappled very carefully with the differences

⁶¹ Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue, 2018 WI 75, ¶ 34, 382 Wis. 2d 496, 531, 914 N.W.2d 21, 38

between *Chevron* and *Auer* like deference and this argument differs in form and strength based on the type of deference in question.

Similarly, there weren't decisions which highlighted the relative experience and independence of the judiciary. This might be because most of the states that have eliminated deference have judges that are either elected in nonpartisan elections (Arkansas, Mississippi, Wisconsin) or are subject to retention elections (Utah, Wyoming). But it is also once again possible that the argument has simply not been made given the relatively small sample size given that this argument was not made with great frequency on the federal level.

Other than these, the most unique argument in state case law stems from the more explicit separation of powers guarantees contained in many state constitutions. These more explicit guarantees may help explain the surge of activity in overturning deference. In many states deference appears to be something that was adopted without significant examination or thought. And when states begin to seriously examine whether deference is compatible with the separation of powers they have to grapple with these more particular separation of powers provisions, which makes it more likely that these courts may ultimately abandon deference.

What is also striking about the arguments summarized in this article is the absence of arguments that are more state specific in nature. One could imagine many such arguments both for and against deference. Subsequent research will be extremely valuable for further expanding on these arguments. But I will briefly sketch some of them in the following section.

V. State Specific Arguments on Deference:

In this section I look at state specific arguments for and against deference. Each of the three branches of government are different at the state level compared to the federal level, and these differences provide both arguments for and arguments against deference.

A. Arguments Concerning the Executive Branch/Agencies

State agencies are incredible diverse and there is no uniform As Miriam Seifer points out in her article, *Understanding State Agency Independence*, “there is no single meaning of state agency independence even within a state, and rarely a strong norm surrounding it.”⁶² Between states there is even greater diversity. This “bespoke approach ... may yield better-tailored and more democratic arrangements . But it also displays raw partisanship, and the combination of weak norms with strong governors may stack the deck against independence.”⁶³ Because of this diversity, there are a variety of factors both for and against deference that one could draw on.

One common criticism of states agencies is that cronyism, nepotism, and corruption can sometimes play a larger role in the process.⁶⁴ This relative lack of

⁶² Miriam Seifter, *Understanding State Agency Independence*, 117 MICH. L. REV. 1537 (2019).

⁶³ Miriam Seifter, *Understanding State Agency Independence*, 117 MICH. L. REV. 1538 (2019).

⁶⁴ <https://www.latimes.com/politics/la-pol-ca-california-government-nepotism-persists-20190501-story.html>; https://www.bsa.ca.gov/pdfs/reports/I2019-1.pdf?fbclid=IwAR0O7uVpBl0gGQ7kSBiACIrs9sleIIuTmNpVx8eQs_28z4T76EldjBR0Z_o

expertise or professionalism of state agencies compared to federal agencies may support deference. For instance, some federal agencies have developed elaborate procedures to insulate scientific review from partisan pressure.⁶⁵ State agency procedures may also often be less formal or require less thorough public notice and comment than federal law.⁶⁶ The relative lack of funding for state agencies,⁶⁷ and lower salaries for state employees might also result in a poorer output or quality of staff.⁶⁸

The degree of accountability to the people may cut either way. Executive officials may be less accountable to the people in some states which might support robust judicial oversight.⁶⁹ On the other hand, state agency heads are frequently

⁶⁵ <https://columbialawreview.org/content/a-place-for-agency-expertise-reconciling-agency-expertise-with-presidential-power/>

⁶⁶ Scott F. Johnson, *Administrative Agencies: A Comparison of New Hampshire and Federal Agencies' History, Structure and Rulemaking Requirements*, 4 *Pierce L. Rev.* 435, 473 (2006) (“New Hampshire agencies do have to consider the public comments and testimony submitted during the process, but unlike federal law, they do not have to respond to comments or testimony unless an “interested person” requests the agency to “issue an explanation of the rule.”),

⁶⁷ William Funk, [Rationality Review of State Administrative Rulemaking](#), 43 *Admin. L. Rev.* 147, 172 (1991); 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, 234 (2012).

⁶⁸ 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, 234; D. Zachary Hudson, Comment, [A Case for Varying Interpretive Deference at the State Level](#), 119 *Yale L.J.* 373, 379 n.24 (2009) (pointing out that “[m]anagerial officials at **federal agencies** generally seem to earn about fifty percent more than their state counterparts”).

⁶⁹ 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, 237 (2012) (“Potential bias aside, most state agency heads also have less democratic pedigree than do Texas judges.”)

elected and also more like to be fully independent from the Governor.⁷⁰ Some scholars have argued that this independence results in more independent and non-partisan decision making.⁷¹ On the other hand, this independence can often result in tension or infighting within the executive branch.⁷² State agencies in certain states may be less likely to be unified under a single executive and be much more prone to conflict or disagreement with the Governor and with each other.⁷³ If that is the case then deference may actually be more likely to produce a splintering of opinion than independent judicial review.

⁷⁰ Miriam Seifter, *Understanding State Agency Independence*, 117 MICH. L. REV. 1552 (2019). (“Forty-three states popularly elect an attorney general; thirtyseven elect a secretary of state; thirty-four elect a treasurer; twenty-four elect an auditor; and twenty-two elect a superintendent of public instruction or members of a board of education”)

⁷¹ See, e.g., John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 TEMP. L. REV. 1205, 1228 n.80 (1993) (“Independent election by the people gives those elected state executive officials far greater autonomy, and far greater control over their departments, than any federal official enjoys.”);

⁷² See, e.g., Jon Kamp, *Governors, Attorneys General Clash Amid Political Tensions*, WALL STREET J. (May 17, 2017, 1:27 PM), <https://www.wsj.com/articles/governors-attorneysgeneral-clash-amid-political-tensions-1495042044>

⁷³ Aaron Saiger, *Chevron and Deference in State Administrative Law*, 83 Fordham L. Rev. 555, 567 (2014)

On a similar note, state agencies may also be more susceptible to factional influence⁷⁴ or regulatory capture,⁷⁵ which supports rigorous judicial review. State agencies may also be more prone to being self-interested in the outcome of proceedings before them. This is of course true at the federal level as well.⁷⁶ But it is certainly a factor at the state level. For instance a paradigmatic example of this would be state agencies that engage in “home equity theft” or the foreclosure of homes to pay off small tax debts.⁷⁷ These agencies may be prone to narrowly construe protections for taxpayers or to expansively interpret their own power and authority. This self-interest suggests that deference would be especially inappropriate.

On the other hand, administrative review of an agency’s decision is in many states handled by outsider administrative law judges that are part of a central panel of judges rather than part of the agency itself. This greater independence

⁷⁴ Cass R. Sunstein, Beyond Marbury: The Executive's Power to Say What the Law Is, 115 Yale L.J. 2580, 2610 (2006) (“Perhaps some such agencies are peculiarly vulnerable to factional power; perhaps state courts are aware of that fact. If James Madison was right to think that factional influence is more difficult to obtain against the nation than against the states, see The Federalist No. 10 (James Madison), then an independent judicial judgment is more important against state agencies than against their federal counterparts.”)

⁷⁵ D. Zachary Hudson, A Case for Varying Interpretive Deference at the State Level, 119 Yale L.J. 373, 380 (2009)

⁷⁶ See Timothy K. Armstrong, Chevron Deference and Agency Self-Interest, 13 Cornell J.L. & Pub. Pol'y 203 (2004) (making the argument on the federal level).

⁷⁷<https://pacificlegal.org/home-equity-theft/#:~:text=PLF%20is%20fighting%20home%20equity,owners%20once%20debts%20are%20settled.>

might give some reason to have confidence in the independence of an ALJ's decision.⁷⁸

Arguments Concerning The Nature of the Judiciary

Currently 16 states elect judges in partisan elections, 19 states elect judges in nonpartisan elections and 2 elect judges in some combination of the two.⁷⁹ As Professor Aaron Saiger has pointed out, the standing of judges points both in favor and against difference in different ways:

Elections do more than make state judges democratically accountable; they also make them politically attuned and politically connected. By virtue of elections and set terms, they are closer to the public than federal judges; by virtue of the political nature of their office they are also closer to the legislature. State judges are thus potentially, in at least some important contexts, differently situated than federal judges with respect to understanding and interpreting statutes that grant agencies power.⁸⁰

On the one hand, elected Judges may have greater democratic legitimacy and accountability. Elected Judges may also be more willing to depart from the consensus and push back on executive action.⁸¹

On the other hand, it may be that elected judges are more likely to be beholden to the interests of those that elect them and therefore prone to embrace specific interpretations that favor key constituencies or portions of

⁷⁸ <https://www.justia.com/administrative-law/state-level-administrative-law/>

⁷⁹ https://ballotpedia.org/Judicial_election_methods_by_state

⁸⁰ Aaron Saiger, Chevron and Deference in State Administrative Law, 83 Fordham L. Rev. 555, 561–62 (2014)

⁸¹ F. Andrew Hanssen, Independent Courts and Administrative Agencies: An Empirical Analysis of the States, 16 J.L. Econ. & Org. 534, 538 (2000).

the bar. If this is the case then it would likely push in favor of deference to agencies.⁸²

B. Arguments concerning the Nature of the Legislature

States vary dramatically in how closely the legislature provides oversight of executive agencies. According to the National Conference of State Legislatures, forty one state have some kind of mechanism for the review of administrative rules⁸³ But the rigor of this process and the power given to the legislature to disapprove of administrative action varies.

Some states have particularly elaborate processes for legislative review and oversight of administrative actions. And this would suggest that deference is unnecessary. Indeed, the process is so elaborate in a small number of states such as Idaho⁸⁴ and West Virginia,⁸⁵ that I argued in my 50 state survey that what happens in these states cannot meaningfully be called deference any more since the legislature is itself in essence ratifying any action by the agency.

But in other states legislative oversight is much laxer which would support more robust judicial review. For instance, in some states the heads of executive

⁸² Aaron Saiger, Chevron and Deference in State Administrative Law, 83 Fordham L. Rev. 555, 562 (2014)

⁸³ <https://www.ncsl.org/research/about-state-legislatures/separation-of-powers-legislative-oversight.aspx>

⁸⁴ 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>

⁸⁵ *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).

agencies do not undergo any kind of advice and consent requirement.⁸⁶ Instead, executive officials are able to unilaterally select state officers and therefore these officials may be more beholden to the wishes of the executive. Because the legislative branch has less impact on the composition and function of the state agencies it might be more problematic to extend deference to the actions of these agencies

Another related factor is the ease with which state lawmakers can meet and respond to agency action. In many states where one party typically controls the legislative and executive branches it may be quite easy to enact legislation. The argument for ratification of agency interpretation through inaction may therefore be somewhat stronger in such states. In contrast, if a state is particularly prone to logjam or where lawmakers are constrained in some other way such as a particularly short legislative session it may be much more difficult for the legislature to express its disapproval of agency action and deference would perhaps be less appropriate.

State legislators are often part time which would make it much more difficult for the legislative branch to master the details of statutes.⁸⁷ Part time state legislators may also be more prone to rely on delegation to state agencies.⁸⁸ These

⁸⁶ Scott F. Johnson, *Administrative Agencies: A Comparison of New Hampshire and Federal Agencies' History, Structure and Rulemaking Requirements*, 4 *Pierce L. Rev.* 435, 460 (2006),

⁸⁷ Richard A. Briffault, [Beyond Congress: The Study of State and Local Legislatures](#), 7 *N.Y.U. J. Legis. & Pub. Pol'y* 23, 25 (2003).

⁸⁸ In the non-delegation context this argument has come up as a reason for why state legislators should be able to delegate significant authority to the executive.

facts could reasonably cut either for or against deference depending on how they are framed.

State legislators are also more likely to be hyperpartisan and rely on roll call votes without detailed debate and deliberation.⁸⁹ But it isn't entirely clear to me which way this fact points. Sloppy legislative drafting should not become fodder for the expansion of agency power. Robust judicial review may be more necessary rather than less necessary under such circumstances.

On the other hand, the case for deference may be particularly weak in the case of direct democracy efforts such as ballot measures.⁹⁰ After all, the people do not have a mechanism to hold agencies accountable such as a legislature would by controlling the power of the purse or through holding hearings. And it may be very difficult for the people to amend or change such a law in response to an agency's interpretation.

Conclusion

For instance in a recent case concerning the COVID-19 pandemic the Kentucky Supreme Court noted that “[a] legislature that is not in continuous session and without constitutional authority to convene itself cannot realistically manage a crisis on a day-to-day basis by the adoption and amendment of laws.”

⁸⁹ Richard A. Briffault, Beyond Congress: The Study of State and Local Legislatures, 7 N.Y.U. J. Legis. & Pub. Pol'y 23, 24 (2004)

⁹⁰ Richard A. Briffault, Beyond Congress: The Study of State and Local Legislatures, 7 N.Y.U. J. Legis. & Pub. Pol'y 23, 29 (2004)

This study of deference arguments at the state level reveals the rich depth of arguments that have been made, but also suggests that there are many arguments that remain unexplored.