NOTE

WHEN ROLES COLLIDE: DEFERENCE, DUE PROCESS, AND THE JUDICIAL DILEMMA

AMY BUCHMEYER*

In *Tetra Tech EC v. DOR*, the Wisconsin Supreme Court became the first court in the country to eliminate deference to agency interpretations of law on the grounds of procedural due process. The lead opinion found deference violated two constitutional principles: separation of powers and procedural due process. The case primarily emphasized the separation of powers violation. But both proponents and critics of agency deference reference separation of powers to support their position. Many deference doctrines, including federal *Chevron* deference, find primary support in separation of powers and the understanding that agencies wield legislative authority. Further adding to the confusion, courts do not always take a clear approach to separation of powers. Procedural due process, alternatively, deals with competing litigants in the courtroom. The judiciary owes litigants an impartial tribunal. But when a judge submits to one party's interpretation of the law solely because of who that party is, the judge ceases to act impartially and violates both parties' due process rights.

The judiciary functions both as a branch of government with a duty to respect the other branches and as an impartial tribunal with a duty to individual litigants. When the two roles collide, which prevails? This Note argues procedural due process must prevail. It focuses on the implications of the procedural due process argument and contrasts it with the separation of powers and other arguments for agency deference. It concludes that if deference violates procedural due process, it presents a serious constitutional problem every time a court defers to an agency's interpretation of law regardless of the justification.

INTRODUCTION

From the moment she opens her eyes in the morning till her head hits the pillow at night, the average American citizen engages directly and indirectly with countless government agencies. An agency regulates the quality of the air she breathes,[1] the coffee she drinks,[2] and the car she drives.[3] Her paycheck,[4] her frozen pizza,[5] and her hairdresser[6] all fall under agency purview. With so much regulation, conflict inevitably occurs. Yet when a citizen challenges an agency decision, the deck often comes stacked in favor of the agency. This happens because of the "agency deference" doctrine, which, under certain circumstances, requires judges to defer to an agency's interpretation of the law.[7] In

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1. The Environmental Protection Agency. *Regulatory Information by Topic: Air*, U.S. ENVTL. PROTECTION AGENCY https://www.epa.gov/regulatory-information-topic/regulatory-information-topic-air [https://perma.cc/4TCJ-U4XQ].

2. The Federal Food and Drug Administration. *See Statement from FDA Commissioner Scott Gottlieb, M.D., on FDA's Support for Exempting Coffee from California's Cancer Warning Law*, FOOD & DRUG ADMIN. (Aug. 29, 2018), https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm618883.htm [https://perma.cc/E7QB-W937].

3. The National Highway Traffic Safety Administration. *See About NHTSA*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., https://www.nhtsa.gov/about-nhtsa [https://perma.cc/G88E-VV2A].

4. U.S. Department of Labor. *See Wages*, U.S. DEP'T OF LABOR, https://www.dol.gov/general/topic/wages [https://perma.cc/RJ89-3SY4].

5. Either the Food and Drug Administration or the United States Department of Agriculture, depending on whether she gets cheese or pepperoni. Daniela Galarza, *USDA vs. FDA: What's the Difference?*, EATER (Mar. 24, 2017, 1:32 PM), https://www.eater.com/2017/3/24/15041686/fda-usda-difference-regulation [https://perma.cc/3NUX-549Q].

6. Occupational Safety and Health Administration. *See Hair Salons: Facts About Formaldehyde in Hair Products*, OCCUPATIONAL SAFETY & HEALTH ADMIN., https://www.osha.gov/SLTC/hairsalons/protecting_worker_health.html [https://perma.cc/EW9V-QXA4].

7. John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 613 (1996) ("[A] reviewing court must accept an agency's 'reasonable' interpretation of a gap or ambiguity in a statute the agency is charged with administering."). In some instances, the court also gives deference to an agency's interpretation of its own ambiguous regulations. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019).

other words, instead of the judge deciding what the law means, one of the disputing parties decides before the case even gets to court.[8]

The Wisconsin Supreme Court recently declared an end to agency deference in Wisconsin.[9] Historically, the state gave different levels of deference to administrative agencies' interpretations of law.[10] Courts considered various factors, such as an agency's expertise and consistency in applying the law, and gave different levels of deference depending on the results.[11] However, in *Tetra Tech EC v. DOR*[12] the court found all levels of deference to agencies' interpretations of the law problematic.[13] The lead opinion[14] focused its conclusion on two constitutional doctrines: separation of powers and due process.[15]

The separation of powers doctrine states that each branch of government holds unique powers and responsibilities separate from one another.[16] Some overlap might occur, but at some point, branches cannot share powers.[17] Under this understanding, the Wisconsin court

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8. Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187, 1189 (2016).

9. *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 914 N.W.2d 21, 28 (Wis. 2018). The Wisconsin Legislature passed 2017 Wis. Act 369 several months later reinforcing the holding. WIS. STAT. § 227.10(2g) ("No agency may seek deference in any proceeding based on the agency's interpretation of any law.").

10. *Tetra Tech,* 914 N.W.2d at 31. A court either gave great weight, due weight, or no weight at all to an agency's interpretation of the law. *See also* discussion *infra* Section I.A.2.

11. *Tetra Tech*, 914 N.W.2d at 31.

12. 914 N.W.2d 21 (Wis. 2018).

13. *Id*. at 63.

14. In Wisconsin, if a majority opinion does not garner the full support of the court, it becomes the "lead opinion." WIS. SUPREME COURT INTERNAL OPERATING PROCEDURES, § III (G)(4) (2017–18). Only the portion of the lead opinion with a majority support acts as binding law. In this case, five justices supported ending agency deference, making it law. However, only two justices subscribed to the opinion's analysis for eliminating it. The other three preferred to end deference on principles of judicial administration and the court's authority to overrule its own prior decisions. *Tetra Tech*, 914 N.W.2d at 67 (Ziegler, J., concurring with Roggensack, C.J., joining in part); *id.* at 74 (Gableman, J., concurring with Roggensack, C.J., joining in full). Thus, the majority opinion became a lead opinion. This Note focuses on the lead opinion's constitutional arguments for eliminating agency deference. However, for simplicity of narrative, it will refer to the lead opinion interchangeably with "the court" and "Wisconsin."

15. *Tetra Tech*, 914 N.W.2d at 48.

16. Matthew James Tanielian, Comment, *Separation of Powers and the Supreme Court: One Doctrine, Two Visions*, 8 ADMIN. L.J. AM. U. 961, 965 (1995).

17. Linda D. Jellum, *"Which Is to Be Master," the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 860 (2009). This is a very simplified description. The exact dimensions of separation of powers break into roughly two schools of thought: formalism and functionalism. *Id.* Formalism allows overlap between the branches only where the constitution specifically prescribes it. *Id.* Functionalists approach overlap as inevitable

held that agency deference impermissibly encroached on a core judicial power.[18]

The due process argument focuses on the procedural problem with a judge deferring to one of the parties in litigation.[19] Stemming from the Fifth and Fourteenth Amendments' procedural due process requirements, it states that any deference creates an impermissible bias in favor of one party.[20] This deprives the other party of an impartial hearing and causes a due process problem.[21] While other state courts previously expressed separation of powers concerns,[22] Wisconsin became the first court to use due process as a reason for eliminating agency deference.

The court's use of the due process argument demonstrates an important shift in the agency deference debate. Both due process and separation of powers present constitutional concerns. But due process is a more powerful argument than separation of powers because it lacks the tension inherent in separation of powers.[23]

Both proponents and critics of agency deference reference separation of powers to support their position. Critics of agency deference point to *Marbury v. Madison*[24] which famously states: "It is emphatically the province and duty of the judicial department to say what the law is."[25] They claim agency deference impermissibly violates the court's authority to say what the law is because it allows someone else to say it and so usurp judicial power.[26] Alternatively, supporters of agency deference—and particularly *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*.[27]—argue that the legislature has the authority to write the law and can delegate that authority to agencies either explicitly through legislation or implicitly through "gaps" in the

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but find a problem where one branch takes another's power and uses it to increase its own power. *Id.* at 870. "Core functions" play a role for both schools of thought, though more fundamentally for functionalists. Core functions are defined as the roles assigned by Articles I, II, and III of the U.S. Constitution. *Id*. at 870. For example, Article I vests the legislative powers in the Congress. U.S. CONST. art. I, § 1. *See also* discussion *infra* Section II.A.

18. *Tetra Tech*, 914 N.W.2d at 45.

19. *Id.* at 49.

20. Hamburger, *supra* note 8, at 1189.

21. *Id.*

22. *See, e.g.*, *King v. Miss. Military Dep't*, 245 So. 3d 404, 407 (Miss. 2018).

23. *See* discussion *infra* Section II.A.

24. 5 U.S. 137 (1803).

25. *Id.* at 177.

26. John M. Dempsey, *Administrative Law: Michigan Sides with* Marbury*, Not* Chevron*, on Agency Deference*, 55 WAYNE L. REV. 3, 5 (2009).

27. 467 U.S. 837 (1984).

statute.[28] Under this understanding, a court that ignores the agency's interpretation of the law basically ignores the legislature's authority to write it.[29]

Further, courts often give varying levels of deference to agencies,[30] and the separation of powers doctrine does not always clearly distinguish among the levels.[31] While a court might rely entirely on the *Marbury* understanding of separation of powers when analyzing agency deference, courts rarely treat core powers as consistently clear cut.[32] This holds particularly true for the more functionalist *Chevron* understanding of separation of powers because it generally views powers as flexible.[33] The tension between the two views of agency deference leaves ambiguity in the law and can make separation of powers a challenging doctrine on which to rely.[34] Due process, on the other hand, finds all levels of judicial deference to an agency's interpretation of law problematic.[35]

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28. The issue of legislative delegation runs throughout the deference debate since the separation of powers argument in support of *Chevron* presupposes the legislature can—and must—delegate law making authority either explicitly or implicitly to agencies. *See, e.g.*, Patrick M. Garry, *Accommodating the Administrative State: The Interrelationship Between the Chevron and Nondelegation Doctrines*, 38 ARIZ. ST. L.J. 921, 923 (2006) ("If Congress is allowed to delegate lawmaking authority to administrative agencies with only the vaguest of directions and the thinnest of intelligible principles, then the *Chevron* doctrine becomes almost an inevitability."). Though not specifically addressed in this Note, the nondelegation doctrine plays a silent but important background role throughout the discussion.

29. Kathryn M. Baldwin, Note, *Endangered Deference: Separation of Powers and Judicial Review of Agency Interpretation*, 92 ST. JOHN'S L. REV. 91, 107 (2018) ("De novo review strays further away from the goals of separation of powers by shifting policy-making power to the judiciary, effectively subverting democratic accountability and undermining the economic exercise of judicial authority.").

30. *See* discussion *infra* Section I.A.

31. At some point, legislative and executive powers come into conflict regarding the interpretation of the law. Particularly from a functionalist understanding, the two must balance and there is not necessarily a clear winner. *See* discussion *infra* Section II.A.

32. Wisconsin, for example, used formalist language in *Tetra Tech* but has not always taken a strictly formalist view of separation of powers. *Compare Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 914 N.W.2d 21, 43 (Wis. 2018) ("It is fair to say that exercising judgment in the interpretation and application of the law in a particular case is the very thing that distinguishes the judiciary from the other branches . . . ."), *with State v. Holmes*, 315 N.W.2d 703, 709 (Wis. 1982) ("The doctrine of separation of powers does not demand a strict, complete, absolute, scientific division of functions between the three branches of government. The separation of powers doctrine states the principle of shared, rather than completely separated powers.").

33. Jellum, *supra* note 17, at 870–71.

34. *See* discussion *infra* Section II.A.

35. *See* discussion *infra* Section II.B.2.

In *Tetra Tech EC v. DOR,* the court used both separation of powers and due process to eliminate deference.[36] But because advocates of deference also reference separation of powers,[37] the two might easily have stood apart. When that happens, this Note argues that the court's due process responsibility must prevail over any separation of powers problem.

Not all agree that deference creates a due process violation. Critics argue it overstates the constitutional problem.[38] Some note that courts defer in other circumstances without violating due process, such as with military deference.[39] Additionally, as mentioned earlier, according to modern deference jurisprudence the judge only enacts the will of the legislature when deferring.[40] Not deferring thereby becomes a separation of powers violation because the court ignores legislative intent.[41] This Note first lays out the arguments for due process and then responds to these critiques.[42]

This Note has two Parts. The first Part further defines administrative deference and the background and analysis used by the *Tetra Tech* court. The second Part analyzes the tension in the separation of powers arguments, the reach of due process, and the interconnected way the doctrines interact. It argues that deference always poses a problem for procedural due process and draws a clear line where separation of powers does not. Accordingly, it argues that when the two collide, due process must prevail. It concludes by addressing some of the criticisms of relying on due process.

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36. *Tetra Tech*, 914 N.W.2d at 48 ("Ceding judicial power to an administrative agency is, from a separation of powers perspective, unacceptably problematic; it is problematic along a different axis when that agency appears in our courts as a party.").

37. *E.g.*, Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269, 269 (1988) (arguing deference derives from separation of powers).

38. *See, e.g.*, Cass R. Sunstein, Chevron *as Law*, 107 GEO. L.J. 1613, 1683 n.120 (2019) ("The simple answer is that the Due Process Clause does not forbid Congress from giving agencies the authority to resolve ambiguities. We could imagine some purported interpretations that would raise due process questions—for example, if they result in the imposition of penalties without providing fair notice. But there the problem is that people have been deprived of life, liberty, or property without due process of law—not that an agency has interpreted a statutory term.").

39. Hamburger, *supra* note 8, at 1216.

40. Nicholas R. Bednar & Kristin E. Hickman, Chevron*'s Inevitability*, 85 GEO. WASH. L. REV. 1392, 1398 (2017).

41. *Id.* at 1419–20.

42. *See* discussion *infra* Section II.B.4.

I. THE MEANING OF DEFERENCE

The phrase "agency deference" encompasses a variety of doctrines and meanings.[43] While hundreds, perhaps thousands, of agencies exist at the federal level,[44] each state also contains numerous administrative agencies.[45] In turn, each state judicial system approaches deference to agency decisions of law differently from the federal government[46] and from one another.[47] Some extend more deference;[48] others extend very little or no deference at all.[49] Different factors can lead to different levels of deference with the same court extending various levels at any given time.[50] These varying standards represent the increasing complexity of federalism and the modern administrative state.[51]

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43. Tercel Maria G. Mercado-Gephart, *Deference in Wonderland: Into the Many Rabbit Holes of* Chevron, Skidmore, *and* Auer *Deference*, 42 OKLA. CITY U. L. REV. 367, 374 (2018).

44. Agencies are notoriously difficult to define. At the federal level, the Administrative Procedure Act quite broadly defines an agency as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency" excluding Congress, the courts, territories, and government of the District of Columbia. Administrative Procedure Act §1, 5 U.S.C. § 551 (2006). The definition covers quite a broad range and makes it difficult to accurately catalogue them all. States can also provide broad definitions for agencies. For example, Wisconsin defines agencies as "a board, commission, committee, department or officer in the state government, except the governor, a district attorney or a military or judicial officer." WIS. STAT. § 227.01(1) (2017–18).

45. *See* D. Zachary Hudson, *A Case for Varying Interpretive Deference at the State Level*, 119 YALE L.J. 373, 373–74 (2009).

46. Deference at the federal level is generally known as *Chevron* deference. Michael Pappas, *No Two-Stepping in the Laboratories: State Deference Standards and Their Implications for Improving the* Chevron *Doctrine*, 39 MCGEORGE L. REV. 977, 980 (2008). Many states used *Chevron* as a starting point for developing their own doctrine but went on to give it their own style without the defining two-step analysis. *See id.*; *see also* Ann Graham, Chevron *Lite: How Much Deference Should Courts Give to State Agency Interpretation?*, 68 LA. L. REV. 1105, 1115–17 (2008).

47. Dan Rempala, *You Say You Want a Chevrolution? Factors Predicting the Adoption of the* Chevron *Standard in Agency Deference at the State Level*, 38 U. HAW. L. REV. 447, 448 (2016). Delaware famously extends no deference to agency interpretation of law. Graham, *supra* note 46, at 1118–19.

48. Rempala, *supra* note 47, at 457.

49. *Id.*

50. *See, e.g.*, Wisconsin's "contextualized methodology of reviewing administrative agency decisions." *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 914 N.W.2d 21, 31 (Wis. 2018).

51. Patricia G. Chapman, *Has the* Chevron *Doctrine Run Out of Gas? Senza Ripieni Use of* Chevron *Deference or the Rule of Lenity*, 19 MISS. C. L. REV. 115, 121–22, 132, 146 (1998).

A. Deference to Agency Interpretations of Law

As legislation and ensuing rules have become more complicated, courts have increasingly looked to agencies for specialized understanding of meaning.[52] Traditional arguments for deference focus on the fact that legislatures often pass vague or ambiguous legislation.[53] Agencies must enact specific rules in order to execute legislation.[54] These rules often represent policy choices, such as regulating pollution versus industrial development, or permissible levels of water contaminants.[55] When a case comes before a court implicating these policy choices, courts frequently defer to agencies under the perception that agencies know more about the subject than judges do.[56] Further, if the legislature provided an ambiguous statute, modern deference doctrine presumes the legislature intended the agency to clarify those ambiguities.[57] Under this understanding, deference promotes efficiency by acknowledging agency expertise and upholds legislative intent by acknowledging legislative delegation to the agency.[58]

1. DEFERENCE AT THE FEDERAL LEVEL

Chevron[59] and *Skidmore*[60] represent the two main levels of administrative deference given to federal agencies' interpretation of

52. Caitlin Miller, *The Balancing Act Between* Chevron *Deference and the Rule of Lenity*, 18 TEX. TECH ADMIN. L.J. 193, 195 (2017) ("The expansion of agency power and influence over many areas of government and governmental issues led to Chevron Deference because the agencies themselves became much more powerful and influential.").

53. Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2091 (1990).

54. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.") (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).

55. Catherine M. Sharkey, *Cutting in on the* Chevron *Two-Step*, 86 FORDHAM L. REV. 2359, 2374 (2018).

56. *See* Bednar & Hickman, *supra* note 38, at 1398, 1454.

57. Linda D. Jellum, *The Impact of the Rise and Fall of* Chevron *on the Executive's Power to Make and Interpret Law*, 44 LOY. U. CHI. L.J. 141, 168 (2012).

58. *See* Neal A. Hoopes, Chevron*'s Pure Questions: Searching for Meaning in Ambiguity*, 2017 BYU L. REV. 663, 678; Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 26 (1983).

59. 467 U.S. 837 (1984).

60. 323 U.S. 134 (1944). *See also* Michael Herz, Chevron *is Dead; Long Live* Chevron, 115 COLUM. L. REV. 1867, 1879 (2015) ("*Chevron* and *Skidmore* are both doctrines of 'judicial deference.'").

law.[61] Doctrinal boundaries of both remain controversial.[62] But in general, *Chevron* represents a "generous" level of deference and *Skidmore* a more limited form.[63]

Chevron deference comes with many layers. Although the original doctrine purported to contain only two steps, it quickly evolved into something more complex.[64] To even begin the infamous "*Chevron* two-step," a court must determine if the agency's interpretation of law qualifies for *Chevron* analysis.[65] This is called "Step Zero."[66] Step Zero does not clearly establish criteria for achieving *Chevron* deference, and the Supreme Court has provided varied application.[67] In general, to determine if *Chevron* applies, Step Zero considers whether the agency intended its interpretation to act with the force of law.[68] Step Zero also sometimes includes the major question doctrine,[69] which prevents courts from deferring if the issue directly impacts a major policy question.[70] For example, whether Congress intended to ban tobacco when it gave the Food and Drug Administration authority over "drugs" concerns a

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61. In reality, multiple types of deference exist at the federal level and their application depends on the issue before the court. For example, "*Auer* deference" applies when a court reviews an agency's interpretation of its own authority. *Auer v. Robbins*, 519 U.S. 452, 457 (1997). The U.S. Supreme Court recently limited but did not overrule *Auer* deference. *See Kisor v. Wilkie,* 139 S. Ct. 2400, 2408 (2019). However, these other forms of deference fall outside of the scope of this Note.

62. *See* Pappas, *supra* note 46, at 980 ("Scholars have frequently criticized the inconsistency between the *Chevron* standards as announced versus as applied . . . ."); 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, 294 (2002) ("Critics of *Skidmore* deference have decried the test as vague and indeterminate . . . .").

63. Jud Mathews, *Deference Lotteries*, 91 TEX. L. REV. 1349, 1350 (2013). *But cf*. Herz, *supra* note 60, at 1879 (2015) (stating that calling *Skidmore* a more limited form of deference "misconceives the distinction as one of degree when it is in fact a difference in kind").

64. Pappas, *supra* note 46, at 978. Each step of the original two-step test has evolved with its own complex doctrine. *See, e.g.*, Sharkey, *supra* note 55, at 2380 (referencing some of the more recent complications around the generally extremely deferential Step Two). Some scholars add additional steps. *See, e.g.*, Daniel J. Hemel & Aaron L. Nielson, Chevron *Step One-and-A-Half*, 84 U. CHI. L. REV. 757, 762 (2017) (arguing for Step One-and-a-Half). Finally, the Supreme Court itself often complicates the matter by applying the doctrine inconsistently, though *Chevron* remains a central tenant of administrative law. Michael Kagan, *Loud and Soft Anti*-Chevron *Decisions*, 53 WAKE FOREST L. REV. 37, 43–44 (2018).

65. Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 191 (2006).

66. *Id*.

67. Jeremy D. Rozansky, Comment, *Waiving* Chevron, 85 U. CHI. L. REV. 1927, 1953–55 (2018) (tracing the origin and varying factors of Step Zero).

68. Sunstein, *supra* note 65, at 193.

69. *Id*.

70. Kevin O. Leske, *Major Questions About the "Major Questions" Doctrine*, 5 MICH. J. ENVTL. & ADMIN. L. 479, 480 (2016).

massive industry with potentially significant consequences and so implicates the major question doctrine.[71]

If an agency passes Step Zero, a court goes through a two-step process to determine if an agency receives deference.[72] First, it ascertains "whether Congress has directly spoken to the precise question at issue."[73] If Congress did, the court stops there because the statute is unambiguous.[74] The agency does not warrant deference because Congress already provided a clear meaning, leaving no room for further agency interpretation.[75]

However, if the statute remains ambiguous, the court then looks at whether the agency's interpretation "is based on a permissible construction of the statute."[76] The construction does not need to be the one the court would reach—just one a court might reach.[77] If the agency interpretation passes both steps, the court applies the agency's interpretation of the law, even if a better interpretation exists.[78] *Chevron* deference highly stresses judicial deferral to legislative intent as demonstrated through delegation to agencies.[79]

If the agency fails to meet *Chevron* level deference at Step Zero,[80] the court may still grant *Skidmore* deference.[81] *Skidmore* deference "varies according to the circumstances."[82] It ostensibly does not create a mandatory deference, but rather grants the "power to persuade."[83] A court looks at a variety of factors to determine what level of "persuasion" to give an agency's legal interpretation.[84] These include "the thoroughness evident in its consideration, the validity of its

71. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33, 135–37 (2000). In this case, the Court's analysis actually took place under *Chevron* Step One, further demonstrating the complications of the doctrine.

72. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

73. *Id.*

74. *Id.* at 842–43.

75. *Id.*

76. *Id.* at 843.

77. *Id.* at 843 n.11.

78. *Id.* at 844.

79. *Id.* This is particularly relevant because it falls square in the difficulty with separation of powers. Deference, at least at the federal level, is the court's attempt to balance competing powers by recognizing legislative delegation to the executive. *See id.*

80. Scott A. Keller, *Texas Versus* Chevron*: Texas Administrative Law on Agency Deference After* Railroad Commission v. Texas Citizens, 74 TEX. B.J. 984, 985 (2011).

81. Mathews, *supra* note 63, at 1353.

82. Herz, *supra* note 63, at 1881.

83. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

84. *Id.*

reasoning, [and] its consistency with earlier and later pronouncements."[85]

Skidmore deference lacks clear definition.[86] Generally, there are two different approaches for applying *Skidmore*.[87] The more popular view treats it as a sliding-scale.[88] The more an agency fits the factors for persuasion, the more deference it gets.[89] Other litigants do not necessarily get the same opportunity to "extra-persuade."[90] The second approach is the independent judgement model.[91] Under this method, "the power to persuade" means the court compares its own conclusion of law to the agency's.[92] If it finds the agency's reasoning more persuasive, it defers to that understanding.[93] Both these interpretations come from Supreme Court precedent.[94]

2. DEFERENCE LEVELS IN WISCONSIN

Prior to *Tetra Tech*, Wisconsin maintained a robust deference standard that created three levels for approaching deference: great weight, due weight, and de novo review.[95] Wisconsin courts extended great weight deference when the agency met the following four criteria: (1) a legislative charge to the agency to administer the statute, (2) a long-standing application of the agency's legal interpretation, (3) the use of agency expertise in developing the legal interpretation, and (4) overall "uniformity and consistency in the application of the statute" stemming from the agency's interpretation.[96] Under this deference

85. *Id.*

86. Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1237 (2007) ("All agree that *Skidmore* is less deferential than *Chevron*, but how much less and in what way remain open questions.").

87. Mercado-Gephart, *supra* note 43, at 405.

88. Hickman & Krueger, *supra* note 86, at 1259.

89. *Id.* at 1255.

90. *Id.* at 1256. Exactly what this extra-persuasion looks like remains unclear.

91. Mary Holper, *The New Moral Turpitude Test: Failing* Chevron *Step Zero*, 76 BROOK. L. REV. 1241, 1297 (2011).

92. Mercado-Gephart, *supra* note 43, at 404–05.

93. *Id.*

94. *Id.*

95. *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 914 N.W.2d 21, 31 (Wis. 2018). Making the deference standard further unique, Wisconsin law limits agency action to *explicit* delegation from the legislature, unlike at the federal level where it can be explicit or implicit. For more on Wisconsin's situation, see Kirsten Koschnick, *Making "Explicit Authority" Explicit: Deciphering Wis. Act 21's Prescriptions for Rulemaking Authority*, 2019 WIS. L. REV. (forthcoming 2019).

96. *Tetra Tech,* 914 N.W2d at 31 (quoting *Harnischfeger Corp. v. Labor & Indus. Review Comm'n*, 539 N.W.2d 98, 102 (Wis. 1995)).

level, the court deferred even if a more reasonable interpretation existed.[97]

If the legislature charged the agency with administering the statute but the agency demonstrated only some expertise in the area, the court extended due weight deference instead.[98] Under this second level of deference, the court deferred to the agency's interpretation of law over its own interpretation only if the agency's interpretation represented an equally good, but not necessarily more reasonable, way of reading the statute.[99] Thus, a court would grant the agency interpretation a "win" even though it was a "tie" between the agency's interpretation and the court's interpretation.[100]

If an agency's interpretation did not meet any of the above criteria, the court applied de novo review.[101] Under de novo review, the agency received no deference.[102] This is the same standard the Wisconsin Supreme Court uses to review a lower court's legal interpretation.[103] It also is the standard the court returned to after it declared deference to agency interpretation of law unconstitutional.[104]

B. Tetra Tech EC v. DOR

Tetra Tech EC. v. DOR arose from a tax dispute between manufacturers and the Wisconsin Department of Revenue (DOR).[105] Pursuant to an order from the federal Environmental Protection Agency

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97. *Harnischfeger Corp. v. Lab. & Indus. Rev. Comm'n*, 539 N.W.2d 98, 103 (Wis. 1995).

98. *Tetra Tech*, 914 N.W.2d at 32 (quoting *Operton v. Labor & Indus. Review Comm'n*, 894 N.W.2d 426, 431 (Wis. 2017) and *UFE Inc. v. Labor & Indus. Review Comm'n*, 548 N.W.2d 57, 62 (Wis. 1996)).

99. *ABKA Ltd. P'ship v. Wis. Dep't of Nat. Res.*, 648 N.W.2d 854, 877 (Wis. 2002) (Sykes, J., dissenting).

100. *Id.* ("[T]he agency's legal interpretation will be upheld even if there is a different, equally reasonable interpretation—in other words, a tie goes to the agency.").

101. *Racine Harley-Davidson, Inc. v. State Div. of Hearings & Appeals*, 717 N.W.2d 184, 191–92 (Wis. 2006).

102. *Tetra Tech*, 914 N.W.2d at 31.

103. *Id.* at 51 ("[W]e will review an administrative agency's conclusions of law under the same standard we apply to a circuit court's conclusions of law—de novo.").

104. Due weight deference arose from a Wisconsin statute requiring courts to give "due weight" to agencies. *Id.* at 52. The statue remains in effect even after *Tetra Tech*. However, the court removed the "deference" portion of it and noted the actual text of the statute did not require the court "to defer to an agency's interpretation or application of the law." *Id.* Accordingly, de novo review remains the relevant framework for reviewing agency decisions of law and due weight consideration only influences a court when it meets the criteria previously required of great weight deference. *Id.* at 52–53.

105. *Id.* at 28.

to clean up the Fox River, paper manufacturers hired Tetra Tech EC, Inc. to dredge the river.[106] DOR then imposed a retail sales tax on the dredging, claiming it constituted "processing" under Wisconsin statute § 77.52(2)(a)11.[107]

Tetra Tech EC, Inc. appealed the decision and it went before the Wisconsin Tax Appeals Commission.[108] The Commission sided with the DOR.[109] The trial court and Wisconsin Court of Appeals subsequently gave the Commission's decision great weight deference and also affirmed the tax.[110]

Although the Wisconsin Supreme Court unanimously affirmed the agency's interpretation of "processing," it used the case as a launching point to overturn the traditional deference standards given to agencies.[111] To do this, it examined deference under two constitutional provisions: separation of powers and due process.[112] As a case of first impression, the court found deference violated both.[113]

Like the federal Constitution, Wisconsin's separation of powers jurisprudence derives from the "tripartite division of government between the judicial, legislative and executive branches."[114] The doctrine holds that each branch maintains core powers that must be jealously guarded.[115] Some sharing will happen, but certain core powers cannot constitutionally be shared.[116] In *Tetra Tech*, the court stated that it possessed the exclusive power to say what the law is.[117] Deferral to agency interpretations of law impermissibly gave that power away, thus violating the separation of powers.[118]

The court then turned to the due process argument. It stressed the responsibility the judiciary owes to all parties in litigation. It held deference created an impermissible bias by requiring the court to unfairly favor one party's interpretation of the law before the trial even started.[119] According to *Tetra Tech*, in Wisconsin, when a court

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106. *Id.* at 29.

107. *Id.*; WIS. STAT. § 77.52(2)(a)11 (2007–08) ("The tax imposed herein applies to . . . processing . . . of tangible personal property . . . .").

108. *Tetra Tech*, 914 N.W.2d at 29.

109. *Id.*

110. *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 890 N.W.2d 598, 601–04 (Wis. Ct. App. 2016).

111. *Tetra Tech*, 914 N.W.2d at 21.

112. *Id.* at 48.

113. *Id.* at 40, 54.

114. *Flynn v. Dep't of Admin.*, 576 N.W.2d 245, 255 (Wis. 1998).

115. *Gabler v. Crime Victims Rights Bd.*, 897 N.W.2d 384, 396 (Wis. 2017).

116. *Id.* at 396–98.

117. *Tetra Tech*, 914 N.W.2d at 43.

118. *Id.* at 45.

119. *Id.* at 49.

accepted an agency's interpretation of law, it created a systematic bias towards the agency.[120] An agency became the "judge of its own cause."[121] And as judge, it would hardly rule against itself.[122] Thus, according to the decision, the system made one party a default winner.[123] This undermined the purpose of the court room and violated the litigants' due process rights.[124]

II. PUTTING DEFERENCE TO THE TEST

Discussion of agency deference frequently centers on the doctrine of separation of powers.[125] However, separation of powers can act as a double-edged sword depending on which interpretation it gets.[126] Under some circumstances it may allow or disallow deference, but those circumstances are not always clear.[127] Due process, however, lays a solid foundation for when and why deference poses a problem.[128] If deference undermines the due process rights of one of the litigants, deference poses a problem every time it interferes with judicial impartiality.[129] The problem cuts to the very heart of the judicial system and cannot be ignored.[130]

A. The Tension in Separation of Powers

Legal commentators often break separation of powers jurisprudence into two schools of thought: formalism and functionalism.[131] For the formalist, the Constitution specifically allots

120. *Id.*

121. *Id.* at 50.

122. *Id.*

123. *Id.* at 45.

124. *Id.* at 49.

125. Philip Hamburger, Chevron *on Stilts: A Response to Jonathan Siegel*, 72 VAND. L. REV. EN BANC 77, 78 (2018).

126. *See* discussion *infra* Section II.A. In *Tetra Tech*, for example, the court took a formalist approach and declared the judiciary possessed an inviolable core power. But functionalists do not view core powers as inviolable and so would not agree with the court's assertion.

127. *See* discussion *infra* Section II.A.

128. *See* discussion *infra* Section II.B.2.

129. *See* discussion *infra* Section II.B.2.

130. *See* discussion *infra* Section II.B.2.

131. Lee A. Deneen, Note, *Defeating a Wolf Clad as a Wolf: Formalism and Functionalism in Separation-of-Powers Suits Against the Consumer Financial Protection Bureau*, 48 GA. L. REV. 579, 583 (2014). This dichotomy originated from Professor Peter Strauss and, though not all commentators agree that it properly frames the doctrine, reflects a frequently used shorthand for understanding the debate around separation of powers. *Id.* at 583–84. *See also* J. Richard Broughton, Boerne *Down the House: The Religious Liberty Protection Act and the Separation of Powers*, 2000 L.

certain powers to each branch of government.[132] The branches cannot share powers except where the Constitution permits.[133] Functionalists, alternatively, view powers as naturally overlapping.[134] Under functionalism, it is not only desirable but also necessary for branches to borrow power from one another so that government can function properly.[135] Though often framed as two incompatible views, the United States Supreme Court traditionally borrows from both understandings when deciding separation of powers cases.[136]

Regardless of whether they take a formalist or functionalist approach, both proponents and critics of agency deference refer to separation of powers to support their position.[137] For proponents, deference represents the court's proper posture towards the other branches.[138] Congress often enacts sweeping or ambiguous legislation delegating authority to agencies.[139] Under this understanding, when judges apply de novo review, they in effect make policy judgements about agency decisions.[140] This places them outside of their

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REV. MICH. ST. U. DET. C.L. 317, 365 n.186 (listing alternative ways to understand the separation of powers debate).

132. John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1959 (2011).

133. The doctrine focuses on "text, structure, and origin." Simona Martinez-McConnell, *The Unstated Tension in* Albuquerque Rape Crisis Center v. Blackmer*: A Divergence Between Formalism and Functionalism*, 36 N.M. L. REV. 661, 667 (2006).

134. Alex Tsiatsos, *Double Jeopardy Law and the Separation of Powers*, 109 W. VA. L. REV. 527, 537 (2007).

135. *See* Vale Krenik, *"No One Can Serve Two Masters": A Separation of Powers Solution for Conflicts of Interest Within the Department of Health and Human Services*, 12 TEX. WESLEYAN L. REV. 585, 602 (2006).

136. Tsiatsos, *supra* note 134, at 538.

137. *E.g.*, Kmiec, *supra* note 37, at 269 (arguing deference derives from separation of powers); Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 STAN. L. REV. 1, 73 (2000) (arguing deference interferes with separation of powers). Critics do not always couch their language within the exact separation of powers language, but emphasis on judicial authority often comes to the same thing. *See* Aditya Bamzai, Marbury v. Madison *and the Concept of Judicial Deference*, 81 MO. L. REV. 1057, 1058–59 n.7 (2016) (describing the separation of powers critiques).

138. This was a foundational argument favoring deference in *Chevron*. Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 466 (1989); *see also* Kmiec, *supra* note 37, at 269 (stating deference derives from a "coalescing of the separation of powers and the judicial acceptance of broad legislative delegations to the executive").

139. Richard J. Pierce, Jr., Chevron *and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 305 (1988).

140. Baldwin, *supra* note 29, at 107 ("De novo review strays further away from the goals of separation of powers by shifting policy-making power to the judiciary, effectively subverting democratic accountability and undermining the economic exercise of judicial authority.").

constitutionally allotted role as interpreters, not creators, of law.[141] Particularly at the federal level, proponents center the problem around unelected judges making policy decisions instead of agencies tasked with enacting the public will by an elected legislature.[142] Viewed this way, deference plays an important role in maintaining the separation of powers by properly deferring to the legislature and legislative intent to empower agencies with authority.[143]

Critics, alternatively, view deference as contrary to judicial power and an interference with the judicial role within the separation of powers.[144] Chief Justice Marshall famously declared in *Marbury v. Madison*: "It is emphatically the province and duty of the judicial department to say what the law is."[145] But when courts defer to an agency's interpretation of law, they surrender the power to say what the law is.[146] This becomes especially problematic when a judge finds a more reasonable or correct interpretation of the statute and must defer to an agency's interpretation anyway.[147] But regardless of whether the judge agrees with the agency in the end, this view holds that deference interferes with judicial independence.[148] It requires the transfer of core judicial power to another branch[149] in violation of separation of powers.[150]

Though they reach different conclusions, the competing underlying rationales about the role of separation of powers are not inherently

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141. *Id.* at 107–08; *see also* Jonathan R. Siegel, *The Constitutional Case for* Chevron *Deference*, 71 VAND. L. REV. 937, 965 (2018) (noting courts must recognize Congress can delegate to agencies "the power to choose to implement any of the reasonable interpretations of the statute").

142. Terence J. McCarrick, Jr., *In Defense of a Little Judiciary: A Textual and Constitutional Foundation for* Chevron, 55 SAN DIEGO L. REV. 55, 85 (2018).

143. Baldwin, *supra* note 28, at 108; Nicholas R. Bednar & Barbara Marchievsky, *Deferring to the Rule of Law: A Comparative Look at United States Deference Doctrines*, 47 U. MEM. L. REV. 1047, 1070 (2017) (quoting Justice Scalia on *Chevron* as saying, "[d]eference is mandatory because Congress has commanded it . . . [c]ourts must obey Congress when it speaks in a manner permitted by the Constitution."). Legislative delegation runs through all of this.

144. *E.g.*, Elbert Lin, *At the Front of the Train: Justice Thomas Reexamines the Administrative State*, 127 YALE L.J.F. 182, 185 (2017), http://www.yalelawjournal.org/forum/at-the-front-of-the-train [https://perma.cc/33H7-TRMS].

145. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

146. John M. Dempsey, *Administrative Law: Michigan Sides with* Marbury*, Not* Chevron*, on Agency Deference*, 55 WAYNE L. REV. 3, 5 (2009).

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

148. *Id.* (Thomas, J., concurring).

149. *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1213 (2015) (Thomas, J., concurring).

150. *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 619 (2013) (Scalia, J., concurring in part and dissenting in part).

incompatible. Each view emphasizes a different branch's power, focusing either on the legislature or the judiciary. Both agree that some overlap occurs.[151] The difference in views, however, exists in how far the powers can lawfully overlap and where that overlap becomes interference.

For a formalist, powers overlap only where a constitution specifically allows it.[152] The question of deference, therefore, centers on whether it interferes with a core judicial power.[153] The Wisconsin Supreme Court took a strictly formalist approach in *Tetra Tech EC v. DOR*. It held that since the power to say "what the law is" belongs solely to the judiciary, the judiciary cannot share the power with the other branches or administrative agencies.[154]

Functionalists, alternatively, do not view core powers as exclusive or limited by specific constitutional directives,[155] and so it is harder to discern where overlap becomes interference.[156] This view considers all powers inherently, and necessarily, shared between the branches.[157] For functionalists, separation of powers exists to maintain checks and balances, not to lay down absolutes.[158] Judicial deference to an agency in every aspect of the courtroom might pose a problem, but it does not follow that deference on a smaller scale also poses a problem.[159]

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151. Pablo J. Davis, *Is the Judiciary a Fragile Fortress?*, 47 U. MEM. L. REV. 999, 1007 (2017); *Gabler v. Crime Victims Rights Bd.*, 897 N.W.2d 384, 396 (Wis. 2017) ("Shared powers lie at the intersections of the[] exclusive core constitutional powers.").

152. Manning, *supra* note 132, at 1959.

153. *Id.* at 1059–61.

154. *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 914 N.W.2d 21, 47 (Wis. 2018). Mississippi took a similar approach when it overturned its historical deference standards by stating, "the courts and the courts alone . . . interpret statutes." *King v. Miss. Military Dep't*, 245 So. 3d 404, 408 (Miss. 2018).

155. Krenik, *supra* note 135, at 602.

156. Especially with administrative agencies, it becomes harder to pinpoint when (and whose) authority is being used. Tanielian, *supra* note 16, at 967 ("[C]lear lines between the branches do not always exist, particularly in the modern administrative state."). One response to the challenge of how administrative agencies apply government power is to say agencies fall outside of the separation of powers altogether. M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1144 (2000). In such cases, core powers concerns would not apply at all. *Id.* However, for the sake of this Note, it is presumed agency action falls within the reach of separation of powers.

157. Jellum, *supra* note 17, at 860–61 ("[T]he functionalist approach posits that overlap beyond the core functions is practically necessary and even desirable.").

158. *See* William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21, 22 (1998).

159. This contrasts with formalism, where deference at any level causes a problem because any use of judicial authority represents usurpation of that authority. However, with functionalism, more than just use is necessary to pose a problem. By

Because functionalism stresses the inherent flexibility necessary for government to function efficiently, most deference standards likely do not pose a problem.[160] If deference causes the most effective results and furthers checks and balances, it furthers the functionalist end goal of government.[161] For functionalists, efficiency represents one of the main purposes of separation of powers,[162] so any deference that furthers such ends would likely not violate separation of powers. Functionalism, thus, does not clearly answer the question of deference. It depends on the circumstances surrounding specific deference.

Functionalism does not easily reconcile where overlapping powers interfere with separation of powers. And courts do not always take a strict formalist approach.[163] So, sole emphasis on separation of powers as a constitutional concern does not automatically address the question of deference. It may raise concerns about the highest levels of deference, particularly where the court finds a more reasonable solution exists and defers anyway.[164] But if taking a functionalist view, the existence of a separation of powers problem does not always answer when—or even if—deference poses a problem. Due process, on the other hand, provides a clear answer.

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extension, deference *might* cause a problem at some level, but the act of deferring would cause less concern.

160. Since functionalism centers on whether one branch "undermine[s] the responsibilities of another," deference would need to undermine judicial power to pose a problem. Deneen, *supra* note 131, at 586. But logically, not all deference undermines judicial power, only a certain amount of it. Therefore, the question of functionalism becomes more about how much deference can come from the court before it poses a problem.

161. Eskridge, *supra* note 158. From a functionalist perspective, the question centers on whether deference "undermine[s] the responsibilities of another branch." Deneen, *supra* note 131, at 586. Functionalism revolves around the *purpose* of separating powers over the categories of power. Ofer Raban, *Is Textualism Required by Constitutional Separation of Powers?*, 49 LOY. L.A. L. REV. 421, 438 (2016). But the doctrine often gets critiqued for its nebulousness. *See, e.g.*, Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence,* 126 YALE L.J. 346, 356 (2016). Further, administrative agencies usually use power from all three branches. Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 492 (1987). It is hard to say at what point—if any—deference interferes with the power balancing since the agencies themselves reflect the balance. *See id.* The temptation, then, is to argue agencies never pose a problem. But functionalism, like formalism, emphasizes some separation. Magill, *supra* note 156, at 1144–45 n.68.

162. Raban, *supra* note 161, at 438.

163. Tsiatsos, *supra* note 134, at 538. Or vice versa. Most courts do not fall strictly into one camp or the other, but blend the two. Strauss, *supra* note 161, at 489.

164. Especially in these situations, the court obviously turns away from "say[ing] what the law is." *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (citing *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

B. The Power of Due Process

Due process shifts the constitutional problem with agency deference from an external question about power allotment to an internal one about the judicial role. Both, in a way, address core judicial powers.[165] But while separation of powers asks *who* uses the power, due process asks *how* they use it. First, however, it is important to recognize where the procedural due process problem originates.

1. THE MEANING OF DUE PROCESS

Although a fairly new argument against agency deference,[166] procedural due represents a familiar concept in administrative law. The Due Process Clause of the Fifth Amendment declares: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."[167] The Fourteenth Amendment similarly echoes: "[No state shall] deprive any person of life, liberty, or property, without due process of law . . . ."[168] Typically, discussion of procedural due process focuses on the application of these clauses to administrative agencies' actions.[169] The amount of procedural due process owed to a litigant depends on the interests encompassed within life, liberty, or property.[170]

In *Tetra Tech EC v. DOR*, however, the procedural due process problem did not stem from an agency's actions but from the judiciary's. The court did not ask whether the Department of Revenue violated a property interest, and thus due process, when it levied a tax on Tetra Tech EC, Inc. Rather, it focused on judicial violation of procedural due

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165. As Justice Neil Gorsuch noted before he joined the Supreme Court: "Transferring the job of saying what the law is from the judiciary to the executive unsurprisingly invites the very sort of due process (fair notice) and equal protection concerns the framers knew would arise if the political branches intruded on judicial functions." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016). Further, both separation of powers and due process invoke questions of individual liberty, power allotment, and the rule of the law. Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1515–16 (1991) (noting the relevance of separation of powers in due process).

166. Hamburger, *supra* note 8, at 1188–89 (introducing due process as a new argument).

167. U.S. CONST. amend. V.

168. U.S. CONST. amend. XIV, § 1.

169. *See* J. Gary Trichter & Chris Samuelson, *Introduction*, CHAMPION, Jan./Feb. 1997, at 31, 36. The debate centers on what due process is due and for whom. Gary Lawson et al., *"Oh Lord, Please Don't Let Me Be Misunderstood!": Rediscovering the* Mathews v. Eldridge *and* Penn Central *Frameworks*, 81 NOTRE DAME L. REV. 1, 7 (2005).

170. *See, e.g.*, *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 569 (1972).

process once Tetra Tech EC, Inc. entered the courtroom.[171] The shift changes the traditional context of the procedural due process discussion within administrative law. Instead of reviewing a procedural due process violation from the executive, with all the accompanying case law, the court looked to the procedural due process owed to a litigant by the *judiciary*. And foundational to procedural due process, the judiciary owes litigants an impartial tribunal.[172]

2. DEFERENCE AND DUE PROCESS

Within our adversarial legal system, judges play a critical role as impartial arbitrators.[173] If two parties cannot agree on something, they go before someone who has no stake in the game.[174] An impartial arbitrator is a "basic requirement of due process."[175] Bias towards one party in litigation undermines a foundational responsibility of the judiciary because it interferes with judicial impartiality.[176]

Agency deference creates a problem for procedural due process because it undermines judicial impartiality by creating a systematic, procedural bias within the framework of law.[177] Due process requires an impartial decision maker.[178] Even the *appearance* of impartiality poses a problem.[179] Impartiality "guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to

171. *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 914 N.W.2d 21, 49–50 (Wis. 2018).

172. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) ("The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases.").

173. Charles Gardner Geyh, *The Dimensions of Judicial Impartiality*, 65 FLA. L. REV. 493, 520 (2013).

174. As James Madison stated, "No man is allowed to be a judge in his own cause; because his interest will certainly bias his judgment, and, not improbably, corrupt his integrity." THE FEDERALIST NO. 10, at 107 (James Madison) (John C. Hamilton ed., 1864).

175. *In re Murchison*, 349 U.S. 133, 136 (1955).

176. Donald L. Burnett, Jr., *A Cancer on the Republic: The Assault Upon Impartiality of State Courts and the Challenge to Judicial Selection*, 34 FORDHAM URB. L.J. 265, 272 (2007); *see also* Robert E. Kohn, *Due Process of Law in Private Civil Litigation: Is There Anything New to Say About It? (Yes, There Is.)*, FED. LAW., June 2013, at 58, 58.

177. Hamburger, *supra* note 8, at 1250–51.

178. *In re Murchison*, 349 U.S. at 136 ("A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.").

179. Sherrilyn A. Ifill, *Do Appearances Matter?: Judicial Impartiality and the Supreme Court in* Bush v. Gore, 61 MD. L. REV. 606, 610 (2002).

any other party."[180] But when a court accepts an interpretation of the law solely based on *who that party is*, it does not apply the law equally. The other party does not also get a chance to have its interpretation of the law considered.[181] Once the court finds deference applies, "it receives instruction from the governmental party on how to interpret and apply the rule of decision."[182] By its very definition, there is nothing impartial about deference. But for due process to function, a judge must demonstrate impartiality.[183] Deference and due process thereby stand completely opposed.

The problem extends beyond one judge replacing impartial, judicial interpretation of the law with that of an agency's: the bias is inherent in the system.[184] Even if judges prefer not to defer, they must do so.[185] Deference is mandatory.[186] Deference narrows the judiciary's role as legal interpreter to nothing more than a "rubberstamp [of] the agency's decision unless the agency's legal interpretation is plainly wrong."[187] Deference creates an entire system where the impartial decision makers of the law cease to act as decision makers. And the new decision maker is hardly impartial: it is one of the parties in the litigation.[188]

Further compounding the due process problem, not only do agencies represent a party to litigation, they represent the *government* party in litigation. Due process exists to protect citizens from improper government overreach.[189] Whether procedural or substantive in nature,

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180. *Republican Party of Minn. v. White*, 536 U.S. 765, 775–76 (2002).

181. Deference applies only to the administrative agency—the already more powerful party in litigation. The other side does not receive an equal opportunity because the court accepts the legal interpretation of one party by virtue of who they are, and not on the arguments presented or the independent judgement of the court. Hamburger, *supra* note 8, at 1189.

182. *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 914 N.W.2d 21, 49 (Wis. 2018).

183. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

184. Hamburger, *supra* note 8, at 1189.

185. Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 865 (2001).

186. *Id.*

187. *Hilton ex rel. Pages Homeowners' Ass'n v. Wis. Dep't of Nat. Res.*, 717 N.W.2d 166, 180 (Wis. 2006) (Prosser, J., concurring).

188. Due process and our system of justice function under the understanding that "[n]o man is allowed to be a judge in his own cause; because his interest will certainly bias his judgment, and, not improbably, corrupt his integrity." THE FEDERALIST NO. 10, at 107 (James Madison) (John C. Hamilton ed., 1864). It does not matter if the party is an individual, a corporation, or an agency. Litigants will display bias towards their own position.

189. "Procedural due process under the Fourteenth Amendment to the United States Constitution and Article I, Section 1 of the Wisconsin Constitution protect against government actions that deprive an individual of life, liberty, or property

due process limits government interferences with a citizen's life, liberty, or property.[190] Yet when a court defers to agencies as government actors, it limits the protection due process can provide to those seeking redress. The very actors who enforce the law also get to direct how the judge interprets it.[191] Instead of providing an impartial forum for citizens to have wrongs redressed, the court adheres to a policy favoring the potential perpetrators of the wrongs. Deference hampers the judiciary's ability to hold the other branches accountable and, as a result, to act justly to the litigants in the system.

3. THE SCOPE OF DUE PROCESS AND DEFERENCE

The due process violation clarifies where more nebulous doctrines, like *Skidmore* deference, are problematic. *Skidmore* comes with at least two interpretations.[192] Both potentially raise a problem. One interpretation is that a court may choose how much significance it gives certain interpretations of law by comparing its own interpretation to that of the parties.[193] By itself, this might not prove to be a problem: courts routinely evaluate evidence and recognize specialized knowledge.[194] But deferring to evidence because it comes from an agency poses a due process problem. Even just a little bit of "extra" weight given to one party solely because of who that party is unfairly tips the scales towards one of the litigants.[195] The same problem holds doubly true for the

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without due process of the law." *Adams v. Northland Equip. Co.*, 850 N.W.2d 272, 285 (Wis. 2014); *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) ("Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.").

190. *See supra* note 189; *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997) ("The Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint.").

191. *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 914 N.W.2d 21, 49 (Wis. 2018) ("[The court] receives instruction from the governmental party on how to interpret and apply the rule of decision.").

192. Hickman & Krueger, *supra* note 86, at 1259. The two models emphasize either granting various levels of deference depending on the agency's actions (the sliding-scale model) or contrasting the judge's legal opinion with that of the agency's, with no obligation to adopt the agency's (the independent judgement model).

193. Holper, *supra* note 91, at 1297.

194. Similarly, it "does not mean that judges must be oblivious to opinions and views derived from living in society." James L. Morse, *A Declaration About Judicial Independence*, 20 QUINNIPIAC L. REV. 731, 738 (2001).

195. The difficulties with interpreting *Skidmore* often come from the nebulousness of the doctrine. Hickman & Krueger, *supra* note 86, at 1259. The Court often wavers in its analysis. Mercado-Gephart, *supra* note 43, at 404–05. But if due process presents an overriding problem, then deference in any form and at any level poses a problem. This includes the various deferential forms of *Skidmore*.

"sliding-scale" interpretation of *Skidmore*. It does not matter if the court provides more or less deference depending on agency expertise.[196] *Skidmore* deference is problematic, even if the deference proves overall to be minor, because at any level it provides deference to a party in litigation.

If deference creates bias, then administrative deference is problematic the minute the court is required to accept an interpretation of the law other than its own. Even if the legislature intended an agency to interpret the law, such intent does not eliminate the judicial responsibility to impartially decide the case before it.[197] Or, to take another argument for deferring, a complicated subject demanding expertise to understand might present a challenge to the court.[198] But easy or difficult, deferring to a litigant with more expertise on a matter of law still creates a due process problem because it involves *deferring to a litigant*. The judge ceases to function as an impartial decisionmaker.[199] The due process problem exists regardless of whether the agency action warrants deferral.[200]

4. Due Process and Separation of Powers

Due process lacks the nebulousness inherent in separation of powers because it clearly lays a foundation for when deference poses a problem. Particularly for functionalists, deferral to the legislative and executive's interpretation of the law likely does not pose a problem, or

196. The sliding-scale form of deference holds that the more an agency fits the factors for persuasion, the more deference it gets. *See* Hickman & Krueger, *supra* note 86, at 1259.

197. The responsibility exists regardless of legislative intent. "[T]he most significant power of the judicial branch is the interpretation of laws enacted by the legislative branch." John M. Mulcahey, Comment, *Separation of Powers in Pennsylvania: The Judiciary's Prevention of Legislative Encroachment*, 32 Duq. L. Rev. 539, 539 (1994). This Note later argues that judicial responsibility trumps legislative intent when the area in controversy involves interpretation of the law. However, the existence of a judicial responsibility does not depend on this weighing of judicial and legislative interests. Rather, it simply exists as a fact: the judicial branch has a responsibility to independently decide the law.

198. Hoopes, *supra* note 58, at 678.

199. Morse, *supra* note 194, at 738 ("[J]udicial independence requires the impartial exercise of judgment."). But a judge does not demonstrate impartial judgment by acceding to a party's interpretation of law, particularly as the judge accedes not because of an argument, but because of who the party is.

200. Once again, though this Note argues so, it does not necessarily follow that the existence of a due process problem must overcome other reasons for deferral. The fact remains that a due process problem exists regardless of reasons to "ignore" it. "The Due Process Clause entitles a person to an impartial and disinterested tribunal." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). But a litigant gets neither when the court accedes its role to the other party.

at least not in every situation.[201] But for due process, the very act of deferring poses a problem.[202] The doctrine does not deal with separate but equal branches of government, but separate and competing litigants.[203] For due process to function, the law—and who decides it—must apply equally to all.[204] This includes government parties.[205]

But this distinction seemingly creates a new tension between competing judicial roles. For the purpose of fulfilling the role of impartial decisionmaker, a court may view an agency as just another litigant. But in reality, the court functions in multiple roles, including as a separate but equal branch of government with a duty to respect the authority of the other branches.[206] When the two roles collide, who prevails?

The answer: the litigant must. Fundamentally, the court interprets laws and applies them to conflicting litigants and the facts.[207] When interpreting and applying the law, the Fifth and Fourteenth Amendments require the court to act with due process of law.[208] Due process requires an impartial tribunal.[209] And an impartial tribunal that ceases to act impartially violates due process.[210] But deference forces the judiciary to act with bias towards one litigant, the agency, even before the trial begins. The problem, then, is not that the judiciary ceases to share from a separation of powers standpoint. The problem is that the judiciary violates a core precept of its existence: impartial adjudication.[211]

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201. *See supra* notes 158–64 and accompanying text.

202. *See supra* notes 184–91 and accompanying text.

203. *See* Hamburger, *supra* note 8, at 1209.

204. Litigants will not always come before the court as equals. Nor will all other factors create an equal playing field. But our system centers on the idea that the law applies equally to all. Regardless of who writes the law and who executes it, the law must apply equally to all who come before the courts, and the only way to apply it fairly is with an impartial judge. Janet Stidman Eveleth, *Preserving Our Judicial Independence*, MD. B.J., July–Aug. 2004, at 58, 58–59.

205. Hamburger, *supra* note 8, at 1189.

206. Judge William H. Pryor, Jr., *Judicial Independence and the Lesson of History*, 68 ALA. LAW. 388, 392–93 (2007).

207. At some point, conflict occurred, and it brought the litigants to court. Otherwise, a judge would not be necessary. In order to get judicial review, a case or controversy must exist. U.S. CONST. art. III, § 2, cl. 1. The court does not dwell in theory, but actual conflict. *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 597–98 (2007). Accordingly, at the heart of every justiciable case, a conflict with competing parties must exist.

208. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

209. *In re Murchison*, 349 U.S. 133, 136 (1955).

210. *See* Burnett, *supra* note 174, at 271–72.

211. *In re Murchison*, 349 U.S. at 136.

C. Critiques of the Procedural Due Process Violation

Not all agree that due process presents a problem for deference to agency interpretation of law. Some claim it overstates the constitutional problem.[212] Others point to instances where the court defers to the other branches without a deference problem but with similar justifications.[213] Finally, from a more pragmatic stance, the question of stare decisis and what happens without deference to agency interpretations of law lead some to consider deference something of a necessary evil, regardless of any constitutionality problem.[214]

This section addresses some of these critiques. It breaks into two parts: the first focuses on the separation of powers critique of due process and addresses the question of presumed legislative intent.[215] The second part covers some of the broader arguments for deference, including what happens if the court disregards it.

1. THE SEPARATION OF POWERS CRITIQUE OF DUE PROCESS

Some critics argue that no due process violation emerges from judicial deference to agency interpretations of law, particularly when contrasted with the separation of powers. In his article *Chevron as Law*, Harvard Professor Cass R. Sunstein dismissed the problem of systematic bias within the judiciary by stating:

> The simple answer is that the Due Process Clause does not forbid Congress from giving agencies the authority to resolve ambiguities. We could imagine some purported interpretations that would raise due process questions—for example, if they result in the imposition of penalties without providing fair notice. But there the problem is that people have been deprived of life, liberty, or property without due process of law—not that an agency has interpreted a statutory term.[216]

This argument, however, misses the heart of the procedural due process violation and ignores the differing roles of the court. A due process violation does not automatically arise when an agency interprets

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212. Sunstein, *supra* note 38, at 1639 n.120.

213. *Developments in the Law: The U.S. Territories*, 130 HARV. L. REV. 1616, 1714–15 (2017).

214. Sunstein, *supra* note 38, at 1679 ("If it were overruled, there would be a degree of chaos, at least in the short run, and an increase in the role of judicial policy preferences, even in the long run.").

215. Despite this delineation, the question of legislative delegation inevitably runs throughout both sections as it remains critical to the question of deference.

216. Sunstein, *supra* note 38, at 1683 n.120.

the law or a legislature delegates authority. The problem arises when the judiciary—acting within its role as an impartial tribunal—cedes decision-making authority to one of the litigants. It is not an external violation, but an internal one. The question is not what Congress can or cannot do, but what the court can or cannot do.

Suppose the legislature can delegate authority and that agency interpretations of vague or ambiguous legislation represent the legislature's intended reading of the law, as proponents of *Chevron* deference argue.[217] *That is still a side issue for procedural due process*. The procedural due process violation does not depend on whether another branch violated due process or whether an equally good separation of powers argument exists for deferral. It depends entirely on the role of the judiciary and its specific actions as the judiciary. The violation begins and ends there.

2. OTHER CRITIQUES

Critiques of due process expand beyond separation of powers, however, as do arguments for deference. This section addresses three of them: the argument that intervention happens in other contexts without a due process violation, the fact that judges may lack expertise that agencies possess, and the problem of stare decisis.

Proponents of deference argue that it poses, at most, a limited constitutional problem since courts defer to the other branches of government in other circumstances without a similar due process violation.[218] A central example is military deference.[219] Both the military and administrative agencies fall under the executive branch and courts traditionally defer to both.[220]

But though an agency might fall under the executive power, deference to an agency's interpretation of law differs dramatically from military deference. Under the military deference doctrine, the court "accords special weight to the political branches' estimation of the discipline and obedience needs of the armed forces, as reflected in various military regulations."[221] The recognition depends heavily on the unique circumstances of the military.[222] As a civilian a soldier might possess certain rights addressable by the courts, but as a soldier the

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217. *See* Sunstein, *supra* note 53, at 2091.

218. Hamburger, *supra* note 8, at 1215–20.

219. John F. O'Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161, 161 (2000).

220. Kathryn E. Kovacs, *Leveling the Deference Playing Field*, 90 OR. L. REV. 583, 583–84 (2011).

221. O'Connor, *supra* note 219, at 219.

222. *Id.* at 229–31.

authority and method for redress lies squarely within the purview of the legislative and executive branches.[223]

Military deference thereby comes from a very different angle than deference to administrative agency's interpretation of law. The military historically falls under the guidance and direction of the executive, making it unique.[224] More foundational to the due process problem, however, by joining the military, soldiers place themselves under the authority of the military and military discipline.[225] They limit their own freedoms and, to a degree, waive their right to an impartial arbitrator.[226] In contrast, American citizens do not waive their rights to full due process of law when they interact with agencies.[227] No overriding disciplinary or national defense concerns require the judiciary to acknowledge agency authority over citizens the same way the military holds authority over soldiers. Military deference does not justify administrative agency deference; instead, military deference demonstrates the breadth of difference between traditional judicial deference standards to the other branches and administrative deference. The court allows military deference because of the unique relationship between soldier and army.[228] A similar relationship does not exist between citizen and agency.

Another argument for deference centers around perceived agency expertise.[229] Under this argument, some ambiguous laws are so complicated that it takes specialized, agency knowledge to understand them.[230] For example, a court might not know the best way to regulate water quality.[231]

But this understanding rests on a presumption that is not always true; an agency does not necessarily have more expertise with a subject

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223. *Id.* at 272 ("The bedrock principle of the military deference doctrine is not that servicemembers should have no avenue for redressing inequitable or ill-considered regulations; rather, the whole idea of the military deference doctrine is that aggrieved servicemembers (and concerned citizens) should take their concerns to Congress and the Executive Branch instead of to the courts.").

224. *See generally* O'Connor, *supra* note 219.

225. *Id.* at 229–30.

226. The government can require soldiers to limit their access to a neutral arbitrator because of "the notion that the government has a unique need in its military regulations to enforce discipline, foster obedience, and to limit debate and dissent that would be permissible in the civilian society." *Id.* at 229–30, 294.

227. If that were the case, due process would become almost meaningless as agencies impact every area of life.

228. O'Connor, *supra* note 219, at 294.

229. Hoopes, *supra* note 58, at 677–78.

230. *Id.* at 678, 707–08.

231. *See* Sharkey, *supra* note 55, at 2374.

than the court.[232] Quick turnover rates[233] and changing political administrations[234] mean agencies—and the people staffing them—do not always come with the presupposed experience or knowledge. Furthermore, when it comes to interpreting the law, the main skill needed is, definitionally, the ability to interpret the law.[235] In this area, judges tend to come with much more training than agency administrators or staff, whether political or career. Besides three years of law school, most judges passed a bar exam, perhaps clerked for a judge, practiced as an attorney for many years, and may have received further training once they reached the bench.[236] Interpreting the law is not just a judicial responsibility:[237] Judges hone the ability to interpret the law over the course of a career. It does not follow that a complicated subject, or a vague law, necessitates deferral.[238] It particularly does not follow when deferral impacts the due process rights of one of the parties before the judge.

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232. 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, 558 (2006) ("Additionally, the history of at least some of the agencies to which the court defers does not support the conclusion that agency expertise is superior to the court's expertise.").

233. *Id.*

234. Particularly with changes in administration, those at the highest levels of agencies experience an increase in turnover rates. Alexander D. Bolton et al., *Elections, Ideology, and Turnover in the U.S. Federal Government* 23 (Nat'l Bureau of Econ. Research, Working Paper No. 22932). While this might be as expected, it matters because the average agency worker does not play a large role in crafting policy. *Id.* at 11. Thus, the legal interpretation the judge defers to does not necessarily follow from the expected agency knowledge.

235. Amicus Curiae Brief by Wis. Mfrs. and Commerce Inc., Midwest Food Prods. A'ssn, Metro. Milwaukee Ass'n of Commerce, Wis. Bankers Ass'n, Wis. Cheese Makers Ass'n, Wis. Paper Council, Dairy Bus. Ass'n, Inc., Associated Builders and Contractors, Inc. (Wisconsin Chapter), Wis. Potato and Vegetable Growers Ass'n, Wis. Farm Bureau Fed'n, and Wis. Corn Growers Ass'n at 10, *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 914 N.W.2d 21 (Wis. 2018) (No. 2015AP2019).

236. At the federal level, most judges undergo further legal training from The Federal Judicial Center. *Education Programs*, FED. JUD. CTR., https://www.fjc.gov/education/education-programs [https://perma.cc/33AE-AQ9X]. At the state level, judges can receive further education from multiple organizations, such as the ABA, National Judicial College, or National Center for State Courts. *See, e.g.*, *About the NJC*, THE NAT'L JUD. C., https://www.judges.org/about [https://perma.cc/FA54-2DHD].

237. Jellum, *supra* note 57, at 159 ("When a statute is ambiguous, it is generally a court's job to resolve that ambiguity, assuming the case is justiciable.").

238. Nor does a complicated topic necessitate judicial policy making. The act of interpreting the law might require a court to declare a policy outside the scope of an agency's statutory or constitutional authority. But the decision still depends on an interpretation of the law, not an evaluation of the "best" policy choice. If the law truly remains too vague or ambiguous to know, the court should recognize such limitations.

Finally, proponents of deference point to the pragmatic concerns of declaring deference unconstitutional.[239] Professor Sunstein expresses it as a stare decisis question: what happens to regulations previously upheld under deference?[240] "If courts are dealing with a relatively minor question, and it is highly technical, might courts defer to the agency's view?"[241] He envisions a chaotic post-deference world: "an upheaval—a large shock to the legal system, producing confusion, more conflicts in the courts of appeals, and far greater politicization of administrative law."[242]

In this, perhaps, Wisconsin's experience proves illustrative.[243] Several justices refused to join the lead opinion in *Tetra Tech* for the same stare decisis reasons expressed by Professor Sunstein.[244] The split composition of the court left many legal commentators confused about the future of deference in Wisconsin, with many wondering if it meant former cases decided under deference would need "re-litigat[ing]."[245]

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239. Sunstein, *supra* note 38, at 1670–71.

240. *Id.* at 1670.

241. *Id.* As argued earlier in this Note, the due process violation occurs regardless of how minor the deference, so the answer is quite easy: no.

242. *Id.*

243. The comparison, of course, is not a perfect one. Professor Sunstein's concerns focus on deference at the federal level. Wisconsin's deference scheme worked differently from its federal counterpart and Wisconsin's law limits agency authority to explicit delegation from legislature. WIS. STAT. § 227.10 (2m) (2017–18). But many in Wisconsin expressed the same type of concerns as Professor Sunstein with doing away with deference.

244. *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 914 N.W.2d 21, 64 (Wis. 2018) (Bradley, Ann J., concurring) ("[T]he court's misguided wholesale changes create possible unintended consequences and a great deal of uncertainty."); *id.* at 59 (Ziegler, J., concurring) ("I agree with Justice Ann Walsh Bradley's concurrence that the lead opinion fails to adequately account for the effect its analysis will have on prior decisions."). For a closer look at how the lead opinion side-stepped stare decisis in Tetra Tech, see Daniel R. Suhr & Kevin LeRoy, *The Past and the Present: Stare Decisis in Wisconsin Law*, 102 MARQ. L. REV. 839, 841 (2019).

245. Philip C. Babler, *Tetra Tech EC, Inc. v. Wisconsin Department of Revenue*, FOLEY & LARDNER: INSIGHTS (Nov. 6, 2018), https://www.foley.com/en/insights/publications/2018/11/tetra-tech-v-wisconsin-department-of-revenue [https://perma.cc/P6VC-F2Q9]; Jeffrey A. Mandell & Barbara Neider, *Supreme Court Ends Great Weight Deference to Agency Legal Interpretations, Splinters on Rationale*, STAFFORD ROSENBAUM: BLOG (July 11, 2018), https://www.staffordlaw.com/blog/article/supreme-court-ends-great-weight-deference-to-agency-legal-interpretations-s/ [https://perma.cc/4G34-X3HQ] ("But there are two reasons to doubt that this resolves the issue."); Laura Lindner & Casey Kaiser, *Wisconsin Supreme Court Ends Required Deference to State Administrative Agencies' Interpretations, Allowing Employers to Push for Broader Review of Agency Decisions*, LITTLER: RECENT DEV. (July 12, 2018), https://www.littler.com/publication-press/publication/wisconsin-supreme-court-ends-required-deference-state-administrative [https://perma.cc/6QHD-DJQT].

Others pointed to potential implementation problems as the makeup of the court changed through upcoming judicial elections.[246]

Nearly a year and a half later, however, and deference remains a thing of the past in Wisconsin[247] without the negative consequences predicted by the legal community.[248] This partially happened because a later Wisconsin Supreme Court decision helped allay concerns by affirming the holding of *Tetra Tech* and the proper role of agency expertise in litigation.[249] But notably, the case did not rework any part of the *Tetra Tech* decision, it simply followed the new standard of agency review.[250] And as far as former cases decided under the agency deference doctrine go, their central holdings remain untouched. Nor do they require further litigation.[251] The specter of a court system overrun with former cases or filled with uncertainty remains just that, a specter. Stare decisis and legal uncertainty certainly matter, but when faced with a systematic, constitutional violation, courts should not hold back from eliminating deference.

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246. Babler, *supra* note 245 ("With Justice Gableman having completed his single term on the court, only four of the current justices have shown themselves willing to do away with agency deference, under various rationales.").

247. Andrew T. Phillips & Jacob Curtis, *Tetra Tech Agency Deference Standard Here to Stay*, NAT'L L. REV. (May 13, 2019) ("gone are the days of *automatic* or *mandatory* deference."), https://www.natlawreview.com/article/tetra-tech-agency-deference-standard-here-to-stay [https://perma.cc/67BG-L8RH].

248. *See* infra notes 249–51 and accompanying text.

249. Phillips & Curtis, *supra* note 247; *Myers v. Wis. Dep't of Nat. Res.*, 922 N.W.2d 47, 51–52 (2019) ("We have ended our practice of deferring to administrative agencies' conclusions of law. Tetra Tech EC, Inc. v. DOR, 2018 WI 75, ¶ 3, 382 Wis. 2d 496, 914 N.W.2d 21. Instead, we give 'due weight' to the experience, technical competence, and specialized knowledge of an administrative agency in evaluating the persuasiveness of the agency's argument. Id. When a determination of the scope of an agency's power is central to resolution of the controversy, as in this case, we independently decide the extent of the agency-authority that the statute provides. See Rock-Koshkonong Lake Dist. v. DNR, 2013 WI 74, ¶¶ 61-62, 350 Wis. 2d 45, 833 N.W.2d 800."). With six of seven Wisconsin Supreme Court justices in the majority, the decision also provided the ideological unity lacking in *Tetra Tech*.

250. *Myers*, 922 N.W.2d at 51–52. Despite all the concerns to the contrary, granting agencies de novo review on matters of law has yet to prove problematic, either in the *Myers* decision or any subsequent decisions to date.

251. Suhr & LeRoy, *supra* note 244, at 841 ("Justice Kelly's lead opinion simply restated a legal truism: on questions of first impression there is no precedent to follow, and thus no stare decisis concerns."). For a further look at the relationship between stare decisis, statutory interpretation, and federal deference, see Randy J. Kozel, *Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis*, 97 TEX. L. REV. 1125 (2019).

CONCLUSION

When the average American citizen goes to court, she is constitutionally entitled to one of the most foundational aspects of due process: an impartial tribunal to hear her claim.[252] Deference to agency interpretations of the law strips her of this right. She does not receive a fair hearing because the impartial tribunal hearing her case surrendered its impartiality.[253] Particularly for those who find deference problematic, separation of powers may present a viable argument to eliminate it. This Note argues, however, that separation of powers does not always bring clarity to the deference debate.[254] Due process poses a more consistent problem and one which interferes with justice every time a judge defers. Accordingly, a court must deal with this internal violation first before addressing separation of powers concerns.

252. *In re Murchison*, 349 U.S. 133, 136 (1955).

253. *See supra* notes 178–98 and accompanying text.

254. *See* discussion *supra* Section II.A.