CHEVRON'S 51 IMPERFECT SOLUTIONS

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In June 2024, the U.S. Supreme Court eliminated the judicial deference federal agencies previously received for their statutory interpretations, overturning the Court's landmark 1984 decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*. While *Chevron* was never binding on state courts, where the balance of powers and state constitutions may require different or no deference to agencies, numerous states have adopted *Chevron* deference, *Skidmore* weight, or similar deference regimes for judicial review of agency legal interpretations. Despite these developments, little scholarly attention has been paid to how and why states have developed administrative law's deference doctrines, how the doctrines have changed over time, or how they may further evolve in light of *Chevron*'s demise at the federal level.

In our contribution to this Fourth Annual Public Law in the States Conference, we provide a literature review of and update on the scholarship to date. Ultimately, we encourage states to not follow the Supreme Court in lockstep when it comes to judicial review of agency statutory interpretations. Federal and state governments differ in important respects, and judicial deference similar to *Chevron* may still have great benefits in at least some states. We also present the preliminary findings from a comprehensive dataset that one of us, Neena Menon, has compiled on judicial deference in state courts that examines the relationship between state-level politics and the corresponding changes in deference regimes. This dataset provides a more nuanced look at the political ties of state courts that choose between different deference regimes. The findings from this dataset are especially important to our understanding of the political dynamics of *Chevron*—a doctrine that conservatives seemed to embrace originally and have since criticized (and perhaps vice versa for progressives). Tracking the political makeup of state courts during times of deference regime change can show whether and how the politics of courts can affect the relationship between states' judicial and executive bodies.

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INTRODUCTION

Last Term, in *Loper Bright Enterprises v. Raimondo*,[1] the Supreme Court eliminated the judicial deference federal agencies previously received for their statutory interpretations.[2] For the last four decades, the *Chevron* doctrine required federal courts to defer to administrative agencies whenever they reasonably interpreted an ambiguous statute they administer.[3] Chief Justice John Roberts, writing for the *Loper Bright* Court, proclaimed that "*Chevron* is overruled."[4] In so holding, the Court rejected *Chevron*'s presumption that, when Congress speaks ambiguously in statutes, it intends to delegate interpretive authority to the relevant agency.[5]

What the Court replaced *Chevron* with is not yet clear and will need to be worked out by courts in the coming years.[6] Chief Justice Roberts indicated that de novo review has taken the place of deference, where "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority."[7] However, the opinion also contains hints of *Skidmore*-like respect being given to the agency's views.[8] Under *Skidmore*, courts review the agency's interpretation with special weight—though not deference to textually plausible but second-best interpretations provided by the agency—based on the "factors which give it power to persuade."[9] Also left for future judicial resolution is how broadly or narrowly courts will interpret what constitutes policy questions left for federal agencies to implement, as

1. 144 S. Ct. 2244 (2024).

2. *Id.* at 2272–73.

3. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

4. *Loper Bright*, 144 S. Ct. at 2273.

5. *Id.* at 2268–69.

6. *See* Christopher J. Walker, *What* Loper Bright Enterprises v. Raimondo *Means for the Future of* Chevron *Deference*, YALE J. ON REGUL.: NOTICE & COMMENT (June 28, 2024), https://www.yalejreg.com/nc/what-loper-bright-enterprises-v-raimondo-means-for-the-future-of-chevron-deference/.

7. *Loper Bright*, 144 S. Ct. at 2273.

8. *See id.* ("Careful attention to the judgment of the Executive Branch may help inform that inquiry."); *id.* at 2267 ("The better presumption is therefore that Congress expects courts to do their ordinary job of interpreting statutes, with due respect for the views of the Executive Branch.").

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

opposed to legal questions now reserved for the courts. The line between law and policy is not always easy to draw.

Regardless of the interpretive regime that replaces *Chevron*, there is no doubt that *Chevron* had occupied an outsized focus in the field of administrative law for its impact on the regulatory state.[10] *Chevron* deference led to high agency-win rates in lower courts,[11] even when *Chevron* fell out of favor at the Supreme Court.[12] *Chevron* critics claim that even the premise of deference both violates Article III's vesting of judicial power in courts to say what the law is and undermines Article I's vesting of legislative power in Congress.[13] The *Loper Bright* majority avoided these constitutional arguments, but the arguments drew support from concurrences by Justices Clarence Thomas and Neil Gorsuch.[14] *Chevron*'s demise will contribute to shockwaves in administrative law as federal courts and agencies try to interpret what a world without this doctrinal deference regime could mean.

That said, *Loper Bright* does not mark *Chevron*'s first death. In the last decade, several states have turned their back on similar judicial deference doctrines in state administrative law. For example, in 2022, Justice Patrick DeWine, writing for the Ohio Supreme Court, declared:

> We reaffirm today that it is the role of the judiciary, not administrative agencies, to make the ultimate determination about what the law means. Thus, the judicial branch is *never* required to defer to an agency's interpretation of the law. As we explain, an agency interpretation is simply one consideration a court *may* sometimes take into account in

10. *See* Peter M. Shane & Christopher J. Walker, *Foreword:* Chevron *at 30: Looking Back and Looking Forward*, 83 FORDHAM L. REV. 475, 475 (2014).

11. *See, e.g.*, Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 47, 48 fig.9 (2017) (finding a twenty-five percentage point difference in agency-win rates in the federal courts of appeals with and without *Chevron* deference being applied); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1142 tbl.15 (2008) (discovering that when courts applied the *Chevron* deference framework, agencies prevailed 76.2% of the time).

12. *See* Nathan Richardson, *Deference is Dead (Long Live* Chevron*)*, 73 RUTGERS U. L. REV. 441, 443–44 (2021).

13. *See generally* Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL'Y 103 (2018).

14. *Loper Bright*, 144 S. Ct. at 2274 (Thomas, J., concurring) ("I write separately to underscore a more fundamental problem: *Chevron* deference also violates our Constitution's separation of powers, as I have previously explained at length."); *id.* at 2281 (Gorsuch, J., concurring) ("*Chevron* deference runs against mainstream currents in our law regarding the separation of powers, due process, and centuries-old interpretive rules that fortify those constitutional commitments."). *See generally* Walker, *supra* note 13.

> rendering the court's own independent judgment as to what the law is.[15]

Some state courts have followed the federal trend in developing their own deference principles, notwithstanding the fact that *Chevron* does not bind state courts. Additionally, states have separation of powers principles and governmental structures that are distinct from the federal government. Nonetheless, states as diverse as Alabama, Massachusetts, and Kentucky adopted *Chevron* deference, absorbing the language and posture of federal deference.[16] On the other hand, states like Delaware, Virginia, and California explicitly or implicitly rejected the *Chevron* regime as early as the 1980s.[17] Delaware was the first to explicitly repudiate administrative deference, writing that a "reviewing court will not defer

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15. *TWISM Enters., L.L.C. v. State Bd. of Registration for Pro. Eng'rs & Surveyors*, 2022-Ohio-4677, ¶ 3, 223 N.E.3d 371, 374. This was not the first time Justice DeWine criticized administrative law's deference doctrines. In 2020, he detailed his prior opinions and thoughts on the state's deference regime on the *Yale Journal on Regulation* Notice and Comment blog. *See* R. Patrick DeWine, *A Few Thoughts on Administrative Deference in Ohio*, YALE J. ON REGUL.: NOTICE & COMMENT (Oct. 26, 2020), https://www.yalejreg.com/nc/a-few-thoughts-on-administrative-deference-in-ohio-by-justice-r-patrick-dewine/ [https://perma.cc/4BG5-RYL7].

16. In total, nine states have a *Chevron* deference regime (citations in alphabetical order by state): *Ala. Metallurgical Corp. v. Ala. Pub. Serv. Comm'n*, 441 So.2d 565, 571 (Ala. 1983); *Cook v. Glover*, 761 S.E.2d 267, 271 (Ga. 2014); *Camara v. Agsalud*, 685 P.2d 794, 797 (Haw. 1984); *Metzinger v. Ky. Ret. Sys.*, 299 S.W.3d 541, 545 (Ky. 2009); *Goldberg v. Bd. of Health of Granby*, 830 N.E.2d 207, 213 (Mass. 2005); *Metromedia, Inc. v. Dir., Div. of Tax'n*, 478 A.2d 742, 749 (N.J 1984); *Nw. Youth Servs., Inc. v. Pa. Dept. of Pub. Welfare*, 66 A.3d 301, 311 (Pa. 2013); *Appalachian Power Co. v. State Tax Dep't*, 466 S.E.2d 424, 433 (W. Va. 1995).

17. In total, nineteen states have either explicitly rejected deference judicially or legislatively or never adopted a more deferential regime. States that have legislatively rejected deference include Arizona, Idaho, Indiana, Nebraska, Tennessee, and Wisconsin. ARIZ. REV. STAT. ANN. § 12-910 (2021); IDAHO CODE § 67-5279(5) (2024); IND. CODE § 4-21.5-5-11 (2024); Legis. B. 43, 108th Leg., Reg. Sess. (Neb. 2024); TENN. CODE ANN. § 4-5-326 (2024); WIS. STAT. § 227.57(11) (2021–22). Florida utilized a ballot initiative to reject *Chevron* deference. *See* FLA. CONST. art. V, § 21. Louisiana's Administrative Procedure Act does not permit *Chevron* deference but contemplates *Auer* deference. *See* LA. STAT. ANN. § 49:968(C). States that have judicially rejected deference include (citations in alphabetical order by state): *Myers v. Yamato Kogyo Co.*, 2020 Ark. 135, at 1–4, 597 S.W.3d 613, 615–16; *Pub. Water Supply Co. v. DiPasquale*, 735 A.2d 378, 383 (Del. 1999); *Douglas v. Ad Astra Info. Sys., L.L.C.*, 293 P.3d 723, 728 (Kan. 2013); *In re Rovas*, 754 N.W.2d 259, 272 (Mich. 2008); *King v. Miss. Mil. Dep't*, 2017-CC-00784-SCT, ¶ 12, 245 So. 3d 404, 408 (Miss. 2018); *Burlington N.R.R. v. Dir. of Revenue*, 785 S.W.2d 272, 273 (Mo. 1990); *TWISM Enters., L.L.C.*, 2022-Ohio-4677, ¶ 3, 223 N.E.3d at 374; *Johnson v. Skelly Oil Co.*, 359 N.W.2d 130, 132 (S.D. 1984); *Murray v. Utah Lab. Comm'n*, 2013 UT 38, ¶ 12, 308 P.3d 461, 466; *Nielsen Co. (US) v. Cnty. Bd. of Arlington Cnty.*, 767 S.E.2d 1, 4 (Va. 2015); *Delcon Partners LLC v. Wyo. Dep't of Revenue*, 2019 WY 106, ¶ 7, 450 P.3d 682, 684 (Wyo. 2019).

to such an interpretation as correct merely because it is [a] rational or not clearly erroneous [interpretation by an agency]."[18] And some states have adopted variations of *Skidmore* deference.[19]

As is evident from the states listed above, there is no obvious political bent as to why some states chose to adopt *Chevron* and others repudiate it. *Chevron*'s confusing political legacy in the states may be a part of why there is not a clear political valence to state political identities and administrative deference regimes. While the political valence of *Chevron* in federal courts has been well-theorized,[20] there is curiously little interest in the political dynamics of deference regimes in states.

This Essay makes the first step toward an understanding of the political dynamics of administrative law's judicial deference doctrines in the state courts. Part I looks at the relationship between the politics of *Chevron*-like deference in state courts and how state courts are influenced by federal deference regimes. Part II presents portions of an updated dataset that one of us (Menon) has compiled on state courts' deference regimes—with a sequential history of all the major changes in state administrative deference before and after *Chevron* and an update on changes in deference regimes in the last five years. Utilizing the relationship between deference changes and court compositions, we present preliminary findings on how politics in states may affect the adoption of a particular deference regime.

We conclude by encouraging state courts and legislatures to not follow the U.S. Supreme Court in lockstep when it comes to judicial review of agency statutory interpretations. States courts and legislatures should adopt homegrown approaches to administrative deference based their independent judgment of what works best in their unique contexts

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18. *DiPasquale*, 735 A.2d at 382–83.

19. Currently, there are eleven states that still use a *Skidmore* regime (citations in alphabetical order by state): *Kelly v. Zamarello*, 486 P.2d 906, 917 (Alaska 1971); *Cal. Hotel & Motel Ass'n v. Indus. Welfare Comm'n*, 599 P.2d 31, 38–39 (Cal. 1979); *Nieto v. Clark's Mkt., Inc.*, 2021 CO 48, ¶ 38, 488 P.3d 1140, 1149; *Conn. State Med. Soc'y v. Conn. Bd. of Exam'rs in Podiatry*, 546 A.2d 830, 834 (Conn. 1988); *Balt. Gas & Elec. Co. v. Pub. Serv. Comm'n*, 501 A.2d 1307, 1315 (Md. App. Ct. 1986); *Arvig Tel. Co. v. Nw. Bell Tel. Co.*, 270 N.W.2d 111, 114 (Minn. 1978); *Gold Creek Cellular of Mont. Ltd. P'ship v. State*, 2013 MT 273, ¶¶ 11–12, 310 P.3d 533, 535–36; *In re Pelletier,* 484 A.2d 1119, 1121 (Del. 1984); *In re Gruber*, 674 N.E.2d 1354, 1358 (N.Y. 1996); *In re N.C. Sav. Loan League*, 276 S.E.2d 404, 410 (N.C. 1981); *State ex rel. Clayburgh v. Am. W. Cmty. Promotions, Inc.*, 2002 ND 98, ¶ 7, 645 N.W.2d 196, 200–01; *Springfield Educ. Ass'n v. Springfield Sch. Dist. No. 19*, 621 P.2d 547, 555 (Or. 1980); *Mancini v. City of Providence*, 115 A.3d 159, 167–68 (R.I. 2017).

20. *See, e.g.*, Kent Barnett, Christina L. Boyd & Christopher J. Walker, *Administrative Law's Political Dynamics*, 71 VAND. L. REV. 1463 (2018).

and history. Administrative law's judicial deference regime is yet another apt example of Judge Jeffrey Sutton's call for "51 Imperfect Solutions."[21]

I. DEFERENCE DIFFERENCES IN THE STATES

Perhaps unsurprisingly, many states have followed the federal trend by initially embracing deference and now discarding it.[22] More than fourteen states by our count have at some point adopted a deference regime that was just as or more deferential than *Chevron*, and more than seven additional states have adopted *Chevron*-lite standards that still offer significantly higher deference than de novo review or *Skidmore*.[23] Even while repudiating *Chevron* deference, state courts are influenced by the discourse in federal courts. The Ohio Supreme Court's citations to the U.S. Supreme Court's criticisms of *Chevron* in their eventually successful attempts to overturn deference comes immediately to mind.[24]

That said, *Chevron* never garnered the kind of wholesale purchase in the states that other Supreme Court doctrines have attracted. In Section I.A, we detail the conventional structural distinctions between state and federal governments that counsel why states do not and should not follow lockstep federal administrative law when it comes to judicial review of administrative interpretations of law. We then take a deeper look in Section I.B at the diverse political dynamics in the states compared to those at the federal level.

A. Structural Distinctions and Deference

Some argue that *Chevron* is tailored to the U.S. Constitution's separation of powers, explaining the relatively low purchase of the

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21. *See* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018).

22. Some parallels can be drawn to state level adoption of the Administrative Procedure Act (APA). While the APA was devised as the legal plumbing for the quickly expanding administrative state in the aftermath of the Second World War, it was also designed to constrain agency independence and arbitrary decision-making. McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180, 196, 206 (1999). Tellingly, the likelihood of adoption of the APA in states was highly influenced by the political identity of the majority in their respective legislatures. *See* Rui J. P. de Figueiredo, Jr. & Richard G. Vanden Bergh, Protecting the Weak: Why (and When) States Adopt an Administrative Procedure Act 7, 23–24 (Oct. 2001) (unpublished manuscript) (on file with the Wisconsin Law Review). The more recent perception of *Chevron* as "agency protective" could explain recent deference rejection in conservative state courts.

23. *See* discussion *infra* Part II; *see also infra* Table 2; *infra* Appendix.

24. *State ex rel. McCann v. Del. Cnty. Bd. of Elections*, 2018-Ohio-3342, ¶ 31, 118 N.E.3d 224, 231–32 (DeWine, J., concurring) (citing Justice Thomas and Chief Justice Roberts' criticism of *Chevron* deference in the federal sphere).

doctrine within state governments where state constitutions may depart from the federal model.[25] Indeed, there are important differences between federal and state government structures and dynamics that counsel against states' lockstep incorporation of federal deference doctrines in administrative law. The creation of varying levels of deference can even be a positive factor[26]—an example of laboratories of democracy experimenting with varying levels of deference.

In this Section, we focus on five such distinctions, and then in Section I.B, we turn to the differences between state and federal political dynamics—the main focus of this Essay. Here, we review these features in summary fashion, as most of them have already been explored in the literature.

1. Elected Judiciary

As discussed more in Part II, state court judges are selected through a different process than federal judges and do not enjoy the same life-tenure protections. Over a third of state supreme court justices and more than half of state trial judges are elected to their positions,[27] creating a significant difference in identity of those occupying the judiciary. An elected judiciary may inherently be more responsive to the desires of the public,[28] and likely has a different relationship to appointed bureaucrats than judges who may have gone through a similar gubernatorial or legislative selection process.[29]

It is not entirely clear which direction an elected judiciary cuts in terms of judicial deference to administrative interpretations of law. Judge Judith Kaye, for instance, has argued that state legislatures and courts are themselves cooperative partners in common-law making, which is a distinct project from the federal judiciary's main role in interpreting

25. *See, e.g.*, Aaron Saiger, *Derailing the Deference Lockstep*, 102 B.U. L. REV. 1879, 1898 (2022) ("If federal separation of powers does not permit deference, because courts must say what the law is, then surely state constitutions, which have explicit separation-of-functions language and traditions, permit it even less.").

26. *See generally* D. Zachary Hudson, Comment, *A Case for Varying Interpretive Deference at the State Level*, 119 YALE L.J. 373, 374 (2009) (discussing the lack of state uniformity in granting (or rejecting) deferential standards).

27. *Judicial Selection: An Interactive Map*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/judicial-selection-map (Aug. 20, 2024).

28. *See* Stephen J. Choi, Mitu Gulati & Eric A. Posner, *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary* 4, 8–9 (John M. Olin Law & Econ., Working Paper No. 357, 2007).

29. *See* Saiger, *supra* note 25, at 1893–95.

statutes and saying what the law is in that context.[30] Accordingly, when it comes to common-law state court systems, "[w]hat is really needed is a homegrown approach to deference, carefully tailored to what it means for a state court in particular to say what state law is."[31]

On the other hand, however, it is disputed whether judicial elections lead to more political accountability. Put differently, if administrative deference was designed to reduce the ability of judges to advance their ideologically preferred outcomes, then the statewide adoption of *Chevron* may well conflict with the role of politically accountable judges, who are at least partially encouraged to rule according to their ideological priors.[32]

2. Governors and Nonunitary Executives

Governors are not akin to the President in ways that are relevant to whether judicial deference to executive agencies is warranted. Gubernatorial power varies across states, but generally executive power is significantly more dispersed.[33] State attorneys general and some other agency heads are often elected independent of the governor,[34] dispersing the element of political and bureaucratic accountability to a singular chief executive that *Chevron* deference presumes to advance the political accountability of agency policymaking.[35] On the other hand, the lack of institutional strength and power of state agencies as opposed to federal agencies may also leave them less able to resist the gubernatorial agenda, which may weigh in favor of a more deferential regime in a traditional

30. *Id.* at 1900 (citing Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 20–21 (1995)).

31. *Id.* at 1909.

32. *See* Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215, 1249–54, 1277–82 (2012) (arguing that the elected nature of state judges undercuts the value of *Chevron* deference in states).

33. *See* Jeffrey L. Brudney & F. Ted Hebert, *State Agencies and Their Environments: Examining the Influence of Important External Actors*, 49 J. POL. 186, 188 (1987) ("Despite numerous state reorganizations, however, the executive branch is not a hierarchical organization yielding to classical management principles with the governor securely in control.").

34. Miriam Seifter, *Understanding State Agency Independence*, 117 MICH. L. REV. 1537, 1541–42, 1557 (2018).

35. Aaron J. Saiger, Chevron *and Deference in State Administrative Law*, 83 FORDHAM L. REV. 555, 566 (2014) ("When *Chevron* refers to the political accountability of the 'Chief Executive,' it contemplates an executive, the President, whose name everyone knows. Likewise, the state-level electorate is familiar with its governor, and blames him for things it does not like." (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984))).

separation of power sense.[36] In other words, weak agencies may result in an effectively singular executive, even if not formally, where the agencies are politically accountable to the governor.

Further, the relationship between state judiciaries and governors is different than the relationship between the federal judiciary and the President. Differences between the political identity of elected judges and that of the governor—when they exist—provides a check on gubernatorial power beyond what just separation of powers creates. In states with elected judges, the relationship may be more akin to warring branches that serve to check each other's political wills than the separate and coordinate branches that the federal separation of powers attempts.[37] Additionally, a politically elected judiciary does not face the same countermajoritarian difficulties of an appointed judiciary. Because elected judiciaries are more directly accountable to the electorate, they may be better suited for judicial "policymaking" in a way that *Chevron* deference seemed to guard against.

3. Active State Legislatures

Chevron deference at the federal level arguably alleviates congressional gridlock by empowering agencies to fill in gaps left by a relatively inactive national legislature.[38] State legislatures are meaningfully different, and many are arguably more involved and equipped to react and amend legislation in response to statutory ambiguity. A tangential example here is the legislative abolishment of *Chevron* deference in seven states in as many years.[39] While laws attempting to codify *Chevron* and other deference regimes have floated around Congress for years, several states have responded very quickly

36. *See* Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483, 519–20 (2017) ("The question remains, then, whether thinly staffed and low-paid legislatures have the capacity and incentives to engage in meaningful oversight of a governor-driven executive branch.").

37. *See id.* at 523 ("In some instances, state courts, especially those that do not feature a majority from their governor's political party, may stand poised to effect a check on governors that otherwise is lacking. But even in that context, there is reason to doubt the consistency and robustness of the court-imposed check.").

38. *See, e.g.*, Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 7 (2014). *Cf.* Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931, 1936–37 (2020) (arguing that this issue of delegation and time is a bug, not a feature).

39. *See State Responses to Judicial Deference*, BALLOTPEDIA, https://ballotpedia.org/State_responses_to_judicial_deference [https://perma.cc/L77E-AVW8].

and decisively by prohibiting deference, thereby granting more decisive powers to their judiciary to interpret statutes governing state agencies.[40]

To be sure, not everyone views state legislatures as more ambitious and active than their federal counterpart. And there is, no doubt, substantial variation across the states. Indeed, some have even argued that state legislatures are inherently countermajoritarian. As Miriam Seifter has advanced, "state legislatures are typically a state's least majoritarian branch. Often they are outright countermajoritarian institutions."[41] If true, which way should that cut for judicial deference to agency interpretations of state statutes?

4. Civil Society and Public Expertise

Judicial deference to agency statutory interpretations is often justified by reference to an agency's comparative expertise (compared to courts) in the subject matter of its mandate and its own statutory and regulatory framework.[42] Agency expertise, moreover, is enhanced by the deliberate processes agencies use to regulate. Those processes allow agencies to leverage not only internal agency expertise but also the expertise of the regulated public and civil society more generally.[43]

There are good, Tocquevillian reasons to suspect that engagement between state-level electorates and their agencies is more vibrant than in the federal analogue.[44] After all, the regulatory power of states is closer to the people, and the increased energy and responsiveness of state

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40. *See id.*

41. Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1735 (2021); *cf.* Miriam Seifter, *State Institutions and Democratic Opportunity*, 72 DUKE L.J. 275, 280 (2022) ("Majorities stand a greater chance in the states. This Article argues that state institutions offer crucial democratic opportunity that federal institutions thwart: the opportunity for popular majorities to rule on equal terms. These state institutions—including state governors, ballot initiatives, state courts, and sometimes state legislatures—are majoritarian in structure and thus preserve space for democratic decision-making." (emphasis omitted) (footnote omitted)).

42. *See, e.g.*, Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against* Chevron *Deference in Immigration Adjudication*, 70 DUKE L.J. 1197, 1215 (2021) ("The predominant delegation theory that motivates *Chevron* deference is the comparative expertise held by federal agencies—as compared to courts—to fill gaps in statutes the agencies administer.").

43. *See generally* Shoba Sivaprasad Wadhia & Christopher J. Walker, *Assessing Visions of Democracy in Regulatory Policymaking*, 21 GEO. J.L. & PUB. POL'Y 389 (2023).

44. *See, e.g.*, Robert T. Gannett, Jr., *Tocqueville and Local Government: Distinguishing Democracy's Second Track*, 67 REV. POL. 721, 723–25 (2005). *See generally* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Harvey C. Mansfield & Delba Winthrop eds., trans., The Univ. of Chi. Press 2002) (1835).

government should lead to a more engaged civil society. If this is all true, the case for judicial deference at the state level becomes much stronger.

Of course, it is possible that state electorates are no more likely to engage with administrative agencies than citizens in the federal context. Miriam Seifter, for instance, has argued that, "[d]espite the common refrain that state government is closer to the people, modern state administration often produces just the opposite effect."[45] Professor Seifter explains:

> There are several reasons to believe civil society oversight faces a headwind in the states. First, features of state-level agencies—including their relative opacity, their increasing politicization in many states, and their complex relationships with local governments—create a more difficult job for civil society overseers. Second, state civil society has distinctive traits. Recent studies show that groups acting on behalf of regulatory beneficiaries—so-called "public interest" groups—are relatively weak in the states, both compared to other state-level interest groups and to federal counterparts, and have comparatively limited resources. Third, the decline in state media, and the dwindling numbers of state journalists covering state government, exacerbate the difficulties of meaningful civil society oversight.[46]

More empirical work is needed in this area to better understand the depth of civil society in the states. It no doubt varies by state and by regulatory context.

5. Local Governments as Regulators

Finally, in contrast to regulation at the federal level, within the states a lot of regulatory activity does not take place at state administrative agencies, but instead within a variety of local government institutions.[47] Local governments do not operate within the confines of judicial deference doctrines that apply to state agencies. Indeed, at least forty-five states grant local governments a form of "home rule" authority to

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45. Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 93 N.Y.U. L. REV. 107, 110 (2018) (footnote omitted).

46. *Id.* (footnotes omitted).

47. *See generally* Maria Ponomarenko, *Substance and Procedure in Local Administrative Law*, 170 U. PA. L. REV. 1527 (2022).

have broad authority to regulate without having to seek further authority from the state legislature.[48]

In many states, the symmetry of *Chevron* deference to state agencies and home rule deference to local governments might well make a lot of sense. But one could also imagine distinguishing local governments and state agencies. After all, local government leadership is democratically elected at the local level, whereas state bureaucrats other than the agency heads are appointed or selected based on merit. The relationship between local government's home rule and judicial deference (or the lack thereof) for state agencies is woefully understudied; the fields of administrative and local government law would benefit from more cross-pollination.

Regardless of where one lands on these questions, the more important point for this Essay is to underscore the stark differences between government at the federal versus state levels. At the federal level, there is nothing remotely similar to the phenomenon of local government and home rule. In thinking about whether states should follow the U.S. Supreme Court's approach to administrative deference, these are five important factors to consider. We turn to a sixth factor—the varying political dynamics in state administrative law—in the following Section and the rest of this Essay.

B. Administrative Law's Political Dynamics

The political dynamics of judicial deference are also different at the federal level. Whether federal administrative deference has always had political valence, it undoubtedly does today. Deference implicates the separation of powers[49] and the role of the judiciary in assessing agency decision-making.[50] The nature of the attacks on *Chevron* in the last two decades make clear how the perspectives on the role of the judiciary and administrative state sharply diverge.[51] The political identity of *Chevron*'s defenders has also flipped in the past few decades. As Cass Sunstein observed: "Once celebrated by the right and sharply criticized by the left,

48. *See* NAT'L CONF. OF STATE LEGIS., HOME RULE IN THE UNITED STATES, https://archive.ncsl.org/Portals/1/Documents/lscc/NCSL_Home-Rule-in-the-United-States_35452.pdf [https://perma.cc/5B7D-Y3SU]. *See generally* Nat'l League of Cities, *Principles of Home Rule for the 21st Century*, 100 N.C. L. REV. 1329 (2022).

49. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1153–54 (10th Cir. 2016) (Gorsuch, J., concurring).

50. *See generally* Elizabeth Garrett, *Legislating* Chevron, 101 MICH. L. REV. 2637 (2003).

51. *See* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE. L.J. 908, 922 (2017) ("Justices on the Court have highlighted their interest in confronting judicial deference from a historical or separation-of-powers perspective, relying on an array of different sources from *Marbury* to James Madison to Montesquieu.").

Chevron is now under assault from the right and (for the most part) accepted on the left."[52]

Chevron was a win for the Reagan Administration's deregulatory agenda at the Environmental Protection Agency, allowing for the agency to roll back air pollution rules.[53] And *Chevron* deference and its two-step structure was initially championed by conservatives like Justice Antonin Scalia,[54] though his support for the doctrine may have diminished in later years.[55] In contrast, Justice Stephen Breyer remained one of *Chevron*'s most prolific critics.[56] Today, *Chevron* is defended primarily by liberals[57]—as deferring to agency interpretations broadens the role of the administrative state, especially as congressional gridlock increasingly inhibits the legislature's power to address dynamic and increasingly challenging problems.

Moreover, the role of judicial ideology on administrative deference has been well theorized and empirically tested at the federal level. In 2006, Thomas Miles and Cass Sunstein found that both at the Supreme Court and in the federal courts of appeals, judges were more deferential to administrative agencies under presidents of the parties that appointed them.[58] Later empirical work found that ideology even affects whether judges apply *Chevron* deference, discovering that liberal panels were less likely to apply the two-step framework to conservative agency interpretations.[59]

With a much larger, eleven-year dataset of all federal court of appeals *Chevron*-related decisions, one of us, Walker, has explored the political dynamics of *Chevron* deference in much greater detail.[60] In that

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52. Cass R. Sunstein, Chevron *as Law*, 107 GEO. L.J. 1613, 1618 (2019).

53. Gregory A. Elinson & Jonathan S. Gould, *The Politics of Deference*, 75 VAND. L. REV. 475, 508–13 (2022).

54. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511 (defending *Chevron* on the grounds that it gives effect to congressional intent).

55. *See* Am. Univ. Wash. Coll. of L., *Remarks by the Honorable Antonin Scalia for the 25th Anniversary of* Chevron v. NRDC, 66 ADMIN. L. REV. 243, 244, 247 (2014).

56. *See* Sunstein, *supra* note 52, at 1635.

57. *See id.* at 1619 ("With respect to *Chevron*, the right and the left have switched sides. To get a bit ahead of the story: *Chevron*'s critics, mostly on the right, see the decision as a way of aggrandizing agency power, increasing agency discretion, producing law-lessness, and authorizing intrusions on liberty.").

58. Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 823, 847–65 (2006) ("Republican appointees demonstrated a greater willingness to invalidate liberal agency decisions and those of Democratic administrations.").

59. Kent Barnett, Christina L. Boyd & Christopher J. Walker, *The Politics of Selecting* Chevron *Deference*, 15 J. EMPIRICAL LEGAL STUD. 597, 608–09 (2018).

60. *See generally* Barnett, Boyd & Walker, *supra* note 20.

co-authored study, we found that *Chevron* deference has a powerful constraining effect on partisanship in judicial decision-making.[61] To be sure, we still found some statistically significant results as to partisan influence.[62] But the overall picture provided compelling evidence that the *Chevron* Court's objective to reduce partisan judicial decision-making had been quite effective.[63]

Consequently, today with *Chevron* in state courts, there may be a presumption that liberal states that lean toward larger governmental regulation may have a greater desire to defer to administrative agencies. One may also expect more conservative states to echo the concerns expressed by the majority in *Loper Bright*. However, from the list of states that have actively adopted or repudiated *Chevron*, it is not clear that there is a strong relationship between political ideology of the states or their judiciaries and the likelihood of a particular deference regime.[64]

The data, further detailed in Part II, raise the question of what motivates state court systems to adopt particular deference regimes. Judge Sutton has argued that state supreme courts have a tendency to move in judicial lockstep with the Supreme Court even when they have no legal obligation to do so.[65] But aside from judicial inertia, other possibilities remain understudied. The state-by-state findings we discuss in Part II can provide valuable insights to those interested in exploring the future of administrative deference in the states as well as at the federal level.[66]

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61. *See id.* at 1468.

62. *See id.*

63. *See id.*

64. *See infra* Part II. It is worth noting a student note from 2016 that sought to test the empirical relationship between political factors and *Chevron* deference in state courts. *See* Dan Rempala, Comment, *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 (2016). Rempala utilizes a survey by Aaron Saiger to analyze various factors that could affect adoption of *Chevron*, such as gubernatorial power, judicial accountability as measured by judiciary selection methodology, and the strength of delegation in various states. *See id.* The study failed to find strong predictive factors, *see id.* at 474–77, but it is a rare empirical piece attempting to describe why some states may have adopted different deference regimes.

65. SUTTON, *supra* note 21, at 174.

66. As the uncertainty on the federal deference regime after *Loper Bright* continues, scholars have started looking at state deference regimes to explore what federal alternatives there are beyond *Skidmore* and de novo review. *See, e.g.*, Michael Asimow, *Teaching* Skidmore *in the Post*-Loper Bright *World*, YALE J. ON REGUL.: NOTICE & COMMENT (July 26, 2024), https://www.yalejreg.com/nc/teaching-skidmore-in-the-post-loper-bright-world-by-michael-asimow/ [https://perma.cc/V83Z-R4CL] (suggesting the utilization of California's *Yamaha* deference, a form of *Skidmore* deference that predates *Chevron*, as a tool to teach judicial review after *Loper Bright*).

II. STATE ADMINISTRATIVE DEFERENCE ON THE GROUND

In Part I, we sketched out the main factors that should counsel states *not* to follow the U.S. Supreme Court in lockstep when it comes to administrative deference. Federal and state governments differ in important respects, and judicial deference similar to *Chevron* may still have great benefits in at least some states. In Part II, we take a closer empirical look at state administrative deference on the ground, reporting the preliminary findings from a dataset co-author Menon compiled on judicial deference in state courts.

To be sure, in the last two decades, we have seen increased scholarly attention to administrative deference in state courts, including how states are following—or not—developments at the federal level. Daniel Ortner has done perhaps the most empirical work, classifying more than fifteen different combinations of deference regimes as well as providing regular updates of developments in the states.[67] In 2020, a student comment conducted a similar state-by-state survey, ultimately finding significant variation across states: "[S]tates that apply pure *Chevron*-style review are outnumbered by states that apply less deferential standards by more than a 2-to-1 ratio. Fourteen states and the District of Columbia apply *Chevron*-type deference, while thirty-six states have de novo review or hybrid standards."[68] Finally, Aaron Saiger's 2014 article summarized the prior surveys conducted and concluded that the surveys depicted "a 'mixed reception' for the *Chevron* rule in the state courts."[69]

The state-by-state survey reported in this Essay attempts to capture more nuance in the important work of classifying the variety of distinctions that exist between these states.

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67. Daniel Ortner, The End of Deference: How States (and Territories and Tribes) Are Leading a (Sometimes Quiet) Revolution Against Administrative Deference Doctrines 3, 73 app.B (Mar. 11, 2020) (unpublished manuscript), https://ssrn.com/abstract=3552321. Ortner has written a number of state-by-state updates to his study in the *Yale Journal on Regulation Notice and Comment* blog. *See* YALE J. ON REG.: NOTICE & COMMENT, https://www.yalejreg.com/?s=ortner [https://perma.cc/URL4-9YTC].

68. Luke Philips, Comment, Chevron *in the States? Not So Much*, 89 MISS. L.J. 313, 315 (2020).

69. Saiger, *supra* note 35, at 558; *see also id.* at 558 n.19 (citing WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 1258–61 (4th ed. 2007)); William R. Andersen, Chevron *in the States: An Assessment and a Proposal*, 58 ADMIN. L. REV. 1017, 1020–30 (2006); Bernard W. Bell, *The Model APA and the Scope of Judicial Review: Importing* Chevron *into State Administrative Law*, 20 WIDENER L.J. 801, 818–22 (2011); Ann Graham, Chevron *Lite: How Much Deference Should Courts Give to State Agency Interpretation*, 68 LA. L. REV. 1105, 1109–19 (2008); Michael Pappas, *No Two-Stepping in the Laboratories: State Deference Standards and Their Implications for Improving the* Chevron *Doctrine*, 39 MCGEORGE L. REV. 977, 980–1007, 1010–24 (2008)).

A. Methodology and Dataset

The dataset utilized in this Essay varies in a few meaningful ways from prior studies.[70] First, this dataset provides updated information for the four states that have judicially or legislatively rejected deference since Ortner's survey. Second, it attempts to create the first set of chronological deference regime changes before and after *Chevron*. The dataset catalogues deference regimes that existed prior to *Chevron* and any changes that have been made by state courts and legislatures in the last four decades.[71] To be sure, the dataset cannot capture every nuance of deference regimes in states that have never explicitly adopted a particular regime.

Next, the dataset focuses on state court compositions during times of change in deference regimes. For the purposes of this Essay, we exclude state supreme court justices that obtain their position through nonpartisan elections. This creates two main sets of judicial selection methodologies: gubernatorial appointment and partisan judicial elections. We analyze these two categories for two reasons. First, an appointed justice's political valence can be categorized by looking at the partisan identity of the body that appointed them. As in federal courts,[72] the identity of the appointing executive can be telling, albeit imperfect.[73]

However, twenty-four states have adopted the Missouri Plan in an attempt to reduce partisanship in judicial selection by instituting a committee to provide a nonpartisan list of potential appointees that the Governor must choose from.[74] States like New Jersey also have unique

70. Menon has spent several years creating this dataset, and here we only report some preliminary findings, focused solely on the political dynamics of deference doctrine developments in the states.

71. To identify changes in deference regimes, Westlaw term searches were conducted, focused on terms such as "*Chevron* deference," "administrative deference," "agency deference," and "*Skidmore* deference." While this approach does not fully capture all of the caselaw, it is quite effective at finding pivotal deference cases in most states and tracing the evolution over time.

72. *See* Barnett, Boyd & Walker, *supra* note 20, at 1488–90 (discussing how to measure judicial ideology at the federal level).

73. The political affiliation of the appointing governor, of course, is nowhere near a perfect identifier of the judge's politics or jurisprudence. Justice John Paul Stevens, appointed by a Republican President, was not ideologically aligned with fellow conservative appointees like Justice Samuel Alito. Moreover, what constitutes "conservative" in Colorado may not be considered "conservative" in Alabama—to provide one example. Politics can be local, and political party affiliation is an imperfect proxy. With these limitations in mind, such classification can still shed important light on the political dynamics of state courts.

74. James A. Gleason, State Judicial Selection Methods as Public Policy: The Missouri Plan 8–9 (2016) (Ph.D. dissertation, Purdue University),

informal schemes which dictate that no more than a simple majority of justices can identify with the same political party.[75] Second, while appointed justices are often subject to retention elections, they face less pressure from the electorate than justices who must face a political election for their first term.[76] Retention elections are rarely lost and frequently uncontested, which translate to fewer electoral incentives that could influence incumbent justices' judicial decision-making.

Compared to prior studies, this dataset uses a new stratified classification for deference regimes in the states. We utilize a five-point scale that ranges from no deference to *Chevron*-plus. The scale and more details are shared in the table below.

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https://docs.lib.purdue.edu/cgi/viewcontent.cgi?article=2147&context=open_access_dissertations/.

75. *See Judicial Selection in the States*, NAT'L CTR. FOR ST. CTS., https://www.judicialselection.us/judicial_selection/ [https://perma.cc/PJ4C-UA99] ("New Jersey's courts also have a tradition of political balance. Governors, regardless of their party affiliation, have generally followed a policy of replacing outgoing judges with someone of the same party or philosophy. . . . [T]he traditional balance is three Democrats and three Republicans, with the chief justice belonging to the party of the appointing governor."); *see also Supreme Court of New Jersey Decisions*, JUSTIA, https://law.justia.com/cases/new-jersey/supreme-court/ [https://perma.cc/U5DV-BA2D] ("The justices must be balanced between the political parties, such that neither party has an advantage of more than one seat.").

76. William Jenkins, Jr., *Retention Elections: Who Wins When No One Loses?*, 61 JUDICATURE 79, 80 (1977).

Scaling for Deference	Key
De novo = 0	A court will never consider the agency's interpretation in determining the meaning of a statute.
Skidmore = 1	A court can consider agency expertise in determining whether they should allow for an agency's expertise to substitute for its own.
Chevron-lite = 2	A stricter version of *Chevron* where courts have more leeway in substituting their own interpretations even after finding reasonability.
Chevron = 3	A court is categorized as *Chevron* if the regime most closely resembles the two-step model of *Chevron*.
Chevron-plus = 4	A court is *Chevron*-plus if a court is not required to find reasonability in order to defer.

Table 1. Five-Point Scale of Deference

It is impossible to capture all the nuances of the types of deference regimes within a five-point scale. However, this scaling mechanism, with *Chevron* and *Skidmore* as its primary benchmarks, provides a useful metric for how courts have developed unique deference regimes. The classification of *Chevron*-lite, for example, references courts that grant deference only when the agency interpreting the statute has a specific and usually technical expertise in the field.[77] *Chevron*-plus, on the other hand, spans from a regime where "a reasonable construction of an ambiguous statute by the agency charged with that statute's enforcement, if contemporaneous, consistent, long-continued, and in concurrence with legislative acquiescence, creates a presumption of correctness that is only

77. *See, e.g.*, *Stokes v. Morgan*, 680 P.2d 335, 342 (N.M. 1984) (holding that the "special knowledge and experience of state agencies should be accorded deference"); *Okla. Gas & Elec. Co. v. State ex rel. Okla. Corp. Comm'n*, 2023 OK 33, ¶ 8, 535 P.3d 1218, 1222 (holding that deference for an agency is generally appropriate when "the [agency] is: (1) acting in its area of expertise or (2) applying a longstanding administrative construction of a statute" (footnote omitted)).

slightly less persuasive than a judicial construction of the same act"[78] to a regime that is simply described as "great deference."[79]

B. Preliminary Findings

There are at least fifty-one different deference regimes for judicial review of administrative interpretations of law within the United States. Even when couched in terms of *Chevron*, *Skidmore*, or de novo review, it is hard to understate the functional variance across states in the deference courts afford administrative agencies—sometimes leading to vastly different and incongruent standards even within the same judicial system.

Even more fascinating is the pace of change of deference regimes. In the first three months of 2024, three states legislatively ended *Chevron* deference, while several states have left their regimes unchanged from before *Chevron* even occurred.[80] The current wave of judicial and legislative rejection of *Chevron* seems to have been politically motivated—all three states that legislatively banned administrative deference this year were inspired by or utilized model legislation developed by right-of-center groups such as the Goldwater Institute and Pacific Legal Foundation.[81] These two organizations have also been engaged in litigation that has judicially overturned *Chevron* deference in other states.[82] In the presence of such ideological reactions to deference, it becomes all the more important to look at the judicial politics of deference regimes. While the new standard for administrative deference will doubtlessly be a protracted challenge on the federal level, the states provide a "laboratory of democracy" where we can observe the effects of political leanings of different courts.

To explore those political dynamics, this dataset encompasses thirty-six states that utilize gubernatorial appointment, partisan election,

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

79. *Me. Hum. Rts. Comm'n v. Loc. 1361, United Paperworkers Int'l Union*, 383 A.2d 369, 378 (Me. 1978).

80. *See* Brian Norman, *Victory! Idaho Becomes Latest State to End Judicial Deference to Administrative State*, GOLDWATER INST. (Mar. 29, 2024), https://www.goldwaterinstitute.org/victory-idaho-becomes-latest-state-to-end-judicial-deference-to-administrative-state/ [https://perma.cc/R2C8-R5VJ].

81. *See id.* ("The legislation was inspired in part by the Judicial Deference Reform Act, the Goldwater Institute's joint model legislation with Pacific Legal Foundation.").

82. Pacific Legal Foundation represented the Appellant in *TWISM Enterprises* which abrogated *Chevron* deference in Ohio. *See TWISM Enters., L.L.C. v. State Bd. of Registration for Pro. Eng'rs & Surveyors*, 2022-Ohio-4677, 223 N.E.3d 371 (listing PLF as counsel).

or a partisan nomination process.[83] Only seven of these states are either a *Chevron* or a *Chevron*-plus regime today under our rubric. And within that subset, legislatures have started to hint at upcoming repeal.[84] The dataset also categorizes the political compositions of the courts that made variations to their deference regimes. Courts are classified on a scale comprised of: Heavily Conservative, Conservative, Leans Conservative, Leans Liberal, Liberal, and Heavily Liberal. Conservative and Liberal classifications indicate that a court is dominated entirely by justices who identified as or were appointed by Republicans or Democrats.

Analyzing the relationship between judicial politics and *Chevron* deference, we first look to all the courts that have ever adopted *Chevron* deference, and then at courts that adopted *Chevron* and then rejected the regime. This dataset contains fourteen states that have at some time maintained a *Chevron* or a *Chevron*-plus regime. A snapshot of those states is depicted in the table below.

83. A comprehensive summary of judicial deference regime changes and partisan make-up of courts with gubernatorial appointment or partisan elections is included below in the Appendix.

84. *See, e.g.*, GA. CODE ANN. § 48-2-18 (2024).

State	Deference Regime	Year of Change	Political Makeup of Court
Alabama	*Chevron* (Judicial)	1983	Leans Conservative
Arizona	*Chevron* (Judicial)	2004	Leans Conservative
Delaware	*Chevron* (Judicial)	1994	Conservative
Florida	*Chevron* (Judicial)	1985	Liberal
Hawaii	*Chevron* (Judicial)	1984	Liberal
Illinois	*Chevron*-plus (Judicial)	2017	Leans Liberal
Maine	*Chevron*-plus (Judicial)	1978	Heavily Liberal
Massachusetts	*Chevron* (Judicial)	2005	Conservative
New Jersey	*Chevron* (Judicial)	1984	Heavily Liberal
Ohio	*Chevron* (Judicial)	1986	Leans Liberal
Pennsylvania	*Chevron* (Judicial)	2013	Heavily Liberal
South Carolina	*Chevron*-plus (Judicial)	1976	Heavily Conservative
Vermont	*Chevron*-plus (Judicial)	1999	Liberal
Wyoming	*Chevron* (Judicial)	1996	Liberal

Table 2. Snapshot of States that Maintained a Chevron or a Chevron-Plus Regime

Even though *Chevron* was considered a "conservative" opinion at its conception, most of the state courts that adopted *Chevron* in the immediate aftermath skewed liberal. Some states also developed an even more deferential standard predating *Chevron*, which is akin to "great weight deference" and coded as *Chevron*-plus in the dataset. South Carolina, for instance, has maintained this form of deference, where "[t]he construction of a statute by the agency charged with executing it is entitled to the most respectful consideration and should not be overruled without cogent reasons."[85] Other states like Alabama describe their approach to deference as "great weight" to the interpretative authority of agencies that are entrusted by the legislature to enact the statutes in question.[86] When initially adopted, often years before the *Chevron* case itself, these heightened deference regimes lacked any apparent judicial political leanings, suggesting bipartisan buy-in for an expansive deference exceeding the scope of *Chevron*. Similarly, while on the legislative level deference reform has become politically polarizing, we find that judiciaries have generally been less likely to be guided by political tides in ruling for or against deference regimes.

Next, in assessing the political valence of *Chevron* deference, we can look to courts that have altered their deference regimes judicially. In total, fourteen states have changed deference regimes.[87] Of the thirteen states with traceable changes in regimes, nine states have adopted a less deferential standard, while four states have adopted more liberal deference regimes. Although the modern trend of deference rejection is concentrated among politically conservative states, there is no pattern within the judicial compositions that indicate rejection of more liberal deference regimes. Colorado and Kansas, for example, adopted less deferential regimes when occupied by equally or more liberally appointed

85. *Faile v. S.C. Emp. Sec. Comm'n*, 230 S.E.2d 219, 221–22 (S.C. 1976). This standard is the same as the one described by the U.S. Supreme Court in *United States v. Moore*, 95 U.S. 760, 763 (1877). This approach preceded *Skidmore* and seems to create a highly deferential regime that requires deference anytime there is a delegation of authority.

86. *See Ala. Metallurgical Corp. v. Ala. Pub. Serv. Comm'n*, 441 So. 2d 565, 571 (Ala. 1983) ("[A]n administrative body's interpretation of its authorizing legislation is entitled to great weight." (citing *State v. S. Elec. Generating Co.*, 151 So. 2d 216, 217 (Ala. 1963))).

87. Some states have demonstrated inconsistency in applying their own deference regimes or, worse, lack knowledge of the deference regime that a preceding court may have adopted. Other states have demonstrated a lack of commitment to a deference regime. This complicates the task of classifying meaningful changes in deference regimes. In this dataset, a difference in deference regime was recognized as an actual change if there was either some recognition of overturning precedent or reliance on the decision in later state supreme court cases.

benches than the previous courts.[88] On the other hand, states such as Utah and Wyoming have repudiated pro-deference regimes after their highest court compositions became far more conservative.[89] The dataset indicates that in the thirteen states where deference regimes were changed, regardless of the change in the political valence of the court, they trended toward reducing deference.

The map below visualizes how untethered to judicial political identity changes in deference regimes have been:

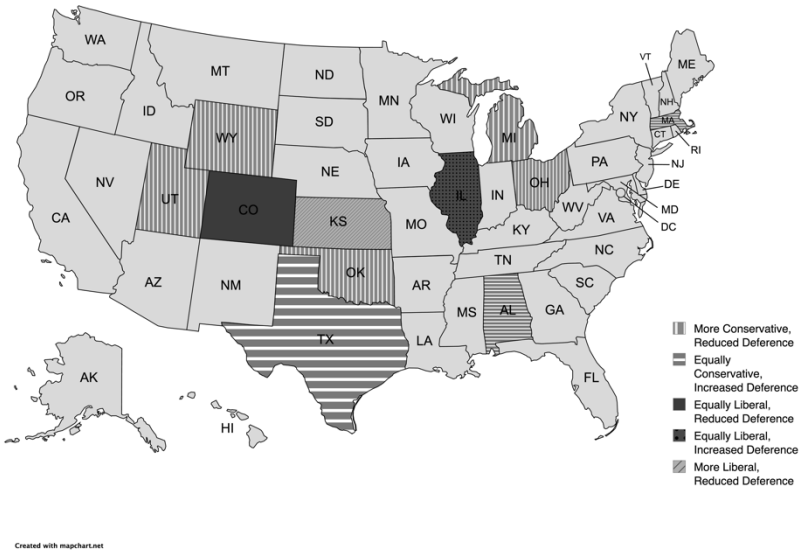

Figure 1. State Supreme Court Makeup and Change in Deference

88. A Colorado Supreme Court bench that was exclusively appointed by a Democratic Governor replaced a *Chevron*-lite regime with a traditional *Skidmore* deference in 2021. *Nieto v. Clark's Mkt., Inc.*, 2021 CO 48, ¶ 38, 488 P.3d 1140, 1149 ("[W]e are unwilling to adopt a rigid approach to agency deference that would require courts to defer to a reasonable agency interpretation of an ambiguous statute even if a better interpretation is available." (emphasis omitted)). Similarly, the Kansas Supreme Court, the majority of which was appointed by a Democratic Governor, replaced a longstanding *Skidmore* regime with de novo review. *See Douglas v. Ad Astra Info. Sys., L.L.C.*, 293 P.3d 723, 728 (Kan. 2013).

89. *See Murray v. Utah Lab. Comm'n*, 2013 UT 38, ¶¶ 9–12, 308 P.3d 461, 465–66 (rejecting a long-standing *Skidmore* deference regime instituted by a bench appointed by a Democratic Governor); *Delcon Partners LLC v. Wyo. Dep't of Revenue*, 2019 WY 106, ¶ 7, 450 P.3d 682, 684 (replacing a long-standing *Chevron* deference regime instituted by a bench appointed by a Democratic Governor).

CONCLUSION

In this Essay, we present the preliminary findings from the dataset that one of us, Menon, has compiled on administrative deference in the states, with a particular emphasis on the relationship between state court political affiliation and the choice to abdicate or maintain administrative deference. This snapshot provides important takeaways for the future of judicial deference to administrative interpretations of law in the states. In particular, whereas the conservative legal movement has been the impetus for *Chevron*'s demise at the federal level, the same political dynamics do not map as neatly onto the states. Accordingly, state supreme courts and legislatures have not—and should not—necessarily follow in lockstep with federal *Chevron* reforms. Instead, states should listen to Judge Sutton's call for "51 Imperfect Solutions" by tailoring their administrative deference doctrine to local needs even when doing so may diverge from the approach taken by the federal system.[90]

To be sure, when state supreme courts alter their deference regimes, they often reference federal law, including but not limited to *Chevron*. But those courts rarely acknowledge the differences between state and federal constitutional structures, even when a state supreme court rejects the federal regime. For example, when Ohio adopted a doctrine similar to *Chevron* in 1986, the Ohio Supreme Court relied on federal cases and explained that "it is well-settled that courts, when interpreting statutes, must give due deference to an administrative interpretation formulated by an agency which has accumulated substantial expertise, and to which the legislature has delegated the responsibility of implementing the legislative command."[91] The court never engaged in substantive reasoning for why this type of deference was appropriate for Ohio's separation of powers. Then, in 2022 when the Ohio Supreme Court eliminated that deference, the court invoked *Marbury v. Madison*[92] for the proposition that mandatory deference was incompatible with separation of powers, writing that this indicated that it was incompatible with the Ohio Constitution as well.[93] Again, however, the court did not

90. One of us has similarly urged for "51 Imperfect Solutions" in the context of qualified immunity and monetary liability for state officials. *See* Aaron L. Nielsen & Christopher J. Walker, *Qualified Immunity's 51 Imperfect Solutions*, 17 DUKE J. CONST. L. & PUB. POL'Y 321, 325 (2022).

91. *State ex rel. McLean v. Indus. Comm'n of Ohio*, 495 N.E.2d 370, 372 (1986) (citing *Jones Metal Products Co. v. Walker*, 281 N.E.2d 1, 8 (1972)) (holding in a case involving federal statutory interpretation that deference to agencies in mixed questions of law is appropriate).

92. 5 U.S. (1 Cranch) 137 (1803).

93. *See TWISM Enters., L.L.C. v. State Bd. of Registration for Pro. Eng'rs & Surveyors*, 2022-Ohio-4677, ¶¶ 34, 42–43, 223 N.E.3d 371, 380–82.

seem to fully reflect on whether that federal vision for separation of powers is consistent with the Ohio Constitution and the structure and norms of state governance in Ohio.

Thus, state courts are evidently tempted to talk about deference by referring to the federal framework. But there are important structural reasons, as discussed in Part I, for states to develop their own deference regimes. States are not miniature replicas of the federal government, and their bureaucracies are not the same as federal agencies. The unique aspects of state governmental structure, including popularly elected judiciaries and the dispersal of the executive power, countenance the development of tailored solutions.

In the wake of *Chevron*'s demise, we expect state courts and legislatures to continue a similar anti-deference trend. But as we have argued in this Essay, we hope states will not just follow the federal reform lockstep. States are different. Experimentation is good. And there are many reasons for states to choose to retain judicial deference in administrative law. Indeed, as Part II of this Essay shows, even the political dynamics of deference reform efforts in the states do not map perfectly onto those dynamics at the federal level.

APPENDIX: STATE-BY-STATE SURVEY

State	Current Deference Regime	Year of Change	Court Make Up	Prior Deference Regime & Source	Prior Deference Year	Court Make Up
AL	*Chevron* (Judicial)	1983	Leans Conservative	*Chevron*-lite (Judicial)	1980	Leans Conservative
AK	*Skidmore* (Judicial)	1971	Leans Conservative			
AZ	De novo (Legislative)	2018	Heavily Conservative	*Chevron* (Judicial)	2004	
AR	De novo (Judicial)	2020	Nonpartisan Election	*Chevron* (Judicial)	2009	Nonpartisan Election
CA	*Skidmore* (Judicial)	1979	Leans Liberal			
CO	*Skidmore* (Judicial)	2021	Liberal	*Chevron*-lite (Judicial)	1996	Liberal
CT	*Skidmore* (Judicial)	Pre-1975				
DE	De novo (Judicial)	1999	Leans Conservative	*Chevron* (Judicial)	1994	Conservative
FL	De novo (Ballot-initiative)	2018		*Chevron*-plus (Judicial)	1985	Liberal
GA	*Chevron* (Judicial)	2014	Nonpartisan Election	*Skidmore*	2001	Nonpartisan Election
HI	*Chevron* (Judicial)	1984	Liberal			
ID	De novo (Legislative)	2024	Nonpartisan Election	*Chevron*-lite (Judicial)	1991	Nonpartisan Election
IL	*Chevron*-plus (Judicial)	2017	Leans Liberal	*Chevron*-lite (Judicial)	1974	Leans Liberal

IN	De novo (Legislative)	2024	Conservative	*Chevron* (Judicial)	2019	Conservative
IA	*Skidmore* (Judicial)	1985	Conservative			
KS	De novo (Judicial)	2013	Heavily Liberal	*Skidmore* (Judicial)	Pre-1962	
KY	*Chevron* (Judicial)	2009	Nonpartisan Election			
LA	*Skidmore* (Statutory/ Judicial)					
ME	*Chevron*-plus (Judicial)	1978	Heavily Liberal			
MD	*Skidmore* (Judicial)	1986	Liberal			
MA	*Chevron* (Judicial)	2005	Conservative	*Skidmore* (Judicial)	1978	Conservative
MI	De novo (Judicial)	2008	Leans Conservative	*Skidmore* (Judicial)	1935	
MN	*Skidmore* (Judicial)	1978	Nonpartisan Election			
MS	De novo (Judicial)	2018	Nonpartisan Election	*Chevron* (Judicial)	1990	Nonpartisan
MO	De novo (Judicial)	Pre-1990	Conservative			
MT	*Skidmore* (Judicial)	2013	Nonpartisan Election			
NE	De novo (Legislative)	2024		*Chevron*	1995	Leans Liberal
NV	*Chevron*-lite	1974	Nonpartisan Election			

NH	*Skidmore* (Judicial)	1984	Heavily Conservative			
NJ	*Chevron* (Judicial)	1984	Heavily Liberal			
NM	*Chevron*-lite (Judicial)	1984	Leans Liberal			
NY	*Chevron*-lite (Judicial)	Predates *Chevron*				
NC	*Skidmore* (Judicial)	1981	Leans Conservative			
ND	Chevron-lite (Judicial)	1992	Highly Conservative			
OH	De novo (Judicial)	2022	Leans Conservative	*Chevron* (Judicial)	1986	Leans Liberal
OK	*Chevron*-lite (Judicial)	2023	Leans Conservative	*Chevron*-plus	1985	Heavily Liberal
OR	*Skidmore* (Judicial)	1980	Nonpartisan Election			
PA	*Chevron* (Judicial)	2013	Heavily Liberal	*Chevron*-plus (Judicial)	1994	Leans Liberal
RI	*Skidmore* (Judicial)	2017		De novo (Judicial)		
SC	*Chevron*-plus (Judicial)	1976	Heavily Conservative			
SD	De novo (Judicial)	1984	Conservative			
TN	De novo (Legislative)	2022		*Skidmore* (Judicial)	2013	Heavily Liberal
TX	*Chevron*-lite (Judicial)	2011	Conservative	*Skidmore* (Judicial)	2001–06	Conservative

UT	De novo (Judicial)	2013	Heavily Conservative	*Skidmore* (Judicial)	1991	Liberal
VT	*Chevron*-plus (Judicial)	1999	Liberal			
VA	De novo (Judicial)	2015	Nonpartisan Election	*Skidmore* (Judicial)	1978	Nonpartisan Election
WA	*Skidmore* (Judicial)	Pre-1992	Nonpartisan Election			
WV	*Chevron* (Judicial)	1995	Nonpartisan Election			
WI	De novo (Judicial/ Legislative)	2018	Nonpartisan Election	*Chevron* (Judicial)	1992	Nonpartisan Election
WY	De novo (Judicial)	2019	Conservative	*Chevron* (Judicial)	1996	Liberal

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