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# ARTICLE

## DERAILING THE DEFERENCE LOCKSTEP

AARON SAIGER\*

### ABSTRACT

*Key voices, most prominently that of Justice Neil Gorsuch, have embraced the position that the Chevron doctrine, under which federal courts defer to an agency's reasonable interpretation of its organizing statutes, is incompatible with the judicial duty to "say what the law is." These voices include several state supreme courts, which have held (often citing Justice Gorsuch) that state-court deference to state agency interpretations likewise impinges upon the fundamental duty of state judges to decide, on their own, what state law is.*

*This Article urges states to resist the uncritical importation into state law of antideference arguments based on the nature of judicial power in the federal context—that is, to resist the temptation to move deference rules in "lockstep" with federal doctrine. In state court, "saying what the law is" is essentially different than doing so in federal court. State courts are common-law courts whose judges not only interpret the law but declare it, often based on policy concerns—just as agencies do. And the law that state courts find is subject to federal supremacy, which makes courts' law-declaration function contingent rather than final. This contingency requires them, even as they say what the law is, to cooperate with agencies in achieving state goals in the face of federal regulatory power.*

*These differences drain the applicability to state constitutional law of most of the arguments now centered in the federal deference debate, both for and against. State courts do not need to decide between Chevron deference and de novo review. Instead, they should seek to build a judicial relationship to agency statutory interpretation consistent with their own particular role as common-*

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\* Professor of Law, Fordham University School of Law. I am grateful to the Fordham University School of Law, the Pacific Legal Foundation, and the C. Boyden Gray Center for the Study of the Administrative State for support. I also thank audiences gathered by each of these institutions for their insightful comments and input. My analysis and conclusions are my own and should not be attributed to any of these groups or any other individual. I am also deeply indebted to the Honorable Jeffrey S. Sutton for his engagement with this piece in a response, Jeffrey S. Sutton with John L. Rockenbach, Response, *Respect and Deference in American Administrative Law*, 102 B.U. L. REV. 1937 (2022); to Daniel Ortner for refocusing my attention on this topic; and to the excellent research assistance of Nikol Oydanich and Celeste Williams.

*law courts, as creators of common-law precedent, and as joint participants with both state and federal agencies in federal regulatory systems.*

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## INTRODUCTION

The famous *Chevron* two-step analysis, under which federal courts defer to an agency's reasonable interpretation of its organizing statutes,<sup>1</sup> is on the ropes.<sup>2</sup> *Chevron* has become a charged political issue, and a partisan one. This feels fairly amazing to people like me who have been thinking and writing about *Chevron* for some time. Such people generally first encountered *Chevron* as part of the plumbing of the administrative state. Deference was interesting, even fascinating, but only to people susceptible to being fascinated by that kind of thing. For everyone else, *Chevron* rated attention only instrumentally. Like federalism,<sup>3</sup> it was a doctrine people cheered when it worked to their advantage, attacked when it damaged them, and otherwise met with indifference. Even among those who were interested in regulatory plumbing for its own sake, deference was not a particularly partisan matter.<sup>4</sup> Justice John Paul Stevens wrote the *Chevron* opinion,<sup>5</sup> but Justice Antonin Scalia was its biggest booster.<sup>6</sup>

<sup>1</sup> *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984).

<sup>2</sup> See, e.g., Cass R. Sunstein, *Chevron as Law*, 107 GEO. L.J. 1613, 1615 (2019) (stating *Chevron* "is under siege" and may not survive through 2024).

<sup>3</sup> For a discussion of "fair-weather federalism," see, for example, Gerald S. Dickinson, *Cooperative Federalism and Federal Takings After the Trump Administration's Border Wall Executive Order*, 70 RUTGERS U. L. REV. 647, 650 n.19 (2018) (noting Republicans and Democrats choose to expand "federal intervention or state and local control depending on the political environment"); Eric A. Posner & Cass R. Sunstein, *Institutional Flip-Flops*, 94 TEX. L. REV. 485, 488 (2016) ("[F]air weather federalists' . . . promote or deride federalism based on their views of the substantive political outcomes at stake." (footnote omitted)) (quoting Jonathan H. Adler, *Are Nebraska and Oklahoma Just Fair-Weather Federalists?*, WASH. POST: THE VOLOKH CONSPIRACY (Dec. 19, 2014, 9:45 AM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/12/19/are-nebraska-and-oklahoma-just-fair-weather-federalists/>)).

<sup>4</sup> See Michael Dorf, *Is Chevron Deference Liberal, Conservative, or Neither?*, DORF ON L. (Feb. 8, 2017), <http://www.dorfonlaw.org/2017/02/is-chevron-deference-liberal.html> [<https://perma.cc/UVW5-XRJB>] ("[T]he political valence of *Chevron* deference is tricky to figure out."); see also discussion *infra* notes 5-13 (providing overview of *Chevron*'s role in politics).

<sup>5</sup> Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253, 255 (2014) ("The Court had said something similar in previous decisions. What was new was the way Justice John Paul Stevens creatively packaged this proposition in his opinion for a unanimous but short-handed Court of six justices." (footnote omitted)).

<sup>6</sup> See JEFFREY S. SUTTON, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION 209 (2022); Craig Green, *Chevron Debates and the Constitutional Transformation of Administrative Law*, 88 GEO. WASH. L. REV. 654, 665-66, 668-69, 675 (2020); Heather Elliott, *Gorsuch v. the Administrative State*, 70 ALA. L. REV. 703, 717-18 (2019) (characterizing Justice Scalia as "Court's most vocal *Chevron* enthusiast" (quoting Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy—An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 826 (2006))); Clarence Thomas, *A Tribute to Justice Antonin Scalia*, 126 YALE L.J. 1600, 1604 & n.28 (2017).

And it was Ruth Bader Ginsburg who wrote for the panel on the D.C. Circuit that the six-member *Chevron* Court, working shorthanded, unanimously overruled.<sup>7</sup>

But *Chevron* is now on the lips of people quite distant from administrative-law wonkery. Its structure is being parsed by generalist elected officials and explained to the reading public in the generalist press.<sup>8</sup> *Bloomberg Law* calls *Chevron* an “arcane” doctrine—but it’s the sort of arcane doctrine that gets covered by *Bloomberg Law*.<sup>9</sup> Senators who could reliably be expected to ask nominees to the Supreme Court at their confirmation hearings how they felt about *Brown v. Board of Education*<sup>10</sup> or *Roe v. Wade*<sup>11</sup> are now asking about deference.<sup>12</sup> Some senators even use their time for questions to speechify about deference on their own behalf.<sup>13</sup> “[S]urely,” writes Gillian E. Metzger, “never

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<sup>7</sup> Nat. Res. Def. Council, Inc. v. Gorsuch, 685 F.2d 718 (D.C. Cir. 1982), *rev’d sub nom.*, *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); Merrill, *supra* note 5, at 265 (“The decision was unanimous to vacate [Environmental Protection Agency’s] regulations.”); Ruth Bader Ginsburg, Assoc. Just., Sup. Ct., Keynote Address at the Bicentennial Celebration of the District of Columbia Circuit (Mar. 8, 2001), in 204 F.R.D. 499, 510 (2001).

<sup>8</sup> See, e.g., Stephanie Mencimer, *Steve Bannon Wants to Destroy the “Administrative State.” Neil Gorsuch Could be the Key*, MOTHER JONES (Apr. 5, 2017), <https://www.motherjones.com/politics/2017/04/steve-bannon-neil-gorsuch-administrative-state-chevron-deference/> [https://perma.cc/A2EN-6F7T].

<sup>9</sup> David Yaffe-Bellany, *Biden’s Agenda Faces a Court System More Hostile to Agency Power*, BLOOMBERG L. (Dec. 15, 2020, 4:00 AM), <https://news.bloomberglaw.com/us-law-week/courts-skeptical-of-chevron-may-stymie-bidens-agenda>.

<sup>10</sup> 347 U.S. 483 (1954).

<sup>11</sup> 410 U.S. 113 (1973), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

<sup>12</sup> See Yaffe-Bellany, *supra* note 9 (Barrett hearing); Brian Naylor, *Kavanaugh Looks on Path to Supreme Court Confirmation, After 4 Days of Hearings*, NPR (Sept. 8, 2018, 7:00 AM), <https://www.npr.org/2018/09/08/645628452/kavanaugh-looks-on-path-to-supreme-court-confirmation-after-4-days-of-hearings> [https://perma.cc/3TQX-RSBM] (Kavanaugh hearing); Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 4 (2017) (noting that *Chevron* “became a centerpiece of Gorsuch’s Senate confirmation hearings”); Elliott, *supra* note 6, at 707-08 & nn.32-33 (suggesting Gorsuch’s nomination and confirmation were motivated in part by his views of *Chevron*); see also RUTH MARCUS, SUPREME AMBITION: BRETT KAVANAUGH AND THE CONSERVATIVE TAKEOVER 63-64 (2019) (claiming process of vetting potential Supreme Court nominees during Trump Administration centered upon candidates’ views of *Chevron* more than on “hottest-button social issues . . . [of] abortion and same-sex marriage”). *Chevron* does not appear to have been raised during the 2022 public hearings for Justice Ketanji Brown Jackson.

<sup>13</sup> At the confirmation hearings for Amy Coney Barrett, Republican Senator of Iowa Mike Crapo stated:

I disagree with that [*Chevron*] doctrine. I think that the courts ought to have the ability to interpret the statute, and if it’s ambiguous, they should interpret it as best they can.

before have so many senators spoken at such length about the *Chevron* doctrine.”<sup>14</sup>

All the signs, moreover, portend that *Chevron* is a terminal case.<sup>15</sup> No fewer than five justices favor its reversal.<sup>16</sup> Such a reversal will be widely understood as a victory for the right. This would have been shocking in 1984, when *Chevron* was decided: to the extent that the case had partisan valence, *Chevron* was celebrated by the Reagan Administration and deprecated by its opponents.<sup>17</sup> Today, the fight *against Chevron* is a “conservative crusade.”<sup>18</sup> *Chevron* was a major target in the campaign that President Donald Trump’s advisor Steve Bannon, early in Trump’s presidency, memorably dubbed the “deconstruction of the administrative state.”<sup>19</sup> Left-leaning groups opposing the judicial nominees of President Trump cited the nominees’ views on judicial deference

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And that the interpreter in our system should not be the agency that is enforcing the statute. I think the courts should oversee this.

*Nomination of the Honorable Amy Coney Barrett to be an Associate Justice of the Supreme Court of the United States (Day 2)*, COMM. ON THE JUDICIARY, at 09:34:17 (Oct. 13, 2020), <https://www.judiciary.senate.gov/meetings/nomination-of-the-honorable-amy-coney-barrett-to-be-an-associate-justice-of-the-supreme-court-of-the-united-states-day-2>.

<sup>14</sup> Metzger, *supra* note 12, at 4 (footnote omitted).

<sup>15</sup> Green, *supra* note 6, at 656 (“[T]he current probability of overturning *Chevron* is [likely] higher than anyone could have imagined a few years ago.”). *But see* Lisa Schultz Bressman & Kevin M. Stack, *Chevron Is a Phoenix*, 74 VAND. L. REV. 465, 481-82 (2021) (suggesting some form of deference will survive); Jeffrey A. Pojanowski, *Without Deference*, 81 MO. L. REV. 1075, 1076 (2016) (“[A]bandoning *Chevron* is not the same thing as abolishing deference.”).

<sup>16</sup> *See* Pojanowski, *supra* note 15, at 1079; Justin Walker, *The Kavanaugh Court and the Schechter-to-Chevron Spectrum: How the New Supreme Court Will Make the Administrative State More Democratically Accountable*, 95 IND. L.J. 923, 952-59 (2020) (discussing which five justices are likely to join in overruling *Chevron*).

<sup>17</sup> *See* Craig Green, *Deconstructing the Administrative State: Chevron Debates and the Transformation of Constitutional Politics*, 101 B.U. L. REV. 619, 639-40, 642 (2021); Sunstein, *supra* note 2, at 1618 (“Once celebrated by the right and sharply criticized by the left, *Chevron* is now under assault from the right and (for the most part) accepted on the left.”).

<sup>18</sup> Jeff Overley, *Chevron Deference’s Future in Doubt if Barrett is Confirmed*, LAW360 (Oct. 23, 2020, 11:11 PM), <https://www.law360.com/articles/1318381/chevron-deference-s-future-in-doubt-if-barrett-is-confirmed>; *accord* Edwin E. Huddleson, *Chevron Under Siege*, 58 U. LOUISVILLE L. REV. 17, 17, 59 (2019) (attacks on *Chevron* “are part of a larger conservative political, judicial, and academic attack on the post-New Deal regulatory state”); Jeremy W. Peters, *New Litmus Test for Trump’s Court Picks: Taming the Bureaucracy*, N.Y. TIMES, Mar. 28, 2018, Late Edition, at A1 (“[The Trump] White House has laid out a plan to fill the courts with judges devoted to a legal doctrine that challenges the broad power federal agencies have to interpret laws and enforce regulations . . .”).

<sup>19</sup> Green, *supra* note 17, at 687 (quoting Ryan Teague Beckwith, *Read Steve Bannon and Reince Priebus’ Joint Interview at CPAC*, TIME (Feb. 23, 2017, 3:59 PM), <http://time.com/4681094/reince-priebus-steve-bannon-cpac-interview-transcript/> [<https://perma.cc/SCC5-LZB7>]).

near the top of their litanies of objections.<sup>20</sup> And, with the death of Justice Scalia and the arrival of several new justices during the Trump Administration, opposition on the Supreme Court to *Chevron* now (apparently and for the moment) lines up on traditional left-right grounds, with Justice Neil Gorsuch as standard-bearer.<sup>21</sup> In the academy, important voices opposed to *Chevron* deference are also associated with the right.<sup>22</sup>

The turn against *Chevron* matters not just to federal courts but to state courts as well. Several state supreme courts have taken up the arguments of Justice

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<sup>20</sup> See Letter from Praveen Fernandes, Vice President of Pub. Engagement, Const. Accountability Ctr.; Kristine A. Kippins, Dir. of Pol’y, Const. Accountability Ctr., to Mitch McConnell, then Senate Majority Leader, U.S. Senate; Charles Schumer, then Senate Minority Leader, U.S. Senate (Feb. 28, 2019) (on file with author) (opposing nomination of Neomi Rao to D.C. Circuit because she “would likely jettison major aspects of the so-called administrative state and give the courts new power to second-guess agency action”); Tom Wheeler, Opinion, *My Word: Will Justice Barrett Kill the Modern Administrative State?*, TIMES STANDARD (Oct. 17, 2020, 12:34 PM), <https://www.times-standard.com/2020/10/17/my-word-will-justice-barrett-kill-the-modern-administrative-state/> [<https://perma.cc/A37S-STEY>] (opposing nomination of Amy Coney Barrett to Supreme Court because she “could provide greater breathing room” for efforts to limit or overrule *Chevron*).

<sup>21</sup> Green, *supra* note 6, at 703 (“Nominated to the Supreme Court in 2017, Gorsuch had the most aggressive record on *Chevron* of any circuit judge in modern history . . .”). The Supreme Court has not been presented with a clear vehicle for overriding *Chevron* since the elevation of Justice Gorsuch to the Court. The Justice’s critique of *Chevron*, therefore, must be gleaned from two important concurrences. The first is a concurrence in *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016), which Gorsuch wrote while still sitting on the Tenth Circuit, shortly before his elevation. *Id.* at 1149 (Gorsuch, J., concurring). *Gutierrez-Brizuela* is obviously not precedential in the Justice’s new job, but just as clearly reveals the Justice’s thinking. *See id.* (“[T]he fact is *Chevron* . . . permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers’ design.”). Justice Gorsuch also concurred in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). *See id.* at 2425 (Gorsuch, J., concurring in the judgment). *Kisor* treats an issue related but technically distinct from the problem in *Chevron* itself, namely, whether to defer to agencies’ interpretation of their own regulations. *See generally id.* (majority opinion). Because it deals with deference to regulations, *Kisor* is not technically about *Chevron*; indeed, Chief Justice Roberts wrote separately in *Kisor* to insist that the issues are unrelated. *Id.* at 2425 (Roberts, C.J., concurring in part) (“Issues surrounding judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes enacted by Congress. *See Chevron* . . . I do not regard the Court’s decision today to touch upon the latter question.”); *see also id.* at 2425 (Kavanaugh, J., concurring in the judgment). Nevertheless, many of the reasons Gorsuch gives for rejecting deference for agency interpretation of regulations apply directly to agency interpretations of statutes as well. *See, e.g., Gutierrez-Brizuela*, 834 F.3d at 1149.

In this Article, I use these opinions together to document Justice Gorsuch’s account and critique of *Chevron*.

<sup>22</sup> *See, e.g.,* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 316, 320 (2014).

Gorsuch and his colleagues.<sup>23</sup> In particular, they have imported into their own constitutional law the argument that state-court deference to state agency interpretations impinges upon the foundational duty of judges to decide, on their own, what the law is—just as Justice Gorsuch argues that federal-court deference is incompatible with the Article III obligation of federal judges to decide, on their own, what is the law.

Not very long ago, when *Chevron* was ascendant at the federal level, a literature developed that both noted and analyzed its relative lack of purchase in the states.<sup>24</sup> Demurring to the doctrine's value in the federal courts, that literature insisted that the "*Chevron* rule is bespoke doctrine" for federal administrative law, successful in part "because it is exquisitely attuned to its own [federal] context."<sup>25</sup> The things that make *Chevron* desirable at the federal level, the literature suggested, might not apply, or apply very differently, in the context of the states. In short, scholars argued that deference doctrine was an area where "lockstepping"—what Judge Jeffrey S. Sutton defines as "the tendency of some state courts to diminish their constitutions by interpreting them in reflexive imitation of the federal courts' interpretation of the Federal Constitution"—is strenuously to be avoided.<sup>26</sup>

The approach of this literature is institutionalist. It surveys the major arguments for *Chevron*—including the arguments made in *Chevron* itself—and asks whether these arguments make sense in the state context. It concludes that many often do not. State-level administrative decision-making structures that differ from the federal government's in ways relevant to deference include

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<sup>23</sup> See generally *infra* note 35.

<sup>24</sup> See, e.g., William R. Andersen, *Chevron in the States: An Assessment and a Proposal*, 58 ADMIN. L. REV. 1017, 1027-29 (2006); Bernard W. Bell, *The Model APA and the Scope of Judicial Review: Importing Chevron into State Administrative Law*, 20 WIDENER L.J. 801, 836-39 (2011); Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215, 1277-83 (2012) (discussing elected judges and deference to agencies in the state context); William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, *Note on Deference to Agencies in The State Courts*, in CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 1258, 1258-59 (4th ed. 2007); Aaron Saiger, *Chevron and Deference in State Administrative Law*, 83 FORDHAM L. REV. 555, 558-60 (2014); D. Zachary Hudson, *Comment, A Case for Varying Interpretive Deference at the State Level*, 119 YALE L.J. 373, 374-75 (2009); 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, 469-76 (2016).

<sup>25</sup> Saiger, *supra* note 24, at 557.

<sup>26</sup> JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 174 (2018); see also Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 ROGER WILLIAMS U. L. REV. 79, 87-92 (1998) (identifying, critiquing, and seeking to explain general trend towards lockstepping in state separation-of-powers jurisprudence).



elected and term-limited state judges,<sup>27</sup> the general jurisdiction of state courts,<sup>28</sup> plural elected executives,<sup>29</sup> state attorneys general with authority over agency activity,<sup>30</sup> approaches to legislative delegation of power to agencies more limiting than corresponding federal doctrine,<sup>31</sup> robust executive and legislative review of proposed rules,<sup>32</sup> and the extent of agency expertise.<sup>33</sup>

These factors strongly counseled state courts to resist any temptation to mirror federal deference doctrine. Instead, the literature argued, states should go their own way, with attention to their own particular institutions and structures.<sup>34</sup> And indeed, that is what had happened. Divergence between state and federal deference doctrine—although not in structural state constitutional law more generally—is well-established.<sup>35</sup> Daniel Ortner’s valuable survey of state courts’ doctrines in this area documents that, in cases spanning several decades, only a minority of states have adopted *Chevron* wholesale, and that several reject deference entirely.<sup>36</sup> More significantly, he identifies a majority of states that have developed deference doctrines that neither reflect nor reject the federal practice.<sup>37</sup>

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<sup>27</sup> See SUTTON, *supra* note 6, at 218-19; Bell, *supra* note 24, at 823-24, 827-31; Bruhl & Leib, *supra* note 24, at 1249, 1278-82; Saiger, *supra* note 24, at 560-63; Hudson, *supra* note 24, at 375-77.

<sup>28</sup> See SUTTON, *supra* note 6, at 218; Saiger, *supra* note 24, at 569-70.

<sup>29</sup> See SUTTON, *supra* note 6, at 218 (“While all executive branch power in the national government flows from a single president, the same is not true in the states . . . Many agency heads at the state level are separately elected.”); Bell, *supra* note 24, at 824; Saiger, *supra* note 24, at 565-66; *cf.* Miriam Seifter, *Understanding State Agency Independence*, 117 MICH. L. REV. 1537, 1551-60 (2019) (providing a rich account of state plural executives).

<sup>30</sup> See SUTTON, *supra* note 6, at 218-19; Saiger, *supra* note 24, at 566-68.

<sup>31</sup> See SUTTON, *supra* note 6, at 215-16, 219-20, 222-24; Saiger, *supra* note 24, at 568-70.

<sup>32</sup> See Saiger, *supra* note 24, at 574-79.

<sup>33</sup> See *id.* at 580-82; Hudson, *supra* note 24, at 378-80.

<sup>34</sup> See Bell, *supra* note 24, at 853.

<sup>35</sup> See SUTTON, *supra* note 6, at 184 (“Administrative law is an area in which the state courts have not been reticent to act independently of federal precedent in construing the structural guarantees in their state constitutions. . . . [T]he federal precedents on delegation and administrative deference seem to have little pull and hardly the presumption of correctness often seen with individual rights.”); Andersen, *supra* note 24, at 1018 (noting “variety and diversity” across states in development of deference doctrines); Bell, *supra* note 24, at 818-19; Ann Graham, *Chevron Lite: How Much Deference Should Courts Give to State Agency Interpretation?*, 68 LA. L. REV. 1105, 1109-19 (2008); Daniel Ortner, *The End of Deference: How States (and Territories and Tribes) Are Leading a (Sometimes Quiet) Revolution Against Administrative Deference Doctrines* 3 (Mar. 11, 2020) (unpublished manuscript) (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3552321](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3552321) [<https://perma.cc/Q8V6-RC7G>]).

<sup>36</sup> See Ortner, *supra* note 35 (manuscript app. at 71-72).

<sup>37</sup> See *id.*

But today, as Justice Gorsuch and his many allies advance a vigorous and multitiered argument that *Chevron* is all wrong, apparently with the wind at their backs,<sup>38</sup> the states face a converse problem to the one upon which the literature focuses. There is not much need to worry about, or justify, states' refusal to lockstep deference. The pressing question is whether states should lockstep *antideference*. This Article picks up the argument developed when *Chevron* was ascendant—that lockstepping with respect to deference should be avoided—to urge that states should also be deeply skeptical before importing the federal *critique* of *Chevron*. Just as it would be a mistake for states reflexively to incorporate *Chevron*—a mistake because *Chevron*'s strength depends upon so many institutional, political, and jurisprudential factors that the federal government does not share with the states—so too it would be a mistake for states reflexively to incorporate any federal rejection of *Chevron* into their own law. States still need to go their own way, thinking about deference with much more attention to their own institutions and needs and less attention to how federal courts understand it.

This is true in part because of the institutional differences the literature already describes. But there are also theoretical, structural, and foundational reasons of state constitutional law not to lockstep the central *principled* argument against *Chevron* at the federal level: that deference to agencies is incompatible with the judicial duty to “say what the law is.”<sup>39</sup> In state court, saying what the law is is fundamentally different than doing so in federal court. State courts are common-law courts whose judges not only interpret the law but declare it, often based on policy concerns—just as agencies do. The law that state courts find is also subject to federal supremacy, which makes their law-declaration function contingent rather than final. This requires them, even as they say what the law is, to cooperate with agencies in achieving state legal goals in the face of federal regulatory power. These differences spotlight the extent to which the public argument about the deference and the judicial function, both favoring deference and opposing it, depends upon the particulars of the role that Article III judges play in federal constitutional law. These particulars do not apply in the states.

States do not need to decide whether to endorse *Chevron* deference, insist upon *de novo* review, or seek some middle ground between them. Instead, states should strike out in new directions as they seek to build a judicial relationship to agency statutory interpretation that is responsive to state conditions. State courts might tailor deference by subject area, or rethink what it means to defer in terms of common-law precedent, or explicitly take account of the development of the common law when deciding deference cases. This Article sketches these possibilities. But its more basic ask is that state courts recognize the extent to which, when it comes to deference, they should go their own way.

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<sup>38</sup> See Walker, *supra* note 16, at 952-59.

<sup>39</sup> See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1156 (10th Cir. 2016) (Gorsuch, J., concurring).

There is some risk, it seems to me, that this will not happen. The themes raised by judges and academics opposed to the federal *Chevron* doctrine now appear repeatedly and without much modification in the writings of judges and others opposed to state-level deference doctrines.<sup>40</sup> This phenomenon is exacerbated because the campaign against *Chevron* has taken on such a strong partisan cast—and political parties are the leading political institutions that cross the federal/state line, especially in our contemporary moment.<sup>41</sup>

Because parties are institutions that bridge the federal/state divide, partisan objections to *Chevron* naturally elide federal/state differences. This is a trap for state courts sympathetic to critiques of the administrative state from the right. This Article, I hope, will help provide a corrective that may help state judges to avoid that trap. Some state supreme courts may fairly conclude that de novo review of agency interpretations is better doctrine than deferential review, in their particular context. That is reasonable—as long it is that particular context, and not the very different context of federal administrative law, that drives their conclusions. A better conclusion, however, is that state constitutions and institutions demand a homegrown deference doctrine, neither *Chevron* deference nor de novo review.<sup>42</sup>

This Article begins by analyzing the centrality of common-law judging and the supremacy of national law in the federal system to thinking about state-level deference. These two topics are considered respectively in Parts I and II. Part III considers some of the ways, largely orthogonal to the *Chevron* debate, that state deference might take account of the analysis. It sketches a doctrine, dubbed *Chevron\** for analytic purposes, that offers one potential direction. The Article then concludes with a brief discussion of the relationship between today's party politics and state deference doctrine.

## I. SAYING WHAT STATE LAW IS

Judicial deference to agency statutory interpretation stands or falls on the separation of powers. This is a point of agreement, accepted by all interlocutors in the deference debate, for and against, federal and state.<sup>43</sup>

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<sup>40</sup> See Green, *supra* note 6, at 703 n.307 (2020) (collecting state cases that refer to Gorsuch's objections to *Chevron*).

<sup>41</sup> Gregory A. Elinson & Jonathan S. Gould, *The Politics of Deference*, 75 VAND. L. REV. 475, 525 (2022) (In the late 2010s, “[a]dministrative law topics previously relegated to law reviews became prominent in political discourse. Republicans began attacking deference as lawless, a violation of separation of powers, and an abnegation of the judicial role—the diametric opposite of the position they took during the Reagan years.”).

<sup>42</sup> See Bressman & Stack, *supra* note 15, at 479.

<sup>43</sup> Those who believe deference is constitutional may still disagree whether it is permitted by statute. The federal Administrative Procedure Act requires “the reviewing court” to “decide all relevant questions of law,” to “determine the meaning . . . of an agency action,” and to “hold unlawful and set aside agency action . . . found to be . . . not in accordance with

*Chevron* itself presents as a separation-of-powers case. Legislative silence or ambiguity, *Chevron* says, should be construed as a permissible legislative delegation to the executive—not to the courts.<sup>44</sup> The courts should restrict themselves to policing the boundaries of the law,<sup>45</sup> for reasons both of institutional comparative advantage and of the principle separation of powers. With respect to comparative advantage, the executive can apply expertise largely inaccessible to the Congress and unavailable to courts.<sup>46</sup> And with respect to principle, policy arguments are “properly addressed to legislators or administrators, not to judges.”<sup>47</sup> Judges cannot act to further their “personal policy preferences.”<sup>48</sup> Agencies, entirely unlike the courts, are political actors, “accountable to the people” via their accountability to the elected president.<sup>49</sup>

There is also a strong functionalist current in *Chevron*, consistent with the jurisprudence of Justice Stevens, the opinion’s author, that the goal of deference doctrine is to maintain an effective, implementable, and balanced equilibrium between the branches in the administrative arena.<sup>50</sup> The goal of administrative separation of powers is to allocate control over administrative action in a way that gives agencies sufficient scope to regulate effectively but prevents

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law.” 5 U.S.C. § 706. In *Kisor*, Justice Elena Kagan (writing for a four-Justice plurality) and Justice Gorsuch (also writing for four Justices) take opposing positions regarding whether this provision requires de novo review. Compare *Kisor v. Wilkie*, 139 S. Ct. 2400, 2422-23 (2019) (Kagan, J., plurality opinion) (asserting § 706 does not require de novo review), with *id.* at 2432 (Gorsuch, J., concurring in the judgment) (asserting it does). See also Ronald M. Levin, *The APA and the Assault on Deference*, 106 MINN. L. REV. 125, 128-29 nn.20-24 (2021) (reviewing literature in preparation for arguing Kagan has the better of the dispute). The state Administrative Procedure Acts do not track the precise language of the cognate federal statute. See, e.g., REVISED MODEL STATE ADMIN. PROC. ACT § 508 (NAT’L CONF. OF COMM’RS ON UNIF. STATE L. 2010) (providing that reviewing court “may grant relief” if “agency erroneously interpreted the law” or acted in fashion “otherwise not in accordance with law”). The comments on this section explicitly deny any intention that this language should be read “to preclude courts from according deference to agency interpretations of law, where such deference is appropriate.” *Id.* cmt. at 97. The Model Act has not been enacted verbatim in the states, creating additional interpretive issues.

This Article leaves arguments about construing statutory provisions governing judicial review to the side. The disagreement between Justices Kagan and Gorsuch is a paradigmatic example of how statutory interpretation is (properly) inflected by constitutional thinking, and cognate thinking in the states should and will likewise be affected substantially by understandings of their constitutional, separation-of-powers questions.

<sup>44</sup> *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984).

<sup>45</sup> See Peter L. Strauss, “Deference” Is Too Confusing—Let’s Call Them “Chevron Space” and “Skidmore Weight,” 112 COLUM. L. REV. 1143, 1163-65 (2012).

<sup>46</sup> See *Chevron*, 467 U.S. at 865-66.

<sup>47</sup> *Id.* at 864, 866 (“The responsibilities for assessing the wisdom of . . . policy choices and resolving the struggle between competing views of the public interest are not judicial ones.”).

<sup>48</sup> *Id.* at 865.

<sup>49</sup> See *id.*

<sup>50</sup> See *id.* at 842-44.

overreach and preserves political control. The Congress (writing the organic statute), the executive (choosing to take an administrative action consistent with its interpretation of the statute), and the judiciary (reviewing the legality of that action) create a balance of power. *Chevron* makes the case that deference limns that equilibrium so that it functions well. Its repeated references to the necessity that judges abstain from questions of wisdom and policy suggest as much. And the decades since *Chevron*, in my view, demonstrate that its equilibrium is both practicable and balanced.<sup>51</sup>

*Chevron*'s critics at the federal level understand as much as its supporters do that deference is a question of how to allocate interpretive authority across the branches. But the critics reach very different conclusions than those of Justice Stevens. With respect to comparative advantage, they argue, deference doctrine must recognize that agencies are inclined to excess. In the words of Justice Gorsuch,

[p]erhaps allowing agencies rather than courts to declare the law's meaning bears some advantages, but it also bears its costs. And the founders were wary of those costs, knowing that, when unchecked by independent courts exercising the job of declaring the law's meaning, executives throughout history had sought to exploit ambiguous laws as license for their own prerogative.<sup>52</sup>

*Chevron*'s critics argue further that agencies' legal interpretations are contaminated by their policy agendas, a thirst for power, and Congressional incentives to avoid accountability. Agency rules are legion,<sup>53</sup> unpredictable,<sup>54</sup> and politicized.<sup>55</sup> In the twenty-first century, "[t]he administrative state 'wields vast power and touches almost every aspect of daily life.'"<sup>56</sup> De novo review by the courts is necessary to keep this power in check.

With respect to principle, one problem is that agencies in a deference regime can change their preferences over time among conflicting but reasonable statutory interpretations, for political or policy reasons.<sup>57</sup> If courts are expected

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<sup>51</sup> See Saiger, *supra* note 24, at 557.

<sup>52</sup> *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring).

<sup>53</sup> See *id.* at 1155 (stating *Chevron* "certainly seems to have added prodigious new powers to an already titanic administrative state").

<sup>54</sup> See *id.* at 1152, 1158 ("*Chevron*'s very point is to permit agencies to upset the settled expectations of the people by changing policy direction depending on the agency's mood at the moment").

<sup>55</sup> See *id.* at 1153 (arguing *Chevron* gives "avowedly politicized administrative agent[s]" power to "pursue whatever policy whim may rule the day").

<sup>56</sup> *City of Arlington v. FCC*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting) (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 499 (2010)).

<sup>57</sup> See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) ("[I]f the agency adequately explains the reasons for a reversal of policy, 'change is

to defer to new interpretations as they did to the old, they must enforce conflicting interpretations over time. This indeterminacy, Justice Gorsuch thinks, is inconsistent with the idea of law itself.<sup>58</sup> Deference, he writes,

contradicts a basic premise of our legal order: that we are governed not by the shifting whims of politicians and bureaucrats, but by written laws whose meaning is fixed and ascertainable—if not by all members of the public, then at least by lawyers who can advise them and judges who must apply the law to individual cases guided by the neutral principles found in our traditional tools of interpretation.<sup>59</sup>

Changeability also makes it impossible for voters to know the law and for those affected by it to rely upon it.<sup>60</sup> Finally, in a point also emphasized by Philip Hamburger,<sup>61</sup> Gorsuch argues that a deferential court is not impartial, because in a suit against an agency the court must defer to one party but not the other. But the judicial role demands neutrality.<sup>62</sup>

Most important among these principled arguments is that deference is inconsistent with the vesting clause of Article III, which assigns the “judicial power” to the courts.<sup>63</sup> When adjudicating a case or controversy properly before it, “[i]t is emphatically the province and duty of the judicial department to say what the law is.”<sup>64</sup> Justice Gorsuch in particular has insisted vigorously that the judicial obligation “to say what the law is”<sup>65</sup> is incompatible with deference. If a court defers to an agency’s statutory interpretation, necessarily there will be cases where it will rule according to what it believes to be a second-best interpretation of a governing statute. In such a case, it has ceded a portion of its duty to say what the law is—a portion of the judicial power—to a nonjudicial actor. It is not deciding cases based on what it has determined, independently,

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not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.” (quoting *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996)).

<sup>58</sup> See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2433 (2019) (Gorsuch, J., concurring in the judgment) (“[I]f an agency can not only control the court’s initial decision but also revoke that decision at any time, how can anyone honestly say the court, rather than the agency, ever really ‘determine[s]’ what the regulation means?”); *Gutierrez-Brizuela*, 834 F.3d at 1150 (“By *Brand X*’s own telling, this means a judicial declaration of the law’s meaning in a case or controversy before it is . . . subject to revision by a politically accountable branch of government.” (citation omitted)).

<sup>59</sup> *Kisor*, 139 S. Ct. at 2442.

<sup>60</sup> See *id.*

<sup>61</sup> See HAMBURGER, *supra* note 22, at 304 (“The result is that administrators feel liberated from the constraints of law, and judges feel bound to make the administrative system work.”).

<sup>62</sup> See *Kisor*, 139 S. Ct. at 2448 (“[Deference] den[ies] the people who come before us the neutral forum for their disputes that they rightly expect and deserve.”).

<sup>63</sup> U.S. CONST. art III., § 1.

<sup>64</sup> *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

<sup>65</sup> *Id.*

neutrally, and on the record, what it thinks the law *is*.<sup>66</sup> This it may not do. It's unconstitutional, but it's not *just* unconstitutional. It violates *Marbury v. Madison*,<sup>67</sup> the wellspring of judicial self-understanding. "*Chevron*," Justice Gorsuch writes, "seems no less than a judge-made doctrine for the abdication of the judicial duty."<sup>68</sup>

State separation-of-powers principles are different from those of the federal system, but the family resemblance is sufficiently strong that all the issues I have described above are relevant to state-court deference. But the conclusions do not translate directly. The existing literature principally focuses upon institutional differences between state and federal systems that might cause one to think that the functional equilibrium that *Chevron* sets out for the federal system will work differently, and less well, in state systems.<sup>69</sup> If one thinks about deference as a potential tool for maintaining a well-functioning balance of power in the administrative state, it seems clear that both the opposing institutional pressures that Justice Stevens relies upon to justify *Chevron*—the agencies' expertise and political accountability opposite the courts' inexperience and insulation from politics—are quite different in the states than in the national government, in potentially important ways.

Perhaps the most obvious such features are the fixed terms and the election of state judges, arrangements that are common though not universal.<sup>70</sup> Even in states where judges are appointed, they sometimes must stand for reelection, or serve for fixed terms.<sup>71</sup> These organizational features create a relationship between state courts and politics quite different than the one created by the institutions of nomination, confirmation, life tenure, and salary protection that organize the Article III courts. Although state judges are not permitted to be nakedly political actors, they do both require and represent (in a sense) a political constituency.<sup>72</sup> They have a species of the accountability that *Chevron* says, accurately, that federal judges lack.

This is not to say that state judges are necessarily strongly politically accountable, or obviously politically accountable, or even meaningfully politically accountable. Aaron-Andrew Bruhl and Ethan Leib argue, for

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<sup>66</sup> See *Kisor*, 139 S. Ct. at 2432, 2437-39; *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1150-52 (10th Cir. 2016) (Gorsuch, J., concurring) ("When does a court independently decide what the statute means and whether it has or has not vested a legal right in a person? Where *Chevron* applies that job seems to have gone extinct.").

<sup>67</sup> *Marbury*, 5 U.S. 137.

<sup>68</sup> See *Gutierrez-Brizuela*, 834 F.3d at 1152.

<sup>69</sup> See *supra* notes 26-33 and accompanying text.

<sup>70</sup> See *Judicial Selection: Significant Figures*, BRENNAN CTR. FOR JUST. (Oct. 4, 2021), <https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures> [<https://perma.cc/6EJF-KARB>].

<sup>71</sup> See *id.*; John L. Warren III, *Holding the Bench Accountable: Judges Qua Representatives*, 6 WASH. U. JURIS. REV. 299, 327-28 (2014) (citing examples from California and Iowa).

<sup>72</sup> See Warren, *supra* note 71, at 304-05, 313-14, 317, 335.

example, “that many or most judicial elections lack some of the qualities that ordinarily give elections their legitimating power.”<sup>73</sup> They emphasize in particular that most judicial elections are “retention or nonpartisan elections,” which they regard as “poor mechanisms for fostering accountability.”<sup>74</sup> But it does seem that judges subject to any kind of election are more politically accountable, at least potentially more politically accountable, than their life-tenured, salary-protected federal counterparts. *Chevron*’s flat, unhedged declaration that that federal judges may not advance their own “policy preferences” transfers to the state arena with some friction. This might give judges more scope to engage in de novo review.

Relevant for similar reasons is the institution of the plural executive, which, like judicial elections, is common but not universal in state constitutions.<sup>75</sup> State agencies have more political accountability, in some instances, than their federal counterparts. In particular, some agencies are elected directly by the people.<sup>76</sup> The winners of those elections—for Attorney General, Agriculture Commissioner, or some other body—take their place among several heads of a plural state executive. Each enjoys their own political legitimacy, their own constituency, and their own accountability that it is not mediated by the management of some general-government chief executive.<sup>77</sup> *Chevron* recognizes that that federal agencies “are not directly accountable to the people.”<sup>78</sup> It relies entirely upon agencies’ indirect accountability: “While agencies are not directly accountable to the people, the Chief Executive is.”<sup>79</sup> But in the states, accountability is sometimes much more direct.

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<sup>73</sup> Bruhl & Leib, *supra* note 24, at 1231.

<sup>74</sup> *Id.* at 1232.

<sup>75</sup> See Seifter, *supra* note 29, at 1554-55.

<sup>76</sup> See *id.* at 1552.

<sup>77</sup> See *id.* at 1589; William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 *YALE L.J.* 2446, 2476 (2006).

<sup>78</sup> *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

<sup>79</sup> *Id.* *Chevron*’s jump within a single sentence from the appointment of agencies to the election of the President elides the many questions, dormant in 1984 but since explosive and much discussed, about to what extent and by what means presidential preferences can and do affect agency decisions about interpretation. Perhaps all that can be said with certainty is that presidential election creates some nonzero level of political accountability for agencies. Reasonable people can disagree both positively and normatively about its magnitude.

Justice Stevens, were he to return to us, might reply by saying that all one needs is some level of accountability to the public, because courts have none. Again, such a claim would be more plausible in 1984 than it is today. Judicial nomination and confirmation, which are the locus of intersection of the federal courts and national politics, were tame, mannered, and nonpartisan when *Chevron* was decided, as compared to the political bloodsport that characterizes them today. Today, political heat does not distinguish between the confirmation of federal judges and of agency heads; if anything, judicial confirmations are more political. See, e.g., Leslie H. Southwick, *A Survivor’s Perspective: Federal Judicial Selection from*



Similar things can be said about expertise. The popular view that state agencies, overall, are less expert than federal agencies also pushes in the direction of non-deference. But our contemporary scene is characterized by very substantial diversity, where deep expertise lives in many state agencies and can be hard to spot in some federal agencies. Moreover, recent developments involving the politicization of what had once been federal agencies organized to maximize expertise have changed the dynamic at the federal level.<sup>80</sup>

These factors—judges who are sometimes elected, agencies that are sometimes both elected and inexperienced—create a different functional balance of separation of powers, just as the election of judges does. Elected judges might be better positioned than unelected ones to promulgate policy-laden and political interpretations. On the other hand, judges might be less well-placed to substitute their judgment for those of elected agencies than for unelected ones. At the same time, *de novo* review seems more appropriate absent agency expertise, a factor *Chevron* emphasizes.<sup>81</sup>

All this leaves it not entirely clear whether institutional differences between state and federal governments suggest that courts at one level should defer to agencies at that level more, less, or the same amount as the other. But these issues clearly challenge the position that deference should be the same at the two levels. Indeed, the best result for a given state may depend on fine details of that state's institutional arrangements. It might depend, for example, upon the particular length of judicial terms, the specific regulatory powers granted to elected state agencies, in what fields state agencies regulate, or the ratio of elected to appointed agencies and the terms of those appointments. Such differences across states might also motivate state courts more than their federal counterparts to “tailor deference to variety”<sup>82</sup> instead of defining a single deference doctrine.

Deference doctrine, in short, needs to be particularized to its institutional context. *Chevron* is particularized to the federal context and does not easily fit the states. Put differently, deference doctrine is the poster child for avoiding state constitutional lockstepping.

It is in some ways surprising—and a cause for relief, even celebration—that the years since *Chevron* did not bring widespread lockstepping in this area. The

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*George Bush to Donald Trump*, 95 NOTRE DAME L. REV. 1847, 1847 (2020) (“The depth of partisan acrimony over judicial confirmations has placed us in the infernal regions, and we seem to be continuing our descent.”). Therefore, only one remaining structural institution—and it is a big one, of course—continues to distinguish agency and judicial accountability to political preferences. This is that federal judges serve for life and agency leaders either for fixed terms or at the pleasure of the President. Again, lifetime appointment is not the modal arrangement for state judges.

<sup>80</sup> See, e.g., Glenn Thrush, *Biden's First Task at Housing Agency: Rebuilding Trump-Depleted Ranks*, N.Y. TIMES (June 18, 2021), <https://www.nytimes.com/2021/06/18/us/politics/biden-housing-agency-trump.html>.

<sup>81</sup> See *Chevron*, 467 U.S. at 865.

<sup>82</sup> *United States v. Mead Corp.*, 533 U.S. 218, 236 (2001).

states in fact did not develop deference doctrines in lockstep with the federal courts in the period when *Chevron* dominated thinking about deference at the federal level. Instead, states have been all over the map, with some reviewing agency decisions de novo and others with various degrees of deference, many of which are different from *Chevron*.<sup>83</sup> This phenomenon is in line with the scholarly judgment that diversity should be the rule, even if the opinions announcing the doctrines did not offer the level of specificity or theoretical justification that motivated academic observers.

In the current moment, however, the rejection of deference has become the dominant perspective in federal administrative law. However strongly an institutional and functional analysis of states commends state departures from the *Chevron* doctrine, it equally suggests that states should consider departure from a rejection of *Chevron* doctrine in favor of less deferential review. The no-lockstepping argument has the same force regardless which way the federal wind is blowing.

This, however, does not appear to be what is happening. States affirming their doctrine of de novo review, and those upsetting deference doctrines in favor of de novo review, seem to be working from Justice Gorsuch's playbook. Moreover, as Daniel Ortner notes,

While only a small number of states have fully rejected deference, many of those that have done so have done so with significant fanfare and a vocal rejection of the notion that the judiciary can delegate the power of judicial interpretation to the executive branch. Even states that have not gone so far as to reject deference have shown increasing skepticism and apply deference in only a narrow and narrowing category of circumstances.<sup>84</sup>

Consider, for example, how the Mississippi Supreme Court justified its decision to abandon the practice of "giving deference to agency interpretations of statutes."<sup>85</sup> It states that it "step[s] fully into the role the [Mississippi] Constitution of 1890 provides for the courts and the courts alone, to interpret statutes."<sup>86</sup> "Interpreting statutes is reserved exclusively for courts,"<sup>87</sup> says that court. The Wisconsin Supreme Court took a similar stance, stating that "only the judiciary may authoritatively interpret and apply the law in cases before our courts. The executive may not intrude on this duty, and the judiciary may not cede it. If our deference doctrine allows either, we must reject it."<sup>88</sup> These courts' explicit authority for these propositions is Justice Gorsuch:

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<sup>83</sup> See *supra* note 35 and accompanying text.

<sup>84</sup> See Ortner, *supra* note 35 (manuscript at 68).

<sup>85</sup> King v. Miss. Mil. Dep't, 245 So. 3d 404, 408 (Miss. 2018).

<sup>86</sup> *Id.*

<sup>87</sup> HWCC-Tunica, Inc. v. Miss. Dep't of Revenue, 296 So. 3d 668, 677 (Miss. 2020); accord, e.g., McCann v. Del. Cnty. Bd. of Elections, 118 N.E.3d 224, 231 (Ohio 2018) (Dewine, J., concurring in the judgment) ("[D]eference is unwarranted [because] it is our job, not the secretary's, to issue final interpretations of the law.").

<sup>88</sup> Tetra Tech EC, Inc. v. Wis. Dep't of Revenue, 914 N.W.2d 21, 45 (Wis. 2018).

Although not writing of Mississippi's constitutional separation of powers, we find persuasive the reasoning of then-Judge Gorsuch who wrote, in a separate opinion concurring with his own majority in *Gutierrez-Brizuela* . . . that, absent judicial deference to administrative agencies' interpretation of statutes, "[C]ourts would then fulfill their duty to exercise their independent judgment about what the law is."<sup>89</sup>

This kind of lockstepping is not necessarily automatic or lazy, although lockstepping often is. The state courts that quote Gorsuch's position on deference are generally clear that they are writing about their own state's, not the country's, separation of powers. However, with respect to the bedrock principle that the role of the judiciary is to say what the law is, they see overwhelming similarity.<sup>90</sup> States, like the nation, have tripartite systems that divide legislative, executive, and judicial functions,<sup>91</sup> and the state judicial branches are the heirs of the *Marbury* principle in lockstep with the federal courts.

Indeed, many of the deference cases recognize that state separation-of-powers doctrine is meaningfully stricter than cognate federal doctrine in insisting upon the separation of functions. This is due in part to "explicit and strict separation of powers provisions"<sup>92</sup> in state constitutions that prohibit one branch from exercising the functions assigned to the others. There are also particular state doctrines, like legislative review of administrative rules, that regulate these relationships.<sup>93</sup> It is also clear that states' separation-of-powers traditions have taken particular and path-dependent routes that do not perfectly parallel those of the federal courts or sister states. But it is an accurate generalization that states are stricter than the nation with respect to separation of powers.

The best studied example of this in the administrative context is that nondelegation doctrines in many states have real teeth. Current federal nondelegation doctrine famously permits extremely broad and vague delegations to agencies,<sup>94</sup> although the current Court—the same Court preparing itself to reverse *Chevron*—has suggested that this doctrine is ripe for

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<sup>89</sup> *King*, 245 So. 3d at 408 (quoting *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1158 (10th Cir. 2016) (Gorsuch, J., concurring)); accord *Tetra Tech*, 914 N.W.2d at 48.

<sup>90</sup> See, e.g., *Tetra Tech*, 914 N.W.2d at 46 ("Wisconsin's separation of powers is a reflection of that found in the United States Constitution . . .").

<sup>91</sup> See Jeffrey Pojanowski, *Statutes in Common Law Courts*, 91 TEX. L. REV. 479, 510 (2013).

<sup>92</sup> *Id.* Several of the recent state cases rejecting judicial deference emphasize this point. E.g., *King*, 245 So. 3d at 407-08.

<sup>93</sup> See Saiger, *supra* note 24, at 574-79.

<sup>94</sup> See *Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019) (collecting and analyzing cases); Cary Coglianese, *Dimensions of Delegation*, 167 U. PA. L. REV. 1849, 1849-50 (2019).

reconsideration.<sup>95</sup> State courts, however, have long required that legislatures be less sweeping, less ambiguous, and more directive in order constitutionally to empower state agencies to act with the force of law.<sup>96</sup>

With respect to deference, however, these differences between state and federal approaches to separation of powers push states to adopt *a fortiori* the argument that deference is incompatible with the vesting of the judicial power in the courts. 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. Likewise, the conclusion that state constitutions demand approaches to nondelegation more robust than those at the federal level just strengthens the case against deference. As Benjamin Silver has argued, state nondelegation doctrines rest in part on the idea, absent in federal constitutional law, that *no* branch may delegate its core functions, including the courts.<sup>97</sup> Moreover, deference and nondelegation are both responses to silence or ambiguity in statutes that empower agencies. Courts craft both doctrines to limit agencies' freedom of action in the face of such silence.<sup>98</sup> Just as their constitutions' particular versions of separation of powers lead states to insist on more robust judicial policing of agencies' freedom of action in cases of legislative silence than what we have federally,<sup>99</sup> so too should those versions lead state courts to be less willing to defer to federal courts.

For these reasons, it makes sense to read state courts' citations of Gorsuch's Article III arguments not as lazy lockstepping but as the careful deployment of authority. That Gorsuch makes his arguments under the federal Constitution makes those arguments particularly convincing with respect to state

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<sup>95</sup> See *Gundy*, 139 S. Ct. at 2131, 2139 (Gorsuch, J., dissenting) (criticizing these cases and noting four votes favoring reversing them—prior to arrival on the Court of Justices Kavanaugh, Barrett, and Jackson).

<sup>96</sup> See Benjamin Silver, *Nondelegation in the States*, 75 VAND. L. REV. 1211, 1216-18 (2022) (“Kentucky courts have consistently affirmed the strength of their nondelegation doctrine.”); Saiger, *supra* note 24, at 568-70; Daniel E. Walters, *Decoding Nondelegation After Gundy: What the Experience in State Courts Tells Us About What to Expect When We’re Expecting*, 71 EMORY L.J. 417, 444-49 & tbl.1 (2022).

<sup>97</sup> Silver calls this the “separation of powers” theory of (state) nondelegation. See Silver, *supra* note 96, at 1227-31.

<sup>98</sup> Justice Gorsuch has made the latter point, stating that the two doctrines are in a “hydraulic” relationship with one another: if one doctrine becomes too weak to allow a court to discipline Congressional or agency overreach, another is strengthened so that overall pressure in the system remains roughly constant. See *Gundy*, 139 S. Ct. at 2141; *cf.* *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1154 (10th Cir. 2016) (Gorsuch, J., concurring) (noting deference can transform what would otherwise be an “intelligible principle” into a mandate for agencies to do as they will).

<sup>99</sup> Another way of saying this is that the sound of (statutory) silence is different in federal and state constitutions. See Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 239.

constitutions. If deference is incompatible with the Article III duty to say what the law is, it is *a fortiori* incompatible with the duties of a state court that must say what the law is *and* may not delegate its functions to other branches.

Much less attention, however, has been paid to another central difference between state courts and federal ones. There are persuasive arguments that state systems, perhaps even more than federal systems, insist that *courts* say what the law is. But it means something very different in state than in the federal court to say what the *law* is. Perhaps the most substantial difference between the federal judicial power and the state judicial power is the difference between a system that forbids judge-made law and a system that relies upon it. State-court judges are common-law judges.

Federal judges rarely decide substantive common law.<sup>100</sup> In the administrative realm, it is well-established that federal judges do make “administrative common law,” notably in cases like *Chevron* that deal with standards of review.<sup>101</sup> But these decisions about administrative law generally are different from substantive holdings in particular policy domains.<sup>102</sup> With respect to domain-specific issues, federal-court decisions announce the meaning of authoritative texts (usually statutes, but also constitutions and rules). Federal judges, when they say what the law is, are nearly always engaged in an act of statutory interpretation.<sup>103</sup> Contemporary resistance to *Chevron*, as we have seen, is a resistance to sharing this function with the agencies.

State judges also interpret texts, but that is not all that they do. They also announce, and therefore decide, what is required by the common law.<sup>104</sup> And regardless of one’s position with respect to the proper jurisprudential status of what common-law judges are doing—whether they merely announce law that

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<sup>100</sup> ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 13 (1997) (“[I]n the federal courts . . . with a qualification so small it does not bear mentioning, there is no such thing as common law.”). For a discussion of the areas where federal courts do make federal common law, see Kevin R. Johnson, *Bridging the Gap: Some Thoughts About Interstitial Lawmaking and the Federal Securities Laws*, 48 WASH. & LEE L. REV. 879, 885-90 (1991). For “interstitial lawmaking” by the federal courts, which falls somewhere between common law and statutory interpretation, and the small domains where federal common law does function, see *id.* at 882.

<sup>101</sup> See Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1298 (2012).

<sup>102</sup> See John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 192 (1998) (describing *Chevron* as “an aggressive fashioning of judge-made law by the Court,” though one that “governs at a higher level of generality”).

<sup>103</sup> See GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 31-32 (1982); SCALIA, *supra* note 100, at 13 (“Every issue of law resolved by a federal judge involves interpretation of text—the text of a regulation, or of a statute, or of the Constitution.”).

<sup>104</sup> See Melvin A. Eisenberg, *The Principles of Legal Reasoning in the Common Law*, in COMMON LAW THEORY 81, 81 (Douglas E. Edlin ed., 2007) (noting it is a “foundational idea that courts should make law concerning private conduct in areas where the legislature has not acted”).

already, in some sense, exists, and is both knowable and binding, or whether they are engaged in lawmaking in a more straightforward sense<sup>105</sup>—it is clear that common-law judgments involve making law in a way that judgments about statutory interpretation do not.<sup>106</sup> Federal courts, in saying what the law is, eschew the possibility that they are announcing common law; state courts embrace it.

Various jurists and scholars have suggested ways in which state judges' dual role as common-law elucidators and statutory interpreters might affect their approach to statutory interpretation generally. They argue that state courts engaging in statutory interpretation are engaged in a different task—one that requires different methods—than their federal counterparts. In 1995, Judge Judith Kaye noted that the power to state the common law makes state courts and state legislatures partners, or interlocutors, in the development of state law.<sup>107</sup> Bruhl and Leib, writing specifically of state judicial deference to state agencies, remind us that locating the power to fill gaps in common-law courts is important not only because it reflects a different understanding of the judicial role than that of the federal system, but because state legislatures legislate with the understanding that “the state judiciary is already assumed to be a policy maker in many statutory domains.”<sup>108</sup> Because the common-law power of state courts is the power to fill statutory gaps, Jeffrey Pojanowski argues, it is acceptable for them to expand the scope of statutes beyond their text and even purpose if doing so is consistent with the common law.<sup>109</sup> Judge Guido Calabresi has argued that “common law courts [could] have the power to treat statutes in precisely the same way that they treat the common law. They can . . . alter a written law . . . in the same way (and with the same reluctance) in which they can modify or abandon a common law doctrine . . . .”<sup>110</sup> Federal courts, without common-law powers, should by contrast eschew such interpretive moves.

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<sup>105</sup> See Frederick Schauer, *The Failure of the Common Law*, 36 ARIZ. ST. L.J. 765, 774-75 (2004).

<sup>106</sup> See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 247 (“There seem to be profound differences between common law and statute law, the fundamental difference being precisely that between a conceptual system on the one hand and a textual system on the other.”).

<sup>107</sup> 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, 21 (1995).

<sup>108</sup> Bruhl & Leib, *supra* note 24, at 1282.

<sup>109</sup> Pojanowski, *supra* note 91, at 497 (“[I]t is not clear how judicial power to expound common law amid statutory silence also entails power to expand or contract legislative handiwork.”); see also Amy Widman, *Interpretive Independence: The Irrelevance of Judicial Selection and Retention Methods to State Statutory Interpretation*, 70 N.Y.U. ANN. SURV. AM. L. 377, 378 (2015) (“A state court is not quite a state legislature’s ‘faithful agent’ as has been the dominant understanding about federal courts in the federal statutory interpretation literature.”).

<sup>110</sup> CALABRESI, *supra* note 103, at 82.

If common-law powers should broaden state courts' approach to their own practice of statutory interpretation, *a fortiori* they complicate state courts' approach to *agencies'* statutory interpretation. The common-law powers of state courts confound many of the most basic separation-of-powers arguments both for judicial deference and for de novo review of agency statutory interpretation. They do this in several important ways.<sup>111</sup>

One is that common-law judicial powers make it untenable to read statutory silence as an implicit delegation to agencies. *Chevron*, of course, depends on this approach. The Congress, *Chevron* says, sometimes "explicitly [leaves] a gap for the agency to fill."<sup>112</sup> By analogy, silence is likewise a delegation, but "implicit rather than explicit."<sup>113</sup> This account is plausible only because the Congress clearly is not delegating, and may not delegate, policymaking power to courts. But common-law powers, because of legislative supremacy, apply *only* in situations where the legislature has been silent or ambiguous.<sup>114</sup> The common-law judge, Justice Benjamin Cardozo reminds us, "legislates only between gaps. He fills the open spaces in the law."<sup>115</sup> Silence in a federal statute might be a delegation to an agency, or it might present an interpretive puzzle or challenge for a court. It is hard not to read silence in a state regulatory statute, by contrast, as a delegation to *someone*: either to an agency or to a common-law court. Neither the implicit delegation idea of *Chevron* nor the Gorsuch principle that judges must assign silent or ambiguous statutes their best reading are sustainable in the context of state courts. The sound of silence is much different in the state code than in the federal one.

That legislative silence limns the scope of courts' power to declare common law undermines, in similar ways, state-level application of Justice Gorsuch's argument against deference on the basis of political accountability. Gorsuch argues that the Constitution does not permit the Congress to punt hard questions of policy to the executive, thus ducking political accountability for unpopular

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<sup>111</sup> This analysis is distinct from, and should not be confused with, analyses of the systems of administrative law in general and judicial review in particular that characterize "common law" as opposed to "civil law" jurisdictions. Those systems are sometimes called "common law" systems of administrative law." See Swati Jhaveri, *What's So Common About "Common Law" Approaches to Judicial Review?*, in JUDICIAL REVIEW OF ADMINISTRATIVE ACTION ACROSS THE COMMON LAW WORLD: ORIGINS AND ADAPTATION 3, 4 (Swati Jhaveri & Michael Ramsden eds., 2021). This phrase does not mean to suggest that administrative law or judicial review in those systems reflects the patterns of reasoning and authority associated with the common law.

<sup>112</sup> *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

<sup>113</sup> *Id.* at 844.

<sup>114</sup> See, e.g., BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 112 (1921).

<sup>115</sup> *Id.* at 113; *accord id.* at 14 (emphasizing that courts address only "gaps to be filled" and "doubts and ambiguities to be cleared").

regulatory decisions.<sup>116</sup> Gorsuch argues that deference is to be rejected in order to force a legislature that wants to legislate to do so itself. But in a common-law system, the common-law courts *by design* declare the law where legislation leaves off. Indeed, that is the essence of the common-law power. This severs the link between refusing to defer and enforcing legislative accountability.

More broadly, state courts' common-law powers are inconsistent with the agency-based logic upon which both *Chevron* and *Chevron's* federal critics rely. The common law insists that state legislatures are supreme, and when they contradict the common law, state courts must accede to their requirements.<sup>117</sup> When state courts interpret statutes, like the federal courts, they are agents of the legislature.<sup>118</sup> But state courts as a general matter are not *merely* agents of the legislatures; they also declare law on their own.<sup>119</sup> When they announce the common law, they are their own masters. Because they can do both, they are partners—junior partners perhaps—in making law.<sup>120</sup> “[C]ommon law powers blur the separation of the legislative and judicial branches in state government as compared to in the federal Constitution.”<sup>121</sup> In such a system, it makes no sense to say, as *Chevron* does, that “[t]he responsibilities for assessing the wisdom of . . . policy choices and resolving the struggle between competing views of the public interest are not judicial ones.”<sup>122</sup> The development of the common law centrally involves making policy choices; all law students learn this in the first week of school.<sup>123</sup> *Chevron's* reasoning is thus exactly wrong in the context of state-court deference.

That common-law judges think about “policy,” in the sense that they are striving to find the best rule in areas where the legislature has not spoken, also creates a commonality between courts and agencies that is not present at the

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<sup>116</sup> See *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting) (“[I]t would frustrate ‘the system of government ordained by the Constitution’ if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals.” (citation omitted)); *id.* at 2135 (“[O]ften enough, legislators will face rational incentives to pass problems to the executive branch.”).

<sup>117</sup> See CALABRESI, *supra* note 103, at 92.

<sup>118</sup> Kaye, *supra* note 107, at 23 (“No one can question the legislature’s authority to correct or redirect a state court’s interpretation of a statute.”).

<sup>119</sup> See *id.* at 20-25.

<sup>120</sup> See *id.* at 23-24 (describing “dialogue” between state courts and legislatures with respect to statutory interpretation inflected by common-law judgment); Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197, 199-200, 242 (1991) (arguing, in American administrative law, courts’ common-law “lawmaking powers” used to operate in tandem with agency policymaking powers, a norm that persisted until its reversal by *Chevron*).

<sup>121</sup> See Pojanowski, *supra* note 91, at 502.

<sup>122</sup> *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984).

<sup>123</sup> See Kaye, *supra* note 107, at 5 (“The common law is . . . lawmaking and policymaking by judges.”).



federal level.<sup>124</sup> Federal courts and federal agencies engage in discrete enterprises. This is a principle to which both pro- and anti-deference forces enthusiastically accede. But agencies and common-law courts, confronting legislative silence, both seek the “wise” policy choice.<sup>125</sup> Judge Calabresi explains that common-law judges

have been taught to honor legislative supremacy and to leave untouched all constitutionally valid statutes, but they have also been trained to think of the law as functional, as responsive to current needs and current majorities, and as abhorring discriminations, special treatments, and inconsistencies . . . . The common law judicial-legislative balance permitted them to honor legislative supremacy and keep the law functional.<sup>126</sup>

Calabresi offered this analysis in 1982, as a description of a “dilemma” facing federal judges who had turned away from viewing themselves as makers of common law, and whose system was characterized by federal statutes multiplying in number and specificity.<sup>127</sup> But state courts never made that turn. They are in a position both to “honor legislative supremacy” and “keep the law functional.”<sup>128</sup>

Pojanowski captures this difference in role by suggesting (though not embracing) a striking and, for our purposes, particularly apt analogy.<sup>129</sup> Common-law courts, he suggests, adjudicate in the sense that *agencies* adjudicate.<sup>130</sup> Agency adjudication demands fairness to all parties, but it is permissible for adjudicative agency decisions to be driven by policy preferences, developed in the context of the case being decided.<sup>131</sup> Indeed, sometimes this is the most desirable modality available for policy development. No federal court would understand its role in this way.<sup>132</sup> For Gorsuch, saying what the law is not

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<sup>124</sup> See Pojanowski, *supra* note 91, at 513 (comparing policymaking ability of state courts and federal agencies).

<sup>125</sup> Compare MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* 33 (1988) (“Consideration of policies is an important element in the courts’ function of enriching the supply of legal rules.”), with *Chevron*, 467 U.S. at 866 (stating that when federal-court challenge “centers on the wisdom of the agency’s policy . . . the challenge must fail”).

<sup>126</sup> See CALABRESI, *supra* note 103, at 6.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> See Pojanowski, *supra* note 91, at 513 (noting a “state legal system, just like a federal agency, has rule making and adjudicative outlets for policy making—the legislature and the courts, respectively” and analogizing “[p]urposive or dynamic interpretation by courts” to “administrative policy making by adjudication”).

<sup>130</sup> See *id.*

<sup>131</sup> See SEC v. *Chenery Corp.* (*Chenery II*), 332 U.S. 194, 200-03 (1947).

<sup>132</sup> See Pojanowski, *supra* note 91, at 519 (noting “federal courts can have delegated authority to ‘make law’ within statutory gaps,” but not “additional prerogative to ‘legislate’ in the absence of statutory coverage”).

only the peculiar role of the judiciary, but its exclusive role. He opposes deference precisely because it introduces policy into judicial decision-making.<sup>133</sup> In this respect, moreover, Gorsuch and *Chevron* are on the same page. *Chevron* itself repeatedly insists that deference is necessary *because* federal courts must eschew policy judgments.<sup>134</sup>

Pojanowski's analogy also runs in the other direction. Common-law courts make policy in the sense that agencies make policy.<sup>135</sup> State courts' and state agencies' twin duties to craft wise policy are much less discrete than the cognate division of roles between federal courts and federal agencies. State courts and agencies alike must "honor legislative supremacy" but must simultaneously strive to "keep the law functional."<sup>136</sup> State courts and agencies seeking good policy alike share the vitally important norm of justification. Both must explain their reasoning,<sup>137</sup> at least for major decisions, and the quality of their reasons is (with only small exceptions) subject to review. And both are often obliged to interpret common-law principles.<sup>138</sup> It is somewhat ironic, but perhaps ultimately sensible, that the same state constitutions that are more rigid than the federal document about the separation of powers<sup>139</sup> also establish systems where the overlaps of those powers are more substantial.<sup>140</sup>

This emphatically does not mean that agencies and courts either define wise policy similarly or seek it in the same ways. All law students learn that the common law is inflected by policy, but this does not mean that common-law judging is coterminous with agency-based policy judgments. To offer any description of what common-law judging is, of course, is to wade into disputed waters.<sup>141</sup> Many see a bright line between common-law judging and

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<sup>133</sup> See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2439 (2019) (Gorsuch, J., concurring in the judgment) ("Unlike Article III judges, executive officials . . . are supposed to . . . have . . . their own policy goals.").

<sup>134</sup> *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 845, 866 (1984).

<sup>135</sup> CARDOZO, *supra* note 114, at 71-73 (stating when "filling the gaps" of legislation, common-law courts seek "what is commonly spoken of as public policy[,] the good of the collective body").

<sup>136</sup> See CALABRESI, *supra* note 103, at 6.

<sup>137</sup> See David Dyzenhaus & Michael Taggart, *Reasoned Decisions and Legal Theory*, in COMMON LAW THEORY, *supra* note 104, at 135, 143-44 (noting this requirement and adding that expectation for administrative bodies to give reasons for their decisions is a relatively new development, dating to mid-twentieth century, in many common-law countries).

<sup>138</sup> See Jeffrey A. Pojanowski, *Reason and Reasonableness in Review of Agency Decisions*, 104 Nw. U. L. REV. 799, 809-10 (2010).

<sup>139</sup> See *supra* note 92 and accompanying text.

<sup>140</sup> See Pojanowski, *supra* note 91, at 524 *cf.* CARDOZO, *supra* note 114, at 113 ("The choice of methods, the appraisal of values, must in the end be guided by like considerations for the [common-law judge] as for the [legislator].").

<sup>141</sup> EISENBERG, *supra* note 125, at 146 ("[C]ommon law rules are not absolutely certain . . .").

policymaking.<sup>142</sup> Others do not.<sup>143</sup> Moreover, these differences are interstate as well as intrastate. Nevertheless, it is clear that the common-law tradition operates under a particular set of norms and constraints.<sup>144</sup> It builds upon precedent.<sup>145</sup> It is incrementalist.<sup>146</sup> It attends to the internal logic and the interplay between various legal doctrines.<sup>147</sup> It considers social norms but tries to eschew raw political preferences or the political imperatives of the fleeting moment.<sup>148</sup> It must strictly avoid favor or partiality.<sup>149</sup> It must depart only rarely

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<sup>142</sup> See KENNETH S. ABRAHAM & G. EDWARD WHITE, *TORT LAW AND THE CONSTRUCTION OF CHANGE: STUDIES IN THE INEVITABILITY OF HISTORY* 8-9 (2022).

<sup>143</sup> See, e.g., Frederick Schauer, *Is the Common Law Law?*, 77 CALIF. L. REV. 455, 456 (1989) (“[I]f rules of law are defeasible in the service of such a wide domain of values, then the job of the courts seems not to be restricted to any discrete normative domain distinguishable from the entire normative universe.”).

<sup>144</sup> See Brian Leiter, *Realism about Precedent*, in *PHILOSOPHICAL FOUNDATIONS OF PRECEDENT* (T. Endicott, H. Kristjansson & S. Lewis eds., forthcoming 2023) (manuscript at 4, 11, 14), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4022400](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4022400) [<https://perma.cc/4PSM-CBR2>] (arguing common-law judging is governed primarily by “inchoate norms,” more so than “more demanding legally obligatory norms”).

<sup>145</sup> See ABRAHAM & WHITE, *supra* note 142, at 8-9; EISENBERG, *supra* note 125, at 50 (“Reasoning from precedent is perhaps the most characteristic mode of reasoning in the common law.”); Schauer, *supra* note 105, at 770; CARDOZO, *supra* note 114, at 19. The nature of common-law reasoning from precedent is, of course, a central preoccupation and locus of dispute for legal philosophers. See, e.g., Leiter, *supra* note 144 (manuscript at 4) (elaborating the realist view that precedent is not a constraint on judicial decision making but that it is a “tool”); accord Emily Sherwin, *Do Precedents Constrain Legal Decision-Making?*, in *PHILOSOPHICAL FOUNDATIONS OF PRECEDENT*, *supra* note 144 (manuscript at 18) (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4076034](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4076034) [<https://perma.cc/XL5A-WHY6>]) (arguing precedent does not “constrain” legal reasoning but does play “vital role” in it).

<sup>146</sup> See Schauer, *supra* note 105, at 770; CALABRESI, *supra* note 103, at 4 (“The changes [in the common law] that did occur tended to be piecemeal and incremental, organic if one wishes . . . .”); CARDOZO, *supra* note 114, at 25, 100 (“This work of modification is gradual.”); ABRAHAM & WHITE, *supra* note 142, at 3 (describing “dominant” model of common law as “a series of judicial decisions, no single one of which accomplishes substantial change,” but noting that some episodes of common-law judging depart from this paradigm).

<sup>147</sup> Michael Sean Quinn, *Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles*, 74 CHI.-KENT L. REV. 655, 658 (1999) (“Sometimes, poets of the common law say that it is a seamless web.”); John Gardner, *Some Types of Law*, in *COMMON LAW THEORY*, *supra* note 104, at 51, 69 (“This is the main way in which case law gradually crystallizes over time, sometimes referred to as its ‘organic’ quality.”); CALABRESI, *supra* note 103, at 6 (noting common-law judges “abho[r] discriminations, special treatments, and inconsistencies”); CARDOZO, *supra* note 114, at 10.

<sup>148</sup> See ABRAHAM & WHITE, *supra* note 142, at 3; EISENBERG, *supra* note 125, at 31 (“The rules made by courts should be durable—generalizable over time as well as over persons—and therefore should not be based on policies that seem transitory.”).

<sup>149</sup> See CARDOZO, *supra* note 114, at 112.

from the well understood but hard to articulate norms of what counts as good judicial reasoning.<sup>150</sup>

Agencies have a different set of constraints.<sup>151</sup> They are designed to channel, but not to reject, political preferences.<sup>152</sup> They are subject to executive authority.<sup>153</sup> They can be avulsive.<sup>154</sup> They feel no particular obligation to respect precedent<sup>155</sup> (although maybe they should).<sup>156</sup> Justice Cardozo writes that common-law judges “are not commissioned to make and unmake rules at pleasure in accordance with changing views of expediency or wisdom.”<sup>157</sup> But this is precisely what agencies do, and what they are supposed to do.<sup>158</sup>

The role of precedent is of particular interest with respect to deference. The always perspicacious Peter Strauss recognized this in his treatment of a very different problem: why federal courts treat their statutory interpretations as precedential.<sup>159</sup> Strauss sees this practice, which is far from universal across legal systems, as the result of the “common law heritage” of the United States.<sup>160</sup> One reason Strauss gives for American courts treating judicial statutory interpretation as precedential is that “statutes in a common law system ordinarily emerge against the backdrop of the common law, as legislators observing

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<sup>150</sup> See *id.* at 43 (noting common-law judges must resort to “semi-intuitive apprehension of the pervading spirit of our law”); *id.* at 103 (stating common-law judges must “keep within those interstitial limits which precedent and custom and the long and silent and almost indefinable practice of other judges through the centuries of the common law have set to judge-made innovations”).

<sup>151</sup> Cf. Cass R. Sunstein, *Is Tobacco a Drug? Administrative Agencies as Common Law Courts*, 47 DUKE L.J. 1013, 1058-61 (1998) (arguing at higher level of generality that federal “agencies have become America’s common law courts” and operate as such, particularly by “adapting” statutes to “new facts and values” in ways that are upheld under *Chevron* Step Two).

<sup>152</sup> *Id.* at 1061-62 (“When compared with common law courts, agencies have . . . a degree of political responsiveness, which is a virtue as well as a potential vice.”).

<sup>153</sup> See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

<sup>154</sup> See Sunstein, *supra* note 151, at 1065. Several canonical administrative law cases establish that agencies can make 180-degree shifts, even repeated ones, in their policies. See, e.g., *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (holding agencies need not provide justification for rescinding prior rules so long as new rule is reasonable); *Epilepsy Found. of Ne. Ohio v. NLRB*, 268 F.3d 1095, 1102 (D.C. Cir. 2001) (noting and permitting repeated changes of mind by agency).

<sup>155</sup> See *Epilepsy Found.*, 268 F.3d at 1102.

<sup>156</sup> See *infra* Part III.

<sup>157</sup> CARDOZO, *supra* note 114, at 68.

<sup>158</sup> *Chevron*, 467 U.S. at 863-64 (“[T]he agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis.”).

<sup>159</sup> See Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225, 243 (1999).

<sup>160</sup> *Id.* at 225, 233-34.

imperfections in the existing state of law attempt to fashion responses.”<sup>161</sup> Making in his own context the point that Bruhl and Leib later made in theirs, Strauss goes on: “it may even be assumed by those who write the legislation, and by the public receiving it, that” reconciling statutes and judge-made law is “work [that] will be done by judges, pursuing ‘the ideal of a unified system of judge-made and statute law woven into a seamless whole by the processes of adjudication.’”<sup>162</sup>

Federal judges, to Strauss’s actual point, continue to think about the precedential value of their statutory interpretations as common-law lawyers would, although “federal judges have given up the idea that there exists a general federal common law.”<sup>163</sup> But “[a]t the state level,” Strauss notes in an aside, one sees the full flowering of the common-law approach.<sup>164</sup> Courts do statutory interpretation, but “the common law largely continues to provide the framework within which statutory work is done.”<sup>165</sup>

Strauss then argues that this approach to statutory work genuinely constrains common-law judges.<sup>166</sup> Again, he proceeds by comparison with the federal courts.<sup>167</sup> If courts’ only inquiry is about what a statute means, a lower court’s interpretation is not terribly relevant to a higher court.<sup>168</sup> The higher court reviews the lower court *de novo*.<sup>169</sup> That, according to Strauss, explains the approach to statutory questions by the United States Supreme Court.<sup>170</sup> But Strauss then asks us to consider the very “different . . . approach that would be taken by a common law court in viewing a question open for its decision at its level, but which had been the subject of a uniform trend at the lower court level.”<sup>171</sup> In that context, common-law courts “would” (or perhaps, should) “feel under a considerable obligation to develop reasons and explanations for its departure from the law as it had been developing” in lower courts.<sup>172</sup> The common-law values of “predictability and stability” would “argue strongly against breasting such a tide” in the lower courts, “even though it would be

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<sup>161</sup> *Id.* at 237.

<sup>162</sup> *Id.* at 238 (quoting Harland Fiske Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 12 (1936)).

<sup>163</sup> *Id.* at 239.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 243.

<sup>167</sup> *Id.* at 246.

<sup>168</sup> *Id.* at 246 (“If the Court believes that the only issue for it to decide is what the statute meant as of its enactment, the intervening developments in the lower courts will be irrelevant, and the Court may quite easily reach a different conclusion.”). For more recent examples, see Metzger, *supra* note 12, at 19-20.

<sup>169</sup> See Strauss, *supra* note 159, at 246.

<sup>170</sup> See *id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 247.

within the formal power of the court to do so.”<sup>173</sup> This sounds remarkably like an argument for deference—not *Chevron* deference in its particulars, to be sure, but not *de novo* review either.

Moreover, the respect for lower-court precedent might extend to agencies. In the federal courts, the exception to the pattern Strauss describes, where higher federal courts feel no particular inclination to defer to the statutory interpretations of lower courts, are *Chevron* cases.<sup>174</sup> There and only there, the interpretation of the cognate institution of the lower court, the agency, constrains the federal court.<sup>175</sup> In state courts, however, it makes sense to think about lower common-law courts and agencies as being similarly situated.<sup>176</sup> The task of state courts is to develop a coherent law out of both statutes and common-law principles, and doing so requires respect and genuine deference to trends in the system, even at lower levels.<sup>177</sup> There is every reason in this context to treat both lower state courts’ and state agencies’ interpretations of statutes as the relevant “lower level.” Agencies, like common-law courts, “apply incompletely specified legal doctrines to new contexts” and “supply new understandings of those doctrines.”<sup>178</sup> Their work is part of the evolving, predictable, and stable system and therefore deserves real respect and even deference, even though they are not binding on the higher court, just as the work of lower courts does. It is hard to see justifications for treating agencies but not lower courts as entirely different in kind. Indeed, it is precisely this approach to agency work that informs those state courts that extend deference only to agency interpretations that are “longstanding and continuous.”<sup>179</sup>

The recognition that state courts and state agencies are engaged in cognate, not discrete, tasks should shape state deference regimes more broadly. Both state courts and state agencies accept that any decisions they make must conform to relevant statutes. Both recognize that when statutes give them the scope to make discretionary choices, it is their duty to craft rules that both give meaning to the statute and manifest a “wise” policy. Both accept that in discharging that duty, their institutional roles require them to conform to particular norms. The two systems of seeking wisdom diverge only as to the substance of those norms. The task of the common-law court reviewing an agency’s discretionary

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<sup>173</sup> *Id.*

<sup>174</sup> See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984); Strauss, *supra* note 159, at 246 (explaining lower courts’ opinions “have no formal authority over the opinion of the Supreme Court”).

<sup>175</sup> *Chevron*, 467 U.S. at 843.

<sup>176</sup> *Cf.* Sunstein, *supra* note 151, at 1019 (arguing federal agencies are like common-law courts in federal system).

<sup>177</sup> *Cf.* CARDOZO, *supra* note 114, at 10 (listing consideration of “logical consistency [and] the symmetry of the legal structure” as goals of common-law system).

<sup>178</sup> Sunstein, *supra* note 151, at 1059.

<sup>179</sup> See Ortner, *supra* note 35 (manuscript at 40) (quoting *Marathon Oil Co. v. State, Dep’t of Nat. Res.*, 254 P.3d 1078, 1082 (Alaska 2011)).

interpretations of a statute is to reconcile its own norms in such circumstances—norms that center incrementalism, coherence, precedent, and neutrality with respect to political disputes between parties<sup>180</sup>—with the results-oriented, overtly political, non-neutral, and evidence-based norms that the agency brings to the same task.<sup>181</sup>

Focusing on the common law also helps blunt, in the state context, another important feature of Justice Gorsuch’s case against *Chevron*. Underneath Justice Gorsuch’s insistence that courts must interpret statutes de novo, lest they fail to say what the law is, is the perception that deference insults the dignity of federal judges.<sup>182</sup> One gets the sense that the strength of Gorsuch’s opposition to deference is that it makes federal courts not just partners but *junior* partners to agencies in the task of saying what the law is.<sup>183</sup> The common-law powers of state courts mean that this feeling does not track in the state context. Courts with a role as dialogic partners of legislatures, and as policymakers in their own right, can defer to agencies without either feeling subservient or ceding so much power as to damage their core function and centrality.<sup>184</sup> This difference should make lockstepping less attractive.

To repeat, it is not that the common-law powers of state courts make deference *more* appropriate at the state than at the federal level.<sup>185</sup> Rather, that power makes the analysis of separation of powers with respect to deference fundamentally different in the federal and state systems. Both supporters of *Chevron* at the federal level and critics who would replace it with de novo review should be quite reluctant to import those arguments into the state context. What 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.

There is another important respect in which saying what the law is is very different in state as opposed to federal court. That difference is that “[t]he supremacy of federal law means that valid federal law overrides otherwise valid state law in cases of conflict between the two.”<sup>186</sup> State courts are not the last word on what the law is; they can be trumped by the Congress, by the federal

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<sup>180</sup> See *supra* notes 144-50 and accompanying text.

<sup>181</sup> See *supra* notes 151-58 and accompanying text.

<sup>182</sup> See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring) (“[W]here in all this does a court *interpret* the law and say what it *is*? When does a court independently decide what the statute means and whether it has or has not vested a legal right in a person? Where *Chevron* applies that job seems to have gone extinct.”).

<sup>183</sup> See *id.* at 1158.

<sup>184</sup> See EISENBERG, *supra* note 125, at 147 (arguing court “may act like a legislature and with a legislature’s discretion”).

<sup>185</sup> See *supra* notes 39-40 and accompanying text.

<sup>186</sup> Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 770 (1994).

courts, and by federal regulation born in agencies.<sup>187</sup> Federal supremacy also has vital consequences for state judicial deference. The next Part considers how.

## II. ADMINISTRATIVE FEDERALISM: DEFERENCE, PREEMPTION, AND NEGOTIATION

Deference doctrines have important effects for the ways in which federal agencies interact with state law, a topic that is often referred to as “administrative federalism.”<sup>188</sup> In particular, deference doctrines shape how federal and state agencies negotiate with one another to enact and to implement regulatory initiatives and programs in which both play a part.<sup>189</sup> The approach that federal courts take in reviewing national agencies’ interpretive decisions shapes both those agency decisions and the attitudes that federal agencies take towards their state partners. Likewise, state agencies subject to a doctrine of state-court deference must operate under the shadow of that doctrine when they interact with their national-level partners. The question for state courts is how to shape their deference doctrines to maximize the effectiveness of state participation in the systems of administrative federalism—and how they should understand what it means for state participation to be effective.

Deference rules, as we have seen, are separation-of-powers rules. They allocate institutional power to engage in authoritative statutory interpretation among agencies and the courts.<sup>190</sup> Thinking in terms of federalism, it seems clear that in developing such rules, state agencies would like to maximize the power they have to shape federal relationships in order to achieve their policy goals. Deference regimes, they hope, will help them to do that. For federal courts, the matter is a bit more complicated. As a constituent part of the national government, federal courts plausibly might echo a national agenda, looking to develop doctrine that maximizes federal regulatory effectiveness.<sup>191</sup> But federal courts’ duty to the entirety of the constitutional system also casts them as protectors of state prerogatives in the federal system.<sup>192</sup> With respect to federal-court deference to agencies, the administrative-federalism question has therefore

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<sup>187</sup> *See id.*

<sup>188</sup> *See* Katherine Shaw, *State Administrative Constitutionalism*, 69 *ARK. L. REV.* 527, 530-31 (2016); Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 *VA. L. REV.* 953, 980-81 (2014) [hereinafter Seifter, *States as Interest Groups*]; David S. Rubenstein, *Administrative Federalism as Separation of Powers*, 72 *WASH. & LEE L. REV.* 171, 174 (2015).

<sup>189</sup> *See* Jim Rossi, *Dual Constitutions and Constitutional Duels: Separation of Powers and State Implementation of Federally Inspired Regulatory Programs and Standards*, 46 *WM. & MARY L. REV.* 1343, 1345-46 (2005); Erin Ryan, *Negotiating Federalism*, 52 *B.C. L. REV.* 1, 7-8 (2011).

<sup>190</sup> *See* Gersen, *supra* note 99, at 203.

<sup>191</sup> *See* Barry Friedman, *Valuing Federalism*, 82 *MINN. L. REV.* 317, 324 (1997) (“[I]t is little surprise that . . . [federal] judges usually find in favor of national authority.”).

<sup>192</sup> *See id.* at 360-64 & n.188.



been how to allocate authority to interpret federal statutes in ways that honor the constraints on power that federalism demands.

In one important respect, the federalist dimensions of deference at the state level are cognate. Just as at the federal level, deference doctrine at the state level likewise allocates power to interpret statutes authoritatively between state courts and state agencies. State agencies' primary goal is their sovereign government's regulatory effectiveness, and will prefer deference doctrines that maximize that effectiveness.<sup>193</sup> State courts, a constituent branch of that sovereign government, share that goal.<sup>194</sup> But, no less than at the federal level, state courts also have a duty to the United States Constitution and its federal mechanisms.<sup>195</sup> No less than at the federal level, therefore, state courts must ensure that their deference doctrine also respects the federal system, even if that means limiting state agency prerogatives.

The problems that deference seeks to address are at their most complex under regulatory regimes in which both federal and state agencies cooperate or interact.<sup>196</sup> In participating in whatever relationship they have, each player has its own goals.<sup>197</sup> A paramount need for each is to respect the limitations created by its own law; and its fealty to that law is policed by its own courts. Although these needs are analogous, however, they are not reciprocal. Administrative federalism is a relationship among sovereigns, but states and the federal government are not equal sovereigns. In federal regulatory regimes that give state agencies a role, the state agencies are emphatically junior partners.<sup>198</sup> This is true for several reasons. The most important and straightforward is the principle that federal law is supreme and trumps inconsistent state law.<sup>199</sup> The

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<sup>193</sup> See Ann Woolhandler & Michael G. Collins, *Judicial Federalism and the Administrative States*, 87 CALIF. L. REV. 613, 619-20 (1999) (noting historical concerns in the United States Supreme Court that "state courts reviewing state agencies [do so] as 'working partners' with the agencies in formulating state policy" (footnote omitted) (quoting *Burford v. Sun Oil Co.*, 319 U.S. 315, 326 (1943))).

<sup>194</sup> See *id.*

<sup>195</sup> See Michael E. Solimine, *The Future of Parity*, 46 WM. & MARY L. REV. 1457, 1462-65 (2005).

<sup>196</sup> See Jessica Bulman-Pozen, *Administrative States: Beyond Presidential Administration*, 98 TEX. L. REV. 265, 299-300 (2019) (arguing state and federal agencies "regulate largely overlapping policy domains," and that states provide federal government "policymaking capacity beyond that available in federal agencies to carry out their agendas"); *id.* at 301-04 (giving examples of state and federal agencies regulating jointly in various policy domains); Rossi, *supra* note 189, at 1345 ("Congress and federal regulators routinely look to state and local governments to implement federal programs and regulatory goals.").

<sup>197</sup> See Bulman-Pozen, *supra* note 196, at 308.

<sup>198</sup> See *id.*

<sup>199</sup> See Rossi, *supra* note 189, at 1347. The states, of course, can and do shape the content of federal law by lobbying and other political means. See Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595, 1636-37 (2014). Huq notes the related

federal government is also richer, bigger, and more politically salient than that of any state. And the relationship between federal agencies and the states is many-one.<sup>200</sup>

Federal agencies arrive at their interpretations through a process internal to the federal government. Regardless whether federal courts defer to those interpretations, agencies can adopt whatever interpretations they believe further their policy goals so long as they hew to the constraints of law.<sup>201</sup> But state agencies are constrained in their policymaking by someone else's law.<sup>202</sup> Federal agencies are the "primary deciders of where to draw lines between federal and state authority."<sup>203</sup> States can influence, but not necessarily make, those decisions.<sup>204</sup>

Deference therefore looks very different from the state side than from the federal side. This is particularly true of the deference issue that preoccupies the administrative-federalism literature from the national side: whether a federal agency's conclusion that a federal statute preempts state law should receive *Chevron* or similar deference.<sup>205</sup>

The debate over deference and preemption in federal administrative law has been laid out in some detail. The concern is that a federal agency, more powerful than its state counterparts, might interpret federal statutes capaciously in order to arrogate power to itself at states' expense.<sup>206</sup> Put differently, federal agencies can deploy the supremacy of federal law to limit state sovereignty.<sup>207</sup> *Chevron* deference to such capacious interpretation encourages agencies to engage in it,

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point that "[f]ederal laws, even when preemptive in general effect, sometimes assign property interests to states allowing vetoes of federal regulatory efforts." *Id.*

<sup>200</sup> See Bulman-Pozen, *supra* note 196, at 312 ("The state role is necessarily multivalent.").

<sup>201</sup> See Aaron Saiger, *Agencies' Obligation to Interpret the Statute*, 69 VAND. L. REV. 1231, 1235 & nn.14-17 (2016).

<sup>202</sup> See Rubenstein, *supra* note 188, at 198.

<sup>203</sup> *Id.* at 197.

<sup>204</sup> See Miriam Seifter, *States, Agencies, and Legitimacy*, 67 VAND. L. REV. 443, 446 (2014) [hereinafter Seifter, *States, Agencies, and Legitimacy*] (describing states' role in determining substance of federal regulation as "influential").

<sup>205</sup> See Gregory M. Dickinson, *Calibrating Chevron for Preemption*, 63 ADMIN. L. REV. 667, 678-79 (2011) ("As . . . agencies have become responsible for administering a substantial number of statutes that raise preemption issues, courts have been forced to wrestle with a particularly vexing conflict between the *Chevron* doctrine . . . and the presumption against preemption . . .").

<sup>206</sup> See Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2075-79 (2008).

<sup>207</sup> See *id.* But cf. Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953, 1024 (2016) ("The federal executive may seek to preserve state governance as well as to displace it, and this provides an opportunity for state-federal interaction to follow from state initiative.").

permitting it to agencies in all situations where the capacious interpretation is also reasonable.<sup>208</sup>

The reasons to defend federal deference in preemption cases track the justifications for judicial deference in general. There are arguments based upon agency expertise, legislative intent, comparative institutional advantage, and judicial modesty. The administrative federalism literature, however, suggests countervailing considerations. Not only do the federal courts lack the power motivations and the specific policy agendas of agencies, but they are typically imagined to have more general constitutional commitments. Federal judges who have no stake in the proper levels of environmental protection do, we often imagine, feel a stake in protecting the proper balance of state and federal power. This commitment finds specific expression when the federal courts interpret statutes in light of interpretive canons that discourage preemption in order to protect federalism. If the federal courts review federalism-affecting interpretations without deference (or with lesser deference, or with federalism in mind at *Chevron* Step One), the values of federalism might be better protected.<sup>209</sup>

Authoritative state-law interpretation enters the preemption debate in a different posture. There is no presumption against preemption or “federalism canon” for state statutory interpretation, and there is no duty or even tendency to ensure that interpretations of state law respect the proper scope of federal power.<sup>210</sup> From the point of view of state courts, federal power, given the supremacy clause, can take care of itself. Rather, state statutory interpretation mostly determines, in light of a past or expected federal interpretation of a federal law, whether and what aspects of a given state statute will be preempted. One important goal for state courts when they determine whether and how to defer to state agency interpretations is to protect state law from unwarranted federal preemption.

The structure of federalism seems to push state courts to defer to, or otherwise respect, state agency interpretations more than they otherwise would. State agencies have expertise and flexibility that gives them comparative advantage

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<sup>208</sup> See Scott A. Keller, *How Courts Can Protect State Autonomy from Federal Administrative Encroachment*, 82 S. CAL. L. REV. 45, 61 (2008) (noting *Chevron* “has the potential to exacerbate the underenforcement of federalism by making it even easier for agencies to alter the federal-state balance of power. An agency can supersede state law in an area of traditional state regulation by simply giving a broad—yet reasonable—interpretation to an ambiguous statutory term [and] . . . receive deference” (footnote omitted)); Metzger, *supra* note 206, at 2026–27 (“[P]reemption determinations are understood as turning on questions of statutory interpretation rather than constitutional law.”).

<sup>209</sup> See Keller, *supra* note 208, at 85 (discussing Justice Frankfurter’s influential advocacy “for statutory construction to protect the federal-state balance”).

<sup>210</sup> See *id.* at 73; Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 553–54 (2011).

relative to state courts when determining how a potentially preempting federal statute or regulation interacts with state law.

The claim that agency expertise is a reason for deference is not new. It is central to *Chevron* itself.<sup>211</sup> With respect to preemption, the complexity of the web of regulatory relationships between federal and state statutes will often make expertise even more important. If a state agency's own organic statute might be preempted or preempted in part by a federal statute as understood by a federal agency, the state agency, rather than state judges, is best placed to understand both the legal and policy consequences of one plausible interpretation versus another. Indeed, state agencies are best situated to understand how various potential paths for developing state common law might trigger or duck various preemption problems. The ability to spot these issues is particularly sensitive to expertise insofar as federal and state statutes in a particular policy area intersect and interlock in complex ways.<sup>212</sup> Federal statutes, because of their preemptive effect, often provide scaffolding and context for state regimes. Courts less familiar with the details of both regimes and their interactions could easily interpret state statutes contrary to their intent, structure, and even text. And they could easily introduce common-law reasoning that will, in the end, fall before federal supremacy.

Flexibility is especially vital for state agencies because they are locked into relationships with federal agencies which themselves are flexible. Federal decisions about preemption, to the extent that they receive any deference, are subject to change as agencies change.<sup>213</sup> Even preemptive interpretations that have survived (deferential) judicial review can be changed at the agency level.<sup>214</sup> State agencies are reasonably well-placed to react to such changes by adjusting their own interpretations of state law. State courts reviewing agency interpretation de novo, however, are poorly placed to do so. Once the state court says what "the law is," change is impossible for state agencies, and unlikely to come in a timely or regular fashion from courts reconsidering their judgments or legislatures rewriting statutes. State-court interpretations of state law are sticky. If state courts proceed with deference, however, then under *Brand X*-type rules, state agencies are more similarly situated to federal agencies, and each can adjust symmetrically to shifting postures from the other.

This flexibility has limits. Most important, the federal doctrine that *Chevron* applies only to agencies interpreting their own organic statutes—but not to

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<sup>211</sup> *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) ("In these cases the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies." (footnotes omitted)).

<sup>212</sup> See Seifter, *States, Agencies, and Legitimacy*, *supra* note 204, at 456.

<sup>213</sup> See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 996 (2005).

<sup>214</sup> See *id.* at 1003.

agency interpretations of other statutes, including organic statutes of other agencies—must have a state-court analogue. The justifications for *Chevron*-style deference or any other form of deference or respect—whether based upon implicit delegation, agency expertise, political accountability, or state-specific views of the judicial power—simply cannot justify judicial deference to agencies outside of their own organizing statutes. This is as true in the state as in the federal context. But preemption claims sometimes are about statutes other than an agency’s organic statute. A state agency would gain negotiating power if it could credibly signal that its interpretations of such statute would also receive deference. But this limitation is not a reason for arrogating the role of saying what state law means *in general* to a state agency delegated by the state constitution or by statute to regulate a particular policy area.

The flexibility state agencies gain from enjoying deference as they seek to adjust to potentially changing federal interpretations regarding preemption is just one aspect of a more general point. State and federal agencies regulate together in various policy spaces under a wide range of arrangements. Preemption, where federal authority displaces that of the state, is only one of these. In any given area, federal and state agencies may have overlapping, inconsistent, and/or collaborative authority.<sup>215</sup> State agencies may be expected to implement federal programs, informally or with formal roles as grantees or as agents.<sup>216</sup> State agencies may carry out their own program in parallel with a federal program in the same area, seeking sometimes to enhance and sometimes to thwart state goals.<sup>217</sup> State and federal agencies (and legislatures) may take turns addressing a particular issue, “much like runners on a relay team passing a baton,” with each turn responding to the prior move and in the shadow of possible future moves.<sup>218</sup> The Congress designs some regulatory regimes purposefully to demand collaboration<sup>219</sup> or competition between federal and state authorities.<sup>220</sup> State agencies may seek assistance from their federal counterparts, or vice versa.<sup>221</sup> Further, states seek to shape federal agencies’

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<sup>215</sup> See Sarah E. Light, *Advisory Nonpreemption*, 95 WASH. U.L. REV. 327, 360-61 (2017); Dave Owen, *The Negotiable Implementation of Environmental Law*, 75 STAN. L. REV. (forthcoming 2022) (manuscript at 33-34), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4044849](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4044849) [<https://perma.cc/Q2U6-ZEVP>].

<sup>216</sup> See Gluck, *supra* note 210, at 538 (noting “various ways in which Congress uses state implementers to entrench new national programs”); Light, *supra* note 215, at 342-43; Owen, *supra* note 215 (manuscript at 10) (discussing “decentralized, state-based implementation” of ambitious environmental law initiatives); Ryan, *supra* note 189, at 76-77.

<sup>217</sup> See Gluck, *supra* note 210, at 571.

<sup>218</sup> Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 170 (2006); see also Huq, *supra* note 199, at 1671.

<sup>219</sup> See Light, *supra* note 215, at 341-42; Owen, *supra* note 215 (manuscript at 26).

<sup>220</sup> See Rubenstein, *supra* note 188, at 205.

<sup>221</sup> See Light, *supra* note 215, at 347-49.

policies and interpretations directly.<sup>222</sup> They can comment, either using the procedures available to all under the Administrative Procedure Act<sup>223</sup> or by using by what Miriam Seifter has called their “privileged . . . access to the federal regulatory process.”<sup>224</sup> States also push federal agencies by lobbying, by appealing to their own power base,<sup>225</sup> and by seeking to utilize Congressional oversight of agencies to their advantage.<sup>226</sup>

What these arrangements all have in common is that they require, always as a practical matter and sometimes as a formal requirement, *negotiation* between state and federal agency. Because of federal supremacy, state agencies are not equal parties in such negotiations.<sup>227</sup> But partners are no less necessary for being junior. Inequality of bargaining power is different than lack of bargaining power.<sup>228</sup> In particular, both parties have power in an asymmetric bargaining situation where any resulting agreements must be maintained over time and there is bilateral monopoly. Federal agencies need or want state agencies to do particular things, or to abstain from them, in order to implement their programs and reach their goals. The Supremacy Clause notwithstanding, the anticommandeering principle<sup>229</sup> and the sheer practicality of some policy problems makes it impossible for the federal agencies to live without state cooperation.<sup>230</sup> Likewise, as Erin Ryan notes, notwithstanding federal

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<sup>222</sup> See Jessica Bulman-Pozen, *Federalism as a Safeguard of Separation of Powers*, 112 COLUM. L. REV. 459, 486 (2012) (claiming state agencies can “diverg[e], curb[], and goad[]” their federal counterparts).

<sup>223</sup> See 5 U.S.C. § 553(b); Seifter, *States as Interest Groups*, *supra* note 188, at 977-78.

<sup>224</sup> Seifter, *States, Agencies, and Legitimacy*, *supra* note 204, at 461; *see also* Seifter, *States as Interest Groups*, *supra* note 188, at 971-77.

<sup>225</sup> See Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1271 (2009).

<sup>226</sup> *Cf.* Bulman-Pozen, *supra* note 196, at 305-07 (cataloging cognate toolbox federal agencies can use to influence state agency policy).

<sup>227</sup> See Bulman-Pozen & Gerken, *supra* note 225, at 1268 (“The servant’s power to decide is interstitial and contingent on the national government’s choice not to eliminate it. The servant thus enjoys microspheres of autonomy, embedded within a federal system and subject to expansion or contraction by a dominant master.”); Bulman-Pozen, *supra* note 207, at 1021; Ryan, *supra* note 189, at 78.

<sup>228</sup> See Bulman-Pozen & Gerken, *supra* note 225, at 1266-67; Huq, *supra* note 199, at 1640-41.

<sup>229</sup> See Matthew D. Adler, *State Sovereignty and the Anti-Commandeering Cases*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 158, 159 (2001) (describing the doctrine and calling the cases representative of a “shibboleth” in Supreme Court jurisprudence that “in our constitutional system the state governments, and not merely the national government, are sovereigns” in a stronger sense than guaranteeing “the sheer existence of states”).

<sup>230</sup> See Gluck, *supra* note 210, at 571 (“Because federal legislation designed with a preference for state implementation generally is either entirely voluntary or includes a state ‘opt out,’ there is an important component of local deliberation built directly into

supremacy (and funding) states often have “generally superior capacity for enforcement, implementation, and innovation.”<sup>231</sup> All this means that state agencies can extract commitments and compromises from federal agencies, not just the converse.<sup>232</sup>

State law, and claims about state law, can play an important role in such bargaining. If state law forbids agencies to engage in particular conduct, neither a federal claim of preemption nor an offer of offsetting benefits can induce a state agency to agree so to conduct itself. Especially under a noncommandeering principle, state actors legally barred from doing a thing *cannot* do that thing. *Claims* about state-law obstacles to participation in a joint regulatory effort therefore become particularly potent (though dangerous for both sides). If an agency can credibly represent that it believes itself to be legally barred by state law from engaging in some conduct under a federal program, many options are then foreclosed (again for both sides). In a negotiation, formal or informal, states’ counterparties must therefore anticipate the possibility that a state might make such a credible representation.

Being the beneficiary of judicial deference confers credibility, and therefore power, upon state agencies negotiating with their federal counterparts.<sup>233</sup> State agencies that can expect judicial deference negotiate more like principals than agents, gaining credibility.<sup>234</sup> Even in a posture of deference, of course, there is always the possibility that a state court will authoritatively overrule some state agency interpretation (and foreclose it for the future). Moreover, there is a possibility that state legislators will change the state legal framework. But the likelihood of judicial override is much reduced when state courts employ a policy of deference. A federal counterparty can therefore expect a state agency that benefits from deference to fulfill its commitments and follow through on its threats.

That deference empowers state agencies as negotiators by enhancing the credibility of their interpretive choices, both announced and possible, is particularly true under the current *Chevron* regime where *federal* agencies are empowered by deference. Just as state agencies are disadvantaged by a *Brand X* rule if their state courts do not adhere to a corresponding principle, state agencies

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implementation.”); Huq, *supra* note 199, at 1641 (noting for some important programs, “the federal government may be unable to achieve national public goods without state officials’ voluntary cooperation”).

<sup>231</sup> Ryan, *supra* note 189, at 79.

<sup>232</sup> See Engel, *supra* note 218, at 170-72 (describing “dynamic interaction[s]” between federal and state environmental authorities that can lead both to “adopt policy positions significantly different from the positions they would have adopted had they been regulating in a vacuum”).

<sup>233</sup> Cf. Woolhandler & Collins, *supra* note 193, at 617 (“[I]f a state’s judiciary typically accords deference to state agency decision making, then federal courts might be cast in an inappropriate appellate posture when reviewing state agency action.”).

<sup>234</sup> See Saiger, *supra* note 201, at 1234 (“By extending deference, a court renders it the ‘province and the duty’ of the agency ‘to say what the law is.’”).

are disadvantaged by federal agencies having deference that state agencies lack. Federal agencies, especially in situations where no *Chevron* exceptions loom as possibilities, can negotiate from a position where they can reliably announce, with relatively high confidence, what federal law means.

It always remains possible that federal courts will reject the legal constructions upon which federal agencies rest their bargaining postures, including, potentially, on federalism grounds. Jonathan Masur makes the broader argument that *Chevron*, as glossed by *Brand X*, makes it more difficult for federal agencies themselves to make credible long-term commitments, because neither agencies nor courts can foreclose future agency changes of position.<sup>235</sup> But Masur's is an observation about agencies' ability to induce long-term reliance within a regulated industry or population.<sup>236</sup> In the regular, short-term, repeat-play negotiations that characterize regulatory enterprises where federal and state agency share authority, there has generally been no court action. In the short term, *Chevron* enhances the credibility of federal agencies by reducing the likelihood that they will be judicially overruled. State judicial deference evens the playing field in this respect, by allowing state agencies to credibly put forward their own interpretations of their own law without being overruled. Of course, these arguments will be mooted should the federal courts abandon deference or cut it back.

State agencies also have to negotiate with one another. Seifter, with other scholars, has demonstrated the central role that organizations of states play in negotiating and delivering policy in cooperation with federal bureaucrats.<sup>237</sup> These organizations, Seifter points out, generally "speak[] with one voice";<sup>238</sup> states therefore must negotiate with *other* states in order to advance their preferred policy positions in these cross-state forums. Just as for federal-state negotiations, judicial deference provides state agencies with flexibility and credibility, and therefore with negotiating power, as they engage in these processes.

A complicating problem is that each state, no less than the nation itself, is not unitary. A state agency might use the interpretive credibility granted by deference to further its own interests, but those interests might diverge from the interests of other state actors, including the state legislature, the state executive(s), and the state courts.<sup>239</sup> As Abbe Gluck notes, "many federalism

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<sup>235</sup> See Jonathan Masur, *Judicial Deference and the Credibility of Agency Commitments*, 60 VAND. L. REV. 1021, 1038-39 (2007).

<sup>236</sup> See *id.* at 1041-42.

<sup>237</sup> See Seifter, *States as Interest Groups*, *supra* note 188, at 961-79; see also Huq, *supra* note 199, at 1671.

<sup>238</sup> Seifter, *States as Interest Groups*, *supra* note 188, at 963 ("The groups' modus operandi in advocacy is to support a unified position—an approach that enhances their lobbying clout.").

<sup>239</sup> See Huq, *supra* note 199, at 1655 (noting unlike individuals, institutions "have a more heterogeneous set of preferences").



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scholars have argued that state and federal specialist agencies share more connections with and loyalties to one another than they do with their particular level of government.<sup>240</sup> Of particular concern to state courts considering alternative approaches to deference is that such loyalties (and policy preferences) might lead state agencies to encourage preemption or adopt unnecessarily restrictive interpretations of state law. Giving federal agencies more power than necessary in a cooperative system would advance a state agency's preferred policies if preferences developed by professionalized state agency staff diverged less from their federal counterparts than from state legislators. In such states of affairs, deference makes much less sense for state courts. Sensitive to federal encroachment on state power but without their own policy agendas, state courts properly determine that "state" interests are better served if state agencies lack the ability to lock in unnecessarily restrictive understandings of state power.

The extent to which this constellation of circumstances prevails is an empirical question, but state courts lack the tools to gather (or even admit) the relevant evidence. Rather, state-court judgments will rest upon their baseline and even unstated knowledge of their states' governmental systems and their politics.

The risk of state agencies aligning with federal agency at the expense of state ones is also relevant to the activity of interstate organizations of state agencies in particular subject areas. These organizations, as noted above, are important players in state-federal regulatory negotiation. State agencies are the constituent members of most such groups, and the groups as such reflect agency preferences.<sup>241</sup> Like their individual constituents, they might be susceptible to agendas that involve constraining, rather than enhancing, state power. Such agendas might be quite uncongenial to interstate agencies such as the National Governors Association or the National Association of State Legislatures, which represent generalist, elected officials.<sup>242</sup> From their perspective, deference to administrative interpretation is not always helpful to states. This concern will be mitigated, but not eliminated, in states with many elected agency officials and in policy areas where many states elect the relevant agency heads. In those cases, both generalist politicians and agency heads are elected by the same polity, and both must be responsive to public preferences.<sup>243</sup> But, of course, a wide variety of factors—election timing regulation, the assignment of the franchise, political salience—means that agencies and generalist officials elected statewide do not have identical political constituencies.

Whether with respect to individual states or state organizations, the concern that deference to state agencies might allow those agencies more effectively to

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<sup>240</sup> Gluck, *supra* note 210, at 570.

<sup>241</sup> See Seifter, *States as Interest Groups*, *supra* note 188, at 968-69; Seifter, *States, Agencies, and Legitimacy*, *supra* note 204, at 457.

<sup>242</sup> See Seifter, *States as Interest Groups*, *supra* note 188, at 956, 968.

<sup>243</sup> See Seifter, *States, Agencies, and Legitimacy*, *supra* note 204, at 458-59.

pursue agendas that limit state power is a somewhat unusual argument against deference. The classic concern of administrative federalism is that federal agencies will interpret statutory authority in ways that increase their own power.<sup>244</sup> Less often does one see concerns about federal agencies insisting their power is narrow rather than simply asserting their policy preferences,<sup>245</sup> although there are reasons to wish that this was seen more frequently.<sup>246</sup> Justice Gorsuch's catalog of objections to deference at the federal level focuses on claims that federal agencies have too much power and generally seek to aggrandize that power; he does not mention that agencies might use deference to limit their own power.<sup>247</sup> But this concern, however fleeting at the federal level, is compelling at the state level because of states' posture as the less powerful negotiating party in a system which, in large part, is characterized by collaborative and picket-fence models.

This Part has suggested reasons both to favor and to worry about state-court deference to state-agency interpretation. On balance, however, these considerations combine strongly to suggest that some form of state judicial deference will enhance states' ability to advance their own interests in the administrative federalism context. This is, of course, not necessarily the exclusive judicial goal, or even a goal at all. Much of the administrative federalism literature asserts that federal courts have a duty not just to maximize the interests of federal actors, but also to make sure that the federal *system* is protected from incursion and functions in a constitutional way. Without denying the (correct) departmentalist position that federal agencies also have a duty, independent of the courts, to ensure that constitutional norms such as federalism are respected, the federal courts do have a particular duty to the federal system as such. State courts and agencies both should embrace the view that they have a parallel duty.<sup>248</sup> In determining whether to defer to state agencies, state courts should privilege the health of the federal system over maximizing state power or state preferences. Given the advantages of the federal partner in regulatory negotiation, however, seeking to strengthen the states within the administrative federal system is likely such a policy.

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<sup>244</sup> See Bulman-Pozen, *supra* note 207, at 1020 (“Current doctrine suggests that the only way federalism may enter the *Chevron* inquiry is to defeat an agency’s claim to deference.”).

<sup>245</sup> See *id.* at 1024.

<sup>246</sup> See Saiger, *supra* note 201, at 1272-75.

<sup>247</sup> See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2439 (2019) (Gorsuch, J., concurring in the judgment); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring) (“[E]xecutives throughout history had sought to exploit ambiguous laws as license for their own prerogative.”).

<sup>248</sup> See Shaw, *supra* note 188, at 538 (noting work of state agencies is important and understudied locus of “rich material for asking what sorts of extra-judicial constitutionalism may occur within the states”).

### III. DESIGN FEATURES OF POTENTIAL STATE “DEFERENCE” DOCTRINES

What would it mean for states to develop doctrines for the judicial review of agency statutory interpretations that are responsive to the particular features of state constitutional law? How could such doctrine productively take into account the institutional differences between separation of powers at the state and federal level—such as judicial election and the plural executive—that are well-discussed in the literature; *and* take into account the common-law status of state judges as makers as well as interpreters of law; *and* take into account that state lawmaking, law declaration, and policymaking must operate in the shadow of federal supremacy? What would it mean for states not necessarily to defer more, or less, than federal courts, or not at all, but to defer *differently*—to break out of the defer-or-de-novo discussion that has been framed by federal concerns rooted in the United States Constitution?

Doctrines like these would govern how state courts should seek to constrain state agencies, and also how they should constrain themselves in that task. In that sense, they would be cognates of *Chevron*. But these doctrines could have different goals than those that animate either *Chevron* or its opponents. Where a key goal of the federal deference regime is to prevent federal courts from disguising their policy preferences as interpretation, the goal in the states might be to force courts to *distinguish* between their policymaking and interpretative roles.

Or states could go in the opposite direction, seeking further to elide the distinction between policymaking and lawmaking, given that agencies and common-law courts are equally in the business of doing both. Where a key goal of the federal deference regime is to recognize agencies’ comparative advantage in defining good policy outcomes, the goal in the states might be to reconcile, or realize synergies from, the regulatory and judicial paths to wise law. Where a key goal of *Chevron* is to give policy free rein so long as it conforms to law, a key goal in the states might be to develop law and policy in tandem.

The appropriate posture for the states, then, is not more deference, or less deference, or no deference at all. It is to define, in a system where positive law is simultaneously developed by legislatures, courts, and agencies, a relationship between these institutions with respect to statutory interpretation. Such a doctrine clearly would and should not be the same in every state. The variety of institutional designs, constitutional traditions, jurisprudential commitments, and reliance interests across the states properly will push them towards a wide range of answers. Likewise, the development of the *Chevron* doctrine at the federal level shows that every deference doctrine raises new problems and concerns, many unanticipated. Any proposal for an approach to deference must therefore be tentative. It is often said that when the Court decided *Chevron* it had no glimmer of the importance the case would take on.<sup>249</sup> In important ways,

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<sup>249</sup> See Thomas W. Merrill, *Justice Stevens and the Chevron Puzzle*, 106 N.W. U.L. REV. 551, 557 (2012) (“[T]here is no evidence from what we know of the Court’s internal

proposals for state deference must share the sketchiness of the initial *Chevron* opinion in 1984. With this in mind, this Part will outline some ways in which states might take the unique posture of state courts and agencies into account in developing new, and more useful, approaches to deference. For convenience, I will dub such a regime *Chevron\**, although I do so reluctantly for fear of the implication that it depends somehow upon federal deference approaches.

One feature of all or nearly all *Chevron\** regimes will surely be a cognate of *Chevron* Step One. If a statute forecloses an agency's reading of that statute, then courts should set aside agency action based on that reading, and should do so with no deference to the agency's views.<sup>250</sup> *Chevron* and its detractors take this position with equal vigor, and the reasons they do so apply fully in the state context. If there is a statute, it is supreme, and neither agency nor court can contravene it. The Step One idea, common across federal and state contexts, is necessitated both by courts' roles as the final arbiter of legality—that they must say what the law is—and by agencies' incentives, less prominent for courts, to arrogate power to themselves.

It is only in cases where there is no clear, unambiguous meaning to the statute—the *Chevron* Step Two cases—where states might take a turn orthogonal to the *Chevron* framework. *Chevron*'s is a framework for judges and developed by judges whose job is statutory interpretation and who have no power to make law. State judges are not those judges. For the same reason, however, state judges uninterested in *Chevron* Step Two should not allow Justice Gorsuch's animadversions in favor of de novo review to suggest that his is the only, or even the among the most desirable, direction that a departure should take. Justice Gorsuch's position shares the same foundation as *Chevron* itself, of courts required to be agnostic regarding policy, apolitical, and whose job is exclusively interpretive.<sup>251</sup> The various proposals to reform the federal *Chevron* doctrine should not define the set of available options for the states, or even limn possible state approaches.

Consider instead a state deference regime that focuses on the common-law powers of the court. *Chevron\** Step One, as noted, will be the same as *Chevron* Step One. But instead of *Chevron* Step Two, which directs courts to defer to any "reasonable" agency interpretation that has survived Step One, *Chevron\** Step

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deliberations that any of the participating Justices viewed *Chevron* as a decision of significance.").

<sup>250</sup> States might depart from the directive in *Chevron* that Step One decisions be made "employing traditional tools of statutory construction." See *Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). As Pojanowski and others have suggested, state courts' toolkits are and should be different from those of federal judges and from those in other states. See Pojanowski, *supra* note 91, at 497. Even if a *Chevron\** approach were to adopt *Chevron*'s footnote nine, its referent would be to the relevant state's own toolkit for statutory construction.

<sup>251</sup> See *Kisor*, 139 S. Ct. at 2439 (2019) ("Unlike Article III judges, executive officials are not, nor are they supposed to be, 'wholly impartial.'" (quoting Archibald Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370, 390 (1947))).

Two might direct courts, when interpretations survive Step One, to decide whether that interpretation is consistent with the common law of the state.<sup>252</sup>

The most immediate objection to this approach is that it is functionally the same as *de novo* review and therefore vacuous as reform. This objection cannot be sustained. As noted, common-law judging does *not* involve state courts simply declaring their policy preferences in any given case. Common-law judges are constrained by an important set of norms. They must heed the organic development of the law, the customs of the community, the needs of justice, and all of the other considerations, some of them admittedly murky, that bind common-law judging.<sup>253</sup> It is not the same for a judge to say that an interpretation is consistent with the common law as for that judge to agree with that interpretation.

*Chevron*\* Step Two would vary among states to the extent that courts of different states understand what the common law is differently from one another. Likewise, a very important feature of *Chevron*\* Step Two regime—an example both of the difference between it and *de novo* review and of the difference between it and *Chevron*—is that it would surely vary in its application across regulated areas.<sup>254</sup> Agencies seeking to regulate life activities that have long been the concern of the common law will find themselves with much less freedom of action than those regulating in fields distant from the common law. Environmental regulation that interferes with the right to use real property,<sup>255</sup> or administrative adjudication that classifies gig workers as employees or independent businesspeople,<sup>256</sup> faces a common-law structure orders of magnitude more involved than regulation of cyberbullying<sup>257</sup> or of cities’

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<sup>252</sup> See Jalen LaRubbio, Note, *Permissible Derogation: The Common Law and Agency Interpretations Under Chevron*, 89 GEO. WASH. L. REV. 1261, 1262 (2021) (noting different positions in courts of appeal regarding whether *federal* courts applying *Chevron* should defer to interpretations “in derogation of the common law”); *id.* at 1273-79 (arguing compatibility of agency action with common law should factor into *Chevron* Step Two reasonableness analysis). Potential state frameworks are, of course, not bound by *Chevron*, and the *Chevron*\* framework proposed here both takes common law into account directly and permits its development on judicial review.

<sup>253</sup> See *supra* notes 145-50 and accompanying text.

<sup>254</sup> See, e.g., Michael Kagan, *Chevron’s Liberty Exception*, 104 IOWA L. REV. 491, 505 (2019) (noting *Chevron*’s “one-size-fits-all” approach).

<sup>255</sup> See, e.g., Alexandra B. Klass, *State Innovation and Preemption: Lessons from State Climate Change Efforts*, 41 LOY. L.A. L. REV. 1653, 1690 (2008) (documenting interaction of state regulatory action and state common law in clean air regulation).

<sup>256</sup> See, e.g., Andrew G. Malik, *Worker Classification and the Gig-Economy*, 69 RUTGERS U. L. REV. 1729, 1733 (2017) (noting whether worker is employee or independent contractor is governed by both state statutory and state common law); *id.* at 1757-58 (noting importance of state agency adjudication in this area).

<sup>257</sup> See Ronen Perry, *Civil Liability for Cyberbullying*, 10 U.C. IRVINE L. REV. 1219, 1226 (2020) (noting limited applicability of common-law tort doctrine to cyberbullying).

provision of internet access to their populations.<sup>258</sup> This sort of distinction, many have argued, would very plausibly be an improvement over the federal *Chevron* approach, in which one size fits all. It is a kind of substantive “tailor[ing] deference to variety”<sup>259</sup> that is foreign to federal-court deference.<sup>260</sup>

Variance over regulated areas is also the way in which a *Chevron*\* regime captures concerns about federalism.<sup>261</sup> Some areas of the common law struggle consistently with preemption and develop in its shadow. Environmental regulation<sup>262</sup> and regulation of independent contractors in the gig economy<sup>263</sup> are again good examples. In other areas, the state is essentially a unitary sovereign, and the common law reflects that as well. Such differences would be reflected in *Chevron*\* Step Two review.

*Chevron*\* Step Two would emphatically not involve a principle that the only common law that could be applied is that which has already been announced or developed before a given case comes before a court.<sup>264</sup> Rather, a state court would be able to, and indeed should have the duty to, seize the opportunity further to develop the common law when an appropriate *Chevron*\* case comes before it. *Chevron*\* Step Two is not an effort to be “fair” to state agencies, but

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<sup>258</sup> Common law is nearly entirely absent from broadband regulation. See Christopher Witteman, *Net Neutrality from the Ground Up*, 55 LOY. L.A. L. REV. 65, 80-84, 94-100 (2022) (providing overview of state action to provide broadband, and federal/state conflicts over broadband policy, that focuses on statutory and regulatory tools and makes no reference to common-law cases). Common law is relevant in defining some takings claims against common carriers. See Daniel A. Lyons, *Virtual Takings: The Coming Fifth Amendment Challenge to Net Neutrality Regulation*, 86 NOTRE DAME L. REV. 65, 105-06 (2011).

<sup>259</sup> *United States v. Mead Corp.*, 533 U.S. 218, 236 (2001).

<sup>260</sup> The cognate discussion at the federal level concerns whether certain agencies operate, de facto or de jure, outside of *Chevron*—even when their own statutes are silent on the matter. This possibility—an instance of “administrative-law exceptionalism”—has been developed primarily with respect to particular agencies. See, e.g., John M. Golden, *Working Without Chevron: The PTO as Prime Mover*, 65 DUKE L.J. 1657, 1673-74 (2016) (discussing patent exceptionalism with respect to *Chevron*); Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1559-63 (2006) (discussing tax exceptionalism with respect to *Chevron*); Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against Chevron Deference in Immigration Adjudication*, 70 DUKE L.J. 1197, 1201 (2021) (“*Chevron*’s core rationale for congressional delegation and judicial deference—agency expertise—is particularly weak in immigration adjudication.”).

<sup>261</sup> See *supra* Part II.

<sup>262</sup> See, e.g., *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 499 (1987) (describing interactions between state regulatory action, state common law, and Environmental Protection Agency regulation regarding discharges into waterbodies on interstate borders).

<sup>263</sup> See V.B. Dubal, *Winning the Battle, Losing the War?: Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy*, 2017 WIS. L. REV. 739, 756-57 (noting interaction between federal and state agencies in gig-economy regulation); Malik, *supra* note 256, at 1732, 1737-38 (noting classification of gig workers depends on federal statutory law, federal common law, state statutory law, and state common law).

<sup>264</sup> See *supra* note 252 and accompanying text.

an effort to find the best path for the development of the law. It seeks to recognize that a living common law, continuously nurtured by common-law judges, is the foundational framework for legal development to which states are committed. *Chevron*\* Step Two would not function like qualified immunity, freezing the law at some point in time. If a court sees in some agency action a misstep inconsistent with the proper development of the common law, given what the common law is and what it could be, it would say so. This approach respects the institution of the common law and its generative potential, the crucial role of judicial review in legitimating and policing agency power—an issue shared with federal deference—and judicial supremacy in saying what the law is.

Is this not a blank check to the courts? Not in a problematic way, or, at least, not in a way that creates problems that we are not used to and that do not arise in other contexts. In terms of pure power, common-law judges operating under *Chevron*\* would have the ability to rule as they wished, and thus to “make law” as they wanted. But this is equally true for common-law judges deciding non-agency, purely common-law cases. The norms of the common law that discipline the use of that power are not absolute. Common-law judges can and perhaps should abandon some subset of them when the justification for doing so is very great. But in the mine run of cases, we see common-law courts routinely declining to abuse their power to do what they think must be done by doing whatever they wish. Common-law judges are disciplined by appellate jurisdiction, by reputation, and by judicial norms. There is no reason to suppose that such discipline would be more or less effective in agency cases.

It should also be recognized that Step One, both under *Chevron* and *Chevron*\*, gives judges the power to do as they wish. This point has been apparent at least since Justice Scalia began to combine his advocacy of *Chevron* with the aggressive use of Step One reasoning.<sup>265</sup> One of the most problematic incentives associated with *Chevron* is for federal judges, lacking common-law powers, to engage in aggressive in statutory interpretation. It is true that “an ‘interpretation only’ perspective keeps [federal] judges out of politics’ way.”<sup>266</sup> However, if judges cannot base their conclusions of law on what they think would be wise, they are more apt to find ways in which to *discover* wisdom, as they understand it, in the statutes they are interpreting.<sup>267</sup> Depending on one’s

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<sup>265</sup> The most famous case exemplifying Justice Scalia’s approach is *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218 (1994). See also Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 67 (2006) (assessing *MCI* in context of *Chevron* Step One).

<sup>266</sup> Strauss, *supra* note 160, at 243.

<sup>267</sup> See Ronald M. Levin, *Mead and the Prospective Exercise of Discretion*, 54 ADMIN. L. REV. 771, 779 (2002) (“[I]n a number of well-known cases, . . . the [Supreme] Court has overridden administrative interpretations by finding ‘clear’ meanings in statutes that it could easily have deemed to be ambiguous at best.”); Strauss, *supra* note 160, at 247 (“Robert Cover argued forcefully that American courts’ turn to formalism in the mid-nineteenth century was

proclivities, one can discern such judicial concerns both in the use of legislative history to “pick out [one’s] friends”<sup>268</sup> and in an astringent but not reliably consistent textualism.<sup>269</sup> Notably, this same incentive would apply to post-*Chevron*, de novo judicial review of federal agency action: if courts were inclined for policy reasons to set aside an agency judgment, they would need cloak those judgments in the wardrobe of interpretation.

State court judges would not need to make such heroic efforts. They could be more straightforward about policymaking, and concomitantly more honest about what counts as good interpretation. Saying what the law is does not require state-court judges to assume an interpreter’s posture. They can supplement their interpretations with their views of policy rather than justify their views of policy as being interpretations. This represents a substantial advantage that *Chevron\** would have over *Chevron*. Given both the plasticity of interpretation and the *Chevron\** Step Two rule that state-court policymaking must adhere to the common-law norms, one might even expect *Chevron\** to constrain state courts more than *Chevron* does federal courts.

Would *Chevron\** Step Two review be *deferential* or *de novo*? This is precisely the wrong question.<sup>270</sup> Common law is bound by precedent.<sup>271</sup> Its understanding of precedent—and of bindingness—offers a state-specific way into the deference problem. Prior cases are not supreme; they can be distinguished and some courts can overrule them. But they get more than a de novo hearing on the merits. Their bindingness is a function of their merits, of their venerability, and of the recognition that the system only works when prior judgments enjoy a healthy respect from current ones. Distinguishing earlier cases is done carefully, with an honest respect for their scope, and those distinctions that are made generally aim for only an incremental impact. Under *Chevron\**, this kind of care would be applied not just to judicial but also to agency precedent, in light of the similar “common-law” work that both state courts and agencies do.<sup>272</sup>

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significantly in reaction to the moral repugnance of slavery, which northern judges found themselves called upon to ratify in the Fugitive Slave Act and other legislative measures of the time.” (citing ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975))).

<sup>268</sup> Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983).

<sup>269</sup> See James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court’s Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483, 487 & n.5 (2013) (collecting citations critical of avowals of textualism at Supreme Court level); Molot, *supra* note 265, at 67.

<sup>270</sup> See *supra* note 15.

<sup>271</sup> See *supra* notes 145-62 and accompanying text.

<sup>272</sup> See *supra* notes 130-38 and accompanying text.



Such an understanding of judicial<sup>273</sup> deference is largely absent at the federal level.<sup>274</sup> It is not *Chevron*'s, and it is not Gorsuch's. Perhaps it is *Skidmore*'s<sup>275</sup>—not *Skidmore* understood to be a euphemism for de novo review nevertheless cloaking itself as “deference,”<sup>276</sup> but as conceptualized by Peter Strauss as “*Skidmore* weight,” a respect for agencies’ exercises of judgment in light of both their interpretive validity and agencies’ institutional role.<sup>277</sup> Such an approach is well-suited to *Chevron*\*. It is not merely proper but perceptive and generative to treat agencies’ legal decisions as similar to, though not identical with, those of lower courts, and to seek a path for the law in which their interpretations, along with prior precedents, the work of lower courts, and work in other jurisdictions, all affect outcomes.<sup>278</sup> This is neither deference nor de novo review. It is a *respect* for agencies—a certain kind of respect that is foreign to contemporary federal administrative law.<sup>279</sup>

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<sup>273</sup> The use of precedential reasoning *within* agencies is commonplace. Agency orders that follow formal adjudicatory proceedings, along with the associated opinions, generally are—and the federal courts have held that they must be—treated as precedential. *See* *Shaw’s Supermarkets, Inc. v. NLRB*, 884 F.2d 34, 36 (1st Cir. 1989) (stating agencies have duty to “clearly set forth” reasons from departing from their own adjudicatory precedents).

<sup>274</sup> Some scholars have suggested that publication rules without “force of law” might still be adjudged to be “binding” in the sense that precedents, rather than statutes, are binding. *See* PETER L. STRAUSS, TODD D. RAKOFF, GILLIAN E. METZGER, DAVID J. BARRON & ANNE JOSEPH O’CONNELL, *GELLHORN AND BYSE’S ADMINISTRATIVE LAW: CASES AND COMMENTS* 375 (12th ed. 2018).

<sup>275</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (“[Agency] interpretations . . . while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”).

<sup>276</sup> *See* Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 *VAND. L. REV.* 1443, 1446 (2005) (“While *Chevron* deference means that an agency, not a court, exercises interpretive control, *Skidmore* deference means just the opposite.”); *cf.* *U.S. v. Mead Corp.*, 533 U.S. 218, 239 (2001) (Scalia, J., dissenting) (referring to “so-called *Skidmore* deference”).

<sup>277</sup> *See* Strauss, *supra* note 45, at 1146 (stating courts evaluate agency “views about statutory meaning” recognizing “not only that agencies have the credibility of their circumstances, but also that they can contribute to an efficient, predictable, and nationally uniform understanding of the law that would be disrupted by the variable results to be expected from a geographically and politically diverse judiciary encountering the hardest (that is to say, the most likely to be litigated) issues with little experience with the overall scheme and its patterns”).

<sup>278</sup> *See* Sunstein, *supra* note 151, at 1019, 1059; *supra* notes 176-78 and accompanying text.

<sup>279</sup> Understanding agency action as creating common law may be witnessing a renewal in federal administrative law under the Court’s newly energized “major questions” doctrine. *See* *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022). That doctrine provides, among other things, for heightened judicial scrutiny when agencies abruptly depart from a regulatory

What to do if a reviewing court finds neither a statute with a contrary clear meaning nor a misstep in the development of the common law? States need not conclude that any interpretation that can survive both *Chevron*\* Step One and *Chevron*\* Step Two must be upheld. Suppose an agency interprets its statute in a way both consistent with the statute itself and with the common law. In that case, it could still face additional review on the model of the reasonableness inquiry of *Chevron* Step Two. For want of a better term, call this final reasonableness review *Chevron*\* Step Three.

States might adopt very different alternatives with respect to what *Chevron*\* Step Three would entail. One would be to embrace the familiar framework of *Chevron* Step Two and conduct a highly deferential reasonableness review. The idea would be that, if there is consistency with both statute and common law, this is a “pure” policy decision where agency discretion is at its apogee. Such an approach recognizes that some version of deference is essential to good agency decision-making,<sup>280</sup> and that the courts should block only unreasonable interpretations of ambiguity.

But state courts might also double down on the common-law approach to agency action. After taking the lead in *Chevron*\* Step Two and determining whether the agency has acted *consistently* with the common law (including whether the common law itself must adjust to prohibit the agency’s action), a state court might then undertake an analysis of whether the agency is setting out a good, new direction for common-law development. Here, the court might consider itself much more dialogic, reasoning jointly with the agency in something like a partnership of equals—or as close as one can get when the court has the last word.<sup>281</sup> Such a court might, for example, strongly defer to

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direction taken in the past. *See, e.g., id.* at 2612 (holding Environmental Protection Agency, having regulated emissions in one way, cannot now reinterpret its authority to allow fundamentally different, “unprecedented” regulatory approach); *Ala. Ass’n of Realtors v. Dep’t of Health and Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam) (stating Centers for Disease Control and Prevention eviction moratorium was unauthorized by Public Health Service Act in part because “[s]ince that provision’s enactment in 1944, no regulation premised on it has even begun to approach the size or scope of the eviction moratorium”); *Nat’l Fed’n of Indep. Bus. v. OSHA*, Nos. 21A244 & 21A247, 142 S. Ct. 661, 665 (2022) (per curiam) (stating Occupational Safety and Health Administration (“OSHA”) cannot lawfully impose COVID-19 vaccination mandates on nearly all workers in part because “a vaccine mandate is strikingly unlike the workplace regulations that OSHA has typically imposed”). The Court’s “major questions” approach to agency interpretation, however, “respects” old agency interpretations only to justify refusing to respect *current* agency interpretations. It freezes the development of any agency “common law” at the end of the first round of regulation under a new statute. The *Chevron*\* proposal, by contrast, analogizes agency interpretation to the continuous, ongoing development of the common law by common-law courts.

<sup>280</sup> *See* Bressman & Stack, *supra* note 15, at 474–77.

<sup>281</sup> On the potential for judicial review to center the potential for dialogue between courts and agencies, see Christopher J. Walker, *Constraining Bureaucracy Beyond Judicial Review*, 150 *DAEDALUS* 155, 160 (2021).

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conclusions reached based on styles of reasoning it considers faithful to the common law while exhibiting more skepticism about interpretations that, though consistent with the common law, are reached through a process foreign to it.

A *Chevron*\* system would create good incentives for agencies and offer a productive way to manage the competing claims of administrative federalism and judicial review. Federal agencies must interpret their organic statutes under the shadow of *Chevron*.<sup>282</sup> When they anticipate judicial review, they cannot simply interpret by their own lights.<sup>283</sup> They must attend to the precedents, methodologies, and other commitments of the federal courts that might lead them to discover a plain meaning in a statute where they themselves do not see one.<sup>284</sup> And they must conform their interpretations to the rule of reasonableness as it is understood by the federal courts.<sup>285</sup> State agencies would likewise need to interpret in light of *Chevron*\* Step One, and in light of *Chevron*\* Step Three's reasonableness review, so that their work would not be set aside for incompatibility with a clear state statute or an unreasonable interpretation of an ambiguous one.

But *Chevron*\* Step Two (and, in its common-law version, *Chevron*\* Step Three) would also require agencies to attend to the common law, and the issues, including the policy issues, that affect state courts in interpreting the common law. This additional constraint on agency freedom of interpretation could well be salutary. It increases the set of considerations agencies might find necessary to consider, including considerations of consistency with broad legal frameworks, incrementalism, and reliance. These are all concerns that agencies' existing political incentives encourage them to ignore. Conversely, this approach also offers agencies a chance to participate in the organic growth of the common law. If their interpretive decisions are plausibly integrated with that growth, reviewing courts committed to *Chevron*\* might in the future give them some of the precedential power that I have suggested that they should enjoy. Reviewing courts might very well be so inclined: agency interpretation sensitive to the common law offers them new voices, different norms, and a sense of urgency regarding the ways that law might develop.

*Chevron*\* also offers state courts and state agencies a partnership that situates both institutions reasonably well to negotiate effectively in the context of administrative federalism. Agencies would need to temper their own goals in making representations about preemption or other aspects of state law not immediately implicated by their particular problem. But when they did so, they would increase the likelihood of success under judicial review and gain credibility that their federal interlocutors (and other states and interstate organizations) could rely upon the interpretations they produce in that context.

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<sup>282</sup> See Saiger, *supra* note 201, at 1247-48.

<sup>283</sup> See *id.*

<sup>284</sup> See *id.*

<sup>285</sup> See *id.*

None of this would transmute state agencies into common-law courts. Nor would it bestow upon them common-law lawmaking authority. They would have every incentive to make decisions that could survive judicial review, but would continue to have strong political and institutional incentives to make wise policies that are not like the common law: policies that respond to immediate needs, policies that respond to political pressures, policies that are avulsive. Under both *Chevron* and *Chevron\**, agencies act in the *shadow* of judicial review. A shadow does not make agencies into courts.

States might also profitably depart from the federal doctrine in developing what might be called *Chevron\** Step Zero, that is, doctrines regarding the set of cases to which a deference regime should apply.<sup>286</sup> They might, for example, take up the banner raised by Kristin Hickman and Aaron Nielson urging courts to “eliminate, or at least reduce, deference to agency adjudications.”<sup>287</sup> Particular attention might be given to licensing. Many states require licensure for individuals who desire to work in a staggeringly wide variety of professions and occupations.<sup>288</sup> The activities of these state licensing boards is the source of much of the discontent on the political right surrounding the administrative state,<sup>289</sup> intensifying the state-level appeal of Justice Gorsuch’s claims of

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<sup>286</sup> See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006); Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 835 (2001).

<sup>287</sup> See Kristin E. Hickman & Aaron L. Nielson, *Narrowing Chevron’s Domain*, 70 DUKE L.J. 931, 938 (2021); see also SUTTON, *supra* note 6, at 230 (suggesting states might “limit[] agencies to policymaking through rulemaking rather than through adjudication”).

<sup>288</sup> See Nick Robinson, *The Multiple Justifications of Occupational Licensing*, 93 WASH. L. REV. 1903, 1912-14 & tbl.1 (2018) (noting ubiquity of occupational licensing and substantial interstate variance in which occupations require licenses).

<sup>289</sup> See, e.g., *Patel v. Tex. Dep’t of Licensing & Regul.*, 469 S.W.3d 69, 126 (Tex. 2015) (Hecht, C.J., dissenting) (summarizing majority opinion striking down statutory requirement that eyebrow threaders be licensed, stating “[t]hreaders deserve to have the yoke of the regulatory state thrown off, the shackles on their free enterprise shattered, in short—although brevity is not the hallmark of some of today’s writings—to stick it to the man”); Maureen K. Ohlhausen, Comm’r, Fed. Trade Comm’n, Opening Keynote Address at George Mason Law Review’s 20th Annual Antitrust Symposium (Feb. 23, 2017), in 24 GEO. MASON L. REV. 1061, 1062-64 (2017) (stating that licensing “inhibits economic liberty,” has justifications that range from “dubious to ridiculous,” and is evidence of rent-seeking by “self-interested active market incumbents” seeking “to prevent competition”); Dick M. Carpenter II, *Bottleneckers: The Origins of Occupational Licensing and What Can Be Done About Its Excesses*, 18 FEDERALIST SOC’Y REV. 14, 18 (2017) (stating under a “presumption of liberty . . . courts and legislators alike should presume that individuals have the right to practice their chosen occupation, free from government interference”); J.D. Tuccille, *Occupational Licensing Hurts the Vulnerable Without Helping the Public*, REASON (Mar. 21, 2022, 8:50 AM), <https://reason.com/2022/03/21/occupational-licensing-hurts-the-vulnerable-without-helping-the-public/> [<http://perma.cc/C2VA-VJG6>] (“[E]vidence continues to grow from multiple sources that occupational licensing acts as a barrier to entry for the most vulnerable people without offering much in the way of benefit to the public.”).

administrative overreach.<sup>290</sup> In federal administrative law, licensing is a species of informal adjudication<sup>291</sup>—and *Chevron* itself, of course, does not require judicial deference to informal adjudications.<sup>292</sup> The outsized importance of licensing at the state level, by contrast, leads state administrative law to treat it in many respects as its own animal.<sup>293</sup> A state might also choose, for example, not to apply *Chevron*\* to rules that regulate state licensing bodies, and instead review them de novo.<sup>294</sup> Bespoke deference or other rules for review could also apply to licenses themselves.

Likewise, as noted above, deference regimes could be tailored to regulatory areas. Some state courts already titrate the extent to which they defer to a given agency based upon the extent of their expertise they believe that agency to possess.<sup>295</sup> The extent of overlap of a regulated area with the state's common law and whether the regulating agency is popularly elected could be factored into those decisions alongside agency expertise.<sup>296</sup> The courts might make that call, but they need not. Legislatures could also include such determinations in organic statutes.

None of this is meant to suggest that all states, or any state, should adopt the version of *Chevron*\* sketched here. Rather, it suggests that state deference doctrines can and should strike out in new directions that are responsive to peculiar and particular ways in which states make law and state courts say what the law is.

#### CONCLUSION

This Article has sought, in a period of ferment with respect to federal deference, to make the case that state courts should double down on their traditional refusal to lockstep in this area. State courts (and legislatures and agencies) should neither endorse nor reject *Chevron*. Instead, they should recognize that saying what the law is is a very different enterprise in state court than in federal court. Deference doctrine should organically incorporate those differences, and take directions that neither *Chevron* nor its critics, working in a very different context, anticipated. State deference should go its own way.

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<sup>290</sup> See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring).

<sup>291</sup> See 5 U.S.C. § 551(5)-(6). The federal regime does include some particular provisions specific to licensing, beyond the ordinary rules for adjudication. See, e.g., § 551(6), (9), (13).

<sup>292</sup> See *Hickman & Nielson*, *supra* note 287, at 937 (“[A]gency interpretations announced through informal adjudication represent a gray area for *Chevron*’s scope.”).

<sup>293</sup> REVISED MODEL STATE ADMIN. PROC. ACT § 419 (NAT’L CONF. OF COMM’RS ON UNIF. STATE L. 2010).

<sup>294</sup> See *id.* § 203 & cmt. (requiring publication of agency methods and rules for license applications, and commenting that licensing procedures were of special concern in drafting of the section).

<sup>295</sup> See *Ortner*, *supra* note 35 (manuscript at 27-29, 45).

<sup>296</sup> See *supra* note 260 and accompanying text.

There are signs, however, that the no-lockstepping pattern is eroding. More and more states are lining up to take a path largely defined by the critique of *Chevron* at the federal level. That critique is being imported into state law without recognizing how much federal deference depends on the particulars of federal lawmaking and judging. A large part of the explanation—and an unfortunate part—appears to be partisanship.<sup>297</sup> The “fierce partisanship” over deference at the national level, write Gregory Elinson and Jonathan Gould, has “trickled down to the states.”<sup>298</sup>

*Chevron* was far from nonpartisan at its birth. Rather, the 1984 decision was seen to have a Republican cast, boosting the progress of President Reagan’s deregulatory revolution. Thomas Merrill writes:

There has occasionally been speculation that *Chevron* was embraced with particular fervor by the newly-appointed Reagan judges on the D.C. Circuit. One can tell a plausible story in support of this surmise. During these years, the D.C. Circuit was closely divided between Republican and Democratic appointees. The Democratic judges were likely somewhat hostile to the deregulatory initiatives of the Reagan Administration, and would seek some way to strike them down. In contrast, the newly-appointed Republican judges (who were gradually growing in number), would be eager to find some way to uphold these initiatives. Perhaps these Republican judges seized upon *Chevron* as the most effective weapon at hand for upholding controversial administrative decisions.<sup>299</sup>

Cass Sunstein thus recognizes a substantial irony when he observes that “[o]nce celebrated by the right and sharply criticized by the left, *Chevron* is now under assault from the right and (for the most part) accepted on the left.”<sup>300</sup> Sunstein goes on: “How has a decision originally celebrated—mostly by the right—for its insistence on judicial humility come to be seen as a kind of abdication or capitulation? From 1984 to the present, what on Earth happened?”<sup>301</sup>

Metzger has argued that American politics are “no stranger” to “sustained resistance” to the reach of the administrative state among politicians and in the political branches.<sup>302</sup> What is new, she says, is the extent to which efforts to constrain agencies are “surfacing in court and being framed in terms of

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<sup>297</sup> *But cf.* Walters, *supra* note 96, at 471 (noting nondelegation doctrine, where lockstepping is rare, “has become a symbolic battle in fights over the future of the administrative state”).

<sup>298</sup> Elinson & Gould, *supra* note 41, at 527.

<sup>299</sup> Merrill, *supra* note 5, at 278-79 (citations omitted).

<sup>300</sup> Sunstein, *supra* note 2, at 1618; *accord* Green, *supra* note 6, at 659; Elinson & Gould, *supra* note 41, at 478.

<sup>301</sup> Sunstein, *supra* note 2, at 1664; *see also* *Pereira v. Sessions*, 138 S. Ct. 2105, 2121 (2018) (Alito, J., dissenting) (describing *Chevron* as “once celebrated, and now increasingly maligned precedent”).

<sup>302</sup> Metzger, *supra* note 12, at 8-9.

constitutional doctrine.”<sup>303</sup> With respect to the states, another thing is new: strong party discipline on the right. The lockstep agendas of the federal and state Republican Party make what Metzger calls “anti-administrativism” in the national Republican Party deeply salient in state politics. Both legislation and court decisions about deference seem to draw sustenance from the national political effort to constrain or even deconstruct the administrative state.<sup>304</sup>

This is how Elinson and Gould, along with others, answer Sunstein when he asks, “what on Earth happened?” They note some states (in fact, two, Arizona and Wisconsin) imposed *de novo* review by legislation.<sup>305</sup> An additional, particularly vivid, and often-cited<sup>306</sup> instance of deference becoming part of the political discourse is the successful 2018 effort in Florida to end deference by popular initiative.<sup>307</sup>

The grassroots dimensions of the Florida initiative may be overstated. Party elites attached an antideference provision to otherwise unconnected initiative proposals to provide a constitutional basis for victims’ rights and alter judicial retirement ages.<sup>308</sup> Those planks, not the ban of deference to agency statutory interpretation, drove the politics of the Florida initiative. Internet searches reveal not a single mention of deference in general-interest local print media leading up to the vote on the initiative.<sup>309</sup> A voter guide that apparently targets the informed general public relegates the deference issue to an afterthought, dealing

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<sup>303</sup> *Id.* at 9.

<sup>304</sup> See Pojanowski, *supra* note 15, at 1091.

<sup>305</sup> See Ortner, *supra* note 35 (manuscript at 18).

<sup>306</sup> See SUTTON, *supra* note 6, at 211 (noting Florida antideference initiative “[c]onfirm[s] the political resonance of [this] issue”); Ortner, *supra* note 35 (manuscript at 19) (“Of all of the states to reject deference in recent years, Florida may be the most significant of them all. . . . [I]t is the only state where the people of the state have directly voted and ratified an amendment that abolished deference. . . . [The] impact this amendment has in Florida will be particularly influential in other states considering abolishing deference.” (footnotes omitted)).

<sup>307</sup> Const. Revision Comm’n, P6001, 2018 Comm’rs, Reg. Sess. (Fla. 2018).

<sup>308</sup> *Id.*

<sup>309</sup> The closest I could come is an editorial recommending a “no” vote on the initiative on the grounds that the publication’s “editorial board is philosophically opposed to the Constitution Revision Commission’s practice of ‘bundling’ unrelated amendments on the ballot. These proposals are vastly different and have far-reaching consequences that voters should be allowed to consider separately.” *How to Vote on 12 Constitutional Amendments on Nov. 6 Ballot: Our View*, TC PALM (Nov. 6, 2018, 7:50 AM), <https://www.tcpalm.com/story/opinion/editorials/2018/10/10/how-vote-12-amendments-floridas-2018-ballot-our-view/1588685002/> [<http://perma.cc/59GN-FFTH>]. The anti-bundling view, but apparently not the merits of deference, triggered a public letter from the Florida Constitutional Revision Commission. See Press Release, Brecht Heuchan, Chairman, Const. Revision Comm’n Style & Drafting Comm., Open Letter from Brecht Heuchan: Grouped CRC Amendments Benefit Voters, Offer Transformational Ideas (May 1, 2018), <http://library.law.fsu.edu/Digital-Collections/CRC/CRC-2018/Media/PressRelease/Show/1100.html> [<http://perma.cc/LE9Z-KL87>].

with it in terms so general that it is hard to see how anyone, even attorneys, could understand the issues.<sup>310</sup> Although the Florida case may not demonstrate popular political energy around deference, however, it nevertheless shows the apparatus of the Florida Republican Party lockstepping a federally driven anti-*Chevron* agenda.

Political parties are the institution that cross federal and state lines with the least friction.<sup>311</sup> New forms of media and communication have further increased the extent to which state parties line up with national leaders about issues which might once have lacked state-level salience. So have new leadership styles that emphasize loyalty and that have arisen in right-wing politics in the era of Donald Trump.<sup>312</sup> And, perhaps most important, the view that the administrative state is a rapacious leviathan<sup>313</sup> has become an important tenet of significant schools of thought on the political right.<sup>314</sup> These phenomena combine with the constitutionalization of arguments about government power that Metzger observes to create very strong forces in favor of lockstepping. Whatever the downsides of lockstepping antideference, it may be taking hold.

Nothing in this Article suggests that states, by their own choice and through their own politics, should not adopt negative views of the administrative state.<sup>315</sup>

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<sup>310</sup> See generally JAMES MADISON INST., 2018 FLORIDA AMENDMENT GUIDE (2018), <https://www.jamesmadison.org/2018-florida-constitutional-amendment-guide-2/> [http://perma.cc/MRH2-S55B]. The Guide's summary paragraph entitled "Ballot Language" entirely ignores the deference provision—so do the two paragraphs entitled "What Your Vote Means." Only after more than a full page of analysis of victims' rights and judicial retirements does the guide mention deference. The entirety of its comment is:

Apart from the concerns present in [the victims' rights area], Amendment 6 upends a functioning and orderly system in administrative agencies. Judges outsource many decisions to administrative law judges because they have a better understanding of the issues. Although this amendment would stress the importance of traditional judges, it risks the progress made in administrative law.

*Id.* at 10.

<sup>311</sup> See Bulman-Pozen, *supra* note 196, at 299.

<sup>312</sup> Michael Kruse, 'I Need Loyalty,' POLITICO MAG. (Mar./Apr. 2018), <https://www.politico.com/magazine/story/2018/03/06/donald-trump-loyalty-staff-217227/> [http://perma.cc/AR7J-T5CC] ("All leaders want loyalty. All politicians. All presidents. But in the 241-year history of the United States of America, there's never been a commander in chief who has thought about loyalty and attempted to use it and enforce it quite like Trump. 'I value loyalty above everything else—more than brains, more than drive and more than energy,' Trump once said.").

<sup>313</sup> See Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring).

<sup>314</sup> See, e.g., Larry P. Arnn, *The Way Out*, IMPRIMIS (Nov. 2021), <https://imprimis.hillsdale.edu/the-way-out/> [http://perma.cc/EH8E-EPXL] ("To establish despotism in a nation like ours, you might begin, if you were smart, by building a bureaucracy of great complexity that commands a large percentage of the resources of the nation.").

<sup>315</sup> See Bulman-Pozen, *supra* note 196, at 307 ("The simple fact that a state adopts a policy favored by the president is not sufficient reason to attribute that policy to the president . . .").



Nor does it suggest that they should not do so for political reasons.<sup>316</sup> Citizens at both the state and national levels are entitled to worry about administrative reach. And just as the institutions of the administrative state sit uneasily with the federal structural constitution, they sit uneasily with the structural constitution in many states. States may legitimately conclude that the proper course is to limit the scope of agency activity and the extent of agency power.

This Article also does not argue that no state should conclude that state-court *de novo* review of state agency action is the right kind of review because its constitutional requirements and traditions require clamping down on agency power. But a state should do so only with great caution and state-specific awareness. Deference doctrine is a strange and ill-fitting tool with which to further antiregulatory goals. Its effects on administrative power are of the third order. A great deal depends on the distribution of political views between courts and agencies, which is a contingent fact that changes over time. (Thus the flip in the political valence of *Chevron*.)<sup>317</sup> If the states and the federal government want to cooperate in a nationwide effort to shrink the regulatory state across all levels of government, legislatures should simply rewrite or amend the statutes that empower agencies to restrict and limit that power. If done clearly, these revisions will create no occasion for deference.

For whatever scope the administrative state retains at the state level, though, importing federal thinking about deference does not help. The federal doctrine is cramped and ill-fitting to the state context, in which the key institutions of judicial law declaration and administrative federalism, absent at the federal level, play such enormous roles. Regardless of any state's view of administrative power and its potential excesses, it is in that state's interest to take only a comparativist's interest in federal doctrine and instead to strike out on its own.

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<sup>316</sup> See Elinson & Gould, *supra* note 41, at 537 (“Politics cannot . . . be stripped out of administrative law.”).

<sup>317</sup> See *supra* notes 295-97 and accompanying text.