RESPONSE

RESPECT AND DEFERENCE IN AMERICAN ADMINISTRATIVE LAW[†]

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CONTENTS

[†] An invited response to Aaron Saiger, *Derailing the Deference Lockstep*, 102 B.U. L. REV. 1879 (2022).

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INTRODUCTION

State statutes, state constitutions, state courts—all come together in thinking about state administrative law. But that is not enough for Aaron Saiger. In *Derailing the Deference Lockstep*, he adds federal statutes, federal constitutions, and federal courts to the mix.[1] In what becomes a rich comparison between the administrative law regimes of the two sets of sovereigns that make up American federalism, he discusses the pushes and pulls between the two systems—all at a moment in American legal history when administrative law has come to resonate deeply with lawyers, judges, politicians, sometimes even citizens, alike.

Just when state courts, in construing the individual rights guarantees in their own constitutions, have begun to liberate themselves from the persistent pull of federal constitutional law, Saiger worries that they are falling under the spell of federal decisions in an area traditionally free from federal influence: administrative law. How strange that seems. Until recently, scholars perceived state courts as independent of federal courts in administrative law. The only risk, they claimed, of "lockstepping"—by which state courts mimic federal courts in construing similarly worded guarantees in the state and federal constitutions—arose in construing individual rights. Saiger sees things changing. Taking a few recent examples—a Mississippi Supreme Court decision in particular—Saiger raises a present-based concern and a future to avoid: a pattern of state courts falling under the influence of federal administrative law. His thesis is that state courts should not lightly embrace federal agency deference doctrines given the many differences between the way our national Constitution organizes the federal government and the ways our fifty state constitutions organize state governments.

There is much to admire in Saiger's article, and lawyers and judges should be grateful that he has devoted his time and considerable talents to this increasingly salient area, one that frequently determines who governs us. As one of our leading federal administrative law scholars, Saiger is in a position to understand what the state courts are doing in the area and why they might—why they should—chart their own paths.

In taking up the *Law Review*'s invitation to comment on Saiger's article, let me start with two revealing realities: that Saiger wrote an article on the topic and that the *Law Review* published it. Here we have one of the leading federal administrative law scholars. And now we have his third piece on state administrative law in the last eight years.[2] Not that long ago, one could go years, maybe decades, without seeing substantial scholarship about state administrative law by much of anyone. No longer. By my count, Saiger mentions thirteen law review articles about state administrative law, all from the last fifteen years and

[1] *See generally* Aaron Saiger, *Derailing the Deference Lockstep*, 102 B.U. L. REV. 1879 (2022).

[2] *See generally* Aaron Saiger, Chevron *and Deference in State Administrative Law*, 83 FORDHAM L. REV. 555 (2014) [hereinafter Saiger, *State Deference*]; Aaron Saiger, *Local Government as a Choice of Agency Form*, 77 OHIO ST. L.J. 423 (2016).

all written by top-flight scholars. Contrast that with the "very limited," I might say nearly nonexistent, scholarship devoted to the topic before then.[3] Anyone doubting this development should start looking under stones for the scholarship in this area in the early 1980s, when three of the major administrative law casebooks saw no reason to discuss state cases at all.[4] Even the few casebook authors that did consider the state side of the story devoted no more than 4% of their textbooks to the state cases and state doctrines.[5] Let's call this progress. And let's call it a welcome course correction in a country in which most administrative law cases run through the state courts, not the federal courts.[6]

But I am happy to report that there is more to the article than its mere existence. Reading the article generated the same grateful feeling that comes with enjoying a well-crafted amicus brief in a case desperately in need of one. Saiger offers several timely and valuable points of view. Let me identify, echo, and elaborate on a few.

I. DEFERENCE TO FEDERAL JUDGES RARELY MAKES SENSE FOR STATE JUDGES

Point one: It rarely makes sense for state judges to defer to federal judges in construing state law, whether with respect to individual rights, separation of powers, or administrative law. The key innovations in American constitutional law occurred before 1789, not after, and they arose in the state constitutional

[3] Jim Rossi, *Overcoming Parochialism: State Administrative Procedure and Institutional Design*, 53 ADMIN. L. REV. 551, 553 n.7 (2001).

[4] *See* Arthur Earl Bonfield, *State Law in the Teaching of Administrative Law: A Critical Analysis of the Status Quo*, 61 TEX. L. REV. 95, 97 n.7 (1982).

[5] *See id.*; *see also* William Funk, *Beyond Casebooks, Beyond Treatises: Administrative Law Readers*, 9 ADMIN. L.J. AM. U. 361, 364 (1995) (book review) (lamenting that the three leading administrative law anthologies were "devoted exclusively to *federal* administrative law").

[6] Approximately 1% of civil filings in Washington state involve "Administrative Law Review." *Caseloads of the Courts of Washington: Superior Court, Civil Cases Filed by Type of Case—2021 Annual Report*, WASH. CTS., https://www.courts.wa.gov/caseload/?fa=caseload.showReport&level=s&freq=a&tab=civil&fileID=civfilyr [https://perma.cc/G8FL-VHDH] (last visited Oct. 25, 2022). And there are nearly twenty million civil filings across the nation's state courts each year. CT. STAT. PROJECT, STATE COURT CASELOAD DIGEST: 2018 DATA 7 (2020), https://www.courtstatistics.org/__data/assets/pdf_file/0014/40820/2018-Digest.pdf [https://perma.cc/LZ9D-ZDJF]. If this 1% figure holds constant, approximately 200,000 administrative law review cases (only a subset of all cases touching upon administrative law) are filed each year across the state courts. This number is nearly comparable to the yearly total of federal civil filings, which has averaged approximately 300,000. *Federal Judicial Caseload Statistics 2021*, U.S. CTS., https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2021 [https://perma.cc/8YG7-LRDA] (last visited Oct. 25, 2022). State administrative law cases may therefore exceed their federal counterparts by many multiples, if not by an order of magnitude.

conventions, not in the Philadelphia Convention. Be they individual rights or structural rights, they arose in the state constitutions, not the other way around. If reasons exist for deference between sovereigns about the meaning of these guarantees, they run in favor of state law. A federal court invested in understanding the meaning of a federal provision should look to the state courts that construed the original language, provision, and context, the source code of the federal provision. The same remains true, it's worth adding, for the thirty-seven states that entered the Union after 1790. For the first few decades after 1789, remember, there was little federal constitutional law on which new states conceivably could base their constitution. As for the states that joined the Union later or for the original states that ratified a new constitution in, say, 1875, little changes. Accept for illustration's sake that a state modeled its 1875 guarantee after a guarantee in the federal constitution. That would show only that what was true of federal law circa 1875 was true for that state at *that point in time*. But that reality would not show, would not even suggest, that the state meant to follow the federal courts wherever they went. Who takes a voyage without knowing the destination?

All in all, it's fine for state courts to respect federal administrative law—and from time to time to borrow insights from it. So too in the other direction. But the idea that they should *defer* to federal law is difficult to credit. Think about the point in *Chevron* deference terms. What evidence, ancient or the most up to date, suggests such a model for state interpretations of state constitutions? That at Step One state courts should ask whether the meaning of the state constitutional guarantee is ambiguous? And that at Step Two the state court should defer to the federal courts in determining the meaning of the state guarantee? Asking is answering. State judicial respect for the federal judicial insights? Sure. Deference? Never.

II. REASONS FOR STATE JUDGES TO GO THEIR OWN WAY

Point two: State judges have lots of reasons to construe state provisions differently from their federal brothers and sisters. Sometimes the language differs. Take as an example the reality that the vast majority of state constitutions have something the U.S. Constitution lacks: an express separation of powers provision. As Massachusetts, thanks to the pen of John Adams, put it in 1780,

> In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.[7]

[7] MASS. CONST. art. XXX; *see, e.g.*, N.H. CONST. pt. I, art. XXXVII; *see also* ARK. CONST. art. IV, § 1; MD. CONST., Declaration of Rights, art. VIII; MICH. CONST. art. III, § 2; MISS.

Different words often generate different meanings. Sometimes a unique state history shows the way, permitting a state court to customize an interpretation to local norms linked to a unique past. The most difficult constitutional problems, moreover, often arise from general language about rights (think of what process is "due," what search is "unreasonable," what speech is "free") or general language about difficult-to-sort-out boundaries between the branches (think of separation of powers). The more general a provision, the more room for reasonable interpretations of it by fifty-one different sovereigns.

Then there are the areas in which the federal doctrine is contestable, even open to criticism, as cases decided under the federal doctrine seem to swerve to and fro. In those areas of law, perhaps vexing due to their difficulty, unleashing interpretive independence allows states to serve as "laborator[ies]" for "novel social and economic experiments," in Justice Louis Brandeis's familiar words.[8] If that metaphor has worn out its welcome, don't fret. There are others: auditions for acceptance, road shows, field tests, research and development teams, training grounds, casting calls, test runs, dress rehearsals, stress tests, and obscure maquettes.

Even the election of judges should not change the calculus. Yes, roughly 90% of state court judges in the country must face the ballot box under a wide range of selection methods: retention elections, partisan elections, or nonpartisan elections.[9] And yes, a majoritarian selection process for a nonmajoritarian job crosses intuitive wires. But the election of state court judges should make them more independent from federal influence, not less so. Imagine running for a seat in the state legislature. Imagine fielding this question from a voter: Where do you look for insights on hard issues? And imagine this answer: I always look to Washington, D.C., for insights about politics' most difficult questions. Now imagine running for a state court judgeship. Imagine fielding this question from a voter: Where do you look for insights in hard cases? And imagine this answer: I always look to Washington, D.C., for insights about law's most difficult questions. Long-standing traditions of local pride in all fifty states make outsourcing an unpromising answer for any local election, whether for a judgeship or the legislature. Localism works best in local elections, and should prompt state judges to customize their resolution of local problems to local solutions, not to whatever happens to be in favor in the nation's capital.

Notwithstanding these and other reasons for independence, many state courts, aided and abetted by lawyers unwilling to learn their states' stories, start with

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CONST. art. I, §§ 1-2; UTAH CONST. art. V, § 1; VA. CONST. art. III, § 1; JEFFREY S. SUTTON, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION 193-94 (2022).

[8] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *see also* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 11 (2018).

[9] *See* JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA 3 (2012).

the presumption that federal law reveals the meaning of state law. The presumption may be rebuttable. But it still amounts to a hard-to-justify deference to a different sovereign. Presumptions and deference create inertia in the law, as any judge can attest, and sometimes a destiny all their own. While that reality seems to be changing, it is fair to say that this has been true in large measure since the Supreme Court launched the constitutional rights revolution of the 1960s.

There has long been one glaring exception, one area of prolonged resistance to federal doctrine: state administrative law. In place after place, the states have set their own standards, particularly when it comes to two issues on the minds of many lawyers today: judicial deference to agency interpretations of law and prohibitions on delegating legislative power to agencies. These two branches of administrative law spring from the same tree. One concerns implied delegations of interpretive power to agencies, the other explicit delegations of such power. Both of them cover the essential features of any government: who makes the law and who decides what it is.

III. STATES' RESISTANCE TO THE FEDERAL MODEL

Point three: Considerable scholarship, embraced and discussed by Saiger, shows how the state courts have not lightly embraced these two features of federal administrative law. In contrast to the federal model in which the federal courts defer to agency interpretations of ambiguous federal laws, the state courts rarely defer to agency interpretations of state law. Only a few states incorporate *Chevron* deference by name. A few more have something similar, though it is not based on incorporation of the federal model. The nondelegation story is similar. In contrast to the federal experience, in which just two cases in the fertile year of 1935 have invalidated federal laws on nondelegation grounds,[10] the state courts as a general rule have been willing to enforce the doctrine from the outset and throughout American history.[11]

One potent reason for resisting the federal model of agency deference turns on an insight I wish I had come up with myself. As Saiger noted in his previous article, the separate election of most executive branch officials at the state level creates many "*Chevron*-confounding" figures.[12] The hyperdemocracy of the state governments and the many nondemocratic features of the federal government create an illuminating contrast.[13] At the federal level, the election of one President to oversee the entire executive branch will generally make this one elected official accountable for every agency position, a unitary executive through and through. But how does deference to one elected executive branch

[10] *See* Panama Refin. Co. v. Ryan, 293 U.S. 388, 430 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935).

[11] *See* SUTTON, *supra* note 7, at 193-205.

[12] Saiger, *State Deference*, *supra* note 2, at 567.

[13] *See* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 862-63 (2021).

official work for a government with many elected executive branch officials with a say on the matter? Most states over time have come to separately elect a Governor, an Attorney General, a Secretary of State, and so on to other positions—from superintendents of insurance to superintendents of education to many others. But how would a state system of deference operate when a dispute arises over the meaning of a law? To whom would a state court defer? Any "appeal of *Chevron* as a general principle"—Saiger's words, not mine—"fades in the face of the widespread phenomenon of the plural state executive and intraexecutive conflict."[14]

State legislatures may chart their own paths too. Several states have laws explaining how courts should construe "ambiguous" statutes.[15] And at least a few of these interpretive statutes say that a court "may consider" an ambiguous statute's "administrative construction."[16] One state supreme court Justice has suggested that the discretionary language of these statutes ("may consider," not "shall defer") calls for a deference doctrine that differs from the federal model.[17] Either way, interpretive statutes offer the people of each state, speaking through their elected representatives, a voice in choosing which deference regime works best for them.

As an aside, it's worth highlighting that the political salience of state administrative law, like the prevalence of scholarship in the area, has grown recently. Two states eliminated deference to state agencies over the meaning of state law by statute in the last five years.[18] And Florida eliminated it through a constitutional initiative a few years ago.[19] The 62% vote in favor of amending the Florida Constitution to prohibit state courts from deferring to agency interpretations of law left some, including me, to wonder how it was that that so many Floridians even knew what agency deference was.[20] But as Saiger points out, the provision was part of an amendment package that included two other items: a victim's rights provision called Marsy's Law and a provision that

[14] Saiger, *State Deference*, *supra* note 2, at 568.

[15] OHIO REV. CODE ANN. § 1.49 (West 2022); *see* COLO. REV. STAT. ANN. § 2-4-203 (West 2022); IOWA CODE ANN. § 4.6 (West 2022); N.D. CENT. CODE ANN. § 1-02-39 (West 2022); *see also* MINN. STAT. ANN. § 645.16 (West 2022).

[16] COLO. REV. STAT. ANN. § 2-4-203; IOWA CODE ANN. § 4.6; N.D. CENT. CODE ANN. § 1-02-39; OHIO REV. CODE ANN. § 1.49.

[17] *See* R. Patrick DeWine, *A Few Thoughts on Administrative Deference in Ohio*, YALE J. ON REGUL.: NOTICE & COMMENT (Oct. 26, 2020), https://www.yalejreg.com/nc/a-few-thoughts-on-administrative-deference-in-ohio-by-justice-r-patrick-dewine/ [https://perma.cc/4PTN-H9QQ].

[18] ARIZ. REV. STAT. ANN. § 12-910(E) (2022); WIS. STAT. § 227.10(2g) (2022).

[19] FLA. CONST. art. V, § 21.

[20] Daniel Ortner, The End of Deference: How States (and Territories and Tribes) Are Leading a (Sometimes Quiet) Revolution Against Administrative Deference Doctrines 18-20 (Mar. 11, 2020) (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3552321 [https://perma.cc/C97G-92AQ]).

increased the judicial retirement age.[21] As Saiger sensibly suggests, the 62% vote in favor of the no-deference provision—Florida requires more than 60% of voters to approve a constitutional initiative—may stem from coattails and bundling, the reality that voters were forced to approve all three provisions or none of them.[22] Perhaps so. But that does not diminish the political salience of the issue. The reality that Florida politicians opted to include an agency-deference provision in a three-item package, instead of some other item, confirms that elected officials care deeply about the issue and devoted scarce political resources to it. By the way, the Florida threshold of 60% is the second highest in the country;[23] New Hampshire requires 67%.[24] Another reality is that many state courts, in contrast to Florida in this instance, prohibit such packages by construing their single-subject requirements to ban bundling of constitutional amendments, whether proposed by the people through an initiative or by the legislature.[25]

IV. THE STATE COURT DEFERENCE DEBATE

Let me shift from praise and echo to call and response. Saiger trains his focus on the imperative of state independence in agency-deference models. He seems to be particularly worried about state courts that have invoked federal decisions in determining how much, or how little, deference to give agency interpretations of law. In a recent Mississippi Supreme Court decision, he notes, the court determined that agency deference violated the Mississippi Constitution—and in the course of its analysis invoked then-Judge Neil Gorsuch's influential concurrence about the infirmities, including potential unconstitutional infirmities, of the federal deference model.[26] In another case, the Wisconsin Supreme Court invoked Justices Gorsuch and Antonin Scalia in ending its practice of deferring to administrative agencies' conclusions of law.[27] In both cases, well regarded state court judges—Justices Josiah Coleman and Daniel Kelly—wrote the opinions. One possibility to keep in mind is that it's the state court judges who are doing the leading. They are the ones after all that by and

[21] *See* FLA. DEP'T OF STATE, PROPOSED CONSTITUTIONAL AMENDMENTS AND REVISIONS FOR THE 2018 GENERAL ELECTION 14-19 (2018), https://files.floridados.gov/media/699824/constitutional-amendments-2018-general-election-english.pdf [https://perma.cc/4B24-8GGZ].

[22] FLA. CONST. art. XI, § 5(e).

[23] SUTTON, *supra* note 7, at 343.

[24] N.H. CONST. pt. II, art. C.

[25] *See generally* Burns v. Cline, 382 P.3d 1048 (Okla. 2016); Gregory v. Shurtleff, 299 P.3d 1098 (Utah 2013); Turnbull v. Fink, 668 A.2d 1370 (Del. 1995).

[26] King v. Miss. Mil. Dep't, 245 So. 3d 404, 408 (Miss. 2018).

[27] Tetra Tech EC, Inc. v. Wis. Dep't of Revenue, 914 N.W.2d 21, 40-57 (Wis. 2018).

large did not fall under *Chevron*'s spell.[28] Against this backdrop, it seems just as likely that state courts that invoke federal decisions in the area mean to welcome long-resistant federal courts to the no-deference perspective, not the reverse. As a judge myself, moreover, I do not recoil at using insightful decisions from other circuits or state courts. It is not a constitutional trespass to invoke a good idea, no matter where in the American legal system it came from. It is only a trespass to let another sovereign do your work for you—or to assume that what is good for one is good for all. Plus, I can't imagine that Saiger would be troubled if state courts invoked *his* writings. He has a lot of good ideas, and many state courts would profit from them, whether the observation at hand concerned federal or state administrative law.

That said, I share Saiger's concerns about the nationalization of many legal debates—and above all the transformation of too many of them into binary options: pro-*Chevron* or anti-*Chevron*, pro-delegation or anti-delegation, textualist or purposivist, originalist or living constitutionalist. Labels, like generalizations, can facilitate conversation and arguments. But they sometimes obscure and often mislead. That is particularly so when it comes to the many shapes in which potential deference to agency interpretations of law could present. The most interesting feature of state administrative law is not the near-uniform rejection of agency deference. It is the many shapes it has assumed. State court judges, overly sensitive to the federal pro- and anti-*Chevron* positions, might easily fall into the trap of simplifying what is going on, all to the loss of the many sound reasons state courts historically have charted paths of their own in the area. One of the key features of federalism is the process of trial, error, and response, whether it leads to national solutions or customized local solutions.

State courts by the way can do only so much of this on their own. They can do more—they can do better—with the help of lawyers and scholars willing to learn and understand our many distinct state histories and traditions. If an appeal to assisting judges falls short, consider self-interest. Lawyers who wish to achieve the best outcomes for their clients in state administrative law cases would do well to read beyond the *Federal Reporter*. Understanding the rich diversity in state court decisions offers a way out of the limiting mindset of pro-*Chevron*, anti-*Chevron* and the clearest way toward finding fresh arguments.

Premature nationalization of law into either-or options seems to have grown in another area affecting state executive branches: state attorneys general litigation. Yes, state attorneys general have a democratic duty to file collective actions on behalf of their constituents. But it is difficult to deny the partisan hue of many of these lawsuits—with state attorneys general of one political party

[28] *See generally, e.g.*, Myers v. Yamato Kogyo Co., 597 S.W.3d 613 (Ark. 2020); Delcon Partners LLC v. Wyo. Dep't of Revenue, 450 P.3d 682 (Wyo. 2019); Hughes Gen. Contractors, Inc. v. Utah Lab. Comm'n, 322 P.3d 712 (Utah 2014); Douglas v. Ad Astra Info. Sys., L.L.C., 293 P.3d 723 (Kan. 2013); *In re* Complaint of Rovas Against SBC Mich., 754 N.W.2d 259 (Mich. 2008); Pub. Water Supply Co. v. DiPasquale, 735 A.2d 378 (Del. 1999).

combining to challenge priorities of the President of the other party. The prevalence of these lawsuits is new to America. One feature of this development is particularly head scratching. There are lots of cases in which large numbers of states litigate in favor of more federal power (by conceding that Congress has a given power) and less state power (by conceding that the state does not have a given power). In whose name do they bring these lawsuits? Is it all of the citizens of their states? Or roughly half? As I've noted before, when the decisions of state attorneys general "line up almost perfectly with the agenda preferences of the political company they keep," they resemble "politicians with ambitions, not lawyers with clients."[29] At the end of this partisan slope is a country in which the states no longer serve as sources of experimentation. Instead of "fifty-one sources of experimentation, we will get just two."[30]

So too in the context of debates about deference to agency interpretations of law. In the same way that our state attorneys general should be the leading voices for identifying those areas suitable for local control and those suitable for nationwide rules, state courts should resist the pull of nationalization—and its tendencies toward either-or binaries—in the legal debate over administrative deference. "Just as it would be a mistake for states reflexively to incorporate *Chevron*," says Saiger, "so too it would be a mistake for states reflexively to incorporate any federal rejection of *Chevron* into their own law."[31] In other words, "[t]he no-lockstepping argument has the same force regardless which way the federal wind is blowing."[32] I agree.

Despite our common ground, some gaps persist in how Saiger and I approach this topic. One is an ankle-biting quibble. I would have preferred fewer references to *Chevron*, and its Steps 1 and 2, to say nothing of its Steps 0 and 3. In a world in which the state courts have done pretty well on their own and in the context of an article criticizing state courts for casually accepting federal doctrine as state doctrine, it seems odd to orient so much of the discussion around one language—the federal language of debate—rather than the many tongues and accents spoken throughout the state courts about state administrative law. Of course, if Saiger mentions *Chevron* so often because he likes it and wishes more state courts would use it, that represents a different symptom and leads to a different diagnosis.

As for how future state courts should treat deference in all of its knottiness, my own judicial career reveals some of the complications. During my first decade or so as a judge, *Chevron* controlled many cases, and it served to push diverse panels toward a consensus because the range of discretion for the agency to exercise was broad. There's something beneficial about that and lost without it. But in the last decade or so, it's been rare for *Chevron* to steer the outcome. Fewer judges rely on it today. In reality, disagreement over deference tends to

[29] SUTTON, *supra* note 7, at 181.

[30] *Id*.

[31] Saiger, *supra* note 1, at 1888.

[32] *Id*. at 1896.

generate more discord than disagreement over the meaning of the underlying federal statute. Most panels now tend to resolve cases based on their own reading of the statute, not the agency's, perhaps due to an increasingly shared acceptance about how statutory interpretation should work.[33]

What has been happening at the Supreme Court suggests that this change is here to stay—whether *Chevron* lasts or not or is modified or not. Consistent with my experience on the Sixth Circuit, the Supreme Court did not use *Chevron* to decide a single case this last term or in recent terms. Best I can tell, the last time a Supreme Court decision turned on the application of *Chevron*—meaning it turned on judicial deference to an agency interpretation of a federal law—occurred six years ago in *Cuozzo Speed Technologies, LLC v. Lee*.[34] That's quite a while, particularly for a precedent invoked so often during the first three decades of its existence.[35]

But it is the rare overruling of a precedent (or sidelining of a precedent) that does not create challenges of its own. Perhaps a form of *Skidmore* deference will replace *Chevron*, especially in complex cases. Perhaps unease with *Chevron* will dissipate with the growth of the "major questions doctrine," which cuts off deference in more statutes, especially consequential statutes. Maybe federal courts will permit some form of deference in the sticky setting of mixed questions of law and fact. Either way, state courts remain free to learn from the federal experience or do what they long have done: adjust their approaches to account for unique features of state government.

One last point deserves a response. Saiger devotes considerable space to another contrast between state and federal structure: that between the wealth of common-law responsibilities of state court judges and the dearth of federal common-law responsibilities of federal judges. Common-law judging, he points out, turns on an accepted form of judicial policymaking at the state level: to make the best law for the situation.[36] By contrast, the work of federal judges—in construing statutes and constitutions—should not turn on policymaking. The contrast, Saiger points out, suggests another reason why state administrative law should operate differently. That's because a central reason for federal agency deference under *Chevron* is to give authority to fill gaps in statutes to elected officials delegated explicit authority over policymaking. That justification does

[33] *See generally* Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298 (2018) (discussing narrower approach to statutory interpretation among judges); Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1 (2017).

[34] 579 U.S. 261, 276-77 (2016). For more commentary, see Nathan Richardson, *Deference Is Dead (Long Live* Chevron*)*, 73 RUTGERS U. L. REV. 441, 488-51 (2021).

[35] *See* Peter M. Shane & Christopher J. Walker, Foreword, Chevron *at 30: Looking Back and Looking Forward*, 83 FORDHAM L. REV. 475, 475 & n.2 (2014).

[36] *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 4-7, 13 (1997).

not necessarily apply to state judges who historically have had considerable policymaking authority under their common-law powers.

How does this advance the ball in the state court deference debate, however? Yes, I agree with Saiger that state court judges, unlike federal judges, spend considerable time and thought on making the common law of their state. That reality indeed empowers state court judges to develop policies in ways generally frowned upon at the federal level.[37] The point adds fuel to his—and my—anti-lockstepping position. But it does not follow, at least to my mind, that this reality favors or disfavors state court deference to state agency interpretations of law. It just returns the question to the starting line. One possibility is that, if state judges are empowered to craft policy through the development of the common law, it should not be surprising that they feel comfortable doing something similar in construing state laws. But another possibility is that their clear common law authority leads them to the view that, on separation of powers grounds, state legislatures legitimately want state agencies, not state courts, to resolve in-between questions about the meaning of state laws. If all he means to say is that the proper deference regime in each state ultimately turns on local considerations and local history, we stand together.

Come to think of it, federal agency interpretations of law and federal court interpretations of the U.S. Constitution deserve the same thing: respect, not deference. Respect by federal courts in looking at the same statute the agency interpreted and respect by state courts in looking at identical or similar language in the state constitution.

CONCLUSION

Modest differences in preferred points of emphasis aside, I return to praise. I'm heartened by Saiger's article and the *Boston University Law Review*'s decision to publish it. Most essential constitutional questions come down to structure. And structure concerns who should be the leading sources of authority when it comes to new challenges in society and how to balance that power among the branches. Most state courts have already charted distinct paths from federal administrative law in these areas. They would do well to continue to do so. Because Saiger helpfully explores how that framework should develop, I wholeheartedly recommend this article for anyone interested in federalism, in administrative law, or in who governs us.

[37] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 864 (1984).