FOUR WAYS TO DECONSTRUCT REGULATION AND UNDERMINE DEMOCRACY IN THE STATES

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ABSTRACT

A few years before the Supreme Court formally overruled Chevron*, anti-administrative activists successfully prohibited judicial deference to reasonable exercises of interpretive discretion by regulatory agencies in a handful of receptive states. State governments' treatment of this issue is likely to generate even more attention in* Loper Bright*'s wake. This Article presents novel case studies of four different ways in which state governments have prohibited deference to state agencies by state courts: (1) judicial decisions in Mississippi and Ohio, (2) a constitutional amendment proposed by an appointed commission and adopted pursuant to the initiative process in Florida, (3) statutes enacted pursuant to the ordinary legislative processes in Arizona and Tennessee, and (4) codification of a state supreme court decision by the state legislature in Wisconsin.*

Conventional wisdom would suggest that these reforms are legally dispositive and that eliminating Chevron *deference through the political process is especially democratic. Yet each case study shows that these were carefully orchestrated political power plays rather than products of reasoned deliberation or meaningful reflections of the people's will. Proponents relied on the same anti-administrative*

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rhetoric that has become popularized at the federal level, rather than anything distinctive about their states. And shifting policymaking authority from regulatory agencies, which serve as the preeminent sites of multilateral deliberation and contestation within our system of government, to the judiciary undermines pluralistic democracy on a more fundamental level. This Article thus contends that the resulting state laws are democratically illegitimate. It also questions the legal force of codified interpretive rules and suggests that continued judicial deference to state agencies is legally permissible, normatively desirable, and practically inevitable.

This does not mean that states must uniformly adhere to the Chevron *framework, but it does challenge the prevailing view that the proper level of judicial deference to agencies is necessarily dictated or controlled by the legislature's meta-intent or the original public meaning of framework laws. It also begs for an affirmatively democratic system of judicial review that involves both reasoned deliberation by state lawmakers and persuasive justifications by state courts. This Article explores what a democratically legitimate system of judicial review of agency exercises of interpretive discretion would entail in states with very different structural arrangements. In the process, it reconfigures the terms of the debate and draws fresh lessons for the federal system as well as the current state of federalism in the wake of* Loper Bright.

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INTRODUCTION

Despite its reputation as technical and boring,[1] administrative law is ultimately about power—who has it and how it is used.[2] That means administrative law is also inevitably about politics and democratic legitimacy. This Article argues that the growing movement to eliminate *Chevron* deference within the states is highly problematic on both fronts.

The conservative legal movement and its allies are actively working to deconstruct the federal administrative state,[3] and this project has recently included successful efforts to limit judicial deference to the resolution of legal ambiguities by agencies.[4] While Justice Scalia and other leading conservatives were big fans of *Chevron* deference when liberal federal judges were reviewing the deregulatory initiatives of Republican administrations,[5] movement conservatives flipped their positions as Democratic presidents (and especially Obama) used agencies to implement a progressive policy agenda and as federal courts grew more conservative.[6] Anti-administrative activists gradually developed the now-standard

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1. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 511 (suggesting that, because his remarks focused on administrative law, the audience should "lean back, clutch the sides of [their] chairs, and steel [themselves] for a pretty dull lecture").

2. *See* Jud Matthews, *Minimally Democratic Administrative Law*, 68 ADMIN. L. REV. 605, 606-07 (2016) (describing scholars' "concern over the democratic legitimacy of administrative power" because agencies are shielded from the electoral process while wielding significant influence over substantive policy).

3. *See generally* Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017) (arguing that contemporary attacks on the administrative state mirror historical efforts from the New Deal era, warning of the potential impact of contemporary attacks, and defending the administrative state as constitutionally necessary for balancing executive power).

4. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

5. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 239, 256 (2001) (Scalia, J., dissenting); Scalia, *supra* note 1, at 516-17 (explaining that *Chevron* is a much better alternative than what came before it). *Chevron* famously endorsed judicial deference to reasonable exercises of interpretive discretion by agencies. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843-45 (1984).

6. *See* Craig Green, *Deconstructing the Administrative State:* Chevron *Debates and the Transformation of Constitutional Politics*, 101 B.U. L. REV. 619, 642, 677-80 (2021); Gregory A. Elinson & Jonathan S. Gould, *The Politics of Deference*, 75 VAND. L. REV. 475, 478-80 (2022).

rhetorical critique of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[7] and the Supreme Court increasingly ignored its framework,[8] before formally overruling the doctrine this past Term in *Loper Bright Enterprises v. Raimondo*.[9] Even before this landmark development, the Court had significantly undermined deference to agency exercises of interpretive discretion through the major questions doctrine,[10] which flipped *Chevron* on its head by requiring a clear statement in the text of the law for agencies to lawfully make important policy decisions.[11]

But the successful attack on *Chevron* deference in the federal system is only half the battle: this interpretive war has also migrated to the states, where the issue promises to garner even more attention in the wake of *Loper Bright*.[12] While some state courts have rejected *Chevron* deference through adjudication,[13] a few states have recently prohibited their courts from deferring to agencies through the political process. For example, Florida adopted a constitutional amendment in 2018 pursuant to the ballot initiative process that prohibits state courts from deferring to agencies and requires them to interpret statutes and regulations de novo.[14] Arizona and Tennessee have enacted similar directives pursuant to the traditional legislative process.[15] And Wisconsin enacted

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7. 467 U.S. 837 (1984).

8. *See* Elinson & Gould, *supra* note 6, at 515-33; *infra* Part I; Isaiah McKinney, *The* Chevron *Ball Ended at Midnight, but the Circuits Are Still Two-Stepping by Themselves*, YALE J. REGUL.: NOTICE & COMMENT (Dec. 18, 2022), https://www.yalejreg.com/nc/chevron-ended/ [https://perma.cc/VPX3-7B92] (reporting that the Court had not cited *Chevron* since 2020 and had not upheld an agency's interpretation under step two since 2016).

9. 144 S. Ct. at 2273.

10. *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022).

11. *See, e.g.*, James Ming Chen, *Doctrinal Destruction and* Chevron*'s Extinction Debt*, 51 FLA. STATE UNIV. L. REV. 61, 94 (2023) ("The major questions doctrine resembles a deliberate perversion of *Chevron*."). The major questions doctrine's precise status after *Loper Bright* is not clear. Patrick Jacobi, *Administrative Law After* Loper Bright Enterprises v. Raimondo, YALE J. REGUL.: NOTICE & COMMENT (Aug. 28, 2024), https://www.yalejreg.com/nc/administrative-law-after-loper-bright-enterprises-v-raimondo-by-patrick-jacobi/ [https://perma.cc/2PWZ-ALYW].

12. State courts are currently also grappling with the potential applicability of the major questions doctrine within their jurisdictions. *See* Evan C. Zoldan, *The Major Questions Doctrine in the States*, 101 WASH. U. L. REV. 359, 375 (2023).

13. *See infra* Part II.A.

14. *See infra* Part II.B.

15. *See infra* Part II.C.

legislation that codified its high court's decision to prohibit judicial deference to agencies' legal interpretations.[16]

Conventional wisdom suggests that these constitutional and statutory directives are dispositive, and that state courts may therefore no longer defer to reasonable exercises of interpretive discretion by agencies.[17] *Chevron* is premised on Congress's implicit delegation of interpretive authority to agencies,[18] and these state laws unambiguously preclude such an inference. Many would also consider the resolution of this issue by voters in Florida and by elected representatives in other states to be especially democratic, at least in comparison to leaving state courts with responsibility for determining the appropriate allocation of policymaking authority among the branches for themselves.

Yet a closer look at these previously unexplored case studies provides grounds for questioning their genuinely democratic character. The constitutional amendment in Florida was recommended by a commission composed almost entirely of Republican appointees,[19] and while several commissioners spoke in favor of the proposal at a public hearing (quoting from judicial opinions by Justices Gorsuch and Thomas),[20] no one articulated any counterarguments.[21] The amendment was presented to voters as part of a single proposal that would also establish a new Bill of Rights for crime victims and their family members.[22] This latter issue received the lion's share of the public's attention during the ballot campaign

16. *See infra* Part II.D.

17. *Cf.* Cass R. Sunstein, Chevron *as Law*, 107 GEO. L.J. 1613, 1619 (2019) ("[W]hether courts should defer to agency interpretations of law turns on just one thing: congressional instructions.").

18. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

19. *See* Garin Flowers, *Who's Behind Florida's Constitution Revision Commission?*, WTSP (Sept. 25, 2017, 11:29 PM), https://www.wtsp.com/article/news/politics/whos-behind-floridas-constitution-revision-commission/67-477559159 [https://perma.cc/B4RS-8U3X].

20. *See* Meeting Transcript of the Florida Constitution Revision Commission at 66, 71-72, 82 (Mar. 19, 2018) [hereinafter March 2018 CRC Transcript], https://library.law.fsu.edu/Digital-Collections/CRC/CRC-2018/PublishedContent/ADMINISTRATIVEPUBLICATIONS/MEETINGS/TRANSCRIPTS/Transcript03-19-2018Vol1.pdf [https://perma.cc/EB6R-DUT6].

21. *See id.* at 71-83 (highlighting how the commissioners only *supported* the proposal during debate).

22. CONST. REVISION COMM'N 2017-2018, FINAL REPORT 1-9 (2018), https://library.law.fsu.edu/Digital-Collections/CRC/CRC-2018/PublishedContent/ADMINISTRATIVEPUBLICATIONS/CRCFinalReport.pdf [https://perma.cc/H8VS-6RWQ].

and was understandably quite popular with voters.[23] The legislative processes in Arizona, Tennessee, and Wisconsin were not any more balanced or normatively attractive.[24] In short, these were political power plays, rather than a product of reasoned deliberation or a meaningful reflection of the people's will.

The anti-deference position also undermines pluralistic democracy more fundamentally because it lets courts choose the meaning of laws that legislative bodies address to agencies. And agencies are the primary sites in contemporary government for facilitating deliberation among stakeholders with disparate interests and views and mediating among competing positions to reach reasonably justifiable decisions that are provisional and subject to ongoing contestation.[25] Prohibiting *Chevron* deference undermines what Anya Bernstein and I have called "agonistic republicanism" by shifting power from more deliberative and contestatory institutions—legislatures and especially agencies—to less deliberative and contestatory courts.[26]

This Article contends that *Chevron* should continue to serve as the default rule for judicial review of agency exercises of interpretive discretion in the states[27] and that this framework is sufficiently flexible to accommodate a substantial degree of jurisprudential disagreement and state structural variation. Nonetheless, state lawmakers or state courts could legitimately adjust the level of deference that state courts provide to state agencies based on a variety of comparative or contextual considerations. The key is for

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23. *See Poll Shows Floridians Overwhelmingly Support Adding Victims' Rights to the Florida Constitution*, MARSY'S L. FOR FLA. (Oct. 11, 2017), https://www.marsyslawforfl.com/poll_shows_floridians_overwhelmingly_support [https://perma.cc/K69W-G4V8].

24. *See infra* Parts II.B-C.

25. *See* Anya Bernstein & Glen Staszewski, *Populist Constitutionalism*, 101 N.C. L. REV. 1763, 1778-83 (2023) [hereinafter Bernstein & Staszewski, *Populist Constitutionalism*].

26. *See id.* at 1767-74, 1787-93; *see also* Anya Bernstein & Glen Staszewski, Opinion, *Populism Has Found a Home at the Supreme Court, Too*, N.Y. TIMES (Dec. 16, 2021), https://www.nytimes.com/2021/12/16/opinion/supreme-court-populism.html [https://perma.cc/DSN4-ETWH]; Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2294-95, 2311 (2024) (Kagan, J., dissenting) (recognizing that the elimination of *Chevron* deference shifts power from Congress, and especially agencies, to federal courts).

27. Most states currently endorse some form of judicial deference to agency exercises of interpretive discretion. *See* Martha Kinsella & Benjamin Lerude, *Judicial Deference to Agency Expertise in the States*, STATE CT. REP. (June 28, 2024), https://statecourtreport.org/our-work/analysis-opinion/judicial-deference-agency-expertise-states [https://perma.cc/K5B9-JYCU].

state officials to engage in reasoned deliberation about the best approach to judicial review in their legal systems and to provide persuasive justifications for their design choices, rather than simply regurgitating the same anti-administrative rhetoric that has been popularized at the federal level. State officials should also ensure that their systems of judicial review promote agonistic republicanism by providing state agencies with the flexibility necessary to keep regulatory statutes up to date based on evolving political, social, and technological considerations.

This Article therefore challenges the generally accepted proposition that the proper level of judicial deference to agencies is necessarily dictated or controlled by framework legislation or other sources of positive law.[28] Scholars have recently argued that something akin to *Chevron* is "inevitable" and that judicial deference to agency decision-making is a foundational principle of administrative law that maintains a proper balance among the branches and will not simply go away.[29] This Article also contends that if a state judge thinks that a regulatory statute is ambiguous and that an agency's preferred interpretation is reasonable, the court could legitimately uphold the agency's decision even if state law instructed her to construct a de novo interpretation and thereby impose her own policy views onto the law. De novo review could even be understood to entail substantial judicial deference to agencies in this context.[30] *Chevron*'s continued survival would be consistent with state courts' general treatment of codified rules of interpretation as legislative guidance rather than as legally binding norms, as well as with the idea that legislatures can confer

28. *See, e.g.*, Kent Barnett, *Codifying* Chevmore, 90 N.Y.U. L. REV. 1, 4-7 (2015); Elizabeth Garrett, *Legislating* Chevron, 101 MICH. L. REV. 2637, 2638-42 (2003); Sunstein, *supra* note 17, at 1657-60. *Loper Bright* reaffirmed this conventional wisdom in the federal system by holding that "[t]he deference that *Chevron* requires of courts reviewing agency action cannot be squared with the APA." *See* 144 S. Ct. at 2263.

29. *See* Nicholas R. Bednar & Kristin E. Hickman, Chevron*'s Inevitability*, 85 GEO. WASH. L. REV. 1392, 1398, 1443 (2017); Lisa Schultz Bressman & Kevin M. Stack, Chevron *Is a Phoenix*, 74 VAND. L. REV. 465, 466 (2021); *see also* ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 136-38, 151-54 (2022) (claiming that "[a]gencies are the living voice of our law" and "broad deference to administrative determinations is itself a juridical principle, rooted in political morality, that can serve the common good").

30. *See* Adrian Vermeule, *The Deference Dilemma*, 31 GEO. MASON L. REV. 619, 632-34 (2024) (discussing the concept of "de novo deference").

interpretive discretion on agencies on a statute-by-statute basis.[31] We should, in any event, work to develop a system of judicial review of agency action within each state that involves both reasoned deliberation by elected officials and persuasive justifications by courts.

In addition to reconfiguring the terms of the debate and elaborating on what a democratically legitimate system of judicial review of agency exercises of interpretive discretion would entail in states with very different structural arrangements, this Article provides fresh lessons for the federal system by questioning the prevailing view that the proper level of judicial deference is necessarily dictated or controlled by Congress's meta-intent or the original public meaning of the Administrative Procedure Act (APA). It also exposes the undemocratic nature of *Loper Bright* and recognizes the continued space for lawful deference to reasonable exercises of interpretive discretion by agencies in systems that ostensibly require independent judicial interpretation. Finally, this Article both reinforces and provides a powerful example of recent literature on federalism that questions the traditional view of states as laboratories of democracy and recognizes instead that they are often just arms of the national political parties and organized advocacy groups when making policy in today's polarized political environment.[32] Partisan efforts to deconstruct the regulatory state based on false or misleading authoritarian populist rhetoric should be resisted. Accordingly, *Loper Bright* perhaps ironically gives state courts a new opportunity to serve as true laboratories of democracy by reaffirming their commitment to *Chevron*-like deference and otherwise going their own way on this important issue.

Part I describes the anti-administrative movement's attack on judicial deference to agencies and contends that this critique is substantively unpersuasive and based largely on authoritarian populist rhetoric. Part II presents a novel series of case studies that

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31. *See* Glen Staszewski, *The Dumbing Down of Statutory Interpretation*, 95 B.U. L. REV. 209, 263-67 (2015); Vermeule, *supra* note 30, at 631-33; Adrian Vermeule, Chevron *by Any Other Name: From "*Chevron *Deference" to "*Loper Bright *Delegation*,*"* NEW DIGEST (June 28, 2024), https://thenewdigest.substack.com/p/chevron-by-any-other-name [https://perma.cc/5NAU-QLD9].

32. *See, e.g.*, JACOB M. GRUMBACH, LABORATORIES AGAINST DEMOCRACY: HOW NATIONAL PARTIES TRANSFORMED STATE POLITICS 123, 126 (2022).

show how this key plank of the anti-administrative movement's agenda was adopted in several states before *Loper Bright*. Part III both explains and challenges the conventional wisdom regarding the legal force and democratic legitimacy of these state actions and calls into question the prevailing view that the proper level of judicial deference to agencies is necessarily dictated or controlled by the legislature's meta-intent or the original public meaning of framework laws. Part IV reconfigures the terms of the debate and explores what a democratically legitimate system of judicial review of exercises of interpretive discretion by state agencies would entail. The Conclusion draws lessons for the federal system and the current state of federalism in the wake of *Loper Bright*.

I. THE ANTI-ADMINISTRATIVE MOVEMENT'S ATTACK ON *CHEVRON*

Chevron famously held that federal courts should defer to an agency's reasonable interpretations of ambiguous regulatory statutes.[33] States are not bound by this decision, and they take a variety of different approaches, but many state courts follow a doctrine that is functionally analogous to *Chevron*.[34] The Supreme Court formally justified this doctrine based on Congress's presumed intent to delegate interpretive authority to agencies, agencies' greater technical and subject matter expertise, and agencies' heightened political accountability for their policy choices compared to federal courts'.[35] The doctrine is important because legislators often enact broadly worded statutes that prescribe general goals for agencies to achieve—such as providing "safe and healthful working

33. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843-45 (1984).

34. *See* Kinsella & Lerude, *supra* note 27 (surveying the prevailing approaches and reporting that about half of the states give agency interpretations "[s]ubstantial [d]eference," another nine states give agency interpretations "appreciable deference," and ten states give "due weight" to agency interpretations); Daniel Ortner, *The End of Deference: How States (and Territories and Tribes) Are Leading a (Sometimes Quiet) Revolution Against Administrative Deference Doctrines* 59 (The C. Boyden Gray Ctr. for the Study of the Admin. State, Working Paper No. 21-23, 2020), https://administrativestate.gmu.edu/wp-content/uploads/2023/04/21-23_Ortner.pdf [https://perma.cc/GLX9-2LW6] (surveying the prevailing approaches and reporting that "11 states (and the District of Columbia) apply deference that appears to be at least as vigorous as Federal case law").

35. *See Chevron*, 467 U.S. at 865-66.

conditions" for employees[36]—and they leave it up to agencies to figure out how to achieve those goals.[37] And by deferring to reasonable understandings of open-textured statutory mandates, *Chevron* gives agencies flexibility to revise or update the means they adopt for achieving Congress's goals based on new information, practical experience, or evolving policy preferences.[38]

Anti-administrative activists and their judicial allies are seeking to deconstruct the federal regulatory state, and this project has recently included concerted efforts to limit or preclude judicial deference to reasonable exercises of interpretive discretion by agencies.[39] Their central arguments are that such deference allows Congress to abdicate its legislative responsibilities by delegating too much discretionary power to agencies; it results in abdication of the judiciary's responsibility to declare what the law means; and it is unfair to litigants who challenge agency action because it puts a thumb on the scale in favor of the government's legal position.[40] They therefore contend that impartial federal judges have a constitutional duty to pronounce the law's one true meaning based

36. *See* Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651(b), 652(8).

37. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2296-97 (2024) (Kagan, J., dissenting) (providing more examples where agencies must determine how to achieve Congress's goals).

38. *See, e.g.*, FCC v. Fox Television Stations, Inc., 556 U.S. 502, 514-15 (2009) (holding that an agency's change in policy is not subject to "more searching" judicial review than the agency's initial policy); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982-83 (2005) (holding that a prior judicial interpretation only trumps an agency's interpretation under *Chevron* if the court held that its construction was mandated by the statute's unambiguous terms).

39. *See Loper Bright*, 144 S. Ct. at 2273 ("*Chevron* is overruled."); *see also* Kisor v. Wilkie, 139 S. Ct. 2400, 2425 (2019) (Gorsuch, J., concurring) (seeking to overrule *Auer v. Robbins*, 519 U.S. 452 (1997), and eliminate judicial deference to an agency's reasonable interpretations of its own ambiguous regulations); Michigan v. EPA, 576 U.S. 743, 760 (2015) (Thomas, J., concurring) (noting "serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes"); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) ("*Chevron* and [its progeny] permit executive bureaucracies to swallow huge amounts of core judicial and legislative power ... in a way that seems more than a little difficult to square with the Constitution of the framers' design.").

40. *Loper Bright*, 144 S. Ct. at 2285 (Gorsuch, J., concurring); *see, e.g.*, Egan v. Del. River Port Auth., 851 F.3d 263, 278-79 (3d Cir. 2017) (Jordan, J., concurring); Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187, 1189-96 (2016).

on the only legitimate interpretive methods and thereby protect the people from bureaucratic overreach.[41]

Anti-deference activists present these arguments by invoking populist rhetoric that is anti-pluralist, anti-institutional, and Manichean in nature.[42] These arguments contain a grain of truth and are thus rhetorically powerful—particularly in a political and legal culture that is predisposed to be wary of governmental power, especially in the hands of unelected bureaucrats. Broad, vague, or ambiguous statutory language does confer enhanced discretionary authority on agencies; courts are traditionally understood to declare "what the law is"; and *Chevron* does give agencies an advantage in litigation. But that does not change the fact that broad, vague, or ambiguous regulatory statutes can, by definition, be interpreted in more than one legally permissible way; Congress can lawfully delegate policymaking authority to agencies, and federal courts are merely charged with reviewing the legality of agency decisions. Thus, while purporting to use neutral and objective methods to find the one true, eternal meaning of legal texts, the anti-deference position shifts power from Congress and agencies to courts and allows federal judges to impose their own interpretive preferences onto the law.[43]

I will elaborate on why the anti-deference position is fundamentally undemocratic below,[44] but it is worth noting that the anti-administrative movement's primary critiques of *Chevron* are completely unpersuasive on their own terms once one moves beyond their superficial rhetorical appeal.[45] First, Congress cannot possibly

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41. While *Loper Bright* was decided based on the Court's interpretation of the APA, these themes permeate the majority opinion. *See Loper Bright*, 144 S. Ct. 2244 *passim*.

42. *See* Bernstein & Staszewski, *Populist Constitutionalism*, *supra* note 25, at 1774-75. *See generally* Anya Bernstein & Glen Staszewski, *Judicial Populism*, 106 MINN. L. REV. 283 (2021) [hereinafter Bernstein & Staszewski, *Judicial Populism*] (identifying key shared traits of populist rhetoric in the political and legal spheres).

43. *See* Bernstein & Staszewski, *Populist Constitutionalism*, *supra* note 25, at 1785-93; *Loper Bright*, 144 S. Ct. at 2294-95, 2311 (Kagan, J., dissenting).

44. *See infra* Part III.B.

45. In *Loper Bright*, the Supreme Court held that *Chevron* is contrary to the text of the APA, 144 S. Ct. at 2263, which provides that "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. The APA also states that reviewing courts shall "hold unlawful and set aside agency action" that is "not in accordance with law" or "in excess of

regulate nimbly or effectively across the entire policy landscape. It therefore "needs agencies with dedicated missions, specialized expertise, and diverse personnel to achieve its [chosen] policy goals" and keep regulations up to date in a complex and constantly evolving technological, political, and legal environment.[46] Legislators routinely delegate broad policymaking authority to agencies to take advantage of these virtues, and this generally reflects a legally permissible institutional choice rather than an abdication of Congress's constitutional responsibilities.[47] Indeed, agencies are legally required to consider and respond in a reasoned fashion to competing interests and views when they exercise interpretive discretion, and they have an unparalleled capacity to engage with interested stakeholders when formulating regulatory policy.[48] These structural mechanisms promote the democratic legitimacy of administrative rulemaking by ensuring that agency decisions are a product of reasoned deliberation in a landscape of new information, new technology, and evolving policy objectives.

Second, the claim that interpretive deference abdicates the judiciary's responsibilities misrepresents the *Chevron* framework and ignores basic administrative law principles.[49] Step one requires

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statutory jurisdiction, authority, or limitations, or short of statutory right." *Id.* § 706(2)(A), (C). However, contrary to the Court's decision, the APA's text has no bearing on the validity of *Chevron* deference because it "does not say whether and when courts should defer to agency interpretations of law." Sunstein, *supra* note 17, at 1642; *see also Loper Bright*, 144 S. Ct. at 2302-06 (Kagan, J., dissenting) (persuasively refuting the Court's understanding of the original public meaning of the APA).

46. *See* Glen Staszewski, *Justice by Means of the Administrative State*, 122 MICH. L. REV. 1231, 1240 (2024) (book review).

47. *See Loper Bright*, 144 S. Ct. at 2294-96 (Kagan, J., dissenting).

48. *See* Staszewski, *supra* note 46 at 1240-41.

49. Critics of interpretive deference sometimes suggest that a stronger form of judicial review is necessary to protect the people from the political whims of agencies. *See, e.g.*, Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1158 (10th Cir. 2016) (Gorsuch, J., concurring) ("[E]ven when clearly and properly implemented, *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."); Egan v. Del. River Port Auth., 851 F.3d 263, 278-79 (3d Cir. 2017) (Jordan, J., concurring) (complaining that *Chevron* "requires judges to ignore their own best judgment on how to construe a statute, if the executive branch shows up in court with any 'reasonable interpretation made by the administrator of an agency'" (quoting Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984))). But agencies cannot adopt or change legally binding policies under the APA at the drop of a hat. Rather, they typically must provide the public with notice and an opportunity to comment, and issue a final rule with a reasoned justification to promulgate or change legally binding regulations. *See* 5

federal courts to ascertain whether Congress unambiguously resolved the precise question at issue, and if so, to ensure that the agency's position is consistent with Congress's intent.[50] The judiciary must therefore ensure that agency interpretations are consistent with applicable law under the *Chevron* framework. Courts should only defer to agencies when a court has determined that Congress lacked an ascertainable intent on the precise question at issue and that the statute is therefore ambiguous. Step two requires federal courts to ensure that an agency's exercise of interpretive discretion is legally permissible (meaning that the agency's resolution of statutory ambiguity falls within a zone of reasonableness) and that the agency has provided a reasoned explanation for its policy choices based on the administrative record (meaning that the agency's decision is not "arbitrary, capricious, or manifestly contrary to the statute").[51] This is hardly a blank check

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U.S.C. § 553(b)-(c). Agencies can also change policy in a common law fashion pursuant to formal adjudication, but such proceedings provide regulated parties with a full-fledged evidentiary hearing before a relatively independent administrative law judge. *See id.* §§ 554, 556-57. Informal rulemaking and formal agency adjudication both provide extensive opportunities for public participation and other structural safeguards designed to foster reasoned deliberation and prevent arbitrary governmental action, and thereby promote the democratic legitimacy of agency decision-making. Significantly, agency interpretations issued pursuant to these procedural forms are the only safe harbors that generally fall comfortably within *Chevron*'s domain under "step zero" of the previously prevailing analytical framework. *See* United States v. Mead Corp., 533 U.S. 218, 227, 229-30 (2001).

50. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984). Justice Kavanaugh has criticized *Chevron* on the grounds that step one's inquiry is too flexible and indeterminate, and he has claimed that his "goal is to help make statutory interpretation a more neutral, impartial process where like cases are treated alike by judges of all ideological stripes, regardless of the issue and regardless of the identity of the parties in the case." Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2153 (2016) (book review). But getting rid of *Chevron* is hardly likely to lead to more uniform judicial decisions, given that federal judges can and do follow very different approaches to statutory interpretation when they decide cases de novo. Indeed, eliminating *Chevron* will likely undermine legal uniformity because judges will no longer be expected to defer to reasonable—and uniform—resolutions of statutory ambiguities by agencies. *See* Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1120-21 (1987).

51. *Chevron*, 467 U.S. at 843-44. Different conceptions of the *Chevron* framework, including the appropriate scope of judicial review under step two, are legion in both the case law and the commentary. *See, e.g.*, Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1254-55 (1997) (arguing that *Chevron* step two and the APA's "'arbitrary and capricious' test" are "identical"); Kent Barnett & Christopher J. Walker, Chevron *Step Two's Domain*, 93 NOTRE DAME L. REV. 1441, 1451-57 (2018)

for agencies to tyrannize the American people based on their latest whims, and it demands far more of agencies in justifying their exercises of policy discretion than what courts customarily require of Congress.[52]

Third, setting aside the dubious claim that federal courts are now, or have ever been, neutral and objective,[53] they *have* traditionally deferred to policy decisions by the political branches in exercising their powers of judicial review.[54] No one seriously claims that it violates due process or is otherwise unconstitutional for courts to adopt a presumption in favor of the constitutionality of duly enacted statutes—as reflected, for example, by the rational basis test used to assess the legality of ordinary legislation—even though such deference to Congress puts a thumb on the scale in the government's favor in litigation.[55] When Congress delegates authority to

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(describing three views on *Chevron* step two—hypertextualism, hyperpurposivism, and arbitrary-and-capricious review). The version of *Chevron* presented in this Article is based on my own prescriptive understanding of this framework. While there is nothing that would prevent courts from adopting or adhering to this framework, I am not suggesting that it accurately describes all the case law or precisely reflects the views of other scholars. Nor have I sought to go down the rabbit hole of parsing this case law or literature.

52. *See* Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 n.9 (1983) ("We do not view as equivalent the presumption of constitutionality afforded legislation drafted by Congress and the presumption of regularity afforded an agency in fulfilling its statutory mandate.").

53. For empirical evidence that political ideology influences judicial decision-making even under relatively deferential standards of review such as *Chevron*, see Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 825-27 (2006).

54. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2258-59 (2024) (discussing the tradition of deference in federal courts). Courts also defer to legally authorized exercises of discretionary power by private parties in adjudication under some circumstances. Yet the anti-administrative movement is not claiming that the business judgment rule, for example, violates procedural due process. *See, e.g.*, eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 36 (Del. Ch. 2010) ("The business judgment standard of review is deferential. When applying this standard, the Court 'will not substitute its judgment for that of the board if the [board's] decision can be "attributed to any rational business purpose."'" (alteration in original) (quoting Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1373 (Del. 1995))).

55. On the contrary, there have traditionally been advocates from across the political spectrum of a "Thayerian" approach to judicial review. *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893) (reviewing the development of judicial review during the Founding and concluding that a court "can only disregard [an] Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question"). Some have argued, however, that this approach cannot be squared with constitutional originalism. *See, e.g.*, Steven G. Calabresi, *Originalism and James Bradley*

an agency to implement a statutory mandate, the agency *is* the legally authoritative decision maker, and it is no longer just an ordinary party to litigation. It therefore strains credulity to suggest that judicial deference to agency decision-making is incompatible with due process—so long as the agency's challenged decision is both legally permissible and reasonably justified on the merits.

The *Chevron* framework provides robust checks against unlawful or arbitrary agency decision-making. Given these realities, the argument that federal courts are obligated to articulate and enforce their best understanding of ambiguous statutory mandates irrespective of what an agency thinks ultimately boils down to a claim that federal judges are legally required to make policy decisions in statutory interpretation. But courts lack the institutional competence to make sound regulatory policy and are therefore only likely to mess things up or get in the way. They also lack the structural attributes and related legal obligations that allow agencies to promote pluralistic democracy by serving as our government's preeminent sites for reasoned deliberation and ongoing contestation among stakeholders with disparate interests and views.[56]

II. FOUR WAYS TO IMPLEMENT THE MOVEMENT'S AGENDA IN THE STATES

The anti-administrative movement's relatively recent efforts to overrule *Chevron* became a top priority of the Federalist Society[57] and served as the primary litmus test for the Trump administration's judicial appointments.[58] It would therefore be surprising if the proper approach to judicial review of interpretive discretion by

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Thayer, 113 NW. U. L. REV. 1419, 1437-38 (2019) ("Vigorous horizontal judicial review [against Congress and the president] was thus contemplated by the Framers, contrary to what Professor Thayer asserted in *The Origin and Scope of American Doctrine of Constitutional Law*.").

56. *See* Bernstein & Staszewski, *Populist Constitutionalism*, *supra* note 25, at 1778-83.

57. *See* Green, *supra* note 6, at 665-66 (noting that the Federalist Society's most prominent event, the National Lawyers Convention, included no discussions about *Chevron* in 2008, but it was entirely dedicated to administrative agencies and included critiques of *Chevron* in 2017 and 2018).

58. *See* Jeremy W. Peters, *Trump's New Judicial Litmus Test: Shrinking "the Administrative State,"* N.Y. TIMES (Mar. 26, 2018), https://www.nytimes.com/2018/03/26/us/politics/trump-judges-courts-administrative-state.html [https://perma.cc/Q5VC-DQNL].

agencies did not also receive greater attention in the states, especially in the wake of *Loper Bright*. But some states were ahead of their time, as anti-administrative activists successfully used four different approaches to prohibit state courts from giving strong deference to legal interpretations by state agencies even before that decision.

This Part tells the stories behind those efforts. It shows that these were carefully orchestrated political power plays rather than products of reasoned deliberation or meaningful reflections of the people's will. It also explains how proponents relied on the same anti-administrative rhetoric that was popularized at the federal level rather than anything distinctive about their states.

A. Judicial Decisions in Mississippi and Ohio

Several state high courts have recently held that their judiciaries may not defer to reasonable resolutions of legal ambiguities by state agencies under state law.[59] For example, in *King v. Mississippi*

59. The Michigan Supreme Court was something of an anti-deference trailblazer, explicitly rejecting *Chevron* in 2008 on the grounds that the framework did not provide "a clear road map" for judicial review and that "the unyielding deference to agency statutory construction" it required "conflict[ed] with [Michigan's] administrative law jurisprudence and with the separation of powers ... by compelling delegation of the judiciary's constitutional authority to construe statutes to another branch of government." *In re* Complaint of Rovas Against SBC Mich., 754 N.W.2d 259, 270-72 (Mich. 2008). The Utah Supreme Court has likewise explicitly rejected *Chevron* deference, while seemingly also rejecting the very possibility of interpretive ambiguity:

> A "discretionary decision involves a question with a range of 'acceptable' answers, some better than others, and the agency ... is free to choose from among this range without regard to what an appellate court thinks is the 'best' answer." Statutory interpretation does not present such a discretionary decision, because "questions of law ... ha[ve] a single 'right' answer."

Hughes Gen. Contractors, Inc. v. Utah Lab. Comm'n, 322 P.3d 712, 717 n.4 (Utah 2014) (alterations in original) (citation omitted) (quoting Murray v. Utah Lab. Comm'n, 308 P.3d 461, 471-72 (Utah 2013)). I have chosen not to present full case studies of the events in Michigan and Utah because of space limitations and a desire to focus more heavily on states that eliminated *Chevron* through legislation or a constitutional amendment rather than through adjudication (and, of course, these states and a few others fall into this latter category). Nonetheless, the events in Michigan and Utah are consistent with my overall conclusion that the states that eliminated *Chevron* deference relied on the same basic rhetoric that has become popularized at the federal level, and those decisions reflected political power plays rather than a meaningful reflection of the will of the people. Indeed, the Michigan Supreme Court prohibited *Chevron* deference when it was controlled by a bare majority of self-described originalists and textualists, and the court's opinion was written by a prominent

Military Department, the Mississippi Supreme Court abandoned earlier case law endorsing varying levels of deference and suggested that state courts must interpret statutes de novo based on the strict separation of functions mandated by the state constitution.[60] The court acknowledged that agencies must interpret statutes as an initial matter in implementing their delegated statutory authority but summarily concluded that state courts must interpret those statutes de novo when reviewing agency decision-making to avoid "shar[ing] ... the power of statutory interpretation with another branch" of state government.[61] While recognizing that its decision was based on Mississippi's constitution rather than federal law, the court also endorsed then-Judge Gorsuch's concurring opinion in *Gutierrez-Brizuela v. Lynch*, which argued that *Chevron* deference must be rejected for federal courts to "fulfill their duty to exercise their independent judgment about what the law *is*."[62] The court, nonetheless, upheld the agency's understanding of the statute at issue based on its own independent judgment.[63]

The Mississippi Supreme Court also went out of its way to take this position a couple steps further in *HWCC-Tunica, Inc. v. Mississippi Department of Revenue*,[64] where it reiterated that state courts must review legal interpretations by state agencies de novo and emphasized that "[i]nterpreting statutes is reserved exclusively

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conservative judicial activist. *See generally* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1803-11 (2010) (describing "Michigan's [t]extualism [r]evolution"). Similarly, the Utah Supreme Court's decision was written by Justice Thomas Lee, another movement conservative who strongly supports the use of corpus linguistics in legal interpretation. *See generally* Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788 (2018). For trenchant criticisms of this approach, see generally Anya Bernstein, *Legal Corpus Linguistics and the Half Empirical Attitude*, 106 CORNELL L. REV. 1397 (2021).

60. 245 So. 3d 404, 407-08 (Miss. 2018).

61. *Id.* at 408.

62. *Id.* (quoting Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1158 (10th Cir. 2016) (Gorsuch, J., concurring)).

63. *Id.* at 408-10.

64. 296 So. 3d 668 (Miss. 2020). The court departed from its usual practice and agreed to resolve the constitutional issues presented even though they were not raised in the lower courts because "the defendants were aware of the constitutional argument, they addressed the issue in their briefs, they were not prejudiced by 'the plaintiffs' failure to raise this issue in their initial pleadings[,]' and the issue was a matter of grave importance." *Id.* at 676 (alteration in original) (quoting Pascagoula Sch. Dist. v. Tucker, 91 So. 3d 598, 604-05 (Miss. 2012)).

for courts."[65] First, the court concluded that the agency's choice of policymaking form was irrelevant to the deference question and that de novo judicial review is required in "any case in which an agency interprets a statute."[66] Accordingly, the fact that *King* involved an agency interpretation issued in adjudication, whereas the challenged interpretation in *HWCC-Tunica* was set forth in a legally binding regulation, made no difference.[67] Second, the court held that a statute that explicitly required state courts to defer to the Mississippi Department of Revenue's interpretations of tax statutes as set forth "in duly enacted regulations and other officially adopted publications"[68] violated the separation of powers required by Mississippi's constitution by infringing on the state judiciary's "exclusive power to interpret statutes."[69] The court therefore effectively prohibited the state legislature from requiring state courts to defer to reasonable exercises of interpretive discretion by state agencies.[70] The court, nonetheless, upheld the agency's understanding of the statute at issue based primarily on its invocation of a judicially created substantive canon that resolves ambiguous revenue statutes in favor of the government.[71]

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65. *Id.* at 677-78. Not surprisingly, the Mississippi Supreme Court subsequently took this position another step further, rejecting *Auer*-like deference and holding that state courts may not defer to reasonable interpretations of ambiguous regulations by state agencies. *See* Miss. Methodist Hosp. & Rehab. Ctr., Inc. v. Miss. Div. of Medicaid, 319 So. 3d 1049, 1055 (Miss. 2021).

66. *HWCC-Tunica*, 296 So. 3d at 677.

67. *Id.* at 676-77; *cf.* United States v. Mead Corp., 533 U.S. 218, 226-27 (2001) (holding that *Chevron* deference applies only when an agency possesses delegated lawmaking authority and "the agency interpretation claiming deference was promulgated in the exercise of that authority"). While *Chevron* generally applies to federal agency interpretations issued pursuant to formal APA adjudication and other adjudications involving relatively extensive procedures, scholars have recently argued that the *Chevron* framework should only apply to rulemaking. *See, e.g.*, Kristin E. Hickman & Aaron L. Nielson, *Narrowing* Chevron*'s Domain*, 70 DUKE L.J. 931, 994, 996 (2021); Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against* Chevron *Deference in Immigration Adjudication*, 70 DUKE L.J. 1197, 1201-02, 1242 (2021). While I take no position on this issue here, this scholarship would sharply distinguish these two cases in Mississippi.

68. MISS. CODE ANN. § 27-77-7(5) (2024) (effective Jan. 1, 2015), *invalidated by HWCC-Tunica*, 296 So. 3d 668 (Miss. 2020).

69. *HWCC-Tunica*, 296 So. 3d at 676-77.

70. *See id.* at 677.

71. *See id.* at 679-81. Because the state supreme court and lower courts all agreed that the agency's interpretation was legally correct, it is difficult to see how this case provided the "unusual circumstances" necessary to overcome the plaintiffs' failure to plead and argue the

Similarly, in *TWISM Enterprises, L.L.C. v. State Board of Registration for Professional Engineers and Surveyors*, the Ohio Supreme Court held that it is the judiciary's responsibility to determine the meaning of statutes and state courts are therefore not required to defer to an agency's legal interpretation.[72] The court began by acknowledging that prior cases had suggested that state courts should defer to legal interpretations by agencies but noted that the case law reflected a muddle of several different—and in some ways inconsistent—standards.[73] The court proceeded to reject mandatory judicial deference to state agencies based on the separation of powers established by the Ohio Constitution.[74] While acknowledging that state agencies are regularly required to interpret the law to carry out their delegated statutory responsibilities, the court concluded that state courts have exclusive power to issue legal interpretations that "would be considered authoritative in a judicial proceeding" because it is emphatically the province and duty of the judiciary to say what the law means.[75] The court also suggested that *Chevron*-like deference raises due process concerns because it results in the judiciary "turn[ing] over to one party" in litigation its "conclusive authority to say what the law means."[76] The court maintained that its understanding of the Ohio Constitution was consistent with the state APA and rules of interpretation codified by the state legislature, which allegedly required de novo judicial review of the legality of administrative adjudicatory orders[77] and authorized—but did not require—state courts to consider state

constitutional issues below. *Id.* at 672, 675, 681; *cf. supra* note 64 (explaining the court's justifications for taking up the constitutional issue).

72. 223 N.E.3d 371, 377-79 (Ohio 2022).

73. *Id.* (explaining that Ohio's approach to judicial deference was "much harder to categorize" than federal doctrine and "there is no '*Chevron* moment' in this court's history").

74. *See id.* at 379-80.

75. *Id.* at 380 (quoting Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 119 (2015) (Thomas, J., concurring)); *see also id.* at 381-82 (quoting Marbury v. Madison, 5 U.S. 137, 177 (1803)).

76. *See id.* at 380.

77. *See id.* at 381 (explaining that the relevant provision of the state APA provided that the court may uphold an agency's adjudicatory order only if it "is supported by reliable, probative, and substantial evidence and is *in accordance with law*" (quoting Ohio Rev. Code Ann. § 119.12(M) (West 2022))). The court construed the italicized language to require de novo review, but it could just as easily be understood as embracing *Chevron* since legally impermissible interpretations of statutes should be invalidated under this framework. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

agency interpretations in ascertaining the legislature's intent when statutes are ambiguous.[78] Nonetheless, the court invalidated the Board's interpretation of the statute at issue because it concluded that the Board's position conflicted with the best understanding of the statutory text.[79]

The Ohio Supreme Court adopted the precise arguments that anti-administrative federal judges and scholars have recently developed to challenge the constitutional validity of *Chevron* deference.[80] These positions were presented in briefs filed by several right-wing advocacy groups, including the Pacific Legal Foundation, the New Civil Liberties Alliance, and the Buckeye Institute.[81] While the state attorney general's office argued that the lower court's decision in favor of the Board should be affirmed without addressing the deference question because the Board's interpretation of the statute was unambiguously correct,[82] the Republican State Attorney General, Dave Yost, filed an amicus brief on his own behalf arguing that the state's version of *Chevron* deference should be rejected.[83] In accepting this invitation, the Ohio Supreme Court relied almost exclusively upon judicial opinions and scholarship by federal judges and scholars closely associated with the Federalist Society, as well as other state supreme courts that recently adopted this position.[84]

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78. *See TWISM*, 223 N.E.3d at 381. *TWISM* endorsed something akin to *Skidmore* deference when regulatory statutes are "genuinely ambiguous." *Id.* at 382 (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

79. *See id.* at 383-85.

80. *See generally* Green, *supra* note 6 (recounting the development of these constitutional arguments).

81. *See* Opening Brief of Appellant TWISM Enterprises, LLC, *TWISM*, 223 N.E.3d 371 (Ohio 2022) (No. 2021-1440); Reply Brief of Appellant TWISM Enterprises, LLC, *TWISM*, 223 N.E.3d 371 (No. 2021-1440); Brief Amicus Curiae of the New Civil Liberties Alliance in Support of Appellant TWISM Enterprises, LLC, *TWISM*, 223 N.E.3d 371 (No. 2021-1440); Amicus Curiae Brief of the Buckeye Institute in Support of Appellant TWISM Enterprises, LLC d/b/a Valucadd Solutions, *TWISM*, 223 N.E.3d 371 (No. 2021-1440).

82. *See TWISM*, 223 N.E.3d at 377.

83. *See* Merit Brief of Amicus Curiae Ohio Att'y Gen. Dave Yost in Support of Neither Party at 1-2, *TWISM*, 223 N.E.3d 371 (No. 2021-1440).

84. *See TWISM*, 223 N.E.3d at 378-83 (citing opinions or scholarship by Justice Alito, Justice Thomas, Jonathan Adler, Aditya Bamzai, and Philip Hamburger); *see also Hon. Samuel A. Alito, Jr.*, FEDERALIST SOC'Y, https://fedsoc.org/contributors/samuel-alito [https://perma.cc/2HDM-DAEZ]; *Hon. Clarence Thomas*, FEDERALIST SOC'Y, https://fedsoc.org/contributors/clarence-thomas [https://perma.cc/43QX-ZRYH]; *Prof. Jonathan H. Adler*, FEDERALIST SOC'Y, https://fedsoc.org/contributors/jonathan-adler [https://perma.cc/5F2Y-PXDH]; *Prof. Aditya Bamzai*, FEDERALIST SOC'Y, https://fedsoc.org/contributors/aditya-bamzai [https://

The Ohio Supreme Court squarely adopted today's party-line among conservative, anti-administrative Republicans. The remainder of this Part shows that the same position was recently codified into state law in Florida, Arizona, Tennessee, and Wisconsin. Rather than a product of reasoned deliberation or a meaningful reflection of the people's will, these laws were likewise the result of political power plays by conservative, anti-administrative Republicans.

B. Constitutional Revision in Florida

When Florida's current constitution was adopted in 1968, it provided a novel mechanism for periodic review and potential revision by a commission of political appointees who could refer proposed amendments to the voters for their approval at an upcoming election.[85] The Florida Constitution Revision Commission (CRC) convenes every twenty years and is charged with reviewing the state constitution, determining whether it should be revised, and crafting the language of proposed amendments as well as the titles and summaries that appear on election ballots.[86] Commissioners are empowered to propose their own amendments and required to hold public meetings to hear public concerns about the constitution.[87] Commissioners also solicit proposals for constitutional amendments from the public.[88] The CRC is composed of thirty-seven members: the state attorney general, fifteen members (including a chair) appointed by the governor, nine members chosen by the speaker of the house, nine members chosen by the president of the senate, and three members selected by the chief justice of the Florida Supreme Court with the advice of the other justices.[89] The

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perma.cc/2CQ5-V5QE]; *Prof. Philip A. Hamburger*, FEDERALIST SOC'Y, https://fedsoc.org/contributors/philip-hamburger [https://perma.cc/84S2-NNEX].

85. FLA. CONST. art. XI, §§ 2-3. *See generally* Mary E. Adkins, *The Same River Twice: A Brief History of How the 1968 Florida Constitution Came to Be and What It Has Become*, 18 FLA. COASTAL L. REV. 5, 19-20 (2016).

86. *See* FLA. CONST. art. XI, §§ 2-3; Adkins, *supra* note 85, at 5; *About the CRC*, CONST. REVISION COMM'N 2017-2018, https://library.law.fsu.edu/Digital-Collections/CRC/CRC-2018/About.html [https://perma.cc/T6ES-FC4J].

87. FLA. CONST. art. XI, § 2(c).

88. *See About the CRC*, *supra* note 86.

89. FLA. CONST. art. XI, § 2(a)-(b).

CRC's proposed revisions must be "approved by a vote of at least sixty percent of the electors voting on the measure" to become effective.[90]

The CRC was designed to be relatively balanced and politically independent based on the length of time between commissions, the unelected status of commissioners, the one-shot nature of commissioners' work, and the designated mix of appointing officials from each main branch of government.[91] Things have generally not worked out that way,[92] and the CRC established in 2017 was composed almost entirely of registered Republicans or members closely associated with Republican politics—many of whom were high-powered attorneys, lobbyists, or public officials.[93] This is not surprising considering the recent dominance of the Republican Party in Florida politics, notwithstanding the nearly equal distribution of registered Democratic and Republican voters within the state at that time.[94]

One of the CRC's proposed revisions in 2018 provided that "[i]n interpreting a state statute or rule, a state court ... may not defer to

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90. *Id.* § 5(e).

91. *See, e.g.*, Mary E. Adkins, *What Florida's Constitution Revision Commission Can Teach and Learn from Those of Other States*, 71 RUTGERS U. L. REV. 1177, 1185-86, 1213 (2019) ("The CRC was created to be independent from interference from the legislative and executive branches."); Joseph W. Little, *The Need to Revise the Florida Constitutional Revision Commission*, 52 FLA. L. REV. 475, 475 (2000) (noting the expectation that the CRC would be "independent").

92. *See, e.g.*, Adkins, *supra* note 91, at 1226-27 (pointing out that the CRC has consistently been "dominated by members of one political party" and otherwise failed "to ensure fair representation of the populace"); Little, *supra* note 91, at 477-78 (claiming that "what was conceived of and sold to the people of Florida as a politics-free review mechanism was in fact a gift of a rich political plum to the politicians who happened to be the incumbents in the designated offices when the time for appointing a constitutional revision commission rolled around," and contending that "[t]he touted 'free of legislative oversight' feature has transmogrified the ideal of an independent, deliberative and expert evaluation of the basic governing document of Florida into occasional super-legislative opportunities to 'one-up' the Legislature by constitutionalizing non-constitutional issues").

93. *See* Flowers, *supra* note 19 (reporting that the 2017-18 CRC included thirty-one Republicans, three Democrats, and three members with unknown political affiliations); Meeting Transcript of the Florida Constitution Revision Commission at 118 (Apr. 16, 2018) [hereinafter April 2018 CRC Transcript], https://library.law.fsu.edu/Digital-Collections/CRC/CRC-2018/PublishedContent/ADMINISTRATIVEPUBLICATIONS/MEETINGS/TRANSCRIPTS/Transcript04-16-2018Vol1.pdf [https://perma.cc/EGL6-JW4R] (statement of Comm'r Lee) (pointing out that in contrast to the 1997-98 CRC, "[t]here's nothing—there's very little bipartisan about this Commission").

94. *See* Adkins, *supra* note 91, at 1197-98.

an administrative agency's interpretation of such statute or rule, and must instead interpret such statute or rule de novo."[95] This proposal was intended to overrule well-established precedent, which provided that a state agency's interpretation of a statute it administers "is entitled to great weight" and will only be overturned if "clearly erroneous."[96] Proponents of the amendment characterized Florida's approach as an unusually strong version of the *Chevron* doctrine, which they criticized on separation of powers and due process grounds.[97] They quoted from judicial opinions by Justices Gorsuch and Thomas to argue that such deference allows "executive bureaucracy to swallow huge amounts of core judicial and legislative power"[98] and "improperly wrests from the courts the ultimate interpretive authority to say what the law is."[99]

The proposal was sponsored by Commissioner Roberto Martinez, a Republican lawyer assigned to the CRC's Judicial Committee.[100] In addition to claiming that Florida's version of *Chevron* "encroache[s] upon the power of both the legislative branch and the judicial branch,"[101] he drew upon an increasingly popular trope among anti-deference activists in arguing that it also violates the principle that justice is blind and thus undermines due process.[102]

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95. CONST. REVISION COMM'N 2017-2018, *supra* note 22, at 8.

96. *See, e.g.*, Dep't of Ins. v. Se. Volusia Hosp. Dist., 438 So. 2d 815, 820 (Fla. 1983); March 2018 CRC Transcript, *supra* note 20, at 61-62 (statement of Comm'r Martinez).

97. *See* March 2018 CRC Transcript, *supra* note 20, at 60-65 (statement of Comm'r Martinez).

98. *Id.* at 72 (statement of Comm'r Solari).

99. *Id.* at 82 (statement of Comm'r Stemberger).

100. *See Commissioner Roberto Martinez*, Const. Revision Comm'n 2017-2018, http://library.law.fsu.edu/Digital-Collections/CRC/CRC-2018/Commissioners/Martinez.html [https://perma.cc/H27D-8H68] (showing Martinez previously served on the transition committees for Republican governors Jeb Bush and Charlie Crist).

101. March 2018 CRC Transcript, *supra* note 20, at 61 (statement of Comm'r Martinez).

102. *See id.* at 62-63 (describing two graphics of Lady Justice, one where she is blindfolded and committed to impartiality, and one where she is "peeking" and tips the scales of justice "in favor of the administrative agency"); *see also* Daniel Dew, Opinion, *11 States Have Ended Judicial Deference to Executive Agencies—More Should Follow Their Lead*, HILL (Jan. 17, 2023, 7:00 AM), https://thehill.com/opinion/judiciary/3809650-11-states-have-ended-judicial-deference-to-executive-agencies-more-should-follow-their-lead/ [https://perma.cc/Y8CW-QQU5] (invoking Lady Justice to advocate eliminating *Chevron* deference); March 2018 CRC Transcript, *supra* note 20, at 76-78 (statement of Comm'r Gaetz) (claiming the proposal would embrace "the notion that the citizen walking in to challenge the king has the opportunity to be viewed as an equal before the law," and arguing that "[n]owhere else, as far as [he] know[s], in our system of government does somebody come into court with an automatic

While other commissioners spoke in favor of the proposal at a public meeting, no one explicitly opposed it.[103] In response to a question about whether eliminating judicial deference could undermine agency expertise, Martinez responded that a court could "still listen to the opinion of the agency" and "give it great weight" if the court concluded that the agency's position was "persuasive," but claimed that the amendment "prevents the Judge from deferring to it reflexively and creating a presumption in its favor that could only be overturned if clearly erroneous."[104] While this explanation may sound reasonable and resonates with the concept of *Skidmore* deference,[105] it is also belied by the fact that the text of the amendment requires state courts to interpret statutes and regulations de novo.[106] Likewise, in response to concerns that de novo judicial review could generate inconsistent interpretations by judges with different ideological orientations or interpretative philosophies, Martinez claimed that prohibiting judicial deference to agencies would instead improve consistency by preventing agencies from changing their legal positions based solely on the shifting political preferences of new gubernatorial administrations.[107] This argument is belied by the fact that state agencies must generally provide public notice and comment before promulgating new regulations, and they generally cannot make dramatic changes to policy at the drop of a hat, even in adjudication.[108] In any event, at the close of this discussion, the CRC voted to adopt the proposal and place it on the election ballot for voter approval by a vote of twenty-eight to four.[109]

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advantage"). These tropes draw on influential critiques of administrative power by Philip Hamburger. *See generally* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014); Hamburger, *supra* note 40.

103. *See* March 2018 CRC Transcript, *supra* note 20, at 71-83 (highlighting how the commissioners only supported the proposal during debate).

104. *Id.* at 66-68 (statement of Comm'r Martinez).

105. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (holding that agency interpretations merit respect based on their persuasiveness).

106. *See* FLA. CONST. art. V, § 21.

107. *See* March 2018 CRC Transcript, *supra* note 20, at 68-71 (statement of Comm'r Martinez); *see also id.* at 79-82 (statement of Comm'r Lee).

108. *See infra* notes 444-47 and accompanying text (describing Florida's rulemaking process).

109. March 2018 CRC Transcript, *supra* note 20, at 83-84.

Despite recognition that prohibiting *Chevron* deference involved "perhaps the most fundamental change that we might really look at in the structure of government in this Constitutional Revision Commission,"[110] the CRC Style and Drafting Committee bundled this proposal with two other recommended revisions as a single ballot measure.[111] The proposed constitutional amendment, which appeared on the ballot in a measure titled "Rights of Crime Victims; Judges," therefore included a 1,500-word Victim's Bill of Rights, which would establish new constitutional protections for crime victims and their families.[112]

While the electorate's views on judicial deference to agencies were probably not well formed or easily predictable in 2018[113] (and voters tend to reject ballot initiatives when they are uncertain),[114] polls conducted before the election showed that Florida voters from across the political spectrum favored the Victim's Bill of Rights (or "Marsy's Law") by overwhelming margins.[115] Thus, if the CRC wanted to guarantee that *Chevron* deference would be prohibited, its best strategy was to bundle that proposal with Marsy's Law. Not surprisingly, this constitutional amendment was approved by Florida voters, clearing the requisite 60 percent threshold by a vote of 4,835,950 to 3,013,601.[116]

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110. *Id.* at 76 (statement of Comm'r Gaetz).

111. *See* CONST. REVISION COMM'N 2017-2018, *supra* note 22, at 1.

112. *Id.* at 1-9. The proposal to eliminate judicial deference to agencies was just fifty words, in comparison. *Id.* at 8.

113. It is possible that politically attentive citizens have developed views on this matter in more recent years given the extensive media attention surrounding the Court's decision to revisit *Chevron* in *Loper Bright*.

114. *See, e.g.*, Todd Donovan, Shaun Bowler, David McCuan & Ken Fernandez, *Contending Players and Strategies: Opposition Advantages in Initiative Campaigns*, *in* CITIZENS AS LEGISLATORS 80, 99 (Shaun Bowler et al. eds., 1998).

115. *See Poll Shows Floridians Overwhelmingly Support Adding Victim's Rights to the Florida Constitution*, *supra* note 23 (reporting that 85 percent of survey respondents "would vote for a constitutional amendment that guarantees victims' rights in the Florida Constitution," including "83 percent of Democrats, 86 percent of Independents and 92 percent of Republicans"); Drew Wilson, *Poll: Florida Voters Overwhelmingly Want "Marsy's Law,"* FLA. POLS. (Mar. 15, 2018), https://testing.floridapolitics.com/archives/259000-poll-florida-voters-overwhelmingly-want-marsys-law/ [https://perma.cc/E5NV-4LF2] (reporting that "[t]he ... proposal is a near lock to pass as it sits at 78 percent support").

116. *Rights of Crime Victims; Judges*, FLA. DIV. OF ELECTIONS, https://dos.elections. my florida.com/initiatives/initdetail.asp?account=11&seqnum=20 [https://perma.cc/HP8B-K5 SG].

The results of this election were likely driven by the overwhelming popularity of Marsy's Law, with voters giving short shrift to the niceties of administrative law in casting their ballots. This is a classic example of "logrolling" in the initiative or referendum process, where a highly popular and salient idea is paired with a less popular or salient reform that is favored by the proposal's sponsors, and the latter issue receives voter approval by riding on the coattails of the more popular measure.[117] This practice breeds voter confusion and undermines the electorate's ability to express their true preferences on each aspect of a proposed constitutional amendment, since voters must decide whether to support the entire measure when it has provisions they both support and oppose.[118] When logrolling of this nature succeeds, it effectively allows the proposal's proponents to impose their own policy preferences onto the people by enacting constitutional changes they favor but that may be contrary to the true preferences of a majority of voters.[119]

The CRC's debate on whether to place this proposed constitutional amendment on the ballot recognized the likelihood of such logrolling. To his credit, Commissioner Martinez opposed the bundling of these distinct revisions on the grounds that they were unrelated; therefore, he moved to return the proposed amendment to the CRC Style and Drafting Committee so that the revisions could be "unbundled."[120] Martinez acknowledged that "[b]y grouping

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117. *See* Kurt G. Kastorf, *Logrolling Gets Logrolled: Same-Sex Marriage, Direct Democracy, and the Single Subject Rule*, 54 EMORY L.J. 1633, 1646-55 (2005) (pointing out that logrolling can either broaden support for a measure by increasing the size of its supporting coalition or weaken support for a measure by piling on outcomes favored only by its most extreme proponents, and advocating relatively aggressive enforcement of single-subject rules in the ballot initiative context where the latter form of logrolling is most prevalent).

118. *See id.* at 1638.

119. Most states, including Florida, have adopted "single-subject rules" that prohibit initiative proponents from bundling unrelated proposals in a single measure for the ballot. *Single-Subject Rule for Ballot Initiatives*, BALLOTPEDIA, https://ballotpedia.org/Single-subject_rule_for_ballot_initiatives [https://perma.cc/5H7M-KHGN]. But Florida's single-subject rule does not apply to the CRC's proposed constitutional amendments. Dep't of State v. Hollander, 256 So. 3d 1300, 1311 (Fla. 2018) (per curiam). Accordingly, the Florida Supreme Court reversed a trial court's decision to preclude this proposed constitutional amendment from appearing on the election ballot on the grounds that it contained unrelated provisions. *See id.* at 1310-11. The lower court also found that the proposed amendment's title and ballot summary contained misleading omissions that should disqualify the measure from the ballot, but the Florida Supreme Court reversed that conclusion as well. *Id.*

120. April 2018 CRC Transcript, *supra* note 93, at 67-75 (statement of Comm'r Martinez).

these separate proposals together, effectively what we've done is we're log rolling."[121] Commissioner Solari, another vocal advocate for prohibiting judicial deference to agencies, supported Martinez's motion on the grounds that even sophisticated voters were likely to support Marsy's Law and overlook the *Chevron* issue.[122] While acknowledging that he would personally like this outcome, Solari argued that the CRC "ought to put something together that the citizens can actually understand.... [and] err on the side of ... giv-[ing] the citizens an opportunity to [cast votes] they really believe in."[123] Another commissioner who supported Martinez's motion acknowledged that the CRC's decision to bundle different proposals together for the ballot was not unprecedented but pointed out that prior commissions included bipartisan working groups.[124] In contrast, "[t]here's nothing—there's very little bipartisan about this

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The 2017-18 CRC adopted rules that prohibited the bundling of unrelated measures. *See id.* at 69 (statement of Comm'r Martinez). But the CRC Style and Drafting Committee concluded that these revisions were sufficiently related because they both involved the state judiciary. *Id.* at 8-9, 131 (statement of Comm'r Heuchan).

121. *Id.* at 70 (statement of Comm'r Martinez). In response to the Florida Supreme Court's reasoning that a single-subject rule is unnecessary for the CRC's proposed constitutional amendments because they are subject to the safeguards provided by public hearings and debate, Martinez claimed that the grouping of these proposals was not the subject of a true public hearing. *Id.* at 71-72. In response to a claim that the meetings of the CRC's Style and Drafting Committee were formally open to the public, Martinez pointed out that the meetings were only attended by a handful of lobbyists and that this was hardly akin to the public hearings that were held throughout the state on the substance of the various proposals. *Id.* at 84-88.

122. *See id.* at 93-94 (statement of Comm'r Solari) ("Last week I spoke before two groups, and these are in our community sophisticated groups. One was the Taxpayer's Association and one was the Republican Executive Committee. These are people that know more or less what's going on as well as anybody, and they didn't like bundling. And one of the things I did was I read Revision 1, and it was clear that nobody in the room could have possibly picked out the Chevron deference issue, which would make me happy because they're going to vote for the first proposal.").

123. *Id.* at 94*; see also id.* at 103-05 (statement of Comm'r Coxe) ("I don't know anything about log rolling because I don't know what the polling shows on any of these. So I don't have any way to measure whether somebody's calculatedly log-rolling or not. Who knows? Maybe some people in the room know that. Maybe some people have the benefit of polling saying I'll put this with that one, or I won't put this with that one. I don't care about that. What I do care about is whether a citizen, not whether somebody on this Commission who's dealt with these issues for so long, but a citizen can read on the ballot what that particular proposal is and do they like it or do they not like it. Not do they like this one, but I sort of don't really like the other one, so what do I do? ... I think we owe it to the citizens of the state of Florida for them to make an intelligent decision, not the decision we made for them.").

124. *Id.* at 118-19 (statement of Comm'r Lee).

Commission.... And it is very important that our process be as unassailable as possible."[125] Notwithstanding these arguments, Martinez's motion was soundly defeated, and the CRC voted overwhelmingly to place the proposed constitutional amendment on the ballot as "bundled" by the Style and Drafting Committee.[126]

The process by which Florida amended its constitution to prohibit its version of *Chevron* deference was hardly unassailable. Rather, it reflected a political power play by well-connected Republicans and their allies and was not a product of reasoned deliberation on the merits or a meaningful reflection of the people's will. While more than 60 percent of Florida voters demonstrably supported a Victim's Bill of Rights in 2018, their well-considered judgment on the merits of *Chevron* deference effectively remains unknown.

C. Ordinary Legislation in Arizona and Tennessee

In April 2018, Arizona became the first state to prohibit *Chevron* deference by enacting a statute pursuant to the traditional legislative process.[127] The statute was adopted based on party-line votes in the Republican-controlled house and senate, and was signed into law by Arizona's Republican governor, Doug Ducey.[128] The statute provides that when a regulated party seeks judicial review of final agency action, "the court shall decide all questions of law, including the interpretation of a constitutional or statutory provision or a rule adopted by an agency, without deference to any previous determination that may have been made on the question by the agency."[129]

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125. *Id.*

126. *Id.* at 130-31.

127. *See* Ortner, *supra* note 34. While the prior case law may have been a bit murky, there were judicial decisions in Arizona that had explicitly endorsed both *Chevron* and *Auer* deference under state law. *See* Ariz. Water Co. v. Ariz. Dep't of Water Res., 91 P.3d 990, 997-98 (Ariz. 2004) (endorsing *Chevron*); Pima Cnty. v. Pima Cnty. L. Enf't Merit Sys. Council, 119 P.3d 1027, 1031 (Ariz. 2005) (endorsing *Auer*).

128. *See Bill History for HB2238*, ARIZ. STATE LEGISLATURE, https://apps.azleg.gov/BillStatus/BillOverview/70015 [https://perma.cc/EDC4-3YM8] (scroll down and select either "Show House THIRD" or "Show Senate THIRD"; then select the "Qualify Votes" dropdown menu at the bottom of the pop-up window; and then select "Democrat Votes" or "Republican Votes."); Ortner, *supra* note 34.

129. ARIZ. REV. STAT. ANN. § 12-910(E) (2018).

This legislation to eliminate *Chevron* deference in Arizona was reportedly developed by the Goldwater Institute,[130] "a free-market public policy research and litigation organization dedicated to advancing the principles of limited government, economic freedom, and individual liberty."[131] Goldwater is based in Arizona and is one of the oldest and largest affiliates of the State Policy Network (SPN), "the national association of conservative, state-level think tanks across the country that share resources, tactics, and information."[132] With "an annual budget of between $4 and $5 million per year," Goldwater has established a national reach.[133] It actively participates in the American Legislative Exchange Council (ALEC), which drafts and promotes model legislation and otherwise supports the work of conservative state lawmakers.[134] Goldwater also receives substantial funding from Donors Capital Fund, "a conservative donor-advised charity that channels philanthropic giving to right-leaning causes," and the network of philanthropic organizations created or backed by the right-wing industrial magnates, Charles and David Koch.[135] Goldwater operates squarely at the crossroads of what Alexander Hertel-Fernandez calls "the Right-Wing Troika"—three overlapping national networks that collaborate closely to adopt conservative policy priorities in the states, partly by crafting and controlling the political narrative on those issues, generating actual or apparent grassroots support for their positions, and incapacitating or delegitimizing the opposition.[136] Goldwater maintained especially cozy ties with Arizona lawmakers during the

130. *See* JON RICHES, GOLDWATER INST., ENDING DEFERENCE TO THE ADMINISTRATIVE STATE IN STATE LEGISLATURES 3 (2021), https://www.goldwaterinstitute.org/wp-content/uploads/2021/07/Ending-Deference-to-the-Administrative-State-in-State-Legislatures-7-27-21.pdf [https://perma.cc/35JM-XLPH].

131. *Our Story*, GOLDWATER INST., https://www.goldwaterinstitute.org/about/ [https://perma.cc/V6EQ-JENC].

132. ALEXANDER HERTEL-FERNANDEZ, STATE CAPTURE: HOW CONSERVATIVE ACTIVISTS, BIG BUSINESSES, AND WEALTHY DONORS RESHAPED THE AMERICAN STATES—AND THE NATION 145, 153 (2019).

133. *Id.* at 154-55.

134. *Id.* at 156. *See generally id.* at 1-139 (exploring ALEC's evolution and influence).

135. *Id.* at 145, 156.

136. *See id.* at 143-210 (discussing the overlapping strategies, efforts, and influence of ALEC, SPN, and Americans for Prosperity (AFP), the national advocacy group that is crucial to the Koch brothers' political network); *id.* at 210 ("For the troika, policy was a means of building and retaining political power").

Republican Party's extended run of unified control of state government from 2009 until 2023.[137]

The proposal to prohibit *Chevron* deference in Arizona was introduced by Representative Eddie Farnsworth, a conservative Republican, and then referred to the House Judiciary and Public Safety Committee and the Senate Judiciary Committee.[138] The House Committee meeting featured testimony in favor of the proposal by two invited witnesses.

First, a representative of the Arizona Free Enterprise Club,[139] which describes itself as "the leading organization in the state dedicated to advancing a pro-growth, limited government agenda,"[140] briefly explained that the bill "ensures that affected parties ... can get their day in court."[141] This statement was followed by more extensive remarks from Jon Riches,[142] Goldwater's Vice President for Litigation and General Counsel.[143] Riches lamented the broad authority delegated to modern agencies and claimed that when there is an interpretive dispute between an agency and a regulated person under existing law, "the court is obligated to put the thumb on the scale for the regulatory agency."[144] According to Riches, "that is not the way due process of law should work."[145] He explained that "this bill corrects that problem; it allows people who appeal an agency decision to have their case reviewed fairly and independently by a superior court judge without deference to an agency's own interpretation of a question of law."[146] Riches argued

137. *Id.* at 156.

138. *See Bill History for HB2238*, *supra* note 128.

139. *See* Arizona Capitol Television, *Hearing on H.B. 2238 Before the H. Judiciary & Pub. Safety Comm.*, 53d Leg., 2d Reg. Sess. 52:48 (Ariz. Jan. 24, 2018) [hereinafter *Hearing on H.B. 2238 Before the H. Judiciary & Pub. Safety Comm.*], https://www.azleg.gov/videoplayer/?eventID=2018011157 [https://perma.cc/PD4Y-R3HX] (testimony of Scot Mussi, President, Arizona Free Enterprise Club).

140. ARIZONA FREE ENTER. CLUB, https://azfree.org [https://perma.cc/X9D6-9W3U].

141. *See Hearing on H.B. 2238 Before the H. Judiciary & Pub. Safety Comm.*, *supra* note 139, at 53:50.

142. *See id.* at 54:30 (testimony of Jon Riches, Vice President for Litigation and General Counsel, Goldwater Institute).

143. *Jon Riches*, GOLDWATER INST., https://www.goldwaterinstitute.org/our-team/jon-riches [https://perma.cc/N3FU-VV2T].

144. *See Hearing on H.B. 2238 Before the H. Judiciary & Pub. Safety Comm.*, *supra* note 139, at 54:40 (testimony of Jon Riches).

145. *Id.* at 55:54.

146. *Id.* at 55:58.

that "administrative deference is a problem for both due process and frankly to republican government," and claimed that "this bill offers Arizonans what they should already enjoy, which is an equal and fair opportunity to challenge regulatory actions without having to contend with a hearing in court that is stacked against them."[147]

After Riches responded to questions about the scope and rationale for *Chevron* deference by claiming that courts have greater expertise on questions of law than agencies, the committee voted on party lines to advance the bill and recommend its adoption by the chamber.[148] None of the committee members spoke directly in opposition to the proposal, challenged the witnesses' characterization of existing law, affirmatively defended the legitimacy or desirability of *Chevron* deference, or proposed amendments that might, for example, limit *Chevron*'s force or domain without prohibiting judicial deference to state agencies entirely.[149]

The Senate Committee hearing began with a brief statement by the bill's sponsor, who claimed that this is a "very straightforward bill."[150] "The whole idea here," he explained, "is that courts have given absolute deference in decisions to agencies."[151] In contrast, "this bill is intended to say, 'you can't give absolute deference, you're the court, [so] you need to make the decision.'"[152] The bill allows the court to "consider what the agency was saying," but makes clear that "it is the court's responsibility to make those decisions and not the agency's."[153] This statement was followed by testimony from a single witness, Jon Riches.[154] Riches essentially repeated his speech from the House Committee hearing, but he added that *Chevron* creates a problematic disincentive for regulated parties to seek judicial review of agency decisions because they are unlikely to

147. *Id.* at 56:10.

148. *See id.* at 56:30, 1:01:15.

149. *See id.* at 56:30.

150. *See* Arizona Capitol Television, *Hearing on H.B. 2238 Before the S. Judiciary Comm.*, 53d Leg., 2d Reg. Sess. 1:06:30 (Ariz. Mar. 1, 2018), https://www.azleg.gov/videoplayer/?eventID=2018031211 [https://perma.cc/H6NX-TUTV] (statement of Rep. Eddie Farnsworth, Chair, H. Judiciary and Pub. Safety Comm.).

151. *Id.* at 1:06:38.

152. *Id.* at 1:06:44.

153. *Id.* at 1:06:50.

154. *See id.* at 1:07:34 (testimony of Jon Riches).

prevail.[155] He confirmed that agencies would still have an opportunity to present their views in litigation if the bill were enacted—it only allows the subjects of enforcement actions "an opportunity for a meaningful review in court that they currently do not enjoy."[156]

As in the house, the Senate Committee voted on party lines to advance the bill and recommend its adoption by the chamber, and no one spoke directly in opposition to the proposal, questioned the witnesses' characterization of existing law, affirmatively supported *Chevron*, or offered amendments that would strike a middle ground between strong deference across the board and de novo judicial review.[157] The bill was subsequently enacted pursuant to party line votes by the house and senate without any meaningful debate on the floor of either chamber, before being signed into law by the governor.[158]

Not surprisingly, the Goldwater Institute has trumpeted its achievement in Arizona and expressed hope that this legislation will serve as a model for other states.[159] Given Goldwater's position at the center of the Right-Wing Troika,[160] it would not be surprising to see other states with Republican supermajorities following its lead.[161] And, indeed, that is precisely what happened in 2022 in

155. *See id.*

156. *Id.* at 1:12:38.

157. *See id.* at 1:13:06.

158. *See Bill History for HB 2238*, *supra* note 128.

159. *See* RICHES, *supra* note 130, at 5.

160. *See supra* notes 132-37 and accompanying text.

161. Indeed, other free-market advocacy groups have been promoting Goldwater's achievement in Arizona and calling for similar efforts in other states. *See, e.g.*, Dew, *supra* note 102; Amanda Reilly, *Will States Follow Ariz. in Assault on* Chevron*?*, E&E NEWS: GREENWIRE (May 9, 2018, 1:27 PM), https://www.eenews.net/articles/will-states-follow-ariz-in-assault-on-chevron/ [https://perma.cc/S9W6-NXWS] ("The Arizona law is fueling a movement by critics of *Chevron* deference for bills in other states and a renewed anti-*Chevron* push on Capitol Hill to demolish the doctrine.").

Tennessee[162]—this time with assistance from another right-wing free-market advocacy group, the Pacific Legal Foundation.[163]

Tennessee's anti-*Chevron* legislation was approved by both chambers of the general assembly and signed into law by Governor Bill Lee in April 2022.[164] This statute provides that "[i]n interpreting a state statute or rule, a court presiding over the appeal of a judgment in a contested case shall not defer to a state agency's interpretation of the statute or rule and shall interpret the statute or rule de novo."[165] This statute also takes anti-deference to another level by instructing that "[a]fter applying all customary tools of interpretation, the court shall resolve any remaining ambiguity against increased agency authority."[166] The statute thus seemingly requires clear statutory authorization for any assertion of regulatory power—a major questions doctrine for all exercises of agency policymaking discretion, regardless of their political or economic significance.

While Tennessee was once considered a model of bipartisanship, it has distinguished itself in recent years as an exemplar of supermajoritarian, one-party rule.[167] Because most of its electoral districts are uncompetitive, state legislators have incentives to take extreme positions on hot-button policy issues, and the state has become a breeding ground for performative, conservative politics.[168]

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162. Prior to enacting this legislation, the Tennessee legislature adopted a joint resolution "staunchly oppos[ing]" *Chevron* and *Auer* deference and "urg[ing] all state and federal courts to refrain from applying such principles." *See* H.J. Res. 140, 111th Gen. Assemb., Reg. Sess. (Tenn. 2019). This joint resolution incorporated the increasingly standard anti-administrative critiques of these doctrines, recognized that Justices Thomas, Kavanaugh, Gorsuch, and Scalia had raised separation of powers concerns with judicial deference to legal interpretations by agencies, and added that "the State of Tennessee is more unique than other states in that its General Assembly legislates with the philosophy that limited regulation by state government entities is better for businesses and Tennesseans as a whole." *See id.*

163. *See About Pacific Legal Foundation*, PAC. LEGAL FOUND., https://pacificlegal.org/about/ [https://perma.cc/SXH6-AKWQ].

164. *See* Daniel Dew, *Tennessee Gov. Lee Signs Historic Bill Ending Wrongful Judicial Deference*, PAC. LEGAL FOUND. (Apr. 19, 2022), https://pacificlegal.org/tennessee-signs-bill-ending-judicial-deference [https://perma.cc/LNF5-C3RT].

165. TENN. CODE ANN. § 4-5-326 (2024) (effective Apr. 14, 2022).

166. *Id.*

167. *See* Anne Applebaum, *Is Tennessee a Democracy?*, ATLANTIC (July 18, 2023), https://www.theatlantic.com/ideas/archive/2023/07/tennessee-republican-partisanship-one-party-state/674732/ [https://perma.cc/4EPE-K63W].

168. *See id.*

These dynamics were fully on display in the enactment of Tennessee's anti-deference legislation.

The proponents of the statute and their only witness in committee hearings in both chambers, Daniel Dew, the Legal Policy Director of the Pacific Legal Foundation, relied heavily upon the standard critiques of *Chevron* deference developed by the anti-administrative movement.[169] Lady Justice therefore made several appearances, along with the suggestion that judicial deference violates due process by putting a thumb on the scale in favor of the government.[170] Proponents also claimed that *Chevron* violates the separation of powers by wresting from courts the power to say what the law is.[171] These arguments were supported by references to Justice Scalia's evolving views and the current positions of the Court's conservative Justices and other anti-administrative activists.[172] Their claims were also laced with other superficial rhetoric and hyperbole, such as the assertion that *Chevron* deference is the largest reason for the administrative state's growth in power.[173]

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169. *See Hearing on H.B. 1749 Before the H. Dep'ts & Agencies Subcomm.*, 112th Gen. Assemb., Reg. Sess. 1:18:34 (Tenn. Mar. 8, 2022), https://tnga.granicus.com/player/clip/26463 [https://perma.cc/EVW3-58MT] (statement of Daniel Dew, Legal Policy Director, Pacific Legal Foundation); *see also* Dew, *supra* note 164 ("When people get their day in court, they believe judges will serve as a neutral party to make sure the law is followed. But prior to this new law, Tennessee, like many other states, followed a series of misguided U.S. Supreme Court decisions where the Court concluded that instead of fulfilling their constitutional duty to interpret laws and regulations, judges should defer to government agency interpretations of their own regulations.").

170. *See, e.g.*, *Hearing on H.B. 1749 Before the H. Dep'ts & Agencies Subcomm.*, *supra* note 169, at 1:19:21 (testimony of Daniel Dew); *Hearing on S.B. 2285 Before the S. Gov't Operations Comm.*, 112th Gen. Assemb., Reg. Sess. 23:26, 41:25 (Tenn. Mar. 9, 2022), https://tnga.granicus.com/player/clip/26469 [https://perma.cc/ZCR6-UUVR] (statements of Sen. Mike Bell, Member, S. Gov't Operations Comm.); *id.* at 26:13 (testimony of Daniel Dew). Proponents contrasted this approach with common methods of contractual interpretation and the rule of lenity, which resolve ambiguities against the drafter of legal instruments. *Id.* at 27:04 (testimony of Daniel Dew).

171. *Hearing on S.B. 2285 Before the S. Gov't Operations Comm.*, *supra* note 170, at 26:45 (testimony of Daniel Dew). This argument was accompanied by complaints that agencies could change their views of the law over time and still receive deference from courts. *Id.* at 28:56.

172. *S. Sess.—59th Legis. Day*, 112th Gen. Assemb., Reg. Sess. 1:28:39 (Tenn. Mar. 28, 2022) [hereinafter *Tenn. S. Sess. on S.B. 2285*], https://tnga.granicus.com/player/clip/26753 [https://perma.cc/8NQ6-3BEU] (statement of Sen. Mike Bell).

173. *Hearing on S.B. 2285 Before the S. Gov't Operations Comm.*, *supra* note 170, at 21:28 (statement of Sen. Mike Bell). Broad delegations of statutory authority by legislatures to agencies are in fact primarily responsible for the growth in administrative power. *See* Jonathan H. Adler, *The Delegation Doctrine*, 12 HARV. J.L. & PUB. POL'Y: PER CURIAM 4-5

Democrats in Tennessee expressed more vocal opposition to this effort to prohibit *Chevron* than occurred in Florida, Arizona, or Wisconsin. Consistent with *Chevron*'s delegation rationale, one representative pointed out that the state legislature generally intends the agency's position to "be a good source of reference for the court deciding a case" when it delegates statutory authority to an agency.[174] The same representative claimed that the Court "had a good rationale for establishing the *Chevron* doctrine" because the agency's expertise provides "the best source" for understanding the law.[175] Given this expertise and the fact that some administrative interpretations are followed for years before they are challenged in court, another representative wondered why the legislature should "intentionally put into the law something that disrupts what executive branch agencies are doing."[176] This representative also argued that *Chevron* deference promotes consistency at the state level because it limits the likelihood that lower state courts will reach different results and thereby avoids the risk of "having important determinations of state policy" vary "depending on which

(2024), https://journals.law.harvard.edu/jlpp/wp-content/uploads/sites/90/2024/06/Adler-Delegation-Doctrine-vf.pdf [https://perma.cc/3ZV8-GWKV] ("Any power [administrative] agencies wish to exercise in the domestic sphere is the result of a legislative delegation."). For similar examples of superficial and exaggerated claims, see *Tenn. S. Sess. on S.B. 2285*, *supra* note 172, at 1:32:47 (statement of Sen. Mike Bell) (claiming that *Chevron* tips the scales of justice away from citizens, manufacturers, and organizations and toward the state); *Hearing on H.B. 1749 Before the H. Dep'ts & Agencies Subcomm.*, *supra* note 169, at 1:19:36 (statement of Daniel Dew) (claiming that courts give away their power to interpret the law under *Chevron* and that such deference allows agencies to act outside the policy constraints carefully set by the legislature); *Hearing on S.B. 2285 Before the S. Gov't Operations Comm.*, *supra* note 170, at 28:49 (statement of Daniel Dew) (claiming that *Chevron* deprives the public of adequate notice of the law's requirements); *Hearing on H.B. 1749 Before the H. State Gov't Comm.*, 112th Gen. Assemb., Reg. Sess. 53:20 (Tenn. Mar. 15, 2022), https://tnga.granicus.com/player/clip/26586 [https://perma.cc/N9QS-4BQ9] (statement of Rep. John Ragan) (claiming that judges are automatically leaning in favor of agencies over individuals under *Chevron*); Dew, *supra* note 102 (claiming that judicial deference means in practice "that as long as a government agency's interpretation of its own regulation isn't clearly contradicted by the text of a regulation, judges side with the government every single time on matters of law," and under this approach, "Tennessee courts have simply adopted the agency view of the law, instead of carefully considering each side's argument").

174. *H. Sess.—58th Legis. Day*, 112th Gen. Assemb., Reg. Sess. 1:15:27 (Tenn. Mar. 24, 2022) [hereinafter *Tenn. H. Sess. on H.B. 1749*], https://tnga.granicus.com/player/clip/26720 [https://perma.cc/2775-SNLN] (statement of Rep. John Ray Clemens).

175. *Id.* at 1:16:28.

176. *Tenn. S. Sess. on S.B. 2285*, *supra* note 172, at 1:34:38 (statement of Sen. Jeff Yarbro).

county one lives in."[177] This representative emphasized that regulations affect many parties and that agencies are often protecting some people from others.[178] Accordingly, he was especially concerned about the provision that would "automatically" require courts to resolve ambiguities against the agency: "Why would we put a thumb on the scale for those challenging agency action?"[179]

Proponents responded by claiming that while agencies may have relevant subject matter expertise, "the courts are the experts when it comes to interpreting law."[180] Proponents characterized de novo review as "start[ing] equally," rather than tipping the scales of justice in favor of the regulatory state.[181] Thus, instead of deferring to agencies, state courts will judge "on the basis of the law."[182]

Tennessee Democrats also raised a couple of state-specific arguments against the proposed legislation. First, they claimed that Tennessee's deference doctrine was more relaxed than *Chevron*, and that lawmakers were "trying to solve a federal problem by hamstringing state litigation."[183] Second, one representative pointed out that rules proposed by state agencies in Tennessee must be approved by the Government Operations Committee of the state legislature prior to becoming effective.[184] This representative argued that the committee's approval of a proposed rule would provide strong evidence that the agency's interpretation was consistent with the legislature's intent.[185] Nicely encapsulating the central problem

177. *Id.* at 1:36:13.

178. *Id.* at 1:41:53.

179. *Id.* at 1:38:47.

180. *Hearing on S.B. 2285 Before the S. Gov't Operations Comm.*, *supra* note 170, at 33:11 (statement of Daniel Dew). Proponents therefore claimed that:

> This bill is about making judges perform as judges....[The agency's] interpretation of the rule should not be the deciding factor. The judge should balance all of the facts in the case to include an agency's interpretation, but also to include all of the relevant facts brought by those contesting the rule.

Tenn. H. Sess. on H.B. 1749, *supra* note 174, at 1:17:30 (statement of Rep. John Ragan).

181. *Hearing on S.B. 2285 Before the S. Gov't Operations Comm.*, *supra* note 170, at 22:39 (statement of Sen. Mike Bell).

182. *Hearing on H.B. 1749 Before the H. State Gov't Comm.*, *supra* note 173, at 53:40 (statement of Rep. John Ragan).

183. *Tenn. S. Sess. on S.B. 2285*, *supra* note 172, at 1:42:45 (statement of Sen. Jeff Yarbro).

184. *Tenn. H. Sess. on H.B. 1749*, *supra* note 174, at 1:29:26 (statement of Rep. G.A. Hardaway).

185. *Id.* at 1:31:02.

with such anti-deference legislation, he flatly concluded that "I can't vote for a bill that ... promotes activism among judges."[186]

Proponents never responded in a meaningful fashion to this latter set of objections, and the Democrats' concerns were generally ignored, rebuffed, or deflected.[187] Still, the legislative debate over whether *Chevron* should be prohibited was more robust in Tennessee than in other states that codified the anti-deference position.[188] This was not to any avail, however, because the Tennessee General Assembly easily enacted the statute along party lines,[189] with one exception: a Democrat who subsequently left the party, became an independent, and lost his bid for re-election to a hard-right Republican.[190]

This case study illustrates an all-too-common phenomenon in states with supermajoritarian, one-party rule, and it is largely why some analysts wonder whether Tennessee is still a democracy.[191] For present purposes, however, the key point is that the legislation that prohibited *Chevron* deference in Tennessee was the result of a Republican power play rather than a product of reasoned deliberation or a meaningful reflection of the people's will.[192]

D. Belt and Suspenders in Wisconsin

Judicial deference to state agencies can be prohibited by judicial decisions that require state courts to interpret state agencies' enabling acts and regulations de novo. The same result can be achieved through state constitutional amendments or ordinary legislation. But in a highly polarized state where the Republican

186. *Id.* at 1:32:03.

187. *See, e.g.*, *id.* at 1:30:30, 1:32:48.

188. *See supra* notes 183-86 and accompanying text.

189. *See* S.B. 2285 Bill Info, TENN. GEN. ASSEMBLY, https://wapp.capitol.tn.gov/apps/BillInfo/default.aspx?BillNumber=SB2285&GA=112 [https://perma.cc/B32B-758C] (select the "Votes" tab from the bill's tab options).

190. *See John Windle*, BALLOTPEDIA, https://ballotpedia.org/John_Windle [https://perma.cc/Q4Z6-4HSF]; S.B. 2285 Bill Info, *supra* note 189.

191. *See* Applebaum, *supra* note 167.

192. Even if a majority of Tennesseans are hostile to the administrative state and would affirmatively support a decision to eliminate judicial deference to reasonable exercises of interpretive discretion by agencies, that would not necessarily make such legislation democratically legitimate. *See infra* Part III.B.

Party's control of the governor's office and high court appear tenuous, it may be worthwhile to seize the day and utilize both strategies together. This belt-and-suspenders approach was recently invoked in Wisconsin.

The first step was the Wisconsin Supreme Court's decision in 2018 to overrule its version of *Chevron* deference in *Tetra Tech EC, Inc. v. Wisconsin Department of Revenue*.[193] The lower courts had upheld the department's imposition of a tax on petitioners for "processing" river sediment into its component parts.[194] While petitioners contested this understanding of the statute's text, they did not challenge the constitutionality of the state's well-established deference doctrines in the lower courts or their petition for review.[195] This issue was raised instead for the first time when the Wisconsin Supreme Court requested briefing on the question.[196] Numerous trade associations and free-market advocacy groups, including the Wisconsin Institute for Law & Liberty, responded to this request by filing amicus briefs arguing that the state's version of *Chevron* violated the state constitution.[197] And not surprisingly, a plurality of the court,[198] in a lead opinion by Justice Daniel Kelly, held that due process and the separation of powers both required state courts to interpret regulatory statutes de novo and the existing deference practices therefore violated the state constitution.[199] The court,

193. 914 N.W.2d 21, 28 (Wis. 2018).

194. *Id.* (quoting WIS. STAT. § 77.52(2)(a)(11)); *id.* at 30.

195. *See id.* at 64 (Bradley, J., concurring).

196. *Id.*

197. *See, e.g.*, Brief of Amicus Curiae Wisconsin Institute for Law & Liberty, Inc. at 1-2, *Tetra Tech*, 914 N.W.2d 21 (Wis. 2018) (No. 2015AP2019), https://will-law.org/wp-content/uploads/2021/02/2017-07-21-signed-tetra-tech-brief.pdf [https://perma.cc/E63B-L8CB]; Amicus Curiae Brief by Wisconsin Manufacturers and Commerce, Inc. et al. at 1-2, *Tetra Tech*, 914 N.W.2d 21 (Wis. 2018) (No. 2015AP2019). The Wisconsin Institute for Law & Liberty, another organization within the Right-Wing Troika, Alexander Hertel-Fernandez, *Dissecting the Conservative Triumph in Wisconsin*, *in* UPENDING AMERICAN POLITICS: POLARIZING PARTIES, IDEOLOGICAL ELITES, AND CITIZEN ACTIVISTS FROM THE TEA PARTY TO THE ANTI-TRUMP RESISTANCE 2, 33-37 (Theda Skocpol & Caroline Tervo eds., 2020), claims that its "track record serves as a disincentive for those who would like to expand government bureaucracy and limit our freedoms. We keep them from even thinking about it." *What We Do*, WIS. INST. FOR L. & LIBERTY, https://will-law.org/what-we-do/ [https://perma.cc/D22H-ZH9R].

198. While a majority agreed that judicial deference to state agencies should be prohibited, the constitutional basis for this decision was only adopted by two justices. *Tetra Tech*, 914 N.W.2d at 28 & n.3, 29 n.4.

199. *Id.* at 54.

nonetheless, upheld the validity of the department's tax based on its understanding of the plain meaning of the statutory text.[200]

Rather than simply agreeing with the department's reading of the statute, a majority reached out to overrule Wisconsin's version of *Chevron* and prohibit judicial deference to state agencies.[201] The lead opinion, in particular, also went out of its way to hinge its decision on the now-standard right-wing claims that *Chevron* violates due process and the separation of powers by depriving private parties of an impartial decision maker and abdicating the judiciary's core obligation to say what the law means.[202] Not only was the lead opinion's view of the state constitution explicitly informed by its understanding of the views of the Framers of the U.S. Constitution, but it went out of its way to highlight its reliance on the views of anti-administrative federal judges and academic commentators, including Justices Thomas, Scalia, and Gorsuch, and Professor Philip Hamburger.[203]

The lead opinion's conclusion that Wisconsin's version of *Chevron* violates the separation of powers also relied on legal scholarship by then-Chief Justice Patience Drake Roggensack, which characterized such deference as a doctrine of "decision-avoidance."[204] But a court that reviews the legality of agency decision-making under this framework will either uphold or invalidate the challenged agency action; it therefore does not *avoid* making a ruling. And in reviewing the legality of the agency's decision, the court must interpret the enabling legislation to determine whether the agency's understanding of the statute is permissible.[205] Judicial review under this framework only involves "decision-avoidance" if one believes that

200. *Id.* at 61-63.

201. *See id.* at 63. The lead opinion justified overruling the state's version of *Chevron*, even though the justices unanimously agreed with the department's understanding of the statute, because precedent suggested that the proper level of judicial deference to agency decision-making involves the applicable "standard of review," which must be determined before appellate courts can proceed to the merits. *Id.* at 37-38.

202. *Id.* at 48 (citing Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1151-52 (10th Cir. 2016) (Gorsuch, J., concurring)).

203. *Id.* at 45-49.

204. *See id.* at 33 (citing Patience Drake Roggensack, *Elected to Decide: Is the Decision-Avoidance Doctrine of Great Weight Deference Appropriate in This Court of Last Resort?*, 89 MARQ. L. REV. 541, 548-60 (2006)) ("A dozen years ago, now-Chief Justice Patience Drake Roggensack conducted yeoman's work in tracing the development and effect of this doctrine.").

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

"interpretation" necessarily involves assigning a single, objectively correct meaning to statutory language.[206] However, courts need not engage in this type of interpretation to uphold or invalidate an agency's conception of ambiguous statutory provisions, because ambiguous statutes are, by definition, reasonably susceptible to more than one legally permissible understanding.[207] Critics of *Chevron* may concede that ambiguous statutes could permissibly be understood in more than one way, but they contend that the Constitution requires courts to declare the single best understanding of the meaning of regulatory statutes that will then be "fixed" into the law through the operation of stare decisis, rather than allowing agencies to make provisional judgments about which understanding is most justifiable for the time being based on the available information.[208] While this may be the true rub of the debate between critics and advocates of *Chevron*, neither approach is a doctrine of "decision-avoidance." In any event, the court's decision had the effect of shifting tremendous power from the state legislature and state agencies to the state judiciary.[209]

Tetra Tech was just one of many controversial decisions by the Wisconsin Supreme Court that favored corporate interests and the Republican Party during a tumultuous fifteen-year period in which conservatives held a bare, 4-3 majority.[210] The conservatives'

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206. *See* Michael C. Dorf, Chevron*,* Brand X*, and Ronald Dworkin's Right-Answers Thesis*, DORF ON L. (Jan. 23, 2024), https://www.dorfonlaw.org/2024/01/chevron-brand-x-and-ghost-of-ronald.html [https://perma.cc/H6JU-HZHF] (recognizing that the conservative critique of *Chevron* and *Brand X* is premised on the idea that the law provides uniquely correct answers to interpretive problems and claiming that it is "blindingly obvious" that this position is mistaken).

207. *See* Bernstein & Staszewski, *Populist Constitutionalism*, *supra* note 25, at 1786.

208. The majority in *Loper Bright* strongly endorses this position. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2266 (2024) (claiming that "[c]ourts ... understand that [ambiguous] statutes, no matter how impenetrable, do—in fact, must—have a single, best meaning," and if an agency's position deviates from a court's view of "the best reading of the statute[,] .... it is not permissible"); *id.* at 2267 (claiming that "there is little value in imposing a uniform interpretation of a statute if that interpretation is wrong," and there is "no reason to presume that Congress prefers uniformity for uniformity's sake over the correct interpretation of the laws it enacts"); *id.* at 2271 ("[A] statute [always] has a best meaning, necessarily discernible by a court deploying its full interpretive toolkit.").

209. *See Tetra Tech*, 914 N.W.2d at 54; *id.* at 69 (Ziegler, J., concurring) (expressing concern that the lead opinion's definition of the judiciary's "core power" could "be read to abrogate the shared nature of the power to interpret and apply the law").

210. *See* Patrick Marley, *Wisconsin Supreme Court Flips Liberal, Creating a 'Seismic Shift,'*

tenuous control of the court meant that it would also be worthwhile for Republicans to lock in key legal victories by codifying the relevant decisions while they still had supermajoritarian control of the state legislature and presided over the governor's office.[211] It is therefore not surprising that the state legislature enacted a statute in 2018 that partially codified *Tetra Tech* by providing that "[n]o agency may seek deference in any proceeding based on the agency's interpretation of any law."[212]

The most notable aspect of the state legislature's codification of the court's anti-deference position may have been the controversial procedure by which it was enacted. Instead of codifying *Tetra Tech* or otherwise prohibiting judicial deference to agencies by statute during the regular course of business in the previous eight years of unified Republican control of state government, this provision was only proposed and adopted in the brief period after Republican Governor Scott Walker lost his bid for reelection and before Democrat Tony Evers was sworn into office.[213] The provision was part of a 141-page package of legislative reforms proposed by Republicans after Walker's defeat that was designed to restrict voter turnout in future elections and transfer powers from the newly elected Democratic governor and state attorney general to the state legislature,[214] which remained comfortably within Republican

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WASH. POST (Aug. 27, 2023, 6:00 AM), https://www.washingtonpost.com/politics/2023/08/27/wisconsin-supreme-court-liberal/ [https://perma.cc/N7Y9-DBBK] (describing how control of the court flipped in 2023 based on the results of an election "that became the most expensive judicial race in U.S. history, with campaigns and interest groups spending more than $50 million," and explaining that "[c]onservatives had controlled the court for 15 years, during which they upheld a voter ID law, approved limits on collective bargaining for public workers, banned absentee ballot drop boxes and shut down a wide-ranging campaign finance investigation into Republicans").

211. *See* NAT'L CONF. OF STATE LEGISLATURES, 2018 STATE & LEGISLATIVE PARTISAN COMPOSITION 1 (2018), https://documents.ncsl.org/wwwncsl/Elections/Legis_Control_011018_26973.pdf [https://perma.cc/77GR-UJAB].

212. WIS. STAT. § 227.10(2)(g) (2024) (effective Dec. 16, 2018); *see* Serv. Emps. Int'l Union, Loc. 1 v. Vos, 946 N.W.2d 35, 41, 59 (Wis. 2020) (rejecting a separation of powers challenge to this provision and reasoning that *Tetra Tech*'s holding "that courts should not defer to the legal conclusions of an agency" suggests that "a statute instructing agencies not to ask for such deference is facially constitutional").

213. *See Serv. Emps. Int'l Union*, 946 N.W.2d at 41; *Tony Evers*, BALLOTPEDIA, https://ballotpedia.org/Tony_Evers [https://perma.cc/UP9P-9JXY].

214. *See* Mitch Smith & Monica Davey, *Wisconsin Republicans Defiantly Move to Limit the Power of Incoming Democrats*, N.Y. TIMES (Dec. 5, 2018), https://www.nytimes.com/2018/

control because of partisan gerrymandering despite Democratic candidates receiving 190,000 more votes statewide in the 2018 election.[215]

Republican lawmakers successfully enacted portions of this reform agenda during a special legislative session held over a three-day period during December 2018.[216] These efforts received national media attention, harsh criticism from Democrats who chastised Republicans for overriding the expressed will of the voters, and unprecedented levels of public opposition.[217] Nevertheless, the special legislation was passed by a single vote in the state senate at 4:30 a.m. "[a]fter hours of mysterious closed-door meetings that went past midnight" the previous evening.[218] Republicans in the state assembly approved the proposed legislation by a more comfortable margin later in the day, and it was subsequently signed into law by Governor Walker.[219] The special legislation "was so sprawling and rushed that many Democrats were still trying to assess the damage" when the dust settled.[220] While Republican leaders defended the reforms on separation of powers grounds as a necessary check on executive power, the speaker of the state assembly admitted that the changes were driven by a perception that "we are going to have a very liberal governor who is going to enact policies that are in direct contrast to what many of us believe

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12/05/us/wisconsin-power-republicans.html [https://perma.cc/2JUU-RNCB]; Tara Golshan, *How Republicans Are Trying to Strip Power from Democratic Governors-Elect*, VOX (Dec. 14, 2018, 1:41 PM), https://www.vox.com/policy-and-politics/2018/12/4/18123784/gop-legislature-wisconsin-michigan-power-grab-lame-duck [https://perma.cc/EXC2-UAXS].

215. *See* Philip Bump, *Wisconsin's Gerrymandering Rides to the Rescue of its Gerrymandering*, WASH. POST (Sept. 6, 2023, 4:19 PM), https://www.washingtonpost.com/politics/2023/09/06/wisconsins-gerrymandering-rides-rescue-its-gerrymandering/ [https://perma.cc/8V79-EUZZ]; Walter Shapiro, *Destroying a State in Order to Save It from Voters*, BRENNAN CTR. FOR JUST. (Dec. 5, 2018), https://www.brennancenter.org/our-work/analysis-opinion/destroying-state-order-save-it-voters [https://perma.cc/6PX9-UMAX].

216. *See* Smith & Davey, *supra* note 214.

217. *See id.*; Golshan, *supra* note 214. In addition to protests at the Wisconsin State Capitol in Madison, more than one thousand individuals filed formal registrations in opposition to the proposed legislation, while only two people registered their support. J. COMM. ON FIN., WIS. STATE LEGISLATURE., RECORD OF COMMITTEE PROCEEDINGS FOR S.B. 884, 2017 Leg., Dec. 2018 Extraordinary Sess., at 9-34 (2018), https://docs.legis.wisconsin.gov/2017/related/records/joint/finance/1475293 [https://perma.cc/JJ2K-5UV8].

218. Smith & Davey, *supra* note 214; *see also* Golshan, *supra* note 214.

219. Smith & Davey, *supra* note 214; Golshan, *supra* note 214.

220. Smith & Davey, *supra* note 214.

in."[221] Representatives of conservative think tanks within the state acknowledged these political motivations, but concluded that "the Republican-led majority does have the clear constitutional authority to call such a session and to pass laws that demand more accountability of the executive branch."[222] And Governor Walker responded to criticism by claiming that "the overwhelming executive ... authority I have as governor today will remain constant with the next governor," as he signed the bills into law.[223]

While the general thrust of the special legislation and the process by which it was enacted received a great deal of critical scrutiny, the same cannot be said of the state legislature's decision to codify *Tetra Tech* and prohibit state courts from deferring to state agencies. In more than ten hours of debate on the floor of the state legislature and two committee hearings by the Joint Committee on Finance, which formally recommended adoption of this proposal, no one gave serious consideration to the merits of this provision or discussed the pros and cons of prohibiting state courts from deferring to reasonable exercises of interpretive discretion by state agencies.[224] Because this provision was presented as a simple codification of a prior decision by the state supreme court, there were apparently bigger fish to fry in the heat of this particular moment.

Much could be said about the enactment of this special legislation in Wisconsin. It seems clear, however, that the state legislature's decision to codify *Tetra Tech* and prohibit judicial deference to state

221. Golshan, *supra* note 214 ("There are not many ways to spin it; it's a power grab that would seriously undermine the platform on which these Democrats campaigned on, and won."); Isaac Stanley-Becker, Katie Zezima & Mark Berman, *Wisconsin Lawmakers Vote to Strip Power from the Incoming Democratic Governor, Attorney General*, WASH. POST (Dec. 5, 2018, 1:11 PM), https://www.washingtonpost.com/nation/2018/12/05/gov-elect-tony-evers-calls-gop-plans-curb-his-power-hot-mess-an-embarrassment-state-wisconsin/ [https://perma.cc/2WE2-54YG]. Many of the enacted provisions, including the partial codification of *Tetra Tech*, were initially proposed by the Speaker of the State Assembly, Robin Vos, who also served as chair of the state's Joint Finance Committee. *See* Smith & Davey, *supra* note 214. Perhaps not coincidentally, the special legislation includes provisions that require the state Attorney General to obtain the Joint Finance Committee's permission before certain lawsuits can be settled. *See* WIS. STAT. §§ 165.08(1), 165.25(6)(a)(1) (2024) (effective Dec. 16, 2018).

222. Golshan, *supra* note 214 (quoting Matt Kittle of the MacIver Institute).

223. *Id.*

224. *See* S. JOURNAL, 2017 Leg., Dec. 2018 Extraordinary Sess. 964, 979-80, 985-86, 988 (Wis. 2018); ASSEMB. JOURNAL, 2017 Leg., Dec. 2018 Extraordinary Sess. 970-71, 973-75 (Wis. 2018).

agencies was the result of a political power play by anti-administrative Republicans rather than a product of reasoned deliberation or a meaningful reflection of the will of the voters. The next Part explains why this decision—and, indeed, all the case studies explored in this Part—are fundamentally undemocratic. In the process, I will challenge the conventional wisdom that "whether courts should defer to agency interpretations of law turns on just one thing: [legislative] instructions."[225] The answer, I will suggest, should turn primarily on two things: whether the agency's decision is (1) legally permissible and (2) reasonably justified on the merits—irrespective of the meta-interpretive instructions provided by high courts or lawmakers.

III. ASSESSING ANTI-DEFERENCE'S DEMOCRATIC LEGITIMACY AND LEGAL FORCE

The conventional take on the preceding events would be that resolving the deference question through the political process is especially democratic. Moreover, even if the resulting state laws were political power plays that were adopted based on the same anti-administrative rhetoric that was developed to attack judicial deference at the federal level rather than anything distinctive about those states, they are still legally dispositive. Anti-administrative activists would therefore be understood to have succeeded in prohibiting state courts from deferring to reasonable exercises of interpretive discretion by state agencies.

After briefly explaining this conventional wisdom, this Part pushes back. It contends that the prohibition of *Chevron* deference in each case study was democratically illegitimate on both retail and fundamental levels. It also questions the legal force of codified interpretive rules of this nature and suggests that continued judicial deference to state agencies is legally permissible, normatively desirable, and practically inevitable. State courts therefore can, and arguably must, continue to defer to reasonable exercises of interpretive discretion by state agencies.

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225. Sunstein, *supra* note 17, at 1619.

A. Conventional Wisdom

The conventional wisdom is that the events described in the previous Part have authoritatively prohibited state courts from deferring to reasonable exercises of interpretive discretion by state agencies. This understanding is based, first, on the notion that the proper level of judicial deference is capable of being settled by judicial precedent.[226] Under this view, state courts in Mississippi, Ohio, and Wisconsin, among others, are required to interpret regulatory statutes de novo in cases challenging agency action based on the binding precedent of their respective high courts.[227] Unless those decisions are subsequently overruled, *Chevron*-like deference in those states is dead. This understanding is based, second, on the notion that state courts are obligated to follow codified interpretive rules that prohibit them from deferring to reasonable understandings of ambiguous statutes by state agencies. Accordingly, state courts in Florida, Arizona, Tennessee, and Wisconsin are required to interpret regulatory statutes de novo based on the laws explored in the case studies.[228]

Chevron deference is premised on the theory that Congress implicitly delegated authority to agencies to resolve any gaps or ambiguities in their authorizing statutes.[229] The federal judiciary should therefore defer to reasonable exercises of interpretive discretion by federal agencies based on Congress's presumed

226. High courts that prohibit judicial deference to reasonable exercises of interpretive discretion by agencies certainly act as if they are creating binding legal precedent. *See, e.g.*, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) ("*Chevron* is overruled."). Yet the traditional understanding is that interpretive methodology is generally *not* entitled to stare decisis effect. *See, e.g.*, HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) ("The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation."). This traditional view is seemingly overstated, and scholars have recently produced sophisticated analyses of methodological stare decisis's apparent scope and determinants. *See generally* Aaron-Andrew P. Bruhl, *Eager to Follow: Methodological Precedent in Statutory Interpretation*, 99 N.C. L. REV. 101 (2020); Jonathan Remy Nash, *When Is Legal Methodology Binding?*, 109 IOWA L. REV. 739 (2024). Others remain deeply skeptical of this practice on both practical and normative grounds. *See generally* Evan J. Criddle & Glen Staszewski, *Against Methodological Stare Decisis*, 102 GEO. L.J. 1573 (2014).

227. *See supra* Parts II.A, II.D.

228. *See supra* Parts II.B-D.

229. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984).

intent.[230] It is widely understood that Congress's meta-intent regarding judicial deference is a fiction, and that Congress could authoritatively resolve the matter by enacting legislation with clear instructions regarding the applicable standard of review.[231] Cass Sunstein has given voice to this conventional wisdom by declaring that "whether courts should defer to agency interpretations of law turns on just one thing: congressional instructions."[232] *Loper Bright* reinforced this conventional wisdom by holding that "[t]he deference that *Chevron* requires of courts reviewing agency action cannot be squared with the APA."[233] Congress could therefore presumably overrule *Loper Bright* and reinstate *Chevron* simply by amending the APA accordingly.[234]

Not only is it conventionally accepted that Congress could authoritatively resolve the deference question by providing clear instructions to federal courts, but resolving the matter pursuant to Congressional legislation is widely viewed as democratically superior to resolution through a judicially created default rule. Congress is generally viewed as having a superior democratic pedigree for making important policy decisions than federal courts have. The Constitution, after all, formally vests all federal legislative powers in Congress, an elected and thus politically accountable body that must overcome the hurdles of bicameralism and presentment to alter existing legal rights and obligations.[235] Successfully enacting legislation, therefore, ideally requires reasoned deliberation and a meaningful level of compromise. In comparison to the federal judiciary, Congress is also functionally more representative of the American people, has greater fact-finding capabilities, and can more easily engage with a broad and inclusive group of interested stakeholders. Even if Congress operates in a less than ideal fashion, resolving the deference question pursuant to legislation

230. *See id.* at 844.

231. *See, e.g.*, Barnett, *supra* note 28, at 15-16.

232. Sunstein, *supra* note 17, at 1619.

233. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2263 (2024).

234. The dissenters agreed that the appropriate level of judicial deference is up to Congress; they simply concluded that *Chevron* correctly reflected both a proper understanding of the APA and Congress's general intent. *See id.* at 2294, 2297, 2302-06 (Kagan, J., dissenting).

235. *See* U.S. CONST. art. I, §§ 1, 7.

could also be viewed as democratically superior based on the simple fact that the doctrine is premised on Congress's intent. It is therefore preferable to have solid evidence of Congress's expressed intent, rather than relying on the answer to a counterfactual hypothesized by unelected federal judges.

With limited exceptions, Congress has been unable to overcome the hurdles of bicameralism and presentment to enact legislation that alters or codifies the judicially created default rules regarding the proper level of judicial deference to reasonable resolutions of statutory ambiguities by federal agencies.[236] In contrast, lawmakers in Arizona, Tennessee, and Wisconsin were able to overcome the vetogates that must be surmounted to enact legislation that prohibited *Chevron* deference and required state courts to interpret regulatory statutes de novo.[237] Moreover, the people of Florida approved a ballot initiative by a supermajority vote that amended the state constitution to accomplish this result.[238] Since direct democracy is widely hailed for being as pure as democracy can get,[239] the conventional wisdom would accord even heightened legitimacy to their policy choice. While the state judiciary's adoption of this position in Mississippi and Ohio would typically be viewed as less democratic than prohibitions of *Chevron* deference pursuant to the political process, those decisions would still be viewed as more democratic than decisions on this matter by federal courts because the judges in those states are elected.[240]

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236. *See* Barnett, *supra* note 28, at 6-10 (discussing rare instances where Congress has expressed its intent regarding judicial deference to agencies in specific statutory contexts); Ronald M. Levin, *The APA and the Assault on Deference*, 106 MINN. L. REV. 125, 174 (2021) [hereinafter Levin, *The APA and the Assault on Deference*] (discussing several failed legislative efforts to eliminate *Chevron* deference); Ronald M. Levin, *Scope of Review Legislation: The Lessons of 1995*, 31 WAKE FOREST L. REV. 647, 653-66 (1996) (providing a detailed description of one failed legislative effort to prohibit *Chevron* deference and expressing skepticism of the general value of codifying detailed standards of judicial review of agency action).

237. *See supra* Parts II.C-D.

238. *See supra* Part II.B.

239. *See* Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434, 444 (1998) ("Direct democracy ... appears to give us the pure and unadulterated voice of the people themselves.").

240. *See Judicial Selection: An Interactive Map*, BRENNAN CTR. FOR JUST. (Aug. 20, 2024), https://www.brennancenter.org/judicial-selection-map [https://perma.cc/QG7A-5YW2] (showing that Ohio and Mississippi elect their state trial, appellate, and supreme court judges).

One limitation on this analysis is that the state supreme courts in Mississippi, Ohio, and Wisconsin all concluded that *Chevron*-like deference violates their state constitutions. The same separation of powers and due process concerns were also raised by participants in the lawmaking processes in Arizona, Florida, and Tennessee. While lawmakers can *prohibit* judicial deference to state agencies from this perspective, they *cannot* authorize state courts to defer to state agencies without running afoul of the state constitutions.[241] Constitutional democracy therefore allegedly requires a one-way ratchet against judicial deference in these states.

B. Democratic Legitimacy

The prohibition of *Chevron* deference in the states featured in the case studies was admittedly democratically legitimate in the minimal sense that public officials had the power to take such action and the ballot initiative in Florida was approved by sufficient voters.[242] But that is the only sense in which the prohibition of *Chevron* deference in these states was democratically legitimate. The case studies provide no reliable basis for concluding that these actions were a true reflection of the will of the people. Moreover, even if those decisions were consistent with majoritarian preferences, they were not a product of the type of reasoned deliberation that is necessary for making legitimate collective decisions in a pluralistic democracy.[243]

Legitimate collective decisions in a pluralistic democracy require public officials to engage in reasoned deliberation on which courses

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241. Indeed, the Mississippi Supreme Court held that a statute that required state courts to defer to legal interpretations by state agencies violated the state constitution. *See* HWCC-Tunica, Inc. v. Miss. Dep't of Revenue, 296 So. 3d 668, 676-77 (Miss. 2018). It is possible that today's Supreme Court would likewise invalidate federal legislation that overruled *Loper Bright* on constitutional grounds.

242. *Cf.* JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 250-83 (1942) (setting forth a minimalist conception of democracy); Matthews, *supra* note 2, at 636-37 (describing Schumpeter's influential theory).

243. *See* Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1549-50 (1988) (describing the importance of deliberation in a republican government and claiming that "[t]he antonym of deliberation is the imposition of outcomes by self-interested and politically powerful private groups").

of action will promote the public good.[244] Public officials must consider all the relevant interests and perspectives and provide persuasive justifications for their positions that could reasonably be accepted by free and equal citizens with fundamentally competing views.[245] This vision of democratic legitimacy seeks to prevent arbitrary governmental action and reach the most justifiable decisions on the merits based on the available information.[246] Because available information is often incomplete, decision makers are fallible, and the public's interests and values evolve, legal and policy decisions should generally be considered provisional.[247]

The prohibition of *Chevron* deference in the states featured in the case studies was not democratically legitimate based on these criteria.[248] *Chevron* deference is one of the most heavily debated topics in American public law and the subject of profound moral, political, and ideological disagreement.[249] Yet the judicial opinions that rejected this doctrine in Mississippi, Ohio, and Wisconsin failed to address any of the legal or policy justifications for this framework.[250]

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244. *See, e.g.*, Evan J. Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 GA. L. REV. 117, 126 (2011) ("Republicanism asserts that all governments bear a basic obligation to advance the good of their people as a whole—*res publica*—rather than their own self-interest or the factional interests of particular groups or individuals."); Dennis F. Thompson, *Deliberative Democratic Theory and Empirical Political Science*, 11 ANN. REV. POL. SCI. 497, 498, 504 (2008) (explaining that the reason-giving at the core of deliberative democracy must be "directed toward the collective good of the group that will be bound by the decision").

245. *See* Joshua Cohen, *Deliberation and Democratic Legitimacy*, *in* THE GOOD POLITY: NORMATIVE ANALYSIS OF THE STATE 17, 21 (Alan Hamlin & Philip Pettit eds., 1989); Bernard Manin, *On Legitimacy and Political Deliberation*, 15 POL. THEORY 338, 340 (1987).

246. *See* Glen Staszewski, *Political Reasons, Deliberative Democracy, and Administrative Law*, 97 IOWA L. REV. 849, 858 (2012); *see also* PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 35, 55 (David Miller & Alan Ryan eds., 1997) (defining liberty as nondomination, or the inability of one agent arbitrarily to interfere with another, and explaining that "an act of interference will be non-arbitrary to the extent that it is forced to track the interests and ideas of the person suffering the interference").

247. *See, e.g.*, AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 132 (2004) (describing deliberative democracy's "dynamic conception of political justification, in which change over time is an essential feature of justifiable principles").

248. Nor, for that matter, was the Court's decision to overrule *Chevron* in *Loper Bright*. *See infra* Conclusion (discussing the implications of this Article's analysis for the federal system).

249. *See, e.g.*, Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight*,*"* 112 COLUM. L. REV. 1143, 1144 (2012) ("Administrative law scholars have leveled a forest of trees exploring the mysteries of the *Chevron* approach contemporary judges take to reviewing law-related aspects of administrative action.").

250. *See supra* Parts II.A, II.D.

The legislative records in Arizona, Florida, Tennessee, and Wisconsin are similarly one-sided and bereft of meaningful discussion of the arguments in *Chevron*'s favor.[251] Simply put, public officials in all these states failed to consider and respond in a reasoned fashion to fundamentally competing views.

The stated reasons for prohibiting judicial deference and requiring de novo review were provided solely by anti-administrative officials and representatives of free-market advocacy groups who merely parroted the constitutional arguments against *Chevron* that have been developed and promoted in recent years by the anti-regulatory movement and their judicial allies.[252] As discussed in Part I, those arguments are completely unpersuasive on the merits.[253] While *Chevron*'s proper domain and precise workings *are* reasonably debatable,[254] especially in states with institutional arrangements that differ from those of the federal government,[255] the explanations provided for prohibiting *Chevron* deference could not reasonably be accepted by people with fundamentally competing views. Anti-administrative activists succeeded in imposing their preferences on the law, but those were not legitimate collective decisions.

Of course, these anti-administrative activists did not claim to be advancing their own interests or preferences but purported instead to be acting on behalf of "the People." This frame is the very hallmark of contemporary authoritarian populism.[256] Instead of providing mutually acceptable reasons to justify their decisions, populist leaders claim legitimacy by fiat using anti-pluralist, anti-institutional, and Manichean rhetoric.[257] Populists purport to possess a unique capacity to embody the single will of a unified people, which is distorted by mediating institutions controlled by

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251. *See supra* Parts II.B-D.

252. *See supra* Part II.

253. *See supra* Part I.

254. *See, e.g.*, Hickman & Nielson, *supra* note 67, at 938-39 (arguing that *Chevron* should not apply to agency adjudication); Wadhia & Walker, *supra* note 67, at 1201-02, 1242 (arguing that *Chevron* is unwarranted in immigration adjudication).

255. *See infra* Part IV.B.

256. *See generally* JAN-WERNER MÜLLER, WHAT IS POPULISM? (2016) (exploring the characteristics of populists and their claims to exclusive representation of the people).

257. *See* Aziz Z. Huq, *The People Against the Constitution*, 116 MICH. L. REV. 1123, 1132-33 (2018) (reviewing JAN-WERNER MÜLLER, WHAT IS POPULISM? (2016)).

self-dealing elites—and, thus, anyone who disagrees is an enemy of the true people.[258]

Anya Bernstein and I have previously shown that this populist rhetoric has insinuated itself into law,[259] and each of its key traits is exemplified by the anti-administrative movement's attack on *Chevron*.[260] This rhetoric is anti-pluralist because it insists there is a single correct answer to reasonably debatable legal problems, which can only be divined by good judges through the proper interpretive methods.[261] *Chevron* therefore clearly violates due process and the separation of powers, and impartial courts can—and, indeed, must—identify the single best understanding of ambiguous regulatory statutes and fix that meaning into law. There is no room for reasonable disagreement now or in the future (absent formal amendment) about what the Constitution or statutes require. This rhetoric is anti-institutional because it centralizes power in the judiciary and disparages the mediating role of legislatures and agencies as ongoing sites for multilateral deliberation and debate among differing social groups.[262] In particular, the anti-deference position restricts the legislature's ability to delegate broad policymaking authority to agencies to solve ongoing problems, while limiting agencies' capacity to respond flexibly to those problems based on prior experience, new information, or evolving public values.[263] This rhetoric is Manichean because it pits righteous judges and lawmakers, who adhere to the one correct understanding of the Constitution to secure the people's liberty, against tyrannical bureaucrats and their legislative and judicial enablers who abdicate their own constitutional responsibilities.[264] The use of superficial tropes and stock stories that invoke unobjectionable premises ("lady justice is blind") to reach unsupported conclusions ("courts therefore cannot lawfully defer to reasonable exercises of interpretive

258. *See* NADIA URBINATI, ME THE PEOPLE: HOW POPULISM TRANSFORMS DEMOCRACY 4-5 (2019).

259. *See generally* Bernstein & Staszewski, *Judicial Populism*, *supra* note 42.

260. *See supra* Parts I-II; Bernstein & Staszewski, *Populist Constitutionalism*, *supra* note 25, at 1788-93.

261. *See* Bernstein & Staszewski, *Populist Constitutionalism*, *supra* note 25, at 1774.

262. *See id.*

263. *See id.* at 1793-94.

264. *See id.* at 1774-75.

discretion by agencies") and avoid the inescapably normative aspects of legal decision-making ("this policymaking power should be exercised by judges rather than by agencies") is also emblematic of this populist style of reasoning.[265]

But contemporary authoritarian populism and its anti-deference position are profoundly undemocratic. In addition to populism's exclusionary nature,[266] most legal and policy questions do not have single, objectively correct answers, and fundamental disagreement pervades pluralistic societies such as the United States.[267] Achieving legitimate collective decisions in conditions of great diversity requires deliberation and mediation among the interests and values of different segments of the public.[268] Anti-administrative activists are using populist rhetoric to seize a moral high ground and allegedly fulfill the judiciary's constitutional duty to exercise independent judgment and protect the people from clear violations of the separation of powers and bureaucratic overreach. But they are actually invoking discretionary authority to shift power from more deliberative and contestatory institutions—state legislatures and especially agencies—to less deliberative and contestatory courts, in a manner that undermines democracy.[269]

An increasingly prominent alternative vision, which Bernstein and I have called "agonistic republicanism," recognizes these realities and views pluralism and enduring disagreement as the very foundation of democracy.[270] This vision treats reasoned

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265. *See* Bernstein & Staszewski, *Judicial Populism*, *supra* note 42, at 338-43.

266. *See* MÜLLER, *supra* note 256, at 3 (recognizing that populism is an exclusionary form of identity politics because, while populists purport to represent "the people," some of the people do not count).

267. Bernstein & Staszewski, *Populist Constitutionalism*, *supra* note 25, at 1765.

268. *Id.* at 1768.

269. *Cf.* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2294-95, 2311 (2024) (Kagan, J., dissenting) (recognizing that the elimination of *Chevron* deference shifts power from Congress, and especially agencies, to the federal courts).

270. Bernstein & Staszewski, *Populist Constitutionalism*, *supra* note 25, at 1765. Bernstein and I view agonistic republicanism as a synthesis of core elements of deliberative democracy, republican political theory, and agonistic democratic theory. *See id.* at 1767-74. This vision is reflected in a variety of recent work on participatory democracy, administrative law, and political economy. *Id.* at 1773-74. For prominent examples, see generally BLAKE EMERSON, THE PUBLIC'S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY (2019); K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION (2016); Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546 (2021); Nikolas Bowie & Daphna Renan, *The Separation-of-*

deliberation and ongoing contestation as vital to the legitimacy of democratic governance and understands liberty as freedom from the possibility of domination by private actors or the state.[271] Democracy must therefore provide a range of mechanisms for different people to participate in policymaking and press their views in deliberation and negotiation with one another. The goal is to reach reasonably justifiable decisions that are themselves provisional, subject to further debate and revision over time.[272] Democracy thus requires mediating institutions to provide sites for meaningful participation, deliberation, and debate.[273] It also assumes that it is legitimate for different individuals or groups to have different views on policy means and ends and that ongoing discussion and conflict are legitimately part of democratic governance.[274] The will of the people emerges through the work of democratic institutions,[275] and it is always subject to potential change.

Chevron promotes this agonistic republican vision of democracy both as a general matter as well as in specific cases. As a general matter, "[a]dministrative agencies are the primary sites [for]

Powers Counterrevolution, 131 YALE L.J. 2020 (2021); Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L.J. 1 (2022).

271. *See* PETTIT, *supra* note 246, at 21-27; Staszewski, *supra* note 46, at 1255-59 (summarizing this vision).

272. While deliberative and agonistic democracy are commonly viewed as rivals, the provisionality of legal and policy decisions and availability of ongoing opportunities for contestation are central to both theories, along with the idea that political opponents should be treated as legitimate adversaries rather than as mortal enemies. *See, e.g.*, GUTMANN & THOMPSON, *supra* note 247, at 7 (defining deliberative democracy "as a form of government in which free and equal citizens (and their representatives), justify decisions in a process in which they give one another reasons that are mutually acceptable and generally accessible, with the aim of reaching conclusions that are binding in the present on all citizens but open to challenge in the future"); Chantal Mouffe, *Deliberative Democracy or Agonistic Pluralism?*, 66 SOC. RSCH. 745, 755 (1999) ("An adversary is a legitimate enemy, an enemy with whom we have in common a shared adhesion to the ethico-political principles of democracy.").

273. Bernstein & Staszewski, *Populist Constitutionalism*, *supra* note 25, at 1768.

274. *See, e.g.*, Mouffe, *supra* note 272, at 755-56 ("[T]he prime task of democratic politics is not to eliminate passions nor to relegate them to the private sphere in order to render rational consensus possible, but to mobilise those passions towards the promotion of democratic designs.").

275. *See* HENRY S. RICHARDSON, DEMOCRATIC AUTONOMY: PUBLIC REASONING ABOUT THE ENDS OF POLICY 205 (2002) ("[O]ne cannot sensibly have in mind the thought that 'the People' is some special sort of entity—whether comprising all citizens or only a majority of them—with a will of its own that is conceptually independent of and genetically antecedent to political institutions.").

pluralistic contestation over public policy" in today's American government.[276] Agencies provide opportunities for public participation and multilateral deliberation that, even with their many imperfections,[277] are still vastly more responsive and accountable to the public than those provided by legislatures, chief executives, or courts.[278] For instance, most agencies have a legal obligation to provide public notice of their proposed regulations, and they must consider and respond in a meaningful fashion to the data, views, and arguments presented by interested members of the public.[279] In contrast to legislatures or chief executives, they must also provide reasoned justifications for their decisions to withstand judicial review in many legal systems.[280]

Agencies often go beyond these legal requirements and seek to facilitate public engagement with interested persons who may not otherwise participate in notice-and-comment rulemaking—for example, by hosting public hearings or convening focus groups or advisory committees.[281] Their policy decisions also routinely involve collaboration among a diverse group of public officials, including political appointees (and, in some states, elected agency heads) and career staff within agencies who have different epistemic orientations and professional backgrounds, as well as the governor's office, legislative representatives, and officials from other state agencies—not to mention federal officials, representatives of local and tribal governments, and perhaps even members of the international

276. Bernstein & Staszewski, *Populist Constitutionalism*, *supra* note 25, at 1777; *see also* Anya Bernstein & Cristina Rodríguez, *Working with Statutes*, 103 TEX. L. REV. (forthcoming 2025) (manuscript at 3), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4906895 [https://perma.cc/ABM5-TXGF].

277. For example, participation in notice-and-comment rulemaking tends to be skewed in favor of well-organized groups of sophisticated stakeholders, including regulated entities and business groups. *See, e.g.*, Jim Rossi & Kevin M. Stack, *Representative Rulemaking*, 109 IOWA L. REV. 1, 26-27 (2023); Michael Sant'Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U. L. REV. 793, 814-15 (2021).

278. *See* Sant'Ambrogio & Staszewski, *supra* note 277, at 802-04.

279. *See infra* notes 419-71 and accompanying text (describing rulemaking procedures in states that have eliminated *Chevron* deference pursuant to positive law).

280. *See id.*; 5 U.S.C. § 553(c).

281. Staszewski, *supra* note 46, at 1240-41 (discussing ways in which agencies are more democratic than other branches of government). *See generally* MICHAEL SANT'AMBROGIO & GLEN STASZEWSKI, PUBLIC ENGAGEMENT WITH AGENCY RULEMAKING (2018) (reporting to the Administrative Conference of the United States on agency tools and practices that encourage participation from traditionally absent stakeholders).

community.[282] Although the nature, quality, and inclusiveness of these deliberations undoubtedly differ from state to state, agency to agency, and decision to decision, the mix involved is generally varied, dynamic, and far more balanced and pluralistic than what can be achieved by most legislatures—or, especially, by the courts.[283]

While the democratic nature of agency decision-making is greatly underappreciated and may even be counterintuitive,[284] agencies *are* frequently lauded for their policymaking expertise.[285] Such expertise is commonly relied upon as a leading justification for *Chevron* deference, and it was even acknowledged in the legislative records of states that have prohibited this practice (though typically accompanied by claims that judges are the true experts on matters of legal interpretation).[286] This expertise is both real and multifaceted, and it includes technical expertise, subject matter expertise, regulatory expertise, and expertise based on situated knowledge or learned experience.[287] Agency expertise also includes information gathering, data collection, and expert integration of both "hard science" and social science, including economics.[288]

Agencies are thus uniquely well-situated to make informed policy decisions, and they are also capable of engaging in dynamic policymaking based on technological innovations, evolving public values, and the lessons of practical experience.[289] Agencies exist in a regulatory ecosystem that involves constant feedback from a broad

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282. *See* Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 YALE L.J. 1600, 1629-32 (2022) (describing the collaborative methods used by federal agencies).

283. *See* Bernstein & Staszewski, *Populist Constitutionalism*, *supra* note 25, at 1780-83.

284. *See* Anya Bernstein, *Agency in State Agencies*, *in* DISTRIBUTED AGENCY 41, 41-42 (N.J. Enfield & Paul Kockelman eds., 2017) (observing that bureaucracy is (in)famous for "melt[ing] individuals into a mass, subordinating them to an unstoppable process" that brooks no dissent).

285. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865-66 (1984); Elinson & Gould, *supra* note 6, at 551.

286. *See supra* notes 148, 180 and accompanying text.

287. *See* WILLIAM D. ARAIZA, REBUILDING EXPERTISE: CREATING EFFECTIVE AND TRUSTWORTHY REGULATION IN AN AGE OF DOUBT 5-10 (2022) (discussing the multifaceted nature of regulatory expertise).

288. *See id.*; THOMAS O. MCGARITY & WENDY E. WAGNER, AGENCIES IN SHACKLES: GOVERNMENT FAILURE AND INSTITUTIONAL DESIGN (forthcoming) (on file with author).

289. *See generally* Wendy Wagner, William West, Thomas McGarity & Lisa Peters, *Dynamic Rulemaking*, 92 N.Y.U. L. REV. 183 (2017) (describing an empirical study of three federal agencies that revealed agencies are incentivized to regularly review and revise their rules despite the absence of a formal requirement to do so).

range of different stakeholders and associated needs for adaptation.[290] This regulatory ecosystem exposes agencies to blind spots and provides them with opportunities to seek necessary legislative updates and reforms.[291] Because agencies typically have delegated statutory authority to promulgate regulations and enforce their own rules, and because they can make policy through a variety of procedural forms,[292] agencies are also especially adept at error correction, incremental policy development, policy clarification and reform, and adaptation to environmental changes—including changes to the physical, technical, institutional, and political environments. In sum, agencies have the capacity to be knowledgeable, flexible, and responsive, and thus to innovate and keep regulatory policy up to date.[293] These epistemic and technical advantages also promote democratic legitimacy from the perspective of agonistic republicanism because agency decision-making is, by definition, provisional and subject to ongoing contestation.

Chevron deference also promotes agonistic republicanism in specific cases by recognizing that legal and policy issues often lack a single objectively correct answer. If elected officials unambiguously resolved the precise question at issue during the legislative process, agencies and courts are obligated to respect that decision under step one of this framework.[294] If, however, the legislature was silent or there is more than one legally permissible resolution of the problem, then courts should uphold an agency's reasonable policy decision under step two of the analysis.[295] This framework is consistent with the traditional notion that agencies and courts are obligated to serve as faithful agents of the legislature.[296] If the

290. *See* Bernstein & Rodríguez, *supra* note 276 (manuscript at 22-31); Wagner et al., *supra* note 289, at 225-41.

291. *See generally* Jarrod Shobe, *Agencies as Legislators: An Empirical Study of the Role of Agencies in the Legislative Process*, 85 GEO. WASH. L. REV. 451 (2017); Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. 1377 (2017).

292. *See* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1386-87 (2004).

293. For a compelling argument that these traits are unduly neglected in democratic and legal theory, see generally Richard H. Pildes, *The Neglected Value of Effective Government*, 2023 U. CHI. LEGAL F. 185.

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

295. *See id.* at 843.

296. *See* Glen Staszewski, *Statutory Interpretation as Contestatory Democracy*, 55 WM. & MARY L. REV. 221, 253-61 (2013).

legislature considered and resolved the precise question at issue in a reasoned fashion, then that decision is presumably democratically legitimate and should be followed unless or until the statute is amended. But *Chevron* openly recognizes that legislatures often delegate broad authority to agencies to figure out the most justifiable ways to achieve its general policy goals in dynamic regulatory ecosystems, and that even relatively specific statutory mandates can often be fairly understood in multiple, legally permissible ways.[297] At the same time, agencies must provide cogent explanations for their decisions that respond in a reasoned fashion to competing interests and views to withstand judicial review under this framework.[298]

Chevron also recognizes the provisional nature of administrative policymaking and thereby facilitates ongoing contestation over the most justifiable resolution of regulatory problems, while encouraging pragmatic and responsive, iterative decision-making. While agencies must resolve statutory ambiguities in a reasoned fashion under the second step of this framework, they are legally permitted to change their positions based on new information or evolving values if they follow the requisite procedures and provide a reasoned justification for their current policy choices.[299] Agencies can therefore promote their statutory missions and make effective policy in a complex and changing regulatory and political environment. This legal framework simultaneously prevents arbitrary decision-making and provides critics of the status quo with ongoing opportunities to seek legal change—and thereby promotes agonistic republicanism.

Many legislatures, in contrast, "lack[ ] the substantive expertise, political will, and consensus-generating" capacities to enact detailed statutory provisions across countless policy domains, and neither legislative bodies nor chief executives can apply the broad principles or goals underlying most regulatory statutes to the innumerable and often unanticipated social realties presented as laws are implemented.[300] Elected officials therefore depend on agencies to

297. *See Chevron*, 467 U.S. at 843-45.

298. *See* 5 U.S.C. § 553(c).

299. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982-83 (2005); FCC v. Fox Television Stations, Inc., 556 U.S. 502, 514-15 (2009).

300. *See* Staszewski, *supra* note 46, at 1243.

continuously fine-tune and develop statutory policies in ways that are vital to pluralistic democracy. Most courts, in turn, lack the policymaking mandate, substantive expertise, and structural mechanisms for broad-based public participation that would be necessary for them to resolve discretionary policy choices on polycentric regulatory problems in a democratically legitimate fashion and keep those regulatory policies up to date.[301] Indeed, *requiring* state courts to issue single, final, and supposedly objective interpretations of ambiguous statutes and regulations significantly increases the likelihood of arbitrary governmental action and facilitates the possibility of both public and private domination in a manner that undermines liberty and pluralistic democracy.

It is worthwhile to recall that until recently, *Chevron* was not an especially polarizing topic,[302] and some scholars understood the decision to reflect an overlapping consensus or incompletely theorized agreement among public officials with fundamentally competing jurisprudential views and disparate perspectives on the administrative state's legitimacy.[303] Writing before the Federalist Society and Right-Wing Troika sought to dismantle *Chevron*, Evan Criddle observed that this decisional framework was supported by Congress's presumptive intent; administrative expertise; presidential influence over agency decision-making and any resulting political accountability; as well as the doctrine's capacity to facilitate national uniformity, responsiveness to evolving political preferences, inherent executive authority, and deliberative rationality.[304] *Chevron* could therefore reasonably be accepted by proponents of legislative supremacy, the neutral expertise model of agency legitimacy, unitary executive theory, and republican political theory and deliberative democracy.[305] Criddle thus concluded that "*Chevron* laid the foundation for a pragmatic consensus in statutory interpre-

301. *See id.*

302. To be sure, *Chevron* has always been controversial. *See, e.g.*, Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 456, 461-63 (1989). But the political valence of the decision has shifted over time based on prevailing power arrangements within the federal government. *See supra* notes 3-11 and accompanying text.

303. *See* Evan J. Criddle, Chevron*'s Consensus*, 88 B.U. L. REV. 1271, 1291-98 (2008).

304. *Id.* at 1283-91.

305. *See id.* at 1297-98.

tation: when an administrative agency engages in flexible statutory interpretation through notice-and-comment rulemaking procedures, citizens of diverse religious, philosophical, and moral perspectives could agree that courts ought to defer to the agency's reasonable interpretations of ambiguous statutory provisions."[306]

Chevron could also reasonably be accepted by public officials with fundamentally competing jurisprudential perspectives because it allows judges with different methodological orientations to reach results that they should find acceptable in individual cases. For example, Justice Scalia famously observed that textualist judges with a penchant for finding regulatory statutes unambiguous could decide most cases at step one and thus defer less often to agencies than their nontextualist counterparts.[307] Intentionalist judges could similarly resolve cases at step one whenever they find that Congress has unambiguously resolved the precise question at issue.[308] Meanwhile, purposive or pragmatic judges may focus more heavily on whether agency decisions promote the agency's broader statutory

306. *Id.* at 1296. Criddle recognized that *United States v. Mead Corp.*, 533 U.S. 218 (2001), called this broad consensus into question by officially hinging *Chevron*'s applicability on Congress's intent, but he claimed that the Court's decisions applying "step zero" were best understood as reinforcing *Chevron*'s consensus. *Id.* at 1300-13; *see Mead*, 533 U.S. at 229. Criddle argued that the Court could clarify and improve the doctrine by transparently adopting *Chevron*'s consensus. Criddle, *supra* note 303, at 1323. Under this approach, administrative interpretations of statutes would qualify for *Chevron* deference "when the agency (1) exercises delegated lawmaking authority; (2) respects expert judgment; (3) reflects political responsiveness and accountability; (4) promotes deliberative rationality; and (5) facilitates national uniformity." *Id.* at 1302-03. If, however, litigants demonstrate that the agency's decision-making process fails to satisfy any of these criteria, "the agency would not be entitled to *Chevron* deference and courts would proceed to evaluate the agency's statutory construction under the residual *Skidmore* factors." *Id.* at 1316. Criddle claimed that this approach was one that could reasonably be accepted by public officials with fundamentally competing views and would therefore constitute a democratically legitimate standard of judicial review. *See id.* at 1320-21. While Criddle's proposal is intriguing, it would be improved, in my view, if agencies were able to obtain *Chevron* deference for subsequent interpretations that met the requisite criteria, even if a court previously adopted a different interpretation using *Skidmore*. *See infra* Part IV.A.

307. *See* Scalia, *supra* note 1, at 521; *see also* Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 VAND. L. REV. EN BANC 315, 320 (2017), https://scholarship.law.vanderbilt.edu/vlreb/vol70/iss7/26/ [https://perma.cc/MX9X-US3U] ("In my own opinions as a judge, I have never yet had occasion to find a statute ambiguous."); Miles & Sunstein, *supra* note 53, at 831-32 (reporting that Justice Scalia was the least deferential Justice in *Chevron* cases).

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

mission at step one of the analysis.[309] They are nonetheless more likely, on average, to find regulatory statutes ambiguous, and thus more likely to base their decisions on whether the agency's policy decision was legally permissible and reasonably justified on the merits. The only constraint *Chevron* imposes on any of these judges is to avoid imposing their own legal or policy preferences on regulatory statutes by deferring to reasonable resolutions of statutory ambiguities by agencies—a constraint that *all judges* should reasonably find acceptable.[310]

In contrast, similar to the authoritarian populism upon which it draws, the anti-deference position is fundamentally undemocratic. It requires judges to impose their own legal or policy preferences on ambiguous regulatory statutes by pretending that the law has a single, objectively correct answer, which can only be ascertained by impartial judges who follow the correct legal methods.[311] In the process, it limits the legislature's ability to delegate broad authority to agencies to solve complex social problems and undermines each of the values reflected by *Chevron*'s consensus.[312] The anti-deference position also fixes the meaning of regulatory statutes through the operation of stare decisis, and thus strips agency policymaking of its provisionality.[313] In the process, it limits the ability of interested stakeholders to contest the regulatory status quo and prevents agencies from updating the law in response to new information, the lessons of experience, and evolving public values.[314] In short, the anti-deference position shifts policymaking power from more deliberative and contestatory institutions—legislatures and especially agencies—to less deliberative and contestatory courts, and thereby severely undermines agonistic republicanism.[315] Indeed, one could argue that from an agonistic republican perspective, the delegation of broad policymaking authority from legislatures to

309. *See, e.g.*, ASARCO, Inc. v. EPA, 578 F.2d 319, 329 & n.40 (D.C. Cir. 1978) (invalidating EPA's bubble concept as contrary to the purpose of the 1977 Amendments to the Clean Air Act).

310. *See Chevron*, 467 U.S. at 865.

311. *See* Bernstein & Staszewski, *Populist Constitutionalism*, *supra* note 25, at 1792-93.

312. *See id.* at 1788-89.

313. *See* Criddle & Staszewski, *supra* note 226, at 1591-95.

314. *See infra* note 478 and accompanying text.

315. *See* Bernstein & Staszewski, *Populist Constitutionalism*, *supra* note 25, at 1785-93; Bernstein & Staszewski, *Judicial Populism*, *supra* note 42, at 343-44.

agencies and judicial deference to reasonable exercises of their interpretive discretion are both necessary to achieve democratic legitimacy in contemporary American government.[316]

C. Legal Force

Of course, one might concede that the process by which these states eliminated *Chevron* was less than ideal and still believe that state courts are required to follow those laws. Many laws fall short of the ideals of deliberative democracy and agonistic republicanism. Yet we do not typically conclude that those laws are devoid of coercive authority. While we could theoretically impose greater demands on lawmakers before giving their decisions the force of law,[317] this Section distinguishes between first-order legal rules and codified interpretive methods.[318] It argues that although first-order legal rules should generally be treated as legally binding, codified rules of legal interpretation are better understood as a form of guidance or as providing canons for decision-making.[319] This Section

316. *Cf.* JERRY L. MASHAW, REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT 177 (2018) (claiming that the process of "reasoned administration" by agencies "may be the most democratic form of collective decision-making in American national political life"); PETER M. SHANE, DEMOCRACY'S CHIEF EXECUTIVE: INTERPRETING THE CONSTITUTION AND DEFINING THE FUTURE OF THE PRESIDENCY 171 (2022) ("[T]he democratic pedigree of the modern federal administrative establishment is at least as strong as that of Congress itself."); Bernstein & Staszewski, *Populist Constitutionalism*, *supra* note 25, at 1780-82 (discussing agencies' unparalleled capacity to promote agonistic republicanism); Daniel E. Walters, *Taking Democracy Seriously in the Administrative State*, LPE PROJECT: LPE BLOG (May 16, 2022), https://lpeproject.org/blog/taking-democracy-seriously-in-the-administrative-state/ [https://perma.cc/8YDA-TGP3] ("[T]he administrative state *is* essential to [agonistic] democracy."). Indeed, one could go further and claim that an administrative state with these structural attributes is necessary to achieve justice in our current system of government. *See* Staszewski, *supra* note 46, at 1240-54.

317. *Cf.* Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 222-24 (1976) (explaining how the Constitution could impose heightened procedural requirements on lawmakers). Perhaps ironically, our legal system *does* impose such demands on agencies, which is partly why they are generally our most democratic institutions. *See supra* notes 25-26 and accompanying text.

318. *See* Criddle & Staszewski, *supra* note 226, at 1591-95 (distinguishing between "first-order, or primary, rules of legal conduct and second-order or third-order legal rules, which are 'rules about rules' or 'rules about rules about rules' respectively," and arguing that it is more problematic for courts to treat second- and third-order interpretive rules as legally binding).

319. *See id.* For the leading survey on codified rules of legal interpretation in the states, see generally Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO.

thus pushes back on the conventional wisdom that the proper level of judicial deference to administrative exercises of interpretive discretion is necessarily dictated or controlled by framework legislation or other sources of positive law.

There are legal, sociological, and democratic reasons for viewing codified interpretive rules as a form of methodological guidance that lacks binding legal force.[320] As a legal matter, codified interpretive rules must themselves be interpreted, and there are frequently competing legal principles or normative values that suggest giving them a narrow berth.[321] Most importantly for present purposes, the legislatures that enacted statutes delegating broad authority to state agencies when *Chevron*-like deference prevailed presumably intended for state courts to defer to reasonable exercises of policymaking discretion by state agencies when they filled gaps in those regulatory regimes.[322] There is thus a strong argument that recently enacted anti-deference legislation should not be applied retroactively to preexisting regulatory statutes that were adopted with different legislative expectations regarding the resulting scope of delegated administrative power and judicial review.[323] Indeed, many regulatory statutes are best understood as conferring broad discretionary authority on state agencies to make reasonable policy decisions to achieve the state legislature's underlying goals and keep those statutes up to date based on new information and evolving values. The enactment of a constitutional amendment or framework statute that prohibits judicial deference to state agencies does not change that fundamental reality. Rather, it creates a

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L.J. 341 (2010).

320. *See* Staszewski, *supra* note 296, at 263-67.

321. *See* Alan R. Romero, Note, *Interpretive Directions in Statutes*, 31 HARV. J. LEGIS. 211, 228-47 (1994); Andrew Tutt, Comment, *Interpretation Step Zero: A Limit on Methodology as "Law,"* 122 YALE L.J. 2055, 2057-61 (2013).

322. *Cf.* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 995-97 (2013) (providing empirical evidence that congressional staffers who draft legislation expect agencies to have the legal authority to resolve ambiguities in regulatory statutes).

323. *See* Criddle & Staszewski, *supra* note 226, at 1575, 1581-87 (explaining that a legislature's evolving interpretive preferences may pose difficult and perhaps insurmountable challenges for faithful agent theories of judging); Tutt, *supra* note 321, at 2057 (recognizing that codified interpretive rules "often force[ ] judges into the middle of an intertemporal clash between a past and present legislature—a difficult lose-lose situation").

conflict between the general intent reflected by the codified interpretive rule and the specific intent of the legislature that enacted the regulatory statute at issue. It is a cardinal principle of legal interpretation, however, that the specific should trump the general in conflicts of this nature.[324] Accordingly, state laws that generally prohibit judicial deference to state agencies should often give way to an agency's delegated policymaking authority under specific regulatory statutes, regardless of the timing of the respective legal enactments.[325]

Adrian Vermeule has argued that federal courts could employ a similar analysis to continue to defer to reasonable resolutions of statutory ambiguities by agencies in the wake of *Loper Bright*.[326] Under this analysis, the independent judicial interpretation assertedly required by the APA could lead to "the conclusion that, in a given statute, Congress has delegated primary responsibility to agencies to fill in statutory gaps or ambiguities, subject to judicial review to ensure that agencies have remained within the scope of the delegation and chosen policy on reasonable grounds."[327] Judicial deference to agencies would be reframed but not eliminated under this approach—which Vermeule has dubbed "de novo deference"[328]

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324. *See, e.g.*, Morton v. Mancari, 417 U.S. 535, 550-51 (1974) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment."); Tutt, *supra* note 321, at 2059-61.

325. *See* Bednar & Hickman, *supra* note 29, at 1458 (recognizing that because "[s]pecific statutes trump the more general APA[,] ... a reviewing court might reasonably interpret a specific statutory grant of discretionary authority—for example to adopt regulations or pursue formal adjudication to elaborate and implement undefined or underdefined statutory terms—as taking precedence over a general call for de novo review contained in the APA" (footnote omitted)).

326. *See* Vermeule, *supra* note 30, at 620, 632-34. Vermeule astutely predicted the Court might leave this option open when it decided *Loper Bright*, partly because it would allow the conservative Justices to be seen overruling *Chevron* without requiring federal judges to make policy decisions for which they are ill-suited. *See id.* at 632-33. This approach would, in effect, allow the conservative Justices to have their cake and eat it too. *See id.* at 632-34.

327. *Id.* at 620; *see also* Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 25-33 (1983) (squaring *Chevron*-like deference with *Marbury* on similar grounds).

328. Vermeule, *supra* note 30, at 632-34. This moniker, in addition to being more amusing, would also apply more cleanly to this Article's case studies, where state law generally requires de novo judicial review.

or "*Loper Bright* delegation"[329] and which was explicitly endorsed by the Court in *Loper Bright*.[330]

Similarly, Lisa Bressman has argued that the elimination of *Chevron* deference recreates uncertainty regarding how courts should review agency decisions that involve mixed questions of law and policy.[331] The *Chevron* framework had rendered this question moot by treating the resolution of legal ambiguity as a policy question that was subject to deferential judicial review.[332] But requiring courts to conduct de novo or independent judicial review of "questions of law" also requires courts to distinguish between legal questions and questions of policy that are still within an agency's bailiwick, and where courts are therefore legally prohibited from substituting their judgment for that of the well-considered judgment of agencies.[333] Bressman argues that federal courts should use the relevant factors under the arbitrary and capricious test to distinguish between pure questions of law that should be decided independently by courts and questions of policy that fall within an agency's delegated authority and should be subject to a deferential form of judicial review.[334] She also concludes that most mixed questions of law and policy—the ubiquitous "ordinary questions" that are the bread and butter of the administrative state—should be treated as policy questions under this analysis.[335] Under this

329. Vermeule, *supra* note 31.

330. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2263 (2024) ("In a case involving an agency, of course, the statute's meaning may well be that the agency is authorized to exercise a degree of discretion.... When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. The court fulfills that role by recognizing constitutional delegations, 'fix[ing] the boundaries of [the] delegated authority,' and ensuring the agency has engaged in 'reasoned decisionmaking' within those boundaries." (alterations in original) (first quoting Monaghan, *supra* note 327, at 27; and then quoting Michigan v. EPA, 576 U.S. 743, 750 (2015))).

331. *See* Lisa Schultz Bressman, *Lower Courts After* Loper Bright, 31 GEO. MASON L. REV. 499, 509 (2024) ("After *Loper Bright*, how a court understands an agency interpretation may have great significance. It may be the difference between de novo and arbitrariness review, judicial judgment and judicial deference, and judicial responsibility and agency authority.").

332. *See* Lisa Schultz Bressman, *The Ordinary Questions Doctrine*, 92 GEO. WASH. L. REV. 985, 988-89 (2024).

333. *Id.* at 988-89, 1012-15.

334. *Id.* at 1013-15.

335. *Id.* at 989-90, 1015-16, 1031.

"ordinary questions doctrine," such agency decisions would only be invalidated by courts if they were legally impermissible or arbitrary and capricious.[336]

As Vermeule's and Bressman's proposed workarounds suggest, there is, in fact, a persistent and irreconcilable tension between judicial or legislative efforts to eliminate *Chevron* and the basic structure of the administrative state. Nicholas Bednar and Kristin Hickman have thus argued that something akin to *Chevron* deference is inevitable when legislatures delegate broad policymaking authority to agencies.[337] Most judges know they lack the legal authority or expertise to make legitimate and effective regulatory policy.[338] They are therefore generally inclined to uphold agency policy decisions that are legally permissible and reasonably justified on the merits. While such judges could technically comply with state laws that prohibit *Chevron* deference by purporting to interpret regulatory statutes de novo, this need not affect the substance of their decisions. Courts could still uphold an agency's reasonable exercises of interpretive discretion by agreeing with the agency based on the court's "independent judgment,"[339] by invoking "de novo deference," or by using the "ordinary questions doctrine."[340] But to the extent courts are still deferring to agency policy judgments in a manner that is fully compatible with the *Chevron* framework, these approaches potentially undermine judicial candor, and they constitute distinctions without a difference in operation.[341]

For similar reasons, Bressman and Kevin Stack have argued that judicial deference to agency decision-making constitutes a foundational principle of administrative law that maintains a proper

336. *Id.* at 989.

337. Bednar & Hickman, *supra* note 29, at 1443.

338. *See, e.g.*, *id.* at 1455-56.

339. Indeed, federal courts should still give agency interpretations respect based on their persuasiveness under *Skidmore* when exercising independent judgment after *Loper Bright*. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2259 (2024).

340. *See supra* notes 326-36 and accompanying text.

341. *See* Bednar & Hickman, *supra* note 29, at 1460 (concluding that "[s]uch disingenuousness in judicial decision-making hardly seems like an improvement over the status quo"); Vermeule, *supra* note 31 ("It is perhaps not excessive or vulgar realism to point out as well that the relabeling of '*Chevron* deference' as '*Loper Bright* delegation' gives a conspicuous headline victory to the conservative-libertarian legal movement, while at the same time leaving in place the deeper institutional and structural rationales that animated *Chevron* deference in the first place."); Vermeule, *supra* note 30, at 633-34.

balance among the branches and will therefore not simply go away.[342] They point out that the administrative state is built on a recognition that legislative bodies both want and need "to delegate the details of regulatory policy to agencies" and that the "interpretation" and "implementation" of regulatory statutes are inextricably intertwined.[343] They also point out that judicial deference to reasonable policy decisions by agencies has a deeply established pedigree that predated the *Chevron* decision.[344] While *Chevron* has taken on a life of its own and generated increasingly vociferous ideological opposition in recent years, that does not change the core principle's foundational status. Bressman and Stack therefore predict that something akin to *Chevron* deference will ultimately reemerge in those jurisdictions that formally eliminate it.[345] Simply put, legislatures need to delegate policy details to agencies, and courts are well-advised to defer to reasonable policy decisions by agencies because they do not have the institutional competence to do otherwise. The continued vitality of judicial deference to agency policymaking is therefore supported by fundamental jurisprudential considerations that transcend the *Chevron* doctrine.[346]

There are also sociological reasons for viewing codified interpretive rules as a form of guidance that lacks genuine legal force.[347] Unlike first-order, substantive rules of legal conduct, which have a specified scope and relatively limited domain, higher-order rules of interpretive methodology generally apply in a much broader array of cases.[348] This means that the chosen contents of interpretive rules involve higher stakes than most substantive rules of law.[349]

342. *See* Bressman & Stack, *supra* note 29, at 466.

343. *Id.* at 482; *see also* Anya Bernstein, *Saying What the Law Is*, 48 LAW & SOC. INQUIRY 14, 18-19 (2023); Bernstein & Rodríguez, *supra* note 276 (manuscript at 8).

344. Bressman & Stack, *supra* note 29, at 477-82; *see also Loper Bright*, 144 S. Ct. at 2303-06 (Kagan, J., dissenting); Levin, *The APA and the Assault on Deference*, *supra* note 236, at 160-74.

345. Bressman & Stack, *supra* note 29, at 474-82.

346. *Id.* at 474 ("Judicial deference will persist because it is the proper counterpart to congressional delegation and statutory implementation in our governmental system.").

347. Most codified interpretative rules adopted by state legislatures explicitly state that they are only advisory in nature. *See* Romero, *supra* note 321, at 217 & nn.27-28.

348. *See* Criddle & Staszewski, *supra* note 226, at 1591 (providing the plain meaning rule and *Chevron* deference as examples).

349. *See id.* at 1592. This may help to explain why the "interpretive wars" have been so intense. *Id.*

Moreover, because interpretive methodology is inextricably intertwined with legal reasoning and the resolution of individual cases, judges are unlikely to follow codified interpretive rules that would lead them to reach what they regard as unjustifiable results in cases of first impression, particularly when such decisions would conflict with their fundamental normative or jurisprudential commitments.[350] Perhaps not surprisingly, scholars have found that courts frequently disregard or ignore codified interpretive rules in practice,[351] and judges sometimes question their constitutional validity on the grounds that legislative efforts to dictate how courts decide specific cases cannot be squared with the judicial power.[352]

Consistent with these jurisprudential and sociological observations, Connor Raso and William Eskridge have demonstrated empirically that none of the Supreme Court Justices regularly treated *Chevron* or other deference doctrines as legally binding precedent.[353] Rather, Raso and Eskridge found that the Justices treated different approaches to judicial deference similar to canons of construction, which are applied episodically on a contextual basis based on underlying policy considerations rather than as binding legal rules.[354] Indeed, Raso and Eskridge argue that interpretive

350. *See id.* at 1592-93 (making this point in the context of methodological stare decisis); Staszewski, *supra* note 31, at 266.

351. *See* Gluck, *supra* note 59, at 1786 ("The state cases indicate that courts will find ways around legislated methodological rules they do not like, and that judges may be unwilling to relinquish authority over interpretive methodology."); Romero, *supra* note 321, at 241-43 (recognizing the tendency of courts to "ignore" interpretive instructions from the legislature); 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, 400-07 (2015) (providing empirical evidence that state courts do not consistently follow codified rules of statutory interpretation).

352. *See, e.g.*, Boykin v. State, 818 S.W.2d 782, 786 n.4 (Tex. Crim. App. 1991) (en banc) (acknowledging that codified interpretive rules "that 'seek[ ] to control the attitude or the subjective thoughts of the judiciary' violate the separation of powers doctrine" (alteration in original) (quoting James C. Thomas, *Statutory Construction When Legislation Is Viewed as a Legal Institution*, 3 HARV. J. LEGIS. 191, 211 n.85 (1966))). *See generally* Linda D. Jellum, *"Which Is to Be Master," the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837 (2009) (exploring the balancing of power between legislatures and judges when legislatures attempt to dictate the process of judicial interpretation).

353. *See* Connor N. Raso & William N. Eskridge, Jr., Chevron *as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1734 (2010).

354. *Id.*

methodology generally cannot be given binding legal force because it is fundamentally "a web of considerations with different and varying weights rather than a set of hierarchical rules."[355] While they therefore suggested that the Court should simplify its existing deference doctrines, they also argued that there are compelling normative reasons for giving binding legal force to "the core *Chevron* proposition that when Congress delegates lawmaking authority to an agency, judges are required to defer to any reasonable agency interpretation, unless Congress has resolved the issue in the statute."[356] Raso and Eskridge thus echoed Bressman and Stack in concluding that "[t]his is a foundational principle of the modern regulatory state."[357]

All of this is to say that if a state judge concludes that a regulatory statute is ambiguous and that a state agency's exercise of interpretive discretion is reasonable, the court could legitimately uphold the agency's decision even if state law instructed her to construct a de novo interpretation and thereby impose her own policy views on the law. Moreover, there would be nothing *unlawful* about such a decision, particularly if the governing statute delegated policymaking authority to the agency, the legal problem involved a mixed question of law and policy, the agency provided interested members of the public with meaningful opportunities to participate in the decision-making process, the decision reflected the agency's considered expertise, and the agency provided a reasoned justification for its decision that responded in a meaningful fashion to competing interests and views. Codified rules of interpretation—including state laws that purportedly require state courts to interpret regulatory statutes de novo—should therefore generally not be treated as legally binding, and each state should work to develop a system of judicial review that involves both reasoned

355. *Id.* at 1811; *cf.* Linda D. Jellum, Chevron*: The Doctrine that Must Not Be Named and Cannot Be Overruled*, 99 TUL. L. REV. 305, 306-10, 336 (2024) (arguing that step one of *Chevron* involves a de novo standard of review and step two involves "a policy-based canon used to resolve ambiguity," and claiming that as a combination of a standard of review and a canon of statutory interpretation, *Chevron* cannot realistically be "overruled" even if federal courts no longer invoke the doctrine by name).

356. Raso & Eskridge, *supra* note 353, at 1811.

357. *Id.*; *see* Bressman & Stack, *supra* note 29, at 474.

deliberation by elected officials and persuasive justifications by state agencies and state courts.

By the same token, there are serious questions regarding whether judicial decisions that purport to eliminate *Chevron*-like deference are entitled to stare decisis effect. While the first-order, substantive legal rules established by appellate courts are generally treated as presumptively binding precedent in subsequent cases, the interpretive methodology used to reach those decisions has an ambiguous legal status and is generally not given stare decisis effect.[358] Moreover, there are a variety of special difficulties associated with giving stare decisis effect to interpretive methodology that parallel the problems or challenges of giving codified interpretive rules the force of law.[359] This does not necessarily mean that courts cannot or will not follow methodological precedent if they agree with (or are indifferent to) the specified interpretive rules and their application leads judges to what they regard as acceptable outcomes in specific cases.[360] This also does not mean that courts will overtly refuse to follow methodological precedent with which they disagree or that proves problematic in application.[361] But it does mean that courts

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358. *See supra* note 226 and accompanying text; Gluck, *supra* note 59, at 1817-18; Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation:* Erie *for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 775-77 (2013).

359. *See* Criddle & Staszewski, *supra* note 226, at 1581-90; Staszewski, *supra* note 31, at 267-70.

360. *See* Bruhl, *supra* note 226, at 137-58 (identifying "successful" examples of methodological stare decisis in the federal system); Gluck, *supra* note 59, at 1771-72 (providing examples of state courts that have given methodological decisions stare decisis effect). Of course, stare decisis is unnecessary, as a practical matter, to compel courts to follow precedent—whether substantive or methodological—when they agree with it. *See* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 588 (1987) ("The most obvious consequence, of [a system of precedent], is that a decisionmaker constrained by precedent will sometimes feel compelled to make a decision contrary to the one she would have made had there been no precedent to be followed."). There is also little doubt that many anti-administrative judges agree with recent legal directives to eliminate *Chevron*. *See* Daniel E. Walters, *Four Futures of* Chevron *Deference*, 31 GEO. MASON L. REV. 635, 652-57 (2024) (presenting a model that suggests that recent efforts to eliminate *Chevron* will likely stick for political reasons in the short term, but that judicial deference to agencies will likely reemerge in the long run based on shifting political dynamics).

361. *See* Jack M. Beermann, Chevron *Deference Is Dead, Long Live Deference*, CATO SUP. CT. REV. 2023-2024, at 31, 38 (2024) ("[T]he Court left no doubt that *Chevron* deference is dead, proclaiming that '*Chevron* is overruled.' A statement to this effect was required to prevent lower courts from continuing to apply *Chevron*." (footnote omitted) (quoting Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273) (2024)); Posting of Jack Beermann,

will understandably tend to ignore, disregard, or work around methodological precedent they find unjustifiable or that would lead them into what they regard as error in analyzing or deciding individual cases.[362] As we have seen, there are several available ways around framework laws or judicial decisions that purport to prohibit courts from deferring to reasonable exercises of interpretive discretion by agencies, and courts should not (and likely will not) hesitate to use them.

In addition to comporting with legal and jurisprudential principles and sociological reality, treating codified rules of interpretation and methodological precedent as guidance that is not entitled to legal force would also promote pluralistic democracy. This view recognizes that regulatory agencies are the preeminent sites for pluralistic contestation in contemporary American government, and that they are uniquely well-situated to make informed policy decisions and to keep regulatory policy up to date. This view also recognizes that legal and policy issues frequently lack single, objectively correct answers, and therefore leaves space for ongoing contestation regarding the most justifiable resolution of regulatory problems, while requiring agencies to demonstrate that their provisional policy choices are legally permissible and nonarbitrary. This view respects the legislature's intent to delegate broad policy-making discretion to agencies, while simultaneously promoting bureaucratic expertise, political responsiveness and accountability, deliberative rationality, and the need for uniform legal rules within a jurisdiction. This view could reasonably be accepted by people with fundamentally competing positions on the democratic legitimacy of the administrative state. It would also allow judges with fundamentally different interpretive philosophies to reach what they should regard as acceptable decisions in each case. And,

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beermann@bu.edu, to adminlaw@listserv.lsu.edu (June 29, 2024, 4:43 PM) (on file with author) (claiming "it's pretty clear that *Chevron*'s methodology has been overruled" because "[i]f a Court of Appeals or District Court writes an opinion deferring to an agency under Step 2 of *Chevron*, it will be ripe for a summary reversal with instructions to reconsider the decision under *Loper Bright*").

362. *Cf.* Staszewski, *supra* note 31, at 267 (making this point in the context of codified interpretive rules); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1098 (2008) (finding rampant inconsistencies in the Court's application of its deference doctrine).

perhaps most importantly, it is a view that promotes agonistic republicanism by ensuring that regulatory policy is a product of reasoned deliberation and ongoing contestation, while allowing agencies to ascertain the most justifiable ways of promoting their statutory missions. The anti-deference position, in contrast, would force judges to make policy decisions that exceed the scope of their proper authority and institutional competence, and would thereby undermine these core democratic values.

IV. A DEMOCRATICALLY LEGITIMATE MODEL FOR PLURALISTIC STATES

A handful of states have recently enacted laws to prohibit their courts from deferring to reasonable exercises of interpretive discretion by state agencies.[363] The case studies presented in Part II showed that these were political power plays that relied on the authoritarian populist rhetoric developed by anti-administrative activists to discredit agency deference in the federal system rather than anything distinctive about those states. Part III argued that contrary to the conventional wisdom, these state laws are democratically illegitimate and lack binding legal force. So how should state courts review the legality of interpretive discretion by state agencies?

This Part contends that we can make headway on this question by reconfiguring the terms of the debate. The anti-deference position only gains its rhetorical purchase by treating *Chevron* as a doctrine of legal interpretation. But no one really "interprets" statutes in a traditional sense in cases that fall within *Chevron*'s domain. Agencies promote their statutory missions by implementing or "activating" statutes, while courts review the legality of their decisions.[364] The question is therefore how state courts should review such agency action, not whether they should defer to an agency's legal interpretation.

This Part maintains that *Chevron* should serve as the default rule for judicial review of agency exercises of interpretive discretion. There may be good reasons for fine-tuning a specific jurisdiction's

363. *See supra* Part II.C-D.

364. *See* Staszewski, *supra* note 296, at 254-55, 263.

approach based on a variety of comparative or contextual considerations. But state officials should provide persuasive justifications for specified departures from the *Chevron* baseline, rather than dogmatically prohibiting judicial deference to reasonable exercises of interpretive discretion by state agencies based on authoritarian populist rhetoric. State officials should also promote agonistic republicanism by ensuring that agencies have the flexibility necessary to modify regulatory policy based on evolving political, social, and technological considerations.

A. Reconfiguring the Terms of the Debate

Chevron has taken on a life of its own.[365] The anti-administrative movement gradually developed its now-standard arguments that this doctrine raises constitutional concerns by delegating legislative powers to agencies, abdicating the judiciary's responsibility to say what the law means, and depriving litigants of an impartial decisionmaker.[366] But these arguments only get off the ground and gain their rhetorical power by treating *Chevron* as a doctrine of legal interpretation. Under this view, agencies interpret statutes, and courts are required by *Chevron* to defer to reasonable interpretations of ambiguous statutory provisions by agencies.[367] Courts are therefore prevented from adopting their best understanding of statutory meaning, which shifts power from the judiciary to agencies and biases adjudication in favor of the government.[368]

In truth, however, no one is *interpreting* statutes in this context. Rather, agencies are implementing their delegated statutory authority, and courts are reviewing the legality of those decisions.[369] While each of these activities can involve legal interpretation in a traditional sense, neither agencies nor courts are required *to say*

365. *See, e.g.*, Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253, 275-77 (2014). It has even been blamed for polarizing our entire political system. *See* Jeff Overley, *Paul Clement's Big Idea: Overrule* Chevron*, Ease Polarization*, LAW360 (Nov. 9, 2023, 9:24 PM), https://www.law360.com/healthcare-authority/articles/1734041/paul-clement-s-big-idea-overrule-chevron-ease-polarization [https://perma.cc/65PX-E5HW].

366. *See generally* Green, *supra* note 6.

367. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843-45 (1984).

368. *See* Hamburger, *supra* note 40, at 1189.

369. *See* Staszewski, *supra* note 296, at 298.

what the law means to perform these functions. Agencies make policy decisions about the best ways to promote their statutory missions, and courts review those decisions to ensure that they are legally permissible and reasonably justified on the merits. Agencies can change their policies based on new information, the lessons of experience, and evolving public values, and courts can review the legality of those decisions on the same grounds. No one is required to identify the single, objectively correct (or even "the best") interpretation of the statute or to fix that meaning into law for this system to work. And the *Chevron* framework is both constitutionally permissible and entirely sensible when the system is understood in this fashion. Indeed, a deferential form of judicial review of agency policymaking seems perfectly natural if not inevitable from this perspective, particularly if this scheme requires courts to invalidate legally impermissible or arbitrary agency decision-making.

Consider, first, how agencies go about implementing their delegated statutory authority. Commentators have long recognized the difficulties associated with conflating this process with formal approaches to legal interpretation.[370] In a pathbreaking new empirical study, Anya Bernstein and Cristina Rodríguez rely on extensive interviews with bureaucrats to describe how federal agencies "work with" or activate statutes.[371] Bernstein and Rodríguez explore the unique aspects of agency decision-making that both distinguish it from statutory interpretation by courts and lend it enhanced democratic legitimacy.[372] Most fundamentally, Bernstein and Rodríguez recognize that statutes are just words on paper until an agency brings them to life.[373]

Their study identifies different catalysts for agency action and shows that agencies generally activate statutes in a pragmatic fashion to solve concrete social problems, which are brought to their

370. *See, e.g.*, Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How* Chevron *Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 695-702 (2007); Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 502-03 (2005).

371. *See generally* Bernstein & Rodríguez, *supra* note 276.

372. *See id.* (manuscript at 2-5).

373. *See id.* (manuscript at 3) (explaining that administrative policymaking "represents our primary conduit for ensuring that the decisions of democratically elected officials are effectuated in practice").

attention by elected officials, regulated entities or other stakeholders, and events in the world.[374] Bernstein and Rodríguez recognize that agency policy making thus gives statutes much of their meaning in the world, translating congressional plans and enactments into programs designed to accomplish concrete objectives.[375] Their study also identifies and explores the importance of "agency mission"—the broader set of cultural values that influence or inform how specific agencies understand and approach their statutory mandates—in carrying out this work.[376] Bernstein and Rodríguez argue that an agency's pursuit of its mission helps to promote democratically legitimate and effective governance by balancing the need for stability with the imperative for change; this can be accomplished through an agency's efforts to maintain fidelity with authoritative decisions of the past, while simultaneously being responsive to a constantly evolving political, legal, and social landscape.[377] Bernstein and Rodríguez also contend that, by pursuing their broader statutory missions, agencies are primarily committed to *the statutory regime itself*, rather than to any specific legislature or chief executive, and that this approach is distinct from traditional theories of statutory interpretation by courts.[378] Finally, Bernstein and Rodríguez find that, while the tools used by agencies to activate statutes are similar to considerations invoked by courts in statutory interpretation, agency officials do not presume that their work with statutes will produce clear answers or lasting resolutions.[379] Rather, agency decisions are understood to be provisional and thus subject to potential change based on evolving

374. *See id.* (manuscript at 24-30) (describing the contexts in which matters of statutory interpretation arise for agencies).

375. *See id.* (manuscript at 23) ("In some sense, we can say that statutes lack much independent meaning; they act as resources whose significance derives largely from how agencies fulfill their duty of care."); *id.* (manuscript at 44) ("Agencies treat statutes as enactments meant to create effects, making policy consequences central to the consideration.").

376. *See id.* (manuscript at 16-22) (discussing the sources and importance of agency mission).

377. *See id.* (manuscript at 8) (discussing how agencies reconcile "the aims of presidential administrations with longer-term agency missions" and how this balances our "interests in stability and change").

378. *See id.* (manuscript at 44-45) (concluding that the way agencies give meaning to statutes contrasts with textualism and purposivism).

379. *See id.* (manuscript at 43) (explaining that agencies are positioned to keep longstanding statutes viable throughout changing landscapes).

political, legal, or social norms.[380] Bernstein and Rodríguez therefore suggest that agencies are a key site for pluralistic, contestatory policymaking of the kind that republican democracy requires.[381]

Agency officials do not say *what the law means* in a traditional or eternal sense when they activate statutes, but they instead exercise interpretive discretion to make policy choices about the best ways to promote their statutory missions for the time being. While agencies surely understand that they must stay within the bounds of their delegated authority and provide a reasoned explanation when they make those policy decisions, they have no reason or obligation to say what the law means as an abstract, metaphysical, or purely semantic matter.[382] Courts, in turn, are not generally required to say what the law means in this latter sense when an agency's decision is challenged in litigation. Rather, courts review the validity of the agency's decision by assessing whether it is legally permissible and reasonably justified on the merits.[383] Both agencies and courts must engage in traditional forms of interpretation to assess whether an agency has interpretive discretion and whether its policy decision is legally permissible, but neither agencies nor courts are required to identify a single, objectively correct understanding of the statute to make this latter determination when the statute has gaps or ambiguities for the agency to fill.

This means that agencies should retain discretionary policymaking authority under their enabling acts as their missions evolve based on changes to the legal, political, or social landscapes. Agencies can change the way they implement their delegated statutory authority by enacting new policies, and courts can review their legality under this framework. Because no one has said what the law means in a traditional, eternal sense, agencies should not be prohibited from changing how they activate statutes. And there is nothing about such change that should fundamentally alter the

380. *Id.*

381. *See id.* (manuscript at 48) ("[A]gencies' work with statutes can reenforce democratic responsiveness, providing an important, likely unique, site for pluralistic contestation over the specific policy choices the federal government must make for statutes to have concrete meaning.").

382. *See* Staszewski, *supra* note 296, at 298.

383. *See id.*

nature or function of judicial review.[384] Courts can still review an agency's policy choice by assessing whether it is legally permissible and reasonably justified on the merits. And this system of agency decision-making and judicial review facilitates agonistic republicanism by encouraging reasoned deliberation, promoting ongoing contestation, and protecting people from the possibility of domination by private parties or the state.[385]

The *Chevron* framework provides a reasonably justifiable approach to judicial review of agency decision-making when the system is understood in this fashion. There are, after all, some circumstances where Congress has considered and resolved the precise question at issue in a reasoned fashion during the legislative process.[386] In these situations, agencies lack interpretive discretion, and both agencies and courts should follow Congress's ascertainable intent. If, however, Congress has not considered and resolved the precise question at issue in a reasoned fashion during the legislative process, then agencies should be permitted to activate statutes by making reasonable policy choices regarding the most justifiable means of promoting their missions under the circumstances.[387] When those policy choices are challenged in court, the judiciary should review their validity by assessing whether they are legally permissible and reasonably justified on the merits.

B. Refining the Chevron *Framework to Reflect Local Circumstances*

The previous Section suggested that no one really "interprets" statutes in the *Chevron* context. Agencies promote their missions by implementing or activating statutes, while courts review the legality of the agencies' decisions. The question is therefore how state courts should review such agency action, not whether they should defer to an agency's legal interpretation. While the best approach to judicial review could legitimately vary based on a variety of comparative or

384. *But cf.* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 546-47 (2009) (Breyer, J., dissenting) (claiming that agencies should be required to explain why they changed policies to avoid a finding that the new policy is arbitrary or capricious).

385. *See supra* notes 276-93 and accompanying text.

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

387. *See id.* at 843-44.

contextual considerations, this system can, and probably must, be operationalized pursuant to something similar to the *Chevron* framework—regardless of what the state legislature or constitution says.

Chevron provides the most justifiable default regime because it rests on three foundational legal principles: (1) agencies should follow clear legislative instructions; (2) when a legislature has delegated discretionary authority to an agency, the agency's policy choices must be legally permissible and nonarbitrary; and (3) courts should uphold reasonable and lawful exercises of policymaking discretion by agencies.[388] There may be good reasons for fine-tuning a particular jurisdiction's approach to judicial review based on local circumstances or contextual considerations, but state officials should provide persuasive justifications for specified departures from the *Chevron* baseline, rather than flatly prohibiting judicial deference to reasonable exercises of interpretive discretion by agencies based on authoritarian populist rhetoric.

There are a variety of structural differences among legal systems that could legitimately influence the scope of judicial review of agency exercises of interpretive discretion. Some of these differences cut in favor of judicial deference to agencies, and others cut against it. Moreover, states may have some institutional features that differ from the federal system that favor judicial deference to agencies, some institutional differences that cut against it, and others that point in conflicting or contested directions. Identifying the most justifiable approach to judicial review of how agencies activate their statutes is a complex comparative and contextual endeavor.[389]

Without fully wading into all the complexities, the primary lines of structural difference between the federal government and many states, and the relevant ways in which states differ among each other, fall into several categories. First, the federal government and states have different methods of judicial selection and differ in the nature and scope of their judicial powers. While federal judges are

388. *See id.* at 842-44.

389. For sophisticated analyses of these complexities, see generally Aaron Saiger, Chevron *and Deference in State Administrative Law*, 83 FORDHAM L. REV. 555 (2014) [hereinafter Saiger, Chevron *and Deference in State Administrative Law*]; Aaron Saiger, *Derailing the Deference Lockstep*, 102 B.U. L. REV. 1879 (2022) [hereinafter Saiger, *Derailing the Deference Lockstep*].

appointed and given life tenure, many state court judges are elected or appointed and subject to retention elections.[390] State judges also generally have greater policymaking authority than their federal counterparts because they make common law decisions, whereas federal judges are part of a system of limited and enumerated powers in which there is no general law.[391]

The federal government and states also differ in the structure and operation of their executive and legislative branches. The federal government is headed by a single president who appoints executive officers with the advice and consent of the Senate, whereas many states have plural executive arrangements with some agency heads who are directly elected.[392] Meanwhile, state legislatures often have fewer resources and lower levels of professionalism than Congress (and differ markedly from one another on those metrics).[393] State governments are more commonly under the unified control of a single political party than the federal system where divided government is the norm. And state legislatures have greater authority to enact laws pursuant to their police powers, whereas Congress's legislative powers are limited and enumerated by the Constitution.[394] Partly as a result, some states impose stricter limits on their legislatures' ability to delegate policymaking authority to state agencies than the Constitution imposes on Congress.[395]

Different versions of the nondelegation doctrine are just one example of variations in the legal context that could have a bearing on the deference question.[396] Federal and state agencies are

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390. *See* Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215, 1220, 1277-82 (2012) (analyzing how different judicial appointments methods could influence the deference question).

391. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

392. *See* William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2448 (2006). Indeed, some state executive officers have a constitutional status and explicit or inherent constitutional powers that distinguish them from ordinary administrative agencies and may give them greater authority vis-à-vis the other branches of government. *See, e.g.*, Derek W. Black, *The Education Power*, 110 VA. L. REV. 341, 343 (2024).

393. *See* Bruhl & Leib, *supra* note 390, at 1280-81.

394. *See* U.S. CONST. amend. X.

395. *See* Saiger, Chevron *and Deference in State Administrative Law*, *supra* note 389, at 568-70.

396. Framework legislation in a few states explicitly instructs agencies to interpret their delegated statutory authority narrowly. *See id.* at 572-73; TENN. CODE ANN. § 4-5-326 (2024).

generally subject to varying legal frameworks depending on the applicable constitutional regime, APA, and specific enabling legislation. These legal frameworks can differ across a host of potentially relevant dimensions, including the extent to which agencies are required to engage in notice-and-comment rulemaking or otherwise use deliberative procedures, and whether their discretionary policy judgments are subject to hard-look judicial review or a more deferential standard outside the *Chevron* context.[397]

State agencies may also differ from federal agencies and from each other in their available resources, levels of expertise, and the extent to which they voluntarily engage with interested stakeholders or otherwise follow participatory or deliberative procedures.[398] State agencies are also part of a federalist system where national regulation is supreme, but states retain substantial policymaking autonomy, and federal regulatory statutes are often implemented through collaborative efforts by federal executive officials and representatives of state and local governments.[399] The manner in which state courts review exercises of interpretive discretion by state agencies under state law may have significant implications for cooperative federalism.[400] For example, if state courts review such decisions de novo, they could potentially undermine the legal strength and resulting credibility of the positions taken by state agencies and thereby hamper state agencies' negotiating leverage with federal officials, whereas judicial deference to state agencies enhances the resilience of their policy decisions and thereby bolsters their negotiating positions with the

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While these laws could superficially be understood to prohibit judicial deference to expansive interpretations of an agency's delegated statutory authority, they raise some of the same problems of democratic legitimacy and legal force as state laws explicitly prohibiting *Chevron* deference and requiring de novo judicial review. Accordingly, while framework statutes of this nature may be relevant to the most justifiable standard of judicial review of agencies' statutory activation in certain states, such statutory provisions should not necessarily be viewed as legally dispositive.

397. *See infra* notes 419-71 and accompanying text.

398. *See* Bruhl & Leib, *supra* note 390, at 1280.

399. For an enlightening discussion of the operative tools and dynamics, see Jessica Bulman-Pozen & Gillian E. Metzger, *The President and the States: Patterns of Contestation and Collaboration Under Obama*, 46 PUBLIUS 308, 309-10, 314-25 (2016).

400. *See* Saiger, Chevron *and Deference in State Administrative Law*, *supra* note 389, at 580-82; Saiger, *Derailing the Deference Lockstep*, *supra* note 389, at 1910-21.

federal government.[401] While the relationship between cooperative federalism and judicial review of state agency decision-making is complex, state courts necessarily intervene in state/federal relations when they review the legality of state agencies' exercises of interpretive discretion.[402]

The complexities that different structural arrangements and other institutional considerations raise for the deference question are further illustrated by the treatment of this issue in foreign legal systems. Susan Rose-Ackerman and Oren Tamir have argued that while most foreign judiciaries have not adopted precise analogues to *Chevron*, there are many factors that both explain and justify this divergence.[403] Some of these factors—which include different conceptions of law, politics, and jurisdictional limits on courts; different constitutional structures; different approaches to the protection of socioeconomic rights; different subconstitutional legal frameworks; different approaches to legal interpretation; and different political and legal cultures[404]—could also have a bearing on the most justifiable approach to judicial review in state courts.[405] Despite these differences, Rose-Ackerman and Tamir report that

401. *See* Saiger, *Derailing the Deference Lockstep*, *supra* note 389, at 1914, 1917.

402. *See id.* at 1920 ("On balance, ... [the relevant] 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.").

403. *See* Susan Rose-Ackerman & Oren Tamir, *The* Chevron *Doctrine Through the Lens of Comparative Law: Introduction to a Symposium*, BALKINIZATION (Sept. 27, 2023, 11:00 AM), https://balkin.blogspot.com/2023/09/the-chevron-doctrine-through-lens-of.html [https://perma.cc/6R93-24VA] [hereinafter Rose-Ackerman & Tamir, Chevron *Doctrine Through Comparative Law Lens*].

404. *See* Susan Rose-Ackerman & Oren Tamir, *Comparative Administrative Law: Is the U.S. an Outlier? A Concluding Essay*, BALKINIZATION (Oct. 17, 2023, 9:30 AM), https://balkin.blogspot.com/2023/10/comparative-administrative-law-is-us.html [https://perma.cc/LTN6-5E2J] [hereinafter Rose-Ackerman & Tamir, *Comparative Administrative Law*].

405. For example, unlike the U.S. Constitution, many state constitutions recognize certain positive rights. *See id.* A more assertive judicial role often pushes governments in those systems to undertake more ambitious efforts to promote those social goods. *Id.* Rose-Ackerman and Tamir contend that eliminating *Chevron* deference in American federal courts is unlikely to have similar consequences: "Rather than leading courts to engage in more proactive enforcement of positive obligations on government to act and provide services for better health, protection of the environment, and other rights for material equality, the elimination of *Chevron* would likely trigger judicial efforts to restrict government regulation." *Id.* In other words, de novo judicial review in foreign legal systems with positive constitutional rights is generally proregulatory in orientation, whereas de novo judicial review of agency statutory activation in American federal courts is likely to be antiregulatory in operation.

foreign legal systems are increasingly moving toward systems of judicial review that accord meaningful deference to agencies.[406] Moreover, they contend that "even if *Chevron* does not have a precise analogy elsewhere, all judiciaries inevitably defer to the administration on some of their exercises of discretion."[407] Consistent with the view that *Chevron* deference is inevitable in American federal courts,[408] Rose-Ackerman and Tamir conclude that comparative analysis shows that "deference has strong reasons supporting it," and that "given the limited capacity of courts, it is, in practice, unavoidable."[409]

A final structural variation among legal systems that could have a significant bearing on the deference question—to which I will return below—involves the nature and operation of political oversight or control of administrative policy making. Federal regulatory review of major proposed agency rules by the White House's Office of Information and Regulatory Affairs (OIRA) has received substantial attention and been the subject of extensive debate.[410] State statutes and executive orders increasingly provide similar or more stringent mechanisms for executive and legislative review of state agency rulemaking.[411] Several states also have legislative veto provisions that are substantially easier to operationalize than the federal Congressional Review Act.[412] Those state laws should provide assurances that state agency rulemaking is legally permissible and consistent with the legislature's intent and would therefore seemingly strengthen the case for judicial deference to agencies. This would be especially true if such political oversight were paired with meaningful public engagement efforts during the rulemaking process.

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406. Rose-Ackerman & Tamir, Chevron *Doctrine Through Comparative Law Lens*, *supra* note 403.

407. Rose-Ackerman & Tamir, *Comparative Administrative Law*, *supra* note 404.

408. *See supra* notes 337-46 and accompanying text.

409. Rose-Ackerman & Tamir, *Comparative Administrative Law*, *supra* note 404.

410. *See, e.g.*, Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1306-09 (2006).

411. *See, e.g.*, Saiger, Chevron *and Deference in State Administrative Law*, *supra* note 389, at 574-79.

412. *See* DEREK CLINGER & MIRIAM SEIFTER, STATE DEMOCRACY RSCH. INITIATIVE, UNPACKING STATE LEGISLATIVE VETOES 1-5 (2024), https://uwmadison.app.box.com/s/hl6eyasw6yrc5i4k9futlzi09pk9ofau [https://perma.cc/8D58-KPX2].

Comparative structural analysis thus reveals many institutional considerations that could bear on the best approach to judicial review in this context, some of which argue in favor of judicial deference and some of which cut against it. Aaron Saiger persuasively concludes that state courts should therefore avoid proceeding in lockstep with federal courts or one another on the deference question.[413] Yet the sheer number of potentially relevant considerations and their seemingly conflicting impacts might suggest that ascertaining the most justifiable approach to judicial review in state courts is hopelessly complicated.[414]

The best solution, in my view, is to return to the notion that *Chevron* provides an appropriate default rule for judicial review of agency statutory activation by state courts, and to recognize that this framework is sufficiently flexible to accommodate a significant degree of structural variation. State lawmakers or courts may nonetheless reasonably want to adjust the level of deference that state courts provide to exercises of interpretive discretion by state agencies based on the types of local considerations discussed above. The key is for state officials to engage in reasoned deliberation about the best approach to judicial review in their legal systems and to provide persuasive justifications for their design choices, rather than relying on the authoritarian populist rhetoric of the anti-administrative movement. State officials should also ensure that their systems of judicial review are designed to promote agonistic republicanism. This means, among other things, that state agencies should generally be permitted to keep the law up to date based on evolving political, social, and technological considerations when they make regulatory policy.

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413. *See* Saiger, *Derailing the Deference Lockstep*, *supra* note 389, at 1888; *see also* Jonathan L. Marshfield, *America's Other Separation of Powers Tradition*, 73 DUKE L.J. 545, 635-37 (2023) (claiming that state separation of powers exists primarily to facilitate the public's oversight of governmental action, rather than to pit the three branches against one another, and discussing this model's potential implications for *Chevron*).

414. *Cf.* Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 779 (2014) (recognizing the difficulties of incorporating the empirical realities of lawmaking processes into "legal theories ostensibly grounded in actual practice when much of what is uncovered is too complex or otherwise impossible for doctrine to absorb").

Under this approach, state courts would be charged with ensuring that the interpretive choices of state agencies are legally permissible and reasonably justified on the merits. These inquiries could be either more or less searching, depending on the applicable legal and structural arrangements in each state. For example, state courts could give state agencies the benefit of the doubt in close cases when state agencies have greater technical expertise, when they have engaged in a deliberative process that involved meaningful public engagement with interested stakeholders, or when the state agency head was directly elected.[415] Conversely, state courts could view state agency decisions more skeptically if state agencies lack technical expertise, make regulatory policy without consulting with interested stakeholders, or fail to promote positive rights recognized by the state constitution.[416] In any event, state courts should avoid reaching decisions that "fix" the law (unless a statute unambiguously resolves the precise question at issue), and they should therefore generally embrace the holding and rationale of *National Cable & Telecommunications Ass'n v. Brand X Internet Services*.[417] The precise scope of judicial review could also be calibrated based in part on the applicable rulemaking procedures—with the goal of facilitating reasoned deliberation by state agencies and providing meaningful opportunities to contest their policies—while simultaneously avoiding unduly ossifying the administrative process.

In this regard, it is worth taking a closer look at the applicable rulemaking procedures in the states that prohibited *Chevron* deference pursuant to the political process. Each state provides extensive mechanisms for political oversight or control over agency rulemaking. In theory, those procedures *could* promote agonistic republicanism by facilitating reasoned deliberation and providing meaningful opportunities for interested stakeholders to contest agency policies. On the other hand, those procedures could ossify the rulemaking process and make it extremely time-consuming,

415. While I tend to prefer practical reasoning, state courts could also consider adopting something similar to Evan Criddle's proposed approach to judicial deference if they wanted a more formal doctrinal structure. *See supra* note 306. State courts should, however, supplement this approach by embracing *Brand X*'s interpretive flexibility. *See supra* note 306; *infra* text accompanying note 417.

416. On this latter consideration, see *supra* note 405 and accompanying text.

417. *See* 545 U.S. 967, 982-83 (2005).

difficult, or expensive for state agencies to take action that will promote their statutory missions and protect regulatory beneficiaries from the possibility of domination by regulated entities. Rather than promoting agonistic republicanism while avoiding ossification, the rulemaking processes in the states featured in this Article's case studies seem specifically designed to achieve paralysis by analysis and to proceduralize their administrative states to death.[418] These rulemaking processes also make it extremely unlikely that state agencies could promulgate rules that exceed the scope of their statutory authority, contravene the intent of state lawmakers, or otherwise impose arbitrary burdens on regulated entities. Prohibiting deference to agencies and requiring de novo judicial review amounts to nothing more than anti-administrative overkill in those states under these circumstances.

Consider, for example, Tennessee. The state APA generally requires notice and a public hearing before agencies can promulgate regulations,[419] and state agencies must "consider fully all written and oral submissions respecting rules being proposed" to satisfy this requirement.[420] Promulgated rules must be filed with the office of the attorney general, which "review[s] the legality and constitutionality of every rule" and has the authority to "approve or disapprove of rules" based on this assessment.[421] Perhaps more remarkably, final agency rules in Tennessee are effective only for a limited time unless they are specifically extended or made permanent by the general assembly.[422] To override this automatic sunsetting provision, the Government Operations Committees of the senate and house must hold public hearings and receive testimony from interested members of the public and the agency.[423] The agency has "the burden of demonstrating, by convincing evidence" that "the continued existence of an agency rule" is justified based on numerous factors, including "[w]hether the agency is acting within its

418. For discussion of this concern, see generally Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345 (2019).

419. TENN. CODE ANN. § 4-5-202(a) (2024).

420. *Id.* § 4-5-205(a).

421. *Id.* § 4-5-211.

422. *Id.* § 4-5-226(a).

423. *Id.* § 4-5-226(c)-(d)(1).

authority to adopt the rule."[424] The reviewing committee "may express its disapproval of a rule that fails, in its judgment, to satisfy" the requisite criteria for justifying a rule's retention "by voting to allow such rule to expire upon its established expiration date."[425] The committee can also ask the agency to repeal, amend, or withdraw the rule more quickly, and if the agency refuses to comply with this request, the committee can seek legislation to repeal the rule immediately or to suspend the agency's rulemaking authority.[426]

Arizona's rulemaking process contains even more structural hurdles to prevent ultra vires agency action and other forms of bureaucratic overreach—or seemingly any regulation whatsoever. Agencies in Arizona must receive the governor's approval before initiating any rulemaking proceeding.[427] Agencies must then provide public notice of the proposed rule[428] and an opportunity for the submission of written comments, and they must also "schedule an oral proceeding on a proposed rule" upon receipt of a timely request.[429] Agencies must then secure the governor's approval before seeking to finalize their proposal.[430] State agencies seeking permission to promulgate a final rule must also "recommend for consideration by the governor at least three existing rules to eliminate for every additional rule requested by the state agency."[431]

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424. *Id.* § 4-5-226(d)-(e). State agencies are required to submit a broad range of information with their final rules to facilitate this review, including "[a] brief summary of the rule and a description of all relevant changes in previous regulations effectuated by such rule;" identification of the stakeholders "most directly affected by this rule, and whether those persons, organizations, corporations or governmental entities urge [its] adoption or rejection;" and "[a]n estimate of the probable increase or decrease in state and local government revenues and expenditures, if any, resulting from the promulgation of this rule, and [the] assumptions and reasoning upon which the estimate is based." *Id.* § 4-5-226(i)(1).

425. *Id.* § 4-5-226(j)(1).

426. *Id.* § 4-5-226(j)(1)-(2).

427. ARIZ. REV. STAT. ANN. § 41-1039(A) (2024).

428. *Id.* § 41-1022(A), (D).

429. *Id.* § 41-1023(B)-(C). Interested persons must be given "a reasonable opportunity" to participate in this oral hearing, which "shall be conducted in a manner that allows for adequate discussion of the substance and the form of the proposed rule." *Id.* § 41-1023(D). Interested persons may also "ask questions regarding the proposed rule and present oral argument, data and views on the proposed rule" at the public hearing. *Id.*

430. *Id.* § 41-1039(B).

431. *Id.* § 41-1039(C).

State agencies in Arizona must generally also secure the approval of proposed rules from the Governor's Regulatory Review Council.[432] The Council is comprised of six members appointed by the governor and the director or assistant director of the state Department of Administration.[433] Among other considerations, the Council cannot approve a rule unless "[t]he probable benefits of the rule outweigh within this state the probable costs of the rule and the agency has demonstrated that it has selected the alternative that imposes the least burden and costs to persons regulated by the rule ... necessary to achieve the underlying regulatory objective;"[434] "[t]he rule is not illegal, inconsistent with legislative intent or beyond the agency's statutory authority;"[435] and "[t]he agency adequately addressed, in writing, the comments on the proposed rule and any supplemental proposals."[436] Moreover, "[i]f the rule relies on scientific principles or methods, ... and a person submits an analysis to the council questioning" their validity, "the council shall not approve the rule unless the council determines that the rule is based on valid scientific or reliable principles or methods that are specific and not of a general nature."[437] When the Council second-guesses the scientific expertise of the rulemaking agency, it must consider, among other factors, whether "[t]he study and its conclusions, principles or methods have been tested or subjected to peer reviewed publications."[438]

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432. *Id.* § 41-1052(A). Certain government organizations, including agencies headed by elected officials, are exempt from Council review. *Id.* § 41-1057(A). Rules exempt from Council review must be approved instead by the attorney general. *Id.* § 41-1044(A). The attorney general must conclude, among other things, that the rule is "[w]ithin the power of the agency to make and within the enacted legislative standards." *Id.* § 41-1044(B)(3).

433. *Id.* § 41-1051(A). The six appointed members shall consist of at least one member representing "the public interest," one representing "the business community," one "small business owner," and one each from a list of three submitted by the leadership of each legislative chamber. *Id.* At least one member must be an attorney, and members are appointed to staggered three-year terms. *Id.*

434. *Id.* § 41-1052(D)(3).

435. *Id.* § 41-1052(D)(5).

436. *Id.* § 41-1052(D)(6).

437. *Id.* § 41-1052(G).

438. *Id.* § 41-1052(G)(4). The Council must accept written public comments (and may accept oral testimony from interested members of the public) that are relevant to its determinations, *id.* § 41-1052(I), and it "may also communicate to the agency its comments on any rule, preamble or economic, small business and consumer impact statement and require the agency to respond to its comments in writing," *id.* § 41-1052(H).

Proposed agency rules in Arizona are also subject to review by the state legislature's Administrative Rules Oversight Committee.[439] This committee is empowered to review proposed and final agency rules "for conformity with statute and legislative intent."[440] The Committee may hold hearings to evaluate the legality of those agency actions and may also "comment to the agency, attorney general or council on whether the proposed or final rule ... is consistent with statute or legislative intent."[441] The Committee may "designate a representative to testify before the council," and such testimony and the committee's comments shall be considered by the Council and included in the administrative record.[442] While the Council is not formally required to follow the Committee's recommendation, agency rules in Arizona can generally be adopted, as a practical matter, only if they are approved by the governor, the Council, and the legislature's oversight committee, and only when each of those reviewers concludes that a rule falls within the scope of the agency's statutory authority. Even when state agencies survive this gauntlet and successfully promulgate new rules in Arizona, those rules are subject to several unusually stringent "look-back requirements" that provide regulated entities and other opponents of existing regulations with ongoing opportunities to challenge their legality and cost-effectiveness.[443]

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439. *Id.* § 41-1046(A). This committee is comprised of five members appointed by the speaker of the house of representatives, five members appointed by the president of the senate, and one member designated by the governor. *Id.* § 41-1046(B)(1)-(3). The leader of each chamber may only appoint three members from her own party, one of whom is designated to serve as co-chairperson. *Id.* § 41-1046(B)(1)-(2). The members of the Committee all "serve at the pleasure of their respective appointing officer." *Id.* § 41-1056(C).

440. *Id.* § 41-1047.

441. *Id.*

442. *Id.*

443. First, state agencies are required to perform a review of all their rules, "to determine whether any rule should be amended or repealed," at least once every five years. *Id.* § 41-1056(A). Second, "[w]ithin two years after a rule is finalized," any affected person "may file a written petition with an agency objecting to all or part of a rule" on the grounds that the agency's regulatory impact analysis when the rule was promulgated was flawed in one of several specified ways. *Id.* § 41-1056.01(A). Third, "[a]ny person" may petition an agency to make, amend, or repeal final rules or to review an agency practice or policy statement that is alleged "to constitute a rule." *Id.* § 41-1033(A). Each of these procedures authorizes the Council to invalidate existing agency rules on specified grounds, including that they exceed the scope of the agency's statutory authority or otherwise are contrary to law. *See id.* §§ 41-1056(E), -1056(G), -1033(K)-(M).

Florida does not provide quite as many avenues for challenging the legality of agency rules or otherwise killing regulations as Tennessee or Arizona, but it does have political oversight mechanisms to ensure that agency rules are consistent with the intent of lawmakers. The Joint Administrative Procedure Committee of the state legislature is responsible for reviewing proposed and existing rules to determine, among other things, whether they are "consistent with expressed legislative intent pertaining to the specific provisions of law which the rule implements."[444] If, after consultation with the relevant legislative standing committees, this body objects to a rule, it is required to certify its objection to the agency, provide a detailed statement of its specific concerns, and notify the leaders of both legislative chambers.[445] After receiving notice of this objection, the agency is required promptly to withdraw, amend, or repeal the rule, or provide written notice to the committee that it refuses to do so.[446] In the latter situation, the committee may recommend proposed legislation to address its objections and ask the agency to temporarily suspend the proposed or existing rule while the committee's proposed legislation is considered.[447]

The mechanisms for political oversight of agency rulemaking in Wisconsin are much more elaborate than in Florida[448] and likewise suggest that de novo judicial review of the legality of regulations is unnecessary to avoid ultra vires agency action. A state agency initiates the rulemaking process by preparing a "scope statement," which describes its initial plans and identifies the specific statutory authority for the rule.[449] The scope statement must be submitted to the Department of Administration and the governor for approval before publication by the Legislative Reference Bureau.[450] An agency's scope statement may also be the subject of a preliminary public hearing and opportunity for comment.[451] If the agency's scope

444. FLA. STAT. § 120.545(1)(f) (2024).

445. *Id.* § 120.545(2).

446. *Id.* § 120.545(3).

447. *Id.* § 120.545(8).

448. For a helpful overview, see generally Scott Grosz & Margit S. Kelley, *Administrative Rulemaking*, *in* WISCONSIN LEGISLATOR BRIEFING BOOK 2019-2020 (2018).

449. WIS. STAT. § 227.135(1) (2024).

450. *Id.* § 227.135(2)-(3). Following publication, the statement must also be approved by the individual or body with policymaking powers for the agency. *Id.*

451. *Id.* § 227.136(1).

statement is approved, it may begin drafting the proposed rule, which must then be submitted to the Legislative Council for staff review.[452] The Legislative Council acts as a "clearinghouse for rule drafting" and has twenty days to review a proposed rule for statutory authority, compliance with applicable procedures, clarity and form, and conflicts with existing law.[453] When a proposed rule is submitted to the Legislative Council staff, it must also be submitted to the Small Business Regulatory Review Board, which may recommend changes to reduce a rule's economic impact.[454] Following the Legislative Council's "clearinghouse review," an agency must typically provide public notice and hold an oral hearing on the proposed rule.[455] When the proposed rule is finalized, the agency again submits it to the governor.[456] "The governor, in his or her discretion, may approve or reject the proposed rule."[457] State agencies therefore may not proceed with proposed rules without the governor's blessing.[458]

Prior to promulgation, state agencies in Wisconsin are required to submit a notice to the legislature when a proposed rule is in its final draft form.[459] This notice is then referred to a standing committee of each legislative chamber,[460] which reviews the proposed rule for statutory authority, conflicts with legislative intent or other state laws, changes in circumstances since enactment of the enabling legislation, arbitrariness or capriciousness, or the imposition of undue hardship.[461] The proposed rule and any objections lodged by the standing committees are then referred to the Joint Committee for Review of Administrative Rules (JCRAR).[462] If a standing committee objected to the proposed rule, JCRAR must "meet and take executive action and may either [disagree with] the

452. *Id.* § 227.15(1).
453. *Id.* § 227.15(2)(a)-(c), (f).
454. *Id.* § 227.14(2)(g).
455. Grosz & Kelley, *supra* note 448, at 6; § 227.16(1); *see id.* § 227.17-18 (describing the notice and conduct requirements for the hearings).
456. § 227.185.
457. *Id.*
458. *Id.*
459. *Id.* § 227.19(2).
460. *Id.*
461. *Id.* § 227.19(4)(d)(1), (3)-(6).
462. *Id.* § 227.19(5)(a).

objection, object to the proposed rule, or seek modifications to the rule in the same manner as the initial reviewing committee."[463] JCRAR may also object to or seek modification of proposed rules on the same grounds as the standing committees[464]—including "[a]n absence of statutory authority" or "[a] failure to comply with legislative intent,"[465]—even when no objections were lodged by the standing committees.[466] JCRAR may object to a proposed rule using one of two methods.[467] First, JCRAR may seek legislation that prevents the agency from promulgating its proposed rule.[468] Second, JCRAR may decide to object indefinitely to a proposed rule.[469] Under this latter method, an agency may not promulgate the proposed rule unless the state legislature specifically grants its approval through the enactment of authorizing legislation.[470] JCRAR—like the governor—can therefore effectively veto proposed agency rules in Wisconsin.[471]

As the foregoing discussion makes clear, Tennessee, Arizona, Florida, and Wisconsin make it very difficult for state agencies to promulgate any new rules—much less rules that exceed an agency's statutory authority or otherwise contravene the intent of state lawmakers. Under these circumstances, it would generally be appropriate for state courts to defer to a state agency's reasonable exercise of interpretive discretion when the agency successfully

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463. Grosz & Kelley, *supra* note 448, at 9; *see* § 227.19(5)(b)(1) (requiring JCRAR to meet and act when the standing committee has objected to proposed rule); *id.* § 227.19(5)(d) (allowing JCRAR to disagree with the objection or object to proposed rule); *id.* § 227.19(5)(b)(2) (allowing JCRAR to seek rule modifications).

464. § 227.19(5)(d).

465. *Id.* § 227.19(4)(d)(1), (3).

466. *See id.* § 227.19(5)(b)(1); Grosz & Kelley, *supra* note 448, at 9.

467. Grosz & Kelley, *supra* note 448, at 9 (describing these methods).

468. § 227.19(5)(d),(e).

469. *Id.* § 227.19(5)(dm).

470. *Id.*; *see id.* § 227.19(5)(em) (allowing introduction of a bill to authorize proposed rule).

471. After promulgation, JCRAR may review any rule based on the same criteria as before, and it may also direct an agency to promulgate statements of policy as an emergency rule, hold public hearings to investigate complaints, temporarily suspend any rule by a majority vote of a quorum of the committee (pending modification or introduction of legislation), or command the agency to hold a hearing. *Id.* § 227.26(2)(b)-(d), (3). As in other states, Wisconsin requires agencies to conduct an economic impact analysis of certain rules. *Id.* § 227.137(2). Where a rule's "implementation and compliance costs are reasonably expected" to exceed ten million dollars, the legislature must enact a bill, signed by the governor, authorizing such rulemaking. *Id.* § 227.139(1)-(2)(a).

activates its delegated statutory authority. State laws requiring de novo judicial review not only empower less deliberative or contestatory courts, but they appear to amount to nothing more than anti-administrative overkill when one considers the applicable rulemaking procedures in these states.[472]

CONCLUSION: FRESH LESSONS FOR THE FEDERAL SYSTEM AND FEDERALISM

Cass Sunstein recently expressed the conventional view that "whether courts should defer to agency interpretations of law turns on just one thing: [legislative] instructions."[473] Yet it turns out things are decidedly more complicated. When lawmakers enact constitutional amendments or framework legislation that requires de novo judicial review of the resolution of statutory ambiguities by agencies, they undermine democracy, and those legislative instructions may lack binding legal force. Judicial deference to reasonable exercises of policymaking discretion by agencies is a foundational principle of administrative law, and something akin to *Chevron* may therefore be inevitable. Indeed, de novo judicial review of reasonable exercises of interpretive discretion by agencies regarding the most justifiable ways to implement their delegated statutory authority could lawfully entail substantial deference. And this form of judicial review can be conducted without anyone "interpreting" the law in a traditional sense. The proper approach to judicial review of how agencies activate their delegated statutory authority should be a reasoned contextual and comparative endeavor. *Chevron* provides the most justifiable default regime for judicial review in this context, which could legitimately be fine-tuned based on local circumstances.

This Article's understanding of the respective roles of legislatures, agencies, and courts has implications for the federal system because it suggests that the proper approach to judicial review of agency

472. Ironically, de novo judicial review may be *most useful* in these states when state agencies take *deregulatory* action that is supported by state officials but contrary to the best understanding of their statutory mandates based on traditional tools of legal interpretation. This could also conceivably be a benefit of *Loper Bright* if lower federal courts were not currently so anti-regulatory in orientation.

473. Sunstein, *supra* note 17, at 1619.

statutory activation is not necessarily dictated or controlled by framework legislation or other general sources of positive law. Nor is it likely to be dictated or controlled by one Supreme Court decision. Judicial review in this context depends upon a combination of constitutional structures and norms, the provisions of general framework legislation and specific enabling acts, broader jurisprudential principles, questions of comparative institutional competence, and the most justifiable means of promoting pluralistic democracy. This complexity explains why legal scholars never tire of discussing *Chevron* and why *Chevron* provides the most justifiable default regime for this form of judicial review. *Chevron* is sufficiently flexible to accommodate a variety of fundamentally different perspectives, and there is no generally superior alternative. So even when courts and legislatures try to kill *Chevron*, it may not really be dead.[474]

This Article's analysis suggests that *Loper Bright* was democratically illegitimate and may not be entitled to the force of law. The majority did not even respond to the substance of Justice Kagan's seemingly irrefutable dissent. It simply imposed its own interpretive preferences on the APA and relied on populist rhetoric to falsely contend that ambiguous regulatory statutes have a single, objectively correct legal meaning that can be ascertained through independent judicial interpretation. In the process, the Court disregarded basic norms of stare decisis and shifted tremendous policymaking power from Congress and especially agencies to the federal judiciary in a manner that undermines agonistic republicanism.[475] The Court's opinion does not merit respect based on its

474. *See* Michael Herz, Chevron *is Dead; Long Live* Chevron, 115 COLUM. L. REV. 1867, 1879 (2015); *cf.* Walters, *supra* note 360, at 638 (providing a model that predicts that *Loper Bright* will likely prevail in federal courts in the short run based on current political dynamics, but that something akin to *Chevron* will likely reemerge in the long run because the conditions favoring this framework are "a natural default for our political system").

475. While I questioned the extent to which interpretive methodology is entitled to stare decisis effect in Part III.C, scholars who have taken this same position have also suggested that *Chevron*'s core principles should be treated as presumptively binding precedent for normative reasons. *See* Criddle & Staszewski, *supra* note 226, at 1595; Raso & Eskridge, *supra* note 353, at 1811. In any event, *Loper Bright* treated *Chevron* as a precedent that was potentially entitled to stare decisis effect and suggested that the Court's decision to overrule *Chevron* should be treated as binding precedent. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2270-73 (2024); *cf. id. passim* (Gorsuch, J., concurring) (suggesting that *Chevron* deserved little respect as precedent because it was a departure from other judicial decisions

persuasiveness,[476] and it should not reasonably be accepted by people with fundamentally competing views.

As indicated above, however, I am enough of a realist to know that courts in anti-deference legal regimes are unlikely to overtly refuse to follow codified interpretive rules or judicial precedent that clearly proscribes or overrules *Chevron*. I am also enough of a realist to know that such courts can easily ignore, disregard, or work around those legal mandates. Indeed, *Loper Bright* provides several workarounds that would still allow federal courts to defer to reasonable exercises of interpretive discretion by agencies: (1) *Skidmore* deference, (2) de novo deference or *Loper Bright* delegation, and (3) the ordinary questions doctrine. Moreover, courts can effectively ignore prohibitions on *Chevron* simply by upholding reasonable resolutions of statutory ambiguities by agencies in individual cases. The availability of these workarounds has led some pundits to conclude that *Loper Bright* and state laws that purport to eliminate *Chevron* deference are not a big deal and the sky is not falling.[477]

But even if these workarounds can be used to reach functionally identical outcomes, they do not improve upon the *Chevron* framework. To the extent there should be a general presumption in favor of judicial deference to reasonable exercises of interpretive discretion by agencies, each of these approaches suffers from a loss of *Chevron*'s refreshing candor. Judicial decisions under *Skidmore* (and those that are unclear about their chosen standard of review) are also less democratically legitimate because they risk fixing the judiciary's independent interpretation of ambiguous statutory provisions into law and thereby precluding agencies from updating regulatory policy based on new information, the lessons of experi-

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and legal norms that provided better evidence of the law's one true meaning).

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

477. *See, e.g.*, Anuj C. Desai, Loper Bright *as Jurisprudence: Institutional Choice and the Expressive Value of Law* 3-11 (Univ. of Wis. L. Sch. Legal Stud. Rsch. Paper Series, Paper No. 1819, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5049030 [https://perma.cc/95QQ-B3HT]; Ilya Somin, *The Supreme Court's Decision Overruling* Chevron *Is Important—But Less So than You Might Think*, REASON: VOLOKH CONSPIRACY (June 28, 2024, 2:07 PM), https://reason.com/volokh/2024/06/28/the-supreme-courts-decision- overruling-chevron-is-important-but-less-so-than-you-might-think/ [https://perma.cc/4RHT-JD64]; Vermeule, *supra* note 30, at 620.

ence, or evolving public values.[478] And both de novo deference and the ordinary questions doctrine are more malleable and subjective than *Chevron* because of the grave uncertainty associated with ascertaining Congress's preferred recipient of delegated interpretive discretion on a statute-by-statute basis (as reflected by the difficulties federal courts have experienced in applying *United States v. Mead Corp.*)[479] and because of the illusory line that courts are required to draw under the latter doctrine between law/interpretation and policy/implementation.[480] Indeed, the need to draw this latter line, in particular, significantly compounds the malleability or subjectivity associated with distinguishing between statutory clarity and ambiguity under *Chevron* because it only comes into play *after a court has already deemed the applicable statute ambiguous*. Rather than requiring courts to perform the hopeless task of distinguishing between law/interpretation and policy/implementation when it comes to the activation of ambiguous statutory mandates, there should be a strong presumption that such discretionary decisions fall squarely within the scope of an agency's authority. In any event, these are not lines I would trust Fifth Circuit judges or other anti-administrative activist courts to administer fairly or

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478. While this is a serious concern based on conventional understandings of *Skidmore*, *see, e.g.*, United States v. Mead Corp., 533 U.S. 218, 247 (2001) (Scalia, J., dissenting) ("Once the court has spoken [under *Skidmore*], it becomes *unlawful* for the agency to take a contradictory position; the statute now *says* what the court has prescribed."), it is not an inevitable consequence of this doctrine, *see* Staszewski, *supra* note 296, at 277-78 (arguing that courts should be willing to reconsider interpretive decisions rendered under *Skidmore* "when agencies subsequently engage in reasoned deliberation on a particular question and reach a persuasive decision that differs from the previous conclusion of a court"); *supra* note 306 and accompanying text.

479. *See Mead*, 533 U.S. at 245 (Scalia, J., dissenting) ("The principal effect [of the Court's narrowing of *Chevron*'s domain] will be protracted confusion."); Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1446-47 (2005); Adrian Vermeule, *Introduction:* Mead *in the Trenches*, 71 GEO. WASH. L. REV. 347, 349 (2003).

480. *See* Bernstein, *supra* note 343, at 18, 22-26 (recognizing that "interpretation" and "implementation" are not "distinct qualities of agency action itself" but "a quality of the judicial framing of agency action instead," and that the bifurcated judicial doctrine involving these allegedly distinct activities reflects a "language ideology" that portrays "interpretation" as passive, neutral, and objective, and "implementation" as active, normative, and political); Bressman, *supra* note 332, at 995-99 (explaining that "[w]ith the rise of the modern administrative state during the New Deal, legal realists challenged the notion that questions of law could be distinguished from questions of fact" and "worried that courts were especially likely to find a question as amenable to independent judicial resolution when they disagreed with the agency's interpretation").

impartially, particularly when one of their options is to arrogate interpretive (or policymaking) power for themselves.[481]

The malleability and potentially unduly strong medicine of the available workarounds spotlights the two biggest problems with *Loper Bright* and analogous state laws that purport to require independent or de novo judicial review of questions of legal interpretation. First, they give anti-administrative judges a green light to deconstruct the administrative state by substituting their preferences for the judgment of agency officials. Sure, a democratic judge could still defer to reasonable exercises of interpretive discretion by agencies by invoking one of the workarounds. But authoritarian populist judges are equally free to exercise independent judgment to impose their own interpretive or policymaking preferences on ambiguous regulatory statutes. The major questions doctrine already greenlighted courts to substitute their judgment for that of agencies on statutory issues of great political or economic significance.[482] *Loper Bright* and analogous state laws do the same for ordinary questions of regulatory law and policy.

Second, when populist judges exercise independent judgment or engage in de novo review to impose their own interpretive and policy preferences onto the law, they fix that position into place forever (or until the legislature amends the statute to overrule the court's decision—often the functional equivalent), rather than permitting agencies to update the law based on new information, the lessons of experience, or evolving public values, as the enacting legislature likely intended. Some of the available workarounds—namely, de novo deference and the ordinary questions doctrine—potentially leave ongoing discretionary policymaking authority in the hands of agencies.[483] But courts could effectively revoke that

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481. *See* Stephen I. Vladeck, *Why the Fifth Circuit Keeps Making Such Outlandish Decisions*, ATLANTIC (Nov. 28, 2023), https://www.theatlantic.com/politics/archive/2023/11/fifth-circuit-conservative-supreme-court/676116/ [https://perma.cc/E223-NKJ8].

482. *See* Bernstein & Staszewski, *Populist Constitutionalism*, *supra* note 25, at 1799-1806; Glen Staszewski, *Major Questions and the Ecosystems of Regulatory Jurisprudence*, MICH. ST. L. REV.: MSLR FORUM (2023), https://www.michiganstatelawreview.org/vol-20222023/2023/5/31/major-questions-ecosystems-of-regulatory-jurisprudence [https://perma.cc/EE9Y-DZDZ].

483. *See* Bressman, *supra* note 331, at 510 (explaining that "[i]n addition to [receiving] judicial deference for agency interpretations in particular cases, agency authority will persist for any future revisions" when courts review administrative policy decisions under the arbitrary and capricious standard); Vermeule, *supra* note 31 ("The Justices in the [*Loper*

authority based largely on their whims by applying these doctrines in ways that allocate interpretive authority to themselves. This turns the authoritarian populist anti-deference rhetoric on its head because courts are the only truly unaccountable decision makers in this scenario.[484]

In addition to offering fresh lessons for the federal system, this Article also has important implications for federalism. Recent literature challenges the traditional view of states as laboratories of democracy.[485] State governments often function instead as arms of the national political parties and organized advocacy groups when they make policy in today's polarized environment.[486] The case studies presented in this Article reinforce and provide powerful examples of this dynamic. The proponents of the laws that prohibited *Chevron* deference merely parroted the authoritarian populist rhetoric of the anti-administrative movement and their federal judicial allies. These arguments are not persuasive on the merits, and their proponents never responded in a reasoned fashion to opposing arguments or competing views. They were incorporated into state law pursuant to political power plays, and such laws are not democratically legitimate.

These states *are* doing some innovative things when it comes to political review of agency rulemaking. On the one hand, such efforts could theoretically promote pluralistic contestation and thereby promote democracy. On the other hand, such efforts seem like

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Bright] majority also seem to think, and indeed, more or less said, that the sort of discretionary-choice-within-a-reasonable-range that the [de novo deference] relabeling leaves to agencies is best understood as 'policymaking' rather than 'interpretation.' That understanding saves the appearances, as the theologians say, and allows the Justices to take themselves to be doing all the law, while the agencies only ever do policy.").

484. *See* Anya Bernstein, *Judicial Accountability*, 113 GEO. L.J. (forthcoming 2025) (manuscript at 33-34), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4962653 [https://perma.cc/KJ6T-ZYJA] (arguing that judicial populist allegations of a lack of accountability are better leveled against courts than against agencies).

485. For the traditional view, see New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

486. *See generally* GRUMBACH, *supra* note 32; HERTEL-FERNANDEZ, *supra* note 132; James A. Gardner, *New Challenges to Judicial Federalism*, 112 KY. L.J. 703 (2024); Charles W. Tyler & Heather K. Gerken, *The Myth of the Laboratories of Democracy*, 112 COLUM. L. REV. 2187 (2022).

nothing more in practice than barriers to public spirited regulation that would protect some people from domination by others. From this perspective, these state rulemaking procedures appear fundamentally undemocratic in operation. While firm conclusions on this score would require careful empirical inquiry,[487] one thing seems clear: when states make it virtually impossible for their agencies to promulgate new regulations that contravene the governor's or legislature's intent or exceed the scope of an agency's delegated statutory authority, there is little need for de novo judicial review of the legality of those rules. State laws prohibiting judicial deference to state agencies under these circumstances are nothing more than a means to deconstruct regulation and thereby undermine democracy in the states.

Perhaps ironically, *Loper Bright* gives state lawmakers and state courts a fresh opportunity to serve as true laboratories of democracy by going their own way on the deference question.[488] This Article provides a blueprint for what truly independent and democratic states should and should not do when it comes to judicial review of agency statutory activation. First, states should not mindlessly follow *Loper Bright* or the example of the states featured in this Article's case studies that prohibited judicial deference to reasonable exercises of interpretive discretion by state agencies based on the authoritarian populist rhetoric popularized at the federal level. Second, state courts should adopt *Loper Bright*'s workarounds if state law formally prohibits them from deferring to reasonable resolutions of statutory ambiguities by state agencies. Third, states should endorse the *Chevron* framework as the default regime for judicial review of questions of legal interpretation if that option is formally still available. Finally, states should consider fine-tuning this regime of judicial review based on local circumstances when

487. *See* CLINGER & SEIFTER, *supra* note 412, at 3 ("In some states, these processes may serve as a mechanism of democratic accountability for an administrative agency. In others, the processes may align with antidemocratic tactics used to reject popular majority preferences in favor of an entrenched—and often gerrymandered—legislative leadership."); *id.* at 42 ("The conversation about legislative veto systems in the states will benefit from further research that empirically analyzes the impact of these tools in the states, as well as work that explores the normative and constitutional implications of the design choices of different systems.").

488. *See* Saiger, Chevron *and Deference in State Administrative Law*, *supra* note 389, at 582-85.

reasonably justified to facilitate legitimate and effective regulatory policy and promote agonistic republicanism.