DEFERENCE DOCTRINES AND A STATE LEGISLATIVE SOLUTION

Jonathan Riches

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Ending Deference to the Administrative State in State Legislatures

The Problem of Administrative Deference

A fundamental tenet of our legal system is that when two parties appear before a court, they are on equal footing. That is, the court ought to apply the law equally to both parties, weigh the merits of each case impartially, and not be predisposed in favor of one party's legal arguments over another. Yet in judicial actions that involve decisions from administrative agencies, a series of deference doctrines *require* courts to defer to the government when the government is prosecuting or defending an action from an administrative agency. In other words, in cases in which a court applies deference to administrative agencies, the court is obligated to put its proverbial thumb on the scale for the government and its legal arguments.

The two most pernicious of these deference doctrines in federal courts are known as *Chevron*[1] and *Auer.*[2] *Chevron* deference requires courts to accept an agency's interpretations of arguably ambiguous statutes. *Auer* deference requires courts to defer to an agency's interpretation of its own regulations.

These doctrines raise core due process and separation of powers concerns because they prevent meaningful and impartial review of decisions from executive branch agencies by the judiciary. Courts are supposed to exercise their independent judgment when interpreting the laws created by the legislature, but deference short-circuits this process and bars courts from questioning the executive branch's interpretation of laws the legislature enacted, or worse, the agency's self-created rules. As Columbia Law School Professor Philip Hamburger observed,

[1] *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).
[2] *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

"When the government is a party to a case, the doctrines that require judicial deference to agency interpretations are precommitments in favor of the government's legal position, and the effect is systematic judicial bias."[3]

This structural accountability problem is accompanied by a practical one. Namely, regulators in the executive branch know they can create expansive rules, investigate borderline violations, and adjudicate close cases in their favor because if those rules are challenged, the regulators will likely win.[4] This results in more and more rulemaking, much of it arbitrary. It results in more investigations and more findings of violations. And ultimately it results in bigger, more intrusive government. In the absence of judicial deference, however, agencies and the regulators who staff them would be more constrained in their rulemaking, more measured in their interpretations, and more principled in their enforcement actions. In other words, they would be more careful because they would be more accountable.

State-based Reform

While much commentary has focused on the myriad problems that judicial deference has created at the federal level, deference to administrative power is not a uniquely federal problem. Many state courts have either expressly adopted *Chevron* or other forms of deference doctrines or have fashioned similar versions.[5] This has turned judicial deference into a nationwide foundation for a large and powerful administrative state at both the federal and state level.

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[3] Philip Hamburger, *The Administrative Threat*, 43 (2017).

[4] William Yeatman, *An Empirical Defense of Auer Step Zero*, 106 Geo. L.J. 515, 545 (2018) (finding that government agencies won 78% of cases from 1993-2005, when *Auer* deference was most permissive compared to 71% of cases after 2005, when the Supreme Court began to limit that deference doctrine.).

[5] *See, e.g., QCC, Inc. v. Hall*, 757 So.2d 1115, 1117 (Ala. 2000); *Bell Atl. Mobile, Inc. v. Dep't of Pub. Util. Control*, 754 A.2d 128 (Conn. 2000); *In re Water Use Permit Applications,* 9 P.3d 409, 456–57 (Haw. 2000); *Canty v. Idaho State Tax Comm'n,* 59 P.3d 983, 988-989 (Idaho 2002); *People ex rel. Birkett v. City of Chicago,* 779 N.E.2d 875, 881 (Ill. 2002); *Reifschneider v.*

Efforts to reform deference doctrines have traditionally been focused on the judiciary, and indeed, several state supreme courts have rejected various deference doctrines in recent years. For example, the Wisconsin[6] and Mississippi[7] Supreme Courts issued decisions in 2018 that repudiated their versions of *Chevron* deference.

In 2020, the Arkansas Supreme Court also repudiated deference to administrative agencies in that state. In *Myers v. Yamato Kogyo Co., Ltd.*, the court "acknowledge[d] confusion in prior cases regarding the standard of review for agency interpretations of a statute and believe that clarification is warranted to address the level of deference due."[8] The court went on to hold that "By giving deference to agencies' interpretations of statutes, the court effectively transfers the job of interpreting the law from the judiciary to the executive."[9] And because "it is the province and duty of this Court to determine what a statute means," the court clarified "that agency interpretations of statutes will be reviewed de novo."[10] Thus, in addition to observing the core separation of powers concerns that are implicated when courts apply various deference doctrines, this case also raised the important point that while many state courts have accepted

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State, 17 P.3d 907, 913 (Kan. 2001); *Davis v. State Bd. of Certified Pub. Accountants,* 131 So.3d 391, 399 (La. 2013); *Md. Aviation Admin. v. Noland,* 873 A.2d 1145, 1154–55 (Md. Ct. App. 2005); *Project Extra Mile v. Neb. Liquor Control Comm'n***,** 810 N.W.2d 149, 163 (Neb. 2012), *overruled on other grounds, Griffith v. Neb. Dep't of Corr. Servs.,* 934 N.W.2d 169 (Neb. 2019); *In re Town of Sebrook,* 44 A.3d 518, 524–525 (N.H. 2012); *TAC Assoc. v. N.J. Dep't of Envtl. Prot.,* 998 A.2d 450, 455 (N.J. 2010); *Lorillard Tobacco Co. v. Roth,* 786 N.E.2d 7, 10 (N.Y. 2003); *N.C. Acupuncture Licensing Bd. v. N.C. Bd. of Physical Therapy Exam'rs,* 821 S.E.2d 376, 379–380 (N.C. 2018); *Indus. Contractors, Inc., v. Workforce Safety & Ins.,* 772 N.W.2d 582, 585 ¶ 6 (N.D. 2009); *In Re Protest of Betts Telecom Okla, Inc.,* 178 P.3d 197, 199 ¶ 10 (Okla. Ct. App. 2008); *Seeton v. Pa. Game Comm'n,* 937 A.2d 1028, 1037 (Pa. 2007); *In re Williston Inn Group,* 949 A.2d 1073, 1077 ¶ 11 (Vt. 2008).

[6] *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 914 N.W.2d 496, 54–55 ¶¶ 83–84 (Wis. 2018).

[7] *King v. Miss. Military Dep't*, 245 So.3d 404, 407–08 ¶¶ 8–12 (Miss. 2018).

[8] 2020 Ark. 135, 4, 597 S.W.3d 613, 616 (2020).

[9] *Id.* at 617.

[10] *Id.*

various versions of administrative deference, they have not always done so consistently, clearly, or evenly. This has understandably led to confusion about what standard of review should apply, and under what circumstances.[11] This has made the need for clarity in the law that much more pressing.

Such legal clarity – and a solution to the problems posed by administrative deference – need not come only from the courts. That is because deference doctrines are based on judicial interpretations of the Federal Administrative Procedures Act (APA).[12] That law sets out the legal framework for *how* courts review administrative decisions, and clarity in the statute could direct courts on how to address deference or whether to apply it at all. Because many states model their state-level administrative procedure statutes on the federal APA,[13] state legislatures can play a key role in scaling back or eliminating this centerpiece of the administrative state. This provides a unique opportunity for state legislatures to lead the way in this important area.

> This is precisely what was done in Arizona. In 2018, Arizona became the first state in the country to eliminate the state equivalent of *Chevron* and *Auer* deference by statute. That was accomplished by including a new sentence in the scope of review section of Arizona's APA:

[11] Luke Phillips, *Chevron in the States? Not So Much*, 89 Miss. L.J. 313, 316 (2020) (classifying eleven states as "Hybrid" states, where some state courts appear to apply both *de novo* review on questions of law while simultaneously providing substantial deference to agencies on legal questions.

[12] 5 U.S.C. § 706.

[13] *See, e.g.,* Colo. Rev. Stat. § 24-4-106; Conn. Gen. Stat. § 4-183; D.C. Code § 2-510; Ga. Code § 50-13-19; Haw. Rev. Stat. § 91-14; Idaho Code § 67-5279; Ind. Code § 4-21.5-5-14; Iowa Code § 17A.19; Kan. Stat. § 77-621; Ky. Rev. Stat. § 13B.150; La. Rev. Stat. § 49:964; Me. Rev. Stat. tit. 5, § 11007; Md. Code, State Gov't § 10-222; Mass. Gen. Laws ch. 30A, § 14; Mich. Comp. Laws § 24.306; Mo. Rev. Stat. § 536.140; Mont. Code § 2-4-704; Neb. Rev. Stat. § 84-917; Nev. Rev. Stat. § 233B.135; N.C. Gen. Stat. §§ 150B-43, 150B-51; N.D. Cent. Code §§ 28-32-46, 28-32-47; R.I. Gen. Laws § 42-35-15; S.C. Code § 1-23-380; Tenn. Code § 4-5-322; Tex. Gov't Code §§ 2001.172, 2001.174; Utah Code § 63G-4-403; Wash. Rev. Code § 34.05.570; W. Va. Code § 29A-5-4.

> In a proceeding brought by or against the regulated party,[14] 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.[15]

This change eliminates both *Chevron* and *Auer* types of deference at the state level and reinforces the courts' obligation to exercise their own independent judgment when interpreting the law.

Is Arizona's Statutory Revision Effective?

Now that the courts and state agencies have had an opportunity to interpret and apply Arizona's law, a key question arises: Is it effective?

Research conducted in the first three years of the law's operation suggest that it is.[16] Specifically, Arizona appellate courts, including the Arizona Supreme Court, appear to be faithfully applying the law by not deferring to the administrative agencies on legal questions.

Prior to the adoption of the amendment to Arizona's APA, Arizona courts applied a form of both *Chevron* and *Auer* deference. In *Arizona Water Co. v. Arizona Dep't of Water Res.*, citing *Chevron*, the Arizona Supreme Court held that in cases where "the legislature has not spoken definitively to the issue at hand, considerable weight should be accorded to an executive

[14] The legislation applies to proceedings that are "*brought* by or against the regulated party" (emphasis added). The law therefore allows regulated parties that have been adversely affected by administrative action to receive *de novo* review of that action if the regulated party brings an action challenging the agency decision or if the agency brings an enforcement action against the regulated party. It is worth noting that this language may a limit third party that is not "the regulated party" from receiving *de novo* review if that third party brings an original action challenging an administrative decision.

[15] A.R.S. § 12-910(E).

[16] The author has reviewed all published decisions from the Arizona Court of Appeals and Arizona Supreme Court that cite to the A.R.S. § 12-910(E) amendment from the effective date of that legislation through July 1, 2021.

department's construction of a statutory scheme it is entrusted to administer."[17] The state Supreme Court went on to write, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[18] In other words, the Arizona Supreme Court applied *Chevron* and deferred to a state agency's legal interpretation of an arguably ambiguous statute. The court also previously held that when agency rules are in dispute, state courts should defer to an "agency's reasonable interpretations of its own regulations," thus adopting the *Auer* doctrine in Arizona courts.[19]

The revisions to Arizona's APA made clear that Arizona courts should do neither of those things. And the courts appear to be interpreting that law as intended. Since the statutory revisions have been in place, decisions from 10 state appellate courts, including two from the Arizona Supreme Court, have cited the law as part of their legal analysis.[20] And the cases make

[17] 91 P.3d 990, 997 ¶ 30 (Ariz. 2004) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).
[18] *Id.*
[19] *Pima Cnty. v. Pima Cnty. Law Enforcement Merit Sys. Council*, 119 P.3d 1027, 1031 ¶ 18 (Ariz. 2005).
[20] *Gelety v. Ariz. Med. Bd.,* No. 1 CA-CV 20-0387, 2021 WL 734735, at *2 ¶ 9 (Ariz. Ct. App. Feb. 25, 2021); *Carter Oil Co., Inc. v. Ariz. Dep't of Revenue,* 460 P.3d 808, 815-16 ¶ 25 (Ariz. Ct. App. 2020); *JH2K I LLC v. Ariz. Dep't of Health Servs.,* 438 P.3d 676, 679 ¶ 9 (Ariz. Ct. App. 2019); *Ruben v. Ariz. Med. Bd.,* No. 1 CA-CV 18-0079, 2019 WL 471031, at *6 ¶¶ 29–30 (Ariz. Ct. App. Feb. 7, 2019); *Waltz Healing Ctr., Inc v. Ariz. Dep't of Health Servs.,* 433 P.3d 14, 18 ¶ 15 (Ariz. Ct. App. 2018); *Silver v. Pueblo Del Sol Water Co.,* 423 P.3d 348, 356 ¶ 28 (Ariz. 2018); *Simms v. Ariz. Racing Comm'n,* 482 P.3d 1049, 1053 ¶ 19 (Ariz. Ct. App. 2021); *Maricopa Cnty. v. Viola,* No. 1 CA-SA 21-0023, 2021 WL 2005913, at *2 ¶ 11 (Ariz. Ct. App. May 20, 2021) ; *Saguaro Healing LLC v. State,* 470 P.3d 636, 640 ¶ 21 (Ariz. 2020); *Heritage At Carefree LLC v. Ariz. Dep't of Health Servs.,* 471 P.3d 658, 661 ¶ 9 (Ariz. Ct. App. 2020)

clear that no deference is accorded to an agency's interpretation of a statute it is charged with implementing,[21] or to an agency's interpretation of its own rules.[22]

The Arizona Supreme Court confronted the issue of an agency's interpretation of an arguably ambiguous statute and an agency's interpretation of its own rules most recently[23] in *Saguaro Healing LLC*.[24] There, court rejected the Arizona Department of Health Services' interpretation of the medical marijuana statute it is charged with administering, as well as an agency rule that implemented that statute.[25] The court specifically cited the statutory revisions eliminating deference at A.R.S. § 12-910(E) in declaring that "we do not defer to the agency's interpretation of a rule of statute."[26] The court also found that because the agency's application of its own rules conflicted with the governing statute, the agency's interpretation of its rule must yield.[27] The court wrote that "[w]e do not defer to [the agency] in this case because….[doing so] would clearly be contrary to law."[28] Thus, in the single decision, the Arizona Supreme Court, while citing the statutory revisions to Arizona's APA, made clear that deference is not afforded

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[21] *Saguaro Healing LLC*, 470 P.3d at 638 ¶ 10 ("We do not defer to the agency's interpretation of a rule or statute." *Citing* A.R.S. § 12-910(E)).
[22] *Simms*, 482 P.3d at 1053 ¶ 19("Arizona courts interpret the Commission's rules de novo … We accord no 'deference to any previous determination that may have been made on the question by the [Commission].'" *Citing* A.R.S. § 12-910(E)).
[23] In 2018, the Arizona Supreme Court first discussed the statutory revisions to the APA. *Pueblo Del Sol Water Co.,* 244 Ariz. 553, 423 P.3d 348. Although the court made clear that the law "prohibits courts from deferring to agencies' interpretation of law," it decided the case by applying the doctrine of legislative adoption, where the legislature can "adopt[] an agency's interpretation of a term of art" through the ratification of subsequent legislation. *Id.* at 561, 423 P.3d at 356. Thus, the holding in *Pueblo Del Sol Water Co.* appears cabined to the specific issue of legislative adoption, and in light of *Saguaro Healing LLC*, it does not impact the Arizona Supreme Court's clear ruling that deference to administrative action does not apply.
[24] 249 Ariz. 362, 470 P.3d 636.
[25] *Id.* at 366, 470 P.3d at 640.
[26] *Id.* at 364, 470 P.3d at 638 (*citing* A.R.S. § 12-910(E)).
[27] *Id.*
[28] *Id.* at 366; 470 P.3d at 640.

to agency interpretations of statutes or agency rules. Additionally, the court went on to rule against the agency and remand the case for the of grant a license to the regulated party.[29] Thus, the lack of deference in this case may have contributed to a favorable outcome for the regulated party.

Similarly, in *Maricopa Cty. v. Viola,* the Arizona Court of Appeals rejected the Maricopa County Assessor's interpretation of the statutory definition of "full cash value" to find in favor of a lower tax assessment for a taxpayer operating low-income housing.[30] In that case, the county argued that the court "must defer to [county] Guidelines because an administrative agency's interpretation of a statute is presumed correct and lawful."[31] Citing Arizona's revisions to the APA, the court rejected that argument and found that "the agency's interpretation is not binding legal authority and cannot be inconsistent with statutory provisions."[32] By ruling in favor of the taxpayer, rejection of deference doctrines in this case also appears to have had a favorable impact on the outcome of the litigation for the regulated party.

In citing the statutory revision and rejecting deference to agency interpretation of statutory provisions and agency rules, Arizona courts, thus appear to have firmly rejected the previous application of *Chevron* and *Auer* deference that existed prior to the adoption of the new law.

One Arizona court also discussed the legislative intent underlying A.R.S. § 12-910(E) as an important accountability measure for agency actions that specifically involve occupational

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[29] *Id.*
[30] 2021 WL 2005913, at *2 ¶ 11 (*citing* A.R.S. § 12-910(E) for the proposition that "court reviewing final administrative decision owes no deference to agency's interpretation of statute").
[31] *Id.*
[32] *Id.*

licensing. In *Ruben v. Arizona Med. Bd.*,[33] the Court of Appeals cited both A.R.S. § 12-910(E) and the Right to Earn a Living Act,[34] another measure passed by the Arizona Legislature in 2017 that raises the standard of judicial review in occupational licensing cases, as evidence of legislative intent to rein in the administrative state. The court cited the Arizona governor's approval message upon signing the Right to Earn a Living Act, which read in part, "It is simply unjust for government to decide who can and cannot earn a living except when absolutely necessary to protect public health and safety."[35] It then went on to read the statutory revisions to the APA and the Right to Earn a Living Act together to observe that "subsequent actions of the Governor and legislature provide additional evidence of the intent of both elected branches of government to change the law in favor of increasing judicial scrutiny of—and agency accountability for—occupational licensing actions."[36] The court, therefore, not only read the plain lanauge of A.R.S. § 12-910(E) as eliminating deference to agency actions, but also affirmed the legislature's intent to increase both judicial scrutiny of and accountability for decisions from Arizona's administrative agencies.

The implementation and interpretation of Arizona's APA revisions show that the law is working as intended. As a result of this reform, Arizona courts are plainly declining to afford deference to agency actions involving disputed questions of law. At the same time, litigants[37]

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[33] 2019 WL 471031, at *6 ¶ 29 (Ariz. Ct. App. Feb. 7, 2019).
[34] A.R.S. § 41-1093–1093.05.
[35] *Id.*
[36] *Id.*
[37] In addition to the judicial decisions that have applied the language of A.R.S. § 12-910 to eliminate deference to agencies, litigants have also been utilizing the new law in arguing against deference doctrines. *See, e.g., Manahan v. State*, No. LC2018-00217, Maricopa Cnty. Super. Ct., at 15 ("On April 11, 2018, Governor Ducey signed into law a significant amendment to A.R.S. §12-910(E) … which requires that Arizona courts *give no deference* to agency interpretations of their own governing statutes.") *citing* A.R.S. 12-910(E) (emphasis in original). Indeed, even Attorney General's Office has cited to A.R.S. § 12-910(E) directly in appellate

and regulated parties are now armed with a new vehicle in arguing for a fair opportunity to challenge or defend against regulatory actions in court.

A Model for Other States (and Congress)

The statutory change that was made in Arizona can be made in other states that model their administrative procedure acts after the federal APA, or as stand-alone legislation in states that do not. Indeed, while Arizona was the first state to statutorily eliminate both *Chevron* and *Auer* deference, other states have also made important legislative changes on deference issues.

In 2018, Florida adopted a *constitutional* amendment that eliminated deference to both an administrative agency's interpretation of a statue and agency rule. The voter-adopted[38] amendment provides that:

> In interpreting a state statute or rule, a state court or an officer hearing an administrative action pursuant to general law may not defer to an administrative agency's interpretation of such statute or rule and must instead interpret such statute or rule de novo.[39]

Thus, like Arizona's reform, the amendment eliminates the state versions of both *Chevron* and *Auer* deference. This was a particularly significant reform in Florida, because, prior to the adoption of the amendment, "Florida was one of the most deferential states in the

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briefing and observed that no deference applied to the agency's legal interpretations because "the agency's legal conclusions concerning questions of law and statutory interpretation do not bind this Court." *Arrowhead Mobile Healthcare, Inc. v. Ariz. Dep't of Health Servs.*, No. 1 CA-CV 19-0640 (Ariz. Ct. App.), Appellees' Cross-Appeal Op. Br. and Answering Br. at 41. And in other cases, while not citing to the statutory revisions directly, the Office has not sought deference on legal questions. *See, e.g., Opukoku v. Ariz. State Bd. of Nursing*, No. 1 CA-CV 19-0699 (Ariz. Ct. App.), Def.-Appellee's Answering Br. at 14 ("This Court reviews questions of law de novo."); *Ariz. State Veterinary Med. Examining Bd. v. Stinnett*, No. 1 CA-CV 20-0219 (Ariz. Ct. App.), Def.-Appellant's Op. Br. at 16 (same).

[38] Florida has a unique constitutional amendment process whereby a Constitution Revision Commission will submit proposed amendments to voters for ratification.

[39] Fla. Const. art. V, § 21

country…"[40] Also of note, for a topic that can often be somewhat esoteric for the broader population, Florida's amendment was passed by 62% of voters.[41]

Also in late 2018, the Wisconsin Legislature rejected judicial deference to state agencies. That law reads, "No agency may seek deference in any proceeding based on the agency's interpretation of any law."[42] This statutory reform was less significant in its effect because the Wisconsin Supreme Court had already eliminated *Chevron* deference by judicial decision earlier that year in *Tetra Tech EC, Inc.*[43] Still, the legislature's ratification of *Tetra Tech* is an important example of how the legislative branch can and should weigh in on the judiciary's application of deference doctrines.

Most recently, the Georgia Legislature statutorily eliminated *Chevron* deference in state court tax cases. This provision, adopted in 2021, reads:

> All questions of law decided by a court or the Georgia Tax Tribunal pursuant to this subsection, including interpretations of constitutional, statutory, and regulatory provisions, shall be made without any deference to any determination or interpretation, whether written or unwritten, that may have been made on the matter by the department, except such requirement shall have no effect on the judicial standard of deference accorded to rules promulgated pursuant to the Georgia Administrative Procedure Act.[44]

Because the reform eliminates only *Chevron* deference and is limited to tax cases, it is not as robust as the other legislative reforms. But it does show a growing recognition of the need for independent and impartial review, particularly for a powerful agency like the Department of Revenue. The measure also passed with

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[40] Ortner, Daniel, The End of Deference: How States Are Leading a (Sometimes Quiet) Revolution Against Administrative Deference Doctrines (March 11, 2020) at 18. Available at SSRN: https://ssrn.com/abstract=3552321 or http://dx.doi.org/10.2139/ssrn.3552321
[41] *Id.* at 17.
[42] Wis. Stat. Ann. § 227.10.
[43] 382 Wis. 2d 496.
[44] Ga. Code Ann. § 48-2-18.

overwhelming legislative support – unanimously in the State Senate and by a 162 to 4 vote in the House.[45]

Finally, state reforms, and especially Arizona's reform, can serve as a model for federal change. In fact, the House of Representatives introduced and passed legislation in 2016 that would address and eliminate *Chevron* deference, although the measure never got a vote in the U.S. Senate.[46] Oftentimes, Congress will follow the lead of state legislatures, particularly where a critical mass of states act. In this way, paradoxically, state legislatures can take the lead on reforms to problems that originated in the federal judiciary.

Given the growing legislative interest in the topic and often strong political support for measures that eliminate various deference doctrines, other state legislatures should take up this measure as a way to rein in courts that have misapplied the APA's original language and intent, as should Congress.

Conclusion

Judicial deference to agency actions is a significant problem in American jurisprudence that has greatly expanded the size and scope of the administrative state. But it is not only a federal problem with a judicial solution. Instead, as the statutory reforms in Arizona and elsewhere show, state legislatures can and should lead the way to ensure that regulated parties get a fair hearing in court, and that administrative agencies are accountable for the decisions they make.

[45] https://www.legis.ga.gov/legislation/59714.
[46] The Separation of Powers Act of 2016, 114th Cong., 2d Session, available at https://www.congress.gov/bill/114th-congress/house-bill/4768/text.