

# Mapping Where State Deference Matters Most

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### Part I: Introduction

In *The End of Deference: How States (and Territories and Tribes) Are Leading a (Sometimes Quiet) Revolution Against Administrative Deference Doctrines*,<sup>1</sup> a co-author of this paper conducted a 50-state survey to investigate how state deference doctrines have developed over the past several years. The survey identified a striking trend away from *Chevron*-like doctrines and towards either a wholesale or partial rejection of deference.

Specifically, at least eight state supreme courts have issued decisions that seem to reject binding deference for an agency's statutory interpretation. And two more states recently rejected deference via legislation or referendum. Other states have followed an incremental pathway—one set by the Supreme Court—in expressing growing skepticism towards *Chevron*-like deference. All of this can be described as a (sometimes quiet) revolution.<sup>2</sup>

The purpose of this paper is to explore where these doctrinal changes are having (or could have) the greatest effect. Here, we're indebted to Professor Aaron Saiger's observation that "the executives, legislatures, courts, statutes, and bureaucracies of the states are different from those of the federal government in ways" that influence judicial deference in the state courts.<sup>3</sup> Yet whereas Professor Saiger took this observation as the starting point for investigating how state-specific contexts affect the development of these doctrines, this paper investigates how state-specific

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<sup>1</sup> Daniel Ortner, *The End of Deference: How States (and Territories and Tribes) Are Leading a (Sometimes Quiet) Revolution Against Administrative Deference Doctrines*, CSAS Working Paper 21-23 (April 29, 2019); Daniel Ortner, *The End of Deference: The States That Have Rejected Deference*, Notice & Comment (March 24, 2020), <https://www.valejreg.com/nc/the-end-of-deference-the-states-that-have-rejected-deference-by-daniel-m-ortner/>.

<sup>2</sup> *Id.* The categories include states that have fully abandoned deference, those that have abandoned some aspects of deference but preserved others, those that have voice of anti-deference dissent in their courts, those that employ especially rigorous statutory review in an effort to minimize deference, those states that are highly inconsistent, and those that employ thorough deference.

<sup>3</sup> Aaron J. Saiger, *Chevron and Deference in State Administrative Law*, 83 *FORDHAM L. REV.* 555, 557 (2014).

contexts influence the practical effect of deference. Simply put, we explore how judicial deference “matters” differently in different states, depending on state-specific factors.

What do we mean in discussing how deference “matters” in a state? Practically speaking, deference doctrines involve an institutional choice between either the judicial branch or the executive branch interpreting statutes in accordance with legislative intent (as manifest by the statutory text).<sup>4</sup> It follows that deference has real-life consequences—it “matters”—to the degree that state regulatory agencies, and state courts disagree on a given interpretation. Deference is more consequential (*ceteris paribus*) in states where these branches of government are prone to differing interpretations of ambiguous statutes. In such states, the stakes are higher when it comes to the institutional choice of whether an agency or a court interprets a statute. And the stakes are higher because these institutions are more likely to disagree.

To locate where deference “matters” (more or less) among the states, this paper identifies three state-specific factors that either promote or undermine inter-branch agreement on statutory interpretation. The first is a state’s political composition. Because any state’s government reflects its people, a politically homogenous citizenry is conducive to inter-branch agreement, while a heterogenous political makeup tends to engender inter-branch disagreement. The second state-specific factor is the extent to which state legislatures oversee administrative policymaking. Where a state legislature keeps regulatory agencies under its thumb, there is less opportunity for interbranch disagreement, for obvious reasons. The third state-specific factor is whether the state legislature requires or otherwise emphasizes clarity in the drafting of its statutes. Where state legislative drafters stress the importance of clear and unambiguous legislative text, there is less likely to be interbranch disagreement because fewer delegations are left to interpretation.

For each of these three state-specific factors, we parsed states into dichotomous categories to estimate their relative differences. For example, a state’s political composition is categorized as either homogenous or heterogenous. And a state’s legislative oversight is categorized as either strong or not strong. Finally, a state’s legislative drafting either emphasized clarity, or it didn’t (yes or no).<sup>5</sup>

Putting it all together, it becomes possible to map out where deference “matters” most in practice, by identifying which states are most likely to exhibit disagreement

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<sup>4</sup> See *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 696–97 (1991) (describing deference as an institutional choice between courts or agencies taking the lead on statutory interpretation); see also, Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. CHI. L. REV. 297, 311 (2017).

<sup>5</sup> As we discuss later, these are far from the only factors that might matter. See *infra n. \_ and accompanying text*. These were selected because they were relatively easy to measure dichotomously using existing data.

between the executive and judicial branches of government when it comes to discerning legislative intent. Specifically, we argue that such *Chevron*-like deference doctrines carry the greatest practical effect in politically heterogeneous states with weak legislative oversight of administrative policymaking, and which do not mandate for clarity in legislative drafting. These states are Colorado, Maine, Michigan, Minnesota, New Hampshire, North Carolina, Pennsylvania, Virginia, and Wisconsin. On comparing our results to *The End of Deference* survey, we find that many of these states—where deference “matters” most—are among those states where the judiciary has placed significant caveats or limits on deference.

## **Part II. State Specific Factors That Influence Deference**

In this part, we explain how three state-specific factors influence the relative importance of deference across the 50 states. These factors are: 1) a state’s political composition; 2) the degree to which a state legislature oversees state regulators; and 3) whether legislative drafters emphasize textual clarity in the drafting process. For each factor, we assess how states vary and, ultimately, how this variation affects *Chevron*-like deference doctrines as a practical matter.

### **Part II.A Political Composition**

We suspect that a state’s political composition is the most consequential criterion in determining the relative importance of judicial deference. For the most part,<sup>6</sup> our belief flows from deduction rather than empirical data. We assume that state governments reflect the politics of their respective citizenries, and that political orientation influences statutory interpretation.

Therefore, in a politically homogenous state, the branches of government are more likely to share the same interpretive philosophy when it comes to construing legal texts. However, in purple states, where politics are heterogeneous, the different branches of government are more likely to diverge in their approach to statutory construction.

To assess states’ political compositions, we categorized states as either politically homogenous or politically heterogeneous. To be sure, our dichotomous approach is a simplification. There are, for example, obvious political differences *within* any state, such as the ubiquitous rural-urban divide. Nevertheless, we believe our binary approach contains useful insights for mapping out where judicial deference carries bigger stakes because the legislature, regulatory agencies, and courts are more prone to disagreements over how to interpret statutes.

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<sup>6</sup> We got the idea that courts and agencies would interpret statutes similarly in politically homogenous states from an interview we performed with a legislative drafter from a politically homogenous state, who suggested that deference disputes were less common in his state for this reason.

To identify politically heterogeneous states, we first considered whether the state was a “swing” or “battleground” state in the 2020 national elections.<sup>7</sup> We then further excluded states that currently have a political party “trifecta,” where a single party controls the governorship, a majority in the state senate, and a majority in the state house;<sup>8</sup> however, we did not exclude those states which switched to a political party “trifecta” since the 2016 election, as these political shifts were recent enough to suggest that these states are still volatile and heterogeneous.<sup>9</sup>

This left us with the following list of politically heterogeneous states: Colorado, Iowa, Maine, Michigan, Minnesota, Nevada, New Hampshire, North Carolina, Ohio, Pennsylvania, Virginia, and Wisconsin.<sup>10</sup> We considered remaining states to be politically homogeneous.

## **Part II.B: Legislative Oversight**

The presence and extent of ongoing legislative involvement in regulatory affairs is another crucial criterion in discerning *Chevron’s* relative importance among the states. Where state lawmakers keep regulatory agencies on a short leash, deference “matters” less, because agencies aren’t allowed to stray from legislative intent, so the political branches of government have less room for disagreement. By the same token, fewer interpretations are left for courts to resolve. There are two primary mechanisms by which state legislatures superintend regulatory agencies—regulatory review and “sunset provisions”—and both are discussed in the subparts below.

### **Part II.B.1 Direct Oversight with Regulatory Review**

Easily the most powerful mechanism for legislative oversight of administrative policymaking is for lawmakers to involve themselves directly in the regulatory process. Thus, forty-one state legislatures have adopted some kind of procedure for reviewing administrative rules, according to the National Conference of State Legislatures.<sup>11</sup> But the rigor of this regulatory review varies.

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<sup>7</sup> This includes Arizona, Colorado, Florida, Georgia, Iowa, Maine, Michigan, Minnesota, Nevada, New Hampshire, North Carolina, Ohio, Pennsylvania, Virginia, and Wisconsin. Ballotpedia: [https://ballotpedia.org/Presidential\\_battleground\\_states\\_2020](https://ballotpedia.org/Presidential_battleground_states_2020); World Pop Review, <https://worldpopulationreview.com/state-rankings/swing-states>.

<sup>8</sup> These states include: Alaska, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, North Carolina, Pennsylvania, Vermont, and Wisconsin. State government trifectas and triplexes, [https://ballotpedia.org/State\\_government\\_trifectas\\_and\\_triplexes](https://ballotpedia.org/State_government_trifectas_and_triplexes).

<sup>9</sup> These states include Montana, New Hampshire, Virginia, Colorado, Illinois, Maine, Nevada, New Mexico, New York, New Jersey, Iowa, Missouri, West Virginia, and Washington. State government trifectas and triplexes, [https://ballotpedia.org/State\\_government\\_trifectas\\_and\\_triplexes](https://ballotpedia.org/State_government_trifectas_and_triplexes).

<sup>10</sup> This list closely resembles the swing state list but omits Arizona, Florida, and Georgia. This makes sense since even though these states are swing states at the presidential level, they are quite conservative and republican in state governance.

<sup>11</sup> NCSL, Separation of Powers: Legislative Oversight <https://www.ncsl.org/research/about-state-legislatures/separation-of-powers-legislative-oversight.aspx>.

Although most state legislatures have a process in place for reviewing regulations on an ongoing basis, often legislatures' powers are only advisory and don't bind the regulatory agency. In these states, legislatures need the governor's signature before they can check regulations, so lawmakers cannot unilaterally veto an administrative regulation.

For example, in Michigan, a Joint Committee on Administrative Rules reviews all proposed rules. By majority vote, the Committee may object to a rule if the measure runs afoul of any of seven factors set forth in the state code. If the Committee objects to a rule, a bill must immediately be introduced to rescind the rule, repeal the statutory authority under which the rule was promulgated, or stay the effective date of the rule. This bill is subject to the governor's veto. If the Committee does not act within 21 days of receiving the rule from the agency, the rule automatically becomes effective.<sup>12</sup>

Similarly, in Florida, the legislature's Joint Administrative Procedures Committee reviews all proposed and final rules. The Committee can recommend that the legislature pass a bill to suspend or repeal a rule, but the Committee cannot take action to repeal a rule on its own. The legislature can only invalidate a rule by passing a bill subject to the Governor's veto.<sup>13</sup>

On the more rigorous end of the oversight spectrum, a minority of state legislatures have a regulatory review process that empowers the legislature to unilaterally veto an administrative rule, without cooperation from the governor or the regulatory agency.

For example, in West Virginia, state agencies have no power to promulgate rules without first submitting proposed rules to the legislature, which must enact a statute authorizing the agency to promulgate the rule. If, during a regular session, the legislature disapproves all or part of any legislative rule, the agency may not issue the rule nor take action to implement all or part of the rule unless authorized to do so, although the agency may later resubmit the same or a similar proposed rule to the committee.<sup>14</sup>

Rather than on a rule-by-rule basis, like West Virginia, the Idaho legislature keeps close tabs on the state's regulatory agencies in a more sweeping fashion. In Idaho, all rules are terminated one year after adoption—unless the legislature reauthorizes the

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<sup>12</sup> See Michigan Code 24-235 (establishing regulatory review process).

<sup>13</sup> See Florida Code Section 120.545, F.S..

<sup>14</sup> See West Virginia Code Section 133-52; see also, *Appalachian Power Co. v. State Tax Dep't of W. Virginia*, 195 W. Va. 573, 581–82, 466 S.E.2d 424, 432–33 (1995) (describing process).

rule.<sup>15</sup> Thus, a rule can survive longer than a year only if the legislature is proactive; if the legislature does nothing, then the default outcome is for the regulation to die on the vine.

Relying on data compiled by the Counsel of State Governments,<sup>16</sup> we divided states into two categories of legislative oversight: “strong” and “weak.” State legislatures with “strong” oversight are those who can unilaterally stop a regulation; state legislatures with “weak” regulatory review are those who either don’t have a regulatory review process, or legislatures that have such a procedure, but can stop a regulation only with the cooperation of the governor or the regulatory agency.

States with “strong” legislative superintendence of regulations influence deference doctrines in two ways. First, where a legislature exercises these powers, the practical effect is to resolve a statutory ambiguity. It follows that less of an agency’s delegation is subject to interpretation, which makes deference “matter” less. Second, the mere threat of these powers gives the legislature leverage to affect the agency’s thinking as it formulates its regulations. With this sort of scrutiny, a state legislature (so empowered) creates an incentive for the agency to temper its rules, so as not to incur a legislative veto. The result, again, is to better align an administrative rule with legislative intent, which lessens the opportunity for disagreement among the branches of government.

The upshot is that “strong” regulatory review resolves ambiguities and otherwise clarifies legislative intent, both of which service to diminish the importance of deference. States with “strong” oversight are Alabama, Connecticut, Idaho, Illinois, Iowa, Kansas, Nevada, Oklahoma, and West Virginia.

## **Part II.B.2 Indirect Oversight with Sunset Provisions**

With regulatory review, state legislatures participate directly in the formulation of regulations. Legislatures also employ another, indirect means of overseeing administrative action, known as “sunset review.” These are clauses embedded in legislation that allows an agency’s regulatory authorization to expire, or “sunset,” unless the legislature takes action to renew the legislation or reauthorize the agency to act. Such sunset provisions typically require a periodic review, usually four to six years, of regulatory agencies by legislative staff or state auditors. After conducting the review, the auditors give a recommendation to end the regulatory agency (by allowing it to sunset), modify the agency, or keep it as is.

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<sup>15</sup> See Daniel Ortner , Smart Regulatory Reform is an Achievable Goal—Idaho has Shown the Way, The Hill (July 21, 2020), <https://thehill.com/opinion/finance/507864-smart-regulatory-reform-is-an-achievable-goal-idaho-has-shown-the-way>.

<sup>16</sup> Council of State Governments, Book of the States: 2019, Table 3.26 Legislative Review of Administrative Rules/Regulations: Powers, <http://knowledgecenter.csg.org/kc/content/book-states-2019-chapter-3-state-legislative-branch>.

For example, Arizona’s sunset review process requires the legislature to periodically evaluate the state’s regulatory agencies to determine if they should be continued, modified, or terminated. These reviews are conducted by the legislative committee with jurisdiction over the regulatory regime in question. The committee is required to hold at least one public hearing to discuss the sunset review and receive testimony from agency officials and the public, although the committee may convene subsequent hearings as necessary. Arizona statutes set forth 17 sunset factors to guide the committee’s analysis. Ultimately, the committee makes a recommendation to the full legislature whether to terminate the regulatory program. If legislation to continue the agency is not approved by the legislature and governor, agencies subject to sunset review automatically terminate. Typically, this review process takes about 20 months.<sup>17</sup> The Arizona legislature makes extensive use of these sunset reviews. In 2020 alone, the legislature terminated 42 regulatory regimes.<sup>18</sup>

According to data compiled by the Council of State Governments, most states operate sunset review programs, although these programs vary to a considerable degree.<sup>19</sup> Some states require *all* statutory agencies to be subject to a sunset review once per review cycle. Other states vet only a subset of agencies. Still other states perform discretionary review.

Again, we took a dichotomous approach in parsing the variety among state sunset review programs. That is, we divided these sunset review programs into two categories: “strong” and “weak.” Here, the operative distinction was the program’s scope. If a state’s sunset review is comprehensive, then we rated it as being “strong.” If, however, the program was partial or non-compulsory (or nonexistent), then we considered it to be “weak.”

“Strong” sunset review programs influence deference doctrines in two ways. To the extent that the statutory code is diminished (by excising regulatory provisions), there are fewer delegations left to interpretation. Also, as explained above regarding the legislative veto, the threat of termination can be a powerful bargaining chip for the legislature in any disagreement with a regulatory agency, especially whenever that agency nears its next review cycle (typically every 4 to 6 years). During these periods, we predict that an agency’s interpretations are more likely to comport with legislative intent. The upshot is that deference “matters” less in a state with “strong” sunset

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<sup>17</sup> See Arizona Revised Statutes § 41-2952; see also, Arizona Legislature, Handbook on Arizona's Sunset & Sunrise Review (2019-2020), [https://www.azleg.gov/sunset\\_review.pdf](https://www.azleg.gov/sunset_review.pdf).

<sup>18</sup> As tallied by the state’s Legislative Council, [https://www.azleg.gov/alisPDFs/council/2020\\_Sunset\\_Repeals.pdf](https://www.azleg.gov/alisPDFs/council/2020_Sunset_Repeals.pdf).

<sup>19</sup> Council of State Governments, Book of the States: 2019, Table 3.27 Summary of Sunset Legislation, <http://knowledgecenter.csg.org/kc/content/book-states-2019-chapter-3-state-legislative-branch>.



review (relative to states without such review). States with strong sunset review are Alabama, Alaska, Arizona, Delaware, Louisiana, Nevada, Ohio, and Tennessee.

## **Part II.D Clarity Mandates for Legislative Drafting**

In researching for this paper, we conducted interviews with a handful of officials at state legislative support offices, which are responsible for drafting bills. With these conversations, we sought to better understand how deference doctrines are perceived by state legislatures. During these conversations, one official emphasized that the state's drafting manual is important in this context. According to this official, "we train all attorneys on the need to draft grants of rulemaking power narrowly" as stipulated by the legislative drafting manual. Furthermore, he described a system where the drafters work with lawmakers to ensure against undue ambiguity in legislative text. Again, he described these processes as emanating from the state's drafting manual for statutes.<sup>20</sup>

In other interviews, however, state legislative drafters minimized or dismissed the importance of the drafting manual for avoiding statutory ambiguity or vagueness.<sup>21</sup> As such, it is evident that there is a spectrum of approaches set forth in state legislative drafting manuals.

Prompted by these discussions, we reviewed state drafting manuals (where available), looking for clear indicia that statutory clarity is given uncommon priority.<sup>22</sup> Here, we relied on two variables to distinguish among the state approaches. First, we considered a state's drafting manual to give priority to clarity if the manual was written pursuant to a statutory command for bills to be drafted clearly. For example, Arkansas statute states that, "No bill shall be considered and no law enacted unless the bill or law is written in clear, unambiguous language."<sup>23</sup> Second, we considered a state's drafting manual to give priority to clarity if the manual expresses an unequivocal preference for unambiguous language. For example, Florida's manual states that, "unlike a press release, a political campaign speech, or directions on how to assemble metal shelving, the language chosen to express the intent of the legislature must be free of ambiguity."<sup>24</sup>

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<sup>20</sup> We had hoped to conduct more of these interviews in more states but did not hear back from most of the legislative drafters that we contacted.

<sup>21</sup> We agreed to maintain the confidentiality of our interview subjects.

<sup>22</sup> The National Conference of State Legislatures has published a list of state legislative drafting guides, available at <https://www.ncsl.org/legislators-staff/legislative-staff/research-editorial-legal-and-committee-staff/bill-drafting-manuals.aspx>.

<sup>23</sup> See Arkansas Code § 1-2-121.

<sup>24</sup> Florida House Drafting Service, Guidelines for Drafting Legislation (2014), [https://www.myfloridahouse.gov/Handlers/LeagisDocumentRetriever.ashx?Leaf=HouseContent/Lists/FP\\_Reference%20Materials/Attachments/9/full\\_document.pdf&Area=House](https://www.myfloridahouse.gov/Handlers/LeagisDocumentRetriever.ashx?Leaf=HouseContent/Lists/FP_Reference%20Materials/Attachments/9/full_document.pdf&Area=House).

Only a handful of states evidence either of these criteria that militate in favor of statutory clarity. These states are Arkansas, Delaware, Florida, Iowa, Kentucky, New Mexico, North Dakota, and Utah. For this subset of states, *Chevron*-like deference doctrines “matter” less, because statutes contain fewer ambiguities as a general matter, so less text is left to interpretation.

## **Part II.E: A Hierarchy of Nonexclusive Factors**

These three state-specific factors affect judicial deference, but they do so to varying degrees. We believe that a state’s political composition is the most relevant factor influencing the relative importance of deference in a state’s political composition. Again, deference is immaterial if the three branches of government are aligned on how to interpret a statutory provision.

The remaining factors are listed in descending order of relative importance. Logically, direct legislative oversight of regulations (through the legislative veto) affects deference more so than indirect oversight (through Sunset Review). Due to their advisory nature, state legislative drafting manuals exert the least influence relative to the other (compulsory) factors. No matter how much a legislative drafting manual emphasizes clarity, such a nonbinding preference will always yield to a lawmaker who insists on ambiguous legislative text.

Finally, it bears stressing that these factors are non-exhaustive and, undoubtedly, other variables influence the varying effect of deference among the states.<sup>25</sup> For example, another important factor that may influence the impact and importance of deference is whether a state has a robust non-delegation doctrine that cabins the legislature’s ability to delegate its authority to the executive branch. Scholars have long identified a close relationship between deference and non-delegation.<sup>26</sup> In particular, the major questions doctrine bars deference to agencies in instances where the agency claims a significant delegation of authority that the legislature would have not likely granted without doing so explicitly. However, some states continue to apply a more robust non-delegation doctrine. In such states, there may be less room for agencies to play in the joints and creatively interpret legislation. The existence of a

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<sup>25</sup> There are many factors that might merit further exploration such as the size of a state, whether the state has a full-time legislature, and how executive officials other than the governor are elected/selected. One of this paper’s co-authors looked at some of these factors in a working paper for the Gray Center for the Study of the Administrative State. Daniel Ortner, *Ending Deference? Why Some State Supreme Courts Have Chosen to Reject Deference and Others Have Not* (Spring 2021), <https://administrativestate.gmu.edu/wp-content/uploads/sites/29/2021/07/Ortner-Ending-Deference.pdf>.

<sup>26</sup> Marla D. Tortorice, *Nondelegation and the Major Questions Doctrine: Displacing Interpretive Power*, 67 BUFF. L. REV. 1075 (2019); Michael C. Pollack, *Chevron’s Regrets: The Persistent Vitality of the Nondelegation Doctrine*, 86 N.Y.U L. REV. 316 (2011)..

stronger non-delegation doctrine may therefore operate as a legislative drafting manual with teeth.

Other factors outside of the scope of this article concern the relationship between the executive and the judiciary, such as whether state judges are elected or appointed. While this factor would be easy to measure, it is far from clear what impact it would have on the weight of deference, and this is a subject for a separate article. Moreover, it is possible that the impact would be subsumed or overshadowed by the difference between heterogenous and homogenous states. Judges in a swing state, whether appointed or elected, would be more likely in the long run to diverge from the ideology of the other branches and therefore deference would have a greater impact. On the other hand, in a relatively homogenous state the judges own preferred interpretation of the law may line up more closely with the preferred interpretation of the executive branch.

### **Part III: Results and Discussion**

In this part, we identify those states where the three branches of government are most likely to disagree—that is, where *Chevron*-like deference carries the greatest effect. In addition, we apply our framework to the federal government, to offer a further comparison. Finally, we use our results to inform prior scholarship about recent state-level changes to judicial deference.

#### **Part III.A: Locating Where Deference “Matters”**

In this study, we identify a non-exhaustive list of three state-specific variables that affect how *Chevron*-like deference influences statutory construction across the states: 1) a state’s political composition; 2) the degree to which the state legislature maintains control over state regulators; and 3) whether legislative drafters emphasize textual clarity. These variables, moreover, influence states to different degrees. The first variable—a state’s political composition—is paramount. The third variable—whether legislative drafters emphasize clarity—is the least influential of the three.

Given the hierarchical nature of these three variables, it is possible to map where their effect is strongest (or weakest), depending on their presence (or absence) in any state. Under our framework, for example, a state’s political composition is the most consequential variable and, as a result, *Chevron*-like deference will always matter more in a politically heterogenous state relative to a politically homogenous state, where the three branches of government are unlikely to diverge in how they interpret regulatory statutes.

#### **Part III.B. Applying the Variables to the Federal Government**

For comparison's sake, it's worth considering how our three variables (political composition, legislative oversight, and clarity mandates in legislative drafting manuals) apply to the federal government. Regarding the first variable, our nation is politically heterogenous, arguably to a greater extent than any single state. Indeed, the political heterogeneity is, not a bug, of our constitutional design—we call it federalism. At present, moreover, political polarization has become a defining feature of contemporary federal politics.

When it comes to legislative oversight of regulatory policymaking, Congress's authority has evolved markedly since the early Twentieth Century. When Congress created the modern administrative state, lawmakers paired their delegations with strong legislative oversight. From 1932 to 1975, Congress included 292 unilateral veto provisions in laws that created regulatory agencies.<sup>27</sup> These vetoes came in many flavors. Sometimes, it took a majority of both the House and Senate to kill a regulatory action. Other times it took passage in only one of the chambers. Less frequently, a legislative veto could be imposed by a single congressional committee. In 1983, however, the Supreme Court held that Congress's unilateral veto contravenes the Constitution by allowing the legislature a role in the execution of the law.<sup>28</sup> In 1996, with the passage of the Congressional Review Act, Congress revived the legislative veto, albeit in a much weaker form.<sup>29</sup> Under the Congressional Review Act, Congress no longer can unilaterally stop a rule; instead, lawmakers need the president's signature before they can nix a regulation.<sup>30</sup>

Turning to sunset review, Congress never has embraced this mechanism for controlling regulatory agencies.<sup>31</sup> The upshot is that legislative oversight is weak at the federal level of government.

Regarding the third factor—mandates for clarity in legislative drafting—Congress maintains a manual on drafting style, but the manual is largely technical.<sup>32</sup> To the extent the manual conveys a drafting ethos, it is to effectuate legislative intent, rather than achieving textual clarity.

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<sup>27</sup> Allen Schick, "Congress and the 'Details' of Administration," *Public Administration Review* 36, no. 5 (September/October 1976): 525.

<sup>28</sup> *INS v. Chadha*, 462 US 919 (1983).

<sup>29</sup> Pub.L. 104–121, 5 U.S.C. Sec. 801, et seq.

<sup>30</sup> For more on the Congressional Review Act and its usage, see GW Regulatory Studies Congressional Review Act Tracker, available at <https://regulatorystudies.columbian.gwu.edu/congressional-review-act>.

<sup>31</sup> See Jonathan Adler & Christopher Walker, *Delegation and Time*, 105 IOWA L. REV. 1931 (2020) (arguing that Congress should start making use of sunset provisions).

<sup>32</sup> See Office of Legislative Counsel, House of Representatives, *House Legislative Counsel's Manual on Drafting Style*, GPO (1995), <https://legcounsel.house.gov/sites/legcounsel.house.gov/files/documents/draftstyle.pdf>.

Across all three factors, the federal government grades out in a manner that accentuates the importance of *Chevron*-like deference. The federal government, therefore, is like the minority of states where deference “matters” most.

### **Part III.C Cross-Referencing Results with Prior Deference Survey**

It is also worth considering whether there is a correlation between the states where we postulate that deference might matter more and the deference regime that we find in that state. Considering the dozen politically heterogenous states mentioned above (Colorado, Maine, Michigan, Minnesota, New Hampshire, North Carolina, Pennsylvania, Virginia, Wisconsin, Ohio, Iowa, and Nevada), it appears that there is likely at least some degree of a positive correlation between these factors and a state being one where the judiciary has placed some significant caveats or limits on deference. Of these twelve states, three are those that have eliminated deference (Colorado, Michigan, and Wisconsin)<sup>33</sup> and two more are states which claim to only apply *Skidmore* deference (North Carolina and Virginia).<sup>34</sup> And all five of those are states that do not have any mechanisms of legislative superintendence. In addition, Minnesota only applies *Auer* like deference<sup>35</sup> and Iowa only applies deference to highly technical agency rulings that clearly employ the agency’s expertise.<sup>36</sup> Ohio and Pennsylvania currently employ deference, but there are prominent voices of dissent in the state judiciary.<sup>37</sup> Nevada is one of the most inconsistent states in the country.<sup>38</sup> So only Maine and New Hampshire employ deference without reservation, and even then, the New Hampshire judiciary has shown willingness to use tools like substantive canons of construction and legal policy considerations to defeat an agency’s determination.<sup>39</sup>

### **Part IV: Conclusion**

Among state governments, all deference regimes aren’t created equal. Practically speaking, *Chevron*-like deference affects different states to a varying extent. The basis of this variety is the institutional choice at the heart of binding deference—either regulatory agencies or courts will interpret an ambiguous statute in according with that institution’s understanding of legislative intent. To the degree that these institutions disagree on a given interpretation, the deference is of greater importance.

In this short paper, we argue that a state’s branches of government are most likely to disagree—such that such *Chevron*-like deference doctrines carry the greatest

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<sup>33</sup> End of Deference at 9-18.

<sup>34</sup> End of Deference at 23-25.

<sup>35</sup> End of Deference at 28-29.

<sup>36</sup> End of Deference at 38.

<sup>37</sup> End of Deference at 44-48.

<sup>38</sup> End of Deference 57-59.

<sup>39</sup> End of Deference at 60, 62.

practical effect—in politically heterogeneous states that lack both robust legislative oversight of administrative policymaking and mandates for clarity in legislative drafting. These states are Colorado, Maine, Michigan, Minnesota, New Hampshire, North Carolina, Pennsylvania, Virginia, and Wisconsin.