

The Effects of Judicial Deference on the Size and Scope of the Regulatory State: Michigan v. Ohio, A Comparison

Alison Somin, Rea S. Hederman Jr., and Keelyn Gallagher

Working Paper

State Judicial Deference Research Roundtable, October 2021

Center for the Separation of Powers | Pacific Legal Foundation
Liberty & Law Center | Antonin Scalia Law School | George Mason University

Pacific Legal Foundation solicits working papers on topics of special interest and posts them for further discussion, generally in advance of publication in academic journals. The views expressed in this and related papers are those of the authors and do not necessarily reflect an institutional position of Pacific Legal Foundation.



The Effects of Judicial Deference on the Size and Scope of the Regulatory State: Michigan versus Ohio, a Comparison

By: Alison Somin, Rea S. Hederman Jr., & Keelyn Gallagher

1. Introduction

As the federal administrative state has grown and grown in both size and scope, scholars have hotly debated whether judicial deference to administrative agencies has been an important cause of this growth. This paper aims to shed light on the role of judicial deference at the state level by examining the size and scope of regulatory agencies in two culturally, economically and demographically similar Midwestern states, Ohio (which has judicial deference) and Michigan (where the state's Supreme Court has abolished judicial deference.)

If Ohio's agencies have grown more and asserted their power more aggressively than Michigan's, that suggests that judicial deference might contribute to the administrative state's growth. If not, or if the results are mixed, that suggests that the debate about Chevron-like deference should focus on other arguments.

In this paper, we first briefly discuss the law of judicial deference to administrative agencies generally and in the two states we are studying. We then give a brief history of occupational licensing boards and changes made in Ohio and Michigan. We then discuss our methodology, our results, and possible areas for future research.

1.1 Legal Background

Sometimes legislators pass ambiguous statutes. When a court is faced with an ambiguous statute, there are two ways it can resolve the ambiguity:(1) The court can try to find the best possible interpretation; or (2) it can defer to some other person's or entity's interpretation of the statute. The latter approach arguably makes the most sense if the other entity has more relevant expertise in the subject of the statute than the court does.

The landmark U.S. Supreme Court case *Chevron v. NRDC* addresses what to do in a case when the government agency interprets an ambiguous statute.¹ *Chevron* famously held that

when a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.²

Thousands of pages have been written both justifying and criticizing this holding, addressing, for example, whether Chevron is consistent with constitutional principles of separation of powers³ and with the Administrative Procedure Act's text.⁴

Important as those purely legal questions are, much of the debate has also addressed *Chevron's* practical consequences. Although *Chevron* was originally seen as a conservative decision that would tend to have deregulatory effects,⁵ in recent years it has more often been characterized by critics and defenders alike as having the opposite effect.⁶

The mechanism that expands regulation is as follows: Agencies tend to interpret ambiguous statutes in ways that increase the power of the agency. Judicial deference to these expansive interpretations entrenches agency power, often beyond what the legislature intended.

The states are a useful laboratory in which to test this hypothesis about the influence of judicial deference on the size and scope of the administrative state. This paper looks at Ohio and Michigan. Michigan courts eliminated judicial deference in 2008. Ohio has judicial deference: courts must give "deference to an administrative interpretation formulated by an agency that has accumulated substantial expertise in the particular subject area and to which the General Assembly has delegated the responsibility of implementing the legislative command."⁷

Ohio courts' practice of deference has been criticized: In dissent in *In re 6011 Greenwich Windpark, L.L.C.*, Justice Sharon L. Kennedy dissented, joined by Justices Pat DeWine and Melody J. Stewart. She declared that "the majority abdicates this court's judicial duty and authority."⁸ While acknowledging that some of the Court's past decisions had accorded deference for agency interpretations of highly specialized issues, she was concerned that in this particular case the Court had "abandon[ed] [its] role as an independent check for the executive branch."⁹

In a different case, Justice DeWine concurred and declared that "deference is unwarranted; it is our job, not the [agency's] to issue final interpretations of the law." Justice DeWine referred to the growing criticism of Chevron in federal court and said he "share[d] the ... concerns that have been expressed about judicial deference to agency interpretations of laws."¹⁰

In a different concurrence, Justice DeWine again declared that he was "skeptical of our deference doctrines generally and think[s] the court ought to take a hard look at those doctrines in an appropriate case."¹¹

Michigan's Supreme Court, by contrast, has decisively rejected Chevron deference in opinions starting in 2008. The Court noted both pragmatic and substantive objections to *Chevron*. It grounded its decision in fundamental constitutional principles: "[T]he unyielding deference to agency statutory construction required by *Chevron* conflicts with this state's administrative law jurisprudence and with the separation of powers principles discussed above by compelling delegation of the judiciary's constitutional authority to construe statutes to another branch of government."¹²

The court also noted practical difficulties with administering a Chevron-like standard: "While the *Chevron* inquiries are comparatively simple to describe, they have proven very difficult to apply." The Court held that adopting *Chevron* would "not provide a clear road map for courts in this state to apply when reviewing administrative decisions."¹³

Research on federal judicial deference finds that deference cases are most often about taxes, the environment, energy, health and safety, and entitlement programs.¹⁴ In this study we focus on a health-and-safety area that rarely has federal involvement: occupational licensing.

1.2 Occupational Licensing Boards Background

In the 19th century, the Supreme Court decision in *Dent v. West Virginia* established that states have the right to regulate occupations in their state.¹⁵ States could establish licensing boards that decide requirements for an occupational license and what, if any, exceptions there are to them. By changing or suspending licensing requirements, licensing boards can control the number of workers in a particular occupation. Licensing boards also issue warnings and penalties to individuals who violate the regulations governing those occupations.

In the latter half of the 20th century, the number of licensing laws and boards proliferated. While some licenses were deemed desirable under the guise of public safety, the justification for other licenses is more dubious.

By restricting the number of workers, existing licensed workers have higher earnings due to the reduced competition. Licensed workers who sit on a licensing board have an incentive to reduce the number of licenses issued by the board as well as vigorously enforcing violations of the regulatory policy. Although the Supreme Court articulated limits under federal antitrust law regarding the use of market participants as regulators in *North Carolina State Board of Dental Examiners v. the Federal Trade Commission*, practitioners had and still have broad latitude in regulating industries in which they themselves were licensed.¹⁶

Since that decision, licensing boards made up of practitioners have been subject to antitrust violations unless the boards serve a deliberate policy goal or are under active state control. This active control shows that state agencies were working with licensing boards during the period of study.

In the 21st century, research has focused on the number and use of occupational licenses. A report from former President Barack Obama's Council of Economic Advisers found that over a fourth of American workers needed an occupational license to do their job.¹⁷ That report called for changes in occupational licensing regulations as free market groups like the Institute for Justice and academic researchers had previously called for reducing the burden of occupational licenses.

Bipartisan reform efforts have been undertaken at both the state and federal levels to limit the use of these licenses. These reforms have broadened exceptions for certain workers like members of an active-duty military family, eliminated licenses for some occupations, and reduced the requirements needed to obtain a license.

1.3 Ohio and Michigan Licensing Changes

This section will outline occupational licensing in Ohio and Michigan and reform efforts in those states during the time period in the study. Both states have made numerous reforms that will impact the number of people covered, affect requirements to obtain a license, and eliminate some licenses entirely. There remains significant heterogeneity in what the states license, requirements for those licenses, and how they enforce the regulations of those licenses.

Ohio and Michigan both license a substantial number of occupations. While Ohio licenses slightly fewer occupations, the licensing requirements are more onerous than the requirements in Michigan.¹⁸ In Ohio, 18.1 percent of workers had a license compared to 20.6 percent of workers in Michigan.¹⁹

Both states have begun to make significant changes in occupational licensing focusing on both individual licenses such as a cosmetologist or all licenses such as entering into a compact where an out-of-state license is recognized as being valid in the participating state.

The Ohio Legislature eliminated the licensing requirement for some occupations such as historical boilers (boilers used only for demonstration purposes) and practitioners of Oriental medicine.²⁰ In 2020, an Ohio statutory reform established licensing recognition for members of a military family currently residing in Ohio who have a valid license in another state.²¹ In 2019, Ohio established a process to renew every licensing board every six years and automatically eliminated those not renewed by the General Assembly.²² In 2021, Ohio entered the nurse-licensing compact, which recognizes out-of-state nursing licenses as being valid in Ohio.

The Michigan legislature has also acted on licensing reform including eliminating some licenses like those for dietitians, nutritionists, painters, and decorators.²³ In 2018, Michigan restricted the ability of localities to impose new occupational licenses or exceed requirements set by the state on occupations regulated by the state.²⁴ In 2020, Michigan enacted many bills that would ease occupational licenses on individuals with criminal records.²⁵

1.4 Comparing Ohio and Michigan

This study picked Ohio and Michigan, because of the similarities between the two states. The states are geographic neighbors with similar demographics and economic output. Both states have had historically strong manufacturing sectors, with manufacturing a bigger share of gross state product compared to the average state. Both states have struggled with globalization and economic changes over the last several decades as the states have led the nation in population decline in urban areas for much of the 21st century.²⁶ The states have had essentially flat population growth over the last several years and had similar unemployment rates before the pandemic impacted the labor market. In the appendix is a table that illustrates the similarities between the states.

Other studies have utilized this cross border comparison as well. A journal article on state inheritance taxes looks at Illinois, Michigan and Ohio as comparative examples, because, as the study states, they are similar from “an economic and geographic standpoint”.²⁷ A paper from the Urban Institute that focused on the industrial Midwest discusses the value of cross-state comparisons over time and at the broad aggregate level.²⁸

2. Methodology

2.1 Sample

This study focuses on Michigan and Ohio to test our hypothesis: removing judicial deference slows the growth of agencies that heavily rely on deference.

In 2008 the Michigan Supreme Court rejected *Chevron* deference, essentially eliminating deference in the state. And though members of the Ohio Supreme Court have expressed skepticism of deference and

may soon eliminate it, Ohio still relies on agency discretion for interpretation during our period of study.²⁹ In addition, Ohio and Michigan are similar in ways that make them good comparison states: average incomes, education, demographics, and geographic location.

The study period is 2015 through 2019 to avoid some likely problems with reaching further back in time. Though Michigan's law changed in 2008, we would expect to see a lag in agency behavior change caused by the removal of deference. In addition, our data is heavily based on public records, which become more difficult to collect the further back in time we go. In addition, by starting in 2015, we can avoid any volatility from the 2008 Great Recession, and we end the data set in 2019 before the impact of the COVID pandemic.

We also carefully selected state agencies to best reflect those most likely to rely heavily on judicial deference. In the empirical literature on federal judicial deference, a few areas often come up in deference cases: taxes, the environment, energy, health and safety, and entitlement programs.³⁰ However, we were careful to avoid areas that are primarily regulated by federal law. This led us to focus on occupational licensing and sin regulation.³¹ We identified 19 agencies in both Ohio and Michigan that regulate similar industries or actions and were appropriate to compare (see Appendix for the matched agencies).

Agencies may not be an exact match because the states organize their agencies in different fashion. In Michigan the Department of Licensing and Regulatory Affairs (LARA) encompasses multiple Bureaus that are responsible for licensing and enforcement for multiple occupations. For efficiency purposes, LARA typically does not have resources dedicated to regulating single occupations. For example, LARA's Regulation Agents may investigate issues involving a variety of occupations. Therefore, actual regulation/enforcement expenses for each occupation are not tracked.³²

Some boards changed names or combined during the time of study. The Cosmetology and Barber boards were combined and treated as one for both states because Ohio combined their Barber and Cosmetology Boards in 2018 to create the Ohio State Cosmetology and Barber Board.

Speech Hearing and Professionals Board to the Board of Speech-Language Pathology and Audiology Ohio 2018 and the Ohio State Board of Optometry became the Vision Professionals Board in 2019 to include optometry dispensers as well. The Michigan Liquor Control Commission (MLCC) is controlled by the government in contrast to Ohio.

2.2 Data

We collected four pieces of information for each agency between 2015 and 2019:

- Percentage Change Annual Revenue
- Percentage Change Annual Expenses
- Percentage Change enforcement actions
- Difference in administrative code changes

Ohio's agencies publish annual reports to the Governor which contains information on their collected revenue, expenses, and formal enforcement action taken in a year. Information on the annual fiscal revenue and expenses were collected from publicly available sites.³³ For Michigan's revenue, expenses,

and employment numbers, we sent public-records requests to the Department of Licensing and Regulatory Affairs (LARA), the Michigan Gaming Control Board, and the Bureau of Lottery. LARA keeps Disciplinary Action Reports (DAR) that list the disciplinary actions taken against health and occupational licensees who are licensed and regulated by the various health and occupational boards within the Licensing Division. The report also includes updated information regarding licensees who have appealed the Board's action to a higher court. The report includes the names of the licensee, their professional license number, the type of disciplinary action taken, the effective date of the action and the general nature of the complaint.

Enforcement actions include any Board orders or formal actions include (revocation, letters, any fines issued, suspensions, etc. We relied on agency annual reports to count the number of board orders.³⁴ Board orders are typically instigated by a complaint or inspection. In Ohio, we requested enforcement data from all 17 agencies number were collected information online from the Annual Reports to the governor and 5 were from PRA. In Michigan, LARA keeps detailed Disciplinary Action reports for all occupations that they license.

Administrative code changes were classified by the type of change made including rescinded, appended, and added. We considered any added regulations additions to the agencies power, value = 1, any regulations rescinded were assigned -1 and amended regulations were considered 0. We also considered these as categorical variables. We tracked the changes to the code to understand if agencies were expanding or reducing their regulatory power.³⁵

Michigan administrative code changes were collected from the Office of Regulatory Reinvention and the Library of Michigan Digital Repository. Ohio administrative code changes were collected using the Register of Ohio. Regulatory impact statements were used to help determine the regulatory and codified effects of rescissions.

In addition, we identified several other variables between 2015 and 2019 that could influence the size and scope of a regulatory agency, including state population,³⁶ gross state product,³⁷ tax revenues,³⁸ unemployment levels,³⁹ and party control of the legislature, and collected relevant data.⁴⁰

2.3 Analysis

We tested our hypothesis that removing judicial deference slows the growth of agencies with four different impacted measures and three different tests. The measures impacted by judicial deference include employment numbers, revenue, expenses, administrative code changes, and enforcement actions. Ohio agencies are the control group that still utilize judicial deference while Michigan agencies are the treatment group. The three tests include an analysis of variance (ANOVA), a multiple analysis of variance (MANOVA), and a matched-pair regression analysis.

2.3.1 ANOVA

We performed a repeated ANOVA tests on all independent variables (percent change in yearly fiscal revenue, yearly fiscal expenses, enforcement activity, and difference in regulatory changes) to test if there are significant differences between Ohio and Michigan over time from 2015 to 2019. We are using a repeated ANOVA because samples are not independent from each other due to the consideration of time. The null hypothesis is the averages for all independent variables are the same over the time period between Ohio and Michigan. Because we expect that removing judicial deference slows the growth of

agencies that heavily rely on deference, we would expect Michigan averages to diverge and grow slower than Ohio averages over time.

2.3.2 Matched-pair Regression Analysis

We hypothesize that since the removal of deference in 2008, Michigan agency's revenue and expenses will grow at a slower rate than their regulatory counterparts in Ohio. To test our hypothesis and control for other factors that can affect our dependent variables, we will use a time-series (2015–2019) regression analysis to study the impact of deference (β_1) on our dependent variables (Y_t):

- (1) the percent change of annual revenue
- (2) the percent change of annual expenditures
- (3) the number of administrative enforcement actions; and
- (4) the number and type of regulatory changes

$$Y_t = \beta_0 + \beta_1(\text{dependent})_t + \beta_1(\text{population})_t + \beta_1(\text{GDP})_t + \beta_1(\text{tax revenue})_t + \beta_1(\text{unemployment})_t + \beta_1(\text{legis. control})_t + \beta_1(\text{gov. party})_t + u$$

We considered the following control variables in the regression: state population, measured in thousands of people, the gross state product in millions of dollars, tax revenue collected in millions of dollars, the state unemployment rate, and the political party in control of the legislature and the governor's office with a 1 for Democrat and 0 for Republican. Transformations did not yield any additional significance.

3. Results

3.1 Balance of Administrative Code Changes

The repeated ANOVA did not yield significant results on the on our independent variables during our study period. This means we fail to reject the null hypothesis, suggesting that agencies in Ohio and Michigan do not differ significantly in the balance of regulatory changes made during the study period.

We also failed to find a significant difference in percent change in revenue and percent change in budgets when controlling the population, GDP, unemployment, and the political party in control of the legislature.

The regression analysis which included the various controls similarly found that the impact of judicial deference is not significant for administrative code changes. Transformations on the control variables did not yield significant results.

4. Discussion

This sought to examine the effect of removing judicial deference on the growth of regulatory agencies. The results will clarify the role judicial deference (or lack thereof) has on the size and impact of regulatory agencies.

Preliminarily, judicial deference does not appear to have a discernable impact on the balance of regulatory changes in occupational regulatory agencies when comparing Ohio and Michigan over the

study period. We will still analyze the number of agency employees, the amount of dollars in the annual agency budgets, and the number of administrative enforcement actions between 2015 and 2019 to see if the existence of judicial deference has an impact on the size and impact of regulatory agencies.

4.1 Potential Flaws

Licensing boards that were eliminated will skew the analysis if these boards are reduced or eliminated and can therefore no longer issue regulations. Many of these licensing reforms are outside the categories of analysis or in years outside the time period of interest. However, licensing boards could constrain activities if they are feeling pressure by overall reform efforts in their state. Thus licensing boards in both states could reduce regulatory activity as a result of policy and political pressures during the period of study.

Regarding exogeneity, it is possible that the Ohio or Michigan courts have impacted the size of these agencies separately from removing judicial deference. We have not seen any overarching decisions to make us think it impacts exogeneity in this study.

One potential argument against focusing on licensing or sin regulation is that the federal courts have sometimes (though not consistently) declined to apply *Chevron* deference to agency interpretations announced in the context of agency adjudications.

The term “adjudication” refers to a quasi-judicial proceeding conducted within an agency that determines the rights of an individual or identifiable group of individuals. For example, in the occupational licensing context, an adjudication might determine whether an individual teacher accused of misconduct gets to keep her teaching license. “Adjudication” is often contrasted with “rulemaking,” which refers to agency action in which the agency issues an interpretation of a statute that will bind the agency in the future. To return to the teacher licensing context, an agency that issued a rule interpreting a “good moral character” statute to mean that “A teacher who is convicted of a crime shall lose his or her license” is engaged in rulemaking.

Some of the rationales for judicial deference to rulemaking do not apply as well or at all to adjudications. One problem is that adjudications often apply to conduct that has already occurred (as with the teacher alleged misconduct example above.) Interpreting an ambiguous law to retroactively change the legal consequences of actions that have already occurred arguably violates the Constitution’s prohibition on ex post facto laws and guarantees of due process. But even when not technically a constitutional violation, punishing individuals for conduct that was not clearly illegal at the time committed is fundamentally unfair. Another is that while it is generally readily ascertainable whether Congress has delegated its authority to an agency to adopt binding rules, it has proven harder to discern which interpretations announced in adjudications carry the force of law.⁴¹ Rulemaking also typically is open to the public so that agencies can benefit from the input of people likely to be affected by a rule before it is officially announced. Adjudications do not usually involve feedback from the broader public.

Federal courts have therefore only inconsistently applied *Chevron* to federal agency adjudications. Given the mixed precedent and the reasons why *Chevron* should not apply, some prominent scholars have compellingly argued that the Court should abandon deference in this context altogether.⁴²

Because occupational licensing agencies and sin regulation agencies do much of their regulatory enforcement through adjudications, abolishing judicial deference might have little effect on their work.

But at least in Ohio, state courts have not recognized this distinction and have applied judicial deference to interpretations announced in agency adjudications.⁴³ So while differences in the application of judicial deference to adjudications as opposed to rulemaking might affect the results of a similar study in other states, it should not affect ours.

4.2 Future Research

This is the first study to look at the impact of state judicial deference on state agencies. There is the potential for far more research in this area. Research can expand on what we have done by incorporating more or different states, a pre- and post-study, different agencies, different dependent variables, and improving on our methods.

Several other states besides Michigan have removed judicial deference.⁴⁴ These states offer opportunities to study the impact of judicial deference across the nation comparing two or more states. Many of these states have also recently changed their regimes, allowing for data collection now to eventually perform a pre- and post-study using a difference-in-differences model.

We attempted to identify agencies most affected by judicial deference given existing literature of deference studies at the federal level and the difference in states' powers and responsibilities. Future research could incorporate different agencies or all agencies to test which ones are impacted, if any, at the state level or the possible differences in the removal of deference protections between similar agencies at the state and federal levels.

In addition, future research can improve on our methodology and test different measures for how judicial deference may impact an agency.

We do want to throw out a note of caution. In Michigan, the state's Supreme Court ended judicial deference. We do not consider the courts to have a direct impact on the size of an agency; however, legislatures do have a much greater and more direct impact on the size of an agency. We note that there may be exogeneity issues in states where the legislature ended judicial deference. The theory is that legislatures that are more concerned with regulatory power may already be more limiting in their statutes and delegation than legislatures that are not.

4.3 Conclusion

Our initial results suggest that judicial deference has no impact on the measures selected to represent the size and scope of regulatory agencies. It is possible that the conventional wisdom about ending judicial deference's effects is correct and that the results simply reflect the limitations inherent in our study. Perhaps regulatory power in a five-year period is not a good measure.

Despite this finding, there may be other good reasons to advocate for ending or limiting judicial deference, such as fidelity to separation of powers principles or state administrative procedure statutes. But this initial study suggests that at least in the short term, it is not clear that limiting the growth of the administrative state is among the most important of them.

Appendix

Matched Agencies

General Name	Ohio Agency	Michigan Agency
Accountancy	Accountancy Board of Ohio	Accountancy
Barbers	Ohio State Barber Board	Barbers
Optometry	State Board of Optometry	Optometry
Gaming	Casino Control Commission	Michigan Gaming Control Board
Chiropractic	Ohio State Chiropractic Board	Chiropractic
Cosmetology	Ohio State Board of Cosmetology	Cosmetology
Social Work	Counselor, Social Worker, and Marriage and Family Therapist Board	Social Work
Dentistry	State Dental Board	Dentistry
Funeral Directors	State Board of Embalmers and Funeral Directors	Funeral Directors (Mortuary Science)
Professional Engineers	State Board of Engineers and Surveyors	Professional Engineers
Liquor Control	Liquor Control Commission	Michigan Liquor Control Commission (MLCC)
State Lottery	Lottery Commission	Bureau of State Lottery
Nursing	Board of Nursing	Board of Nursing
Pharmacy	State Board of Pharmacy	Board of Pharmacy
Psychologist	State Board of Psychology	Psychologist
Racing	State Racing Commission	Horse Racing
Sanitarian	Board of Sanitarian Registration	Sanitarians Registration
Audiologist	Board of Speech-Language Pathology and Audiology	Audiologist
Veterinary Medicine	Veterinary Medical Licensing Board	Board of Veterinary Medicine

	Ohio	Michigan
Total Population July 1, 2021	11,780,017	10,050,811
Over 65 population percentage, July 1, 2021	17.5%	17.7%
Median Income (2018)	\$54,533	\$54,938
State Ranking in Population Growth (2014-2019)	34th	35th
Unemployment Rate March 2020	5.30%	5.30%
Average Employment Growth (2018)	2.60%	2.60%
Average Growth Rate of Gross State Product (2014-2019)	1.50%	1.90%

Note: Data From the Census Bureau and Ibisworld Reports available at <https://www.ibisworld.com/united-states/economic-profiles/ohio/#CovidImpact> and <https://www.ibisworld.com/united-states/economic-profiles/michigan/> <https://www.census.gov/quickfacts/OH>

Notes

¹ 467 U.S. 837 (1984.)

² *Id.* at 842-3.

³ See, e.g., *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (opinion authored by now Supreme Court Justice Neil Gorsuch when he was a federal appellate judge); *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J. concurring); Brett M. Kavanaugh, Fixing Statutory Interpretation, 129 HARV. L. REV. 2118, 2150 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)).

⁴ See, e.g., Patrick J. Smith, Chevron's Conflict with the Administrative Procedure Act, 32 Va Tax Rev. 813 (2013), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3742429 and Robert A. Anthony, The Supreme Court and the APA: Sometimes They Just Don't Get It, 10 ADMIN. L.J. AM. U. 1 (1996); Jeffrey Bossert Clark Sr., "Chevron Doctrine Is Opposed to the Administrative Procedure Act's Text and the Legislative History," Legal Opinion Letter, Washington Legal Foundation, August 26, 2016.

⁵ See Cass R. Sunstein, Chevron as Law, 107 Geo. L. Rev. 1613 1632-4 (2019.)

⁶ See, e.g., James Copland, "The Four Horsemen of the Regulatory State," *City Journal*, Summer 2018, available at <https://www.city-journal.org/html/four-horsemen-regulatory-state-16031.html> (critic of *Chevron* arguing that it will tend to strengthen the administrative state). For critics of *Chevron* arguing that it will tend to strengthen the administrative state, see, e.g., Ian Milhiser, "Inside the Most Important Supreme Court Case in Human History," ThinkProgress, Feb. 12, 2016, available at <https://archive.thinkprogress.org/inside-the-most-important-supreme-court-case-in-human-history-c6b3c1123fa7/> (arguing for importance of preserving *Chevron*, among other pro-administrative state doctrine, to preserve climate regulation.); Ian Milhiser, "Brett Kavanaugh's Kavanaugh's Court begins its inevitable power grab with *Kisor v. Wilkie*," ThinkProgress, December 10, 2018, available at <https://archive.thinkprogress.org/brett-kavanaughs-court-threatens-auer-deference-80f4b3e3169d/> (critics of *Chevron*, particularly those affiliated with the Federalist Society, "hate agency regulation with the white-hot intensity normally associated with jilted lovers and Captain Ahab."

⁷ *Opus III-VII Corp. v. Ohio State Bd. of Pharmacy*, 109 Ohio App.3d 102, 671 N.E.2d 1087 (Ohio App. 1996.)

⁸ 157 Ohio St. 235, 247; 134 N.E.3d 1157, 1169 (Ohio 2019.)

⁹ *Id.*

¹⁰ *State ex rel. McCann v. Delaware Cty. Bd. of Elections*, 2018-Ohio-3342, 155 Ohio St. 3d 14, 21, 118 N.E.3d 224, 231.

¹¹ *In re Ohio Edison Co.*, 2019-Ohio-2401, 157 Ohio St. 3d 73, 88, 131 N.E.3d 906, 922.

¹² *In re Complaint of Rovas Against SBC Michigan*, 482 Mich. 90, 111, 754 N.W.2d 259, 272 (2008).

¹³ *In re Complaint of Rovas Against SBC Michigan*, 482 Mich. 90, 111, 754 N.W.2d 259, 272 (2008).

¹⁴ Eskridge Jr., William N. and Lauren E. Baer. "The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from *Chevron* to *Hamdan*." *The Georgetown Law Journal* 96 (2008): 1083-1226.

¹⁵ *Dent v. West Virginia*, 129 US 114, 1989.

¹⁶ *North Carolina State Board of Dental Examiners vs. the Federal Trade Commission*, 574 US 494, 2015.

¹⁷ The White House, *Occupational Licensing a Framework for Policymakers*, July 2015.

¹⁸ Dick M. Carpenter II, Lisa Knepper, Angela C. Erickson, and John K. Ross *License to Work A National Study of Burdens from Occupational Licensing*, Institute for Justice, 2012.

¹⁹ Morris Kleiner and Evgeny Vоротkinov, The Economic Effects of Occupational Licensing Among the States, Working Paper, University of Minnesota, January 2015.

²⁰ Kelly Bomba and Joe McDaniels, *Final Analysis H.B. 442, Ohio 133rd General Assembly*, Ohio Legislative Service Commission, February 15, 2021.

²¹ Daniel DeSantis, *Fiscal Analysis S.B. 7, Ohio 133rd General Assembly*, Ohio Legislative Service Commission, February 20, 2020.

²² Abby McMahon and Kelly Boomba, *Fiscal Analysis Am. Sub. S. B. 255*, Ohio Legislative Service Commission, 2018.

- ²³ [Michigan House Bill 4688](#), LegiScan, 2014, and [Michigan House bill 4608](#), 2017.
- ²⁴ [Michigan House Bill 5955](#), 99th State Legislature, 2018.
- ²⁵ Margaret Love and David Schlüssel “[Legislative Report Card: The Reintegration During the Pandemic](#)”, Collateral Consequences of Criminal Conviction and Restoration of Rights, January 25, 2021.
- ²⁶ Forbes Magazine “[America’s Fastest Dying Cities](#)”, Forbes Magazine, August 5, 2008.
- ²⁷ Stulberg, Edward B. “Selected Provisions of Illinois, Michigan and Ohio: A Study in Application and Justification”, *Michigan Law Review* 57 (1959): 864-884.
- ²⁸ Nightingale, Demetra Smith, Kathleen Brennan, Jabari A. D. Young. “[Issues and Options for Cross-State Analysis of Spending Patterns in the Midwest](#).” The Urban Institute, March 1, 2008.
- ²⁹ Ortner, Daniel. “The End of Deference: How States Are Leading a (Sometimes Quiet) Revolution Against Administrative Deference Doctrines.” [Available at SSRN](#) (2020).
- ³⁰ Eskridge Jr., William N. and Lauren E. Baer. “The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from *Chevron* to *Hamdan*.” *The Georgetown Law Journal* 96 (2008): 1083-1226.
- ³¹ We confirmed that deference cases have included these areas in Ohio or Michigan.
- ³² Gobbo, Nicolas, email message to Keelyn Gallagher, October 15, 2021
- ³³ “Expenses by Agency.” Ohio Checkbook - State Agencies. Ohio.gov. Accessed October 1, 2021. <https://checkbook.ohio.gov/State/Expenses/Agency.aspx>.
- “Department of Administrative Services > Divisions > Human Resources > Policy Development > State Employee Data > State Employee Trend Reports.” Department of Administrative Services. Ohio.gov. Accessed October 1, 2021. <https://das.ohio.gov/Divisions/Human-Resources/HRD-OCB-Policy/State-Employee-Data/State-Employee-Trend-Reports>.
- ³⁴ “The Annual Reports for the State Cosmetology and Barber Board.” Ohio State Cosmetology and Barber Board. Ohio.gov. Accessed October 1, 2021. <https://cos.ohio.gov/FOR-THE-PUBLIC/ANNUAL-REPORTS>.
- ³⁵ Administrative code updates change the regulatory power of an agency in different ways, some more significant than others –changing the licensing fee from \$75 to \$100 is less significant than requiring an entirely new occupation to get licensed.
- ³⁶ United States Census Bureau, Population, Population Change, and Estimated Components of Population Change: April 1, 2010 to July 1, 2019 (CO-EST2019-alldata), distributed by United States Census Bureau, <https://www.census.gov/data/datasets/time-series/demo/popest/2010s-counties-total.html>.
- ³⁷ U.S. Bureau of Economic Analysis, Gross Domestic Product: All Industry Total in Michigan [MINGSP], retrieved from FRED, Federal Reserve Bank of St. Louis; <https://fred.stlouisfed.org/series/MINGSP>, October 1, 2021.
- ³⁸ “How Do Current Year Tax Collections Compare to Prior Years?” State Budget Office - How do current year tax collections compare to prior years? Michigan.gov. Accessed October 1, 2021. https://www.michigan.gov/budget/0,9357,7-379-88601_91413_91645-301767--,00.html; Mclain, Jeffrey A. Ohio Department of Taxation Fiscal Year 2019 Annual Report. PDF file. https://tax.ohio.gov/static/communications/publications/annual_reports/2019AnnualReport/AR2019.pdf
- ³⁹ “Michigan Economy at a Glance.” U.S. Bureau of Labor Statistics. U.S. Bureau of Labor Statistics. Accessed October 1, 2021. <https://www.bls.gov/eag/eag.mi.htm>; “Ohio Economy at a Glance.” U.S. Bureau of Labor Statistics. U.S. Bureau of Labor Statistics. Accessed October 1, 2021. https://www.bls.gov/eag/eag.oh.htm#eag_oh.f.1.
- ⁴⁰ Mahoney, John, and Ben Williams. “State Partisan Composition.” State partisan composition. National Conference of State Legislatures, September 14, 2021. <https://www.ncsl.org/research/about-state-legislatures/partisan-composition.aspx>; “Michigan’s Governors, 1835 to Present.” Former Governors - Michigan’s Governors, 1835 to Present. Michigan.gov. Accessed October 1, 2021. <https://www.michigan.gov/formergovernors/0,4584,7-212--54132--,00.html>; “Governors of the State of Ohio: 1788 - Present” Ohio Secretary of State. Accessed October 1, 2021. <https://www.ohiosos.gov/elections/election-results-and-data/historical-election-comparisons/governors-of-the-state-of-ohio-1788-present/>.
- ⁴¹ Hickman and Nielson at 938.
- ⁴² Hickman and Nielson...
- ⁴³ See, e.g., *In re Determination of Existence of Significant Earnings*, 162 Ohio St. 651 (2020); *In re Application of Ohio Edison Company*, 157 Ohio St. 3d 73 (2019); *In Matter of Avery Health Care Center*, 155 N.E. 3d 286 (2020). *Compare State ex rel. DeMuth v. State Board of Education*, 110 Ohio App. 3d 430 (1996) (applying judicial deference to the application of a rule at the declaratory judgment stage.)
- ⁴⁴ Ortner, Daniel. “The End of Deference: How States Are Leading a (Sometimes Quiet) Revolution Against Administrative Deference Doctrines.” [Available at SSRN](#) (2020).