CHEVRON IN THE STATES? NOT SO MUCH

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INTRODUCTION

In the years since the U.S. Supreme Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[1] many in the judiciary and the academy have questioned its compatibility with our Constitution's separation of powers and the Administrative Procedure Act.[2] Chief Justice Roberts and Justice Alito have objected to what they see as excessive *Chevron* deference, relying on Chief Justice Marshall's axiom that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[3] Before joining the Supreme Court, then-Judge Gorsuch expressed serious doubts about *Chevron* deference

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[1] 467 U.S. 837 (1984).

[2] 5 U.S.C. § 706 (2018) (directing federal courts to "decide all relevant questions of law" and "interpret constitutional and statutory provisions").

[3] City of Arlington v. FCC, 569 U.S. 290, 316 (2013) (Roberts, C.J., dissenting) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

altogether.[4] Yet, *Chevron* deference in federal courts is still alive, though it is uncertain for how long.[5]

Aside from federal law, there has been a recent surge in states abandoning their own standards of judicial deference to administrative agencies' interpretations of statutes. In 2018 alone, four states relinquished their past deference doctrines and instituted de novo review in questions of statutory interpretation, even where agencies are involved in cases. The Mississippi Supreme Court unanimously decided to no longer grant agencies any level of deference, turning to review of agency interpretations de novo as a matter of law.[6] Over vigorous dissent, the Wisconsin Supreme Court ended its "practice of deferring to administrative agencies' conclusions of law," by redefining its doctrine of "due weight" deference and eliminating entirely its "great weight" deference regime.[7] In Florida, voters approved a state constitutional Amendment ("Amendment 6") which, among other things, eliminated the deference given to administrative agencies in interpreting statutes or rules.[8] Judicial officers in Florida are now required to interpret such statutes and rules de novo.[9] And in Arizona, the legislature enacted a law establishing de novo review of interpretations of state statutes by state agencies.[10]

This Comment surveys all fifty states' and the District of Columbia's levels of deference to state administrative agencies' interpretations of state statutes. In this endeavor, this Comment

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[4] Gutierrez–Brizuela v. Lynch, 834 F.3d 1142, 1158 (10th Cir. 2016) (Gorsuch, J., concurring).

[5] *See, e.g.*, Kisor v. Wilkie, 139 S. Ct. 2400, 2425 (2019) (Roberts, C.J., concurring).

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

[7] Tetra Tech EC, Inc. v. Wis. Dep't of Revenue, 914 N.W.2d 21, 28, 30 (Wis. 2018).

[8] Brittany Adams Long, Donna Blanton, & Travis Miller, *Practical Implications of Amendment 6 in Administrative Law Disputes*, ADMIN. L. SEC. NEWSL., (Fla. Bar, Tallahassee, Fla.), June 2019, at 1, http://flaadminlaw.org/wp-content/uploads/2019/06/Adm-06-19.pdf [https://perma.cc/PAZ7-74KA].

[9] FLA. CONST. art. V, § 21 ("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.").

[10] ARIZ. REV. STAT. ANN. § 12-910(E) (2018) ("In a proceeding brought by or against the regulated party, 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.").

principally analyzes state appellate court decisions, but also state constitutions and state statutes when they are used to explicate the various doctrines in the states. The goal of this Comment is to provide a total picture of all the levels of deference across the United States.

I. SUMMARY OF THE FINDINGS

There is a remarkable variation of deference doctrines among the states. That said, states that apply pure *Chevron*-style review are outnumbered by states that apply less deferential standards by more than a 2-to-1 ratio. Fourteen states and the District of Columbia apply *Chevron*-type deference, while thirty-six states have de novo review or hybrid standards.

The most common type, applied by twenty-five states, is de novo review. The states that follow this standard are as follows: Arizona, Delaware, Florida, Kansas, Michigan, Mississippi, Montana, Nevada, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Virginia, Wisconsin, Wyoming, Nebraska, Missouri, New Mexico, California, Louisiana, Maryland, Massachusetts, Washington, and New Hampshire. These states actually have quite a diverse set of considerations under their standards, but broadly, they either do not apply any level of deference, or the deference given is so slight as to have no consequence on the outcome of cases.

Included among the states with de novo review are those that apply a *Skidmore* test— California, Louisiana, Maryland, and Massachusetts. These four states follow a *Skidmore*-type rule, which is essentially de novo review in practice, characterized by giving weight, but not deference, to agency expertise and consistency of interpretation over time. The recent trend in the states is to cast aside *Chevron*-type review and institute de novo review, with four states doing so in 2018. In fact, it appears that twelve states have established de novo review just in the last twenty years. Notably, two of the states that turned to de novo review in 2018 enacted this reform outside of the judiciary, Florida by constitutional amendment and Arizona by legislative process.

The second most common class is *Chevron*-type review, applied by fourteen states and the District of Columbia. Alabama,

Colorado, Connecticut, District of Columbia, Georgia, Hawaii, Idaho, Indiana, Kentucky, Maine, Minnesota, New Jersey, Ohio, South Carolina, Vermont, and West Virginia have all established a *Chevron*-type standard of review. The respective standards in these states expressly adopt or follow *Chevron*, use nearly the exact steps as *Chevron*, or apply as strict (or stricter) a standard as *Chevron* in practice. Three of the *Chevron*-type states—Connecticut, Idaho, and Vermont—have adopted *Chevron*-like step zero tests that mirror the *Mead* and *Barnhart* standards.

The last type categorized in this Comment is the Hybrid type. The eleven states classified under the Hybrid type apply myriad standards. These states are Alaska, Arkansas, New York, North Carolina, North Dakota, Oregon, Pennsylvania, Texas, Iowa, Illinois, and Minnesota. Five states—Alaska, Arkansas, Illinois, Minnesota, and North Carolina—incorporate elements from both *Chevron* and *Skidmore* under a single standard I am terming Chevmore. Alaska and six other states—Iowa, New York, North Dakota, Oregon, Pennsylvania, and Texas—have adopted step zero tests to determine whether to accord deference agency interpretations. Alaska, Iowa, New York, North Dakota, and Oregon incorporate step zero tests that resemble the *Mead* and *Barnhart* standards. Pennsylvania has adopted a step zero test that looks more like the *Christensen* rule, and the step zero consideration in Texas is distinctive in that it considers the multiple common meanings of the statutory terms being interpreted. Some Hybrid states consider factors that are more or less unique, such as the kind of discretionary authority granted by the legislature (like Iowa) or the category of the statutory term being interpreted (like Oregon and Texas).

There is a potential source of confusion common among the states identified under the Hybrid type. In many of the Hybrid-type states, the announced rule is that questions of law (including statutory interpretation) are reviewed de novo. Then, often in the next sentence, it is announced that nevertheless, agency interpretations of statutes they are charged to enforce are given substantial deference. The level of deference applied is different depending on the state, but the use of seemingly incompatible terms can easily perplex those attempting to understand these doctrines. The term "de novo" in this context usually connotes

reviewing an interpretation afresh and without regard to other interpretations. The term "deference," on the other hand, implies a sort of submission, or at least great consideration, to an interpretation that did not originate with the court. These terms, then, are seemingly antithetical. Courts of Hybrid-type states have tried to reconcile this issue by using "deference" as a stand-in for "weight" or "consideration." Thus, this kind of deference can diverge quite far (and is much less consequential) from the deference applied in *Chevron* and *Chevron*-type states. This problem of terminology has been recognized in states like Virginia and Wisconsin, which have gone at lengths to explain the distinction between the concepts of "deference" and "weight." Moreover, the Mississippi Supreme Court cited the inconsistency of applying de novo review and deference as one of the reasons for abandoning its deference doctrine. Regardless of what standard a state chooses to adopt, each state should take the time to clarify its own terminology. If the Hybrid-type states reconsidered and scrutinized the language used in their own rules, they will be able to simplify and better define their standards of review.

II. *CHEVRON* AND *SKIDMORE*

Before diving into examining the varying deference doctrines across the states, it is vital to clarify the two major strands of federal deference to agency interpretations of statutes; namely, *Chevron* and *Skidmore*. These two standards will more or less provide the framework for classifying the different state doctrines.

Under *Chevron*, courts apply a very deferential standard of review. Generally, a two-step process is followed in applying *Chevron* deference:

> 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.[11]

This Comment categorizes *Chevron*-type states based precisely on whether the state follows this two-step process. In each of the *Chevron*-type states, if the state statute or intent of the legislature is clear, there is no need to defer to the agency's interpretation. But if the statute is decidedly silent or ambiguous as to the issue, the courts in *Chevron*-type states defer to the agency's interpretation if it is reasonable or not clearly erroneous. *Chevron*-type states use the concepts of reasonableness of interpretation and ambiguity in statutory language in analyzing agency interpretations. Moreover, a state is classified under the *Chevron* type if there is nothing in its standard that provides courts the ability and independence to apply their own interpretations, regardless of the reasonableness of the agency's interpretation or ambiguity of the statute. If it is clear or even implied in the standard that courts will be bound to an agency's interpretation if it is reasonable and the statute is ambiguous, the state is categorized in the *Chevron* type.

Chevron doctrine has been further developed in subsequent cases that have dealt with the issue of when to apply *Chevron* deference. The rules established for triggering *Chevron* deference are often referred to as *Chevron* "Step Zero."[12] In *United States v. Mead Corp.*,[13] the Supreme Court held that agency interpretations are not entitled to *Chevron* deference when there is no indication that Congress intended the agency's rulings behind the interpretations to "carry the force of law."[14] Instead, such interpretations may merit some weight under *Skidmore*,[15] which is explained below. Likewise, the Court decided in *Christensen v. Harris County*[16] that that nonbinding interpretations issued

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[11] Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984) (internal footnotes omitted).

[12] *See, e.g.*, Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 192 (2006).

[13] 533 U.S. 218 (2001).

[14] *Id.* at 221.

[15] *Id.* at 235.

[16] 529 U.S. 576 (2000).

informally by the agency, "like [those] . . . contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law," are not entitled to *Chevron* deference.[17] Moreover, in *Barnhart v. Walton*,[18] the Court held, in a majority opinion written by Justice Breyer, that the application of *Chevron* deference depended on "the interpretive method used and the nature of the question at issue."[19] The Court rejected a bright-line rule and instead embraced a case-by-case approach that considers factors such as "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time."[20] Without delving too deeply into the Court's later rulings, *Barnhart*'s case-by-case approach has opened to door to the major questions doctrine. In this Comment, the focus is on how various states have developed their own rules that are similar to *Mead*, *Christensen*, and *Barnhart*. But first, the second major doctrine apart from *Chevron* must be discussed.

Under *Skidmore v. Swift & Co.*,[21] courts apply a relatively less deferential standard. The *Skidmore* standard prescribes the following concerning administrative agency interpretations:

> [W]hile not controlling upon the courts by reason of their authority, [agency interpretations] do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[22]

Following this standard, if a state's doctrine focuses on the interpretation's persuasiveness or the agency's experience or

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[17] *Id.* at 587.
[18] 535 U.S. 212 (2002).
[19] *Id.* at 222.
[20] *Id.*
[21] 323 U.S. 134 (1944).
[22] *Id.* at 140.

expertise, the state is usually classified under the *Skidmore*-type. Another marker of a *Skidmore*-type state is that it factors in the consistency of an agency's interpretation over time. Of course, the factors of expertise and consistency are also discussed in *Mead* and *Barnhart*, and where states have applied rules closely resembling those doctrines it is mentioned. But *Barnhart* and especially *Mead* are closely related to *Skidmore* (*Mead* calls for application of *Skidmore* when appropriate), and thus the issues of expertise and consistency are still broadly classified under the *Skidmore* type in this Comment. Finally, *Skidmore*-type states prefer to use the term "weight" rather than "deference" in applying their analyses. In any event, it is clear from the announced standards in *Skidmore*-type states that courts are not bound by agency interpretations, which do control the judgments of the courts, in keeping with the original *Skidmore* standard quoted above.

Some states use language typical of both *Chevron* and *Skidmore*. If a state mixes the terminology from both standards, discussing reasonableness and expertise, for example, it is more likely to be classified as a Hybrid-type (or even a Chevmore) state. Similarly, other states apply factors distinct from *Chevron* and *Skidmore*, and are also categorized under Hybrid type.

III. SURVEY OF THE STATES

At the outset, it is necessary to explain exactly what types of judicial standards this Comment is focused on. The only doctrines of concern here are those specifically addressing the standard of review in considering state agencies' interpretations of state statutes. Throughout this Comment, a state agency is merely referred to as an agency, and state statutes are just called statutes. Unless explicitly stated otherwise, for the rest this Comment, the agencies and statutes referred to are at the state level, rather than the federal level.

To be clear, this survey does not track how different states review administrative findings of fact. Those standards touch upon an entirely different issue of law. Moreover, this survey is not interested in doctrines concerning agency interpretations of their own regulations, the state counterparts to so-called *Auer* deference. The myriad state doctrines related to the standard for

agency regulations, especially in the aftermath of *Kisor v. Wilkie*,[23] are just as fascinating as the issue discussed in this Comment, but that comparison will have to be taken up on another day. Some states do lump together the standards for statutes and regulations, and where they do, it is noted here. But where, as in most states, the standards are different or are at least separated conceptually, the survey does not cover it.

As explicated above, the first broad umbrella class is the de novo review type. In the states under this category, courts are free to disagree with an agency's interpretation and implement the reading of the statute that the court thinks best. Included under de novo review are *Skidmore*-type states, which stress that the weight given to agency interpretations is dependent on consistency over time, expertise, and other factors. The second broad type is simply called Hybrid. These states combine elements from both *Chevron* and *Skidmore* into their respective standards (the Chevmore states), incorporate step zero considerations before applying deference, or add elements to their doctrines that are more or less unique. And third is the *Chevron* type. These states have very deferential standards and usually follow similar if not the exact same steps as *Chevron* in reviewing agency interpretations of statutes. Naturally, many states do not fit neatly into these types. Thus, where there are significant departures or even small tweaks in the state doctrines that differentiate them from the federal standards and those in other states, it is noted. With the classifications explained, the following section is the fifty-state (plus D.C.) survey.

1. Alabama: Chevron*-Type Rule*

Alabama follows a rule of interpretation similar to its federal counterpart, *Chevro*n. Like *Chevron*, the Alabama rule stresses that the administrative agency must be charged with enforcing the statute that it is interpreting before it is entitled to any deference.[24] Also, like *Chevron*, deference will only be given to an

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[23] 139 S. Ct. 2400 (2019).

[24] *See* Farmer v. Hypo Holdings, Inc., 675 So. 2d 387, 390 (Ala. 1996) ("an interpretation placed on a statute by an administrative agency charged with its enforcement will be given great weight and deference by a reviewing court").

agency if the statute at controversy is ambiguous. "[W]here the language of a statute is plain this Court will not blindly follow an administrative interpretation, but will interpret the statute to mean exactly what it says."[25] If deference is owed, however, the agency's interpretation is binding unless it is unreasonable.[26]

2. Alaska: Chevmore Hybrid Rule (Step Zero Test Like Barnhart *and* Mead*)*

Alaska has a deference rule that may be rightly understood as a hybrid between *Chevron* and *Skidmore* – Chevmore. Alaska's rule incorporates elements of both standards. On one hand, Alaska's deference standard sounds much like *Chevron* with its requirement of reasonableness for an agency interpretation.[27] On the other hand, Alaska's doctrine also factors in *Skidmore*-like factors, deferring to "agency expertise" and applying "a more deferential standard of review where an agency action is longstanding and continuous."[28] These factors are also present in the *Barnhart* case and its progeny. Like *Barnhart*, Alaska's doctrine grants agencies more deference when expertise and continuous interpretations are involved.

Alaska courts "substitute [their] own judgment for questions of law when the statutory interpretation does not involve agency expertise, or the agency's specialized knowledge and experience would not be particularly probative."[29] At that point, they "adopt the rule of law that is most persuasive in light of precedent, reason, and policy."[30] In this sense, Alaska follows an approach like *Barnhart*, and like *Mead*, turns to an interpretive standard more like *Skidmore* when the factors for *Chevron*-type deference are not present.

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[25] *Id.*

[26] *See Ex parte* State Dep't of Revenue, 683 So. 2d 980, 983 (Ala. 1996).

[27] Marathon Oil Co. v. State, Dep't of Nat. Res., 254 P.3d 1078, 1082 (Alaska 2011) ("we give deference to the agency's interpretation [of a statute] so long as it is reasonable").

[28] Premera Blue Cross v. State, Dep't of Commerce, Cmty. & Econ. Dev., Div. of Ins., 171 P.3d 1110, 1119 (Alaska 2007).

[29] Studley v. Alaska Pub. Offices Comm'n, 389 P.3d 18, 22 (Alaska 2017) (internal quotation marks omitted).

[30] *Id.* (internal quotation marks omitted).

3. Arizona: De Novo Review (Abandoned Chevron*-Type Deference in 2018)*

In 2018, Arizona Governor Doug Ducey signed a bill into law which established de novo review for agency interpretations of statutes.[31] As far as the author is aware, Arizona is the only state to amend one of its statutes for the express purpose of ensuring that state courts grant no deference to agencies on questions of law, including interpretations of constitutions, statutes, or agency rules. The amended statute reads as follows:

> In a proceeding brought by or against the regulated party, 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.[32]

4. Arkansas: Chevmore Hybrid Rule (Stress on Persuasiveness and Chevron *Elements)*

The deference standard followed by Arkansas is similar to *Chevron* doctrine yet pulls back from going full *Chevron* in a distinctive way. Like *Chevron*, the Arkansas standard gives greater deference when the agency is charged with the execution of the statute it is interpreting.[33] Moreover, such an interpretation will not be overturned unless it is clearly wrong, similar to *Chevron*'s unreasonableness standard.[34] However, Arkansas grants a small amount of leeway for courts to decide interpretive issues on their own, exemplified in the rest of the language omitted from the quotation above: "the interpretation given a statute by the agency charged with its execution is highly persuasive, and while not conclusive, neither should it be

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[31] Deborah Heller, *Arizona Passes New Law Limiting Deference to Agencies*, PACE LAW LIBRARY BLOG (Apr. 12, 2018), https://lawlibrary.blogs.pace.edu/2018/04/12/arizona-passes-new-law-limiting-deference-to-agencies/ [https://perma.cc/C8PT-X93C].

[32] ARIZ. REV. STAT. ANN. § 12-910(E) (2018).

[33] Sw. Bell Tel. Co. v. Ark. Pub. Serv. Comm'n, 13 S.W.3d 197, 201 (Ark. Ct. App. 2000).

[34] *Id.* ("the interpretation given a statute by the agency charged with its execution . . . should [not] be overturned unless it is clearly wrong").

overturned unless it is clearly wrong."[35] The focus on persuasiveness gives the Arkansas standard a similar feel to *Skidmore*, but since it also incorporates factors associated with *Chevron*, it ultimately has the elements of a Chevmore hybrid standard between the two.

*5. California: De Novo Review (*Skidmore-*Type Rule)*

California's deference standard mirrors the classic *Skidmore* standard in several ways. First, an agency's expertise is a major consideration if that expertise is pertinent to the interpretation. Second, consistency of an agency's interpretation over time is a major marker for the level of deference. California "courts must give great weight and respect to an administrative agency's interpretation of a statute governing its powers and responsibilities. Consistent administrative construction of a statute, especially when it originates with an agency that is charged with putting the statutory machinery into effect, is accorded great weight."[36] Moreover, courts consider whether an agency's interpretation is carried out under California's Administrative Procedure Act. This factor is coupled with the issue of expertise, as interpretations have more weight when there is some level of statutory authority and legitimacy in performing the specialized functions of an agency.[37]

The California rule resembles *Skidmore* in yet another respect: compared to *Chevron*, its language permits independence

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[35] *Id.*; *see also* Brookshire v. Adcock, 307 S.W.3d 22, 26 (Ark. 2009) ("Ordinarily, agency interpretations of statutes are afforded great deference, even though they are not binding. However, although an agency's interpretation is highly persuasive, where the statute is not ambiguous, we will not interpret it to mean anything other than what it says.").

[36] Mason v. Ret. Bd., 4 Cal. Rptr. 3d 619, 624-25 (Cal. Ct. App. 2003) (internal citations omitted); *see also* Ste. Marie v. Riverside Cty. Reg'l Park & Open-Space Dist., 206 P.3d 739, 745-46 (Cal. 2009) ("Significant factors to consider include whether the administrative interpretation has been formally adopted by the agency or is instead in the form of an advice letter from a single staff member, and whether the interpretation is long-standing and has been consistently maintained." (citations omitted)).

[37] Cal. Bldg. Indus. Assn. v. Bay Area Air Quality Mgmt. Dist., 362 P.3d 792, 797 (Cal. 2015) ("In deciding how much weight to give the agency's interpretation, we consider the agency's specialized knowledge and expertise—especially relevant where the statute at issue is a complex, technical one—and whether the agency adopted the interpretation pursuant to the Administrative Procedure Act." (citation omitted)).

for judges in interpreting statutes. While California courts give significant deference when agency expertise and long-running interpretations are involved, the judiciary retains its ability to interpret the statutes at issue. Under California's doctrine:

> [A]lone and apart from the context and circumstances that produce them, agency interpretations are not binding or necessarily even authoritative. . . . The standard for judicial review of agency interpretation of law is the *independent judgment* of the court, giving *deference* to the determination of the agency *appropriate* to the circumstances of the agency action.[38]

6. Colorado: Chevron-*Type Rule*

Colorado follows a *Chevron*-type rule but does not detail the steps of its deference standard. Instead, courts simply look to whether the agency's interpretation is reasonable. Colorado specifically cites state statutory authority for the proposition that courts will correct an agency's erroneous interpretation of a statute.[39] While Colorado's standard is similar to *Chevron*, courts have used more limiting language in opinions that suggest the deference is not quite as strong. In Colorado, the "interpretation of a statute or regulation by the agency charged with its administration is *ordinarily* accorded deference. If it has a reasonable basis in law and is warranted by the record, a court will *generally* accept an agency's interpretation of the statute or regulation."[40]

7. Connecticut: Chevron-*Type Rule (*Skidmore-*ish Language)*

Connecticut's deference standard looks like *Chevron* in key respects, particularly with its reasonableness and empowered-by-statute requirements. A court in Connecticut:

> [A]ffords deference to the construction of a statute applied by the administrative agency empowered by law to carry out the

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[38] Yamaha Corp. of Am. v. State Bd. of Equalization, 78 Cal. Rptr. 2d 1, 8 (Cal. 1998) (internal citations and quotation marks omitted).

[39] *See* COLO. REV. STAT. ANN. § 24–4–106(7) (West 2018).

[40] *See* Stell v. Boulder Cty. Dep't of Soc. Servs., 92 P.3d 910, 915-16 (Colo. 2004) (en banc) (emphasis added) (citations omitted).

> statute's purposes. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is . . . involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion . . . .[41]

Further, however, the Connecticut rule incorporates an element identifiable with *Skidmore*: consistency of an agency's interpretation over time. In Connecticut, a state "agency's interpretation of a statute is accorded deference when the agency's interpretation has been formally articulated and applied for an extended period of time, and that interpretation is reasonable."[42] Of course, these factors are also used under the *Barnhart* rule, and thus this test is a step zero consideration in deciding whether to accord deference.

*8. Delaware: De Novo Review (*Skidmore-*Type Weight)*

Delaware was among the earliest states to expressly overturn its deference doctrine for agency interpretations in favor of de novo review, doing so in 1999. Delaware has distinguished between deference and due weight and has decided to adopt the latter standard. The Delaware Supreme Court declared that its "standard of review for agency interpretation of statutory law is consistent with this Court's standard of *de novo* review of legal rulings by trial courts."[43] *The Public Water Supply Co. decision overruled its past standard because:*

> [R]eview of agency determinations of issues of statutory construction articulated in *Eastern Shore* [was] overly deferential and confusing. . . . Statutory interpretation is ultimately the responsibility of the courts. A reviewing court may accord due weight, but not defer, to an agency interpretation of a statute administered by it.[44]

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[41] City of Meriden v. Freedom of Info. Comm'n, 216 A.3d 847, 852 (Conn. App. Ct. 2019) (citation omitted).

[42] Martorelli v. Dep't of Transp., 114 A.3d 912, 918 (Conn. 2015).

[43] *Public Water Supply Co. v. DiPasquale,* 735 A.2d 378, 381 (Del. 1999) (citations omitted).

[44] *Id.* at 382 (footnotes omitted).

Delaware departs further from *Chevron* in that it rejects *Chevron*'s standard of mere reasonableness.[45] In addition, Delaware, like many other states, distinguishes agency interpretations of statutes from determinations of fact. Agency determinations of fact present an entirely different issue, and the standard on such determinations is written into Delaware's own Administrative Procedures Act. The Delaware Supreme Court explained this standard as the following:

> Deference to administrative agency determinations of fact based on expertise, however, is specifically contemplated by the Administrative Procedures Act which provides [that] . . . [t]he Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of factual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.[46]

Last, the Delaware standard for reviewing agency interpretations of their own regulations is much more deferential than for statutes. Delaware courts "defer to the construction placed by an administrative agency on regulations promulgated or enforced by it, unless shown to be clearly erroneous."[47] This shows a clear example of a court distinguishing between an agency interpretation of its own regulation and an interpretation of a legislative statute. There is a tendency to apply more leniency when agencies are construing their own regulations and be stricter when agencies are interpreting a statute.

9. District of Columbia: Chevron*-Type Review*

The District of Columbia has a review standard that mirrors *Chevron* nearly exactly. The deference doctrine follows the familiar *Chevron*. D.C. courts "first look to see whether the

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[45] *Id.* at 382-83 ("A reviewing court will not defer to such an interpretation as correct merely because it is rational or not clearly erroneous.").

[46] *Id.* at 383 n.9 (quoting DEL. CODE ANN. tit. 29, § 10142).

[47] *Id.* (citation omitted).

statutory language at issue is 'plain and admits of no more than one meaning.'"[48]

D.C. courts follow the statute's plain meaning when it "is unambiguous and does not produce an absurd result."[49] Moreover, D.C. courts even "look to the legislative history" in order discern whether their own interpretations follow "legislative intent."[50] When the statute is ambiguous, however, D.C. courts "defer to an agency's reasonable interpretation of the statute it administers."[51]

10. Florida: De Novo Review by Constitutional Amendment

Florida has established de novo review for agency interpretations of statutes. But unlike Arizona, Floridians overturned the state's former deference doctrine by amendment to the state constitution. The issue was put on the ballot on November 6, 2018, and Florida voters approved the elimination of deference to agency interpretations of statutes (as well their own regulations).[52]

The amendment established Section 21 in Article V of the Florida Constitution, which provides the following: "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, instead, must interpret such statute or rule de novo."[53] Thus, Floridians have not only rejected a state-level *Chevron*-type deference, but have renounced *Auer*/*Kisor*-type deference as well.

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[48] D.C. Appleseed Ctr. for L. & Just., Inc. v. D.C. Dep't of Ins., Sec. & Banking, 214 A.3d 978, 985 (D.C. 2019) (quoting Peoples Drug Stores, Inc. v. District of Columbia, 470 A.2d 751, 753 (D.C. 1983) (en banc) (internal quotation marks omitted)).

[49] McNeely v. United States, 874 A.2d 371, 387 (D.C. 2005) (internal quotation marks omitted).

[50] Thomas v. Buckley, 176 A.3d 1277, 1281 (D.C. 2017) (internal quotation marks omitted).

[51] *Appleseed*, 214 A.3d at 985 (internal citation and quotation marks omitted).

[52] *See* Long, Blanton & Miller, *supra* note 8.

[53] FLA. CONST. art. V, § 21.

11. Georgia: Chevron-*Type Rule (Expressly Adopted* Chevron*)*

Georgia has established a deference doctrine that expressly follows the standard outlined by *Chevron*.[54] The Georgia Supreme Court specified that the deference level state courts apply to "state administrative agency decisions interpreting ambiguous statutes is in accord with that identified by the United States Supreme Court in *Chevron* as appropriate for the judicial review of a federal administrative agency's statutory interpretation. . . . [I]f 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."[55]

12. Hawaii: Chevron-*Type Rule (Some* Skidmore-*ish Language)*

Hawaii follows a rule that incorporates elements of *Chevron* yet places more emphasis on the obligation to follow legislative intent. Moreover, the Hawaii Supreme Court uses somewhat unique language in the explication of its rule. Hawaii courts follow the "well established rule of statutory construction that, where an administrative agency is charged with the responsibility of carrying out the mandate of a statute which contains words of broad and indefinite meaning, courts accord persuasive weight to administrative construction and follow the same, unless the construction is palpably erroneous."[56]

At first glance, the term "palpably erroneous" appears to be yet another standard similarly used by other states that follow *Chevron*, but on further inspection it emerges more complex. "An agency's interpretation of a statute is palpably erroneous when it is inconsistent with the legislative intent underlying the statute."[57] The Hawaii Supreme Court has made clear that "deference to an agency's interpretation of ambiguous statutory

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[54] Cook v. Glover, 761 S.E.2d 267, 271-272 (Ga. 2014) ("the deference Georgia courts accord state administrative agency interpretations is comparable to *Chevron*-style deference").

[55] *Id.* at 271 (citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984)).

[56] *In re* Water Use Permit Applications, 9 P.3d 409, 456 (Haw. 2000) (internal quotation marks omitted).

[57] Gillan v. Gov't Emps. Ins. Co., 194 P.3d 1071, 1081 (Haw. 2008) (citation omitted).

language 'is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history.'"[58] Moreover, Hawaii's use of the term "persuasive weight"—which carries with it *Skidmore*-like connotations—differentiates its standard from *Chevron*. The obligation of Hawaii courts to follow legislative intent, even if it differs from the agency's interpretation, is more pronounced in Hawaii's rule than under *Chevron* and in many other *Chevron*-type states.

13. Idaho: Chevron-*Type Rule (Fourth Step Resembles* Mead *and* Barnhart*)*

Idaho follows a deference standard that resembles *Chevron* in practice, yet the steps it follows are presented differently and the last factor mirrors the *Mead* and *Barnhart* tests, as well as *Skidmore*, in some important respects. The Idaho Supreme Court established a four-prong test for deciding the level of deference to agency interpretations of statutes:

> First, the court must determine if the agency has been entrusted with the responsibility to administer the statute at issue. Second, the agency's statutory construction must be reasonable. Third, the court must determine that the statutory language at issue does not expressly treat the precise question at issue. Finally, under the fourth prong of the test, a court must ask whether any of the rationales underlying the rule of deference are present. If the underlying rationales are absent then their absence may present reasons justifying the court in adopting a statutory construction which differs from that of the agency. If the four-prong test is met, then courts must give considerable weight to the agency's interpretation of the statute.[59]

The first three steps of the test follow the *Chevron* standard, but the last step is more like the *Mead* and *Barnhart* step zero tests. The five rationales underlying the rule of deference are as

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[58] Kanahele v. Maui Cty. Council, 307 P.3d 1174, 1190 (Haw. 2013) (quoting Morgan v. Planning Dep't, Cty. of Kaua'i, 86 P.3d 982, 989 (Haw. 2004) (internal quotation marks omitted)).

[59] Preston v. Idaho State Tax Comm'n, 960 P.2d 185, 187 (Idaho 1998) (internal citations and quotations marks omitted).

follows: "(1) that a practical interpretation of the rule exists; (2) the presumption of legislative acquiescence; (3) reliance on the agency's expertise in interpretation of the rule; (4) the rationale of repose; and (5) the requirement of contemporaneous agency interpretation."[60]

Like *Barnhart* and Skidmore, these rationales are partially focused on agency expertise and consistency of interpretation. However, the factors are part of the fourth step of Idaho's rule, rather than a "step zero" in deciding whether to apply *Chevron* deference at all. The Idaho Supreme Court has explained how the absence of certain rationales affects the level of deference:

> If the underlying rationales are absent then their absence may present "cogent reasons" justifying the court in adopting a statutory construction which differs from that of the agency.
>
> When some of the rationales underlying the rule exist but other rationales are absent, a balancing is necessary because all of the supporting rationales may not be weighted equally. Therefore, the absence of one rationale in the presence of others could, in an appropriate case, still present a "cogent reason" for departing from the agency's statutory construction. Because these rationales are important in determining whether cogent reasons exist for departing from an agency interpretation, we disapprove of the practice of merely concluding that cogent reasons for departing from the agency interpretation exist without any further explanation. If one or more of the rationales underlying the rule are present, and no "cogent reason" exists for denying the agency some deference, the court should afford "considerable weight" to the agency's statutory interpretation. If, on the other hand, a court concludes that the agency is not entitled to receive considerable weight to its interpretation based on the lack of justifying rationales for deference, then the agency's interpretation will be left to its persuasive force.[61]

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[60] Duncan v. State Bd. of Accountancy, 232 P.3d 322, 324 (Idaho 2010) (citation omitted).

[61] J.R. Simplot Co. v. Idaho State Tax Comm'n, 820 P.2d 1206, 1219-20 (Idaho 1991).

The concept in the fourth step of Idaho's standard—the five rationales—hearkens to the idea of *Skidmore* with its stress on the persuasiveness of the agency's interpretation based on factors such as the agency's experience and consistency of interpretation. Moreover, the turn to considering mere "persuasive force" in the absence of these rationales resembles the *Mead* step zero test, which refers courts to the application of *Skidmore* when the agency is not entitled to *Chevron* deference. Moreover, the five rationales themselves resemble the *Barnhart* test in emphasizing agency expertise and longstanding interpretation and conditioning the application of high-level deference on whether the rationales are present.

14. Illinois: Chevmore Hybrid Rule

Illinois has a deference rule that combines elements from both *Chevron* and *Skidmore*. Like *Chevron*, if a statute is "clear and unambiguous," an Illinois court will apply the statute, without deference to any agency's interpretation.[62] But if the statute is ambiguous—meaning it is capable of being understood by reasonably well-informed persons in two or more different ways—a court considers other sources to discern the legislature's intent.[63] An Illinois "court will give substantial weight and deference to an interpretation of an ambiguous statute by the agency charged with administering and enforcing that statute."[64]

The Illinois doctrine also highlights certain *Skidmore*-like factors in order for an agency to be entitled to a presumption of correctness. This element of the state's doctrine is explained as follows by the Illinois Supreme Court: "a reasonable construction of an ambiguous statute by the agency charged with that statute's enforcement, if consistent, contemporaneous, long-continued, and in concurrence with legislative acquiescence, creates a presumption of correctness that is only slightly less persuasive

[62] Davis v. Toshiba Machine Co., Am., 710 N.E.2d 399, 401 (Ill. 1999) (quoting Garza v. Navistar Int'l Transp. Corp., 666 N.E.2d 1198, 1200 (Ill. 1996)).

[63] People v. Jameson, 642 N.E.2d 1207, 1210 (Ill. 1994).

[64] People *ex rel.* Birkett v. City of Chicago, 779 N.E.2d 875, 881 (Ill. 2002) (citation omitted).

than a judicial construction of the same act."[65] This language—stressing consistent and long-standing interpretations—mirrors *Skidmore* and thus the Illinois standard can rightly be considered a Chevmore hybrid rule.

15. Indiana: Chevron*-Type Rule (Strong Version)*

Indiana has established a deference doctrine that follows *Chevron* and uses language which clarifies that its deference is as strong (if not stronger) as any similar *Chevron*-type rule in other states. When an Indiana court "is faced with two reasonable interpretations of a statute, one of which is supplied by an administrative agency charged with enforcing the statute, the court should defer to the agency."[66]

Once it is determined that an agency's interpretation is reasonable, a court terminates its analysis and does not address the other party's interpretation.[67] This termination of analysis is premised on "acknowledging the expertise of agencies empowered to interpret and enforce statutes and increasing public reliance on agency interpretations."[68] In practice, other states that follow the strongest version of *Chevron* do the same thing, but it is uncommon to see a court come right out and say it simply terminates its analysis. Perhaps litigators in Indiana appreciate the clarity and bluntness of the state's deference doctrine; it is clearly among the states that provide to agencies the utmost weight in statutory interpretation.

16. Iowa: Hybrid-Type Rule (Deference Applied When Statute Gives Interpretive Discretion to Agency; Strict Version of Mead*)*

While Iowa acknowledges that, in general, "interpretation of a statute is a matter of law" for courts to decide, it also follows a unique deference rule that focuses on whether an agency has been

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[65] *Id.* (citing People *ex rel.* Watson v. House of Vision, 322 N.E.2d 15, 19-20 (Ill. 1974)).

[66] Ind. Dep't of Envtl. Mgmt. v. Boone Cty. Res. Recovery Sys., Inc., 803 N.E.2d 267, 273 (Ind. Ct. App. 2004) (emphasis omitted) (quoting Shaffer v. State, 795 N.E.2d 1072, 1076 (Ind. Ct. App. 2003)).

[67] *Id.* at 274.

[68] *Id.* at 273 (quoting *Shaffer*,795 N.E.2d at 1076) (emphasis and quotation marks omitted).

granted interpretive discretion by statute.[69] In this sense, because it focuses on whether the agency has purposely been granted discretion, Iowa's standard may be classified as a strict version of the *Chevron* step zero rule under *Mead*. Like several other states, Iowa's doctrine has been established by statute. The Iowa Administrative Procedure Act provides that when statutory "interpretation has clearly been vested by a provision of law in the discretion of the agency," deference is only unjustified when the interpretation is "irrational, illogical, or wholly unjustifiable."[70] However, if the agency "has not been clearly vested with the authority to interpret [a statute]," then an Iowa court will not defer to the agency's interpretation.[71]

Iowa's doctrine is notable for multiple reasons. First, not many other states apply deference only when there is a clear delegation of interpretive authority in a particular statute. Second, it allows the legislature to consider the type of discretion it wants to grant to agencies. Executive branch agencies in the federal government and in many states often have more discretionary power compared to the other branches. At the same time, several state supreme courts (as well as voters and legislatures) have declared judicial supremacy in the interpretation of statutes. But in Iowa, the power is in the legislature to decide when and how agencies are granted discretion in the interpretation of statutes. That is a creative way to ensure the legislature has more control of how the laws it passes are enforced, and it will be interesting to see if any other states follow this approach.

*17. Kansas: De Novo Review (*Skidmore*-Like Language)*

Kansas has overturned its past practice of granting deference to agency's statutory interpretations. Now, agency interpretations are reviewed de novo and are not binding upon Kansas courts.[72] The Kansas Supreme Court made it abundantly clear that the practice of deferring to agency interpretations of law, what Kansas

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[69] State v. Pub. Emp't Relations Bd., 744 N.W.2d 357, 360 (Iowa 2008).

[70] IOWA CODE § 17A.19(10)(*l*) (2020).

[71] Sunrise Ret. Cmty. v. Iowa Dep't of Human Servs., 833 N.W.2d 216, 219 (Iowa 2013).

[72] Cochran v. Kan. Dep't of Agric., 249 P.3d 434, 440 (Kan. 2011).

called the "doctrine of operative construction," has been "abandoned, abrogated, disallowed, disapproved, ousted, overruled, and permanently relegated to the history books where it will never again affect the outcome of an appeal."[73]

18. Kentucky: Chevron*-Type Rule (Adopted Exact Same Analysis as* Chevron*)*

Kentucky has adopted a deference doctrine that is entirely in line with *Chevron*. The Kentucky Supreme Court has stated that when it is in the "form of an adopted regulation or formal adjudication," Kentucky courts "review an agency's interpretation of a statute it is charged with implementing" under the *Chevron* doctrine.[74] If the "statutory language is clear," Kentucky courts do not defer to the agency's interpretation.[75] But if the statute is ambiguous, courts "defer to an agency's reasonable interpretation of the agency's enabling statute."[76] However, if a "statutory ambiguity can be resolved using 'traditional tools of statutory construction . . . [a]n agency's interpretation is not entitled to *Chevron* deference.'"[77] Kentucky stresses that when a court "ascertains that [the legislature] had an intention on the precise question at issue, that intention is the law and must be given effect."[78]

*19. Louisiana: De Novo Review (*Skidmore*-Type Rule)*

Louisiana's doctrine is classified as de novo review because it is like *Skidmore* in that it uses the language of persuasiveness rather than deference. Louisiana has established that "while the administrative construction given to a statute by the agency responsible for its implementation may be a persuasive indication

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[73] Douglas v. Ad Astra Info. Sys., LLC, 293 P.3d 723, 728 (Kan. 2013).

[74] Metzinger v. Ky. Ret. Sys., 299 S.W.3d 541, 545 (Ky. 2009) (internal citation omitted).

[75] Ky. Occupational Safety & Health Rev. Comm'n v. Estill Cty. Fiscal Ct., 503 S.W.3d 924, 927 (Ky. 2016) (citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984)).

[76] *Id*. at 927 (citing *Chevron*, 467 U.S. at 842-43).

[77] *Metzinger*, 299 S.W.3d at 545 (quoting Mid–America Care Found. v. Nat'l Labor Relations Bd., 148 F.3d 638, 642 (6th Cir. 1998) (citing Immigration & Naturalization Serv. v. Cardoza–Fonseca, 480 U.S. 421, 446 (1987))).

[78] *Id.* (quoting *Chevron*, 467 U.S. at 843 n.9.).

of its true meaning in some instances, an administrative interpretation cannot be given weight where it is contrary to or inconsistent with the statute."[79] Louisiana courts stress that statutory "interpretation is the province of the judicial branch of State government."[80] When a statute is ambiguous, "courts will give that construction which best comports with the principles of reason, justice, and convenience."[81]

The Louisiana rule is also similar to *Skidmore* in that it places importance on whether an agency has interpreted a statute consistently over time. In Louisiana, this is called the "doctrine of contemporaneous construction."[82] The doctrine commands that, "when an administrative body has, over a long period of time, placed an interpretation upon a legislative enactment, that interpretation is given substantial and often decisive weight in the legislation's interpretation."[83] However, "while contemporaneous administrative construction of statutes . . . is a persuasive indication of the true meaning of a statute, an administrative interpretation cannot be contrary to the legislative will as expressed in those statutes, and determination of the legislative intent is a judicial matter."[84] Rather, an "administrative construction cannot have weight where it is contrary to or inconsistent with the statute."[85]

20. Maine: Chevron-*Type Review (Adopted Exact Same Analysis as* Chevron*)*

Maine has adopted the *Chevron* doctrine as its own deference standard in analyzing agency interpretations of statutes. The Maine Supreme Court has announced that when state courts review "an agency's interpretation of a statute, we apply the analysis developed by the United States

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[79] City of Baton Rouge/Par. of E. Baton Rouge v. 200 Gov't St., LLC, 995 So. 2d 32, 38 (La. Ct. App. 2008).

[80] Bd. of Tr. of State Emps. Grp. Benefits Program v. St. Landry Par. Bd., 844 So. 2d 90, 97 (La. Ct. App. 2003).

[81] *Id.*

[82] *Id.* at 100.

[83] *Id.*

[84] *Id.*

[85] *Id.*

Supreme Court in *Chevron*."[86] Following *Chevron*'s example, Maine has stated that if "the statute is unambiguous, we do not defer to the agency's construction, but we interpret the statute according to its plain language. If the statute is ambiguous, we defer to the agency's interpretation, and we affirm the agency's interpretation unless it is unreasonable."[87]

*21. Maryland: De Novo Review (*Skidmore-*Type Rule)*

Maryland follows a de novo review standard that is much like *Skidmore* in that it incorporates the persuasiveness of an agency's reasoning and its consistency of interpretation. Maryland applies several factors to determine the amount of weight to give an agency's statutory interpretation. "More weight is appropriate when the interpretation resulted from a process of 'reasoned elaboration' by the agency, when the agency has applied that interpretation consistently over time, or when the interpretation is the product of contested adversarial proceedings or formal rule making."[88] In assessing the proper amount of weight, Maryland courts are to keep "in mind" that it is the judiciary's function to "determine whether an agency's conclusions of law are correct."[89]

While Maryland's rule is clearly less deferential than *Chevron*, it sometimes uses the language of deference. When Maryland courts discuss deference, however, it is often pointed out that deference due to agencies is quite limited. Specifically, "no deference is required to be given to the [agency's] conclusions of law, as issues of law are ultimately within the domain of the Judicial Branch, courts normally give some deference to the [agency's] interpretations of the laws it is authorized to administer."[90] The Maryland doctrine has clarified that in considering "an agency's legal conclusions, a reviewing court accords the agency less deference than with respect to fact-

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[86] Forest Ecology Network v. Land Use Regulation Comm'n, 39 A.3d 74, 91 (Me. 2012)

[87] *Id.* (internal quotation marks omitted).

[88] Md. Dep't of the Env't v. Cty. Comm'rs of Carroll Cty., 214 A.3d 61, 82 (Md. 2019) (citation omitted).

[89] *Id.* (internal citation and quotation marks omitted).

[90] *See* Nat'l Waste Mgrs. v. Forks of the Patuxent, 162 A.3d 874, 885 (Md. 2017).

findings or discretionary decisions."[91] In the place of the language of "deference," Maryland courts prefer the term "careful consideration" in reviewing an agency's statutory interpretation.[92] Thus, it is clear that Maryland understands "deference" as more synonymous with "weight" under *Skidmore*, rather than the deference understood under *Chevron*.

*22. Massachusetts: De Novo Review (*Skidmore-*Type Rule)*

Massachusetts has a de novo standard, with certain *Skidmore*-type elements as well. The state's standard of review is similar to *Skidmore* in that it gives persuasive weight to matters of expertise and specialized knowledge. Massachusetts courts give "due weight" to the "experience" of an agency and its "technical competence and specialized knowledge."[93] Considerable weight is also due when the legislature conferred "discretionary authority" to the agency.[94] In this way, the Massachusetts doctrine is like the Iowa doctrine because it gives legislatures the power to purposely grant agencies some interpretive authority.

However, the Massachusetts rule recalls *Chevron* with its "substantial deference to a reasonable interpretation of a statute by the administrative agency charged with its . . . enforcement."[95] The requirement of a reasonable interpretation is similar to *Chevron*. Yet, Massachusetts clarified that, ultimately, "the duty of statutory interpretation rests in the courts."[96] The application of deference in Massachusetts, like in Maryland, appears much more akin to mere "weight" or "careful consideration" applied in other states. The Supreme Judicial Court of Massachusetts has stated that "deference does not suggest abdication; [a]n incorrect interpretation of a statute is not entitled to deference."[97]

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[91] *Md. Dep't of the Env't*, 214 A.3d at 81 (internal citation omitted).

[92] *Id.*

[93] Van Munching Co. v. Alcoholic Beverages Control Comm'n, 670 N.E.2d 401, 403 (Mass. App. Ct. 1996).

[94] *Id. See also* Souza v. Registrar of Motor Vehicles, 967 N.E.2d 1095, 1097 (Mass. 2012) ("Deference is particularly appropriate when the statute in question explicitly grants broad rule-making authority to the agency.").

[95] Commerce Ins. Co. v. Comm'r of Ins., N.E.2d 1061, 1064 (Mass. 2006).

[96] *Id.*

[97] Craft Beer Guild, LLC v. Alcoholic Beverages Control Comm'n, 117 N.E.3d 676, 683 (Mass. 2019) (alteration in original) (internal quotation marks omitted).

23. Michigan: De Novo Review for Questions of Law (Some Skidmore*-Like Language)*

In 2008, the Michigan Supreme Court clarified the state's deference doctrine, holding that issues of interpretation are reviewed de novo, and that "deference" in the *Chevron* sense is not the rule in Michigan courts.[98] Instead, Michigan courts give "respectful consideration" to agency interpretations of statutes.[99] Michigan courts "may not abdicate their judicial responsibility to interpret statutes by giving unfettered deference to an agency's interpretation."[100] Rather, an agency interpretation is only adopted "to the extent it is persuasive."[101]

Michigan courts follow the standard of review detailed in *Boyer–Campbell Co. v. Fry*,[102] which held:

> [T]he construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. However, these are not binding on the courts, and while not controlling, the practical construction given to doubtful or obscure laws in their administration by public officers and departments with a duty to perform under them is taken note of by the courts as an aiding element to be given weight in construing such laws and is sometimes deferred to when not in conflict with the indicated spirit and purpose of the Legislature.[103]

Thus, while a court must have "cogent reasons" for overruling an agency's interpretation, such an interpretation "is not binding . . . and it cannot conflict with the Legislature's intent as expressed in the language of the statute at issue."[104]

The Michigan Supreme Court further explained that "[r]espectful consideration" is a different concept than "deference"

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[98] *In re* Complaint of Rovas Against SBC Michigan, 754 N.W.2d 259, 267-70 (Mich. 2008).

[99] *Id*. at 270.

[100] *Id*. at 262.

[101] *Id*.

[102] Boyer-Campbell Co. v. Fry, 260 N.W. 165 (Mich. 1935).

[103] *Id.* at 170 (internal citations and quotation marks omitted).

[104] *In re* Complaint of Rovas Against SBC Michigan, 754 N.W.2d 259, 267 (Mich. 2008).

as "commonly used in appellate decisions."[105] The Court firmly rejected adopting *Chevron* as its own state standard:

> The vagaries of *Chevron* jurisprudence do not provide a clear road map for courts in this state to apply when reviewing administrative decisions. Moreover, the unyielding deference to agency statutory construction required by *Chevron* conflicts with this state's administrative law jurisprudence and with the separation of powers principles . . . by compelling delegation of the judiciary's constitutional authority to another branch of government. For these reasons, we decline to import the federal regime into Michigan's jurisprudence.[106]

In sum, Michigan courts "give an administrative agency's interpretation of statutes it is obliged to execute respectful consideration, but not deference."[107]

24. Minnesota: Chevmore Hybrid Rule

Minnesota's deference standard, at first glance, seems like a fairly straightforward application of *Chevron*-type review. Minnesota courts "give deference to an administrative agency's interpretation when the agency is legally required to enforce and administer the [statute] under review" and when the statute is "unclear and susceptible to different reasonable interpretations—ambiguous."[108] A statute "generally should be construed according to [its] plain and ordinary meaning."[109] If the statute is ambiguous, however, and the "agency's interpretation is reasonable," Minnesota courts "defer to the agency's interpretation."[110]

However, other Minnesota appellate opinions seem to follow a standard more in line with *Skidmore* deference. First, Minnesota courts are "not bound by an agency's interpretation of a

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[105] *Id*. at 270 (internal quotation marks omitted).

[106] *Id*. at 271-272.

[107] Saginaw Educ. Ass'n v. Eady-Miskiewicz, 902 N.W.2d 1, 12 (Mich. App. 2017) (citation omitted).

[108] *In re* Minn. Dep't of Nat. Res. Special Permit No. 16868, 867 N.W.2d 522, 527 (Minn. Ct. App. 2015) (internal quotation marks omitted).

[109] Nadeau v. Austin Mut. Ins. Co., 350 N.W.2d 368, 373 (Minn. 1984).

[110] *In re Minn. Dep't of Nat. Res.*, 867 N.W.2d at 527.

statute."[111] Moreover, an agency's construction of a statute is "entitled to some weight" when "(1) the statutory language is technical in nature, and (2) the agency's interpretation is one of long-standing application."[112]

The latter opinions have been neither overturned nor abrogated. It is not immediately apparent that the two deference standards, the *Chevron* type and the *Skidmore* type, are reconcilable. Does a Chevmore standard really work in practice? Why should a court defer to an agency's reasonable interpretation if is not bound to follow it? The older opinions also seemingly preferred the language of "weight" to "deference," and placed importance on expertise and consistency, rather than the familiar *Chevron* steps of ambiguity and reasonableness. Minnesota's deference standard needs to be clarified, and the issue should be a prime candidate for reconsideration by the Minnesota Supreme Court.

25. Mississippi: De Novo Review

In 2018, the Mississippi Supreme Court overturned its practice of giving deference to agency interpretations of statutes and established de novo review.[113] The Court criticized its former standard, pointing out the "contradiction inherent in *de novo* but deferential review" and "claiming to give deference while simultaneously claiming that the Court bears the ultimate responsibility to interpret statutes."[114]

The Court explained that deferential review was inconsistent with the separation of powers under the state constitution.[115] Article 1, Section 2 of the Mississippi Constitution provides that, "No person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belonging

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[111] Glazier v. Indep. Sch. Dist. No. 876, 558 N.W.2d 763, 766 (Minn. Ct. App. 1997) (citation omitted).

[112] Arvig Tel. Co. v. Nw. Bell Tel. Co., 270 N.W.2d 111, 114 (Minn. 1978) (citation omitted).

[113] King v. Miss. Military Dep't, 245 So. 3d 404, 408 (Miss. 2018) ("Pursuant to the foregoing reasoning, we announce today that we abandon the old standard of review giving deference to agency interpretations of statutes.").

[114] *Id.* at 407.

[115] *Id.* at 408 ("interpreting statutes once enacted is the role of the judicial branch").

to either of the others."[116] The Court stated that deferring to an agency's statutory interpretation violated Article 1, Section 2, because the executive branch shares in the exercise of judicial power.[117]

Thus, Mississippi decided to "no longer to give deference to agency interpretations," as "the courts alone" have the role of interpreting statutes.[118] The Mississippi Supreme Court found a concurring opinion of then-Judge Gorsuch convincing: absent deference, courts "would then fulfill their duty to exercise their independent judgment about what the law *is*."[119]

It will be interesting to see if other states follow Mississippi's lead in declaring judicial deference inconsistent with their own state constitutions. Moreover, the contradictions of deference highlighted by the Mississippi Supreme Court are present in many of the standards in other states. Quite often, state supreme courts explicate their standards by stating that statutory construction is a question of law reviewed de novo, and then in the next sentence acknowledge that it defers to agency interpretations. Likewise, many of these courts will begin by stating it is not bound by an agency's interpretation, but then profess that it will not overrule it if it is reasonable. These are, in fact, contradictions, and whether other states begin to clean up their language in their respective standards is something to keep an eye on.

26. Missouri: De Novo Review (Some Deference, but Unlike Chevron*)*

Missouri follows a standard that accords some deference to agency interpretations of statutes, but it is essentially de novo review, unlike *Chevron*. In fact, the only obvious similarity between the Missouri standard and *Chevron* is the requirement of reasonableness for the application of deference: "If the agency's interpretation of a statute is reasonable and consistent with the

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[116] MISS. CONST. art. I, § 2.

[117] *King*, 245 So. 3d at 408.

[118] *Id.*

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

language of the statute, it is entitled to considerable deference."[120] Considerable deference, however, is not applied in Missouri as it is under *Chevron*; rather, it is more like mere *Skidmore* consideration.

The Missouri standard stresses the independent judgment of the courts and not being bound by agency interpretations. Missouri's rule requires that "when an administrative agency's decision is based on the agency's interpretation of law, the reviewing court must exercise unrestricted, independent judgment and correct erroneous interpretations."[121] From that language, it is clear that Missouri's rule is a de novo review standard, with certain *Skidmore*-like consideration—considerable weight—to agency interpretations.

27. Montana: De Novo Review (Same First Step as Chevron*, Essentially De Novo in Second Step)*

Montana has de novo review that resembles *Chevron* in its first step, but instead of deferring to interpretations, courts only give them "respectful consideration;" the Montana Supreme Court has announced that in "reviewing a state agency's interpretation of a Montana statute for correctness, this Court applies a two-step analysis similar to *Chevron* deference . . . but much less deferential."[122] First, Montana courts ascertain whether the language of the statute is ambiguous, while keeping in mind that if "the intent of the Legislature can be determined from the plain meaning of the words used in the statute, the plain meaning controls."[123] If the statute is ambiguous, however, Montana courts only grant "respectful consideration" to agency interpretations.[124]

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[120] Morton v. Mo. Air Conservation Comm'n, 944 S.W.2d 231, 236 (Mo. Ct. App. 1997) (internal citation omitted).

[121] *Id*. at 237. *See also* Maples v. Dep't of Soc. Servs., 11 S.W.3d 869, 871 (Mo. App. S.D. 2000) ("[W]e must form our own independent conclusions, and we are not bound by the interpretation of the agency.").

[122] Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality, 452 P.3d 493, 500 n.9 (Mont. 2019) (internal citations omitted).

[123] Clark Fork Coal. v. Tubbs, 380 P.3d 771, 777 (Mont. 2016).

[124] Mont. Power Co. v. Mont. Pub. Serv. Comm'n, 26 P.3d 91, 94 (Mont. 2001) (quoting Doe v. Colburg, 555 P.2d 753, 754 (Mont. 1976).

The Montana Supreme Court has stressed that courts are not bound by agency interpretations of statutes.[125]

The second step, calling for "respectful consideration," puts courts in no bind to defer to an agency's construction when it is not persuasive. In this sense, the "respectful consideration" idea resembles *Skidmore*. Michigan, Nevada, and Wisconsin also use a "respectful consideration" standard, which is essentially de novo review. After all, courts are always supposed to respectfully consider the parties' arguments before them, but consideration does not entail deference. After respectfully considering an agency's interpretation, a court under this standard is entirely free to adopt a different construction that the court believes is the best.

28. Nebraska: De Novo Review (Some Chevron*-Like Language)*

Nebraska has established a de novo review standard that still incorporates certain language used in *Chevron*. Like *Chevron*, when statutes are plain and unambiguous under the Nebraska rule, deference to agency interpretations is improper.[126] "Resort to contemporaneous construction of a statute by administrative bodies is neither necessary nor proper where the language used is clear, or its meaning can be ascertained by the use of intrinsic aids alone."[127]

However, Nebraska courts emphasize that they will make independent conclusions on statutory interpretation. In Nebraska, "the meaning of a statute is a question of law, and a reviewing court is obligated to reach its conclusions independent of the determination made by the administrative agency."[128] So while Nebraska courts are in no way bound to any agency's statutory interpretation, such an interpretation "may be helpful to this court when reaching its independent conclusion concerning the meaning of a statute."[129] Thus, Nebraska's doctrine is a de

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[125] *Id*.

[126] Ameritas Life Ins. Corp. v. Balka, 601 N.W.2d 508, 511 (Neb. 1999).

[127] City of Lincoln v. First Nat'l Bank, 19 N.W.2d 156, 160 (Neb. 1945) (internal citation and quotation marks omitted).

[128] *Ameritas*, 601 N.W.2d at 515.

[129] *Id*.

novo review standard because courts are independent in regard to judicial construction.

*29. Nevada: De Novo Review (*Chevron*-Like Language)*

Nevada follows a de novo review standard, but includes language that mirrors *Chevron*, even going so far as applying "great deference" in certain circumstances. A Nevada court "reviews de novo pure questions of law, including the administrative construction of statutes."[130] An agency's interpretation of a statute is "entitled to consideration and respect," but "[w]hen the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it."[131] The interpretation of an agency "does not control if an alternative reading is compelled by the plain language of the provision."[132]

However, Nevada courts still "defer" to an agency "if the interpretation is within the language of the statute."[133] A statutory "interpretation by the agency charged with administering a statute is persuasive, and that great deference should be given to that interpretation if it is within the language of the statute."[134] While Nevada may apply "great deference" in certain situations, it is clear from its announced de novo standard that the deference it applies is much weaker that the deference under *Chevron* and in *Chevron*-type states, as courts are not bound by any agency interpretation.

30. New Hampshire: De Novo Review, but Some Limited Deference

The New Hampshire Supreme Court has held that, when an agency interprets its own regulation or a statute it administers,

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[130] Holiday Ret. Corp. v. Nev. Div. of Indus. Rel., 274 P.3d 759, 761 (Nev. 2012). *See also* City of Henderson v. Kilgore, 131 P.3d 11, 13 (Nev. 2006) ("Statutory interpretation is a question of law which this court reviews de novo.").

[131] United States v. State Eng'r, 27 P.3d 51, 53 (Nev. 2001) (alteration in original) (internal quotation marks omitted).

[132] *Id.* (internal quotation marks omitted).

[133] *Dutchess Bus. Servs. v. Nev. State Bd. of Pharm.,* 191 P.3d 1159, 1165 (Nev. 2008).

[134] Nev. Tax Comm'n v. Nev. Cement Co., 36 P.3d 418, 423 (Nev. 2001).

New Hampshire courts provide some "deference" under the state doctrine.[135] But it is clearly a limited standard, and less powerful than *Chevron*. The New Hampshire Supreme Court has stated that while state courts "give some deference to an agency's interpretation of its own regulations or of a statute it administers, '[such] deference is not total.'"[136] When engaging in statutory interpretation, New Hampshire courts are "the final arbiter of the legislature's intent as expressed in the words of the statute considered as a whole," and are "not bound by an agency's interpretation of a statute."[137] Thus, this is not deference in the *Chevron* sense. The New Hampshire standard is essentially de novo review; its deference is more akin to "weight" or "consideration" that accompanies other de novo review doctrines.

31. New Jersey: Chevron*-Type Deference or "Substantial Deference"*

New Jersey follows a standard that provides for "substantial deference" to agency interpretations of statutes that looks much like *Chevron* deference in application. When state agencies are "charged with enforcing a statute interprets that statute," New Jersey courts "give substantial deference to the agency's interpretation."[138] However, if the agency interpretation of a statute is plainly at odds with the plain meaning of the statute, then "the agency interpretation will be set aside."[139] But "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."[140] Thus, New Jersey's deference doctrine follows the *Chevron* steps of looking first to plain language of the statute, and if ambiguous, deferring to an agency's permissible (or reasonable) interpretation.

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[135] Appeal of Michele, 123 A.3d 255, 258 (N.H. 2015).

[136] *Id.* at 258 (quoting *Appeal of Old Dutch Mustard Co.,* 99 A.3d 290, 293 (N.H. 2014)).

[137] *Appeal of Town of Seabrook,* 44 A.3d 518, 525 (N.H. 2012).

[138] Oberhand v. Dir., Div. of Taxation, 940 A.2d 1202, 1207 (N.J. 2008).

[139] *Id.*

[140] *Kasper v. Bd. of Tr. of the Teachers' Pension & Annuity Fund,* 754 A.2d 525, 534-35 (N.J. 2000) (quoting 2 AM. JUR. 2d *Admin. Law* § 525 (1994)).

*32. New Mexico: De Novo Review (*Chevron *and* Skidmore *Elements)*

The New Mexico Supreme Court has stressed that statutory interpretation is an issue of law reviewed de novo.[141] A New Mexico "court is not bound by the agency's interpretation and may substitute its own independent judgment for that of the agency because it is the function of the courts to interpret the law."[142]

However, New Mexico has retained language that mirrors the *Chevron*-type deference standard, with an added element of *Barnhart* or *Skidmore*-like emphasis on agency expertise. New Mexico courts "defer to an agency interpretation if the relevant statute is unclear or ambiguous."[143] Moreover, an agency is entitled to a "heightened degree of deference to . . . special agency expertise or the determination of fundamental policies within the scope of the agency's statutory function."[144] A court "should reverse if the agency's interpretation of a law is unreasonable or unlawful."[145] To put another way, a reviewing court will overturn an agency's statutory interpretation only if it is "*clearly incorrect*."[146]

Thus, New Mexico is yet another state with both de novo review and deference. In the *Morningstar* case, the New Mexico Supreme Court quite emphatically claimed its own independence in interpreting statutes. So, it is apparent that what New Mexico understands as "deference" is not synonymous with the deference applied under *Chevron* and in *Chevron*-type states, where courts are bound to agency interpretations in certain situations. Of course, using the term has the potential to confuse litigators, and New Mexico should perhaps consider clarifying its terms in similar fashion to Michigan and Virginia, for example. But if New Mexico holds to the rule that courts may substitute their own

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[141] *N.M. Att'y Gen. v. N.M. Pub. Reg. Comm'n,* 309 P.3d 89, 93 (N.M. 2013).

[142] Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n, 904 P.2d 28, 32 (N.M. 1995).

[143] Doña Ana Mut. Domestic Water Consumers Ass'n v. N.M. Pub. Reg. Comm'n, 139 P.3d 166, 170 (N.M. 2006).

[144] *Rio Grande Chapter of Sierra Club v. N.M. Mining Comm'n*, 61 P.3d 806, 815 (N.M. 2002) (internal citations and quotation marks omitted).

[145] *N.M. Att'y Gen.,* 309 P.3d at 94 (internal citations and quotation marks omitted).

[146] Bokum Res. Corp. v. N.M. Water Quality Control Comm'n, 603 P.2d 285, 294 (N.M. 1979) (emphasis in original) (citation omitted).

independent judgment regardless of circumstance, it will be classified as a de novo review state.

33. New York: Hybrid Rule (No Deference for Statutory Interpretation; Only if Specialized Knowledge)

New York's standard only applies deference when an agency's statutory interpretation "involves some type of specialized knowledge."[147] By conditioning the application of deference in this way, New York's standard is akin to a restrictive version of *Chevron*'s step zero standard.

The *Chevron* step zero standard under *Barnhart* is somewhat similar since "specialized knowledge" is comparable to the concepts of expertise and complexity. An interpretation based on specialized knowledge could include, for example, an "understanding of underlying operational practices or . . . an evaluation of factual data and inferences to be drawn therefrom."[148] However, courts have explained that:

> [W]here the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency. In such circumstances, the judiciary need not accord any deference to the agency's determination, and is free to ascertain the proper interpretation from the statutory language and legislative intent.[149]

Thus, New York's standard is clearly a hybrid type. Although it is not quite de novo review, due to the "specialized knowledge" component, it provides for far less deference than *Chevron*.

34. North Carolina: Chevmore Hybrid Rule (More Emphasis on Skidmore*)*

North Carolina has announced a standard that includes elements of both *Chevron* and *Skidmore*, but the elements of

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[147] Belmonte v. Snashall, 813 N.E.2d 621, 624 (N.Y. 2004).

[148] Kurcsics v. Merchants Mut. Ins. Co., 403 N.E.2d 159, 163 (N.Y. 1980).

[149] *In re* Gruber, 674 N.E.2d 1354, 1358 (N.Y. 1996) (internal citations and quotation marks omitted).

Skidmore are more prominent. North Carolina courts "give great weight to an agency's interpretation of a statute it is charged with administering."[150] Moreover, a "court should defer to the agency's interpretation . . . [as] long as the agency's interpretation is reasonable and based on a permissible construction of the statute."[151] But, "[u]nder no circumstances will the courts follow an administrative interpretation in direct conflict with the clear intent and purpose of the act under consideration."[152]

However, North Carolina's standard is not equivalent to *Chevron*, and is clearly more in line with *Skidmore*. The North Carolina Supreme Court has announced that "[w]hen the issue on appeal is whether a state agency erred in interpreting a statutory term, an appellate court may freely substitute its judgment for that of the agency and employ *de novo* review."[153] In fact, the Court quoted the exact language from *Skidmore* in explicating its own state standard:

> Although the interpretation of a statute by an agency created to administer that statute is traditionally accorded some deference by appellate courts, those interpretations are not binding. "The weight of such (an interpretation) in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[154]

And notably, North Carolina's dependence on *Skidmore* means that its Chevmore hybrid standard is less deferential than other hybrid standard states.

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[150] High Rock Lake Partners v. N.C. Dep't of Transp., 735 S.E.2d 300, 303 (N.C. 2012).

[151] Cashwell v. Dep't of State Treasurer, 675 S.E.2d 73, 78 (N.C. Ct. App. 2009) (alteration in original) (quoting Carpenter v. N.C. Dep't of Human Resources, 419 S.E.2d 582, 584 (N.C. Ct. App. 1992)).

[152] Watson Indus., Inc. v. Shaw, 69 S.E.2d 505, 511 (N.C. 1952).

[153] *In re* Appeal of N.C. Sav. & Loan League, 276 S.E.2d 404, 410 (N.C. 1981).

[154] *Id.* (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

35. North Dakota: Hybrid Rule (Distinguishes Technical Questions from Questions of Law)

North Dakota's deference standard is similar to New York's. In North Dakota, a state agency's "interpretation of a statute is entitled to some deference if it does not contradict clear and unambiguous statutory language."[155] Moreover, "[w]hen the statute at issue is complex and technical in nature, this deference is appreciable, and [a court] will be reluctant to substitute [its] interpretation for the [agency's] interpretation."[156] So, like New York, North Dakota has created its own step zero rule focusing on the complex and technical nature of the interpretation, which is similar to the considerations under the *Barnhart* standard.

Where the issue is a "nontechnical question of law," however, North Dakota courts do not give deference to an agency.[157] Quoting New York case law, the Supreme Court of North Dakota provided that if "the question is one of pure statutory interpretation dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretive regulations are therefore to be accorded much less weight."[158]

36. Ohio: Chevron*-Type Rule (For Now)*

Ohio applies a strong level of deference for agency interpretations of statutes, ostensibly just as strong as *Chevron*. Ohio courts "must give due deference to an administrative interpretation formulated by an agency which has accumulated substantial expertise, and to which the legislature has delegated the responsibility of implementing the legislative command."[159]

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[155] State *ex rel.* Clayburgh v. Am. W. Cmty. Promotions, Inc., 645 N.W.2d 196, 200 (N.D. 2002).

[156] *Id*. *See also* N.D State Bd. of Med. Exam'rs–Investigative Panel B v. Hsu, 726 N.W.2d 216, 234 (N.D. 2007) ("In technical matters involving agency expertise, an agency decision is entitled to appreciable deference.").

[157] *State ex rel. Clayburgh*, 645 N.W.2d at 200.

[158] *Id.* at 201 (quoting Dworman v. N.Y. State Div. of Hous. & Cmty. Renewal, 725 N.E.2d 613, 619 (N.Y 1999) (internal citation and quotation marks omitted)).

[159] *State ex rel. McLean v. Indus. Comm'n of Ohio,* 495 N.E.2d 370, 372 (Ohio 1986) (citations omitted).

Deference is given to an agency's interpretation of an ambiguous statute "so long as the interpretation is reasonable."[160]

It is of note, however, that as many as four current justices on the Ohio Supreme Court are considering revisiting the state's extremely deferential standard of review.[161] Justice DeWine, in a concurring opinion joined by Justice Fischer, stated that in "an appropriate case, [the Supreme Court of Ohio] ought to take a hard look at [its] practice of deferring to statutory interpretations made by administrative agencies and nonjudicial officials."[162] He opined that giving "deference to an agency's interpretation of a statute is at odds with the separation-of-powers principle that is central to our state and federal Constitutions."[163] Comparing Ohio's standard to *Chevron*, he stated that Ohio's practice "could be seen as more expansive" because the requirement of ambiguity in the statute has not been "consistently imposed."[164] Justice Kennedy, in a dissent joined by Justice French, also seemed open to the idea of taking a fresh look at the deference standard: "I will leave for another day the issue whether the judicial branch truly owes deference to administrative agencies' interpretations of statutes."[165]

37. Oklahoma: De Novo Review

In Oklahoma, no deference is given to agency interpretations of statutes; rather, such interpretations are reviewed de novo. Oklahoma courts "decide questions of law and do not defer to agency interpretation of the Constitution or the statutes."[166] The

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[160] Bernard v. Unemp. Comp. Rev. Comm'n, 994 N.E.2d 437, 440 (Ohio 2013) (citations omitted).

[161] *See* State *ex rel*. McCann v. Delaware Cty. Bd. of Elections, 118 N.E.3d 224 (Ohio 2018).

[162] *Id*. at 231 (DeWine, J., concurring).

[163] *Id*.

[164] *Id*. at 232.

[165] *Id*. at 234 n.2 (Kennedy, J., dissenting). *See also In re* Black Fork Wind Energy, LLC, 124 N.E.3d 787, 799 (Ohio 2018) (Kennedy, J., concurring) (warning against the abdication of the judicial role to "saw what the law is," and abandoning its function "as an independent check on the executive branch" (internal citations and quotation marks omitted omitted)).

[166] Metcalf v. Oklahoma Bd. of Med. Licensure & Supervision, 848 P.2d 48, 50 (Okla. Ct. App. 1992) (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)). The Oklahoma Supreme Court later disapproved *Metcalf*, but that disapproval only

Oklahoma Court of Appeals declared that the "[i]nterpretation of statutory language is a question of law and [Oklahoma courts] review the determination of the language de novo."[167] This principle extends to agency interpretations: "The appellate court will review *de novo* an administrative agency's interpretation of a statute."[168]

38. Oregon: Hybrid Rule (Amount of Deference Depends on the Type of Statutory Term)

Oregon has established a deference standard that is similar to the one applied in Iowa, in that it gives power to the state legislature to decide the type of authority to grant state agencies. Like several other states, Oregon's standard is set out by state statute.[169] Since it focuses on legislative authority given to agencies, it can be seen as a restrictive step zero doctrine, similar to the *Chevron* step zero rule under *Mead*. But Oregon has added another degree of complexity to its doctrine by determining deference levels based on the categorization of specific statutory terms: "The deference we give to an agency's interpretation of a statutory term depends on the nature and scope of authority that the words convey to the agency."[170]

The amount of deference "depends on whether the disputed term is exact, inexact, or delegative."[171] And "[w]hether legislation is exact, inexact, or delegative is itself a question of statutory construction," which means courts must "examine the text of the statute in its context."[172] Exact terms "impart relatively precise meaning, [e.g.], 21 years of age, male, 30 days, Class II farmland, rodent, Marion County."[173] Agency actions arising out of disputes

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extended to an unrelated matter. *See* Davuluri v. State *ex rel.* Okla. Bd. Of Med. Licensure & Supervision, 10 P.3d 198, 202 (Okla. 2000).

[167] Okla. Emp't Sec. Comm'n v. Okla. Merit Prot. Comm'n, 900 P.2d 470, 473 (Okla. Ct. App. 1995).

[168] Laws v. State *ex rel.* Oklahoma Dep't of Human Servs., 81 P.3d 78, 84 (Okla. Civ. App. 2003) (citation omitted).

[169] *See* OR. REV. STAT. § 183.482(8) (West 2020).

[170] Eicks v. Teacher Standards & Practices Comm'n, 349 P.3d 591, 595 (Or. Ct. App. 2015).

[171] Matter of Comp. of Muliro, 380 P.3d 270, 273 (Or. 2016).

[172] *Id.* at 273-74.

[173] Springfield Educ. Ass'n v. Springfield Sch. Dist. No. 19, 621 P.2d 547, 553 (Or. 1980).

concerning exact terms are normally reviewed under a substantial evidence standard.[174] Inexact terms, however, are "less precise" and courts inquire into the legislature's intended use of the term.[175] Further, delegative terms "express non-completed legislation which the agency is given delegated authority to complete."[176] An Oregon court will not defer to an agency's interpretation of a delegative term if the interpretation is "(A) Outside the range of discretion delegated to the agency by law; (B) Inconsistent with an agency rule, an officially stated agency position, or a prior agency practice, if the inconsistency is not explained by the agency; or (C) Otherwise in violation of a constitutional or statutory provision."[177] When a "case involves inexact terms," courts "examine the meaning of the statute without deference to the agency's construction."[178] Likewise, an agency's interpretation of a non-delegative term "is not entitled to deference on review."[179]

39. Pennsylvania: Hybrid Rule (Adopted Chevron *and* Skidmore *Deference for Formal and Informal Interpretations of Statutes, Respectively)*

Pennsylvania has explicitly adopted *Chevron* deference and *Skidmore* deference, and applies either standard depending on the circumstances. In practice, the state's standard looks like a restrictive step zero doctrine. Specifically, it resembles the rule suggested in *Christensen* that nonbinding interpretations issued informally by the agency—such as policy statements, agency manuals, and enforcement guidelines—are not entitled to *Chevron* deference. In Pennsylvania, agency "interpretations that are promulgated in published rules and regulations have been referred to as 'legislative rules' and 'are accorded a particularly high measure of deference[,]' also known as *Chevron* deference,

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[174] *Id.* (citing OR. REV. STAT. § 183.482(8)(c)).
[175] *Id.*
[176] *Id.* at 555.
[177] *Id.* at 556 (quoting § 183.482(8)(b) (internal quotation marks omitted)).
[178] Matter of Comp. of Muliro, 380 P.3d 270, 274 (Or. 2016).
[179] Blachana, LLC v. Bureau of Labor & Indus., 318 P.3d 735, 742 (Or. 2014).

and 'enjoy a presumption of reasonableness.'"[180] On the other hand, rules that are non-legislative, "also known as interpretive rules or guidance documents, such as manuals, interpretive memoranda, staff instructions, policy statements, circulars, bulletins, advisories, [and] press releases are accorded a lesser quantum of deference, also known as *Skidmore* deference," which can be disregarded "when a court is convinced that the interpretative regulation adopted by an administrative agency is unwise or violative of legislative intent."[181]

Regardless of the interpretive type, an "interpretation by the agency charged with the administration of a particular law is normally accorded deference, unless clearly erroneous."[182] The Supreme Court of Pennsylvania has also stressed that an agency's interpretation is never binding on the courts.[183] To evidence that point, the court has "declined to accord **any** deference to an agency's interpretation of a statute where there is nothing in the record indicating that the [agency] had considered and decided [the] issue at a point prior to the instant litigation."[184] So, the lack of consideration or decision by the agency before litigation is yet another step zero issue under the current state standard.

Notably, as many as three of the current justices on the Pennsylvania Supreme Court have expressed their desire to reconsider the state's deference doctrine. In a concurring opinion in *Harmon*, Justice Donohue proposed that an agency's statutory interpretation "is not entitled to any deference in the interpretive process."[185] She explained that the language of the relevant state statute, section 1921(c), "makes clear that courts may **consider** . . . external factors, including administrative interpretations, when interpreting a statute."[186] However, the statute "does not instruct courts to **defer** to agency interpretations . . . when engaging in an

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[180] Harmon v. Unemployment Comp. Bd. of Review, 207 A.3d 292, 299-300 (Pa. 2019) (alteration in original) (footnote omitted) (quoting Nw. Youth Serv., Inc. v. Com., Dep't of Pub. Welfare, 66 A.3d 301, 310-11 (Pa. 2013)).

[181] *Id.* at 300 (internal citations, quotations, and footnote omitted).

[182] *Harkness v. Unemployment Comp. Bd. of Review,* 920 A.2d 162, 171 (Pa. 2007).

[183] *Harmon*, 207 A.3d at 300.

[184] *Id.* (alteration in original) (internal quotation marks omitted).

[185] *Id.* at 309 (Donohue, J., concurring).

[186] *Id.* (citing 1 PA. STAT. AND CONS. STAT. ANN. § 1921(c)).

interpretative analysis."[187] Lastly, she stated that "interpretation of statutes is a question of law for reviewing courts to decide" and that the court should "reject any rule of construction that would require courts to abdicate our judicial role to administrative agencies."[188] Justice Wecht also concurred in *Harmon*, challenging the idea that "reviewing courts should afford what often amounts to unqualified deference—*i.e.*, *Chevron* deference—to an executive-branch agency's interpretation of an ambiguous statute."[189] He opined that state courts "should not delegate their interpretative responsibilities to state agencies."[190]

Justice Mundy, moreover, has requested that the Supreme Court of Pennsylvania revisit its deference standard.[191] He expressed that the "Court has consistently shown a willingness to chip away at the administrative deference rule."[192] Thus, "[i]n lieu of slowly moving this Court's jurisprudence away from the administrative deference rule and leaving litigants with limited guidance as to the rule's applicability," he stated that the "Court should reconsider the line of cases establishing the administrative deference rule."[193]

40. Rhode Island: De Novo Review (Weight and Deference when a Statute is Ambiguous)

Rhode Island has announced a de novo standard for reviewing agency interpretations of statutes. All "questions of law—including statutory interpretation—are reviewed *de novo*."[194] State courts are "free . . . to conduct a *de novo* review of determinations of law made by an agency."[195] Yet, if "a statute's requirements are unclear or subject to more than one reasonable

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[187] *Id*.

[188] *Id*. at 309-310.

[189] *Id*. at 310 (Wecht, J., concurring) (footnote omitted).

[190] *Id*.

[191] Gen. Motors, LLC v. Bureau of Prof'l & Occupational Affairs, 212 A.3d 40, 52 (Pa. 2019) (Mundy, J., concurring and dissenting).

[192] *Id*. at 52 n.2.

[193] *Id*.

[194] Grasso v. Raimondo, 177 A.3d 482, 487 (R.I. 2018) (quoting *Iselin v. Ret. Bd. of Emp. Ret. Sys. of R.I.*, 943 A.2d 1045, 1049 (R.I. 2008)).

[195] Arnold v. R.I. Dep't of Labor & Training Bd. of Review, 822 A.2d 164, 167 (R.I. 2003).

interpretation, the construction given by the agency charged with its enforcement is entitled to weight and deference as long as that construction is not clearly erroneous or unauthorized."[196]

Although the de novo review standard applied in Rhode Island may give more weight and deference to agencies than typical de novo review, the Rhode Island Supreme Court has emphasized that agency interpretations are "not controlling" and that "regardless of . . . deference due, this Court always has the final say in construing a statute."[197] The standard includes *Skidmore*-like language: "[T]he true measure of a court's willingness to defer to an agency's interpretation of a statute depends, in the last analysis, on the persuasiveness of the interpretation, given all the attendant circumstances."[198]

41. South Carolina: Chevron*-Type Rule*

South Carolina has established a *Chevron*-type deference standard in reviewing agency interpretations of statutes. The state follows the steps outlined in *Chevron*. If the language of a statute "directly speaks to the issue," South Carolina courts "must utilize the clear meaning of the statute."[199] However, if "the statute . . . 'is silent or ambiguous with respect to the specific issue,' the court then must give deference to the agency's interpretation of the statute . . . assuming the interpretation is worthy of deference."[200] But "where . . . the plain language of the statute . . . is contrary to the agency's interpretation, the Court

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[196] State v. Swindell, 895 A.2d 100, 105 (R.I. 2006) (internal citations and quotation marks omitted).

[197] *In re* Proposed Town of New Shoreham Project, 25 A.3d 482, 506 (R.I. 2011). *See also* Mancini v. City of Providence, 155 A.3d 159, 168 (R.I. 2017) (stating that the Supreme Court of Rhode Island does not "owe any administrative agency's interpretation blind obeisance").

[198] Unistrut Corp. v. State of R.I. Dep't of Labor & Training, 922 A.2d 93, 101 (R.I. 2007) (alteration in original) (internal quotation marks omitted). *See also Mancini*, 155 A.3d at 168 ("rather than being confronted with a fact-intensive issue or an issue of a technical nature, we are in this case considering a pure question of law, which does not require special expertise beyond what the members of this Court possess").

[199] Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control, 766 S.E.2d 707, 717 (S.C. 2014) (internal citation omitted).

[200] *Id.* (quoting Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984)).

will reject the agency's interpretation."[201] A South Carolina court will "defer to an agency interpretation unless it is arbitrary, capricious, or manifestly contrary to the statute [or regulation]."[202]

42. South Dakota: De Novo Review

South Dakota follows a de novo standard in examining agency interpretations of statutes. "Questions of statutory interpretation are reviewed de novo."[203] The South Dakota Supreme Court has declared that for "questions of law . . . it is well within our province to interpret statutes without any assistance from the administrative agency. . . . [L]acking special circumstances, we see no reason to give deference to agency conclusions of law.[204]

43. Tennessee: De Novo Review (Deference if the Statute is Ambiguous, but Not Binding)

Tennessee has established that, for questions of statutory construction, an "agency's interpretation is a question of law subject to de novo review."[205] Tennessee's de novo standard, however, still incorporates elements found in *Chevron* and *Skidmore*. While "an agency's interpretation of its controlling statutes is entitled to consideration and respect, especially as to doubtful or ambiguous statutes, the agency's interpretation is not binding on the courts."[206] The respect due to interpretations is on account of "administrative expertise," yet such interpretations are always "subject to de novo review."[207] Agency interpretations are

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[201] Sierra Club v. S.C. Dep't of Health & Envtl. Control, 826 S.E.2d 595, 606 (S.C. 2019) (internal citation and quotation marks omitted).

[202] *Id.* (alteration in original) (internal citation and quotation marks omitted).

[203] Midwest Railcar Repair, Inc. v. S.D. Dep't of Revenue, 872 N.W.2d 79, 85 (S.D. 2015) (citing Knapp v. Hamm & Phillips Serv. Co., Inc., 824 N.W.2d 785, 788 (S.D. 2012) (citing S.D. CODIFIED LAWS § 1-26-37)).

[204] Permann v. S.D. Dep't of Labor, Unemp. Ins. Div., 411 N.W.2d 113, 117 (S.D. 1987) (footnote omitted).

[205] Tenn. Dep't of Health v. Sparks, No. M2018-01317-COA-R3-CV, No. M2018-02113-COA-R3-CV, 2019 WL 4235229, at *4 (Tenn. Ct. App. Sept. 6, 2019).

[206] *Id.* (internal citation and quotation marks omitted).

[207] Pickard v. Tenn. Water Quality Control Bd., 424 S.W.3d 511, 523 (Tenn. 2013).

"entitled to consideration and respect and should be awarded appropriate weight," but are never "binding on the courts."[208]

44. Texas: Hybrid-Type Rule (Deference with Ambiguous Statutes, but if an Undefined Term has Multiple Common Meanings, Apply the Definition Most Consistent with Statutory Scheme)

Texas has announced a de novo review standard, but upon closer examination, it is clear that it is yet another Hybrid-type state that defers to agency interpretations in certain situations. In Texas courts, the "construction of a statute is a question of law" is reviewed "de novo."[209] Deference is due "to agency interpretations of statutes only if they are ambiguous, provided that the agency's interpretation is reasonable and does not conflict with the plain language of the statute."[210] However, even "if an undefined term has multiple common meanings, it is not necessarily ambiguous," and Texas courts "will apply the definition most consistent with the context of the statutory scheme."[211] The analysis of "multiple common meanings" under the Texas standard may very well be understood as a step zero consideration.

The Texas Supreme Court has "never expressly adopted the *Chevron* or *Skidmore* doctrines," but concedes that the deference standard in Texas is "similar."[212] *The court* labeled its own standard a "serious consideration" inquiry (language comparable to *Skidmore*), stating that Texas courts should "generally uphold an agency's interpretation of a statute it is charged by the Legislature with enforcing" when it is "reasonable and does not contradict the plain language of the statute."[213] Yet, the reasonableness language is most akin to *Chevron*; thus it is

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[208] *Id.* (quoting Nashville Mobilphone Co. v. Atkins, 536 S.W.2d 335, 340 (Tenn. 1976)).

[209] Thompson v. Tex. Dep't of Licensing & Regulation, 455 S.W.3d 569, 571 (Tex. 2014) (citing First Am. Title Ins. Co. v. Combs, 258 S.W.3d 627, 631 (Tex. 2008)).

[210] *Id.* (citing *R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water,* 336 S.W.3d 619, 625 (Tex. 2011) (stating that another factor warranting deference is when the agency's interpretation has been formally adopted)).

[211] *Id.* (citing *State v. $1,760.00 in U.S. Currency,* 406 S.W.3d 177, 180-81 (Tex. 2013)).

[212] *R.R. Comm'n, 336 S.W.3d at 625.*

[213] *Id.* (internal citation and quotation marks omitted).

apparent that Texas should be classified as a Hybrid type. And while the Texas standard is a Hybrid type, it is not a typical Chevmore state, since it also incorporates elements of de novo review and considers the multiple meanings of undefined terms.

45. Utah: De Novo Review (Little or No Deference, Review for Correctness)

Utah has established what is essentially a de novo standard of review for statutory interpretations by state agencies, despite the term's absence from the language of the announced doctrine. Utah courts review agency's interpretations for correctness, "granting little or no deference to the agency's determination."[214] In considering an agency's "interpretation of its statutorily granted powers and authority," it is viewed as a "question of law, with no deference to the agency's view of the law."[215] Instead of deferring to an agency's interpretation when faced with an ambiguous statute, Utah courts "use extrinsic interpretive tools such as policy and legislative intent to guide" the statutory analysis.[216]

46. Vermont: Chevron*-Type Rule (Extreme Version, Step Zero Consideration for Expertise)*

Vermont's standard for reviewing agency interpretations of statutes is an extremely deferential one. It is similar to *Chevron* in that it factors in a statute's ambiguity, but it does not stress that an interpretation needs to be reasonable. Rather, Vermont has established a step zero standard depending on agency expertise. This is similar to the step zero rule announced in *Barnhart*, albeit the focus is solely on expertise in Vermont. The Vermont Supreme Court has stated that when a "statute is either silent or ambiguous concerning a particular question, deference must be

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[214] *Utah Chapter of the Sierra Club v. Utah Air Quality Bd.,* 148 P.3d 960, 965 (Utah 2006).

[215] *Bevans v. Indus. Comm'n of Utah,* 790 P.2d 573, 576 (Utah Ct. App. 1990). *See also* Bennion v. Graham Res., Inc., 849 P.2d 569, 570 (Utah 1993) ("[W]e review the Board's interpretation of the applicable statutes for correctness and give its view on the matter no particular deference.").

[216] *R & R Indus. Park, LLC. v. Utah Prop. & Cas. Ins. Guar. Ass'n,* 199 P.3d 917, 923 (Utah 2008).

given to the agency's interpretation of a statute within the agency's area of expertise."[217] Vermont's deference doctrine is one of the strongest *Chevron*-type standards in the country.[218]

47. Virginia: De Novo Review (Agencies May Be Entitled to Weight, Not Deference)

In Virginia, issues of statutory interpretation are "subject to *de novo* review."[219] Virginia courts "apply the plain language of a statute unless the terms are ambiguous, or applying the plain language would lead to an absurd result."[220] The Supreme Court of Virginia has provided:

> Although the practical construction given to a statute by public officials charged with its enforcement is entitled to great weight by the courts and in doubtful cases will be regarded as decisive, when an issue involves a pure question of statutory interpretation, that issue does not invoke the agency's specialized competence but is a question of law to be decided by the courts.[221]

And the Supreme Court of Virginia has also taken the time to clarify its standard, recognizing that its past opinions had at times "conflated deference with weight."[222] While many courts across the country use the "terms interchangeably," they are distinguishable in Virginia.[223] "Deference refers to a court's acquiescence to an agency's position without stringent, independent evaluation of the issue. Weight refers to the degree of consideration a court will give

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[217] Clayton v. J.C. Penney Corp., 177 A.3d 522, 527 (Vt. 2017) (citing *In re* Smith, 730 A.2d 605, 611 (Vt. 1999)).

[218] *See Judicial Watch, Inc. v. State,* 892 A.2d 191, 196 (Vt. 2005) ("Absent compelling indications of error, interpretations of administrative regulations or statutes by the agency responsible for their execution will be sustained on appeal." (internal quotation marks omitted)).

[219] *Commonwealth, Office of Comptroller v. Barker*, 659 S.E.2d 502, 504 (Va. 2008).

[220] *Id.* (quoting Boynton v. Kilgore, 623 S.E.2d 922, 925 (Va. 2006)).

[221] *Id.* at 505 (internal citations and quotation marks omitted). *See also Superior Steel Corp. v. Commonwealth,* 136 S.E. 666, 667 (Va. 1927) (providing that, when a "statute is obscure or its meaning doubtful, [the court] will give great weight to and sometimes follow the [agency's] interpretation").

[222] Nielsen Co. (US), LLC v. Cty. Bd. of Arlington Cty., 767 S.E.2d 1, 4 (Va. 2015) (internal citation and quotation marks omitted).

[223] *Id.* at 4.

an agency's position in the course of the court's wholly independent assessment of an issue."[224]

Virginia courts "do not defer to an agency's construction of a statute because the interpretation of statutory language always falls within a court's judicial expertise."[225] But "[e]ven when great weight is afforded to an administrative interpretation of a statute, such an interpretation does not bind a court in deciding the statutory issue."[226] In the absence of ambiguity, the "agency's interpretation is afforded no weight beyond that of a typical litigant."[227]

48. Washington: De Novo Review for Statutory Interpretation ("Deference" for Expertise)

Washington has announced a de novo standard of review in considering agency interpretations of statutes. However, if the interpretation of an ambiguous statute involves an agency's expertise, the interpretation may be entitled to great weight, or "deference." Yet, this is not "deference" in the *Chevron* sense, as Washington courts are not bound by any agency interpretation. Rather, "deference" as applied in Washington appears more akin to the idea of "weight" in the *Skidmore* sense.

The Washington Supreme Court has held that it "interprets the meaning of statutes de novo," and thus it can "substitute [its] interpretation of the law for that of the agency."[228] But, "[w]here a statute is within [an] agency's special expertise, the agency's interpretation is accorded great weight, provided that the statute is ambiguous."[229] When a court interprets statutes, "the error of law standard applies."[230] No deference is applied when an agency's

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[224] *Id*. (internal citations and quotation marks omitted).

[225] *Id*. (citing *Va. Marine Res. Comm'n v. Chincoteague Inn,* 757 S.E.2d 1, 5 (Va. 2014)).

[226] *Id*. at 4-5 (citing *Webster Brick Co. v. Dep't of Taxation,* 245 S.E.2d 252, 255, 255 n.4 (Va. 1978)).

[227] *Id.* at 5 *(citing Davenport v. Little–Bowser,* 611 S.E.2d 366, 371 (Va. 2005)).

[228] Port of Seattle v. Pollution Control Hr'gs Bd., 90 P.3d 659, 672 (Wash. 2004).

[229] *Id*. (alteration in original) (quoting *Postema v. Pollution Control Hearings Bd.,* 11 P.3d 726, 733 (Wash. 2000)).

[230] *Postema*, 11 P.3d at 733 (citing Okanogan Wilderness League, Inc. v. Town of Twisp, 947 P.2d 732, 736 (Wash. 1997) and WASH. REV. CODE § 34.05.570(3)(d)).

interpretation "conflicts with the statute."[231] Washington courts always retain the power to "determine the meaning and purpose of a statute."[232]

Washington courts have, at times, used the term "deference" in describing the courts' obligations in reviewing agency interpretations.[233] However, the Washington Supreme Court has emphasized that an "agency's interpretation of pure questions of law is not accorded deference."[234] While the use of both the terms "great weight" and "deference" has the potential to confuse, it is apparent that this is a situation in which the court is using them synonymously. Some may wish for a more consistent approach or a clarification *à la* Virginia, and it will be interesting to see what future cases hold in the state of Washington.

49. West Virginia: Chevron*-Type Rule*

West Virginia has adopted *Chevron* as its standard for reviewing state agency interpretations of state statutes. "In deciding whether an administrative agency's position should be sustained, a reviewing court applies the standards set out by the United States Supreme Court in *Chevron.*"[235] West Virginia courts "first must ask whether the Legislature has directly spoken to the precise question at issue. If the intention of the Legislature is clear, that is the end of the matter, and the agency's position only can be upheld if it conforms to the Legislature's intent."[236] Additionally, "[n]o deference is due the agency's interpretation at this stage."[237] The Supreme Court of West Virginia has provided:

> If legislative intent is not clear, a reviewing court may not simply impose its own construction of the statute in reviewing

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[231] *Id.* (citation omitted).

[232] *Id.* (citation omitted).

[233] *See, e.g.*, *Chicago Title Ins. Co. v. State Office of Ins. Comm'r,* 309 P.3d 372, 378 (Wash. 2013) (stating that courts accord deference to an interpretation of law in matters involving the agency's specialized expertise). *See also Impecoven v. Dep't of Revenue,* 841 P.2d 752, 754 (Wash. 1992) (considerable deference given to interpretation by agency charged with enforcing statute).

[234] *Chicago Title Ins. Co.,* 309 P.3d at 378.

[235] Steager v. Consol Energy, Inc., 832 S.E.2d 135, 148 (W. Va. 2019) (internal citation and quotation marks omitted).

[236] *Id.* (internal citation and quotation marks omitted).

[237] *Id.* at 139 (citation omitted).

> a legislative rule. 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.[238]

In West Virginia, a "valid legislative rule is entitled to substantial deference by the reviewing court."[239] Such rules "can be ignored only if the agency has exceeded its constitutional or statutory authority or is arbitrary or capricious."[240]

50. Wisconsin: De Novo Review ("Due Weight" a Matter of Persuasion)

In 2018, Wisconsin overturned its past doctrine of giving significant deference to agencies' statutory interpretations.[241] Now, Wisconsin courts apply a de novo standard of review for such interpretations.[242] The Wisconsin Supreme Court abandoned its previous deference doctrine because it "d[id\ not respect the separation of powers, gives insufficient consideration to the parties' due process interest in a neutral and independent judiciary, and risks perpetuating erroneous declarations of the law."[243]

Though it discarded deference, the state has retained a "due weight" standard. Pursuant to Wis. Stat. § 227.57(10), Wisconsin courts give "due weight" to the "experience, technical competence, and specialized knowledge of an administrative agency."[244] This recognizes that "agencies can sometimes bring unique insights to the matters for which they are responsible," but it is not deference.[245] Rather, "due weight means giving respectful,

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[238] *Id*. (internal citation and quotation marks omitted).

[239] Id. at 149.

[240] *Id*. at 139 (citing W. VA. CODE § 29A-4-2 (1982)).

[241] Tetra Tech EC, Inc. v. Wis. Dep't of Revenue, 914 N.W.2d 21, 54 (Wis. 2018) ("Today, the core judicial power ceded by our deference doctrine returns to its constitutionally-assigned residence. Henceforth, we will review an administrative agency's conclusions of law under the same standard we apply to a circuit court's conclusions of law—de novo.").

[242] Wis. Dep't of Revenue v. Microsoft Corp., 936 N.W.2d 160, 164 (Wis. Ct. App. 2019) (citations omitted).

[243] *Tetra Tech EC, Inc.*, 914 N.W.2d at 54.

[244] *Id.* at 28.

[245] *Id*. at 53.

appropriate consideration to the agency's views while the court exercises its independent judgment in deciding questions of law."[246] In Wisconsin, "[d]ue weight is a matter of persuasion, not deference."[247]

51. Wyoming: De Novo Review

Wyoming follows a de novo standard of review in examining agency interpretations of statutes. Wyoming courts "review an agency's conclusions of law *de novo* and affirm when they are in accordance with the law."[248] The Wyoming Supreme Court has stated that there is no "deference to an agency's determination on a question of law," and courts "will correct any errors made in interpreting or applying the law."[249] In Wyoming, the interpretation of statutes "is a question of law subject to de novo review."[250]

CONCLUSION

The most significant finding of this survey is that, by a count of thirty-six states against

fourteen states and the District of Columbia, the states that apply no deference or a lesser form of deference outnumber the *Chevron*-type of deference standards by a ratio of greater than 2-to-1. Twenty-five states have established de novo review of agencies' interpretations, according varying levels of weight to agency interpretations, but emphasizing courts' independent construction of statutes. Among those are four states that adhere to a *Skidmore*-type rule, stressing the persuasive factors of agency interpretations, including consistency of interpretations over time and expertise. Eleven states have a Hybrid standard of review, some with a Chevmore style doctrine, and others that incorporate step zero tests or are more creative in specifying unique factors for their own standard. Fourteen states and the District of Columbia

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[246] *Id*. (internal quotation marks omitted).

[247] *Id*. (internal quotation marks omitted).

[248] Wyodak Res. Dev. Corp. v. Wyo. Dep't of Revenue, 387 P.3d 725, 730 (Wyo. 2017).

[249] Delcon Partners LLC v. Wyoming Dep't of Revenue, 450 P.3d 682, 684 (Wyo. 2019) (citation omitted).

[250] *Id*. (citation omitted).

follow *Chevron*-type deference, either adopting the *Chevron* standard explicitly or applying similar analysis with the same effect.

In all, some standards are clearer than others. A consistent problem among the Hybrid states is the dual application of incompatible doctrines, *Chevron*-type and de novo review. Many states have insisted on retaining multiple avenues by which to review agency interpretations. One could easily argue that having a multitude of deference standards only makes courts more susceptible to deciding the issues before based on their own whim, as they can pick and choose whatever standard suits the day. To be less cynical, it is easy to see that states which apply different sets of standards, with no clear demarcation on how or when to use them, can fall into inconsistent application. Moreover, the use of terms such as "deference" and "weight" as synonyms has the potential to confuse, as states like Mississippi and Virginia have observed. Much is sure to be done to clarify and refine the standards across the states.

The lack of clarity and frustration with these doctrines in certain states has resulted in a recent upsurge in declarations of de novo review for agency interpretations of statutes. Four states established de novo review in 2018 alone. In the state supreme courts that choose to overturn past deference doctrines, a consistent rationale is such doctrines are discordant with the separation of powers in their respective state constitutions. Not only courts, but also the legislature in Arizona and the voting public in Florida got in on the action in 2018, with each state deciding to abandon deference and apply de novo review. In the coming years, this may very well become an increasingly popular issue. As concern about the "administrative state" grows, more states will likely revisit their approaches regarding "judicial deference" to agency interpretations of statutes.