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Curing the Blind Spot in Administrative Law: A Federal Common Law Framework for State Agencies Implementing Cooperative Federalism Statutes

ABSTRACT. This Note examines whether state or federal principles of administrative law should govern suits challenging state agency action pursuant to cooperative federalism statutes. Despite the prevalence of cooperative federalism statutes, courts and scholars alike have given scant attention to this question. That neglect has translated into poorly reasoned and inconsistent judicial decisions. We show that this question is one of federal common law that is properly governed by the framework of *Kimbell Foods*, which holds that federal common law should take state law as its substantive source unless doing so would create a significant conflict with federal policy.

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INTRODUCTION

Administrative law scholarship focuses almost exclusively on federal agencies implementing federal laws.¹ Yet state agency implementation of federal statutes—cooperative federalism²—is an integral part of our administrative state in fields ranging from environmental law to health care to education.³ When state agencies are sued for violating cooperative federalism statutes they administer, courts must decide what doctrines of administrative law should apply. Does federal or state law control? If federal, should these agencies be treated like their federal counterparts, or must new rules be developed to accommodate the unique issues posed by state agencies?

1. See, e.g., Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749 (2007); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689 (1990); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071 (1990).
2. While cooperative federalism is sometimes used as a broad term to encompass a wide range of ways state and federal governments may work together, for the purposes of this Note, we use the term “cooperative federalism statutes” narrowly to describe laws that task state agencies with carrying out regulatory or implementation responsibilities that are at least initially laid out by a broad federal plan. See *New York v. United States*, 505 U.S. 144, 167 (1992); *Carrie Gombos, Alaska Department of Environmental Conservation v. E.P.A.*, 28 HARV. ENVTL. L. REV. 537, 542 (2004) (“There are several conceptions of cooperative federalism, but the Supreme Court has suggested that cooperative federalism best describes those instances in which a federal statute provides for state regulation or implementation of plans to achieve federally prescribed policy goals . . .”). The term “cooperative federalism” has also been used more generally to describe a theory of government, whereby state and federal governments often share overlapping responsibilities, as opposed to the theory of “dual federalism,” whereby state and federal actors have discrete responsibilities. See, e.g., Daniel J. Elazar, *Cooperative Federalism*, in *COMPETITION AMONG STATES AND LOCAL GOVERNMENTS* 65, 65-69 (Daphne A. Kenyon & John Kincaid eds., 1991) (describing the theoretical distinction between these two different conceptions of government).
3. There are a number of federal statutes that enlist state agencies in carrying out the law. See e.g., *Federal Water Pollution Control Act*, 33 U.S.C. §§ 1251-1387 (2006); *Social Security Act*, 42 U.S.C. §§ 1396-1396v (2006) (Medicaid); *Clean Air Act*, 42 U.S.C. §§ 7401-7671q (2006); *Patient Protection and Affordable Care Act*, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by *Health Care and Reconciliation Act of 2010*, Pub. L. No. 111-152, 124 Stat. 1029 (to be codified primarily in scattered sections of 42 U.S.C.); *Telecommunications Act of 1996*, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.). For a description of many of the ways state agencies may be enlisted to implement federal laws, see Joshua D. Sarnoff, *Cooperative Federalism, the Delegation of Federal Power, and the Constitution*, 39 ARIZ. L. REV. 205 (1997).

Surprisingly, courts and scholars alike have given scant attention to those fundamental questions.

The recent scholarship most on point is Abbe R. Gluck's article *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*.⁴ Gluck exposes the gap that has existed in current scholarship regarding the role of state agencies in statutory interpretation. Gluck, other scholars, and the federal courts have recently considered whether state agencies interpreting cooperative federalism statutes that they administer should receive *Chevron* deference.⁵ But *Chevron* deference is only one of many doctrines that must be transposed to the context of cooperative federalism. Courts must also determine, for example, whether state or federal law should govern, which actions are reviewable, what standard of review to use, and who bears the burden of proof in agency proceedings.

When facing these questions, courts operate with very little guidance from statutory or common law. The federal Administrative Procedure Act (APA) does not include state agencies within its ambit.⁶ And federal common law doctrines of administrative law have been developed with federal, not state, agencies in mind. Furthermore, state administrative law doctrines that usually apply to state agencies often diverge considerably from federal law. As we discuss *infra* Section I.B, in the face of this difficult and undertheorized issue, courts have acted reflexively, applying the law that is most familiar to them. Federal courts apply federal law while giving little, if any, consideration to state law. State courts, by contrast, often apply state law while giving inadequate consideration to federal law. In part, this chaotic situation exists because courts and commentators have not identified the issue.

By always applying one form of law, both state and federal courts treat the issue too simply. There is great diversity in cooperative federalism regimes and administrative law doctrines. In some cases, it will be wise to follow the distinctive rules that states have created to govern their own institutions. In other cases, it will be wise to ensure uniform policy across the nation. The diversity of circumstances demands a practical approach that considers what will happen when a given administrative law doctrine is applied to the

4. 121 YALE L.J. 534 (2011).

5. See *id.* at 601-07; Philip J. Weiser, *Chevron, Cooperative Federalism, and Telecommunications Reform*, 52 VAND. L. REV. 1 (1999). See generally *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

6. 5 U.S.C. §§ 551-559 (2006).

statutory problem at hand. In this Note, we argue that the Supreme Court has already developed such a framework in *United States v. Kimbell Foods, Inc.*⁷

The question presented in *Kimbell Foods* was “whether contractual liens arising from certain federal loan programs take precedence over private liens.”⁸ The statute did not specify what the priority should be, so the Court had to use its federal common law powers to fill the statutory gap. To do so, it could either devise a uniform federal rule or apply state law. The Court concluded that “a national rule is unnecessary to protect the federal interests underlying the [federal] loan programs.”⁹ Instead, “absent a congressional directive” to the contrary, the lien priorities would be “determined under nondiscriminatory state laws.”¹⁰ The Court made clear that this sort of reasoning would apply more generally: barring “concrete reasons” to the contrary, “the prudent course is to adopt the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation.”¹¹

Kimbell Foods set a new tone for federal common law. In subsequent cases, the Court has made clear that there is a “presumption that state law should be incorporated into federal common law” as the federal rule of decision¹² and that the ultimate question is “whether the relevant federal interest warrants displacement of state law.”¹³ Only in limited instances should courts “fill the interstices of federal remedial schemes with uniform federal rules.”¹⁴

As in *Kimbell Foods*, the question here—what law to apply to state agencies carrying out cooperative federalism statutes—presents a situation where “Congress has not spoken ‘in an area comprising issues substantially related to an established program of government operation.’”¹⁵ Courts should approach the question in the same way they approach other questions of developing federal common law. As *Kimbell Foods* suggests, the presumption should be to adopt state law. Yet this presumption should be overcome “where there is a

7. 440 U.S. 715 (1979).

8. *Id.* at 718.

9. *Id.*

10. *Id.* at 740.

11. *Id.*

12. *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991).

13. *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 692 (2006).

14. *Kamen*, 500 U.S. at 98.

15. *Kimbell Foods*, 440 U.S. at 727 (quoting *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 593 (1973)).

‘significant conflict between some federal policy or interest and the use of state law.’”¹⁶

In this Note, we begin by presenting background on the history of cooperative federalism statutes, the role of cooperative federalism today, and the sources of administrative law. We then argue that the APA never considered the role of state agencies in implementing federal law and examine the inconsistent and reflexive way in which courts have applied administrative law to state agencies implementing cooperative federalism statutes. Finally, we explain how these issues can be better resolved and understood through the *Kimbell Foods* framework.

I. LEGISLATIVE SILENCE AND JUDICIAL CHAOS

A. Cooperative Federalism and Administrative Law

The archetypal federal program involves federal agencies implementing federal statutory law. But federal statutes that delegate responsibility to state agencies make up a large and important part of the United States Code.

Although some cooperative federalism statutes, such as the Pure Food and Drug Act of 1906, existed prior to the New Deal,¹⁷ it was the New Deal that “put the concept of a cooperative federalism on the map.”¹⁸ Most cooperative federalism statutes passed during this period generally “involved the sharing of funding, as opposed to regulatory authority” between the federal and state governments.¹⁹ By 1938, so-called grants-in-aid programs were already providing funding for such diverse projects as “agricultural extension work in the states, the training of teachers [of certain subjects], . . . experiments in reforestation, the construction of highways, the equipment and training of the National Guard, and other matters falling normally under the reserved powers of the states.”²⁰

16. *O’Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994) (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)).

17. Pub. L. No. 59-384, 34 Stat. 768 (repealed 1938); see also Louis W. Koenig, *Federal and State Cooperation Under the Constitution*, 36 MICH. L. REV. 752, 773-74 (1938) (discussing early cooperative federalism programs).

18. Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 669 (2001).

19. *Id.*

20. Koenig, *supra* note 17, at 756-57 (footnotes omitted).

In other programs, the federal government explicitly enlisted state agencies to carry out federal statutes.²¹ Even prior to the New Deal, the federal government used state governmental actors to assist in the “apprehension of fugitives from justice, the enforcement of the National Prohibition Act, [and] public health administration.”²² The New Deal considerably expanded the reach of these types of programs.²³ Perhaps most significantly, the Motor Carrier Act of 1935 substantively involved state commissioners in much of the administration of motor carrier regulation.²⁴

Still, the dominant regulatory model of the New Deal involved “national bureaucracies directly regulat[ing] citizens and businesses in support of national policies.”²⁵ Programs involving cooperative federalism were seen as “striking” experiments rather than the norm.²⁶ According to one commentator, the cooperative aspect of the Motor Carrier Act “would not have been feasible and could scarcely have commended itself to congressional approval had not the plan been solidly grounded on vital facts *peculiar* to the motor carrier industry.”²⁷

This changed dramatically in the 1960s and 1970s, when the federal government passed an unprecedented number of regulatory statutes. In fact, “[b]etween 1968 and 1978 Congress passed more regulatory statutes than it had in the nation’s previous 179 years.”²⁸ This regulatory expansion was

21. *Id.* at 772-73.

22. *Id.* at 773-74 (footnotes omitted).

23. *See id.* at 772-84.

24. Pub. L. No. 74-255, 49 Stat. 543 (1935) (codified as amended at 49 U.S.C. § 502 (2006)); Paul G. Kauper, *Utilization of State Commissioners in the Administration of the Federal Motor Carrier Act*, 34 MICH. L. REV. 37 (1935).

25. Alfred R. Light, *He Who Pays the Piper Should Call the Tune: Dual Sovereignty in U.S. Environmental Law*, 4 ENVTL. L. 779, 825 (1998).

26. *See* Kauper, *supra* note 24, at 37. Interstate Commerce Commissioner Clyde B. Aitchison called the cooperative federalism of the Motor Carrier Act “a ‘noble experiment’ of the decentralization of Federal power.” PAT MCCARRAN, ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 79-248, at 122 (2d Sess. 1946).

27. Kauper, *supra* note 24, at 40 (emphasis added).

28. R. SHEP MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT 5 (1983); *see also* Weiser, *supra* note 18, at 669-70 (describing some of the statutes enacted during this period). Examples of cooperative federalism statutes passed during this era include the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1387 (2006)); the Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401-7671 (2006)); the Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634 (2006)); and the

achieved without a “corresponding increase in national administration of regulatory and service-provision programs,” because ground-level implementation of regulatory responsibilities under these statutes was generally left to the states.²⁹ In many of these areas, federal laws encroached on traditional areas of state regulation.³⁰ Thus, federal statutes frequently incorporated state regulators as a way of softening the increased role of the federal government. Other statutes regulated new areas, but used states as an efficient means of ensuring adequate and localized enforcement.³¹

Congress continues to vigorously employ cooperative federalism structures. For example, the Telecommunications Act of 1996 requires state agencies to oversee interconnection agreements between telecommunications utilities according to federal standards.³² The most important statute in many years, the Patient Protection and Affordable Care Act (ACA), is an even more prominent example of a federal program engaging state agencies in cooperative regulation.³³ Cooperative federalism has been called the “dominant model for federal environmental statutes,”³⁴ and it is used in “such disparate programs as Medicaid, OSHA, public utilities regulation, law enforcement licensure, online

Social Security Act Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (codified as amended in scattered sections of 42 U.S.C.).

29. Joseph F. Zimmerman, *National-State Relations: Cooperative Federalism in the Twentieth Century*, 31 *PUBLIUS* 15, 29 (2001). Zimmerman also notes that “the federal government directly administers few programs that it did not administer prior to 1935.” *Id.*
30. *Id.* at 22 (noting that in 1965 Congress passed over 250 statutes preempting state authority); see also JOSEPH F. ZIMMERMAN, *FEDERAL PREEMPTION: THE SILENT REVOLUTION* 63-74, 91-100 (1991) (discussing the nature and typology of federal statutes that encroach on state authority).
31. The Age Discrimination in Employment Act, for example, provides that “state administrative agencies initially handle most . . . grievances” so as to “provide expeditious resolution of discriminatory employment complaints.” Yvonne T. Kuczynski, Note, *Administrative Res Judicata and the Age Discrimination in Employment Act*, 89 *COLUM. L. REV.* 1111, 1111 (1989) (citing Pub. L. No. 90-202, §§ 1-16, 81 Stat. 602, 602-608 (1967) (codified as amended at 29 U.S.C. §§ 621-634 (2006))).
32. See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.). For a discussion of the cooperative federalism aspects of this Act, see Weiser, *supra* note 5.
33. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (to be codified primarily in scattered sections of 42 U.S.C.). For a discussion of the many ways in which this statute grants state agencies authority, see Gluck, *supra* note 4, at 576-94.
34. David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 *MINN. L. REV.* 1796, 1811 (2008).

pharmacy regulation, and hate crime enforcement.”³⁵ Because state agency authority is rarely revoked once given, it appears that cooperative federalism will only become more widespread with time.³⁶ Cooperative federalism statutes make up such a large portion of the law that any analysis of federal administrative law excluding them would be incomplete.

Cooperative federalism is a broad category, with statutes distributing responsibility between federal and state agencies in many different ways. For our purposes, it may help to categorize cooperative federalism programs into one of three stylized types, in order of increasing federal predominance: (1) state agencies implementing state law subject to federal requirements and oversight; (2) state agencies implementing state law, side-by-side with federal law, subject to federal requirements and oversight; and (3) state agencies implementing purely federal law, acting as a kind of contractor for the federal program.

In the first category, the cooperative federalism statute offers state agencies federal funding with strings attached. For example, the state might be required to enact laws and regulations that meet certain specifications and make reports to a federal agency tasked with supervision. Thus, in this category, state agencies implement state law, which is shaped by federal law. This type of statute is common in benefits programs,³⁷ public housing,³⁸ and education.³⁹ For example, Temporary Assistance for Needy Families⁴⁰ (TANF) is a block grant program created in 1996 to replace the welfare entitlement program, Aid to Families with Dependent Children (AFDC). TANF provides funding to aid needy families. To be eligible, states must submit a written plan that meets federal statutory requirements, such as describing the state’s plan to “[r]equire

35. Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L.J. 179, 188 (2005) (footnotes omitted).

36. See Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1268 (2009) (theorizing that once state authority is given, such power will be cemented because “federal dependence [should] increase as state bureaucrats develop institutional competence and area-specific expertise”); Ronald J. Krotoszynski, Jr., *Cooperative Federalism, the New Formalism, and the Separation of Powers Revisited: Free Enterprise Fund and the Problem of Presidential Oversight of State-Government Officers Enforcing Federal Law*, 61 DUKE L.J. 1599, 1654 (2012) (“[T]he empirical reality is that federal agencies almost *never* suspend state primacy, once it is established.”).

37. See, e.g., Social Security Act, 42 U.S.C. §§ 601-658 (2006) (Temporary Assistance to Needy Families program); Social Security Act, 42 U.S.C. §§ 1396-1396v (2006) (Medicaid).

38. See, e.g., United States Housing Act of 1937, 42 U.S.C. § 1437(g) (2006).

39. See, e.g., Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 6301-8962 (2006); Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1482 (2006).

40. 42 U.S.C. §§ 601-658 (2006).

a parent or caretaker receiving assistance under the program to engage in work (as defined by the State) once the State determines the parent or caretaker is ready to engage in work, or once the parent or caretaker has received assistance under the program for 24 months.”⁴¹

In the second category, state administrators implement federal law directly, often while simultaneously implementing state law as part of the same larger program of regulation.⁴² For example, the Clean Air Act requires participating states to

enact legislation and regulations to implement the air quality standards set by Congress and the EPA . . . [and] submit to the EPA an implementation plan After the EPA approves a state’s regulatory and permitting program, the state agency becomes the primary regulatory authority for interpreting and enforcing the program.⁴³

Thus, under the Clean Air Act and similar programs, state agencies have been delegated authority by both Congress and the state legislature. For example, both federal and state law give participating agencies the authority “to issue and enforce air pollution permits.”⁴⁴

In the third category, exemplified by Social Security Disability Insurance (SSDI), state agencies implement exclusively or nearly exclusively federal law using federal funding. For these programs, state agencies act almost as contractors carrying out a federal mission.⁴⁵

This variety in cooperative federalism programs is part of the reason that a nuanced, flexible rule modeled on *Kimbell Foods* is appropriate. As we shall explore *infra* Section II.B, the goals and organizational structure of some cooperative federalism programs will argue for more use of federal administrative law, while others will argue for more state administrative law. But in discussing these differences, we should not lose sight of the fact that all cooperative federalism programs subject state agencies to federal requirements that they would not otherwise face and present a question of whether

41. *Id.* § 602(a)(1)(A)(ii).

42. *See, e.g.*, Clean Air Act, 42 U.S.C. §§ 7401-7671q (2006).

43. *Sierra Club v. Wis. Dep’t of Natural Res.*, 787 N.W.2d 855, 860 (Wis. Ct. App. 2010) (describing 42 U.S.C. § 7410(a)(2)(A) (2006)).

44. *Id.* at 861.

45. *See Disability Determination Process*, SOC. SECURITY ADMIN., <http://www.ssa.gov/disability/determination.htm> (last visited Dec. 17, 2012) (“The DDSs [Disability Determination Services], which are fully funded by the Federal Government, are State agencies responsible for developing medical evidence and making the initial determination on whether or not a claimant is disabled or blind under the law.”).

administrative law principles should be uniform across the nation or state specific.

B. The Law Today

1. The Hole in the Administrative Procedure Act

Administrative law has long had many sources: substantive statutes,⁴⁶ agency organic statutes,⁴⁷ the common law and equity powers of the courts,⁴⁸ agency practice and regulation, and the Constitution.⁴⁹ In 1946, Congress added another source: the Administrative Procedure Act (APA), which codified federal administrative law into one comprehensive framework that applies by default to all programs and agencies.⁵⁰

Constitutional constraints on the administrative state, such as the Due Process Clause, apply to state and federal agencies alike. Agency-specific requirements, meanwhile, can fairly be read to apply only to the agency they concern. One can imagine a world in which Congress would have written the APA to encompass state agencies administering federal programs. But, despite the fact that state agencies play a vital role in the administration of federal law, they are conspicuously left out of the APA. Under the APA, “agency” is defined only as including “each authority of the Government of the *United States*.”⁵¹ As a result, the APA’s rules regarding “agencies” simply do not apply to state agencies.⁵² Although federal statutes that relied on state agency implementation

46. The Clean Air Act, for example, articulates a series of steps for how state and federal agencies must proceed in establishing ambient air quality standards. See 42 U.S.C. §§ 7401-7671q.

47. See Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499, 509 (2011) (discussing agency organic statutes).

48. See, e.g., SEC v. Chenery Corp., 332 U.S. 194, 196 (1947) (holding that an administrative agency may not generally make post hoc rationalizations to justify its orders).

49. See, e.g., Goldberg v. Kelly, 397 U.S. 254 (1970) (articulating due process requirements for administrative hearings). As Gillian Metzger discusses, it is not always clear when administrative law is driven by constitutional concerns. See Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479 (2010). Metzger argues that much of ordinary administrative law is constitutional, but that this is rarely acknowledged by courts. *Id.* at 506.

50. See U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 9 (1947).

51. 5 U.S.C. § 701(b)(1) (2006) (emphasis added).

52. See Merryfield v. Disability Rights Ctr. of Kan., 439 F. App’x 677, 679 (10th Cir. 2011); Hunter v. Underwood, 362 F.3d 468, 477 (8th Cir. 2004); Gilliam v. Miller, 973 F.2d 760,

did exist at the time the APA was passed in 1946,⁵³ it appears that Congress did not even consider whether state agencies should be included within the APA's scope.

Throughout the entire legislative history of the APA, there is no debate about whether to include state agencies within the scope of the statute, nor even a mention of the fact that state agencies would not be covered.⁵⁴ Perhaps this was because, at the time, cooperative federalism statutes like the Motor Carrier Act were still classified as "experiment[s]."⁵⁵ Cooperative federalism regimes were not nearly as prevalent as they would later become.⁵⁶ Nor did Congress say what law *should* apply to state agencies administering federal law. By omitting state agencies from the APA's definition of "agency," then, Congress determined, whether intentionally or not, that the APA's rules would not directly govern state agencies.⁵⁷ Because the APA totally excludes state agencies from its mandate, federal requirements can only be applied to state

761 (9th Cir. 1992); *Sowell's Meats & Servs., Inc. v. McSwain*, 788 F.2d 226, 228 (4th Cir. 1986); *St. Michael's Convalescent Hosp. v. California*, 643 F.2d 1369, 1373 (9th Cir. 1981); *Johnson v. Wells*, 566 F.2d 1016, 1018 (5th Cir. 1978).

53. See Koenig, *supra* note 17, at 774-75 (describing federal statutes, such as the Pure Food and Drug Act of 1906, that permitted implementation by state agencies).
54. See MCCARRAN, *supra* note 26. There is but one cryptic reference to cooperative federalism, which comes from the testimony of Clyde B. Aitchison, the Commissioner of the Interstate Commerce Commission. After discussing the proposed definition of "agency" in the Administrative Procedure Act (APA), Aitchison stated that "I should have called attention also to the Motor Carrier Act which provides for State boards being given jurisdiction in a 'noble experiment' of the decentralization of Federal power, which is working and has worked out very well." *Id.* at 122. Yet, before explaining why he should have called the House Judiciary Committee's attention to this Act, Aitchison jumped ahead to another problem: whether divisions within the hierarchy of the Interstate Commerce Commission count as an "authority" for purposes of the APA. *Id.* Given the placement of his statement, it appears that, if anything, Aitchison was suggesting that perhaps Congress should have considered whether to include state boards carrying out directives of federal agencies within its definition of agency. This seems especially possible given Aitchison's own extensive experience with cooperative federalism. Prior to his appointment to the Interstate Commerce Commission, Aitchison had acted as solicitor for the state railway commissions, "and during that time the State commissions and the Interstate Commerce Commission were working together in administering [an] act to make an evaluation of the railroads of the United States." *Id.* at 88. But Congress did not pause to further investigate Aitchison's fleeting comment.
55. *Id.* at 122.
56. See Zimmerman, *supra* note 29, at 29 (describing how the government's vast regulatory expansion enlisted states in statutory implementation).
57. The absence of state agencies from the APA also means that the APA does not provide a cause of action against state agencies carrying out federal law. We discuss the implications of this *infra* Subsection I.B.2.

agencies as a matter of federal common law⁵⁸ or through the requirements of substantive federal statutes. This Note will focus on the common law question because it is quite rare for substantive federal statutes to address the administrative law doctrine that will govern state agencies.⁵⁹ In fact, the only statute we are aware of that does so is the Telecommunications Act, which specifies that “[a]ny decision by a *State or local government* . . . to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.”⁶⁰ Even the Telecommunications Act does not specify how courts should defer to interpretations of the Act by state agencies.⁶¹

These gaps in the APA and cooperative federalism statutes have left courts to determine for themselves how to sort out the application of the many different procedural doctrines that fall under the umbrella of APA law. Although more than sixty years have passed since the APA was first enacted, Congress still has not spoken regarding the general applicability of federal administrative law to state agencies that carry out federal law.

2. *Why the Judicial Silence?*

Although this question is present in a wide range of administrative law doctrines across a variety of cooperative federalism statutes, there has been little discussion of how it should be resolved. Judicial opinions give scant attention to the issue of state agencies’ role in implementing federal statutes. The same can be said of the legal academy. Only Abbe Gluck has systematically examined how state agencies implementing federal statutes should be treated under federal law doctrines.⁶² And Gluck focused on only one aspect of the

58. In rare instances, state agencies may be deemed to be acting in the capacity of a federal agency. See, e.g., *Gilliam v. Miller*, 973 F.2d 760, 762 (9th Cir. 1992) (“We agree that the [Oregon Adjutant General’s] personnel actions as supervisor over the federal civilian technicians are taken in the capacity of a federal agency. . . . These cases, however, do not support the proposition that the OAG’s actions in supervising members of the state National Guard are taken in the capacity of a federal agency.” (citations omitted)).

59. See generally *infra* notes 76-157 and accompanying text.

60. 47 U.S.C. § 332(c)(7)(B)(iii) (2006) (emphasis added).

61. See *infra* notes 105-142 and accompanying text.

62. Gluck, *supra* note 4, at 601-04; see also Weiser, *supra* note 5 (discussing the *Chevron* doctrine in the context of state agency implementation of the Telecommunications Act of 1996); Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869, 892-94 (2008) (discussing whether state agencies should receive *Skidmore* deference when making statutory interpretations regarding federal preemption of state law).

problem: statutory interpretation.⁶³ No scholarship considers the broader question of how choices should be made between state and federal law for the broader set of administrative law doctrines that could conceivably be extended to state agencies applying federal law.

In the following Subsection, we survey how courts have dealt with the issue across an array of administrative law doctrines.⁶⁴ However, before we address the opinions themselves, it is useful to note the context in which these cases are presented to the courts.

While state agencies may not be sued under the APA, plaintiffs may challenge their actions using a variety of different methods. They may bring Supremacy Clause challenges, arguing that state action is preempted by federal law.⁶⁵ Alternatively, so long as the federal statute creates a private right of action and does not include its own comprehensive enforcement mechanism, they can bring a § 1983 action against state officials.⁶⁶ In addition, the relevant state or federal statutes may explicitly create a cause of action against the state agency.⁶⁷ Finally, plaintiffs might bring suit under the relevant *state* APA or other general state administrative law.

Though there are many potential causes of action that plaintiffs can bring against state agencies, for several reasons these suits will often not produce debate about which source of administrative law should apply. First, and most obviously, state and federal administrative law must diverge. If state and federal law have the same administrative law doctrine for the question at issue, or even if they are different but would yield the same result, there will be no discussion of whether state or federal law applies. There are many cases in

63. See Gluck, *supra* note 4.

64. We should note that because of the many ways in which suits against state administrative agencies implementing federal law may be brought and the many statutes under which they may be sued, conducting a survey of judicial responses to this cooperative federalism question is inherently difficult. We have done our best, but we hope that the understanding reader will forgive us if we have missed relevant cases.

65. See, e.g., *Townsend v. Swank*, 404 U.S. 282, 285 (1971). *But see Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204, 1207 (2012) (declining “to decide whether Medicaid providers and recipients may maintain a cause of action under the Supremacy Clause to enforce a federal Medicaid law”).

66. See, e.g., *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (holding that § 1983 actions are only available when Congress intended to create a private right of action); *Middlesex Cnty. Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1 (1981) (holding that § 1983 actions are not available when the statute being sued under contains its own comprehensive enforcement regime); *Maine v. Thiboutot*, 448 U.S. 1 (1980) (establishing that § 1983 actions may be available whenever any federal law is allegedly violated).

67. See, for example, the citizen suit provision of the Clean Air Act, 42 U.S.C. § 7604 (2006).

which state and federal standards will yield similar results, both because of natural convergence and because federal administrative law has exerted a substantial influence on state administrative law.⁶⁸ But there are also many cases in which federal and state administrative law will differ. State APAs largely “reject[ed] the federal act as a direct model,” creating divergent provisions governing many details.⁶⁹ And even where the language of statutes is identical, state courts could construe the text differently.⁷⁰ The bottom line is that the choice of law matters infrequently enough that the question has flown under the radar, but often enough that the failure to recognize it is a serious problem.

Second, the *Pennhurst* doctrine must not have dissuaded the plaintiffs from bringing suit against the state agency.⁷¹ *Pennhurst* bars unconsented suits in federal court “against state officials on the basis of state law.”⁷² Plaintiffs may wish to sue both the federal and the state agency—for example, when they believe that the federal agency has violated federal law in approving a state implementation plan and the state agency has violated state law in its execution of that plan.⁷³ But *Pennhurst* prevents plaintiffs from bringing such a case in federal court. Plaintiffs either have to bring only federal claims against the state agency, dropping the state agency from the lawsuit, or bring the case in state court, thereby forgoing a federal forum for their federal claim.⁷⁴ Faced with this dilemma, plaintiffs may choose to omit the state agency from the suit entirely.

68. See Arthur Earl Bonfield, *The Federal APA and State Administrative Law*, 72 VA. L. REV. 297, 297 (1986).

69. *Id.* at 302.

70. See MICHAEL ASIMOW & RONALD M. LEVIN, *STATE AND FEDERAL ADMINISTRATIVE LAW* 592, 598 (3d ed. 2009) (discussing the stricter standard of review at the federal level in terms of “hard look” review, which is sometimes not attributable to differences in the wording of the standard); cf. *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2377 (2011) (“Federal and state courts, after all, can and do apply identically worded procedural provisions in widely varying ways. If a State’s procedural provision tracks the language of a Federal Rule, but a state court interprets that provision in a manner federal courts have not, then the state court is using a different standard and thus deciding a different issue.”).

71. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984).

72. *Id.* at 106.

73. See, e.g., *Mass. Fed’n of Nursing Homes, Inc. v. Massachusetts*, 791 F. Supp. 899 (D. Mass. 1992) (addressing plaintiffs’ challenge to federal approval of a state plan where plaintiffs’ challenge to the state agency’s execution of the plan was previously dismissed on *Pennhurst* grounds).

74. See Robert H. Smith, *Pennhurst v. Halderman: The Eleventh Amendment, Erie, and Pendent State Law Claims*, 34 BUFF. L. REV. 227, 271-94 (1985) (discussing the choices litigants face under *Pennhurst*).

Third, the cooperative federalism statute at issue must be silent on which law should apply.⁷⁵ As in all administrative law contexts, if the language of a statute prescribes specific procedures, or a specific choice of law, then the text of the statute usually governs authoritatively. But that is more a theoretical bar to courts facing this question than a real one, because as discussed above, it is rare for cooperative federalism statutes to specify which law should apply to state agencies.

While none of these factors can entirely explain away the curious failure of courts and commentators to address this question, they may have led to a fragmenting of the doctrine that has made the issue more difficult to spot. The question can arise under many statutes and, within a given statutory context, will only sometimes be decisive. As a result, courts have addressed the question in a haphazard manner rather than in an organized line of cases. In fact, courts usually do not recognize the question of what law to apply at all. Perhaps they sense that there is something there, but especially without proper briefing, it is easier to ignore it. Meanwhile, since litigants have no case law to brief, they may find it not worth their time to construct a whole new theory of administrative law.

3. Courts' Discussion of the Doctrine

There are two main contexts in which courts face the question of whether to apply state or federal administrative law: the standard of review for agency action and the deference due to agency interpretations of statutes. Most courts do not raise the question of which body of law should apply. Instead, they apply the law that is most familiar to them. Federal courts generally apply federal law to state agencies without considering whether state law might apply; rather, they focus their inquiry on how to apply federal principles to state agencies.⁷⁶ State courts, by contrast, tend to apply state administrative law without considering whether federal law might apply.⁷⁷

In practice, then, the law today depends on the forum. State agencies are treated differently depending on whether they appear in state or federal court.⁷⁸ This does violence to two of *Erie's* goals, "discouragement of forum-

75. See, e.g., *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 51 (2005) (crafting a rule as to the burden of proof when the substantive statute was silent on the issue).

76. See *infra* notes 81-147 and accompanying text.

77. See *infra* notes 81-147 and accompanying text.

78. One interesting question is whether litigants know this and behave strategically.

shopping and avoidance of inequitable administration of the laws.”⁷⁹ Furthermore, in this chaotic regime, the federal courts give too little consideration to the value of comity toward state law, while the state courts give too little consideration to potentially significant conflicts with the ultimately overriding demands of federal law.

This pattern also provides insight into the debate in the federal courts literature about parity.⁸⁰ Our research shows that, at least in this area of administrative law, state courts are not as solicitous of federal law as are the federal courts. Yet this does not mean that state courts are necessarily any more wrong than federal courts—here, both are insufficiently mindful of the other sovereign’s law.

i. Standard of Review for State Agency Actions

The federal APA specifies a number of standards by which courts should review agency action. The two most prominent standards are the substantial evidence test,⁸¹ used to review formal adjudication and formal rulemaking, and the arbitrary and capricious test,⁸² used for agency factfinding in informal proceedings. While there is legitimate debate about the difference between these standards,⁸³ there is a general recognition that the federal courts have moved from a deferential approach to a more scrutinizing, “hard look” review of agency action.⁸⁴ By contrast, state courts are generally more deferential.⁸⁵ While “many states have moved much closer to the federal model, . . . few have embraced true hard look review.”⁸⁶ At the most deferential end, Massachusetts still follows the traditional state rule of upholding an agency decision if there was any conceivable basis for it.⁸⁷ Even when state and federal law both use the

79. *Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

80. See generally Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (arguing that state courts lack parity with the federal courts).

81. 5 U.S.C. § 706(2)(E) (2006).

82. *Id.* § 706(2)(A).

83. See, e.g., ASIMOW & LEVIN, *supra* note 70, at 597-98.

84. *Id.* at 592.

85. *Id.* at 598-99.

86. *Id.* at 598.

87. *Id.* (citing *Mass. Fed’n of Teachers v. Bd. of Educ.*, 767 N.E.2d 549, 557-58 (Mass. 2002)).

substantial evidence standard, case law may interpret the phrase “substantial evidence” differently.⁸⁸

Despite these differences, federal courts often apply federal standards to state agency actions without acknowledging state doctrine at all.⁸⁹ Some federal courts have applied the federal substantial evidence standard of review to state agency actions, while others apply an arbitrary and capricious standard of review.⁹⁰ Most circuits have done so without discussing why they are applying the standard they do, instead merely citing authority from other courts.⁹¹ However, some courts have discussed the issue more substantively. In *GTE South, Inc. v. Morrison*, the Fourth Circuit reasoned that because the federal APA does not apply to state agencies, “the standards provided by that act are not directly applicable.”⁹² Nevertheless, it concluded that “[a]bsent a statutory command, general standards for judicial review of agency action apply.”⁹³ The court appeared to justify its choice of a substantial evidence

88. Compare *Universal Camera v. NLRB*, 340 U.S. 474, 477 (1951) (holding that substantial evidence “means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion”), with *Kenyon v. Air Quality Board*, 270 P.3d 417, 424 (Utah 2009) (“A decision is supported by substantial evidence if there is a ‘quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion.’” (quoting *Associated Gen. Contractors v. Bd. of Oil, Gas & Mining*, 38 P.3d 291, 298 (Utah 2001))), and *Hilton ex rel. Pages Homeowners’ Ass’n v. Dep’t of Natural Res.*, 717 N.W.2d 166, 172 (Wis. 2006) (“‘Substantial evidence does not mean a preponderance of the evidence.’ Instead, the test is whether, after considering all the evidence of record, reasonable minds could arrive at the same conclusion.” (citation omitted) (quoting *Madison Gas & Elec. Co. v. Pub. Serv. Comm’n*, 325 N.W.2d 339, 342-43 (Wis. 1982))).

89. E.g., *MCI Telecomms. Corp. v. U.S. W. Commc’ns*, 204 F.3d 1262, 1266-67 (9th Cir. 2000) (applying the substantial evidence standard to state agency factfinding in a suit under the federal Telecommunications Act); *GTE S., Inc. v. Morrison*, 199 F.3d 733, 745 (4th Cir. 1999) (same).

90. Compare cases cited *supra* note 89, with *MCI Telecomms. Corp. v. Ohio Bell Tel. Co.*, 376 F.3d 539, 548 (6th Cir. 2004) (applying arbitrary and capricious review in a Telecommunications Act case).

91. See, e.g., *U.S. W. Commc’ns v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1117 (9th Cir. 1999) (applying an arbitrary and capricious standard to all state agency actions besides statutory interpretation in a Telecommunications Act case while citing a district court case from another circuit and not otherwise justifying its reasoning); see also *Ohio Bell*, 376 F.3d at 548 (applying arbitrary and capricious review to agency factfinding in a Telecommunications Act case without supplying any justification or even citing any cases at all).

92. 199 F.3d at 745.

93. *Id.*

standard in part because this standard would apply to the same actions if undertaken by the federal agency implementing the underlying act.⁹⁴

Courts applying the more deferential arbitrary and capricious standard have sometimes justified the choice by pointing to the state agency's technical expertise in applying the law.⁹⁵ In addition, when federal and state agencies act together to carry out a federal statute, courts have cited the combination of federal approval and state experience carrying out the statute as a reason to use arbitrary and capricious review.⁹⁶

Significantly, courts discussing the issue very rarely take state doctrine into account.⁹⁷ The opinion in *GTE South* illustrates the way many federal courts reflexively apply federal law without inquiring into state doctrine. The *GTE South* court applied the federal substantial evidence standard, which it described as "consistent with our precedent concerning federal judicial review of state-agency decisions."⁹⁸ However, the opinion it cited as precedent used the substantial evidence test not because that was a blanket federal standard that should apply, but rather because it determined that the *state* standard should control, and North Carolina, the state in question, used the substantial evidence test as its standard.⁹⁹ Yet *GTE South*, which concerned a decision by the Virginia State Corporation Commission, applied the *federal* substantial evidence standard based on this precedent without ever inquiring into Virginia law.¹⁰⁰ It thus twisted prior precedent into a uniform federal rule in favor of

94. *Id.* ("The substantial evidence standard is, by the way, the same standard we would apply in cases where arbitration under the Act is conducted by the FCC, rather than a state utilities commission.").

95. See *U.S. W. Commc'ns, Inc. v. Hix*, 986 F. Supp. 13, 19 (D. Colo. 1997).

96. *E.g.*, *Abbeville Gen. Hosp. v. Ramsey*, 3 F.3d 797, 803-04 (5th Cir. 1993) (discussing an alleged violation of the federal Medicaid law in a § 1983 action).

97. One rare exception is *TCG Milwaukee, Inc. v. Public Service Commission*, 980 F. Supp. 992, 1003 (W.D. Wis. 1997), which applied the state standard of review. Specifically, the court applied Wisconsin's arbitrary and capricious standard of review to a state agency arbitration decision made under the Telecommunications Act of 1996. But the court provided no reason why it did so, and other federal courts appear not to have followed its approach.

98. *GTE S.*, 199 F.3d at 745 (quoting *AT&T Wireless PCS, Inc. v. Winston-Salem Zoning Bd. of Adjustment*, 172 F.3d 307, 314 (4th Cir. 1999)).

99. See *AT&T Wireless*, 172 F.3d at 314. In this Telecommunications Act case, deference to the state standard was supported by *University of Tennessee v. Elliott's* declaration that federal courts must give agency factfinding the same preclusive effect that it is due in state court. *Id.* (citing *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 799 (1986)).

100. *GTE S.*, 199 F.3d at 745. Incidentally, Virginia also uses the substantial evidence standard, see *Va. Real Estate Comm'n v. Bias*, 308 S.E.2d 123, 125 (Va. 1983), but the key point is that the court in *GTE South* arrived at its standard carelessly and for the wrong reasons.

substantial evidence. The court's lack of inquiry into state doctrine is typical. In one case considering a challenge to Virginia's Medicaid plan, a federal district court noted that the APA did not apply to the state agency, but then nevertheless proceeded to apply doctrine derived from the APA.¹⁰¹ Another district court decided in a telecommunications case that the state agency's "technical expertise" merited deference, and so it explicitly adopted the APA's arbitrary and capricious standard in reviewing the state agency's application of law to fact.¹⁰² It did not think to defer to the agency through the vehicle of state law.

Just as federal courts generally do not look to state doctrine, state courts do not look to federal doctrine.¹⁰³ For example, in *Sierra Club v. Department of Natural Resources*, a Wisconsin appeals court used the state's "substantial evidence" standard when evaluating the state agency's findings of fact under the Clean Air Act.¹⁰⁴ The court never contemplated the possibility that, under the Clean Air Act's cooperative federalism regime, a federal standard of review might apply through federal common law to the Wisconsin state agency.

ii. Statutory Interpretation

One of the most important administrative law questions is when courts should defer to the statutory interpretations of agencies. When a federal agency

101. *Mary Washington Hosp., Inc. v. Fisher*, 635 F. Supp. 891, 897 (E.D. Va. 1985) ("[T]he Court must defer to the agency's exercise of discretion unless it acts arbitrarily or capriciously." (citing *Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971))). But for contrast, see *Colorado Health Care Ass'n v. Colorado Department of Social Services*, 842 F.2d 1158, 1162-64 (10th Cir. 1988), a Medicaid suit filed in state court and removed under federal question jurisdiction, in which the court identified relevant state doctrine but did not specifically base its determination on state law.

102. *Bell Atl.-Del., Inc. v. McMahon*, 80 F. Supp. 2d 218, 227 (D. Del. 2000) ("The [state agency]'s technical expertise in applying the Act's mandates to the complex facts of the administrative record, however, deserves substantial deference. . . . Accordingly, the court shall adopt the Federal Administrative Procedure Act's 'arbitrary and capricious' standard in its review of the [agency]'s application of the law to the facts." (citations omitted)).

103. See *Nat'l Fuel Gas Distrib. Corp. v. Pub. Serv. Comm'n*, 487 N.Y.S.2d 150, 151 (App. Div.), *aff'd*, 489 N.E.2d 767 (N.Y. 1985) (referencing a New York state case to determine that the standard of review for agency action is substantial evidence); *Swan Super Cleaners, Inc. v. Tyler*, 549 N.E.2d 526, 531 (Ohio Ct. App. 1988) (applying the state's requirement that agency orders be "supported by reliable, probative, and substantial evidence" to state implementation of the Clean Air Act); *Sierra Club v. Wis. Dep't of Natural Res.*, 787 N.W.2d 855, 865 (Wis. Ct. App. 2010) (applying the state's substantial evidence standard to agency factfindings made pursuant to the Clean Air Act).

104. *Sierra Club*, 787 N.W.2d at 865.

interprets a statute that it is entrusted with implementing in an authoritative manner (through rulemaking, for example), federal courts will defer to that interpretation if the statute is ambiguous and the agency's interpretation is reasonable.¹⁰⁵ This is *Chevron* deference. Federal courts may also give a weaker form of deference, *Skidmore* deference, to less authoritative decisions by federal agencies.¹⁰⁶ State courts are typically less deferential to state agencies' statutory interpretations. "Among state courts generally, the most prevalent attitude toward deference on issues of law is some version of the weak deference model A minority of jurisdictions follow *Chevron*. . . . Some state cases read as though they will accord no deference whatsoever to administrative views" ¹⁰⁷ How much deference, then, should state agencies receive for their interpretations of cooperative federalism statutes? What law should govern, state or federal?

Numerous courts have considered whether to defer to state agencies interpreting federal law.¹⁰⁸ Five out of the six circuits that have considered the issue have elected to give state agencies no deference and apply a de novo standard of review.¹⁰⁹ Courts have granted no deference in a variety of cooperative federalism regimes—telecommunications, Medicaid, and public housing. The courts have justified this lack of deference with a wide variety of rationales. Some have argued that de novo review is compelled by *United States v. Mead Corp.*¹¹⁰ The Second Circuit argues that because "the question is

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

106. *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

107. ASIMOW & LEVIN, *supra* note 70, at 526.

108. *See BellSouth Telecomms., Inc. v. Sanford*, 494 F.3d 439, 447-49 (4th Cir. 2007) (Telecommunications Act); *Qwest Corp. v. Minn. Pub. Util. Comm'n*, 427 F.3d 1061, 1064 (8th Cir. 2005) (same); *MCI Telecomm. Corp. v. Bell Atl.-Pa.*, 271 F.3d 491, 515-17 (3d Cir. 2001) (same); *Sw. Bell Tel. Co. v. Pub. Util. Comm'n*, 208 F.3d 475, 482 (5th Cir. 2000) (same); *GTE S., Inc. v. Morrison*, 199 F.3d 733, 745 (4th Cir. 1999) (same); *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1495 (9th Cir. 1997) (a § 1983 suit for violations of the Medicaid Act); *Turner v. Perales*, 869 F.2d 140, 141 (2d Cir. 1989) (a suit alleging that the calculation of New York public housing benefits violated federal housing law and regulations, the Supremacy Clause, and the Equal Protection Clause); *Bell Atl.-Del., Inc. v. McMahon*, 80 F. Supp. 2d 218, 227 (D. Del. 2000) (Telecommunications Act).

109. *Compare Qwest*, 427 F.3d at 1064, *MCI*, 271 F.3d at 515-17, *Sw. Bell*, 208 F.3d at 482, *GTE S.*, 199 F.3d at 745, *Orthopaedic Hosp.*, 103 F.3d at 1495, and *Turner*, 869 F.2d at 141 (each reviewing state agency interpretations de novo), with *BellSouth Telecomms.*, 494 F.3d at 447-49 (granting deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944)).

110. *See, e.g., MCI*, 271 F.3d at 517 ("Our conclusion not to accord deference to a state commission's interpretation of the Act is enforced by the Supreme Court's recent decision in *Mead* which suggests that not every formal agency act involving interpretation of a federal statute is entitled to deference.").

whether the state law and implementing regulations are consistent with federal law,” the situation is analogous to preemption, where *de novo* review is applied.¹¹¹ Others argue that *Chevron’s* uniformity rationale does not apply to state interpretations because cooperative federalism schemes “do[] not envision any unitary or uniform application from state to state.”¹¹² One court wrote that “deferring to state commission interpretations of [a cooperative federalism statute] would lead to fifty different interpretations of the Act and thereby frustrate Congress’[s] efforts to impose a degree of national uniformity.”¹¹³ Two courts have argued that *Chevron’s* expertise rationale does not apply because “[s]tate agencies have no expertise in interpreting federal law.”¹¹⁴ The Eleventh Circuit has gone so far as to say that a federal agency does not merit *Chevron* deference when its interpretation is based on deference to a state agency interpretation.¹¹⁵ “If this Court were to defer to the FCC, which had, in turn, deferred to the state commission, it would render our *de novo* review of the state commission meaningless.”¹¹⁶

However, courts are not unanimous in granting state agencies no deference. The Fourth Circuit grants state agencies *Skidmore* deference, citing Philip Weiser’s arguments for deference to state agency interpretations.¹¹⁷ In a Medicaid case where a federal agency had approved the state agency’s actions, the Second Circuit applied *Chevron* deference,¹¹⁸ though it is not clear if we should understand that as deference to the state agency or the federal agency.

Federal courts’ *de novo* review of state agencies’ interpretations only applies when state agencies construe federal law. When state agencies interpret *state* law in their implementation of cooperative federalism statutes, federal courts have given those interpretations deference under the arbitrary and

111. *Turner*, 869 F.2d at 141.

112. *Id.* (“*Chevron’s* policy underpinnings emphasize . . . the need for coherent and uniform construction of federal law nationwide.”); accord *Orthopaedic Hosp.*, 103 F.3d at 1495-96 (quoting *Turner*, 869 F.2d at 141).

113. *Bell Atl.-Del.*, 80 F. Supp. 2d at 227.

114. *Id.*; accord *Orthopaedic Hosp.*, 103 F.3d at 1495-96.

115. *MCI Worldcom Commc’ns, Inc. v. BellSouth Telecomms., Inc.*, 446 F.3d 1164, 1172 (11th Cir. 2006) (Telecommunications Act).

116. *Id.*

117. *BellSouth Telecomms., Inc. v. Sanford*, 494 F.3d 439, 448-49 (4th Cir. 2007) (citing Weiser, *supra* note 5, at 24-30).

118. *Perry v. Dowling*, 95 F.3d 231, 237 (2d Cir. 1996) (“In these circumstances, in which the state has received prior federal-agency approval to implement its plan, the federal agency expressly concurs in the state’s interpretation of the statute, and the interpretation is a permissible construction of the statute, that interpretation warrants deference.”).

capricious review standard.¹¹⁹ Federal courts do not explain why they use this standard rather than apply state deference doctrine to state agency determinations of state law.

Surprisingly, the Supreme Court has remained silent on what deference to grant state agencies, even though it has squarely addressed situations in which the question was relevant.¹²⁰ In *Lukhard v. Reed*, the Court upheld a state agency determination of the meaning of the words “income” and “resources” in the federal statute governing AFDC without even broaching the subject of deference to the state.¹²¹ In *Wisconsin Department of Health & Family Services v. Blumer*, the Court again ignored the issue, despite declaring that its ruling turned on statutory interpretation.¹²² The Court’s ruling upholding the state agency action was supported in part by a proposed rule by the Secretary of Health and Human Services declaring that “‘in the spirit of Federalism,’ the Federal Government ‘should leave to States the decision as to which alternative to use.’”¹²³ The Court granted HHS’s proposed rule *Mead* deference, but was silent as to whether the state agency was itself due any deference.¹²⁴ Although this silence could be taken to mean that state agency determinations are reviewed *de novo*, it seems more likely that the Court missed the issue entirely,

119. *Sw. Bell Tel. Co. v. Pub. Util. Comm’n*, 208 F.3d 475, 482 (5th Cir. 2000) (“[O]ur review of the PUC’s state law determinations will be under the more deferential arbitrary-and-capricious standard.”); see *Fitch v. Pub. Util. Comm’n*, 261 F. App’x 788, 791 (5th Cir. 2008) (holding that “state law determinations by state commissions are reviewed ‘under the more deferential arbitrary and capricious standard,’” but then recognizing “that there is no meaningful difference between the arbitrary and capricious standard and the ‘substantial evidence’ standard” (quoting *Sw. Bell*, 208 F.3d at 482 & n.8); *Mich. Bell Tel. Co. v. MFS Intelenet of Mich., Inc.*, 339 F.3d 428, 433 (6th Cir. 2003) (endorsing *Southwestern Bell’s* approach); cf. *Pharm. Research & Mfrs. of Am. v. Concannon*, 249 F.3d 66, 75 (1st Cir. 2001), *aff’d sub nom. Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644 (2003) (“As the [state] Department is charged with administering the Maine Rx Program, we owe deference to its interpretation of the [state] Act.”). It should be noted that each of these cases concerned state agency interpretation of contracts. While these situations are not exactly analogous to *Chevron*-style statutory interpretation, their holdings appear to require deference for all “state law determinations.”

120. See *Wis. Dep’t of Health & Family Servs. v. Blumer*, 534 U.S. 473 (2002) (Medicaid); *Lukhard v. Reed*, 481 U.S. 368 (1987) (a § 1983 suit alleging violations of federal welfare law).

121. 481 U.S. at 381.

122. 534 U.S. at 489 (“The answer to th[e] question [presented], the parties agree, turns on whether the words ‘community spouse’s income’ in § 1396r-5(e)(2)(C) may be interpreted to include potential, posteligibility transfers of income from the institutionalized spouse permitted by § 1396r-5(d)(1)(B).”).

123. *Id.* at 497 (quoting 66 Fed. Reg. 46,763, 46,767 (Sept. 7, 2001)).

124. *Id.*

as neither party's brief addressed the issue,¹²⁵ and neither the majority nor the dissent cited any of the relevant circuit law.

In sharp contrast to the approach of federal courts, state courts generally grant state agencies the same deference when interpreting a cooperative federalism statute as when interpreting state law.¹²⁶ In doing so, state courts entirely omit any discussion of federal case law. For example, in *Keup v. Wisconsin Department of Health & Family Services*, the Wisconsin Supreme Court applied the Wisconsin deference framework, which calls for either “great

125. Brief for Petitioner, *Blumer*, 534 U.S. 473 (No. 00-952), 2001 WL 1025887; Brief of Respondent, *Blumer*, 534 U.S. 473 (No. 00-952), 2001 WL 1424474.

126. See, e.g., *Bldg. Indus. Ass'n of San Diego Cnty. v. State Water Res. Control Bd.*, 22 Cal. Rptr. 3d 128, 137 n.9 (Ct. App. 2004) (“[T]he parties do not argue [that *Chevron* deference] applies to a state agency's interpretation of the Clean Water Act. Nonetheless, under governing state law principles, we do consider and give due deference to the Water Boards' statutory interpretations in this case.”); *Iowa Power & Light Co. v. Iowa State Commerce Comm'n*, No. AA 677, 1986 WL 1170625, at *16-17 (Iowa Dist. Ct. Mar. 26, 1986) (applying Iowa deference doctrine to the State Commerce Commission's implementation of the Public Utility Regulatory Policies Act (PURPA)); *Occidental Chem. Corp. v. Pub. Serv. Comm'n*, 114 A.D.2d 149, 153-54 (N.Y. App. Div. 1986) (applying New York deference doctrine to the state Public Service Commission's actions implementing PURPA); *Brazoria Cnty. v. Tex. Comm'n on Envtl. Quality*, 128 S.W.3d 728, 734 (Tex. App. 2004) (applying state doctrine that agency interpretation is entitled to “serious consideration” in a case under the Clean Air Act); *Utah Chapter of Sierra Club v. Air Quality Bd.*, 226 P.3d 719, 725 (Utah 2009) (reviewing a state interpretation of the Clean Air Act and applying state doctrine “granting little or no deference to the agency's determination”); *Keup v. Wis. Dep't of Health & Family Servs.*, 675 N.W.2d 755, 762-63 (Wis. 2004) (applying state doctrine to a state agency's interpretation of federal Medicaid law, and ultimately deciding to grant no deference because the issue was one of first impression before the agency); see also *Albany Law Sch. v. N.Y. State Office of Mental Retardation & Developmental Disabilities*, 81 A.D.3d 145, 148-49 (N.Y. App. Div. 2011), *aff'd as modified*, 968 N.E.2d 967 (N.Y. 2012) (holding that, under state deference doctrine, the state agency merited no deference for its interpretation of a state statute “enacted in an effort to comply with the federal Developmental Disabilities Assistance and Bill of Rights Act of 1984,” because “[w]here, as here, interpretation of the statutes does not depend on any specialized knowledge or competence of the agency, no deference is accorded to the agency's interpretation”); *Gardner v. Dep't of Envtl. Res.*, 603 A.2d 279, 281 n.2 (Pa. Commw. Ct. 1992) (applying state deference doctrine to a state agency's regulation interpreting a state law, the Pennsylvania Surface Mining and Control Act, that had “been amended a number of times to bring it into conformity with The Federal Surface Mining and Control Act”). *But see* *Voices of Wetlands v. Cal. State Water Res. Control Bd.*, 69 Cal. Rptr. 3d 487, 538-39 (Ct. App. 2007) (declaring cryptically that state agency interpretation is “relevant” while citing—though not applying—the federal *Chevron* doctrine and not discussing state deference doctrine); *Martin v. N.C. Dep't of Health & Human Servs.*, 670 S.E.2d 629, 632 (N.C. Ct. App. 2009) (quoting two Fourth Circuit cases for the proposition that a “state agency's interpretation of federal statutes is not entitled to the deference afforded a federal agency's interpretation of its own statutes”).

weight” deference, “due weight” deference, or no deference.¹²⁷ Interestingly, when the federal agency has weighed in, state courts have applied federal deference doctrine without mentioning the state position.¹²⁸

State court deference frameworks may be significantly different from federal ones. As mentioned above, state courts generally follow the weak deference model.¹²⁹ Some states differ even more. Utah, for example, grants “little or no deference” to agency determinations, and has applied this standard to cooperative federalism statutes.¹³⁰ A number of states explicitly take account of agency expertise and other contextual factors in determining the appropriate level of deference. In California, for instance, “[d]eference to administrative interpretations always is situational and depends on a complex of factors . . . , but where the agency has special expertise and its decision is carefully considered by senior agency officials, that decision is entitled to correspondingly greater weight.”¹³¹ In New York, the level of deference depends on whether “the interpretation or application of a statute involves specialized knowledge and understanding of underlying operational practices or entails an evaluation of factual data, within the expertise of the agency administering the statute,” in which case great deference is granted, or whether “the question is one of pure statutory interpretation,” in which case no deference is granted.¹³² In Wisconsin, “[t]he weight that is due an agency’s interpretation of the law depends on the comparative institutional capabilities and qualifications of the court and the administrative agency.”¹³³ Despite this potential divergence, when the Fourth Circuit declared that “an order of a state commission may deserve a measure of respect in view of the commission’s experience [and] expertise, and the role that Congress has given it in the Telecommunications Act,” it decided that the best way to accord that respect was to grant the state agency *Skidmore* deference, without even considering whether the best way to accord it respect would be to grant it the deference normally due the agency under state law.¹³⁴

127. *Keup*, 675 N.W.2d at 762-63.

128. *See, e.g.,* *Consol. Edison Co. v. Pub. Serv. Comm’n*, 472 N.E.2d 981, 986 (N.Y. 1984) (adjudicating whether the state agency’s determination was preempted by PURPA).

129. ASIMOW & LEVIN, *supra* note 70, at 526.

130. *See Utah Chapter of Sierra Club*, 226 P.3d at 725.

131. *Sharon S. v. Superior Court*, 73 P.3d 554, 568 (Cal. 2003) (citations and internal quotation marks omitted).

132. *Albano v. Bd. of Tr.*, 780 N.E.2d 159, 161 (N.Y. 2002) (internal quotation marks omitted).

133. *State ex rel. Parker v. Sullivan*, 517 N.W.2d 449, 461 (Wis. 1994).

134. *BellSouth Telecomms., Inc. v. Sanford*, 494 F.3d 439, 447-49 (4th Cir. 2007).

Note that in many cases it is not clear whether the state is interpreting state law, federal law, or both. For example, in *Brazoria County v. Texas Commission on Environmental Quality*, the plaintiff challenged “several rules and orders” of a State Implementation Plan developed pursuant to the Clean Air Act.¹³⁵ In that case, the majority of the plaintiff’s challenges were based entirely on state law, but some of the causes of action depended on the resolution of federal law. In other cases, the state law at issue may be a state statute, regulation, or plan created pursuant to a federal statute.¹³⁶

iii. Other Doctrines

This pattern, in which federal courts consider only federal law, recurs when federal courts apply most other administrative law doctrines to state agencies implementing federal law.

One prominent example is the doctrine flowing from *Heckler v. Chaney*’s holding that a federal agency’s decision not to bring an enforcement action is presumptively unreviewable in court.¹³⁷ One district court held that, because *Chaney* and its ilk flow from the APA, and the APA does not apply to state agencies, those cases do not apply to state agencies.¹³⁸ As a result, the court held that the state agency’s action was reviewable. Oddly, however, the court did not consider whether state administrative law doctrines similar to *Chaney* might make the state agency’s action unreviewable.¹³⁹ In a similar case, the

^{135.} 128 S.W.3d 728, 732 (Tex. App. 2004).

^{136.} See *Occidental Chem. Corp. v. Pub. Serv. Comm’n*, 114 A.D.2d 149, 153-54 (N.Y. App. Div. 1986).

^{137.} 470 U.S. 821, 830-38 (1985). Courts are split on whether this presumption of unreviewability flows from the APA or exists as a matter of federal common law. Compare *Sierra Club v. Whitman*, 268 F.3d 898, 902 (9th Cir. 2001) (“The presumption of agency discretion recognized in *Chaney* has a long history and . . . is not limited to cases brought under the APA. When setting out the presumption in *Chaney*, the Supreme Court relied on four prior cases, none of which had been brought under the APA.”), with *Occidental Chem. Corp. v. Power Auth.*, 758 F. Supp. 854, 859 (W.D.N.Y. 1991) (“[*Chaney*’s] exception to judicial review [is] clearly developed from the language and legislative history of the APA.”).

^{138.} *Occidental Chemical*, 758 F. Supp. at 859. This case questioned whether the Power Authority of the State of New York was authorized to raise certain utility rates by the federal Niagara Redevelopment Act or by its license issued by the Federal Power Commission. The court held that the broader “no law to apply” exception to judicial review, which encompasses *Chaney*, flows from the APA and therefore does not apply to state agencies. *Id.* at 860.

^{139.} See *id.*

Seventh Circuit ignored state law,¹⁴⁰ despite acknowledging that “federal courts are poorly equipped to set substantive standards for institutions whose control is properly reserved to other branches and levels of government.”¹⁴¹ Similarly, many other reviewability cases cite federal precedent without discussing whether different principles should apply to a state agency or inquiring into the substance of state law.¹⁴²

This pattern holds for many other doctrines of administrative law, including both APA-based doctrines and common law doctrines. For example, *GTE North v. McCarty*¹⁴³ unquestioningly applied ripeness doctrine from *Abbott Laboratories v. Gardner* to a state agency, even though the reasoning of *Abbott Laboratories* is heavily based on the federal APA.¹⁴⁴ Similarly, the Tenth Circuit applied the federal common law rule of *SEC v. Chenery Corp.*¹⁴⁵ to support its determination that a state agency should have discretion over whether to announce a policy through a rulemaking or an adjudicatory proceeding.¹⁴⁶ The court never considered state law.¹⁴⁷

iv. A Path Forward

There are a few cases where courts grapple with these issues in greater depth. Both such cases we have found deal with the burden of proof in state agency proceedings under federal law. In *U.S. West Communications, Inc. v. Minnesota Public Utilities Commission*, the district court reasoned that “normally when a federal statute is silent as to the burden of proof in an administrative proceeding, a court would turn to the [APA] to fill the void. However the APA

¹⁴⁰. *Gomez v. Ill. State Bd. of Educ.*, 811 F.2d 1030, 1034 (7th Cir. 1987) (holding that a § 1983 class action alleging that the state’s “fail[ure] to provide local districts with proper guidelines for the identification and placement of LEP [Limited English Proficient] children and . . . to monitor and enforce the local districts’ compliance with the law” violated the federal Equal Educational Opportunities Act of 1974, the Equal Protection Clause, and Title VI of the Civil Rights Act of 1964 and its regulations).

¹⁴¹. *Id.* at 1041.

¹⁴². See, e.g., *GTE N. Inc. v. McCarty*, 978 F. Supp. 827, 833-34 (N.D. Ind. 1997); *GTE S., Inc. v. Breathitt*, 963 F. Supp. 610, 612 (E.D. Ky. 1997); *GTE Nw., Inc. v. Nelson*, 969 F. Supp. 654, 656 (W.D. Wash. 1997); *GTE S. Inc. v. Morrison*, 957 F. Supp. 800, 803-04 (E.D. Va. 1997). All of these cases are Telecommunications Act cases.

¹⁴³. 978 F. Supp. at 836-38.

¹⁴⁴. 387 U.S. 136 (1967).

¹⁴⁵. 332 U.S. 194, 203 (1947).

¹⁴⁶. *WWC Holding Co. v. Sopkin*, 488 F.3d 1262, 1278 (10th Cir. 2007).

¹⁴⁷. *Id.*

does not apply to these proceedings because the [Minnesota Public Utilities Commission (MPUC)] is not a federal agency.”¹⁴⁸ The court explained that because state law was not “explicitly on point,” the MPUC had been forced to fashion a new rule for the burden of proof.¹⁴⁹ Ultimately, the court accepted the MPUC’s conclusion because it felt it was reasonably consistent with the principles of both federal common law and Minnesota common law.¹⁵⁰

The Supreme Court itself discussed the issue of how to treat state agencies applying federal law in *Schaffer ex rel. Schaffer v. Weast*,¹⁵¹ which considered the burden of proof in a state hearing before an administrative law judge under the Individuals with Disabilities Education Act (IDEA). The administrative law judge had ruled in favor of a school district on the grounds that the evidence was close and the parents bore the burden of persuasion. The parents then challenged the result through a civil action in federal district court, as provided for by the IDEA.¹⁵² Since the statute was silent on the issue, the Court applied the default federal rule. “Absent some reason to believe that Congress intended otherwise, therefore, we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief.”¹⁵³ The respondent school district and several state amici argued that, rather than applying the federal rule, the Court should defer to state law.¹⁵⁴ Although other states had issued statutes or regulations covering the matter, the Court reasoned that “[b]ecause no such law or regulation exists in Maryland [the jurisdiction in question], we need not decide this issue today.”¹⁵⁵

Justice Breyer’s dissent drew upon the broader jurisprudence of federal common law, which teaches that only in limited instances should courts “fill the interstices of federal remedial schemes with uniform federal rules.”¹⁵⁶ In general, courts should borrow state law. Here, Justice Breyer argued that that presumption applied with full force:

148. 55 F. Supp. 2d 968, 987 (D. Minn. 1999).

149. *Id.*

150. *Id.*

151. 546 U.S. 49 (2005).

152. The IDEA provides that, in a due process hearing in front of a state administrative law judge, any aggrieved party may bring a civil action in state or federal court. 20 U.S.C. § 1415(i)(2) (2006).

153. *Schaffer*, 546 U.S. at 57-58.

154. *Id.* at 61.

155. *Id.* at 61-62.

156. *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991).

Nothing in the [IDEA] suggests a need to fill every interstice of the Act's remedial scheme with a uniform federal rule. . . . Most importantly, Congress has made clear that the Act itself represents an exercise in "cooperative federalism." Respecting the States' right to decide this procedural matter here, where education is at issue, where expertise matters, and where costs are shared, is consistent with that cooperative approach.¹⁵⁷

Justice Breyer's dissent suggests a way that courts can apply administrative law to cooperative federalism statutes while taking account of the demands of both federal and state law. In Part II, we develop this framework.

II. ESTABLISHING A FRAMEWORK FOR THE ADMINISTRATIVE LAW OF COOPERATIVE FEDERALISM

As we have demonstrated, courts have not adequately considered what law should apply to state agencies challenged under cooperative federalism statutes. But what *should* their answer be? In principle, the courts could take three different types of approaches: (1) adopt a blanket rule applying either federal or state law; (2) adopt a presumption in favor of either federal or state law that could be overridden by considerations specific to the statutory regime and administrative law doctrine at issue; or (3) adopt no general rule or presumption and instead focus entirely on the contextual factors of the statute and administrative law doctrine at issue. In this Part, we first show that the teachings of federal common law and the principles of practical governance they embody point toward a version of the second option in which courts presume that state law applies but engage in a contextual analysis to determine whether this presumption would create a significant conflict with federal policy. We then explore what this approach would look like in practice. Finally, we conclude with questions for further research.

At the outset, we note that the question of what law courts should apply in the absence of congressional direction is a separate question from what direction Congress should give. Courts are forced to determine the choice-of-law question for themselves because Congress has mostly been silent, but Congress could decide to speak. Since Congress generally has not done so, we suggest a framework for how courts should proceed in the face of current ambiguity.

¹⁵⁷. *Schaffer*, 546 U.S. at 70-71 (Breyer, J., dissenting) (citation omitted).

A. *The Kimbell Foods Presumption in Favor of State Law*

In *United States v. Kimbell Foods, Inc.*, the Supreme Court held that “when Congress has not spoken ‘in an area comprising issues substantially related to an established program of government operation,’ . . . courts [must] fill the interstices of federal legislation ‘according to their own standards.’”¹⁵⁸ Drawing from *Clearfield Trust Co. v. United States*, the Court explained that federal law governs these situations, so courts must fashion federal common law to resolve areas of legislative silence. Our question—what law should govern state agencies implementing cooperative federalism statutes—is such an area of legislative silence where the courts must fashion federal common law.

Clearfield first clearly established that federal courts have authority to craft federal common law in such circumstances, and that in doing so they may either fill gaps with state law or craft uniform federal rules.¹⁵⁹ In *Clearfield*, the Court had to decide what law should govern a suit by the United States to recover the value of a stolen check that had been issued by the Treasury. The Court held that state law did not apply directly through *Erie* because “[t]he authority to issue the check had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws of Pennsylvania or of any other state.”¹⁶⁰ Thus, “[t]he duties imposed upon the United States and the rights acquired by it as a result of the issuance find their roots in the same federal sources.”¹⁶¹ These federal duties, combined with the “absence of an applicable Act of Congress,” gave the federal courts authority to make federal common law—that is, “to fashion the governing rule of law according to their own standards.”¹⁶² But while the legal question was inherently federal, the *Clearfield* Court noted that courts were free to borrow the substantive rule from state law.¹⁶³ *Clearfield* itself declined that invitation, observing that the need for uniformity in the law governing federal commercial paper made it inappropriate to borrow law from the various states.¹⁶⁴

^{158.} 440 U.S. 715, 727 (1979) (quoting *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 593 (1973); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943)).

^{159.} See *Clearfield*, 318 U.S. at 367; see also *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 690 (2006) (“*Clearfield* is indeed a pathmarking precedent on the authority of federal courts to fashion uniform federal common law on issues of national concern.”).

^{160.} *Clearfield*, 318 U.S. at 366.

^{161.} *Id.*

^{162.} *Id.* at 367.

^{163.} *Id.*

^{164.} *Id.*

The general framework of *Clearfield* has held up over time.¹⁶⁵ But its emphasis on uniformity has been met with withering criticism. As Paul Mishkin has pointed out, federal common law is unlikely to result in true uniformity because the Supreme Court can review so few of the cases heard in the appellate courts.¹⁶⁶ Moreover, while uniformity may matter for particular legislative problems, “not infrequently the call for ‘uniformity’ seems basically to represent a desire for symmetry of abstract legal principles and a revolt against the complexities of a federated system of government.”¹⁶⁷ Perhaps most importantly, by imposing a uniform rule for federal commercial paper, the Court in *Clearfield* missed a competing uniformity: that of banking transactions within a specific state.¹⁶⁸ Under *Clearfield*, citizens of any given state were forced to operate under two different banking systems with different rules, one involving federal notes and one involving state notes.¹⁶⁹

In light of these problems, the Court found a different solution to a similar situation in *Kimbell Foods*. Faced with the question of how to resolve lien priority for liens stemming from federal programs, the Court reasoned that “a national rule is unnecessary to protect the federal interests underlying the [federal] loan programs.”¹⁷⁰ Instead it declared that, “absent a congressional directive to the contrary,” the lien priorities would be “determined under nondiscriminatory state laws.”¹⁷¹ The Court made clear that this sort of reasoning would apply more generally: absent “concrete reasons” to the

165. Martha A. Field has criticized the two-step inquiry of *Clearfield*, in which courts first determine whether they have the authority to craft federal common law, and second determine whether that law should take federal or state law as its source. See Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 950-51 (1986) (arguing that the two-step inquiry should only be one step because courts always have the power to use state law). In at least one recent decision, the Court quietly collapsed these two inquiries into one, per Professor Field’s argument. See *Atherton v. FDIC*, 519 U.S. 213, 215-16 (1997). Our argument is premised on the assumption that when state agencies are sued for violations of federal law, federal courts have the authority to craft federal common law, and that the difficult question is what the substance of the law should be.

166. See Paul Mishkin, *The Variousness of “Federal Law”: Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 813 (1957).

167. *Id.*; see also Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 410 (1964) (arguing that the Supreme Court jumped over the uniformity point “rather quickly and not altogether convincingly”).

168. Friendly, *supra* note 167, at 410 (“[T]he question persists why it is more important that federal fiscal officials rather than Pennsylvanians dealing in commercial paper should have the solace of uniformity.”).

169. *Id.*

170. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 718 (1979).

171. *Id.* at 740.

contrary, “the prudent course is to adopt the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation.”¹⁷²

The Court has subsequently elaborated on the *Kimbell Foods* presumption in favor of state law. The ultimate question is “whether the relevant federal interest warrants displacement of state law.”¹⁷³ There is a “presumption that state law should be incorporated into federal common law” as the federal rule of decision.¹⁷⁴ Only in limited instances should courts “fill the interstices of federal remedial schemes with uniform federal rules.”¹⁷⁵ Cases meriting the “judicial creation of a special federal rule . . . are . . . ‘few and restricted,’ [and] limited to situations where there is a ‘significant conflict between some federal policy or interest and the use of state law.’”¹⁷⁶

Thus, through *Kimbell Foods* and subsequent cases, the Court established a general set of ground rules that call for a presumption in favor of state law when creating federal common law.

As with the federal loan program at issue in *Kimbell Foods*, cooperative federalism statutes create situations where “[g]overnment activities ‘arise from and bear heavily upon a federal program.’”¹⁷⁷ Likewise, in many situations, they “‘require’ otherwise than that state law govern of its own force.”¹⁷⁸ Admittedly, cooperative federalism cases sound in public law, whereas the *Kimbell Foods* cases sounded in tort, contract, and property—private law. However, as we will show, *Kimbell Foods* makes sense in the public law context, too. It teaches that courts should adopt state law unless doing so presents a significant conflict with federal policy.

172. *Id.*

173. *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 692 (2006).

174. *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991).

175. *Id.*

176. *O’Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994) (citations omitted) (quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963); *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)).

177. *Kimbell Foods*, 440 U.S. at 727 (quoting *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 592 (1973) (internal punctuation marks omitted)).

178. *Id.* (quoting *Little Lake Misere*, 412 U.S. at 593).

B. *The Value of the Kimbell Foods Presumption in the Cooperative Federalism Context*

In the previous Section, we explained why, doctrinally, *Kimbell Foods* governs what law should apply when state agencies are sued for violations of cooperative federalism statutes. This Section explains why the *Kimbell Foods* rule—a presumption in favor of state law—is also desirable. Here, as in the core *Kimbell Foods* cases, state law will usually be most appropriate, but there will be cases in which applying state law would undermine the policy objectives behind the statute in question. Courts should adopt a middle ground in which they presume that state law governs but adopt federal law when doing otherwise would present a significant conflict with federal policy.

A blanket rule for state law would too often do violence to compelling federal interests, while a blanket rule for federal law would too often do violence to state interests. Blanket rules would also be blind to the tremendous variety of cooperative federalism statutes and questions of law. In contrast, a totally flexible, contextual inquiry with no presumption would undermine consistency and predictability in the law while ignoring the fact that state law is more often appropriate. In this Section, we first explain why cooperative federalism regimes should mostly use state law. Second, we explain why that tendency should not be so strong as to become a blanket rule.

1. *Why Cooperative Federalism Should Lean Toward State Law*

Kimbell Foods has been developed in the private law context and calls for a presumption in favor of state law in part because application of a federal rule might “disrupt commercial relationships predicated on state law.”¹⁷⁹ So why should the same presumption apply in the public law context of cooperative federalism, where bargaining reliance is rarely an issue?¹⁸⁰ We suggest four reasons.

First, state agencies, just like business entities, expect to operate under a uniform and predictable set of rules. For example, if a state agency has structured its quasijudicial processes (e.g., how it gathers evidence) to meet a state “soft look” review rather than federal “hard look” review, the agency would either have to change its processes when federal issues were at stake, or it would see its federally inflected decisions struck down at a higher rate.

179. *Id.* at 729.

180. Some disputes between private parties might turn on the legality of agency action, and in those cases bargaining reliance could be relevant.

Predictability could be an issue too, since sometimes it is not clear whether an agency is acting in its purely state capacity or in its cooperative federalism capacity. If the agency cannot predict what law will govern judicial review of its cooperative federalism actions, it will not be able to structure its processes intelligently. Moreover, when a state agency acts pursuant to both federal and state law, as is often the case, it could be subject to two separate and potentially conflicting standards for the same action, depending on whether plaintiffs sued under the state or the federal law.

Second, it is reasonable to assume that state courts and legislatures, in developing administrative law doctrines to oversee their agencies, have taken the characteristics of their agencies into account in a way that uniform federal rules could not. For example, in a state with a notoriously corrupt or incompetent public utilities commission, or just a poor civil service generally, the state legislature or courts may have developed a stricter standard of review, whereas a state whose appointment rules lead to a well-respected commission may be more deferential. State deference doctrine may also take account of internal variation in state institutions. In a number of states, deference doctrine explicitly takes into account contextual factors such as the role of agency expertise and senior agency officials in the decision.¹⁸¹ This flexible deference standard may be a wise adaptation to the varying quality of agency action that those state courts have seen over the years. (Of course, it could also be a similarly wise course for the federal courts to adopt with respect to federal agencies.) Another good reason for state deference doctrine to differ from federal deference doctrine is that the heads of state agencies are often directly elected by the people, and therefore directly accountable to them, while the heads of federal agencies are never elected.¹⁸² As a result, the courts may need to play less of a role in checking potentially arbitrary administrative action. In the face of carefully considered state adaptations, the federal government would be wise not to impose federal rules—which are adapted for a different set of institutions—unless there is a strong case for such interference.

Third, the Constitution values the independence of state institutions. Thus, “Congress cannot compel the States to enact or enforce a federal regulatory program” nor “circumvent that prohibition by conscripting the State’s officers.”¹⁸³ In fact, state interests are at their height when the governance of

¹⁸¹. See *supra* notes 131-133 and accompanying text.

¹⁸². Bernard W. Bell, *The Model APA and the Scope of Judicial Review: Importing Chevron into State Administrative Law*, 20 WIDENER L. REV. 801, 824 n.130 (2011) (“In many states there are several elected statewide officials in addition to the governor.”).

¹⁸³. *Printz v. United States*, 521 U.S. 898, 935 (1997).

state institutions is concerned: “[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.”¹⁸⁴

Of course, Congress does create cooperative federalism programs in which federal law directs state agencies. It usually does so either by conditioning the receipt of federal funds on certain behavior¹⁸⁵ or by “offer[ing] States the choice of regulating [an] activity according to federal standards or having state law pre-empted by federal regulation.”¹⁸⁶ In addition, Congress can command states using its powers under Section 5 of the Fourteenth Amendment,¹⁸⁷ impose requirements on states and private parties alike,¹⁸⁸ or order state officials to comply with federal commands, enforceable by injunctions sought by private parties.¹⁸⁹

Once a lawful cooperative federalism program is in place, a state cannot claim some sovereign freedom from federal direction. But the deference due to state institutions is a constitutional value that should not disappear from the picture. Courts should give it real weight when deciding whether to adopt state or federal law. And, in this context, this value holds greater sway than in the situation originally contemplated by the *Kimbell Foods* line of cases, because it involves control over state institutions rather than simply state laws. The presumption that state principles usually govern challenges to state agency action while federal principles govern challenges to federal agency action respects the importance of both state and federal governments in cooperative federalism programs. And it respects the legislative intent of both elected bodies by allowing legislatures to specify principles of review that govern the agencies they create.

Fourth, congressional silence may itself indicate an intent for state law to apply. In *United States v. Standard Oil Co.*, which provided much of the foundation for *Kimbell Foods*, the Court reasoned that “it may fairly be taken that Congress has consented to application of state law, when acting partially in relation to federal interests and functions, through failure to make other

¹⁸⁴. *New York v. United States*, 505 U.S. 144, 166 (1992).

¹⁸⁵. *South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

¹⁸⁶. *New York*, 505 U.S. at 173-74.

¹⁸⁷. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (“[T]he Eleventh Amendment, and the principle of state sovereignty which it embodies, . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment.” (citation omitted)).

¹⁸⁸. *New York*, 505 U.S. at 160.

¹⁸⁹. *Ex parte Young*, 209 U.S. 123 (1908).

provision concerning matters ordinarily so governed.”¹⁹⁰ Since state agency actions are ordinarily governed by state law, the absence of any language governing state agencies in the APA and Congress’s continued silence can be interpreted as another example of this form of acquiescence. Of course, this argument should not be taken too far—since Congress will often not have noticed an issue, its silence should not be dispositive when purposive reasons are to the contrary.¹⁹¹ But Congress’s silence should strengthen the presumption in favor of state law, especially as recognition of this issue grows.

2. *Why Not a Blanket Rule in Favor of State Law?*

Why not always adopt state administrative law as the rule of decision? Again, the *Kimbell Foods* line of cases provides an answer: sometimes, applying state law will present “a significant conflict” with a “federal policy or interest.”¹⁹² For example, if state deference doctrine allows agencies such wide latitude in interpretation that giving them that deference would mean dramatically different interpretations in different states, and the statutory regime in question strongly demands uniformity, then state deference doctrine may need to be displaced by deference doctrine shaped in the federal courts. The courts should not use their common law powers to adopt state administrative law that would undermine a statute duly enacted by Congress.

One could argue in favor of a clear statement rule: if Congress wants federal administrative law to govern state administrative agencies, it should have to say so explicitly. But this is unreasonable. First, until this Note was written, the issue was simply not recognized, so we cannot say that Congress was on notice or that Congress definitively meant anything through its silence. Second, going forward, Congress could not possibly anticipate every situation in which this question might arise. A judicially created blanket rule would either force judges to apply state law in a manner contrary to how Congress would have spoken if it had thought of the issue, or it would encourage Congress to create a default rule of its own—but there is no good reason for the courts to so pressure the legislature.

We have shown that it will often be important for state law to govern, but also that federal law must be supreme where state law presents a significant conflict with federal policy. Of course, what it means to present a significant

190. 332 U.S. 301, 309 (1947).

191. See *infra* Subsection II.B.2.

192. *O’Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994) (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)).

conflict with federal policy is not at all obvious on its face. In the next Section, we draw on the *Kimbell Foods* line of cases to flesh out that concept in the context of cooperative federalism.

C. *How Kimbell Foods Should Work in the Cooperative Federalism Context*

Under the *Kimbell Foods* framework, there are three main ways in which a federal policy may warrant displacement of state law:

- [1] the scheme in question evidences a distinct need for nationwide legal standards, or when
- [2] express provisions in analogous statutory schemes embody congressional policy choices readily applicable to the matter at hand . . . [or when]
- [3] “application of the particular state law in question would frustrate specific objectives of the federal programs.”¹⁹³

We discuss these sources of conflict in turn.

1. *Uniformity*

The first exception to the presumption in favor of state law applies where there is a “distinct need for nationwide legal standards.”¹⁹⁴ But that need must truly be distinct—courts will “reject generalized pleas for uniformity.”¹⁹⁵ Today’s Supreme Court is often dismissive of uniformity arguments, calling uniformity “that most generic (and lightly invoked) of alleged federal interests.”¹⁹⁶ Even cases involving federal government contracts no longer automatically merit uniform federal rules.¹⁹⁷ Moreover, for a federal policy to be a “genuinely identifiable” one meriting a uniform federal rule, it cannot be “judicially constructed,”¹⁹⁸ because “[w]hether latent federal power should be

193. *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991) (citations and alterations omitted) (quoting *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979)). The *Kimbell Foods* presumption is also overridden if state law discriminates against federal law. *Kimbell Foods*, 440 U.S. at 739.

194. *Kamen*, 500 U.S. at 98.

195. *Kimbell Foods*, 440 U.S. at 730.

196. *O’Melveny*, 512 U.S. at 88.

197. *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 691 (2006).

198. *O’Melveny*, 512 U.S. at 89.

exercised to displace state law is primarily a decision for Congress,' not the federal courts."¹⁹⁹

In general, cooperative federalism regimes are less likely than other federal statutes to require a uniform federal rule.²⁰⁰ If Congress wanted a uniform, national solution badly enough, it could have granted full authority to a national regulatory agency.²⁰¹ Congress's choice to involve state agencies in its regulatory scheme shows a desire, or at least a willingness, for implementation to vary according to the preferences and characteristics of state institutions and interests.²⁰² Cooperative federalism regimes often grant state agencies wide latitude in implementation. As Philip Weiser has observed, "the very point of cooperative federalism schemes . . . is to allow states to adopt the approach that they deem to be the optimal regulatory strategy . . . whenever the statutory scheme authorizes them to make that decision in the first instance."²⁰³

Still, even in the cooperative federalism context, there will be situations that cry out for a uniform federal rule. Ultimately, the judgment must be specific to the matter presented before the court.²⁰⁴ The specifics of both the cooperative federalism regime and the type of agency action will be relevant.

As discussed earlier, the relative importance of state versus federal law varies tremendously among cooperative federalism programs. When state agencies implement state law subject to federal requirements and oversight, as in the case of many benefits, public housing, and education programs,

199. *Atherton v. FDIC*, 519 U.S. 213, 218 (1997) (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)).

200. *Cf. Reconstruction Fin. Corp. v. Beaver County*, 328 U.S. 204, 209 (1946) ("But Congress, in permitting local taxation of the real property, made it impossible to apply the law with uniform tax consequences in each state and locality. For the several States, and even the localities within them, have diverse methods of assessment, collection, and refunding.").

201. Weiser, *supra* note 5, at 36. Of course, the decision to use a cooperative federalism regime does not necessarily mean that Congress was *opposed* to centralized authority. Other factors may have been relevant. For example, Congress may have decided that there was no federal agency already in existence with the ability to implement the program in full, and that creating a new agency or increasing the capacity of an existing agency was not worth the gains in uniformity.

202. *Id.*

203. *Id.*

204. This is in accord with Gluck's suggestion of a statute-specific approach to determining whether state agencies should receive *Chevron* deference. "The extent to which one might recommend deferring to state agency interpretations of federal law, for example, likely should turn on why Congress uses the state agency implementers in the first place." Gluck, *supra* note 4, at 565.

Congress has probably already given up on true uniformity.²⁰⁵ By contrast, when state agencies operate entirely according to federal law and with federal funding, as in the case of SSDI, Congress has prioritized uniformity. In more hybrid regimes such as workplace safety and environmental programs, state agencies implement federal law directly, often side-by-side with state law.²⁰⁶ These will be the hardest cases, requiring a more detailed look at the importance of uniformity to the program and how uniformity would be affected by the adoption of a state rule in the particular administrative law doctrine in question. The demand for uniformity may even vary within a regulatory regime, if some parts rely more heavily on state implementation than others.²⁰⁷

The more local an issue is, the less it will demand uniformity. Ideally, Congress will have emphasized state law in areas where an issue is more local and federal law where the issue is more regional or national. For example, the vast majority of education funding, policy, and practice is determined by state and local governments.²⁰⁸ If the burden of persuasion in proceedings under the IDEA were determined by state law, as Justice Breyer proposed in *Schaffer*,²⁰⁹ that would be just a tiny sliver of state law's predominance in education—and since our educational policy accepts the dominant role of state government, state administrative law doctrines would rarely present any significant conflict with federal policy. By contrast, federal laws governing environmental pollution partly seek to create a consistent set of rules for businesses in a national marketplace and to avoid races to the bottom between states, so uniformity is more important.²¹⁰

205. See *Disability Determination Process*, *supra* note 45.

206. See Clean Air Act, 42 U.S.C. §§ 7401-7671q (2006); *Sierra Club v. Wis. Dep't of Natural Res.*, 787 N.W.2d 855, 860 (Wis. Ct. App. 2010) (describing 42 U.S.C. § 7410(a)(2)(A)); see also Sarah D. Himmelhoch, Comment, *Environmental Crimes: Recent Efforts To Develop a Role for Traditional Criminal Law in the Environmental Protection Effort* 22 ENVTL. L. 1469, 1490-91 (1992) ("State agencies can regulate worker safety in two ways: a state may submit its own enforcement plan to the Department of Labor for approval, thereby acquiring jurisdiction over safety and health violations governed by federal law; or a state agency can assert jurisdiction over an area of occupational health and safety that is not covered by a federal standard.").

207. See Gluck, *supra* note 4, at 577.

208. See Richard Briffault, *The Role of Local Control in School Finance Reform*, 24 CONN. L. REV. 773 (1992).

209. 546 U.S. 49, 70-71 (2005) (Breyer, J., dissenting).

210. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 195 (2001); *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 281-82 (1981);

The strength of the demand for uniformity will also depend on the administrative law doctrine in question. It should rarely be necessary to displace state law and create uniform federal rules regarding the standard of review of a state agency action involving the application of law to fact. Recall the standard of review cases discussed *supra* Subsection I.B.3. In many of these, federal courts were reviewing the decision of a state public utilities commission on whether an interconnection agreement between two telecommunications providers met the requirements of the Telecommunications Act. While the Act may demand uniformity in some areas, it is hard to imagine how it would demand uniformity in the standard of review applied to state public utility commission decisions. After all, other differences between state commissions will do much more to create diversity in the law's application. Different agencies will have different compositions, expertise, policy goals, institutional cultures, staffing resources, and procedures, to name but a few salient distinctions. If Congress accepted these differences by setting up a cooperative federalism scheme, it is hard to claim that different standards of review are a bridge too far. In fact, given the differences between state agencies, it may well be wise for federal courts to use the standards that state courts have adopted to oversee their administrative agencies.²¹¹

By contrast, deference doctrine will often demand uniformity. As discussed *supra* Subsection I.B.3, federal courts generally do not give state agencies deference when interpreting federal law. If state law were applied to grant greater deference, it would widen the range of permissible statutory interpretations, such that the same statutory text could mean substantially different things in California and Kansas. Statutory interpretation occurs at a higher level of generality than the application of law to facts and therefore has greater policy implications. Where Congress seeks to create uniform national standards, for example, in order to ease compliance costs for businesses or to avoid races to the bottom by state agencies, such diversity of law could pose a significant conflict with a federal policy. In addition, we generally assume that the same text from the same authority should mean the same thing to different implementers. Maintaining that assumption here would be entirely reasonable.

That said, whether a diversity of interpretations would actually lead to a significant conflict with federal policy sufficient to displace state law will depend on the statutory regime in question. If the IDEA were interpreted somewhat differently in different states, that would probably be fine – there is

Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1222 (1992).

211. Here, "standards" should be read to mean both formal standards – arbitrary and capricious, substantial evidence, etc. – and the case law that gives those standards content and meaning.

already a tremendous difference in the education disabled children receive, so it is difficult to justify a hard stand for uniformity in interpretation. But if environmental emissions laws were interpreted differently, it would undermine the creation of a nationwide marketplace.²¹²

Some commentators have argued for giving state agencies deference under a federal standard.²¹³ But the application of a *federally* imposed standard of deference does not evince the respect for state institutions that *Kimbell Foods* teaches. Rather, *Kimbell Foods* teaches that such respect, where it does not conflict with a federal policy, entails the adoption of *state* law to determine the deference due state agencies. In some cases, this might mean little deference is granted. In general, state law grants state agencies weak deference, not the strong *Chevron* deference that federal law grants federal agencies.²¹⁴ Utah, for example, gives its agencies “little or no deference.”²¹⁵ A uniform federal deference standard would, in at least some cases, grant state agencies more deference than that to which they would be entitled under state law. This would run counter to states’ ability to set standards for their own agencies, incentivize the agencies to act pursuant to federal rather than state law, and perversely imply that state agencies are more authoritative interpreters of federal law than of state law.

Moreover, it is hard to imagine a need for uniformity sufficient to displace state law that would simultaneously allow the creation of a federally sourced rule granting deference to state agencies. After all, where uniformity is needed, what is needed is not uniformity in deference standards per se, but rather uniformity in the interpretation of substantive law. Thus, the appropriate choice is whether to invoke federal law to grant no deference, invoke federal law to limit state law-based deference, or apply state deference law in all its variegated ways.

Applying state law doctrines of deference to state agencies will raise several distinctive issues. First, courts will have to determine who should receive deference when state and federal agencies disagree.²¹⁶ This may turn on which

212. An interesting and related question is what deference states grant local implementers of state law. The answer might provide insight into what deference federal law should grant state implementers of federal law.

213. See Gluck, *supra* note 4; Weiser, *supra* note 5, at 22-38.

214. ASIMOW & LEVIN, *supra* note 70, at 526.

215. Utah Chapter of Sierra Club v. Air Quality Bd., 226 P.3d 719, 725 (Utah 2009).

216. Federal agencies might be able to assert themselves by regulation, but there are at least two limits on this power. First, constraints on resources and foresight dictate that agencies will not anticipate every situation when crafting regulations. Second, it is simply not clear that federal agencies are the privileged interpreters in all cooperative federalism contexts. See

agency Congress delegated greater “authority . . . to make rules carrying the force of law.”²¹⁷ Second, less deference might be due state agencies interpreting whether a federal statute preempts state authority.²¹⁸ Courts might address this issue by, for example, affording state agencies no more than *Skidmore* deference in such a situation. Third, this issue raises the question of whether state agencies should receive *Auer*-like deference for their interpretation of federal regulations.²¹⁹

2. Readily Applicable Analogous Statutes

The second exception to the presumption in favor of state law applies “when express provisions in analogous statutory schemes embody congressional policy choices readily applicable to the matter at hand.”²²⁰ Where Congress establishes a policy in an analogous statutory scheme, a significant conflict with that policy may be sufficient to justify a federal rule of decision. At the same time, we should remember that “the existence of related federal statutes [does not] automatically show that Congress intended courts to create

Gluck, *supra* note 4, at 599–601 (raising the question of whether there should be “a limitation on *Chevron*’s breadth for federal agencies in the intrastatutory federalism context”).

217. *Gonzales v. Oregon*, 546 U.S. 243, 255 (2006) (holding that “[d]eference in accordance with *Chevron*, however, is warranted only ‘when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law’” (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001))).

218. See Young, *supra* note 62, at 892–94. Young’s article is focused on what deference federal agency interpretations regarding preemption should receive, but his brief discussion of state agencies is illuminating:

In many cases, the *state* action may display the same sorts of decisional qualities – thorough consideration, consistency with past practice, thoughtful reasoning, or even policy expertise – that counsel deference under *Skidmore*. *Skidmore* deference, in other words, is not in principle confined to *federal* governmental entities. A court applying *Skidmore* could well conclude that a state agency’s interpretation of the underlying federal statute as *not* preempting the state law possessed greater indicia of reliability than did a contrary decision by a federal agency, with the result that the court should defer to the *state* decisionmaker.

Id. at 892.

219. There are two distinct issues here: first, whether federal law, when it applies, should treat state agencies as privileged interpreters of relevant federal regulations; and second, whether state law, when it applies, has a concept of *Auer*-like deference. *Cf.* *Auer v. Robbins*, 519 U.S. 452 (1997) (granting federal agencies deference regarding the interpretation of their own regulations).

220. *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991).

federal common-law rules, for ‘Congress acts . . . against the background of the total *corpus juris* of the states.’”²²¹

In some cases, courts should adopt a rule from an analogous federal statute because federal statutory law contains a closer analogue than state law. That was the case in *DelCostello v. International Brotherhood of Teamsters*, in which the federal statute at issue did not specify a statute of limitations, so the Court’s task was to borrow one from another source of law.²²² The Court’s default presumption was to use state law. But state law contained no cause of action similar to the unusual labor relations suit at issue. As a result, the Court borrowed the statute of limitations from analogous federal law. It explained that where “state statutes of limitations [are] unsatisfactory vehicles for the enforcement of federal law . . . it may be inappropriate to conclude that Congress would choose to adopt [such] state rules.”²²³ Rather, it may be appropriate to adopt a federal rule “when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking.”²²⁴ *DelCostello* is a relatively soft precedent. It does not call for the displacement of relevant state law, but rather for the adoption of more relevant analogous federal law over less relevant analogous state law. In most administrative law cases, there will be relevant state and federal law on point, so *DelCostello* will have no force.

But the use of analogous federal statutes does not end with *DelCostello*. Another case, *Boyle v. United Technologies Corp.*, suggests that courts should use the policies embedded in analogous federal statutes to preempt and displace relevant state law.²²⁵ In *Boyle*, the father of a Marine helicopter pilot who was killed in a crash brought a tort suit for defective design and repair against the manufacturer of the helicopter. The Court held that the federal interest in setting the terms of the military’s contracts with its manufacturers preempted the operation of state law, and that the appropriate choice of substantive law was federal, not state law. The Court cited the Federal Tort Claims Act (FTCA) as an analogous statute creating a federal policy that the government should not be liable for “[a]ny claim . . . based upon the exercise or performance or the

221. *Atherton v. FDIC*, 519 U.S. 213, 218 (1997) (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)).

222. 462 U.S. 151, 169-72 (1983).

223. *Id.* at 161.

224. *Id.* at 172.

225. 487 U.S. 500, 511-12 (1988).

failure to exercise or perform a discretionary function or duty,”²²⁶ and that “the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this provision.”²²⁷ The Court concluded that “‘second-guessing’ of these judgments . . . through state tort suits against contractors would produce the same effect sought to be avoided by the FTCA exemption,” because “[t]he financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself.”²²⁸ Thus, state tort law “present[ed] a ‘significant conflict’ with federal policy and must be displaced.”²²⁹

Boyle stands for a muscular use of analogous federal law to shove aside state law. However, we should be cautious in extending *Boyle*, as military cases often present distinctive concerns and stretch the limits of available doctrine.²³⁰ That said, in certain cases, state law might create sufficiently significant conflicts with federal policies embodied in analogous federal statutes, such as the APA, to warrant displacement of state law.

The primary federal policy expressed in the APA is that government action is generally subject to judicial review to ensure that it accords with law. Federal law contains a “strong presumption that Congress intends judicial review of administrative action.”²³¹ “From the beginning ‘our cases have established that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.’”²³² This principle dates back to *Marbury v. Madison*,²³³ written when what is now called administrative law took the form of actions for writs of mandamus. Later, Chief Justice Marshall “laid the foundation for the modern presumption of judicial review”²³⁴ when he wrote that “[i]t would excite some

226. *Id.* at 511 (quoting 28 U.S.C. § 2680(a) (1982)).

227. *Id.*

228. *Id.* at 511–12.

229. *Id.* at 512.

230. See, e.g., *United States v. Stanley*, 483 U.S. 669, 686 (1987) (holding that a former serviceman who had been the involuntary subject of an Army LSD experiment was barred from bringing a *Bivens* action due to special factors relating to the military); *Feres v. United States*, 340 U.S. 135, 146 (1950) (holding that the Federal Tort Claims Act does not allow military servicemen to sue the United States for tort claims for injuries arising in the course of military service, despite the absence of any statutory language to that effect).

231. *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986).

232. *Id.* (alterations omitted) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967)).

233. 5 U.S. (1 Cranch) 137 (1803).

234. *Bowen*, 476 U.S. at 670.

surprise if, in a government of laws and of principle . . . a ministerial officer might, at his discretion, issue this powerful process . . . leaving to that debtor no remedy, no appeal to the laws of his country.”²³⁵ The presumption of judicial review has been “reinforced by the enactment of the Administrative Procedure Act, which embodies the basic presumption of judicial review.”²³⁶

Boyle suggests that if state law presents a significant conflict with the APA’s policy of accountability, it should be displaced in favor of federal common law built on the APA. An extreme and clear case would arise if state law applied a presumption of unreviewability to all agency actions. A closer case would be where state law has a presumption of reviewability but is so deferential to state agencies that, in practice, reviewability does not mean so much—as with states, such as Massachusetts, that follow the older, highly deferential approach to review of agency action.²³⁷

3. Frustration of the Federal Scheme

The third *Kimbell Foods* exception to the presumption in favor of state law applies where the “application of the particular state law in question would frustrate specific objectives of the federal programs.”²³⁸ This exception parallels the “analogous statute” exception discussed above, but rather than applying principles from another statute, it seeks to safeguard the goals of the particular federal program or activity at hand.²³⁹

The frustration exception is often used to protect the proprietary interests of the United States. It has been applied to block state law from determining title in property created by a procurement contract of the War Department²⁴⁰ and from retroactively abrogating the terms of a written agreement for land

235. *United States v. Nourse*, 34 U.S. (9 Pet.) 8, 28-29 (1835).

236. *Abbott Labs.*, 387 U.S. at 140.

237. See, e.g., ASIMOW & LEVIN, *supra* note 70, at 598.

238. *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991) (quoting *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979)) (internal punctuation marks omitted).

239. It is also related to the uniformity exception; in fact, the uniformity exception is arguably an especially important subset of the frustration exception. Both are focused on protecting the statutory regime in question. The frustration exception says that whenever state law would frustrate a statutory regime, it should be displaced, while the uniformity exception says that whenever state law would frustrate a federal regime specifically by creating a problematic lack of uniformity, it should be displaced.

240. See *United States v. County of Allegheny*, 322 U.S. 174, 182 (1944), *abrogated by* *United States v. City of Detroit*, 355 U.S. 466 (1958).

made by the United States.²⁴¹ In *United States v. Little Lake Misere Land Co.*, the Court explained that “in a setting in which the rights of the United States are at issue in a contract to which it is a party and ‘the issue’s outcome bears some relationship to a federal program, no rule may be applied which would not be wholly in accord with that program.’”²⁴² Louisiana law was an impermissible choice because it was “plainly not in accord with the federal program implemented by the 1937 and 1939 land acquisitions.”²⁴³ The Court also noted the looming presence of the Supremacy Clause, such that “[t]he choice of law merges with the constitutional demands of controlling federal legislation.”²⁴⁴

Frustration of a federal scheme could be the basis for using federal administrative law in cooperative federalism regimes. For example, if the use of state law would frustrate the environmental goals of the Clean Air Act, federal law should govern. The analysis here will be context specific, with the broader admonition that cooperative federalism regimes invite variation in implementation in a way that unified federal regimes do not, so that what might be frustration in a unified federal regime might be par for the course in the cooperative federalism context.

CONCLUSION

This Note has posed the difficult question of what law should apply when state agencies are alleged to have violated cooperative federalism statutes. Though the courts have largely ignored the question and reflexively applied the law with which they are most familiar, federal common law has already explained what law should apply when federal law is silent. The answer is that state law should apply unless doing so creates a significant conflict with federal policy. We have shown that, though this answer comes from the context of private law, it is also compelling, on both doctrinal and normative grounds, in the context of cooperative federalism.

The strength of the *Kimbell Foods* framework is that it allows for some measure of predictability while at the same time not oversimplifying the issues at stake. Of course, extending *Kimbell Foods* to the new domain of cooperative federalism raises new issues. One of the most important tasks for courts and commentators is to organize our understanding of cooperative federalism statutes and administrative law doctrines to give meaningful guidance to

²⁴¹. *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 595 (1973).

²⁴². *Id.* at 604 (quoting Mishkin, *supra* note 166, at 805-06).

²⁴³. *Id.*

²⁴⁴. *Id.*

agencies. For example, grouping cooperative federalism programs into general categories based on their level of “cooperativeness” could help state agencies predict whether their actions will be evaluated under principles of state or federal administrative law.

The argument in favor of state law will be strongest where federal law delegates substantial responsibility to state authorities and calls for implementation through the passage of state laws. It will be weakest when it calls for state agencies to directly apply federal law and delegates minimal responsibility to them. Probative factors may include whether the cooperative federalism regime grants state agencies substantial policy or enforcement discretion; whether state programs predated federal programs and federal legislation evinces a desire to layer on top of rather than displace those programs; and whether funding is largely or primarily a state or local concern. In addition, cooperative federalism laws that give state and federal agencies overlapping implementation responsibilities invite less state autonomy than laws that clearly delegate sole responsibility for implementation to the states.²⁴⁵

Other aspects of cooperative federalism laws may affect the deference due state law in more complicated ways.²⁴⁶ For example, some cooperative federalism laws create federal floors or ceilings, often enforced by the threat of federal backstop authority—does this make a program more or less demanding of uniformity?²⁴⁷ Statutes also delegate to a broad range of “state” actors, some of whom may merit more deference than others.²⁴⁸ Some even delegate

245. See Gluck, *supra* note 4, at 578-79 (“[T]he extent of the overlap between state and federal implementation responsibility already ha[s] created numerous areas of interpretive uncertainty. Even as the states have begun to implement the [Affordable Care Act], they are not sure how much uniformity HHS will require”); see also William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1605 (2007) (explaining how overlapping implementation responsibilities may influence preemption analysis).

246. Gluck, *supra* note 4, at 550 (“This literature also has viewed ‘cooperative federalism’ as an undifferentiated category, when in fact there is much diversity within this category with respect to how exactly these schemes are designed.”).

247. See Buzbee, *supra* note 245, at 1555 (discussing federal floors and ceilings and arguing that federal preemption applies more naturally to floors than to ceilings); see also Gluck, *supra* note 4, at 544 (suggesting these regulatory choices could influence statutory interpretation doctrine).

248. Gluck, *supra* note 4, at 598 (“There may be arguments justifying different preferences for state autonomy in federal statutory implementation depending on what the ‘state’ is in any given context.”); see also Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law To Free State and Local Officials from State Legislatures’ Control*, 97 MICH. L. REV. 1201 (1999) (discussing the breadth of different actors who may constitute the “state” under federal statutes).

responsibility to local agencies, such as school districts, or independent actors.²⁴⁹

Courts and commentators can also develop this area of law by thinking about the differences between various doctrines of administrative law. We have argued that the use of state principles regarding agency interpretations of statutes is more likely to create serious problems with uniformity than the use of state principles regarding the standard of review that governs agency action. But a full consideration of this complex issue is not possible in this Note. We hope that this is just the beginning of a conversation on these and other administrative law doctrines.

While each statute and doctrine presents distinct concerns, *Kimbell Foods* provides a framework to analyze these issues in an orderly manner that is consistent with the ethos of cooperative federalism. Courts can determine what law to apply by asking whether application of state law would create a significant conflict with federal policies. While this question may not be as simple as it seems, when both state and federal courts start approaching this issue through the same question, we should expect greater consistency in the law, greater respect for state and federal policy needs, and perhaps even a more fruitful dialogue between state and federal courts on administrative law.²⁵⁰

249. See Gluck, *supra* note 4, at 606-07 (discussing *Chevron's* relationship to other nonfederal implementers).

250. See Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977) (discussing the benefits of creative dialogue between state and federal courts).