

COMMENT

A Case for Varying Interpretive Deference at the State Level

The rules governing a court's interpretation of a statute should depend heavily on where that court is situated within the judicial institutional framework. The varying degrees of interpretive deference that should be shown to federal agencies by federal courts and state agencies by state courts is demonstrative of this proposition. In *Chevron*, the Supreme Court mandated that a federal agency's interpretation of a statute be shown judicial deference when Congress had not spoken directly on the issue and the agency interpretation was based on a reasonable construction of the statute.¹ Among the many factors the Court cited in justifying this allocation of interpretive power were the comparative political accountability of executive branch entities, the formal distinction between the role of the courts and agencies in the legislative process, and the technical expertise of agencies as compared to courts.² These justifications, however, are much less convincing in defining the

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1. *Chevron USA Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, courts are tasked with performing a two-step analysis. First, the evaluating court must ask whether Congress specifically addressed the question at issue. If so, that is the end of the matter. If not, then the court must ask whether or not the agency's interpretation is reasonable, an extremely deferential standard. See Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 ADMIN. L.J. AM. U. 187, 199 (1992). Though *Chevron* is now more than a quarter of a century old, it still yields significant power at the federal level: "in cases where *Chevron* was the deference regime invoked by the [Supreme] Court, the agency w[ins] 76.2% of the time" William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1122 (2008).
 2. *Chevron*, 467 U.S. at 865 (arguing that it is possible that when Congress leaves gaps in statutes, it "consciously desire[s] the Administrator to strike the balance at th[e agency] level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so").

optimal relationship between state courts and state agencies with respect to interpretive deference. As such, while in many cases some level of deference may be appropriate, state agencies should not be shown *Chevron*-like deference by state courts when interpreting state statutes.³

State courts have not uniformly adopted the Supreme Court's approach in *Chevron*. In fact, several state courts have rejected outright the idea of granting strong deference to state agencies' statutory interpretations. The most recent decisions of state high courts addressing the issue indicate that only sixteen states have opted to give strong, *Chevron*-like deference to state agencies' interpretive efforts.⁴ On the opposite end of the deference spectrum, fourteen state judiciaries have announced they have no intention to defer to the interpretive opinions of state agencies, choosing instead to decide those questions de novo.⁵ Eighteen states currently split the difference, granting agencies "due deference" or some other form of measured respect when appraising agencies' interpretive acts.⁶

3. Whether or not "state courts' deference to state agencies' interpretation of state law" should mirror the deference required in *Chevron* at the federal level remains "an open question" that has not been robustly addressed in the literature to date. Catherine M. Sharkey, *Federalism in Action: FDA Regulatory Preemption in Pharmaceutical Cases in State Versus Federal Courts*, 15 J.L. & POL'Y 1013, 1036 n.76 (2007).
4. Alabama, Connecticut, Florida, Georgia, Hawaii, Indiana, Maine, Michigan, Mississippi, Montana, Pennsylvania, South Carolina, Tennessee, Vermont, West Virginia, and Wyoming. Michael Pappas, *No Two-Stepping in the Laboratories: State Deference Standards and Their Implications for Improving the Chevron Doctrine*, 39 MCGEORGE L. REV. 977, 1010-24 (2008); see, e.g., *Mid-Century Ins. Co. v. Ademaj*, 243 S.W.3d 618, 623 (Tex. 2007) ("Construction of a statute by [an] administrative agency charged with its enforcement is entitled to serious consideration, so long as the construction is reasonable and does not contradict the plain language of the statute." (internal quotation marks omitted)).
5. Alaska, California, Delaware, Iowa, Maryland, Minnesota, Nebraska, New Hampshire, New Mexico, New York, Oklahoma, Utah, Virginia, and Washington. Pappas, *supra* note 4, at 1010-24; see, e.g., *Hirneisen v. Champlain Cable Corp.*, 892 A.2d 1056, 1059 (Del. 2006) ("A reviewing court may accord due weight, but not defer, to an agency interpretation of a statute administered by it. A reviewing court will not defer to such an interpretation as correct merely because it is rational or not clearly erroneous.").
6. Arizona, Arkansas, Colorado, Idaho, Illinois, Kansas, Kentucky, Massachusetts, Missouri, New Jersey, Nevada, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, Texas, and Wisconsin. Pappas, *supra* note 4, at 1010; see, e.g., *Sandusky Dock Corp. v. Jones*, 834 N.E.2d 786, 789 (Ohio 2005) ("[W]e will give due deference to the director's reasonable interpretation of the legislative scheme governing his agency." (internal quotation marks omitted)). Louisiana is unaccounted for in the catalogue of state *Chevron* cases because of its civil law system, and South Dakota has also been omitted due to a lack of available cases. For a thorough discussion of which states show what level of deference to state agency interpretations, as well as an accompanying discussion of the stated reasons for granting that particular level of deference, see Pappas, *supra* note 4, at 1010-24.

While the states have not adopted a uniform approach to agency deference, most states share common attributes that, this Comment argues, justify denying state agencies *Chevron*-like deference on *Chevron*'s own terms. State judges are in most cases more directly politically accountable than state agency officials and federal judges due to their necessary involvement in electoral politics. State courts also have a long, rich history of engaging in common law making that state agencies and federal courts do not, making them well-suited to fill statutory gaps independently. Finally, deference based on technical expertise is less warranted at the state level due to the typical subject matter of state agency action.

I. THE POLITICAL NATURE OF STATE JUDGES

The assertion that agencies' interpretive efforts should be afforded deference at the federal level because they are more democratically accountable than the courts lacks validity at the state level. State court judges are in most instances more politically accountable than state or federal agency decisionmakers, and certainly more accountable than federal judges. In twenty-one states, judges are elected at the outset by popular vote.⁷ In thirty-eight states, judges are subject to some form of retention election regardless of whether they obtain office initially by election or appointment, holding them directly accountable for the decisions they make on the bench to the electorate.⁸ In ten of the twelve states lacking direct judicial electoral accountability, judicial performance is reviewed periodically by the state legislature or

7. Alabama, Arkansas, Georgia, Idaho, Illinois, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Texas, Washington, West Virginia, and Wisconsin. In the remaining states, judges are initially appointed under a merit system or by the state governor. Am. Judicature Soc'y, *Methods of Judicial Selection: Selection of Judges*, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm (last visited Sept. 20, 2009). Although some of these elections are officially nonpartisan, political parties and political action groups have the ability to campaign in each instance. Eric Helland & Alex Tabarrok, *The Effect of Electoral Institutions on Tort Awards*, 4 AM. L. & ECON. REV. 341, 343 (2002). While this discussion deals only with selection and retention of the judges of a state's highest court, in most cases, similar practices are employed throughout the state judicial system. For a comprehensive description of the electoral status of state judges at all levels, see Am. Judicature Soc'y, *supra*.

8. This figure includes both states in which judges are subject to retention elections and reelection. In a retention election, a judge runs unopposed based solely on their record. A judicial reelection is a competitive, partisan, political race. Helland & Tabarrok, *supra* note 7, at 343.

executive.⁹ Judicial rulings escape periodic political scrutiny by either the body politic or other branches of the government in just two states.¹⁰ In contrast to agency officials, who are typically appointed and retained by an elected executive, and federal judges with life tenure, state judges are in many cases held directly accountable to the people of the state for their judicial actions.¹¹

State judges possess many additional political attributes that federal judges and state agency heads do not, beyond the mere fact that they are elected. Federal judges obtain life tenure positions through a process that does not penetrate particularly deeply into their policy views. Federal and state agency heads' policy views are formally put through the crucible just once during the confirmation process. In the case of state judges, important policy issues are often brought to their attention through the campaigning process and can play a dispositive role in whether or not judges are ultimately elected.

Additionally, when facing questions of statutory interpretation, state judges "are more likely than their federal counterparts to know what the issues of public debate were when state legislation was proposed, what the state legislature thought it was doing when it passed the legislation, and what the situation in the State was before and after that legislation was passed."¹² By

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9. Connecticut, Delaware, District of Columbia, Hawaii, Maine, New Jersey, New York, South Carolina, Vermont, and Virginia. In Hawaii, an independent commission conducts the review. Am. Judicature Soc'y, *supra* note 7.
 10. In New Hampshire, judges serve after appointment until age seventy. In Rhode Island, state judges are appointed to life terms. *Id.*
 11. Noting this fact, some scholars have commented that "state judges are significantly more vulnerable to the influence of the majority than are their federal counterparts." John Dayton & Anne Dupre, *Blood and Turnips in School Finance Litigation: A Response to Building on Judicial Intervention*, 36 J.L. & EDUC. 481, 489 (2007). In almost every state, all but the top five executive positions are appointed. Colorado, for example, elects the Governor, Lieutenant Governor, Attorney General, Secretary of State, and the Treasurer; all other executive officers are appointed. THE EXECUTIVE BRANCH OF STATE GOVERNMENT: PEOPLE, PROCESS, AND POLITICS 246-48 (Margaret R. Ferguson ed., 2006) (detailing which executive positions are elected or appointed in Colorado).
 12. Marcia L. McCormick, *When Worlds Collide: Federal Construction of State Institutional Competence*, 9 U. PA. J. CONST. L. 1167, 1198 (2007). The fact that state judges are held directly accountable to the electorate in many states has both practical and theoretical implications for their interpretive roles, as compared to federal judges. There is a very interesting strand of scholarship arguing that judges should update statutes in accordance with political preferences. Regardless of the general utility of these ideas, it would seem their implementation would be much more appropriate at the state level where judges are held politically accountable directly than at the federal level where judges are intentionally insulated from politics. See GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 2, 6-7, 82, 100-04, 163-66 (1982); WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 167-70 (1994); RICHARD A. POSNER, OVERCOMING LAW 231 (1995); T.

comparison, federal judges are politically insulated to a much greater extent. Because they are removed from the electoral process, federal judges can often “ascertain current political preferences only from a cold record of legislative action.”¹³ They serve life terms, are not removable except under extraordinary circumstances, and have salaries that cannot be lowered.¹⁴ If state court judges miscalculate what is democratically desirable then they can be held democratically accountable by the electorate much the same as a legislator or executive. State judicial elections “routinely feature intense competition, broad public participation, and high salience,” drawing the important political issues of the day into the fore.¹⁵ To the extent that having a democratically accountable authority interpreting certain statutes is desirable, as *Chevron* implies is appropriate in certain situations, state judges are likely better suited for the task than federal judges and state agency officials.

II. THE COMMON LAW ORIGINS OF STATE COURTS

While the political accountability justification alone is enough to raise significant doubts about applying *Chevron*'s logic at the state level, there are other legitimate reasons that state courts should interpret statutes independently. The distinction between the roles of courts and agencies in the legislative process cited in *Chevron*¹⁶ holds far less sway at the state level than at the federal level. State legislatures have historically relied on courts to fill in the

Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 21-22, 46-61 (1988); Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2129 (2002); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 390-91 (1991); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1166-73 (1993).

13. Elhauge, *supra* note 12, at 2129. Beyond the fact that they are appointed as opposed to elected, it is entirely possible that federal judges are influenced by their political beliefs and political party affiliations. See CASS R. SUNSTEIN ET AL., *ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* (2006) (examining how prior political affiliation correlates with judicial outcomes). Political influence based on one's prior beliefs, however, is in no way unique to the federal judiciary and is probably at best sporadically correlated with the type of political accountability at issue in *Chevron*.
14. U.S. CONST. art. III, § 1.
15. David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 265 (2008).
16. 467 U.S. 837, 865 (1984) (“Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments.”).

legal and practical gaps left by the legislative process in a way that Congress has not.¹⁷ With respect to state courts' ability to make law through interpretive efforts, "state legislatures not only accept such judicial decisionmaking as entirely legitimate, but also expect that within defined boundaries courts will make such choices."¹⁸ This attitude may be reflective of the fact that state courts are better suited than federal courts to engage in quasi-legislative processes due to their common law origins.

The paradigmatic example of state courts making law occurs in the realm of torts. By judicially defining the boundaries of socially acceptable conduct through tort verdicts, state courts regularly engage in policymaking with effects similar to those of a legislative act.¹⁹ While federal courts primarily decide issues based on statute and precedent, state courts often rely exclusively on their own policy perceptions.²⁰ Viewed from this perspective, state courts have a far higher level of institutional competency than federal courts with respect to engaging in common law making.²¹ State courts' common law competencies make them uniquely qualified to definitively interpret statutes and fill legislative gaps in a way that the federal courts are not.

III. THE EXPERTISE DIFFERENTIAL BETWEEN STATE AND FEDERAL AGENCIES AND OTHER PRACTICAL CONCERNS

The significant differences between the responsibilities of state and federal agencies further undermine the applicability of *Chevron*-like deference at the state level. There is less reason for state court deference to state agencies for technical reasons because the issues state agencies deal with are, on the whole, less technically complicated. Federal courts must deal with issues stemming

17. See Judith Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 34 (1995).

18. *Id.*

19. See Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 849 (1978); Burt Neuborne, *Foreword: State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 896-97 (1989).

20. Such important issues include disputes about torts as well as choice of law, standing, and the admissibility of evidence. See Barbara C. Salken, *To Codify or Not To Codify—That Is the Question: A Study of New York's Efforts To Enact an Evidence Code*, 58 BROOK. L. REV. 641, 641 (1992).

21. Adam N. Steinman, "Less" is "More"? *Textualism, Intentionalism, and a Better Solution to the Class Action Fairness Act's Appellate Deadline Riddle*, 92 IOWA L. REV. 1183, 1223 n.248 (2007) ("The tradition of common law policy-making by state courts arguably gives them greater leeway when interpreting a state statute than federal courts (which lack broad authority to make common law) have when interpreting a federal statute.").

from statutory interpretations rendered by agencies like the Federal Energy Regulatory Commission, the Federal Communications Commission, and the Food and Drug Administration that can be substantively challenging due to their scientific and technical nature.²² By way of comparison, many state agencies are concerned with solely domestic matters like public safety and family services.²³ While the problems that state courts encounter on this front may be no less difficult from a factual or legal perspective, most states do not have agencies analogous to those existing at the federal level that deal with complex scientific issues that may be beyond the grasp of liberally educated judges.²⁴

In addition to the fact that *Chevron's* deferential rationale does not apply at the state level on its own terms, there are numerous practical considerations suggesting that state courts would be justified in independently interpreting state statutes.²⁵ A reasoned measure of agency deference is appropriate at the

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22. See, e.g., *Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 339 (2002) (“[T]he subject matter here is technical, complex, and dynamic; and as a general rule, agencies have authority to fill gaps where the statutes are silent.”).
 23. For example, the State of Ohio has created agencies and departments by statute to deal with the following issues: agriculture, commerce, development, education, employment, family services, health, natural resources, public safety, rehabilitation and correction, taxation, transportation, and veterans affairs. See *State of Ohio Government Agencies*, <http://www.ohio.gov/agencies> (last visited Sept. 20, 2009).
 24. Additionally, there may be a smaller difference between the ability of judges and that of agency officials to deal with what technical issues do arise at the state level than there is at the federal level, lessening the need for interpretive deference. To the extent that wages correlate with skill within a given profession, as labor market economics postulates, the disparity in compensation provided to state and federal agency employees indicates that federal agency interpretations might deserve greater deference than their state analogs based on technical expertise. Managerial officials at federal agencies generally seem to earn about fifty percent more than their state counterparts. Compare U.S. Office of Pers. Mgmt., *Salary Table No. 2008-EX* (Jan. 2008), <http://www.opm.gov/oca/o8tables/html/ex.asp> (federal), with MARK SHEPARD, *HOUSE RES. DEP'T, STATE AGENCY HEAD SALARIES* (2008), <http://www.house.leg.state.mn.us/hrd/pubs/ss/ssagsal.pdf> (Minnesota). Additionally, although expertise can theoretically inform decisionmakers about the likely consequences of a given interpretation, even in theory it cannot resolve which statutory interpretation has the best policy implications. Such ultimate resolution depends on political preferences about how to weigh those consequences. See Elhauge, *supra* note 12, at 2038.
 25. Some of these practical issues may have constitutional implications. *Chevron*, at some level, may aggrandize the political opinion of the executive over the legislative branch. See Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 *GEO. L.J.* 833, 864-65 (2001) (summarizing arguments that *Chevron* can be seen as a possible source of separation of powers and nondelegation norms). Ensuring that the judiciary retains independent interpretive power may be useful in helping to maintain a desirable balance of power between the state executive and legislature.

federal level because allowing individual federal courts to arrive at their own interpretations of federal statutes would result in a disparate patchwork of law emanating from the same statutory source.²⁶ This is less of a concern with respect to state law since the state's highest court can issue a unifying and authoritative interpretation of a state statute—at least in the intra-state sense. It is also possible that deference at the state level is less appropriate than at the federal level because state agencies may be more susceptible to non-democratic regulatory capture.²⁷ The threat of capture is greatest when an agency regulates a small group with limited interests,²⁸ a situation much more common within the states than at the federal level. In this case, it is more important that an independent interpretive analysis occur at the state level than in federal courts. Furthermore, many states have codified canons of statutory construction,²⁹ potentially resulting in less ambiguity *ex ante* about how statutes should be interpreted and, therefore, less need for deference to an agency's reading of a statute.

CONCLUSION

State judges should not give deference to the statutory interpretations of state agencies based on the justifications offered in *Chevron*. While state judges are only elected in twenty-one states, they are held directly politically accountable for their actions in thirty-eight states. Under the rationale of *Chevron*, federal agency officials are better suited to interpret the statutes they administer because they are held politically accountable *ex post*, not because they were selected by a political process *ex ante*. As such, more than two-thirds of state judiciaries are more politically accountable than the agencies found to be sufficiently politically accountable to warrant deference in *Chevron*. In all but two of the remaining states, judicial performance is at least reviewed by the

26. See Cass R. Sunstein, *Beyond Marbury: The Executive's Power To Say What the Law Is*, 115 YALE L.J. 2580, 2597 n.79 (2006).

27. SUSAN ROSE-ACKERMAN, RETHINKING THE PROGRESSIVE AGENDA: THE REFORM OF THE AMERICAN REGULATORY STATE 159-73 (1992); Jerry L. Mashaw & Susan Rose-Ackerman, *Federalism and Regulation*, in THE REAGAN REGULATORY STRATEGY 111 (George C. Eads & Michael Fix eds., 1984); see also THE FEDERALIST NO. 10 (James Madison) (arguing that state governments may be more susceptible to factional influences than the national government).

28. Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167, 169-70 (1990).

29. See Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. (forthcoming 2010), available at http://digitalcommons.law.yale.edu/ylsspps_papers/32.

state executive or legislature, making state judges in those states at least as accountable as the vast majority of state and agency officials. With these findings in mind, *Chevron* deference is not warranted based on political accountability concerns in the thirty-eight states in which judges are held directly accountable to the electorate. To the extent that *Chevron* is appropriate at the federal level based on political accountability concerns, its use may be justifiable in the two states in which judges have life tenure as well. In the remaining ten states in which judicial performance is reviewed only by other government actors, the political accountability argument is not dispositive, requiring an assessment of other factors to determine the doctrine's applicability in those states.

Political accountability considerations aside, the origins of state courts and the nature of state regulatory efforts argue for the rejection of *Chevron*-like deference in all states. Most state courts originated from, and grew within, a deeply rooted common law tradition much stronger than that of the federal judicial realm. Since state judicial bodies regularly engage in common law making, these state institutions are uniquely qualified to fill statutory gaps in a way that federal courts and state agencies are not. Regardless of the electoral accountability of a state's judges, concerns about technical competence and decisional uniformity are less relevant at the state than federal level.³⁰

While *Chevron*'s reasoning does not support state court deference to state agency statutory interpretations based on the reasons *Chevron* offers, there are other more measured deference doctrines that can be validly transferred from the federal court-agency relationship to the state court-agency dynamic. Deference doctrines grounded in respect for the executive and legislative branches of the government provide illustrative examples. For example, state courts would be justified in mimicking federal courts' behavior with respect to agencies' statutory interpretations when the state legislature has expressly

30. Currently, there is not a high level of correlation between whether or not the members of a state court are elected and the level of deference that a court gives to agencies' statutory interpretations. Cross-referencing the information about the electoral aspects of state courts and whether or not they utilize *Chevron* deference reveals that only one-third of the state judiciaries that are held directly democratically accountable refuse to show deference to state agencies' interpretive efforts. More specifically, of the thirty-eight states that hold their judiciaries accountable by popular vote, twelve state courts grant *Chevron* deference, sixteen implement some form of intermediate deference, and ten review agency interpretations de novo. In terms of percentages, these numbers are not strikingly different from courts where the judges are not held democratically accountable: five of these state courts show *Chevron*-like deference, three some intermediate form of deference, and four conduct de novo review. Compare Pappas, *supra* note 4, at 1010-24, with Am. Judicature Soc'y, *supra* note 7.

delegated lawmaking authority on that topic to the agency.³¹ Under this same rationale, it is appropriate for state courts to defer to state agencies' interpretations of their own regulations unless they are "plainly erroneous or inconsistent with the regulation."³² In a manner analogous to a federal court's extreme deference to the executive's interpretation of treaties, it may also be appropriate for state courts to give deference to state executives' interpretations of interstate compacts.³³

In addition to doctrines based on respect for the legislative and executive branches of government, there are other specific doctrines used when federal courts interpret federal statutes that can be appropriately applied in state courts. State courts would likely be justified in showing state agency statutory interpretations *Skidmore*-like deference, granting state agency statutory interpretations respect to the extent that they have the "power to persuade," as this doctrine is based simply on the individual arguments presented in a given case and not some broader deferential principle.³⁴ There are many different jurisprudential theories that can justify state court deference to a state agency's interpretive acts, but in most cases, the theory articulated in *Chevron* is not one of them.

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31. See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005); *Sullivan v. Everhart*, 494 U.S. 83, 88-89 (1990). This scenario is complicated by the fact that whether or not Congress has expressly delegated an agency lawmaking authority is itself an issue of statutory interpretation. *Gonzales v. Oregon*, 546 U.S. 243, 255 (2006).
 32. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); see *Comm'r v. Schleier*, 515 U.S. 323, 336 (1995); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988).
 33. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 356 (2006); *El Al Isr. Airlines v. Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999). Due to the nature of interstate compacts, these issues will infrequently appear in state courts. See *New Jersey v. New York*, 523 U.S. 767 (1998).
 34. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); see also *Gonzales*, 546 U.S. at 255-56; *United States v. Mead Corp.*, 533 U.S. 218, 226-28 (2001). *Skidmore* deference is similar in many respects to the "due deference" standard currently in use in seventeen states. See Pappas, *supra* note 4, at 1010-24. As a corollary, states would be similarly justified in adopting the reasoning applied in federal courts that agency interpretations in constant flux or that are underdeveloped wield minimal persuasive power. See *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 65-66 (2006).