Federal Deference to State Agency
Implementation of Federal Law

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ABSTRACT

Increasingly, federal statutory schemes call upon state agencies to execute federal laws. One such example is the Affordable Care Act—a statute that allows states the option of implementing the requirements of the law and offering health coverage through their own agencies instead of through the Department of Health and Human Services. As more laws like this permit state agencies to carry out federal law, state agencies will be forced to interpret federal law as ambiguities arise. While federal courts have constructed a fairly defined regime for review of agency interpretations under the Chevron and Skidmore doctrines, review of state agencies' interpretation of federal law remains largely unaddressed and unsettled. This Article attempts to fill out this conversation about what level of review state agency interpretations should be afforded when interpreting federal law. To do this, the Article maps out the levels of review federal courts have provided to state agencies in these situations of intrastatutory interpretation. It reviews the justifications that support use of the Chevron and Skidmore standards for federal agency decisions, and catalogues courts' consideration of when those same rationales apply to state agencies' interpretations of federal law. Finally, from synthesizing the available cases, this Article constructs and suggests three rudimentary categories for determining what level of review should attach to a state agency's interpretation of federal law.

INTRODUCTION

State agencies have long been tasked with implementing federal law. Congress delegates power to state agencies to carry out federal laws for many reasons: to "preserve and protect" states' traditional regulatory spheres, to take advantage of states' expertise and existing bureaucracies, or to allow states to experiment with different implementation. And yet, as Abbe Gluck's sweeping essay Intrastatutory

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Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond points out, courts and legal scholars have paid scant attention to the implications for federalism and statutory construction that arise when state agencies interpret and implement federal law. In scholarship analyzing the canons of interpretation followed in administrative law “the states typically are treated as if they do not exist.” Similarly, the two canons governing state-federal relationships, the presumption against preemption and the federalism canon, are not especially useful in evaluating the role that state agencies should play in interpreting federal law.

This Article attempts to begin filling in one of the gaps identified in Gluck’s essay. One of the most intriguing areas for development in the scholarship on intrastatutory federalism is the level of deference afforded to state implementation of federal law: under what circumstances courts allow states deference in interpreting federal law when Congress has delegated power to these state agencies to implement federal law. In federal administrative law, the Chevron doctrine governs agencies’ interpretations of ambiguous statutes. Under the Chevron doctrine, reasonable agency interpretations of a statute are acceptable. But, as Gluck points out, Chevron is “only for federal agencies, and there is no analogue for when Congress delegates interpretive work to the states.” This Article examines courts’ review of challenges to state agency interpretations of federal law. Part I reviews the current levels of deference afforded to federal agencies. Part II surveys major cases of state interpretation of federal law. Part III analyzes what factors courts consider in determining whether they defer to, or deny, state agencies’ interpretations of federal law, and attempts to articulate a rough formulation of what factors should guide federal courts in deciding what level of deference to afford state interpretations of federal law.

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4 Id. at 553.
5 Id. Gluck explains that the presumption against preemption manages “the question of when federal law displaces state law, not what interpretive or other kinds of rules should govern the state-federal relationship when both state and federal actors have interpretive authority within the same federal statute.” Id. at 555. The federalism canon is also “irrelevant once Congress unambiguously enters an area of traditional state authority—that is, once Congress legislates in the field—and the only question is what role the named state actors should play in the implementation of that new federal law.” Id.
7 Gluck, supra note 3, at 557.
I. DEFERENCE TOWARDS FEDERAL AGENCY INTERPRETATIONS OF FEDERAL LAW

There are several levels of review that federal courts give federal agency interpretations of federal law, depending on the type of agency action in question. *Chevron* deference, as stated above, is triggered when courts find that the agency was delegated the authority to act, acted under that grant of authority, and the statute the agency acted under is ambiguous. It is the most deferential level of review; most agency interpretations are found to be reasonable under *Chevron*-level deference. The deference given to federal agencies' interpretations in *Chevron* is typically justified in four ways: the delegation of congressional power to the agency, the agency's expertise in its subject matter, the accountability of the agency to the political branches, and the desire for uniformity of federal law.

A. Delegation of Congressional Power to Federal Agencies

Foremost amongst the justifications for the *Chevron* doctrine is the theory that "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." Delegations of congressional power may also be implicit. In both cases, courts consider this sufficient to demonstrate that Congress has transferred a portion of its legislative power to the agency to fill in the gaps left in the statute. Where Congress delegates this power to the agency to fill in the gaps, "[s]uch
legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."\(^{14}\)

Almost two decades after *Chevron*, the Court narrowed *Chevron*’s reach based on a more nuanced understanding of the delegation doctrine. In *United States v. Mead Corp.*, the Court added a threshold question to the *Chevron* doctrine.\(^{15}\) At issue in *Mead* was whether a Customs ruling letter on classification of notebooks was subject to *Chevron* deference.\(^{16}\) Ultimately, the Court held that *Chevron* deference is only appropriate “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”\(^{17}\) To determine whether Congress has delegated the proper authority, courts may look to a variety of factors, including “an agency’s power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.”\(^{18}\) Where, as in *Mead*, these indicia are lacking, courts should treat the agency’s interpretation more akin to policy or enforcement guidelines, which are only afforded the deference found in *Skidmore v. Swift & Co.*.\(^{19}\) The Court’s decision in *Mead* represented a detailed and complex analysis of the ways Congress utilizes agencies beyond merely looking for statutory ambiguity.\(^{20}\)

The Supreme Court’s latest administrative law decision, *City of Arlington v. FCC*,\(^{21}\) reaffirmed the power of the *Chevron* doctrine and, particularly, of the delegation rationale. At issue in *City of Arlington* was whether the *Chevron* doctrine extended to agency interpretations of their own jurisdiction.\(^{22}\) Plaintiffs, along with state and local governments, argued that *Chevron* deference did not apply to jurisdictional decisions by agencies—that is, decisions which enlarged the scope of regulation by the agency.\(^{23}\) The majority opinion sharply disagreed with this characterization and described the distinction between jurisdictional and non-jurisdictional decisions in the federal agency context as “illusory.”\(^{24}\) Ultimately, all agency decisions, whether jurisdictional or non-jurisdictional, present the same question: did the agency stay within the bounds of its statutory authority?\(^{25}\) Essentially, “the question—whether framed as an incorrect application of agency

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14 *Chevron*, 467 U.S. at 844.
16 *Id.* at 226.
17 *Id.* at 226–27.
18 *Id.* at 227.
20 Gluck, *supra* note 3, at 599.
21 133 S. Ct. 1863, 1868 (2013).
22 *Id.* at 1866.
23 *Id.* at 1867.
24 *Id.* at 1869.
25 *Id.* at 1868.
authority or an assertion of authority not conferred—is always whether the agency has gone beyond what Congress has permitted it to do . . . .” In asserting this, the Court fell back upon the core justification for the Chevron doctrine, that all agency decision-making power flows from Congress, and agencies merely effectuate congressional intent.

The Skidmore doctrine holds that agency interpretations in the form of guidelines and other less formal decisions are not given as high a level of deference as formal decisions analyzed under the Chevron doctrine. This decreased deference is justified by the fact that either Congress did not delegate the agency authority to make decisions that bind with the force of law, or, as Mead addresses, Congress did delegate the authority to the agency, but the agency did not act with that authority. Under the Skidmore doctrine, agency decisions may be persuasive to the extent that they fulfill other justifications for Chevron deference. The Skidmore Court held that where decisions are made by agencies acting in their areas of expertise, particularly where the regulatory system is highly detailed or complex, and where decisions add value to uniformity in administrative and judicial understandings of the law, deference may be appropriate. Courts are instructed to look to “the thoroughness evident in [the agency’s] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade . . . .” Thus, where congressional delegation does not require courts to defer to agencies’ interpretations, expertise and uniformity may at least be able to persuade a court to defer. However, City of Arlington, Mead, and Skidmore suggest that congressional grant of legislative power to the agency is the most important factor in deciding deference. In all of these levels of review, delegation acts as a gatekeeping element that initially determines to what extent courts will look upon the other Chevron justifications.

B. Agency Expertise in Their Subject Matter

The second widely accepted justification for Chevron deference is that agencies possess expertise in their subject matter, and Congress, which does not hold this specific knowledge, has deferred to the agency because it is better informed to make such decisions. The Chevron Court acknowledged that, similarly, the Court’s own ability to judge whether an agency’s interpretation of an ambiguous

26 Id. at 1869.
28 Id. at 137–38.
30 Id. at 234 (citing Skidmore, 323 U.S. at 139).
31 Skidmore, 323 U.S. at 140.
term is the best or most accurate is hampered where “a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.” This is especially true where “the regulatory scheme is technical and complex.” Consequently, the Court reasoned that as long as the agency’s reading of the statute stayed within the bounds of reasonability, the Court should defer to the agency’s superior knowledge.

Likewise, Skidmore deference is also heavily grounded in the expertise rationale. While the agency administrator at issue in Skidmore did not have the power to make binding decisions, the Court still found that deference was warranted to the extent that the agency’s “rulings, interpretations and opinions . . . constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.” The Court reaffirmed this reliance upon agency expertise as a proper justification for deference in Mead, stating that “where the regulatory scheme is highly detailed, and [the agency] can bring the benefit of specialized experience to bear on the subtle questions in [a] case” some deference should be given to the agency. Therefore, though the agency’s grant of congressional power is not as broad, the technical knowledge of the agency in its field weighs in favor of deference. This logically reflects one reason why Congress created agencies: because Congress did not have the understanding necessary to make all the decisions within complex statutory regimes.

C. Agency Accountability Towards the Political Branches

Third, federal agencies are seen as generally accountable to the political branches, which impose checks and balances on the decisions of federal agencies; and, generally, courts typically do not want to impede this process of accountability. The Court in Chevron clarified that one possible explanation for why Congress leaves statutory gaps is due to political concerns or conflicts that it was unable to reconcile. In committing the agency to decide how to construe the statutory ambiguity, the Court reasoned that:

Judges are not experts in the field, and are not part of either political branch of the Government. . . . In contrast, an agency to which Congress has delegated
policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its judgments.40

Agencies themselves are not directly accountable to the people, as their heads are not elected by vote. However, because the President is elected by the people and does appoint agency heads, “it is entirely appropriate for [such a] political branch of the Government to make such policy choices—resolving the competing interests which Congress itself . . . did not resolve.”41 Judges are not in a position to evaluate the wisdom of these policy choices because they answer to no constituency and “have a duty to respect legitimate policy choices made by those who do.”42 Because the Constitution commits those choices to the political branches, the separation of powers demands that judges must respect this decision.43 Therefore, agencies are left with the task of making the decisions that Congress delegates to them.

The Court revisited the political accountability rationale in City of Arlington v. FCC.44 The majority opinion in City of Arlington described agency decision-making as done by “unelected federal bureaucrats.”45 However, the Court then went on to describe the alternative decision-makers, federal courts, as “unelected (and even less politically accountable).”46 Despite this, City of Arlington ultimately represents a strong defense of the Chevron doctrine as a way to protect the discretion of the political branches via agency decision-making. The Court reasoned that to allow courts to decide jurisdictional matters for agencies would tempt judges “by the prospect of making public policy by prescribing the meaning of ambiguous statutory commands.”47 Allowing this would reassign political decisions from the executive to the judicial branch, a result that Chevron was designed to protect against.48 Based on the Court’s spirited defense of Chevron in this case, the political-accountability rationale remains powerful in current jurisprudence.

D. Uniformity of Federal Law

Finally, allowing agencies, instead of courts, to decide what policies to pursue serves the need for uniformity in federal law.49 Otherwise, courts in various

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40 Id.
41 Id.
42 Id. at 866.
43 Id.
44 133 S. Ct. 1863, 1873 (2013).
45 Id.
46 Id.
47 Id.
48 Id.
49 See Weiser, supra note 13, at 9.
jurisdictions, deciding upon differing interpretations of the same federal law, could create great confusion. Differing enforcement of a federal law across various jurisdictions could easily result in discrimination and unfairness. Although the Court in *Chevron* did not explicitly rely on uniformity as a rationale, court decisions explicating on the appropriate levels of review for agency actions since *Chevron* have relied on uniformity to support varying levels of deference. In *Mead*, for example, the Court suggested that while the statute’s purpose of providing for uniformity in tariff classifications was not sufficient by itself to merit *Chevron* deference, it did lend itself towards creating precedential value. The Court held that the statute did warrant *Skidmore* deference “given the value of uniformity in its administrative and judicial understandings of what a national law requires.” More recently, in *Mayo Foundation for Medical Education and Research v. United States*, the Court declined to apply a less deferential standard of review than *Chevron* to Treasury Department regulations. The Court was “not inclined to carve out an approach to administrative review good for tax law only” because it “[r]ecogniz[ed] the importance of maintaining a uniform approach to judicial review of administrative action.” Accordingly, the Court has resisted deviating from the core administrative law doctrines set by *Chevron* and *Skidmore* in an effort to maintain consistency in its review. However, this rigid approach fails to fully account for the existence of cooperative federal-state agency schemes, quasi-agency entities, regulatory preemption, and inter-agency conflicts.

Of the four main rationales behind the *Chevron* doctrine, and to a lesser extent behind *Skidmore* as well, congressional delegation appears to be the most powerful. In scrutinizing the validity of state agency interpretations of federal law, courts have drawn on all four justifications to varying degrees. Numerous cases have considered the level of deference to afford state agency interpretations in these circumstances. However, four major federal cases have emerged that have considered this question. Of those four cases, two post-*Chevron* cases denied deference to state agency interpretations, one pre-*Chevron* case suggested that such deference might be warranted, and one granted a slightly modified version of *Chevron* deference to the state agency’s interpretation. These decisions are examined next in turn.

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51 *Id.* at 234.
53 *Id.* (citation omitted) (internal quotation marks omitted).
II. MAJOR CASES OF STATE AGENCY INTERPRETATION OF FEDERAL LAW

Most often, courts give little or no deference to state agencies’ interpretations of federal law.55 Two major cases, *Orthopaedic Hospital v. Belshe* from the Ninth Circuit and *Turner v. Perales* from the Second Circuit established this trend in the years after the Court decided *Chevron*.56 However, the Court’s pre-*Chevron* rule laid out in *Pennhurst State School and Hospital v. Halderman*, giving state agencies the prerogative to construe ambiguous conditions attached to receipt of federal money, contests the presumption that state agencies’ interpretations should always be superseded by federal interpretations.57 Finally, in *Perry v. Dowling*, the Second Circuit distinguished the case from its previous reasoning in *Turner* in order to apply an adapted *Chevron* test and to defer to a state agency’s interpretation of a federal law.58

*Turner v. Perales*, coming several years after *Chevron*, considered the question of deference to state agency interpretations.59 The Second Circuit denied *Chevron* deference to the New York State Department of Social Services’ interpretation of federal law.60 The court emphasized that *Chevron* was justified by the expertise and familiarity of agencies with their subject matter and the need for uniformity in federal law.61 Where the state agency in question was concerned, the court stated, *Chevron*’s considerations did not apply.62 Although Congress had assigned the state agency “broad responsibility and latitude in administering welfare assistance programs, the federal scheme [did] not envision any unitary or uniform application from state to state.”63 Thus, the court appeared to at least acknowledge that Congress delegated a significant role to the state agency in shaping the welfare scheme. Despite this congressional vision of cooperative federalism, the court rationalized that because it was not a federal agency interpreting the law and because the state agency’s actions did not seek uniformity with other states, *Chevron* deference was not appropriate.64 However, the court left open the

55 Weaver, supra note 54 at 71 (“Of course, few courts defer to state interpretations of federal schemes. Illustrative is the holding in *AMISUB (PSL), Inc. v. Colorado Department of Social Services* interpretation of federal Medicaid law. The Tenth Circuit concluded that the matter involved a question of law for the court because a ‘state agency’s determination of procedural and substantive compliance with federal law is not entitled to the deference afforded a federal agency.’”).

56 103 F.3d 1491, 1495–96 (9th Cir. 1997); 869 F.2d 140, 141 (2d Cir. 1989).


58 95 F.3d 231, 236–37 (2d Cir. 1996).

59 869 F.2d at 141.

60 Id.

61 Id.

62 Id.

63 Id.

64 Id.
question of whether state agency determinations that did seek uniformity in their interpretations would be given deference.

The *Turner* decision presents an unusual analysis because the court appeared to emphasize the lack of uniformity and expertise rather than Congress' ostensible intent in delegating to the state agency. In particular, the court failed to explain why they assumed the state agency lacked expertise—a presumption that conflicts with *Chevron*'s assumption of federal agencies as experts. The fact that it was a state agency as opposed to a federal agency in *Turner* does not necessarily explain why the state agency would lack expertise, and an argument could be made that a state agency likely has greater knowledge of how to implement and administer a welfare scheme in its state than would a federal agency. Furthermore, the court's valuation of uniformity is at odds with *Chevron*, which focused on delegation, while ignoring the uniformity rationale. Despite these departures from *Chevron*'s analysis, the Ninth Circuit subsequently followed *Turner*'s reasoning in *Orthopaedic Hospital v. Belshe*.65

The Ninth Circuit applied the Second Circuit's decision in *Turner* to *Orthopaedic Hospital*, which considered whether Medicaid reimbursement rates set by the California Department of Health Services were arbitrary and capricious.66 This program was implemented as part of the Social Security Act and financed by both state and federal governments.67 Patients' medical care was paid for directly by the state, which in turn received matching finances from the federal government if the state obeyed the federal Medicaid law.68 The court reviewed the decision of the state agency de novo and, like *Turner*, cited the need for expertise and uniformity as rationales for not granting deference to the state agency's interpretation of the Medicaid law.69 The court in *Orthopaedic Hospital* quoted *Turner*, explaining that "*Chevron*'s policy underpinnings emphasize the expertise and familiarity of the federal agency with the subject matter of its mandate and the need for coherent and uniform construction of federal law nationwide. Those considerations are not apt [to a state agency]."70 The only thing that concerned the court was "whether the state law and regulations are consistent with federal law."71 Like the court in *Turner*, the *Orthopaedic Hospital* court failed to interrogate or give weight to congressional intent in assigning the state agency's role. The court also did not consider whether the state agency might have equivalent or superior expertise to the federal agency. Therefore, the Ninth Circuit's reasoning also weighed the need for expertise and uniformity more heavily than *Chevron*.72

65 103 F.3d 1491, 1495–96 (9th Cir. 1997).
66 Id. at 1495–96, 1500.
67 Id. at 1493.
68 Id.
69 Id. at 1495–96.
70 Id. (alteration in original) (quoting *Turner* v. Perales, 869 F.2d 140, 141 (2d Cir. 1989)).
71 Id. at 1496.
72 See id. at 1495–96.
Despite the Second and Ninth Circuit's decisions in Turner and Orthopaedic Hospital, Pennhurst State School & Hospital v. Halderman, a case decided before Chevron, indirectly challenged the presumption of de novo review for state agency interpretation. In Halderman v. Pennhurst State School & Hospital, the Third Circuit held that where Congress left ambiguity regarding how to implement a federal Act, states accepting federal funding under the Act reserved the right to construct their own interpretations in implementing the Act. The Act, in which states participated voluntarily, provided federal funding for states to create living programs for the developmentally disabled. The Supreme Court, in reviewing the Third Circuit's decision, found that Congress' power to impose conditions on states by grant of federal funding was similar in nature to contracts, whereby the state agrees to conditions in exchange for money. Because of this, "[t]he legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" When Congress wished to impose conditions on states through acceptance of federal funding, they must do so unambiguously. Since Congress left the Act ambiguous regarding whether states must provide for the care necessary to fulfill the conditions prescribed by the Act, the states were not bound by it. Pennhurst demonstrates that at the very least there are situations where Congress recognizes that in giving states certain powers via statute, the state reserves a right to determine how to interpret statutory ambiguities and to not be bound to federal constructions. This could potentially inform future interpretive clashes between state and federal agencies' interpretations in cases of intrastatutory federalism schemes.

In addition to Pennhurst's cession of some ground towards deference to state agency interpretations, the Second Circuit later departed from its Turner reasoning in Perry v. Dowling. Perry shows one way that a court has justified giving increased deference to a state agency. There, the Commissioner of the New York State Department of Social Service ("DSS") and the Commissioner of the Allegany County Department of Social Services ("ACDSS") had interpreted a provision of the Social Security Act. The provision, aimed at recovering the cost of prenatal and postpartum medical care, to require unwed, pregnant women receiving this care to

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75 Pennhurst State Sch. & Hosp., 451 U.S. at 11.
76 Id. at 17.
77 Id.
78 Id.
79 Id. at 19, 27.
80 See id. at 19–27.
81 Perry v. Dowling, 95 F.3d 231, 236 (2d Cir. 1996).
82 See id. at 236–37.
cooperate with efforts by the state to recover these costs from the fathers. The state Medicaid plan exempted women from cooperating with efforts to recoup healthcare costs from third parties—such as the father—while they were pregnant and for sixty days following the last day of pregnancy. The district court in Perry held that the state's construction of the Social Security Act to require unwed, pregnant women to assist the state in retroactively recovering money from the fathers of their children in order to receive health coverage was an unreasonable interpretation of the Social Security Act's exemption from parental cooperation.

In reviewing the district court's decision, the Second Circuit found that the Social Security Act was ambiguous and Congress was silent about whether the exemption covered cooperation with retroactive recovery of the cost of healthcare. Therefore, the court reasoned, "substantial deference to the pertinent agency's interpretation of the statute is warranted, so long as its interpretation is based on a permissible construction of the statute . . . ." The court then quoted Chevron directly in order to explain that courts do not impose their own interpretations onto agencies in recognition of Congress' choice in delegating that role to the agency instead. In addition, the court stated that the case for deferring to agency interpretation is particularly strong with statutes as complex as the Social Security Act. After the court explained the Chevron standard, it acknowledged the Turner decision, stating that "[t]hese principles are generally applicable to interpretations of federal statutes by federal agencies. When the federal-statute interpretation is that of a state agency and 'no federal agency is involved,' deference

83 Id. at 233–34. The state Medicaid plan required poor mothers who sought recertification of Medicaid benefits following the birth of their child to:

(2)(C) cooperate with the state in (i) establishing the paternity of their child, if it is born out of wedlock, and (ii) obtaining support and payments for themselves and/or their child . . . . and
(3) cooperate with the state in identifying and pursuing any third party, such as an insurer, who may be liable for care and services available under the statute.

Id. at 234 (citing 42 U.S.C. § 1396k(a)(1)(A)–(C) (1994); 42 C.F.R. §§ 433.145–147 (1994)).
84 Perry, 95 F.3d at 234.
85 Id. at 233.
86 Id. at 235–36.
87 Id. at 236.
88 The court quoted, "[w]here the court determines [that] Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id. (alteration in original) (quoting Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984)).
89 The court referenced its decision in Connecticut Hospital Ass'n v. Weicker, in which the court found that "[d]eference to an agency is even more appropriate where . . . we consider a small corner of a labyrinthine statute." Id. (quoting Conn. Hosp. Ass'n v. Weicker, 46 F.3d 211, 219 (2d Cir. 1995)) (internal quotation marks omitted). The court also looked to its decision in White v. Shalala, noting a "special need' to defer to HHS's interpretation of the Act." Id. (quoting White v. Shalala, 7 F.3d 296, 300 (2d Cir. 1993)).
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is not appropriate." While recognizing the rule of de novo review of state agency interpretation previously set forth in Turner, the Perry court distinguished the case in front of them from Turner.

The Second Circuit found that Perry differed from Turner in two ways. First, states' Medicaid plans and implementation are approved by the Department of Health and Human Services ("HHS") as part of the jointly run federal-state program; whereas, in Turner, there was no federal agency involvement with the state agency in question. While the court did not spend any time analyzing this, presumably the involvement of a federal agency may have made it more logical to apply Chevron deference because state agencies lack some of the justifications that make Chevron deference to federal agencies logical. Namely, state agencies lack the national political accountability on a nationwide scale that federal agencies have by virtue of their officers being answerable to the executive branch. Requiring a federal agency's involvement may ease fears of state agencies interpreting and implementing federal law without having to deal with the political ramifications.

But as Gluck points out, "It is not clear that state citizenries are capable of properly discerning whom to hold accountable in an intrastatutory federalist scheme." While Gluck's comment addressed confusion about which state agency actor to hold accountable, the presence of a federal agency that oversees and approves state agency decision-making may not resolve this problem. For example, citizens may not realize that the federal agency has the power to approve the state agency's implementation plans and may not be sophisticated enough to hold the right actors accountable. Therefore, where political accountability is concerned, the added presence of a federal agency may be somewhat of a formal—but largely meaningless—justification for giving state agency interpretation heightened deference.

While a jointly run state-federal statutory scheme may only nominally solve the issue of political accountability, the presence of such a scheme does fulfill Chevron's most important justification—congressional delegation. Congress, by designing and approving a program delegating not only to the federal agency, but also to the state agency via the federal agency, arguably implicitly sub-delegates a grant of its legislative power to the state agency. Consequently, Chevron's logic that approves allowing federal agencies to formulate their own interpretations of ambiguous federal statutes could also be extended to apply to state agencies when Congress grants them the authority to act.

The second reason the Perry court cited in distinguishing and departing from its decision in Turner is the federal agency's explicit agreement with the state agency's interpretation of the Social Security Act. The court reasoned that the

90 Id.
91 Id.
92 Gluck, supra note 3, at 603.
93 See id. at 602.
94 Perry, 95 F.3d at 236.
Social Security Act's statutory scheme envisions state Medicaid programs, like the one run by the state agency, DSS, as implementers and operators of the healthcare programs after approval from HHS. In this case, the state agency made the initial interpretation, but HHS signaled its approval of DSS's interpretation by submitting a declaration agreeing to the interpretation. The deference the court gave to DSS here was based on very narrow grounds and required that "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." Subsequently, the court found that DSS's interpretation was reasonable, fulfilling the final step of the *Chevron* test; and, in doing so, the court upheld DSS's reading of the statute. While the court essentially mapped the *Chevron* doctrine directly onto the state agency's interpretation of the statute, it also added a crucial first step. Ascertaining the presence of a federal agency and its overt agreement with the state agency's interpretation, as well as Congress's delegation to both the state and federal agency as implementers of the law, appears central to the court's approval here. Logically, the court treated the state agency as having been subsumed by the federal agency, thus managing to keep the delegation justifications for *Chevron* deference relevant to this case. Although the *Perry* court did not discuss expertise and uniformity in the decision, federal agency approval of the state agency's action could theoretically also serve these rationales as well. In certain areas, a federal agency might possess more expertise than a state agency, and could act as a check on the state agency's lack of expertise if necessary by signaling its agreement or disagreement with the state agency. Similarly, federal agencies would be able to make sure that state interpretations did not conflict with federal interpretations or other states' interpretations, thus preserving the uniformity of federal law in areas that called for consistency.

These four major cases—*Turner, Orthopaedic Hospital, Pennhurst*, and *Perry*—leave a great deal of uncertainty about how courts should judge state agencies interpreting federal law. They indicate that in some situations, certain *Chevron* justifications may weigh in favor of granting deference, but the logic within *Turner, Orthopaedic Hospital*, and *Perry* do not harmonize to produce one consistent rule. Thus, formulating more general principles about deference to state agencies requires looking further into how *Chevron*’s justifications play out in the intrastatutory interpretation context. In addition, some federal court decisions have further illuminated the ways in which state agencies may or may not fulfill the four grounds for granting *Chevron* deference when interpreting federal law.

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95 Id.
96 Id. at 237.
97 Id.
98 Id. at 238.
99 See id. at 236.
100 See Gluck, *supra* note 3, at 612 & n.213.
III. CHEVRON’S JUSTIFICATIONS AT WORK IN STATE AGENCY INTERPRETATIONS OF FEDERAL LAW

There are substantial reasons on both sides as to whether and when a Chevron-like level of deference to state agencies’ interpretations of federal law may be appropriate. As Gluck points out, “[t]he lesser level of deference accorded by Skidmore may seem more obviously appropriate because of an intuition that the common justifications for Chevron do not fit well when states are the implementers.” Yet, as Perry demonstrates, in some situations, a Chevron-type deference can allow courts and federal agencies to take advantage of state agencies’ expertise and resources to better implement federal laws where Congress has appropriately delegated authority to the state agency. Since Chevron, many federal courts have considered what level of deference to afford state agencies’ interpretations of federal law, and in doing so, further clarified the role played by Chevron’s justifications in intrastatutory schemes.

A. Delegation Concerns

Despite that most state agency interpretations of federal law are given de novo review, there are situations in which a state agency might fulfill several of Chevron’s justifications for receiving increased deference. “To the extent that one reads Mead as a statement that Chevron deference is justified by congressional choice rather than by any of the constitutional or functional justifications that previously have been given for Chevron,” Gluck writes, “there are situations in which a Chevron-type rule for state agencies may be appropriate.” Gluck identifies “direct delegations” of congressional power to state agencies or “broad federal grants” where the federal agency’s main role is to funnel money to state agencies as examples of when this might be appropriate. However, there are numerous federal statutory schemes requiring joint state-federal agency cooperation in which courts could reasonably ascribe some congressional delegation of power to state agencies.

For example, in West Virginia University Hospitals, Inc. v. Casey, the Third Circuit dealt with state agency implementation of the Social Security Act. The Social Security Act “implemented a federal-state joint venture in which participating states receive federal Medicaid (sic) funds in return for administering a Medicaid program developed by the state within the parameters established by federal law and regulations.” Under this scheme, a single state agency was designated to decide upon the services offered and the eligibility level for the

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101 Id. at 601.
102 Id. at 602.
103 Id.
105 Id.
program. The court here assessed the adequacy of the state's Medicaid program and found that the structure of the Social Security Act "contemplates a deferential standard of review by the courts in assessing compliance with the 'reasonable and adequate' requirement [of the statute]." The court reasoned that "[a]pplying a higher standard would run counter to the congressional intent that states be afforded considerable freedom in pursuing ways of limiting medicaid costs and encouraging efficiency." By looking at congressional intent in shaping the joint federal-state statutory regime, the court here essentially judges to what extent Congress delegated power to the state agency to make independent decisions about implementation. Although the court did not cite Chevron, it decided the appropriate standard was "whether the state's determination was arbitrary and capricious." Thus, the court echoed the deferential standard of review found in Chevron.

Similarly, the Fifth Circuit in Abbeville General Hospital v. Ramsey evaluated the state agency's Medicaid rate-finding and setting processes. The court reviewed the state's fact-finding process de novo, but reviewed the state's findings and rates under the arbitrary and capricious standard. This judicial review process provided the "minimum [oversight] necessary to assure proper accountability" while also "stri[k]ing a balance between Congress's view of the federal role under the Medicaid Act and general principles of federalism, which do not permit states to be final arbiters of their compliance with federal law." As in Perry, the Abbeville court relied heavily upon the structure of the Social Security Act, in which Congress delegated responsibilities to both the state and federal agencies. Thus, this court found that Congress's delegation of some grant of legislative power to the state agency was a valid reason for extending deference.

The Seventh Circuit in Illinois Health Care Ass'n v. Bradley also found that federal agency approval of a state agency's rate-setting and reimbursement plan was "a product of state and federal agency action" and therefore must be given "the de novo review of agency actions." The court then reviewed the agency's rate-setting process to establish whether it was arbitrary and capricious.

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106 Id. at 15-16.
107 Id. at 23.
108 Id. at 24.
109 Id. at 24.
110 Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984) ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.").
111 3 F.3d 797, 803-04 (5th Cir. 1993).
112 Id. at 801-02.
113 Id. at 803-04 (internal citation omitted).
114 Id.
115 983 F.2d 1460, 1462-63 (7th Cir. 1993).
116 Id. at 1463.
Having the state agency’s decisions “pass through” the federal agency made the court comfortable with ascribing the usual justifications for deference that apply to federal agencies onto the state agency. Consequently, the joint federal-state scheme again was crucial in determining if Congress had intended to delegate power to the state agency, meriting deferential review.

In Clark v. Alexander, the Fourth Circuit explicitly cited Chevron when giving deference to a state agency’s interpretation that had been approved by the corresponding federal agency. 117 The court subjected the state agency’s interpretation of federal regulations determining Section 8 benefits to a two-step test.118 The court stated that “[f]irst, the court should determine whether the state agency action is inconsistent with the federal housing provisions.”119 Second, citing Chevron, the court held that, “[i]f there is no inconsistency, the court should afford the state agency’s action reasonable deference, meaning that the action should be upheld unless it is found to be arbitrary or capricious.”120 This test almost mirrors Chevron’s, but instead of initially determining whether the statute is ambiguous,121 the court first decides whether the state agency’s action met with approval from the federal agency. The Fourth Circuit regarded the presence and authorization of a federal agency as a legitimizing factor for the state agency interpretation.122 By carrying out this analysis, the court recognized that cooperative federalism schemes imply a congressional delegation of power to state agencies that justify a higher level of deference than the de novo review typically given to state agency interpretations of federal law.

Likewise, in Ritter v. Cecil County Office of Housing & Community Development, the Fourth Circuit again acknowledged that although the local housing agency was not due the deference given to federal agencies under the Administrative Procedure Act because it was not a federal agency, it was still “appropriate for [the court] to show some deference to a state agency interpreting regulations under the authority of a federally created program.”123 The court cited Skidmore in consideration of the fact that it was an interpretive rule in question.124 However, the court concluded that if the local agency’s rules were not contrary to the statute or regulation, then “deference is accorded, and a court may not substitute its own interpretation for the agency’s if the agency’s interpretation is reasonable.”125 Again, the presence of federal agency authorization merited similar deference to the local agency’s determination that would have been given to a

117 85 F.3d 146, 152 (4th Cir. 1996).
118 Id.
119 Id.
120 Id.
122 Clark, 85 F.3d at 152.
123 33 F.3d 323, 327–28 (4th Cir. 1994).
124 Id. at 328.
125 Id.
federal agency. Congressional intent provided the state agency with a significant role in the statutory scheme.

In his dissent, Judge Prado hypothesized that if the statute was ambiguous, the majority’s decision to defer to the state agency when its regulations conflicted with FERC’s federal regulations would “upset this basic doctrine of agency deference because the PUC enjoys some discretion in implementing FERC regulations.”126 The majority in Exelon Wind held that the Public Utilities Regulatory Policies Act of 1878 was unambiguous, therefore foreclosing any deference due to the Federal Energy Regulatory Commission.127 Instead, deference was due to the state agency, the Public Utilities Commission (PUC), because the Act, as well as the court’s previous decisions regarding it, specified that state agencies determined the parameters for when wind generation facilities could form agreements to sell power.128

In his dissent, Judge Prado hypothesized that were were the statute ambiguous, because the state agency’s regulation conflicted with the federal regulation promulgated by FERC, the majority’s decision to defer to the PUC instead of to FERC “upset this basic doctrine of agency deference because the PUC enjoys some discretion in implementing FERC regulations.”129 Judge Prado argued that FERC authored the regulation in question, and the structure of the Act “suggests Congress’s intent to let FERC’s interpretations of its own regulation trump the state’s.”130 Because Congress had delegated authority to FERC to determine the structure for forming wind power obligation, the majority’s reading of the statute “displac[ed] FERC’s role as Congress’s delegate and [went] beyond the issue in dispute.”131 In determining which agency’s regulations should be given deference in a cooperative federalism scheme, Judge Prado stated that courts had to look to the structure and history of the statute.132 The Act granted FERC the power to write rules and enforce states’ implementation of them, in particular by empowering FERC to intervene in federal court actions challenging state agencies’ implementation of the regulations.133 Judge Prado viewed this structure as evidence that “the power to render authoritative interpretations of [PURPA] regulations is a ‘necessary adjunct’ of [FERC’s] powers to promulgate and to enforce national . . . standards.”134 Another indication of congressional delegation to FERC was the Act’s provision allowing FERC to bring enforcement actions against state agencies

126 766 F.3d 380, 400 (5th Cir. 2014) (Judge Prado, concurring in part and dissenting in part).
127 Id. at 397 (majority opinion).
128 Id. at 396.
129 Id. at 405 (Judge Prado, concurring in part and dissenting in part).
130 Id. at 402.
131 Id. at 405.
132 Id. at 406.
133 Id. at 407.
134 Id. (quoting Martin v. Occupational Safety & Health Review Comm’n, 499 U.S. 144, 152 (1991)).
where they failed to comply with FERC regulations.\textsuperscript{135} According to Judge Prado, this was indicative of FERC’s superiority because “[i]t would be odd indeed for Congress to give FERC the power to bring enforcement actions against state regulatory authorities, only to let FERC lose every action because Congress had supposedly intended states, not FERC, to have interpretive authority.”\textsuperscript{136} Therefore, he viewed the majority’s decision to defer to the state agency in light of FERC’s opposition to that agency’s interpretation of the Act to run contrary to Congressional intent.\textsuperscript{137}

Although “Congress also expected meaningful interaction between state regulatory authorities and FERC” because the Act specified that FERC should seek the counsel of state agencies before issuing regulations, Judge Prado felt this did not point towards “which agency Congress wanted to speak with the force of law.”\textsuperscript{138} Instead, Judge Prado felt that the relationship between FERC and the state agency implied deference to the state agency only when the FERC had explicitly left the state agency authority to interpret ambiguous provisions, and FERC had not taken action otherwise (as it had done in this case).\textsuperscript{139}

Judge Prado’s concurrence and dissent in Exelon Wind, although not controlling precedent, offer one of the most in-depth discussions of congressional delegation to both federal and state agencies in cooperative federalism schemes. In doing so, his decision also demonstrates how nuanced this analysis can be; considering prior precedent, enforcement schemes, and the balance of power between agencies given by Congress. While Judge Prado acknowledged that state agencies may bring their expertise to bear on the issue, as well as their grant of interpretive power from the federal agency and Congress, he saw these factors as subservient to the ultimate question of which agency Congress had allocated the final power to interpret and promulgate regulation on the Act.\textsuperscript{140}

Finally, the Sixth Circuit in Day v. Shalala\textsuperscript{141} also gave Skidmore-like deference to the decision of a state agency under the Social Security Act. The court noted that it must give deference to agency decisions “within the limits of the policymaking responsibilities delegated to the agency by Congress.”\textsuperscript{142} To support this standard, the court cited Chevron.\textsuperscript{143} Thus, the court explicitly acknowledged that congressional delegation played an important role in giving deference to the

\textsuperscript{135} Id. at 408.
\textsuperscript{136} Id.
\textsuperscript{137} Id.
\textsuperscript{138} Id.
\textsuperscript{139} Id. at 411.
\textsuperscript{140} Id. at 408 (“FERC [granted state agencies power in implementing FERC’s rules] with a sense that states could use discretion to implement better policies. FERC noted the context of ‘economic and regulatory circumstances [that] vary from State to State and utility to utility’ and ‘recogni[zed] the work already begun and . . . the variety of local conditions.’”).
\textsuperscript{141} 23 F.3d 1052, 1060 (6th Cir. 1994).
\textsuperscript{142} Id.
\textsuperscript{143} Id. (citing Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984)).
state agency where it could be safely presumed that Congress intended the state agency to make independent interpretive decisions on how to implement the Social Security Act.

B. Expertise Concerns

Federal agency approval of a state agency’s interpretation combined with the assumption that the state agency possesses technical knowledge in its subject matter is likely to fulfill Chevron’s expertise-based justification. The theory that agencies have more expertise than courts regarding their subject matter, and thus courts should not second-guess their determinations, is a strong rationalization for deference. In joint federal-state implementation schemes, state agencies may have more expertise than federal agencies. Because state agencies serve a smaller and more specific population than federal agencies, they can be more attuned to the particular needs of that population. State agencies may have more information about the population they serve or the issues they encounter than a federal agency. Courts have recognized that complicated joint federal-state implementation schemes are often designed to draw on the greater knowledge of the state agency to best implement the goals of the statute. When Congress makes it clear by statutory design or legislative history that the statute draws on the power of state agencies because of their expertise, courts should defer to the state agency’s determination. This is especially true in regards to complex statutes like the Social Security Act, the Clean Air Act, the Clean Water Act, the Telecommunications Act of 1996, and the Patient Protection and Affordable Care Act.

Furthermore, state agencies may be able to offer the court significant insights when the federal agency has not yet interpreted the statute. Another instance of when state agencies’ experience may add value to interpretations of federal law is when states have differing interpretations of the same statute. There, federal agencies may make use of states as experimental laboratories for modeling how these differing interpretations would play out. This may result in competition between states, which empirical research appears to show “can help to maximize social welfare” by “allow[ing] for a degree of competition between the states for residents, capital, and economic activity in an increasingly mobile society.”

144 See Weiser, supra note 13.
146 Gluck, supra note 3, at 577.
147 Id.
148 Weiser, supra note 13, at 19, 22–23.
149 Gluck, supra note 3, at 563.
150 See Sarnoff, supra note 2, at 213–14.
Recently, issues of how state expertise may play out in an intrastatutory scheme can be seen at work in the rollout of health insurance exchanges under the Affordable Care Act. The Act allows states to either set up their own insurance exchanges or use the federal exchange administered by the Centers for Medicare and Medicaid Services. Insurance exchanges, both state and federal, opened October 1, 2013. The federal insurance exchange’s website was beset by glitches and overwhelmed by traffic, which prevented people from signing up and enrolling. However, most states that had chosen to set up their own insurance exchanges suffered fewer technical problems and were at least initially more successful at enrolling applicants.

The difference in performance between the rollout of most state exchanges versus the lagging federal exchange demonstrates flexibility, another way that states may be more adept at executing federal laws. In New York, the discrepancy in the federal versus the state exchange’s performance was attributed to the state’s tractability in responding to challenges and to the smaller number of people it sought to serve in comparison to the federal exchange. In Washington, the state exchange’s website went down the first day it launched. However, just a week later, the exchange had almost 20,000 people signed up for coverage—one of the more successful initial enrollment efforts. The difference between Washington’s exchange and the federal exchange was due to the simplicity of the website, which

152 See Patient Protection and Affordable Care Act (ACA), 42 U.S.C. § 18041(b) (2012).
156 Pear & Goodnough, supra note 155.
158 Id.
allowed people to browse options quickly without creating an account. In Kentucky, the state exchange’s smooth performance was credited to more rigorous testing and greater coordination between state agencies. In these situations, states implementing their own exchanges demonstrated greater expertise in catering to the needs of their populations by using their own resources and responding quickly to obstacles that arose. Examples like New York, Washington, and Kentucky may also provide guidance to the federal exchange on how to function better in the future. Thus, this example of successful state execution of the Affordable Care Act highlights some of the reasons that state agency expertise may be a valuable tool and worthy of increased deference.

In the past, some federal courts have recognized this potential that state agencies have to exercise expertise in implementing federal law to their particular constituency. The Fifth Circuit in Abbeville General Hospital v. Ramsey cited expertise as one of the justifications that merited deferential review towards the state agency in the joint federal–state Medicaid program. The court explained that because expertise was one of the factors lending itself towards deference where federal agencies were concerned, a joint federal–state scheme “evoke[d] the same policy.” Therefore, arbitrary and capricious review was sufficient to ensure the “minimum necessary to assure proper accountability.” Although the presence of a federal agency appeared crucial to the court’s analysis, the court recognized the added justification of using state agency expertise, which Congress tried to take advantage of.

In Illinois Health Care Ass’n v. Bradley, prior approval from the Secretary of Health and Human Services allowed the court to see the state agency as a legitimate source of expertise. The court inquired whether the state plan complied with “the requirements of the federal law” and whether it was arbitrary and capricious. In its analysis, the court specifically called attention to how Congress gave the state agency discretion to exercise its expertise and to allow states to experiment with finding new efficient reimbursement methods and ways to deliver medical services under the Social Security Act. The court noted that Congress had “reduced the Secretary’s involvement in the rate-setting process,” and consequently the Secretary “[did] not review the methods by which a state determines its reimbursement rates . . . only the reasonableness of the state’s assurance.” In setting up this intrastatutory implementation scheme, Congress

159 Id.
160 Campo-Flores, supra note 155.
161 3 F.3d 797, 803 (5th Cir. 1993).
162 Id.
163 Id. (citation omitted).
164 See Ill. Health Care Ass’n v. Bradley, 983 F.2d 1460, 1462 (7th Cir. 1993).
165 Id. at 1463.
166 Id.
167 Id. (citation omitted).
allowed states to use their own expertise and knowledge to consider what might work best for their particular systems and demographics.

In *BellSouth Telecommunications, Inc. v. Sanford*, a case regarding state implementation of the Telecommunications Act, the Fourth Circuit found in favor of the North Carolina Utilities Commission’s interpretation of the Telecommunications Act.\(^{168}\) Although the court stated that it performed a de novo review, it cited to *Skidmore* while stating that “even with [its] de novo standard of review, an order of a state commission may deserve a measure of respect in view of the commission’s experience, expertise, and the role that Congress has given it in the Telecommunications Act.”\(^{169}\) Thus the court acknowledged that one reason to grant such deference is to use the state commission’s particular knowledge, a reason that courts are expressly encouraged to take advantage of by virtue of Congress creating a joint federal-state scheme. The court continued its analysis by stating that *Skidmore* review was appropriate due to “the respect that flows from the long-standing principle that the well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”\(^{170}\) The court even went so far as to explain that the commission’s expertise in applying communication law predated the existence of the Telecommunications Act, thus potentially outstripping the federal agency in its knowledge.\(^{171}\) For this reason, “[g]iven the NC Commission’s accumulation of knowledge and experience . . . its orders should not be taken lightly.”\(^{172}\)

The majority in *Exelon Wind* deferred to the state agency because they found they Public Utilities Regulatory Policies Act of 1878 unambiguous, and the Act granted the state agency (the PUC) deference to interpret the Federal Energy Regulatory Commission’s (FERC) regulation.\(^{173}\) However, in addition to deference on those grounds, the majority also pointed towards the state agency’s expertise as a rationale for deference. “Like FERC,” the majority wrote, the PUC too has a great deal of expertise. Indeed, Texas is unique in that it runs its own electric grid.”\(^{174}\) Thus, the majority acknowledged here that state agencies may have more unique and relevant knowledge about how to better serve their jurisdictions than the relevant federal agency. Although ultimately the majority deferred because they viewed the statute as unambiguously granting deference to the state agency, their nod towards the expertise rationale demonstrates its use in a deference analysis.

\(^{168}\) 494 F.3d 439, 454 (4th Cir. 2007).

\(^{169}\) *Id.* at 447.

\(^{170}\) *Id.* at 448 (quoting United States v. Mead Corp., 533 U.S. 218, 227 (2001)) (internal quotation marks omitted).

\(^{171}\) *Id.*

\(^{172}\) *Id.*

\(^{173}\) 766 F.3d 380, 399 (5th Cir. 2014).

\(^{174}\) *Id.*
However, a state agency's localized knowledge can also be characterized as an argument against state expertise in implementing federal law. For example, in *U.S. West Communications, Inc. v. Hix*, the District Court of Colorado held that de novo review applied to a state agency's determination under the Telecommunications Act. 175 Although the court accepted that Congress had delegated authority specifically to the state agencies regarding the issues in question, *Chevron* deference was not appropriate because "state commissions, while having experience in regulating local exchange carriers in intrastate matters, have little or no expertise in implementing federal laws and policies and do not have the nationwide perspective characteristic of a federal agency." 176 More generally, the court held, "state commissions do not have extensive experience or expertise in the specific mandate of the Act—promoting competition in the local exchange market, because of the recent passage of the Act in 1996." 177 The court's reasoning here diametrically opposes that of *BellSouth* by placing the emphasis on the federal characteristics of the Telecommunications Act, rather than what the state agencies have to offer in local knowledge. Thus, whether the court values expertise in state implementation versus the overall federal mandate prescribed by the law—an inquiry that also implicates uniformity concerns—appears critical.

C. Accountability Concerns

State agencies are not subject to the same political checks as federal agencies, which are in theory responsive on a nationwide level to the political masses. It is hard to generalize about the accountability of state agencies, other than to stress that they are typically more removed from democratic control than those at the federal level. 178 Unlike federal agencies, which mostly fall into several recognizable agency structures with varying levels of political accountability, 179 state agencies comprise a multitude of different actors which "not only often have different principals because of the lack of a unitary executive in most states, but also that each have different relationships with the federal government." 180 States' citizens may not be informed enough to hold the appropriate entities responsible when both state and federal governments are working together in the context of

176 Id. at 17.
177 Id. at 17-18.
178 Interestingly, Gluck points out that during periods where government is politically divided, Congress is more likely to delegate to state agencies to implement federal law. Gluck, supra note 3, at 603. Gluck theorizes that this may demonstrate that congressmen and women view the state agencies in their constituencies as more trustworthy to implement federal law than federal agencies under the control of the President's appointees. Id.
179 Generally agencies within the executive branch are seen as both more accountable to the executive branch and to the people. On the other hand, independent agencies are structured to be less controllable by the executive branch due to their heads' being appointed for specified terms and the requirement that they be from particular political parties, as well as protections from firing.
180 Gluck, supra note 3, at 602.
intrasstatutory implementation.\textsuperscript{181} Even extremely savvy citizens may not be able to
determine which aspects of implementation result from the state agency's volition
and which come from federal sources. For out of state citizens, delegation to state
agencies "places policymaking discretion in the hands of state officials for whom
many federal citizens do not vote. State officials are unlikely to hear the political
voices of out-of-state citizens when policymaking discretion is exercised."\textsuperscript{182} Thus,democratic accountability as a rationale for deference does not translate well from a
federal to state level. Neither does accountability to the executive branch because
the federal executive branch does not control state agencies. As a result there are
fewer checks on the power of agencies when state agencies, instead of federal
agencies, implement federal law.

Few cases discuss accountability when deciding on the appropriate level of
review of a state agency's interpretation of federal law. The Fourth Circuit briefly
addressed political accountability in Clark v. Alexander when applying Chevron-
like deference to a local housing authority's interpretation of federal housing
law.\textsuperscript{183} To defend this choice, the court explained that a less deferential level of
review "would place federal courts and juries in the position of second-guessing
every decision made by local housing authorities. The actual role of the federal
courts is far more limited . . . ."\textsuperscript{184} This opinion hints at the fact that federal courts are not in a position to second-guess policy decisions because those decisions are
committed to the agency by the political branches. The court in Day v. Shalala
explored this justification for deference more thoroughly, stating that:

\begin{quote}
[1] It is important to respect the balance struck by the agency between competing
policies and concerns. Judges, who "are not part of either political branch of the
Government," must not substitute their own judgments for decisions made by an
agency that fall within the limits of the policymaking responsibilities delegated to
the agency by Congress.\textsuperscript{185}
\end{quote}

However, the courts in both Clark and Day fail to take into account the
potential differences between state and federal agencies' roles in political
accountability. These courts' explanations merely echo that of Chevron, which
places policy decisions beyond the reach of the judges because, in theory, incorrect
decisions can be fixed through the political process. But this may not be true of
state agencies. State agencies encompass a vast array of different entities, some of
which may be more or less politically accountable depending on their structure and
the state in which they sit. Furthermore, the fact that a state agency may be
operating with the approval of a federal agency under a joint federal-state program
does not suffice to make state agencies accountable in the same way that federal

\begin{flushleft}
\textsuperscript{181} Id. at 603. \\
\textsuperscript{182} Sarnoff, supra note 2, at 210. \\
\textsuperscript{183} See 85 F.3d 146, 152–53 (4th Cir. 1996). \\
\textsuperscript{184} Id. at 153. \\
\end{flushleft}
agencies are. As previously discussed, even if citizens within the state have a way to hold the state agency accountable, they may be confused about whether to attribute the decision to the state or federal agency. Even if state citizens are able to hold the federal agency accountable for the actions of a state agency, it is questionable whether the citizens of one state would be able to have any political effect at the national level.

The reverse is also true. Federal executive officials may have little ability to check the decisions of state agencies if state agencies’ interpretations are afforded deference—unless the state agency’s interpretation requires federal agency approval before deference is given. The court in *U.S. West Communications, Inc. v. Hix* hinted at this when it denied deference to a state agency in part because “such agencies are not subject to Congressional oversight.”\(^\text{186}\) In contrast, “deference is given [to] federal agencies because ‘their activities are subject to continuous congressional supervision by virtue of Congress’s powers of advice and consent, appropriation, and oversight.’”\(^\text{187}\) Simply put, state agencies are likely far more immune from the effects of the political branches than federal agencies. Thus, in most cases, political accountability does not effectively serve as a rationale for giving deference to state agency interpretations of federal law.

**D. Uniformity Concerns**

Uniformity, while not explicitly discussed in *Chevron*, stands as another oft-touted justification for denying state agency interpretations of federal law heightened review. Allowing state agencies deference could have negative consequences for achieving uniformity where federal laws are concerned. If state agencies interpret federal laws differently, the result could be numerous interpretations of federal law that change from state to state, defeating the uniformity typically sought from federal law that justifies *Chevron* deference.\(^\text{188}\) Conflicting interpretations of the same federal law could cause confusion and discontent amongst citizens who might feel that it is unfair for the interpretation of a nationwide law to depend on the whim of their state agency. Another problem presented by differing state interpretations of federal law is whether the resulting law is treated as state or federal law for purposes of judicial review. The answer to this question determines what substantive law applies on review. Although the Supreme Court recently held in *Virginia Office for Protection & Advocacy v. Stewart* that federal question jurisdiction is created when a state actor implements a federal law,\(^\text{189}\) questions remain about how these tensions will play out.\(^\text{190}\) While

\(^{186}\) 986 F. Supp. 13, 16 (D. Colo. 1997).

\(^{187}\) *Id.* at 17 (quoting Kenaitez Indian Tribe v. Alaska, 860 F.2d 312, 316 (9th Cir. 1988)).

\(^{188}\) Weiser, *supra* note 13, at 11.

\(^{189}\) 131 S. Ct. 1632, 1642 (2011).

Gluck points out that often "the very reason that Congress delegates to the states in many circumstances is to produce policy disuniformity,"\(^{191}\) this means that in order to justify deference to state entities, uniformity of federal law cannot be a goal that Congress seeks to effectuate through delegation to state agencies.\(^{192}\)

Like with concerns about the political accountability of state agencies, courts have paid little attention to uniformity concerns. In *Abbeville General Hospital v. Ramsey*, the court mentioned uniformity as one reason for deferential review by a state agency interpretation of Medicaid that had been approved by the federal agency.\(^{193}\) However, the court's analysis was conclusory and failed to offer any real insight. *U.S. West Communications, Inc. v. Hix* offered a more thorough analysis of the effects on uniformity of allowing state agencies deference in implementing federal law under the Telecommunications Act. The court explained that "giving deference to state commission determinations might only undermine, rather than promote, a coherent and uniform construction of federal law nationwide."\(^{194}\) Furthermore, citing *Turner*, the court dismissed that the joint federal-state statutory scheme was able to make up for this deficiency.\(^{195}\) It is undeniable that giving state agencies deference may result in varying interpretations from state to state. However, the courts in *U.S. West Communications*, as well as *Turner*, both failed to consider that by nature of the statutes—the Telecommunications Act and the Social Security, respectively—uniformity was not envisioned or demanded. But in both cases, the respective statute's ambivalence towards uniformity was not sufficient for the courts to disregard uniformity as a justification for granting deference.

Other courts may see view uniformity differently. If a statute implementing a joint federal-state scheme does not seek or require uniformity, it is possible that a court might find the rationale unnecessary. A court might then permit deference in light of the fact that congressional intent clearly did not see uniformity as something to necessarily be achieved by the statute. As Gluck points out, there are numerous legitimate reasons why Congress might not seek uniformity: allowing states to use methods most efficient for them, use of the states as experimental implementers of federal law, or as a way of political compromise to ensure that a bill gets passed by leaving the messy details of implementation for states to interpret so that Congress may avoid taking accountability for it.\(^{196}\)

\(^{191}\) Gluck, *supra* note 3, at 604.

\(^{192}\) See Sarnoff, *supra* note 2, at 274.

\(^{193}\) 3 F.3d 797, 803 (5th Cir. 1993).


\(^{195}\) *Id.*

E. Three Possible Standards for Courts’ Review of State Agency Interpretations of Federal Law

The supremacy of federal over state law has been firmly established since Martin v. Hunter’s Lessee. Consequently, most courts resist deferring to state agencies’ interpretation of federal statutes and regulations. Yet, as the above cases demonstrate, there are contexts in which courts have found sufficient justifications for deferring to state agencies. Foremost among courts’ justifications for giving deference to state agencies is the explicit or implicit acquiescence of a federal agency to the state agency’s interpretation, in conjunction with clear congressional delegation to the state agency. However, permitting federal agency approval to allow state agencies to bypass the hurdle posed by the delegation justification may not fulfill other rationalizations for giving deference to federal agencies, such as uniformity and political accountability. As a result, it is very difficult to formulate doctrines that can conclusively speak to all the possible nuances present when deciding what level of deference to grant state agencies.

Nevertheless, even the levels of review in federal administrative law that apply solely to federal agencies fail to account for all the variations in federal agency structure. Despite this, the Court has still generated the Chevron and Skidmore doctrines to at least provide a structure for reviewing the most commonly recognized agency decision-making processes. Thus, an attempt to generate a somewhat similar framework for reviewing state agency decisions in the intrastatutory implementation context may also prove useful, at least as a starting point for considering what factors courts should weigh under what circumstances. Certainly, legislation, such as the Affordable Care Act, will increasingly push the question of how to review state agency decision-making into the dockets of federal courts.

In a general sense, three broad, rough formulas for determining the level of deference to afford state agency interpretations of federal law can be articulated from the court cases and scholarly considerations. First, where the state agency is not part of a cooperative federal-state statutory scheme where Congress has implicitly or explicitly delegated power to the state agency, a court’s review should be de novo. The largest rationale behind Chevron deference, as well as the question driving Mead’s inquiry, is one of congressional delegation and intent.

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197 14 U.S. (1 Wheat.) 304, 347–48 (1816) ("A motive of another kind, perfectly compatible with the most sincere respect for state tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity of uniformity of decisions throughout the whole United States . . . . If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable.") (emphasis added).

198 See generally O’Connell, supra note 54, at 922-26 (arguing that federal administrative law canons fail to account for the vast diversity in agency structure outside of executive agencies and independent regulatory commissions).
Thus, when delegation and congressional intent are lacking, accountability and uniformity should not follow. Courts' rationales for giving deference to state agencies in Clark, Ritter, Abbeville General Hospital, Illinois Health Care Ass'n, and West Virginia University Hospitals, Inc. further support this result—if deference was warranted because Congress had carved out a role for the state agency's discretion while implementing federal law, then by that same logic a lack of congressional authorization counsels the opposite outcome. As Chevron and subsequent cases interpreting it demonstrate, agencies' power to decide how to implement federal law ultimately comes from Congress's delegation of legislative power to the agency. Without congressional delegation, there is no basis for either a federal or state agency to exercise this decision-making power. Thus, where Congress has not carved out a role for the state agency through a joint federal-state implementation scheme, courts should not defer. Similarly, where a state agency that is part of a joint federal-state scheme has not acted with the force of law or approval of a federal agency, review should also be de novo. This level of deference would act akin to Mead, as a gate-keeping mechanism to ensure that agencies possessed and acted with power delegated by Congress. While this is perhaps an obvious standard, the most difficult question in these types of cases will likely be discerning whether state agencies involved in joint implementation schemes have been delegated power and whether they acted with that power. If not, a state agency may still possess expertise in the subject area of the law or its implementation, but without federal guidance and oversight a state agency's expertise alone should not merit deference.

Second, state agencies that have not been delegated power under a joint federal-state scheme still may have the “power to persuade” as described in Skidmore. In cases where the state agency in a joint state-federal scheme has not acted with the force of law or the approval of a federal agency, courts could use a Skidmore-like level of review. Similar to Skidmore analysis, this review would assuage courts' concerns about permitting the agency deference where Congress did not intend the state agency to be able to interpret and act with the force of law. However, courts and federal agencies would still be able to take advantage of state agencies' knowledge of their subject matter or their resources in implementation. State agencies' interpretations should only be granted deference to the extent they resulted from expertise and persuasiveness. As discussed previously, by virtue of having smaller constituencies and more specific knowledge about their populations, state agencies may have expertise that large federal agencies simply cannot hope to possess because they deal with issues at the national level. Furthermore, as the Illinois Health Care Association court noted, federal-state implementation

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schemes that permit courts to be persuaded by states’ experimentation can provide federal agencies with valuable examples of what may or may not work.

Lastly, as Perry demonstrates, when there is federal agency approval of a state agency interpretation in a cooperative federalism scheme, this provides a strong argument for granting Chevron-like deference. Courts need only add several new threshold inquiries to the existing Chevron/Mead doctrine to manipulate the current framework for use in cooperative federalist schemes. First, a court would ask whether the state agency was acting as part of a joint federal-state scheme where Congress had delegated the state agency the authority to act or, alternatively, where Congress had delegated to the federal agency that in turn delegated to the state agency. Then, a court would ask whether the federal agency had implicitly or explicitly approved of the state agency’s interpretation of the federal law. Courts would then have to ask, as Mead requires, whether the agency acted pursuant to the delegated authority and whether that authority granted the agency the power to act with the force of law. A court might ask whether Congress had given the state agency the authority to act with the force of law, or whether the federal agency had the power to act in this manner. Because the state agency’s interpretation passes through by approval to the federal agency, a court could impute the state agency’s interpretations onto a federal agency that had been given this power to act with the force of law and had acquiesced to a state agency’s actions. If these inquiries were fulfilled, the court would then proceed with the normal Chevron inquiries. Doing so would still preserve justifications based on delegation and expertise. As discussed in Part III(C) and (D), respectively, in some cases rationales based on accountability and uniformity may be maintained as well. Alternately, uniformity could be abandoned as irrelevant if the statutory scheme does not call for it. However, a drawback of only deferring to federally approved state agency interpretations would be that, because federal agencies are unlikely to approve of state interpretations that run contrary to federal interpretations or goals, state agency experimentation could be stifled. State agencies pursuing innovative and cutting-edge regulatory solutions may be unwilling to attempt these solutions if they know their interpretations would be subject to federal agency scrutiny and were unlikely to be approved.

CONCLUSION

These three proposed levels of deference above are but rough attempts to formulate a policy around how state agency interpretations of federal law should be approached. In both the second and third formulations, questions of political accountability of state agencies remain problematic. It is also unclear whether courts would be eager to abandon uniformity as a goal of federal law even where Congress indicates that the statute does not seek it.

Furthermore, it is unclear whether the Supreme Court would support such an approach. The Supreme Court has never spoken definitively about what kind of gap-filling approach courts should take in intrastatutory schemes. In *AT&T Corp. v. Iowa Utilities Board*, the majority opinion of the Supreme Court held that the FCC’s interpretation of the Telecommunications Act trumped the state agency’s, with Scalia writing that “[i]f there is any ‘presumption’ [regarding whether the state agency should be guided by the federal regime] . . . , it should arise from the fact that a federal program administered by 50 independent state agencies is surpassing strange.”202 This case also saw dissents from Justices Thomas and Breyer who “each invoked the federalism canon and the presumption against preemption to support the states’ interpretive primacy over this provision of the federal statute.”203 In a subsequent case involving the Clean Air Act, Justice Kennedy’s dissent recommended that state agencies’ interpretations of federal statutes should not be constrained by the federal agency.204 Justice Kennedy believed such a rule was necessary “[i]f cooperative federalism is to achieve Congress’s goal of allowing state governments to be accountable to the democratic process in implementing environmental policies.”205 However, the Supreme Court has never addressed the question directly or hinted at adopting Justice Kennedy’s recommendation.

What is clear is that eventually the Court will be confronted by these questions. As Congress passes more complex statutory regimes like the Patient Protection and Affordable Care Act, which draw state agencies into the web of implementation, courts will be forced to grapple more and more with how much deference to afford state agencies. By analyzing the justifications behind deference to federal agency interpretations and looking at what little courts and scholars have illuminated about their applicability in state agency interpretations of federal law, this Article attempts to begin making headway on some of the unanswered questions Gluck proposes in *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*.

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202 Gluck, supra note 3, at 555–56 (quoting AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 378 n.6 (1999)).
203 Id. at 555.
204 Id. at 556.