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## Essay

# **Voigt Deference: Deferring to a State Agency's Interpretation of a Federal Regulation**

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### INTRODUCTION

Administrative law involves a handful of deference doctrines. These doctrines call on federal courts to defer to an agency's interpretation of a statute or a regulation. *Chevron* deference, for instance, compels a federal court to defer to an agency's reasonable interpretation of an ambiguous statute.<sup>1</sup> *Auer* deference, likewise, requires a federal court to defer to an agency's reasonable interpretation of an ambiguous regulation that the agency has promulgated.<sup>2</sup> Genre of deference aside, the bulk of cases raising a deference question involve federal courts having to decide whether to defer to a federal agency's interpretation. But that's not always the scenario. Sometimes a case presents the question whether a federal court should defer to a state agency's interpretation of a federal statute or regulation.

Under what have come to be known as "cooperative federalism" statutes, Congress enacts federal statutory programs that "combine federal and state authority in creative ways."<sup>3</sup> The Resource Conservation and Recovery Act, for example, envisions state agencies acting

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1. "*Chevron* deference" refers to the deference framework for reviewing agency statutory interpretations laid out in *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984); see also Gary Lawson & Stephen Kam, *Making Law out of Nothing at All: The Origins of the Chevron Doctrine*, 65 ADMIN. L. REV. 1 (2013) (discussing *Chevron* in some depth); Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908 (2017).

2. *Auer v. Robbins*, 519 U.S. 452, 460–61 (1997).

3. Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 663 (2001); see also Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41

“in lieu of” the federal government to administer and enforce the Act’s hazardous waste program.<sup>4</sup> The Act clarifies that any state-agency action “ha[s] the same force and effect” as an action taken by the Environmental Protection Agency—the federal agency tasked with administering the RCRA.<sup>5</sup>

Though the decentralization that accompanies cooperative federalism can produce efficiencies and positive externalities, statutory schemes that use federal and state actors to implement federal law will often blur the lines “between regulatory federalism choices, statutory interpretation disputes, and administrative law.”<sup>6</sup> Academics and courts have just started to unpack the many questions that arise out of this blurring of the lines.<sup>7</sup> Consider this query: What deference, if any, should a federal court grant a state agency when that agency

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WAKE FOREST L. REV. 719, 723 (2006) (discussing the origins of cooperative federalism); Sam Solomon, *Health Exchange Federalism: Striking the Balance Between State Flexibility and Consumer Protection in ACA Implementation*, 34 CARDOZO L. REV. 2073, 2090 n.88 (2013) (“Cooperative federalism is a model of intergovernmental relations that provides for the sharing of regulatory authority between the federal and state governments.”); Josh Bendor & Miles Farmer, *Curing the Blind Spot in Administrative Law: A Federal Common Law Framework for State Agencies Implementing Cooperative Federalism Statutes*, 122 YALE L.J. 1280, 1285 (2013) (“[F]ederal statutes that delegate responsibility to state agencies make up a large and important part of the United States Code.”); Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576, 606 n.113 (2014) (“‘Cooperative federalism’ is better understood as an umbrella term naming several varying arrangements rather than a single precise model of federal-state cooperation.”).

4. 42 U.S.C. § 6926(b); see also Sarah E. Light, *Precautionary Federalism and the Sharing Economy*, 66 EMORY L.J. 333, 357 (2017).

5. 42 U.S.C. § 6926(d). Many statutory regimes like the RCRA fit within the cooperative-federalism category, see Primus, *supra* note 3, at 606–07, which means that “[s]tate agencies often implement federal legal requirements.” Jacob E. Gersen, *Administrative Law’s Shadow*, 88 GEO. WASH. L. REV. 1071, 1089 (2020). Though counterintuitive from the perspective of vertical federalism, the sheer number of cooperative federalism statutes means that “Congress and federal regulators routinely look to state and local governments to implement federal programs and regulatory goals.” Jim Rossi, *Dual Constitutions and Constitutional Duels: Separation of Powers and State Implementation of Federally Inspired Regulatory Programs and Standards*, 46 WM. & MARY L. REV. 1343, 1345 (2005). Congress turns to the states and their agencies for help with implementing federal law for two principal reasons: first, as a means to “give some effect to the states’ traditional authority over areas that Congress is now entering” and, second, as a “nationalizing mechanism utilized by Congress to facilitate its takeover of a new field.” Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 543 (2011).

6. William W. Buzbee, *Federalism-Facilitated Regulatory Innovation and Regression in a Time of Environmental Legislative Gridlock*, 28 GEO. ENVTL. L. REV. 451, 456 (2016).

7. See, e.g., sources cited *supra* note 3.

interprets federal law when implementing a cooperative-federalism scheme?

Despite scholarship discussing deference doctrines drowning out contemporary legal discourse, “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.”<sup>8</sup> As one federal judge recently put it: “Whether a state agency is entitled to deference when administering federal law is not well settled.”<sup>9</sup> Another had this to say just last year: “It is unsettled whether a state agency is entitled to . . . deference when administering federal law . . . pursuant to federal delegation.”<sup>10</sup> The few scholars who have addressed the question have largely focused on state agencies interpreting a federal statute.<sup>11</sup> Even fewer scholars have discussed whether a federal court should defer to a state agency’s interpretation of a federal regulation.<sup>12</sup> And no one has provided arguments for or against this latter form of deference.

This Essay illuminates that blind spot. In doing so, it argues that a state agency’s interpretation of a federal regulation should receive

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8. Emily Stabile, *Federal Deference to State Agency Implementation of Federal Law*, 103 KY. L.J. 237, 238 (2015). A related and largely unresolved question that this Essay does not touch on is when federal courts have subject-matter jurisdiction to hear a dispute over a state agency’s implementation of a federal rule. See *ITT Educ. Servs., Inc. v. Cal. State Approving Agency for Veterans Educ.*, No. SA CV 15-0884 DOC, 2015 WL 3767606, at \*6 (C.D. Cal. June 17, 2015) (“Courts have not yet developed clear rules regarding if and when federal question jurisdiction exists over a party’s challenge to the way a state agency carries out federal duties.”).

9. *Grand Canyon Tr. v. Energy Fuels Res. (U.S.A.) Inc.*, 269 F. Supp. 3d 1173, 1194 (D. Utah 2017); *Nw. Env’tl. Def. Ctr. v. Cascade Kelly Holdings LLC*, 155 F. Supp. 3d 1100, 1125 (D. Or. 2015).

10. *WildEarth Guardians v. Extraction Oil & Gas, Inc.*, 457 F. Supp. 3d 936, 956 (D. Colo. 2020).

11. Stabile, *supra* note 8 (noting that few have discussed “under what circumstances courts [grant] state[] [agencies] deference in interpreting federal law when Congress has delegated power to these state agencies to implement federal law”); Gersen, *supra* note 5 (“What happens when state courts review state agency actions implementing federal law? What standard of review is applicable? Are doctrines like *Chevron* or *Auer* applicable?”). Few, if any, have discussed whether Congress delegating some power to state agencies raises trouble under the delegation doctrine. That may change as more scholars begin to unpack the origins and the breadth of the delegation doctrine. See generally Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021).

12. Gluck, *supra* note 5, at 616 (supporting in passing “a presumption of deference to state agency interpretations of federal regulations, unless Congress states otherwise”); Stabile, *supra* note 8 (“[S]tate agencies that have not been delegated power under a joint federal-state scheme still may have the ‘power to persuade’ as described in *Skidmore*.”).

so-called “*Voigt* deference,” named after *Voigt v. Coyote Creek Mining Co., LLC*—a recent Eighth Circuit decision that explores deferring to a state agency’s interpretation of a federal regulation. This Essay contends that *Voigt* deference should apply when: (1) federal law anticipates collaboration between state and federal agencies; (2) the federal agency charged with administering the statute promulgates a regulation to help carry out its mandate; and (3) a state agency interprets that regulation when implementing the cooperative-federalism scheme.<sup>13</sup> If the scenario triggers *Voigt* deference, this Essay maintains that a federal court should grant the state agency’s interpretive position *Skidmore* deference rather than reviewing the interpretive question anew or applying a stronger form of deference.<sup>14</sup>

This Essay divides itself into three parts. Part I discusses the recent Eighth Circuit case of *Voigt v. Coyote Creek Mining Co., LLC*—the case accountable for *Voigt* deference’s name. Part II details *Skidmore* deference, unpacking the contours of the deference doctrine and what it requires of federal courts. Part III argues in support of *Voigt* deference. It lays out the justifications for applying *Skidmore* deference to a state agency’s interpretation of a federal regulation when Congress calls on state agencies to help implement a cooperative-federalism regime. It also offers reasons against applying deference stronger than *Skidmore* to a state agency’s interpretation of a federal regulation.

#### I. THE SAGA OF *VOIGT V. COYOTE MINING COMPANY*

As its name suggests, Coyote Creek Mining Company operates mines.<sup>15</sup> Specifically, it digs coal from the ground—predominately in North Dakota.<sup>16</sup> One of its mines in the Peace Garden State sits about four miles down the road from a coal processing plant.<sup>17</sup> The company uses trucks to transport the coal to the plant and deposits each load against a retaining wall next to the plant, where workers take coal from the pile and toss it into a crushing machine.<sup>18</sup> Eventually, the

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13. See *infra* Part I. If the scenario does not trigger *Voigt* deference, the federal court should review the state agency’s interpretation anew, granting the agency no deference at all.

14. Reviewing the federal regulation with fresh eyes undercuts the state agency’s envisioned role under the cooperative-federalism scheme.

15. *Voigt v. Coyote Creek Mining Co., LLC*, 329 F. Supp. 3d 735, 738 (D.N.D. 2018).

16. *Id.*

17. *Id.*

18. *Id.*

crushed coal generates electrical power for consumers across the nation.<sup>19</sup>

Casey and Julie Voigt own a large ranch in rural North Dakota located next to the mining company's coal processing plant.<sup>20</sup> Fed up with the pollution emanating from the plant, the Voigts sued the company under the Clean Air Act's citizen-suit provision.<sup>21</sup> They argued that the company failed to obtain the necessary permits for its business operations because it undercounted its overall emission level.<sup>22</sup> According to the Voigts, the coal that the mining company placed against the retaining wall should have factored into the company's overall emission level under a proper reading of EPA regulation Subpart Y.<sup>23</sup>

EPA regulation Subpart Y regulates coal processing plants.<sup>24</sup> It requires in part that a coal pile in a coal processing plant must have a "fugitive coal dust emissions control plan" to limit pollution.<sup>25</sup> For all of Subpart Y's requirements to apply in the Voigts' case, the mining company's coal pile would have to have been "in [a] coal preparation and processing plant[ ]."<sup>26</sup> In other words, if the coal pile sitting

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19. *Id.*

20. *Voigt v. Coyote Creek Mining Co., LLC*, 980 F.3d 1191, 1193 (8th Cir. 2020), *vacated*, 999 F.3d 555 (8th Cir. 2021).

21. The Act not only authorizes citizens to file a lawsuit challenging conduct that pollutes, *see* 42 U.S.C. §§ 7604, 7607, but it also bears the mark of a cooperative-federalism statute. It provides "that air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments." *Id.* § 7401(a)(3). It also declares it to be "the primary responsibility" of each state to assure air quality by implementing the EPA's regulations. *Id.* § 7407(a). The Act thus carves out a significant role for the states either in implementing the federal standards or in supplementing federal regulatory initiatives. One court has described the Act as an example of Congress "embark[ing] upon a bold experiment in cooperative federalism designed to protect the nation against the grave threat of air pollution." *Connecticut v. EPA*, 696 F.2d 147, 151 (2d Cir. 1982). Even the Supreme Court has recognized that Congress intended to afford each state the "liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." *Train v. NRDC, Inc.*, 421 U.S. 60, 79 (1975).

22. *Voigt*, 980 F.3d at 1193.

23. *Id.* EPA officials have stated that the agency is "very respectful" of the role of states in implementing cooperative federalism schemes and that it recognizes the "need to coordinate with the states," to "talk to them very thoroughly" before rules are proposed, and to act "in a collaborative way" with states. Miriam Seifter, *States, Agencies, and Legitimacy*, 67 VAND. L. REV. 443, 469 (2014); 40 C.F.R. § 60.250(a) (2020).

24. *Voigt v. Coyote Creek Mining Co.*, No. 1:15-CV-00109, 2016 WL 3920045, at \*9 (D.N.D. July 15, 2016).

25. 40 C.F.R. § 60.254(c) (2020).

26. *Id.* § 60.250(a).

against the wall counted as “in” the processing plant, then the company would have needed to obtain additional permits and a fugitive dust control plan. But if the coal pile was not “in” the plant, then the company had conformed with Subpart Y.

Long before the Voigts filed their lawsuit, the North Dakota Department of Health told Coyote Creek Mining Company that it complied with the federal regulation because the state agency interpreted Subpart Y not to cover the coal pile sitting against the retaining wall.<sup>27</sup> A federal magistrate judge ultimately ruled for the company in large part out of deference to the state agency’s interpretation of Subpart Y.<sup>28</sup> The judge, however, noted a lack of “case law addressing what deference, if any, should be accorded to determinations made by a state permitting agency” that involve interpretations of a federal regulation.<sup>29</sup> Despite the dearth of case law on that point, the court held that a state agency’s interpretation of a federal regulation should get deference “so long as it appears after careful consideration that the state agency determination is consistent with EPA’s requirements and is otherwise rationale [sic].”<sup>30</sup>

The Voigts appealed the magistrate judge’s order to the Eighth Circuit. On appeal, they argued that the North Dakota state agency should not have been afforded any deference because it “is a state agency offering an opinion on federal law.”<sup>31</sup> At first, the Eighth Circuit disagreed. It reasoned that the Clean Air Act constitutes a cooperative-federalism statute that envisions the EPA working together with state agencies to implement the comprehensive statutory scheme.<sup>32</sup> As the Act envisions cooperation between the state and federal governments, the Eighth Circuit concluded that North Dakota’s state agency deserved deference in its interpretation of the ambiguous federal regulation known as Subpart Y.<sup>33</sup>

Not all of the circuit judges on the Eighth Circuit panel agreed with the appropriateness of deferring to a state agency’s interpretation of a federal regulation. The dissenting judge authored a forceful attack on what he termed “*Voigt* deference.”<sup>34</sup> In his view, courts should not defer to a state agency’s interpretation of a federal rule,

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27. *Voigt*, 980 F.3d at 1195, 1200.

28. *Voigt v. Coyote Creek Mining Co.*, 329 F. Supp. 3d 735, 769 (D.N.D. 2018).

29. *Id.*

30. *Id.*

31. *Voigt*, 980 F.3d at 1197.

32. *Id.* at 1200.

33. *Id.*

34. *Id.* at 1202 (Stras, J., dissenting).

statute, or regulation, because doing so “mark[s] [a] departure from both historical practice and the Framers’ constitutional design.”<sup>35</sup> “[S]tate bureaucrats,” in the dissenter’s words, have local rather than national interests at top of mind when implementing a federal regulation, and they have no business stepping on the toes of federal judges when it comes to matters of interpretation.<sup>36</sup>

The force of the dissenter’s attack on federal courts deferring to a state agency’s interpretation of a federal regulation caused the majority to mount a retreat. The Eighth Circuit pulled its opinion about a month after issuing it.<sup>37</sup> Six months after that switcheroo, the majority published a revised opinion that omitted mention of deference to a state agency’s interpretation of a federal regulation.<sup>38</sup> It instead resolved the case on alternative grounds. The original dissenter also authored one paragraph to go along with the revised opinion, declaring that “*Voigt* deference is dead and all I can say is, good riddance.”<sup>39</sup>

## II. WHAT *SKIDMORE* DEFERENCE DEMANDS

Deferring to a federal agency’s interpretation of a federal regulation made its seminal debut in the Supreme Court’s 1945 decision, *Bowles v. Seminole Rock & Sand Co.*<sup>40</sup> The case pitted a private company that produced stone against the federal government, in a fight over how much the company could charge the government for its rock products.<sup>41</sup> The company contracted with a buyer to sell crushed stone at \$0.60 per ton, which it delivered in March of 1942.<sup>42</sup> Soon after, the company sought to raise the price on a subsequent sale to the same buyer.<sup>43</sup> But the administrator of the Office of Price Administration enjoined the later sale because a federal regulation seemingly mandated that the company charge the same price as it did the first time around.<sup>44</sup> The company disagreed, arguing that the regulation applied only to its initial sale and not to the subsequent one.<sup>45</sup> But the

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35. *Id.* at 1203.

36. *Id.* at 1202.

37. *See Voigt v. Coyote Creek Mining Co.*, 999 F.3d 555 (8th Cir. 2021) (vacating the first opinion).

38. *Id.*

39. *Id.* at 562 (Stras, J., dissenting).

40. 325 U.S. 410 (1945).

41. *Id.* at 412.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

Court sided with the agency. It declared that “the ultimate criterion” in cases involving interpretation of federal regulations “is the administrative [agency’s] interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.”<sup>46</sup>

A half century after *Seminole Rock*, the Court in *Auer v. Robbins* reexamined whether courts should defer to an agency’s interpretation of a federal regulation.<sup>47</sup> *Auer* concerned whether St. Louis police officers qualified for overtime pay under the Fair Labor Standards Act.<sup>48</sup> Before the officers’ filed a lawsuit, the Secretary of Labor promulgated a regulation to aid with the Department of Labor’s administration of the Act.<sup>49</sup> The substance of the regulation suggested that the officers fell outside the scope of the Act’s overtime-pay provisions.<sup>50</sup> Writing for the majority and reciting *Seminole Rock*, Justice Scalia stated that, because the case concerned an agency interpretation of its own regulation, the agency’s interpretation was, “under our jurisprudence, controlling unless ‘plainly erroneous or inconsistent with the regulation.’”<sup>51</sup> Under that logic, the Labor Secretary’s interpretive position won out, and the Court held that the officers did not qualify for overtime compensation under the Act.<sup>52</sup> Justice Scalia’s opinion in *Auer* formed the foundation for what has become known as *Auer* deference.<sup>53</sup>

Over the years, *Auer* deference has come to require courts to defer under certain circumstances to an agency’s construction of its own ambiguous regulation. The doctrine, in other words, “accords agencies with a high level of deference when interpreting their own regulations.”<sup>54</sup> The import of *Auer* deference to administrative law cannot be

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46. *Id.* at 414.

47. 519 U.S. 452 (1997).

48. *Id.* at 455.

49. *Id.*

50. *Id.*

51. *Id.* at 461.

52. *Id.*

53. *Auer* deference moonlights under the pseudonym *Seminole Rock* from time to time.

54. Nicholas R. Bednar, *Defying Auer Deference: Skidmore as a Solution to Conservative Concerns in Perez v. Mortgage Bankers Association*, MINN. L. REV: DE NOVO BLOG (June 24, 2015), <https://minnesotalawreview.org/2015/06/24/defying-auer-deference-skidmore-solution-conservative-concerns-perez-v-mortgage-bankers-association> [<https://perma.cc/3C7P-2CAT>]. When it applies, *Auer* deference gives an agency significant leeway to say what its own rules mean. In so doing, the doctrine enables the agency to fill out the regulatory scheme Congress has placed under its supervision. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2418 (2019). The Supreme

overstated. It is “critically important . . . because agency regulations rather than statutes are the primary way in which the rights and obligations of private parties are established in the administrative state today.”<sup>55</sup>

Ever since *Auer* deference gained a foothold, many have challenged the wisdom and the legality of deferring to an agency’s interpretation of its own regulation.<sup>56</sup> The calls for the Supreme Court to overrule the *Auer* doctrine came to a crescendo in *Kisor v. Wilkie*.<sup>57</sup> But instead of casting *Auer* deference aside, a bare majority of the Supreme Court remodeled its precedent and fashioned a test providing lower courts with guidance on how and when to apply the deference doctrine.<sup>58</sup>

Before a court may afford an agency *Auer* deference, it must determine that: (1) the regulation is “genuinely ambiguous” after exhausting all “traditional tools of construction;” (2) the agency’s interpretation is “reasonable;” and (3) the agency’s interpretation satisfies a “character and context” inquiry into whether it deserves “controlling weight.”<sup>59</sup> Part of the third prong involves asking whether the interpretation counts as an “official position,” whether it implicates the

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Court has held that “considerable respect is due to ‘the interpretation given [to a] statute by the officers or agency charged with its administration.’” *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980).

55. Kevin O. Leske, *Splits in the Rock: The Conflicting Interpretations of the Seminole Rock Deference Doctrine by the U.S. Courts of Appeals*, 66 ADMIN. L. REV. 787, 789 (2014). *Auer* deference extends to an agency’s application of its regulations to a specific set of facts. See *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 283 (2009) (“[W]e do find that agency interpretation and agency application of the regulations are instructive and to the point.”).

56. Professor John F. Manning, for instance, believes that *Auer* deference “contradicts the constitutional premise that lawmaking and law-exposition must be distinct.” John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 654 (1996). In his view, the deference doctrine “presumes that an administrative agency should have binding authority over both functions.” *Id.* Others have suggested that *Auer* deference “implicates self-delegation: the agency drafting an unclear regulation confers on itself the power to create more law down the road.” Jeffrey A. Pojanowski, *Revisiting Seminole Rock*, 81 GEO. J.L. & PUB. POL’Y 87, 90 (2018). And some have even argued that *Auer* deference “appears to be wholly at odds with the APA,” as Section 706 of the Administrative Procedure Act seems to promise “an independent judicial interpreter of the agency’s legislative act, where, after all, the agency is often an adverse party.” Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don’t Get It*, 10 ADMIN. L.J. AM. U. 1, 9 (1996).

57. 139 S. Ct. 2400 (2019).

58. See generally Christian Talley, *Stare Decisis and the Identity-Over-Time Problem: A Comment on the Majority’s Wrongness in Kisor v. Wilkie*, 73 SMU L. REV. F. 204 (2020).

59. *Kisor*, 139 S. Ct. at 2412, 2415–16.

agency's substantive expertise, and whether it reflects the agency's "fair and considered judgment."<sup>60</sup> The Supreme Court in *Kisor* gave the *Auer* deference doctrine a makeover to say the least.<sup>61</sup> *Kisor* turned *Auer*'s single-sentence "rule into a multi-step, multi-factor inquiry."<sup>62</sup>

What happens when an agency's interpretation of a regulation fails *Kisor*'s "multi-step, multi-factor inquiry?"<sup>63</sup> Does the federal court still consider the federal agency's interpretive position? Or does the federal court simply review the federal regulation de novo without paying heed to the agency's interpretive stance? When a federal agency cannot satisfy *Kisor*'s multi-step inquiry, courts employ a fallback doctrine known as *Skidmore* deference.<sup>64</sup>

Handed down in 1944, the Court's unanimous opinion in *Skidmore v. Swift* addressed how much credence a reviewing court should give an agency's interpretation of a statute.<sup>65</sup> *Skidmore* holds that "the weight of [the agency's] judgment . . . will depend upon the thorough-

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60. *Id.* at 1216–17; see also Shelby M. Krafska, Note, *Strategies to Bring Down a Giant: Auer Deference Vulnerable After Reprive in Kisor v. Wilkie*, 65 VILL. L. REV. 647, 662 (2020); Talley, *supra* note 58, at 213–15.

61. Administrative law seems to undergo constant change, as it must account for "an ever-shifting balance of practical expediency and constitutional legitimacy." Steve R. Johnson, *The Rise and Fall of Chevron in Tax: From the Early Days to King and Beyond*, 2015 PEPP. L. REV. 19, 20 (2015); Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197, 245 (1991) ("[O]ne cannot conclude that there is one ideal and elegant allocation of power between court and agency where administrative law will necessarily have to rest . . .").

62. *Kisor*, 139 S. Ct. at 2447 (Gorsuch, J., concurring).

63. *Id.*

64. One may wonder what daylight exists between *Auer* deference and *Skidmore* deference. On the surface, the two doctrines seem to mirror one another. But wiggle room separates the two: *Auer* compels deference, while *Skidmore* obliges a court to consider and explain away the agency's interpretive position. As Chief Justice Roberts stated in his concurrence in *Kisor*: "[T]here is a difference between holding that a court ought to be persuaded by an agency's interpretation and holding that it should defer to that interpretation under certain conditions." *Id.* at 2424–25 (Roberts, C.J., concurring). But see Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. CHI. L. REV. 297, 319 (2017) ("[T]he line between *Auer* deference and *Skidmore* deference is thin even in principle and often invisible in operation; in general, it is of far more interest to administrative law teachers than to actual judicial practice."). Unlike the *Auer* framework, the *Skidmore* framework "does not require a court to adopt the agency's interpretation; rather, a court utilizes *Skidmore*'s factors in determining whether an agency's interpretation merits deference." Bradley George Hubbard, Comment, *Deference to Agency Statutory Interpretations First Advanced in Litigation? The Chevron Two-Step and the Skidmore Shuffle*, 80 U. CHI. L. REV. 447, 454 (2013). Even still, *Skidmore* has bite. See Bednar, *supra* note 54.

65. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Keep in mind that the Court decided *Skidmore* nearly forty years before it created *Chevron* doctrine.

ness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”<sup>66</sup> Putting the point in simpler terms, a reviewing court applying *Skidmore* deference will analyze factors like “thoroughness, formality, validity, consistency, and agency expertise” when deciding whether the agency’s interpretive position has the “power to persuade.”<sup>67</sup> Though the non-exhaustive list of factors guides the way, “[c]ourts have yet to determine the exact meaning of the *Skidmore* test.”<sup>68</sup> Many scholars and some courts present *Skidmore* deference as a sort of “sliding scale.”<sup>69</sup> In the words of the First Circuit, *Skidmore* deference entails a “sliding-scale approach under which the degree of deference accorded to an agency interpretation hinges on a variety of factors.”<sup>70</sup> Once the court analyzes the factors, the analysis “either contributes to or detracts from the power of an agency’s interpretation to persuade.”<sup>71</sup>

Whether conceptualized as a sliding scale or something else, *Skidmore* deference should be understood as triggering a “duty of attention.”<sup>72</sup> When *Skidmore* deference applies, “a court is not free to ignore the administrative interpretation or to reject it solely because it differs from the court’s preferred interpretation.”<sup>73</sup> Rather, *Skidmore* deference intrudes upon a reviewing court’s independence, as it requires a court to consider multiple factors when deciding whether the

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66. *Id.* at 140.

67. Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1245, 1259 (2007); Ann Graham, *Chevron Lite: How Much Deference Should Courts Give to State Agency Interpretation?*, 68 LA. L. REV. 1105, 1119 (2008) (proposing “a facts-and-circumstances review of agency interpretation like the federal *Skidmore* test, but with the relevant factors clearly enumerated”). Graham has argued that relevant “[f]actors should include: agency interpretation, plain language, legislative history, consistency with legislative purpose and the regulatory scheme, case law from other jurisdictions, and a catch-all category of ‘other considerations.’” Graham, *supra*.

68. Yoav Dotan, *Deference and Disagreement in Administrative Law*, 71 ADMIN. L. REV. 761, 784 (2019).

69. By engaging in “[t]his sliding scale type of analysis . . . the reviewing court considers the relative weight of a number of content-dependent and content-independent factors and decides the degree to which it is willing to defer to the agency determination.” *Id.* at 786. Scholars Kenneth Culp Davis and Thomas Merrill also conceptualized the *Skidmore* test as a sort of sliding scale. See Hickman & Krueger, *supra* note 67, at 1255.

70. *Doe v. Leavitt*, 552 F.3d 75, 81 (1st Cir. 2009).

71. *Id.*

72. Richard W. Murphy, *Abandon Chevron and Modernize Stare Decisis for the Administrative State*, 69 ALA. L. REV. 1, 40 (2017).

73. Hickman & Krueger, *supra* note 67, at 1255.

agency's interpretive position persuades. In other words, the doctrine obliges a reviewing court to assess the merits of the agency's interpretation and the reasoning behind the agency's position.<sup>74</sup> If the reviewing court disagrees with the agency's proffered interpretation, it must "explain why the agency's construction is wrong" and "why the court's construction is better."<sup>75</sup> That explanation involves a court giving due consideration to the agency's comparative advantages as well as its practical experience in implementing the regulation. *Skidmore* deference, in short, obligates a court to explain why it finds the agency's interpretive position unpersuasive. This duty of attention facilitates reasoned consideration of the agency's inherent advantages.

### III. THE CASE FOR VOIGT DEFERENCE

Administering a complex statutory regime is not easy. Cooperative-federalism schemes simultaneously cover technical areas (think air pollution) but do so on a nationwide scale (think Hawaii and Maine). Implementation of such a scheme takes time, money, manpower, resources, and logistical planning. All that explains why Congress passes statutes that call for collaboration between federal and state agencies.<sup>76</sup> Assuming that Congress's desire to rely on the states and their agencies to help implement a cooperative-federalism scheme does not alone justify *Voigt* deference, what other considerations might rationalize a federal court deferring to a state agency's interpretation of a federal regulation? There are at least three rationales supporting a federal court applying something like *Skidmore* deference to a state agency's interpretation of a federal regulation when the elements of *Voigt* deference have been met.<sup>77</sup> Before delving into the

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74. *Skidmore* opts for "persuasive" rather than "authoritative" deference. Sunstein & Vermeule, *supra* note 64, at 318.

75. Pojanowski, *supra* note 56, at 95; Graham, *supra* note 67, at 1109 n.22 (2008) ("Courts will weigh an agency interpretation of a statute in light of the facts and circumstances and grant judicial deference to the extent the agency interpretation has the power to persuade.").

76. By calling on the states and their agencies to aid with implementation, Congress acknowledges "the relationship between federalism and administrative government." Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2025 (2008). The states and federal government regulate together under cooperative regimes, "with the federal government often depending heavily on states to implement federal policy." Heather K. Gerken, *Slipping the Bonds of Federalism*, 128 HARV. L. REV. 85, 115 (2014).

77. A deference doctrine separate and apart from those already in existence could in theory apply in scenarios that trigger *Voigt* deference. This Essay, however, calls for the application of *Skidmore* deference rather than creating a standalone deference doctrine to (1) work within existing frameworks and (2) limit the number of deference

rationales, recall that this Essay encourages the application of *Voigt* deference when (1) federal law anticipates collaboration between state and federal agencies, (2) the federal agency charged with administering the statute promulgates a regulation to help carry out its mandate, (3) and a state agency interprets that regulation when implementing the cooperative-federalism scheme.<sup>78</sup>

The localized expertise of state agencies offers a point in favor of *Voigt* deference. State agencies have “at least some expertise” over issues that crop up within their own borders.<sup>79</sup> They service smaller and often more industry specific communities compared to federal agencies.<sup>80</sup> The state agents who staff the state agencies often hail from the state, live within its borders, and understand the state’s needs more so than do federal agents.<sup>81</sup> Congress seeks to draw upon this specialized knowledge when it passes a cooperative-federalism statute.<sup>82</sup> At bottom, then, the “justifications based on federal agency expertise translate well to state agencies, particularly when states are asked to implement federal laws concerning traditional areas of state control.”<sup>83</sup>

*Voigt* deference also facilitates experimentation while minimizing the size of the federal government. Congress has the power to preempt state legislatures and displace state agencies from entire

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doctrines.

78. See *supra* Introduction.

79. *Grand Canyon Tr. v. Energy Fuels Res. (U.S.A.) Inc.*, 269 F. Supp. 3d 1173, 1195 (D. Utah 2017). The Ninth Circuit has noted that “where state agencies have environmental expertise they are entitled to ‘some deference’ with regard to questions concerning their area of expertise.” *Arizona v. City of Tucson*, 761 F.3d 1005, 1014 (9th Cir. 2014).

80. *Stabile*, *supra* note 8. Some may worry that “most state agencies have small staffs, and lack the stability, funding or level of professionalism necessary to ensure consistent, thorough, and state-of-the-art evaluation of scientific and technical issues.” Jim Rossi, *Dynamic Incorporation of Federal Law*, 77 OHIO STATE L.J. 457, 465 (2016). That concern, though legitimate, does not undercut the importance of leveraging localized expertise.

81. Some have noted a fair counterpoint: state actors tasked with implementing federal law often “lack basic, comprehensive information about the policy experiments being conducted by other states, and it takes legal and policy experts years to collect and synthesize this information.” Hannah J. Wiseman, *Regulatory Islands*, 89 N.Y.U. L. REV. 1661, 1664 (2014). The result is that “states remain on relatively isolated islands of policy experimentation.” *Id.*

82. *Stabile*, *supra* note 8, at 256.

83. *Gluck*, *supra* note 5, at 602. See generally JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2015) (exploring the importance of the states and their constitutions in the development of the federal republic and federal constitutional rights).

fields.<sup>84</sup> But when Congress passes a cooperative-federalism statute, it has decided to “invite state agencies to implement federal law”<sup>85</sup> rather than to push those agencies aside. This form of decentralization often “advance[s] the aims of the federal government,” as it expands the “leverage points” for obtaining national goals.<sup>86</sup> It likewise allows states to experiment as they implement federal policy.<sup>87</sup> Declining to grant state agencies any deference for their (reasonable) interpretations of federal regulations may lead to less experimentation and less localized tailoring. State agencies may even feel obligated to guess what the federal agency or a federal court would desire in a particular fact-specific circumstance. This guessing game undercuts a major premise of cooperative federalism: that many regulatory problems require innovation at different levels of government.<sup>88</sup>

*Voigt* deference also encourages buy-in.<sup>89</sup> State agencies may be motivated to go the extra mile when tasked with implementing a federal regulation if they know that their interpretive positions will receive deference in a federal court.<sup>90</sup> Without *Voigt* deference, a state

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84. See Justin W. Aimonetti & Christian Talley, *Game Changer: Why and How Congress Should Preempt State Student-Athlete Compensation Regimes*, 72 STAN. L. REV. ONLINE 28, 35 (2019).

85. Weiser, *supra* note 3, at 665.

86. Joshua M. Divine, *Statutory Federalism and Criminal Law*, 106 VA. L. REV. 127, 146 (2020).

87. *Id.*

88. Mark C. Gordon, *Differing Paradigms, Similar Flaws: Constructing a New Approach to Federalism in Congress and the Court*, 14 YALE L. & POL'Y REV. 187, 215 (1996). It is also worth considering that “the shared nature of regulatory programs also leads federal and state regulators to develop close bonds and loyalty. State and federal regulators work together often, and over time their working relationships become hard-wired . . . Consulting with state counterparts may therefore be a matter of respect and camaraderie as well as necessity.” Miriam Seifter, *States, Agencies, and Legitimacy*, 67 VAND. L. REV. 443, 469 (2014).

89. Some may worry that this buy-in effect will lead to “overcooperative federalism.” Eliza A. Lehner, Note, *Dissenting by Enforcing: Using State Consumer Protection Statutes to Enforce Federal Law*, 12 HARV. L. & POL'Y REV. 209, 211–12 (2018). Overcooperative federalism occurs when states use their role to “intentionally enforce federal law more rigorously than the federal government.” *Id.* at 211. But it is hard to see how state agencies going out of their way to enforce federal regulations can be viewed as problematic.

90. The idea that states and their agencies may increase their willingness to implement federal law if courts grant them some deference when interpreting federal regulations draws support from political theory. Some theorize that “political participation is likely to increase as policy responsibilities are decentralized to state and local governments.” See Robert P. Inman & Daniel L. Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine: Balancing Political Participation and Economic Efficiency in Reg-*

agency may view its obligation to implement the federal regulation as the federal government asking for, but not appreciating, its assistance. Embracing *Voigt* deference discourages that sentiment, as it encourages state agencies to buy into the federal scheme and their role in implementing it. The deference doctrine, in short, heartens state agencies to take their role in the cooperative scheme seriously.<sup>91</sup>

None of the anticipated arguments against *Voigt* deference support reviewing a state agency's interpretation of a federal regulation with fresh eyes. One thorn in *Voigt* deference's side is concern over accountability.<sup>92</sup> The President lacks the authority to fire a state agent tasked with implementing federal law. Nor does Congress have the authority to dictate how a state agent acts. But these accountability worries seem overblown.<sup>93</sup> Oversight mechanisms at the state level help ensure "that state-run programs adhere to governing federal requirements."<sup>94</sup> Plus, the federal agency tasked with administering the cooperative scheme can always step in if a state agency's interpretive position conflicts with federal priorities.<sup>95</sup>

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*ulatory Federalism*, 75 TEX. L. REV. 1203, 1232 (1997). That logic maps onto cooperative federalism more generally.

91. All in all, *Voigt* deference enables localized tailoring, utilizes state infrastructure toward efficiency ends, and also elevates a state agency's inherent competency over a defined geographic region and the familiar political terrain. Divine, *supra* note 86, at 146 (noting that "local agents usually have better knowledge of local facts").

92. A related accountability concern involves how voters should sort out who to hold responsible for implementing federal regulations. State agencies comprise a multitude of different actors who "have different principals because of the lack of a unitary executive in most states." Gluck, *supra* note 5, at 602. This may mean that the citizenry will struggle to pin the blame for the poor implementation of a federal regulation on the appropriate government actor. *Id.* at 603. Though possible in theory, it may be untrue that cooperative arrangements between state and federal agencies "cause accountability line-blurring and thus voter confusion." Christopher K. Bader, *A Dynamic Defense of Cooperative Federalism*, 35 WHITTIER L. REV. 161, 189 (2014). But even if confusion does occur, "state governments remain responsive to the local electorate," and "state officials remain accountable to the people." *New York v. United States*, 505 U.S. 144, 167-68 (1992).

93. *Voigt* deference may also flip the accountability concern on its head, as states can serve to check federal-executive power in the name of faithfulness to congressional intent. Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 471-77 (2012). What's more, "states play an important role in challenging requirements that they consider to be unlawful or excessive and in developing new programmatic approaches for the federal government to adopt." Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1854 (2015).

94. Metzger, *supra* note 93.

95. *But see* *Exelon Wind 1*, L.L.C. v. Nelson, 766 F.3d 380, 394 (5th Cir. 2014) (deferring to a Texas state agency's interpretation of a FERC regulation in the face of a contrary opinion by FERC); *id.* at 413 (Prado, J., concurring in part and dissenting in

A second thorn in *Voigt* deference's side is concern about uniformity.<sup>96</sup> A state agency in an eastern state may interpret a federal regulation differently from a state agency in a western state, making the federal regulation mean something different depending on what side of the Mississippi one stands. But "the very reason that Congress delegates to the states in many circumstances is to produce policy *dis*-uniformity—that is, to produce federal law that may mean different things in different states."<sup>97</sup> Indeed, Congress often "uses state implementation to galvanize experimentation."<sup>98</sup> Curbing *Voigt* deference would likely cause "more interpretive uniformity than Congress may have intended when it designed the intrafederalist statutory scheme in the first place."<sup>99</sup> And even if *Voigt* deference leads to some disuniformity, widespread-interpretive disagreement may diminish a state agency's power to persuade under *Skidmore* deference.

A third concern about *Voigt* deference is the prospect that state agencies may try to circumvent Congress's will by utilizing a theory known as "uncooperative federalism."<sup>100</sup> Uncooperative federalism posits that states may use their role as "servant[s]" to and "insider[s]" of the federal government to sometimes act as "rival[s]" and "challenger[s]."<sup>101</sup> State agencies may even engage in something called "[a]bdication," which occurs when state agencies use "the veneer of federalism to obscure their failure to comply with federal law."<sup>102</sup> But the lurking federal agency that promulgates the federal regulation at

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part) ("I would conclude that our court should defer to FERC's reasonable interpretation of that regulation according to well-established principles of administrative deference."). See generally Ben Raker, *Decentralization and Deference: How Different Conceptions of Federalism Matter for Deference and Why That Matters for Renewable Energy*, 47 ENVTL. L. REP. NEWS & ANALYSIS 10963 (2017) (discussing who should receive deference under "cooperative federalism statutes").

96. Stabile, *supra* note 8, at 262 ("Allowing state agencies deference could have negative consequences for achieving uniformity where federal laws are concerned.").

97. Gluck, *supra* note 5, at 604.

98. *Id.* at 597–98.

99. *Id.* at 606.

100. See Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1256 (2009). Generally speaking, "[i]t is hard to dispute the risk that federal agencies will privilege their specific programmatic goals over more general concerns relating to government structure, or may be unduly beholden to particular regulated entities." Metzger, *supra* note 76, at 2077.

101. Bulman-Pozen & Gerken, *supra* note 100; see also Tara Mayeux & Karen Tani, *Federalism Anew*, 56 AM. J. LEGAL HIST. 128, 131 (2016).

102. Justin Weinstein-Tull, *Abdication and Federalism*, 117 COLUM. L. REV. 839, 891 (2017).

issue in the *Voigt*-deference context quells concern about state agencies engaging in harmful uncooperative federalism.<sup>103</sup> Financial incentives also guard against renegade state agencies. Many state agencies “are effectively creatures of federal policy,” given that federal dollars often fund their overhead and expenditures.<sup>104</sup> If uncooperative federalism becomes a real problem, Congress can strip funding or preempt the field—thereby taking power out of the hands of state agencies.

The points in favor of *Voigt* deference outweigh the arguments against it. Leveraging localized-comparative advantage, encouraging state experimentation, and enhancing state buy-in overshadow concerns about accountability, uniformity, and uncooperative federalism. But the counterarguments to *Voigt* deference show why granting a state agency’s interpretation of a federal regulation something more potent than *Skidmore* deference (say, *Auer* deference) would be problematic. It is also not clear that a more deferential standard can be reconciled with the Constitution or the judiciary’s duty to interpret the law unencumbered by non-legal considerations and the partial will of political actors.<sup>105</sup>

#### CONCLUSION

Adopting *Voigt* deference would not mark a sea of change. It rather ushers in a modest reconfiguration of the trend of ignoring a state agency’s interpretation of a federal regulation that it has been tasked by Congress with implementing. Recall that *Voigt* deference should apply only when (1) federal law anticipates collaboration between state and federal agencies, (2) the federal agency charged with administering the statute promulgates a regulation to help carry out its mandate, and (3) a state agency interprets that regulation when implementing the cooperative-federalism scheme. If triggered, *Voigt* deference merely calls on federal courts to consider the reasoned

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103. Metzger, *supra* note 93 (“[F]ederal administrative engagement and oversight will be a prime mechanism for changing federal requirements in response to state protests.”).

104. Justin Weinstein-Tull, *State Bureaucratic Undermining*, 85 U. CHI. L. REV. 1083, 1094 (2018).

105. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2447 (2019) (Gorsuch, J., concurring). Justice Thomas has explained that “the judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws.” *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 119 (2015) (Thomas J., concurring). Granting a state agency’s interpretation of a federal regulation too much deference may lead to the abdication of the judiciary’s proper role under our system of government.

views of the state agency and explain why departing from the agency's interpretive position must occur. Giving due consideration to the state agency's arguments in favor of its interpretation leverages localized-comparative advantage, encourages state experimentation, enhances state buy-in, and promotes the goals of cooperative federalism. All in all, federal courts should not review anew a state agency's interpretation of a federal regulation, nor should they apply something as deferential as *Auer* deference. Federal courts instead owe a state agency's interpretation of a federal regulation a "duty of attention." Nothing more. But also nothing less.