

ADMINISTRATIVE LAW IN THE STATES: AN INTRODUCTION TO THE SYMPOSIUM

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Five States—Colorado, Georgia, Kansas, Pennsylvania, Wisconsin—and five distinct approaches to administrative law, each explained by a distinguished justice from each State’s high court. Perhaps there should be a round-robin tournament to pick the best one. Or perhaps Adam White, the symposium’s able organizer in chief, might judge the justices, declaring a winner after reading each justice’s submission and hearing them present their cases. Or perhaps I—federal judges have trouble resisting the temptation to pick winners—should decide who wins.

But maybe winning is not the right way to think about it. As these timely and thoughtful essays confirm, state courts are all over the map when it comes to their approaches to administrative law and to today’s most pressing issues: the permissible scope of explicit delegations of legislative power and the propriety of implied delegations of interpretive power. Sure, state courts sometimes identify winning insights suitable for export to other States and eventually even to the federal courts. Sure too, state courts may serve as a forum for trial-and-error approaches to new challenges, say the proper approach to administrative law during a pandemic. But as often as not, more often than not in truth, the state courts show variation, perhaps because variation is often due in a country this large and filled with so many different, sometimes competing, demands. If there can be a culture and cuisine of place, there can be an administrative law of place.

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But who would know? While state administrative law historically has revealed many distinct approaches and insights, much of the attention on the topic for too long has gone to the federal side of things. Our obsession with federal law inclines us to notice changes in administrative law most of all through decisions of the U.S. Supreme Court, the Hubble Telescope for assessing American law. That lens reveals federal decisions cutting back on judicial deference to agency interpretations of law—the *Chevron* doctrine—and warning Congress that the Court may enforce the nondelegation doctrine more rigorously in the future. But that singular focus often misses key innovations in American administrative law where they first occur—in the States—then misses the lessons that the state experiences have to offer.

What was once invariably true about administrative law has become less true. Today’s symposium confirms a promising trend. For decades, state administrative law languished in academic circles.¹ Law review articles and casebooks alike consistently overlooked the busier and more diverse state administrative docket.² But state administrative law in recent decades has received much-needed and much-deserved attention.³ Just in time, too. As scholars, lawyers, and citizens alike grapple with the ever-expanding administrative state, there is much to gather from a careful study of

1. Jeffrey S. Sutton & John L. Rockenbach, *Response: Respect and Deference in American Administrative Law*, 102 B.U. L. REV. 1937, 1938–39 (2022) (describing the dearth of scholarship about state administrative law).

2. *Id.* at 1939 & nn.4–5.

3. See, e.g., Aaron Saiger, *Derailing the Deference Lockstep*, 102 B.U. L. REV. 1879, 1887–89 (2022); Sutton & Rockenbach, *supra* note 1, at 1938–39; JEFFREY S. SUTTON, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION 183–231 (2022); Daniel Ortner, *The End of Deference: How States (and Territories and Tribes) Are Leading a Sometimes Quiet Revolution Against Administrative Deference Doctrines* (CSAS Working Paper No. 21-23, 2021) (unpublished manuscript); Miriam Seifter, *Understanding State Agency Independence*, 117 MICH. L. REV. 1537 (2019); Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 93 N.Y.U. L. REV. 107 (2018); Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 NOTRE DAME L. REV. 619 (2017).

the assorted state approaches. And the state approaches vary indeed.

Take Wisconsin. Justice Brian Hagedorn highlights the “drastic changes” in the State’s approach to administrative law in recent years and the multi-branch sources of that change.⁴ In 2018, the Wisconsin Supreme Court “jettisoned” its “longstanding” three-tiered approach—“great weight,” “due weight,” “no weight”⁵—by which the courts assessed agency interpretations of laws.⁶ The majority in *Tetra Tech* divided over whether the Wisconsin Constitution’s separation of powers imperatives required the change or whether the Court, having “giveth” this trio of deference standards, could simply “taketh” them away.⁷ The debate became moot when the legislature endorsed the change soon after the decision. It codified a no-deference approach through an amendment to Wisconsin’s Administrative Procedure Act.⁸

Think about that. Wisconsin fixed a serious separation of powers challenge by calling on all three branches. The judicial branch initially identified the problem. But it could not settle on a way out. The legislature proposed a solution. And the governor signed the presented bill into law. The only government officials not directly included in the solution, as it happens, were in the State’s agencies. Wisconsin may be subject to “political polarization”⁹ but that

4. Brian Hagedorn, *The Administrative State and Separation of Powers in Wisconsin*, 46 HARV. J.L. & PUB. POL’Y 323, 323 (2023).

5. *Id.* at 324–25 (defining the three tiers as: (1) “great weight deference” in which courts deferred to longstanding, reasonable agency interpretations based on specialized experience and technical competence; (2) “due weight deference” in which courts deferred to an agency interpretation based on expertise unless the court found a different interpretation more reasonable; and (3) no deference, when “the question was one of first impression or the agency’s expertise or experience did not give it unique insight”).

6. *Id.* at 325–26 (discussing *Tetra Tech EC, Inc. v. Wis. Dep’t of Rev.*, 914 N.W.2d 21 (Wis. 2018)).

7. *Id.* at 326.

8. *Id.* The Wisconsin legislature, Justice Hagedorn adds, has made other changes to the administrative state outside of deference. *Id.* at 323 (noting the legislature and governor have “enacted a number of modifications to the administrative rules process”).

9. *Id.*

reality has not prevented the State from using cooperation and coordination among the three branches to wrestle with—and identify solutions for—modern problems of government.

What will this new approach mean in the future? Justice Hagedorn predicts that the rejection of deference will have its greatest impact in “cases where longstanding agency interpretations are overturned by courts.”¹⁰ The new approach, he anticipates, will have the “salutary effect” of refocusing disputes on the statutory text, not the reasonableness of an agency’s interpretation or the ineffable ambiguity (or not) of a law.¹¹ Absent legislative change, the default rule will be the court’s interpretation, not an agency’s.

That future became the fore with COVID-19.¹² The pandemic has generated many quarrels between the Badger State’s legislature and governor, frequently refereed by its High Court. Justice Hagedorn describes several cases that grappled with these issues, including debates about the scope of permissible rulemaking power, the governor’s authority to postpone an election, the Wisconsin Department of Health Services’ authority to promulgate a “Safer at Home” order, and the scope of power of a county health officer.¹³ Separation of powers principles undergirded the disputes, and at least two of the contests pressed the Court to decide the case on nondelegation grounds.¹⁴ So far at least, the Court has not used the nondelegation doctrine to deal with the disputes. In his separate writing in the “Safer at Home” case, Justice Hagedorn showed one reason why. Invoking the same separation of powers principles that the majority invoked, he “circumscribe[d]” the issues on

10. *Id.* at 327.

11. *Id.*

12. *Id.* at 328. Justice Hagedorn also identifies one pre-COVID separation of powers case in which the Wisconsin Supreme Court determined that agency rulemaking was a function of delegated legislative power rather than executive power. *Id.* (discussing *Koschkee v. Taylor*, 929 N.W.2d 600 (Wis. 2019)).

13. *Id.* at 329–335 (discussing *Wis. Leg. v. Evers*, No. 2020AP608-OA, unpublished slip op. (Wis. Apr. 6, 2020); *Wis. Leg. v. Palm*, 942 N.W.2d 900 (Wis. 2020); and *Becker v. Dane County*, 977 N.W.2d 390 (Wis. 2022)).

14. *Id.*

appeal by resolving the case on statutory interpretation grounds.¹⁵ Constitutional avoidance principles, fair enough, offer one way to handle these cases. Either way, given Wisconsin's even political divide reflected in a divided government, Justice Hagedorn sees no reason to think such separation of powers battles in the courts will abate soon.¹⁶

In Kansas, administrative law has risen to the top of the docket of its Supreme Court, sometimes in ways similar to Wisconsin, other times in ways of its own. Justice Caleb Stegall notes that Kansans voted on a constitutional amendment in 2022 that would have allowed the legislature to override agency rules and regulations through a majority vote.¹⁷ The amendment failed. But the reality that the people used scarce amendment resources to put the topic on the ballot highlights that separation of powers has become a matter of some salience in the State.¹⁸

With this framing, Justice Stegall traces the evolution of separation of powers in Kansas courts. He explains that a strict application of nondelegation principles¹⁹ eventually gave way to a pragmatic approach.²⁰ As it stands, Kansas courts now apply the nondelegation doctrine loosely—though not without limits—using a four-factor balancing test.²¹ In recent cases, Justice Stegall observes that the justices on the Kansas Supreme Court have indicated a willingness to draw crisper lines between the branches, signaling that change

15. *Id.* at 333.

16. *Id.* at 334–35 (noting also that several justices have expressed an interest in strengthening and expanding Wisconsin's nondelegation doctrine).

17. Caleb Stegall, *Something There is That Doesn't Love a Wall*, 46 HARV. J.L. & PUB. POL'Y 361, 361–62 (2023); *see also* H.R. 5014, 89th Gen. Assemb., Reg. Sess. (Kan. 2022).

18. Stegall, *supra* note 17, at 362 (noting further that Kansas politicians have recently campaigned on curtailing bureaucracy).

19. *See State v. Johnson*, 60 P. 1068, 1072 (Kan. 1900).

20. Stegall, *supra* note 17, at 365–67 (noting the Kansas Supreme Court has frequently refused “to strike down governmental combinations of power”).

21. *Id.* at 365–66 & n. 23 (identifying the factors as: (1) the nature of the power being exercised; (2) the degree of control by the legislature over the exercise of the power; (3) the nature of the goal; and (4) the result of blending the powers).

may be in the offing.²² In two recent cases, the Kansas Supreme Court relied on separation of powers principles to cabin the discretion afforded to prosecutors by criminal statutes.²³ That judicial response is not unusual through all corners of American law. Challenges to the imposition of criminal penalties have long been a fruitful source of successful nondelegation and non-deference challenges alike, whether in the state courts or the federal courts.²⁴

As with Wisconsin, Kansas does not follow certain facets of federal administrative law—or, just as accurately, federal law broke from the approach of these and other States. Justice Stegall explains that Kansas courts once applied the “doctrine of operative construction” to agency interpretations of statutes,²⁵ a model with hints of, if not the absoluteness of, *Chevron* deference.²⁶ But in 2009, the Kansas Supreme Court abandoned even that approach in favor of denying any deference to an agency’s statutory interpretation.²⁷ The legislature endorsed the decision through amendments to the Kansas Judicial Review Act.²⁸ Deference to an agency’s interpretation of its own rules and regulations—known as *Seminole Rock* or *Auer* deference at the federal level²⁹—suffered a similar fall in 2016.³⁰ As with its Wisconsin counterpart, the Kansas Supreme Court has fielded controversies related to the governor’s use of emergency powers in response to the COVID-19 pandemic.³¹ And

22. *Id.* at 367–68.

23. *Id.* at 371–72 (discussing *State v. Harris*, 467 P.3d 504 (Kan. 2020) and *State v. Ingham*, 430 P.3d 931 (Kan. 2018)).

24. See SUTTON, *supra* note 3, at 185, 225–28.

25. Stegall, *supra* note 17, at 369.

26. *Chevron U.S.A., Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837 (1984).

27. Stegall, *supra* note 17, at 369–70 (explaining that some lower courts continued to apply the doctrine of operative construction until the Kansas Supreme Court issued a follow-up opinion in 2013 clarifying that the doctrine had been abandoned).

28. *Id.* at 370 & n. 43 (citing Kan. Stat. Ann. § 77-621(c)(4)).

29. *Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945); see also *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

30. Stegall, *supra* note 17, at 371.

31. *Id.* at 373–74.

as with Wisconsin, separation of powers considerations have raised “vexing” problems requiring continued, robust judicial focus.³²

While separation of powers and administrative law problems “vex[]” every symposium State, not all of them have diverged from federal approaches in resolving those problems. Georgia continues to defer to agency interpretations of ambiguous statutes and regulations—unlike Wisconsin and Kansas—and did so in some ways before *Chevron*.³³ Justice Nels Peterson writes that statutory deference has a long history in Georgia courts, “but the nature of the deference afforded has been inconsistent.”³⁴ In 2014, the Georgia Supreme Court tried to make clear that Georgia courts apply a form of deference akin to *Chevron* deference.³⁵ But even that clarification has not resolved the confusion, as “it is unclear just how consistently” Georgia courts apply a *Chevron*-like approach.³⁶ Regulatory deference—deference to an agency’s interpretation of its own rules—has a more recent pedigree. But, as Justice Peterson explains, it too is “imported” from federal precedents like *Seminole Rock* and *Auer*.³⁷

Justice Peterson identifies an increasing suspicion of deference in Georgia courts.³⁸ But rather than prompt a wholesale rejection of deference, as in Wisconsin or Kansas, the Georgia courts have taken a different tack: imposing a higher bar for identifying a material ambiguity.³⁹ This approach, as Justice Peterson points out, follows,

32. *Id.* at 374.

33. Nels S.D. Peterson, *Georgia Judicial Deference to Executive Branch Agency Legal Interpretations*, 46 HARV. J.L. & PUB. POL’Y 349, 353 (2023).

34. *Id.*

35. *Id.*; see *Cook v. Glover*, 761 S.E.2d 267, 271 (Ga. 2014).

36. Peterson, *supra* note 33, at 354.

37. *Id.* at 355.

38. *Id.* at 355, 357 (noting that “the current state of the law is increasingly the subject of criticism” and that the Georgia Supreme Court granted certiorari to consider whether to continue deferring to an agency’s interpretation of its regulations but that the court ultimately declined to resolve the question).

39. *Id.* at 349, 355–57.

if not helps to chart, a path that the federal courts also seem to be taking.⁴⁰

That the Georgia courts would defer to agency interpretations of law in a manner reminiscent of the federal courts—something Justice Peterson describes rather than endorses—is surprising given the many features of Georgia’s Constitution that distinguish it from the federal government’s. For one, the Georgia Constitution contains an explicit separation of powers clause, unlike the U.S. Constitution.⁴¹ For another, Georgia has a plural executive. That means it elects several members of the executive branch in addition to the governor. Who in the executive branch receives deference in that setting? And what if, in a dispute about, say, state election law, the Governor, Secretary of State, and Attorney General each has different views about the meaning of an election law? For still another, Georgia’s judges face elections,⁴² taking one of the explanations for *Chevron*—political accountability—off the table. At a minimum, these differences may explain why the Georgia courts have tightened their grasp on ultimate responsibility for interpretations of law by raising the threshold—clear ambiguity—for granting deference.⁴³

Reminiscent of the Georgia experience, Colorado historically has employed “inconsistent formulations” of agency deference as well.⁴⁴ Colorado courts, Justice Melissa Hart explains, have articulated “multiple slightly different deference standards,” sometimes even in the same opinion.⁴⁵ Not until 2021 did the Colorado

40. *Id.* at 359 (noting that the U.S. Supreme Court took a similar approach one month later in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019)).

41. *Id.* at 349–50; see GA. CONST. art. I, § II, para. III.

42. See GA. CONST. art. I, § VII, para. I.

43. See Peterson, *supra* note 3333, at 350–51 (explaining how Georgia courts interpret constitutional provisions that have existed in multiple iterations of the state constitution).

44. Melissa Hart, *Administrative Deference in Colorado*, 46 HARV. J.L. & PUB. POL’Y 337, 337 (2023).

45. *Id.* at 337–38 (citing *Coffman v. Colo. Common Cause*, 102 P.3d 999, 1005 (Colo. 2004), as one example of this phenomenon).

Supreme Court try to clarify the standard. Unlike Georgia, which embraced a form of *Chevron* deference, the Centennial State “decided to chart its own path rather than to adopt the federal approach.”⁴⁶

In *Nieto v. Clark’s Market, Inc.*,⁴⁷ the Colorado Supreme Court faced competing interpretations of the Colorado Wage Claim Act, with the lower courts adopting one interpretation and the state agency another.⁴⁸ In trying to resolve the tension, the Colorado Supreme Court rejected one federal option, *Brand X*,⁴⁹ a U.S. Supreme Court decision that empowers agencies to abrogate judicial interpretations of ambiguous statutes.⁵⁰ It then rejected *Chevron* itself, declining to adopt a “rigid” deference standard “that would require courts to defer” to reasonable agency interpretations.⁵¹ Instead, Colorado courts now treat agency interpretations as “persuasive evidence,” the value of which depends on several factors.⁵² These factors include: the agency’s expertise, the consistency, thoroughness, and force of the agency’s interpretation, and public feedback.⁵³ Sound familiar? Yes, Colorado, as Justice Hart acknowledges, is “charting the course set by the United States Supreme Court almost 80 years ago in *Skidmore*,”⁵⁴ a path, I might add, set by several state court decisions before that.⁵⁵ Even when a State goes

46. *Id.* at 339.

47. 448 P.3d 1140 (Colo. 2021).

48. Hart, *supra* note 44, at 339–44.

49. Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967 (2005).

50. Hart, *supra* note 44, at 343–44.

51. *Id.* (quoting *Nieto*, 488 P.3d at 1149).

52. *Id.* at 344.

53. *Id.* at 345–47.

54. *Id.* at 347 (discussing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

55. Before *Skidmore*, many state courts had already reasoned that the long-held consistency and sound reasoning of an agency’s interpretation weighed in favor of affording it deference. *E.g.*, *Cino v. Driscoll*, 34 A.2d 6, 9 (N.J. 1943) (noting that a state agency’s “contemporaneous construction” of a statute “for over a decade is necessarily respected by [the court]”); *Kolb v. Holling*, 32 N.E.2d 811, 815 (N.Y. 1941) (affording “great weight” to the “practical construction” of a statute by a state agency that “has continued in operation over a long period of time”); *Cent. R.R. of N.J. v. Martin*, 175 A.

its own way—in Colorado’s case, rejecting *Chevron* and *Brand X*—it still may adopt other aspects of federal and state administrative law.

Even “margin[al]”⁵⁶ differences between state and federal administrative law—differences in emphasis if not in description—may produce differences in case outcomes. Consider Pennsylvania. Justice David Wecht explains that the State boasts a “comparatively lively” nondelegation docket,⁵⁷ as compared to the staid federal docket.⁵⁸ He discusses two recent decisions in which the Pennsylvania Supreme Court refused to enforce laws on nondelegation grounds. One statute empowered the School Reform Commission, an executive branch body, to suspend parts of the Public School Code or regulations from the Secretary of Education in “distressed” school districts.⁵⁹ In the other, the legislature empowered the American Medical Association, a private body, to modify in its discretion the impairment-rating methodology in the Workers’ Compensation Act.⁶⁰ In both cases, the court relied on the familiar principle (also found in the federal nondelegation doctrine) that the legislature must provide an “intelligible principle” when empowering agency action.⁶¹

637, 641 (N.J. 1934) (noting a state agency’s “sound, fair, and reasonable” interpretation that had been uniformly applied “for nearly half a century” counted as “strong evidence” that the agency’s view of a statute was correct); *Cannon v. Maxwell*, 171 S.E. 624, 625 (N.C. 1933) (explaining that “settled administrative practice as established by the uniform and long-continued interpretation of these statutes” is “not controlling” but “always entitled to due consideration”).

56. David N. Wecht & Lawrence McIntyre, *Nondelegation in Pennsylvania*, 46 HARV. J.L. & PUB. POL’Y 377, 387 (2023).

57. *Id.* at 377.

58. Notably, the U.S. Supreme Court has overturned statutes on nondelegation grounds only twice. *See* *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935).

59. Wecht & McIntyre, *supra* note 56, at 378–82 (discussing *W. Phila. Achievement Charter Elementary Sch. v. Sch. Dist.*, 132 A.3d 957 (Pa. 2016)).

60. *Id.* at 382–86 (discussing *Protz v. Workers’ Comp. Appeal Bd.*, 161 A.3d 827 (Pa. 2017)).

61. *Id.* at 381 (noting that the Pennsylvania Supreme Court cited “many of the same standards that the United States Supreme Court applies in nondelegation cases”).

But, as Justice Wecht explains, Pennsylvania courts have tweaked the federal nondelegation doctrine. He notes “the importance of procedural safeguards” to cabin an agency’s exercise of power in addition to the “intelligible principle.”⁶² While it appears that few, if any, cases have invoked procedural safeguards alone as grounds for overturning a statute on nondelegation grounds, that possibility remains.⁶³ Justice Wecht ultimately rejects the idea that Pennsylvania has “a particularly strict nondelegation doctrine.”⁶⁴ He explains instead that the Pennsylvania statutes at issue in recent nondelegation cases lacked any intelligible principle whatsoever, distinguishing them from the various federal statutes that survived review under a linguistic framework that is similar if subject to different accents.⁶⁵

The symposium States showcase a variety of approaches to deference and the nondelegation doctrine. Some have borrowed from and built on federal approaches, while others have rejected them entirely.

That observation prompts two concluding questions.

The first: Do the experiences of these five States fairly represent the whole? Yes, as several fifty-state surveys confirm. As to deference, scholars have found that the States employ a wide range of approaches, ranging from full deference to a full rejection of deference.⁶⁶ One scholar classified seventeen different approaches to deference across the country.⁶⁷ As with Wisconsin and Kansas (which have rejected deference relatively recently), Colorado (which

62. *Id.*

63. *Id.* at 382 n.29.

64. *Id.* at 386.

65. *Id.* at 386–88.

66. *E.g.*, Michael Pappas, *No Two-Stepping in the Laboratories: State Deference Standards and Their Implications for Improving the Chevron Doctrine*, 39 MCGEORGE L. REV. 977, 984 (2008) (identifying “an array of different announced [deference] standards” that “generally fit into four categories: strong deference, intermediate deference, de novo review with the possibility of deference to agency expertise or experience, and de novo review with deference discouraged”); Ortner, *supra* note 3, at 73.

67. Ortner, *supra* note 3, at 73 (mapping seventeen different state approaches to deference).

recently rejected a deference model and now uses a respect model), and Georgia (which now limits deference through a high bar for ambiguity), the trend in most States points towards less rather than more deference.⁶⁸ Just recently, my State (Ohio) adopted a no-deference approach premised on the Ohio Constitution and on explicit disagreement with the federal *Chevron* model.⁶⁹

As for the nondelegation doctrine, the state courts have adopted several distinct approaches, which one scholar has categorized along a weak-moderate-strong continuum.⁷⁰ Scholars claim that the nondelegation doctrine is “alive and well” in its enforcement in the state courts.⁷¹ In reality, the vast majority of nondelegation challenges occur in state courts and have a much higher success rate (16%) than those in federal court (3%), according to one study.⁷²

The second question: What has caused the States to go their own way? A comparison between the 50 state constitutions on the one side and the federal constitution on the other reveals lots of structural distinctions, many unappreciated by American lawyers and many pertinent to administrative law. Start with the ease of amending state constitutions. Forty-six require a mere majority vote once an amendment reaches the ballot,⁷³ a marked contrast to the federal requirement that three-quarters of the States approve an amendment. The state constitutions as a result have evolved far more than the U.S. Constitution since 1776 and 1789. That evolution has invariably occurred in ways that have made state governments

68. *Id.* at 5 (finding “a large number of states abandoned deference” and “a significant number of states have also moved away from deference in less dramatic respects”).

69. *TWISM Enters., L.L.C. v. State Bd. of Registration for Pro. Eng’rs & Surveyors*, No. 2021-1440, 2022 WL 17981386, at *7–9 (Ohio Dec. 29, 2022).

70. Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 *VAND. L. REV.* 1167, 1191–1200 (1999).

71. Iuliano & Whittington, *supra* note 3, at 620. *But see* Joseph Postell & Randolph J. May, *The Myth of the State Nondelegation Doctrines*, 74 *ADMIN. L. REV.* 263, 267, 303 (2022) (taking the position that “the nondelegation doctrine is impotent even in states where it has been used to invalidate statutes in recent decades” and that past scholarship “mischaracterized” some of the state approaches).

72. Iuliano & Whittington, *supra* note 3, at 636.

73. SUTTON, *supra* note 3, at 343.

increasingly democratic. More officers to vote for in plural positions of the executive branch. More judges to vote for through judicial elections.⁷⁴ And more laws for the people to vote directly for through the initiative and the referendum. Such “hyperdemocracy” alters many of the assumptions that underpin delegation and deference debates at the federal level.⁷⁵ All of these differences help to explain why so many state courts use distinct, or non-existent, deference models and more vigorously enforce the nondelegation doctrine.⁷⁶

On top of that, many state legislatures follow a different rhythm from Congress. They often convene only a few times a year or in alternating years, and their members often work part time with few staff.⁷⁷ Those time and resource constraints might create incentives to delegate more authority to state agencies, such as the Pennsylvania statutes that delegated legislative power (as Justice Wecht put it) without “any standards at all.”⁷⁸

Justice Stegall ends his essay by invoking *Mending Wall*, Robert Frost’s poem about the neighbors who meet at their shared stone wall each spring to build back up what the winter has brought down. Just as it may be true that “Something there is that doesn’t love a wall/That wants it down,” it may be true that “there is something about power that doesn’t love a wall; that wants it down” too, Stegall says.⁷⁹ “It is in the centripetal nature of governmental power,” he adds, “to be restless until it is united in one place.”⁸⁰ It

74. See Sutton & Rockenbach, *supra* note 1, at 1941 (“[R]oughly 90% of state court judges in the country must face the ballot box under a wide range of selection methods: retention elections, partisan elections, or nonpartisan elections.”).

75. *Id.* at 1942–43; see Aaron Saiger, *Chevron and Deference in State Administrative Law*, 83 *FORDHAM L. REV.* 555, 568 (2014).

76. Saiger, *supra* note 3, at 1886–88 (cataloguing state institutional differences and explaining that “[t]hese factors strongly counseled state courts to resist any temptation to mirror federal deference doctrine”); see also Saiger, *supra* note 75, at 557.

77. See SUTTON, *supra* note 3, at 217–18.

78. Wecht & McIntyre, *supra* note 56, at 387.

79. Stegall, *supra* note 17, at 375 (quoting Robert Frost, *Mending Wall*, in *NORTH OF BOSTON* 11–13 (1917)).

80. *Id.*

is up to the courts, Stegall concludes, to remain steadfast in preserving those “walls of separation” created by our Founders, to ensure they are “kept in good repair,” to avoid the perils of “consolidated power.”⁸¹ I wholeheartedly second the point.

But just as separation of powers can be “vexing,” the same might be said about the meaning of the poem.⁸² *Mending Wall* may be subject to two interpretations, not just one. Yes, power, like winter, invariably imposes pressure on boundaries, and the courts have a critical role to play in putting the authority-limiting stones back in place. But another theme in the poem reflects ambivalence about what the neighbors do each year. For every reference to the benefits of walls, there is a twin reference to uncertainty about them. Yes, “Good fences make good neighbors,” the neighbor says twice.⁸³ But the author’s rebuttal—“Something there is that doesn’t love a wall”—gets a curtain call too.⁸⁴

System design when it comes to separation of powers—and issues like agency deference and agency delegation — also may not submit to just one winning answer either. The challenge for all courts in fortifying separation of powers walls is to avoid creating new balance of power problems of their own. Should it always be the courts, whether state or federal, that micro-manage these lines? Are courts invariably the answer to the who-decides question? Or is there room for cooperation and respect for distinct forms of institutional expertise? Hence Frost’s question: “Before I built a wall I’d ask to know/What I was walling in or walling out.”⁸⁵

Which is our question too. At least one part of the answer seems clear. To the extent some of today’s quandaries about administrative law do not submit to one winning answer, it would be foolish not to pay attention to all 51 American approaches to administrative law—and to learn from each of them.

81. *Id.*

82. *Id.* at 374.

83. Frost, *supra* note 79.

84. *Id.*

85. *Id.*